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**Petition before the Inter-American Commission on Human Rights**

Between

**MAURICE TOMLINSON**

Petitioner

- and -

**JAMAICA**

Member State

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**PETITION BEFORE  
THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS  
CONCERNING SECTION 18(2) OF THE CONSTITUTION OF JAMAICA  
THAT BANS SAME-SEX MARRIAGE OR OTHER UNIONS**

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**SUBMITTED UNDER ARTICLE 44 OF THE  
AMERICAN CONVENTION ON HUMAN RIGHTS AND  
ARTICLE 23 OF THE COMMISSION'S RULES OF PROCEDURE**

The Petitioner hereby petitions the Inter-American Commission on Human Rights (the "Commission") to investigate Jamaica's violation of his human rights. More specifically, the Petitioner's same-sex marriage is not recognized under Jamaica's Constitution and he (and his partner) are unable to enjoy the benefits and protections afforded to them, due to Jamaica's notorious non-recognition of same-sex marriage.

The Petitioner is represented in this matter by the barristers and attorneys-at-law referenced on the covering page of this Petition. All correspondence should be directed to said representatives.

**The grounds for this Petition are:**

**GROUND 1: BACKGROUND**

1. The Petitioner is a citizen of Jamaica. (Petitioner is also a citizen of Canada).
2. The Petitioner is married to Mr. Thomas Decker, a Canadian citizen.
3. The Petitioner is desirous of repatriating to Jamaica with his same-sex spouse.
4. However, Petitioner is unable to do so because:
  - a. Section 18(2) of Jamaica's *Charter of Fundamental Rights and Freedoms* (the *Charter*), which is part of the Constitution does not recognize same-sex marriage.
  - b. By virtue of that non-recognition, Petitioner's spouse would be unable to obtain Jamaican citizenship by marriage.
5. To the extent necessary, and where the context so dictates, the Petitioner brings this Petition on his own behalf and on behalf of his spouse, Mr. Decker.
6. Attached in Appendix 1 is a copy of the Petitioner's passports (Jamaican and Canadian), his spouse's passport (Canadian), and their marriage certificate (Ontario, Canada).

**Jurisdiction**

7. The twin pillars of personal liberty and social justice are enshrined in the Convention. The Convention's preamble reiterates that, in accordance with the Universal Declaration of Human Rights, freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy economic, social, and cultural, as well as civil and political rights.
8. Jamaica pledged to pursue, achieve and uphold these ideals when it ratified the Convention forty years ago in 1978. As Jamaica is a party to the Convention the Inter-American Commission on Human Rights has jurisdiction to consider the Petitioner's claim that the rights owed to him under the Convention have been, and are being, breached by the continued constitutional ban on the recognition of same-sex unions, including marriage.
9. The Petitioner in this case, Maurice Tomlinson is a Jamaican citizen who simply wants to return to his homeland with his Canadian husband in order to work and look after his aging parents who are in rapidly declining health. He therefore asks that the Commission require Jamaica to fulfil its human rights obligations under the Convention. Events described in this application took place in Jamaica, and Jamaica had jurisdiction over the Petitioner. The

Petitioner has standing to appear pursuant to Article 44 of the Convention and Article 23 of the Rules of Procedure of the Commission.

**Request for Expeditious Consideration of the Petition and Decision on the Merits**

10. As set forth below, the Petitioner and his family face serious and urgent hardship, with the ongoing threat of serious violence. Furthermore, this and other violations of their rights, and those of all LGBT people in Jamaica, continue each day the impugned provision of the *Charter* remains in force. The Commission's decision could repair this ongoing structural denial of the rights of all LGBT persons in Jamaica and promote changes in legislation and the practice of state agents, thereby avoiding the need for multiple petitions on this same matter. Therefore, the Petitioner requests the Commission process, admit and decide their case on the merits as expeditiously as possible under Articles 29(2)(d), 30(4), 36(3) and 37(3) of the Commission's Rules of Procedure.

## FOUNDATIONS 2 & 3: JAMAICA'S CONSTITUTION DOES NOT RECOGNIZE SAME-SEX UNIONS

11. The alleged human rights violation, and the impossibility of the Petitioner exhausting domestic remedies are interrelated. They shall be addressed together.
12. In 2011, Jamaica amended its Constitution to provide for a "[Charter of Fundamental Rights and Freedoms](#)" (the "Charter").
13. Section 18(2) of the [Charter](#) only recognizes marriage as being between a man and a woman:

"No form of marriage or other relationship referred to in subsection (1), other than the voluntary union of one man and one woman may be contracted or legally recognized in Jamaica."

14. Same-sex unions are therefore not recognized.
15. Petitioner's marriage is therefore not recognized under Jamaica's Constitution. The same-sex spouse of the Petitioner is therefore unable to acquire Jamaican citizenship by marriage as otherwise provided for in sub-section 7(1) of Jamaica's [Constitution](#):

**7.—(1) Any man or woman who, after the fifth day of August, 1962, marries a person who is or becomes a citizen of Jamaica shall, subject to subsection (2), be entitled, upon making application in such manner as may be prescribed and, if he or she is a British protected person or an alien, upon taking the oath of allegiance, to be registered as a citizen of Jamaica.**

16. Further to Article 31 (2) of the IACHR's Rules of Procedure, the Petitioner submits that by virtue of this [constitutional ban](#) against non-heterosexual unions, there is neither an adequate nor effective domestic remedy available to him and/or his same-sex partner under Jamaican law.
17. Generally, Article 31(1) of the IACHR Rules requires the exhaustion of domestic remedies prior to filing a petition before the Commission.<sup>1</sup> However, the Petitioner qualifies for an exemption from the exhaustion requirement because Jamaican law does not and cannot provide an adequate domestic remedy to the violations of Convention-guaranteed rights identified by the Petitioners.

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<sup>1</sup> Inter-American Commission on Human Rights, *Rules of Procedure of the Inter-American Commission on Human Rights (Approved by the Commission at its 137th regular period of sessions, held from October 28 to November 13, 2009, and modified on September 2nd, 2011 and during the 147th Regular Period of Sessions, held from 8 to 22 March 2013, for entry into force on August 1st, 2013)*, Article 31 [hereinafter IACHR Rules of Procedure].

18. Article 31(2) of the IACHR Rules provides for an exemption from the exhaustion requirement in the following circumstances:
- a. the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated;
  - b. the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or,
  - c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.<sup>2</sup>
- ~~19.~~ The Petitioners qualifies for an exemption under either or both of Articles 31(2)(a) and 31(2)(b).
20. Jamaica's domestic law *does not afford due process of law* for the protection of the rights that have been violated by the ban on same-sex unions, including marriage— i.e., the situation contemplated in Article 31(2)(a) of the Convention. It could equally be said that the law of Jamaica *denies a remedy* for the violation of said rights—the situation contemplated in Article 31(2)(b). In either case, the Petitioner is entitled to seek relief from the Commission.
21. The chief reason for this is that section 18(2) of the *Charter* forms part of the *Constitution of Jamaica* and no domestic court can overturn a provision of the Constitution itself. This is left to Parliament only (and even then, by special majority).
22. The *Charter* and Constitution are enclosed in Appendix 2.

### **Facts Demonstrating Violations of Petitioner's Human Rights Under the Convention**

23. The existence of section 18(2) of the *Charter* has helped create and maintain an environment of fear and harassment in Jamaica that not only affects gay couples but all members of the LGBT community. In response to Jamaican radio shows, newspapers and online sites, many listeners and readers refer to the law as proof of the illegitimacy of homosexuality.
24. There is significant documentation and compilation of the abuse and harassment experienced by LGBT people and in particular couples in Jamaica and the frequency with which such abuse occurs. The Petitioner presents below a list of just some of the documented incidents recorded in recent years. The number of such incidents is striking, given the small size of the population of Jamaica (2.9 million)<sup>3</sup> relative to other countries in the hemisphere.
25. After Montego Bay Pride 2016, a young man who attended the event was confronted at his home by gunmen who gave him three days to leave the community of Portmore, St. Catherine because his sister had shared his private Facebook photos of him at Pride. He refused to go to the police to report the incident because the last time he had an interaction with officers (over an altercation at his home) the police told him that they were not interested in his side of the story because he is gay. Subsequent to his Facebook outing, posters of the young man were plastered over his community with the tagline "Pastor Batty Bwoy" (pastor faggot) because he is the son of a popular local pastor and was very active in

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<sup>2</sup> IACHR Rules of Procedure, Article 31.

<sup>3</sup> <http://worldpopulationreview.com/countries/jamaica-population/>.

his church. He was also being groomed to take over the church when his father retires. The youngster has since lost his job and is homeless. In January 2017, he was also arrested and fined for "loitering" when police officers found him sitting with his boyfriend at the Mona Campus of the University of the West Indies. The young man and his boyfriend were targeted, harassed, arrested and charged solely because of their sexual orientation as the Petitioner knows of no instance of police treating heterosexual couples in that way. The Petitioner was once employed as a project manager at that university and know that gays are not liked by university police on the campus.

26. In December 2016, Jamaica's most popular daily newspaper, the Jamaica Gleaner carried an editorial detailing the murder of Devon Fray, a 20-year-old who was killed after a short video of him was released on social media which seemed to indicate that he was gay and in a relationship with a popular male pastor. After the video release, Mr. Fray had repeatedly used social media to protest that he was straight, but he nevertheless received multiple death threats before he was eventually murdered.
27. On May 27, 2016, the Jamaica Gleaner reported that gunmen shot up the home of two gay men while they slept, killing them, but community members refused to help the police because they objected to gays living in their community.
28. In October 2015, a gay man and an ally who were assisting some homeless LGBT youth living in an abandoned Cholera cemetery in Kingston, were attacked by a violent mob. The men were savagely beaten, and the young man's face was cut, and his chest slashed. When he was taken to the main hospital in Kingston in critical condition the non-medical staff refused to assist him because he was gay. He subsequently had to try and scrub all references to his sexuality from his social media and begged persons not to tell his parents why he had been attacked as he had not yet come out to them. When the Petitioner contacted the Minister of Justice, a legal colleague of his, about the incident, the Minister advised the Petitioner that the police told him that the reason the young man was attacked was because of an internal conflict between gays. The Petitioner had to point out to the Minister that the police regularly misrepresent these attacks so that they do not have to investigate them. For example, when some of these same homeless LGBT youth were attacked by a mob leaving a sporting event in 2015, a video crew from the UK was coincidentally recording the incident and when they asked the police who stood by doing nothing what was the cause of the attack, the officer said, on tape, that the youth had started the altercation. A former Assistant Commissioner of Police (ACP) also characterized homophobic attacks as largely "gay on gay" violence. In 2011, this same ACP dismissed the Petitioner's complaint after the Petitioner was chased out of a police station by an officer when the Petitioner went to report death threats. According to the ACP, attitudes like those displayed by the officer were "unfortunate," but they would not change until the anti-sodomy law is repealed. One of the Petitioner's legal colleagues also took some LGBT victims to report attacks at the New Kingston police station in 2015, and the senior officer was recorded saying that the victims would have to first provide the names and addresses of their attackers before the police would do anything to assist. There is no such requirement for heterosexual victims.
29. In October 2016, the major LGBT organization on the island, J-FLAG, in collaboration with several local and international organizations, published a Shadow Report for the 118th session of the United Nations Human Rights Committee to assess Jamaica's compliance with the International Covenant on Civil and Political Rights (ICCPR). The Report found, among other things, that despite a new police policy against discrimination on the basis of sexual orientation, officers continue to stand by in the face of LGBT violations, and/or have in fact been the perpetrators of these attacks themselves. The Report also highlights that from

January to June 2016 alone, 23 persons reported to J-FLAG that they had been physically assaulted or attacked due to their sexual orientation or gender identity.

30. July 22, 2013: 16-year-old Dwayne Jones was stabbed, shot, run over by a car, and subsequently dumped in a nearby ditch for wearing a dress to a public street dance in Montego Bay. No one has been arrested for this murder.<sup>4</sup>
31. August 1, 2013: A mob attacked the home of two gay persons in St. Catherine. The police responded but there were no arrests.<sup>5</sup>
32. August 10, 2013: A mob attacked a cross-dresser in St. Catherine. The police again responded but no arrests were made.<sup>6</sup>
33. August 22, 2013: A mob attacked five allegedly gay men, who were trapped in their house in Green Mountain, Manchester. The police responded but again no arrests were made.<sup>7</sup>
34. August 26, 2013: A mob surrounded two allegedly gay men who were involved in a minor traffic accident in Old Harbour, St. Catherine. A member of the mob said that homosexuality might be acceptable elsewhere, but not in Old Harbour. The men had to flee into a nearby police station to escape harm. The police made no arrests.<sup>8</sup>
35. October 8, 2013: A mob firebombed the abandoned building in Montego Bay which was the former home of murdered teen, Dwayne Jones, where his surviving friends continued to live. When the friends sought refuge in a police station, the police asked them to leave, stating that the station would itself be attacked if it was known to be "harbouring" gays.<sup>9</sup>
36. June 14, 2014: A mob attacked a young man at a shopping mall in May Pen, Clarendon because he was allegedly seen putting on lipstick. The police responded but no arrests were made.<sup>10</sup>
37. August 28, 2014: A young Jamaican man who had filed a constitutional challenge against the anti-buggery law withdrew his claim because of threats against his family and himself.<sup>11</sup>

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<sup>4</sup> "Justice Minister Condemns Murder Of MoBay Cross-Dresser," *The Gleaner*, Kingston, 29 July 2013, online: <http://jamaica-gleaner.com/power/46809>.

<sup>5</sup> "Alleged Gay men in St Catherine Home," *CVM-TV*, Kingston, 1 August 2013, online: [https://www.youtube.com/watch?v=bmL-Cyyn\\_KU](https://www.youtube.com/watch?v=bmL-Cyyn_KU).

<sup>6</sup> Rasbert Turner, "Cops rescue man in girl clothes - Save him from angry mob," *The Star*, Kingston, 14 August 2013, online: <http://jamaica-star.com/thestar/20130814/news/news1.html>.

<sup>7</sup> "5 Gay Men Trapped by Angry Mob," *CVM-TV*, Kingston, 22 August 2013, online: <https://www.youtube.com/watch?v=F1XxeqOIBao>.

<sup>8</sup> "Mob Descends on Old Harbour Police Station to demand Gay Men," *CVM-TV*, Kingston, 26 August 2013, online: [https://www.youtube.com/watch?v=A4\\_qE9IRM3M](https://www.youtube.com/watch?v=A4_qE9IRM3M).

<sup>9</sup> Adrian Frater, "House Occupied By Gays Firebombed," *The Gleaner*, Kingston, 10 October 2013, online: <http://jamaica-gleaner.com/gleaner/20131010/lead/lead6.html>.

<sup>10</sup> "Gay Man saved from mob by police in May Pen, Clarendon," *TVJ*, Kingston, 14 June 2014, online: <https://www.youtube.com/watch?v=Hmu7SvFTbnc>.

<sup>11</sup> "Jamaican Gay Man Drops Court Challenge Against Anti-Buggery Law," *The Gleaner*, Kingston, 29 August 2014, online: <http://jamaica-gleaner.com/power/55113>.

38. May 15, 2015: The Jamaica Star newspaper reported that a mob attacked and beat three schoolboys whom they accused of engaging in homosexual relations.<sup>12</sup>
39. Oct. 4, 2015: The Jamaica Observer reported that three men beat a man whom they accused of being gay because he was seen to be holding his penis while he slept.<sup>13</sup>
40. In the past eight years, there have been other gruesome, anti-gay murders and attacks, with no arrests. On October 18, 2011, CVM TV, one of the major television stations on the island, reported that in the early hours of that morning armed men invaded the home of 16-year-old Oshane Gordon and his mother in the resort city of Montego Bay. The men chopped off his foot as he tried to escape through a window in order to slow his escape, and when they caught up with Oshane the men administered several more chops, killing him. CVM reported that Oshane was attacked because of "questionable relations" with another man. Oshane's mother was also chopped several times.<sup>14</sup> This was the second homophobic murder reported by CVM in three months. On August 2, 2011, the station also reported that on that day a 26-year-old hair stylist, Ricardo Morgan, was almost completely decapitated in Kingston. He had been jeered about his gender non-conformity for some time and he was finally killed after an altercation with a group of men in his community about his sexual orientation.<sup>15</sup>

### **Police Involvement and Inaction in the Harassment of LGBT Couples and Individuals**

41. Harassment of LGBT couples and individuals occurs not only by members of the public but also by police officers. These are the same police officers who should keep all Jamaicans, including LGBT Jamaicans, safe. Again, the Petitioner presents a number of documented incidents that are reflective of a much deeper, wider pattern of anti-LGBT attitudes on the part of law enforcement and of the kind of harassment, threats and abuse encountered and/or legitimately feared by LGBT people:
  - a. In June 2006, the police instigated a mob leading to the death of a gay man, Victor Jarrett, on Dump-Up beach in Montego Bay.
  - b. In 2007, police refused to act when the burial of a gay man was disrupted by a mob in Mandeville.
  - c. In February 2008, police 'rescued' three gay men from a mob attack in Half-Way-Tree, Kingston and then proceeded to hurl homophobic insults at and pistol-whip the men on the way to the station.
  - d. In 2013 and 2014, there were several reports of anti-gay mob attacks (as described above) and despite being present, the police have never made any arrests in these very public assaults.

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<sup>12</sup> Horace Fisher, "Mob beats schoolboys caught in threesome," *The Star*, Kingston, 15 May 2015, online: <http://jamaica-star.com/thestar/20150515/news/news1.html>.

<sup>13</sup> Tanesha Mundle, "Man allegedly beaten for holding his penis while sleeping," *The Jamaica Observer*, Kingston, 4 October 2015, online: [http://www.jamaicaobserver.com/news/Man-allegedly-beaten-for-holding-his-penis-while-sleeping\\_19231808](http://www.jamaicaobserver.com/news/Man-allegedly-beaten-for-holding-his-penis-while-sleeping_19231808).

<sup>14</sup> CVM-TV Kingston, 18 October 2011, online: [http://www.youtube.com/user/cvmtelevision#p/u/18/ZYgGDH\\_SgbI](http://www.youtube.com/user/cvmtelevision#p/u/18/ZYgGDH_SgbI) [at 9:50mins].

<sup>15</sup> "Murder in Torrington Park," CVM-TV Kingston, 2 August 2011, online: <https://www.youtube.com/watch?v=XYy-W7MgygE>.



- e. In April 2010, the Petitioner organized a 'Walk for Tolerance' in Montego Bay. On multiple occasions, he requested permission and police presence for this event from the Jamaican police headquarters in Montego Bay. The office 'misplaced' his request several times. Eventually, he had to stage a 'solo sit-in' at a police station in Montego Bay to get police presence at the event. However, a single police officer on a motorbike showed up to "protect" a parade of about 200 people.
- f. In February 2011, police raided two gay clubs in Kingston and Montego Bay.
- g. In March 2011, the police officer who took the Petitioner's report of a death threat went on a homophobic tirade.
- h. In April 2011, police in Montego Bay refused to offer protection for an effeminate man who reported homophobic death threats made to him by a gang of thugs in his community, ostensibly because the young man could not provide the names and addresses of the attackers.

42. Jamaican police largely blame gays for their vulnerability.

43. The Jamaican police are clearly complicit in the attacks against MSM and their complicity continues to this day. The former Public Defender has also claimed that MSM are responsible for their own attacks because they are too visible. While the government is well aware of the severity of the homophobic attacks, it has done little to stop them, primarily because this would anger the fundamentalist religious right that is so dominant. There are widely held homophobic views among individual police officers and government officials, who further permit homophobic attacks and impede any efforts to protect the LGBT population.

#### **Jamaica's Official Position on Discrimination Against LGBT People**

44. Jamaica has repeatedly refused to legalize same-sex conduct and unions between consenting LGBT adults. Instead, the current Prime Minister has stated that those matters should be put to a national referendum.<sup>16</sup>

#### **Link Between Ban on Same-Sex Conduct and Unions on Public Health of Jamaicans**

45. The presence of laws such as section 18 (2) of the *Charter* that ban same-sex unions including marriage, have been linked to lower health outcomes for LGBT people and the wider public.<sup>17</sup>

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<sup>16</sup> [http://www.jamaicaobserver.com/news/Holness--JLP-Gov-t-will-put-buggery-law-to-referendum\\_19235602](http://www.jamaicaobserver.com/news/Holness--JLP-Gov-t-will-put-buggery-law-to-referendum_19235602).

<sup>17</sup> <https://www.nejm.org/doi/full/10.1056/NEJMp1400254>.

46. Writing in the context of similar bans in United States before the Supreme Court found them illegal, Gilbert Gonzales, M.H.A. wrote:

A 2011 report by the Institute of Medicine on the health of LGBT persons identified substantial disparities in health and access to health care for sexual and gender minorities. Many LGBT people of all ages report worse physical and mental health outcomes than heterosexual and non-transgender populations, largely as a result of the stress caused by being a member of a stigmatized minority group or because of discrimination due to sexual orientation or gender nonconformity. Discriminatory environments and public policies stigmatize LGBT people and engender feelings of rejection, shame, and low self-esteem, which can negatively affect people's health-related behavior as well as their mental health. LGBT people living in states that ban same-sex marriage, for instance, are more likely than their counterparts in other states to report symptoms of depression, anxiety, and alcohol use disorder.<sup>18</sup>

Public health research has suggested not only that discriminatory environments and bans on same-sex marriage are detrimental to health but also that legalizing same-sex marriage (among other policies expanding protections) contributes to better health for LGBT people. For example, data from Massachusetts<sup>19</sup> and California,<sup>20</sup> respectively, indicate that same-sex marriage led to fewer mental health care visits and expenditures for gay men and that it reduced psychological distress among lesbian, gay, and bisexual adults in legally recognized same-sex relationships.

And of course, legalizing same-sex marriage also improves access to health insurance for LGBT people. About 55% of Americans are covered through their own or a family member's employer-sponsored health insurance plan, but many employers do not extend coverage to same-sex partners or children of same-sex partners. Even among companies with more than 200 employees, only 42% offer health benefits to same-sex partners, according to the 2012 Employer Health Benefits Survey conducted by the Kaiser Family Foundation and Health Research and Educational Trust. Thus, adults in same-sex relationships are less likely than their heterosexual counterparts to have health insurance and may therefore delay or forgo necessary medical care. When states legalize same-sex marriage, some workplaces that offer employer-sponsored insurance are required to treat married same-sex couples just as they treat married opposite-sex couples. Therefore, disparities in insurance coverage are narrower in states that permit same-sex marriage or civil unions that guarantee complete spousal rights to same-sex couples.<sup>21</sup>

47. The adverse impact of criminalisation of same-sex conduct on the HIV response has been of human rights and public health concern for many years. In their *International Guidelines on HIV/AIDS and Human Rights*, UNAIDS and the Office of the UN High Commissioner for Human Rights have recommended for more than two decades that countries repeal criminal laws

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<sup>18</sup> Hatzenbuehler ML, McLaughlin KA, Keyes KM, Hasin DS. The impact of institutional discrimination on psychiatric disorders in lesbian, gay, and bisexual populations: a prospective study. *Am J Public Health* 2010;100:452-459.

<sup>19</sup> Hatzenbuehler ML, O'Cleirigh C, Grasso C, Mayer K, Safren S, Bradford J. Effect of same-sex marriage laws on health care use and expenditures in sexual minority men: a quasi-natural experiment. *Am J Public Health* 2012;102:285-291.

<sup>20</sup> Wight RG, Leblanc AJ, Lee Badgett MV. Same-sex legal marriage and psychological well-being: findings from the California Health Interview Survey. *Am J Public Health* 2013;103:339-346.

<sup>21</sup> Gonzales G, Blewett LA. National and state-specific health insurance disparities for adults in same-sex relationships. *Am J Public Health* 2014;104:e95-e104.

prohibiting consensual sexual acts, including 'sodomy,' between adults.<sup>22</sup> The UN Human Rights Committee observed more than a quarter-century ago that the criminalisation of sex between men "would appear to run counter to the implementation of effective education programmes in respect of HIV/AIDS prevention,"<sup>23</sup> and has more recently observed in its Concluding Observations to Jamaica that laws criminalizing consensual same-sex relationships contributes to HIV stigma and undermines access to treatment and medical care by persons living with HIV/AIDS, including gay men.<sup>24</sup>

48. In the Inter-American regional system, former Commissioner Rose-Marie Belle Antoine of the Commission has noted that the existence of such laws "negatively impacts on the full enjoyment and exercise of [LGBT persons] of their human rights — including their right to the highest attainable standard of health — and severely undermine effective national responses to HIV. The dire impact of the buggery laws on the human rights of persons most at risk for contracting HIV, such as men who have sex with men...is an issue of deep concern to the Commission."<sup>25</sup>

49. In 2011 bioethicist Professor Udo Schlenk of Queen's University conducted research on the disturbingly high HIV prevalence rate among Jamaican MSM (31.8%) and the implications for public health. Among other things he found that anti-gays laws drove MSM underground, away from effective HIV interventions and:

Homosexual men in Jamaica rarely ever live in monogamous relationships because of the security risks involved in living with a member of the same sex over longer periods in the same household.<sup>26</sup>

50. In order to mask or "cure" their orientation, many Jamaican MSM (nearly 60%<sup>27</sup>) have female partners and father multiple children while clandestinely continuing their homosexual relationships. This constitutes a threat to the mental and physical health of the men, women and any children of the union as well as the wider public.

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<sup>22</sup> Office of the UN High Commissioner for Human Rights & Joint United Nations Programme on HIV/AIDS, *International Guidelines on HIV/AIDS and Human Rights*, 2006 Consolidated Version, Guideline 4, para.. 21(b).

<sup>23</sup> *Toonen v. Australia*, Communication No. 488/1992, CCPR/C/50/D/488/1992 (Mar. 31, 1994).

<sup>24</sup> UN Human Rights Committee, *Concluding observations of the Human Rights Committee, Jamaica*, CCPR/C/JAM/CO/3 (Nov. 1, 2011) at para. 9.

<sup>25</sup> Commissioner Rose-Marie Belle Antoine, Speech entitled "Human Rights, HIV/AIDS and Discrimination in the Americas on the Occasion of the Exhibit of the AIDS Quilt at OAS Grounds in the Context of the World AIDS Conference" (July 23, 2012), available at <http://www.oas.org/en/iachr/activities/speeches/07.23.12.asp>.

<sup>26</sup> <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1471-8847.2011.00298.x>

<sup>27</sup> According to Professor Peter Figueroa, former head of the National HIV/STI programme in Jamaica and head of the Professor of Public Health, Epidemiology and HIV/AIDS at the University of the West Indies, Mona, Kingston, Jamaica.

## **Facts Relating to the Petitioner**

### *Background*

51. The Petitioner is a Jamaican national and has residences in Jamaica and Canada.
52. He is an attorney-at-law called to the Jamaican bar in 2006 and a gay man.
53. For four years he was married to a woman under the laws of Jamaica, but that marriage broke down in 2004 when he could no longer deny his homosexuality. After an acrimonious divorce, the Petitioner had relationships with men before marrying his husband in Canada in 2011.
54. After his marriage he returned to Jamaica for work while he waited the Canadian visa processing for him to migrate to Canada to be with his husband. However, in 2012, he was forced to flee Jamaica for Canada when a Jamaican newspaper published an unauthorized photo of his Canadian wedding and he received multiple death threats as a result.
55. The Petitioner returns to Jamaica to continue his legal work and to visit his sick and ailing parents. As his parents' health has declined and there are no remaining family members in the country to assist them, the Petitioner wishes to repatriate to Jamaica with his husband.
56. For the past 20 years the Petitioner has worked to eliminate stigma and discrimination against lesbian, gay, bisexual and transgender (LGBT) persons in general and men who have sex with men (MSM) in particular. He pursues this work because of his commitment to universal respect for human rights that reflect the essential dignity of the person.
57. From January to December 2010, he served as Corporate Secretary and Legal Advisor for the Jamaica Forum for Lesbians, All-Sexuals and Gays ("J-FLAG"), which is Jamaica's major LGBT organization.
58. From August 2009 to August 2012, he was a lecturer in law at the University of Technology, Jamaica where he taught a variety of law courses, including human rights and discrimination law.
59. In 2010, he was appointed Legal Advisor, Marginalized Groups for the international non-governmental organization (NGO) AIDS-Free World. In this capacity, he worked with J-FLAG and other Jamaican LGBT and HIV groups to document abuses against LGBT Jamaicans, including MSM in particular, in an attempt to advocate for changes to anti-gay laws and policies across the region.
60. Since January 2015, the Petitioner has been employed as a Senior Policy Analyst with the Canadian HIV/AIDS Legal Network ("Legal Network"). In this capacity, he continues working with various Caribbean LGBT groups to document abuses and other acts of violence against Caribbean MSM and other LGBT people and to advocate for the human rights of LGBT people in countries of the region.

### **Impaired Family Relationships**

61. Growing up in a fundamentalist evangelical church, the Petitioner was repeatedly told by his parents and church leaders that being homosexual was wrong. He therefore resisted acknowledging his sexual attraction to men and even though he had relationships with men,

they did not last long because the Petitioner was always consumed with guilt about his sexual orientation and pushed his partners away.

62. After one such relationship with another man ended, the Petitioner reconnected with his best female friend from university. They had known each other for nearly ten years and she knew about his sexual orientation. However, they both believed in their church's teaching that homosexuality could be "cured" by regular heterosexual intercourse and prayer. They married in 1999 and regrettably, the Petitioner found that he was only able to be physically intimate with his wife by thinking about men.<sup>28</sup> The Petitioner also engaged in furtive same-sex encounters while he was married, as the only way to experience full sexual satisfaction. The Petitioner ended the marriage after four years when he realized that he could no longer keep cheating on his best friend and using her as a "mask" and "cure" for his homosexuality.
63. The Petitioner met his husband, Thomas Decker, in 2009 at an International Lesbian and Gay Association (ILGA) conference in São Paulo, Brazil. They were married on August 28, 2011 in Toronto, Canada.
64. The Petitioner is now able to fully experience his sexuality in a committed, loving, nurturing relationship that harms no one.
65. Prior to his migration to Canada the Petitioner was the only one of his parents' three children and their closest family member left in Jamaica. The Petitioner therefore provided physical, financial and emotional support to his parents who both suffer from chronic degenerative illnesses.
66. Both of the Petitioner's parents have recently suffered significant health challenges and had to be hospitalized on multiple occasions.<sup>29</sup> The Petitioner therefore wishes to return to Jamaica to look after his parents in their rapidly declining health as they are now being largely cared for by strangers. And even some friends on whom they rely are preying on their increased vulnerability.<sup>30</sup>
67. The Petitioner plans to repatriate to Jamaica with his husband but he is precluded from doing so because the constitutional ban on the recognition of their marriage means that the Petitioner's husband would not be eligible for a passport through naturalization, as is possible for opposite-sex spouses of Jamaicans.
68. As a result of the ban the Petitioner's husband would also not qualify for any spousal benefits that as a Jamaican the Petitioner would be able to grant to an opposite-sex partner. This includes national insurance and pension. The Petitioner's husband would also be a legal stranger to the Petitioner and so would not be able to make any urgent health related decisions on the Petitioner's behalf if the Petitioner were incapacitated. The Petitioner's only other relatives in Jamaica are his aged and very ill parents. Without his husband the Petitioner could be left to the mercy of strangers making decisions about his welfare and health care.

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<sup>28</sup> <http://www.jamaicaobserver.com/news/-I-tried-not-to-be-gay-by-getting-married----Tomlinson>.

<sup>29</sup> <http://jamaica-gleaner.com/article/letters/20180213/anti-gay-rant-cornwall-regional>.

<sup>30</sup> <http://jamaica-gleaner.com/article/letters/20170304/religious-bigots-preyed-sick-mom>.

*Threats of violence and police inaction*

69. As a result of his advocacy for the human rights of LGBT people, including in Jamaica, the Petitioner has been subjected to numerous death threats as described below. These threats significantly intensified in 2012 after his marriage became known in Jamaica when a local newspaper published an unauthorized photo of his Canadian wedding on their front-page.<sup>31</sup>
70. The Petitioner regularly writes letters to the Jamaican newspapers denouncing attacks on members of the LGBT community in Jamaica. He also gives radio and television interviews on this subject. Comments are posted on the newspapers' websites in response to the Petitioner's published letters and he also provides an email address where he receives correspondence in response to these published letters. Most of the radio and television programmes on which the Petitioner appears also have a call-in segment. The Petitioner regularly receives ill-informed, often vitriolic and hateful, responses that repeat common inaccuracies, fanciful claims and religious denunciations. These include declarations that all violence against gay Jamaicans is self-inflicted, assertions that legalizing same-sex intimacy will have apocalyptic results for Jamaica on the magnitude of the 2010 Haitian earthquake, and condemnations that gays are "perverts" and an "abomination" – which echoes the language of s. 76 of the Offences Against the Person Act criminalizing the "abominable crime" of buggery – and should either leave Jamaica voluntarily or be forcibly removed from the country.
71. In some instances, the responses threaten violence. In February 2011, the Petitioner wrote a letter to a local newspaper describing police raids on two gay clubs in Jamaica. In response to the letter, the Petitioner received a death threat via e-mail. The writer threatened that if the Petitioner did not stop writing such opinions, he would "fucking die!" In a setting where such threats occur against a backdrop of regular violence against LGBT people, including extreme and vicious assaults and murders, such a threat was not to be taken lightly, particularly given the Petitioner's visibility as a gay man and a human rights activist. When the Petitioner reported the threat to the police, the recording officer proceeded to hurl homophobic slurs at the Petitioner. This was reported to Assistant Police Commissioner Les Green, who said that those anti-gay attitudes would not change until the anti-buggery law changes.
72. The Petitioner subsequently reported the matter to the Inter-American Commission on Human Rights (IACHR) and on March 21, 2011, the IACHR ordered Precautionary Measures for the Petitioner in light of the risk of human rights abuses. A copy of the IACHR's notification of precautionary measures is attached to Appendix 4 hereto and marked as Exhibit MAT 2.
73. In issuing its order requesting the state of Jamaica to take Precautionary Measures, the IACHR found that the Petitioner faced a situation of risk because of his work as a defender of the human rights of LGBT persons in Jamaica. It indicates that state authorities have not adopted protection measures despite the death threats the Petitioner has received and drawn to their attention. The IACHR asked the State of Jamaica to adopt, in agreement with the Petitioner, the necessary measures to guarantee the Petitioner's life and physical integrity, and to inform the IACHR on the steps taken to investigate the facts that led to the adoption of these precautionary measures. The Petitioner requested that the police investigate the source of the death threat and advise him. The police told the Petitioner that

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<sup>31</sup> <http://www.jamaicaobserver.com/news/Jamaican-gay-activist-marries-man-in-Canada>.

it would take them a week to identify the sender of the email but despite repeated requests they have failed to do so, more than seven years later.

74. In January 2012, the Jamaica Observer carried an unauthorized photo of the Petitioner's wedding in Canada to his husband, Thomas Decker. Within 24 hours, more than 20 death threats were posted on the newspaper's website as comments to the story. Despite the Petitioner's repeated requests that the newspaper remove the picture, they have failed to do so.
75. In March 2012, the Petitioner received another email death threat, which he again reported to the police. He was again told that it would take the police a week to trace the email's sender but, once again, despite repeated requests and despite the IACHR's existing order for precautionary measures, the police have failed to provide the Petitioner with any information on the source of the death threat, more than seven years later.
76. The Petitioner's husband was a Toronto Police Officer and he designed a security protocol to ensure the Petitioner's safety on his frequent trips to Jamaica to see his sick parents and for work. The Petitioner would therefore need his husband's support for the Petitioner's full return to Jamaica as his husband will be indispensable to ensure the Petitioner's protection. This is because, as described above, Jamaican police have done little to protect the Petitioner from threats associated with his advocacy despite being specifically instructed to do so by the Inter-American Commission on Human Rights.

#### **Petitioner's Claims Are Made Within a Reasonable Period of Time**

77. As described above, the Petitioner is not required to exhaust domestic remedies, since the law of Jamaica appears not to provide any remedies that can be exhausted. It follows that, if no domestic remedy is available, the six-month statute of limitations in Article 32(1) does not apply.<sup>32</sup>
78. If exhaustion of domestic rights is unavailable, Article 32(2) of the IACHR Rules allows parties a "reasonable period of time" to file a petition.<sup>33</sup> Whether a petition is filed within a "reasonable period of time" is determined by the Commission with reference to "the date on which the alleged violation of rights occurred and the circumstances of each case."<sup>34</sup> In cases of a continuing violation of a petitioner's human rights, the Commission has stated, "[T]here is no single date from which to calculate the reasonable period of time."<sup>35</sup> The facts above demonstrate the Petitioner's legitimate, continuing fear of ongoing human rights violations and personal insecurity as long as section 18(2) of the *Charter* remains part of the law of Jamaica. Given the current state of the law in Jamaica—and specifically, the fact that section 18(2) of the *Charter*, which is a part of the constitution and thus shielded from judicial review—the Petitioner has no recourse to domestic remedies and has filed this petition in response to the ongoing violation of his rights. This petition therefore has been filed within a reasonable period of time under Article 32(2) of the IACHR Rules.

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<sup>32</sup> IACHR Rules of Procedure, Article 32(2).

<sup>33</sup> IACHR Rules of Procedure, Article 32(2).

<sup>34</sup> IACHR Rules of Procedure, Article 32(2).

<sup>35</sup> See Inter-American Commission on Human Rights, *The Kalina and Lokono Peoples v. Suriname*, Petition 198-07, Report N° 76/07, Admissibility OEA/Ser.L/V/II.130, doc. 22, rev.1 (Oct. 15, 2007) at para. 63.

**Petitioner's Claims Are Not Under Consideration in Another International Proceeding**

79. The Petitioner confirms that his case is presently not under consideration in another international proceeding.



#### GROUND 4: AMERICAN CONVENTION ON HUMAN RIGHTS

80. The Government of Jamaica, through its ban on the recognition of same-sex unions, including marriage pursuant to sections 18(2) of the constitution has violated the following Articles of the Convention:

- a. Article 1: the right to freedom from discrimination;
- b. Article 5: the right to respect for physical, mental and moral integrity;
- c. Article 7: the right to liberty;
- d. Article 8: the right to a hearing for determination of rights;
- e. Article 11: the right to privacy;
- f. Article 13: the right to freedom of expression;
- g. Article 17: the right to family life;
- h. Article 24: the right to equal protection before the law; and
- i. Article 25: the right to judicial protection.

81. The impugned *Charter* provision is inherently a violation of the rights of LGBT people whose unions it unjustifiably erases; it also operates as legislative encouragement to the government of Jamaica, as well as private citizens, to commit blatant abuses of the human rights of LGBT people.

82. States have an obligation to “ensure the free and full exercise of the rights recognized by the American Convention.”<sup>36</sup> The Court has recognized that this includes “prevent[ing], investigat[ing], and punish[ing] any violation of the rights recognized by the Convention.”<sup>37</sup> The Court has reasoned that when a State permits a violation of one’s rights to occur without taking measures to prevent the violation or punish those responsible, the State has failed to comply with its duty under the Convention.<sup>38</sup>

83. As the following sections illustrate, by continuing to ban consensual unions between same-sex couples pursuant to sections 18(2), Jamaica violates multiple human rights of the Petitioner and other LGBT people.

84. To this end, the Petitioner relies, *inter alia*, on the Advisory Opinion of the Inter-American Court of Human Rights (the “Court”) [OC-24/17](#), on Gender Identity, Equality and Non-Discrimination of Same-Sex Couples (the “*Opinion*”). The Opinion is enclosed in [Appendix 3](#).

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<sup>36</sup> Organization of American States, *American Convention on Human Rights “Pact of San Jose, Costa Rica” (B-32)*, 22 November 1969, O.A.S. Treaty Series N° 36, 1144 UNTS 123, Article 1(1).

<sup>37</sup> *Velásquez Rodríguez v. Honduras* at para. 66.

<sup>38</sup> *Velásquez Rodríguez v. Honduras* at para. 66.

## Article 1

85. Article 1(1) of the Convention is the most fundamental provision in the Convention. It provides a blanket guarantee that persons will be free from discrimination and obligates Jamaica to respect the rights and freedoms enumerated in the Convention, without discrimination. It states:

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, **or any other social condition.**" (emphasis added)
2. For the purposes of this Convention, "persons" means every human being.<sup>39</sup>

86. Article 1(1) has been interpreted by the Inter-American Court to prohibit any discriminatory norm, act, or practice that reduces or restricts an individual's Convention rights based on one of the prohibited grounds of discrimination, whether the norm, act, or practice is applied by the State or by private parties.<sup>40</sup> Discrimination does not need to be deliberate; it can occur indirectly. Even if a norm, act, or practice appears neutral, it can have a disproportionate impact on certain groups of people.<sup>41</sup>

87. The list of prohibited grounds of discrimination under Article 1 is not exhaustive; it enumerates several specific grounds but also refers to "any other social condition." Like the European Court of Human Rights<sup>42</sup> and the UN Human Rights Committee<sup>43</sup>, the Court has interpreted "without discrimination" to include without discrimination *for reasons of sexual orientation or gender identity*. In *Atala Riffo and Daughters v. Chile*, the Court ruled that Ms. Atala was discriminated against when her custody of her children was revoked on the basis of her sexual orientation, violating the Convention.<sup>44</sup> The Court established that:

[T]he **sexual orientation** and gender identity of persons is a category protected by the Convention. Therefore, 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

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<sup>39</sup> Convention, Article 1.

<sup>40</sup> *Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile* at para. 206; *Atala Riffo and Daughters v. Chile* at para. 82.

<sup>41</sup> *Expelled Dominicans and Haitians v. Dominican Republic* at para. 263.

<sup>42</sup> *Salgueiro da Silva Mouta v. Portugal* (No. 33290/96) at para. 28; *Fretté v. France* (No. 36515/97) at para. 32; *L. and V. v. Austria* (No. 39392/98, No. 39829/98) at para. 45. *Kozak v. Poland* (No. 13102/02) at para. 92; *Clift v. United Kingdom* (No. 7205/07) at para. 57; *J.M. v. United Kingdom* (No. 37060/06) at para. 55.

<sup>43</sup> *Toonen v. Australia*, Communication No. 488/1992, CCPR/C/50/D/488/1992 (Mar. 31, 1994) at para. 8.7; *Young v. Australia*, Communication No. 941/2000, CCPR/C/78/D/941/2000 (Sept. 18, 2003) at para. 10.4; *X v. Colombia*, Communication No. 1361/2005, CCPR/C/89/D/1361/2005 (May 14, 2007) at para. 7.2.

<sup>44</sup> *Atala Riffo and Daughters v. Chile* at para. 124.

diminish or restrict, in any way whatsoever, the rights of a person based on his or her sexual orientation.<sup>45</sup>

88. Article 1(1) extends to all provisions of the Convention.<sup>46</sup> By virtue of this Article, if a State does not equally respect and protect any Convention right *without discrimination*, that Convention right, in combination with Article 1(1), has been breached. Article 1(1) also imposes a positive obligation on states to “reverse or change any discriminatory situations in their societies that prejudice a specific group of persons.”<sup>47</sup> This involves the “special obligation of protection that the State must exercise with regard to the actions and practices of third parties who, with its tolerance or acquiescence, create, maintain or encourage discriminatory situations.”<sup>48</sup>

89. In the *Opinion*, the Court expressly held that “any other social condition” was open-ended. It could, and does, protect sexual orientation. At paras. 67 and 68, the Court held that:

“[It] has also established that the prohibited **categories of discrimination** listed under Article 1(1) of the American Convention **are neither exhaustive nor restrictive**, but merely indicative. Thus, the Court finds that by including the expression “or any other social condition” the wording of this article leaves the grounds of discrimination open in order to recognize other categories that were not explicitly listed but are analogous to these...

...

Based on the above, and bearing in mind the general obligations of respect and guarantee established in Article 1(1) of the American Convention, the interpretation criteria established in Article 29 of this Convention, the stipulations of the Vienna Convention on the Law of Treaties, the resolutions of the OAS General Assembly, the standards established by the European Court and the United Nations agencies, the Court has determined that sexual orientation and gender identity are categories protected by the Convention. Consequently, **the Convention prohibits any discriminatory law, act or practice based on a person’s sexual orientation or gender identity, as this would be contrary to the provisions of Article 1(1) of the American Convention.**<sup>49</sup>

90. In addition to the cross-cutting obligation under Article 1(1) to ensure equal enjoyment of all Convention rights without discrimination, the Convention contains a specific right to equality: more particularly, Article 24 stipulates that “[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”<sup>50</sup>

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<sup>45</sup> *Atala Riffo and Daughters v. Chile* at para. 91 (emphasis added). That Article 1(1) of the Convention prohibits discrimination based on sexual orientation was reaffirmed by the Court in *Duque v. Colombia*, Series C, No. 310 (Feb. 26, 2016), paras. 104-105, and *Flor Freire v. Ecuador*, Series C, No. 315 (Aug. 31, 2016), paras. 118-124.

<sup>46</sup> *Nadege Dorzema et al. v. Dominican Republic* at para. 224

<sup>47</sup> *Nadege Dorzema et al. v. Dominican Republic* at para. 236.

<sup>48</sup> *Nadege Dorzema et al. v. Dominican Republic* at para. 236.

<sup>49</sup> Inter-American Court of Human Rights, *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples*, Advisory Opinion OC-24/17, Series A, No. 24 (Nov. 24, 2017) (emphasis added)

<sup>50</sup> Convention, Article 24 (emphasis added).

Article 24 has been interpreted to “prohibit discrimination resulting from any inequality derived from domestic law or its application.”<sup>51</sup>

91. In other words, if a State discriminates on any of the grounds protected by Article 1(1) in its respect for, or willingness to guarantee, a right contained in the Convention, it will be failing to comply with its obligation contained in the relevant Article in light of Article 1(1). If, on the other hand, the discrimination refers to inequality before the country’s law or unequal protection of said laws on the basis of any ground encompassed by Article 1(1), the State will be failing to comply with its obligation under Article 24.<sup>52</sup> The two Articles are related but distinct.

In the instant case, by maintaining section 18(2) of the *Charter* and excluding non-heterosexual unions from legal recognition Jamaica is both (a) in breach of Article 24’s equality guarantees and (b) discriminatorily violating other Convention rights (discussed before below) and is therefore contravening several other articles in light of Article 1(1).

#### Article 24

92. Article 24, in turn, guarantees that the fundamental rights enshrined in the Convention are enjoyed by all with the equal protection of the law. It states that:

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

93. In the *Opinion*, the Court described the relationship between Article 1 (1) and Article 24 as follows:

“... the general obligation under Article 1(1) refers to the State’s obligation to respect and ensure the rights contained in the American Convention “without any discrimination,” Article 24 protects the “right to equal protection of the law.” That is, Article 24 of the American Convention prohibits any discrimination by the law, not only with regard to the rights contained in this instrument, but also as regards all the laws enacted by the State and their enforcement. In other words, if a State discriminates in the respect or guarantee of a treaty-based right, it is in non-compliance with the obligation established in Article 1(1) and the substantive right in question. If, to the contrary, the discrimination refers to unequal protection by a domestic law or its enforcement, this must be examined in light of Article 24 of the American Convention in relation to the categories protected by Article 1(1) of the Convention.”

94. The constitutional non-recognition of same-sex marriage deprives that union of the protection(s) afforded to heterosexual marriages.

95. As stated under “Grounds 2 & 3” (above), the constitutional non-recognition of same-sex marriages would deprive the Petitioner’s partner of Jamaican citizenship. In other words, the constitutional guarantee of Jamaican citizenship for a non-Jamaican heterosexual spouse does not exist for the non-Jamaican homosexual spouse. The same-sex spouse is therefore deprived of the equal protection of the law.

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<sup>51</sup> *Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile* at para. 199.

<sup>52</sup> *Atala Riffo and Daughters v. Chile* at para. 82; *Advisory Opinion OC-24/17* at para. 64.

96. Ancillary to which, of course, is the *substantive* disruption this causes to persons like the Petitioner who are desirous of repatriating to Jamaica with his homosexual spouse. The Petitioner's liberty, freedom of movement, and freedom of residence are all tangentially (and significantly) impacted.

#### Article 5

97. Article 5 of the Convention is titled in English as "Right to Humane Treatment" and more specifically states:

1. Every person has the right to have his physical, mental, and moral integrity respected.

98. The Petitioner submits that Jamaica has failed to respect his physical, mental or moral integrity, contrary to Article 5(1).

99. The complete ban on the recognition of non-heterosexual unions under section 18(2) of the *Charter* is a direct attack on the *moral integrity* of the Petitioner. The provision purports to erase the Petitioner's marriage in his homeland, unjustifiably subjecting him to the destruction of his marriage's credibility and integrity in the eyes of the community. The Petitioner and his husband are viewed as legal aberrations and are consequently stigmatized.

100. As has been described above, anti-LGBT laws, such as section 18(2) of the *Charter* contribute to a culture in which LGBT people become targets, in various ways, for acts of physical violence and threats of such violence, directly violating their right to *physical integrity* and, necessarily, violating their *mental integrity* as well. Moreover, as a result of Jamaican authorities' unwillingness to meaningfully investigate harassment and violence against LGBT Jamaicans, LGBT Jamaicans experience feelings of deep frustration and powerlessness in the face of such threats and violence, further violating his mental integrity. This, too, is a breach by Jamaica of Article 5(1). In *Fernandez Ortega et al. v Mexico*, delays in an investigation caused the victim emotional harm, humiliation and degradation.<sup>53</sup> The delays were characterized as emphasizing the "discrimination, subordination, and racism against the alleged victim and delegitimized her before members of her community."<sup>54</sup> The Inter-American Court found the State had breached Article 5(1), emphasizing the fact that the victim experienced "powerlessness related to the lack of justice in her case."<sup>55</sup>

101. The Petitioner has experienced this on more than one occasion.

102. In February 2011, the Petitioner wrote a letter to a local newspaper describing police raids on two gay clubs in Jamaica. In response to the letter, the Petitioner received a death threat via e-mail. The writer threatened that if the Petitioner did not stop writing such opinions, he would "fucking die!" In a setting where such threats occur against a backdrop of regular violence against LGBT people, including extreme and vicious assaults and murders, such a threat was not to be taken lightly, particularly given the Petitioner's visibility as a gay man and a human rights activist. When he reported the threat to the police, the recording officer proceeded to hurl homophobic slurs at the Petitioner. This was

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<sup>53</sup> *Fernandez Ortega et al. v Mexico*, Series C., No. 215 Judgment of August 30, 2010 at para. 133, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_215\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_215_ing.pdf).

<sup>54</sup> *Fernandez Ortega et al. v Mexico* at para. 133.

<sup>55</sup> *Fernandez Ortega et al. v Mexico* at para. 137.

reported to Assistant Police Commissioner Les Green, who said that those anti-gay attitudes would not change until the anti-buggery law changes.

103. The Petitioner subsequently reported the matter to the Inter-American Commission on Human Rights (IACHR) and on March 21, 2011, the IACHR ordered Precautionary Measures for the Petitioner in light of the risk of human rights abuses. A copy of the IACHR's notification of precautionary measures is attached to Appendix 4 hereto and marked as Exhibit MAT 2.
104. In issuing its order requesting the state of Jamaica to take Precautionary Measures, the IACHR found that the Petitioner faced a situation of risk because of his work as a defender of the human rights of LGBT persons in Jamaica. It indicates that state authorities have not adopted protection measures despite the death threats the Petitioner had received and drawn to their attention. The IACHR asked the State of Jamaica to adopt, in agreement with the Petitioner, the necessary measures to guarantee his life and physical integrity, and to inform the IACHR on the steps taken to investigate the facts that led to the adoption of these precautionary measures. The Petitioner requested that the police investigate the source of the death threat and advise him. The police told the Petitioner that it would take them a week to identify the sender of the email but despite repeated requests they have failed to do so, more than seven years later.
105. In January 2012, the *Jamaica Observer* carried an unauthorized photo of the Petitioner's wedding in Canada to his husband. Within 24 hours, more than 20 death threats were posted on the newspaper's website as comments to the story. Despite the Petitioner's repeated requests that the newspaper remove the picture, they have failed to do so.<sup>56</sup>
106. In March 2012, the Petitioner received another email death threat, which he again reported to the police. He was again told that it would take the police a week to trace the email's sender but, once again, despite repeated requests and despite the IACHR's existing order for precautionary measures, the police have failed to provide the Petitioner with any information on the source of the death threat, more than seven years later.
107. Jamaica has also failed to ensure to the Petitioner the exercise *without discrimination* of his Article 5 right to physical, mental, and moral integrity, which breaches Article 1(1). As is amply demonstrated by the Declaration of the Petitioner, the existence of anti-LGBT laws such as sections 18(2) of the *Charter* facilitate harassment and violence against and induces fear throughout the life of the Petitioner. For example, the provision facilitates the fear that kept the Petitioner silent in the face of subsequent death threats. Now, he will not show affection to his partner in public because he fears stigmatization, discrimination and violence. This undermines his mental and moral integrity.
108. Stigmatization, and its attendant consequence for personal security and health care, is also a thread that runs through the Petitioner's Declaration; the experiences he describes are not unique to the Petitioner but mark the lives of many LGBT Jamaicans. The Petitioner is fearful within his community and has developed a robust private security protocol. Jamaica's failure to protect the Petitioner's right to have his "physical, mental, and moral integrity respected" constitutes a breach of Article 5(1) of the Convention.
109. Finally, the Petitioner submits that the continued existence of anti-LGBT laws such as section 18(2) of the *Charter* in light of those provisions' adverse *impact on the mental health*

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<sup>56</sup> <http://www.jamaicaobserver.com/news/Jamaican-gay-activist-marries-man-in-Canada>.

and physical health of LGBT Jamaicans, their partners and children as a result of “forced sham” marriages, violates Article 5(1), and also does so in a discriminatory fashion contrary to Article 1(1).

110. Anti-LGBT laws such as section 18(2) of the *Charter* disproportionately aggravate the HIV epidemic among men who have sex with men. This is for myriad reasons, including stigmatization by healthcare professionals, lack of knowledge on the part of healthcare professionals on issues facing LGBT people, and the reticence of LGBT people to come to health services when they fear arrest. These issues are magnified by the popular stigmatization and discrimination occasioned by provisions like sections 18(2).

111. In 2011 bioethicist Professor Udo Schuklenk of Queen’s University conducted research on the disturbingly high HIV prevalence rate among Jamaican MSM (31.8%) and the implications for public health. Among other things he found that anti-gays laws drove MSM underground, away from effective HIV interventions and:

***Homosexual men in Jamaica rarely ever live in monogamous relationships because of the security risks involved in living with a member of the same sex over longer periods in the same household.***

A copy of Professor Shuklenk article is attached in Appendix 4 hereto and marked as Exhibit MAT 1.

112. In order to mask or “cure” their orientation, many MSM (nearly 60%<sup>57</sup>) have female partners and father multiple children while clandestinely continuing their homosexual relationships. This constitutes a threat to the mental and physical health of the men, women and children as well as the wider public.

113. There is also overwhelming evidence that banning same-sex unions has many deleterious societal implications, including lower health outcomes for LGBT people<sup>58</sup>

114. The Inter-American Court observed in *Gonzales Lluy et al. v. Ecuador* that “the right to personal integrity is directly and immediately linked to health care, and that the lack of adequate medical treatment may result in a violation of Article 5(1) of the Convention.”<sup>59</sup> Although that case concerned the regulation of health service providers, it would be illogical to conclude that Articles 5(1) and 1(1) do not also oblige the State to take legislative measures to reduce the need for adequate medical treatment in the first place. This is especially true where the impact of the State’s failure to act results in a disproportionate health impact on a particular group, on grounds such as sexual orientation, contrary to the requirement in Article 1 that the State take steps to ensure exercise of Convention rights without discrimination.

115. In essence, Jamaica’s reluctance to eliminate anti-LGBT laws such as section 18(2) of the *Charter* discriminatorily forces a greater medical burden onto one particularly marginalized group. This violates the right to personal integrity guaranteed in Article 5 in light of Article 1(1).

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<sup>57</sup> According to Professor Peter Figueroa, former head of the National HIV/STI programme in Jamaica and head of the Professor of Public Health, Epidemiology and HIV/AIDS at the University of the West Indies, Mona, Kingston, Jamaica.

<sup>58</sup> <https://www.nejm.org/doi/pdf/10.1056/NEJMp1400254>.

<sup>59</sup> *Gonzales Lluy et al. v. Ecuador* at para. 171.

## Article 7

116. Article 7 of the Convention is geared towards the general protection of liberty and security of the person. These rights are fundamental to one's sense of 'self', and overall functioning in society.
117. Article 7(1) is the most general of the rights. Namely:  
"Every person has the right to personal liberty and security."
118. The wide-ranging applicability of this right was itself emphasized by the Court in the *Opinion*. At para. 89 the Court the Court stated that:  
"[The Court itself] has made a broad interpretation of Article 7(1) of the American Convention by indicating that it includes a wide-ranging concept of liberty, and this is understood as the capacity to do or not to do whatever is legally permitted. In other words, **it constitutes the right of everyone to organize, pursuant to the law, their individual and social life in accordance with their own choices and convictions.** Defined as such, **liberty is a basic human right inherent in the attributes of the person that pervades the whole American Convention.**"<sup>60</sup>
119. Jamaica's constitutional non-recognition of same-sex marriage is therefore a direct attack on the Petitioner's right to organize his life and personal relations according to his own choices.

## Article 11

120. Article 11 of the Convention, which enshrines the right to privacy, provides that:
1. Everyone has the right to have his honor respected and his dignity recognized.
  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.<sup>61</sup>

Banning same-sex unions violates privacy directly.

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<sup>60</sup> Inter-American Court of Human Rights, Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples, Advisory Opinion OC-24/17, Series A, No. 24 (Nov. 24, 2017) (emphasis added)

<sup>61</sup> Convention, Article 11.



121. In *Atala Riffo and Daughters v. Chile*, the Court noted that privacy “is an ample concept that is not subject to exhaustive definitions and includes, among other protected realms, the sex life and the right to establish and develop relationships with other human beings.”<sup>62</sup> Elsewhere, the Court has noted that the right to a private life includes “the way in which individuals...decide to project themselves towards others”<sup>63</sup> and is fundamentally linked to autonomy and dignity:<sup>64</sup>

Thus, based on the principle of the free development of the personality or of personal autonomy, everyone is free and autonomous to live in a way that accords with their values, beliefs, convictions and interests.<sup>65</sup>

122. Similarly, the European Court of Human Rights (ECtHR) observed in *Pretty v. United Kingdom*, with reference to the analogous provision in the *European Convention on Human Rights* (Article 8):

[T]he concept of “private life” is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It 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 Article 8. Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.<sup>66</sup>

123. The Supreme Court of India has also emphasized that the right to privacy includes the right to make personal decisions regarding intimate relationships, including in keeping with one's sexual orientation:

Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life...Privacy constitutes the foundation of all liberty because it is

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<sup>62</sup> *Atala Riffo and Daughters v. Chile* at para. 162.

<sup>63</sup> Inter-American Court of Human Rights, *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples*, Advisory Opinion OC-24/17, Series A, No. 24 (Nov. 24, 2017) at para. 87.

<sup>64</sup> Inter-American Court of Human Rights, *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples*, Advisory Opinion OC-24/17, Series A, No. 24 (Nov. 24, 2017) at paras 87-88.

<sup>65</sup> Inter-American Court of Human Rights, *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples*, Advisory Opinion OC-24/17, Series A, No. 24 (Nov. 24, 2017) at para. 88.

<sup>66</sup> *Pretty v. United Kingdom* European Court of Human Rights (Application no. 2346/02) Judgment Strasbourg 29 April 2002 at para. 61, available at: <http://www.bailii.org/eu/cases/ECHR/2002/427.html> (citations omitted).

in privacy that the individual can decide how liberty is best exercised...

The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual...<sup>67</sup>

124. The state is not permitted to intrude upon privacy in ways that are abusive or arbitrary.<sup>68</sup> As the Commission has explained:

A principal objective of Article 11 is to protect individuals from arbitrary action by State authorities which infringes in the private sphere. Of course, where State regulation of matters within that sphere is necessary to protect the rights of others, it may not only be justified, but required. The guarantee against arbitrariness is intended to ensure that any such regulation (or other action) comports with the norms and objectives of the Convention and is reasonable under the circumstances.<sup>69</sup>

125. The Inter-American Court has held that any restrictions on privacy must be "regulated by the law, pursue a legitimate goal and comply with the requirements of suitability, necessity, and proportionality, in other words, they must be necessary in a democratic society."<sup>70</sup>

126. However, anti-LGBT laws such as Section 18(2) of the *Charter* advance no such legitimate goal, are disproportionate, and are not necessary in a democratic society, including to protect the rights of others. Section 18(2) is a sweeping denouncement of any form of same-sex unions, even those entered into by consenting adults. Courts around the world have consistently concluded that such a prohibition is an indefensible infringement of the right to privacy in a free and democratic society.

127. The ECtHR has also considered these arguments in the context of an anti-buggery law as early as 1981, in *Dudgeon v. United Kingdom*, ultimately concluding that the law unjustifiably breached the applicant's right to privacy. In that case, a gay man complained to the ECtHR that his right to privacy had been violated after police searched his home, seized personal papers detailing consensual sexual activities with other men, and was questioned by police about them. The applicant was considered for prosecution under Northern Ireland's anti-buggery law.<sup>71</sup>

128. Similar to the past jurisprudence of the Court noted above, Article 8 of the *European Convention for the Protection of Human Rights* (the "European Convention") permits the right to privacy to be restricted where the restriction "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."<sup>72</sup>

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<sup>67</sup> *Justice K. S. Puttawamy (Retd.) and Anr. vs Union of India and Ors.*, Writ Petition (Civil) No 494 of 2012 at paras 168-169.

<sup>68</sup> *Atala Riffo and Daughters v. Chile* at para. 164; *Escher et al. v. Brazil* at para. 116.

<sup>69</sup> See Inter-American Commission on Human Rights, *Maria Eugenia Morales De Sierra v. Guatemala*, Petition 11.625, Report N° 4/01, Merits, OEA/Ser./L/V/II.111, doc. 20, rev. at 929 (Jan. 19, 2001) at para. 47.

<sup>70</sup> *Atala Riffo and Daughters v. Chile* at para. 164; *Tristan Donoso v. Panama* at para. 56.

<sup>71</sup> *Dudgeon v. United Kingdom* (No. 7525/76) at para. 33.

<sup>72</sup> Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, 213 UNTS 221, Article 8.

129. In *Dudgeon*, the ECtHR held that the "cardinal issue" in the case was the extent to which the legislation was "necessary in a democratic society" to achieve the government's alleged goal of protecting morals and safeguarding the rights of others, namely, protecting youth from allegedly "undesirable and harmful pressures".<sup>73</sup> In order to satisfy the necessity requirement, it fell to the government to show both that there was a pressing social need and that the restriction was proportionate to addressing that objective.<sup>74</sup> The ECtHR rejected the government's arguments on both fronts.

130. With respect to the existence of a "pressing social need," the ECtHR held:

As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States... In Northern Ireland itself, the authorities have refrained in recent years from enforcing the law in respect of private homosexual acts between consenting males over the age of 21 years capable of valid consent... No evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there has been any public demand for stricter enforcement of the law.

It cannot be maintained in these circumstances that there is a "pressing social need" to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public.<sup>75</sup>

131. With respect to proportionality, the ECtHR held:

On the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.<sup>76</sup>

132. Consequently, the ECtHR held that Northern Ireland's anti-buggery law breached the applicant's right to privacy under the European Convention. The ECtHR has affirmed this ruling and reached the same conclusion in subsequent cases as well.<sup>77</sup>

133. The Petitioner submits that the same logic as evidenced in the above-noted decisions applies with even greater force now, more than thirty years after *Dudgeon* was decided.

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<sup>73</sup> *Dudgeon v. United Kingdom* (No. 7525/76) at paras 47-48.

<sup>74</sup> *Dudgeon v. United Kingdom* (No. 7525/76) at para. 53.

<sup>75</sup> *Dudgeon v. United Kingdom* (No. 7525/76) at para. 60.

<sup>76</sup> *Dudgeon v. United Kingdom* (No. 7525/76) at para. 60.

<sup>77</sup> *Norris v. Ireland*, Application No. 10581/83 (Oct. 26, 1988); *Modinos v. Cyprus*, Application No. 15070/89 (Apr. 22, 1993).

Homosexuality is understood (and accepted) in even greater measure than in 1981, when *Dudgeon* was decided. The collective experience of democracies around the world has also shown that the legalization of same-sex intimacy and unions does not result in the destruction of societies' moral fiber or wanton violence.<sup>78</sup> And nearly sixty countries now recognize some form of same-sex unions with no deleterious effect.<sup>79</sup> In these circumstances, anti-LGBT laws (such as section 18(2) of the *Charter*) cannot be viewed as pursuing legitimate aims — and furthermore, given the documented harms they cause, could not be considered proportionate means for achieving the alleged aims. They are therefore not “necessary in a democratic society”.

134. With respect to the Petitioner's circumstances, anti-LGBT laws such as section 18(2) of the *Charter* directly interfere with his ability to enjoy his private family life by effectively erasing a fundamental part of his identity in his homeland. As noted above, both the Inter-American Court and the European Court of Human Rights have found that the right to privacy under the Convention and the European Convention respectively protect “sexual life.” So, too, have the apex courts of other democracies, including in the Americas. Most recently, it is noteworthy that the High Court of Trinidad and Tobago has also recently agreed with this assessment and found that that country's anti-buggery and serious indecency provisions violate its constitutional “right to a private and family life”:

The claimant, and others who express their sexual orientation in a similar way, cannot lawfully live their life, their private life, nor can they choose their life partners or create the families that they wish. To do so would be to incur the possibility of being branded a criminal. The Act impinges on the right to respect for a private and family life.<sup>80</sup>

135. The Petitioner submits that section 18(2) of the *Charter*, which interferes with his private family life is an indefensible breach of his Article 11 right to privacy. The provision invades the ‘zone of solitude’ of the Petitioner and other LGBT people in same-sex unions.

136. Anti-LGBT laws such as the ban on same-sex unions incites other violations of privacy.

a) Section 18(2) and similar anti-LGBT laws encourage non-state actors to commit violations of LGBT peoples' right to privacy. For example, a number of LGBT people in same-sex unions, like the Petitioner, fled from their homes in Jamaica to other countries in order to avoid discrimination, harassment, and violence on the basis of their sexual orientation (and hence their presumed or actual sexual activities), which infringe on personal privacy contrary to Article 11. LGBT couples have also experienced savage attacks in their homes. On May 27, 2016, the Jamaica Gleaner reported that gunmen shot up the home of two gay men while they slept, killing them, but community members refused to help the police because they objected to gays living in their community. After Montego Bay Pride 2016, a young man who attended the event was confronted at his home by gunmen who gave him three days to leave the community of Portmore, St. Catherine because his sister had shared his private Facebook photos of him at Pride. On August 1, 2013 a mob attacked the home of two gay persons in St. Catherine. The police responded but there were no

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<sup>78</sup> There are 124 States that do not prohibit same-sex sexual conduct between consenting adults in private. Angus Carroll and Lucas Ramón Mendos, *State-Sponsored Homophobia 2017: A world survey of sexual orientation laws: criminalisation, protection and recognition* (May 2017) at 8-9, available at [http://ilga.org/downloads/2017/ILGA\\_State\\_Sponsored\\_Homophobia\\_2017\\_WEB.pdf](http://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf).

<sup>79</sup> [https://en.wikipedia.org/wiki/Same-sex\\_union\\_legislation](https://en.wikipedia.org/wiki/Same-sex_union_legislation).

<sup>80</sup> *Jones v. The Attorney General of Trinidad and Tobago*, Claim No. CV2017-00720 at para. 92.

arrests.<sup>81</sup> On August 22, 2013 a mob attacked five allegedly gay men, who were trapped in their house in Green Mountain, Manchester. The police responded but again no arrests were made.<sup>82</sup> On Oct. 4, 2015 the Jamaica Observer reported that three men beat a man whom they accused of being gay because he was seen to be holding his penis while he slept.<sup>83</sup> On October 18, 2011, CVM TV, one of the major television stations on the island, reported that in the early hours of that morning armed men invaded the home of 16-year-old Oshane Gordon and his mother in the resort city of Montego Bay. The men chopped off his foot as he tried to escape through a window in order to slow his escape, and when they caught up with Oshane the men administered several more chops, killing him. CVM reported that Oshane was attacked because of "questionable relations" with another man. Oshane's mother was also chopped several times.<sup>84</sup>

137. Police conduct that is abusively disrespectful of the honour and dignity of LGBT people is also a violation of Article 11 of the Convention.

138. The Petitioner has also had his right to privacy violated by the police. In 2011 when he reported a death threat that he had received to the police, the recording officer proceeded to hurl homophobic slurs at the Petitioner. The constable's comments had no respect for the Petitioner's dignity or honour. This was reported to Assistant Police Commissioner Les Green, who said that those anti-gay attitudes would not change until the anti-buggery law changes.

139. The facts demonstrate that the Jamaican Government has failed to protect LGBT peoples, resulting in intrusions into their private lives. Section 18(2) has no reasonable, non-discriminatory purpose and violates Article 11 of the Convention.

### Article 13

*There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society.*<sup>85</sup>

140. Article 13's guarantee of freedom of expression strikes a balance between the rule of law and the pluralistic demands of democracy. The foundational importance of free expression cannot be understated. Justice Cardozo of the United States Supreme Court described freedom of expression as 'the matrix, the indispensable condition of nearly every other form of freedom.'<sup>86</sup> Other jurists, such as Justice Rand of the Supreme Court of Canada, have described it as "little less vital to man's mind and spirit than breathing is to his physical existence."<sup>87</sup> The

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<sup>81</sup> "Alleged Gay men in St Catherine Home," CVM-TV, Kingston, 1 August 2013, online: [https://www.youtube.com/watch?v=bmL-Cyyn\\_KU](https://www.youtube.com/watch?v=bmL-Cyyn_KU).

<sup>82</sup> "5 Gay Men Trapped by Angry Mob," CVM-TV, Kingston, 22 August 2013, online: <https://www.youtube.com/watch?v=F1XxeqOIBao>.

<sup>83</sup> Tanesha Mundle, "Man allegedly beaten for holding his penis while sleeping," *The Jamaica Observer*, Kingston, 4 October 2015, online: [http://www.jamaicaobserver.com/news/Man-allegedly-beaten-for-holding-his-penis-while-sleeping\\_19231808](http://www.jamaicaobserver.com/news/Man-allegedly-beaten-for-holding-his-penis-while-sleeping_19231808).

<sup>84</sup> CVM-TV Kingston, 18 October 2011, online: [http://www.youtube.com/user/cvmtelevision#p/u/18/ZYgGDH\\_SgbI](http://www.youtube.com/user/cvmtelevision#p/u/18/ZYgGDH_SgbI) [at 9:50mins].

<sup>85</sup> *National Coalition for Gay and Lesbian Equality and Anor v. Minister of Justice* at para. 28.

<sup>86</sup> *Palko v. Connecticut*, 302 US 319 (1937) at 327.

<sup>87</sup> *Switzman v. Elbling and A.G. of Quebec* [1957] SCR 285 at 306.

Inter-American Court has itself stated that “[f]reedom of expression is a cornerstone upon which the very existence of a democratic society rests.”<sup>88</sup>

141. With this recognition of the foundational importance of free expression to the democratic spirit in mind, the drafters of Article 13 of the Convention adopted, and indeed strengthened, much of the language of Article 19 of the ICCPR.<sup>89</sup> The relevant provisions of Article 13 read as follows:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

a. respect for the rights or reputations of others; or

b. the protection of national security, public order, or public health or morals.<sup>90</sup>

142. Through the inclusion of the words “through any other medium of one’s choice,” the drafters of Article 13(1) intended to protect a very broad range of modes of expression.<sup>91</sup> Indeed, State Parties to the ICCPR have recognized in their submissions to the Human Rights Committee on the interpretation of the similarly worded Article 19 of the ICCPR, that “the right to freedom of expression does not depend on the mode of expression...”<sup>92</sup> The Supreme Court of Canada has stated that if an activity “conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the [free expression] guarantee [contained in the Canadian constitution].”<sup>93</sup> The United States Supreme Court has held that conduct will be protected when there is “[a]n intent to convey a particularized message” and that message is likely to be understood by those receiving it.<sup>94</sup> The Inter-American Court has itself adopted this expansive approach and stated that the right to freedom of expression includes “the right to use any appropriate method to disseminate ideas...”<sup>95</sup>

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<sup>88</sup> Inter-American Court of Human Rights, *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, Series A, No. 5 (Nov. 13, 1985) at para. 70, cited in *Herrera-Ulloa v. Costa Rica* at para. 112.

<sup>89</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Article 19.

<sup>90</sup> Convention, Article 13.

<sup>91</sup> Similar words are used in Article 19 of the ICCPR, the *travaux préparatoires* for which confirm the comprehensive scope of application. See Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, 2<sup>nd</sup> Ed. (Germany: NP Engel, 2002) at 445.

<sup>92</sup> *Kivenmaa v. Finland* (No. 412/90) at para. 7.2.

<sup>93</sup> *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 SCR 927 at para. 42.

<sup>94</sup> *Texas v. Johnson*, 491 US 397 (1989) at 404.

<sup>95</sup> “*The Last Temptation of Christ*” (*Olmedo-Busto et al.*) *v. Chile* at 65; *Ivcher-Bronstein v. Peru* at para. 147; *Herrera-Ulloa v. Costa Rica* at para. 109.

143. The Petitioner submits that his freedom of expression, and that of all LGBT people in Jamaica, has been violated in two ways by section 18(2) of the *Charter*:

- First, this section directly and unjustifiably prohibits a form of expression, namely consensual same-sex unions.
- Second, the Jamaican government has failed to halt harassment and discrimination by third parties against LGBT people and couples, precluding the full and free exercise of their right to free expression. This takes the form of harassment on the basis of the Petitioner's sexual orientation and his marriage to another man.

144. By prohibiting legal recognition of same-sex unions, sections 18(2) of the *Charter* prohibit a particular medium of expression affecting the LGBT community. It therefore violates Article 13. The consequences to the Petitioner are significant. The Petitioner depends on his husband for financial, emotional and physical support. However, as a result of the ban on the legal recognition of their marriage the Petitioner's husband would not be allowed to live and work in Jamaica without an expensive annual work-permit that he is not guaranteed to receive. The Petitioner would also not be able to give his husband any spousal benefits that he would be able to grant to an opposite-sex partner. This includes national insurance and pension. The Petitioner's husband would also be a legal stranger to him and so would not be able to make any urgent health related decisions on his behalf if the Petitioner were incapacitated. The Petitioner's only other relatives in Jamaica are his aged and very ill parents. Without his husband the Petitioner could be left to the mercy of strangers making decisions about his welfare and health care. Finally, the Petitioner's husband was the one who designed a robust security protocol to keep the Petitioner safe on his return to Jamaica, after local police failed to act. The Petitioner would need his husband to help keep him safe after his repatriation to Jamaica.

145. The Petitioner submits that the unions of consenting adults is clearly expressive conduct and therefore protected by Article 13. The content of that expression is undoubtedly varied and personal to the individuals forming the union but can clearly be connected to expressions of love and respect. A union may also carry with it political meaning, for instance as a sign of protest.

146. The Inter-American Court has explicitly noted that the *expression* of one's sexual orientation attracts protection under the Convention. As noted above, in *Flor Freire v. Ecuador*, Ecuador was found to have breached the Convention for discharging a soldier from the armed forces on the basis of his having engaged in consensual sexual activity with another man. The complaint had not alleged a violation of his freedom of expression *per se*, so the Court did not engage in any specific analysis of Article 13 of the Convention. However, the Court declared that the right to enjoyment of Convention rights without discrimination on the basis of sexual orientation (under Article 1.1) is not limited simply to the status of being homosexual but also includes the expression of that sexual orientation in a person's life. As noted in the passages below, the Court specifically noted that sexual acts (which must also include forming a union such as marriage) are a means of expressing one's sexual orientation (para 119), and that the prohibition of discrimination based on sexual orientation includes protection of the person's expression of their sexual orientation (para 127):

119. Adicionalmente, este Tribunal ha establecido que el alcance del derecho a la no discriminación por orientación sexual no se limita a la condición de homosexual en sí misma, sino que incluye su expresión y las consecuencias necesarias en el proyecto de vida de las personas<sup>171</sup>. En este sentido, **los actos sexuales son una manera de expresar la orientación sexual de la**

**persona**, por lo que se encuentran protegidos dentro del mismo derecho a la no discriminación por orientación sexual.

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127. Este Tribunal destaca que, con el propósito de preservar la disciplina militar, podría resultar razonable y admisible la imposición de restricciones a las relaciones sexuales al interior de las instalaciones militares o durante el servicio. No obstante, la ausencia de una justificación adecuada para la mayor gravedad de la sanción asignada a los actos sexuales homosexuales, genera una presunción sobre el carácter discriminatorio de esta medida. Asimismo, resalta que la diferencia de regulación existente en el presente caso frente a los actos homosexuales tenía como efecto excluir la participación de personas homosexuales en las fuerzas armadas. **En este sentido, la Corte recuerda que la prohibición de discriminación con base en la orientación sexual de una persona incluye la protección de la expresión de dicha orientación sexual (supra párr. 119). Al sancionar los “actos de homosexualidad” dentro o fuera del servicio, el artículo 117 del Reglamento de Disciplina Militar castigaba toda forma de expresión de esta orientación sexual, restringiendo la participación de personas homosexuales en las fuerzas armadas ecuatorianas.**<sup>96</sup>

147. The Court concluded that the State had discriminated against the complainant, contrary to Article 24 and Article 1 of the Convention, for dismissing him from his employment based on his consensual sexual activity that was an expression of his sexual orientation.<sup>97</sup>

148. The Petitioner further submits that section 18(2) of the *Charter* banning consensual same-sex unions not only violate Article 24’s right to equality before the law, in conjunction with Article 1 (as was found in *Flor Freire*), but given the *dicta* in that ruling, and the obvious expressive value of unions such as marriage, they also violate freedom of expression contrary to Article 13 of the Convention. The Petitioner submits that the provision’s denial of legal recognition of a consensual union violates the freedom of expression of all LGBT people who form the different unions prohibited by section 18(2) of the *Charter*. Furthermore, since the provision necessarily infringes the freedom of expression of homosexual people with their consenting homosexual partners (i.e., the prohibition on same-sex unions) and disproportionately infringes the freedom of homosexual people more generally to express their sexual orientation in a union of their choice, they also violate the Article 13 guarantee of freedom of expression in a discriminatory fashion, contrary to the guarantee in Article 1 of the right to enjoy all Convention rights without discrimination on the basis of sexual orientation or gender identity.

149. The Court has held that “it is possible for freedom of expression to be unlawfully curtailed by *de facto* conditions that directly or indirectly place those who exercise it in a situation of risk or increased vulnerability.”<sup>98</sup> States must therefore not act in a manner that “propitiates, encourages, favors or increases that vulnerability” and must adopt measures to “prevent violations or protect the rights of those who find themselves in such a situation.”<sup>99</sup>

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<sup>96</sup> *Flor Freire v. Ecuador* at paras 119 and 127 (emphasis added).

<sup>97</sup> *Ibid.*, at para. 140.

<sup>98</sup> *Uzcategui et al. v. Venezuela* at para. 190; *Vargas v. Columbia* at para. 172; *Rios et al. v. Venezuela* at para. 107.

<sup>99</sup> *Uzcategui et al. v. Venezuela* at para. 190; *Vargas v. Columbia* at para. 172; *Rios et al. v.*



150. Thus, the obligation imposed by Article 13 on Jamaica extends beyond merely refraining from direct interference with the Petitioners' right to free expression. Jamaica must take measures to relieve *de facto* conditions contributing to the Petitioner's increased vulnerability and take further measures to prevent and redress violations of his rights.

151. Where, as here, third parties are also responsible for committing acts which violate an individual's rights, liability will accrue to the State if the State fails to comply, by action or omission, with the obligation included in Article 1(1) of the Convention.<sup>100</sup> Article 1(1) contains a positive obligation on Jamaica to ensure that all individuals under its jurisdiction are able to fully and freely exercise the rights guaranteed to them by the Convention without discrimination:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

152. A similar provision, Article 2(1), exists within the ICCPR and was the subject of General Comment 34 by the UN Human Rights Committee, which addressed the ICCPR's free expression guarantee:

The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.<sup>101</sup>

153. Through the retention of section 18(2) of the *Charter* Jamaica has failed to ensure that the Petitioner is able to freely and fully exercise his guaranteed right to free expression. The harassment he experiences by private parties may be traced in part to section 18(2).

154. The Commission has noted this issue before. In its 2010 Annual Report, the Commission noted that Peru should "take positive measures to eradicate socio-cultural practices and discourse contrary to the *freedom of expression of gender-related identities, attitudes, and practices that are not heterosexual* in keeping with the provisions" of a Peruvian plan to protect the rights of homosexuals.<sup>102</sup>

155. Similarly, the UN Special Rapporteur on the right to freedom of opinion and expression sent a letter of allegation to Jamaican authorities expressing concern that the expression rights of LGBT Jamaicans were being compromised by, in part, "violent attacks by homophobic individuals who may have gained the impression that the Government would not vigorously pursue such violence."<sup>103</sup>

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*Venezuela* at para. 107.

<sup>100</sup> *Rios et al. v. Venezuela* at para. 109.

<sup>101</sup> UN Human Rights Committee, *General comment No. 34*, CCPR/C/GC/34 (Sept. 12, 2011) at para. 7.

<sup>102</sup> Inter-American Commission on Human Rights, *Evaluation of Human Rights in the Americas During IACHR Regular Sessions*, Press Release N° 07/06 (Mar. 17, 2006), available at <http://www.cidh.org/Comunicados/English/2006/7.06eng.htm>

<sup>103</sup> UN Commission on Human Rights, *The right to freedom of opinion and expression – Summary*

156. The Inter-American Court itself has linked states' failure to recognize sexual identity with a failure to ensure full enjoyment of freedom of expression. In its *Advisory Opinion OC-24/17*, the Court held:

[T]he Court agrees with the Commission when it pointed out that a lack of recognition of gender or sexual identity could result in indirect censure of gender expressions that diverge from cisnormative or heteronormative standards, which would send a general message that those persons who diverge from these "traditional" standards would not have the legal protection and recognition of their rights in equal conditions to persons who do not diverge from such standards.<sup>104</sup> (emphasis added)

157. The existence of section 18(2) of the *Charter* facilitates harassment against LGBT couples by state and non-state actors, including harassment on the basis of sexual orientation. The Petitioner has experienced precisely this. When a Jamaican newspaper published an unauthorized photo of his Canadian same-sex marriage the Petitioner received a barrage of death threats that forced him to flee to Canada. The Petitioner has also been called a slew of derogative names, including by Police.

158. Unsurprisingly, the Petitioner fears for his safety when he is in Jamaica. In other words, he is unable to enjoy the full measure of his right to free expression. In maintaining laws that ban same-sex unions Jamaica continues to contribute to such an environment of hostility, discrimination and violence.

159. The facts highlighted in the Petitioner's Declaration demonstrate a failure by the authorities to adopt measures necessary to halt the harassment and discrimination faced by LGBT couples and to allow them to exercise their right to freely express their sexual orientation and their love for persons of the same sex. Instead, the Petitioner lives in fear for his safety and has consequently been silenced about the expression of his relationship. When viewed together with Article 1 of the Convention, this is a breach of Article 13 by Jamaica.

160. Similar to the ECtHR<sup>105</sup> and the UN Human Rights Committee<sup>106</sup>, the Court has stated that a permissible restriction on the right to freedom of expression under Article 13 must be (a) provided by law, (b) have a legitimate aim, and (c) be "necessary in a democratic society". The Court has outlined the following legitimate aims: i) respect for the rights or reputation of others, ii) protection of national security, iii) protection of public order, and iv) protection of public health or morals.<sup>107</sup> The State must prove the restriction corresponds to one of these purposes.<sup>108</sup> Moreover, as any such restriction must be "necessary in a democratic society", a showing of a compelling government purpose is required.<sup>109</sup> A restriction will not be "necessary" if its purpose is merely "useful," "reasonable" or "desirable". Rather, the

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*of cases transmitted to Governments and replies received*, E/CN.4/2005/64/Add.1 (Mar. 29, 2005) at para. 494.

<sup>104</sup> Inter-American Court of Human Rights, *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples*, Advisory Opinion OC-24/17, Series A, No. 24 (Nov. 24, 2017) at para. 97.

<sup>105</sup> *Müller and Others v. Switzerland* (No. 10737/84) at para. 26.

<sup>106</sup> ICCPR, Article 19(3); UN Human Rights Committee, *General comment No. 34*, CCPR/C/GC/34 (Sept. 12, 2011) at paras 21-22.

<sup>107</sup> *Herrera-Ulloa v Costa Rica* at para. 120.

<sup>108</sup> *Claude-Reyes et al. v. Chile* at para. 90.

<sup>109</sup> *Herrera-Ulloa v Costa Rica* at para. 120, citing *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* at para. 46.

restriction's purpose must be a "pressing social need."<sup>110</sup> Thus, the restriction must be "proportionate" to the legitimate interest that justifies it and must be limited to what is strictly necessary to achieve that objective.<sup>111</sup> It cannot be overbroad. To determine whether a restriction is proportionate to the legitimate aim, the case as a whole, including context, must be examined.<sup>112</sup>

161. It is conceded that the restriction is provided by law. However, the restriction does *not* have a legitimate aim and is not necessary in a democratic society.
162. States can invoke "public health" as a "legitimate aim" justifying a restriction of freedom of expression in order to allow a State to take measures to deal with a serious health threat.<sup>113</sup> However, this would not be a legitimate aim in this case. As explained above, laws which ban same-sex unions, like section 18(2) of the *Charter*, in fact *worsen* the health of homosexuals and thus the public in general.
163. States often invoke the concept of "public morality" as a "legitimate aim" justifying limitations on the right to freedom of expression of individuals and organizations. The UN Human Rights Committee has observed that "the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations [...] for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition".<sup>114</sup> The limitation must be essential for maintaining respect for the fundamental views of the State.<sup>115</sup>
164. In *Handyside v. United Kingdom*, the confiscation of a reference schoolbook geared towards children and adolescents, which included a section on sex, was held not to violate the freedom of expression guarantee in the European Convention. The ECtHR found the book would likely deprave and corrupt most of the children likely to read it, and therefore its confiscation was necessary for the protection of morals in a democratic society.<sup>116</sup> In regard to restricting freedom of expression in order to protect morals, the ECtHR clarified that:

Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. [...] [I]t is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.<sup>117</sup>

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<sup>110</sup> *Herrera-Ulloa v Costa Rica* at para. 122.

<sup>111</sup> *Herrera-Ulloa v Costa Rica* at para. 123 (emphasis added).

<sup>112</sup> *Müller and Others v. Switzerland* (No. 10737/84) at para. 32.

<sup>113</sup> *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, E/CN.4/1984/4, Annex (1984) at para. 25.

<sup>114</sup> UN Human Rights Committee, *General comment No. 22*, CCPR/C/21/Rev.1/Add.4 (Sept. 27, 1993) at para. 8.

<sup>115</sup> *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, E/CN.4/1984/4, Annex (1984) at para. 25.

<sup>116</sup> *Handyside v. United Kingdom* (No. 5493/72) at para. 33.

<sup>117</sup> *Handyside v. United Kingdom* (No. 5493/72) at para. 49.

165. The ECtHR has held that State authorities are in a better position to determine whether a restriction is necessary to protect morals, due to the fact that morals differ over time and from location to location. However, the ECtHR makes the final decision on whether the restriction is reconcilable with the right to freedom of expression guarantee.<sup>118</sup>
166. In *Kaos GL v. Turkey*, seizure of all copies of a magazine published by the Kaos cultural research and solidarity association for gays and lesbians (Kaos GL) was held to be in violation of the organization's right to freedom of expression. The magazine did contain articles on pornography related to homosexuality, with a few explicit images, however, Turkey's actions were not proportionate to the aim of protecting society's morals. A less intrusive interference (e.g. not selling the magazine to minors) should have instead been implemented.<sup>119</sup> In *Fedotova v. Russian Federation*, a lesbian woman who displayed posters declaring "Homosexuality is normal" and "I am proud of my homosexuality" near a secondary school was fined for displaying propaganda of homosexuality among minors.<sup>120</sup> The UN Human Rights Committee rejected the argument that Russia's law prohibiting propaganda of homosexuality among minors was a permissible restriction on the right of freedom of expression in order to protect morality. The Russian government did not show "that a restriction on the right to freedom of expression in relation to "propaganda of homosexuality" – as opposed to propaganda of heterosexuality or sexuality generally – among minors is based on reasonable and objective criteria."<sup>121</sup>
167. The Petitioner submits that the restriction placed on their expression cannot be justified. There is no legitimate aim. In this case, section 18(2) appears to be protecting society's prejudices, not morals. Section 18(2) also exacerbate a public health crisis rather than facilitate its resolution.
168. Even if section 18(2) was proven to protect morals, they are not necessary in a democratic society. To be necessary, the restriction would have to be the least restrictive option available for protecting morality.<sup>122</sup>
169. The absolute ban on all forms of non-heterosexual unions is a disproportionate interference with the Petitioner's expression. The majority of cases dealing with restrictions on freedom of expression to protect morality involve publications dealing with obscenity, pornography, blasphemy, and information on homosexuality, with a focus on access to said publications by minors.<sup>123</sup> In the Petitioner's case, same-sex unions is an expression that

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<sup>118</sup> *Handyside v. United Kingdom* (No. 5493/72) at para. 48; *Müller and Others v. Switzerland* (No. 10737/84) at para. 35; *Open Door Counselling Ltd and Dublin Well Woman Centre Ltd v. Ireland* (No. 14234/88) at para. 68.

<sup>119</sup> European Court of Human Rights, *Judgment Kaos GL v. Turkey – violation of an LGBT association's right to freedom of expression*, Press Release – Chamber Judgments (Nov. 22, 2016), available at <http://hudoc.echr.coe.int/eng?i=003-5554597-6999894>.

<sup>120</sup> *Fedotova v. Russian Federation* CCPR/C/106/D/1932/2010 at paras 2.2-2.3.

<sup>121</sup> *Fedotova v. Russian Federation* CCPR/C/106/D/1932/2010 at para. 10.6.

<sup>122</sup> *Ricardo Canese v. Paraguay* at para. 96; *Palamara Iribarne v. Chile* at para. 85.

<sup>123</sup> Elizabeth K. Cassidy, "Restricting Rights? The Public Order and Public Morality Limitations on Free Speech and Religious Liberty in UN Human Rights Institutions" (2015) 13:1 *The Review of Faith & International Affairs* 5 at 10; *Handyside v. United Kingdom* (No. 5493/72); *Müller and Others v. Switzerland* (No. 10737/84); *Fedotova v. Russian Federation* CCPR/C/106/D/1932/2010; *Kaos GL v. Turkey*, European Court of Human Rights, Application No. 4982/07, Judgment of 22 November 2016 (in French only; English summary available in European Court of Human Rights, Press Release: "Seizure of all copies of a magazine published by an association promoting LGBT rights in Turkey breached its right to freedom of expression," 22 November 2016, available at:

occurs between consenting adults. Homosexuality, and same-sex unions, may offend a significant number of Jamaicans, including government officials. However, as stated in *Handyside v. United Kingdom*<sup>124</sup>, and reiterated in cases by the Court<sup>125</sup> and the ECtHR<sup>126</sup>, the Petitioners should not be restricted from being expressive in a manner which “offends, shocks, or disturbs” the State or population.

170. Similarly, the indirect restriction of the manner in which the Petitioner and his husband express themselves in public is a disproportionate interference with their freedom of expression and violates Article 13 in light of Article 1(1). The UN Human Rights Committee has held that permissible restrictions on freedom of expression for the purpose of protecting morality must be framed around the principle of non-discrimination.<sup>127</sup> However, the Petitioner is being harassed by third parties on the basis of his sexual orientation, a protected ground now recognized under Article 1(1), and the State is not working to stop this harassment so they can freely express themselves. This suggests the restriction on the Petitioner’s freedom of expression is not permissible because it is discriminatory.

#### Article 17

171. Article 17 of the Convention outlines the rights of the family. Article 17(1) states:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.<sup>128</sup>

172. The Court has established that “the State is obliged to promote the development and strengthening of the family unit” because “the mutual enjoyment of the harmonious relations between parents and children is a fundamental aspect of family life.”<sup>129</sup> The Court has broadly interpreted the term ‘family unit’, including all persons connected by a close relationship.<sup>130</sup> Thus, the relationship between parents and children is protected.

173. Very recently, the Court held that same-sex couples have the right to recognition of their families: “Pursuant to the protection of private and family life (Article 11(2)), as well as the right to protection of the family (Article 17), the Convention protects the family ties that may derive from a relationship between persons of the same sex.”<sup>131</sup>

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<http://hudoc.echr.coe.int/eng?i=003-5554597-6999894>.

<sup>124</sup> *Handyside v. United Kingdom* (No. 5493/72) at para. 49.

<sup>125</sup> *Herrera-Ulloa v. Costa Rica* at para. 113; “*The Last Temptation of Christ*” (*Olmedo-Bustos et al.*) *v. Chile* at para. 69; *Ríos et al. v. Venezuela* at para. 105; *Ivcher Bronstein v. Peru* at para. 152; *Perozo et al. v. Venezuela* at para. 116.

<sup>126</sup> *Müller and Others v. Switzerland* (No. 10737/84) at para. 33; *Otto-Preminger-Institut v. Austria* (No. 13470/87) at para. 49; *Open Door Counselling Ltd and Dublin Well Woman Centre Ltd v. Ireland* (No. 14234/88) at para. 71.

<sup>127</sup> UN Human Rights Committee, *General comment No. 34*, CCPR/C/GC/34 (Sept. 12, 2011) at para. 26.

<sup>128</sup> Convention, Article 17(1).

<sup>129</sup> *Fornerón and daughter v. Argentina* at para. 116; *Vélez Restrepo and family v. Colombia* at para. 225; *Expelled Dominicans and Haitians v. Dominican Republic* at para. 414.

<sup>130</sup> *Fornerón and daughter v. Argentina* at para. 98.

<sup>131</sup> Inter-American Court of Human Rights, *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples*, Advisory Opinion OC-24/17, Series A, No. 24 (Nov. 24, 2017) at para. 199.

174. The High Court of Trinidad and Tobago recently held that that state's anti-buggery and serious indecency provisions violated Trinidad and Tobago's constitutional "right to a private and family life." It noted:

To this court, human dignity is a basic and inalienable right recognized worldwide in all democratic societies. Attached to that right is the concept of autonomy and the right of an individual to make decisions for herself/himself without any unreasonable intervention by the State. In a case such as this, she/he must be able to make decisions as to who she/he loves, incorporates in his/her life, who she/he wishes to live with and make a family with and not have to live under the constant threat, the proverbial "Sword of Damocles", that at any moment she/he may be persecuted or prosecuted. That is the threat that exists at present...

The claimant, and others who express their sexual orientation in a similar way, cannot lawfully live their life, their private life, nor can they choose their life partners or create the families that they wish. To do so would be to incur the possibility of being branded a criminal. The [*Sexual Offences Act*] impinges on the right to respect for a private and family life.<sup>132</sup>

175. Anti-LGBT laws such as section 18(2) of the *Charter* have had devastating consequences on LGBT individuals' family relationships. By fostering discrimination against LGBT individuals on the basis of their sexual orientation, Jamaica has indirectly damaged LGBT individuals' family relationships, causing a breakdown of the family unit.

176. By banning same-sex unions, Jamaica has violated the Petitioner's rights of the family guaranteed under Article 17(1) of the Convention. The Petitioner's familial relationships are being strained as he must either choose between caring for his aging parents in Jamaica, which would mean leaving his husband behind in Canada, or remain with his husband and leave the care of his parents to strangers. Further, the discrimination and violence that the Petitioner and his husband face as a result of being a gay couple in Jamaica makes it difficult to enjoy their marriage there. Maintaining section 18(2) of the *Charter* negatively affects the Petitioner's relationships with his family members as it validates some family members' homophobic attitudes. His family relationships are further strained because his family members have faced discrimination and harassment themselves because they continue to associate with the Petitioner and his husband.

177. The Petitioner has had difficult relationships with his family because of his same-sex marriage given widespread societal discrimination rooted in homophobia - discrimination that is encouraged by the ban on same-sex unions under section 18(2) of the *Charter*. The Petitioner's father wanted nothing to do with him after his marriage was made public. And although the Petitioner and his father have reconciled the Petitioner's aunt still urges his father to disown him. The Petitioner's brother has cut him off since his marriage.

178. As evidenced by the Petitioner's experiences with familial relationships, Jamaica is failing in their duty to support the development of the family unit for LGBT individuals from the continued existence of section 18(2) of the *Charter*.

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<sup>132</sup> *Jones v. The Attorney General of Trinidad and Tobago*, Claim No. CV2017-00720 at paras 91-92.

## Articles 8 and 25

179. Article 8 of the Convention outlines the right to have one's rights determined by a tribunal. Article 8(1) states:

1. Every person has the **right to a hearing**, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or **for the determination of his rights** and obligations of a civil, labor, fiscal, or any other nature.<sup>133</sup>

180. Meanwhile, Article 25 of the Convention guarantees the right to judicial protection:

1. Everyone has the **right to simple and prompt recourse**, or any other effective recourse, to a competent court or tribunal **for protection against acts that violate his fundamental rights** recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

- a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- b. to develop the possibilities of judicial remedy; and
- c. to ensure that the competent authorities shall enforce such remedies when granted.<sup>134</sup>

181. Under Article 25, the Court has recognized that the State has an obligation to "guarantee the rights of all persons under its jurisdiction to an effective judicial remedy against violations of their fundamental rights. Mere availability of said remedies will not suffice; **these remedies must be effective; i.e. they must be suitable to offer results or answers to violations of the rights protected under the Convention.**"<sup>135</sup>

182. Based on the protection granted by both Articles 8 and 25, the Court has established that there is a positive obligation on the State to not only prevent violations of human rights, but to investigate alleged violations as well.<sup>136</sup> This is an obligation of means and not of results. The State must investigate diligently in an attempt to avoid impunity and the repetition of human rights violations.<sup>137</sup> The Court has stated:

In light of this obligation, once the State authorities are aware of an incident, they must open, *ex officio* and immediately, a serious, impartial and effective investigation using all legal means available, designed to determine the truth and to pursue, capture, prosecute and eventually punish all the perpetrators

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<sup>133</sup> Convention, Article 8(1) (emphasis added).

<sup>134</sup> Convention, Article 25 (emphasis added).

<sup>135</sup> *Baldeón García v Peru* at para. 144. (emphasis added).

<sup>136</sup> *Barrios family v Venezuela* at para. 174.

<sup>137</sup> *Vélez Restrepo and family v Colombia* at 247.

of the acts, especially when State agents are or could be involved.<sup>138</sup>

183. Moreover, the obligation exists even if the perpetrator is a private individual, because, if "their acts are not investigated genuinely, they would, to some extent, be assisted by the public authorities."<sup>139</sup> In *Baldeón García v Peru*, the State was found to infringe the obligations outlined in Article 8(1) of the Convention because they failed to carry out an effective investigation.<sup>140</sup> The "State should have attempted...an efficient investigation and judicial proceedings aimed at clarifying the events, punishing the perpetrators of the acts and granting an appropriate compensation."<sup>141</sup>
184. The continued existence of laws against LGBT people, such as section 18(2) of the *Charter* help maintain a homophobic environment in Jamaica. Police officers, who should be working to keep all Jamaicans safe, instead contribute to the harassment of LGBT individuals and do not react seriously when LGBT individuals report verbal or physical abuse, and even prevent LGBT people who experience assault from seeking protection and recourse against acts that violate their fundamental rights. This is in direct violation of Articles 8 and 25, which require serious, impartial, and effective investigations.
185. The Petitioner has experienced police inaction and ineffective investigations firsthand. When he reported a death threat to the police in 2011, the recording officer proceeded to hurl homophobic slurs at him. This was reported to Assistant Police Commissioner Les Green, who said that those anti-gay attitudes would not change until the anti-buggery law changes. After the IACHR issued Precautionary Measures against the state of Jamaica on behalf of the Petitioner due to the police inaction, the police then told the Petitioner that that it would take them a week to identify the sender of the emailed death threat. However, despite repeated requests they have failed to do so, more than seven years later. In March 2012, the Petitioner received another emailed death threat, which he again reported to the police. He was again told that it would take the police a week to trace the email's sender but, once again, despite repeated requests and despite the IACHR's existing order for precautionary measures, the police have failed to provide the Petitioner with any information on the source of the death threat, more than seven years later.
186. The Petitioner has also witnessed and recorded many instances of police inaction and ineffective investigations when dealing with other members of the LGBT community.
- a. Police officers use the law to arrest men who are suspected of being gay or bisexual. Thereafter, the police contact the family demanding bribes. If the family of the gay or bisexual person refuses to pay, the police publicly displays the arrest record, or publishes the record in a local newspaper. A public display of an arrest record involving homosexuality will likely result in that person being attacked or killed, as illustrated by the following examples:
  - b. In June 2006, the police instigated a mob leading to the death of a gay man, Victor Jarrett, on Dump-Up beach in Montego Bay.
  - c. In 2007, police refused to act when the burial of a gay man was disrupted by a mob in Mandeville.

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<sup>138</sup> *Barrios family v Venezuela* at para. 176.

<sup>139</sup> *Barrios family v Venezuela* at para. 177.

<sup>140</sup> *Baldeón García v Peru* at para. 148.

<sup>141</sup> *Baldeón García v Peru* at para. 147.



- d. In February 2008, police 'rescued' three gay men from a mob attack in Half-Way-Tree, Kingston and then proceeded to hurl homophobic insults at and pistol-whip the men on the way to the station.
  - e. In 2013 and 2014, there were several reports of anti-gay mob attacks and despite being present, the police have never made any arrests in these very public assaults.
  - f. In February 2011, police raided two gay clubs in Kingston and Montego Bay.
187. The Jamaican police are clearly complicit in the attacks against MSM and their complicity continues to this day. The former Public Defender has also claimed that MSM are responsible for their attacks because they are too visible. While the government is well aware of the severity of the homophobic attacks, it has done little to stop them, primarily because this would anger the fundamentalist religious right that is so dominant. There are widely held homophobic views among individual police officers and government officials, who further permit homophobic attacks and impede any efforts to protect the LGBT population.
188. Owing to the homophobic atmosphere created by laws such as section 18(2), Jamaica is failing in its obligation to effectively investigate human rights violations, in breach of Articles 8(1) and 25.
189. Beyond this, the Petitioner has also noted above the challenge posed by the fact that section 18(2) of the *Charter* forms part of Jamaica's Constitution. As a result, the Petitioner and other members of the LGBT community are denied domestically an *effective* judicial remedy against the absence of legal recognition for their unions, and the all violations of Convention rights that such non-recognition represents or engenders, as described above. Therefore, that non-recognition (under *Charter* section 18(2)) amounts to a breach of the obligation under Article 25 for an effective judicial remedy for violation of Convention rights.<sup>142</sup>

#### Jamaica is Out of Step With Many Countries and the Inter-American Court

190. Starting with the first same-sex civil union in 1989 (Denmark) nearly 60 countries worldwide now recognize some form of same-sex unions, such as marriage. This includes several countries in the Western Hemisphere (Argentina, Aruba, Bonaire, Bermuda, Brazil, Canada, Cayman Islands, Costa Rica, Chile, Curacao, French Guiana, Guadeloupe, Martinique, Mexico, Puerto Rico, the United States of America, the United States Virgin Islands, and Uruguay). In addition, other countries, such as Cuba are reviewing their constitutions and domestic laws to allow for the legal recognition of same-sex unions.
191. The irrational fears espoused by opponents to these unions have not materialized, and at para. 227 of the *Opinion*<sup>143</sup>, the Inter-American Court admonished States who continue to discriminate against same-sex unions. It stated that:
- "... States that do not yet ensure the right of access to marriage to same-sex couples are obliged not to violate the provisions that prohibit discriminating against them and must, consequently, **ensure them the same rights derived from marriage** in the understanding that this is a transitional situation." (*ibid.*, emphasis added)

<sup>142</sup> *Baldeón García v Peru* at para. 144.

<sup>143</sup> Inter-American Court of Human Rights, Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples, Advisory Opinion OC-24/17, Series A, No. 24 (Nov. 24, 2017)

192. In the *Opinion*, by six votes to one, the Court ultimately advised that:

“Under Articles 1(1), 2, 11(2), 17 and 24 of the Convention, States must ensure full access to all the mechanisms that exist in their domestic laws, **including the right to marriage**, to ensure the protection of the rights of families formed by same-sex couples, without discrimination in relation to those that are formed by heterosexual couples...”. (emphasis added)

193. Indeed, at para. 228 the Court helpfully summarized the position on same-sex marriage:

**“States must ensure access to all the legal institutions that exist in their domestic laws to guarantee the protection of all the rights of families composed of same-sex couples, without discrimination in relation to families constituted by heterosexual couples. To this end, States may need to amend existing institutions by taking administrative, judicial or legislative measures in order to extend such mechanisms to same-sex couples. States that encounter institutional difficulties to adapt the existing provisions, on a transitional basis, and while promoting such reforms in good faith, still have the obligation to ensure to same-sex couples, equality and parity of rights with respect to heterosexual couples without any discrimination.”** (emphasis in original)

194. Jamaica’s constitutional ban against non-heterosexual unions is therefore a direct (and inexcusable) breach of its obligations under the Convention, and the Court’s Opinion.

## **GROUND 5: RELIEF REQUESTED**

195. The Petitioner asks that the Commission issue a declaration that, to the extent that section 18 (2) of the constitution of Jamaica bans the legal recognition of marriage or other relationship between two consenting adults of the same sex then this section contravenes articles 1, 5, 7, 8, 11, 13, 17, 24 and 25 of the Convention on Human Rights:
- a. Article 1: the right to freedom from discrimination;
  - b. Article 5: the right to respect for physical, mental and moral integrity;
  - c. Article 7: the right to liberty;
  - d. Article 8: the right to a hearing for determination of rights;
  - e. Article 11: the right to privacy;
  - f. Article 13: the right to freedom of expression;
  - g. Article 17: the right to family life;
  - h. Article 24: the right to equal protection before the law; and
  - i. Article 25: the right to judicial protection.
196. The Petitioner asks that the Commission recommend that the Government of Jamaica repeal section 18(2) of the constitution of Jamaica in order to comply with the State's obligations under the Convention.
197. The Petitioner asks that the Commission recommend that the government of Jamaica allow the naturalization of same-sex spouses of Jamaican citizens on the same conditions as heterosexual spouses of Jamaican citizens.
198. In keeping with Jamaica's obligations under the Convention, and to the extent the following recommendations are within the scope of this Petition, the Petitioner also asks the Commission to recommend the following:
- a. The Government of Jamaica must condemn and monitor serious human rights violations, including discrimination and hate speech, as well as incitement to violence and hatred, on the grounds of sexual orientation in accordance with its international commitments, including the Convention;
  - b. The Government of Jamaica must ensure that all allegations of excessive use of force and other human rights violations by law enforcement officials based on real or perceived sexual orientation are investigated promptly and thoroughly;
  - c. The Government of Jamaica must train all law enforcement and criminal justice officials on international human rights standards and non-discrimination, including on the grounds of sexual orientation;
  - d. The Government of Jamaica must conduct awareness-raising programs, especially through the education system, to address social stigma and exclusion of individuals and communities on the grounds of their sexual orientation, and respect for the

human rights of all Jamaicans, including the obligation not to discriminate against LGBT people and couples;

- e. The Government of Jamaica must facilitate access to social services, and especially health services, regardless of the individual's sexual orientation or relationship status; and
- f. The Government of Jamaica must enact legislation that specifically prohibits discrimination based on sexual orientation, in keeping with its obligations under Article 1 of the Convention.

199. The Commission issue such other declarations and directions as it may consider appropriate to secure the enforcement of the declarations and recommendations; and

200. The Commission issues such further and/or other relief as it may deem just.

#### Appendices

201. The Appendices accompanying this Petition are as follows:

- a. Appendix 1: Biographical information on the Petitioner and his same-sex spouse.
- b. Appendix 2: Applicable Jamaican Laws.
- c. Appendix 3: The Court's Advisory Opinion in OC-24/17.
- d. Appendix 4: Declaration by the Petitioner

#### Contact for Petition

202. Should the Commission require any further information, please do not hesitate to contact the Petitioner's representatives.

All of which is respectfully submitted

This 19<sup>th</sup> day of August 2018



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Barristers & Attorneys-at-Law for the Petitioner

This application for special leave was filed by **Dr. Emir Crowne and Mr. Matthew Gayle of New City Chambers, 9B Charles Street, Port-of-Spain, Trinidad, W.I.**, barristers & attorney(s)-at-law for the Petitioner whose address for service is 9B Charles Street, Port-of-Spain. Service may, preferably, be effected by electronic means to the email address of the filing attorney(s)-at-law ([e.crowne@NewCityChambers.com](mailto:e.crowne@NewCityChambers.com) and [m.gayle@NewCityChambers.com](mailto:m.gayle@NewCityChambers.com))

## Appendix 1:

# Biographical information on the Petitioner and his same-sex spouse



**Ontario** CANADA

**CERTIFICATE OF MARRIAGE**  
**CERTIFICAT DE MARIAGE**



Form 30 — Formule 30  
Vital Statistics Act - Loi sur l'état civil

**M1016896**

**12155854-001**

Name - Nom

**DECKER, THOMAS**

Birthplace - Lieu de naissance

**AUSTRALIA**

Name - Nom

**TOMLINSON, MAURICE ARNOLD**

Birthplace - Lieu de naissance

**JAMAICA**

Date of marriage - Date de mariage

**AUGUST 28, 2011**

Place of marriage - Célébré à

**TORONTO**

Date of registration - Date d'enregistrement

**NOVEMBER 17, 2011**

and - et

Were married on - Se sont mariés le

Registration number - Numéro d'enregistrement

**2011-05-049432**

Issued in the Province of Ontario

Délivré dans la province de l'Ontario

**APRIL 10, 2012**

*Judith M. Hartman*

(Deputy Registrar General)  
(Registraire générale adjointe de l'état civil)



*H. Stakhac*

(Registrar General)  
(Le registraire général de l'état civil)

11132 (12 / 09)

CERTIFIED EXTRACT FROM MARRIAGE REGISTRATION  
EXTRAIT CERTIFIÉ CONFORMÉ DE L'ENREGISTREMENT DE MARIAGE







Appendix 2:  
Applicable Jamaican Laws

STATUTORY INSTRUMENTS

1962 No. 1550

CARIBBEAN AND NORTH ATLANTIC  
TERRITORIES

The Jamaica (Constitution) Order in Council 1962

*Made* ... .. 23rd July 1962

*Laid before Parliament* ... .. 24th July 1962

*Coming into Operation—*

Section 3(2) of the Order in Council,  
and sections 80, 81, 94(1) and (2), 103,  
104, 111, 124 and 125 (in part) of the

Constitution	...	...	...	25th July 1962
Remainder	...	...	...	Immediately before the 6th August 1962

ARRANGEMENT OF ORDER

*Section*

1. Citation, commencement and interpretation.
2. Revocation.
3. Establishment of the Constitution.
4. Existing laws.
5. Finance.
6. House of Representatives.
7. First Standing Orders of Senate.
8. Remuneration of Members of Parliament, etc.
9. Clerks to Houses of Parliament and their staffs.
10. First Cabinet.
11. Parliamentary Secretaries.
12. Secretary to the Cabinet.
13. Supreme Court and Judges.
14. Pending Appeals.
15. Appeals from Cayman Islands and Turks and Caicos Islands.
16. Remuneration of Auditor-General.
17. Existing officers.
18. Transitional provisions relating to Privy Council.
19. Transitional provisions relating to existing Commissions.
20. Transitional provisions for certain officers.
21. Alteration of this Order.
22. Interpretation.

FIRST SCHEDULE

ORDERS IN COUNCIL REVOKED BY THIS ORDER

SECOND SCHEDULE

THE CONSTITUTION OF JAMAICA.

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[The inclusion of this page is authorized by L.N. 50/1979]

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At the Court at Buckingham Palace, the 23rd day of July, 1962

Present,

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL  
Her Majesty, by virtue and in exercise of the powers in that behalf by subsection (1) of section 5 of the West Indies Act, 1962 or otherwise in Her vested, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:—

10 & 11  
Eliz.  
2 c. 19.

1.—(1) This Order may be cited as the Jamaica (Constitution) Order in Council 1962.

Citation,  
commence-  
ment and  
interpreta-  
tion.

(2) Subject to the provisions of subsection (2) of section 3 of this Order, this Order shall come into operation immediately before the appointed day (in this Order referred to as "the commencement of this Order"):

Provided that where by or under this Order the Governor-General has power to make any appointment or to make any Order or to do any other thing for the purposes of this Order that power may be exercised by the Governor of the Colony of Jamaica at any time after the twenty-fourth day of July, 1962 to such extent as may, in his opinion, be necessary or expedient to enable the Constitution established by this Order to function as from the commencement of this Order.

2.—(1) The Orders in Council specified in the First Schedule to this Order (hereinafter referred to as "the existing Orders") are hereby revoked.

Revoca-  
tion.

(2) Notwithstanding the revocation of the existing Orders the following Regulations—

- (a) the Public Service Regulations, 1961,
- (b) the Judicial Service Regulations, 1961,
- (c) the Police Service Regulations, 1961, and
- (d) the Jamaica (Constitution) (Retirement of Entitled Officers) Regulations, 1961,

made thereunder and all amendments thereto shall continue in force subject to such adaptations or modifications as may be made thereto by or under section 4 of this Order and subject to amendment or repeal by the authority having power to amend or revoke the same.

(3) With effect from the commencement of this Order paragraph (f) (which specifies Jamaica) of the definition of the "the Territories" in subsection (1) of section 2 of the British Caribbean Court of Appeal Order in Council 1962 is revoked.

S. I.  
1962/1086  
(1962 II,  
p. 1247)

Establish-  
ment of the  
Constitu-  
tion.

3.—(1) Subject to the provisions of subsection (2) of this section and the other provisions of this Order, the Constitution of Jamaica set out in the Second Schedule to this Order (in this Order referred to as "the Constitution") shall come into force in Jamaica at the commencement of this Order.

(2) This subsection and the following provisions of the Constitution—

- (a) sections 80 and 81,
- (b) subsections (1) and (2) of section 94,
- (c) sections 103 and 104,
- (d) section 111,
- (e) section 124,
- (f) section 125 to the extent only as to enable a Director of Public Prosecutions to be appointed before the appointed day,

shall come into force in Jamaica on the twenty-fifth day of July 1962:

Provided that in relation to any period prior to the appointed day references in these provisions of the Constitution—

- (a) to the Governor-General and the Prime Minister shall be construed as references to the Governor and Premier respectively of the Colony of Jamaica;

- (b) to Parliament and to the House of Representatives shall be construed as references to the Legislature and the House of Representatives constituted under the existing Orders; and
- (c) to the Chief Justice or a Judge of the Supreme Court shall be construed as references to the Chief Justice or a Judge of the Supreme Court holding office under the existing Orders.

4.—(1) All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on and after that day, and all laws which have been made before that day but have not previously been brought into operation may (subject as aforesaid) be brought into force, in accordance with any provision in that behalf, on or after that day, but all such laws shall, subject to the provisions of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order. Existing laws.

(2) Without prejudice to the generality of the preceding subsection, in any law which continues in force on and after the appointed day or which, having been made before that day, is brought into force on or after that day, unless the context otherwise requires—

- (a) references to the Governor shall, in relation to any period beginning on or after the appointed day, be construed as references to the Governor-General;
- (b) references to the Legislature or to either chamber thereof shall, in relation to any period as aforesaid, be construed as references to the Parliament, or to the corresponding House thereof, established by the Constitution;

- (c) references to any office (or to the person holding or acting in it) connected with either chamber of the Legislature shall, in relation to any such period as aforesaid be construed as references to the corresponding office (or the person holding or acting in it) constituted by or under the Constitution;
- (d) references to the Cabinet, to the premier or to any other Minister shall, in relation to any such period as aforesaid, be construed as references respectively to the Cabinet established by the Constitution to the Prime Minister appointed for the time being under the Constitution and to the corresponding Minister so appointed;
- (e) references to the Secretary to the Cabinet shall, in relation to any such period as aforesaid, be construed as references to the Secretary to the Cabinet established by the Constitution;
- (f) references to the Privy Council shall, in relation to any such period as aforesaid, be construed as references to the Privy Council established by the Constitution;
- (g) references to the Judicial Service Commission, the Public Service Commission or the Police Service Commission shall, in relation to any such period as aforesaid, be construed as references respectively to the Judicial Service Commission, the Public Service Commission or the Police Service Commission established by the Constitution;
- (h) references to any other office (or to the person holding or acting in it) constituted by or under the existing Orders or to any other authority or body so constituted shall, in relation to any such period



as aforesaid, be construed as references respectively to the corresponding office (or to the person holding or acting in it) or the corresponding authority or body constituted by or under the Constitution.

(3) For the purposes of this Order the Senate is the corresponding House to the Legislative Council constituted under the existing Orders.

(4) The Governor-General may, by Order published in the *Gazette*, declare—

(a) for the purposes of paragraphs (c) and (h) of subsection (2) of this section, what is the corresponding office, authority or body referred to in either of those paragraphs; and

(b) for the purposes of paragraph (d) of that subsection, who is the corresponding Minister referred to in that paragraph.

(5) (a) The Governor-General may, by Order made at any time within a period of two years commencing with the appointed day and published in the *Gazette*, make such adaptations and modifications in any law which continues in force in Jamaica on and after the appointed day, or which having been made before that day, is brought into force on or after that day, as appear to him to be necessary or expedient by reason of anything contained in this Order.

(b) Without prejudice to the generality of paragraph (a) of this subsection any Order made thereunder may transfer to the Director of Public Prosecutions any function by any such law vested in the Attorney-General.

(c) An Order made by the Governor-General under this subsection shall have effect from such date, not earlier than the appointed day, as may be specified therein.

5. Without prejudice to the provisions of the preceding section and for the avoidance of doubt, it is hereby declared **Finance.**

that any resolution of the House of Representatives passed before the appointed day and any law enacted by the Legislature before that day (whether such resolution was passed or such law enacted before or after the making of this Order) may have effect for the purposes of section 117 of the Constitution as if they were respectively a resolution of the House of Representatives established by the Constitution or a law enacted by the Parliament so established.

House of  
Representatives.

6.—(1) Notwithstanding any other provisions of this Order, the House of Representatives constituted under the existing Orders (in this section referred to as “the existing House of Representatives”) shall be the House of Representatives of Jamaica during the period beginning with the commencement of this Order and ending with the first dissolution of Parliament thereafter.

(2) The persons who immediately before the commencement of this Order are members of the existing House of Representatives shall be members of the House of Representatives established by this Order and as from that time shall be deemed to have been elected as such in pursuance of section 36 of the Constitution and shall hold their seats in that House in accordance with the provisions of the Constitution.

(3) The persons who immediately before the commencement of this Order are Speaker and Deputy Speaker of the existing House of Representatives shall be Speaker and Deputy Speaker respectively of the House of Representatives established by this Order and as from that time shall be deemed to have been elected as such in pursuance of section 43 of the Constitution and shall hold office in accordance with the provisions of the Constitution.

(4) The Standing Orders of the existing House of Representatives as in force immediately before the commencement of this Order shall, with such adaptations and

modifications as may be necessary to bring them into conformity with this Order, be the first Standing Orders of the House of Representatives established by the Constitution as if they had been made in pursuance of section 51 of the Constitution.

(5) Notwithstanding anything contained in subsection (2) of section 64 of the Constitution (but subject to the provisions of subsections (3) and (4) of that section) Parliament shall, unless sooner dissolved, stand dissolved on the tenth day of April 1967.

7. The Standing Orders of the Legislative Council constituted under the existing Orders as in force immediately before the commencement of this Order shall, with such adaptations and modifications as may be necessary to bring them into conformity with this Order, be the first Standing Orders of the Senate established by the Constitution as if they had been made in pursuance of section 51 of the Constitution.

First Standing Orders of Senate.

8. Until other provision is made in that behalf, the salary and allowances payable to members of either House, the President and Deputy President of the Senate, the Speaker and Deputy Speaker of the House of Representatives, Ministers and Parliamentary Secretaries shall be those payable to the persons last holding the corresponding offices immediately before the commencement of this Order.

Remuneration of members of Parliament, etc.

9.—(1) Any person who, immediately before the commencement of this Order holds office as Clerk or Deputy Clerk of the Legislative Council or of the House of Representatives shall, as from that time, hold the like office of Clerk or Deputy Clerk of the Senate or of the House of Representatives as if he had been appointed thereto under section 47 of the Constitution, and shall, until other pro-

Clerks to Houses of Parliament and their staffs.

vision is made in accordance with the provisions of that section, hold office on the same terms of service as applied to him immediately before the commencement of this Order.

(2) Any other person who, immediately before the commencement of this Order holds an office on the staff of the Clerk of the Legislative Council or on the staff of the Clerk of the House of Representatives shall hold the like office on the staff of the Clerk of the Senate or on the staff of the Clerk of the House of Representatives as from that time as if he had been appointed thereto under section 47 of the Constitution.

First  
Cabinet.

10.—(1) The person who, immediately before the commencement of this Order, holds the office of Premier shall, as from that time hold office as Prime Minister as if he had been appointed thereto under section 70 of the Constitution; the persons who, immediately before the commencement of this Order, are members of the House of Representatives and hold office as other Ministers shall, as from that time, similarly hold the like offices under the Constitution; and references in the Constitution to the Cabinet shall be construed accordingly.

(2) Where any Minister who holds office as from the commencement of this Order under the provisions of the preceding subsection is, by virtue of a direction given under the existing Orders, charged immediately before the commencement of this Order with responsibility for any subject or department, he shall be deemed as from the commencement of this Order to have been charged with the responsibility for the corresponding subject or department of government under subsection (1) of section 77 of the Constitution.

Parliamentary  
Secretaries.

11. Any person who, immediately before the commencement of this Order, is a member of the House of Representa-

tives and holds office as a Parliamentary Secretary shall, as from that time hold office as Parliamentary Secretary as if he had been appointed thereto under the provisions of section 78 of the Constitution.

12. The person who, immediately before the commencement of this Order holds office as Secretary of the Cabinet shall, as from that time, hold office as Secretary to the Cabinet as if he had been appointed thereto under the provisions of section 92 of the Constitution.

Secretary  
to Cabinet.

13.—(1) The Supreme Court in existence immediately before the commencement of this Order shall be the Supreme Court for the purposes of the Constitution, and the Chief Justice and other Judges of the Supreme Court holding office immediately before the commencement of this Order shall, as from that time, continue to hold the like offices as if they had been appointed thereto under the provisions of Chapter VII of the Constitution.

Supreme  
Court and  
Judges.

(2) Until other provision is made under and in accordance with the provisions of section 101 of the Constitution, the salaries and allowances of the Judges of the Supreme Court shall be the salaries and allowances to which the holders of those offices were entitled immediately before the commencement of this Order.

14.—(1) Any proceedings pending immediately before the commencement of this Order on appeal from the Supreme Court to the British Caribbean Court of Appeal may be continued after the commencement of this Order before the Court of Appeal established by the Constitution.

Pending  
Appeals.

(2) Any judgment of the Supreme Court of the Federation of The West Indies or of the British Caribbean Court of Appeal in an appeal from a court of Jamaica given, but not satisfied, before the commencement of this

Order, may be enforced after the commencement of this Order as if it were a judgment of the Court of Appeal established by the Constitution.

Appeals  
from  
Cayman  
Islands and  
Turks and  
Caicos  
Islands.

15. The Court of Appeal established by the Constitution may have and exercise such jurisdiction and powers in respect of the Cayman Islands and the Turks and Caicos Islands as may be conferred upon it by any law for the time being in force in the Cayman Islands or the Turks and Caicos Islands, as the case may be, and may for the purpose of exercising that jurisdiction sit either in Jamaica or in the Cayman Islands or in the Turks and Caicos Islands, as the case may be.

Remunera-  
tion of  
Auditor-  
General.

16. Until provision is made under and in accordance with subsection (4) of section 120 of the Constitution, the salary and allowances of the Auditor-General shall be the salary and allowances to which the holder of that office was entitled immediately before the commencement of this Order.

Existing  
Officers.

17.—(1) Where any office has been established for the former Colony of Jamaica by or under the existing Orders or any existing law, and the Constitution establishes the same or an equivalent office for Jamaica, not being the office of Prime Minister, Minister, or Parliamentary Secretary, any person who, immediately before the commencement of this Order, is holding or acting in the former office shall, so far as is consistent with the provisions of this Order, be deemed as from the commencement of this Order to have been appointed to or to act in the latter office in accordance with the provisions of this Order and to have taken any necessary oath under this Order.

(2) Subject to the provisions of this Order, every person who, immediately before the commencement of this Order, holds or is acting in a public office shall, as from that

time, continue to hold or act in the like office as if he had been appointed thereto or to act therein in accordance with the provisions of this Order.

(3) The provisions of this section shall be without prejudice to—

- (a) the provisions of section 6 of this Order; and
- (b) any powers conferred by or under this Order upon any person or authority to make provision for the abolition of offices and the removal of persons holding or acting in any office.

(4) In this section “existing law” means such a law as is referred to in subsection (1) of section 4 of this Order.

18. Any matter which, immediately before the commencement of this Order, is pending before the Privy Council established under the existing Orders shall as from the commencement of this Order, be continued before the Privy Council established by the Constitution.

Transitional provisions relating to Privy Council.

19.—(1) Any power of the Governor of the Colony of Jamaica acting on the recommendation of a Commission established by the existing Orders (in this section referred to as “an existing Commission”) which has been validly delegated to any person or authority under those Orders shall, as from the commencement of this Order, be deemed to have been delegated to that person or authority in accordance with the provisions of the Constitution.

Transitional provisions relating to existing Commissions.

(2) Any matter which, immediately before the commencement of this Order, is pending before an existing Commission or, as the case may be, before any person or authority to whom the power to deal with such matter has been validly delegated under the existing Orders shall as from the commencement of this Order be continued before

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[The inclusion of this page is authorized by L.N. 50/1979]

the Judicial Service Commission established by the Constitution or the Public Service Commission or the Police Service Commission so established or, as the case may be, the said person or authority :

Provided that where an existing Commission or, as the case may be, any person or authority as aforesaid has, immediately before the commencement of this Order, partly completed the hearing of a disciplinary proceeding (in this section referred to as "the original hearing"), no person shall take part in the continued hearing unless he has also taken part in the original hearing; and where by virtue of this subsection the original hearing cannot be so continued the hearing of the disciplinary proceedings shall be recommenced.

Transitional provisions relating to certain officers.

**20.—**(1) Any person who, immediately before the commencement of this Order, holds any office established by or under the existing Orders and who does not, as from the date of such commencement, hold any public office shall be entitled to the leave, beginning with the commencement of this Order, for which under the terms of service applicable to him immediately before the commencement of this Order he was then eligible :

Provided that if any such person holds, or is acting in, as from the commencement of this Order, any office established by or under the Constitution, the leave to which he is entitled under this section shall begin when he relinquishes that office.

(2) When any person is on leave under the provisions of subsection (1) of this section, he shall be regarded as still in the office which he held immediately before the commencement of this Order.

Alteration of this Order.

**21.—**(1) Parliament may alter any of the provisions of sections 1 to 22 (inclusive), other than section 15, of this

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[The inclusion of this page is authorized by L.N. 50/1979]



Order including this section in the same manner as it may alter the provisions of the Jamaica Independence Act, 1962.

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c. 40.

(2) Parliament may amend from time to time or repeal, in so far as it forms part of the law of Jamaica, section 15 of this Order by an Act passed in accordance with the provisions of paragraph (b) of subsection (4) of section 49 of the Constitution.

22.—(1) In this Order references to any body or to any office shall be construed, in relation to any period before the commencement of this Order, as references to such body or such office as constituted by or under the existing Orders, and references to the holder of any office shall be similarly construed.

Interpreta-  
tion.

(2) The provisions of section 1 of the Constitution shall apply for the purposes of interpreting this Order as they apply for interpreting the Constitution.

[W. G. Agnew.]

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[The inclusion of this page is authorized by L.N. 3/2001]

## SCHEDULES

## Section 2 FIRST SCHEDULE

The Jamaica (Constitution) Order in Council, 1959.

The Jamaica (Constitution) (Amendment) Order in Council, 1959.

The Jamaica (Constitution) (Amendment) Order in Council, 1961.

## Section 3 SECOND SCHEDULE

## THE CONSTITUTION OF JAMAICA

## ARRANGEMENT OF SECTIONS

## CHAPTER I

## PRELIMINARY

## Section

1. Interpretation.
2. Effect of this Constitution.

## CHAPTER II

## CITIZENSHIP

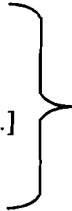
## Section

3. Acquisition of Jamaican citizenship.
  - 3A. Persons entitled to citizenship on 1st March 1993.
  - 3B. Citizenship by birth.
  - 3C. Citizenship by descent.
4. Persons entitled to be registered as citizens.
5. *[Repealed by Act 18 of 1999.]*
6. *[Repealed by Act 18 of 1999.]*
7. Marriage to citizen of Jamaica.
8. Deprivation of citizenship.
9. Commonwealth citizens.
10. Criminal liability of Commonwealth citizens.
11. Powers of Parliament.
12. Interpretation.

CHAPTER III  
CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS

Section

- 13. Fundamental rights and freedoms.
- 14. Protection of freedom of the person.
- 15. Protection of property rights.
- 16. Protection of right due to process.
- 17. Protection of freedom of religion.
- 18. Status of marriage.
- 19. Application for redress.
- 20. Interpretation.
- 21.
- 22.
- 23. *[Repealed by Act 12 of 2011.]*
- 24.
- 25.
- 26.



CHAPTER IV  
THE GOVERNOR-GENERAL

- 27. Establishment of office of Governor-General.
- 28. Oaths to be taken by Governor-General.
- 29. Acting Governor-General.
- 30. Deputy to Governor-General.
- 31. Personal staff of Governor-General.
- 32. Exercise of Governor-General's functions.
- 33. Broad Seal.

CHAPTER V  
PARLIAMENT

PART I

*Composition of Parliament*

- 34. Establishment of Parliament.
- 35. Senate.
- 36. House of Representatives.

## Section

37. Qualifications and disqualifications for electors.
38. Elector law.
39. Qualification for membership of senate and House of Representatives.
40. Disqualification for membership of Senate and House of Representatives.
41. Tenure of office of Senators and Members of House of Representatives.
42. President and Deputy President of Senate.
43. Speaker and Deputy Speaker of House of Representatives.
44. Determination of questions as to membership.
45. Filling of vacancies.
46. Unqualified persons sitting or voting.
47. Clerks to Houses of Parliament and their staffs.

## PART 2

*Powers and Procedure of Parliament*

48. Power to make laws.
49. Alteration of this Constitution.
50. [*Repealed by Act 12 of 2011, S.3.*]
51. Regulation of procedure in Houses of Parliament.
52. Presiding in Senate and House of Representatives.
53. Quorum.
54. Voting.
55. Introduction of Bills, etc.
56. Restriction on powers of Senate as to Money Bills.
57. Restriction on powers of Senate as to Bills other than money Bills and certain other Bills.
58. Provisions relating to sections 55, 56 and 57.
59. Restriction on powers of Senate as to certain statutory instruments.
60. Assent to Bills.
61. Words of enactment.
62. Oath of allegiance.

PART 3

*Summoning, prorogation and dissolution*

Section

- 63. Sessions of Parliament.
- 64. Prorogation and dissolution of Parliament.
- 65. General elections and appointment of Senators.

PART 4

*Delimitation of Constituencies*

- 66. Establishment of first constituencies.
- 67. Standing Committee of House of Representatives.

CHAPTER VI

EXECUTIVE POWERS

- 68. Executive authority of Jamaica.
- 69. Cabinet.
- 70. Appointment of Ministers.
- 71. Tenure of office of Ministers.
- 72. Performance of Prime Minister's functions in certain events.
- 73. Temporary Ministers.
- 74. Oaths.
- 75. Presiding in Cabinet.
- 76. Governor-General to be informed concerning matters of Government.
- 77. Assignment of responsibility to Ministers.
- 78. Parliamentary Secretaries.
- 79. Attorney-General.
- 80. Leader of the Opposition.
- 81. Certain vacancies in office of Leader of Opposition.
- 82. Privy Council.
- 83. Tenure of office of members of Privy Council.
- 84. Incapacity of member of Privy Council.
- 85. Provisional appointments to Privy Council.
- 86. Senior Member of Privy Council.

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[The inclusion of this page is authorized by L.N. 50/1979]

## Section

- 87. Attendance of Governor-General.
- 88. Summoning of Privy Council and procedure.
- 89. Validity of proceedings of Privy Council.
- 90. Prerogative of mercy.
- 91. Pardon in capital cases.
- 92. Secretary to the Cabinet.
- 93. Permanent Secretaries.
- 94. Establishment of office and functions of Director of Public Prosecutions.
- 95. Remuneration of Director of Public Prosecutions..
- 96. Tenure of office of Director of Public Prosecutions.

## CHAPTER VII

## THE JUDICATURE

## PART 1

*The Supreme Court*

- 97. Establishment of the Supreme Court.
- 98. Appointment of Judges of the Supreme Court.
- 99. Acting Judges of the Supreme Court.
- 100. Tenure of office of Judges of the Supreme Court.
- 101. Remuneration of Judges of the Supreme Court.
- 102. Oaths to be taken by Judges of the Supreme Court.

## PART 2

*Court of Appeal*

- 103. Establishment of the Court of Appeal.
- 104. Appointment of Judges of the Court of Appeal.
- 105. Acting Judges of the Court of Appeal.
- 106. Tenure of office of Judges of the Court of Appeal.
- 107. Remuneration of Judges of the Court of Appeal.
- 108. Oaths to be taken by Judges of the Court of Appeal.
- 109. Number of judges.

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[The inclusion of this page is authorized by L.N. 50/1979]

PART 3

*Appeals to Her Majesty in Council*

Section

110. Appeals from Court of Appeal to Her Majesty in Council.

PART 4

*Judicial Service Commission*

111. Composition of Judicial Service Commission.  
 112. Appointment of Judicial officers.  
 113. Delegation of functions of Judicial Service Commission.

CHAPTER VIII

FINANCE

114. Consolidated Fund.  
 115. Estimates.  
 116. Authorisation of Expenditure.  
 117. Meeting expenditure from Consolidated Fund.  
 118. Contingencies Fund.  
 119. Public Debt.  
 120. Auditor-General.  
 121. Tenure of office of Auditor-General.  
 122. Functions of Auditor-General.

CHAPTER IX

THE PUBLIC SERVICE

PART 1

*General*

123. Interpretation.  
 124. Public Service Commission.  
 125. Appointment, etc. of public officers.  
 126. Permanent Secretaries.  
 127. Delegation of functions of Public Service Commission.  
 128. Appointment, etc. of principal representatives of Jamaica abroad.

## PART 2

*Police*

## Section

- 129. Police Service Commission.
- 130. Appointment, etc. of police officers.
- 131. Delegation of functions of Police Service Commission.

## PART 3

*Pensions*

- 132. Applicability of pensions law.
- 133. Pensions, etc. to be charged on Consolidated Fund.
- 134. Grant and withholding of pensions, etc.

## CHAPTER X

## MISCELLANEOUS

- 135. Powers and procedure of Commissions.
- 136. Protection of Commissions, etc. from legal proceedings.
- 137. Resignations.
- 138. Re-appointments, etc.

## FIRST SCHEDULE

*Oaths*

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[The inclusion of this page is authorized by L.N. 50/1979]



SECOND SCHEDULE

*Number and Boundaries of Constituencies*

THIRD SCHEDULE

*Provisions relating to applicability of the Commissions of Enquiry  
Act to Tribunals appointed under this Constitution.*

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[The inclusion of this page is authorized by L.N. 50/1979]

*Amended  
by:*  
Acts  
15 of 1971,  
36 of 1975,  
1 of 1977,  
16 of 1986,  
15 of 1990,  
6 of 1993,  
4 of 1994,  
18 of 1999,  
5 of 2009,  
12 of 2011,  
13 of 2011.

CHAPTER I

PRELIMINARY

1.—(1) In this Constitution unless it is otherwise provided or the context otherwise requires—

Interpreta-  
tion.

- “Act of Parliament” means any law made by Parliament;
- “the appointed day” means the sixth day of August, 1962;
- “the Broad Seal” means the Broad Seal of Jamaica;
- “the Cabinet” means the Cabinet established by section 69 of this Constitution;
- “the Clerk” and “the Deputy Clerk” mean respectively the Clerk and the Deputy Clerk of either House, as the context may require;
- “the Commonwealth” means Jamaica, any country to which section 9 of this Constitution applies and any dependency of any such country;
- “the Consolidated Fund” means the Consolidated Fund established by section 114 of this Constitution;
- “constituency” means an area of Jamaica having separate representation in the House of Representatives;
- “defence force” means any naval, military or air force of the Crown in right of the Government of Jamaica;
- “the financial year” means the twelve months ending on the 31st day of March in any year or on such other date as may from time to time be prescribed by Act of Parliament;

“the *Gazette*” means the Jamaica Gazette;

“House” means either the Senate or the House of Representatives as the context may require;

“Jamaica” has the meaning attributed to that expression in the Jamaica Independence Act, 1962;

“law” includes any instrument having the force of law and any unwritten rule of law and “lawful” and “lawfully” shall be construed accordingly;

“oath of allegiance” means the oath of allegiance set out in the First Schedule to this Constitution;

“Parliament” means the Parliament of Jamaica;

“police officer” means a member of the Jamaica Constabulary Force or any force, by whatever name called, for the time being succeeding to the functions of the Jamaica Constabulary Force;

“the President” and “the Deputy President” mean respectively the President and the Deputy President of the Senate elected under section 42 of this Constitution;

“Privy Council” means the Privy Council established by section 82 of this Constitution;

“public office” means any office of emolument in the public service;

“public officer” means the holder of any public office and includes any person appointed to act in any such office;

“the public service” means, subject to the provisions of subsections (5) and (6) of this section, the service of the Crown in a civil capacity in respect of the Government of Jamaica (including service as a member of the Judicial Service Commission, the Public Service Commission or the Police Service Commission) and includes public service in respect of the former Colony of Jamaica;

“session” means, in relation to a House, the sittings of that House commencing when it first meets after

10 & 11  
Eliz. 2  
c. 40.

First Schedule.

this Constitution comes into force or after the prorogation or dissolution of Parliament at any time and terminating when Parliament is prorogued or is dissolved without having been prorogued;

“sitting” means, in relation to a House, a period during which that House is sitting continuously without adjournment and includes any period during which the House is in committee;

“the Speaker” and “the Deputy Speaker” mean respectively the Speaker and Deputy Speaker elected under section 43 of this Constitution.

(2) Save where this Constitution otherwise provides or the context otherwise requires—

(a) any reference in this Constitution to an appointment to any office shall be construed as including a reference to an appointment on promotion or transfer to that office and to the appointment of a person to perform the functions of that office during any period during which it is vacant or during which the holder thereof is unable (whether by reason of absence or infirmity of body or mind or any other cause) to perform those functions; and

(b) any reference in this Constitution to the holder of an office by the term designating his office shall be construed as including a reference to any person for the time being lawfully performing the functions of that office.

(3) Where by this Constitution power is conferred on any person or authority to appoint a person to perform the functions of any office if the holder thereof is unable himself to perform its functions, any such appointment

shall not be called in question on the ground that the holder of that office was not unable to perform those functions.

(4) For the purposes of this Constitution a person shall not be considered as holding a public office by reason only of the fact that he is in receipt of a pension or other like allowance in respect of public service.

(5) If it is provided by any law for the time being in force that an office (not being an office constituted by this Constitution) shall not be a public office for the purposes of Chapter V of this Constitution, this Constitution shall have effect accordingly as if that provision of that law were enacted herein.

(6) In this Constitution "the public service" does not include service in the office of Governor-General, President, Deputy President, Speaker, Deputy Speaker, Minister, Parliamentary Secretary, Leader of the Opposition, Senator, member of the House of Representatives, member of the Privy Council, Judge of the Supreme Court or Judge of the Court of Appeal or Clerk or Deputy Clerk of either House or service on the personal staff of the Governor-General or, subject to the provisions of section 79 of this Constitution, service in the office of Attorney-General.

(7) References in this Constitution to the power to remove a public officer from his office shall be construed as including references to any power conferred by any law to require or permit that officer to retire from the public service:

Provided that—

- (a) nothing in this subsection shall be construed as conferring on any person or authority power to require a Judge of the Supreme Court or Court of Appeal or the Director of Public Prosecutions or the Auditor-General to retire from the public service; and

(b) any power conferred by any law to permit a person to retire from the public service shall, in the case of any public officer who may be removed from office by some person or authority other than a Commission established by this Constitution, vest in the Public Service Commission.

(8) Where any power is conferred by this Constitution to make any Proclamation or order or to give any directions, the power shall be construed as including a power exercisable in like manner to amend or revoke any such Proclamation, order or directions.

(9) No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in exercising any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law.

(10) Any reference in this Constitution to a law enacted before the commencement of this Constitution shall, unless the context otherwise requires, be construed as a reference to that law as in force immediately before the appointed day.

(11) Where a person is required by this Constitution to make an oath he shall be permitted, if he so desires, to comply with that requirement by making an affirmation.

(12) The Interpretation Act, 1889 as in force on the appointed day, shall apply, with the necessary adaptations, for the purpose of interpreting this Constitution and otherwise in relation thereto as it applies for the purpose of interpreting, and in relation to, Acts of Parliament of the United Kingdom.

52 & 53  
Vict. c. 63.

Effect of  
this Consti-  
tution.

2. Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

## CHAPTER II

### CITIZENSHIP

Acquisi-  
tion of  
Jamaican  
citizenship.  
18/1999  
S. 2.

3.—(1) A person may, in accordance with the provisions of this Chapter, become a citizen of Jamaica by—

- (a) birth;
- (b) descent; or
- (c) registration as a citizen of Jamaica based on marriage to a citizen of Jamaica.

(2) Parliament may make provision for the acquisition of citizenship of Jamaica by persons who do not become citizens of Jamaica by virtue of the provisions of this Chapter.

(3) Subsection (1) shall not affect the right of any person who, before the 26th day of March, 1999, was entitled to Jamaican citizenship by virtue of any provision of the Constitution in force before that date.

Persons  
entitled to  
citizenship  
on 1st  
March  
1993.  
6/1993  
S. 3.

3A.—(1) A person—

- (a) who was born outside Jamaica before the sixth day of August 1962;
- (b) who was not before the 1st day of March 1993, entitled to Jamaican citizenship by virtue of any provisions of this Constitution in force before that date; and

(c) whose father or mother, on the sixth day of August 1962, became or would but for his or her death have become a citizen of Jamaica in accordance with subsection (1) of section 3, shall become a citizen of Jamaica on the 1st day of March 1993.

(2) Subsection (1) shall not affect the rights of any person who, before the 1st day of March 1993, was entitled to Jamaican citizenship by virtue of any provision of this Constitution which was in force before that date.

**3B.—**(1) Every person born in Jamaica shall become a citizen of Jamaica—

Citizenship  
by birth.  
18/1999  
S. 3.

- (a) on the sixth day of August, 1962, in the case of a person born before that date;
- (b) on the date of his birth, in the case of a person born on or after the sixth day of August, 1962.

(2) A person shall be deemed to be born in Jamaica—

- (a) if he is born on a ship or aircraft registered in Jamaica or belonging to the Government; or
- (b) if at the time of his birth his mother—
  - (i) is a citizen of Jamaica residing in a country other than Jamaica by reason of her employment in the diplomatic service of Jamaica; or
  - (ii) whether or not a citizen of Jamaica, is residing in a country other than Jamaica by reason of her being married to a citizen of Jamaica who is residing in that country by reason of his employment in the diplomatic service of Jamaica.



(3) A person shall not become a citizen of Jamaica by virtue of this section if at the time of his birth—

- (a) his father or mother possesses such immunity from suit and legal process as is accorded to an envoy of a foreign sovereign power accredited to Her Majesty in right of her government in Jamaica and neither of his parents is a citizen of Jamaica; or
- (b) his father or mother is an enemy alien and the birth occurs in a place then under occupation by the enemy.

Citizenship  
by descent.  
18/1999  
S. 3.

**3C.** Every person born outside Jamaica shall become a citizen of Jamaica—

- (a) on the sixth day of August, 1962, in the case of a person born before that date; or
- (b) on the date of his birth, in the case of a person born on or after the sixth day of August, 1962,

if, at that date, his father or mother is a citizen of Jamaica by birth, descent or registration by virtue of marriage to a citizen of Jamaica.

Persons  
entitled to  
be registered  
as citizens.

**4.—(1)** Any man or woman who, on the fifth day of August 1962, is or had been married to a person—

- (a) who becomes a citizen of Jamaica by virtue of section 3 of this Constitution; or
- (b) who, having died before the sixth day of August 1962 would but for that person's death, have become a citizen of Jamaica by virtue of that section,

shall be entitled, upon making application in such manner as may be prescribed and, if he or she is a British protected person or an alien, upon taking the oath of allegiance, to be registered as a citizen of Jamaica.

4/1994  
S. 2 (1) (c).

(2) Any person who, on the fifth day of August 1962, is a citizen of the United Kingdom and Colonies—

- (a) having become such a citizen under the British Nationality Act, 1948, by virtue of his having been naturalised in the former Colony of Jamaica as a British subject, before that Act came into force; or
- (b) having become such a citizen by virtue of his having been naturalised or registered in the former Colony of Jamaica under that Act,

11 & 12  
Geo. 6 c. 56.

shall be entitled, upon making application before the sixth day of August 1964, in such manner as may be prescribed, to be registered as a citizen of Jamaica :

Provided that a person who has not attained the age of twenty-one years (other than a woman who is or has been married) may not make an application under this subsection himself but an application may be made on his behalf by his parent or guardian.

(3) Any man or woman who on the fifth day of August 1962 is or has been married to a person who subsequently becomes a citizen of Jamaica by registration under subsection (2) of this section shall be entitled, upon making application in such manner as may be prescribed and, if he or she is a British protected person or an alien, upon taking the oath of allegiance to be registered as a citizen of Jamaica.

4/1994  
S. 2 (2) (a).

4/1994  
S. 2 (2) (b).

5. *[Repealed by Act 18 of 1999.]*

6. *[Repealed by Act 18 of 1999.]*

7.—(1) Any man or woman who, after the fifth day of August, 1962, marries a person who is or becomes a citizen of Jamaica shall, subject to subsection (2), be entitled, upon making application in such manner as may be prescribed and, if he or she is a British protected person or an alien, upon taking the oath of allegiance, to be registered as a citizen of Jamaica.

Marriage to  
citizen of  
Jamaica.  
6/1993  
S. 6 (a).  
6/1993  
S. 6 (b).  
18/1999  
S. 5 (a).

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[The inclusion of this page is authorized by L.N. 3/2001]

18/1999  
S. 5 (b).

(2) A person may be denied registration under this section if—

- (a) there is satisfactory evidence that—
  - (i) the marriage was entered into primarily for the purpose of enabling that person to acquire Jamaican citizenship; or
  - (ii) the parties to the marriage have no intention to live permanently with each other as spouses, after the marriage;
- (b) the person has been convicted in any country of a criminal offence specified in any law which makes provision for such denial on the ground of such conviction.

18/1999  
S. 5 (b).

(3) Subsection (2) shall not affect the right of any person who, before the 26th day of March, 1999, was entitled to apply for Jamaican citizenship by virtue of any provision of this Constitution in force before that date.

Deprivation  
of citizen-  
ship.  
18/1999  
S. 6.

8.—(1) No person who is a citizen of Jamaica by virtue of section 3 (1) (a), (b) or (c) shall be deprived of his citizenship of Jamaica.

(2) A person who is a citizen of Jamaica other than by virtue of section 3 (1) (a), (b) or (c), shall not be deprived of his citizenship except by or under the provisions of a law—

- (a) specifying the grounds on which such deprivation may take place and the procedure for such deprivation; and
- (b) securing to any person affected thereby a right of access to the Supreme Court for the purpose of reviewing the decision to deprive him of his right to such citizenship.

9.—(1) Every person who under this Constitution or any Act of Parliament is a citizen of Jamaica or under any enactment for the time being in force in any country to which this section applies is a citizen of that country shall, by virtue of that citizenship, have the status of a Commonwealth citizen.

Commonwealth citizens.

(2) Every person who is a British subject without citizenship under the British Nationality Act, 1948, or who continues to be a British subject under section 2 of that Act shall by virtue of that status have the status of a Commonwealth citizen.

11 & 12 Geo. 6 c. 56.

(3) Save as may be otherwise provided by Parliament, the countries to which this section applies are the United Kingdom and Colonies, Canada, Australia, New Zealand, India, Pakistan, Ceylon, Ghana, the Federation of Malaya, the Federation of Nigeria, the Republic of Cyprus, Sierra Leone, Tanganyika, the Federation of Rhodesia and Nyasaland and the State of Singapore.

10. A Commonwealth citizen who is not a citizen of Jamaica, or a citizen of the Republic of Ireland who is not a citizen of Jamaica, shall not be guilty of an offence against any law in force in Jamaica by reason of anything done or omitted in any part of the Commonwealth other than Jamaica or in the Republic of Ireland or in any foreign country unless—

Criminal liability of Commonwealth citizens.

- (a) the act or omission would be an offence if he were an alien; and
- (b) in the case of an act or omission in any part of the Commonwealth or in the Republic of Ireland, it would be an offence if the country in which the act was done or the omission made were a foreign country.

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[The inclusion of this page is authorized by L.N. 3/2001]

Powers of  
Parliament.

18/1999  
S. 7 (b).

**11. Parliament may make provision—**

- (a) *[Deleted by Act 18 of 1999.]*
- (b) prescribing the grounds on which and the procedure whereby a person may be deprived of his citizenship of Jamaica;
- (c) for the renunciation by any person of his citizenship of Jamaica.

Interpreta-  
tion.

11 & 12  
Geo. 6 c. 56.

**12.—(1) In this Chapter—**

“alien” means a person who is not a Commonwealth citizen, a British protected person or a citizen of the Republic of Ireland;

“British protected person” means a person who is a British protected person for the purposes of the British Nationality Act, 1948;

“foreign country” means a country (other than the Republic of Ireland) that is not part of the Commonwealth;

“prescribed” means prescribed by or under any Act of Parliament.

(2) *[Deleted by Act 6 of 1993.]*

(3) For the purposes of this Chapter, a person born aboard a registered ship or aircraft, or aboard an unregistered ship or aircraft of the government of any country, shall be deemed to have been born in the place in which the ship or aircraft was registered or, as the case may be, in that country.

6/1993  
S. 7 (b).

(4) Any reference in this Chapter to the national status of the parent of a person at the time of that person's birth shall, in relation to a person born after the death of his parent, be construed as a reference to the national status of the parent at the time of that parent's death; and where that death occurred before the fifth day of August, 1962, the national status that the parent would have had if he or she had died on the sixth day of August, 1962, shall be deemed to be his or her national status at the time of death.

## CHAPTER III

## CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS

## 13.—(1) Whereas—

Fundamental  
rights and  
freedoms.  
12/2011  
S. 2.

- (a) the state has an obligation to promote universal respect for, and observance of, human rights and freedoms;
- (b) all persons in Jamaica are entitled to preserve for themselves and future generations the fundamental rights and freedoms to which they are entitled by virtue of their inherent dignity as persons and as citizens of a free and democratic society; and
- (c) all persons are under a responsibility to respect and uphold the rights of others recognized in this Chapter,

the following provisions of this Chapter shall have effect for the purpose of affording protection to the rights and freedoms of persons as set out in those provisions, to the extent that those rights and freedoms do not prejudice the rights and freedoms of others.

(2) Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society—

- (a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and
- (b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.

(3) The rights and freedoms referred to in subsection (2) are as follows—

- (a) the right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted;
- (b) the right to freedom of thought, conscience, belief and observance of political doctrines;
- (c) the right to freedom of expression;
- (d) the right to seek, receive, distribute or disseminate information, opinions and ideas through any media;
- (e) the right to freedom of peaceful assembly and association;
- (f) the right to freedom of movement, that is to say, the right—
  - (i) of every citizen of Jamaica to enter Jamaica; and
  - (ii) of every person lawfully in Jamaica, to move around freely throughout Jamaica, to reside in any part of Jamaica and to leave Jamaica;
- (g) the right to equality before the law;
- (h) the right to equitable and humane treatment by any public authority in the exercise of any function;
- (i) the right to freedom from discrimination on the ground of—

- (i) being male or female;
- (ii) race, place of origin, social class, colour, religion or political opinions;

(j) the right of everyone to—

- (i) protection from search of the person and property;
- (ii) respect for and protection of private and family life, and privacy of the home;
- (iii) protection of privacy of other property and of communication;

(k) the right of every child—

- (i) to such measures of protection as are required by virtue of the status of being a minor or as part of the family, society and the State;
- (ii) who is a citizen of Jamaica, to publicly funded tuition in a public educational institution at the pre-primary and primary levels;

(l) the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage;

(m) the right of every citizen of Jamaica—



- (i) who is qualified to be registered as an elector for elections to the House of Representatives, to be so registered; and
  - (ii) who is so registered, to vote in free and fair elections;
- (n) the right of every citizen of Jamaica to be granted a passport and not to be denied or deprived thereof except by due process of law;
- (o) the right to protection from torture, or inhuman or degrading punishment or other treatment as provided in subsections (6) and (7);
- (p) the right to freedom of the person as provided in section 14;
- (q) the protection of property rights as provided in section 15;
- (r) the right to due process as provided in section 16; and
- (s) the right to freedom of religion, as provided in section 17.

(4) This Chapter applies to all law and binds the legislature, the executive and all public authorities.

(5) A provision of this Chapter binds natural or juristic persons if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right.

(6) No person shall be subjected to torture or inhuman or degrading punishment or other treatment.

(7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (6) to the extent that the law in question authorizes the infliction of any description of punishment which was lawful in Jamaica immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011.

(8) The execution of a sentence of death imposed after the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, on any person for an offence against the law of Jamaica, shall not be held to be inconsistent with, or in contravention of, this section by reason of—

- (a) the length of time which elapses between the date on which the sentence is imposed and the date on which the sentence is executed; or
- (b) the physical conditions or arrangements under which such person is detained pending the execution of the sentence by virtue of any law or practice in force immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011.

(9) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (3)(f) of this section and sections 14 and 16(3), to the extent that the law authorizes the taking, in relation to persons detained or whose freedom of movement has been restricted by virtue of that law, of

measures that are reasonably justifiable for the purpose of dealing with the situation that exists during a period of public emergency or public disaster.

(10) A person, who is detained or whose freedom of movement has been restricted by virtue only of a law referred to in subsection (9), may request a review of his case at any time during the period of detention or restriction, but any request subsequent to the initial request shall not be made earlier than six weeks after he last made such a request, and if he makes such a request, his case shall be reviewed promptly by an independent and impartial tribunal which shall be immediately established pursuant to law and presided over by a person appointed by the Chief Justice of Jamaica from among persons qualified to be appointed as a Judge of the Supreme Court.

(11) On any review by a tribunal in pursuance of subsection (10), of the case of any person who is detained or whose freedom of movement has been restricted, the tribunal may give directions to the authority by whom such detention or restriction was ordered concerning the continued detention or restriction of movement of that person and the authority shall act in accordance with such directions.

(12) Nothing contained in or done under the authority of any law in force immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, relating to—

- (a) sexual offences;
- (b) obscene publications; or
- (c) offences regarding the life of the unborn,

shall be held to be inconsistent with or in contravention of the provisions of this Chapter.

(13) In this section “public educational institution” means an all-age school, a pre-primary school or a primary school that is maintained or assisted by the Government.

14.—(1) No person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law in the following circumstances—

Protection of  
freedom of  
the person.

- (a) in consequence of his unfitness to plead to a criminal charge;
- (b) in execution of the sentence or order of a court whether in Jamaica or elsewhere, in respect of a criminal offence of which he has been convicted;
- (c) in execution of an order of the Supreme Court or of the Court of Appeal or such other court as may be prescribed by Parliament on the grounds of his contempt of any such court or of another court or tribunal;
- (d) in execution of the order of a court made in order to secure the fulfilment of any obligation imposed on him by law;
- (e) for the purpose of bringing him before a court in execution of the order of a court;
- (f) the arrest or detention of a person—
  - (i) for the purpose of bringing him before the competent legal authority on reasonable suspicion of his having committed an offence; or

- (ii) where it is reasonably necessary to prevent his committing an offence;
  - (g) in the case of a person who has not attained the age of eighteen years, for the purpose of his care and protection;
  - (h) the detention of a person—
    - (i) for the prevention of the spreading of an infectious or contagious disease constituting a serious threat to public health; or
    - (ii) suffering from mental disorder or addicted to drugs or alcohol where necessary for his care or treatment or for the prevention of harm to himself or others; or
  - (i) the arrest or detention of a person—
    - (i) who is not a citizen of Jamaica, to prevent his unauthorized entry into Jamaica; or
    - (ii) against whom action is being taken with a view to deportation or extradition or other lawful removal or the taking of proceedings relating thereto.
- (2) Any person who is arrested or detained shall have the right—
- (a) to communicate with and be visited by his spouse, partner or family member, religious counsellor and a medical practitioner of his choice;

(b) at the time of his arrest or detention or as soon as is reasonably practicable, to be informed, in a language which he understands, of the reasons for his arrest or detention;

(c) where he is charged with an offence, to be informed forthwith, in a language which he understands, of the nature of the charge; and

(d) to communicate with and retain an attorney-at-law.

(3) Any person who is arrested or detained shall be entitled to be tried within a reasonable time and—

(a) shall be—

(i) brought forthwith or as soon as is reasonably practicable before an officer authorized by law, or a court; and

(ii) released either unconditionally or upon reasonable conditions to secure his attendance at the trial or at any other stage of the proceedings; or

(b) if he is not released as mentioned in paragraph (a)(ii), shall be promptly brought before a court which may thereupon release him as provided in that paragraph.

(4) Any person awaiting trial and detained in custody shall be entitled to bail on reasonable conditions unless sufficient cause is shown for keeping him in custody.

(5) Any person deprived of his liberty shall be treated humanely and with respect for the inherent dignity of the person.

Protection of  
property  
rights.

15.—(1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under the provisions of a law that—

- (a) prescribes the principles on which and the manner in which compensation therefor is to be determined and given; and
- (b) secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of—
  - (i) establishing such interest or right (if any);
  - (ii) determining the compensation (if any) to which he is entitled; and
  - (iii) enforcing his right to any such compensation.

(2) Nothing in this section shall be construed as affecting the making or operation of any law so far as it provides for the taking of possession or acquisition of property—

- (a) in satisfaction of any tax, rate or due;
- (b) by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence;
- (c) upon the attempted removal of the property in question out of or into Jamaica in contravention of any law;

- (d) by way of the taking of a sample for the purposes of any law;
- (e) where the property consists of an animal, upon its being found trespassing or straying;
- (f) as an incident of a lease, tenancy, licence, mortgage, charge, bill of sale, pledge or contract;
- (g) by way of the vesting or administration of trust property, enemy property, or the property of persons adjudged or otherwise declared bankrupt or insolvent, persons of unsound mind, deceased persons, or bodies corporate or unincorporate in the course of being wound up;
- (h) in the execution of judgments or orders of courts;
- (i) by reason of its being in a dangerous state or injurious to the health of human beings, animals or plants;
- (j) in consequence of any law with respect to the limitation of actions;
- (k) for so long as may be necessary for the purposes of any examination, investigation, trial or inquiry or, in the case of land, the carrying out thereon—
  - (i) of work of soil conservation or the conservation of other natural resources; or
  - (ii) of agricultural development or improvement which the owner or occupier of the land has been required and has, without reasonable and lawful excuse, refused or failed to carry out.

(3) Nothing in this section shall be construed as affecting the making or operation of any law so far as it—



- (a) makes such provisions as are reasonably required for the protection of the environment; or
  
- (b) provides for the orderly marketing or production or growth or extraction of any agricultural product or mineral or any article or thing prepared for the market or manufactured therefor or for the reasonable restriction of the use of any property in the interests of safeguarding the interest of others or the protection of tenants, licensees or others having rights in or over such property.

(4) Nothing in this section shall be construed as affecting the making or operation of any law for the compulsory taking of possession in the public interest of any property, or the compulsory acquisition in the public interest of any interest in or right over property, where that property, interest or right is held by a body corporate which is established for public purposes by any law and in which no monies have been invested other than monies provided by Parliament.

(5) Where an order is made under any law which provides for the compulsory acquisition of property, the court may have regard to—

- (a) any hardship that may reasonably be expected to be caused to any person by the operation of the order; or
  
- (b) the use that is ordinarily made of the property, or the intended use of the property.

(6) In this section “compensation” means the consideration to be given to a person for any interest or right which he may have in or over property which has been compulsorily taken possession of or compulsorily acquired as prescribed and determined in accordance with the provisions of the law by or under which the property has been so compulsorily taken possession of or acquired.

16.—(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

Protection of right to due process.

(2) In the determination of a person’s civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law.

(3) All proceedings of every court and proceedings relating to the determination of the existence or the extent of a person’s civil rights or obligations before any court or other authority, including the announcement of the decision of the court or authority, shall be held in public.

(4) Nothing in subsection (3) shall prevent any court or any authority such as is mentioned in that subsection from excluding from the proceedings, persons other than the parties thereto and their legal representatives—

(a) in interlocutory proceedings;

(b) in appeal proceedings under any law relating to income tax; or

(c) to such extent as—

- (i) the court or other authority may consider necessary or expedient, in circumstances where publicity would prejudice the interests of justice; or
- (ii) the court may decide to do so or, as the case may be, the authority may be empowered or required by law to do so, in the interests of defence, public safety, public order, public morality, the welfare of persons under the age of eighteen years, or the protection of the private lives of persons concerned in the proceedings.

(5) Every person charged with a criminal offence shall be presumed innocent until he is proved guilty or has pleaded guilty.

(6) Every person charged with a criminal offence shall—

- (a) be informed as soon as is reasonably practicable, in a language which he understands, of the nature of the offence charged;
- (b) have adequate time and facilities for the preparation of his defence;
- (c) be entitled to defend himself in person or through legal representation of his own choosing or, if he has not sufficient means to pay for legal representation, to be given such assistance as is required in the interests of justice;

- (d) be entitled to examine or have examined, at his trial, witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) have the assistance of an interpreter free of cost if he cannot understand or speak the language used in court;
- (f) not to be compelled to testify against himself or to make any statement amounting to a confession or admission of guilt; and
- (g) except with his own consent, not be tried in his absence unless—
  - (i) he so conducts himself in the court as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence; or
  - (ii) he absconds during the trial.

(7) An accused person who is tried for a criminal offence or any person authorized by him in that behalf shall be entitled, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, to be given for his own use, within a reasonable time after judgment, a copy of any record of the proceedings made by or on behalf of the court.

(8) Any person convicted of a criminal offence shall have the right to have his conviction and sentence reviewed by a court the jurisdiction of which is superior to the court in which he was convicted and sentenced.

(9) No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted, shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence save upon the order of a superior court made in the course of appeal proceedings relating to the conviction or acquittal; and no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence:

Provided that nothing in any law shall be held to be inconsistent with or in contravention of this subsection by reason only that it authorizes any court to try a member of a defence force for a criminal offence notwithstanding any trial and conviction or acquittal of that member under service law; but any court so trying such a member and convicting him shall in sentencing him to any punishment take into account any punishment awarded him under service law.

(10) No person shall be held guilty of any criminal offence on account of any act or omission which did not, at the time it took place, constitute a criminal offence.

(11) No penalty shall be imposed in relation to any criminal offence or in relation to an infringement of a civil nature which is more severe than the maximum penalty which might have been imposed for the offence or in respect of that infringement, at the time when the offence was committed or the infringement occurred.

(12) If, at the time of sentencing of a person who is convicted of a criminal offence, the penalty prescribed by law for that offence is less severe than the penalty that might have been imposed at the time when the offence was committed, the less severe penalty shall be imposed at the time of sentencing.

17.—(1) Every person shall have the right to freedom of religion including the freedom to change his religion and the right, either alone or in community with others and both in public and in private, to manifest and propagate his religion in worship, teaching, practice and observance.

Protection of freedom of religion.

(2) The constitution of a religious body or denomination shall not be altered except with the consent of the governing authority of that body or denomination.

(3) Every religious body or denomination shall have the right to provide religious instruction for persons of that body or denomination in the course of any education provided by that body or denomination whether or not that body or denomination is in receipt of any government subsidy, grant or other form of financial assistance designed to meet, in whole or in part, the cost of such course of education.

(4) No person attending any place of education, except with his own consent (or, if he is a minor, the consent of his parent or guardian) shall be required to receive religious instruction, or to take part in or attend any religious ceremony or observance, which relates to a religion or religious body or denomination other than his own.

18.—(1) Nothing contained in or done under any law in so far as it restricts—

Status of marriage.

(a) marriage; or

(b) any other relationship in respect of which any rights and obligations similar to those pertaining to marriage are conferred upon persons as if they were husband and wife,

to one man and one woman shall be regarded as being inconsistent with or in contravention of the provisions of this Chapter.

(2) No form of marriage or other relationship referred to in subsection (1), other than the voluntary union of one man and one woman may be contracted or legally recognized in Jamaica.

Application  
for redress.

19.—(1) If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

(2) Any person authorized by law, or, with the leave of the Court, a public or civic organization, may initiate an application to the Supreme Court on behalf of persons who are entitled to apply under subsection (1) for a declaration that any legislative or executive act contravenes the provisions of this Chapter.

(3) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.

(4) Where any application is made for redress under this Chapter, the Supreme Court may decline to exercise its powers and may remit the matter to the appropriate court, tribunal or authority if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law.

(5) Any person aggrieved by any determination of the Supreme Court under this section may appeal therefrom to the Court of Appeal.

(6) Parliament may make provision or authorize the making of provision with respect to the practice and procedure of any court for the purposes of this section and may confer upon that court such powers, or may authorize the conferment thereon of such powers, in addition to those conferred by this section, as may appear to be necessary or desirable for the purpose of enabling that court more effectively to exercise the jurisdiction conferred upon it by this section.

20.—(1) In this Chapter—

Interpretation.

“contravention”, in relation to any requirement, includes a failure to comply with that requirement, and cognate expressions shall be construed accordingly;

“court” means any court of law in Jamaica other than a court constituted by or under service law and—

(a) in sections 13(3)(a), 14 and 16 (1), (2), (3), (5), (6), (7) and (9) (excluding the proviso thereto) of this Constitution includes, in relation to an offence against service law, a court so constituted; and

(b) in section 14 of this Constitution includes, in relation to an offence against service law, an officer of a defence force, or the Police Service Commission or any person or authority to whom the disciplinary powers of that Commission have been lawfully delegated;

“period of public disaster” means any period during which there is in force a Proclamation by the Governor-General declaring that a period of public disaster exists;



“period of public emergency” means any period during which—

- (a) Jamaica is engaged in any war;
- (b) there is in force a Proclamation by the Governor-General declaring that a state of public emergency exists; or
- (c) there is in force a resolution of each House of Parliament supported by the votes of a two-thirds majority of all the members of each House declaring that democratic institutions in Jamaica are threatened by subversion;

“service law” means the law regulating the discipline of a defence force or police officers.

(2) A Proclamation made by the Governor-General shall not be effective for the purposes of subsection (1) unless it is declared that the Governor-General is satisfied—

- (a) that a public emergency has arisen as a result of the imminence of a state of war between Jamaica and a foreign State;
- (b) that action has been taken or is immediately threatened by any person or body of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety or to deprive the community, or any substantial portion of the community, of supplies or services essential to life;
- (c) that a period of public disaster has arisen as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence, outbreak of infectious disease or other calamity, whether similar to the foregoing or not.

(3) A Proclamation made by the Governor-General for the purposes of and in accordance with this section—

- (a) shall, unless previously revoked, remain in force for fourteen days or for such longer period, not exceeding three months, as both Houses of Parliament may determine by a resolution supported by a two-thirds majority of all the members of each House;

(b) may be extended from time to time by a resolution passed in like manner as is prescribed in paragraph (a) for further periods, not exceeding in respect of each such extension a period of three months;

(c) may be revoked at any time by a resolution supported by the votes of a two-thirds majority of all the members of each House.

(4) A resolution passed by a House for the purpose of paragraph (c) of the definition of “period of public emergency” in subsection (1) may be revoked at any time by a resolution of that House supported by the votes of a majority of all the members thereof.

(5) The court shall be competent to enquire into and determine whether a proclamation or resolution purporting to have been made or passed under this section was made or passed for any purpose specified in this section or whether any measures taken pursuant thereto are reasonably justified for that purpose.

21. *[Repealed by Act 12 of 2011.]*

22. *[Repealed by Act 12 of 2011.]*

23. *[Repealed by Act 12 of 2011.]*

24. *[Repealed by Act 12 of 2011.]*

25. *[Repealed by Act 12 of 2011.]*

26. *[Repealed by Act 12 of 2011.]*

## CHAPTER IV

### THE GOVERNOR-GENERAL

27. There shall be a Governor-General of Jamaica who shall be appointed by Her Majesty and shall hold office during Her Majesty’s pleasure and who shall be Her Majesty’s representative in Jamaica.

Establishment of office of Governor-General.

Oaths to be  
taken by  
Governor-  
General.  
First Schedule.

**28.** A person appointed to the office of Governor-General shall, before entering upon the duties of that office, take and subscribe the oaths of allegiance and for the due execution of the office of Governor-General in the forms set out in the First Schedule to this Constitution.

Acting  
Governor-  
General.

**29.—(1)** Whenever the office of Governor-General is vacant or the holder of the office is absent from Jamaica or is for any other reason unable to perform the functions of his office, those functions shall be performed by such person as Her Majesty may appoint or, if there is no such person in Jamaica so appointed and able to perform those functions, by the Chief Justice of Jamaica.

(2) Before assuming the functions of the office of Governor-General any such person as aforesaid shall take and subscribe the oaths directed by section 28 of this Constitution to be taken and subscribed by the Governor-General.

(3) The Governor-General shall not, for the purposes of this section, be regarded as absent from Jamaica or as unable to perform the functions of the office of Governor-General—

- (a) by reason only that he is in passage from one part of Jamaica to another; or
- (b) at any time when there is a subsisting appointment of a deputy under section 30 of this Constitution.

Deputy to  
Governor-  
General.

**30.—(1)** Whenever the Governor-General—

- (a) has occasion to be absent from the seat of Government but not from Jamaica, or
- (b) has occasion to be absent from Jamaica for a period which he has reason to believe will be of short duration;  
or

(c) is suffering from an illness that he has reason to believe will be of short duration,

he may, on the advice of the Prime Minister, by instrument under the Broad Seal, appoint any person in Jamaica to be his deputy during such absence or illness, and in that capacity to perform on his behalf such of the functions of the office of Governor-General as may be specified in that instrument.

(2) The power and authority of the Governor-General shall not be abridged, altered or in any way affected by the appointment of a deputy under this section, and a deputy shall conform to and observe all instructions that the Governor-General may from time to time address to him :

Provided that the question whether or not a deputy has conformed to or observed any such instructions shall not be enquired into in any court.

(3) A person appointed as a deputy under this section shall hold that appointment for such period as may be specified in the instrument by which he is appointed, and his appointment may be revoked at any time by the Governor-General acting on the advice of the Prime Minister.

31.—(1) Parliament may from time to time prescribe the offices that are to constitute the personal staff of the Governor-General, the salaries and allowances that are to be paid to the members of that staff and the other sums that are to be paid in respect of the expenditure attaching to the office of Governor-General.

Personal  
staff of  
Governor-  
General.

(2) Any salaries or other sums prescribed under subsection (1) of this section shall be charged on and paid out of the Consolidated Fund.

(3) Subject to the provisions of subsection (4) of this section, the power to make appointments to the offices for

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the time being prescribed under subsection (1) of this section as offices that are to constitute the personal staff of the Governor-General, and to remove and to exercise disciplinary control over persons holding or acting in any such offices, shall vest in the Governor-General acting in his discretion.

(4) The Governor-General acting in his discretion, may appoint to any of the offices prescribed under subsection (1) of this section such public officers as he may select from a list submitted by the Public Service Commission, but—

- (a) the provisions of subsection (3) of this section shall apply in relation to an officer so appointed as respects his service on the personal staff of the Governor-General but not as respects his service as a public officer;
- (b) an officer so appointed shall not, during his continuance on the personal staff of the Governor-General, perform the functions of any public office; and
- (c) an officer so appointed may at any time be appointed by the Governor-General, if the Public Service Commission so recommend, to assume or resume the functions of a public office and he shall thereupon vacate his office on the personal staff of the Governor-General, but the Governor-General may, in his discretion, decline to release the officer for that appointment.

(5) All offices prescribed under subsection (1) of this section as offices that are to constitute the personal staff of the Governor-General shall, for the purposes of sections 40, 41, 111, 124, 129, 132, 133 and 134 of this Constitution be deemed to be public offices.

32.—(1) The Governor-General shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet in the exercise of his functions other than—

Exercise of  
Governor-  
General's  
functions.

- (a) any function which is expressed (in whatever terms) to be exercisable by him on or in accordance with the recommendation or advice of, or with the concurrence of, or after consultation with, any person or authority other than the Cabinet; and
- (b) any function which is expressed (in whatever terms) to be exercisable by him in his discretion.

(2) Where the Governor-General is directed to exercise any function on the recommendation of any person or authority, he shall exercise that function in accordance with such recommendation :

Provided that—

- (a) before he acts in accordance therewith, he may, in his discretion, once refer that recommendation back for reconsideration by the person or authority concerned; and
- (b) if that person or authority, having reconsidered the original recommendation under the preceding paragraph, substitutes therefor a different recommendation, the provisions of this subsection shall apply to that different recommendation as they apply to the original recommendation.

(3) Where the Governor-General is directed to exercise any function after consultation with any person or authority he shall not be obliged to exercise that function in accordance with the advice of that person or authority.

(4) Where the Governor-General is directed to exercise any function in accordance with the recommenda-

tion or advice of, or with the concurrence of, or after consultation with, or on the representation of, any person or authority, the question whether he has so exercised that function shall not be enquired into in any court.

(5) Where the Governor-General is directed to exercise any function on the recommendation of the Prime Minister after consultation with the Leader of the Opposition the following steps shall be taken :—

- (a) the Prime Minister shall first consult the Leader of the Opposition and thereafter tender his recommendation to the Governor-General;
- (b) the Governor-General shall then inform the Leader of the Opposition of this recommendation and if the Leader of the Opposition concurs therein the Governor-General shall act in accordance with such recommendation;
- (c) if the Leader of the Opposition does not concur in the recommendation the Governor-General shall so inform the Prime Minister and refer the recommendation back to him;
- (d) the Prime Minister shall then advise the Governor-General and the Governor-General shall act in accordance with that advice.

(6) Any reference in this Constitution to the functions of the Governor-General shall be construed as a reference to his powers and duties in the exercise of the executive authority of Jamaica and to any other powers and duties conferred or imposed on him as Governor-General by or under this Constitution or any other law.

Broad Seal.

33. The Governor-General shall keep and use the Broad Seal for sealing all things whatsoever that shall pass under the said Seal.

CHAPTER V

PARLIAMENT

PART I

*Composition of Parliament*

34. There shall be a Parliament of Jamaica which shall consist of Her Majesty, a Senate and a House of Representatives.

Establishment of Parliament.

35.—(1) The Senate shall consist of twenty-one persons who being qualified for appointment as Senators in accordance with this Constitution have been so appointed in accordance with the provisions of this section.

Senate.

(2) Thirteen Senators shall be appointed by the Governor-General, acting in accordance with the advice of the Prime Minister, by instrument under the Broad Seal.

(3) The remaining eight Senators shall be appointed by the Governor-General, acting in accordance with the advice of the Leader of the Opposition, by instrument under the Broad Seal.

36. The House of Representatives shall consist of persons who, being qualified for election as members in accordance with the provisions of this Constitution, have been so elected in the manner provided by or under any law for the time being in force in Jamaica and who shall be known as "Members of Parliament".

House of Representatives.

37.—(1) Subject to the provisions of subsection (2) of this section a person shall be qualified to be registered as an elector for elections to the House of Representatives if, and shall not be so qualified unless, he is—

Qualifications and disqualifications for electors.

(a) a citizen of Jamaica resident in Jamaica at the date of registration, or

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(b) a Commonwealth citizen (other than a citizen of Jamaica) who is resident in Jamaica at the date of registration and who has been so resident for at least twelve months immediately preceding that date,  
and has attained the prescribed age.

(2) No person shall be qualified to be registered as an elector for elections to the House of Representatives who—

- (a) is under sentence of death imposed on him by a court in any part of the Commonwealth, or is serving a sentence of imprisonment (by whatever name called) of or exceeding six months imposed on him by such a court or substituted by competent authority for some other sentence imposed on him by such a court or is under such a sentence of imprisonment the execution of which is suspended; or
- (b) is disqualified for such registration by or under any law for the time being in force in Jamaica because he has been convicted of any offence connected with the election of members of the House of Representatives or of any local authority or body for local purposes; or
- (c) is, under any law for the time being in force in Jamaica, certified to be insane or otherwise adjudged to be of unsound mind or detained as a criminal lunatic; or
- (d) is disqualified for such registration by any law for the time being in force in Jamaica by reason of his holding, or acting in, any office the functions of which involve responsibility for, or in connection with the election in the constituency in which such person would otherwise be entitled to vote.

(3) In this section—

“the prescribed age” means—

- (a) the age of twenty-one years, or
- (b) such other age being less than the age of twenty-one years but not less than the age of eighteen years that may from time to time be prescribed by a special Act; and “a special Act” means an Act of Parliament the Bill for which has been passed by both Houses and at the final vote thereon in each House has been supported by the votes of a majority of all the members of that House.

(4) A special Act may be repealed or amended by another special Act and in no other manner.

**38.—**(1) Any law for the time being providing for the election of members of the House of Representatives shall— <sup>Electoral law.</sup>

- (a) contain provisions designed to ensure that so far as is practicable any person entitled to vote at an election of members of the House of Representatives shall have a reasonable opportunity of so voting; and
- (b) contain provisions relating to the conduct of elections of members of the House of Representatives, including provisions relating to the identification of electors, designed to ensure that as far as is practicable no person shall vote at an election of a member of the House of Representatives—
  - (i) who is not entitled to vote; or
  - (ii) when he is not entitled to vote; or
  - (iii) where he is not entitled to vote :

Provided that this paragraph shall not come into operation until the first day of January 1964.

(2) No election of a member of the House of Representatives shall be called in question on the ground that the law under which that election was conducted was inconsistent with this section.

Qualifica-  
tion for  
membership  
of Senate  
and House  
of Represent-  
atives.

39. Subject to the provisions of section 40 of this Constitution, any person, who at the date of his appointment or nomination for election—

(a) is a Commonwealth citizen of the age of twenty-one years or upwards; and

(b) has been ordinarily resident in Jamaica for the immediately preceding twelve months,

shall be qualified to be appointed as a Senator or elected as a member of the House of Representatives and no other person shall be so qualified.

Disqualifica-  
tions for  
membership  
of Senate  
and House  
of Represent-  
atives.

40.—(1) No person shall be qualified for election as a member of the House of Representatives who—

(a) is a member of the Senate;

(b) is disqualified for election by any law for the time being in force in Jamaica by reason of his holding, or acting in, any office the functions of which involve any responsibility for, or in connection with, the conduct of any election, or any responsibility for the compilation or revision of any electoral register.

(2) No person shall be qualified to be appointed as a Senator or elected as a member of the House of Representatives who—

(a) is, by virtue of his own act, under any acknowledgment of allegiance, obedience or adherence to a foreign Power or State;

(b) holds or is acting in any public office or the office of Judge of the Supreme Court or Judge of the

Court of Appeal or, save as is otherwise provided by Parliament, is a member of a defence force;

- (c) is a party to, or a partner in a firm or a director or manager of a company which to his knowledge is a party to, any contract with the Government of Jamaica for or on account of the public service, and has not—
  - (i) in the case of appointment as a Senator, by informing the Governor-General; or
  - (ii) in the case of election as a member of the House of Representatives, by publishing a notice in the *Gazette* within one month before the day of election, previously disclosed the nature of such contract and his interest or the interest of such firm or company therein;
- (d) subject to the provisions of subsection (3) of this section, is under sentence of death imposed on him by a court in any part of the Commonwealth, or is serving a sentence of imprisonment (by whatever name called) of or exceeding six months imposed on him by such a court or substituted by competent authority for some other sentence imposed on him by such a court or is under such a sentence of imprisonment the execution of which is suspended;
- (e) has been adjudged or otherwise declared bankrupt under any law in force in any part of the Commonwealth and has not been discharged;
- (f) is, under any law for the time being in force in Jamaica, certified to be insane or otherwise adjudged to be of unsound mind or detained as a criminal lunatic; or

- (g) is disqualified for membership of the House of Representatives by or under any law for the time being in force in Jamaica because he has been convicted of any offence connected with the election of members of that House or of any local authority or body for local purposes.

(3) For the purposes of paragraph (d) of subsection (2) of this section—

- (a) where a person is serving two or more sentences of imprisonment that are required to be served consecutively he shall, throughout the whole time during which he so serves, be regarded as serving a sentence of or exceeding six months if (but not unless) any one of those sentences amounts to or exceeds that term; and
- (b) no account shall be taken of a sentence of imprisonment imposed as an alternative to or in default of the payment of a fine.

Tenure of  
office of  
Senators  
and members  
of House of  
Representa-  
tives.

41.—(1) The seat of a member of either House shall become vacant—

- (a) upon the next dissolution of Parliament after he has been appointed or elected;
- (b) if he resigns his seat;
- (c) if he is absent from sittings of the House for such period and in such circumstances as may be prescribed in the Standing Orders of the House;
- (d) if he ceases to be a Commonwealth citizen or takes any oath or makes any declaration or acknowledgment of allegiance, obedience or adherence to any foreign Power or State or does, concurs in or adopts any act done with the intention that he shall be-

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come a subject or citizen of any foreign Power or State;

- (e) if any circumstances arise that, if he were not a member of the House, would cause him to be disqualified for appointment or election as such by virtue of paragraph (b) or (g) of subsection (2) of section 40 of this Constitution;
- (f) if he becomes a party to any contract with the Government of Jamaica for or on account of the public service:

Provided that—

- (i) if in the circumstances it appears to the Senate (in the case of a Senator) or to the House of Representatives (in the case of a member of that House) to be just so to do, the Senate, or the House of Representatives (as the case may be) may exempt any member from vacating his seat under the provisions of this paragraph, if that member, before becoming a party to such contract as aforesaid, discloses to the Senate or to the House of Representatives (as the case may be) the nature of such contract and his interest therein;
- (ii) if proceedings are taken under section 44 of this Constitution to determine whether a Senator or a member of the House of Representatives has vacated his seat under the provisions of this paragraph he shall be declared by the Court not to have vacated his seat if he establishes to the satisfaction of the Court that he, acting reason-

ably, was not aware that he was or had become a party to such contract;

- (g) if any firm in which he is a partner, or any company of which he is a director or manager, becomes a party to any contract with the Government of Jamaica for or on account of the public service or if he becomes a partner in a firm, or a director or manager of a company which is a party to any such contract:

Provided that—

- (i) if in the circumstances it appears to the Senate (in the case of a Senator) or to the House of Representatives (in the case of a member of that House) to be just so to do, the Senate or the House of Representatives (as the case may be) may exempt any Senator or member from vacating his seat under the provisions of this paragraph if that Senator or member, before or as soon as practicable after becoming interested in such contract (whether as a partner in a firm or as director or manager of a company), discloses to the Senate or to the House of Representatives (as the case may be) the nature of such contract and the interest of such firm or company therein;
- (ii) if proceedings are taken under section 44 of this Constitution to determine whether a Senator or a member of the House of Representatives has vacated his seat under the provisions of this paragraph, he shall be declared by the Court not to have vacated his seat if he establishes to the satisfaction of the Court that he, acting reasonably, was not aware that the firm or comp-

any was or had become a party to such contract.

(2) The seat of a member of the House of Representatives shall become vacant if—

- (a) he is appointed as a Senator; or
- (b) any circumstances arise that, if he were not a member of the House of Representatives, would cause him to be disqualified for election as such by virtue of paragraph (b) of subsection (1) of section 40 of this Constitution.

(3) (a) Subject to the provisions of paragraph (b) of this subsection, if any member of either House is sentenced by a court in any part of the Commonwealth to death or to imprisonment (by whatever name called) for a term of or exceeding six months, he shall forthwith cease to exercise any of his functions as a member and his seat in the House shall become vacant at the expiration of a period of thirty days thereafter :

Provided that the President or the Speaker, as the case may be, may at the request of the member, from time to time extend that period for further periods of thirty days to enable the member to pursue any appeal in respect of his conviction or sentence, so, however, that extensions of time exceeding in the aggregate three hundred and thirty days shall not be given without the approval, signified by resolution, of the House concerned.

(b) If at any time before the member vacates his seat he is granted a free pardon or his conviction is set aside or his sentence is reduced to a term of imprisonment of less than six months or a punishment other than imprisonment is substituted, his seat shall not become vacant under paragraph (a) of this subsection and he may resume the exercise of his functions as a member.



(c) For the purposes of this subsection—

- (i) where a person is sentenced to two or more terms of imprisonment that are required to be served consecutively, account shall be taken only of any of those terms that amounts to or exceeds six months; and
- (ii) no account shall be taken of a sentence of imprisonment imposed as an alternative to or in default of the payment of a fine.

(4) (a) Subject to the provisions of paragraph (b) of this subsection, if any member of either House is adjudged or declared bankrupt, certified to be insane, adjudged to be of unsound mind or detained as a criminal lunatic, he shall forthwith cease to exercise any of his functions as a member and his seat in the House shall become vacant at the expiration of a period of thirty days thereafter :

Provided that the President or the Speaker, as the case may be, may at the request of the member, from time to time extend that period for further periods of thirty days to enable the member to pursue any appeal in respect of any such adjudication, certification or detention, so, however, that extensions of time exceeding in the aggregate one hundred and eighty days shall not be given without the approval, signified by resolution, of the House concerned.

(b) If at any time before the member vacates his seat any such adjudication or certification is set aside or the detention of the member as a criminal lunatic is terminated, his seat shall not become vacant under paragraph (a) of this subsection and he may resume the exercise of his functions as a member.

42.—(1) When the Senate first meets after any dissolution of Parliament and before it proceeds to the despatch of any other business, it shall elect a Senator, not being a Minister or a Parliamentary Secretary, to be President; and whenever the office of President is vacant otherwise than by reason of a dissolution of Parliament, the Senate shall not later than its second sitting after the vacancy has arisen, elect any other such Senator to fill that office.

President  
and Deputy  
President  
of Senate.

(2) Upon the President's being elected and before he enters upon the duties of his office, he shall (unless he has already done so in accordance with the provisions of section 62 of this Constitution) make and subscribe before the Senate the oath of allegiance.

(3) When the Senate first meets after any dissolution of Parliament, it shall, as soon as practicable, elect one of its members, not being a Minister or a Parliamentary Secretary, to be Deputy President; and whenever the office of Deputy President becomes vacant, the Senate shall, as soon as convenient, elect another such member to fill that office.

(4) A person shall vacate the office of President or Deputy President—

- (a) if he resigns that office;
- (b) if he ceases to be a member of the Senate:

Provided that if the President or Deputy President ceases to be a member by reason of a dissolution of Parliament, he shall be deemed to continue in office for the purposes of section 47 of this Constitution until he resigns his office or vacates it otherwise than by reason of a dissolution of Parliament or until the office of President or, as the case may be, of Deputy President is filled;

- (c) if, under the provisions of subsection (3) or subsection (4) of section 41 of this Constitution, he is required to cease to exercise any of his functions as a member of the Senate;
- (d) if he is appointed to be a Minister or a Parliamentary Secretary; or
- (e) in the case of the Deputy President, if he is elected to be President.

Speaker  
and Deputy  
Speaker of  
House of  
Representatives.

43.—(1) When the House of Representatives first meets after any dissolution of Parliament, and before it proceeds to the despatch of any other business, it shall elect one of its members, not being a Minister or a Parliamentary Secretary, to be Speaker; and whenever the office of Speaker is vacant otherwise than by reason of a dissolution of Parliament, the House of Representatives shall, not later than its second sitting after the vacancy has arisen, elect another such member to fill that office.

(2) Upon the Speaker's being elected and before he enters upon the duties of his office, he shall (unless he has already done so in accordance with the provisions of section 62 of this Constitution) make and subscribe before the House of Representatives the oath of allegiance.

(3) When the House of Representatives first meets after any dissolution of Parliament it shall, as soon as practicable, elect one of its members, not being a Minister or a Parliamentary Secretary, to be Deputy Speaker; and whenever the office of Deputy Speaker becomes vacant, the House of Representatives shall, as soon as convenient, elect another such member to fill that office.

(4) A person shall vacate the office of Speaker or Deputy Speaker—

- (a) if he resigns that office;

- (b) if he ceases to be a member of the House of Representatives :

Provided that if the Speaker or Deputy Speaker ceases to be a member by reason of a dissolution of Parliament, he shall be deemed to continue in office for the purposes of section 47 of this Constitution until he resigns his office or vacates it otherwise than by reason of a dissolution of Parliament or until the office of Speaker or, as the case may be, Deputy Speaker is filled;

- (c) if, under the provisions of subsection (3) or subsection (4) of section 41 of this Constitution, he is required to cease to exercise any of his functions as a member of the House of Representatives;
- (d) if he is appointed to be a Minister or a Parliamentary Secretary; or
- (e) in the case of the Deputy Speaker, if he is elected to be Speaker.

**44.—(1) Any question whether—**

- (a) any person has been validly elected or appointed as a member of either House; or
- (b) any member of either House has vacated his seat therein or is required, under the provisions of subsection (3) or subsection (4) of section 41 of this Constitution, to cease to exercise any of his functions as a member,

Deter-  
mination of  
questions  
as to  
membership.

shall be determined by the Supreme Court or, on appeal, by the Court of Appeal whose decision shall be final, in accordance with the provisions of any law for the time being in force in Jamaica and, subject to any such law, in accordance with any directions given in that behalf by the Chief Justice.

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[The inclusion of this page is authorized by L.N. 50/1979]

(2) Proceedings for the determination of any question referred to in subsection (1) of this section may be instituted by any person (including the Attorney-General) and, where such proceedings are instituted by a person other than the Attorney-General, the Attorney-General if he is not a party thereto may intervene and (if he intervenes) may appear or be represented therein.

Filling of  
vacancies.

**45.—(1) (a)** Whenever the seat of any member of the Senate becomes vacant, the Governor-General shall, by instrument under the Broad Seal, appoint to fill the vacancy a person qualified in accordance with this Constitution for appointment as a Senator.

*(b)* In making such an appointment the Governor-General shall, in any case where the member whose seat has become vacant—

- (i) was appointed on the advice of the Prime Minister, act in accordance with the advice of the Prime Minister; and
- (ii) was appointed on the advice of the Leader of the Opposition, act in accordance with the advice of the Leader of the Opposition.

(2) Whenever the seat of any member of the House of Representatives becomes vacant the vacancy shall be filled by election in the manner provided by or under any Law for the time being in force in Jamaica.

Unqualified  
persons  
sitting or  
voting.

**46.—(1)** Any person who sits or votes in either House knowing or having reasonable ground for knowing that he is not entitled to do so, shall be liable to a penalty of twenty dollars for each day upon which he so sits or votes.

(2) Any such penalty shall be recoverable by civil action in the Supreme Court at the suit of the Attorney-General.

47.—(1) The offices of Clerk and Deputy Clerk of the Senate are hereby constituted and appointments to those offices shall be made by the Governor-General, acting on the recommendation of the President.

Clerks to House of Parliament and their staff.

(2) The offices of Clerk and Deputy Clerk of the House of Representatives are hereby constituted and appointments to those offices shall be made by the Governor-General, acting on the recommendation of the Speaker.

(3) Subject to the provisions of subsection (5) of this section the Clerk shall, unless he sooner resigns his office, hold office until he attains the age of 65 years or such later age as may, in any particular case, be prescribed by the Commission appointed under subsection (7) of this section.

(4) Nothing done by the Clerk shall be invalid by reason only that he has attained the age at which he is required by this section to vacate office.

(5) The Clerk shall be removed from office by the Governor-General if, but shall not be so removed unless, the House, by a resolution which has received the affirmative vote of not less than two-thirds of all the members thereof, has resolved that he ought to be so removed for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour.

(6) The provisions of subsections (3), (4) and (5) of this section shall apply to the Deputy Clerk as they apply to the Clerk.

(7) Subject to the provisions of subsections (3), (5), (6) and (9) of this section the terms of service (including salary and allowances) of the Clerk and Deputy Clerk shall be determined from time to time by a Commission consisting of the following persons, that is to say:—

(a) the Speaker, as Chairman;

- (b) the President; and
- (c) the Minister responsible for finance or a person nominated by that Minister to represent him at any meeting of the Commission.

(8) The salaries and allowances of the Clerk and Deputy Clerk shall be paid out of the Consolidated Fund and no such salary shall be reduced during the continuance in office of the person to whom it is payable.

(9) The offices of Clerk and Deputy Clerk shall, for the purposes of sections 40, 41, 111, 124, 129, 132, 133 and 134 of this Constitution, be deemed to be public offices.

(10) A person who is a public officer may, without ceasing to hold office in the public service, be appointed, in accordance with the provisions of this section, to the office of Clerk or Deputy Clerk but—

- (a) no such appointment shall be made except with the concurrence of the Governor-General, acting on the recommendation of the Public Service Commission;
- (b) the provisions of subsections (3), (5) and (6) of this section shall, in relation to an officer so appointed, apply, subject to the provisions of paragraph (d) of this subsection, as respects his service as Clerk or Deputy Clerk but not as respects his service as a public officer;
- (c) an officer so appointed shall not, during his continuance in the office of Clerk or Deputy Clerk, perform the functions of any public office; and
- (d) an officer so appointed may at any time be appointed by the Governor-General, acting on the advice of the Public Service Commission, to assume

or resume the functions of a public office and he shall thereupon vacate his office as Clerk or Deputy Clerk, but no appointment under this paragraph shall be made without the concurrence of the President or the Speaker, as the case may be.

(11) The Governor-General, acting on the recommendation of the Minister responsible for finance after that Minister has consulted the Clerk, may from time to time prescribe, by notice published in the *Gazette*, the offices (other than the office of Deputy Clerk) which are to constitute the staff of the Clerk and may likewise prescribe which of those offices are subordinate offices.

(12) Power to make appointments to any office for the time being prescribed under subsection (11) of this section as a subordinate office on the staff of the Clerk and to remove and to exercise disciplinary control over persons holding or acting in any such offices is hereby vested in the Clerk.

(13) Before the Public Service Commission advises the Governor-General under subsection (1) of section 125 of this Constitution—

- (a) that any person should be appointed to any office on the staff of the Clerk (other than the office of Deputy Clerk and any subordinate office thereon);
- (b) that any person holding or acting in any such office should be appointed to any other public office; or
- (c) that any person holding or acting in any such office should be removed or that any penalty should be imposed on him by way of disciplinary control, the Commission shall consult the Clerk.



(14) Nothing in this section shall be construed as preventing—

- (a) the appointment of one person to the offices of Clerk of the Senate and Clerk of the House of Representatives; or
- (b) the appointment of one person to the offices of Deputy Clerk of the Senate and Deputy Clerk of the House of Representatives; or
- (c) the appointment of one person to any other office on the staff of the Clerk of the Senate and any other office on the staff of the Clerk of the House of Representatives,

and where any person is so appointed to two offices, the foregoing provisions of this section shall apply in relation to him in respect of each such office separately.

(15) The functions conferred by this section on the President shall, if there is no person holding the office of President or if the President is absent from Jamaica or is otherwise unable to perform those functions, be performed by the Deputy President and the functions conferred by this section on the Speaker shall, if there is no person holding the office of Speaker or if the Speaker is absent from Jamaica or is otherwise unable to perform those functions, be performed by the Deputy Speaker.

## PART 2

### *Powers and Procedure of Parliament*

Power to  
make laws.

**48.**—(1) Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Jamaica.

(2) Without prejudice to the generality of subsection (1) and subject to the provisions of subsections (3), (4) and (5) of this section Parliament may by law determine the

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privileges, immunities and powers of the two Houses and the members thereof.

(3) No civil or criminal proceedings may be instituted against any member of either House for words spoken before, or written in a report to, the House of which he is a member or to a committee thereof or to any joint committee of both Houses or by reason of any matter or thing brought by him therein by petition, bill, resolution, motion or otherwise.

(4) For the duration of any session members of both Houses shall enjoy freedom from arrest for any civil debt except a debt the contraction of which constitutes a criminal offence.

(5) No process issued by any court in the exercise of its civil jurisdiction shall be served or executed within the precincts of either House while such House is sitting or through the President or the Speaker, the Clerk or any officer of either House.

**49.—**(1) Subject to the provisions of this section Parliament may by Act of Parliament passed by both Houses alter any of the provisions of this Constitution or (in so far as it forms part of the law of Jamaica) any of the provisions of the Jamaica Independence Act, 1962.

Alteration  
of this  
Constitution.

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Eliz. 2 c. 40.

(2) In so far as it alters—

- (a) sections 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, subsection (3) of section 48, sections 66, 67, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 94, subsections (2), (3), (4), (5), (6) or (7) of section 96, sections 97, 98, 99, subsections (3), (4), (5), (6), (7), (8) or (9) of section 100, sections 101, 103, 104, 105, subsections (3), (4), (5), (6), (7), (8) or (9) of section 106, subsections (1), (2), (4), (5), (6), (7), (8), (9) or (10) of section 111, sections 112, 113, 114, 116,

117, 118, 119, 120, subsections (2), (3), (4), (5), (6) or (7) of section 121, sections 122, 124, 125, subsection (1) of section 126, sections 127, 129, 130, 131, 135 or 136 or the Second or Third Schedule to this Constitution; or

- (b) section 1 of this Constitution in its application to any of the provisions specified in paragraph (a) of this subsection,

a Bill for an Act of Parliament under this section shall not be submitted to the Governor-General for his assent unless a period of three months has elapsed between the introduction of the Bill into the House of Representatives and the commencement of the first debate on the whole text of that Bill in that House and a further period of three months has elapsed between the conclusion of that debate and the passing of that Bill by that House.

(3) In so far as it alters—

- (a) this section;
- (b) sections 2, 34, 35, 36, 39, subsection (2) of section 63, subsections (2), (3) or (5) of section 64, section 65, or subsection (1) of section 68 of this Constitution;
- (c) section 1 of this Constitution in its application to any of the provisions specified in paragraph (a) or (b) of this subsection; or
- (d) any of the provisions of the Jamaica Independence Act, 1962,

10 & 11  
Eliz. 2 c. 40.

a Bill for an Act of Parliament under this section shall not be submitted to the Governor-General for his assent unless—

- (i) a period of three months has elapsed between the introduction of the Bill into the House of Representatives and the com-

mencement of the first debate on the whole text of that Bill in that House and a further period of three months has elapsed between the conclusion of that debate and the passing of that Bill by that House, and

- (ii) subject to the provisions of subsection (6) of this section, the Bill, not less than two nor more than six months after its passage through both Houses, has been submitted to the electors qualified to vote for the election of members of the House of Representatives and, on a vote taken in such manner as Parliament may prescribe, the majority of the electors voting have approved the Bill.

(4) A Bill for an Act of Parliament under this section shall not be deemed to be passed in either House unless at the final vote thereon it is supported—

- (a) in the case of a Bill which alters any of the provisions specified in subsection (2) or subsection (3) of this section by the votes of not less than two-thirds of all the members of that House, or
- (b) in any other case by the votes of a majority of all the members of that House.

(5) If a Bill for an Act of Parliament which alters any of the provisions specified in subsection (2) of this section is passed by the House of Representatives—

- (a) twice in the same session in the manner prescribed by subsection (2) and paragraph (a) of subsection (4) of this section and having been sent to the Senate on the first occasion at least seven months before the end of the session and on the second occasion at least one month before the end of the

session, is rejected by the Senate on each occasion,  
or

- (b) in two successive sessions (whether of the same Parliament or not) in the manner prescribed by subsection (2) and paragraph (a) of subsection (4) of this section and, having been sent to the Senate in each of those sessions at least one month before the end of the session, the second occasion being at least six months after the first occasion, is rejected by the Senate in each of those sessions,

that Bill may, not less than two nor more than six months after its rejection by the Senate for the second time, be submitted to the electors qualified to vote for the election of members of the House of Representatives and, if on a vote taken in such manner as Parliament may prescribe, three-fifths of the electors voting approve the Bill, the Bill may be presented to the Governor-General for assent.

(6) If a Bill for an Act of Parliament which alters any of the provisions specified in subsection (3) of this section is passed by the House of Representatives—

- (a) twice in the same session in the manner prescribed by subsection (3) and paragraph (a) of subsection (4) of this section and having been sent to the Senate on the first occasion at least seven months before the end of the session and on the second occasion at least one month before the end of the session, is rejected by the Senate on each occasion,  
or

- (b) in two successive sessions (whether of the same Parliament or not) in the manner prescribed by subsection (3) and paragraph (a) of subsection (4) of this section and, having been sent to the Senate in each of those sessions at least one month before the end of the session, the second occasion being

at least six months after the first occasion, is rejected by the Senate in each of those sessions,

that Bill may, not less than two nor more than six months after its rejection by the Senate for the second time, be submitted to the electors qualified to vote for the election of members of the House of Representatives and, if on a vote taken in such manner as Parliament may prescribe, two-thirds of the electors voting approve the Bill, the Bill may be presented to the Governor-General for assent.

(7) For the purposes of subsection (5) and subsection (6) of this section a Bill shall be deemed to be rejected by the Senate if—

- (a) it is not passed by the Senate in the manner prescribed by paragraph (a) of subsection (4) of this section within one month after it is sent to that House; or
- (b) it is passed by the Senate in the manner so prescribed with any amendment which is not agreed to by the House of Representatives.

(8) For the purposes of subsection (5) and subsection (6) of this section a Bill that is sent to the Senate from the House of Representatives in any session shall be deemed to be the same Bill as the former Bill sent to the Senate in the same or in the preceding session if, when it is sent to the Senate, it is identical with the former Bill or contains only such alterations as are specified by the Speaker to be necessary owing to the time that has elapsed since the date of the former Bill or to represent any amendments which have been made by the Senate in the former Bill.

(9) In this section—

- (a) reference to any of the provisions of this Constitution or the Jamaica Independence Act, 1962, includes

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references to any law that alters that provision;  
and

- (b) “alter” includes amend, modify, re-enact with or without amendment or modification, make different provision in lieu of, suspend, repeal or add to.

50. [*Repealed by 12 of 2011, S. 3.*]

Regulation  
of procedure  
in Houses of  
Parliament.

51.—(1) Subject to the provisions of this Constitution, each House may regulate its own procedure and for this purpose may make Standing Orders.

(2) Each House may act notwithstanding any vacancy in its membership (including any vacancy not filled when the House first meets on or after the appointed day or after any dissolution of Parliament) and the presence or participation of any person not entitled to be present at or to participate in the proceedings of the House shall not invalidate those proceedings.

Presiding in  
Senate and  
House of  
Representatives.

52.—(1) The President or, in his absence, the Deputy President or, if they are both absent, a member of the Senate (not being a Minister or a Parliamentary Secretary) elected by the Senate for that sitting shall preside at each sitting of the Senate.

(2) The Speaker or, in his absence, the Deputy Speaker or, if they are both absent, a member of the House

of Representatives (not being a Minister or a Parliamentary Secretary) elected by the House of Representatives for that sitting shall preside at each sitting of the House of Representatives.

(3) References in this section to circumstances in which the President, Deputy President, Speaker or Deputy Speaker is absent include references to circumstances in which the office of President, Deputy President, Speaker or Deputy Speaker is vacant.

53.—(1) If at any time during a sitting of either House objection is taken by a member that there is not a quorum present and, after such interval as may be prescribed in the Standing Orders of that House, the person presiding ascertains that there is still not a quorum present, he shall thereupon adjourn the House. Quorum.

(2) For the purposes of this section—

- (a) a quorum of the Senate shall consist of eight members besides the person presiding; and
- (b) a quorum of the House of Representatives shall consist of sixteen members besides the person presiding.

54.—(1) Save as is otherwise provided in this Constitution, all questions proposed for decision in either House shall be determined by a majority of the votes of the members thereof present and voting. Voting.

(2) The person presiding in either House shall not vote—

- (a) unless on any question the votes are equally divided, in which case he shall have and exercise a casting vote; or



- (b) except in the case of the final vote on a Bill for an Act of Parliament under subsection (3) of section 37 or section 49 of this Constitution or the final vote on a Bill for an Act of Parliament to which section 50 of this Constitution refers in each of which cases he shall have an original vote.

Introduction  
of Bills, etc.

**55.**—(1) Subject to the provisions of this Constitution and of the Standing Orders of the House, any member of either House may introduce any Bill or propose any motion for debate in or may present any petition to that House, and the same shall be debated and disposed of according to the Standing Orders of that House.

(2) A Bill other than a Money Bill may be introduced in either House, but a Money Bill shall not be introduced in the Senate.

(3) Except on the recommendation of the Governor-General signified by a Minister, the House of Representatives shall not—

- (a) proceed upon any Bill (including any amendment to a Bill) which Bill or amendment, as the case may be, in the opinion of the person presiding, makes provision for any of the following purposes, that is to say, for imposing or increasing any tax, for imposing or increasing any charge on the revenues or other funds of Jamaica or for altering any such charge otherwise than by reducing it, or for compounding or remitting any debt due to Jamaica;
- (b) proceed upon any motion (including any amendment to a motion) the effect of which motion or amendment, as the case may be, in the opinion of the person presiding, is that provision should be made for any of the purposes aforesaid; or

(c) receive any petition which, in the opinion of the person presiding, requests that provision be made for any of the purposes aforesaid.

(4) The Senate shall not—

(a) proceed upon any Bill, other than a Bill sent from the House of Representatives, or upon any amendment to a Bill, which Bill or amendment, as the case may be, in the opinion of the person presiding, makes provision for any of the following purposes, that is to say, for imposing or altering any existing or proposed tax, for imposing or altering any existing or proposed charge on the revenues or other funds of Jamaica, or for compounding or remitting any debt due to Jamaica;

(b) proceed upon any motion (including any amendment to a motion) the effect of which motion or amendment, as the case may be, in the opinion of the person presiding, is that provision should be made for any of the purposes aforesaid; or

(c) receive any petition which, in the opinion of the person presiding, requests that provision be made for any of the purposes aforesaid.

56.—(1) Subject to the provisions of this Constitution, if a Money Bill, having been passed by the House of Representatives and sent to the Senate at least one month before the end of the session, is not passed by the Senate without amendment within one month after it is sent to that House, the Bill shall, unless the House of Representatives otherwise resolves, be presented to the Governor-General for his assent notwithstanding that the Senate has not consented to the Bill.

Restriction  
on powers of  
Senate as to  
Money Bills.

(2) There shall be endorsed on every Money Bill when it is sent to the Senate the certificate of the Speaker

signed by him that it is a Money Bill; and there shall be endorsed on any Money Bill that is presented to the Governor-General for assent in pursuance of subsection (1) of this section the certificate of the Speaker signed by him that it is a Money Bill and that the provisions of that subsection have been complied with.

Restriction  
on powers of  
Senate as to  
Bills other  
than Money  
Bills and  
certain other  
Bills.

**57.—(1)** Subject to the provisions of this Constitution, if any Bill other than a Money Bill is passed by the House of Representatives—

- (a) twice in the same session and, having been sent to the Senate on the first occasion at least seven months before the end of the session and on the second occasion at least one month before the end of the session, is rejected by the Senate on each occasion, or
- (b) in two successive sessions (whether of the same Parliament or not) and, having been sent to the Senate in each of those sessions at least one month before the end of the session, the second occasion being at least six months after the first occasion, is rejected by the Senate in each of those sessions,

that Bill shall, on its rejection for the second time by the Senate, unless the House of Representatives otherwise resolves, be presented to the Governor-General for assent notwithstanding that the Senate has not consented to the Bill.

(2) For the purposes of this section a Bill that is sent to the Senate from the House of Representatives in any session shall be deemed to be the same Bill as a former Bill sent to the Senate in the same or in the preceding session if, when it is sent to the Senate, it is identical with the former Bill or contains only such alterations as are certified by the Speaker to be necessary owing to the time that has elapsed since the date of the former Bill or to represent

any amendments which have been made by the Senate in the former Bill.

(3) The House of Representatives may, if it thinks fit, on the passage through that House of a Bill that is deemed to be the same Bill as a former Bill sent to the Senate in the same or in the preceding session, suggest any amendments without inserting the amendments in the Bill, and any such amendments shall be considered by the Senate, and, if agreed to by the Senate, shall be treated as amendments made by the Senate and agreed to by the House of Representatives; but the exercise of this power by the House of Representatives shall not affect the operation of this section in the event of the rejection of the Bill in the Senate.

(4) There shall be inserted in any Bill that is presented to the Governor-General for assent in pursuance of this section any amendments that are certified by the Speaker to have been made in the Bill by the Senate and agreed to by the House of Representatives.

(5) There shall be endorsed on any Bill that is presented to the Governor-General for assent in pursuance of this section the certificate of the Speaker signed by him that the provisions of this section have been complied with.

(6) The provisions of this section shall not apply to a Bill which is required by this Constitution to be passed by both Houses.

**58.—**(1) In sections 55, 56 and 57 of this Constitution “Money Bill” means a public Bill which, in the opinion of the Speaker, contains only provisions dealing with all or any of the following matters, namely, the imposition, repeal, remission, alteration or regulation of taxation; the imposition, for the payment of debt or other financial purposes, of charges on the Consolidated Fund or any other public funds or on monies provided by Parliament, or the varia-

Provisions relating to sections 55, 56 and 57.

tion or repeal of any such charges; the grant of money to the Crown or to any authority or person, or the variation or revocation of any such grant; the appropriation, receipt, custody, investment, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof, or the establishment, alteration, administration or abolition of any sinking fund provided in connection with any such loan; or subordinate matters incidental to any of the matters aforesaid; and in this subsection the expressions "taxation", "debt", "public fund", "public money" and "loan" do not include any taxation imposed, debt incurred, fund or money provided or loan raised by any local authority or body for local purposes.

(2) For the purposes of section 57 of this Constitution, a Bill shall be deemed to be rejected by the Senate if—

- (a) it is not passed by the Senate without amendment within one month after it is sent to that House; or
- (b) it is passed by the Senate with any amendment which is not agreed to by the House of Representatives.

(3) Where the office of Speaker is vacant or the Speaker is for any reason unable to perform any function conferred upon him by subsection (1) of this section or by section 56 or 57 of this Constitution, that function may be performed by the Deputy Speaker.

(4) Any certificate of the Speaker or Deputy Speaker given under section 56 or 57 of this Constitution shall be conclusive for all purposes and shall not be questioned in any court.

(5) Before giving any such certificate the Speaker or Deputy Speaker, as the case may be, shall, if practicable, consult the Attorney-General.

**59.—(1)** Any statutory instrument to which this section applies and which, having been laid before the Senate—

Restriction on powers of Senate as to certain statutory instruments.

- (a) in any session at least seven months before the end of the session, is not approved by the Senate shall, if it is again laid before the Senate at least one month before the end of that session, or
- (b) in any session at least one month before the end of the session, is not approved by the Senate in that session shall, if it is again laid before the Senate at least one month before the end of the next succeeding session (whether of the same Parliament or not),

but not earlier than six months after it was laid for the first time, be deemed to have been approved by the Senate at the end of the session in which it was laid for the second time if it has not earlier been so approved.

(2) In this section “statutory instrument” means any document by which the Governor-General, the Governor of the former Colony of Jamaica, a Minister or any other executive authority has exercised a power to make, confirm or approve orders, rules, regulations or other subordinate legislation, being a power conferred by any law enacted (whether before or after the appointed day) by any legislature in Jamaica, and the statutory instruments to which this section applies are all statutory instruments in respect of which it is provided (in whatever terms) that they may not come into force until approved by the Senate.

(3) For the purposes of this section a statutory instrument that is laid before the Senate in any session shall be deemed to be the same statutory instrument as a former statutory instrument laid before the Senate, in the same or in the preceding session if, when it is laid before the Senate, it is identical with the former statutory instrument or contains only such alterations as are certified by the President

to be necessary owing to the time that has elapsed since the date of the former statutory instrument.

(4) Where the office of President is vacant or the President is for any reason unable to perform the function conferred upon him by subsection (3) of this section that function may be performed by the Deputy President.

(5) Any certificate of the President or Deputy President given under subsection (3) of this section shall be conclusive for all purposes and shall not be questioned in any court.

Assent  
to Bills.

60.—(1) A Bill shall not become law until the Governor-General has assented thereto in Her Majesty's name and on Her Majesty's behalf and has signed it in token of such assent.

(2) Subject to the provisions of sections 37, 49, 50, 56 and 57 of this Constitution, a Bill shall be presented to the Governor-General for assent if, and shall not be so presented unless, it has been approved by both Houses of Parliament either without amendment or with such amendments only as are agreed to by both Houses.

(3) When a Bill is presented to the Governor-General for assent he shall signify that he assents or that he withholds assent.

Words of  
enactment.

61.—(1) In every Bill presented to the Governor-General for assent, other than a Bill for a special Act as defined in subsection (3) of section 37 of this Constitution or a Bill presented under section 49, 56 or 57 of this Constitution or a Bill for an Act to which section 50 of this Constitution refers, the words of enactment shall be as follows:—

“Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and House of Representatives of

Jamaica, and by the authority of the same, as follows:—”.

(2) In every Bill for a special Act as defined in subsection (3) of section 37 of this Constitution presented to the Governor-General for assent the words of enactment shall be as follows:—

“Be it enacted by The Queen’s Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Representatives of Jamaica in accordance with the provisions of subsection (3) of section 37 of the Constitution of Jamaica, and by the authority of the same, as follows:—”.

(3) In every Bill presented to the Governor-General for assent under section 49 of this Constitution, the words of enactment shall be as follows:—

“Be it enacted by The Queen’s Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Representatives of Jamaica (or of the House of Representatives of Jamaica, as the case may be) in accordance with the provisions of section 49 of the Constitution of Jamaica, and by the authority of the same, as follows:—”.

(4) In every Bill for an Act to which section 50 of this Constitution refers presented to the Governor-General for assent the words of enactment shall be as follows:—

“Be it enacted by The Queen’s Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Representatives of Jamaica in accordance with the provisions of section 50 of the Constitution of Jamaica, and by the authority of the same, as follows:—”.



(5) In every Bill presented to the Governor-General for assent under sections 56 and 57 of this Constitution, the words of enactment shall be as follows:—

“Be it enacted by The Queen’s Most Excellent Majesty, by and with the advice and consent of the House of Representatives of Jamaica in accordance with the provisions of section 56 (or section 57, as the case may be) of the Constitution of Jamaica, and by the authority of the same, as follows:—”.

(6) Any alteration of the words of enactment of a Bill made in consequence of the provisions of subsection (3) or subsection (5) of this section shall be deemed not to be an amendment of the Bill.

Oath of  
allegiance.

62. No member of either House shall take part in the proceedings thereof (other than proceedings necessary for the purpose of this section) until he has made and subscribed before that House the oath of allegiance:

Provided that the election of a President or a Speaker (as the case may be) may take place before the members of the House have made and subscribed such oath.

### PART 3

#### *Summoning, prorogation and dissolution*

Sessions of  
Parliament.

63.—(1) Each session of Parliament shall be held at such place within Jamaica and shall commence at such time as the Governor-General may by Proclamation published in the *Gazette* appoint.

(2) Sessions shall be held at such times so that a period of six months shall not intervene between the last sitting of Parliament in one session and the first sitting thereof in the next session.

64.—(1) The Governor-General may at any time by Proclamation published in the *Gazette* prorogue or dissolve Parliament.

Prorogation  
and dis-  
solution of  
Parliament.

(2) Subject to the provisions of subsection (3) of this section, Parliament, unless sooner dissolved, shall continue for five years from the date of its first sitting after any dissolution and shall then stand dissolved.

(3) At any time when Jamaica is at war, Parliament may from time to time extend the period of five years specified in subsection (2) of this section for not more than twelve months at a time:

Provided that the life of Parliament shall not be extended under this subsection for more than two years.

(4) If, between a dissolution of Parliament and the next ensuing general election of members to the House of Representatives, an emergency arises of such a nature that, in the opinion of the Prime Minister, it is necessary for the two Houses or either of them to be summoned before that general election can be held, the Governor-General may, by Proclamation published in the *Gazette*, summon the two Houses of the preceding Parliament and that Parliament shall thereupon be deemed (except for the purposes of section 65 of this Constitution) not to have been dissolved but shall be deemed (except as aforesaid) to be dissolved on the date on which the polls are held in the next ensuing general election.

(5) In the exercise of his powers under this section the Governor-General shall act in accordance with the advice to the Prime Minister:

Provided that if the House of Representatives by a resolution which has received the affirmative vote of a majority of all the members thereof has resolved that it has no confidence in the Government, the Governor-General shall by Proclamation published in the *Gazette* dissolve Parliament.

General elections and appointment of Senators.

65.—(1) A general election of members of the House of Representatives shall be held at such time within three months after every dissolution of Parliament as the Governor-General, acting in accordance with the advice of the Prime Minister, shall appoint by Proclamation published in the *Gazette*.

(2) As soon as may be after every general election the Governor-General shall proceed under section 35 of this Constitution to the appointment of Senators.

#### PART 4

##### *Delimitation of Constituencies*

Establishment of first Constituencies.

66.—(1) Until otherwise provided by an Order made by the Governor-General under section 67 of this Constitution, Jamaica shall, for the purpose of electing the members of the House of Representatives, be divided into the forty five constituencies prescribed by the Constituencies (Boundaries) Order, 1959 made by the Governor of the former Colony of Jamaica and published in the *Gazette* of the 28th day of May, 1959.

(2) Every constituency established under this section or under section 67 of this Constitution shall return one member to the House of Representatives.

Standing Committee of House of Representatives.

5/2009  
S. 2.

67.—(1) Subject to the provisions of section 66 of this Constitution, Jamaica shall, for the purpose of election of members to the House of Representatives, be divided into such number of constituencies, being not less than forty five nor more than sixty five, as may from time to time be provided by Order made by the Governor-General under this section.

(2) As soon as practicable after the House of Representatives first meets after the appointed day or following any general election there shall be established a Standing Committee of the House consisting of—

- (a) the Speaker, as Chairman;
- (b) three members of the House appointed by the Prime Minister; and
- (c) three members of the House appointed by the Leader of the Opposition.

(3) It shall be the function of the Standing Committee to keep under continuous review—

- (a) the number of constituencies into which Jamaica is to be divided; and
- (b) the boundaries of such constituencies.

(4) Subject to the provisions of this section, the procedure of the Standing Committee shall be determined by the Standing Orders of the House of Representatives.

(5) The Standing Committee shall, in accordance with the provisions of the following subsection, submit to the House of Representatives reports either—

- (a) showing the constituencies into which it recommends that Jamaica should be divided in order to give effect to the rules set out in the Second Schedule to this Constitution; or
- (b) stating that, in the opinion of the Committee, no alteration is required in the existing number or boundaries of constituencies in order to give effect to the said rules.

(6) Reports under subsection (5) of this section shall be submitted by the Standing Committee—

- (a) in the case of its first report after the appointed day, not less than four nor more than six years from that day; and
- (b) in the case of any subsequent report, not less than four nor more than six years from the date of the submission of its last report.

(7) Where the Standing Committee intends to consider making a report, it shall, by notice in writing, inform the Minister responsible for the conduct of elections (hereafter in this section called "the Minister") accordingly, and a copy of that notice shall be published in the *Gazette*.

(8) As soon as may be after the Standing Committee has submitted a report to the House under paragraph (a) of subsection (5) of this section, the Minister shall lay before the House for its approval the draft of an Order by the Governor-General for giving effect to the recommendations contained in the report and that draft may make provision for any matters which appear to the Minister to be incidental to or consequential upon the other provisions of the draft.

(9) Where any draft made under this section gives effect to any such recommendations with modifications, the Minister shall lay before the House together with the draft a statement of the reasons for the modifications.

(10) If the motion for the approval of any draft made under this section is rejected by the House of Representatives, or is withdrawn by leave of that House, the Minister shall amend the draft and lay the amended draft before the House of Representatives.

(11) If any draft made under this section is approved by resolution of the House, the Minister shall submit it to the Governor-General who shall make an Order (which shall be published in the *Gazette*) in terms of the draft; and that Order shall come into force on such

day as may be specified therein and, until revoked by a further Order made by the Governor-General in accordance with the provisions of this section, shall have the force of law:

Provided that the coming into force of any such Order shall not affect any election to the House of Representatives until a proclamation is made by the Governor-General appointing the date for the holding of a general election of members to the House of Representatives or affect the constitution of the House of Representatives until the dissolution of the Parliament then in being.

(12) An Act of Parliament may provide for the institution of proceedings in the Supreme Court for the purpose of determining whether or not any report made under subsection (5) of this section gives effect to the provisions of this section and empower the Supreme Court, subject to an appeal to the Court of Appeal, to make whatever orders are necessary in order to ensure that effect is given to those provisions and to make orders relating to the costs of those proceedings.

(13) Subject to the provisions of any Act to which subsection (12) of this section refers, the question of the validity of any Order by the Governor-General purporting to be made under this section and reciting that a draft thereof has been approved by resolution of the House of Representatives shall not be enquired into in any court.

## CHAPTER VI

### EXECUTIVE POWERS

**68.—**(1) The executive authority of Jamaica is vested in Her Majesty.

Executive  
authority  
of Jamaica.

(2) Subject to the provisions of this Constitution, the executive authority of Jamaica may be exercised on

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[The inclusion of this page is authorized by L.N. 41/1987]

behalf of Her Majesty by the Governor-General either directly or through officers subordinate to him.

(3) Nothing in this section shall prevent Parliament from conferring functions on persons or authorities other than the Governor-General.

Cabinet.  
1/1977  
S. 2.

**69.**—(1) There shall be in and for Jamaica a Cabinet which shall consist of the Prime Minister and such number of other Ministers (not being less than eleven) selected from among Ministers appointed in accordance with the provisions of section 70 of this Constitution as the Prime Minister may from time to time consider appropriate.

(2) The Cabinet shall be the principal instrument of policy and shall be charged with the general direction and control of the Government of Jamaica and shall be collectively responsible therefor to Parliament.

16/1986  
S. 2.

(3) Not less than two nor more than four of the Ministers selected pursuant to subsection (1) shall be persons who are members of the Senate.

Appoint-  
ment of  
Ministers.

**70.**—(1) Whenever the Governor-General has occasion to appoint a Prime Minister he, acting in his discretion, shall appoint the member of the House of Representatives who, in his judgment, is best able to command the confidence of a majority of the members of that House and shall, acting in accordance with the advice of the Prime Minister, appoint from among the members of the two Houses such number of other Ministers as the Prime Minister may advise.

1/1977  
S. 3.

(2) [*Deleted by Act 16 of 1986.*]

(3) If occasion arises for making an appointment while Parliament is dissolved, a person who was a member of the House of Representatives immediately before the dissolution may be appointed Prime Minister and a person who was a member of either House immediately before the dissolution may, subject to the provisions of subsection (2) of this section, be appointed as any other Minister as if, in each case, such person were still a member of the House

in question, but any person so appointed shall vacate office at the beginning of the next session of that House if he is not then a member thereof.

(4) Appointments under this section shall be made by instrument under the Broad Seal.

71.—(1) The office of Prime Minister shall become vacant— Tenure of  
office of  
Ministers.

- (a) if he resigns his office;
- (b) if he ceases to be a member of the House of Representatives otherwise than by a dissolution of Parliament;
- (c) if, under the provisions of subsection (3) or subsection (4) of section 41 of this Constitution, he is required to cease to exercise any of his functions as a member of the House of Representatives;
- (d) when, after any dissolution of Parliament, the Prime Minister is informed by the Governor-General, acting in his discretion, that the Governor-General is about to re-appoint him as Prime Minister or appoint another person as Prime Minister; or
- (e) if the Governor-General revokes his appointment in accordance with the provisions of subsection (2) of this section.

(2) If the House of Representatives by a resolution which has received the affirmative vote of a majority of all the members thereof has resolved that the appointment of the Prime Minister ought to be revoked, the Governor-General shall, subject to the provisions of subsection (3) of this section, by instrument under the Broad Seal, revoke his appointment.

(3) If the House of Representatives has passed a resolution as provided by subsection (2) of this section that



the appointment of the Prime Minister ought to be revoked, the Governor-General shall consult with the Prime Minister and, if the Prime Minister within three days so requests, the Governor-General shall dissolve Parliament instead of revoking the appointment.

(4) The office of a Minister, other than the office of Prime Minister, shall become vacant—

- (a) upon the appointment or re-appointment of any person to the office of Prime Minister;
- (b) if his appointment to his office is revoked by the Governor-General, acting in accordance with the advice of the Prime Minister, by instrument under the Broad Seal;
- (c) if, for any reason other than a dissolution of Parliament, he ceases to be a member of the House of which he was a member at the date of his appointment as a Minister;
- (d) if under the provisions of subsection (3) or subsection (4) of section 41 of this Constitution, he is required to cease to exercise any of his functions as a member of either House; or
- (e) if he resigns his office.

Performance  
of Prime  
Minister's  
functions in  
certain  
events.

72.—(1) Whenever the Prime Minister is unable, by reason of his illness or absence from Jamaica, to perform the functions of his office, the Governor-General may, by instrument under the Broad Seal, authorise any other Minister who is a member of the House of Representatives to perform the functions conferred on the Prime Minister by this Constitution (other than the functions conferred on him by subsection (3) of this section).

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[The inclusion of this page is authorized by L.N. 50/1979]

(2) The Governor-General may, by instrument under the Broad Seal, revoke any authority given under this section.

(3) The power conferred on the Governor-General by this section shall be exercised by him acting in his discretion if in his opinion it is impracticable to obtain the advice of the Prime Minister owing to the Prime Minister's illness or absence, and in any other case shall be exercised by the Governor-General in accordance with the advice of the Prime Minister.

73.—(1) Whenever a Minister other than the Prime Minister is unable, by reason of his illness or absence from Jamaica, to perform the functions of his office, the Governor-General may, by instrument under the Broad Seal, appoint a person who is a member of the same House as that Minister to be a temporary Minister : Temporary Ministers.

Provided that if occasion arises for making an appointment while Parliament is dissolved, a person who, immediately before the dissolution, was a member of the same House as the aforesaid Minister, may be appointed as a temporary Minister as if he were still a member of that House but any person so appointed shall, vacate office at the beginning of the next session of that House if he is not then a member thereof.

(2) Subject to the provisions of section 71 of this Constitution a temporary Minister shall hold office until he is notified by the Governor-General, by instrument under the Broad Seal, that the Minister on account of whose inability to perform the functions of his office he was appointed is again able to perform those functions or until that Minister vacates his office.

(3) The powers conferred on the Governor-General by this section shall be exercised by him in accordance with the advice of the Prime Minister.

**Oath.** 74. The Prime Minister and every other Minister shall, before entering upon the duties of his office, make before the Governor-General the oath of allegiance and the appropriate oath for the due execution of his office in the forms set out in the First Schedule to this Constitution.

**Presiding in Cabinet.** 75. The Prime Minister shall, so far as is practicable, attend and preside at all meetings of the Cabinet and in his absence such other Minister shall preside as the Prime Minister shall appoint.

**Governor-General to be informed concerning matters of Government.** 76. The Prime Minister shall keep the Governor-General fully informed concerning the general conduct of the government of Jamaica and shall furnish the Governor-General with such information as he may request with respect to any particular matter relating to the government of Jamaica.

**Assignment of responsibilities to Ministers.** 77.—(1) Subject to the provisions of this Constitution, the Governor-General, acting in accordance with the advice of the Prime Minister, may, by directions in writing, charge any Minister who is a member of the House of Representatives, or (except in so far as may be inconsistent with any Ministerial functions under section 67, 115, 116 or 118 of this Constitution) who is a member of the Senate with the responsibility for any subject or any department of government.

36/1975  
S. 3.

(2) Nothing in this section shall empower the Governor-General to confer on any Minister authority to exercise any power or to discharge any duty that is conferred or imposed by this Constitution or any other law on the Governor-General or any person or authority other than that Minister.

(3) With the approval of the House of Representatives signified by a resolution directions in writing made

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[The inclusion of this page is authorized by L.N. 50/1979]

under subsection (1) of this section may be given retro-active effect.

78.—(1) The Governor-General, acting in accordance with the advice of the Prime Minister, may, by instrument under the Broad Seal, appoint Parliamentary Secretaries from among the members of the two Houses to assist Ministers in the discharge of their functions.

Parliamentary Secretaries.

(2) [*Deleted by Act 1 of 1977.*]

(3) If occasion arises for making an appointment to the office of Parliamentary Secretary while Parliament is dissolved, a person who was a member of either House of the last Parliament may be appointed as if he were still a member of that House but any person so appointed shall vacate office at the beginning of the next session of that House if he is not then a member thereof.

1/1977 S. 4.

(4) The provisions of subsection (4) of section 71 and section 74 of this Constitution shall apply to Parliamentary Secretaries as they apply to Ministers.

79.—(1) There shall be an Attorney-General who shall be the principal legal adviser to the Government of Jamaica.

Attorney-General.

(2) Power to appoint a person to hold or act in the office of Attorney-General and to remove from that office a person holding or acting in it shall, subject to subsection (4) of this section, be exercised by the Governor-General acting in accordance with the advice of the Prime Minister.

(3) Any person appointed to hold or act in the office of Attorney-General in pursuance of subsection (2) of this section shall not, except in accordance with the provisions of section 70 of this Constitution, be appointed a Minister.

(4) Until an appointment of a person to hold or act in the office of Attorney-General is first made under the provisions of subsection (2) of this section, it shall be a

public office and a person shall not be qualified to hold or act in that office unless he is qualified for appointment as a Judge of the Supreme Court.

(5) On the occasion of the first appointment of a person to hold or act in the office of Attorney-General under the provisions of subsection (2) of this section, the office of Attorney-General as a public office shall be deemed to have been abolished.

Leader of  
the Opposition.

**80.—(1)** There shall be a Leader of the Opposition who shall be appointed by the Governor-General by instrument under the Broad Seal.

(2) Whenever the Governor-General has occasion to appoint a Leader of the Opposition he shall, in his discretion, appoint the member of the House of Representatives who, in his judgment, is best able to command the support of a majority of those members who do not support the Government, or, if there is no such person, the member of that House who, in his judgment, commands the support of the largest single group of such members who are prepared to support one leader.

(3) The office of Leader of the Opposition shall become vacant—

- (a) if he resigns his office;
- (b) if, after any dissolution of Parliament, he is informed by the Governor-General acting in his discretion that the Governor-General is about to appoint another person as Leader of the Opposition;
- (c) if he ceases to be a member of the House of Representatives otherwise than by reason of a dissolution of Parliament;
- (d) if, under the provisions of subsection (3) or subsection (4) of section 41 of this Constitution, he

is required to cease to exercise any of his functions as a member of the House of Representatives; or

- (e) if his appointment is revoked under the provisions of subsection (5) of this section.

(4) If occasion arises for making an appointment while Parliament is dissolved, a person who was a member of the House of Representatives immediately before the dissolution may be appointed Leader of the Opposition as if such person were still a member of that House but the person so appointed shall vacate office at the beginning of the next session of that House if he is not a member thereof.

(5) If, in the judgment of the Governor-General, the Leader of the Opposition no longer is able to command the support of a majority of those members of the House of Representatives who do not support the Government, or, as the case may be, the support of the largest single group of such members who are prepared to support one leader, the Governor-General, acting in his discretion, shall revoke the appointment of the Leader of the Opposition.

**81.** During any period in which there is a vacancy in the office of Leader of the Opposition by reason of the fact that no person is both qualified in accordance with this Constitution for, and willing to accept, appointment to that office, the Governor-General shall act in accordance with the advice of the Prime Minister on any matter in respect of which it is provided in this Constitution either—

Certain vacancies in office of Leader of Opposition.

- (a) that the Governor-General shall act on the advice of the Leader of the Opposition, or
- (b) that the Governor-General shall act on the recommendation of the Prime Minister after consultation with the Leader of the Opposition.

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[The inclusion of this page is authorized by L.N. 50/1979]

Privy  
Council.

**82.**—(1) There shall be in and for Jamaica a Privy Council which shall consist of six members appointed by the Governor-General, after consultation with the Prime Minister, by instrument under the Broad Seal.

(2) At least two of the members of the Privy Council shall be persons who hold or have held public office.

(3) The Privy Council shall have such powers and duties as may be conferred or imposed upon it by or under this Constitution or any other law.

Tenure of  
office of  
members of  
Privy  
Council.

**83.**—(1) The seat of a member of the Privy Council shall become vacant—

- (a) at the expiration of three years from the date of his appointment or such earlier time as may be specified in the instrument by which he was appointed;
- (b) if he resigns his seat; or
- (c) if his appointment is revoked by the Governor-General, acting after consultation with the Prime Minister, by instrument under the Broad Seal.

(2) If any person is appointed to be a provisional member of the Privy Council under section 85 of this Constitution and his tenure of his seat as a provisional member is immediately followed by his substantive appointment as a member under this section, the period of three years referred to in paragraph (a) of subsection (1) of this section shall be reckoned from the date of the instrument by which he was appointed a provisional member.

Incapacity  
of member  
of Privy  
Council.

**84.** The Governor-General, acting after consultation with the Prime Minister, may, by instrument under the Broad Seal, declare that a member of the Privy Council, is by reason of absence or infirmity of body or mind, temporarily unable to discharge his functions as a member of the Council, and thereupon that member shall not take part in

the proceedings of the Council until he is declared in like manner to be again able to discharge those functions.

**85.**—(1) Whenever a member of the Privy Council has, under section 84 of this Constitution, been declared to be temporarily unable to discharge his functions as a member, the Governor-General, acting after consultation with the Prime Minister, may, by instrument under the Broad Seal, appoint a person to be a provisional member in place of that member during the period until that member is declared under section 84 of this Constitution to be again able to discharge those functions or vacates his seat.

Provisional  
appointments  
to Privy  
Council.

(2) Subject to the provisions of subsection (1) of this section, the provisions of subsection (1) of section 83 of this Constitution shall apply in relation to a provisional member of the Privy Council as they apply in relation to a substantive member.

**86.**—(1) The Governor-General, after consultation with the Prime Minister, shall appoint one of the members of the Privy Council to be the Senior Member thereof.

Senior  
Member of  
Privy  
Council.

(2) If on any question the votes of the members of the Privy Council are equally divided the Senior Member shall have and exercise a casting vote in addition to his original vote.

(3) The Senior Member shall preside over any meeting of the Privy Council at which the Governor-General is not present.

(4) If at any meeting of the Privy Council the Senior Member is absent, the members present shall elect one of their number to exercise the powers and to perform the duties of the Senior Member at that meeting.

**87.** The Governor-General shall, so far as is practicable, attend and preside at all meetings of the Privy Council.

Attendance  
of Governor-  
General.



Summoning  
of Privy  
Council  
and pro-  
cedure.

**88.—**(1) The Privy Council shall not be summoned except by the authority of the Governor-General acting in his discretion.

(2) If, during any meeting of the Privy Council, the Governor-General or member presiding observes, upon objection in that behalf being taken by any member present, that there are present less than three members besides the Governor-General or member presiding, he shall thereupon adjourn the meeting.

(3) Subject to the provisions of this Constitution, the Privy Council may regulate its own procedure.

Validity of  
proceedings  
of Privy  
Council.

**89.** The Privy Council shall not be disqualified for the transaction of business by reason only of any vacancy among its members (including any vacancy not filled when it is first constituted or is reconstituted at any time), and any proceeding therein shall be valid notwithstanding that some person who was not entitled so to do took part therein.

Prerogative  
of mercy.

**90.—**(1) The Governor-General may, in Her Majesty's name and on Her Majesty's behalf—

- (a) grant to any person convicted of any offence against the law of Jamaica a pardon, either free or subject to lawful conditions;
- (b) grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence;
- (c) substitute a less severe form of punishment for that imposed on any person for such an offence; or
- (d) remit the whole or part of any punishment imposed on any person for such an offence or any penalty or forfeiture otherwise due to the Crown on account of such an offence.

(2) In the exercise of the powers conferred on him by this section the Governor-General shall act on the recommendation of the Privy Council.

91.—(1) Where any person has been sentenced to death for an offence against the law of Jamaica, the Governor-General shall cause—

Pardon in  
capital  
cases.  
13/2011  
S. 2(a).

(a) a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor-General may require, to be forwarded to the Privy Council; and

(b) a notice to be delivered to the person sentenced, specifying a date, being in the case of sub-paragraph (ii) or (iii) a date not less than eighteen months after the date of the delivery of the notice, on or before which the person or his legal representative—

(i) shall commence any application to, or consultation with, any entity outside of Jamaica (other than Her Majesty in Council) in relation to the offence for which the person has been sentenced to death;

(ii) shall conclude any application to, or consultation with, any entity outside of Jamaica (other than Her Majesty in Council) in relation to the offence for which the person has been sentenced to death; and

(iii) may submit to the Governor-General, for consideration by the Privy Council, representations relating to the case in accordance with such procedure as shall be set out in the notice,

so that the Privy Council may make a recommendation to the Governor-General in accordance with the provisions of section 90 of this Constitution.

13/2011  
S. 2(a).

(1A) Representations submitted under subsection (1)(b) may include any report issued by the date specified under sub-paragraph (ii) of subsection (1)(b), by an entity referred to in that sub-paragraph.

13/2011  
S. 2(a).

(1B) Nothing in this section or section 13 shall be construed as requiring—

- (a) the Governor-General or the Privy Council, in the exercise of the powers conferred on them by section 90 or this section, to consider the report of any entity referred to in subsection (1)(b)(i) in any case where the report has not been issued by the entity, and submitted by the person sentenced, on or before the date specified under subsection (1)(b)(ii); or
- (b) the Governor-General, in giving notice under subsection (1)(b), to take into account any period of time within which any such entity is likely to produce its report.

13/2011  
S. 2(b).

(2) The powers conferred on the Governor-General by this section shall be exercised by him on the recommendation of the Privy Council or, in any case in which in his judgment the matter is too urgent to admit of such recommendation being obtained by the time within which it may be necessary for him to act, in his discretion.

13/2011  
S. 2(c).

(3) In relation to a person to whom a notice is delivered in accordance with subsection (1)(b), the Governor-General may exercise, after the date specified under subsection (1)(b)(ii), the powers conferred on him by section 90.

13/2011  
S. 2(c).

(4) For the purposes of this section, in determining its recommendations to the Governor-General under section 90 the Privy Council shall consider—

- (a) the written report and other information referred to in subsection (1)(a); and
- (b) all representations submitted in accordance with a notice delivered under subsection (1)(b) in relation to the case.

(5) Where the provisions of this section have been complied with, no act done by the— 13/2011  
S. 2(c).

- (a) Governor-General in exercise of the powers conferred on him by section 90; or
- (b) the Privy Council in exercise of the powers conferred on it by section 90 or this section,

shall be held to be inconsistent with or in contravention of the provisions of Chapter III.

92.—(1) There shall be a Secretary to the Cabinet who shall be appointed by the Governor-General, acting on the recommendation of the Prime Minister, from a list of public officers submitted by the Public Service Commission. Secretary  
to the  
Cabinet.

(2) The Secretary to the Cabinet shall have charge of the Cabinet Office and shall be responsible, in accordance with such instructions as may be given to him by the Prime Minister, for arranging the business for, and keeping the minutes of, the meetings of the Cabinet and for conveying the decisions of the Cabinet to the appropriate person or authority, and shall have such other functions as the Prime Minister may from time to time direct.

93.—(1) Where any Minister has been charged with the responsibility for a subject or department of government, he shall exercise general direction and control over the work relating to that subject and over that department; and, subject as aforesaid and to such direction and control, the aforesaid work and the department shall be under the supervision of a Permanent Secretary appointed in accordance with the provisions of section 126 of this Constitution. Permanent  
Secretaries.

(2) A person may be a Permanent Secretary in respect of more than one department of government.

(3) The office of Financial Secretary is hereby constituted and, for the purposes of this section, he shall be deemed to be a Permanent Secretary.

Establishment  
of office and  
functions of  
Director of  
Public Pro-  
secutions.

94.—(1) There shall be a Director of Public Prosecutions, whose office shall be a public office.

(2) A person shall not be qualified to hold or act in the office of Director of Public Prosecutions unless he is qualified for appointment as a Judge of the Supreme Court.

(3) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do—

- (a) to institute and undertake criminal proceedings against any person before any court other than a court-martial in respect of any offence against the law of Jamaica;
- (b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and
- (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.

(4) The powers of the Director of Public Prosecutions under subsection (3) of this section may be exercised

by him in person or through other persons acting under and in accordance with his general or special instructions.

(5) The powers conferred upon the Director of Public Prosecutions by paragraphs (b) and (c) of subsection (3) of this section shall be vested in him to the exclusion of any other person or authority :

Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the Court.

(6) In the exercise of the powers conferred upon him by this section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority.

(7) For the purposes of this section, any appeal from any determination in any criminal proceedings before any court, or any case stated or question of law reserved for the purposes of any such proceedings, to any other court in Jamaica or to the Judicial Committee of Her Majesty's Privy Council shall be deemed to be part of those proceedings.

95.—(1) The Director of Public Prosecutions shall receive such emoluments and be subject to such other terms and conditions of service as may from time to time be prescribed by or under any law :

Remuneration of Director of Public Prosecutions.

Provided that the emoluments and terms and conditions of service of the Director of Public Prosecutions, other than allowances that are not taken into account in computing pensions, shall not be altered to his disadvantage during his continuance in office.

(2) The salary for the time being payable to the Director of Public Prosecutions under this Constitution shall be charged on and paid out of the Consolidated Fund.

Tenure of office of Director of Public Prosecutions and Acting Director of Public Prosecutions.

96.—(1) Subject to the provisions of subsections (4) to (7) (inclusive) of this section the Director of Public Prosecutions shall hold office until he attains the age of sixty years:

Provided that—

- (a) he may at any time resign his office; and
- (b) the Governor-General, acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition, may permit a Director of Public Prosecutions who has attained the age of sixty years to continue in office until he has attained such later age, not exceeding sixty-five years, as may (before the Director of Public Prosecutions has attained the age of sixty years) have been agreed between them.

(2) Nothing done by the Director of Public Prosecutions shall be invalid by reason only that he has attained the age at which he is required by this section to vacate his office.

(3) If the office of Director of Public Prosecutions is vacant or the holder of that office is for any reason unable to perform the functions thereof, a person qualified for appointment to that office may be appointed to act therein, and any person so appointed shall, subject to the provisions of subsection (1) of this section, continue to act until the office of Director of Public Prosecutions is filled or, as the case may be, until the Director of Public Prosecutions has resumed the functions of his office or the appointment of that person is revoked by the Governor-General acting on the advice of the Public Service Commission.

(4) The Director of Public Prosecutions may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall not be so removed except in accordance with the provisions of this section.

(5) The Director of Public Prosecutions shall be removed from office by the Governor-General if the question of his removal from office has been referred to a tribunal appointed under subsection (6) of this section and the tribunal has recommended to the Governor-General that he ought to be removed from office for inability as aforesaid or for misbehaviour.

(6) If the Prime Minister represents to the Governor-General that the question of removing the Director of Public Prosecutions from office for inability as aforesaid or for misbehaviour ought to be investigated then—

- (a) the Governor-General, acting in accordance with the advice of the Prime Minister, shall appoint a tribunal, which shall consist of a chairman and not less than two other members, from among persons who hold or have held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court; and
- (b) that tribunal shall enquire into the matter and report on the facts thereof to the Governor-General and recommend to the Governor-General whether the Director of Public Prosecutions ought to be removed from office for inability as aforesaid or for misbehaviour.

(7) The provisions of the Commissions of Enquiry Act as in force immediately before the appointed day shall,



subject to the provisions of this section and of the Third Schedule to this Constitution, apply as nearly as may be in relation to tribunals appointed under subsection (6) of this section or, as the context may require, to the members thereof as they apply in relation to Commissions or Commissioners appointed under that Act, and for that purpose shall have effect as if they formed part of this Constitution.

(8) If the question of removing the Director of Public Prosecutions from office has been referred to a tribunal under subsection (6) of this section, the Governor-General, acting in accordance with the advice of the Prime Minister, may suspend the Director of Public Prosecutions from performing the functions of his office, and any such suspension may at any time be revoked by the Governor-General, acting in accordance with the advice of the Prime Minister, and shall in any case cease to have effect if the tribunal recommends to the Governor-General that the Director of Public Prosecutions should not be removed from office.

## CHAPTER VII

### THE JUDICATURE

#### PART 1

#### *The Supreme Court*

Establishment of Supreme Court.

97.—(1) There shall be a Supreme Court for Jamaica which shall have such jurisdiction and powers as may be conferred upon it by this Constitution or any other law.

(2) The Judges of the Supreme Court shall be the Chief Justice, a Senior Puisne Judge and such number of other Puisne Judges as may be prescribed by Parliament.

(3) No office of Judge of the Supreme Court shall be abolished while there is a substantive holder thereof.

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[The inclusion of this page is authorized by L.N. 50/1979]

(4) The Supreme Court shall be a superior court of record and, save as otherwise provided by Parliament, shall have all the powers of such a court.

98.—(1) The Chief Justice shall be appointed by the Governor-General by instrument under the Broad Seal on the recommendation of the Prime Minister after consultation with the Leader of the Opposition.

Appoint-  
ment  
of Judges  
of Supreme  
Court.

(2) The Puisne Judges shall be appointed by the Governor-General by instrument under the Broad Seal acting on the advice of the Judicial Service Commission.

(3) The qualifications for appointment as a Judge of the Supreme Court shall be such as may be prescribed by any law for the time being in force :

Provided that a person who has been appointed as a Judge of the Supreme Court may continue in office notwithstanding any subsequent variations in the qualifications so prescribed.

99.—(1) If the office of Chief Justice is vacant or if the Chief Justice is for any reason unable to perform the functions of his office, then, until a person has been appointed to that office and assumed its functions or, as the case may be, until the Chief Justice has resumed those functions, they shall be performed by such other person, qualified under subsection (3) of section 98 of this Constitution for appointment as a Judge, as the Governor-General, acting in accordance with the advice of the Prime Minister may appoint for that purpose by instrument under the Broad Seal.

Acting  
Judges.

(2) If the office of a Puisne Judge of the Supreme Court is vacant, or if any such Judge is appointed to act as Chief Justice or as a Judge of the Court of Appeal, or is for any reason unable to perform the functions of his office, the Governor-General, acting on the advice of the Judicial Service Commission, may by instrument under the Broad Seal appoint a person qualified under subsection (3) of section 98 of this Constitution for appointment as a Judge to act as a Judge of the Supreme Court, and any person so appointed shall, subject to the provisions of subsection (3) of section 100 of this Constitution, continue to act for the period of his appointment or, if no such period is specified, until his appointment is revoked by the Governor-General acting on the advice of the Judicial Service Commission :

Provided that he may, at any time, resign his acting office.

(3) Any person appointed to act as a Judge under the provisions of this section may, notwithstanding that the period of his appointment has expired or his appointment has been revoked, sit as a Judge for the purpose of delivering judgment or doing any other thing in relation to proceedings which were commenced before him while he was so acting.

Tenure of  
office of  
Judges of  
Supreme  
Court.  
15/1990  
S. 2(a) (b).

**100.—**(1) Subject to the provisions of subsections (4) to (7) (inclusive) of this section, a Judge of the Supreme Court shall hold office until he attains the age of seventy years :

Provided that he may at any time resign his office.

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[The inclusion of this page is authorized by L.N. 5/1992]

(2) Notwithstanding that he has attained the age at which he is required by or under the provisions of this section to vacate his office a person holding the office of Judge of the Supreme Court may, with the permission of the Governor-General, acting in accordance with the advice of the Prime Minister, continue in office for such period after attaining that age as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him before he attained that age.

(3) Nothing done by a Judge of the Supreme Court shall be invalid by reason only that he has attained the age at which he is required by this section to vacate his office.

(4) A Judge of the Supreme Court may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of subsection (5) of this section.

(5) A Judge of the Supreme Court shall be removed from office by the Governor-General by instrument under the Broad Seal if the question of the removal of that Judge from office has, at the request of the Governor-General, made in pursuance of subsection (6) of this section, been referred by Her Majesty to the Judicial Committee of Her Majesty's Privy Council under section 4 of the Judicial Committee Act, 1833, or any other enactment enabling Her Majesty in that behalf, and the Judicial Committee has advised Her Majesty that the Judge ought to be removed from office for inability as aforesaid or for misbehaviour.

3 & 4 Will.  
4. c. 41.

(6) If the Prime Minister (in the case of the Chief Justice) or the Chief Justice after consultation with the Prime Minister (in the case of any other Judge) represents

to the Governor-General that the question of removing a Judge of the Supreme Court from office for inability as aforesaid or for misbehaviour ought to be investigated, then—

- (a) the Governor-General shall appoint a tribunal, which shall consist of a Chairman and not less than two other members, selected by the Governor-General on the advice of the Prime Minister (in the case of the Chief Justice) or of the Chief Justice (in the case of any other Judge) from among persons who hold or have held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court;
- (b) that tribunal shall enquire into the matter and report on the facts thereof to the Governor-General and recommend to the Governor-General whether he should request that the question of the removal of that Judge should be referred by Her Majesty to the Judicial Committee; and
- (c) if the tribunal so recommends, the Governor-General shall request that the question should be referred accordingly.

(7) The provisions of the Commissions of Enquiry Act as in force immediately before the appointed day shall, subject to the provisions of this section and of the Third Schedule to this Constitution, apply as nearly as may be in relation to tribunals appointed under subsection (6) of this section or, as the context may require, to the members thereof as they apply in relation to Commissions or Commissioners appointed under that Act, and for that purpose shall have effect as if they formed part of this Constitution.

(8) If the question of removing a Judge of the Supreme Court from office has been referred to a tribunal appointed under subsection (6) of this section, the Governor-General, acting in accordance with the advice of the Prime Minister (in the case of the Chief Justice) or of the Chief Justice after the Chief Justice has consulted with the Prime Minister (in the case of any other Judge), may suspend the Judge from performing the functions of his office.

(9) Any such suspension may at any time be revoked by the Governor-General, acting in accordance with the advice of the Prime Minister or the Chief Justice (as the case may be), and shall in any case cease to have effect—

(a) if the tribunal recommends to the Governor-General that he should not request that the question of the removal of the Judge from office should be referred by Her Majesty to the Judicial Committee; or

(b) the Judicial Committee advises Her Majesty that the Judge ought not to be removed from office.

(10) The provisions of this section shall be without prejudice to the provisions of subsection (2) of section 99 of this Constitution.

**101.—(1)** The Judges of the Supreme Court shall receive such emoluments and be subject to such other terms and conditions of service as may from time to time be prescribed by or under any law :

Remuneration of Judges of Supreme Court.

Provided that the emoluments and terms and conditions of service of such a Judge, other than allowances that are not taken into account in computing pensions, shall not be altered to his disadvantage during his continuance in office.

(2) The salaries for the time being payable to the Judges of the Supreme Court under this Constitution shall be charged on and paid out of the Consolidated Fund.

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[The inclusion of this page is authorized by L.N. 50/1979]

Oaths to be  
taken by  
Judges of  
Supreme  
Court.

**102.** A Judge of the Supreme Court shall not enter upon the duties of his office unless he has taken and subscribed the oath of allegiance and the judicial oath in the forms set out in the First Schedule to this Constitution.

## PART 2

### *Court of Appeal*

Establish-  
ment of  
Court of  
Appeal.

**103.**—(1) There shall be a Court of Appeal for Jamaica which shall have such jurisdiction and powers as may be conferred upon it by this Constitution or any other law.

(2) The Judges of the Court of Appeal shall be—

(a) a President;

(b) the Chief Justice by virtue of his office as head of the Judiciary but who, however, shall not sit in the Court of Appeal unless there are at least four other Judges sitting and unless he has been invited so to sit by the President of the Court;

(c) three other Judges; and

(d) such number, if any, of other Judges as may be prescribed by Parliament.

(3) The President of the Court of Appeal shall be responsible for the arrangement of the work of the Court and shall preside whenever he is sitting in that Court.

(4) No office of Judge of the Court of Appeal shall be abolished while there is a substantive holder thereof.

(5) The Court of Appeal shall be a superior court of record and, save as otherwise provided by Parliament, shall have all the powers of such a court.

**104.**—(1) The President of the Court of Appeal shall be appointed by the Governor-General by instrument under

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[The inclusion of this page is authorized by L.N. 50/1979]

the Broad Seal on the recommendation of the Prime Minister after consultation with the Leader of the Opposition.

(2) The other Judges of the Court of Appeal shall be appointed by the Governor-General by instrument under the Broad Seal acting on the advice of the Judicial Service Commission.

(3) The qualifications for appointment as a Judge of the Court of Appeal shall be such as may be prescribed by any law for the time being in force:

Provided that a person who has been appointed as a Judge of the Court of Appeal may continue in office notwithstanding any subsequent variations in the qualifications so prescribed.

**105.—**(1) If the office of President of the Court of Appeal is vacant or if the President of the Court of Appeal is for any reason unable to perform the functions of his office, then, until a person has been appointed to that office and assumed its functions or, as the case may be, until the President of the Court of Appeal has resumed those functions, they shall be performed by such other person, qualified under subsection (3) of section 104 of this Constitution for appointment as a Judge of the Court of Appeal, as the Governor-General, acting in accordance with the advice of the Prime Minister, may appoint for that purpose by instrument under the Broad Seal.

Acting  
Judges of  
Court of  
Appeal.

(2) If the office of a Judge of the Court of Appeal (other than the President) is vacant, or if any such Judge is appointed to act as President of the Court of Appeal, or is for any reason unable to perform the functions of his office, the Governor-General, acting on the advice of the



Judicial Service Commission, may by instrument under the Broad Seal appoint a person qualified under subsection (3) of section 104 of this Constitution for appointment as a Judge of the Court of Appeal to act as a Judge of the Court of Appeal, and any person so appointed shall, subject to the provisions of subsection (3) of section 106 of this Constitution, continue to act for the period of his appointment or, if no such period is specified, until his appointment is revoked by the Governor-General acting on the advice of the Judicial Service Commission.

(3) Any person appointed to act as a Judge of the Court of Appeal under the provisions of this section may, notwithstanding that the period of his appointment has expired or his appointment has been revoked, sit as a Judge for the purpose of delivering judgment or doing any other thing in relation to proceedings which were commenced before him while he was so acting.

Tenure of  
office of  
Judges of  
Court of  
Appeal.  
15/1990  
S. 3(a) (b).

**106.—**(1) Subject to the provisions of subsections (4) to (7) (inclusive) of this section, a Judge of the Court of Appeal shall hold office until he attains the age of seventy years:

Provided that he may at any time resign his office.

(2) Notwithstanding that he has attained the age at which he is required by or under the provisions of this section to vacate his office a person holding the office of Judge of the Court of Appeal may, with the permission of the Governor-General, acting in accordance with the

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[The inclusion of this page is authorized by L.N. 5/1992]

advice of the Prime Minister, continue in office for such period after attaining that age as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him before he attained that age.

(3) Nothing done by a Judge of the Court of Appeal shall be invalid by reason only that he has attained the age at which he is required by this section to vacate his office.

(4) A Judge of the Court of Appeal may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of subsection (5) of this section.

(5) A Judge of the Court of Appeal shall be removed from office by the Governor-General by instrument under the Broad Seal if the question of the removal of that Judge from office has, at the request of the Governor-General made in pursuance of subsection (6) of this section, been referred by Her Majesty to the Judicial Committee of Her Majesty's Privy Council under section 4 of the Judicial Committee Act, 1833, or any other enactment enabling Her Majesty in that behalf, and the Judicial Committee has advised Her Majesty that the Judge ought to be removed from office for inability as aforesaid or for misbehaviour.

3 & 4 Will.  
4. c. 41.

(6) If the Prime Minister (in the case of the President of the Court of Appeal) or the President of the Court of Appeal after consultation with the Prime Minister (in the case of any other Judge) represents to the Governor-General that the question of removing a Judge of the Court of Appeal from office for inability as aforesaid or for misbehaviour ought to be investigated, then—

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[The inclusion of this page is authorized by L.N. 50/1979]

- (a) the Governor-General shall appoint a tribunal, which shall consist of a Chairman and not less than two other members, selected by the Governor-General on the advice of the Prime Minister (in the case of the President of the Court of Appeal) or of the President of the Court of Appeal (in the case of any other Judge) from among persons who hold or have held office as a Judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court;
- (b) that tribunal shall enquire into the matter and report on the facts thereof to the Governor-General and recommend to the Governor-General whether he should request that the question of the removal of that Judge should be referred by Her Majesty to the Judicial Committee; and
- (c) if the tribunal so recommends, the Governor-General shall request that the question should be referred accordingly.

(7) The provisions of the Commissions of Enquiry Act as in force immediately before the appointed day shall, subject to the provisions of this section and of the Third Schedule to this Constitution, apply as nearly as may be in relation to tribunals appointed under subsection (6) of this section or, as the context may require, to the members thereof as they apply in relation to Commissions or Commissioners appointed under that Act, and for that purpose shall have effect as if they formed part of this Constitution.

(8) If the question of removing a Judge of the Court of Appeal from office has been referred to a tribunal appointed under subsection (6) of this section, the Governor-General acting in accordance with the advice of the Prime

Minister (in the case of the President of the Court of Appeal) or of the President of the Court of Appeal after the President of the Court of Appeal has consulted with the Prime Minister (in the case of any other Judge), may suspend the Judge from performing the functions of his office.

(9) Any such suspension may at any time be revoked by the Governor-General, acting in accordance with the advice of the Prime Minister or the President of the Court of Appeal (as the case may be), and shall in any case cease to have effect if—

- (a) the tribunal recommends to the Governor-General that he should not request that the question of the removal of the Judge from office should be referred by Her Majesty to the Judicial Committee; or
- (b) the Judicial Committee advises Her Majesty that the Judge ought not to be removed from office.

(10) The provisions of this section shall be without prejudice to the provisions of subsection (2) of section 105 of this Constitution.

(11) The provisions of this section and of sections 107 and 108 of this Constitution shall not apply to the Chief Justice.

**107.—**(1) The Judges of the Court of Appeal shall receive such emoluments and be subject to such other terms and conditions of service as may from time to time be prescribed by or under any law:

Remuneration of Judges of Court of Appeal.

Provided that the emoluments and terms and conditions of service of such a Judge, other than allowances that are not taken into account in computing pensions, shall not be altered to his disadvantage during his continuance in office.

(2) The salaries for the time being payable to the Judges of the Court of Appeal under this Constitution shall be charged on and paid out of the Consolidated Fund.

Oaths to be taken by Judges of Court of Appeal.

**108.** A Judge of the Court of Appeal shall not enter upon the duties of his office unless he has taken and subscribed the oath of allegiance and the judicial oath in the forms set out in the First Schedule to this Constitution.

Number of Judges.

**109.** The Court of Appeal shall, when determining any matter other than an interlocutory matter, be composed of an uneven number of Judges, not being less than three.

### PART 3

#### *Appeals to Her Majesty in Council*

Appeals from Court of Appeal to Her Majesty in Council.

**110.—**(1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases—

- (a) where the matter in dispute on the appeal to Her Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards, final decisions in any civil proceedings;
- (b) final decisions in proceedings for dissolution or nullity of marriage;
- (c) final decisions in any civil, criminal or other proceedings on questions as to the interpretation of this Constitution; and
- (d) such other cases as may be prescribed by Parliament.

(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases—

- (a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and
- (b) such other cases as may be prescribed by Parliament.

(3) Nothing in this section shall affect any right of Her Majesty to grant special leave to appeal from decisions of the Court of Appeal to Her Majesty in Council in any civil or criminal matter.

(4) The provisions of this section shall be subject to the provisions of subsection (1) of section 44 of this Constitution.

(5) A decision of the Court of Appeal such as is referred to in this section means a decision of that Court on appeal from a Court of Jamaica.

PART 4

*Judicial Service Commission*

**111.**—(1) There shall be a Judicial Service Commission for Jamaica.

Composition  
of Judicial  
Service  
Commission.

(2) The members of the Judicial Service Commission shall be—

- (a) the Chief Justice who shall be Chairman;
- (b) the President of the Court of Appeal;

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[The inclusion of this page is authorized by L.N. 50/1979].

- (c) the Chairman of the Public Service Commission;  
and
- (d) three other members (hereinafter called "the appointed members") appointed in accordance with the provisions of subsection (3) of this section.

(3) The appointed members shall be appointed by the Governor-General, by instrument under the Broad Seal, acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition—

- (a) one from among persons who hold or have held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court;
- (b) two from a list of six persons, none of whom is an attorney-at-law in active practice, submitted by the General Legal Council:
- (c) [*Deleted by Act 15 of 1971.*]

15/1971  
S. 42.

Provided that no person shall be appointed under this subsection who holds or who is acting in any public office other than the office of member of the Public Service Commission or member of the Police Service Commission.

(4) The office of an appointed member of the Judicial Service Commission shall become vacant—

- (a) at the expiration of three years from the date of his appointment or at such earlier time as may be specified in the instrument by which he was appointed;
- (b) if he resigns his office;
- (c) if he is appointed to the office of President of the Court of Appeal, Chief Justice, Chairman of the Public Service Commission or to any public office

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[The inclusion of this page is authorized by L.N. 50/1979]

except the office of member of the Public Service Commission or member of the Police Service Commission;

- (d) if the Governor-General, acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition, directs that he shall be removed from office for inability to discharge the functions thereof (whether arising from infirmity of body or mind or any other cause) or for misbehaviour:

Provided that if the appointed member is a Judge of the Court of Appeal or a Judge of the Supreme Court, he shall not be so removed unless, in accordance with the provisions of section 106 or section 100 of this Constitution (as the case may be), he is removed from his office as a Judge.

(5) If the office of an appointed member is vacant or an appointed member is for any reason unable to perform the functions of his office, the Governor-General, on the recommendation of the Prime Minister after consultation with the Leader of the Opposition, may, by instrument under the Broad Seal, appoint a person, having the same qualifications for appointment as that member, to act as a member of the Commission and any person so appointed shall, subject to the provisions of subsection (4) of this section, continue to act until the office of the appointed member is filled or until his appointment is revoked by the Governor-General, acting as aforesaid.

(6) An appointed member shall not, within a period of three years commencing with the date on which he last held or acted in the office of appointed member, be eligible for appointment to any office power to make appointments to which is vested by this Constitution in the Governor-



General acting on the advice of the Judicial Service Commission:

Provided that nothing in this subsection shall prevent his being appointed to the office of Judge of the Court of Appeal or Judge of the Supreme Court.

(7) An appointed member shall receive such salary and allowances as may from time to time be prescribed by or under any law or by a resolution of the House of Representatives:

Provided that—

- (a) no such resolution may reduce any salary or allowance for the time being prescribed by or under a law; and
- (b) the salary of an appointed member shall not be reduced during his continuance in office.

(8) The salary for the time being payable to an appointed member under this Constitution shall be charged on and paid out of the Consolidated Fund.

(9) Nothing in subsection (7) of this section shall entitle the appointed member to any salary in respect of his office as such, if he is also a Judge of the Court of Appeal or a Judge of the Supreme Court.

(10) For the purposes of this section, "public office" does not include office as a member of any board, panel, committee or other similar body (whether incorporated or not) established by any law for the time being in force in Jamaica.

(11) [*Deleted by Act 15 of 1971.*]

Appoint-  
ment, etc.  
of judicial  
officers.

112.—(1) Power to make appointments to the offices to which this section applies and, subject to the provisions of subsections (3) and (4) of this section, to remove and to exercise disciplinary control over persons holding or acting

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[The inclusion of this page is authorized by L.N. 50/1979].

in such offices is hereby vested in the Governor-General acting on the advice of the Judicial Service Commission.

(2) This section applies to the offices of Resident Magistrate, Judge of the Traffic Court, Registrar of the Supreme Court, Registrar of the Court of Appeal and to such other offices connected with the courts of Jamaica as, subject to the provisions of this Constitution, may be prescribed by Parliament.

(3) Before the Governor-General acts in accordance with the advice of the Judicial Service Commission that any officer holding or acting in any office to which this section applies should be removed or that any penalty should be imposed on him by way of disciplinary control he shall inform the officer of that advice and, if the officer then applies for the case to be referred to the Privy Council, the Governor-General shall not act in accordance with the advice but shall refer the case to the Privy Council accordingly:

Provided that the Governor-General, acting on the advice of the Commission, may nevertheless suspend that officer from the exercise of his office pending the determination of the reference to the Privy Council.

(4) Where a reference is made to the Privy Council under the provisions of subsection (3) of this section, the Privy Council shall consider the case and shall advise the Governor-General what action should be taken in respect of the officer, and the Governor-General shall then act in accordance with such advice.

**113.** The Governor-General, acting on the advice of the Judicial Service Commission, may by instrument under the Broad Seal direct that, subject to such conditions as may be specified in that instrument, power to make appointments

Delegation  
of functions  
of Judicial  
Service  
Commission.

to such offices, being offices to which section 112 of this Constitution applies, as may be so specified shall (without prejudice to the exercise of such power by the Governor-General acting on the advice of the Judicial Service Commission) be exercisable by such one or more members of the Commission or by such other authority or public officer as may be so specified, but in any case where the person to be appointed under this section holds or is acting in any office power to make appointments to which is vested by this Constitution in the Governor-General acting on the advice of the Public Service Commission or the Police Service Commission, the person or authority specified in the aforesaid instrument shall consult with the Public Service Commission or the Police Service Commission, as the case may be, before making such appointment.

## CHAPTER VIII

### FINANCE

Consolidated Fund.

**114.** There shall be in and for Jamaica a Consolidated Fund, into which, subject to the provisions of any law for the time being in force in Jamaica, shall be paid all revenues of Jamaica.

Estimates.

**115.—(1)** The Minister responsible for finance shall, before the end of each financial year, cause to be prepared annual estimates of revenue and expenditure for public services during the succeeding financial year, which shall be laid before the House of Representatives.

(2) The estimates of expenditure shall show separately the sums required to meet statutory expenditure (as defined in subsection (4) of section 116 of this Constitution) and the sums required to meet other expenditure proposed to be paid out of the Consolidated Fund.

**116.—(1)** The Minister responsible for finance shall, in respect of each financial year, at the earliest convenient moment, introduce in the House of Representatives an Appropriation Bill containing, under appropriate heads for the several services required, the estimated aggregate sums which are proposed to be expended (otherwise than by way of statutory expenditure) during that financial year.

Authorisation of expenditure.

**(2) Whenever—**

- (a)** any monies are expended or are likely to be expended in any financial year on any services which are in excess of the sum provided for that service by the Appropriation law relating to that year; or
- (b)** any monies are expended or are likely to be expended (otherwise than by way of statutory expenditure) in any financial year upon any new service not provided for by the Appropriation law relating to that year,

statements of excess or, as the case may be, supplementary estimates shall be prepared by the Minister responsible for finance and shall be laid before and voted on by the House of Representatives; in respect of all supplementary expenditure so voted the Minister responsible for finance may, at any time before the end of the financial year, introduce into the House of Representatives a Supplementary Appropriation Bill containing, under appropriate heads, the estimated aggregate sums so voted, and shall, as soon as possible after the end of each financial year, introduce into the House of Representatives a final Appropriation Bill containing any such sums which have not yet been included in any Appropriation Bill.

**(3)** That part of any estimate of expenditure laid before the House of Representatives which shows statutory

expenditure shall not be voted on by the House of Representatives, and such expenditure shall, without further authority of Parliament, be paid out of the Consolidated Fund.

(4) For the purposes of this section and section 115 of this Constitution, "statutory expenditure" means—

- (a) expenditure charged on the Consolidated Fund or on the general revenues and assets of Jamaica by virtue of any of the provisions of this Constitution or by virtue of the provisions of any other law for the time being in force; and
- (b) the interest on the public debt, sinking fund payments, redemption monies, and the costs, charges and expenses incidental to the management of the public debt.

Meeting  
expenditure  
from Con-  
solidated  
Fund.

117.—(1) No sum shall be paid out of the Consolidated Fund except upon the authority of a warrant under the hand of the Minister responsible for finance.

(2) Subject to the provisions of subsections (3) and (4) of this section and section 118 of this Constitution, no such warrant shall be issued except in respect of sums granted for the specified public services by the Appropriation law for the financial year in respect of which the withdrawal is to take place or for service otherwise lawfully charged on the Consolidated Fund.

(3) The House of Representatives may, by resolution approving estimates containing a vote on account, authorise expenditure for part of any financial year before the passing of the Appropriation law for that year, but the aggregate sums so voted shall be included, under the appropriate heads, in the Appropriation Bill for that year.

(4) Where at any time Parliament has been dissolved before any provision or any sufficient provision is made under this Chapter of this Constitution for the carrying on of the government of Jamaica, the Minister responsible for finance may issue a warrant for the payment out of the Consolidated Fund of such sums as he may consider necessary for the continuance of the public services until the expiry of a period of three months commencing with the date on which the House of Representatives first meets after that dissolution, but a statement of the sums so authorised shall, as soon as practicable, be laid before and voted on by the House of Representatives and the aggregate sums so voted shall be included, under the appropriate heads, in the next Appropriation Bill.

118.—(1) Any law for the time being in force may create or authorise the creation of a Contingencies Fund and may authorise the Minister responsible for finance to make advances from that Fund if he is satisfied that there is an unforeseen need for expenditure for which no provision or no sufficient provision has been made by an Appropriation law. Contingen-  
cies Fund.

(2) Where any advance is made by virtue of an authorisation conferred under subsection (1) of this section, a supplementary estimate of the sum required to replace the amount so advanced shall, as soon as practicable, be laid before and voted on by the House of Representatives and the sum so voted shall be included in a Supplementary Appropriation Bill or a Final Appropriation Bill.

119.—(1) The public debt of Jamaica is hereby charged on the Consolidated Fund. Public  
debt.

(2) In this section references to the public debt of Jamaica include references to the interest on that debt, sinking fund payments and redemption monies in respect of

that debt and the costs, charges and expenses incidental to the management of that debt.

Auditor-  
General.

120.—(1) There shall be in and for Jamaica an Auditor-General who shall be appointed by the Governor-General by instrument under the Broad Seal.

(2) If the office of Auditor-General is vacant or the Auditor-General is for any reason unable to perform the functions of his office, the Governor-General may appoint a person to act as Auditor-General and any person so appointed shall, subject to the provisions of subsection (1) of section 121 of this Constitution, continue to act until the office of Auditor-General is filled or until his appointment is revoked by the Governor-General.

(3) A person who has held the office of Auditor-General shall not be eligible for appointment to any other public office.

(4) The Auditor-General shall receive such salary and allowances as may from time to time be prescribed by or under any law or by a resolution of the House of Representatives:

Provided that—

- (a) no such resolution may reduce any salary or allowance for the time being prescribed by or under a law; and
- (b) the salary of the Auditor-General shall not be reduced during his continuance in office.

(5) The salary for the time being payable to the Auditor-General under this Constitution shall be charged on and paid out of the Consolidated Fund.

(6) In the exercise of his powers under this section the Governor-General shall act in accordance with the recommendation of the Public Service Commission:

Provided that—

- (a) before he acts in accordance therewith he shall inform the Prime Minister of the nature of that recommendation and shall, if the Prime Minister so requires, once refer that recommendation (hereafter in this subsection called the “original recommendation”) back to the Public Service Commission for reconsideration; and
- (b) if, upon such reconsideration, the Public Service Commission submits a different recommendation, the provisions of this subsection and of subsection (2) of section 32 of this Constitution shall apply to that different recommendation as they apply to the original recommendation.

**121.**—(1) Subject to the provisions of subsections (3) to (6) (inclusive) of this section, the Auditor-General shall hold office until he attains the age of sixty years:

Tenure of  
office of  
Auditor-  
General.

Provided that—

- (a) he may at any time resign his office; and
- (b) the Governor-General, acting in the manner prescribed by subsection (6) of section 120 of this Constitution, may permit an Auditor-General who has attained the age of sixty years to remain in office until he has reached such later age, not exceeding sixty-five years, as may (before the Auditor-General has reached the age of sixty years) have been agreed between the Governor-General and the Auditor-General.



(2) Nothing done by the Auditor-General shall be invalid by reason only that he has attained the age at which he is required by this section to vacate his office.

(3) The Auditor-General may be removed from office only for inability to discharge the functions thereof (whether arising from infirmity of body or mind or any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of subsection (4) of this section.

(4) The Auditor-General shall be removed from office by the Governor-General by instrument under the Broad Seal if the question of his removal from office has been referred to a tribunal appointed under subsection (5) of this section and the tribunal has recommended to the Governor-General that he ought to be removed from office for inability as aforesaid or for misbehaviour.

(5) If the Prime Minister or the Chairman of the Public Service Commission advises the Governor-General that the question of removing the Auditor-General from office for inability as aforesaid or for misbehaviour ought to be investigated, then—

- (a) the Governor-General shall appoint a tribunal, which shall consist of a Chairman and not less than two other members, selected by the Governor-General, acting on the advice of the Chief Justice, from among persons who hold or have held the office of a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court; and
- (b) that tribunal shall enquire into the matter and report on the facts thereof to the Governor-General and recommend to the Governor-General

whether the Auditor-General ought to be removed from office for inability as aforesaid or for misbehaviour.

(6) The provisions of the Commissions of Enquiry Act as in force immediately before the appointed day shall, subject to the provisions of this section and of the Third Schedule to this Constitution, apply as nearly as may be in relation to tribunals appointed under subsection (5) of this section or, as the context may require, to the members thereof as they apply in relation to Commissions or Commissioners appointed under that Act, and for that purpose shall have effect as if they formed part of this Constitution.

(7) If the question of removing the Auditor-General from office has been referred to a tribunal under subsection (5) of this section, the Governor-General acting in the manner prescribed by subsection (6) of section 120 of this Constitution, may suspend the Auditor-General from performing the functions of his office and any such suspension may at any time be revoked by the Governor-General, acting as aforesaid, and shall in any case cease to have effect if the tribunal recommends to the Governor-General that the Auditor-General should not be removed from office.

122.—(1) The accounts of the Court of Appeal, the accounts of the Supreme Court, the accounts of the offices of the Clerks to the Senate and the House of Representatives and the accounts of all departments and offices of the Government of Jamaica (including the offices of the Cabinet, the Judicial Service Commission, the Public Service Commission and the Police Service Commission but excluding the department of the Auditor-General) shall, at least once in every year, be audited and reported on by the Auditor-General who, with his subordinate staff, shall at all times

Functions  
of Auditor-  
General.

be entitled to have access to all books, records, returns and reports relating to such accounts.

(2) The Auditor-General shall submit his reports made under subsection (1) of this section to the Speaker (or, if the office of Speaker is vacant or the Speaker is for any reason unable to perform the functions of his office, to the Deputy Speaker) who shall cause them to be laid before the House of Representatives.

(3) In the exercise of his functions under the provisions of subsections (1) and (2) of this section, the Auditor-General shall not be subject to the direction or control of any other person or authority.

(4) The accounts of the department of the Auditor-General shall be audited and reported on by the Minister responsible for finance, and the provisions of subsections (1) and (2) of this section shall apply in relation to the exercise by that Minister of those functions as they apply in relation to audits and reports made by the Auditor-General.

(5) Nothing in this section shall prevent the performance by the Auditor-General of—

- (a) such other functions in relation to the accounts of the Government of Jamaica and the accounts of other public authorities and other bodies administering public funds in Jamaica as may be prescribed by or under any law for the time being in force in Jamaica; or
- (b) such other functions in relation to the supervision and control of expenditure from public funds in Jamaica as may be so prescribed; or
- (c) such other functions in relation to the accounts of any other government as he may be empowered

to perform by any authority competent in that behalf.

## CHAPTER IX

### THE PUBLIC SERVICE

#### PART 1

##### *General*

**123.** For the purposes of this Chapter of this Constitution, “public office” does not include office as a member of any board, panel, committee or other similar body (whether incorporated or not) established by any law for the time being in force in Jamaica. Interpretation.

**124.—(1)** There shall be a Public Service Commission for Jamaica consisting of a Chairman and such number of other members, being not less than three nor more than five, as the Governor-General, acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition, may from time to time decide. Public Service Commission.

(2) The members of the Public Service Commission shall be appointed by the Governor-General, acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition, by instrument under the Broad Seal:

Provided that one such member shall be so appointed by the Governor-General from a list of persons, not disqualified for appointment under this section, submitted by the Jamaica Civil Service Association (or any other body representing members of the public service which may from time to time, in the opinion of the Governor-General acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition, have succeeded to the functions of that Association).

(3) No person shall be qualified to be appointed as a member of the Public Service Commission if he holds or is acting in any public office other than the office of member of the Judicial Service Commission or member of the Police Service Commission.

(4) A member of the Public Service Commission shall not, within a period of three years commencing with the date on which he last held or acted in that office, be eligible for appointment to any office power to make appointments to which is vested by this Constitution in the Governor-General acting on the advice of the Public Service Commission.

(5) The office of a member of the Public Service Commission shall become vacant—

- (a) at the expiration of five years from the date of his appointment or such earlier time as may be specified in the instrument by which he was appointed;
- (b) if he resigns his office;
- (c) if he is appointed to any public office other than the office of member of the Judicial Service Commission or member of the Police Service Commission; or
- (d) if the Governor-General, acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition, directs that he shall be removed from office for inability to discharge the functions thereof (whether arising from infirmity of body or mind or any other cause) or for misbehaviour.

(6) If the office of a member of the Public Service Commission is vacant or a member is for any reason unable

to perform the functions of his office, the Governor-General, acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition, may appoint a person who is qualified for appointment as a member of the Commission to act as a member of the Commission, and any person so appointed shall, subject to the provisions of subsection (5) of this section, continue to act until the office of the member of the Commission is filled or until his appointment is revoked by the Governor-General acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition.

(7) The members of the Public Service Commission shall receive such salaries and allowances as may from time to time be prescribed by or under any law or by a resolution of the House of Representatives:

Provided that—

- (a) no such resolution may reduce any salary or allowance for the time being prescribed by or under a law; and
- (b) the salary of a member of the Public Service Commission shall not be reduced during his continuance in office.

(8) The salaries for the time being payable to members of the Public Service Commission under this Constitution shall be charged on and paid out of the Consolidated Fund.

**125.**—(1) Subject to the provisions of this Constitution, power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in any such offices is hereby vested in the Governor-General acting on the advice of the Public Service Commission.

Appoint-  
ment, etc.,  
of public  
officers.

(2) Before the Public Service Commission advises the appointment to any public office of any person holding or acting in any office power to make appointments to which is vested by this Constitution in the Governor-General acting on the advice of the Judicial Service Commission or the Police Service Commission, it shall consult with the Judicial Service Commission or the Police Service Commission, as the case may be.

(3) Before the Governor-General acts in accordance with the advice of the Public Service Commission that any public officer should be removed or that any penalty should be imposed on him by way of disciplinary control, he shall inform the officer of that advice and if the officer then applies for the case to be referred to the Privy Council, the Governor-General shall not act in accordance with the advice but shall refer the case to the Privy Council accordingly:

Provided that the Governor-General, acting on the advice of the Commission, may nevertheless suspend that officer from the exercise of his office pending the determination of the reference to the Privy Council.

(4) Where a reference is made to the Privy Council under the provisions of subsection (3) of this section, the Privy Council shall consider the case and shall advise the Governor-General what action should be taken in respect of the officer, and the Governor-General shall then act in accordance with such advice.

(5) Except for the purpose of making appointments thereto or to act therein or of revoking an appointment to act therein, the provisions of this section shall not apply in relation to the office of the Director of Public Prosecutions.

126.—(1) Subject to the provisions of subsection (2) of this section, power to make appointments to the office of Permanent Secretary (other than appointments on transfer from another such office carrying the same salary) is hereby vested in the Governor-General acting on the recommendation of the Public Service Commission.

Permanent Secretaries.

(2) Before the Governor-General acts in accordance with a recommendation of the Public Service Commission made under subsection (1) of this section, he shall consult the Prime Minister who may once require that recommendation (hereafter in this subsection called the “original recommendation”) to be referred back to the Public Service Commission for reconsideration; and if, upon such reconsideration, the Public Service Commission submits a different recommendation, the provisions of this subsection and of subsection (2) of section 32 of this Constitution shall apply thereto as they apply to an original recommendation.

(3) Power to make appointments to any office of Permanent Secretary on transfer from another such office carrying the same salary is hereby vested in the Governor-General acting on the recommendation of the Prime Minister.

(4) For the purposes of this section the office of Financial Secretary shall be deemed to be the office of a Permanent Secretary.

127.—(1) The Governor-General, acting on the advice of the Public Service Commission, may by instrument under the Broad Seal direct that, subject to such conditions as may be specified in that instrument, power to make appointments to such offices, being offices to which this section applies, as may be so specified and power to remove and

Delegation of functions of Public Service Commission.



power to exercise disciplinary control over persons holding or acting in those offices, or any of those powers, shall (without prejudice to the exercise of such power by the Governor-General acting on the advice of the Public Service Commission) be exercisable by such one or more members of the Public Service Commission or by such other authority or public officer as may be so specified.

(2) In relation to any power made exercisable under subsection (1) of this section by some person or authority other than the Governor-General acting on the advice of the Public Service Commission, the offices to which this section applies are all offices in respect of which that power is, apart from this section, vested by this Constitution in the Governor-General acting on such advice.

(3) In any case where an appointment is to be made by virtue of an instrument made under this section and the person to be appointed holds or is acting in any office power to make appointments to which is vested by this Constitution in the Governor-General acting on the advice of the Judicial Service Commission or the Police Service Commission, the person or authority specified in the said instrument shall consult with the Judicial Service Commission or the Police Service Commission, as the case may be, before making the appointment.

(4) Where, by virtue of an instrument made under this section, the power to remove or to exercise disciplinary control over any officer has been exercised by a person or authority other than the Governor-General acting on the advice of the Public Service Commission, the officer in respect of whom it was so exercised may apply for the case to be referred to the Privy Council, and thereupon the action of the aforesaid person or authority shall cease to have effect and the case shall be referred to the Privy Council accordingly and the Governor-General shall then

take such action in respect of that officer as the Privy Council may advise:

Provided that—

- (a) where the action of the aforesaid person or authority included the removal of that officer or his suspension from the exercise of his office, that person or authority may nevertheless suspend him from the exercise of his office pending the determination of the reference to the Privy Council; and
- (b) before advising the Governor-General under this subsection, the Privy Council shall consult with the Public Service Commission.

128.—(1) Power to appoint persons to hold or act in the offices to which this section applies (including power to make appointments on promotion and transfer and to confirm appointments) and to remove persons so appointed from any such office shall vest in the Governor-General, acting in accordance with the advice of the Prime Minister.

Appoint-  
ment, etc.,  
of principal  
representa-  
tives of  
Jamaica  
abroad.

(2) Before tendering any advice for the purposes of this section in relation to any person who holds or acts in any public office other than an office to which this section applies, the Prime Minister shall consult the Public Service Commission.

(3) The offices to which this section applies are the offices of any Ambassador, High Commissioner or other principal representative of Jamaica in countries other than Jamaica.

## PART 2

### *Police*

129.—(1) There shall be a Police Service Commission for Jamaica consisting of a Chairman and such number of other members, being not less than two nor more than four, as

Police  
Service  
Commis-  
sion.

the Governor-General, acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition, may from time to time decide.

(2) The members of the Police Service Commission shall be appointed by the Governor-General on the recommendation of the Prime Minister after consultation with the Leader of the Opposition, by instrument under the Broad Seal.

(3) No person shall be qualified to be appointed as a member of the Police Service Commission if he holds or is acting in any public office other than the office of member of the Judicial Service Commission or member of the Public Service Commission.

(4) A member of the Police Service Commission shall not, within a period of three years commencing with the date on which he last held or acted in that office, be eligible for appointment to any office power to make appointments to which is vested by this Constitution in the Governor-General acting on the advice of the Police Service Commission.

(5) The office of a member of the Police Service Commission shall become vacant—

- (a) at the expiration of five years from the date of his appointment or such earlier time as may be specified in the instrument by which he was appointed;
- (b) if he resigns his office;
- (c) if he is appointed to any public office other than the office of member of the Judicial Service Commission or member of the Public Service Commission;

(d) if the Governor-General, acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition, directs that he shall be removed from office for inability to discharge the functions thereof (whether arising from infirmity of body or mind or any other cause) or for misbehaviour.

(6) If the office of a member of the Police Service Commission is vacant or a member is for any reason unable to perform the functions thereof, the Governor-General, acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition, may appoint a person who is qualified for appointment as a member of the Commission to act as a member of the Commission, and any person so appointed shall, subject to the provisions of subsection (5) of this section, continue to act until the office of the member of the Commission is filled or until his appointment is revoked by the Governor-General, acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition.

(7) The members of the Police Service Commission shall receive such salaries and allowances as may from time to time be prescribed by or under any law or by a resolution of the House of Representatives:

Provided that—

(a) no such resolution may reduce any salary or allowance for the time being prescribed by or under a law; and

(b) the salary of a member of the Police Service Commission shall not be reduced during his continuance in office.

(8) The salaries for the time being payable to members of the Police Service Commission under this

Constitution shall be charged on and paid out of the Consolidated Fund.

Appoint-  
ment, etc.,  
of police  
officers.

**130.** Section 125 of this Constitution (with the substitution therein of the words "the Police Service Commission" for the words "the Public Service Commission" wherever the same occur and of the words "the Public Service Commission" for the words "the Police Service Commission" in subsection (2) thereof) shall apply in relation to police officers as it applies in relation to other public officers.

Delegation  
of functions  
of Police  
Service  
Commis-  
sion.

**131.—(1)** The Governor-General, acting on the advice of the Police Service Commission, may by instrument under the Broad Seal direct that, subject to such conditions as may be specified in that instrument, power to make appointments to such offices, being offices to which this section applies, as may be so specified and power to remove and power to exercise disciplinary control over persons holding or acting in those offices, or any of those powers shall (without prejudice to the exercise of such power by the Governor-General acting on the advice of the Police Service Commission) be exercisable by such one or more members of the Police Service Commission or by such other authority or public officer as may be so specified.

(2) The offices to which this section applies are the offices of all police officers not above the rank of inspector.

(3) In any case where an appointment is to be made by virtue of an instrument made under this section and the person to be appointed holds or is acting in any office power to make appointments to which is vested by this Constitution in the Governor-General acting on the advice of the Judicial Service Commission or the Public Service Commission, the person or authority specified in the said instrument shall consult with the Judicial Service

Commission or the Public Service Commission, as the case may be, before making the appointment.

(4) Where, by virtue of an instrument made under this section, the power to remove or to exercise disciplinary control over any officer has been exercised by a person or authority other than the Governor-General acting on the advice of the Police Service Commission, the officer in respect of whom it was so exercised may apply for the case to be referred to the Privy Council, and thereupon the action of the aforesaid person or authority shall cease to have effect and the case shall be referred to the Privy Council accordingly; and the Governor-General shall then take such action in respect of that officer as the Privy Council may advise:

Provided that—

- (a) where the action of the aforesaid person or authority includes the removal of that officer or his suspension from the exercise of his office, that person or authority may nevertheless suspend him from the exercise of his office pending the determination of the reference to the Privy Council; and
- (b) before advising the Governor-General under this subsection, the Privy Council shall consult with the Police Service Commission.

### PART 3

#### *Pensions*

132.—(1) Subject to the provisions of section 134 of this Constitution, the law applicable to the grant and payment to any officer, or to his widow, children, dependants or personal representatives, of any pension, compensations, gratuity or other like allowance (in this section and in sections 133 and 134 of this Constitution referred to as

Applic-  
ability  
of pension  
law.

an "award") in respect of the service of that officer in a public office shall be that in force on the relevant day or any later law not less favourable to the person concerned.

(2) For the purposes of this section the relevant day is—

- (a) in relation to an award granted before the appointed day, the day on which the award was granted;
- (b) in relation to an award granted or to be granted on or after the appointed day to or in respect of a person who was a public officer before that day, the day immediately before that day;
- (c) in relation to an award granted or to be granted to or in respect of a person who first becomes a public officer on or after the appointed day, the day on which he becomes a public officer.

(3) For the purposes of this section, in so far as the law applicable to an award depends on the option of the person to or in respect of whom it is granted or to be granted, the law for which he opts shall be taken to be more favourable to him than any other law for which he might have opted.

(4) For the purposes of this section and of sections 133 and 134 of this Constitution, service as a Judge of the Court of Appeal or as a Judge of the Supreme Court shall be deemed to be public service.

Pensions,  
etc., to be  
charged on  
Consolida-  
ted Fund.

**133.** Awards granted under any law for the time being in force in Jamaica in respect of the public service shall be charged on and paid out of the Consolidated Fund.

Grant and  
withholding  
of pensions,  
etc.

**134.—(1)** The power to grant any award under any pensions law for the time being in force in Jamaica (other

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[The inclusion of this page is authorized by L.N. 50/1979]

than an award to which, under that law, the person to whom it is payable is entitled as of right) and, in accordance with any provisions in that behalf contained in any such law, to withhold, reduce in amount or suspend any award payable under any such law is hereby vested in the Governor-General.

(2) The power vested in the Governor-General by subsection (1) of this section shall be exercised by him—

(a) in the case of an award payable to a person who, having been a public officer, was immediately before the date on which he ceased to hold public office, serving—

(i) as a Judge of the Court of Appeal;

(ii) as a Judge of the Supreme Court;

(iii) in any office to which section 112 of this Constitution applies at the date of the exercise of the power,

on the recommendation of the Judicial Service Commission;

(b) in the case of an award payable to a person who, having been a public officer, was, immediately before the date aforesaid, serving as a police officer, on the recommendation of the Police Service Commission; and

(c) in the case of an award payable to any other person, on the recommendation of the Public Service Commission.

(3) In this section, “pensions law” means any law relating to the grant to any person, or to the widow, children, dependants or personal representatives of that person, of an award in respect of the services of that person in a public office, and includes any instrument made under any such law.



## CHAPTER X

## MISCELLANEOUS

Powers and  
procedure  
of Com-  
missions.

**135.**—(1) In relation to any Commission established by this Constitution, the Governor-General, acting in accordance with the advice of the Commission, may by regulation or otherwise regulate its procedure and, subject to the consent of the Prime Minister or such other Minister as may be authorised in that behalf by the Prime Minister, confer powers and impose duties on any public officer or any authority of the Government of Jamaica for the purpose of the discharge of the functions of the Commission.

(2) At any meeting of any Commission established by this Constitution a quorum shall be constituted if three members are present. If a quorum is present the Commission shall not be disqualified for the transaction of business by reason of any vacancy among its members and any proceedings of the Commission shall be valid notwithstanding that some person who was not entitled so to do took part therein.

(3) Any question proposed for decision at any meeting of any Commission established by this Constitution shall be determined by a majority of the votes of the members thereof present and voting, and if on any such question the votes are equally divided the member presiding shall have and exercise a casting vote.

Protection  
of Com-  
missions,  
etc., from  
legal pro-  
ceedings.

**136.** The question whether—

- (a) any Commission established by this Constitution has validly performed any function vested in it by or under this Constitution;
- (b) any member of such a Commission or any other person or authority has validly performed any function delegated to such member, person or

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[The inclusion of this page is authorized by L.N. 50/1979]

authority in pursuance of the provisions of section 113 or, as the case may be, of section 127 or of section 131 of this Constitution; or

- (c) any member of such a Commission or any other person or authority has validly performed any other function in relation to the work of the Commission or in relation to any such function as is referred to in paragraph (b) of this section, shall not be enquired into in any court.

**137.—**(1) Any person who is appointed, elected or otherwise selected to any office established by this Constitution (including the office of Prime Minister or other Minister or Parliamentary Secretary) may resign from that office by writing under his hand addressed to the person or authority by whom he was appointed, elected or selected:

Resignations.

Provided that in the case of—

- (a) a person who holds office as President or Deputy President of the Senate his resignation from that office shall be addressed to the Senate;
- (b) a person who holds office as Speaker or Deputy Speaker his resignation from that office shall be addressed to the House of Representatives;
- (c) a member of the House of Representatives his resignation from the House shall be addressed to the Speaker.

(2) The resignation of any person from any such office as aforesaid shall take effect when the writing signifying the resignation is received by the person or authority to whom it is addressed or any person authorised by that person or authority to whom it is addressed or by this Constitution to receive it.

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(3) A resignation that is required to be addressed to the President or Speaker shall, if the office of President or Speaker (as the case may be) is vacant, or the President or Speaker is absent from Jamaica, be received by the Deputy President or Deputy Speaker on behalf of the President or Speaker.

Re-appointments, etc.

**138.**—(1) Where any person has vacated any office established by this Constitution (including the office of Prime Minister or other Minister or Parliamentary Secretary) he may, if qualified, again be appointed, elected or otherwise selected to hold that office in accordance with the provisions of this Constitution.

(2) Without prejudice to the provisions of subsection (3) of this section, when the holder of any office constituted by or under this Constitution is on leave of absence pending relinquishment of that office, the person or authority having power to make appointments to that office may appoint another person thereto.

(3) Where two or more persons are holding the same office by reason of an appointment made pursuant to subsection (2) of this section, the person last appointed shall, in respect of any function conferred on the holder of that office, be deemed to be the sole holder of that office.

FIRST SCHEDULE

Sections 28,  
29(2), 42 (2),  
43(2), 62, 74,  
78(4), 102  
and 108.

OATHS

*Oath of Allegiance*

I, ....., do swear that I will be faithful and bear true allegiance to Jamaica, that I will uphold and defend the Constitution and the laws of Jamaica and that I will conscientiously and impartially discharge my responsibilities to the people of Jamaica. So help me God. 36/2002 S. 2 (a).

*Oath for the due execution of the office of Prime Minister or other Minister or Parliamentary Secretary*

I, ....., being appointed Prime Minister/Minister/Parliamentary Secretary, do swear that I will to the best of my judgment, at all times when so required, freely give my counsel and advice to the Governor-General (or any other person for the time being lawfully performing the functions of that office) for the good management of the public affairs of Jamaica, and I do further swear that I will not on any account, at any time whatsoever, disclose the counsel, advice, opinion or vote of any particular Minister or Parliamentary Secretary and that I will not, except with the authority of the Cabinet and to such extent as may be required for the good management of the affairs of Jamaica, directly or indirectly reveal the business or proceedings of the Cabinet or the nature or contents of any documents communicated to me as a Minister/Parliamentary Secretary or any matter coming to my knowledge in my capacity as such and that in all things I will be a true and faithful Prime Minister/Minister/Parliamentary Secretary. So help me God.

*Judicial Oath*

I, ....., do swear that I will be faithful and bear true allegiance to Jamaica, that I will uphold and defend the Constitution of Jamaica and that I will administer justice to all persons alike in accordance with the laws and usages of Jamaica without fear or favour, affection or ill will. So help me God. 36/2002 S. 2 (b).

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[The inclusion of this page is authorized by L.N. 88/2003]

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## Section 67

## SECOND SCHEDULE

*Number and Boundaries of Constituencies*

1. The number of constituencies shall be such as will most conveniently permit the application of paragraphs 2 to 5 (inclusive) of this Schedule.

2.—(1) The boundary of a constituency shall not cross the boundary of a Parish as delimited by the Counties and Parishes Act or by any law amending or replacing that law.

(2) There shall be at least two constituencies in each such parish.

3. Subject to the provisions of paragraphs 2 and 4 of this Schedule, the boundaries of each constituency shall be such that the number of the electorate thereof is as nearly equal to the electorate quota as is reasonably practicable.

4. The electorate of a constituency may be greater or less than the electorate quota in order to take account of—

- (a) the varying physical features and transportation facilities within Jamaica; and
- (b) the difference between urban and rural areas in respect of density of population:

Provided that, subject to the provisions of paragraph 2 of this Schedule, the electorate of a constituency shall not—

- (i) exceed the electorate quota by more than fifty per centum; or
- (ii) be less than sixty-six and two-thirds per centum of the electorate quota.

5. For the purposes of this Schedule—

- (a) the electorate of a constituency means the number of persons whose names appear on the official lists of electors for the area comprised in that constituency in force on the enumeration date under the law for the time being regulating the conduct of elections;
- (b) the “enumeration date” means, in relation to any report of the Standing Committee, the date on which the notice with respect to that report is published in accordance with subsection (7) of section 67 of this Constitution; and
- (c) the “electorate quota” means the number obtained by dividing the total of the electorate of all the constituencies by the number of constituencies into which the Standing Committee recommends Jamaica should be divided.

## THIRD SCHEDULE

Sections  
96(7), 100(7),  
106(7) and  
121 (6).

*Provisions Relating to Applicability of the Commissions of Enquiry  
Act to Tribunals Appointed under this Constitution*

1. The following provisions of the Act shall not apply, that is to say:—

- (a) section 2—whole section;
- (b) section 3—so much of the section as follows the words “in his place”;
- (c) section 5—whole section;
- (d) section 7—the words “after taking such oath or affirmation”;
- (e) section 15—whole section.

2. In section 13 there shall be substituted for the words “Such sums, so directed to be paid, shall be paid by the Accountant-General out of the ordinary cash balance in the Treasury”, the words “Such sums so directed to be paid, shall be charged on and paid out of the Consolidated Fund”.

3. All powers and duties conferred or imposed on the Governor-General under the Act shall be exercised or performed by him acting in each case in the manner prescribed by this Constitution.

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EXPLANATORY NOTE

*(This Note is not part of the Order, but is intended to indicate its general purport).*

By virtue of the Jamaica Independence Act, 1962, Jamaica will attain fully responsible status within the Commonwealth on the 6th August, 1962. This Order makes provision for a new Constitution for Jamaica with effect from that date, including provision for the executive government, the legislature, the judicature and the public service. The Constitution also contains provision relating to citizenship of Jamaica and fundamental rights and freedoms of the individual.

JAMAICA

No. 12 – 2011

I assent,

[L.S.]

(sgd) P. L. Allen  
Governor-General

7<sup>th</sup> April 2011

AN ACT to Amend the Constitution of Jamaica to provide for a Charter of Fundamental Rights and Freedoms and for connected matters.

WHEREAS a Constitutional Commission established by Parliament recommended, after wide public consultation and due deliberation, that Chapter III of the Constitution of Jamaica should be replaced by a new Chapter which provides more comprehensive and effective protection for the fundamental rights and freedoms of all persons in Jamaica:

AND WHEREAS the recommendations of the Constitutional Commission were endorsed by a Joint Select Committee of Parliament and by resolutions of the House of Representatives and of the Senate:

AND WHEREAS successive Joint Select Committees of both Houses of Parliament gave further consideration to the recommendations and received and considered representations made by members of the public in relation thereto and made recommendations thereon:

[ 8th April, 2011 ]

NOW, THEREFORE, BE IT ENACTED by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and House of Representatives of Jamaica in accordance with the provisions of section 49 of the Constitution of Jamaica, and by the authority of the same, as follows:—

Short title  
and  
construction.

1. This Act may be cited as the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, and shall be read and construed as one with the Constitution of Jamaica (hereinafter referred to as the "Constitution") and all amendments thereto.

Repeal and  
replacement  
of Chapter  
III of  
Constitution.

2. Chapter III of the Constitution is repealed and the following substituted therefor—

“

### CHAPTER III

#### CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS

Fundamental  
rights and  
freedoms.

13.—(1) Whereas—

- (a) the state has an obligation to promote universal respect for, and observance of, human rights and freedoms;
- (b) all persons in Jamaica are entitled to preserve for themselves and future generations the fundamental rights and freedoms to which they are entitled by virtue of their inherent dignity as persons and as citizens of a free and democratic society; and
- (c) all persons are under a responsibility to respect and uphold the rights of others recognized in this Chapter,



the following provisions of this Chapter shall have effect for the purpose of affording protection to the rights and freedoms of persons as set out in those provisions, to the extent that those rights and freedoms do not prejudice the rights and freedoms of others.

(2) Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society—

- (a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and
- (b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.

(3) The rights and freedoms referred to in subsection (2) are as follows—

- (a) the right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted;
- (b) the right to freedom of thought, conscience, belief and observance of political doctrines;
- (c) the right to freedom of expression;
- (d) the right to seek, receive, distribute or disseminate information, opinions and ideas through any media;

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- (e) the right to freedom of peaceful assembly and association;
- (f) the right to freedom of movement, that is to say, the right—
  - (i) of every citizen of Jamaica to enter Jamaica; and
  - (ii) of every person lawfully in Jamaica, to move around freely throughout Jamaica, to reside in any part of Jamaica and to leave Jamaica;
- (g) the right to equality before the law;
- (h) the right to equitable and humane treatment by any public authority in the exercise of any function;
- (i) the right to freedom from discrimination on the ground of—
  - (i) being male or female;
  - (ii) race, place of origin, social class, colour, religion or political opinions;
- (j) the right of everyone to—
  - (i) protection from search of the person and property;
  - (ii) respect for and protection of private and family life, and privacy of the home; and
  - (iii) protection of privacy of other property and of communication;

- (k) the right of every child—
  - (i) to such measures of protection as are required by virtue of the status of being a minor or as part of the family, society and the State;
  - (ii) who is a citizen of Jamaica, to publicly funded tuition in a public educational institution at the pre-primary and primary levels;
- (l) the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage;
- (m) the right of every citizen of Jamaica—
  - (i) who is qualified to be registered as an elector for elections to the House of Representatives, to be so registered; and
  - (ii) who is so registered, to vote in free and fair elections;
- (n) the right of every citizen of Jamaica to be granted a passport and not to be denied or deprived thereof except by due process of law;
- (o) the right to protection from torture, or inhuman or degrading punishment or other treatment as provided in subsections (6) and (7);
- (p) the right to freedom of the person as provided in section 14;

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- (q) the protection of property rights as provided in section 15;
- (r) the right to due process as provided in section 16; and
- (s) the right to freedom of religion, as provided in section 17.

(4) This Chapter applies to all law and binds the legislature, the executive and all public authorities.

(5) A provision of this Chapter binds natural or juristic persons if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right.

(6) No person shall be subjected to torture or inhuman or degrading punishment or other treatment.

(7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (6) to the extent that the law in question authorizes the infliction of any description of punishment which was lawful in Jamaica immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011.

(8) The execution of a sentence of death imposed after the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, on any person for an offence against the law of Jamaica, shall not be held to be inconsistent with, or in contravention of, this section by reason of—

- (a) the length of time which elapses between the date on which the sentence is imposed and the date on which the sentence is executed; or

(b) the physical conditions or arrangements under which such person is detained pending the execution of the sentence by virtue of any law or practice in force immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011.

(9) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (3)(f) of this section and sections 14 and 16(3), to the extent that the law authorizes the taking, in relation to persons detained or whose freedom of movement has been restricted by virtue of that law, of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during a period of public emergency or public disaster.

(10) A person, who is detained or whose freedom of movement has been restricted by virtue only of a law referred to in subsection (9), may request a review of his case at any time during the period of detention or restriction, but any request subsequent to the initial request shall not be made earlier than six weeks after he last made such a request, and if he makes such a request, his case shall be reviewed promptly by an independent and impartial tribunal which shall be immediately established pursuant to law and presided over by a person appointed by the Chief Justice of Jamaica from among persons qualified to be appointed as a Judge of the Supreme Court.

(11) On any review by a tribunal in pursuance of subsection (10), of the case of any person who is detained or whose freedom of movement has been restricted, the tribunal may give directions to the authority by whom such detention or restriction was ordered

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concerning the continued detention or restriction of movement of that person and the authority shall act in accordance with such directions.

(12) Nothing contained in or done under the authority of any law in force immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, relating to—

- (a) sexual offences;
- (b) obscene publications; or
- (c) offences regarding the life of the unborn,

shall be held to be inconsistent with or in contravention of the provisions of this Chapter.

(13) In this section “public educational institution” means an all-age school, a pre-primary school or a primary school that is maintained or assisted by the Government.

Protection of  
freedom of  
the person.

14.—(1) No person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law in the following circumstances—

- (a) in consequence of his unfitness to plead to a criminal charge;
- (b) in execution of the sentence or order of a court whether in Jamaica or elsewhere, in respect of a criminal offence of which he has been convicted;
- (c) in execution of an order of the Supreme Court or of the Court of Appeal or such other court as may be prescribed by Parliament on the grounds of his contempt of any such court or of another court or tribunal;

- (d) in execution of the order of a court made in order to secure the fulfilment of any obligation imposed on him by law;
- (e) for the purpose of bringing him before a court in execution of the order of a court;
- (f) the arrest or detention of a person—
  - (i) for the purpose of bringing him before the competent legal authority on reasonable suspicion of his having committed an offence; or
  - (ii) where it is reasonably necessary to prevent his committing an offence;
- (g) in the case of a person who has not attained the age of eighteen years, for the purpose of his care and protection;
- (h) the detention of a person—
  - (i) for the prevention of the spreading of an infectious or contagious disease constituting a serious threat to public health; or
  - (ii) suffering from mental disorder or addicted to drugs or alcohol where necessary for his care or treatment or for the prevention of harm to himself or others; or
- (i) the arrest or detention of a person—
  - (i) who is not a citizen of Jamaica, to prevent his unauthorized entry into Jamaica; or
  - (ii) against whom action is being taken with a view to deportation or extradition or other lawful removal or the taking of proceedings relating thereto.

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(2) Any person who is arrested or detained shall have the right—

- (a) to communicate with and be visited by his spouse, partner or family member, religious counsellor and a medical practitioner of his choice;
- (b) at the time of his arrest or detention or as soon as is reasonably practicable, to be informed, in a language which he understands, of the reasons for his arrest or detention;
- (c) where he is charged with an offence, to be informed forthwith, in a language which he understands, of the nature of the charge; and
- (d) to communicate with and retain an attorney-at-law.

(3) Any person who is arrested or detained shall be entitled to be tried within a reasonable time and—

- (a) shall be—
  - (i) brought forthwith or as soon as is reasonably practicable before an officer authorized by law, or a court; and
  - (ii) released either unconditionally or upon reasonable conditions to secure his attendance at the trial or at any other stage of the proceedings; or
- (b) if he is not released as mentioned in paragraph (a)(ii), shall be promptly brought before a court which may thereupon release him as provided in that paragraph.



(4) Any person awaiting trial and detained in custody shall be entitled to bail on reasonable conditions unless sufficient cause is shown for keeping him in custody.

(5) Any person deprived of his liberty shall be treated humanely and with respect for the inherent dignity of the person.

Protection of  
property  
rights.

15.—(1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under the provisions of a law that—

- (a) prescribes the principles on which and the manner in which compensation therefor is to be determined and given; and
- (b) secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of—
  - (i) establishing such interest or right (if any);
  - (ii) determining the compensation (if any) to which he is entitled; and
  - (iii) enforcing his right to any such compensation.

(2) Nothing in this section shall be construed as affecting the making or operation of any law so far as it provides for the taking of possession or acquisition of property—

- (a) in satisfaction of any tax, rate or due;
- (b) by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence;

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- (c) upon the attempted removal of the property in question out of or into Jamaica in contravention of any law;
- (d) by way of the taking of a sample for the purposes of any law;
- (e) where the property consists of an animal, upon its being found trespassing or straying;
- (f) as an incident of a lease, tenancy, licence, mortgage, charge, bill of sale, pledge or contract;
- (g) by way of the vesting or administration of trust property, enemy property, or the property of persons adjudged or otherwise declared bankrupt or insolvent, persons of unsound mind, deceased persons, or bodies corporate or unincorporate in the course of being wound up;
- (h) in the execution of judgments or orders of courts;
- (i) by reason of its being in a dangerous state or injurious to the health of human beings, animals or plants;
- (j) in consequence of any law with respect to the limitation of actions;
- (k) for so long as may be necessary for the purposes of any examination, investigation, trial or inquiry or, in the case of land, the carrying out thereon—
  - (i) of work of soil conservation or the conservation of other natural resources; or
  - (ii) of agricultural development or improvement which the owner or

occupier of the land has been required and has, without reasonable and lawful excuse, refused or failed to carry out.

(3) Nothing in this section shall be construed as affecting the making or operation of any law so far as it—

- (a) makes such provisions as are reasonably required for the protection of the environment; or
- (b) provides for the orderly marketing or production or growth or extraction of any agricultural product or mineral or any article or thing prepared for the market or manufactured therefor or for the reasonable restriction of the use of any property in the interests of safeguarding the interest of others or the protection of tenants, licensees or others having rights in or over such property.

(4) Nothing in this section shall be construed as affecting the making or operation of any law for the compulsory taking of possession in the public interest of any property, or the compulsory acquisition in the public interest of any interest in or right over property, where that property, interest or right is held by a body corporate which is established for public purposes by any law and in which no monies have been invested other than monies provided by Parliament.

(5) Where an order is made under any law which provides for the compulsory acquisition of property, the court may have regard to—

- (a) any hardship that may reasonably be expected to be caused to any person by the operation of the order; or

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(b) the use that is ordinarily made of the property, or the intended use of the property.

(6) In this section “compensation” means the consideration to be given to a person for any interest or right which he may have in or over property which has been compulsorily taken possession of or compulsorily acquired as prescribed and determined in accordance with the provisions of the law by or under which the property has been so compulsorily taken possession of or acquired.

Protection of  
right to due  
process.

16.—(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) In the determination of a person’s civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law.

(3) All proceedings of every court and proceedings relating to the determination of the existence or the extent of a person’s civil rights or obligations before any court or other authority, including the announcement of the decision of the court or authority, shall be held in public.

(4) Nothing in subsection (3) shall prevent any court or any authority such as is mentioned in that subsection from excluding from the proceedings, persons other than the parties thereto and their legal representatives—

- (a) in interlocutory proceedings;
- (b) in appeal proceedings under any law relating to income tax; or

(c) to such extent as—

- (i) the court or other authority may consider necessary or expedient, in circumstances where publicity would prejudice the interests of justice; or
- (ii) the court may decide to do so or, as the case may be, the authority may be empowered or required by law to do so, in the interests of defence, public safety, public order, public morality, the welfare of persons under the age of eighteen years, or the protection of the private lives of persons concerned in the proceedings.

(5) Every person charged with a criminal offence shall be presumed innocent until he is proved guilty or has pleaded guilty.

(6) Every person charged with a criminal offence shall—

- (a) be informed as soon as is reasonably practicable, in a language which he understands, of the nature of the offence charged;
- (b) have adequate time and facilities for the preparation of his defence;
- (c) be entitled to defend himself in person or through legal representation of his own choosing or, if he has not sufficient means to pay for legal representation, to be given such assistance as is required in the interests of justice;

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- (d) be entitled to examine or have examined, at his trial, witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) have the assistance of an interpreter free of cost if he cannot understand or speak the language used in court;
- (f) not to be compelled to testify against himself or to make any statement amounting to a confession or admission of guilt; and
- (g) except with his own consent, not be tried in his absence unless—
  - (i) he so conducts himself in the court as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence; or
  - (ii) he absconds during the trial.

(7) An accused person who is tried for a criminal offence or any person authorized by him in that behalf shall be entitled, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, to be given for his own use, within a reasonable time after judgment, a copy of any record of the proceedings made by or on behalf of the court.

(8) Any person convicted of a criminal offence shall have the right to have his conviction and sentence reviewed by a court the jurisdiction of which is superior to the court in which he was convicted and sentenced.

(9) No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted, shall again be tried for

that offence or for any other criminal offence of which he could have been convicted at the trial for that offence save upon the order of a superior court made in the course of appeal proceedings relating to the conviction or acquittal; and no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence:

Provided that nothing in any law shall be held to be inconsistent with or in contravention of this subsection by reason only that it authorizes any court to try a member of a defence force for a criminal offence notwithstanding any trial and conviction or acquittal of that member under service law; but any court so trying such a member and convicting him shall in sentencing him to any punishment take into account any punishment awarded him under service law.

(10) No person shall be held guilty of any criminal offence on account of any act or omission which did not, at the time it took place, constitute a criminal offence.

(11) No penalty shall be imposed in relation to any criminal offence or in relation to an infringement of a civil nature which is more severe than the maximum penalty which might have been imposed for the offence or in respect of that infringement, at the time when the offence was committed or the infringement occurred.

(12) If, at the time of sentencing of a person who is convicted of a criminal offence, the penalty prescribed by law for that offence is less severe than the penalty that might have been imposed at the time when the offence was committed, the less severe penalty shall be imposed at the time of sentencing.

Protection of  
freedom of  
religion.

17.—(1) Every person shall have the right to freedom of religion including the freedom to change his religion and the right, either alone or in community with others and both in public and in private, to

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manifest and propagate his religion in worship, teaching, practice and observance.

(2) The constitution of a religious body or denomination shall not be altered except with the consent of the governing authority of that body or denomination.

(3) Every religious body or denomination shall have the right to provide religious instruction for persons of that body or denomination in the course of any education provided by that body or denomination whether or not that body or denomination is in receipt of any government subsidy, grant or other form of financial assistance designed to meet, in whole or in part, the cost of such course of education.

(4) No person attending any place of education, except with his own consent (or, if he is a minor, the consent of his parent or guardian) shall be required to receive religious instruction, or to take part in or attend any religious ceremony or observance, which relates to a religion or religious body or denomination other than his own.

Status of  
marriage.

18.—(1) Nothing contained in or done under any law in so far as it restricts—

- (a) marriage; or
- (b) any other relationship in respect of which any rights and obligations similar to those pertaining to marriage are conferred upon persons as if they were husband and wife,

to one man and one woman shall be regarded as being inconsistent with or in contravention of the provisions of this Chapter.

(2) No form of marriage or other relationship referred to in subsection (1), other than the voluntary union of one man and one woman may be contracted or legally recognized in Jamaica.



Application  
for redress.

19.—(1) If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

(2) Any person authorized by law, or, with the leave of the Court, a public or civic organization, may initiate an application to the Supreme Court on behalf of persons who are entitled to apply under subsection (1) for a declaration that any legislative or executive act contravenes the provisions of this Chapter.

(3) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.

(4) Where any application is made for redress under this Chapter, the Supreme Court may decline to exercise its powers and may remit the matter to the appropriate court, tribunal or authority if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law.

(5) Any person aggrieved by any determination of the Supreme Court under this section may appeal therefrom to the Court of Appeal.

(6) Parliament may make provision or authorize the making of provision with respect to the practice and procedure of any court for the purposes of this section and may confer upon that court such powers, or may authorize the conferment thereon of such

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powers, in addition to those conferred by this section, as may appear to be necessary or desirable for the purpose of enabling that court more effectively to exercise the jurisdiction conferred upon it by this section.

Interpretation.

20.—(1) In this Chapter—

“contravention”, in relation to any requirement, includes a failure to comply with that requirement, and cognate expressions shall be construed accordingly;

“court” means any court of law in Jamaica other than a court constituted by or under service law and—

(a) in sections 13(3)(a), 14 and 16 (1), (2), (3), (5), (6), (7) and (9) (excluding the proviso thereto) of this Constitution includes, in relation to an offence against service law, a court so constituted; and

(b) in section 14 of this Constitution includes, in relation to an offence against service law, an officer of a defence force, or the Police Service Commission or any person or authority to whom the disciplinary powers of that Commission have been lawfully delegated;

“period of public disaster” means any period during which there is in force a Proclamation by the Governor-General declaring that a period of public disaster exists;

“period of public emergency” means any period during which—

(a) Jamaica is engaged in any war;

- (b) there is in force a Proclamation by the Governor-General declaring that a state of public emergency exists; or
- (c) there is in force a resolution of each House of Parliament supported by the votes of a two-thirds majority of all the members of each House declaring that democratic institutions in Jamaica are threatened by subversion;

“service law” means the law regulating the discipline of a defence force or police officers.

(2) A Proclamation made by the Governor-General shall not be effective for the purposes of subsection (1) unless it is declared that the Governor-General is satisfied—

- (a) that a public emergency has arisen as a result of the imminence of a state of war between Jamaica and a foreign State;
- (b) that action has been taken or is immediately threatened by any person or body of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety or to deprive the community, or any substantial portion of the community, of supplies or services essential to life;
- (c) that a period of public disaster has arisen as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence, outbreak of infectious disease or other calamity, whether similar to the foregoing or not.

*The Charter of Fundamental Rights and  
Freedoms (Constitutional Amendment) Act, 2011*

(3) A Proclamation made by the Governor-General for the purposes of and in accordance with this section—

- (a) shall, unless previously revoked, remain in force for fourteen days or for such longer period, not exceeding three months, as both Houses of Parliament may determine by a resolution supported by a two-thirds majority of all the members of each House;
- (b) may be extended from time to time by a resolution passed in like manner as is prescribed in paragraph (a) for further periods, not exceeding in respect of each such extension a period of three months;
- (c) may be revoked at any time by a resolution supported by the votes of a two-thirds majority of all the members of each House.

(4) A resolution passed by a House for the purpose of paragraph (c) of the definition of “period of public emergency” in subsection (1) may be revoked at any time by a resolution of that House supported by the votes of a majority of all the members thereof.

(5) The court shall be competent to enquire into and determine whether a proclamation or resolution purporting to have been made or passed under this section was made or passed for any purpose specified in this section or whether any measures taken pursuant thereto are reasonably justified for that purpose.”.

**3.** Section 50 of the Constitution is repealed.

Repeal of  
section 50 of  
Constitution.

Passed in the House of Representatives this 22nd day of March, 2011.

DELROY H. CHUCK,  
*Speaker.*

*The Charter of Fundamental Rights and  
Freedoms (Constitutional Amendment) Act, 2011*

[No. ]

23

Passed in the Honourable Senate this 1st day of April, 2011.

OSWALD G. HARDING, OJ, CD, QC

*President.*

*This printed impression has been carefully  
compared by me with the authenticated  
impression of the foregoing Act, and has been  
found by me to be a true and correct printed  
copy of the said Act.*

*Clerk to the Houses of Parliament.*



Appendix 3:  
Advisory Opinion of the  
Inter-American Court of Human Rights  
OC-24/17

**INTER-AMERICAN COURT OF HUMAN RIGHTS**

**ADVISORY OPINION OC-24/17  
OF NOVEMBER 24, 2017  
REQUESTED BY THE REPUBLIC OF COSTA RICA**

**GENDER IDENTITY, AND EQUALITY AND NON-DISCRIMINATION OF SAME-SEX COUPLES**

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

The Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”), composed of the following judges:

Roberto F. Caldas, President  
Eduardo Ferrer Mac-Gregor Poisot, Vice President  
Eduardo Vio Grossi, Judge  
Humberto Antonio Sierra Porto, Judge  
Elizabeth Odio Benito, Judge  
Eugenio Raúl Zaffaroni, Judge, and  
L. Patricio Pazmiño Freire, Judge;

also present,

Pablo Saavedra Alessandri, Secretary, and  
Emilia Segares Rodríguez, Deputy Secretary,

pursuant to Article 64(1) of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) and Articles 70 to 75 of the Rules of Procedure of the Court (hereinafter “the Rules of Procedure”), issues this Advisory Opinion, structured as follows:



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## I PRESENTATION OF THE REQUEST

1. On May 18, 2016, the Republic of Costa Rica (hereinafter “Costa Rica” or “the requesting State”), based on Articles 64(1) and 64(2) of the American Convention<sup>1</sup> and in accordance with the provisions of Articles 70<sup>2</sup> and 72<sup>3</sup> of the Rules of Procedure, presented a request for an advisory opinion concerning the interpretation and scope of Articles 11(2),<sup>4</sup> 18<sup>5</sup> and 24<sup>6</sup> of the American Convention on Human Rights, in relation to Article 1<sup>7</sup> of this instrument (hereinafter “the request”). Specifically, Costa Rica presented the request for an advisory opinion for the Court to rule on:<sup>8</sup>

- a. “[T]he protection provided by Articles 11(2), 18 and 24 in relation to Article 1 of the [American Convention] to the recognition of a change of name in accordance with the gender identity of the person concerned.”
- b. “[T]he compatibility with Articles 11(2), 18 and 24, in relation to Article 1 of the Convention of the practice of applying Article 54 of the Civil Code of the Republic of Costa Rica,<sup>9</sup> Statute No. 63 of September 28, 1887, to persons wishing to change their name based on their gender identity.”

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<sup>1</sup> Article 64 of the American Convention: “1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court. 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

<sup>2</sup> Article 70 of the Court’s Rules of Procedure: “1. 1. Requests for an advisory opinion under Article 64(1) of the Convention shall state with precision the specific questions on which the opinion of the Court is being sought. 2. Requests for an advisory opinion submitted by a Member State or by the Commission shall, in addition, identify the provisions to be interpreted, the considerations giving rise to the request, and the names and addresses of the Agent or the Delegates. 3. If the advisory opinion is sought by an OAS organ other than the Commission, the request shall also specify how it relates to the sphere of competence of the organ in question, in addition to the information listed in the preceding paragraph.”

<sup>3</sup> Article 72 of the Court’s Rules of Procedure: “1. A request for an advisory opinion presented pursuant to Article 64(2) of the Convention shall indicate the following: a. the provisions of domestic law and of the Convention or of other treaties concerning the protection of human rights to which the request relates; b. the specific questions on which the opinion of the Court is being sought; c. the name and address of the requesting party’s Agent. 2. Copies of the domestic laws referred to in the request shall accompany the application.”

<sup>4</sup> Article 11(2) of the American Convention: “Right to Privacy. [...] 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.”

<sup>5</sup> Article 18 of the American Convention: “Right to a Name. Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.”

<sup>6</sup> Article 24 of the American Convention: “Right to Equal Protection. All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law”.

<sup>7</sup> Article 1 of the American Convention: “Obligation to Respect Rights. 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. 2. For the purposes of this Convention, “person” means every human being.”

<sup>8</sup> The complete text of the request [in Spanish only] can be consulted on the Court’s website at the following link: [http://www.corteidh.or.cr/docs/solicitudoc/solicitud\\_17\\_05\\_16\\_esp.pdf](http://www.corteidh.or.cr/docs/solicitudoc/solicitud_17_05_16_esp.pdf)

<sup>9</sup> Article 54 of the Civil Code of Costa Rica establishes that: “Every Costa Rican national registered in the Civil Registry may change his or her name with the authorization of the court and this shall be obtained by means of the corresponding voluntary jurisdiction proceeding.”

- c. [T]he protection provided by Articles 11(2) and 24 in relation to Article 1 of the [America Convention] to the recognition of the patrimonial rights derived from a relationship between persons of the same sex."

2. Costa Rica set out the considerations that had given rise to the request indicating that:

"Recognition of the human rights derived from sexual orientation and gender identity has been characterized by diverse processes in the different member States of the Inter-American system." It further indicated that "[a] wide range of situations can be distinguished, from countries that have fully recognized rights to lesbian, gay, bisexual, transgender and intersex persons, to those member States that, to date, maintain in force laws that prohibit any form of lifestyle and expression contrary to heteronormativity or that have failed to recognize the rights that relate to these groups."

In addition, it "recognized that, in the cases of *Atala Riffo and daughters v. Chile* and *Duque v. Colombia*, the Court had determined that actions denigrating a person based on either their gender identity, or especially as in these cases, sexual orientation, constituted a type of discrimination that the Convention provided protection against."

Despite this, Costa Rica indicated that it "was unsure about the extent of the prohibition of discrimination based on sexual orientation and gender identity or, in other words, that problems remained when determining whether certain actions are included in such category of discrimination." Accordingly, it asserted that "an interpretation by the Inter-American Court on the standards indicated above would make a significant contribution to the State of Costa Rica and all the countries of the Inter-American system of human rights, because it would allow them to adapt their domestic laws to the inter-American standards, providing a guarantee to individuals and their rights. In other words, it would guide and strengthen the actions taken by the States towards full compliance with their obligations regarding these human rights."

Lastly, it "consider[ed] necessary that the Court issue its opinion regarding the conformity with the Convention of the practice of requiring those who wished to change their name based on their gender identity to follow the voluntary jurisdiction procedure established in Article 54 of the Civil Code of the Republic of Costa Rica." In this regard, it mentioned that "the said procedure involves expenses for the applicant and entails a lengthy delay [...], [and therefore it] asked whether the application of that provision to the cases indicated is contrary to human rights."

3. Based on the foregoing, Costa Rica submitted the following specific questions to the Court:

1. "Taking into account that gender identity is a category protected by Articles 1 and 24 of the ACHR [American Convention on Human Rights], as well as the provisions of Articles 11(2) and 18 of the Convention: does this protection and the ACHR imply that the State must recognize and facilitate the name change of an individual in accordance with his or her gender identity?"

2. "If the answer to the preceding question is affirmative, could it be considered contrary to the ACHR that those interested in changing their given name may only do so through a judicial procedure, in the absence of a pertinent administrative procedure?"

3. "Could it be understood that, in accordance with the ACHR, Article 54 of the Civil Code of Costa Rica should be interpreted as to imply that those who wish to change their given name based on their gender identity are not obliged to submit to the judicial procedure established therein, but rather that the State must provide them with a free, prompt and accessible administrative procedure to exercise that human right?"

4. "Taking into account that non-discrimination based on sexual orientation is a category protected by Articles 1 and 24 of the ACHR, in addition to the provisions of Article 11(2) of the Convention: does this protection and the ACHR imply that the State should recognize all the patrimonial rights derived from a relationship between persons of the same sex?" and

5. "If the answer to the preceding question is affirmative, must there be a legal institution that regulates relationships between persons of the same sex for the State to recognize all the patrimonial rights that derive from that relationship?"

4. Costa Rica appointed Ana Helena Chacón Echeverría, Vice President of the Republic, Marvin Carvajal Pérez, General Counsel of the Presidency of the Republic, and Eugenia Gutiérrez Ruiz, Legal Counsel a.i. of the Ministry of Foreign Affairs and Worship, as the State's Agents.

## II PROCEEDINGS BEFORE THE COURT

5. In notes dated August 12, 2016, the Secretariat of the Court (hereinafter "the Secretariat"), pursuant to Article 73(1)<sup>10</sup> of the Rules of Procedure, forwarded the request to the other Member States of the Organization of American States (hereinafter "the OAS"), the OAS Secretary General, the President of the OAS Permanent Council, the President of the Inter-American Juridical Committee and the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission"). In these notes, the Secretariat advised that the President of the Court, in consultation with the other judges, had established December 9, 2016, as the time limit for presenting written observations on the said request. Also, in notes of August 12, 2016, on the instructions of the President and as established in Article 73(3)<sup>11</sup> of the said Rules of Procedure, the Secretariat invited several civil society and international organizations, as well as academic establishments in the region, to submit their written opinion on the questions presented to the Court within the said time frame. Lastly, an open invitation was issued on the Inter-American Court's website to all those interested in presenting their written opinion on the questions submitted to the Court. The original deadline was extended until February 14, 2017; those interested had around six months to forward their submissions.

6. The Secretariat received the following briefs with observations within the established time frame:<sup>12</sup>

*a. Written observations submitted by OAS Member States:* 1) Argentina; 2) Bolivia; 3) Brazil; 4) Colombia; 5) Guatemala; 6) Honduras; 7) United Mexican States; 8) Panama and 9) Uruguay;

*b. Written observations submitted by OAS organs:* Inter-American Commission on Human Rights;

*c. Written observations submitted by international organizations:* Office of the United Nations High Commissioner for Human Rights;

*d. Written observations submitted by state agencies:* 1) Human Rights Commission of the Federal District of Mexico; 2) Office of the Ombudsperson of the Republic of Costa Rica; 3) Office of the Federal Ombudsman (DPU) of Brazil and other institutions; 4) Argentine Public Defender's Office; 5) Office of the Ombudsman of the state of Río de Janeiro; 6) Public Defender's Office of the Autonomous City of Buenos Aires, and 7) Office of the Attorney General of Argentina;

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<sup>10</sup> Article 73(1) of the Court's Rules of Procedure: "Upon receipt of a request for an advisory opinion, the Secretary shall transmit copies thereof to all of the Member States, the Commission, the Permanent Council through its Presidency, the Secretary General, and, if applicable, to the OAS organs whose sphere of competence is referred to in the request."

<sup>11</sup> Article 73(3) of the Court's Rules of Procedure: "The Presidency may invite or authorize any interested party to submit a written opinion on the issues covered by the request. If the request is governed by Article 64(2) of the Convention, the Presidency may do so after prior consultation with the Agent."

<sup>12</sup> The request for an advisory opinion presented by Costa Rica, the written and oral observations of the participating States, the Inter-American Commission, and also state and international agencies, academic establishments, non-governmental organizations, and members of civil society can be consulted on the Court's website at the following link: [http://www.corteidh.or.cr/cf/jurisprudencia2/observaciones\\_oc.cfm?nld\\_oc=1671](http://www.corteidh.or.cr/cf/jurisprudencia2/observaciones_oc.cfm?nld_oc=1671)

*e. Written observations submitted by national and international associations, academic establishments and non-governmental organizations:* 1) ADF International; 2) Amicus D.H., A.C.; 3) Asociación Civil 100% Diversidad y Derechos; 4) Asociación OTD Chile; 5) Asociación de Travestis, Transexuales y Transgéneros de Argentina, and the Red de Personas Trans de Latinoamérica y del Caribe; 6) Asociación Frente por los Derechos Igualitarios, Asociación Ciudadana ACCEDER, Asociación Movimiento Diversidad pro Derechos Humanos y Salud, Asociación Transvida, and Asociación Centro de Investigación y Promoción para América Central (CIPAC); 7) Asociación para la Promoción y Protección de los Derechos Humanos "Xumek"; 8) Australian Human Rights Centre, UNSW Faculty of Law; 9) Avocats Sans Frontières, Canada, and the UQAM Clinique internationale de défense des droits humains; 10) Center for Family and Human Rights (C-Fam); 11) Human Rights Center at the Pontificia Universidad Católica del Ecuador; 12) Centro de Direito Internacional; 13) Center for Human Rights Studies (CEDH), and Specialized Program on Protection of the Rights of Children and Adolescents of the Faculty of Law at the Universidad Nacional del Centro de la Provincia de Buenos Aires (UNICEN); 14) Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos – PROMSEX; 15) Centro Guadalupe Vida y Familia, Puerto Rico; 16) International Law Study Group of the Faculty of Law at the Universidad del Pacifico, Peru; 17) Center for Justice and International Law (CEJIL), Asociación LGTB Arcoiris-Honduras, Asociación REDTRANS-Nicaragua, Centro de Investigación y Promoción de Derechos Humanos, Centro de Investigación y Promoción para América Central de Derechos Humanos, Coalición contra la Impunidad, Comité de Familiares de Detenidos Desaparecidos en Honduras, Comunicando y Capacitando a Mujeres Trans, Fundación de Estudios para la Aplicación del Derecho, Mulabi / Espacio Latinoamericano de Sexualidades y Derechos, and Unidad de Atención Sicológica, Sexológica y Educativa para el Crecimiento Personal A.C.; 18) César Norberto Bissutti, Juliana Carbó, Gisela Vanesa Hill, Antonela Sabrina Rivero, Estefanía Watson and Leandro Anibal Ardo, members of the Human Rights Legal Clinic of the Faculty of Juridical and Social Sciences at the Universidad Nacional del Litoral, Santa Fe, Argentina; 19) Human Rights Legal Clinic and the International Law Group at the Pontificia Universidad Javeriana, Cali; 20) Human Rights Clinic at the Universidade Federal de Minas Gerais; 21) Human Rights Clinic of the Post-graduate program in Law at the Pontificia Universidade Católica do Paraná; 22) Human Rights and Environmental Law Clinic at the Universidade do Estado do Amazonas (Clínica DHDA/UEA); 23) Public Interest Clinic against People Trafficking of the Instituto Tecnológico Autónomo de México and the Grupo de Acción por los Derechos Humanos y la Justicia Social A.C.; 24) Public Interest Legal Clinic "Grupo de Acciones Públicas" of the Faculty of Jurisprudence at the Universidad del Rosario, Colombia; 25) Legal Clinic at the Universidad de San Andrés, Argentina; 26) Comisión Colombiana de Juristas; 27) Dejusticia; 28) Sixteen human rights organizations that form part of the Coalition of LGBTTTTI Organizations working at the OAS: Colombia Diversa; Akahatá; Asociación Alfil; Asociación Panambi; Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos (Promsex); Colectiva Mujer y Salud; Fundación Diversencia; Heartland Alliance–Global Initiatives for Human Rights (GIHR); Liga Brasileira de Lésbicas; Letra S, Sida, Cultura y Vida Cotidiana, A.C.; Otrans–Reinas de la Noche; Ovejas Negras; Red Mexicana de Mujeres Trans; Red Latinoamericana y del Caribe de Personas Trans (Redlactrans); Taller Comunicación Mujer, and UNIBAM; 29) Faculty of Law at the Pontificia Universidad Católica de Chile; 30) Faculty of Law at the Universidad Veracruzana; 31) Faculty of Law Tijuana at the Universidad Autónoma de Baja California; 32) Fundación Iguales; 33) Fundación Myrna Mack; 34) Grupo de Advogados pela Diversidade Sexual e de Gênero–GADvS; 35) Group of students from the Escuela Libre de Derecho de Mexico. Coordinators: Daniel Esquivel Garay, Marianna Olivia Loredó Celaya and Claudio Martínez Santistevan. Members: Aranxa Bello Brindis, Daniela Morales Galván Duque, Eduardo González Ávila, Alejandra Muñoz Castillo, Rosete MacGregor, Jimena Pulliam de Teresa and Carlos Rodolfo Ríos Armillas. Legal adviser: Elí Rodríguez Martínez;

36) Grupo de Investigación Problemas Contemporáneos del Derecho y la Política (GIPCODEP), attached to the Faculty of Law and Political Science at the Universidad de San Buenaventura, Cali; 37) "Humanismo y Legalidad", "Ixtlamatque Ukari A.C" and "La Cana Proyecto de Reinserción Social"; 38) Jorge Kenneth Burbano Villamarín, Laura Melisa Posada Orjuela and Hans Alexander Villalobos Díaz, members of the Observatorio de Intervención Ciudadana Constitucional of the Faculty of Law at the Universidad Libre de Bogotá; 39) Karla Lasso Camacho and María Gracia Naranjo Ponce, students of the Legal Clinic at the Universidad San Francisco, Quito; 40) LIBERARTE Advisería Psicológica; 41) Movimiento Diversidad pro Derechos Humanos y Salud; 42) Natalia Castro and Gerardo Acosta, members of the Public Interest Litigation Group at the Universidad del Norte; 43) Red Lésbica CATTRACHAS, Honduras; 44) Parliamentarians for Global Action; 45) The Impact Litigation Project of the Center for Human Rights and Humanitarian Law at American University Washington College of Law; 46) The John Marshall Law School International Human Rights Clinic; 47) Universidad Centroamericana José Simeón Cañas, and

*f. Written observations submitted by members of civil society:* 1) Alicia I. Curiel, Adjunct Professor of Human Rights and Guarantees at the Universidad de Buenos Aires and Luciano Varela, studying for a master's degree in human rights at the Universidad Nacional de la Plata; 2) Cristabel Mañón Vallejo, Nahuiquetzalli Pérez Mañón and José Manuel Pérez Guerra; 3) Damián A. González-Salzberg, Lecturer and researcher in international human rights law at the University of Sheffield; 4) Daniel Arturo Valverde Mesén; 5) Elena Hernáiz Landáez; 6) Erick Vargas Campos; 7) Hermán M. Duarte Iraheta; 8) Hermilo Lares Contreras; 9) Ivonei Souza Trindade; 10) Jorge Alberto Pérez Tolentino; 11) José Benjamín González Mauricio, Andrea Yatzil Lamas Sánchez, Izack Alberto Zacarías Najar, Rafael Ríos Nuño, Carlos Eduardo Moyado Zapata and Kristyan Felype Luis Navarro; 12) Josefina Fernández, Paula Viturro and Emiliano Litardo; 13) Luis Alejandro Álvarez Mora and María José Vicente Ureña; 14) Luis Chinchilla, Nadia Mejía, Isiss Turcios and Larissa Reyes; 15) Luis Peraza Parga; 16) María Fernanda Téllez Girón García, Giovanni Alexander Salgado Cipriano, Yoceline Gutiérrez Montoya and Daniela Reyes Rodríguez; 17) Michael Vinicio Sánchez Araya; 18) Monsignor Óscar Fernández Guillén, President and representative of the National Episcopal Conference of Costa Rica; 19) Pablo Stolze, Professor of Civil Law at the Universidad Federal de Bahía; 20) Paul McHugh; 21) Paula Siverino Bavio; 22) Rossana Muga Gonzáles, Researcher at the Centro de Investigación Social Avanzada (CISAV-Mexico); 23) Tamara Adrián and Arminio Borjas; 24) Víctor Alonso Vargas Sibaja and Jorge Arturo Ulloa Cordero; 25) Xochithl Guadalupe Rangel Romero, Professor and researcher at the Universidad Autónoma de San Luis Potosí, and 26) Yashín Castrillo Fernández.

7. Following the conclusion of the written procedure and pursuant to Article 73(4) of the Rules of Procedure,<sup>13</sup> on March 31, 2017, the President of the Court issued an order<sup>14</sup> calling for a public hearing and invited the OAS Member States, the OAS Secretary General, the President of the OAS Permanent Council, the President of the Inter-American Juridical Committee, the Inter-American Commission, and members of various international and civil society organizations, academic establishments, and individuals who had submitted written observations to present their oral comments on the request for an advisory opinion submitted to the Court.

<sup>13</sup> Article 73(4) of the Court's Rules of Procedure: "[a]t the conclusion of the written proceedings, the Court shall decide whether oral proceedings should take place and shall establish the date for a hearing, unless it delegates the latter task to the Presidency. Prior consultation with the Agent is required in cases governed by Article 64(2) of the Convention."

<sup>14</sup> Cf. Request for Advisory Opinion OC-24. Call to a public hearing. Order of the President of the Inter-American Court of Human Rights of March 31, 2017. Available at: [http://www.corteidh.or.cr/docs/asuntos/solicitud\\_31\\_03\\_17.pdf](http://www.corteidh.or.cr/docs/asuntos/solicitud_31_03_17.pdf)

8. The public hearing was held on May 16 and 17, 2017, during the 118<sup>th</sup> regular session of the Inter-American Court of Human Rights, which took place in San José, Costa Rica.
9. The following persons appeared before the Court:
- 1) For the State of Costa Rica: Ana Helena Chacón Echeverría, Second Vice President of the Republic; Marvin Carvajal Pérez, Legal Counsel to the Presidency of the Republic; Eugenia Gutiérrez Ruiz, Assistant Legal Counsel, Ministry of Foreign Affairs and Worship; Emilio Arias Rodríguez, Minister of Human Development and Social Inclusion; Alejandra Mora Mora, Minister for Women's Affairs; María Fulmen Salazar, Vice Minister of Public Safety, William Vega Murillo, adviser, Vice Minister of Political Affairs and Civic Dialogue, Ministry of the Presidency; Luis Eduardo Salazar Muñoz, legal adviser, Legal Department of the Presidency of the Republic; María Rebeca Sandí Salvatierra, legal adviser, Legal Department of the Presidency of the Republic; Viviana Benavides Hernández, legal adviser, Legal Department of the Presidency of the Republic; Andrea González Yamuni, adviser to the Second Vice President of the Republic; Alejandra Arbuola Cabrera, adviser, Vice Ministry of Political Affairs and Civic Dialogue, Ministry of the Presidency; Natalia Córdoba Ulate, Chief of Staff of the Minister for Foreign Affairs; José Carlos Jiménez Alpizar, legal adviser, Legal Department of the Ministry of Foreign Affairs and Worship; María Julia Cerdas Jimenez, legal adviser, Legal Department of the Presidency of the Republic, and Ersilia Zúñiga Centeno, adviser, Presidency of the Republic;
  - 2) For the State of Argentina: Javier Salgado;
  - 3) For the Plurinational State of Bolivia: Jaime Ernesto Rossell Arteaga, Assistant Public Defender and Legal Representative of the State; Roberto Arce Brozek, Director General for the Defense of Human Rights and the Environment; Cynthia Fernández Torrez, Human Rights and Environmental Expert; José Enrique Colodro Baldiviezo, Chargé d'affaires a.i.; Ramiro Quisbert Liuca, First Secretary of the Embassy of Bolivia in Costa Rica, and Carlos Fuentes López, Second Secretary of the Embassy of Bolivia in Costa Rica;
  - 4) For the United Mexican States: Erasmo A. Lara Cabrera, Director General for Human Rights and Democracy of the Ministry of Foreign Affairs, and Óscar Francisco Holguín González, responsible for legal, political and media affairs at the Embassy of Mexico in Costa Rica;
  - 5) For the State of Uruguay: Marta Echarte Baraibar, Minister, and Tabaré Bocalandro Yapeyú, Minister Counsellor;
  - 6) For the Human Rights Commission of the Federal District of Mexico: Gabriel Santiago López, General Counsel;
  - 7) For the Office of the Federal Ombudsman (DPU) of Brazil and other institutions: Carlos Eduardo Barbosa Paz, Federal Ombudsman;
  - 8) For the Office of the Ombudsperson of the Republic of Costa Rica: Montserrat Solano Carboni, Ombudsperson of the Republic of Costa Rica; Gloriana López Fuscaldo, Director of the Ombudsperson's Office; Catalina Delgado Agüero and Angélica Solera Steller;
  - 9) For the Impact Litigation Project of the Center for Human Rights and Humanitarian Law at American University Washington College of Law: Whitney Washington, Natalia Gómez and Facundo Capurro;
  - 10) For the Inter-American Commission on Human Rights: Paulo Abrao, Executive Secretary; Silvia Serrano Guzmán, Adviser, and Selene Soto Rodríguez, Adviser;

- 11) For the Ombudsperson's Office of the state of Río de Janeiro: Livia Miranda Müller Drumond Casseres, Ombudsperson of the state of Río de Janeiro, and Rodrigo Baptista Pacheco, Second Assistant Ombudsperson of the state of Río de Janeiro;
- 12) For the Public Prosecution Service of the Autonomous City of Buenos Aires: Lorena Lampolio, Public Defender, and Josefina Fernández;
- 13) Hermán M. Duarte Iraheta;
- 14) For ADF International: Jeff Shafer, Neydy Casillas, Natalia Callejas and Michelle Riestras;
- 15) For Amicus D.H., A.C.: Luz Rebeca Lorea Hernández, Javier Meléndez López Velarde and Juan Pablo Delgado Miranda;
- 16) For the Asociación Civil 100% Diversidad y Derechos: Greta Marisa Pena, President, Francisco Cotado and Hernán Arrue;
- 17) For the Asociación OTD-Chile: Constanza Valdés Contreras, legal adviser;
- 18) For the Asociación de Travestis, Transexuales y Transgéneros de Argentina and the Red de Personas Trans de Latinoamérica y del Caribe: Marcela Romero, Regional Coordinator;
- 19) For the Asociación Frente por los Derechos Igualitarios (FDI), Asociación Ciudadana ACCEDER, and Asociación Transvida: Larissa Arroyo Navarrete, Dayana Hernández, Antonella Morales and Michelle Jones;
- 20) For the Center for Justice and International Law (CEJIL), Asociación LGTB Arcoíris-Honduras, Asociación REDTRANS-Nicaragua, Centro de Investigación y Promoción de los Derechos Humanos, Centro de Investigación y Promoción para América Central de Derechos Humanos, Coalición contra la Impunidad, Comité de Familiares de Detenidos Desaparecidos en Honduras, Comunicando y Capacitando a Mujeres Trans, Fundación de Estudios para la Aplicación del Derecho, Mulabi/Espacio Latinoamericano de Sexualidades y Derechos, and the Unidad de Atención Sicológica, Sexológica y Educativa para el Crecimiento Personal, A.C.: Marcela Martino, Florencia Reggiardo, Esteban Mandrigal, Samantha Colli, Gisela De León, Marcia Aguiluz, Natasha Jiménez, Daría Suárez and Karla Acuña;
- 21) For the Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos – PROMSEX: Brenda Álvarez;
- 22) For Colombia Diversa: Marcela Sánchez, Executive Director, and Lilibeth Cortés;
- 23) For the Comisión Colombiana de Juristas: Carolina Solano Gutiérrez;
- 24) For "Humanismo y Legalidad", "Asociación Ixtlamatque Ukari A.C." and "Asociación La Cana, Proyecto de Reinserción Social, A.C.": Norma Celia Bautista Romero, Marcela Duque Penagos, Daniela Ancira Ruiz, Raquel Adriana Aguirre García, Benjamín García Aguirre and Marlene Rodríguez Atriano;
- 25) For the Movimiento Diversidad Pro Derechos Humanos y Salud of Costa Rica: Marco Castillo Rojas and Giovanni Delgado Castro;
- 26) For the Red Lésbica CATTRACHAS-Honduras: Indyra Mendoza Aguilar and Karina Trujillo;
- 27) María Gracia Naranjo and Karla Lasso, Students of the Legal Clinic at the Universidad San Francisco, Quito;
- 28) For the Human Rights and Environmental Law Clinic at the Universidade do Estado do Amazonas (Clínica DHDA/UEA): Sílvia Maria da Silveira Loureiro, Hérika Luna Arce Lima and Érika Guedes de Sousa Lima;



- 29) For the Faculty of Law Tijuana at the Universidad Autónoma de Baja California: Laura Alicia Camarillo Govea and Elizabeth Nataly Rosas Rábago;
- 30) For the Faculty of Law at the Pontificia Universidad Católica de Chile: Álvaro Paúl;
- 31) For the Public Interest Clinic against People Trafficking at the Instituto Tecnológico Autónomo de México and the Grupo de Acción por los Derechos Humanos y la Justicia Social A.C.: Héctor Alberto Pérez, General Coordinator of the Clinic; Amalia Cruz Rojo, Legal Coordinator of the Clinic, Ana Lilia Amezcua Ferrer, Tábata Ximena Salas Ramírez and Edwin Alan Piñon González;
- 32) For the Faculty of Law at the Universidad Veracruzana: Geiser Manuel Caso Molinari, Iris del Carmen Cruz De Jesús, Sara Fernanda Parra Pérez, Teresa Nataly Solano Sánchez and Sonia Itzel Castilla Torres;
- 33) Daniel Valverde Mesén;
- 34) Hermilo de Jesús Lares Contreras and Rodolfo Reyes Leyva;
- 35) José Benjamín González Mauricio;
- 36) Jorge Arturo Ulloa Cordero;
- 37) Michael Vinicio Sánchez Araya;
- 38) Paula Siverino Bavio;
- 39) Tomás Henríquez Carrera, representing Dr. Paul McHugh, and
- 40) Yashín Castrillo Fernández.

10. Following the hearing, supplementary briefs were received from: 1) the State of Costa Rica; 2) the Impact Litigation Project of the Center for Human Rights and Humanitarian Law at American University Washington College of Law; 3) the Movimiento Diversidad pro Derechos Humanos y Salud of Costa Rica; 4) Hermán M. Duarte Iraheta; 5) Monsignor Óscar Fernández Guillén, President and representative of the National Episcopal Conference of Costa Rica; 6) the Human Rights Commission of the Federal District of Mexico; 7) the Office of the Federal Ombudsman (DPU) of Brazil and other institutions; 8) Paula Siverino Bavio, and 9) the Asociación Frente por los Derechos Igualitarios (FDI), Asociación Ciudadana ACCEDER, and Asociación Transvida.

11. In answering this request for an advisory opinion, the Court examined, took into account and analyzed the ninety-one briefs presented by States, OAS organs, international organization, State agencies, non-governmental organizations, academic establishments, and members of civil society, together with the observations and interventions of the forty participants in the public hearing (*supra* paras. 6 and 9). The Court expresses its appreciation for these valuable contributions that provided it with insight on the different questions raised by this request for an advisory opinion.

12. The Court began to deliberate the advisory opinion on November 21, 2017.

### III JURISDICTION AND ADMISSIBILITY

13. In this chapter, the Court will examine the scope of the Court's jurisdiction to issue advisory opinions, as well as the jurisdiction, admissibility and validity of ruling on the request for an advisory opinion presented by Costa Rica.

### A. The advisory jurisdiction of the Court in relation to this request

14. The request was submitted to the Court by the State of Costa Rica, based on the authority granted by Article 64(1) of the American Convention. Costa Rica is a Member State of the OAS and, therefore, has the right to request the Inter-American Court to issue advisory opinions on the interpretation of this treaty or of other treaties concerning the protection of human rights in the American states.

15. Furthermore, the Court considers that, as an organ with jurisdictional and advisory functions, it has the inherent authority to determine the scope of its own jurisdiction (*compétence de la compétence/Kompetenz-Kompetenz*) when exercising its advisory function, pursuant to Article 64(1) of the Convention.<sup>15</sup> And this is so, in particular, because the mere fact of having recourse to the Court supposes that the State or States who make the request recognize the Court's right to determine the scope of its competence in that regard.

16. The advisory function allows the Court to interpret any article of the American Convention, and no part or aspect of this instrument is excluded from such interpretation. Thus, it is plain that, since the Court is the "ultimate interpreter of the American Convention,"<sup>16</sup> it is competent to interpret all the provisions of the Convention, even those of a procedural nature, with full authority.<sup>17</sup>

17. In addition, the Court has considered that Article 64(1) of the Convention, when referring to the Court's authority to provide an opinion on "other treaties concerning the protection of human rights in the States of the Americas," is broad and non-restrictive. In other words, the advisory jurisdiction of the Court can be exercised, in general, with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever the principal purpose of such a treaty is, and whether or not non-Member States of the Inter-American system are or have the right to become parties thereto.<sup>18</sup> Consequently, when interpreting the Convention within the framework of its advisory function and in the terms of Article 29(d) of the Convention, the Court may resort to the Convention or other treaties concerning the protection of human rights in the American States.<sup>19</sup>

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<sup>15</sup> Cf. *Case of the Constitutional Court v. Peru. Competence*. Judgment of September 24, 1999. Series C No. 55, para. 33, *Reports of the Inter-American Commission on Human Rights (Art. 51 American Convention on Human Rights)*. Advisory Opinion OC-15/97 of November 14, 1997. Series A No. 15., para.5, *Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection*. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, para. 17, and *Entitlement of Legal Entities to hold Rights under the Inter-American System of Human Rights (Interpretation and scope of Article 1(2) in relation to Articles 1(1), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62(3) of the American Convention on Human Rights, as well as 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, para. 14. See also, *Case of Vásquez Durand et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of February 15, 2017. Series C No. 332, para. 22.

<sup>16</sup> *Case of Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs*. Judgment of September 26, 2006. Series C No. 154, para. 124; Advisory Opinion OC-21/14, para. 19, Advisory Opinion OC-22/16, para. 16, and *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of February 29, 2016. Series C No. 312, para. 242.

<sup>17</sup> Cf. *Article 55 of the American Convention on Human Rights*. Advisory Opinion OC-20/09 of September 29, 2009. Series A No. 20, para. 18; Advisory Opinion OC-21/14, para. 19, and Advisory Opinion OC-22/16, para. 16.

<sup>18</sup> Cf. "Other Treaties" Subject to the Advisory Function of the Court (Art. 64 American Convention on Human Rights). Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, first operative paragraph; Advisory Opinion OC-21/14, para. 23, and Advisory Opinion OC-22/16, para. 26.

<sup>19</sup> Cf. *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, sole operative paragraph, Advisory Opinion OC-21/14, para. 22, and Advisory Opinion OC-22/16, para. 17.

## B. The requirements of admissibility of the request

18. The Court must now determine whether the request for an advisory opinion presented by the State of Costa Rica meets the formal and substantive requirements of admissibility.

19. First, the Court finds that the request presented by Costa Rica complies formally with the requirements described in Articles 70<sup>20</sup> and 71<sup>21</sup> of the Rules of Procedure, according to which, for a request to be considered by the Court, the questions must be precise, specifying the provisions that must be interpreted, indicating the considerations that give rise to the request, and providing the name and address of the agent.

20. Regarding the substantive requirements, the Court recalls that, on numerous occasions, it has indicated that compliance with the regulatory requirements to submit a request does not mean that the Court is obliged to respond to it.<sup>22</sup> To determine the validity of the request, the Court must bear in mind considerations that exceed questions of mere form and that relate to the characteristics it has recognized for the exercise of its advisory function.<sup>23</sup> It must go beyond the formalism that would prevent the Court from considering questions that have a juridical interest for the protection and promotion of human rights.<sup>24</sup> Also, the Court's advisory competence should not, in principle be used for abstract speculations without a foreseeable application to specific situations that justify the issuing of an advisory opinion.<sup>25</sup>

21. When recalling that the advisory function represents "a service that the Court is able to provide to all the members of the Inter-American system in order to help them comply with their international commitments" concerning human rights,<sup>26</sup> the Court considers that, based on the interpretation of the relevant provisions, its response to the request will be of great importance for the countries of the region, because it will identify the obligations of the States in relation to the rights of LGBTI persons within the framework of their obligation to respect and guarantee the

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<sup>20</sup> Article 70 of the Court's Rules of Procedure: "Interpretation of the Convention: 1. Requests for an advisory opinion under Article 64(1) of the Convention shall state with precision the specific questions on which the opinion of the Court is being sought. 2. Requests for an advisory opinion submitted by a Member State or by the Commission shall, in addition, identify the provisions to be interpreted, the considerations giving rise to the request, and the names and addresses of the Agent or the Delegates. [...]"

<sup>21</sup> Article 71 of the Court's Rules of Procedure: "Interpretation of Other Treaties: 1. If, as provided for in Article 64(1) of the Convention, the interpretation requested refers to other treaties concerning the protection of human rights in the American States, the request shall indicate the name of the treaty and parties thereto, the specific questions on which the opinion of the Court is being sought, and the considerations giving rise to the request. [...]"

<sup>22</sup> Cf. *The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 31; Advisory Opinion OC-21/14, para. 25, and Advisory Opinion OC-22/16, para. 21.

<sup>23</sup> Cf. Advisory Opinion OC-1/82, para. 25; Advisory Opinion OC-15/97, para. 39; *Juridical Status and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 19; *Juridical Status and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 50; *Control of Due Process in the Exercise of the Powers of the Inter-American Commission on Human Rights* (Arts. 41 and 44 to 51 of the American Convention on Human Rights); Advisory Opinion OC-19/05 of November 28, 2005. Series A No. 19, para. 17, and Advisory Opinion OC-20/09, para. 14.

<sup>24</sup> Cf. Advisory Opinion OC-1/82, para. 25; *Certain Attributes of the Inter-American Commission on Human Rights* (Arts. 41, 42, 44, 46, 47, 50 and 51 American Convention on Human Rights). Advisory Opinion OC-13/93 of July 16, 1993, Series A No. 13, para. 41; Advisory Opinion OC-15/97, para. 39, and Advisory Opinion OC-19/05, para. 17.

<sup>25</sup> Cf. *Judicial Guarantees in State of Emergency* (Arts. 27.2, 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 16; Advisory Opinion OC-21/14, para. 25, and Advisory Opinion OC-22/16, para. 21.

<sup>26</sup> Cf. Advisory Opinion OC-1/82, para. 39; Advisory Opinion OC-19/05, para. 18; Advisory Opinion OC-21/14, para. 28, and Advisory Opinion OC-22/16, para. 23.

human rights of all persons subject to their jurisdiction. This will lead to the determination of the principles and the specific obligations that States must meet concerning the right to equality and non-discrimination.

22. In this regard, the Court recalls, as it has on other occasions,<sup>27</sup> that the task of interpretation that it performs in the exercise of its advisory function not only seeks to clarify the reason for, meaning and purpose of international human rights norms, but also, and above all, to assist the OAS Member States and organs to comply fully and effectively with their relevant international obligations, and to define and implement public policies to protect human rights. Thus, its interpretations aim to help strengthen the system for the protection of human rights.

23. In addition, while this advisory opinion was being processed, the Commission presented information that a petition is currently at the admissibility stage concerning alleged discrimination and patrimonial prejudice due to the impossibility of incorporating a same-sex couple into the social security system and the absence of legal recognition for unions of same-sex couples.<sup>28</sup> Also, during the processing of this advisory opinion, a written observation was submitted to the Court by a person advising that a petition against Costa Rica was currently being processed before the Commission concerning the “violation of the fundamental rights to equality and non-discrimination based on sexual orientation, specifically owing to non-recognition of *de facto* unions of same-sex couples, and the prohibition to marry.”<sup>29</sup> This person asked the Court to reject outright the request for an advisory opinion submitted by the State of Costa Rica on May 18, 2016, considering that “the request made to the Court by the Executive branch [...] would result in a covert settlement, using the advisory opinion, of litigations at the domestic level (action of unconstitutionality) and at the international level (petition lodged before the Inter-American Commission), still pending a decision by the Constitutional Chamber (violation of the principle of exhaustion of domestic remedies), [both of which are] still being processed and have not been submitted to the Court’s consideration, without giving [this person] the right to file the pertinent recourses established by law, the American Convention and the Court’s Rules of Procedure, thus distorting the system upheld by the Convention.”

24. In this regard, the Court recalls, as it has in the context of other advisory consultations, that the mere fact that petitions related to the subject matter of the request exist before the Commission is not sufficient for the Court to abstain from responding to the questions submitted to it.<sup>30</sup>

25. Furthermore, the Court considers that it is not necessarily restricted to the literal terms of the requests that are submitted to it; rather, in exercise of its non-contentious or advisory competence and in view of the provisions of Article 2 of the Convention and the purpose of advisory opinions of “help[ing States to] comply with their international commitments” concerning human rights, it may also suggest the adoption of treaties or other kinds of international norms on matters relating to such commitments as well as other types of measures that may be required in order to guarantee human rights.<sup>31</sup>

26. The Court also finds it necessary to recall that, under international law, when a State is a party to an international treaty, such as the American Convention, this treaty is binding for all its

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<sup>27</sup> Cf. Advisory Opinion OC-1/82, para. 25, and Advisory Opinion OC-21/14, para. 29.

<sup>28</sup> Cf. Inter-American Commission on Human Rights, brief of June 17, 2016 (merits file, folio 20).

<sup>29</sup> Observation received on December 9, 2016 (file, folio 2036).

<sup>30</sup> Cf. Advisory Opinion OC-16/99, paras. 45 to 65, and Advisory Opinion OC-18/03, paras. 62 to 66.

<sup>31</sup> Cf. Advisory Opinion OC-21/14, para. 30, and Advisory Opinion OC-22/16, para. 24.

organs, including the Judiciary and the Legislature,<sup>32</sup> so that a violation by any of these organs gives rise to the international responsibility of the State.<sup>33</sup> Accordingly, the Court considers that the different organs of the State must carry out the corresponding conventionality control,<sup>34</sup> which must be based also on the considerations of the Court in the exercise of its non-contentious or advisory jurisdiction. Both, the non-contentious and the contentious jurisdiction undeniably share the same goal of the Inter-American human rights system, which is “the protection of the fundamental rights of the human being.”<sup>35</sup>

27. Furthermore, the interpretation given to a provision of the Convention<sup>36</sup> through an advisory opinion provides to all the organs of the OAS Member States, including those that are not parties to the Convention but that have undertaken to respect human rights under the Charter of the OAS (Article 3(I)) and the Inter-American Democratic Charter (Articles 3, 7, 8 and 9) with a source that, by its very nature, also contributes, especially in a preventive manner, to achieving the effective respect and guarantee of human rights. In particular, it can provide guidance when deciding matters relating to the respect and guarantee of human rights in the context of the protection of LGBTI persons, to avoid possible human rights violations.<sup>37</sup>

28. Given the broad scope of the Court’s advisory function, which, as previously indicated, encompasses not only the States Parties to the American Convention, everything indicated in this Advisory Opinion also has legal relevance for all OAS Member States,<sup>38</sup> as well as for the organs of the OAS whose sphere of competence relates to the matter that is the subject of this request.

29. In short, the Court considers that it has jurisdiction to rule on the questions raised by Costa Rica and does not find in this request any reasons to abstain from doing so; it therefore admits the request and proceeds to respond to it.

## IV GENERAL CONSIDERATIONS

### A. Glossary

30. As already mentioned, the request for an advisory opinion presented by the State of Costa Rica required the Court to answer five questions on two issues related to the rights of LGBTI

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<sup>32</sup> Cf. *Case of Fontevecchia and D`Amico v. Argentina. Merits, reparations and costs.* Judgment of November 29, 2011. Series C No. 238, para. 93; *Case of Mendoza et al. v. Argentina. Preliminary objections, merits and reparations.* Judgment of May 14, 2013. Series C No. 260, para. 221, and Advisory Opinion OC-21/14, para. 31.

<sup>33</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 164; *Case of the Las Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of November 24, 2009. Series C No. 211, para. 197, and Advisory Opinion OC-21/14, para. 31.

<sup>34</sup> Cf. *Case of Almonacid Arellano et al. v. Chile*, para. 124, and *Case of Liakat Ali Alibux v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of January 30, 2014. Series C No. 276, para. 124, and OC-21/14, para. 31.

<sup>35</sup> *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights.* Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 29, and Advisory Opinion OC-21/14, para. 31.

<sup>36</sup> Cf. *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 26, 2010. Series C No. 220, para. 79; *Case of Gelman v. Uruguay. Monitoring compliance with judgment.* Order of the Inter-American Court of Human Rights of March 20, 2013, *consideranda* 65 to 90, and Advisory Opinion OC-21/14, para. 31.

<sup>37</sup> Cf. Advisory Opinion OC-21/14, para. 31.

<sup>38</sup> Cf. Advisory Opinion OC-18/03, para. 65; OC-21/14, para. 32, and OC-22/16, para. 25.

persons. The first issue refers to recognition of the right to gender identity and, in particular, the procedure to process name change requests based on gender identity; the second refers to the patrimonial rights of same-sex couples.

31. The Court must approach these issues bearing in mind that they usually involve concepts and definitions on which no agreement has been reached by national and international agencies, or by organizations and groups that defend the respective rights, or in academic circles in which they are discussed. In addition, these definitions respond to a conceptual dynamic that is constantly changing and being revised. Furthermore, adopting definitions in this matter is highly sensitive because it is easy to stereotype or classify individuals, and this must be carefully avoided. Consequently, in this opinion, the Court will try to avoid, insofar as possible, the use of these conceptually problematic definitions and, when it must do so, it will do this with the greatest breadth and provisionality, without adopting or defending any conceptual or, especially, inflexible position.

32. Merely for illustrative purposes, and even to demonstrate this difficulty, the Court notes that the following concepts taken from different international sources appear to be the most up-to-date ones at the international level – and again insists that it does not adopt them as its own in this opinion:

**a) Sex:** Strictly speaking, the word sex refers to biological differences between men and women, their physiological characteristics, the sum of biological characteristics that define the spectrum of humans as females and males, or a biological construct referring to the genetic, hormonal, anatomical and physiological characteristics based on which an individual is classified at birth as either male or female.<sup>39</sup> Given that this word only establishes a subdivision between men and women, it does not recognize the existence of other categories that do not fit within the female/male binary system.

**b) Sex assigned at birth:** This idea transcends the concept of sex as male or female and is associated with the determination of sex as a social construct. Sex assignment is not an innate biological fact; rather, sex is assigned at birth based on the perception others have of the genitalia. Most individuals are easily classified, but some do not fit within the female/male binary system.<sup>40</sup>

**c) Gender/sex binary system:** Social and cultural model dominant in western culture which “considers gender and sex as consisting of two, and only two, rigid categories, namely male/man and female/woman. Such a system or model excludes those who do not fit within the two categories (such as transsexual or intersex persons).<sup>41</sup>

**d) Intersexuality:** All those situations in which an individual’s sexual anatomy does not physically conform to the culturally defined standard for the female or male body.<sup>42</sup>

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<sup>39</sup> Cf. OAS, Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs. *Sexual orientation, gender identity and gender expression: key terms and standards*. Study prepared by the Inter-American Commission on Human Rights, OEA/Ser.G. CP/CAJP/INF.166/12, April 23, 2012, para. 13.

<sup>40</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II. Rev.2.Doc. 36, November 12, 2015, para. 16, and Inter-American Commission on Human Rights, *Rapporteurship on the Rights of LGBTI Persons. Basic concepts*. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>.

<sup>41</sup> Cf. Inter-American Commission on Human Rights, *Rapporteurship on the Rights of LGBTI Persons. Basic concepts*. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>

<sup>42</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II. Rev.2.Doc. 36, November 12, 2015, para. 17, and Inter-American Commission on Human Rights, *Rapporteurship on the Rights of LGBTI Persons. Basic concepts*. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>

Intersexual people are born with sexual anatomy, reproductive organs, or chromosomal patterns that do not fit the typical definitions of male or female. These characteristics may be apparent at birth or emerge later in life. Intersex people may identify as a man or a woman or as neither of these categories. Intersexuality is not related to sexual orientation or gender identity: intersex people experience the same range of sexual orientations and gender identities as those who are not intersex.<sup>43</sup>

**e) Gender:** This refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences.<sup>44</sup>

**f) Gender identity:** Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth,<sup>45</sup> including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function through medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.<sup>46</sup> Gender identity is a broad concept that creates space for self-identification, and reflects a deeply felt and experienced sense of one's own gender.<sup>47</sup> Thus, gender identity and its expression also take

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<sup>43</sup> Cf. United Nations, Office of the United Nations High Commissioner for Human Rights, *Living Free & Equal. What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, New York and Geneva, 2016, HR/PUB/16/3, p. 18, and OAS, Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs. *Sexual orientation, gender identity and gender expression: key terms and standards*. Study prepared by the Inter-American Commission on Human Rights, OEA/Ser.G. CP/CAJP/INF. 166/12, April 23, 2012, para. 13.

<sup>44</sup> Cf. United Nations, Committee on the Elimination of Discrimination against Women – CEDAW, *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28, 16 December 2010, para. 5, and OAS, Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs. *Sexual orientation, gender identity and gender expression: key terms and standards*. Study prepared by the Inter-American Commission on Human Rights, OEA/Ser.G. CP/CAJP/INF. 166/12. April 23, 2012, para. 14.

<sup>45</sup> Cf. Inter-American Commission on Human Rights, Rapporteurship on the Rights of LGTBI Persons. *Basic concepts*. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>; UNHCR, *Guidelines on international protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity with the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/IP/12/09, 23 October 2012, para. 8; UNHCR, *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*, December 2015, and *Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, Yogyakarta Principles, March 2007. The Yogyakarta Principles are contained in a document drawn up by various experts, academics and activists in the area of international human rights law at the request of the United Nations High Commissioner for Human Rights. The document proposed a series of principles concerning sexual orientation and gender identity with the aim of providing guidance for the interpretation and application of international human rights law to protect LGBTI people. The final document was published in March 2007. Subsequently, on November 10, 2017, the Yogyakarta Principles "+10" were adopted as a supplement to the 2007 principles. This Court has used these principles in its case law (*Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 110).

<sup>46</sup> Cf. UNHCR, *Guidelines on international protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity with the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/IP/12/09, 23 October 2012, para. 8; OAS, Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs. *Sexual orientation, gender identity and gender expression: key terms and standards*. Study prepared by the Inter-American Commission on Human Rights, OEA/Ser.G. CP/CAJP/INF. 166/12. April 23, 2012, and *Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, Yogyakarta Principles, March 2007.

<sup>47</sup> Cf. UNHCR, *Guidelines on international protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity with the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/IP/12/09, 23 October 2012, and United Nations, Office of the United Nations High Commissioner for Human Rights, *Living Free & Equal. What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, New York and Geneva, 2016, HR/PUB/16/3, p. 18.

many forms; some people do not identify themselves as either male or female or identify themselves as both.<sup>48</sup>

**g) Gender expression:** is understood to be the outward manifestation of a person's gender, by physical aspects, which may include dress, hair style, or the use of cosmetics, or by mannerisms, speech, personal behavior or social interaction, and names or personal references. A person's gender expression may or may not correspond to his or her self-perceived gender identity.<sup>49</sup>

**h) Transgender or trans:** when the gender identity of the person does not correspond with the sex assigned at birth.<sup>50</sup> The gender identity of a trans person is not determined by surgical interventions or medical treatments.<sup>51</sup> The word *trans* is an umbrella term used to describe people with a wide range of gender identities, and the common denominator is that their sense of their own gender is different to the sex that they were assigned at birth and the gender identity that has traditionally been assigned to them. A transgender or trans person may identify her or himself as a man, woman, trans man, trans woman or non-binary person, or in other terms such as hijra, third gender, two-spirit, transvestite, fa'afafine, queer, transpinoy, muxhe, waria and meti. The concept of gender identity differs from that of sexual orientation.<sup>52</sup>

**i) Transsexual person:** Transsexual persons feel and perceive themselves as belonging to a gender that is not the one socially or culturally associated with their biological sex and who opt to have medical treatment – hormonal, surgical or both – to adapt their physical-biological appearance to their mental, spiritual and social sense of self.<sup>53</sup>

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<sup>48</sup> Cf. UNHCR, *Guidelines on international protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity with the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/IP/12/09, 23 October 2012, para. 8. Also, United Nations, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 27 April 2010, A/HRC/14/20, para. 10.

<sup>49</sup> Cf. *Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, Yogyakarta Principles +10, of November 10, 2017, and Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II. Rev.2.Doc. 36, November 12, 2015, para. 22.

<sup>50</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II. Rev.2.Doc. 36, November 12, 2015, para. 21; Inter-American Commission on Human Rights, Rapporteurship on the Rights of LGBTI Persons. Basic concepts. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>, United Nations, Office of the United Nations High Commissioner for Human Rights, *Living Free & Equal. What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, New York and Geneva, 2016, HR/PUB/16/3, p. 18, and Council of Europe, *Case of law of the European Court of Human Rights relating to discrimination on grounds of sexual orientation or gender identity*, Strasbourg, March 2015.

<sup>51</sup> Cf. Inter-American Commission on Human Rights, Rapporteurship on the Rights of LGBTI Persons. Basic concepts. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>, and United Nations, Office of the United Nations High Commissioner for Human Rights, *Living Free & Equal. What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, New York and Geneva, 2016, HR/PUB/16/3, p. 18.

<sup>52</sup> Cf. United Nations, Office of the United Nations High Commissioner for Human Rights, *Living Free & Equal. What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, New York and Geneva, 2016, HR/PUB/16/3, p. 18.

<sup>53</sup> Cf. OAS, Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs. *Sexual orientation, gender identity and gender expression: key terms and standards*. Study prepared by the Inter-American Commission on Human Rights, OEA/Ser.G. CP/CAJP/INF. 166/12. April 23, 2012, para. 19.



**j) Transvestite:** In general, it could be said that transvestites are persons who express their gender identity – either on a permanent or temporary basis – by wearing articles of clothing and adopting the deportment and mannerisms of the gender opposite to the one socially and culturally associated with their biological sex. This may or may not include body modifications.<sup>54</sup>

**k) Cisgender person:** When the gender identity of the person corresponds with the sex assigned at birth.<sup>55</sup>

**l) Sexual orientation:** refers to the emotional, affectional and sexual attraction to, individuals of a different gender or the same gender, or more than one gender,<sup>56</sup> as well as intimate and sexual relations with such individuals.<sup>57</sup> Sexual orientation is a broad concept which creates space for self-identification. In addition, sexual orientation can range along a continuum, including exclusive and non-exclusive attraction to the same or the opposite sex.<sup>58</sup> Everyone has a sexual orientation which is inherent to the identity of the individual.<sup>59</sup>

**m) Homosexuality:** refers to the emotional, affectional and sexual attraction to a person of the same gender, and to the capacity to maintain intimate and sexual relations with that other person. The terms gay and lesbian are related to this definition.<sup>60</sup>

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<sup>54</sup> Cf. OAS, Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs. *Sexual orientation, gender identity and gender expression: key terms and standards*. Study prepared by the Inter-American Commission on Human Rights, OEA/Ser.G. CP/CAJP/INF. 166/12. April 23, 2012, para. 19.

<sup>55</sup> Cf. Inter-American Commission on Human Rights, Rapporteurship on the Rights of LGBTI Persons. *Basic concepts*. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>

<sup>56</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II. Rev.2.Doc. 36, November 12, 2015, para. 19; and Inter-American Commission on Human Rights, Rapporteurship on the Rights of LGBTI Persons. *Basic concepts*. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>; *Mutatis mutandis* Yogyakarta Principles. Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, 2007; UNHCR, *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*, December 2015, and *Guidelines on international protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity with the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/IP/12/09, 23 October 2012.

<sup>57</sup> Cf. Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Yogyakarta Principles, March 2007; UNHCR, *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*, December 2015, and *Guidelines on international protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity with the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/IP/12/09, 23 October 2012. Also, United Nations, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 27 April 2010, A/HRC/14/20, para. 10.

<sup>58</sup> Cf. UNHCR, *Guidelines on international protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity with the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/IP/12/09, October 23, 2012.

<sup>59</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II. Rev.2.Doc. 36, November 12, 2015, para. 19, and United Nations, Office of the United Nations High Commissioner for Human Rights, *Living Free & Equal. What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, New York and Geneva, 2016, HR/PUB/16/3, p. 18.

<sup>60</sup> Cf. OAS, Permanent Council of the Organization of American States. *Committee on Juridical and Political Affairs. Sexual orientation, gender identity and gender expression: key terms and standards*. Study prepared by the Inter-American Commission on Human Rights, OEA/Ser.G. CP/CAJP/INF. 166/12. April 23, 2012, para. 17, and United Nations, Office of the United Nations High Commissioner for Human Rights, *Living Free & Equal. What States are doing to tackle violence and*

**n) Heterosexual person:** refers to women who feel emotionally, sexually and romantically attracted to men; or men who feel emotionally, sexually and romantically attracted to women.<sup>61</sup>

**o) Lesbian:** refers to women who feel emotionally, sexually and romantically attracted to other women on a long-term basis.<sup>62</sup>

**p) Gay:** This term is often used to describe men who feel emotionally, sexually and romantically attracted to other men,<sup>63</sup> although the term may be used to describe both gay men and lesbian women.<sup>64</sup>

**q) Homophobia and transphobia:** Homophobia is an irrational fear of, hatred or aversion towards lesbian, gay or bisexual people; transphobia denotes an irrational fear, hatred or aversion towards transgender people. Because the term homophobia is widely understood, it is often used in an all-encompassing way to refer to fear, hatred and aversion towards LGBTI people in general.<sup>65</sup>

**r) Lesbophobia:** is an irrational fear of, hatred or aversion towards lesbians.<sup>66</sup>

**s) Bisexual:** Person who feels emotionally, sexually and romantically attracted to persons of the same or a different sex.<sup>67</sup> The term bisexual tends to be interpreted and applied

*discrimination against lesbian, gay, bisexual, transgender and intersex people*, New York and Geneva, 2016, HR/PUB/16/3, p. 18.

<sup>61</sup> Cf. UNHCR, *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*, December 2015; OAS, Permanent Council of the Organization of American States. Committee on Juridical and Political Affairs. *Sexual orientation, gender identity and gender expression: key terms and standards*. Study prepared by the Inter-American Commission on Human Rights, OEA/Ser.G. CP/CAJP/INF. 166/12, April 23, 2012, para. 17, and Inter-American Commission on Human Rights, Rapporteurship on the Rights of LGTBI Persons. *Basic concepts*. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>

<sup>62</sup> Cf. OAS, Permanent Council of the Organization of American States. *Committee on Juridical and Political Affairs. Sexual orientation, gender identity and gender expression: key terms and standards*. Study prepared by the Inter-American Commission on Human Rights, OEA/Ser.G. CP/CAJP/INF. 166/12, April 23, 2012, para. 17; Inter-American Commission on Human Rights, Rapporteurship on the Rights of LGTBI Persons. *Basic concepts*. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>; UNHCR, *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*, December 2015, and *Guidelines on international protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity with the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/IP/12/09, October 23, 2012.

<sup>63</sup> Cf. OAS, Permanent Council of the Organization of American States. *Committee on Juridical and Political Affairs. Sexual orientation, gender identity and gender expression: key terms and standards*. Study prepared by the Inter-American Commission on Human Rights, OEA/Ser.G. CP/CAJP/INF. 166/12, April 23, 2012, para. 17, and Inter-American Commission on Human Rights, Rapporteurship on the Rights of LGTBI Persons. *Basic concepts*. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>.

<sup>64</sup> Cf. UNHCR, *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*, December 2015; *Guidelines on international protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity with the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/IP/12/09, October 23, 2012, and OAS, Permanent Council of the Organization of American States and *Committee on Juridical and Political Affairs. Sexual orientation, gender identity and gender expression: key terms and standards*. Study prepared by the Inter-American Commission on Human Rights, OEA/Ser.G. CP/CAJP/INF. 166/12, April 23, 2012, para. 17.

<sup>65</sup> Cf. United Nations, *Fact Sheet. LGBT Rights: Frequently Asked Questions*. Available at: <https://www.unfe.org/wp-content/uploads/2017/05/LGBT-Rights-FAQs.pdf>.

<sup>66</sup> Cf. *Mutatis mutandis*, United Nations, *Fact Sheet. LGBT Rights: Frequently Asked Questions*. Available at: <https://www.unfe.org/wp-content/uploads/2017/05/LGBT-Rights-FAQs.pdf>.

inconsistently, often with too narrow of an understanding. Bisexuality does not have to involve attraction to both sexes at the same time, nor does it have to involve equal attraction to or number of relationships with both sexes. Bisexuality is a unique identity, which requires an examination in its own right.<sup>68</sup>

**t) Cisnormativity:** idea or expectation that all people are cisgender, and that those assigned male at birth always grow up to be men and those assigned female at birth always grow up to be women.<sup>69</sup>

**u) Heteronormativity:** refers to the cultural bias in favor of heterosexual relationships, under which such relationships are deemed normal, natural and ideal, and are preferred over same-gender or same-sex relationships. This concept is composed of legal, social and cultural rules that require individuals to act according to dominant and ruling heterosexual patterns.<sup>70</sup>

**v) LGBTI:** Lesbian, Gay, Bisexual, Trans or Transgender and Intersex. The acronym LGBTI describes a diverse group of people who do not conform to conventional or traditional notions of male and female gender roles.<sup>71</sup> Regarding this specific acronym, the Court recalls that the terminology relating to these human groups is not fixed and evolves rapidly, and that many other terms exist including asexual people, queers, transvestites and transsexuals, among others. In addition, in different cultures other terms may be used to describe people who form same-sex relationships and those who self-identify or exhibit non-binary gender identities (such as hijra, meti, lala, skesana, motsoalle, mithli, kuchu, kawein, travesty, muxé, fa'afafine, fakaleiti, hamjensgara and Two-Spirit).<sup>72</sup> Despite the foregoing, although the Court will not rule on which acronyms, terms and definitions represent the populations analyzed more fairly and exactly, solely for the effects of this opinion and as it

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<sup>67</sup> Cf. Inter-American Commission on Human Rights, Rapporteurship on the Rights of LGTBI Persons. *Basic concepts*. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>; United Nations, *Fact Sheet. LGBT Rights: Frequently Asked Questions*. Available at: <https://www.unfe.org/wp-content/uploads/2017/05/LGBT-Rights-FAQs.pdf>; UNHCR, *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*, December 2015, and *Guidelines on international protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity with the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/IP/12/09, October 23, 2012. <https://www.unfe.org/wp-content/uploads/2017/05/LGBT-Rights-FAQs.pdf>

<sup>68</sup> Cf. UNHCR, *Guidelines on international protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity with the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/IP/12/09, October 23, 2012.

<sup>69</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II. Rev.2.Doc. 36, November 12, 2015, para. 32, and Inter-American Commission on Human Rights, Rapporteurship on the Rights of LGTBI Persons. *Basic concepts*. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>.

<sup>70</sup> Cf. Inter-American Commission on Human Rights, Rapporteurship on the Rights of LGTBI Persons. *Basic concepts*. At October 31, 2017, available at: <http://www.oea.org/en/iachr/multimedia/2015/lgbti-violence/lgbti-terminology.html>, and Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II. Rev.2.Doc. 36, November 12, 2015, para. 31.

<sup>71</sup> Cf. UNHCR, *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees*, December 2015. UNHCR, *Need to Know Guidance: Working with Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Forced Displacement*, 2011, and Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II. Rev.2.Doc. 36, November 12, 2015, para. 1.

<sup>72</sup> Cf. United Nations, *Fact Sheet. LGBT Rights: Frequently Asked Questions*. Available at: <https://www.unfe.org/wp-content/uploads/2017/05/LGBT-Rights-FAQs.pdf>.

has done in previous cases<sup>73</sup> and has been the practice of the OAS General Assembly,<sup>74</sup> it will use this acronym indistinctly, and without this meaning a lack of acknowledgment of other manifestations of gender expression, gender identity and sexual orientation.

## B. Regarding this request for an advisory opinion

33. This request for an advisory opinion presented by Costa Rica refers to the rights of LGBTI persons.<sup>75</sup> The Court considers it appropriate to refer briefly to the context of the rights of these minorities in order to provide a frame of reference as regards the importance of the issues dealt with in this Opinion for the effective protection of the rights of such persons who have historically been victims of structural discrimination, stigmatization, diverse types of violence, and violations of their fundamental rights.<sup>76</sup>

34. In this regard, the Court recalls, for example, that within the sphere of the United Nations, the Human Rights Council has expressed its “grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity.”<sup>77</sup> Also, in 2011, the United Nations High Commissioner for Human Rights (hereinafter “the High Commissioner” or “UNHCHR”) indicated that, “[i]n all regions, people experience violence and discrimination because of their sexual orientation or gender identity,” and that “even the perception of homosexuality or transgender identity puts people at risk.”<sup>78</sup>

35. Likewise, in several resolutions adopted since 2008, the OAS General Assembly has stated that LGBTI persons are subject to various forms of violence and discrimination based on the perception of their sexual orientation and gender identity or expression, and has resolved to condemn acts of violence, human rights violations and all forms of discrimination on the basis of sexual orientation and gender identity or expression.<sup>79</sup>

<sup>73</sup> Cf. *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, paras. 92 and 267; *Case of the Hacienda Brazil Verde Workers v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of October 20, 2016. Series C No. 318, para. 76, and *Case of Flor Freire v. Ecuador. Preliminary objection, merits, reparations and costs*. Judgment of August 31, 2016. Series C No. 315, para. 129.

<sup>74</sup> Cf. OAS, General Assembly resolutions: AG/RES. 2908 (XLVII-O/17), Promotion and protection of human rights, June 21, 2017; AG/RES. 2887 (XLVI-O/16), Promotion and protection of human rights, June 14, 2016; AG/RES. 2863 (XLIV-O/14), Human Rights, Sexual Orientation, and Gender Identity and Expression, June 5, 2014; AG/RES. 2807 (XLIIO-O/13) corr.1, Human Rights, Sexual Orientation, and Gender Identity and Expression, June 6, 2013; AG/RES. 2721 (XLIIO-O/12), Human Rights, Sexual Orientation, and Gender Identity, June 4, 2012; AG/RES. 2653 (XLI-O/11), Human Rights, Sexual Orientation, and Gender Identity, June 7, 2011; AG/RES. 2600 (XL-O/10), Human Rights, Sexual Orientation, and Gender Identity, June 8, 2010; AG/RES. 2504 (XXXIX-O/09), Human Rights, Sexual Orientation, and Gender Identity, June 4, 2009, and AG/RES. 2435 (XXXVIII-O/08), Human Rights, Sexual Orientation, and Gender Identity, June 3, 2008.

<sup>75</sup> Cf. Request for an advisory opinion presented by Costa Rica (file, folio 4).

<sup>76</sup> Cf. *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, paras. 92 and 267.

<sup>77</sup> United Nations, Human Rights Council. Resolution 17/19 of 14 July 2011, A/HRC/RES/17/19. See also Resolutions 32/2 of 15 July 2016, A/HRC/RES/32/2, and 27/32 of 2 October 2014, A/HRC/RES/27/32.

<sup>78</sup> United Nations, Report of the United Nations High Commissioner for Human Rights. *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, para. 1. Similarly, see United Nations, Report of the Office of the United Nations High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 5, and Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 19 April 2017, A/HRC/35/36, paras. 2, 14 and 15. See also WHO *Sexual Health, Human Rights and the Law*, Geneva, 2015, p. 23.

<sup>79</sup> Cf. OAS, General Assembly resolutions: AG/RES. 2908 (XLVII-O/17), Promotion and protection of human rights, June 21, 2017; AG/RES. 2887 (XLVI-O/16), Promotion and protection of human rights, June 14, 2016; AG/RES. 2863 (XLIV-O/14), Human Rights, Sexual Orientation, and Gender Identity and Expression, June 5, 2014; AG/RES. 2807 (XLIIO-O/13) corr.1, Human Rights, Sexual Orientation, and Gender Identity and Expression, June 6, 2013; AG/RES. 2721 (XLIIO-O/12), Human Rights, Sexual Orientation, and Gender Identity, June 4, 2012.

36. The different forms of discrimination against LGBTI persons are evident and present themselves in numerous ways both in the public and private sphere.<sup>80</sup> In the Court's opinion, one of the most extreme forms of discrimination against LGBTI persons is that which occurs in violent situations. Thus, the mechanisms for the protection of human rights of the United Nations<sup>81</sup> and of the Inter-American system<sup>82</sup> have documented violent acts committed against LGBTI persons in all regions based on prejudices. The UNHCHR has noted that "such violence may be physical (including murder, beatings, kidnapping and sexual assault) or psychological (including threats, coercion and the arbitrary deprivation of liberty, which includes forced psychiatric incarceration)."<sup>83</sup> In addition, it indicated that such prejudice-based violence "is often particularly brutal"<sup>84</sup> and considered that it constituted "a form of gender-based violence, driven by a desire to punish individuals whose appearance or behaviour appears to challenge gender stereotypes."<sup>85</sup> In addition, "LGBTI youth and lesbian, bisexual and transgender women are at particular risk of physical, psychological and sexual violence in family and community settings."<sup>86</sup>

37. For example, the United Nations Special Rapporteur on torture and other forms of cruel, inhuman or degrading treatment or punishment has noted that "discrimination on grounds of sexual orientation or gender identity may often contribute to the dehumanization of the victim,

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O/12), Human Rights, Sexual Orientation, and Gender Identity, June 4, 2012; AG/RES. 2653 (XLI-O/11), Human Rights, Sexual Orientation, and Gender Identity, June 7, 2011; AG/RES. 2600 (XL-O/10), Human Rights, Sexual Orientation, and Gender Identity, June 8, 2010; AG/RES. 2504 (XXXIX-O/09), Human Rights, Sexual Orientation, and Gender Identity, June 4, 2009, and AG/RES. 2435 (XXXVIII-O/08), Human Rights, Sexual Orientation, and Gender Identity, June 3, 2008.

<sup>80</sup> Cf. United Nations, Report of the United Nations High Commissioner for Human Rights. *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, para. 1.

<sup>81</sup> Cf. United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 21. See also, Report of the United Nations High Commissioner for Human Rights. *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, A/HRC/19/41, para. 20.

<sup>82</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II.rev.2, November 12, 2015, para. 24.

<sup>83</sup> United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 21.

<sup>84</sup> United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 23, and Report of the United Nations High Commissioner for Human Rights. *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, para. 22. Also, Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II.rev.2, November 12, 2015, paras. 107 to 109.

<sup>85</sup> United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 21. Also, Report of the United Nations High Commissioner for Human Rights. *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, paras. 20 and 21. Similarly, see Organization for Security and Cooperation in Europe – OSCE, *Hate Crimes in the OSCE Region – Incidents and Responses, Annual Report 2006*, OSCE/ODIHR, Warsaw, 2007, p. 53.

<sup>86</sup> Cf. United Nations, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 19 April 2017, A/HRC/35/36, para. 14. In addition, the Independent Expert noted that multiple, interrelated and aggravated forms of violence and discrimination against LGBTI persons had been identified, which "appear not as singular events but as part of a prolonged vicious circle. They are multiple and multiplied — inextricably linked emotionally, psychologically, physically and structurally." Added to this, they "intersect in a variety of ways, and most clearly where the victim is not only attacked or discriminated against for having a different sexual orientation and gender identity but also on grounds of race, ethnic origin, age, gender, or membership of a minority or indigenous community." United Nations, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 19 April 2017, A/HRC/35/36, para. 39.

which is often a necessary condition for torture and ill-treatment to take place.”<sup>87</sup> Similarly, the United Nations Committee against Torture has expressed its concern with regard to the physical and sexual abuse perpetrated by police and prison staff against LGBTI persons in some countries of the region.<sup>88</sup>

38. Both the United Nations system<sup>89</sup> and the Inter-American system<sup>90</sup> have asserted that the response to these violations is inadequate, because often these violations are not properly investigated and prosecuted and there is a lack of support mechanisms for the victims.<sup>91</sup> The UNHCHR has also noted that “[h]uman rights defenders combating these violations are frequently persecuted and face discriminatory restrictions on their activities.”<sup>92</sup>

39. In addition, LGBTI persons also suffer both official discrimination, “in the form of State laws and policies that criminalize homosexuality, bar them from certain forms of employment, or deny them access to benefits, and unofficial discrimination in the form of social stigma, exclusion, and bias including at work, at home, at school and in health care institutions.”<sup>93</sup> For example, several States in the region still criminalize private consensual sexual relations between adults of the same

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<sup>87</sup> United Nations, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 1 February 2013, A/HRC/22/53, para. 79. See also, Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, 3 July 2001, A/56/156, paras. 17 to 25.

<sup>88</sup> Cf. United Nations, Committee against Torture, Concluding observations with regard to Argentina, 24 May 2017, CAT/C/ARG/CO/5-6, para. 35; Colombia, 29 May 2015, CAT/C/COL/CO/5; Costa Rica, 7 July 2008, CAT/C/CRI/CO/2, para. 11; Ecuador, 8 February 2006, CAT/C/ECU/CO/3, para. 17; United States of America, 25 July 2006, CAT/C/USA/CO/2, para. 37, and 19 December 2014, CAT/C/USA/CO/3-5; Paraguay, 14 December 2011, CAT/C/PRY/CO/4-6, para. 19, and Peru, 21 January 2013, CAT/C/PER/CO/5-6, para. 22.

<sup>89</sup> Cf. United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 25, and Report of the United Nations High Commissioner for Human Rights. *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, para. 23.

<sup>90</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II.rev.2, November 12, 2015, para. 476.

<sup>91</sup> Cf. United Nations, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 19 April 2017, A/HRC/35/36, para. 14, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 25. Also, Report of the United Nations High Commissioner for Human Rights. *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, para. 23. See also Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II.rev.2, November 12, 2015, paras. 97 to 101, and 103. The extent of the daily violence tends to be masked because “official statistics tend to understate the number of incidents, and victims are often reluctant to report their experiences for fear of extortion, breach of confidentiality or reprisals. In addition, prejudicial and inexact categorization of cases results in misidentification, concealment and underreporting.” Cf. United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 25. Also, Report of the United Nations High Commissioner for Human Rights. *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, para. 23. See also Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II.rev.2, November 12, 2015, paras. 97 to 101, and 103.

<sup>92</sup> United Nations, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 19 April 2017, A/HRC/35/36, para. 14.

<sup>93</sup> United Nations, Office of the United Nations High Commissioner for Human Rights, *Born Free and Equal. Sexual Orientation and Gender Identity in International Human Rights Law*, 2012, HR/PUB/12/06, p. 39.

sex,<sup>94</sup> while this Court<sup>95</sup> and different organs involved in the protection of international human rights law have considered this to be contrary to international human rights law because it violates the right to equality and non-discrimination and the right to privacy.<sup>96</sup> Added to this, these kinds of laws have negative repercussions on the quality of health services, dissuading this population from using such services. It may also result in the denial of care or the inexistence of services that respond to the specific health needs of LGBTI and intersexual persons.<sup>97</sup> Furthermore, in jurisdictions in which their sexual conduct is criminalized, it is “much more likely that the preventive health measures that should be tailored to these communities are suppressed.” In the same way, “the fear of judgment and punishment can deter those engaging in consensual same-sex conduct from seeking access to health services.” “These problems are compounded for persons living with HIV/AIDS.”<sup>98</sup> The UNHCHR has found that, as a result of such laws, “victims may be reluctant to report violence perpetrated by a family member for fear of the criminal ramifications of revealing their sexual orientation.”<sup>99</sup>

<sup>94</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II.rev.2, November 12, 2015, para. 61. The following laws are mentioned: “[Antigua and Barbuda] Sexual Offences Act of 1995 (Act No. 9), Section 12 (Buggery); [Barbados] Sexual Offences Act, Chapter 154, Article 9 (Buggery); [Belize] Criminal Code of Belize establishes in its Chapter 101, Section 53 (carnal intercourse against the order of nature) and Section 45 (aggravated indecent assault); [Dominica] Sexual Offences Act 1998, Section 15 (Buggery), article 16 (Attempted buggery); [Grenada] Criminal Code, article 431 (“unnatural connexion”); [Guyana] Criminal Law Act, Chapter 8:01, section 353 (Attempt to commit unnatural offences), Section 354 (buggery); [Jamaica] Offences against the Person Act, Section 76 (Unnatural Crime), Section 77 (attempt); [Saint Kitts and Nevis] Offences against the Person Act, Part XII, Section 56 (Unnatural offences and Sodomy); [Saint Lucia] Criminal Code, Sub-Part C, Subsection 133 (Buggery); [Saint Vincent and the Grenadines] Criminal Code, Section 146 (buggery); and [Trinidad and Tobago] Sexual Offences Act Chapter 11:28, Section 13 (buggery).” Likewise, United Nations, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 19 April 2017, A/HRC/35/36, para. 15. See also, United Nations, Office of the United Nations High Commissioner for Human Rights, *Living Free & Equal. What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, New York and Geneva, 2016, HR/PUB/16/3, p. 11.

<sup>95</sup> Cf. *Case of Flor Freire v. Ecuador*, para. 123.

<sup>96</sup> Cf. United Nations, Report of the United Nations High Commissioner for Human Rights. *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, para. 41; Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 43; Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 19 April 2017, A/HRC/35/36, paras. 52 to 54; Human Rights Committee. *Toonen v. Australia*. Communication No. 488/1992, 31 March 1994, CCPR/C/WG/44/D/488/1992, paras. 8(1) to 9; Committee on Economic, Social and Cultural Rights: Concluding observations on the second periodic report of Sudan, E/C.12/SDN/CO/2, 9 October 2015, para. 19; Concluding observations on the third periodic report of Tunisia, E/C.12/TUN/CO/3, 14 November 2016, paras. 24 and 25; Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 27 April 2010, A/HRC/14/20, paras. 2, 6 and 7; ECHR. *Case of Dudgeon v. The United Kingdom*. No. 7525/76, 22 October 1981, paras. 61 and 63; *Case of Norris v. Ireland*. No. 10581/83, 26 October 1988, paras. 46 and 47; *Case of Modinos v. Cyprus*. No. 15070/89, 22 April 1993, paras. 24 and 25; *Case of A.D.T. v. The United Kingdom*. No. 35765/97, 31 July 2000, and *Case of H.Ç. v. Turkey*. No. 6428/12, 31 July 2000, and Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II.rev.2, November 12, 2015, para. 60.

<sup>97</sup> Cf. United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 50. Similarly, United Nations, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 27 April 2010, A/HRC/14/20, paras. 9 and 21.

<sup>98</sup> Cf. United Nations, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 27 April 2010, A/HRC/14/20, paras. 18 and 19, and Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 50.

<sup>99</sup> Cf. United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 66.

40. In the private sphere, such persons typically suffer “discrimination in the form of social stigma, exclusion and bias, including at work, at home, at school and in health care institutions.”<sup>100</sup> Generally, stigmatization occurs “under the umbrella of culture, religion and tradition.”<sup>101</sup> Nevertheless, the interpretations on which such practices are based are “not immutable and homogenous”<sup>102</sup> and, in the Court’s opinion, it is the obligation of States to eradicate them encouraging empathy for sexual orientation and gender identity as an inherent aspect of everyone, which “invites reappraisal of both educational content and textbooks, and the building of pedagogical tools and methodology, to promote an open mindset and respect for human biodiversity.”<sup>103</sup>

41. The Court also notes that “discrimination against LGBTI individuals is often exacerbated by other identity factors such as sex, ethnicity, age and religion, and socio-economic factors such as poverty and armed conflict.”<sup>104</sup> “The impact of such multiple forms of discrimination may be felt at an individual level and a societal one, as LGBTI persons, deprived of access to such basic rights as employment, health, education and housing find themselves in poverty, cut off from economic opportunity.”<sup>105</sup> Thus, as the UNHCR has noted, “rates of poverty, homelessness and food insecurity are higher among LGBT[I] individuals than in the wider community.”<sup>106</sup>

42. In this regard, the UNHCHR has indicated that transgender persons “face multiple challenges in the exercise of their rights, including in employment and housing, in contracting obligations, enjoying State benefits, or when travelling abroad,” as a result of the lack of legal recognition of their self-perceived gender.<sup>107</sup>

43. Moreover, in the exercise of its contentious jurisdiction, the Court has observed the consequences of the failure of official recognition of relationships between persons of the same sex.<sup>108</sup> The UNHCHR has indicated that this lack of official recognition also results in “same-sex

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and Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II.rev.2, November 12, 2015, para. 76, 78 and 79.

<sup>100</sup> Cf. United Nations, Office of the United Nations High Commissioner for Human Rights, *Born Free and Equal. Sexual Orientation and Gender Identity in International Human Rights Law*, 2012, HR/PUB/12/06, p. 39.

<sup>101</sup> United Nations, Report of the Special Rapporteur on the human right to safe drinking water and sanitation, 2 July 2012, A/HRC/21/42, para. 65.

<sup>102</sup> United Nations, Report of the Special Rapporteur on violence against women, its causes and consequences, 20 January 2006, E/CN.4/2006/61, para. 85.

<sup>103</sup> United Nations, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 19 April 2017, A/HRC/35/36, para. 61, and Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II.rev.2, November 12, 2015, para. 262.

<sup>104</sup> Cf. United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 42.

<sup>105</sup> Cf. United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 42. Also, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 27 April 2010, A/HRC/14/20, para. 6.

<sup>106</sup> United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 42.

<sup>107</sup> Cf. United Nations, Report of the United Nations High Commissioner for Human Rights. *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, para. 69.

<sup>108</sup> Cf. *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of February 26, 2016. Series C No. 310.



partners being treated unfairly by private actors, including health-care providers and insurance companies.”<sup>109</sup>

44. Nevertheless, the Court is aware that the regional situation of LGBTI persons “is not homogeneous, but heterogeneous”;<sup>110</sup> accordingly, it is not necessarily the same in all the countries of the region. The degree of recognition and access to fundamental rights of such persons varies depending on the State in question.

45. Bearing this mind, the Court finds it evident that LGBTI persons face different forms of violence and discrimination, although consensus exists among several countries in the region that measures must be taken to combat this scourge.<sup>111</sup> Indeed this consensus is so that, in the context of the United Nations’ Universal Periodic Review, most of the OAS Member States have voluntarily accepted recommendations to confront violence and discrimination based on sexual orientation and gender identity.<sup>112</sup>

46. In this regard, the Court notes that, at the domestic level, some States of the region have begun to implement actions to recognize the situation of violence and discrimination against LGBTI persons and have implemented public policies or enacted laws that seek to prevent, respond to or eradicate the violations of which they are victims. For example, in 2010, the State of Brazil created a National Anti-discrimination Council attached to the Human Rights Secretariat, the purpose of which is to draw up and propose “guidelines for government action in the domestic sphere to combat discrimination and promote and defend the rights of Lesbian, Gay, Bisexual, Tranvestite and Transsexual persons.”<sup>113</sup> Similarly, since 2005, Argentina has a National Anti-discrimination Plan with a component relating to LGBTI persons.<sup>114</sup> Colombia has a Directorate for Indigenous,

<sup>109</sup> United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 68.

<sup>110</sup> United Nations, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 19 April 2017, A/HRC/35/36, para. 61, para. 18.

<sup>111</sup> Cf. OAS, General Assembly resolutions: AG/RES. 2908 (XLVII-O/17), Promotion and protection of human rights, June 21, 2017; AG/RES. 2887 (XLVI-O/16), Promotion and protection of human rights, June 14, 2016; AG/RES. 2863 (XLIV-O/14), Human Rights, Sexual Orientation, and Gender Identity and Expression, June 5, 2014; AG/RES. 2807 (XLIII-O/13) corr.1, Human Rights, Sexual Orientation, and Gender Identity and Expression, June 6, 2013; AG/RES. 2721 (XLII-O/12), Human Rights, Sexual Orientation, and Gender Identity, June 4, 2012; AG/RES. 2653 (XLI-O/11), Human Rights, Sexual Orientation, and Gender Identity, June 7, 2011; AG/RES. 2600 (XL-O/10), Human Rights, Sexual Orientation, and Gender Identity, June 8, 2010; AG/RES. 2504 (XXXIX-O/09), Human Rights, Sexual Orientation, and Gender Identity, June 4, 2009, and AG/RES. 2435 (XXXVIII-O/08), Human Rights, Sexual Orientation, and Gender Identity, June 3, 2008.

<sup>112</sup> Cf. United Nations, Human Rights Council, Antigua and Barbuda: 23 June 2016, A/HRC/33/13, para. 76.13; Barbados: 12 March 2013, A/HRC/23/11, paras. 102.38, 102.45 and 102.56, and 5 June 2013, A/HRC/23/11/Add.1, paras. 11 and 13; Bolivia: 17 December 2014, A/HRC/28/7, para. 114.9; Brazil: 9 July 2012, A/HRC/21/11, paras. 119.94 and 119.97, and 13 September 2012, A/HRC/21/11/Add.1, para. 19; Canada: 5 October 2009, A/HRC/11/17, para. 86.29, and 8 June 2009, A/HRC/11/17/Add.1, para. 36; Chile: 2 April 2014, A/HRC/26/5, paras. 121.70, 121.71, and 121.73, and 5 March 2014, A/HRC/26/5/Add.1, para. 4; Colombia: 4 July 2013, A/HRC/24/6, para. 116.43, and 19 July 2013, A/HRC/24/6/Add.1; Costa Rica: 7 July 2014, A/HRC/27/12, paras. 128.69-71, and 22 September 2014 A/HRC/27/12/Add.1; Cuba: 8 July 2013, A/HRC/24/16, para. 170.131-133, and 19 September 2013, A/HRC/24/16/Add.1, para. 6; Ecuador: 10 July 2017, A/HRC/36/4, paras. 118.17-23; El Salvador: 17 December 2014, A/HRC/28/5, paras. 103.9, 104.19 and 105.32-35, and 18 March 2015, A/HRC/28/5/Add.1, para. 13; United States of America: 20 July 2015, A/HRC/30/12, paras. 176.162-164, and 14 September 2015, A/HRC/30/12/Add.1, paras. 5 and 6; Guatemala: 31 December 2012, A/HRC/22/8, para. 99.27; Guyana: 13 April 2015, A/HRC/29/16, paras. 130.25-27; Haiti: 20 December 2016, A/HRC/34/14, para. 115.71; Honduras: 15 July 2015, A/HRC/30/11, paras. 124.10-11 124.18 and 124.20; Jamaica: 20 July 2015, A/HRC/30/15, paras. 119.20-21; Mexico: 11 December 2013, A/HRC/25/7, para. 148.39, and 14 March 2014, A/HRC/25/7/Add.1, para. 20; Nicaragua: 1 July 2014, A/HRC/27/16, paras. 114.34 and 116.4, 18 September 2014, and A/HRC/27/16/Add.1, para. 12, and Panama: 8 July 2015, A/HRC/30/7, paras. 90.38 to 44.

<sup>113</sup> Brazil. Office of the President of the Republic of Brazil. Decree No. 7,388, of December 9, 2010, article 1.

<sup>114</sup> Cf. Argentina. Annex “*Hacia un Plan Nacional contra la Discriminación - la Discriminación en Argentina. Diagnóstico y propuestas*” to Decree 1086/2005 of September 27, 2005. “*Plan Nacional Contra la Discriminación*”, pp. 160 to 171.

Rom and Minority Affairs with the mandate, *inter alia*, of designing “programs to provide technical and social assistance and support for policies for the indigenous and rom communities and the lesbian, gay, transsexual and bisexual [LGBTI] population.”<sup>115</sup> In the case of Costa Rica, the Executive branch’s “Policy to eradicate discrimination against the LGBTI population from its institutions”<sup>116</sup> was adopted in 2015. In it, the Government recognized “that discrimination towards persons of diverse sexual orientations still exists in Costa Rica and within its public institutions, whereby practices contrary to their human rights persist towards those who work in the public sector and also those who are users of the services of the public institutions.” In Chile, Statute No. 20,609 was enacted in 2012 establishing measures against discrimination based on sexual orientation and gender identity, among other protected categories.<sup>117</sup>

47. In addition to the above, it should be pointed out that, owing to the acts of violence described above, the violation of the right to equality and non-discrimination of LGBTI persons (Articles 1(1) and 24 of the American Convention, see *supra* para. 34 and *infra* paras. 98 and 134) results in the concurrent violation of other rights and provisions of the Convention, such as, and above all, the right to life and to physical integrity. This occurs because discriminatory speech and the resulting attitudes, which are based on stereotypes of heteronormativity and cisnormativity with different degrees of radicalization, lead to the homophobia, lesbophobia and transphobia that encourage such hate crimes.

48. The discrimination suffered by LGBTI persons is also extremely harmful to the right to mental integrity of such persons (Article 5(1) of the Convention), owing to the characteristics of discrimination based on sexual orientation. In many cases, this happens when a person is at a difficult stage of their psychological evolution, such as during puberty, when he or she has already internalized prejudicial disparagement, even coming from within the family circle.<sup>118</sup> This does not occur in other forms of discrimination where the person has been aware of the reason for the discrimination since infancy and is supported by the family unit which may also be subject to such discrimination. The contradiction in values which the adolescent is immersed in during the development of his or her personality is particularly harmful to his or her mental integrity, which also affects his or her identity and life project, and sometimes leads not only to self-harming conducts, but also to adolescent suicides.<sup>119</sup>

49. Thus, discrimination against this human group not only harms the right to individual health (Article 5(1)), but also to public health (Article 26 of the Convention and Article 10(1) of the Protocol of San Salvador), which is the sum of the health of the inhabitants. According to the World Health Organization (hereinafter “WHO”), the classic concept of health is a state of complete physical, mental and social well-being and not merely the absence of diseases or illnesses.<sup>120</sup> Those

<sup>115</sup> Colombia. Office of the President of the Republic of Colombia. Decree 4530, Article 13.9, published in Official Gazette No. 47,187 of November 28, 2008.

<sup>116</sup> Costa Rica. Office of the President of the Republic of Costa Rica. “*Política del Poder Ejecutivo para erradicar de sus instituciones la discriminación hacia la población LGBTI*,” May 12, 2015.

<sup>117</sup> Cf. Chile. National Congress of Chile. Act No. 20,609 of June 28, 2012.

<sup>118</sup> Cf. United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, paras. 22 and 66.

<sup>119</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II.rev.2, November 12, 2015, para. 324, and United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, para. 55. Also, UNICEF, *Position Paper No. 9: Eliminating discrimination against children and parents based on sexual orientation and/or gender identity*, November 2014, p. 3.

<sup>120</sup> Cf. WHO. Constitution of the World Health Organization, adopted by the International Health Conference held in New York from June 19 to July 22, 1946. Preamble.

discriminated against based on their sexual orientation – since this is part of their identity and, consequently, of their mental integrity – may be prone to psychological problems resulting from a specific situation or event; in other words, their individual health is affected as a whole even if the discrimination only occurs in certain situations.

50. As well it has been shown, at least based on pioneering North American research of the 1950s, that the sexual conduct of a very significant percentage of the population does not respond to the heteronormative or cisnormative stereotype. Therefore, owing to the discrimination suffered by LGBTI persons, who constitute a considerable percentage of the population, their interactions with the rest of the population tend to happen under conditions of more or less pronounced situational neurosis. This consequently also creates problems for those with whom LGBTI persons interact. As such, social relations in general tend to become unbalanced.

51. Consequently, the better the health (psychological well-being) of the members of a population, the better will be the public health of such society. Conversely, the more people with a deteriorated psychological well-being exist within a population, the more the general level of psychological well-being of the population (public health) will be affected. This is so not only because of those who suffer from poor psychological well-being, but also, because those individuals interact with other members in society who find themselves affected too.

### **C. Regarding the structure of this advisory opinion**

52. The Court recalls that it is inherent to its attributes the authority to structure its rulings as it considers most appropriate in the interests of law and for the purpose of an advisory opinion.

53. Bearing this in mind, in order to respond satisfactorily to the questions raised by the State of Costa Rica, the Court has decided to organize this opinion as follows: (1) Chapter V will refer specifically to the criteria used in this Opinion to interpret the provisions of the Convention; (2) Chapter VI will contain general consideration on the right to equality and non-discrimination and, in particular, will analyze this principle in relation to gender identity, gender expression and sexual orientation; (3) Chapter VII will deal with the issues raised in the first three questions posed by the State; that is, those related to the right to gender identity and the name change procedure, and (4) Chapter VIII will cover the last two questions, which relate to the rights derived from a relationship between same-sex couples.

## **V INTERPRETATION CRITERIA**

54. The contentious jurisdiction of the Inter-American Court consists essentially in the interpretation and application of the American Convention<sup>121</sup> or other treaties over which it has jurisdiction,<sup>122</sup> to determine the international responsibility of the State under international law,

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<sup>121</sup> Article 62 of the American Convention: 1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention. [...] 3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

<sup>122</sup> Cf. *Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 16, 2009. Series C No. 205, paras. 45 to 58 and 77.

pursuant to international customary and treaty-based law.<sup>123</sup> However, the Court recalls, as it has on other occasions,<sup>124</sup> that the task of interpretation which it must perform in the exercise of its advisory function differs from its contentious jurisdiction in that there are no “parties” involved in the advisory procedure and there is no litigation to be decided. The main purpose of the advisory function is to obtain a judicial interpretation of one or several provisions of the Convention or of other treaties concerning the protection of human rights in the States of the Americas.<sup>125</sup>

55. To issue its opinion on the interpretation of the legal provisions cited in the request, the Court will resort to the Vienna Convention on the Law of Treaties, which contains the general and customary rules for the interpretation of international treaties.<sup>126</sup> This involves the simultaneous and joint application of the criteria of good faith, the analysis of the ordinary meaning to be given to the terms of the treaty in question in their context and in light of the given treaty’s object and purpose. Accordingly, the Court will use the methods set out in Articles 31<sup>127</sup> and 32<sup>128</sup> of the Vienna Convention to make this interpretation.

56. Based on the foregoing, the Court has asserted that, in the case of the American Convention, the object and purpose of the treaty is “the protection of the fundamental rights of the human being.”<sup>129</sup> To this end the Convention was designed to protect the human rights of individuals, regardless of their nationality, against their own State or any other.<sup>130</sup> In this regard, it is essential to recall the specificity of human rights treaties, which create a legal system under which States assume obligations towards the persons subject to their jurisdiction<sup>131</sup> and where a complaint for the violation of such obligations may be filed by the victims of these violations and by

<sup>123</sup> Cf. United Nations, Resolution 56/83 of the General Assembly, *Responsibility of States for internationally wrongful acts*, 28 January 2002, A/RES/56/83, article 3 (Characterization of an act of a State as internationally wrongful): “[t]he characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.”

<sup>124</sup> Cf. Advisory Opinion OC-15/97, paras. 25 and 26, and Advisory Opinion OC-22/16, para. 26.

<sup>125</sup> Cf. *Restrictions to the Death Penalty (Arts. 4.2 and 4.4 American Convention on Human Rights)*. Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 22, and OC-22/16, para. 26.

<sup>126</sup> Cf. Advisory Opinion OC-21/14, para. 52, and Advisory Opinion OC-22/16, para. 35. See also, International Court of Justice, *Case concerning the sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, Judgment of 17 December 2002, para. 37, and International Court of Justice, *Avena and Other Mexican Nationals (Mexico v. the United States of America)*, Judgment of 31 March 2004, para. 83.

<sup>127</sup> Cf. Vienna Convention on the Law of Treaties, U.N. Doc A/CONF.39/27 (1969), U.N.T.S. vol. 1155, p. 331, signed at Vienna on May 23, 1969, Article 31 (General rule of interpretation): “1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.”

<sup>128</sup> Article 32 of the Vienna Convention on the Law of Treaties: (Supplementary means of interpretation): “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”

<sup>129</sup> *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*. Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 29, and Advisory Opinion OC-21/14, para. 54.

<sup>130</sup> Cf. Advisory Opinion OC-2/82, para. 33, and Advisory Opinion OC-21/14, para. 54.

<sup>131</sup> Cf. Advisory Opinion OC-2/82, para. 29, and Advisory Opinion OC-21/14, para. 54.

the community of States Parties to the Convention through the direct action of the Commission<sup>132</sup> and even by lodging a petition before the Court.<sup>133</sup> In this sense, the interpretation of the provisions must be based on the values that the Inter-American system seeks to safeguard, from the “best perspective” for the protection of the individual.<sup>134</sup>

57. Hence, the American Convention expressly contains specific interpretation standards in its Article 29,<sup>135</sup> including the *pro persona* principle, which means that “no provision of the Convention shall be interpreted as: [...] restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party,” or “excluding or limiting the effects that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.”

58. In addition, the Court has repeatedly indicated that human rights treaties are living instruments, the interpretation of which must evolve with time and with the conditions of contemporary life.<sup>136</sup> This evolutive interpretation is consequent with the general rules of interpretation set out in Article 29 of the American Convention, as well as with those established by the Vienna Convention on the Law of Treaties.<sup>137</sup>

59. Furthermore, it is necessary to consider that the purpose of this advisory opinion is to interpret the right to equality and non-discrimination of LGBTI persons in relation to the obligation to respect and guarantee the human rights established in the American Convention. According to the systematic interpretation contained in the Vienna Convention on the Law of Treaties, “the provisions must be interpreted as part of a whole, the significance and scope of which must be established based on the legal system to which it belongs.”<sup>138</sup> The Court finds that, in application of these rules, it must take into consideration international legal standards regarding LGBTI persons when identifying the content and scope of the obligations assumed by States under the American Convention, and especially when indicating the measures that States must take. Owing to the subject matter submitted in the request, as additional sources of international law, the Court will take into consideration other relevant conventions to which the States of the Americas are a party to in order to make a harmonious interpretation of their international obligations in the terms of the provision cited. Moreover, the Court will consider the applicable obligations, and the case law and

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<sup>132</sup> Cf. Articles 43 and 44 of the American Convention.

<sup>133</sup> Cf. Article 61 of the American Convention.

<sup>134</sup> Cf. *Case of González et al. (“Cotton Field”) v. Mexico*, para. 33.

<sup>135</sup> Article 29 of the American Convention: “Restrictions regarding Interpretation: No provision of this Convention shall be interpreted as: (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; (c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.”

<sup>136</sup> Cf. *Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 193; *The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 114; *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, para. 245, and *Case of the Hacienda Brazil Verde Workers v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of October 20, 2016. Series C No. 318, para. 245.

<sup>137</sup> Cf. Advisory Opinion OC-16/99, para. 114, and *Case of Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*, para. 245.

<sup>138</sup> *Case of González et al. (“Cotton Field”) v. Mexico*, para. 43, and *Case of Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*, para. 191.

decisions in this matter, as well as the relevant decisions, rulings and declarations adopted at the international level.

60. All in all, when answering the present request, the Court acts as a human rights court, guided by the norms that regulate its advisory jurisdiction, and proceeds to make a strictly legal analysis of the questions raised, pursuant to international human rights law, taking into account the relevant sources of international law.<sup>139</sup> In this regard, it should be clarified that the *corpus juris* of international human rights law consists of a series of rules expressly established in international treaties or to be found in international customary law as evidence of a practice generally accepted as law, as well as of the general principles of law and of a series of rules of a general nature or otherwise called *soft law*; the latter providing guidance on the interpretation of the former, because they give greater precision to the minimum content established in the treaties.<sup>140</sup> In addition, the Court will base its opinion on its own jurisprudence.

## VI THE RIGHT TO EQUALITY AND NON-DISCRIMINATION OF LGBTI PERSONS

### A. The right to equality and non-discrimination

61. The Court has asserted that the notion of equality emanates directly from the oneness of the nature of humankind and is indissociable of the essential dignity of the individual. Thus, any situation is incompatible with this that, considering a specific group to be superior, gives it privileged treatment or, inversely, considering it inferior, treats it with hostility or otherwise subjects it to discrimination in the enjoyment of rights that are accorded to others not so classified.<sup>141</sup> States must refrain from taking actions that are directly or indirectly aimed at creating situations of *de jure* or *de facto* discrimination.<sup>142</sup> The Court's jurisprudence has also indicated that at the current stage of evolution of international law, the fundamental principle of equality and non-discrimination has entered the domain of *ius cogens*. The whole legal structure of national and international public order rests on this premise and it permeates every legal system.<sup>143</sup>

62. The American Convention, like the International Covenant on Civil and Political Rights, does not contain an explicit definition of the concept of "discrimination." Based on the definitions of discrimination established in Article 2 of the Inter-American Convention on Protecting the Human

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<sup>139</sup> Cf. *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 American Convention on Human Rights)*. Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 60, and Advisory Opinion OC-22/16, para. 29.

<sup>140</sup> Cf. Advisory Opinion OC-14/94, para. 60, and Advisory Opinion OC-22/16, para. 29.

<sup>141</sup> Cf. *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 55; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 79; *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 91, and *Case of Flor Freire v. Ecuador*, para. 109.

<sup>142</sup> Cf. Advisory Opinion OC-18/03, para. 103, and *Case of Flor Freire v. Ecuador*, para. 110.

<sup>143</sup> Cf. Advisory Opinion OC-18/03, para. 101; *Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2014. Series C No. 289, para. 216; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 79; *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 91; *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 30, 2016. Series C No. 329, para. 238, and *Case of Flor Freire v. Ecuador*, para. 109.

Rights of Older Persons,<sup>144</sup> Article 1(2)(a) of the Inter-American Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities,<sup>145</sup> Article 1(1) of the Inter-American Convention against all Forms of Discrimination and Intolerance<sup>146</sup>, Article 1(1) of the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance,<sup>147</sup> Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women,<sup>148</sup> and Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>149</sup> and also by the United Nations Human Rights Committee, discrimination may be defined as “any distinction, exclusion, restriction or preference based on specific reasons, such as race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of the human rights and fundamental freedoms of all persons.”<sup>150</sup>

63. In this regard, the Court has established that Article 1(1) of the Convention is a general obligation, the content of which extends to all the provisions of this treaty and establishes the obligation of States Parties to respect and ensure the free and full exercise of the rights and freedoms recognized therein “without any discrimination.” In other words, whatever the origin or form it takes, any treatment that may be considered discriminatory with regard to the exercise of any of the rights guaranteed in the Convention is, *per se*, incompatible with this general obligation.<sup>151</sup> If a State fails to comply with the general obligation to respect and guarantee human

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<sup>144</sup> Article 2 indicates that discrimination consists in: “[a]ny distinction, exclusion, or restriction with the purpose or effect of hindering, annulling, or restricting the recognition, enjoyment, or exercise, on an equal basis, of human rights and fundamental freedoms in the political, cultural, economic, social, or any other sphere of public and private life.”

<sup>145</sup> Article 1(2)(a) stipulates that: “[t]he term “discrimination against persons with disabilities” means any distinction, exclusion, or restriction based on a disability, record of disability, condition resulting from a previous disability, or perception of disability, whether present or past, which has the effect or objective of impairing or nullifying the recognition, enjoyment, or exercise by a person with a disability of his or her human rights and fundamental freedoms.”

<sup>146</sup> Article 1(1) indicates that “[d]iscrimination shall mean any distinction, exclusion, restriction, or preference, in any area of public or private life, the purpose or effect of which is to nullify or curtail the equal recognition, enjoyment, or exercise of one or more human rights and fundamental freedoms enshrined in the international instruments applicable to the States Parties. Discrimination may be based on nationality; age; sex; sexual orientation; gender identity and expression; language; religion; cultural identity; political opinions or opinions of any kind; social origin; socioeconomic status; educational level; migrant, refugee, repatriate, stateless or internally displaced status; disability; genetic trait; mental or physical health condition, including infectious-contagious condition and debilitating psychological condition; or any other condition.”

<sup>147</sup> Article 1(1) establishes that “[r]acial discrimination shall mean any distinction, exclusion, restriction, or preference, in any area of public or private life, the purpose or effect of which is to nullify or curtail the equal recognition, enjoyment, or exercise of one or more human rights and fundamental freedoms enshrined in the international instruments applicable to the States Parties.”

<sup>148</sup> Article 1 indicates that “the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

<sup>149</sup> Article 1(1) stipulates that: “[i]n this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

<sup>150</sup> *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 81, and *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 90. Also, United Nations, Human Rights Committee, General Comment No. 18, Non-discrimination, para. 6.

<sup>151</sup> *Cf. Advisory Opinion OC-4/84*, para. 53; *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs*. Judgment of August 24, 2010. Series C No. 214, para. 268; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 78; *Case of Duque v. Colombia. Preliminary objections, merits, reparations and*

rights by applying any form of differentiated treatment that may have discriminatory effects – in other words, that does not have a legitimate purpose, or is unnecessary and/or disproportionate – will result in the State’s international responsibility.<sup>152</sup> Consequently, there is an inseparable link between the obligation to respect and guarantee human rights and the principle of equality and non-discrimination.<sup>153</sup>

64. Furthermore, while the general obligation under Article 1(1) refers to the State’s obligation to respect and ensure the rights contained in the American Convention “without any discrimination,” Article 24 protects the “right to equal protection of the law.”<sup>154</sup> That is, Article 24 of the American Convention prohibits any discrimination by the law, not only with regard to the rights contained in this instrument, but also as regards all the laws enacted by the State and their enforcement.<sup>155</sup> In other words, if a State discriminates in the respect or guarantee of a treaty-based right, it is in non-compliance with the obligation established in Article 1(1) and the substantive right in question. If, to the contrary, the discrimination refers to unequal protection by a domestic law or its enforcement, this must be examined in light of Article 24 of the American Convention<sup>156</sup> in relation to the categories protected by Article 1(1) of the Convention.

65. States are obliged to adopt positive measures to reverse or to change discriminatory situations existing within their society that prejudice a specific group of persons. This entails the special obligation of protection that the State must exercise with regard to the actions and practices of third parties, who with its acquiescence or tolerance, create, maintain or facilitate discriminatory situations.<sup>157</sup>

66. That said, the Court recalls that not every difference in treatment will be considered discriminatory, rather only differences based on criteria that cannot realistically be considered objective and reasonable;<sup>158</sup> in other words, when the difference in treatment does not have a legitimate purpose and there is no reasonable relationship of proportionality between the methods

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*costs*, para. 93; *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 239, and *Case of Flor Freire v. Ecuador*, para. 111.

<sup>152</sup> Cf. Advisory Opinion OC-18/03 of September 17, 2003, para. 85; *Case of Granier et al. (Radio Caracas Television) v. Venezuela*, para. 214; *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 94, and *Case of Flor Freire v. Ecuador*, para. 111.

<sup>153</sup> Cf. Advisory Opinion OC-18/03 of September 17, 2003, para. 85; *Case of Granier et al. (Radio Caracas Television) v. Venezuela*, para. 214; *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 94, and *Case of Flor Freire v. Ecuador*, para. 111.

<sup>154</sup> Cf. Advisory Opinion OC-4/84, paras. 53 and 54; *Case of Espinoza Gonzáles v. Peru*, para. 217, and *Case of Flor Freire v. Ecuador*, para. 112.

<sup>155</sup> Cf. *Case of Yatama v. Nicaragua. Preliminary objections, merits, reparations and costs*. Judgment of June 23, 2005. Series C No. 127, para. 186; *Case of Espinoza Gonzáles v. Peru*, para. 217, and *Case of Flor Freire v. Ecuador*, para. 112.

<sup>156</sup> Cf. *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of August 5, 2008. Series C No. 182, para. 209; *Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 298, para. 243; *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 104, and *Case of Flor Freire v. Ecuador*, para. 112.

<sup>157</sup> Cf. Advisory Opinion OC-18/03, para. 104; *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, para. 271; *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile. Merits, reparations and costs*. Judgment of May 29, 2014. Series C No. 279, para. 201; *Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs*; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 80; *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 92; *Case of Flor Freire v. Ecuador*, para. 110, and *Case of the Hacienda Brazil Verde Workers v. Brazil*, para. 336. Also, United Nations, Human Rights Committee, General Comment No. 18: Non-discrimination, 10 November 1989, CCPR/C/37, para. 5.

<sup>158</sup> Cf. United Nations, Human Rights Committee, General Comment No. 18: Non-discrimination, 10 November 1989, para. 13. Also, *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 240.



used and the end pursued.<sup>159</sup> Moreover, in cases of prejudicial differential treatment, that is, when the differentiating criteria correspond to one of the categories protected by Article 1(1) of the Convention which relate to: (i) permanent personal traits that an individual cannot dispose of without losing his or her identity; (ii) groups that are traditionally marginalized, excluded or subordinated, and (iii) irrelevant criteria for the equitable distribution of property, rights or social benefits, the Court considers that there is evidence that the State has acted arbitrarily.<sup>160</sup>

67. The Court has also established that the prohibited categories of discrimination listed under Article 1(1) of the American Convention are neither exhaustive nor restrictive, but merely indicative.<sup>161</sup> Thus, the Court finds that by including the expression “or any other social condition” the wording of this article leaves the grounds of discrimination open in order to recognize other categories that were not explicitly listed but are analogous to these.<sup>162</sup> Consequently, when interpreting this phrase, the hermeneutic alternative that is most favorable to the protection of the rights of the individual and compatible to the application of the *pro persona* principle must be chosen.<sup>163</sup>

### **B. Sexual orientation, gender identity and gender expression as categories protected by Article 1(1) of the Convention**

68. Based on the above, and bearing in mind the general obligations of respect and guarantee established in Article 1(1) of the American Convention, the interpretation criteria established in Article 29 of this Convention, the stipulations of the Vienna Convention on the Law of Treaties, the resolutions of the OAS General Assembly, the standards established by the European Court and the United Nations agencies, the Court has determined that sexual orientation and gender identity are categories protected by the Convention. Consequently, the Convention prohibits any discriminatory law, act or practice based on a person’s sexual orientation or gender identity,<sup>164</sup> as this would be contrary to the provisions of Article 1(1) of the American Convention.

69. Accordingly, as already mentioned (*supra*, para. 58), the Court recalls that human rights treaties are living instruments the interpretation of which must evolve with time and with the conditions of contemporary life.<sup>165</sup> This evolutive interpretation is consequent with the general rules of interpretation established in Article 29 of the American Convention, as well as by the Vienna Convention on the Law of Treaties.<sup>166</sup>

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<sup>159</sup> Cf. *Case of Norín Catrimán (Leaders, members and activist of the Mapuche Indigenous People) et al. v. Chile*, para. 200; *Case of Espinoza González v. Peru*, para. 219, and *Case of Flor Freire v. Ecuador*, para. 125.

<sup>160</sup> Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 240.

<sup>161</sup> Cf. *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 202; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 85, and *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 240.

<sup>162</sup> Cf. *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 85, and *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 240.

<sup>163</sup> Cf. *Case of the Mapiripán Massacre v. Colombia*. Judgment of September 15, 2005. Series C No. 134, para. 106, and *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, paras. 84 and 85.

<sup>164</sup> Cf. *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 91; *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 105, and *Case of Flor Freire v. Ecuador*, para. 118.

<sup>165</sup> Cf. *Advisory Opinion OC-16/99*, para. 114; *Case of the Mapiripán Massacre v. Colombia*, para. 106, and *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 83.

<sup>166</sup> Cf. *Advisory Opinion OC-16/99*, para. 114; *Case of the Mapiripán Massacre v. Colombia*, para. 106, and *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 83.

70. Thus, when interpreting the phrase “any other social condition” of Article 1(1) of the Convention, the most favorable alternative for the safeguard of the rights protected by the treaty must be chosen, pursuant to the *pro homine* principle.<sup>167</sup> Likewise, the Court reiterates that the prohibited categories of discrimination listed under Article 1(1) of the American Convention are neither exhaustive nor restrictive, but merely indicative. Therefore, the wording of this article, with the inclusion of the words “any other social condition”, leaves the categories open to the incorporation of other grounds of discrimination that were not explicitly indicated. Consequently, the phrase “any other social condition” of Article 1(1) of the Convention must be interpreted by the Court in the most favorable perspective for the individual and for the evolution of fundamental rights in contemporary international law.<sup>168</sup>

71. In this regard, some recent regional treaties that deal with the issue of discrimination refer specifically to sexual orientation and gender identity as prohibited categories of discrimination. For instance, the Inter-American Convention on Protecting the Human Rights of Older Persons, in force since January 11, 2017, in its Article 5 on “Equality and non-discrimination for reasons of age” establishes the prohibition of “discrimination based on the age of older persons” and stipulates that “[i]n their policies, plans, and legislation on ageing and old age, States Parties shall develop specific approaches for older persons who are vulnerable and those who are victims of multiple discrimination, including women, persons with disabilities, persons of different sexual orientations and gender identities, migrants, persons living in poverty or social exclusion, people of African descent, and persons pertaining to indigenous peoples, the homeless, people deprived of their liberty, persons pertaining to traditional peoples, and persons who belong to ethnic, racial, national, linguistic, religious, and rural groups, among others.” Likewise, Article 1(1) of the Inter-American Convention against all Forms of Discrimination and Intolerance, adopted on June 5, 2013, establishes that “[d]iscrimination may be based on nationality; age; sex; sexual orientation; gender identity and expression; language; religion; cultural identity; political opinions or opinions of any kind; social origin; socioeconomic status; educational level; migrant, refugee, repatriate, stateless or internally displaced status; disability; genetic trait; mental or physical health condition, including infectious-contagious condition and debilitating psychological condition, or any other condition.”

72. Also, since 2008, within the Inter-American system, the General Assembly of the Organization of American States has approved nine resolutions on the protection of persons against discriminatory treatment based on their sexual orientation and gender identity (since 2013, the resolutions also refer to discriminatory treatment based on gender expression), in which it has required the adoption of specific measures to ensure effective protection against discriminatory acts.<sup>169</sup>

73. Under the universal system for the protection of human rights, on December 22, 2008, the General Assembly of the United Nations adopted the “Statement on human rights, sexual

<sup>167</sup> Cf. Advisory Opinion OC-5/85, para. 52; *Case of the Mapiripán Massacre v. Colombia*, para. 106, *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 84.

<sup>168</sup> Cf. Advisory Opinion OC-16/99, para. 115, and *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 85.

<sup>169</sup> Cf. OAS, General Assembly resolutions: AG/RES. 2908 (XLVII-O/17), Promotion and protection of human rights, June 21, 2017; AG/RES. 2887 (XLVI-O/16), Promotion and protection of human rights, June 14, 2016; AG/RES. 2863 (XLIV-O/14), Human Rights, Sexual Orientation, and Gender Identity and Expression, June 5, 2014; AG/RES. 2807 (XLI-O/13) corr.1, Human Rights, Sexual Orientation, and Gender Identity and Expression, June 6, 2013; AG/RES. 2721 (XLII-O/12), Human Rights, Sexual Orientation, and Gender Identity, June 4, 2012; AG/RES. 2653 (XLI-O/11), Human Rights, Sexual Orientation, and Gender Identity, June 7, 2011; AG/RES. 2600 (XL-O/10), Human Rights, Sexual Orientation, and Gender Identity, June 8, 2010; AG/RES. 2504 (XXXIX-O/09), Human Rights, Sexual Orientation, and Gender Identity, June 4, 2009, and AG/RES. 2435 (XXXVIII-O/08), Human Rights, Sexual Orientation, and Gender Identity, June 3, 2008.

orientation and gender identity” reaffirming “the principle of non-discrimination, which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity.”<sup>170</sup> Also, on March 22, 2011, the “Joint statement on ending acts of violence and related human rights violations based on sexual orientation and gender identity”<sup>171</sup> was presented before the Human Rights Council of the United Nations. On June 17, 2011, the Council approved a resolution on “human rights, sexual orientation and gender identity” in which it expressed its “grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity.”<sup>172</sup> This was reiterated in the resolutions 27/32 of September 26, 2014, and 32/2 of June 30, 2016.<sup>173</sup> The prohibition of discrimination based on sexual orientation, gender identity and gender expression has also been stressed in numerous reports by the United Nations Special Rapporteurs,<sup>174</sup> as well as by the United Nations High Commissioner for Human Rights.<sup>175</sup>

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<sup>170</sup> United Nations, *Statement on human rights, sexual orientation, and gender identity, General Assembly of the United Nations*, 22 December 2008, A/63/635, para. 3.

<sup>171</sup> United Nations, *Joint Statement on ending acts of violence and related human rights violations based on sexual orientation and gender identity*. United Nations Human Rights Council, 22 March 2011.

<sup>172</sup> United Nations, Human Rights Council, *Resolution on human rights, sexual orientation, and gender identity*, Resolution 17/19, A/66/53, of 17 June 2011.

<sup>173</sup> Cf. United Nations, Human Rights Council, *Resolution on human rights, sexual orientation, and gender identity*, Resolution 27/32 of 26 September 2014, A/69/53/Add.1, and *Resolution on protection against violence and discrimination based on sexual orientation and gender identity*, Resolution 32/2 of 30 June 2016, A/71/53.

<sup>174</sup> Cf. Among other reports: United Nations, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 16 February 2004, E/CN.4/2004/49, paras. 32 and 38 (“International human rights law proscribes discrimination in access to health care and the underlying determinants of health, and to the means for their procurement, on the grounds of [...] sexual orientation [...]. [...] discrimination on the grounds of sexual orientation is impermissible under international human rights law.”); Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mission to Brazil, 28 February 2006, E/CN.4/2006/16/Add.3, para. 40; Report of the Special Rapporteur on violence against women, its causes and consequences, Integration of the human rights of women and the gender perspective: violence against women. Intersections of violence against women and HIV/AIDS, 17 January 2005, E/CN.4/2005/72, paras. 27 and 58; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions. Civil and political rights, including the question of disappearances and summary executions, 13 January 2003, E/CN.4/2003/3, paras. 66 and 67; Interim report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions, 2 July 2002, A/57/138, para. 37; Report of the Special Representative of the Secretary-General on human rights defenders, 26 January 2001, E/CN.4/2001/94, para. 89.g); Report of the Special Rapporteur on the independence of judges and lawyers; Civil and political rights, including the questions of independence of the judiciary, administration of justice, impunity, Mission to Brazil, 22 February 2005, E/CN.4/2005/60/Add.3, para. 28; Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, 3 July 2001, A/56/156, paras. 17 to 25; Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, Civil and political rights, including the questions of torture and detention, 27 December 2001, E/CN.4/2002/76, p. 14; Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, 23 December 2003, E/CN.4/2004/56, para. 64; Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, 5 January 2004, E/CN.4/2004/9, para. 118, and Working Group on arbitrary detention, Opinion No. 7/2002 (Egypt), 24 January 2003, E/CN.4/2003/8/Add.1, p. 72, para. 28. Also, United Nations, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 27 April 2010, A/HRC/14/20, para. 11, and Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 19 April 2017, A/HRC/35/36, paras. 20 to 24.

<sup>175</sup> Cf. United Nations, Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23; Office of the United Nations High Commissioner for Human Rights, *Born Free and Equal. Sexual Orientation and Gender Identity in International Human Rights Law*, 2012, HR/PUB/12/06, and *Living Free & Equal. What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, HR/PUB/16/3, New York and Geneva, 2016.

74. Likewise, the Human Rights Committee has classified sexual orientation, together with gender identity and expression, as one of the prohibited categories of discrimination contemplated in Article 2(1)<sup>176</sup> of the International Covenant on Civil and Political Rights.<sup>177</sup> The Committee on Economic, Social and Cultural Rights ruled similarly with regard to Article 2(2)<sup>178</sup> of the International Covenant on Economic, Social and Cultural Rights, and determined, in particular, that sexual orientation and gender identity can be included under “other status” so that these also constitute categories protected against any discriminatory differentiated treatment.<sup>179</sup>

<sup>176</sup> Article 2(1) of the International Covenant on Civil and Political Rights: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>177</sup> Cf. United Nations, Human Rights Committee, Concluding observations Turkmenistan, CCPR/C/TKM/CO/2 (CCPR, 2017), paras. 6 to 9; Concluding observations Slovakia, CCPR/C/SVK/CO/4 (CCPR, 2016), para. 15; Concluding observations Kazakhstan, CCPR/C/KAZ/CO/2 (CCPR, 2016), para. 10; Concluding observations Costa Rica, CCPR/C/CRI/CO/6 (CCPR, 2016), para. 12; Concluding observations Denmark, CCPR/C/DNK/CO/6 (CCPR, 2016), para. 14; Concluding observations Namibia, CCPR/C/NAM/CO/2 (CCPR, 2016), para. 36; Concluding observations San Marino, CCPR/C/SMR/CO/3 (CCPR, 2015), para. 9; Concluding observations Iraq, CCPR/C/IRQ/CO/5 (CCPR, 2015), para. 12.d; Concluding observations Korea, CCPR/C/KOR/CO/4 (CCPR, 2015), para. 15; Concluding observations former Yugoslav Republic of Macedonia, CCPR/C/MKD/CO/3 (CCPR, 2015), para. 7; Concluding observations Venezuela, CCPR/C/VEN/CO/4 (CCPR, 2015), para. 8; Concluding observations Cambodia, CCPR/C/KHM/CO/2 (CCPR, 2015), para. 9; Concluding observations Sri Lanka, CCPR/C/LKA/CO/5 (CCPR, 2014), para. 8; Concluding observations Japan, CCPR/C/JPN/CO/6 (CCPR, 2014), para. 11; Concluding observations Sierra Leone, CCPR/C/SLE/CO/1 (CCPR, 2014), para. 11; Concluding observations Ukraine, CCPR/C/UKR/CO/7 (CCPR, 2013), para. 8; Concluding observations Belize, CCPR/C/BLZ/CO/1 (CCPR, 2013), para. 13; Concluding observations Hong Kong, CCPR/C/CHN-HKG/CO/3 (CCPR, 2013), para. 23; Concluding observations Turkey, CCPR/C/TUR/CO/1 (CCPR, 2012), para. 8; Concluding observations Slovenia, CCPR/C/SVN/CO/3 (CCPR, 2016), para. 10; Concluding observations Chile, CCPR/C/CHL/CO/5, para. 16; Concluding observations Barbados, CCPR/C/BRB/CO/3, para. 13; Concluding observations United States of America, CCPR/C/USA/CO/3/Rev.1, para. 25; Concluding observations El Salvador, CCPR/CO/78/SLV, para. 16; Concluding observations Poland, CCPR/C/POL/CO/7 (CCPR, 2016), para. 13; Concluding observations Poland, CCPR/C/79/Add.110, para. 23; Concluding observations Kyrgyzstan, CCPR/C/KGZ/CO/2, para. 9; Concluding observations Malawi, CCPR/C/MWI/CO/1, para. 6; Concluding observations Kuwait, CCPR/C/KWT/CO/2, para. 30; Concluding observations Ireland, CCPR/C/IRL/CO/3, para. 8; Concluding observations Ireland, CCPR/C/IRL/CO/4, para. 7; Concluding observations Ukraine, CCPR/C/UKR/CO/7, para. 10; Concluding observations Peru, CCPR/C/PER/CO/5, para. 8, and Concluding observations Georgia, CCPR/C/GEO/CO/4, para. 8. Also, specifically on the prohibition to discriminate on the basis of sexual orientation, see: United Nations, Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, CCPR/C/50/D/488/1992, 31 March 1994, para. 8.7 (“The State party has sought the Committee’s guidance as to whether sexual orientation may be considered an “other status” for the purposes of article 26. The same issue could arise under article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view, the reference to “sex” in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation”); *X v. Colombia*, Communication No. 1361/2005, 14 May 2007, CCPR/C/89/D/1361/2005, para. 7.2. (“The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation”); *Edward Young v. Australia*, Communication No. 941/2000, 18 September 2003, CCPR/C/78/D/941/2000, para. 10.4. See also: United Nations, Human Rights Committee, General Comment No. 34, CCPR/C/GC/34, para. 26, and General Comment No. 35, CCPR/C/GC/35, paras. 3 and 9.

<sup>178</sup> Article 2(2) of the International Covenant on Economic, Social and Cultural Rights: “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 as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>179</sup> Cf. United Nations, Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) 2 July 2009, E/C.12/GC/20, para. 32. See also, General Comment No. 23 on the Right to just and favorable conditions of work (Article 7 of the International Covenant on Economic, Social and Cultural Rights), 27 April 2016, E/C.12/GC/23, paras. 11, 48 and 65.a); General Comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), 2 May 2016, E/C.12/GC/22, paras. 9, 23, and 30. Regarding the protected category of “sexual orientation”, see: Committee on Economic, Social and Cultural Rights, General Comment No. 18. The right to work, 6 February 2006, E/C.12/GC/18, para. 12; General Comment No. 15. The right to water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), 20 January 2003, E/C.12/2002/11, para. 13 (“[t]he Covenant thus proscribes any discrimination on the grounds of [...] sexual orientation”); General Comment No. 14. The right to the highest attainable standard of health (Article 12 of the International Covenant

75. Furthermore, in their general comments and recommendations, the Committee on the Rights of the Child,<sup>180</sup> the Committee against Torture<sup>181</sup> and the Committee on the Elimination of Discrimination against Women<sup>182</sup> have referred to the inclusion of sexual orientation as one of the prohibited categories of discrimination and to the need to eliminate practices that discriminate against individuals on the grounds of their sexual orientation and/or gender identity.

76. The United Nations High Commissioner for Human Rights has also expressed concern regarding human rights violations based on sexual orientation, gender expression and identity.<sup>183</sup> In this regard, the High Commissioner has recommended that States take appropriate legal measures to prohibit discrimination on the grounds of sexual orientation and gender expression and identity.<sup>184</sup>

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on Economic, Social and Cultural Rights), 11 August 2000, E/C.12/2000/4, para. 18 (“By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of [...] sexual orientation”). See also, United Nations, Committee on Economic, Social and Cultural Rights, Concluding observations Iran, E/C.12/IRN/CO/2, para. 7; Concluding observations Indonesia, E/C.12/IDN/CO/1, para. 6; Concluding observations Bulgaria, E/C.12/BGR/CO/4-5, para. 17; Concluding observations Slovakia, E/C.12/SVK/CO/2, para. 10, and Concluding observations Peru, E/C.12/PER/CO/2-4, para. 5.

<sup>180</sup> Cf. United Nations, Committee on the Rights of the Child, General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20, para. 34; General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (Article 24), 17 April 2013, CRC/C/GC/15, para. 8; General Comment No. 3. HIV/AIDS and the rights of the child, CRC/GC/2003/3, 17 March 2003, para. 8 (“Of concern also is discrimination based on sexual orientation”); General Comment No. 4 (2003) Adolescent Health and Development in the Context of the Convention on the Rights of the Child, 21 July 2003, CRC/GC/2003/4, para. 6 (“States parties have the obligation to ensure that all human beings below 18 enjoy all the rights set forth in the Convention without discrimination (art. 2), including with regard to “race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. These grounds also cover adolescents’ sexual orientation [...],” and General Comment No. 13 (2011) on the right of the child to freedom from all forms of violence, 18 April 2011, CRC/C/GC/13, paras. 60 and 72. See also: Concluding observations Nepal, CRC/C/NPL/CO/3-5 (CRC, 2016), para. 41, Concluding observations New Zealand, CRC/C/NZL/CO/5 (CRC, 2016), para. 15; Concluding observations Poland, CRC/C/POL/CO/3-4 (CRC, 2015), para. 17; Concluding observations Russia, CRC/C/RUS/CO/4-5, paras. 24 and 25, 55 and 56, 59 and 60; Concluding observations Gambia, CRC/C/GAM/CO/2-3, paras. 29 and 30; Concluding observations Australia, CRC/C/AUS/CO/4, paras. 29 and 30; Concluding observations Iraq, CRC/C/IRQ/CO/2-4, paras. 19 and 20, and Concluding observations Tanzania, CRC/C/TZA/CO/3-5, paras. 56 and 57.

<sup>181</sup> Cf. United Nations, Committee against Torture, General Comment No. 2. Implementation of Article 2 by the States Parties, CAT/C/GC/2, 24 January 2008, paras. 15 to 24; General Comment No. 3. Implementation of Article 3 by the States Parties, 13 December 2012, CAT/C/GC/3, para. 8, 32 and 39; Concluding observations Russia, CAT/C/RUS/CO/5, para. 15; Concluding observations Kyrgyzstan, CAT/C/KGZ/CO/2, para. 19.

<sup>182</sup> Cf. United Nations, Committee for the Elimination of Discrimination against Women, General Recommendation No. 27 on older women and protection of their human rights, 16 December 2010, CEDAW/C/GC/27, para. 13, and General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28, para. 18 (“The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity.”) See also: Concluding observations Ecuador, CEDAW/C/ECU/CO/8-9 (CEDAW, 2015), para. 21.f; Concluding observations Uganda, CEDAW/C/UGA/CO/7, paras. 43 and 44; Concluding observations Costa Rica, CEDAW/C/CRI/CO/5-6, paras. 40 and 41; Concluding observations The Netherlands, CEDAW/C/NLD/CO/5, paras. 46 and 47; Concluding observations Germany, CEDAW/C/DEU/CO/6, para. 61; Concluding observations Guyana, CEDAW/C/GUY/CO/7-8, paras. 22 and 23, and Concluding observations Kyrgyzstan, CEDAW/C/KGZ/CO/4, paras. 9 and 10.

<sup>183</sup> Cf. United Nations, Annual Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and of the Secretary-General, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, 4 May 2015, A/HRC/29/23, paras. 86, 88 and 111(q).

<sup>184</sup> Cf. United Nations, The United Nations High Commissioner for Human Rights. “Living Free and Equal”, HR/PUB/16/3, 2016, pp. 30 and 62.

77. Regarding the inclusion of sexual orientation and gender identity as prohibited grounds of discrimination, the European Court of Human Rights has indicated that that sexual orientation and gender identity can be understood to be included in the category of “other status” mentioned in Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>185</sup> (hereinafter “the European Convention”), which prohibits discriminatory treatment.<sup>186</sup> In particular, in the case of *Salgueiro da Silva Mouta v. Portugal*, the European Court found that sexual orientation is a concept covered by Article 14 of the European Convention. It also repeated that the list of categories contained in this article was illustrative and not exhaustive.<sup>187</sup> As well, in the case of *Clift v. The United Kingdom*, the European Court reiterated that sexual orientation, as one of the categories that may be included under “other status,” is another specific example of the categories found on that list that are considered personal characteristics inasmuch as they are innate or inherent to the person.<sup>188</sup> In the case of *S.L. v. Austria*, it indicated that differences in treatment between the heterosexual and homosexual populations regarding the age of consent to engage in sexual relations lacked any objective and reasonable justification and, consequently, were discriminatory.<sup>189</sup> In addition, the Council of Europe has adopted a series of recommendations aimed at combating discrimination on the grounds of sexual orientation, and to a lesser degree of gender identity.<sup>190</sup>

78. Based on the above and taking into account the general obligation of respect and guarantee established in Article 1(1) of the American Convention, the interpretation criteria established in Article 29 of this Convention, the provisions of the Vienna Convention on the Law of Treaties, the resolutions of the OAS General Assembly, and the United Nations treaty bodies (*supra* paras. 71 to 76), the Inter-American Court establishes that sexual orientation and gender identity, as well as

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<sup>185</sup> Article 14 of the European Convention on Human Rights: “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.”

<sup>186</sup> Cf. ECHR, *Case of Salgueiro da Silva Mouta v. Portugal* No. 33290/96, Judgment of 21 December 1999, para. 28; *Case of L. and V. v. Austria*, Nos. 39392/98 and 39829/98, Judgment of 9 January 2003, para. 45; *Case of S.L. v. Austria*, No. 45330/99, Judgment of 9 January 2003, para. 37; *Case of E.B. v. France*, No. 43546/02, Judgment of 22 January 2008, para. 50; *Case of Identoba et al. v. Georgia*, No. 73235/12, 12 May 2005, para. 96, and *Case of Goodwin v. The United Kingdom*, No. 28957/95, 11 July 2002, para. 108.

<sup>187</sup> Cf. ECHR, *Case of Salgueiro da Silva Mouta*, para. 28 (“the applicant’s sexual orientation [is] a concept which is undoubtedly covered by Article 14 of the Convention. The Court reiterates in that connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words [“]any ground such as[”]. See also: *Case of Fretté v. France*, No. 36515/97, Judgment of 26 February 2002, para. 32; *Case of Kozak v. Poland*, No. 13102/02, Judgment of 2 March 2010, para. 92; *Case of J.M. v. The United Kingdom*, No. 37060/06, Judgment of 28 September 2010, para. 55, and *Case of Alekseyev v. Russia*, Nos. 4916/07, 25924/08 and 14599/09, Judgment of 21 October 2010, para. 108 (“The Court reiterates that sexual orientation is a concept covered by Article 14 [...]”).

<sup>188</sup> Cf. ECHR, *Case of Clift v. The United Kingdom*, No. 7205/07, Judgment of 13 July 2010, para. 57 (“As to its interpretation of ‘other status’, the Court has considered to constitute [“]other status[”] characteristics which, like some of the specific examples listed in the Article, can be said to be personal in the sense that they are innate or inherent”). However, based on this concept of “other status,” the European Court did not decide to establish the limitation that the characteristics should be inherent or innate in the individual. Also, *Case of Clift v. The United Kingdom*, para. 58.

<sup>189</sup> Cf. ECHR, *Case of S.L. v. Austria*, No. 45330/99, Judgment of 19 January 2003, paras. 44 to 46.

<sup>190</sup> Cf. Recommendation CM/Rec (2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity; Recommendation 1915 (2010) of the Parliamentary Assembly of the Council of Europe on Discrimination on the basis of sexual orientation and gender identity; Recommendation 924 (1981) of the Parliamentary Assembly of the Council of Europe on discrimination against homosexuals; Recommendation 1117 (1989) of the Parliamentary Assembly on the condition of transsexuals; Recommendation 1470 (2000) of the Parliamentary Assembly on the situation of gays and lesbians and their partners in respect to asylum and immigration in the member states of the Council of Europe; Recommendation 1474 (2000) of the Parliamentary Assembly on the situation of lesbians and gays in the member states of the Council of Europe, and Recommendation 1635 (2003) of the Parliamentary Assembly on lesbians and gays in sport.

gender expression, are categories protected by the Convention. Accordingly, the Convention proscribes any discriminatory law, action or practice based on the sexual orientation, gender identity or gender expression of the individual. Consequently, no provision, decision or practice under domestic law, either by state authorities or private individuals, can reduce or restrict in any way the rights of a person on the grounds of their sexual orientation, their gender identity and/or their gender expression.

79. With regard to gender expression, this Court has indicated that a person may be discriminated against on the grounds of the perception that others have of his or her relationship with a social sector or group, regardless of whether this corresponds to the reality or to the self-identification of the victim.<sup>191</sup> The purpose or effect of discrimination based on perception is to prevent or invalidate the recognition, enjoyment or exercise of the human rights and fundamental freedoms of the person subjected to such discrimination, irrespective of whether that person self-identifies with a specific category.<sup>192</sup> As with other forms of discrimination, the person is reduced to a single characteristic attributed to him or her, without taking into account other personal conditions.<sup>193</sup> Consequently, it can be considered that the prohibition to discriminate on the grounds of gender identity is understood not only with regard to the real or self-perceived identity, but also in relation to the identity perceived externally, regardless of whether or not that perception corresponds to the reality. Thus, it should be understood that any expression of gender constitutes a category protected by Article 1(1) of the American Convention.

80. Lastly, it is relevant to point out that several States in the region have recognized under their domestic legal system, either by constitutional provisions or by laws, decrees or court rulings, that sexual orientation and gender identity constitute categories protected against discriminatory differentiated treatment.<sup>194</sup>

<sup>191</sup> Cf. *Case of Perozo et al. v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of January 28, 2009. Series C No. 195, para. 380; *Case of Ríos et al. v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of January 28, 2009. Series C No. 194, para. 349, and *Case of Flor Freire v. Ecuador*, para. 120.

<sup>192</sup> Cf. *Mutatis mutandis, Case of Perozo et al. v. Venezuela*, para. 158; *Case of Ríos et al. v. Venezuela*, para. 146, and *Case of Flor Freire v. Ecuador*, para. 120.

<sup>193</sup> Cf. *Mutatis mutandis, Case of Perozo et al. v. Venezuela*, para. 158; *Case of Ríos et al. v. Venezuela*, para. 146, and *Case of Flor Freire v. Ecuador*, para. 120.

<sup>194</sup> Cf. Argentina. Act No. 23,592, August 23, 1988, article 1; Argentina. Legislature of the Autonomous City of Buenos Aires, Anti-discrimination Act, April 9, 2015, article 3; Bolivia. Constitution, February 7, 2009, article 14, para. II; Bolivia. Act No. 045, Law against racism and all forms of discrimination. October 8, 2010, article 5; Bolivia. Act No. 807, Act on gender identity, May 21, 2016, article 5; Brazil. Superior Court of Justice. Special Appeal No. 1,626,739 (2016/0245586); Canada, Canadian Human Rights Act, R.S.C., 1985, c. H-6 (1996, c. 14, s. 1; 1998, c. 9, s. 9; 2012, c. 1, s. 137(E); 2017, c. 3, ff. 9, 11, c. 13, s. 1.), article 2. Purpose of the Act; Chile. Act No. 20,609, July 24, 2012, article 2; Chile, Santiago Appeals Court, Judgment of March 9, 2015, case No. 9901-2014; Chile, Supreme Court of Chile, Judgment of March 13, 2017, case No. 99813; Colombia. Act No. 1752, June 3, 2015, article 1; Colombia. Act No. 1448, June 10, 2011, article 3; Constitutional Court of Colombia, Judgment C-481/98 of September 9, 1998, Judgment C-075/07 of February 7, 2007, Judgment C-577/11 of July 26, 2011, Judgment T-099/15 of March 10, 2015, Judgment T-478/15 of August 3, 2015, and Judgment SU-214/16 of April 28, 2016; Costa Rica, Decree 38999, "Executive Branch policy to eradicate from its institutions discrimination against the sexually diverse population," May 12, 2015, article 1; Costa Rica, Decision of the Supreme Electoral Court taken in resolution 3 of Regular Session No. 37-2016 of April 28, 2016, *Policy of non-discrimination on the grounds of sexual orientation and gender identity of the Supreme Electoral Court*; Ecuador, Constitution of the Republic of Ecuador, 2008, article 11; Constitutional Court of Ecuador, Judgment 037-13-SCN-CC, June 11, 2013; Mexico, Federal law to prevent and eliminate discrimination, June 11, 2003, article 1.III; Peru, Legislative Decree 1323, January 5, 2017, article 1; Peru, Act No. 28,237, Code of Constitutional Procedure, May 28, 2004, article 37(1); Puerto Rico, Act No. 22, Law to establish the public policy of the Government of Puerto Rico against discrimination on the grounds of sexual orientation or gender identity in public or private employments, May 29, 2013, article 1; Dominican Republic, Constitution, January 26, 2010, article 39; Dominican Republic, Act No. 550-14, December 19, 2014, article 182; Uruguay, Act No. 17,817, Law on the fight against racism, xenophobia and discrimination, September 14, 2004, article 2; Uruguay, Act No. 18,620, Law on the right to gender identity and change of name and sex on identity documents, November 17, 2009, article 1; Uruguay, Act

### C. Differences in treatment that are discriminatory

81. The Court considers that the criteria for determining whether there has been a violation of the principle of equality and non-discrimination in a specific case may have varying degrees, depending on the reasons for a difference in treatment. In this regard, the Court finds that, in the case of a measure that establishes a differentiated treatment involving one of these categories, a thorough examination must be made, incorporating especially rigorous elements in the analysis; in other words, the different treatment should constitute a necessary measure to achieve an objective that is imperative pursuant to the Convention. Thus, in this type of examination, in order to analyze the validity of the differentiating measure, the end pursued must not only be legitimate under the Convention, but also imperative. Also, the means chosen must not only be adequate and truly enabling, but also necessary; that is, that it could not be replaced by other less harmful means. In addition, there must be a strict proportionality analysis of the measure by which the benefits of adopting the measure in question must be clearly more advantageous than the restrictions it imposes on the treaty-based principles it affects.<sup>195</sup>

82. Furthermore, specifically regarding the scope of the right to non-discrimination on the grounds of sexual orientation, the Court indicates that this is not restricted to homosexuality in itself, but that also includes its forms of expression and the logical consequences in the life project of the individual.<sup>196</sup> In this regard, for example, sexual acts are a way of expressing a person's sexual orientation, and are therefore protected under the same right of non-discrimination on the basis of sexual orientation.<sup>197</sup>

83. Lastly, it is important to recall that the lack of consensus in some countries as regards to the full respect for the rights of certain groups or persons identified by their real or perceived sexual orientation, gender identity or gender expression cannot be considered a valid argument to deny or restrict their human rights or to reproduce and perpetuate the historical and structural discrimination that these groups or persons have suffered.<sup>198</sup> The fact that this issue could be

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No. 19,075, Law on same-sex marriage, May 9, 2013, article 1, and Venezuela, Organic Law of the People's Power, 9 December 2010, article 4.

<sup>195</sup> Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 241.

<sup>196</sup> Cf. *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 133, and *Case of Flor Freire v. Ecuador*, para. 119.

<sup>197</sup> Cf. *Case of Flor Freire v. Ecuador*, para. 119.

<sup>198</sup> According to different sources of international and comparative law this discrimination against the community of lesbians, gays, transsexuals, bisexuals and intersexuals is unacceptable because: (i) sexual orientation constitutes an essential aspect of a person's identity. Also, (ii) the LGBTI community has been discriminated against historically and stereotypes are often used in how it is treated. Cf. United Nations, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 16 February 2004, E/CN.4/2004/49, para. 33 (“[...] discrimination and stigma continue to pose a serious threat to sexual and reproductive health for many groups, including [...] sexual minorities [...]”); Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, 23 December 2003, E/CN.4/2004/56, para. 64 (“Attitudes and beliefs stemming from myths and fears associated with HIV/AIDS and sexuality contribute to stigma and discrimination against sexual minorities. In addition, the fact that members of these minorities are perceived as transgressing gender barriers or challenging predominant conceptions of gender roles seems to contribute to their vulnerability to torture as a way to “punish” their unaccepted behaviour.”). Furthermore, (iii) they constitute a minority from which it is much more difficult to remove discriminations in settings such as the legislative sphere, and to avoid negative repercussions in the interpretation of laws by officials in the Executive and Legislative branches of government, and in access to justice. Cf. Special Rapporteur on the Independence of judges and lawyers, civil and political rights, including the questions of independence of the judiciary, administration of justice, impunity. Mission to Brazil, E/CN.4/2005/60/Add.3, 22 February 2005, para. 28 (“Transvestites, transsexuals and homosexuals are also frequently the victims of violence and discrimination. When they turn to the judicial system, they are often confronted with the same prejudices and stereotypes they face in society at large.”), and Constitutional Court of Colombia, Judgment C-481 of September 9, 1998. Lastly: (iv) sexual orientation does not constitute a rational criterion for the reasonable and fair distribution of property, rights or social benefits. Cf.



controversial in some sectors and countries, and thus that is not necessarily a matter of consensus, cannot lead the Court to abstain from taking a decision, because when so issuing its opinion, the Court must refer only and exclusively to the stipulations of the international obligations that States have assumed by a sovereign decision under and through the American Convention.<sup>199</sup>

84. No right that has been recognized to the individual can be denied or restricted in any circumstance, on the grounds of sexual orientation, gender identity or gender expression since this would violate Article 1(1) of the American Convention. Indeed, this Inter-American instrument proscribes discrimination in general, including against categories such as sexual orientation and gender identity which cannot be used to deny or restrict any of the rights established in the Convention.

## VII THE RIGHT TO GENDER IDENTITY AND THE NAME CHANGE PROCEDURE

### A. The right to identity

85. The Court recalls that the American Convention protects one of the most basic values of the human being, understood to be a rational being; that is, the recognition of his or her dignity. On other occasions, the Court has asserted that this value is an essential characteristic of the individual and, consequently, it is a basic human right enforceable *erga omnes* as an expression of a collective interest of the whole international community that does not admit derogation or suspension in cases provided for in the American Convention on Human Rights.<sup>200</sup> Moreover, it should be understood that this protection exists transversely in all the rights recognized in the American Convention.

86. In this regard, the Convention contains a universal clause for protection of dignity, based on the principle of individual autonomy and on the idea that all persons must be treated as equals, inasmuch as they are ends in themselves in accordance with their intentions, aspirations and life decisions. Moreover, the American Convention also recognizes the sanctity of private and family life, among other protected spheres. The Court has affirmed that this sphere of the individual's private life is an area of freedom shielded and exempt from arbitrary or abusive interference by third parties or by public authorities.<sup>201</sup>

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Constitutional Court of Colombia, Judgment C-481 of September 9, 1998, para. 25. In this judgment, which relates to the right of public schools teachers not to be dismissed because they are homosexual, the Colombian Constitutional Court indicated that removing a teacher from his post for this reason is based "on a prejudice without any empiric basis, which denotes the unfair stigma that has affected this population and that has been cited in order to encumber it or deprive it of rights, to the detriment of its possibilities of participating in such relevant spheres for social and economic life" (para. 29). Meanwhile, Judgment C-507 (1999) of the Colombian Constitutional Court declared unconstitutional a provision that established homosexuality in the armed forces as a disciplinary offense. In Judgment C-373 (2002), the Constitutional Court of Colombia declared unconstitutional a provision establishing that having received a disciplinary sanction for the offense of "homosexuality" was a motive for incapacity to exercise the office of notary.

<sup>199</sup> Cf. *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 92; *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 123, and *Case of Flor Freire v. Ecuador*, para. 124.

<sup>200</sup> Cf. OAS, The Inter-American Juridical Committee, Opinion "on the scope of the right to identity," Resolution CJI/doc. 276/07 rev. 1, of August 10, 2007, para. 12, and *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, para. 123.

<sup>201</sup> Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 149; *Case of the Ituango Massacres v. Colombia*. Judgment of July 1, 2006. Series C No. 148, para. 194, and *Case of the Santa Bárbara Campesino Community v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 299, para. 200.

87. The Court has also indicated that the protection of the right to private life is not restricted to the right to privacy, because it comprises a series of factors related to the dignity of the individual, including, for example, the capacity to develop their own personality and aspirations, determine their identity, and define their personal relationships. The concept of private life encompasses aspects of social and physical identity, including the right to personal autonomy and personal development, and to establish and develop relationships with other human beings and with the external world.<sup>202</sup> The effective realization of the right to private life is decisive for the possibility of exercising personal autonomy in relation to the future course of events that are relevant for an individual's quality of life.<sup>203</sup> Furthermore, private life includes the way in which individuals see themselves and how they decide to project themselves towards others,<sup>204</sup> and this is an essential condition for the free development of the personality.<sup>205</sup>

88. That said, a crucial aspect of the recognition of dignity, is the possibility accorded to all human beings for self-determination and to freely choose the options and circumstances that give meaning to their existence based on their own preferences and convictions.<sup>206</sup> Under this framework, the principle of personal autonomy plays an essential role as it prohibits any action by the State that tries to exploit or utilize the individual; in other words, any action that converts the individual in means to an end which is alien to the choices about their own life, body and the full development of their personality, within the limits imposed by the Convention.<sup>207</sup> Thus, based on the principle of the free development of the personality or of personal autonomy, everyone is free and autonomous to live in a way that accords with their values, beliefs, convictions and interests.<sup>208</sup>

89. Moreover, the Court has made a broad interpretation of Article 7(1) of the American Convention by indicating that it includes a wide-ranging concept of liberty, and this is understood as the capacity to do or not to do whatever is legally permitted. In other words, it constitutes the right of everyone to organize, pursuant to the law, their individual and social life in accordance with their own choices and convictions.<sup>209</sup> Defined as such, liberty is a basic human right inherent in the attributes of the person that pervades the whole American Convention.<sup>210</sup> In this regard, the United

<sup>202</sup> Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 152; *Case of Fernández Ortega et al. v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of August 30, 2010. Series C No. 215, para. 129, and *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*, para. 143.

<sup>203</sup> Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 152, and *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*, para. 143.

<sup>204</sup> Cf. *Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of August 31, 2010. Series C No. 216, para. 119, and *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*, para. 143.

<sup>205</sup> Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 152.

<sup>206</sup> Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 150; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 136, and *Case of Flor Freire v. Ecuador*, para. 103.

<sup>207</sup> Article 32 of the American Convention, "Relationship between Duties and Rights. 1. Every person has responsibilities to his family, his community, and mankind. 2. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare in a democratic society." See also, *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 150.

<sup>208</sup> In this regard, see Constitutional Court of Colombia, Judgment T-063/2015.

<sup>209</sup> Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 148, and *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2007. Series C No. 170, para. 52.

<sup>210</sup> Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 52; *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*, para. 142, and *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 151.

Nations Human Rights Committee has stated that the notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity, that being in his or her relationships with others or by themselves.<sup>211</sup> Accordingly, the Court understands that the right to identity arises from recognition of the free development of the personality and the protection of the right to privacy. This right is closely related to the principle of personal autonomy and it identifies the person as a self-determining and self-governing individual. In other words, the right to identity understands individuals as masters of themselves and of their own acts.<sup>212</sup>

90. Regarding the right to identity, the Court has indicated that, in general, it may be conceived as the series of attributes and characteristics that individualize a person in society and that encompass several rights depending on the subject of rights in question and the respective circumstances.<sup>213</sup> The right to identity may be affected by numerous situations or contexts that may occur from childhood to adulthood.<sup>214</sup> Although the American Convention does not specifically refer to the right to identity under this name, it includes other rights that are its components.<sup>215</sup> Thus, the Court recalls that the American Convention protects those elements as rights in themselves even though not all such rights will necessarily be implicated in all cases that concern the right to identity.<sup>216</sup> Moreover, the right to identity cannot be confused with, or reduced or subordinated to one of the rights that it includes, nor to the sum of them. For example, the name forms part of the right to identity, but it is not its only component.<sup>217</sup> In addition, this Court has indicated that the right to identity is closely related to human dignity, the right to privacy and the principle of personal autonomy (Articles 7 and 11 of the American Convention).<sup>218</sup>

91. It can also be understood that this right is closely linked to the individual in his or her specific individuality and private life, both of which are supported by historical and biological experiences and by the way in which this person relates to others, through the development of relationships within the family and society.<sup>219</sup> This also means that the individual may experience the need to be recognized as someone who is distinct and distinguishable from others. To achieve this, the State and society must respect and ensure the individuality of each person, as well as the right to be treated in keeping with the essential aspects of their personality, with no other limitations than those imposed by the rights of other persons. Thus, consolidating the individuality of the person before the State and before society implies having the legitimate authority to establish the exteriorization of their persona according to their most intimate convictions. Likewise,

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<sup>211</sup> Cf. United Nations, Human Rights Committee, *Case of Coeriel et al. v. The Netherlands*, 9 December 1994, CCPR/C/52/D/453/1991, para. 10.2.

<sup>212</sup> In this regard, see Constitutional Court of Colombia, Judgment T-063/2015.

<sup>213</sup> Cf. *Case of Gelman v. Uruguay*, para. 122; *Case of Fornerón and daughter v. Argentina*, para. 123, and *Case of Rochac Hernández et al. v. El Salvador. Merits, reparations and costs*. Judgment of October 14, 2014. Series C No. 285, para. 116.

<sup>214</sup> Cf. *Case of Contreras et al. v. El Salvador. Merits, reparations and costs*. Judgment of August 31, 2011. Series C No. 232, para. 113.

<sup>215</sup> Cf. *Case of Gelman v. Uruguay*, para. 122, and *Case of Contreras et al. v. El Salvador*, para. 112. See also, OAS, The Inter-American Juridical Committee, Opinion "on the scope of the right to identity", Resolution CJI/doc. 276/07 rev. 1, of August 10, 2007, para. 11(2).

<sup>216</sup> Cf. *Case of Rochac Hernández et al. v. El Salvador*, para.116.

<sup>217</sup> Cf. OAS, The Inter-American Juridical Committee, Opinion "on the scope of the right to identity", Resolution CJI/doc. 276/07 rev. 1, of August 10, 2007, para. 11.

<sup>218</sup> Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 149 to 152.

<sup>219</sup> Cf. *Case of Contreras et al. v. El Salvador*, para. 113

one of the essential components of any life plan and of the individualization of the person is precisely their gender and sexual identity.<sup>220</sup>

92. Additionally, the most relevant implications and scope of the right to identity and, therefore, the right to a sexual and gender identity, are that it constitutes an autonomous right based on the provisions of international law and those derived from the cultural elements considered in the domestic legal systems of the States, in order therefore to satisfy the specificity of the individual, with his or her rights that are unique, singular and identifiable.<sup>221</sup>

93. Regarding gender and sexual identity, the Court reiterates that this is also linked to the concept of liberty and to the possibility of all human beings for self-determination and to freely choose the options and circumstances that give meaning to their existence, according to their own convictions, as well as the right to protection of their privacy (*supra* para. 87).<sup>222</sup> Thus, in the case of sexual identity, the Court has established that affective life with a spouse or permanent companion, which logically includes sexual relations, is one of the main aspects of this circle or sphere of intimacy.<sup>223</sup> This sphere of intimacy is therefore also influenced by the self-identified sexual orientation of the individual.<sup>224</sup>

94. In this regard it should be recalled that, in this Opinion, gender identity has been defined as the internal and individual experience of gender as each person feels it, which may or may not correspond to the sex assigned at birth. This includes the personal experience of the body as well as other expressions of gender, such as dress, speech and mannerisms (*supra* para. 32.f). Thus, for this Court, recognition of gender identity is necessarily linked to the idea that sex and gender should be perceived as being a part of the constructed identity that is the result of the free and autonomous decision of each person, and without this having to be subject to their genitalia.<sup>225</sup>

95. In this way, the sex, together with the socially constructed identities, attributes and roles that are ascribed to the biological differences regarding the sex assigned at birth, far from constituting objective and unchangeable characteristics of the civil status that individualizes a person – for these being a physical or biological fact – are merely characteristics that depend on the subjective appreciation of the person concerned, and are based on the construction of a self-perceived gender identity dependent on the free development of the personality, sexual self-determination, and the right to privacy. Consequently, those who decide to assume this self-perceived gender identity, are the holders of legally protected interests which cannot be subject to any restriction based merely on the fact that society as a whole does not share specific singular

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<sup>220</sup> In this regard, see Constitutional Court of Colombia, Judgment T-594/93.

<sup>221</sup> Cf. OAS, The Inter-American Juridical Committee, Opinion “on the scope of the right to identity”, Resolution CJI/doc. 276/07 rev. 1, of August 10, 2007, para. 15.

<sup>222</sup> Cf. *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 141.

<sup>223</sup> Cf. *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 141. See also, Constitutional Court of Colombia, Judgment T-499 of 2003. The Constitutional Court has defined the right to the free development of personality embodied in article 16 of the Colombian Constitution, as the right of individuals “to choose their life plan and develop their personality according to their interests, wishes and convictions, provided this does not affect the rights of third parties or violate the Constitution” (Constitutional Court of Colombia, Judgment C-309 of 1997). Likewise, it has been understood as “the capacity of individuals to define, autonomously, the essential choices that will guide the course of their existence” (Constitutional Court of Colombia, Judgment SU-642 of 1998).

<sup>224</sup> Cf. *Case of Flor Freire v. Ecuador*, para. 103. See, in this regard also, OAS, Permanent Council, Committee on Juridical and Political Affairs, CP/CAJP/INF.166/12, 23 April 2012, and Constitutional Court of Colombia, Judgment C-098/96, No. 4.

<sup>225</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II.rev.2, November 12, 2015, para. 16.

lifestyles,<sup>226</sup> due to fears, stereotypes, and social and moral prejudices which have no reasonable basis. Thus, regarding the factors that define the sexual and gender identity of a person, precedence is given to the subjective factor over the physical or morphological features (objective factor). In this sense, owing to the complex human nature that leads everyone to develop their own personality based on the particular way they see themselves, the psychosocial sex should be given pre-eminence over the morphological sex in order to fully respect the right to sexual and gender identity, since these are elements that, to a great extent, define both how individuals see themselves and how they project themselves in society.<sup>227</sup>

96. Furthermore, the Court considers that the right to identity and, in particular, the manifestation of identity, is also protected by Article 13, which recognizes the right to freedom of expression. From this standpoint, arbitrarily interfering in the expression of the different attributes of the identity may signify a violation of this right. That said, regarding the exteriorization of identity, this Court indicated in the case of *López Álvarez v. Honduras* that one of the pillars of freedom of expression is precisely the right to speak and that this necessarily implies the right of the individual to use the language of his choice to express his or her thoughts. In that judgment, the Court analyzed the violation of the freedom of expression and the individuality of Mr. López Álvarez because he had been prevented from using the Garifuna language, an element profoundly and intrinsically linked to his identity.<sup>228</sup> In that case, the Court also considered that this violation was especially serious because it affected his personal dignity as a member of the Garifuna community.<sup>229</sup>

97. Based on the above, the Court agrees with the Commission when it pointed out that a lack of recognition of gender or sexual identity could result in indirect censure of gender expressions that diverge from cisnormative or heteronormative standards, which would send a general message that those persons who diverge from these “traditional” standards would not have the legal protection and recognition of their rights in equal conditions to persons who do not diverge from such standards.<sup>230</sup>

98. Accordingly, the Court understands gender identity to be both an and integral and a determining component of the personal identity of the individual; consequently, its recognition by the State is critical to ensuring that transgender persons can fully enjoy all human rights, including protection from violence, torture, ill-treatment, the right to health, education, employment,

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<sup>226</sup> Cf. Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*. OEA/Ser.L/V/II.rev.2, November 12, 2015, para. 16. In this regard, see Constitutional Court of Colombia, Judgment T-063/2015. Likewise, see Constitutional Court of Peru, Judgment of October 21, 2016, File No. 06040-2015-PA/TC, para. 13: “based on the above, the biological reality should not be the only determinant to assign sex, because since this is also a construct, it should be understood within the social, cultural and interpersonal situations that individuals themselves experience during their existence. Consequently, the sex should not always be determined based on the genitalia, because this would signify succumbing to biological determinism, which would reduce human nature to mere physical existence, disregarding the fact that humans are also social and psychological beings.”

<sup>227</sup> In this regard, see Supreme Court of Justice of Mexico, Direct amparo 6/2008. January 6, 2009, p. 20.

<sup>228</sup> Cf. *Case of López Álvarez v. Honduras. Merits, reparations and costs*. Judgment of February 1, 2006. Series C No. 141, paras. 164, 169 and 171.

<sup>229</sup> Cf. *Case of López Álvarez v. Honduras*, para. 169.

<sup>230</sup> Cf. Inter-American Commission on Human Rights, Observation presented by the Commission on February 14, 2017, para. 49. See, similarly, United Nations, Committee on the Rights of the Child, General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20, para. 34, and Office of the United Nations High Commissioner for Human Rights, *Living Free & Equal. What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, New York and Geneva, 2016, HR/PUB/16/3, pp. 86 and 87.

housing, access to social security, and freedom of expression and association.<sup>231</sup> In this regard, the Court has indicated, in the same terms as the General Assembly of the Organization of American States, “that recognition of the identity of persons is one of the means through which observance of the rights to legal personhood, a name, a nationality, civil registration, and family relationships is facilitated, among other rights recognized in international instruments such as the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights.”<sup>232</sup> Therefore, non-recognition of identity may mean that a person has no legal record of his or her existence, which makes it difficult to exercise fully his or her rights.<sup>233</sup>

99. Similarly, the Court shares the opinion of the Inter-American Juridical Committee which has asserted that the right to identity “has an instrumental value for exercising certain civil, cultural, economic, political and social rights so that they fully prevail to reinforce democracy and the exercise of basic rights and liberties. Consequently, the right to identity is a means to exercise rights in a democratic society, committed to the effective practice of citizenship and the values of representative democracy, thereby facilitating social inclusion, citizen participation and equal opportunities.”<sup>234</sup> Also, “depriving the right to identity, or a legal vacuum in the domestic law for its effective practice, places people in situations that hinder or prevent the enjoyment of or access to basic rights, thus creating differences in treatment and opportunities that affect the principles of equality before the law and non-discrimination, and obstructing the right of everyone to full recognition of their legal personality.”<sup>235</sup>

100. Accordingly, the State, as guarantor of all rights, must respect and ensure the coexistence of individuals with varied identities, gender expressions and sexual orientations and, therefore, must ensure that they are all able to live and develop with dignity and the respect to which everyone has a right to. The Court considers that this protection does not refer merely to the content of those rights, but that, through their protection, the State would also be ensuring the full enjoyment and exercise of other rights of individuals whose gender identity differs from the one associated with the sex assigned to them at birth.

101. Based on the above, the following conclusions can be reached:

- a) The right to identity emanates from the recognition of the free development of the personality and the right to privacy (*supra* paras. 88 and 89);
- b) The right to identity has been recognized by this Court as a right protected by the American Convention (*supra* para. 90);

<sup>231</sup> Cf. United Nations, Office of the United Nations High Commissioner for Human Rights, *Living Free & Equal. What States are doing to tackle violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*, New York and Geneva, 2016, HR/PUB/16/3, p. 94.

<sup>232</sup> *Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs*. Judgment of August 28, 2014. Series C No. 282, para. 267, and Case of *Gelman v. Uruguay*, para. 123. See also: OAS, General Assembly, Resolution AG/RES. 2362 (XXXVIII-O/08), “Inter-American program for universal civil registry and the “right to identity” of June 3, 2008, and Resolution AG/RES. 2602 (XL-O/10), Human rights, sexual orientation, and gender identity of June 8, 2010. Also, OAS, The Inter-American Juridical Committee, Opinion “on the scope of the right to identity,” Resolution CJI/doc. 276/07 rev. 1, of August 10, 2007, paras. 11.2 and 18.3.3.

<sup>233</sup> Cf. OAS, General Assembly, Resolution AG/RES. 2362 (XXXVIII-O/08), “Inter-American program for universal civil registry and the “right to identity” of June 3, 2008, and Resolution AG/RES. 2602 (XL-O/10), Human rights, sexual orientation, and gender identity of June 8, 2010.

<sup>234</sup> OAS, The Inter-American Juridical Committee, Opinion “on the scope of the right to identity”, Resolution CJI/doc. 276/07 rev. 1, of August 10, 2007, para. 16.

<sup>235</sup> Cf. OAS, The Inter-American Juridical Committee, Opinion “on the scope of the right to identity”, Resolution CJI/doc. 276/07 rev. 1, of August 10, 2007, para. 17.

- c) The right to identity includes other rights, according to the persons and circumstances of each case, although it is closely related to human dignity, the right to life, and the principle of personal autonomy (Articles 7 and 11 of the American Convention) (*supra* para. 90);
- d) Recognition of the affirmation of sexual and gender identity as a manifestation of personal autonomy is both an integral and a determining component of the personal identity of the individual which is protected by the American Convention in its Articles 7 and 11(2) (*supra* para. 98);
- e) Gender and sexual identity are linked to the concept of liberty, the right to privacy, and the possibility of all human beings for self-determination and to freely choose the options and circumstances that give meaning to their existence, according to their own convictions (*supra* para. 93);
- f) Gender identity has been defined in this Opinion as the internal and individual experience of gender as each person feels it, whether or not it corresponds to the sex assigned at birth (*supra* para. 94);
- g) Sex, gender and the socially constructed identities, attributes and roles that are ascribed to the biological differences regarding the sex assigned at birth, far from constituting objective and unchangeable characteristics of the civil status that individualizes a person – for these being a physical or biological fact – are merely characteristics that depend on the subjective appreciation of the person concerned, and are based on the construction of a self-perceived gender identity dependent on the free development of the personality, sexual self-determination, and the right to privacy (*supra* para. 95);
- h) The right to identity also has an instrumental value for the exercise of certain rights (*supra* para. 99);
- i) State recognition of gender identity is critical to ensuring that transgender persons can fully enjoy all human rights, including protection from violence, torture, ill-treatment, the right to health, education, employment, housing, access to social security, and freedom of expression and association (*supra* para. 98), and
- j) The State must ensure that individuals of all sexual orientations and gender identities are able to live with the dignity and respect to which everyone has a right to (*supra* para. 100).

**B. The right to recognition of juridical personality, the right to a name, and the right to gender identity**

102. In keeping with the questions raised in the request for this Advisory Opinion, the Court will now examine specifically the relationship that exists between the recognition of gender identity and the right to a name, as well as to the recognition of juridical personality.

103. Regarding the right to juridical personality protected under Article 3 of the American Convention, the Court has indicated that recognition of this right determines the effective existence of its holders before society and the State, which allows them to enjoy and exercise rights and empowers them to act. This constitutes an inherent right of the human being, which, according to the American Convention, can never be derogated by the State.<sup>236</sup> Consequently, the State must

<sup>236</sup> Cf. *Case of Bámaca Velásquez v. Guatemala. Merits*. Judgment of November 25, 2000, Series C No. 70, para. 179; *Case of Chitay Nech et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of May 25, 2010. Series C No. 212, para. 101; *Case of the Massacres of the Rio Negro v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of September 4, 2012 Series C No. 250, para. 119, and *Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs*. Judgment of August 29, 2014. Series C No. 282, para. 265.

necessarily respect and ensure the legal means and conditions so that the right to recognition of juridical personality can be exercised freely and fully by its holders.<sup>237</sup> The lack of recognition of juridical personality harms human dignity because it is an absolute denial of a person's condition as a subject of rights, and places that person in a vulnerable position owing to the non-observance of his or her rights by the State or by private individuals.<sup>238</sup> Also, this lack of recognition of juridical personality eliminates the possibility of being a holder of rights, which results in the impossibility of effectively exercising personally and directly the subjective rights, as well as fully assuming legal obligations and performing other acts of a personal and patrimonial nature.<sup>239</sup>

104. Regarding gender and sexual identity, the foregoing means that individuals, with their diverse sexual orientations and gender identities and expressions, should be able to enjoy their legal capacity in all aspects of life. This is so because the sexual orientation or gender identity that each person defines for himself or herself is essential for their personality and constitutes one of the fundamental aspects of their self-determination, dignity and liberty.<sup>240</sup> However, the right to juridical personality is not merely the capacity of the individual to enter the legal framework and hold rights and obligations, but also includes the possibility of all human beings, based on the mere fact of existing and irrespective of their condition, to possess certain attributes that constitute the essence of their juridical personality and individuality as subjects of law. Consequently, there is a close relationship between, on the one hand, the recognition of juridical personality and, on the other hand, the legal attributes inherent in all human beings that distinguish, identify and individualize them.<sup>241</sup>

105. Accordingly, it is the Court's opinion that the right of individuals to define, autonomously, their own sexual and gender identity is made effective by guaranteeing that their self-determined identities correspond with the personal identification information recorded in the different registers, as well as in the identity documents. This implies the existence of the right of all individuals to have their personal attributes and characteristics, which are recorded in these registers and other identification documents, coincide with their own identity definition and, if this is not the case, that there should be a mechanism of amending those records.

106. It has already been mentioned that the free development of the personality and the right to privacy imply the recognition of the rights to personal, sexual and gender identity, because, it is on the basis of these rights that individuals see themselves and project themselves in society.<sup>242</sup> A name, as an attribute of personality, represents an expression of individuality and its end is to affirm the identity of a person before society and in procedures before the State. Its purpose is to ensure that every individual has a unique and singular sign that distinguishes him or her from everyone else, by which he or she can be identified and recognized. It is a basic right inherent to

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<sup>237</sup> Cf. *Case of the Sawhoyamaya Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of March 29, 2006. Series C No. 146, para. 189, and *Case of Chitay Nech et al. v. Guatemala*, para. 101.

<sup>238</sup> Cf. *Case of the Yean and Bosico Girls v. Dominican Republic.* Judgment of September 8 2005. Series C No. 130, para. 179.

<sup>239</sup> Cf. *Juridical Status and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 29, 2002, para. 41, and *Case of Bámaca Velásquez v. Guatemala. Merits*, para. 179.

<sup>240</sup> Cf. *Mutatis mutandis*, Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Yogyakarta Principles, 2007. Principle 6.

<sup>241</sup> In this regard, see Constitutional Court of Colombia, Judgment C-109 of 1995, section II, Nos. 7 and 8, and Judgment T-090 of

1995, section 2, No. 2.2.

<sup>242</sup> In this regard, see Supreme Court of Justice of Mexico, Direct amparo 6/2008. January 6, 2009, p. 17.



all persons based merely on their existence.<sup>243</sup> In addition, the Court has indicated that the right to a name recognized in Article 18 of the Convention and in various other international instruments,<sup>244</sup> constitutes a basic and essential element of the identify of each person, without which they cannot be recognized by society or registered by the State.<sup>245</sup>

107. The Court has also indicated that, as a result of the foregoing, States are obliged not only to protect the right to a name, but also to provide the means required to facilitate a person's registration.<sup>246</sup> As such, this right implies that the State must ensure that individuals are registered with the name chosen by them or their parents, depending on the time they are registered, without any type of restriction or interference in the moment of the choice of name and, once the person has been registered, that it be possible to keep and to re-establish the given name and surname.<sup>247</sup>

108. Moreover, the Inter-American Juridical Committee considered that "exercising the right to identity cannot be dissociated from registration and an effective national system, accessible and universal, that enables people to provide documents that contain the information relating to their identity, bearing in mind particularly that the right to identity is both a right in itself and an essential right for exercising other cultural, economic, political and social rights. Consequences of the right to identity are the right to registration after birth and a duty of the State to take the necessary measures for this purpose. Registration of the birth is a primary instrument and starting point to exercise the juridical personality before the State and other individuals, and to act in equal conditions before the law."<sup>248</sup>

109. Meanwhile, the United Nations Human Rights Committee has maintained 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.<sup>249</sup>

110. On the right to a name, the ECHR has stated that although the European Convention does not contain any explicit reference to this matter, since the name and surname are part of the private and family life of any human being, given that they constitute a means of personal identification and a link to a family, there are protected by Article 8 of that instrument. Similarly, the European Court has stated that private life encompasses aspects of the personal and social identity of the individual, and the fact that there could be a public interest in regulating the use of

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<sup>243</sup> In this regard, see Constitutional Court of Colombia, Judgment T-063/15, section II No. 4.

<sup>244</sup> Cf. *Case of Gelman v. Uruguay*, para. 127. Also, see *inter alia*, the International Covenant on Civil and Political Rights, Article 24(2); Convention on the Rights of the Child, Article 7(1); African Charter on the Rights and Welfare of the Child, Article 6(1), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 29. The European Court of Human Rights has stated that the right to a name is protected by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, even though it is not specifically mentioned, cf. ECHR, *Case of Stjerna v. Finland*, No. 18131/91, Judgment of 25 November 1994, para. 37, and *Case of Burghartz v. Switzerland*, No. 16213/90, Judgment of 22 February 1994, para. 24.

<sup>245</sup> Cf. *Case of the Yean and Bosico Girls v. Dominican Republic*, para. 182, and *Case of Expelled Dominicans and Haitians v. Dominican Republic*, para. 268.

<sup>246</sup> Cf. *Case of the Yean and Bosico Girls v. Dominican Republic*, para. 183, and *Case of Expelled Dominicans and Haitians v. Dominican Republic*, para. 268.

<sup>247</sup> Cf. *Case of the Yean and Bosico Girls v. Dominican Republic*, para. 184, and *Case of Expelled Dominicans and Haitians v. Dominican Republic*, para. 268.

<sup>248</sup> Cf. OAS, The Inter-American Juridical Committee, Opinion "on the scope of the right to identity," Resolution CJI/doc. 276/07 rev. 1, of August 10, 2007, para. 14.4.

<sup>249</sup> Cf. United Nations, Human Rights Committee, *Coeriel et al. v. The Netherlands*, No. 453/1991, CCPR/C/52/D/453/1991, para. 10.2.

names, this is not a sufficient reason to eliminate the matter from the scope of the right to private and family life contained in Article 8 of the Convention.<sup>250</sup>

111. Additionally, this Court maintains that the establishment of the name, as an attribute of the personality, is determinant for the free development of the choices that give meaning to each person's existence, as well as to the realization of the right to identity.<sup>251</sup> It is not a means of standardizing human beings; rather, to the contrary, it is a factor of distinction between them.<sup>252</sup> Thus why everyone should be able to choose their name freely and change their name as they wish. In this way, the lack of recognition of a change of name in accordance with the self-perceived identity means that the individual loses, totally or partially, the ownership of those rights and that, although that individual exists and may find himself or herself in a determined social context within the State, their very existence is not legally recognized in accordance with an essential component of their identity.<sup>253</sup> Under these circumstances, the right to the recognition of juridical personality and the right to gender identity are also compromised.

112. In this way, it can also be inferred that the right to recognition of gender identity necessarily includes the right that the personal information in records and on identity documents should correspond to the sexual and gender identity assumed by transgender persons. Thus, the Yogyakarta Principles establish the obligation of States "to take all necessary legislative, administrative and other measures to fully respect and legally recognize each person's self-defined gender identity," and to ensure that "procedures exist whereby all State-issued identity papers which indicate a person's gender/sex – including birth certificates, passports, electoral records and other documents – reflect the person's profound self-defined gender identity."<sup>254</sup>

113. In this regard, it should be recalled that the ECHR<sup>255</sup> has established that the failure to recognize the identity of a transgender person may constitute interference in their private life. Also, the United Nations High Commissioner for Human Rights has recommended that States "issue legal identity documents, upon request, that reflect the preferred gender of the person concerned,"<sup>256</sup> and also "facilitate legal recognition of the preferred gender of transgender persons and establish arrangements to permit relevant identity documents to be reissued reflecting the preferred gender

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<sup>250</sup> Cf. ECHR Judgments *Stjerna v. Finland*, para. 37, and *Guillot v. France*, No. 22500/93, Judgment of 24 October 1993, paras. 21 and 22.

<sup>251</sup> In this regard, for example, Article 1 of Act No. 18.620 of Uruguay on the "Right to gender identity and to the change of name and sex in identity documents," establishes that "[e]veryone has the right to the free development of their personality in accordance with their own gender identity, regardless of their biological, genetic, anatomical, morphological, hormonal, assigned or other sex. [...] This right includes that of being identified in a way that fully recognizes the gender identity and the conformity between this identity and the name and sex indicated in the person's identity documents, whether records of the Civil Registry, identity, electoral, travel or other documents." Likewise, Argentina's Act 26,743 on gender identity establishes in its Article 1 that everyone has the right to their gender identity and "to be treated according to their gender identity and, in particular, to be identified in this way in the instruments that certify his or her identity as regard the given name, photograph and sex with which they are registered."

<sup>252</sup> In this regard, see Constitutional Court of Peru, Judgment of October 21, 2016, File No. 06040-2015-PA/TC, para. 14 and Constitutional Court of Colombia, Judgment T-063/15, section II No. 4.4.1.

<sup>253</sup> Cf. *Mutatis mutandis*, *Case of the Yean and Bosico Girls v. Dominican Republic*, para. 180.

<sup>254</sup> Yogyakarta Principles, 2007. Principle 3.

<sup>255</sup> Cf. ECHR, *Case of Dudgeon v. The United Kingdom*. No. 7525/76, 22 October 1981, para. 41, and *Case of Goodwin v. The United Kingdom*, para. 77.

<sup>256</sup> Cf. United Nations, Report of the Office of the United Nations High Commissioner for Human Rights. "Discrimination and violence against individuals based on their sexual orientation and gender identity." 4 May 2015, A/HRC/29/23, para. 79.i.

and name, without infringing other human rights.”<sup>257</sup> As well, the difference between the sexual and gender identity assumed by a person and the one that appears on the identity documents signifies the denial of a constitutive dimension of personal autonomy – the right to live as one wants – which, in turn, can result in rejection and discrimination by others – the right to live without humiliation – and complicates the employment opportunities that allow the person to obtain the material conditions required for a decent existence.<sup>258</sup>

114. Furthermore, as already mentioned, States must ensure the recognition of the gender identity of the individual, because this is critical for the full enjoyment of other human rights<sup>259</sup> (*supra* para. 113). Likewise, the Court notes that the failure to recognize this right may also impede the exercise of other fundamental rights and, consequently, have an important differential impact on transgender persons, who, as we have seen, generally find themselves in a situation of vulnerability (*supra* paras. 33 to 51). The lack of recognition of gender identity also constitutes a determinant factor in the reinforcement of acts of discrimination against such persons and may also become a major obstacle for the full enjoyment of all the rights recognized by international law, such as the right to a decent life, freedom of movement, freedom of expression, civil and political rights, personal integrity, health, education, and all the other rights.<sup>260</sup>

115. Consequently, it can be concluded that the right of each person to define his or her sexual and gender identity autonomously and that the personal information in records and on identity documents should correspond to and coincide with their self-defined identity is protected by the American Convention under the provisions that ensure the free development of the personality (Articles 7 and 11(2)), the right to privacy (Article 11(2)), the recognition of juridical personality (Article 3), and the right to a name (Article 18). Thus, States must respect and ensure to everyone the possibility of registering and/or changing, rectifying or amending their name and the other essential components of their identity such as the image, or the reference to sex or gender, without interference by the public authorities or by third parties. This necessarily means that those who identify themselves with diverse gender identities must be recognized as such. Moreover, the State must ensure that they can exercise their rights and contract obligations based on that same identity, without being obliged to purport another identity that does not represent their individuality, especially so when this involves a continuous exposure to the social questioning of that same identity, thus affecting the exercise and enjoyment of the rights recognized by domestic and international law.

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<sup>257</sup> Cf. United Nations, Report of the United Nations High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, para. 84.h.

<sup>258</sup> Cf. United Nations, Report of the United Nations High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, A/HRC/19/41, para. 71.

<sup>259</sup> Cf. United Nations, United Nations High Commissioner for Human Rights, *Living Free and Equal*, HR/PUB/16/3, 2016, p. 94.

<sup>260</sup> Cf. United Nations, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/29/23, paras. 21 and 60 to 62; Human Rights Committee, Concluding observations on the fourth periodic report of the Bolivarian Republic of Venezuela, 14 August 2015, CCPR/C/VEN/CO/4, para. 8; Concluding observations on the seventh periodic report of Ukraine, 22 August 2013, CCPR/C/UKR/CO/7, para. 10; Concluding observations on the third periodic report of Suriname, 3 December 2015, CCPR/C/SUR/CO/3, para. 27; Committee against Torture, Concluding observations of the Committee against Torture: Kuwait, June 28, 2011, CAT/C/KWT/CO/2, para. 25; Concluding observations on the second periodic report of Kyrgyzstan, 20 December 2013, CAT/C/KGZ/CO/2, para. 19; United Nations Educational, Scientific and Cultural Organization - UNESCO, *Out in the open: Education sector responses to violence based on Sexual Orientation and Gender Identity/Expression*, Paris, 2016; Human Rights Council, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, 19 April 2017, A/HRC/35/36, para. 57. Similarly, see Supreme Court of Justice of Mexico, Direct amparo 6/2008. January 6, 2009, p. 6.

116. Based on the above, the answer to the first question raised by Costa Rica concerning the protection provided to the recognition of gender identity by Articles 11(2), 18 and 24, in relation to Article 1(1) of the Convention, is as follows:

**The change of name, the rectification of the image and the rectification of the sex or gender in the public records and identity documents, so that they correspond to the self-perceived gender identity is a right protected by Article 18 (Right to a Name), but also by Articles 3 (Right to Recognition of Juridical Personality), 7(1) (Right to Personal Liberty), and 11(2) (Right to Privacy) of the American Convention. Consequently, pursuant to the obligation to respect and ensure rights without any discrimination (Articles 1(1) and 24 of the Convention), and the obligation to adopt domestic legal provisions (Article 2 of the Convention), States are obliged to recognize, regulate and establish the appropriate procedure to this end.**

**C. The procedure for requesting the rectification of identity data to conform with the self-perceived gender identity**

117. In order to ensure that the interested persons are able to amend public records and identity documents so that these correspond to their self-perceived gender identity, the procedures should be regulated and implemented in accordance with certain basic characteristics, so that this right is truly protected, and so that the procedures do not violate the rights of third parties protected by the Convention.

118. The Court also notes that the measures implemented to make effective the right to identity should not hinder the principle of legal certainty. This principle guarantees, among other things, stability in legal situations and is an essential component of the trust that the people place in the democratic institutional framework. This principle is implicit in all the articles of the Convention.<sup>261</sup> The absence of legal certainty may stem from legal or administrative aspects or from state practices<sup>262</sup> that decrease public trust in the institutions (judicial, legislative and executive) or in the enjoyment of the rights and obligations recognized by these institutions, and produce instability in relation to the exercise of basic rights, and legal situations in general.

119. Thus, the Court considers that legal certainty is guaranteed, *inter alia*, as long as there is confidence that the fundamental rights and freedoms of everyone subject to the jurisdiction of a State Party to the American Convention will be fully respected. For the Court, this means that the implementation of the procedures described below must ensure that the rights and obligations of third parties are effectively protected, without this entailing hindrance to the full protection of the right to gender identity. Thus, although the effects of these procedures are opposable to third parties, the changes, amendments or rectifications made in accordance with gender identity should not alter the ownership of legal rights and obligations.

120. Accordingly, in relation to the effects of the procedure for recognition of gender identity, the Court recalls that it must not change the ownership of the legal rights and obligations that may correspond to the person prior to the registration of the change, nor those arising from relationships under family law in all its varying degrees.<sup>263</sup> This means that all those acts executed

<sup>261</sup> Cf. ECHR. *Case of Beian v. Romania (No. 1)*, No. 30658/05. Judgment of 6 December 2007, para. 39, and *Case of Brumărescu v. Romania*, No. 28342/95. Judgment of 10 November 1999, para. 61.

<sup>262</sup> Cf. ECHR. *Case of Nejdet Şahin and Perihan Şahin v. Turkey*, No. 13279/05. Judgment of October 20, 2011, para. 56.

<sup>263</sup> In this regard, see Argentina. Gender Identity Act, No. 26,743 of May 23, 2012, article 7.

by a person before the procedure to amend the identity data – in accordance with his or her self-perceived gender identity – that had legal effects continue to produce these effects and are enforceable, except in cases in which the law itself determines their extinction or modification.<sup>264</sup>

*a) The procedure for the complete rectification of the self-perceived gender identity*

121. First, and as indicated in the previous section, in addition to the name, which is just one element of the identity, this procedure should be designed to rectify – comprehensively – other components of the identity so that it can conform to the self-perceived gender identity of the person concerned. Therefore, the procedure should allow changes in the registration of the given name and, if applicable, a change of the photograph, as well as the rectification of the recorded gender or sex, on the identity documents and in all the relevant records required for the interested parties to exercise their subjective rights.

122. In this regard, it should be recalled that this Court has indicated that the protection of privacy established by the American Convention extends beyond those aspects specifically mentioned in the said provisions.<sup>265</sup> In this sense, although the right to one's self-image is not expressly stated in Article 11 of the Convention, personal photographs and pictures are evidently included within the sphere of protection of privacy.<sup>266</sup> Moreover, the photograph is a form of expression included in the sphere of protection of Article 13 of the Convention.<sup>267</sup> The photograph not only supports or gives credibility to information provided in writing but, in itself, has a significant content and expressive, communicative and informative value; indeed, in some cases, photographs can communicate or inform with the same or greater impact than the written word.<sup>268</sup> Indeed, the domestic law of several States of the region recognizes that changes made to the identity data so that it conforms to the self-perceived gender identity of the applicant is not limited to the given name, but also covers elements such as the person's sex or gender, and the photograph.<sup>269</sup>

123. Closely related to the foregoing, in its Report on Privacy and Data Protection, the Inter-American Juridical Committee stipulated that personal data included information that identifies, or can reasonably be used to identify, a specific individual, and that "the term data" was intentionally used "broadly in an effort to provide the broadest protection to the rights of the individuals concerned, without regard to the particular form in which the data is collected, stored, retrieved,

<sup>264</sup> In this regard, see Supreme Court of Justice of Mexico, Direct amparo 6/2008. January 6, 2009, p. 17

<sup>265</sup> Cf. *Case of Tristán Donoso v. Panama. Preliminary objection, merits, reparations and costs*. Judgment of January 27, 2009. Series C No. 193, para. 55, and *Case of Fontevecchia and D`Amico v. Argentina*, para. 67.

<sup>266</sup> Cf. *Case of Fontevecchia and D`Amico v. Argentina*, para. 67. Similarly cf. ECHR, *Case of Schussel v. Austria*, Admissibility, No. 42409/98. Decision of 21 February 2002, para. 2, and *Case of Von Hannover v. Germany*, Nos. 40660/08 and 60641/08. Judgment of 7 February 2012, para. 50.

<sup>267</sup> Cf. *Case of Fontevecchia and D`Amico v. Argentina*, para. 67. See also, ECHR, *Case of Von Hannover v. Germany*, Nos. 40660/08 and 60641/08. Judgment of 7 February 2012, para. 42, and *Case of MGN Limited v. The United Kingdom*, No. 39401/04. Judgment of 18 January 2011, para. 143.

<sup>268</sup> Cf. *Case of Fontevecchia and D`Amico v. Argentina*, para. 67.

<sup>269</sup> Cf. Argentina. Act 26,743 of May 23, 2012, Article 1(c). Article 1 of Act No. 26,743, which established the right to gender identity, stipulates that everyone has a right "to be treated in keeping with their gender identity and, in particular, to be identified in this way in the instruments that prove their identity as regards the given name(s), photograph, and sex with which they are registered." Also, in Bolivia, Act No. 807 of May 21, 2016, establishes the procedure for the change of name, sex and photograph of transsexual and transgender persons in any public or private documentation related to their identity, allowing them to exercise fully their right to gender identity. Decisions have also been issued by domestic courts recognizing the foregoing; see, for example: Brazil. Superior Court of Justice, Judgment of May 9, 2017; Chile. Santiago Appeals Court, Judgment of March 9, 2015, case No. 9901-2014, and Colombia. Constitutional Court, Judgment T-063/15.

used or disseminated.”<sup>270</sup> It added that “[t]he term ‘sensitive personal data’ refers to data affecting the most intimate aspects of individuals [... d]epending on the specific cultural, social or political context.”<sup>271</sup> The Committee also asserted that “[t]he individual must be able to exercise the right to request the correction of (or an addition to) personal data about himself or herself that is incomplete, inaccurate, unnecessary or excessive.”<sup>272</sup>

124. Lastly, the Court considers that States must endeavor to ensure that those interested in the recognition of their self-perceived gender identity in the public records as well as on their identity documents do not have to undertake several procedures before numerous authorities. The Court understands that it is a State obligation to ensure that any changes in the personal data recorded before the civil registers be updated in all other relevant documents and institutions without requiring the applicant’s intervention, so that this person does not have to incur unreasonable burdens to achieve the amendment of his or her self-perceived gender identity in all relevant records.

125. In this regard, reference should be made to the Inter-American Program for Universal Civil Registry and the “Right to Identity,” which refers to the need to identify and promote best practices and standards for civil registry systems and their universalization, “taking the gender perspective into account,” as well as the need to “raise awareness” of the importance of effectively establishing “the identity of millions of persons, taking into account vulnerable groups and the rich diversity of cultures in the Americas.”<sup>273</sup> In particular, the document indicates that States must endeavor to identify, systematize and standardize the basic criteria and standards needed to ensure that national civil registry systems can function properly and guarantee universal coverage. Also, States must “promote the simplification of civil registry administrative processes and their standardization at the national level.”<sup>274</sup>

126. In this regard, in Uruguay, Act No. 18,620 “Right to gender identity and change of name and sex on identity documents,” specifically establishes the harmonization of the data in records and identity documents. In fact, article 4 of the law establishes that: “[w]hen a decision has been made approving the amendment request, the competent court shall inform the Directorate General of the Civil Registry, the respective Departmental Council, the National Civil Identification Department of the Ministry of the Interior, the National Civil Registry of the Electoral Court, and the

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<sup>270</sup> OAS, The Inter-American Juridical Committee, Report on Privacy and Data Protection, CJI/doc.474/15 rev.2, 2015. Definitions.

<sup>271</sup> OAS, The Inter-American Juridical Committee, Report on Privacy and Data Protection, CJI/doc.474/15 rev.2, 2015. Ninth principle.

<sup>272</sup> OAS, The Inter-American Juridical Committee, Report on Privacy and Data Protection, CJI/doc.474/15 rev.2, 2015. Eighth principle.

<sup>273</sup> OAS, General Assembly of the OAS, Resolution AG/RES. 2362 (XXXVIII-O/08), adopted on June 3, 2008. The Inter-American Program for Universal Civil Registry and the “Right to Identity” “is a consolidated effort by the OAS and its Member States, in consultation with international organizations and civil society, to promote and achieve in a progressive manner and in accordance with international law, applicable international human rights law, and domestic law, the purposes, objectives, and specific measures set for below: [...] Ensure that by 2015 birth registration, which is used to ensure the right to identity, with emphasis on persons in poverty and at risk, is universal, accessible, and, if possible, cost-free. Identify and promote best practices, criteria, and standards for civil registry systems and their universalization, in order to address the problems and overcome the obstacles that arise in this area, taking the gender perspective into account, as well as raise awareness of the need effectively to establish the identity of millions of persons, taking into account vulnerable groups and the rich diversity of cultures in the Americas. Promote and protect the rights to identity; juridical personality; a name; a nationality; inscription in the civil registry; family relations; and citizen participation as an essential element of decision-making. Contribute to building just and equitable societies based on the principles of social justice and social inclusion.

<sup>274</sup> Cf. OAS, General Assembly of the OAS, Resolution AG/RES. 2362 (XXXVIII-O/08). Section “Specific measures” Nos. 2.g and 2.i.

General Directorate of Records, so that they may make the corresponding amendments to the identity documents of the person concerned, as well as to the documents relating to the rights or obligations of said person. The identity document, passport and civil credentials shall always retain the same number.”<sup>275</sup> Likewise, in Bolivia it has been established that, following the issuing of the administrative decision, the change of name, the rectification of the sex recorded and of the photograph, will be notified *ex officio* to several institutions.<sup>276</sup>

b) *The procedure should be based solely on the free and informed consent of the applicant without requirements such as medical and/or psychological or other certifications that could be unreasonable or pathologizing*

127. The regulation and implementation of this procedure should be based solely on the free and informed consent of the applicant. This is consistent with the fact that procedures for recognizing gender identity are founded on the possibility for self-determination and to freely choose the options and circumstances that give a meaning to a person’s existence, in keeping with their own choices and convictions, as well as with the applicant’s right to dignity and privacy (*supra* para. 88).

128. Similarly, in its report on Privacy and Data Protection, the Inter-American Juridical Committee mentioned that “consistent with these fundamental rights, the OAS Principles reflect the concepts of informational self-determination, freedom from arbitrary restrictions on access to data, and protection of privacy, identity, dignity and reputation.”<sup>277</sup>

129. In this regard, the United Nations High Commissioner and several of the United Nations human rights bodies have indicated that, to comply with international human rights commitments, States should respect the physical and mental integrity of individuals by providing legal recognition of their self-perceived gender identity without obstacles or abusive requirements that may constitute human rights violations. From this perspective, these bodies have recommended that the procedure for the recognition of gender identity should not require applicants to meet abusive preconditions such as the presentation of medical certificates or evidence of unmarried civil status;<sup>278</sup> nor should applicants be subjected to medical or psychological appraisals related to their

<sup>275</sup> Uruguay. Act No. 18,620 of October 25, 2009, article 4. See also: Argentina. Act 26,743, article 6: “the public official shall proceed, without the need for a judicial or administrative procedure, to notify *ex officio* the rectification of the sex and change of given name to the Civil Registry of the jurisdiction in which the birth was registered so that it may proceed to issue a new birth certificate adjusting it to these changes, and to issue a new national identity document that reflects the rectification of the sex and the new given name in the records.

<sup>276</sup> Cf. Bolivia. Act No. 807 of May 21, 2016. Article 9(v) indicates that the following shall be notified: Personal Identification Service – SEGIP; Financial System Supervision Authority – ASFI; Directorate General of Immigration – DIGEMIG; National Tax Service – SIN; Royalties; Judicial Criminal Records System – REJAP; National Police Records – SINARAP, of the Bolivian Police (FELCC, FELCN and FELCV); General Directorate of the Prison System; Office of the State Comptroller General – CGE; Ministry of Education; Ministry of Defense; Public Health Institutes; Social Security System – SENASIR; Pension, Securities and Insurance Authority – APS; and others that SERECI or the applicant deem necessary.

<sup>277</sup> OAS, The Inter-American Juridical Committee. Report on Privacy and Data Protection, CJI/doc.474/15 rev.2, 2015. Definitions.

<sup>278</sup> Cf. United Nations, United Nations High Commissioner for Human Rights. Informe “*Discrimination and violence against individuals based on their sexual orientation and gender identity*”. 4 May 2015, A/HRC/29/23, para. 79; Human Rights Committee. Concluding observations: Ireland. 30 July 2008, CCPR/C/IRL/CO/3, para. 8; Human Rights Committee. Concluding observations on the fourth periodic report of Ireland. 19 August 2014, CCPR/C/IRL/CO/4, para. 7; Human Rights Committee. Concluding observations on the seventh periodic report of Ukraine. 22 August 2013, CCPR/C/UKR/CO/7, para. 10; Committee on the Elimination of Discrimination against Women. Concluding observations: The Netherlands. 5 February 2010, CEDAW/C/NLD/CO/5, paras. 46-47; Human Rights Committee. Concluding observations on the fourth periodic report of the Republic of Korea. 3 December 2015, CCPR/C/KOR/CO/4, paras. 14-15; Committee against Torture. Concluding observations on the fifth periodic report of China with respect to Hong Kong (China). 3 February 2016, CAT/C/CHNHKG/CO/5, para. 29(a); Human Rights Council. Report of the Special Rapporteur on torture and other cruel,

self-perceived gender identity, or other requirements that undermine the principle according to which gender identity is not to be proven. Consequently, the procedure should be based on the mere expression of the applicant's intention. Likewise, the Yogyakarta Principles stipulate that "[n]o status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity."<sup>279</sup>

130. Moreover, in the case of the medical, psychological or psychiatric certificates that are usually required in this type of procedure, the Court understands that, in addition to being of an invasive nature and calling into question the applicant's self-assigned identity, they are based on the assumption that having an identity that differs from the sex assigned at birth is a pathology. In this sense, these types of requirements or medical certificates contribute to perpetuating the prejudices associated with the binary construct of male and female genders.<sup>280</sup>

131. Regarding the requirements and documentation usually demanded specifically from individuals who request a change in their identity data so that it corresponds to their gender identity, the Court considers that, pursuant to the principles of equality and non-discrimination (*supra* Chapter VI), it is unreasonable to establish a differentiated treatment between cisgender and transgender persons who wish to amend their records and identity documents. Indeed, in the case of cisgender persons, the sex assigned at birth and entered into the records corresponds to the gender identity that they assume autonomously throughout their life, while in the case of transgender persons, the identity assigned by third parties (generally their parents) differs from the one they have developed autonomously. Thus, transgender persons encounter obstacles to achieving recognition of and respect for their gender identity that cisgender persons do not have to face.

132. In the case of the requirement of certifications of good conduct or police records, the Court understands that, although these may be requested for a legitimate reason, which can only be to ensure that the purpose and/or effect of the request for amendments to the records and identity document is not to evade justice, it can also be understood that this requirement is a disproportionate restriction because it unreasonably transfers to the applicant a State obligation; that is, the harmonization of the records with the personal identity data. In this regard, it should be recalled that the protection of third parties and of the public order should be guaranteed by legal mechanisms that do not entail, permit or result in the impairment, hindrance or sacrifice of the basic human rights. To the contrary, the essence of the free development of the personality, the right to privacy, the right to personal and sexual identity, the right to health and, consequently, to the dignity of the individual and his or her right to equality and non-discrimination would be completely affected. All of this, given that the integral identification of individuals based on the rectification of their identity data to conform to their self-perceived gender identity is what would allow them to participate in all aspects of life. In this way, the State would be recognizing them legally as the persons they really are.<sup>281</sup>

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inhuman or degrading treatment or punishment, Juan E. Méndez. 1 February 2013, A/HRC/22/53, paras. 78 and 88; Committee on Economic, Social and Cultural Rights. General comment No. 22 (2016), on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), 2 May 2016, E/C.12/GC/22, para. 58; *Interagency Statement, Eliminating forced, coercive and otherwise involuntary sterilization*, May 2014, and *Joint statement of UN and regional human rights mechanisms on the rights of young LGBT and intersex people*, 13 May 2015.

<sup>279</sup> Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Yogyakarta Principles, March 2007, Principle 3.

<sup>280</sup> *Cf.* In this regard, see Constitutional Court of Colombia, Judgment T-063/15, section 7 No. 7.2.7.

<sup>281</sup> In this regard, see Supreme Court of Justice of Mexico, Direct amparo 6/2008. January 6, 2009, p. 7.



133. Lastly, the Court considers, in general, that in the context of the procedure for recognition of the right to gender identity, it is not reasonable to demand that the individual meet requirements that undermine the merely declarative nature of such procedures. In addition, it is inappropriate that such requirements become demands that invade the private sphere, because this would oblige individuals to subject the most intimate decisions and most private matters of their life to the public scrutiny of all those who, directly or indirectly, intervene in the procedure.<sup>282</sup>

c) *The procedure and the changes, corrections or amendments to the records should be confidential and the identity document should not reflect the change in gender identity*

134. In this Opinion, the Court has already indicated that the failure to recognize the right to gender identity of transgender persons contributes to reinforce and perpetuate discriminatory behavior towards them (*supra* Chapter IV.B). This may also increase their vulnerability to hate crimes, or transphobic and psychological violence,<sup>283</sup> which constitutes a form of gender-based violence, driven by a desire to punish individuals whose appearance or behavior appears to challenge gender stereotypes.<sup>284</sup> In the same way, the failure to recognize their gender identity may result in other human rights violations; for example, torture and ill-treatment in health centers or detention centers, sexual violence, denial of the right of access to health care, discrimination, exclusion and bullying in educational contexts, discrimination in access to employment or in the professional sphere, and access to housing and social security.<sup>285</sup>

135. In keeping with the above, undesired publicity concerning a change in gender identity, already effected or pending, may make the applicant more vulnerable to diverse acts of discrimination against his or her person, honor or reputation and, ultimately, may represent a major obstacle to the exercise of other human rights (*supra* para. 134). In this regard, both the procedure, and the amendments made in the records and on the identity documents in conformity with the self-perceived gender identity, should not be accessible to the public, and should not appear on the identity document itself.<sup>286</sup> This is consistent with the close relationship that exists between the right to identity and the right to privacy recognized in Article 11(2) of the Convention, which provides protection against any arbitrary interference in a person's privacy, which includes their gender identity. It is on this basis that this Court has asserted that "the sphere of private life is characterized by being exempt or immune from abusive and arbitrary interference or aggressions by third parties or the public authorities,"<sup>287</sup> and this "includes, among other dimensions, the ability to take decisions related to different areas of one's own life freely, to have a space of personal peace, to keep certain aspects of private life confidential, and to control public disclosure of personal information."<sup>288</sup> This does not mean that such information cannot be accessed if the

<sup>282</sup> In this regard, see Constitutional Court of Colombia, Judgment T-063/2015, section 7 No. 7.2.3.

<sup>283</sup> Cf. United Nations, United Nations High Commissioner for Human Rights, A/HRC/29/23, para. 21; Human Rights Committee, CCPR/C/VEN/CO/4, para. 8; Committee against Torture, CAT/C/KWT/CO/2, para. 25; Committee against Torture, CAT/C/KGZ/CO/2, para. 19; Human Rights Committee, CCPR/C/UKR/CO/7, para. 10, and Concluding observations on the third periodic report of Suriname, 3 December 2015, CCPR/C/SUR/CO/3, para. 27.

<sup>284</sup> Cf. United Nations, United Nations High Commissioner for Human Rights, A/HRC/29/23, para. 21.

<sup>285</sup> Cf. United Nations United Nations High Commissioner for Human Rights, A/HRC/29/23, paras. 34-38, 54, and 60-62; UNDP, Discussion Paper on *Transgender Health & Human Rights*, New York, 2013, and UNESCO, *Out in the open: Education sector responses to violence based on Sexual Orientation and Gender Identity/Expression*, UNESCO, Paris, 2016.

<sup>286</sup> See, for example, Constitutional Court of Colombia, Judgment T-063/2015.

<sup>287</sup> *Case of Atala Riffo and daughters v. Chile. Chile. Merits, reparations and costs*, para. 161.

<sup>288</sup> *Case of Fontevecchia and D`Amico v. Argentina*, para. 48.

person is summoned to appear before the competent authorities pursuant to the domestic law of the respective State.

136. In this regard, in its report on Privacy and Data Protection, the Inter-American Juridical Committee indicated that “[s]ome types of personal data, given its sensitivity in particular contexts, are especially likely to cause material harm to individuals if misused. Data controllers should adopt privacy and security measures that are commensurate with the sensitivity of the data and its capacity to harm individual data subjects.” Regarding sensitive data, the Committee suggested that “it might be considered entitled to special protection because its improper handling or disclosure would intrude deeply upon the personal dignity and honor of the individual concerned and could trigger unlawful or arbitrary discrimination against the individual or result in risk of serious harm to the individual.” “Accordingly, appropriate guarantees should be established within the context of national law and rules, reflecting the circumstances within the relevant jurisdiction, to ensure that the privacy interests of individuals are sufficiently protected” and “[e]xplicit consent of the individual concerned should be the governing rule for the collection, disclosure and use of sensitive personal data.”<sup>289</sup>

137. The same report indicates that “[p]ersonal data should be protected by reasonable and appropriate security safeguards against unauthorized access, loss, destruction, use, modification or disclosure.”<sup>290</sup> The report also recalled that “[t]he concept of privacy is well-established in international law and that it rests on fundamental concepts of personal honor and dignity as well as freedom of speech, thought, opinion and association. Provisions on the protection of privacy, personal honor and dignity are found in all the major human rights systems of the world.”<sup>291</sup> Lastly, the Committee stipulated that protecting the privacy of personal data “means not only keeping personal data secure, but also enabling individuals to control how their personal data is used and disclosed.”<sup>292</sup>

138. In addition, the Inter-American Program for Universal Civil Registry and the “Right to Identity” adopted by the OAS General Assembly established that “[t]hrough appropriate legislation, the States will guarantee the confidentiality of the personal information gathered by the civil registry systems, by applying the principles of personal data protection.”<sup>293</sup> Lastly, the confidential nature of the procedure to change the given name and, when appropriate, the gender or sex and the photograph to conform to a self-perceived gender identity is consistent with the Yogyakarta Principles as these stipulate that “[e]veryone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, [... which] includes the choice to disclose or not to disclose information relating to one’s sexual orientation or gender identity, as well as decisions and choices regarding both one’s own body and consensual sexual and other relations with others.”<sup>294</sup>

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<sup>289</sup> OAS, The Inter-American Juridical Committee. Report on Privacy and Data Protection, CJI/doc.474/15 rev.2, 2015. Ninth principle.

<sup>290</sup> OAS, The Inter-American Juridical Committee. Report on Privacy and Data Protection, CJI/doc.474/15 rev.2, 2015. Sixth principle.

<sup>291</sup> OAS, The Inter-American Juridical Committee, Report on Privacy and Data Protection, CJI/doc.474/15 rev.2, 2015. Definitions.

<sup>292</sup> OAS, The Inter-American Juridical Committee. Report on Privacy and Data Protection, CJI/doc.474/15 rev.2, 2015. Fifth principle.

<sup>293</sup> Cf. OAS, General Assembly of the OAS, AG/RES. 2362 (XXXVIII-O/08). Inter-American Program for Universal Civil Registry and the “Right to Identity”. Objectives 2.c.

<sup>294</sup> Cf. Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Yogyakarta Principles, March 2007, Principle 6.

139. In this regard, article 9 of the Argentine Gender Identity Act establishes that “an original birth registration shall only be accessed by those authorized by its owner or by a written and reasoned court order. [...] The rectifications of sex and name changes in the records shall not be made public without the authorization of the owner of the data.” Article 6 of this same law indicates expressly that “any reference to this law in the amended birth certificate and on the national identity document issued as a result is prohibited.”<sup>295</sup> Other States in the region have adopted gender identity laws that recognize the principle of confidentiality as a rule, and the principle of accessibility to the information as an exception when it is required by the judicial or fiscal authorities. For example, the Bolivian Gender Identity Act stipulates that the procedure must guarantee “that the information be accessible solely by the person concerned, those authorized by this law, or those authorized by a court order and/or by order of the public prosecutor.”<sup>296</sup>

140. Similarly, the Supreme Court of Mexico has understood that the rights to personal and sexual identity are “inherent human rights, that may not be interfered with by others” and that they constitute “rights essential to the human condition that must be guaranteed and defended, because they can be claimed both to defend privacy that is threatened or has been violated, and to require the State to prevent possible interferences that harm them; thus, even though they are not absolute, interfering with them can only be justified by law, when a higher interest is at issue.”<sup>297</sup> Accordingly, that Court understood that, in the case of individuals who have changed their gender identity, if “the data concerning the name and sex with which they were originally registered at birth” is retained “in their documents, including the birth certificate, and the decision granting the amendment is merely annotated in the margin, the resulting disclosure of such personal data would violate their fundamental rights to human dignity, equality and non-discrimination, privacy, image, personal and sexual identity, free development of the personality, and health, because the annotation in the margin means that, in even the most simple activities of their lives, these persons must reveal their previous condition, possibly giving rise to discriminatory acts towards them, without there being any reason to burden them in this way.”<sup>298</sup>

*d) The procedure should be prompt and, if possible, cost-free*

141. In this Opinion, the Court has mentioned that the right to identity is closely related to the exercise of certain rights (*supra* paras. 99 and 101.h). Reference has also been made to the impact that the denial of the right to gender identity has on the situation of vulnerability of transgender persons, as well as its specific effects on the exercise of other rights (*supra* paras. 98 and 101.i).

142. In this regard, it should be recalled that, on several occasions, this Court has indicated that the reasonable time for an administrative or judicial procedure is determined, among other elements, by the effects that the duration of the procedure has on the legal status of the person concerned. Thus, the Court has established that if the passage of time has a relevant impact on the legal status of this person, the procedure must be executed more promptly in order to settle the matter as soon as possible.<sup>299</sup> Accordingly, there can be no doubt that the effect that this type of procedure for name change and for the rectification of the self-perceived gender identity can have

<sup>295</sup> Argentina. Act No. 26,743, Articles 6 and 9.

<sup>296</sup> Bolivia. Act No. 807, of May 21, 2016, article 6. Also, article 10 of the act establishes that the administrative procedure to change the name, sex and photograph is confidential.

<sup>297</sup> Supreme Court of Justice of Mexico, Direct amparo 6/2008. January 6, 2009, p. 7.

<sup>298</sup> Supreme Court of Justice of Mexico, Direct amparo 6/2008. January 6, 2009, p. 18.

<sup>299</sup> Cf. *Case of Valle Jaramillo et al. v. Colombia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 192, para. 155, and *Case of Andrade Salmón v. Bolivia. Merits, reparations and costs*. Judgment of December 1, 2016. Series C No. 330, para. 164.

on the persons concerned is of such significance that it must be executed as promptly as possible. The domestic laws of several States of the region establish the need for the procedure of change of name, sex and photograph of persons in accordance with their gender identity to be prompt.<sup>300</sup>

143. In addition, as indicated in the Inter-American Program for Universal Civil Registry and the "Right to Identity," the registration procedure should be cost-free,<sup>301</sup> or at least be the least onerous possible for those concerned; in particular if they are "in poverty and at risk [... and also] taking the gender perspective into account."<sup>302</sup> Also, the Committee of Ministers of the Council of Europe has affirmed that "procedural and financial obstacles are considered contrary to the quick and accessible nature of the change of name and gender procedure."<sup>303</sup> Similarly, the Court notes that Argentina's Gender identity Act No. 26,743 establishes that the procedure to amend the records provided for in the law is free of charge, personal, and does not require the intervention of an agent or a lawyer.<sup>304</sup>

144. In other cases, this Court has already analyzed the existence of pecuniary requirements to be able to access a right contained in the Convention, indicating that such requirements should not nullify the exercise of these rights.<sup>305</sup> In this regard, the Court understands that the foregoing observations on the necessary cost-free nature of this procedure relates to the need to reduce the obstacles, in this case of a financial nature, that can be placed in the way of the legal recognition of gender identity. The cost-free nature of this procedure also relates to the need to avoid creating discriminatory differences in treatment with regard to cisgender persons, who do not need to use such procedures and, consequently, do not incur pecuniary expenses for the recognition of their gender identity. This matter is especially relevant when recalling the context of vulnerability and poverty associated with those unable to obtain recognition of their gender identity.

*e) Regarding the requirement to provide evidence of surgical and/or hormonal therapy*

145. As already mentioned (*supra* para. 32.h), gender identity creates space for self-identification, in other words, the experience that a person has of his or her own gender<sup>306</sup> and, in some cases, this may eventually involve the modification of the appearance or bodily functions by medical, surgical or other means. However, it is important to stress that gender identity is not a concept that should be systematically associated with physical transformations. This should be understood even in situations in which a person's gender identity or expression is different from the

<sup>300</sup> See, for example: Bolivia. Act No. 807 of 2016, "Gender Identity Act", article 6: "Promptness. This refers to timely and prompt exercise in the administration of the procedure for the change of name, sex and photographic data of transsexual and transgender persons."

<sup>301</sup> Cf. OAS, General Assembly of the OAS, AG/RES. 2362 (XXXVIII-O/08). Objective 2.d.

<sup>302</sup> OAS, General Assembly of the OAS, AG/RES. 2362 (XXXVIII-O/08). Purpose.

<sup>303</sup> Cf. Committee of Ministers of the Council of Europe. Recommendation CM/Rec (2010) 5 of the Council of Europe on measures to combat discrimination on grounds of sexual orientation or gender identity (adopted by the Committee of Ministers on 31 March 2010 at the 1081<sup>st</sup> meeting of the Ministers' Deputies).

<sup>304</sup> Cf. Argentina. Act No. 26,743, article 6 final paragraph. The cost-free nature of the procedure is established in Resolution 1795/2012 of the National Directorate of the National Civil Registry (amending Resolution No. 1417/12), declaring persons requesting rectification of their records and the consequent issue of a new national identity document exempt from the payment of any fee.

<sup>305</sup> Cf. *Case of Cantos v. Argentina. Merits, reparations and costs*. Judgment of November 28, 2002. Series C No. 97, para. 54, and *Case of Andrade Salmón v. Bolivia*, para. 117.

<sup>306</sup> Cf. UNHCR, Guidelines on international protection No. 9, Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/IP/12/09, 23 October 2012; UN, Fact sheet, LGBT Rights: Frequently Asked Questions. FREE&EQUAL, United Nations for LGBT Equality.

one assigned at birth, or that is typically associated with the sex assigned at birth, because transgender persons construct their identity regardless of medical treatment or surgery (*supra* para. 32.h).

146. Consequently, the procedure for name change, change of the photograph and rectification of the reference to sex or gender in records and on identity documents cannot require supporting evidence of total or partial surgery, hormonal therapy, sterilization, or bodily changes in order to grant the request or to prove the gender identity in question, because this could be contrary to the right to personal integrity recognized in Article 5(1) and 5(2) of the American Convention. Indeed, subjecting the recognition of a transgender person's gender identity to an undesired surgical intervention or sterilization would mean conditioning the full exercise of several rights, including the rights to privacy (Article 11(2) of the Convention) and to choose freely the options and circumstances that give a meaning to his or her existence (Article 7 of the Convention), and would lead to the refusal of the full and effective enjoyment of the right to personal integrity.<sup>307</sup> It should be recalled that, in the case of *I.V. v. Bolivia*, this Court indicated that health, as an integral part of the right to personal integrity, also includes the liberty of everyone to control their health and their body, and the right not to suffer from interferences, such as to be subjected to torture or to non-consensual medical treatments and experiments.<sup>308</sup> The foregoing could also constitute a violation of the principle of equality and non-discrimination contained in Articles 24 and 1(1) of the Convention because cisgender persons would not need to submit to such obstacles and harm to their personal integrity in order to enforce their right to identity.

147. In this regard, the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has indicated that “[i]n States that permit the modification of gender markers on identity documents abusive requirements [have been] imposed, such as forced or otherwise involuntary gender reassignment surgery, sterilization or other coercive medical procedures [...]. Even in places with no legislative requirement, enforced sterilization of individuals seeking gender reassignment is common. These practices are rooted in discrimination on the basis of sexual orientation and gender identity, violate the rights to physical integrity and self-determination of individuals and amount to ill-treatment or torture.”<sup>309</sup> Similarly, the ECHR has established that the burden imposed on a person to prove the medical need for treatment, including irreversible surgery, in one of the most intimate areas of private life, seems disproportionate and violates the right to privacy contained in Article 8 of the Convention.<sup>310</sup>

148. Furthermore, in its General Comment No. 22 on the right to sexual and reproductive health, the Committee on Economic, Social and Cultural Rights indicated that: “[l]aws and policies that indirectly perpetuate coercive medical practices, including incentive- or quota-based contraceptive policies and hormonal therapy, as well as surgery or sterilization requirements for legal recognition of one's gender identity, constitute additional violations of the obligation to respect.”<sup>311</sup> Likewise,

<sup>307</sup> Cf. ECHR, *Case of A.P., Garçon and Nicot v. France*, Nos. 79885/12, 52471/13, and 52596/13. Judgment of 6 April 2017, paras. 131 to 133.

<sup>308</sup> Cf. *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 155. Also, United Nations, Committee on Economic, Social and Cultural Rights, General Comment No. 14, *The right to the highest attainable standard of health* E/C.12/2000/4, 11 August 2000, para. 8.

<sup>309</sup> United Nations, Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 5 January 2016, A/HRC/31/57.

<sup>310</sup> Cf. ECHR, *Case of Christine Goodwin v. The United Kingdom*, paras. 75, 78 and 82, and *Case of A.P., Garçon and Nicot v. France*, para. 131 to 133.

<sup>311</sup> United Nations, Committee on Economic, Social and Cultural Rights. General comment No. 22, on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 2 May 2016, E/C.12/GC/22, para. 58.

the Committee on the Rights of the Child has indicated that it condemned “the imposition of so-called ‘treatments’ to try to change sexual orientation and forced surgeries or treatments on intersex adolescents. It urges States to eliminate such practices, repeal all laws criminalizing or otherwise discriminating against individuals on the basis of their sexual orientation, gender identity or intersex status and adopt laws prohibiting discrimination on those grounds.”<sup>312</sup> Similarly, the Yogyakarta Principles stipulate that “[n]o one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity.”<sup>313</sup> In addition, Argentina, Uruguay, and Bolivia have laws reflecting this, and the high courts of Colombia and Brazil have ruled in this sense.<sup>314</sup>

f) *The procedures in relation to children*

149. With regard to the regulation of the procedure for change of name, change of the photograph and rectification of the reference to sex or gender in the records and identity documents of children, the Court recalls, first that, as it has indicated in other cases, children are holders of the same rights as adults and of all the rights recognized in the American Convention as well as benefitting from the special measures of protection contained in Article 19 of the Convention, which must be defined based on the particular circumstances of each specific case.<sup>315</sup> The Court has also indicated that, when applied to children, the rights contained in general human rights instruments should be interpreted taking into consideration the *corpus juris* on the rights of the child.<sup>316</sup> Moreover, the Court has considered that Article 19 “should be understood as an additional supplementary right that the treaty establishes for individuals who, based on their physical and emotional stage of development, need special protection.”<sup>317</sup>

150. Additionally, the Court has understood that due protection of the rights of the child must take into consideration their innate characteristics and the need to encourage their development, offering them the conditions required to be able to live and develop their capabilities taking full advantage of their potential.<sup>318</sup> In this sense, children exercise their rights progressively, as they develop a greater degree of personal autonomy.<sup>319</sup> Thus, the Court understands that the pertinent measures of protection for children are special or more specific than those established for adults.<sup>320</sup>

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<sup>312</sup> United Nations, Committee on the Rights of the Child. General comment No. 20 on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20, para. 34.

<sup>313</sup> Cf. Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Yogyakarta Principles, March 2007, Principle 3.

<sup>314</sup> Cf. Argentina. Act 26,743, article 4; Bolivia. Act No. 807 of 2016; Uruguay, Act No. 18,620, article 3; Colombia. Constitutional Court of Colombia, Judgment T-063/15; Mexico, Supreme Court of Justice of Mexico. Direct amparo 6/2008. January 6, 2009; Brazil, Superior Court of Justice of Brazil, Judgment of May 9, 2017.

<sup>315</sup> Cf. *Case of Gelman v. Uruguay*, para. 121; Advisory Opinion OC-21/14, para. 66, and *Case of Atala Riffo and daughters v. Chile*. Order of November 29, 2011, para. 6.

<sup>316</sup> Cf. *Case of Gelman v. Uruguay*, para. 121.

<sup>317</sup> *Case of the “Juvenile Re-education Institute” v. Paraguay. Preliminary objections, merits, reparations and costs.* Judgment of September 2, 2004. Series C No. 112, para. 147, and *Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of September 4, 2012. Series C No. 250, para. 142.

<sup>318</sup> Cf. *Case of the Pacheco Tineo Family v. Bolivia*, para. 218, and Advisory Opinion OC-21/14, para. 66.

<sup>319</sup> Cf. *Case of Gelman v. Uruguay*, para. 129; Advisory Opinion OC-21/14, para. 66; *Case of Furlan and family members v. Argentina*, para. 203, and *Case of Mendoza et al. v. Argentina*, para. 143. See also, United Nations, Committee on the Rights of the Child, General Comment No. 7, Implementing child rights in early childhood, CRC/GC/7/rev. 1, 20 September 2006, para. 17.

<sup>320</sup> Cf. Advisory Opinion OC-21/14, para. 66.

151. According to the Court's jurisprudence, when it is a question of protecting the rights of the child and adopting measures to achieve this protection, in addition to the principle of progressive autonomy mentioned above (para. 150), the following four guiding principles that govern the Convention on the Rights of the Child should permeate and be implemented in every comprehensive protection system;<sup>321</sup> the principle of non-discrimination,<sup>322</sup> the principle of the best interests of the child,<sup>323</sup> the principle of respect for the right to life, survival and development,<sup>324</sup> and the principle of respect for the child's views in all matters affecting the child, in order to ensure his or her participation.<sup>325</sup>

152. In this regard, it is useful to recall that the principle of the best interest of the child implies, as governing criteria, that this should be a primary consideration in the design of public policies and in the drafting of laws concerning childhood, as well as in their implementation at all levels of the child's life.<sup>326</sup> In addition and closely related to the right to be heard, the Court has referred in other decisions to the obligation to fully respect the right of the child to be heard in all decisions that affect his or her life.<sup>327</sup> In particular, the Court has asserted that the right of the child to be

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<sup>321</sup> Cf. Advisory Opinion OC-21/14, para. 66, and *Case of Atala Riffo and daughters v. Chile*. Order of November 29, 2011, para. 7. Also, United Nations, Committee on the Rights of the Child, General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), CRC/GC/2003/5, 27 November 2003, para. 12.

<sup>322</sup> Article 2 of the Convention on the Rights of the Child establishes the obligation for States Parties to respect and ensure the rights set forth in that instrument to each child within their jurisdiction without discrimination of any kind, which "requires that States take steps to identify children and groups of children towards whom recognition and exercise of their rights may require the adoption of special measures." Cf. *Matter of L.M. with regard to Paraguay*. Provisional measures. Order of the Inter-American Court of Human Rights of July 1, 2011, para. 14, and Advisory Opinion OC-21/14, para. 66. See also, United Nations, Committee on the Rights of the Child, General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), 27 November 2003, CRC/GC/2003/5, para. 12, and Committee on the Rights of the Child, General comment No. 6. Treatment of unaccompanied and separated children outside their country of origin, para. 1.

<sup>323</sup> Paragraph 1 of Article 3 of the Convention on the Rights of the Child establishes that the best interests of the child must be the primary consideration in all actions concerning children. Cf. Advisory Opinion OC-21/14, para. 66. See also, United Nations, Committee on the Rights of the Child, General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), para. 12, and Committee on the Rights of the Child, General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC/C/CG/14.

<sup>324</sup> Article 6 of the Convention on the Rights of the Child recognizes the inherent right of every child to life, and the obligation of States Parties to ensure to the maximum extent possible the survival and development of the child; in other words, as a holistic concept that includes the physical, mental, spiritual, moral, psychological and social development of the child. Cf. Advisory Opinion OC-21/14, para. 66. See also, United Nations, Committee on the Rights of the Child, General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), para. 12.

<sup>325</sup> Article 12 of the Convention on the Rights of the Child establishes the right of the child "to express his or her views freely in all matters affecting the child" and that the views of the child must be "given due weight in accordance with the age and maturity of the child." Cf. Advisory Opinion OC-21/14, para. 66; *Case of Gelman v. Uruguay*, para. 129, and *Case of Atala Riffo and daughters v. Chile*. Order of November 29, 2011, para. 7. See also, United Nations, Committee on the Rights of the Child, General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), para. 12, and Committee on the Rights of the Child, General comment No. 12. The right of the child to be heard, 20 July 2009, CRC/C/GC/12.

<sup>326</sup> Cf. Advisory Opinion OC-21/14, para. 70, and second operative paragraph of the opinion.

<sup>327</sup> Cf. *Case of Fornerón and daughter v. Argentina. Merits, reparations and costs*. Judgment of April 27, 2012. Series C No. 242; Advisory Opinion OC-21/14, para. 70, and *Case of Atala Riffo and daughters v. Chile*. Order of November 29, 2011, para. 7. See also, United Nations, Committee on the Rights of the Child, General comment No. 12. The right of the child to be heard, 20 July 2009, CRC/C/GC/12., para. 74.

heard is not only a right in itself, but should also be considered in the interpretation and implementation of all other rights.<sup>328</sup>

153. Furthermore, in the context of contentious cases,<sup>329</sup> the Court has had the occasion to discuss the child's right to identity recognized in Article 8 of the Convention on the Rights of the Child. The first paragraph of this article establishes that: "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference." In such cases, the Court indicated that the right to identity was closely related to the person in his or her specific individuality and private life.<sup>330</sup> Similarly, in the case of *Gelman v. Uruguay*, the Court concluded that the State violated the right to liberty recognized in Article 7(1) of the Convention in a broad sense, for the abduction and subsequent elimination of the identity of a girl child by the State's security forces.<sup>331</sup> The Court considers that this right implies the possibility of every human being for self-determination and to freely choose the options and circumstances that give meaning to his or her existence.

154. Consequently, the Court understands that the foregoing considerations concerning the right to gender identity are also applicable to children who wish to apply for recognition of their self-perceived gender identity in their records and on their documents. This right should be understood in keeping with the special measures of protection established at the domestic level pursuant to Article 19 of the Convention, and those measures should necessarily be designed based on the principles of the child's best interests, progressive autonomy, and right to be heard and that the child's views be taken into account in any procedure that concerns the child, respect for the right to life, survival and development, and also the principle of non-discrimination. Lastly, it is important to underline that any restriction imposed on the full exercise of that right by provisions aimed at the protection of the child can only be justified based on these principles and should not be disproportionate. It is also pertinent to recall that the Committee on the Rights of the Child has emphasized that all adolescents have the rights "to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy."<sup>332</sup>

155. In addition, the Yogyakarta Principles have established that "everyone is entitled to the enjoyment of human rights" regardless of "their sexual orientation and gender identity" and "that in all actions concerning children the best interests of the child shall be a primary consideration and a child who is capable of forming personal views has the right to express those views freely, such views being given due weight in accordance with the age and maturity of the child."<sup>333</sup>

156. Lastly, and as an example of best practice in this regard, the Argentina's Gender Identity Act No. 26,743 of May 23, 2002, should be mentioned. Article 5 of the law refers to the procedure for amending a child's sex, name and picture in public records. In particular, the law establishes that, in the case of persons under the age of 18, the application "should be made through their legal representatives and with the express agreement of the minor, taking into account the

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<sup>328</sup> Cf. *Case of Atala Riffo and daughters v. Chile*. Order of November 29, 2011, para. 7. See also, United Nations, Committee on the Rights of the Child, General comment No. 12. The right of the child to be heard, 20 July 2009, CRC/C/GC/12, para. 2.

<sup>329</sup> Cf. *Case of Gelman v. Uruguay*, paras. 122 to 124; *Case of Rochac Hernández et al. v. El Salvador*, paras. 116 and 117, and *Case of Contreras et al. v. El Salvador*, paras. 112 to 114.

<sup>330</sup> Cf. *Case of Contreras et al. v. El Salvador*, para. 113.

<sup>331</sup> Cf. *Case of Gelman v. Uruguay*, para. 129.

<sup>332</sup> United Nations, Committee on the Rights of the Child. General comment No. 20 on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20, para. 34.

<sup>333</sup> Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Yogyakarta Principles, March 2007, Preamble.



principles of evolving capacities and best interests of the child as stipulated in the Convention on the Rights of the Child and in the law [...] on the comprehensive protection of the rights of children and adolescents. [...] In addition, the minor must be assisted by a children's lawyer. [...] When, for any reason, it is impossible to obtain the consent of any of the minor's legal representatives, or this is denied, then recourse may be had to a summary proceeding for the corresponding judges to rule based on the principles of the evolving capacities and best interests of the child as stipulated in the Convention on the Rights of the Child and in the law [...] on the comprehensive protection of the rights of children and adolescents."<sup>334</sup>

*g) The nature of the procedure*

157. This requirement is closely related to the second question raised by the State of Costa Rica concerning whether it "could it be considered contrary to the [American Convention] that those interested in changing their given name may only do so through a judicial procedure, without there being a pertinent administrative procedure."

158. Regarding this question, the considerations made *supra* concerning gender identity as an expression of the individuality of the person and the relationship that exists between this fundamental right and the possibility of all human beings to exercise self-determination and to freely choose the options and circumstances that give meaning to their existence, according to their own choices and convictions, without external interference should be recalled (*supra* para. 88). On this basis, the Court has recognized the fundamental right of everyone that the sex or gender registered in public records should coincide with the sexual and gender identity effectively assumed and experienced by the person concerned. Thus, the procedure for recognition of a person's self-perceived gender identity should consist of a registration process that everyone has the right to carry out autonomously, and in which the role of the State and of society should merely be to recognize and respect this registration of identity, without the intervention of the state authorities becoming an integral part of such identity. Accordingly, the said procedure may never be a space for external scrutiny and validation of the sexual and gender identity of the person requesting its recognition (*supra* para. 133).

159. Consequently, it can be affirmed that although, in principle, States may determine, based on their internal social and juridical circumstances, the most appropriate procedure to comply with the requirements for procedures to rectify the name and, if applicable, the reference to the sex/gender and the photograph in the corresponding records and identity documents, it is also true that the procedure best suited to the requirements established in this Opinion is one of an administrative or notarial nature, because, in some States, a judicial proceeding may incur in excessive formalities and delays characteristic of the proceedings of judicial nature. In this regard, it should be recalled that the Inter-American Program for Universal Civil Registry and the "Right to Identity" establishes that, "[i]n accordance with their domestic laws, the States will promote the cost-free use of administrative procedures in connection with registration processes in order to simplify and decentralize them, while leaving recourse to the judicial system as a last resort."<sup>335</sup>

160. In addition, a procedure of a judicial nature to obtain authorization to implement a right with these characteristics would place excessive constraints on the applicant and would not be appropriate because the procedure should be of an administrative nature in an administrative or judicial venue. Accordingly, the official responsible for the procedure could only deny the request, without violating the applicant's possibility for self-determination and right to privacy, if he or she

<sup>334</sup> Argentina. Act No. 26,743 of May 23, 2012, article 5.

<sup>335</sup> OAS, General Assembly of the OAS, AG/RES. 2362 (XXXVIII-O/08). Inter-American Program for Universal Civil Registry and the "Right to Identity". Objective 2.d.

notes a defect in the applicant's free and informed consent. In other words, any decision concerning a request for amendment or rectification based on gender identity should not be able to assign rights; it may only be of a declarative nature, because it should merely verify whether the requirements inherent to the manifestation of the will of the applicant have been met. Based on the foregoing, the answer to the second question raised by the State of Costa Rica concerning the nature of the procedure for a change of name so that this conforms to the self-perceived gender identity of the applicant is the following:

**States may determine and establish, in keeping with the characteristics of each context and their domestic law, the most appropriate procedures for the change of name, change of the photograph and rectification of the reference to sex or gender in records and on identity documents so that these conform to the self-perceived gender identity, regardless of whether these are of an administrative or judicial nature.<sup>336</sup> However, these procedures should comply with the following requirements established in this Opinion: (a) these should be centered on the complete rectification of the self-perceived gender identity; (b) these should be based solely on the free and informed consent of the applicant without involving requirements such as medical and/or psychological or other certifications that could be unreasonable or pathologizing; (c) these should be confidential, and the changes, corrections or amendments to the records and on the identity documents should not reflect the changes made based on the gender identity; (d) these should be prompt and, insofar as possible, cost-free, and (e) these should not require evidence of surgery and/or hormonal therapy.**

**Since the Court notes that administrative or notarial procedures are those best suited to and most appropriate for these requirements, States may provide a parallel administrative procedure that the person concerned may choose.**

161. Lastly, and based on the above, it can also be indicated that the procedure for a change of name, change of the photograph and rectification of the reference to sex or gender in the records and on the identity documents so that these conform to the self-perceived gender identity does not necessarily have to be regulated by law, because it should consist of a simple procedure to verify the applicant's intention.

#### **D. Article 54 of the Civil Code of Costa Rica**

162. The State of Costa Rica asked the Court to rule on the compatibility with Articles 11(2), 18 and 24, in relation to Article 1(1) of the Convention, of the practice of applying Article 54 of the Civil Code of the Republic of Costa Rica<sup>337</sup> to those persons who wish to change their name based on their gender identity. In particular, it submitted the following question: "Could it be understood that, in accordance with the ACHR, Article 54 of the Civil Code of Costa Rica should be interpreted as to imply that those who wish to change their given name based on their gender identity are not obliged to submit to the judicial procedure established therein, but rather that the State must provide them with a free, prompt and accessible administrative procedure to exercise that human right?"

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<sup>336</sup> This category includes procedures of a notarial nature such as those established in the laws of Colombia. See Decree No. 1069 of 2015, regulating the justice and law sector, which refers to the procedure for amending a person's sex in the Civil Registry.

<sup>337</sup> Promulgated by Act No. 30 of April 19, 1885. It came into force on January 1, 1888, based on Act No. 63 of September 28, 1887.

163. Article 54 of the Civil Code establishes that “[e]very Costa Rican registered in the Civil Registry may change his or her name with the authorization of the court and this shall be obtained by means of the corresponding voluntary jurisdiction proceeding.” Meanwhile, article 55 of the Civil Code indicates that “when the request for a change has been submitted, the court shall order an announcement to be published in the Official Gazette indicating that any objections should be advised within 15 days,” and article 56 of the Civil Code indicates that “in the case of any name change or amendment, the Public Prosecution’s Office shall be heard, and before making its ruling the court shall obtain a report of good conduct and the police record of the applicant. It shall also advise the Ministry of Public Security.”

164. The Court notes, first, that although the request for an advisory opinion relates to article 54 of the Civil Code, which indicates the name change procedure, this article is closely related to articles 55 and 56 of the Code because these articles define some of the specific elements of the procedure. Consequently, the Court’s analysis will be based on these three articles.

165. During the proceedings of this Advisory Opinion, the Ombudsperson of the Republic of Costa Rica advised that, article 65 of the “The Supreme Electoral Tribunal and the Civil Registry Organic Act” establishes the possibility of amending entries in public records by way of administrative channel. In this case and based on the application of article 45 of the Civil Registry Rules of Procedure, in the administrative practice, it is considered that the amendment of entries in the records and, especially of the name, by means of a written petition (*ocurso*), is admissible by way of administrative channel only in the case of grammatical or spelling errors. In the case of a complete amendment to the records, those concerned are obliged to follow what is stipulated in 54 of the Civil Code.

166. The Ombudsperson added that, “currently, there are no legal restrictions to submitting a written petition as an administrative recourse to amend registry entries, including name and sex, because the rules that regulate this recourse do not establish a difference between the registry entries that may be amended using this procedure. Nevertheless, as verified on numerous occasions, the refusal to proceed with this recourse is due to the interpretation of the rules by the Supreme Electoral Tribunal and the administrative practice derived from this [...].”

167. In this regard, it should be pointed out that it is not incumbent on this Court to determine whether or not national regulations are being applied correctly in light of the domestic law, or to indicate the competent body to hear a specific matter in light of Costa Rica’s legal system. Rather, for this question, the Court must only interpret the rights recognized in the Convention and determine whether the referred provisions of domestic law – in this case article 54 of the Civil Code – conform with to the provisions of the American Convention.

168. Regarding the name change procedure referred to in article 54 of the Civil Code, the Court notes that: (a) it entails only the change of name and not of the other elements inherent in the right to identity such as, for example, the sex or gender recorded in the identity documents and other records; (b) it involves a judicial procedure; (c) it opens up the possibility of presenting objections to the name change request; (d) it requires the intervention of a third party (the Public Prosecution’s Office), and (e) it requires the submission of a report of good conduct and police records.

169. In the previous section, the Court verified that a procedure to decide a request for rectification of the records and the identity documents to the applicant’s gender identity must, among other requirements: (a) be centered on the complete rectification of the self-perceived gender identity; (b) the decision on the request should be based solely on the applicant’s free and informed consent, without third parties being able to interfere arbitrarily with the extremely personal right to gender identity; (c) should be cost-free insofar as possible, and implemented promptly; (d) should not require the submission of medical or psychological evidence, or required

accounts of the private life nor the submission of police records, and (e) should preferably be an administrative or notarial procedure rather than a procedure of a judicial nature.

170. The Court notes that the requirements established in articles 55 and 56 of the Civil Code of Costa Rica do not comply with the elements just mentioned, because they introduce the possibility of objections being raised by third parties and the Public Prosecution's Office. This signifies that the eventual decision of the judge would not be merely declarative. Also, article 55 of the Civil Code indicates that the judge must order the publication of an announcement in the Official Gazette, which means that the procedure is not confidential. Lastly, article 56 of the Civil Code of Costa Rica requires the submission of a report of good conduct and of the applicant's police record and, as already indicated (*supra* para. 168), this requirement is incompatible with the procedure to rectify the identity data of a person to the self-perceived gender identity of that person.

171. Based on the above, the Court considers that the answer to the third question raised by the State of Costa Rica is as follows:

**As it is currently worded, article 54 of the Civil Code of Costa Rica is in conformity with the provisions of the American Convention only if it is interpreted by the courts or regulated administratively to mean that the procedure established by this article can ensure that the persons who wish to change their identity data so that it accords with their self-perceived gender identity can do so through a merely administrative procedure that meets the following criteria:**

**(a) It must be centered on the complete rectification of the self-perceived gender identity; (b) it must be based solely on the applicant's free and informed consent, without requirements such as medical and/or psychological or other certifications that could be unreasonable or pathologizing; (c) it must be confidential, and the changes, corrections or amendments to the records and the identity documents should not reflect the changes to conform to the gender identity; (d) it must be prompt and, insofar as possible, cost-free, and (e) it must not require evidence of surgery and/or hormonal therapy.**

**Consequently, based on the conventionality control, article 54 of the Civil Code of Costa Rica must be interpreted pursuant to the standards established above so that those who wish to have their records and/or their identity documents comprehensively rectified in order to conform to their self-perceived gender identity, may effectively enjoy this human right recognized in Articles 3, 7, 11(2), 13 and 18 of the American Convention.**

**The State of Costa Rica, in order to ensure a more effective protection of human rights, may issue a regulation that incorporates these previously mentioned standards into an administrative procedure that it may offer in parallel, in keeping with the considerations in the preceding paragraphs of this Opinion (*supra* para. 160).**

## VIII

### INTERNATIONAL PROTECTION OF RELATIONSHIPS BETWEEN SAME-SEX COUPLES

172. The fourth and fifth questions on which the State of Costa Rica requested this Court's opinion relate to the patrimonial rights derived from "relationships between persons of the same sex." In this chapter, the Court will refer, first, to the standards applicable to the "relationships" referred to by Costa Rica, and will then turn to the second part of the question regarding the

mechanisms through which this relationship should be protected, according to the American Convention.

### A. The treaty-based protection of the relationship between same-sex couples

173. As a preliminary observation, the Court notes that, in the request for this Advisory Opinion, the State of Costa Rica did not explain the kind of relationship between same-sex persons to which it was referring. However, the Court observes that, in its question, the State alludes to Article 11(2) of the Convention,<sup>338</sup> which protects the individual, *inter alia*, from arbitrary interference with his or her private life or family.<sup>339</sup> Accordingly, the Court understands that the questions submitted by the State refer to the patrimonial rights derived from the relationship which result from the emotional ties between same-sex couples, as in the case of *Duque v. Colombia*.<sup>340</sup> The Court also observes that, in general, the rights resulting from emotional ties between couples are usually protected by the Convention through the family and family life institutions.

174. In this regard, the Court recalls, that the American Convention contains two articles that provide complementary protection to both the family and the family life. Thus, this Court has considered that the possible violations of these protected rights should be analyzed not only as a possible arbitrary interference with the private and family life under Article 11(2) of the American Convention, but also, because of the impact that such violations may have on the family unit, in light of Article 17(1) of this same instrument.<sup>341</sup> None of the articles cited include a rigorous and exhaustive definition of what should be understood by "family." Regarding this, the Court has indicated that the American Convention does not refer to a specific narrow concept of family and that, in particular, it does not protect either a single specific model of the family.<sup>342</sup>

175. Consequently, to answer the questions raised by the State of Costa Rica, the Court finds it necessary to determine whether the emotional ties between same-sex couples can be considered "family" in the terms of the Convention, in order to establish the scope of the applicable international protection. To this end, the Court must resort to the general rules for the interpretation of international treaties and the special rules of interpretation of the American Convention referred to in Chapter V of this Opinion. Thus, the Court will analyze the ordinary meaning of the word (literal interpretation), its context (systematic interpretation), its object and purpose (teleological interpretation), as well as the evolutive interpretation of its scope. Also, pursuant to the provisions of Article 32 of the Vienna Convention, it will refer to supplementary means of interpretation, especially the preparatory works for the Convention.

176. To establish the ordinary meaning of the word "family," the Court deems it necessary to recognize the crucial importance of the family as a social institution, which emerges from the most basic needs and desires of the human being. It seeks to realize aspirations of safety, connection,

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<sup>338</sup> Article 11(2) of the American Convention: "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."

<sup>339</sup> *Cf. Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 161.

<sup>340</sup> *Cf. Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 138.

<sup>341</sup> *Cf. Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 175.

<sup>342</sup> *Cf. Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, paras. 142 and 172. Similarly, see United Nations, Committee on the Elimination of Discrimination against Women, General Recommendation No. 21 (thirteenth session 1994). Equality in marriage and family relations, para. 13; Committee on the Rights of the Child, General Comment No. 7, 20 September 2006, Implementing child rights in early childhood, CRC/C/GC/7/Rev.1, paras. 15 and 19; Human Rights Committee, General Comment No. 19 (thirty-ninth session, 1990). Article 23 (The Family), HRI/GEN/1/Rev.9 (Vol. I), para. 2, and Human Rights Committee, General Comment No. 16 (thirty-second session, 1988). Article 17 (The right to privacy), HRI/GEN/1/Rev.9 (Vol. I), para. 5.

and refuge that express the best inclinations of humankind. The Court finds it evident that the family is an institution that has provided cohesion to entire communities, societies and peoples.

177. Notwithstanding its transcendental significance, the Court also notes that the existence of the family has accompanied the development of society. Its conceptualization has varied and evolved over time. For example, up until a few decades ago, it was still considered legitimate to distinguish between children born in and out of wedlock.<sup>343</sup> Furthermore, contemporary societies have cast off stereotyped notions of the roles that the members of a family should assume, which were very present in societies of this region when the Convention was drawn up. At times, these notions have evolved long before the laws of a State have been adapted to them.<sup>344</sup>

178. Furthermore, the Court observes that, today, family relationships have numerous forms and are not limited to relationships based on marriage.<sup>345</sup> Thus, this Court has found that:

“[...] [T]he definition of family should not be restricted by the traditional notion of a couple and their children, because other relatives may also be entitled to the right to family life, such as uncles and aunts, cousins, and grandparents, to name but a few of the possible members of the extended family, provided they have close personal ties. In addition, in many families the person or persons in charge of the legal or habitual maintenance, care and development of a child are not the biological parents. Furthermore, in the migratory context, “family ties” may have been established between individuals who are not necessarily family members in a legal sense, especially when, as regards children, they have not been accompanied by their parents in these processes. This is why the State has the obligation to determine, in each case, the composition of the child’s family unit. [...]”<sup>346</sup>

179. In the Court’s opinion, there is no doubt that – for example – a single-parent family must be protected in the same way that the grandparents who assume the role of parents of a grandchild.

<sup>343</sup> Cf. ECHR, Case of *Marckx v. Belgium*, No. 6833/74, Judgment of 13 June 1979, para. 14.

<sup>344</sup> For example, in Guatemala, in 1998, when provisions in the Civil Code established that a married woman could only exercise a profession or have an employment when this did not prejudice “her functions of mother and housewife,” Guatemala, Civil Code, Decree-Law No. 106, of September 14, 1963, articles 113 and 114. Also, article 109 of the Civil Code accorded conjugal representation to the husband, and article 131 authorized the husband to administer the conjugal property. In addition, article 110 referred to the responsibilities within the marriage, according the wife “the right and the [special] obligation” to care for the underage children and the household. These provisions were repealed or reformed by congressional Decrees No. 80-98 of December 23, 1998, and 27-99 of August 30, 1999. Similarly, in Nicaragua, article 151 of the Civil Code established that “[t]he husband is the representative of the family and, in his absence, the wife”; also, article 152 indicated that “[t]he husband is obliged to live with his wife and she to live with her husband and to follow him wherever he moves his residence.” These provisions were repealed by articles 79 to 82 and 671 of the Family Code, Act 870 of August 26, 2014. Article 158 of the Paraguayan Civil Code, Act No. 1183/85, December 18, 1985, established that “[t]he consent of both spouses shall be required for the woman to be able to take the following actions: (a) exercise a profession, industry or trade on her own account, or work outside the home; (b) hire out her services; (c) constitute single or joint-stock industrial or investment companies, or limited partnerships; (d) accept donations; (e) freely surrender transactions of the property that she administers. In all the situations in which the husband’s consent is required, if he refuses this or is unable to provide it, the wife may request due authorization from the judge, and the latter shall grant this when the petition responds to the needs or interests of the household.” Additionally, article 195 established that “[t]he husband is the administrator of the communal property, subject to the exceptions established in this chapter.” The preceding articles were repealed by Act 1/92 of June 25, 1992, article 98.

<sup>345</sup> Cf. Advisory Opinion OC-17/02, paras. 69 and 70; *Case of Atala Riffo and daughters v. Chile*, para. 142, and ECHR, *Case of Elsholz v. Germany*, No. 25735/94, Judgment of 13 July 2000, para. 43, *Case of Keegan v. Ireland*, No. 16969/90, Judgment of 26 May 1994, para. 44, and *Case of Kroon et al. v. The Netherlands*, No. 18535/91, Judgment of 27 October 1994, para. 30. In this regard, the Court has indicated that “the concept of family life is not reduced to marriage and should encompass other *de facto* family ties where the parties live together outside marriage.” *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 142

<sup>346</sup> Advisory Opinion OC-21/14, August 19, 2014, para. 272.

Likewise, adoption is unquestionably a social institution that, in certain circumstances, allows two or more persons who do not know each other to become a family. Also, pursuant to the considerations set out in Chapter VII of this Opinion, a family may also consist of persons with different gender identities and/or sexual orientations. All these models require protection by society and the State because, as mentioned previously (*supra* para. 174), the Convention does not protect a single or a specific model of a family.

180. Without limiting the foregoing, the European Court has indicated that a number of factors may be relevant to identify whether a relationship can be said to amount to “family life”, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other.<sup>347</sup> Despite this, the United Nations System has observed that “the concept of family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition.”<sup>348</sup>

181. Given the impossibility of identifying an ordinary meaning for the word “family,” the Court observes that the *immediate* context<sup>349</sup> of Articles 11(2) and 17(1) does not provide a satisfactory answer either. On the one hand, paragraphs 2, 3, 4 and 5 of Article 17 clearly refer exclusively to one model of family relationship, but as noted previously, the protection of family relationships is not limited to relationships based on marriage. Meanwhile, paragraphs 1 and 3 of Article 11 do not offer any additional evidence to establish the scope of the word examined.

182. Thus, regarding Article 17(2) of the Convention, the Court considers that although it is true that, taken literally, it recognizes the “right of men and women of marriageable age to marry and to raise a family,” this wording does not propose a restrictive definition of how marriage should be understood or how a family should be based. In the opinion of this Court, Article 17(2) is merely establishing, expressly, the treaty-based protection of a specific model of marriage. In the Court’s opinion, this wording does not necessarily mean either that this is the only form of family protected by the American Convention.

183. As mentioned in Chapter V of this Opinion, a treaty’s context also includes, *inter alia*, the legal system to which the provisions to be interpreted belong.<sup>350</sup> Thus, the Court has considered that, when interpreting a treaty, it is not only the formal agreements and instruments that relate to it that must be taken into account,<sup>351</sup> but also the system to which it belongs;<sup>352</sup> in this case, the Inter-American system for the protection of human rights.<sup>353</sup>

<sup>347</sup> Cf. *Mutatis mutandi*, ECHR, *Case of X, Y and Z v. The United Kingdom*, No. 21830/93, Judgment of 22 April 1997, para. 36, and *Case of Şerife Yiğit v. Turkey*, No. 3976/05), Judgment of 2 November 2010 para. 96.

<sup>348</sup> United Nations, Human Rights Committee, General Comment No. 19 (thirty-ninth session, 1990). Article 23 (The Family), HRI/GEN/1/Rev.9 (Vol. I), para. 2. Also, Committee on the Elimination of Discrimination against Women, General Recommendation No. 21 (thirteenth session 1994). Equality in marriage and family relations, para. 13; Committee on the Rights of the Child, General Comment No. 7, 20 September 2006, Implementing child rights in early childhood, CRC/C/GC/7/Rev.1, paras. 15 and 19, and Human Rights Committee, General Comment No. 16 (thirty-second session, 1988). Article 17 (The right to privacy), HRI/GEN/1/Rev.9 (Vol. I), para. 5.

<sup>349</sup> Cf. World Trade Organization. *Import Prohibition of Certain Shrimp and Shrimp Products (United States v. India, Malaysia, Pakistan, Thailand)*. Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998, para. 116.

<sup>350</sup> Cf. *Case of González et al. (“Cotton Field”) v. Mexico*, para. 43; *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica*, para. 191, and Advisory Opinion OC-22/16, para. 44.

<sup>351</sup> Article 31(2) of the Vienna Convention on the Law of Treaties establishes that: “2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”

184. Accordingly, in addition to taking into account all the provisions of the American Convention, the Court has found it necessary to verify all the formal agreements and instruments related to it, because this allows the Court to verify whether the interpretation given to a specific provision or word is coherent with the meaning of the other provisions.<sup>354</sup> Thus, the Court notes that Articles 5 and 6<sup>355</sup> of the American Declaration of the Rights and Duties of Man, Article 15<sup>356</sup> of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) of November 17, 1988, and Article XVII<sup>357</sup> of the American Declaration on the Rights of Indigenous Peoples of June 15, 2016, contain provisions similar to those of Article 17 of the American Convention.

185. None of these texts contains a definition of the word “family” or any indication of this. To the contrary, the wording of the provisions cited is broader. Indeed, the American Declaration and the Protocol of San Salvador refer to the right of “every person” or “everyone” to establish or form a family. Neither of these instruments mentions the sex, gender or sexual orientation of such persons, or specifically indicates a particular family model. Meanwhile, the American Declaration on the Rights of Indigenous Peoples is broader still, as it refers to the “family systems” characteristic of the indigenous peoples.

186. That said, the Court notes that, during the preparatory works for the adoption of the American Convention, there was no discussion on whether same-sex couples should be considered a form of family. Doubtless this was due to the historic moment during which this instrument was adopted. Nevertheless, similar considerations could be made about other family models,<sup>358</sup> including those in which the members do not assume roles based on gender stereotypes.<sup>359</sup>

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<sup>352</sup> Article 31(3)(c) of the Vienna Convention on the Law of Treaties stipulates that: “3. There shall be taken into account, together with the context: [...] c) any relevant rules of international law applicable in the relations between the parties.”

<sup>353</sup> Cf. Advisory Opinion OC-16/99, para. 113, and *Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica*, para. 191.

<sup>354</sup> Cf. Advisory Opinion OC-22/16, para. 45.

<sup>355</sup> Article V of the American Declaration of the Rights and Duties of Man: “Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life”, and Article VI indicates that: “Every person has the right to establish a family, the basic element of society, and to receive protection therefore.”

<sup>356</sup> Article 15 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador): “Right to the Formation and the Protection of Families. 1. The family is the natural and fundamental element of society and ought to be protected by the State, which should see to the improvement of its spiritual and material conditions. 2. Everyone has the right to form a family, which shall be exercised in accordance with the provisions of the pertinent domestic legislation [...]”

<sup>357</sup> Article XVII of the American Declaration on the Rights of Indigenous Peoples: “Indigenous family: 1. The family is a natural and fundamental group unit of society. Indigenous peoples have the right to preserve, maintain, and promote their own family systems. States shall recognize, respect, and protect the various indigenous forms of family, in particular the extended family, as well as the forms of matrimonial union, filiations, descent, and family name. In all cases, gender and generational equity shall be recognized and respected. [...]”

<sup>358</sup> For example, in the *travaux préparatoires* of the American Convention, the Court observes that the delegations of the States of Chile, Argentina, the United States of America, Guatemala, and Trinidad and Tobago made observations on the wording that was finally adopted in Article 17(5) of the Convention: “The law shall recognize equal rights for children born out of wedlock and those born in wedlock.” Inter-America Specialized Conference on Human Rights. *Actas y Documentos*. OEA/Ser.K/XVI/1.2, pp. 227 and 228. See also: Observations of the Government of Chile on the draft Convention on Human Rights, Doc. 7, September 26, 1969, para. 9. In their observations, these States indicated that it was necessary to establish exceptions to Article 17(5), specifically with regard to inheritance. However, their observations were not taken into account in the final text.

<sup>359</sup> The *travaux préparatoires* record that the Dominican Republic delegation indicated that “[t]he new concept of ‘adequate balancing of responsibilities’ (of the spouses) constitutes an interesting initiative.” Inter-America Specialized



187. In the Court's opinion, these circumstances mean that the assertion made on numerous occasions by the Court<sup>360</sup> and by its European counterpart<sup>361</sup> acquires special force and validity: human rights treaties are living instruments, the interpretation of which must evolve with the time and present-day conditions.<sup>362</sup> In this way, the evolutive interpretation converges with the object and purpose of the American Convention. As previously established (*supra* para. 58), the evolutive interpretation is consequent with the general rules of interpretation contained in Article 29 of the American Convention, as well as those established by the Vienna Convention on the Law of Treaties.

188. In this regard, the International Court of Justice has indicated that, in certain international treaties, the intention of the States Parties was precisely "to give the terms used a meaning capable of evolving, not one fixed once and for all [...] so as to make allowance for [...] developments in international law. In such instances, [...] in order to respect the parties' common intention at the time the treaty was concluded," it is necessary to make an evolutive interpretation. This "is founded on the idea that, where the parties have used generic terms in a treaty, the parties necessarily ha[d] been aware that the meaning of the terms was likely to evolve over time." In such cases, the International Court of Justice established that, "the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning."<sup>363</sup>

189. Indeed, a restrictive interpretation of the concept of "family" that excludes the emotional ties between a same-sex couple from the inter-American protection would defeat the object and purpose of the Convention. The Court recalls that the object and purpose of the American Convention is "the protection of the basic rights of the human being,"<sup>364</sup> with no distinctions.

190. The emotional ties protected by the Convention cannot be quantified or codified and, therefore, even from its early jurisprudence, this Court has understood the concept of family in a broad and flexible sense.<sup>365</sup> The wealth and diversity of the region has been reflected in the cases

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Conference on Human Rights. *Actas y Documentos*. OEA/Ser.K/XVI/1.2., Observations and comments on the draft convention on the protection of human rights presented by the Government of the Dominican Republic, p. 3.

<sup>360</sup> Cf. Advisory Opinion OC-16/99 of October 1, 1999, para. 114, and *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*, para. 245.

<sup>361</sup> Cf. ECHR, *Case of Tyrer v. The United Kingdom*, No. 5856/72, Judgment of 25 April 1978, para. 31.

<sup>362</sup> Cf. *Case of the Hacienda Brazil Verde Workers v. Brazil*, para. 245.

<sup>363</sup> Cf. International Court of Justice, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, p. 213, paras. 64 and 66. The Court indicated that: "[...] there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied. [...] It is founded on the idea that, where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning,"

<sup>364</sup> Advisory Opinion OC-2/82, para. 29; Advisory Opinion OC-21/14, para. 53, and Advisory Opinion OC-22/16 of February 26, 2016, para. 42.

<sup>365</sup> Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala*, para. 68; *Case of the "White Van" (Paniagua Morales et al.) v. Guatemala*. Reparations and costs. Judgment of May 25, 2001. Series C No. 76, para. 86, and *Case of Loayza Tamayo v. Peru*. Reparations and costs. Judgment of November 27, 1998. Series C No. 42, para. 92. More recently, *Case of Fornerón and daughter v. Argentina*, para. 98.

submitted to the Court's contentious jurisdiction, which have revealed the different family arrangements that can be protected, including polygamous families.<sup>366</sup>

191. Bearing this in mind, the Court finds no reason to ignore the family relationships that same-sex couples who seek to undertake a life project together may establish by means of permanent emotional ties, typically characterized by cooperation and mutual support. In the Court's opinion, it is not its role to give preference to or distinguish one type of family tie over another. However, the Court finds that, under the Convention, it is the obligation of States to recognize such family ties and protect them.

192. On this basis the Court agrees with its European counterpart in that it would be "artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life.'"<sup>367</sup> Additionally, as already mentioned, a family may also consist of persons with different gender identities and/or sexual orientations (*supra* para. 179). The Court deems it important to stress that with this it is not downplaying other family models, nor is it ignoring the importance of the family institution as an essential component of society. To the contrary, the Court is recognizing the same dignity to the emotional ties of a couple formed by two persons who are part of a historically oppressed and discriminated minority.

193. Those who drafted and adopted the American Convention did not presume to know the absolute scope of the fundamental rights and freedoms recognized therein. Accordingly, the Convention confers on the States and the Court the task of identifying and protecting the scope in accordance with the passage of time. Thus, the Court considers that it is not diverging from the initial intention of the States that signed the Convention; to the contrary, by recognizing this family relationship, the Court is adhering to the original intention.

194. That said, the Court finds that the protection of this family model has two aspects. The first arises from Article 1(1) of the Convention, which gives rise to a general obligation the content of which extends to all the provisions of this treaty (*supra* para. 63). In addition, this protection extends to all the instruments of the Inter-American system for the protection of human rights<sup>368</sup> and, in general, to any international human rights treaty that contains any clause concerning the protection of the family.<sup>369</sup>

195. The second aspect of the protection of this type of family model refers to the domestic law of the States pursuant to Article 24 of the Convention. In other words, the "equal protection of the law" with regard to all the domestic laws of a State and their enforcement<sup>370</sup> (*supra* para. 64).

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<sup>366</sup> Cf. *Case of Aloeboetoe et al. v. Suriname*. Reparations and costs. Judgment of September 10, 1993. Series C No. 15, paras. 62 and *ff.*

<sup>367</sup> Cf. ECHR, *Case of Schalk and Kopf v. Austria*, No. 30141/04, Judgment of 24 June 2010, para. 94, and *Case of Vallianatos et al. v. Greece*, Nos. 29381/09 and 32684/09, Judgment of 7 November 2013, para. 73.

<sup>368</sup> For example, Article XI of the Inter-American Convention on the Forced Disappearance of Persons requires States "to establish and maintain official up-to-date records of their detainees," which must be made available to family members. Also, the Inter-American Convention on Protecting the Human Rights of Older Persons contains a wide range of provisions that protect not only older persons, but also their family members.

<sup>369</sup> For example, Article 5 of the Convention on the Rights of the Child establishes that: "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."

<sup>370</sup> Cf. *Case of Yatama v. Nicaragua*, para. 186, and *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 94.

196. In this regard, the Court has already indicated that Principle No. 13 of the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity, establishes that “[e]veryone has the right to social security and other social protection measures, without discrimination on the basis of sexual orientation or gender identity. Therefore, “States shall: (a) [t]ake all necessary legislative, administrative and other measures to ensure equal access, without discrimination on the basis of sexual orientation or gender identity, to social security and other social protection measures, including employment benefits, parental leave, unemployment benefits, health insurance or care or benefits (including for body modifications related to gender identity), other social insurance, family benefits, funeral benefits, pensions and benefits with regard to the loss of support for spouses or partners as the result of illness or death.”<sup>371</sup>

197. The Court has also noted that there is an increasing list of rights, benefits and responsibilities that same-sex couples could benefit from and enjoy. These aspects include, *inter alia*, taxes, inheritance and property rights, rules on intestate succession, spousal privilege as established by the law of evidence and procedural law, authority to take medical decisions, survivors’ rights and benefits, birth and death certificates, professional ethical standards, financial restrictions in electoral matters, workers’ compensation benefits, health insurance, and child custody.<sup>372</sup> All of this, in the Court’s opinion, must be ensured without any discrimination to families composed of same-sex couples.

198. Based on the above, the Court considers that the scope of the protection of the family relationship of a same-sex couple goes beyond mere patrimonial rights issues. As noted by this Court, the implications of the recognition of this family relationship permeates other rights, such as civil and political, economic and social rights, as well as other internationally recognized rights. Moreover, the protection extends to the rights and obligations established by the domestic laws of each State applicable to the family relationships of heterosexual couples.

199. Consequently, in answer to the fourth question raised by the State of Costa Rica, which refers to the protection of the patrimonial rights derived from a relationship between persons of the same sex, the Court concludes that:

**Pursuant to the right to the protection of private and family life (Article 11(2)), as well as the right to protection of the family (Article 17), the American Convention protects the family ties that may derive from a relationship between persons of the same sex. The Court also finds that all the patrimonial rights derived from a protected family relationship between a same-sex couple must be protected, with no discrimination as regards to heterosexual couples, pursuant to the right to equality and non-discrimination (Articles 1(1) and 24). Notwithstanding the foregoing, the international obligation of States goes beyond mere patrimonial rights and includes all the internationally recognized human rights, as well as the rights and obligations recognized under the domestic law of each State that arise from the family ties of heterosexual couples (*supra* para. 198).**

<sup>371</sup> Cf. *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 110. Also, Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Yogyakarta Principles, March 2007, Principle 13. The right to social security and to other social protection measures.

<sup>372</sup> Cf. *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 118. See also, Supreme Court of the United States, *Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al.* No. 14–556. Argued April 28, 2015—Decided June 26, 2015.

## B. The mechanisms States could use to protect diverse families

200. To respond to the fifth question raised by the State of Costa Rica, the Court finds it pertinent to examine the relevant international practice to ensure the rights derived from the family ties between same-sex couples. Thus, in this section, the Court will refer to some of the legislative, judicial and administrative measures that have been undertaken to this end.

201. The Court noted in the case of *Duque v. Colombia* that several States in the region have taken legislative, administrative and judicial actions to ensure the rights of same-sex couples by recognizing both, civil or *de facto* unions, and equal or same-sex marriage.<sup>373</sup>

202. Furthermore, the Court has indicated repeatedly that Article 1(1) of the Convention includes a twofold obligation. On the one hand, there is the obligation of respect (*negative obligation*), meaning that States must abstain from committing acts that violate the fundamental rights and freedoms recognized by the Convention;<sup>374</sup> on the other hand, there is the State obligation to guarantee these rights (*positive obligation*). These obligations imply the further obligation of States Parties to organize their whole governmental apparatus and, in general, all the structures through which public authority is exercised, so that they are able to guarantee, by law, the free and full exercise of human rights.<sup>375</sup> These obligations are constituted and should be realized in different ways, depending on the right in question. It is clear, for example, that ensuring equality and non-discrimination *de jure* and *de facto* does not call for the same actions by the State as ensuring the exercise of freedom of expression. Added to this, there is the general obligation contained in Article 2, which requires States to adapt their domestic law in order to give effect to the rights and freedoms recognized in the Convention.

203. Within the United Nations System, the Human Rights Committee has considered that States “should ensure that [their] legislation is not discriminatory of non-traditional forms of partnership”<sup>376</sup> and has indicated, for example, that a “difference in treatment in the granting of pension benefits to a partner of the same sex constitutes a violation of the prohibition of discrimination.”<sup>377</sup> Also, both the Committee on Economic, Social and Cultural Rights,<sup>378</sup> and the Committee on the Elimination of Discrimination against Women<sup>379</sup> have called on States to facilitate the legal recognition of same-sex couples. In this regard, the Office of the United Nations High Commissioner for Human Rights found that, in 2015, “34 States offered same-sex couples either marriage or civil unions, which bestow many of the same benefits and entitlements as marriage.”<sup>380</sup>

<sup>373</sup> Cf. *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, paras. 113 to 119.

<sup>374</sup> Cf. *Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala*, para. 139, and *Case of Valencia Hinojosa et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 29, 2016. Series C No. 327, para. 130.

<sup>375</sup> Cf. *Case of Gelman v. Uruguay*, para. 189, and *Case of I.V. v. Bolivia. Preliminary objections, merits, reparations and costs*, para. 207.

<sup>376</sup> Cf. United Nations, Human Rights Committee, Concluding observations. Ireland, 30 July 2008, CCPR/C/IRL/CO/3, para. 8.

<sup>377</sup> Cf. United Nations, Human Rights Committee, *Young v. Australia*, Communication No 941/2000, 18 September 2003, CCPR/C/78/D/941/2000, para. 10.4, and *X v. Colombia*, CCPR/C/89/D/1361/2005, para. 9.

<sup>378</sup> Cf. United Nations, Committee on Economic, Social and Cultural Rights, Concluding observations on the combined fourth and fifth reports of Bulgaria, 11 December 2012, E/C.12/BGR/CO/4-5, para. 17, and Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant, Slovakia, 8 June 2012, E/C.12/SVK/CO/2, para. 10.

<sup>379</sup> Cf. United Nations, Committee on the Elimination of Discrimination against Women, Concluding observations on the combined second and third periodic reports of Serbia, 30 July 2013, CEDAW/C/SRB/CO/2-3, para. 39.d.

<sup>380</sup> Cf. United Nations, Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights, 4 May 2015, A/HRC/29/23, para. 67.

204. Furthermore, the Court notes that, in the case of *Karner v. Austria*, the European Court of Human Rights indicated that “[t]he aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it.”<sup>381</sup> The European Court also recognized the right of the surviving cohabitant of a same-sex couple not to be evicted from the home as successor to the tenancy, a right that Austrian law accorded to the person who enjoyed the status of “life companion.” The European Court indicated that the interpretation of the Austrian Rent Act made by the Austrian Supreme Court contradicted what was stipulated in Article 14 (Prohibition of discrimination) of the European Convention in relation to Article 8 (Right of respect for private and family life) of this instrument. The European Court reiterated this legal reasoning in the case of *Kozak v. Poland*.<sup>382</sup>

205. The European jurisprudence has also established that, under Articles 14 and 8 of the European Convention, distinctions in permitting an uninsured dependent partner access to health insurance are inadmissible if they are based on the sexual orientation of couples.<sup>383</sup> In the 2013 case of *Vallianatos and Others v. Greece*, the Grand Chamber found that the State had violated these articles because the law that allowed a civil union to be legally recognized only permitted so for heterosexual couples.<sup>384</sup> In a subsequent decision, in 2015, in the case of *Oliari and Others v. Italy*, the European Court again established a violation of Article 8 of the Convention, because Italian laws did not provide same-sex couples with access to any type of civil union.<sup>385</sup>

206. In the case of Mexico City, the “cohabitation partnership” [*sociedad de convivencia*] of same-sex couples has been recognized since 2006,<sup>386</sup> and their marriage since 2009.<sup>387</sup> At the federal level, in 2015, the Supreme Court of Justice declared that: “is unconstitutional any law of any federal entity that considers that the purpose of [marriage] is procreation and/or that defines it as an act between a man and a woman.” The Supreme Court indicated that seeking to link marriage requirements to the sexual preferences of those who have access to the institution of marriage or to procreation was discriminatory, because it unjustifiably excluded homosexual couples who are similarly-situated to heterosexual couples from accessing this institution. The distinction was found to be discriminatory because sexual preferences were not a relevant factor for making the distinction, considering the overriding constitutional purpose. Since the purpose of marriage is not procreation, there is no justification for considering that the matrimonial union should be heterosexual, or that it be said to be “just between a man and a woman.” The Supreme Court found that the wording of this statement was discriminatory by itself and “recalled that no provision, decision or practice of domestic law, by either the state authorities or private individuals, may diminish or restrict the rights of a person based on his or her sexual orientation.”<sup>388</sup>

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<sup>381</sup> ECHR, *Case of Karner v. Austria*, No. 40016/98, Judgment of 24 July 2003, para. 41. (“The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. [...] as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realizing the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people”).

<sup>382</sup> Cf. ECHR, *Case of Kozak v. Poland*, No. 13102/02, Judgment of 2 March 2010, para. 99.

<sup>383</sup> Cf. ECHR, *Case of P.B. and J.S. v. Austria*, No. 18984/02, Judgment of 22 July 2010, paras. 40 to 44.

<sup>384</sup> Cf. ECHR. *Case of Vallianatos and Others v. Grecia*, Nos. 29381/09 and 32684/09, Judgment of 7 November 2013, paras. 90 to 92.

<sup>385</sup> Cf. ECHR. *Case of Oliari and Others. v. Italy*, Nos. 18766/11 and 36030/11, Judgment of 21 July 2015, para. 185.

<sup>386</sup> Cf. Mexico. Mexico DF, Legislative Assembly of the Federal District, Federal District Cohabitation Act, November 16, 2006.

<sup>387</sup> Cf. Mexico. Mexico DF, Federal District Civil Code, paras. 2, and 146 and *ff.*

<sup>388</sup> Mexico. Supreme Court of Justice, First Chamber, June 19, 2015, 1a./J.43/2015.

207. Since 2007, Uruguay adopted the Cohabiting Union Act which applied to same-sex couples. The Act included as the beneficiaries of a survivor's pension, those persons who had maintained uninterrupted cohabitation with the testator in an exclusive, singular, stable, and permanent union I, whatever their sex, sexual identity, sexual orientation or sexual preferences.<sup>389</sup> Subsequently, in 2013, Uruguay recognized marriage for same-sex couples.<sup>390</sup>

208. In the case of Argentina, the City of Buenos Aires authorized the civil union of same-sex couples in 2002.<sup>391</sup> At the national level, the marriage of same-sex couples has been legal since 2010.<sup>392</sup> The law states that "the marriage shall have the same requirements and effects, regardless of whether the parties are of the same or a different sex."<sup>393</sup>

209. In Brazil, on May 5, 2011, the Federal Supreme Court guaranteed same-sex couples the same rights as heterosexual couples.<sup>394</sup> In addition, on May 14, 2013, the National Council of the Judiciary declared that, based on the principle of non-discrimination, the marriage or *de facto* union of same-sex couples could not be denied.<sup>395</sup>

210. Similarly, in Chile, since 2015, a law is in force creating the civil union agreement which benefits same-sex couples who, if they sign this agreement, are considered to be related by kinship. This civil cohabitation union gives rise to both patrimonial and non-patrimonial effects (articles 14 to 12).<sup>396</sup>

211. In Ecuador, the *de facto* union of same-sex couples was recognized in 2015 by an amendment to the Civil Code.<sup>397</sup> Since 2014, a resolution of the Civil Registry Directorate allowed a *de facto* union to be recorded in the civil registry.<sup>398</sup>

212. In the case of Colombia, the Constitutional Court indicated in the Judgment C-577-11 that "same-sex couples may go before a competent notary or judge to celebrate and formalize their contractual relationship."<sup>399</sup> Subsequently, on April 7, 2016, the Constitutional Court recognized marriage between same-sex couples. On that occasion, the Constitutional Court pointed out that there was no reason supported by the Constitution that justified refusing the surviving same-sex companion the right to receive the inheritance of the person with whom he or she had formed a family, especially if, based on the protective purpose underlying the special regulation of the family, that right had already been recognized to the surviving permanent companion in the case of

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<sup>389</sup> Cf. Uruguay, Act No. 18,246, on consensual union, December 27, 2007. "Article 14. The following paragraph shall be added to article 25 of Act No. 16,713, of September 3, 1995: Cohabitants shall be understood as persons who, when applicable, would have maintained with the decedent, an uninterrupted cohabitation of at least five years in exclusive, singular, stable and permanent consensual union, whatever their sex, or sexual identity, orientation or option, and who are not included in the specific impediments established in paragraphs 1, 2, 4 and 5 of article 91 of the Civil Code."

<sup>390</sup> Cf. Uruguay, Act No. 19,075, adopted by Parliament on April 10, 2013, and promulgated by the Executive on May 3, 2013.

<sup>391</sup> Cf. Argentina. City of Buenos Aires, Act No. 1004, December 12, 2002.

<sup>392</sup> Cf. Argentina. Act No. 26,618: "civil marriage," adopted on July 15, 2010, promulgated on July 21, 2010.

<sup>393</sup> Argentina. Act No. 26,618, article 2, which substitutes article 172 of the Civil Code.

<sup>394</sup> Cf. Brazil. Federal Supreme Court. Direct action for unconstitutionality No. 4277, May 5, 2011.

<sup>395</sup> Cf. Brazil. National Council of the Judiciary, Resolution No. 175, May 14, 2013.

<sup>396</sup> Cf. Chile. Act No. 20,830 on the civil union agreement and civil cohabitants, promulgated on April 13, 2015, and published on April 21, 2015.

<sup>397</sup> Cf. Act amending the Civil Code, June 19, 2015.

<sup>398</sup> Cf. Ecuador. Civil Registry Directorate. Resolution No. 0174.

<sup>399</sup> Constitutional Court of Colombia, Judgment C-577-11.

a *de facto* union composed of a heterosexual couple, also recognized as a family and, thus, comparable to a *de facto* union between persons of the same sex. Lastly that Court emphasized that the family formed by a same-sex couple is, as other families, “the basic institution and fundamental core of society,” so that “it merits the protection of society and the State.”<sup>400</sup>

213. Canada legalized marriage between persons of the same sex at the federal level on July 20, 2005.<sup>401</sup> However, this provision had already been adopted by several Canadian provinces before that date.<sup>402</sup> Meanwhile, the United States Supreme Court has also recognized that same-sex couples have the right to marry.<sup>403</sup>

214. In addition, there are other mechanisms to protect the rights derived from the family ties between same-sex couples that do not create specific legal institutions, but rather refer to rights or legal institutions that operate in specific areas. Thus, the Court notes that some States have undertaken actions seeking to protect the rights to health, social security and pensions, the extension of alimony obligations between partners, and inheritance rights, among others. This is the case of Costa Rica which, by administrative acts, has provided same-sex couples with access to family benefits under the social security umbrella.<sup>404</sup> Similarly, it has given them access to the old-age, invalidity and survivor's benefits scheme provided by the Costa Rican Social Security Institute, which gives them access to the survivor's pension.<sup>405</sup>

215. In a series of successive judgments of the Constitutional Court, Colombia extended the recognition of a number of rights derived from family ties to same-sex couples based on the recognition of the right to identity, human dignity and non-discrimination.<sup>406</sup> Thus, in the area of health, it extended the family coverage of the Obligatory Health Plan to same-sex couples;<sup>407</sup> it recognized the right to the survivor's pension to same-sex couples,<sup>408</sup> as well as the right to inheritance rights to persons living in *de facto* marital union.<sup>409</sup>

216. In Argentina, the Supreme Court of Justice recognized the right to a pension of same-sex cohabitants in 2008.<sup>410</sup> In 2011, the Supreme Court of Justice recognized the right to payment of

<sup>400</sup> Constitutional Court of Colombia, Judgments C238-12 and SU-214/16.

<sup>401</sup> Cf. Canada. Civil Marriage Act (full title: “An Act respecting certain aspects of legal capacity for marriage for civil purposes”), 20 July 2005.

<sup>402</sup> Cf. Ontario. Court of Appeal. *Halpern v. Canada*, 10 June 2003; British Columbia. Court of Appeal. *Barbeau v. British Columbia*, 8 July 2003; Quebec. Court of Appeal. *Catholic Civil Rights League v. Hendricks*, 19 March 2004; Yukon. Supreme Court of the Yukon Territory. *Dunbar & Edge v. Yukon*, 14 July 2004; Manitoba. Court of Queen's Bench. *Vogel et al. v. Attorney General of Canada*, 16 September 2004; Nova Scotia Supreme Court. *Boutilier v. Nova Scotia*, 24 September 2004; Saskatchewan. Court of Queen's Bench (Family Law Division). *N.W. v. Canada*, 5 November 2004; Newfoundland and Labrador. Supreme Court. *Pottle et al. v. Attorney General of Canada et al.*, 21 December 2004; Nuevo Brunswick. Court of Queen's Bench. *Harrison v. Canada*, 23 June 2005.

<sup>403</sup> Cf. United States of America. Supreme Court, Case of *Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al.*, No. 14–556. Argued April 28, 2015—Decided June 26, 2015.

<sup>404</sup> Cf. Costa Rica. Costa Rican Social Security Institute (CCSS), Board of Directors, Decision No. 47,069 of May 22, 2014. See also, Executive Decree No. 38999 of May 15, 2015.

<sup>405</sup> Cf. Costa Rica. Costa Rican Social Security Institute (CCSS), Board of Directors, Decision No. 59,994 of June 30, 2016.

<sup>406</sup> Cf. Constitutional Court, Judgment C-075 of 2007.

<sup>407</sup> Cf. Constitutional Court, Judgment C-811 of 2007.

<sup>408</sup> Cf. Constitutional Court, Judgment C-336 of 2008.

<sup>409</sup> Cf. Constitutional Court, Judgment C-283 of 2011.

<sup>410</sup> Cf. Argentina. National Social Security Administration, Resolution No.671/2008 on the pension for widows/widowers of same-sex couples, August 19, 2008.

the survivor's pension to same-sex couples retroactive to the date of the partner's death.<sup>411</sup> In Brazil, the right of same-sex couples to receive the survivor's pension was recognized by executive decree on December 10, 2010.<sup>412</sup>

217. Based on the above, the Court notes that States can adopt diverse types of administrative, judicial and legislative measures to ensure the rights of same-sex couples. As previously mentioned, Articles 11(2) and 17 of the Convention do not protect a specific family model, and neither of these provisions can be interpreted to exclude a group of persons from the rights recognized therein.

218. Indeed, if a State should decide that it is not necessary to create new legal institutions to ensure the rights of same-sex couples and, consequently, chooses to extend those that exist to couples composed of persons of the same sex – including marriage – based on the *pro persona* principle contained in Article 29 of the Convention, this recognition would mean that the extension of these institutions would also be protected by Articles 11(2) and 17 of the Convention. The Court considers that this would be the most simple and effective way to ensure the rights derived from the relationship between same-sex couples.

219. In addition, the Court reiterates its consistent jurisprudence that the presumed lack of consensus within 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 reproduce and perpetuate the historical and structural discrimination that such minorities have suffered<sup>413</sup> (*supra* para. 83).

220. The establishment of a differentiated treatment between heterosexual couples and couples of the same sex regarding the way in which they can form a family – either by a *de facto* marital union or a civil marriage – does not pass the strict test of equality (*supra* para. 81) because, in the Court's opinion, there is no purpose acceptable under the Convention for which this distinction could be considered necessary or proportionate.

221. The Court notes that, in order to deny the right of access to the institution of marriage, it is typically asserted that the purpose of marriage is procreation and that such a union could not meet this purpose. The Court finds that this assertion is incompatible with the intention of Article 17 of the Convention, which is the protection of the family as a social reality.<sup>414</sup> Moreover, the Court considers that procreation is not a characteristic that defines conjugal relationships, because affirming the contrary would be demeaning for couples – whether married or not – who, for whatever reason, are unable or unwilling to procreate.

222. In addition, the meaning of the word "marriage," like that of the word "family" has changed with the passage of time (*supra* para. 177). Although the etymology is always enlightening, no one seeks a semantic imposition of the etymology because, in such a case, it would be necessary to exclude from the language numerous words whose semantics differ from their etymology.

223. Added to the above, the evolution of marriage evidences that its current form responds to the existence of complex interactions of, *inter alia*, cultural, religious, sociological, economic, ideological and linguistic aspects.<sup>415</sup> The Court also notes that, at times, the opposition to the marriage of same-sex couples is based on philosophical or religious convictions. The Court

<sup>411</sup> Cf. Argentina. Supreme Court of Justice, "P., A. v/ ANSeS ref/ pensions," June 28, 2011.

<sup>412</sup> Cf. Brazil. National Supplementary Social Welfare Bureau, Decree No. 941, December 9, 2010.

<sup>413</sup> Cf. *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*, para. 92, *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*, para. 123, and *Case of Flor Freire v. Ecuador*, para. 124.

<sup>414</sup> In this regard, see Supreme Court of Justice of Mexico, First Chamber, June 19, 2015, 1a./J.43/2015.

<sup>415</sup> In this regard, see Constitutional Court of Colombia, Judgment SU-214/16.



recognizes the important role that such convictions play in the life and dignity of those who profess them. Nevertheless, these convictions cannot be used as a parameter of conventionality because the Court could not use them as an interpretative guide when determining the rights of human being. In that sense, it is the Court's opinion that such convictions cannot condition what the Convention establishes in relation to discrimination based on sexual orientation. As such, in democratic societies there must exist a peaceful coexistence between the secular and the religious spheres, implying therefore that the role of the States and of this Court is to recognize the sphere inhabited by each of them, and never force one into the sphere of the other.<sup>416</sup>

224. Moreover, in the Court's opinion, there would be no sense in creating an institution that produces the same effects and gives rise to the same rights as marriage, but that is not called marriage except to draw attention to same-sex couples by the use of a label that indicates a stigmatizing difference or that, at the very least, belittles them. On that basis, there would be marriage for those who, according to the stereotype of heteronormativity, were considered "normal," while another institution with identical effects but with another name would exist for those considered "abnormal" according to this stereotype. Consequently, the Court deems inadmissible the existence of two types of formal unions to legally constitute the heterosexual and homosexual cohabiting community, because this would create a distinction based on an individual's sexual orientation that would be discriminatory and, therefore, incompatible with the American Convention.

225. In addition, as already indicated, the Court understands that the principle of human dignity derives from the complete autonomy of the individual to choose with whom he or she wishes to enter into a permanent and marital relationship, whether it be a natural one (*de facto* union) or a formal one (marriage). This free and autonomous choice forms part of the dignity of each person and is intrinsic to the most intimate and relevant aspects of his or her identity and life project (Articles 7(1) and 11(2)). Also, the Court considers that, provided there is an intention to enter into a permanent relationship and form a family, ties exist that merit equal rights and protection whatever the sexual orientation of the parties (Articles 11(2) and 17).<sup>417</sup> When asserting this, the Court is not diminishing the institution of marriage but, to the contrary, considers marriage necessary to recognize equal dignity to those persons who belong to a human group that has historically been oppressed and discriminated against (*supra* para. 33).

226. Notwithstanding the foregoing, this Court cannot ignore the possibility that some States must overcome institutional difficulties to adapt their domestic law and extend the right of access to the institution of marriage to same-sex couples, especially when there are rigorous procedures for legislative reform, which may demand a process that is politically complex and requires time. Given that such amendments are the fruit of juridical, judicial or legislative evolution that is gradually extending to other geographical areas of the Americas and that represents the progressive interpretation of the Convention, the Court urges those States to promote, in good faith, the legislative, administrative and judicial reforms required to adapt their domestic laws, and internal interpretations and practice.

227. That said, States that do not yet ensure the right of access to marriage to same-sex couples are obliged not to violate the provisions that prohibit discriminating against them and must, consequently, ensure them the same rights derived from marriage in the understanding that this is a transitional situation.

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<sup>416</sup> In this regard, see Constitutional Court of South Africa. *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC), Judgment of 1 December 2005.

<sup>417</sup> In this regard, see Constitutional Court of Colombia, Judgment SU-214/16.

228. Based on the above, in answer to the fifth question of the State of Costa Rica regarding whether there must be a legal institution that regulates relationships between persons of the same sex for the State to recognize all the patrimonial rights that derive from that relationship, the response of the Court is that:

**States must ensure access to all the legal institutions that exist in their domestic laws to guarantee the protection of all the rights of families composed of same-sex couples, without discrimination in relation to families constituted by heterosexual couples. To this end, States may need to amend existing institutions by taking administrative, judicial or legislative measures in order to extend such mechanisms to same-sex couples. States that encounter institutional difficulties to adapt the existing provisions, on a transitional basis, and while promoting such reforms in good faith, still have the obligation to ensure to same-sex couples, equality and parity of rights with respect to heterosexual couples without any discrimination.**

## IX OPINION

229. Based on the reasons given, in interpretation of Articles 1(1), 2, 11, 17, 18 and 29 of the American Convention on Human Rights

**THE COURT,**

**DECIDES**

unanimously that:

1. It is competent to issue this Advisory Opinion, in the terms established in paragraphs 13 to 29.

**AND IS OF THE OPINION**

by unanimity that:

2. The change of name and, in general, the rectification of public records and identity documents so that these conform to the self-perceived gender identity constitute a right protected by Articles 3, 7(1), 11(2) and 18 of the American Convention, in relation to Articles 1(1) and 24 of this instrument; consequently, States are obliged to recognize, regulate and establish the appropriate procedure to this end, as established in paragraphs 85 to 116.

by unanimity that:

3. States must ensure that persons interested in rectifying the annotation of gender or, if applicable the mention of sex, in changing their name and changing their photograph in the records and/or on their identity documents to conform to their self-perceived gender identity may have recourse to a procedure that must: (a) be centered on the complete rectification of the self-perceived gender identity; (b) be based solely on the free and informed consent of the applicant without demanding requirements such as medical and/or psychological certifications and others that could be unreasonable and pathologizing; (c) be confidential, and the changes, corrections or amendments to the records and the identity documents should not reflect the changes to conform

to the gender identity; (d) be prompt and, insofar as possible, cost-free, and (e) not require evidence of surgery and/or hormonal therapy. The procedure best adapted to these elements is the notarial or administrative procedure. States may provide in parallel an administrative procedure that allows the person a choice, as established in paragraphs 117 to 161.

by unanimity that:

4. Article 54 of the Civil Code of Costa Rica, as currently worded, is compatible with the provisions of the American Convention only if it is either interpreted by the courts, or regulated administratively, to the effect that the procedure established by this article can guarantee that persons who wish to change their identity data so that this conforms to their self-perceived gender identity is effectively an administrative procedure that meets the following criteria: (a) it must be centered on the complete rectification of the self-perceived gender identity; (b) it must be based solely on the free and informed consent of the applicant without demanding requirements such as medical and/or psychological certifications and others that could be unreasonable and pathologizing; (c) it must be confidential, and the changes, corrections or amendments to the records and the identity documents should not reflect the changes to conform to the gender identity; (d) it should be prompt and, insofar as possible, cost-free, and (e) it should not require evidence of surgery and/or hormonal therapy. Consequently, based on the conventionality control, Article 54 of the Civil Code should be interpreted pursuant to the above standards so that persons who wish to comprehensively rectify their records and/or identity document to their self-perceived gender identity may truly enjoy the human rights recognized in Articles 3, 7, 11(2), 13 and 18 of the American Convention as established in paragraphs 162 to 171.

by unanimity that:

5. The State of Costa Rica, in order to ensure the protection of human rights more effectively, may issue a regulation incorporating the above standards into the administrative procedure that it may provide in parallel, in accordance with the considerations in the previous paragraphs of this Opinion, as established in paragraphs 162 to 171.

by unanimity that:

6. The American Convention, based on the right to the protection of private and family life (Article 11(2)), as well as on the right to protection of the family (Article 17), protects the family ties that may derive from a relationship between a same-sex couple, as established in paragraphs 173 to 199.

by unanimity that:

7. The State must recognize and ensure all the rights derived from a family relationship between same-sex couples in accordance with the provisions of Articles 11(2) and 17(1) of the American Convention, as established in paragraphs 200 to 218.

by six votes to one, that:

8. Under Articles 1(1), 2, 11(2), 17 and 24 of the Convention, States must ensure full access to all the mechanisms that exist in their domestic laws, including the right to marriage, to ensure the protection of the rights of families formed by same-sex couples, without discrimination in relation to those that are formed by heterosexual couples, as established in paragraphs 200 to 228.

Judge Humberto Antonio Sierra Porto presented to the Court his concurring opinion and Judge Eduardo Vio Grossi his separate partially dissenting opinion, both of which are attached to this Advisory Opinion.

Inter-American Court of Human Rights. Advisory Opinion OC-24/17 of November 24, 2017.  
Requested by the Republic of Costa Rica.

Roberto F. Caldas  
President

Eduardo Ferrer Mac-Gregor Poisot

Eduardo Vio Grossi

Humberto Antonio Sierra Porto

Elizabeth Odio Benito

Eugenio Raúl Zaffaroni

L. Patricio Pazmiño Freire

Pablo Saavedra Alessandri  
Secretary

So ordered,

Roberto F. Caldas  
President

Pablo Saavedra Alessandri  
Secretary

**SEPARATE OPINION OF JUDGE EDUARDO VIO GROSSI,  
INTER-AMERICAN COURT OF HUMAN RIGHTS,  
ADVISORY OPINION OC-24/17  
OF NOVEMBER 24, 2017,  
REQUESTED BY THE REPUBLIC OF COSTA RICA**

**GENDER IDENTITY, AND EQUALITY AND NON-DISCRIMINATION WITH REGARD TO  
SAME-SEX COUPLES**

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

**INTRODUCTION**

1. This separate opinion<sup>1</sup> on the Advisory Opinion indicated above<sup>2</sup> is issued to explain the reasons why the author agrees – in the terms indicated below – with seven of its decisions, and why he disagrees with the eighth decision.<sup>3</sup> These explanations endeavor to facilitate the understanding of both the answers provided to the “specific questions”<sup>4</sup> raised by Costa Rica<sup>5</sup> in the request examined, and the author’s disagreement with the eighth decision. In addition, he takes advantage of the occasion to indicate the reasons why he agrees with the reference to the control of conventionality in OC-24.

2. Before proceeding, it is evidently essential to reiterate some considerations made in previous cases. Thus, this opinion is issued with full and absolute respect for the Inter-American

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<sup>1</sup> Art.66(2) of the American Convention on Human Rights: “If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment.”

Art. 75(3) of the Rules of Procedure of the Inter-American Court of Human Rights: “Any judge who has taken part in the delivery of an advisory opinion is entitled to append a separate reasoned opinion, concurring or dissenting, to that of the Court. These opinions shall be submitted within a time limit to be fixed by the Presidency, so that the other Judges can take cognizance thereof before the advisory opinion is served. Advisory opinions shall be published in accordance with Article 32(1)(a) of these Rules.”

Hereinafter, each time that reference is made to “the Convention” it should be understood that this is to the American Convention on Human Rights. Also, hereafter, when reference is made to an article with no other reference, it should be understood that this corresponds to an article of the Convention.

<sup>2</sup> Hereinafter, OC-24. Also, the abbreviation “para.” will be used each time a paragraph is indicated in the footnotes, and it should be understood that it corresponds to OC-24.

<sup>3</sup> “Under Articles 1(1), 2, 11(2), 17 and 24 of the Convention, States must ensure total access to all the mechanisms that exist in their domestic laws, including the right to marriage, to ensure the protection of the rights of families formed by same-sex couples, without discrimination in relation to those that are formed by heterosexual couples, as established in paragraphs 200 to 228” of the Advisory Opinion.

<sup>4</sup> Art.72(1)(b) of these Rules of Procedure.: “A request for an advisory opinion presented pursuant to Article 64(2) of the Convention shall indicate the following: ... (b) the specific questions on which the opinion of the Court is being sought; ...”

<sup>5</sup> Hereinafter, the State.

Court of Human Rights<sup>6</sup> and its members and, also, as evidence of the dialogue and diversity of opinions that exist within the Court; consequently, with a view to providing a better understanding of its function and of the development of its jurisprudence and of human rights.<sup>7</sup>

## I. PRELIMINARY CONSIDERATIONS

### A. GENERAL OBSERVATIONS

3. As a first preliminary observation, it should be repeated that the Court has been established by the Convention as an autonomous entity, and this requires that it be rigorous in the exercise of its jurisdiction. Among other considerations, it must proceed pursuant to the principle of public law that it may only do what the law allows.

4. It also appears necessary to recall that the Court exercises its jurisdiction, both contentious<sup>8</sup> and advisory,<sup>9</sup> pursuant to international public law and, especially, the international human rights law expressed in the Convention. Thus, it does not exercise its jurisdiction in accordance with the domestic law of the States of the Americas and in the exercise of its competences, the domestic law of the States is considered either as merely a fact from which legal consequences can be inferred for the respective State, or as an act that establishes or reflects an international custom or a general principle of law; that is, one of the other two autonomous sources of international law that, together with the treaties,<sup>10</sup> creates it.

5. In addition, it is worth emphasizing that the matters regarding which the Court exercises its jurisdiction may also include aspects that are part of the internal, domestic or exclusive jurisdiction of the State, also known as a reserved domain and, in other latitudes, as the States' margin of appreciation. The said jurisdiction is contemplated in the Charter of the United Nations,<sup>11</sup> the Charter of the Organization of American States,<sup>12</sup> and also the Convention, although indirectly.<sup>13</sup>

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<sup>6</sup> Hereinafter, the Court.

<sup>7</sup> Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of Lagos del Campo v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2017.

<sup>8</sup> Art. 62(3) of the American Convention on Human Rights: "The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

<sup>9</sup> Art. 64: "1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court. 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments."

<sup>10</sup> Art. 38 of the Statute of the International Court of Justice: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto." This provision does not contemplate unilateral legal acts and the declarative legal resolutions of international organizations, the former as an autonomous source, and the latter as a subsidiary source.

<sup>11</sup> Art. 2(7): "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to

6. The internal, domestic or exclusive jurisdiction of the State means, on the one hand, that international law, including international human rights law, does not encompass all the activities of the subjects of international law and, particularly, of the States<sup>14</sup> and, on the other hand, that in the case of those activities that it does not regulate or the aspects that do not include state acts and omissions, the respective State has the competence and the autonomy to regulate them.<sup>15</sup> This means that, when exercising its competences, the Court should consider the said legal institution as a reality within the international legal structure, although not with the same breadth and intensity as previously.

7. It is also necessary to reiterate that, in the exercise of its competences, it is not incumbent on the Court to amend the Convention; thus, its advisory or non-contentious jurisdiction should not seek to exercise the normative function, which is generally expressly conferred on the States<sup>16</sup> and in the case of the Convention, the States Parties.<sup>17</sup>

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settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

<sup>12</sup> Art.1 (para. 2): "The Organization of American States has no powers other than those expressly conferred upon it by this Charter, none of whose provisions authorizes it to intervene in matters that are within the internal jurisdiction of the Member States."

<sup>13</sup> Preamble, para. 2: "Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states."

<sup>14</sup> "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain." Permanent Court of International Justice, Advisory Opinion on Nationality Decrees in Tunis and Morocco, Series B N° 4 P. 24.

<sup>15</sup> Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, Art.1: "At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention."

<sup>16</sup> The Vienna Convention on the Law of Treaties: "Art. 39. General rule regarding the amendment of treaties: A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.

Art. 40 of this Convention: Amendment of multilateral treaties: 1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs. 2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in: (a) the decision as to the action to be taken in regard to such proposal; (b) the negotiation and conclusion of any agreement for the amendment of the treaty. 3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended. 4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(b), applies in relation to such State. 5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State: (a) be considered as a party to the treaty as amended; and (b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement."

<sup>17</sup> Art. 31: Recognition of Other Rights: Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention."

Art.76: "1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General. 2. Amendments shall enter into force for the States ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification."

8. In this regard, it should be pointed out that, if the Court should assume, implicitly or expressly, the inter-American normative function under the umbrella of the exercise of its function of interpreting the Convention, this could have serious effects on the right of the States to formulate a reservation on the provision of the Convention that is being interpreted.

9. It is also necessary to bear in mind that the interpretive function consists in determining the meaning and scope of a provision that admits two or more possibilities of application and, consequently, indicating the appropriate one. The rules of interpretation established in the Vienna Convention on the Law of Treaties have this precise purpose; that is, to determine the will of the States parties employing, harmoniously and simultaneously, the principle of good faith, the terms of the treaties in their context, and the object and purpose they seek. None of these criteria or methods of interpretation may be omitted or privileged. Therefore, the result of the operation does not consist in expressing what the interpreter wishes that the norm establishes, but rather what it effectively and objectively establishes.

10. This text is based on the conviction that the Court's function in the exercise of its advisory and non-contentious competence is solely,<sup>18</sup> either "to interpret" the Convention or other human rights treaties or to determine the "compatibility" of a domestic law with such instruments<sup>19</sup> and, consequently and essentially, that an advisory opinion is not binding for the States Parties to the Convention or for the other members of the Organization of American States,<sup>20</sup> so that it is not appropriate that it order the adoption of any conduct.

11. Accordingly, an advisory opinion relates to the exercise of a competence that is distinct from the contentious competence in which the Court's function is "the interpretation and application"<sup>21</sup> of the Convention to decide a dispute, and in which its decision is binding for the State Party to the respective case.<sup>22</sup> To the contrary, the Advisory Opinion does not decide whether "there has been a violation of a right or freedom protected by this Convention" or, therefore, order "that the injured party be ensured the enjoyment of his right or freedom that was violated," or, "if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."<sup>23</sup>

12. In the Advisory Opinion, the Court responds to a request "regarding the interpretation of th[e] Convention or of other treaties concerning the protection of human rights in the American

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Art. 77: "1. In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection. 2. Each protocol shall determine the manner of its entry into force and shall be applied only among the States Parties to it."

<sup>18</sup> According to Art. 41, "the main function of the [Inter-American Commission on Human Rights, hereinafter,] the Commission shall be to promote respect for and defense of human rights."

<sup>19</sup> Footnote 9.

<sup>20</sup> Hereinafter, the OAS.

<sup>21</sup> Footnote 8.

<sup>22</sup> Art. 68: "1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties. 2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state."

<sup>23</sup> Art. 63(1): "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."



States," or provides an opinion "regarding the compatibility of any of its domestic laws with the aforesaid international instruments." Therefore, in the exercise of its advisory or non-contentious competence the Court does not order or rule, but rather convinces. The fact that the opinion is non-binding is the main difference with the contentious jurisdiction and is its fundamental characteristic.

13. Ultimately, the Convention conceives advisory opinions as decisions that warn States of the risks they may assume if they do not comply with the Court's recommendations, in the eventuality that a case is filed against them and their responsibility is declared.<sup>24</sup> This is precisely what is asserted in OC-24, reiterating what has been maintained on other occasions<sup>25</sup> as regard the control of conventionality by means of an advisory opinion.

"Based on the provision of the Convention that is interpreted by the issue of an advisory opinion, all the organs of the OAS Member States, including those that are not party to the Convention but have undertaken to respect human rights under the Charter of the OAS (Article 3(I)) and the Interamerican Democratic Charter (Articles 3, 7, 8 and 9), have a source that, in accordance with its inherent nature, also contributes, especially in a preventive manner, to achieving the effective respect and guarantee of human rights and, in particular, constitutes a guideline when deciding matters relating to the respect and guarantee of human rights in the context of the protection of LGBTI persons and thus avoiding possible human rights violations."<sup>26</sup>

14. In this regard, it is implicitly indicated that the said control reposes, to a greater extent than the binding and obligatory orders and judgments of the Court, on the wisdom, impartiality and justice that should emanate from its rulings.

15. This means, consequently, that advisory opinions interpreting the Convention or other treaties should not, by their nature, refer to a specific case, but to situations that concern most or all of the OAS Member States, so that, owing to their very nature, advisory opinions are formulated in general and even abstract terms.

16. The foregoing reveals that it is possible to agree with an advisory opinion even if not with all the exact and precise terms it uses or for all the grounds it indicates regarding each matter dealt with.

## **B. SPECIFIC OBSERVATIONS ON OC-24**

17. In the specific case of OC-24, it should be indicated that the purpose of the request related to "recognition of the change of name in accordance with [or based on] gender identity" and "the patrimonial rights derived from a relationship between persons of the same sex." Indeed, this stems from both the "specific questions"<sup>27</sup> submitted pursuant to the provisions of Article 70(1) of

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<sup>24</sup> Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of the Dismissed Employees of PetroPeru, the Ministry of Education, the Ministry of the Economy and Finance, and the National Port Authority v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2017

<sup>25</sup> Para. 31 OC-21.

<sup>26</sup> Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of the Dismissed Employees of PetroPeru, the Ministry of Education, the Ministry of the Economy and Finance, and the National Port Authority v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2017.

<sup>27</sup> "1. Taking into account that gender identity is a category protected by Articles 1 and 24 of the ACHR [American Convention on Human Rights], and also the provisions of Articles 11(2) and 18 of the Convention: does that protection and the ACHR mean that the State must recognize and facilitate the name change of an individual in accordance with their gender identity?"

the recently cited Rules of Procedure,<sup>28</sup> and from the purpose of the answers requested from the Court.<sup>29</sup>

18. Second, it should also be pointed out that both the request and OC-24 refer to the right to non-discrimination or the treaty-based obligation of non-discrimination. The former with regard to the gender identity of the individual and the latter with regard to LGBTI persons, and this is done citing the provisions of Article 1(1) of the Convention.<sup>30</sup>

19. It can be inferred from the provision cited above that the obligation it establishes relates to all “the rights and freedoms recognized” in the Convention. It can also be inferred from this that the said obligation is with regard to “all persons subject to the jurisdiction” of the State in question; in other words, according to Article 1(2), “every human being” who is under the effective control of the State, for any reason. And, it can also be inferred from this provision that the said obligation cannot be restricted whatever the “social condition” or special category or situation of an individual.<sup>31</sup>

20. Ultimately, therefore, the provisions of Article 1(1) of the Convention apply to everyone, among whom, undoubtedly and unquestionably, it should be understood that LGBTI persons are included.

21. Accordingly, to understand fully the significance of the said article, it appears necessary to clarify, insofar as possible, the concept of discrimination.

2. “If the answer to the preceding question is affirmative, could it be considered contrary to the ACHR that those interested in changing their given name may only do so by using a judicial procedure, in the absence of a relevant administrative procedure?”

3. “Could it be understood that, in accordance with the ACHR, Article 54 of the Civil Code of Costa Rica should be interpreted in the sense that those who wish to change their given name based on their gender identity are not obliged to submit to the judicial proceeding established therein, but rather that the State must provide them with a free, prompt and accessible administrative procedure to exercise that human right?”

4. “Taking into account that non-discrimination based on sexual orientation is a category protected by Articles 1 and 24 of the ACHR, in addition to the provisions of Article 11(2) of the Convention: does this protection and the ACHR mean that the State should recognize all the patrimonial rights derived from a relationship between persons of the same sex?” and

5. “If the answer to the preceding question is affirmative, must there be a legal mechanism that regulates relationships between persons of the same sex for the State to recognize all the patrimonial rights that derive from that relationship?”

<sup>28</sup> “A request for an advisory opinion presented pursuant to Article 64(2) of the Convention shall indicate the following: (b) the specific questions on which the opinion of the Court is being sought.” *Supra* footnote 3.

<sup>29</sup> Para.1: Costa Rica “presented the request for an advisory opinion for the Court to rule on:

(a) “[T]he protection provided by Articles 11(2), 18 and 24 in relation to Article 1 of the [American Convention] to recognition of a change of name in accordance with the gender identity of the person concerned.”

(b) “[T]he compatibility of the practice of applying Article 54 of the Civil Code of the Republic of Costa Rica,<sup>29</sup> Law No. 63 of September 28, 1887, to persons wishing to change their name based on their gender identity with Articles 11(2), 18 and 24, in relation to Article 1 of the Convention.”

(c) “[T]he protection provided by Articles 11(2) and 24 in relation to Article 1 of the [America Convention] to the recognition of the patrimonial rights derived from a relationship between persons of the same sex.”

<sup>30</sup> “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”

<sup>31</sup> *Diccionario de la Lengua Española, Real Academia Española*, 23rd edition online, “2.f. Condición social de unas personas respecto de las demás” [social condition of some individuals in relation to others].

22. The Court has adopted<sup>32</sup> the concept of discrimination established by the Human Rights Committee of the International Covenant on Civil and Political Rights. According to this concept, any distinction, exclusion, restriction or preference established will be discriminatory, "if it has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of the human rights and fundamental freedoms of all persons." Thus, if it does not have this purpose or effect, it would not be discriminatory and would, consequently, be permitted.

23. In addition, it should be underlined that this concept of discrimination corresponds to the definition in the *Diccionario de la Real Academia Española*; that is "*seleccionar excluyendo*" [choose by excluding] and "*dar trato desigual a una persona o colectividad por motivos raciales, religiosos, políticos, de sexo, etc.*"<sup>33</sup> [treat a person or collectivity unequally based on race, religion, politics, sex, etc.]. In short, it is the inequality in treatment for the reasons indicated that characterizes discrimination.

24. Accordingly, discrimination can only be understood if individuals who are in the same or an equal juridical condition or situation are treated differently, thus affecting the exercise or enjoyment of their human rights. In this regard, it could be said, for example, that if children or women are given a different treatment from that given, respectively, to other children<sup>34</sup> or other women,<sup>35</sup> affecting the recognition or enjoyment of their human rights, this would be discrimination.

25. This means that there may be differences in the situation of individuals that would have repercussions on human rights. In this regard, the Court has asserted that:

"Not all differences in legal treatment are discriminatory as such, for not all differences in treatment are in themselves offensive to human dignity";<sup>36</sup> thus "[i]t follows that there would be no discrimination in differences in treatment of individuals by a State when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind."<sup>37</sup>

26. Now the issue raised in this matter relates to whether the Convention permits a difference or distinction to be made in the State's treatment of individuals in relation to the "change of name [...], in accordance with their gender identity" or "based on their gender identity" and to "the patrimonial rights derived from a relationship between persons of the same sex."

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<sup>32</sup> "[A]ny distinction, exclusion, restriction or preference based on specific reasons, such as race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of the human rights and fundamental freedoms of all persons." Para. 62.

<sup>33</sup> 23rd edition online.

<sup>34</sup> Art. 19: "Rights of the Child. Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

<sup>35</sup> Art. 4.5: "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women."

<sup>36</sup> OC-4/84 *cit.* para. 56.

<sup>37</sup> *Idem*, para. 57.

27. In this regard, it appears useful to emphasize that the request does not ask for a ruling on the meaning and scope of gender identity as a category protected by the Convention. That is, it does not ask for an interpretation of gender identity pursuant to the provisions of the Convention. To the contrary, the State asserts that "gender identity has already been recognized by the Court as a category protected by the Convention,"<sup>38</sup> and this is ratified by OC-24.<sup>39</sup>

28. In other words, according to the petition, it should be understood that the recognition of gender identity as a category protected by the Convention, has already happened. Therefore, it is a fact that is provided as an assumption on the basis of which OC-24 was requested and, consequently, not subject to discussion. Accordingly, it was not essential for OC-24 to refer to gender identity in the terms it does,<sup>40</sup> particularly when it does not alter the opinion that the Court had expressed previously.<sup>41</sup>

29. However, it should be noted that, at the time of this recognition, no treaty or legal instrument that was binding for the OAS Member States and that included the term gender identity was cited, and that, in this regard, OC-24 mentions the 2015 Inter-American Convention on Protecting the Human Rights of Older Persons, that entered into force on January 11, 2017, only for the eight States of the Americas that have ratified it, and the 2013 Inter-American Convention against all Forms of Discrimination and Intolerance; however, to date this convention has not been ratified by any State of the Americas.

30. Nevertheless, it should be pointed out that the "social condition" to which Article 1(1) of the Convention refers, including gender identity in this, is a question of fact; that is, it should be considered based on how it currently exists, in the same way as with "race, color, sex, language, religion, political or other opinion, national or social origin, economic status, [or] birth." The norms can or do regulate these aspects of a person's life, but do not create them.

31. Bearing the above in mind and considering the provisions in the Court's Rules of Procedure in this matter,<sup>42</sup> this text indicates how the author understands the answers given in OC-24 to the "specific questions" raised, which the Court did not alter.<sup>43</sup>

## **II. THE QUESTIONS RAISED**

32. The request being examined contained five "specific questions."

### **A. NAME CHANGE**

33. The first "specific question" was worded as follows:

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<sup>38</sup> Para. 2.

<sup>39</sup> Para. 78.

<sup>40</sup> Part VI: The right to equality and non-discrimination of LGBTI persons, B. Sexual orientation, gender identity and gender expression as categories protected by Article 1(1) of the Convention, paras. 68 to 80.

<sup>41</sup> *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239, paras. 83 to 93.

<sup>42</sup> Art. 70(1) of the Court's Rules of Procedure: "Requests for an advisory opinion under Article 64(1) of the Convention shall state with precision the specific questions on which the opinion of the Court is being sought."

<sup>43</sup> Para. 29.

“Taking into account that gender identity is a category protected by Articles 1 and 24 of the ACHR, and also the provisions of Articles 11(2)<sup>44</sup> and 18 of the Convention: does that protection and the ACHR mean that the State must recognize and facilitate the name change of an individual in accordance with his or her gender identity?”

34. And the Court was asked to rule on this “specific question”:

“[T]he protection provided by Articles 11(2) and 24<sup>45</sup> in relation to Article 1 of the [American Convention] to recognition of a change of name in accordance with the gender identity of the person concerned.”

35. The matter is therefore restricted solely and above all to the name change, one of the elements that constitutes an individual’s identity. It therefore relates essentially to the interpretation of Article 18 of the Convention.<sup>46</sup>

36. Accordingly, this question may be answered to the effect that, based on the said article, the means to ensure the right to a name should be regulated by law; that is, this article refers the matter to the sphere of the State’s domestic or exclusive jurisdiction. Evidently, in this regard, the law must respect the provisions of Articles 1(1) and 24 of the Convention and any possible restriction that it contemplates must be necessary for the purposes of the Convention and conform to the principle of proportionality.

37. Consequently, the said regulation must obviously envisage the possibility that the holder of the right to a name may decide to change his or her name. In this regard, it should be recalled that, in general, the name is assigned at birth; thus, strictly speaking, the holder of the right to a name does not exercise this right at that moment.

38. The right to change one’s name emerges, then, after the name has been assigned; consequently, the exercise of this right also falls within the sphere of the domestic, internal or exclusive jurisdiction of the State, as is the case in all the States Parties to the Convention.

39. That said, the matter is generally and more properly related to the control of conventionality that the Court should carry out in each contentious case submitted to it, in relation to the conditions that the corresponding State Party to the Convention has established or establishes to authorize the change of name or, as stated in OC-24, in relation to the “appropriate procedure”<sup>47</sup> that it has provided for this purpose.

40. This control should therefore relate to the feasibility that those conditions truly make it possible to exercise the right to change one’s name and do not subject this to a decision by the authorities that could be discriminatory<sup>48</sup> as regards the rights to a name, personal integrity, protection of honor and dignity, and equality before the law.

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<sup>44</sup> “Right to Privacy. ... 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.”

<sup>45</sup> Right to Equal Protection: All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”

<sup>46</sup> “Right to a Name. Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.”

<sup>47</sup> Para. 116.

<sup>48</sup> For example, this would be the case if the change of name was subject to being ridiculous, risible or morally or materially harmful for the applicant, or if it was a condition that the new name should be in keeping with the sex of the

41. These conditions should therefore be aimed at ensuring that the exercise of the said right is effective and, evidently, should not entail the violation of the rights of third parties, including those of society as a whole, or the principle of legal certainty. In short, these conditions should ensure that the State's decision in the case of a name change request is not arbitrary.

42. Consequently, in general, the reason why a person requests a name change should not be one of the elements considered when authorizing this. It is not the State's role to rule on this aspect. The State should merely ensure that the requested name change does not affect the rights of third parties. Ultimately, the respective State cannot refuse the name change based on the reason cited by the applicant to request it, whatever this may be. Moreover, it should not require the applicant to provide any specific reason.

43. In sum, if the State rejects the name change request – unless it does so because this could affect the rights of third parties – it would be committing a discriminatory act that violates the rights to a name, personal integrity, protection against arbitrary and abusive interference in private life, and equal protection of the law.

44. The foregoing also includes, undoubtedly, name change requests based on gender identity. It is, therefore, in this sense that the undersigned understands that OC-24 answers the first question raised regarding the change of name by indicating that it is a right protected by Article 18 of the Convention.<sup>49</sup>

45. The undersigned evidently agrees with this, in the understanding that it is appropriate in the case all name change requests based on "race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition," thus, including gender identity.

46. Nevertheless, it should be pointed out that although the Court's decision included matters that were not raised in the request, such as those concerning registration of all the data relating to a person's identity or the incorporation of this data on the identity document – which may include, in addition to the person's given names and last names, the date and place of birth, nationality and profession, together with the corresponding photograph and fingerprint – it is also true that such matters also fall within the domestic or exclusive jurisdiction of the State. Consequently, it would only be by the control of conventionality in relation to a contentious case submitted to it on this matter that the Court could rule on such aspects; that is, on how the defendant State had exercised or exercises its jurisdiction in this regard.

47. It is on these grounds that the undersigned concurs with the second decision<sup>50</sup> of OC-24.

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person, disregarding the fact that there are names that do not correspond clearly to this, or that are neutral, and even invented by the applicants.

<sup>49</sup> "The change of name, the amendment of the photograph and the rectification of the sex or gender in public records and identity documents, so that they correspond to the self-perceived gender identity is a right protected by Article 18 (Right to a Name), but also by Articles 3 (Right to Recognition of Juridical Personality), 7(1) (Right to Personal Liberty), 11(2) (Right to Privacy) of the American Convention. Consequently, pursuant to the obligation to respect and ensure rights without any discrimination (Articles 1(1) and 24 of the Convention), and the obligation to adopt domestic legal provisions (Article 2 of the Convention), States are obliged to recognize, regulate and establish the appropriate procedure to this end." Para. 116.

<sup>50</sup> "The change of name and, in general, the amendment of public records and identity documents so that these conform to the self-perceived gender identity constitute a right protected by Articles 3, 7(1), 11(2) and 18 of the American Convention, in relation to Articles 1(1) and 24 of this instrument; consequently, States are obliged to recognize, regulate and establish the appropriate procedure to this end, as established in paragraphs 85 to 116."

## B. PROCEDURE

48. The second “specific question” posed in the request and identified with the number “2” is as follows:

“If the answer to the preceding question is affirmative, could it be considered contrary to the ACHR that those interested in changing their given name may only do so by using a judicial procedure, in the absence of a pertinent administrative procedure?”

49. This question obviously has the same purpose as the previous one; namely, that the Court rule on:

“[T]he protection provided by Articles 11(2), 18 and 24 in relation to Article 1 of the ACHR to recognition of a change of name in accordance with the gender identity of the person concerned.”

50. On this question, attention should be drawn to the fact that, among its considerations, OC-24 refers expressly to the internal, domestic or exclusive jurisdiction of the States.<sup>51</sup> It also does so when answering the above “specific question”;<sup>52</sup> nevertheless, after referring to the essential requirements for this procedure, it concludes by expressing preference for the administrative path.<sup>53</sup>

51. Having said this, it should be pointed out that the relevant issue here is not the name change procedure that the State establishes in the exercise of its internal, domestic or exclusive jurisdiction, but rather that this procedure respects the provisions of Articles 8(1)<sup>54</sup> and 25(1)<sup>55</sup> of the Convention.

52. Also, the limits to this internal, domestic or exclusive jurisdiction in this case should not be overlooked. And this is, above all, owing to the provisions of Article 1(1) of the Convention; that is, the appropriate procedure for the change should not be discriminatory for any reason.

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<sup>51</sup> “... in principle, States may determine, based on their internal social and juridical circumstances, the most appropriate procedure to comply with the requirements for a procedure to rectify the name and, if applicable, the reference to the sex/gender and the photograph in the corresponding records and identity documents ...” Para. 159.

<sup>52</sup> “States may determine and establish, in keeping with the characteristics of each context and their domestic law, the most appropriate procedures for a change of name, amendment of the photograph and rectification of the reference to sex or gender in records and on identity documents so that these conform to the self-perceived gender identity regardless of whether they are administrative or judicial in nature.” Para. 160.

<sup>53</sup> “Since the Court notes that administrative or notarial procedures are those best suited to and most appropriate for these requirements, States may provide a parallel administrative procedure that the person concerned may choose.” Para. 160.

<sup>54</sup> “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”

<sup>55</sup> “Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.”

53. Second, this limit is also established by the Convention in its Articles 3, which indicates that “[e]very person has the right to recognition as a person before the law”; 5(1), that “[e]very person has the right to have his physical, mental, and moral integrity respected,” and 11, that “[e]veryone has the right to have his honor respected and his dignity recognized,” “[n]o 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,” and “[e]veryone has the right to the protection of the law against such interference or attacks”; and 24, that “[a]ll persons are equal before the law” and “[c]onsequently, they are entitled, without discrimination, to equal protection of the law.”

54. Thus, considering that the Court has understood that the provisions of Article 8(1) of the Convention are also applicable to the decisions taken by non-judicial authorities,<sup>56</sup> the significant aspect is not whether the name change procedure established by domestic law is administrative or judicial, but rather whether it allows the corresponding decision to be made by the competent authority, within a reasonable time, and that a judicial instance is provided where the said decision may be appealed.

55. Based on the foregoing, the undersigned concurs in approving the third decision<sup>57</sup> of OC-24.

### C. ADMINISTRATIVE PROCEDURE

56. The third “specific question” included in the request for an advisory opinion, and identified with the number “3” is as follows:

“Could it be understood that, in accordance with the ACHR, Article 54 of the Civil Code of Costa Rica should be interpreted in the sense that those who wish to change their given name based on their gender identity are not obliged to submit to the judicial proceeding established therein, but rather that the State must provide them with a free, prompt and accessible administrative procedure to exercise that human right?”

57. The purpose of this question was for the Court to rule on:

“[T]he compatibility of the practice of applying Article 54 of the Civil Code of the Republic of Costa Rica, Law No. 63 of September 28, 1887, to persons wishing to change their name based on their gender identity with Articles 11(2), 18 and 24, in relation to Article 1 of the Convention.”

58. The way in which the question is worded and the objective sought may lead to some confusion. Indeed, it is difficult to perceive the correspondence between the “specific question” and the objective sought by the State when raising it. And this is because it appears that the State is asking the Court to provide a ruling on the hierarchy of the Convention within the State’s domestic legal system. This is because the wording of the “specific question” posed – “that those who wish

<sup>56</sup> *Case of Claude Reyes et al. v. Chile*, Judgment of September 19, 2006, Series C No. 151, paras. 118 and 119.

<sup>57</sup> “States must ensure that persons interested in rectifying the annotation of gender or, if applicable the mention of sex, in changing their name, amending their photograph in the records and/or on their identity documents to conform to their self-perceived gender identity, may have recourse to a procedure that must: (a) be centered on the comprehensive adjustment to the self-perceived gender identity; (b) be based solely on the free and informed consent of the applicant without calling for requirements such as medical and/or psychological certifications and others that could be unreasonable and pathologizing; (c) be confidential; and the changes, corrections or amendments in the records and the identity documents should not reflect the changes to conform to the gender identity; (d) be prompt and cost-free insofar as possible, and (e) not require evidence of surgery and/or hormone treatment. The procedure best adapted to these elements is the notarial or administrative procedure. States may provide an administrative path, in parallel, that allows the person a choice, as established in paragraphs 117 to 161.”



to change their given name based on their gender identity are not obliged to submit to the judicial proceeding established therein” – could be understood to mean that the State wanted the Court to declare that, although this provision of the State’s domestic law is fully in force, it is not compulsory owing to the provisions of the Convention.

59. However, it would appear that this question does not consider that, although it may be true that, under the State’s Constitution, treaties take precedence over domestic law<sup>58</sup> and that, pursuant to the State’s case law, the Court’s jurisprudence “shall – in principle – have the same status as the interpreted provision,”<sup>59</sup> it is no less true that not only is it binding exclusively for the State concerned, but also, it does not correspond to the Court to rule on this matter.

60. Nevertheless, it could also be understood that what the “specific question” requires is a ruling on the “the compatibility of the practice of applying Article 54 of the Civil Code of the Republic of Costa Rica, Law No. 63 of September 28, 1887, to persons wishing to change their name based on their gender identity.” In its consideration, OC-24 partially examines this possibility.<sup>60</sup>

61. In summary, the wording used in OC-24 reveals, first, that the said Article 54, interpreted with the meaning and scope described is compatible with the Convention; second, that since the control of conventionality is exercised in the sphere of an advisory opinion, it is of a preventive nature and is not binding for the States, as it would have been if it had been exercised in relation to a contentious case; third, that the State could, in exercise of its internal, domestic or exclusive jurisdiction, issue a regulation incorporating an administrative procedure to permit the right to a change of name based on gender identity, which should also be understood to include any other reason.

62. It is on this basis that the undersigned concurs with the approval of the fourth<sup>61</sup> and fifth<sup>62</sup> decision of OC-24.

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<sup>58</sup> Art. 7. “Public treaties, and international conventions and agreements duly approved by the Legislative Assembly shall take preference over the laws, as of their promulgation or from the date they indicate.”

<sup>59</sup> Judgment 0421-S-90 of the Constitutional Chamber of the Supreme Court of Justice of the State.

<sup>60</sup> “... it is only for the Court to interpret the rights contained in the Convention and to determine whether the provisions of domestic law – in this case article 54 of the Civil Code – are adapted to the provisions of the American Convention.” Para. 167. And, it adds that “[a]s it is currently worded, article 54 of the Civil Code of Costa Rica is only in keeping with the provisions of the American Convention if it is interpreted by the courts or regulated administratively in the sense that the procedure established by this article, ensuring that persons who wish to change their identity data so that it accords with their self-perceived gender identity is merely an administrative procedure that meets the [...] criteria” that it indicates and that “[t]he State of Costa Rica, to ensure a more effective protection of human rights, may issue regulations that incorporate these standards into a parallel administrative procedure that it may provide in keeping with the considerations in the preceding paragraphs of this Opinion (*supra* para. 160).” Para. 171.

<sup>61</sup> “Article 54 of the Civil Code of Costa Rica, as currently worded, is in accordance with the provisions of the American Convention only if it is either interpreted by the courts, or regulated administratively, to the effect that the procedure established by this article can guarantee that persons who wish to change their identity data so that this conforms to their self-perceived gender identity is a totally administrative procedure that meets the following criteria: (a) it must be centered on the comprehensive adjustment of the self-perceived gender identity; (b) it must be based solely on the free and informed consent of the applicant without calling for requirements such as medical and/or psychological certifications and others that could be unreasonable and pathologizing; (c) it must be confidential; and the changes, corrections or amendments in the records and the identity documents should not reflect the changes to conform to the gender identity; (d) it should be prompt and cost-free insofar as possible, and (e) it should not require evidence of surgery and/or hormone treatment. Consequently, based on the control of its conformity with the Convention, Article 54 of the Civil Code should be interpreted pursuant to the above standards so that persons who wish to comprehensively adjust their records and/or identity document to their self-perceived gender identity may truly enjoy the human rights recognized in Articles 3, 7, 11(2), 13 and 18 of the American Convention as established in paragraphs 162 to 171.”

#### D. PATRIMONIAL RIGHTS

63. The fourth question submitted to the Court is as follows:

“Taking into account that non-discrimination based on sexual orientation is a category protected by Articles 1 and 24 of the ACHR, in addition to the provisions of Article 11(2) of the Convention: does this protection and the ACHR mean that the State should recognize all the patrimonial rights derived from a relationship between persons of the same sex?”

64. The purpose of this request was to obtain a ruling by the Court on:

“The protection provided by Articles 11(2) and 24 in relation to Article 1 of the ACHR to the recognition of the patrimonial rights derived from a relationship between persons of the same sex.”

65. Regarding this question, identified as number 4 in the request, and its purpose, it should be underscored that it relates solely to the patrimonial rights derived from a relationship between persons of the same sex. It is limited to the situation of persons of the same sex, without referring to gender identity, and covers only the patrimonial rights derived from a relationship between these persons.

66. It is also essential to recall that international law, including international human rights law, at the current state of its development, does not include special rights for unions between same-sex couples. There is no binding treaty for OAS Member States that regulates the situation of such couples. The Convention does not do so. Furthermore, there is no customary law or general principle of law that does so. Nor do the laws of most of those States refer to the matter. All this can be deduced from OC-24.<sup>63</sup> Of the 34 Member States of the OAS, only eight of them regulate cohabitation unions, civil unions or *de facto* unions.

67. In short, there is no autonomous source of international law, in other words, a treaty, custom, or general principle of law that, in the legal sphere of the Americas, governs the union of same-sex couples, creating the institution and establishing the corresponding rights. All that exists, are unilateral legal instruments of some OAS Member States<sup>64</sup> that, logically, are binding only for the States that have issued them, particularly as they correspond to a minority and, thus, cannot be considered evidence of an international custom or serve as grounds for a general principle of law.

68. With regard to the resolutions of international organizations concerning unions of same-sex couples, these are not declarations of law; that is, they do not interpret a provision of a convention

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<sup>62</sup> “The State of Costa Rica, in order to ensure the protection of human rights more effectively, may issue a regulation incorporating the above standards into the administrative procedure that it may provide in parallel, in accordance with the considerations in the previous paragraphs of this Opinion, as established in paragraphs 162 to 171.”

<sup>63</sup> Paras. 206 to 213.

<sup>64</sup> A unilateral legal instrument is the expression of the will of a single State, not subordinated to another legal instrument, and executed with the intention of producing relevant legal effects for that State and possibly for third parties. This autonomous source of international law is not included in Art. 38 of the Statute of the International Court of Justice.

or customary law or a general principle of law in force for the OAS Member States.<sup>65</sup> Consequently, they do not constitute a supplementary source of international law, but rather express an aspiration - that could evidently be considered very legitimate - of most of the member States of the international organization concerned, so that it is either international law or the domestic law of each of them that includes and regulates the situation.

69. And, regarding jurisprudence, there is only the judgment handed down in the Atala case.<sup>66</sup> In this regard, it should be noted that, as a supplementary source of international law, jurisprudence is not binding if it is expressed in advisory opinions and, conversely, it is binding if it is expressed in the ruling in a contentious case, but only for the State that is a party to the respective case.

70. Consequently, the situation of unions between same-sex couples is a matter that also falls within the internal, domestic or exclusive jurisdiction of the State.<sup>67</sup>

71. This signifies, first, that States, in exercise of their internal, domestic or exclusive jurisdiction, may regulate this situation unilaterally; international law does not prevent them from doing so. Second, it means that States may decide not to regulate the situation; in other words, based on the current development of international law, they do not commit any internationally wrongful act in this case. And, third, it means that the Court's possible control of the conventionality of the actions taken by States in this regard, either of a preventive nature by an advisory opinion, or of a binding nature by a judgment in a contentious case, would only be admissible with regard to those States that have regulated the relationship between same-sex couples, in order to determine whether this regulation has had a negative effect on human rights. From a different perspective this means that the recognition and regulation of unions between same-sex couples cannot be imposed on States by jurisprudence, and especially by an advisory opinion, which is not binding for the State that requests the opinion and, above all, for other States.

72. Accordingly, this brief is not an opinion on whether or not unions between same-sex couples are admissible. Recalling the function of the Court, which is to indicate the applicable international law, in particular the Convention, as it is expressed and not as the Court would like it to express, this text merely points out that the said unions are not established in either international law or the Convention, so that any decisions in this regard correspond to each State.

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<sup>65</sup> The resolutions of international organizations can be of four types. One type refers to those that, based on the treaty that regulates the organization in question, are compulsory for its member States. For example, the resolutions of the Security Council of the United Nations issued under Chapter VII of the Charter of the United Nations, "Action with respect to threats to the peace, breaches of the peace, and acts of aggression." Such resolutions are not autonomous sources of international law, because their binding nature arises from the treaty that regulates the respective organization; thus, it is the treaty that is the autonomous source. Another type relates to those issued to regulate the functioning of the organization that issues them. For example, resolutions concerning the organization's budget. Plainly, these are binding in that setting. The third type of resolution of international organizations refers to those issued to interpret a legal provision of either a convention, customary law or a general principle of law. These are known as "resolutions of international organizations that are declarations of law" and are a supplementary source of international law insofar as they define a law already established by an autonomous source. This type of resolution is not binding for member States. The fourth type of resolutions of international organizations is that which simply expresses aspirations that international law be amended in the sense outlined. Evidently, such resolutions, which are the most numerous, are not binding for the member States of the respective organization either.

<sup>66</sup> *Supra* No. 41.

<sup>67</sup> Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of February 26, 2015,

73. In addition, this brief considers that the Convention deals with the family regardless of the ties that exist between the persons who form it. Thus, paragraph 1 of Article 17, entitled "Rights of the Family" refers solely to the family,<sup>68</sup> while paragraph 2 recognizes the right to marry and to raise a family.<sup>69</sup> Meanwhile, Article 19<sup>70</sup> refers to the family and not to marriage.

74. Consequently, in this brief it is understood that the question raised is not whether the union of two persons of the same sex constitutes a family, but exclusively whether the State should recognize the patrimonial rights derived from such a union.

75. In short, and in the understanding that they are supported by the reasons set out above, the undersigned concurred with the approval of the 6th<sup>71</sup> and 7th<sup>72</sup> decisions of OC-24.

#### **E. LEGAL MECHANISM**

76. The fifth and last "specific question," identified with the number "5," is worded as follows:

"If the answer to the preceding question is affirmative, must there be a legal mechanism that regulates relationships between persons of the same sex for the State to recognize all the patrimonial rights that derive from that relationship?"

77. And, with the same purpose as the previous question; that is, to obtain a ruling from the Court on:

"The protection provided by Articles 11(2) and 24 in relation to Article 1 of the [America Convention] to the recognition of the patrimonial rights derived from a relationship between persons of the same sex."

78. In this regard, first, it should be noted that, as in the case of the previous question, this one refers exclusively to relationships between persons of the same sex, without referring to gender identity; that it is limited to the patrimonial rights derived from this relationship; that the object and purpose of the legal mechanism concerned is "for the State to recognize all the patrimonial rights that derive from" the relationship or union between persons of the same sex, and that the question does not indicate the legal mechanism to which it refers or aspires.

79. Second, it should be emphasized that, in its analysis and answer to the "specific question" posed, OC-24 includes marriage between persons of the same sex.<sup>73</sup> Indeed, both the response

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<sup>68</sup> "The family is the natural and fundamental group unit of society and is entitled to protection by society and the state."

<sup>69</sup> "The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention."

<sup>70</sup> "Rights of the Child. Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the State."

<sup>71</sup> "The American Convention, based on the right to the protection of private and family life (Article 11(2)), as well as on the right to protection of the family (Article 17), protects the family ties that may derive from a relationship between a same-sex couple, as established in paragraphs 173 to 199."

<sup>72</sup> "The State must recognize and ensure all the rights derived from a family relationship between same-sex couples in accordance with the provisions of Articles 11(2) and 17(1) of the American Convention, and as established in paragraphs 200 to 218."

<sup>73</sup> Paras. 218 to 227.

provided by OC-24<sup>74</sup> and the eighth decision,<sup>75</sup> include marriage between persons of the same sex as perhaps the most relevant legal mechanism for the recognition of the patrimonial rights derived from the relationship between these persons.

80. Thus, basically, the matter in hand relates to the interpretation of Article 17(2) of the Convention.<sup>76</sup>

81. That said, the answer provided by OC-24 implies, on the one hand, that, when referring to marriage, the Convention includes marriage between persons of the same sex and, on the other hand, that if the States Parties to the Convention have not provided for this in their domestic laws, they should do so. But, this answer is confusing.

82. Regarding marriage between same-sex couples as an international legal obligation, OC-24 appears to suppose that the only institution that serves “for the State to recognize all the patrimonial rights that derive from that relationship” is marriage between persons of the same sex, and this is obviously not so. As already mentioned, there is also the possibility of civil unions and similar models.

83. In addition, it should be noted that, under the Convention, the situation of marriage is different from that of a civil union or any similar mechanism. This is because while marriage is contemplated in the Convention, civil union is not. Also, it should be stressed that, while everything related to a civil union or any similar mechanism falls with the sphere of the internal, domestic or exclusive jurisdiction of the State, in the case of marriage, the only part that corresponds to this sphere is the age and “the conditions required by domestic law” to marry and to raise a family; but, “insofar as such conditions do not affect the principle of non-discrimination established in th[e] Convention,” which is what must be determined when exercising the control of conventionality during the hearing and deciding of a contentious case.

84. That said, it should be pointed out that OC-24 prescind[s] of the application of Article 31<sup>77</sup> of the Vienna Convention on the Law of Treaties, the provisions of which should be used by States to interpret treaties and, consequently, the Convention.

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<sup>74</sup> “States must ensure access to all the mechanisms that exist in their domestic laws to guarantee the protection of all the rights of families composed of same-sex couples, without discrimination in relation to families constituted by heterosexual couples. To this end, States may need to amend existing mechanisms by taking administrative, judicial or legislative measures in order to extend such mechanisms to same-sex couples. States that encounter institutional difficulties to adapt existing mechanisms, on a transitory basis while promoting such reforms in good faith, have the obligation to ensure to same-sex couples, equality and parity of rights with heterosexual couples, without any discrimination.” Para. 228.

<sup>75</sup> *Supra* footnote 3.

<sup>76</sup> “The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.”

<sup>77</sup> “Article 31 (General rule of interpretation): “1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.”

85. Indeed, OC-24 accords no importance to the fact that the States Parties agreed to sign the Convention “in good faith”; in other words, that, at that time, 1969, they wished to sign it and did so pursuant to the “ordinary meaning” attributed to its terms, which were, according to the 20<sup>th</sup> edition of the *Diccionario de la Real Academia Española* (1984), in force until 1992: “*Matrimonio: Unión de hombre and mujer, concertada mediante ciertos ritos o formalidades legales*”<sup>78</sup> [Marriage: Union of men and women, celebrated by certain rites or legal formalities].

86. Furthermore, there is no evidence that OC-24 considered the “context” of the terms of the Convention. Thus, for example, it did not weigh the fact that, while in almost all its articles recognizing human rights, it refers to the subjects of these rights as “everyone,”<sup>79</sup> in Article 17(2) it refers to “[t]he right of men and women of marriageable age to marry.”

87. In addition, OC-24 does not mention the “Preamble” or the “annexes” to the Convention. Nor does it mention “any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty” or “any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”

88. A similar situation occurs with what should be taken into account together with the context; in other words: “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions,” or “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation,” or “any relevant rules of international law applicable in the relations between the parties.”

89. And it could not mention the foregoing because, quite simply, there is no preamble, annex or agreement in this regard. Moreover, even today, there is no treaty or other instrument that is binding for the States of the Americas that refers to marriage between persons of the same sex. There are merely a few laws that refer to this. The OC-24 itself recognizes that only six of the 23 States Parties to the Convention and eight of the 34 Member States of the OAS have laws on marriage between same-sex couples.<sup>80</sup> At the global level, around 24 of the 193 members of the United Nations include this in their laws, and even this only in recent years.

90. Regarding the mention made in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, to “any relevant rules of international law applicable in the relations between the parties,” it should be considered that the 1948 American Declaration of the Rights and Duties of Man does not refer to marriage, while, when referring to marriage, both the 1948 Universal Declaration of

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<sup>78</sup> Subsequently, the following phrase was added: “*En determinadas legislaciones, unión de dos personas del mismo sexo, concertada mediante ciertos ritos o formalidades legales, para establecer and mantener una comunidad de vida e intereses.*” [Under certain legal systems, the union of two persons of the same sex, celebrated by means of certain rites or legal formalities, to establish and maintain a common life and interests.]

<sup>79</sup> Arts. 3 (Right to the Recognition of Juridical Personality), 4 (Right to Life), 5 (Right to Personal Integrity), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), 10 (Right to Compensation), 11 (Right to Privacy), 12 (Freedom of Conscience and Religion), 13 (Freedom of Thought and Expression), 14 (Right of Reply), 16 (Freedom of Association), 18 (Right to Name), 20 (Right to Nationality), 21 (Right to Property), 22 (Freedom of Movement and Residence), 24 (Right to Equal Protection) and 25 (Right to Judicial Protection). Art. 19 (Rights of the Child) refers to “every child; Art. 23 (Right to Participate in Government) alludes to “every citizen.” Arts. 6 (Freedom from Slavery) and 9 (Freedom from *Ex Post Facto* Laws) use the expression “no one.” This expression is also used following “everyone” in Articles 5, 7, 12, 20 and 22.

<sup>80</sup> Paras. 206 to 213.

Human Rights<sup>81</sup> and the 1966 International Covenant on Civil and Political Rights<sup>82</sup> refer to “men” and “women.”

91. In addition, regarding the resolutions of international organizations cited in OC-24 as sufficient precedents to support its opinion with regard to same-sex couples, it should be reiterated that such resolutions are not declarations of law; in other words, they do not interpret a provision of a convention or customary norm or a general principle of law in force for the aforementioned States. Consequently, they do not constitute a supplementary source of international law; rather they express an aspiration, which may evidently be considered very legitimate, of the member States of the international organization concerned that either international law or the domestic law of each of them establish and regulate the situation referred to.<sup>83</sup>

92. In other words, the resolutions of certain international organizations cited in OC-24 as evidence of the practice as regards recognition of marriage between same-sex couples<sup>84</sup> cannot be forced on the OAS Member States.

93. The OC-24 also appears to assert the binding nature of marriage between same-sex couples based on an evolutive interpretation,<sup>85</sup> but in relation to its sociological rather than its legal aspect. As indicated on another occasion: “the evolutive interpretation of the Convention, or considering the Convention a living law, does not mean interpreting it to legitimize, almost automatically, the social reality at the time of the interpretation because, in that case, the said reality would be the interpreter and even exercise the normative function.” Rather, “to the contrary, the evolutive interpretation of the Convention signifies understanding its provisions in the perspective of determining how they stipulate that these innovative matters or problems should be approached.”<sup>86</sup>

94. It should be added that, while Article 1(1) of the Convention would be the general rule as regards discrimination, the provisions of Article 17(2) of the Convention would be the special rule, so that the *lex specialis derogat legi generali* principle would be applicable, especially considering that the latter article mentions non-discrimination, from which it can be inferred that this provision considers that marriage, as it describes it – the union between a man and a woman – is not discriminatory.

95. As a supplementary element, it could be added that an evolutive interpretation is only appropriate in those situations in which the words used in the Convention could be understood with regard to rights that are implicitly or explicitly included therein, but not to rights that are not established or that are deliberately excluded from the Convention. Furthermore, an evolutive interpretation cannot go against the clear and explicit terms of the Convention. In this regard, it should be recalled that Article 31 of the Vienna Convention on the Law of Treaties establishes four rules of interpretation: good faith, the ordinary meaning of the terms in their context, and the

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<sup>81</sup> Art. 16: “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.”

<sup>82</sup> Art. 23(2): “The right of men and women of marriageable age to marry and to found a family shall be recognized.”

<sup>83</sup> *Supra* paras. 66 to 69.

<sup>84</sup> Paras. 203 to 205.

<sup>85</sup> Para. 187.

<sup>86</sup> Partially dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of Duque v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of February 26, 2015.

object and purpose of the treaty, rules that should be employed harmoniously, without favoring or downplaying any one of them.

96. Thus, it is based on the above that the undersigned is unable to share the assertion made in OC-24 that "Article 17(2) is merely establishing, expressly, the treaty-based protection of a specific model of marriage,"<sup>87</sup> because Article 17(2) of the Convention refers expressly and only to the sole form of marriage that existed when the Convention was drafted and that continues to be the main model – the union between a man and a woman.

97. In addition, the undersigned is unable to agree with the view expressed in OC-24 that "where the parties have used generic terms in a treaty, the parties necessarily ha[d] been aware that the meaning of the terms was likely to evolve over time"<sup>88</sup> because, the adoption of this position when interpreting the Convention runs the risk of affecting the principle of legal certainty. Moreover, the matter in hand is not that the terms of the treaty change over time, but rather when and how this has occurred and, especially, if this has been established in one or several legal instruments that are binding for the States concerned.

98. Another additional point is that it would appear that, with the above phrase, OC-24 reproaches the States Parties to the Convention for not complying with the obligation to foresee the change in the meaning of the term, when this could never constitute a state obligation, in particular when it is considered that they probably did not desire a change.

99. Furthermore, it should be added that OC-24 is contradictory because it indicates the simultaneous existence of the state obligations, on the one hand, to allow same sex couples access to all the mechanisms that exist in their domestic laws for heterosexual couples, including marriage; while, on the other hand, and with regard to those States that endeavor, in good faith, to guarantee the patrimonial rights of same-sex couples, to ensure such couples, anyway, the same rights as heterosexual couples. In sum, it is unclear whether OC-24 is resorting to the customary norms applicable for the determination of an internationally wrongful act<sup>89</sup> and for compliance with the obligation of non-repetition, if such an act has already taken place.<sup>90</sup>

100. Evidently, the undersigned cannot agree either with the assertions in OC-24 that "[t]he Court also notes that, at times, the opposition to the marriage of same-sex couples is based on philosophical or religious convictions" and that these parameters "cannot be used [...] as a guide to interpretation when determining the rights of the human being," and "that such convictions cannot condition the provisions of the Convention in relation to discrimination based on sexual orientation."<sup>91</sup>

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<sup>87</sup> Para. 182.

<sup>88</sup> Para. 188.

<sup>89</sup> Art 2 of the Articles on Responsibility of States for Internationally Wrongful Acts, presented by the International Law Commission, Annex to Resolution A/RES/56/83: "Elements of an internationally wrongful act of a State. There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law, and (b) constitutes a breach of an international obligation of the State."

<sup>90</sup> Art. 30 of the said Articles: "The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; and (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require."

<sup>91</sup> Para. 223.



101. The undersigned is unable to agree with this because, by presuming, without providing explanations or grounds for this, that those who oppose marriage between persons of the same sex have inappropriate religious or philosophical convictions (and, therefore, to interpret the Convention), OC-24 runs the risk that some may consider that such persons are opposed to human rights and, consequently, that their opinions can be suppressed, which is definitively discriminatory. It should not be forgotten that the Court is and should be the place in which everyone may present, respectfully and without fear, their claims for justice in the area of human rights.

102. Furthermore, the undersigned does not agree with this assertion because it does not appear to consider that every legal provision, particularly in a democratic society, results from the confrontation or consensus between different ideas, interests or positions based on distinct religious, ideological, political, cultural and even economic beliefs. In short, legal norms reflect the relations that exist in the respective national or international society at a specific moment.

103. Accordingly, no objections can be raised to individuals expressing their political, ideological or religious opinions on legal provisions. They are only exercising their rights to freedom of conscience and religion,<sup>92</sup> and freedom of thought and expression.<sup>93</sup> Moreover, those opinions may be useful to understand more exactly the meaning and scope of the provision concerned, so that it would be inappropriate for the Court to reject them *prima facie*.

104. Nevertheless, it should be recalled that the arguments set out in OC-24 regarding the recognition of marriage between same-sex couples would appear to be reasons to encourage its recognition under the domestic laws of the States, rather than to maintain that it has been adopted by international law.<sup>94</sup>

105. That said, Article 17(2) of the Convention indicates that the right to marry and to raise a family shall be recognized if the parties are "of marriageable age to marry [... and] meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of non-discrimination established in this Convention."

106. Thus, this article refers the determination of the conditions to marry and to raise a family to the sphere of the internal, domestic or exclusive jurisdiction of the respective State, adding that such conditions should not affect the principle of non-discrimination. This does not establish that recognition of marriage between persons of the same sex is required, but rather that the conditions to marry, understood as the union between a man and a woman, should not be discriminatory, as would be the case, for example, if marriage between a man and a woman was prohibited based on "race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

107. Consequently, and in this regard, States may, for example and pursuant to the said Article 17(2), prohibit marriage between minors or between close relatives, or polygamy.

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<sup>92</sup> Art. 12(1): "Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private."

<sup>93</sup> Art. 13(1): "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."

<sup>94</sup> Paras. 223 to 226.

108. Indeed, it is Article 17(2) of the Convention itself that makes the difference or distinction between marriage and other institutions that could exist between human beings. Consequently, since, according to the Convention, marriage is deemed to be the union between a man and a woman, it cannot be considered, in light of contemporary international law, that it would be discriminatory if the domestic laws of the States of the Americas did not allow marriage between persons of the same sex.

109. Lastly, in consequence, from the interpretation of Article 17(2) of the Convention, pursuant to the rules of interpretation contained in the Vienna Convention on the Law of Treaties, it cannot be inferred that marriage between persons of the same sex has been recognized by international law or by international human rights law either tacitly or even applying an evolutive interpretation. To the contrary, the interpretation of this article reveals clearly that there is no international obligation to recognize or celebrate marriage between persons of the same sex, and if this has not occurred, there is no obligation to amend the respective domestic laws to allow this.

110. Based on the above, the undersigned is unable to agree with the eighth decision<sup>95</sup> of OC-24.

### **III. CONTROL OF CONVENTIONALITY**

111. Bearing in mind the considerations in the judgment on the control of conventionality exercised in the context of the advisory and non-contentious jurisdiction, this text endeavors to insert those considerations into the Court's general concept of this control; that is, it is exercised either within the contentious jurisdiction, or within the advisory and non-contentious jurisdiction. In both cases, it has been included in jurisprudence to facilitate timely and full respect for international human rights law and, consequently, general international law also.

#### **A. BACKGROUND INFORMATION**

##### **a. Jurisprudence**

112. On numerous occasions the Court has referred to the control of conventionality<sup>96</sup> and, thus, has gradually clarified the terms of this mechanism arising from its obligation to protect rights.

<sup>95</sup> *Supra* footnote 3.

<sup>96</sup> See in this regard, *Case of Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs.* Judgment of September 26, 2006. Series C No. 154; *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 24, 2006. Series C No. 158; *Case of La Cantuta v. Peru, merits, reparations and costs.* Judgment of November 29, 2006, Series C No. 162; *Case of Boyce et al. v. Barbados. Preliminary objection, merits, reparations and costs.* Judgment of November 20, 2007, Series C No. 169; *Case of Heliodoro Portugal v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of August 12, 2008, Series C No. 186; *Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2009, Series C No. 209; *Case of Manuel Cepeda Vargas v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of May 26, 2010, Series C No. 213; *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of August 24, 2010, Series C No. 214; *Case of Fernández Ortega et al. v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of August 30, 2010, Series C No. 215; *Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of August 31, 2010, Series C No. 216; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, reparations and costs.* Judgment of September 1, 2010, Series C No. 217; *Case of Vélez Loor v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2010, Series C No. 218; *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of November 24, 2010, Series C No. 219; *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 26, 2010, Series C No. 220; *Case of Gelman v. Uruguay. Merits and reparations.* Judgment of February 24, 2011, Series C No. 221; *Case of Chocrón Chocrón v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2011, Series C No. 227; *Case of López Mendoza v. Venezuela. Merits, reparations and costs.* Judgment of September 1, 2011, Series C No. 233; *Case of Fontevecchia and D'Amico v. Argentina, merits, reparations and costs.* Judgment of November 29, 2011. Series C No. 238; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012,

However, it was in an order on monitoring compliance with judgment that it went into greater detail on the issue,<sup>97</sup> as follows:

“Inter-American jurisprudence has introduced the concept of “control of conventionality,” conceived as an institution used to apply international law, in this case international human rights law, and specifically the American Convention and its sources, including the jurisprudence of this Court.”<sup>98</sup>

113. And the Court added that:

“It is possible to observe two different expressions of this State obligation to exercise the control of conventionality, depending on whether or not the State was a party to a case in which judgment has been delivered. This is because the provision of the Convention interpreted and applied has different binding effects depending on whether or not the State was a substantive party to the international proceedings.”<sup>99</sup>

### b. Concept

114. In view of the foregoing, the issue of the control of conventionality is clearly inserted into the relationship between internal or domestic law and international law if it is considered that international law does not regulate all matters and, in the case of some matters, even when it does regulate them it does not do so completely. Consequently, the institution known as the reserved domain or the internal, domestic or exclusive jurisdiction of the State<sup>100</sup> or, as it is known in other latitudes, the margin of appreciation,<sup>101</sup> subsists as a central element of the international legal

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Series C No. 239; *Case of Furlan and family members v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2012, Series C No. 246; *Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of September 4, 2012, Series C No. 250; *Case of the Massacres of El Mozote and Nearby Places v. El Salvador. Merits, reparations and costs.* Judgment of October 25, 2012, Series C No. 252; *Case of Gudiel Álvarez et al. (“Diario Militar”) v. Guatemala. Merits, reparations and costs.* Judgment of November 20, 2012, Series C No. 253; *Case of the Santo Domingo Massacre v. Colombia. Preliminary objections, merits and reparations.* Judgment of November 30, 2012, Series C No. 259; *Case of Mendoza et al. v. Argentina. Preliminary objections, merits and reparations.* Judgment of May 14, 2013, Series C No. 260; *Case of Gutiérrez and family v. Argentina. Merits, reparations and costs.* Judgment of November 25, 2013, Series C No. 271; *Case of García Cruz and Sánchez Silvestre v. Mexico. Merits, reparations and costs.* Judgment of November 26, 2013, Series C No. 273; *Case of J. v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of November 27, 2013, Series C No. 275; *Case of Liakat Ali Alibux v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of January 30, 2014, Series C No. 276; *Case of Norin Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile. Merits, reparations and costs.* Judgment of May 29, 2014, Series C No. 279; *Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs.* Judgment of August 29, 2014, Series C No. 282; *Case of Rochac Hernández et al. v. El Salvador. Merits, reparations and costs.* Judgment of October 14, 2014, Series C No. 285; *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of February 29, 2016. Series C No. 312; *Case of Tenorio Roca et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of June 22, 2016. Series C No. 314; *Case of Andrade Salmón v. Bolivia. Merits, reparations and costs.* Judgment of December 1, 2016. Series C No. 330, para. 93; *Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21; Entitlement of Legal Entities to hold Rights under the Inter-American System of Human Rights (Interpretation and scope of Article 1(2) in relation to Articles 1(1), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62(3) of the American Convention on Human Rights, as well as 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.

<sup>97</sup> *Case of Gelman v. Uruguay. Monitoring compliance with judgment.* Order of the Inter-American Court of Human Rights of March 20, 2013.

<sup>98</sup> *Idem*, Para. 65.

<sup>99</sup> *Idem*, Para. 67.

<sup>100</sup> *Supra* footnote 14.

<sup>101</sup> *Supra* footnote 15.

structure, although not with the same intensity and breadth as before. This circumstance means that a matter is no longer in this exclusive jurisdiction to the extent that it is governed by international law and this is precisely why the said relationship has a different response based on whether a matter is decided internally or in the international sphere, in particular, as regards its effects.

115. Thus, the control of conventionality consists in comparing a domestic norm or practice with the provisions of the Convention to determine whether the former is compatible with the latter and, consequently, the primacy of one over the other should there be a contradiction between them. Evidently, the response will depend on whether this control is exercised by an organ of the pertinent State Party to the Convention prior to the intervention of the Court, or whether it is the Court that decides this subsequently or when the State Party has not exercised this control.

## **B. PRIOR CONTROL OF CONVENTIONALITY BY THE STATE**

### **a. Rationale**

116. First, it should be underlined that there is no international provision, either treaty-based, customary or a general principle of law, and this includes the Convention, that establishes the supremacy of international law over the corresponding domestic law in the internal sphere of the State. Thus, it may be concluded, with regard to the primacy of international law over the State's domestic law in the internal sphere, that this relates to the reserved domain or the internal, domestic or exclusive jurisdiction of the State, precisely because it is a matter that is not regulated at the international level.

117. It is in this perspective that attention should be drawn to the fact that, according to the above-mentioned order on compliance with judgment, the control of conventionality should be exercised by the state authorities, who are "subject to the rule of law and, therefore [...] obliged to apply the legal provisions that are in force [...] within their respective terms of reference and the corresponding procedural regulations." Thus, the Court recalls that these authorities "are also subject to the treaty"; that is, they are subject to both domestic law and the Convention.

118. Perhaps it is this that explains, at least in part, that, in practice, it is based on the provisions of the respective state Constitutions that their organs rule on the relationship between international law and the corresponding domestic law in the domestic sphere. Accordingly, it is the Constitution of each State that decides on the relationship between international law and the corresponding domestic law in the domestic sphere.

119. And this is precisely what happens in the 20 States Parties to the Convention that have accepted the Court's jurisdiction. Indeed, following the monistic doctrine regarding this relationship, some of the Constitutions grant treaties, constitutionally<sup>102</sup> and according to the interpretation of the Constitution made by their highest courts, either a "legal" status,<sup>103</sup> that is the same status as their laws, or an "infra-constitutional" or "supralegal" status";<sup>104</sup> in other words,

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<sup>102</sup> The references below refer to articles in the Constitution of the respective States.

<sup>103</sup> Barbados, Preamble and art 1; Trinidad and Tobago, art.2.

<sup>104</sup> Argentina, art.75.22; Brazil, art. 5; Ecuador, art. 163; El Salvador, art. 144; Guatemala, art. 46; Haiti, art. 276.2; Honduras, art. 18, and Nicaragua, art. 46.

they are above the law but below the Constitution. Meanwhile other Constitutions grant norms on human rights a “constitutional”<sup>105</sup> and even a “supra-constitutional” status.<sup>106</sup>

120. In short, it is because it is understood that the Convention is incorporated into the domestic law of the corresponding State Party that its state interpreter and executor must understand it as part of domestic law and, consequently, must interpret it and apply it in harmony with that law in accordance with the hierarchy assigned by the respective Constitution. In this situation, the source of the obligation to interpret and to apply the Convention is the Constitution and not the Convention or any other source of international law.

121. Accordingly, it is in this understanding – that the Convention has been incorporated into the respective domestic law – that its domestic interpreter must determine its meaning and scope as a treaty, bearing in mind, as will be pointed out below,<sup>107</sup> the *pacta sunt servanda* principle, the inappropriateness of citing domestic law to fail to comply with what has been agreed and, in a simultaneous and harmonious manner, the rules concerning good faith, the terms of the treaty in its context, and its object and purpose, without privileging or downplaying any of these elements.

122. Moreover, in this regard, it should be stressed that the control of conventionality is applicable not only with regard to the Convention, but also to all the treaties in force in the State in question.

#### **b. Jurisprudence**

123. Regarding the control of constitutionality that the State should exercise prior to the control eventually carried out by the Court, the latter has indicated that:

“In situations and cases in which the State concerned has not been a party to the international proceedings in which certain case law was established, merely because it is a party to the American Convention, all its public authorities and all its organs, including the democratic instances, judges and other organs that are part of the administration of justice at all levels, are bound by the treaty and must therefore exercise a control of conventionality within their respective spheres of competence and the corresponding procedural regulations, both when issuing and applying norms, as regards their validity and compatibility with the Convention, and also in the determination, prosecution and deciding of specific situations and concrete cases, taking into account the treaty itself and, as appropriate, the precedents and jurisprudence of the Inter-American Court.”<sup>108</sup>

124. Thus, the Court’s case law asserts that, even though a State Party to the Convention, is not a party to a case submitted to the Court, all its organs should exercise the pertinent control of conventionality “within their respective spheres of competence and the corresponding procedural regulations.”

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<sup>105</sup> Argentina, art. 75.22; Bolivia, art. 13.IV and 14.III; Colombia, art. 93; Chile, Art. 5.2; Mexico, art. 133; Panama, art. 17; Paraguay, art. 142; Peru, final provisions and fourth transitory provision; Dominican Republic, art. 74.3; Uruguay, art. 6, and Venezuela, art. 23 (has denounced the Convention).

<sup>106</sup> Bolivia, art. 257.I. and II., and Costa Rica, art. 7.

<sup>107</sup> *Infra*, paras. 139 and 140.

<sup>108</sup> *Case of Gelman v. Uruguay. Monitoring compliance with judgment.* Order of the Inter-American Court of Human Rights of March 20, 2013, para. 56.

125. In conclusion, therefore, in no part of the Court's jurisprudence is there an express and definitive indication that, in case of discrepancy, divergence or contradiction between the Constitution or any law of the respective State and the Convention "all" that State's "organs" "including its judges and other organs that are part of the administration of justice at all levels," must ensure that the Convention prevails over the domestic legal provisions. Consequently, neither has the Court referred to the primacy of one over the other in that eventuality, and has never called upon the State, in that hypothetical case, to disregard its Constitution.

126. Let it be repeated that what the Court has maintained is, to the contrary, "that the domestic authorities are subject to the rule of law and, therefore, are obliged to apply the legal provisions in force"<sup>109</sup> and also that they must "ensure that the effects of the provisions of the Convention are not diminished by the application of norms that are contrary to its object and purpose, or that judicial or administrative decisions do not make full or partial compliance with the international obligations illusory."<sup>110</sup> However, it has not indicated how that objective should be achieved.

127. In short, what the Court has stated is that the Convention should be interpreted and applied as part of the domestic law of the respective State and by its competent organ, but it has not indicated that the control of conventionality should be exercised against the provisions of domestic law, or that this interpretation and application cannot ultimately correspond, as in the case of control of constitutionality, to the State's highest court or a specialized court, such as the constitutional court.

128. And a problem arises precisely in those situations in which the pertinent state organ gives preference to the domestic law, which may even be the Constitution itself, over the provisions of the Convention, thus violating an international obligation under this instrument. If the said state organ justifies its action based on the Constitution, it would not be exercising control of conventionality, but rather control of constitutionality, the purpose of which is to ensure the supremacy of the Constitution over any other norm.

### **c. Comments**

129. As a first comment on the control of conventionality by a state organ, it can be affirmed that, if the Convention contradicts the provisions of the Constitution, obviously and definitively, the state organ will generally prefer the Constitution over the Convention or, in other words, the control of constitutionality over the control of conventionality, pursuant to the hierarchical system that characterizes the national social order and, consequently, its laws.

130. Second, it can be said that, since the control of conventionality by the organs of the respective State is not regulated by international law but rather international law leaves it to the sphere of the corresponding domestic law – in other words, to the State's reserved domain or its internal, domestic or exclusive jurisdiction – the foregoing comment is valid even in relation to States that have unilaterally accepted the primacy of the Convention in their domestic law or the binding effects of its case law, including when this emanates from cases in which they have not been a party because, logically and unilaterally, they could, always in the sphere of their internal, domestic or exclusive jurisdiction, amend their Constitution or the domestic law in question, depriving the Convention of this superior ranking.

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<sup>109</sup> *Idem*, para. 66.

<sup>110</sup> *Idem*.

131. Third, it can also be stated that the control of conventionality by the state organs is, consequently, preventive in nature; that is, it constitutes, if anything, an obligation of conduct, which is to “ensure that the effects of the provisions of the Convention are not diminished by the application of norms that are contrary to its object and purpose, or that judicial or administrative decisions do not make full or partial compliance with the international obligations illusory,” and not of result, as it would be if it was required that, in the event of contradiction between the domestic provision and the Convention, the corresponding state organ should always give the Convention and its provisions preference within the domestic legal system.

132. Thus, the control of conventionality by a state organ is preventive because if it decrees the primacy of the Convention over the provisions of its domestic law, it will generally avoid a case being submitted to the Court in this regard and if, to the contrary, it should decide that the domestic law prevails over the provision of the Convention, it runs the risk of the matter being brought before the inter-American human rights system and the possibility of the Court declaring the international responsibility of the State.

133. Nevertheless, the above could suggest that control of conventionality by the respective State would not be strictly useful or necessary. However, it should be pointed out that this mechanism has played and will surely continue to play a relevant and indispensable role, especially as regards the incorporation of the Convention into domestic law. Moreover, it has allowed the idea that the Convention should be applied as part of domestic law to be socialized among state agents in order to avoid the State incurring international responsibility.

### C. CONTROL OF CONVENTIONALITY BY THE COURT

#### a. Preliminary consideration

134. The first thing that should be recalled in this regard is that, under the international legal system, there is no hierarchy of autonomous sources; in other words, no norm establishes that one treaty has primacy over another, or that the treaty prevails over the custom or the custom over the treaty, or either of them over the general principles of law.<sup>111</sup> This differs from domestic legal systems, where the Constitution heads the hierarchy, followed by the laws, either organic, derived from special or regular quorums, decrees, resolutions, instructions and, lastly, contracts. What international law does contemplate is a preference for the use of autonomous sources, and that some of its norms, but not all, are *jus cogens*,<sup>112</sup> so that it is more difficult to amend them. Thus, the international legal system does not contain a regulatory framework with a status similar to that of the Constitution under the domestic legal system.

135. Consequently, the Convention does not rank higher than other treaties, and there is no international provision that establishes the primacy, in the international sphere, of one regulatory framework over another.

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<sup>111</sup> *Supra*, footnote 10.

<sup>112</sup> Art. 53 of the Vienna Convention on the Law of Treaties: “Treaties conflicting with a peremptory norm of general international law (*jus cogens*). A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

136. Accordingly, when exercising the control of conventionality, the Court does so, not to guarantee the primacy of the Convention over other treaties in the international sphere, but rather, in this sphere, to assert or proclaim its binding nature for the respective States Parties to the Convention.

137. That said, the Court can exercise the control of conventionality in two situations. One is in the exercise of its advisory or non-contentious jurisdiction, and the other in the exercise of its contentious jurisdiction.

**b. Applicable provisions**

138. Taking the above into account, it can be said that the control of conventionality by the Court is founded on the following international norms:

**i. Vienna Convention on the Law of Treaties**

139. The provisions of the Vienna Convention on the Law of Treaties on which the control of conventionality exercised by the Court is based are, above all, Article 26, which embodies the *pacta sunt servanda* principle,<sup>113</sup> the first phrase of Article 27, which establishes that parties may not invoke internal law as justification for failure to comply with their obligations,<sup>114</sup> and Article 31(1), which establishes, as an essential rule, that treaties must be interpreted in good faith, according to the terms of the treaty in their context, and in light of its object and purpose.<sup>115</sup>

140. Therefore, pursuant to the Vienna Convention, which also codifies the customary law applicable to treaties between States,<sup>116</sup> that is, in the international sphere, treaties must be interpreted considering that the States parties have signed and ratified them freely, pledging their word to comply with them, even when such treaties may possibly contradict provisions of their domestic law. Also, according to this Convention, treaties should be interpreted based on the simultaneous and harmonious application of the four elements it stipulates. These are: that the will of the contracting parties is expressed by their intention to conclude the treaty in accordance with the ordinary terms used (unless these are accorded a special meaning), in their context, and in light of the object and purpose of the treaty. None of these elements should be disregarded or overvalued. They are all equally necessary for a correct interpretation of the treaty in question. None of them can be dispensed with or privileged and they must be employed harmoniously.

**ii. Draft articles on the responsibility of States for internationally wrongful acts, prepared by the International Law Commission of the United Nations**

141. The second group of provisions on which the control of conventionality by the Court is based are the customary norms on State responsibility for internationally wrongful acts.<sup>117</sup> These articles

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<sup>113</sup> "*Pacta sunt servanda*," Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

<sup>114</sup> "Internal law and observance of treaties. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

<sup>115</sup> *Supra* footnote 77.

<sup>116</sup> Art. 1 of the Vienna Convention on the Law of Treaties: "Scope of the present Convention. The present Convention applies to treaties between States."

<sup>117</sup> Draft articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission, Annex to Resolution A/RES/56/83 of 12 December 2001.



establish that every internationally wrongful act entails responsibility for the respective State;<sup>118</sup> that the wrongful act consists of an action or omission attributable to the State and that violates an international obligation under international law,<sup>119</sup> regardless of the provisions of its domestic law,<sup>120</sup> and that the State is responsible for any conduct of any of its organs.<sup>121</sup>

142. These provisions, as the previous ones, are also applicable to the control of conventionality of any treaty, not just the Convention.

### iii. American Convention on Human Rights

143. The specific provisions of the Convention that may be cited as support for the control of conventionality by the Court are those that establish that the States Parties to the Convention undertake to respect and ensure respect for human rights,<sup>122</sup> and their obligation to adopt the necessary measures to give effect to such rights.<sup>123</sup>

144. Thus, these provisions constitute a legal structure that allows the Court to proceed to impart justice in the cases submitted to its consideration, with the certainty that its decisions will be obeyed by the corresponding State, because the latter has freely consented to this.

## c. Control of conventionality and advisory and non-contentious jurisdiction

### i. Advisory and non-contentious jurisdiction

145. According to Article 64 of the Convention,<sup>124</sup> the Court has an advisory and non-contentious jurisdiction on the basis of which the Member States of the Organization of American States may consult the Court regarding the interpretation of the Convention or of other treaties concerning the protection of human rights in the States or with regard to the compatibility of their respective laws with the said international instruments.

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<sup>118</sup> "Art 1. Responsibility of a State for its internationally wrongful acts. Every internationally wrongful act of a State entails the international responsibility of that State."

<sup>119</sup> "Art. 2. Elements of an internationally wrongful act of a State. There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State."

<sup>120</sup> "Art. 3. Characterization of an act of a State as internationally wrongful. The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."

<sup>121</sup> "Art. 4. Conduct of organs of a State. 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

<sup>122</sup> *Supra* footnote 30.

<sup>123</sup> Art. 2: "*Domestic Legal Effects*. Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

<sup>124</sup> "1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court. 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments."

146. It should be noted that the Convention recognizes the authority to request an advisory opinion to all the OAS Member States, not only the States Parties to this instrument and, also, that the corresponding request may relate both to the interpretation of the Convention or other human rights treaties and to the compatibility of the domestic laws of those States with such treaties.

147. The main organs of the OAS listed in Chapter X of its Charter may also request an advisory opinion from the Court.<sup>125</sup>

148. In other words, the Court may give advisory opinions at the request of more States and international organs and in more cases than has been established for other international judicial instances.<sup>126</sup>

149. The foregoing explains the relevance of advisory opinions, even though, as their name indicates, they are not binding,<sup>127</sup> which constitutes their main difference from the Court's judgments. And they are not binding, not only because, to the contrary, they would not differ from the latter, but also because there are no parties to an advisory opinion, from which it can be concluded that it would not be fair that a decision of the Court was binding for entities that had not appeared before it and had not been prosecuted or questioned. In addition, in the hypothesis that advisory opinions were considered binding for all the States, not only would the right to a defense be very seriously affected, but also States that are not parties to the Convention would, in this way be subject to the Court's jurisdiction, which would fall entirely outside the provisions of the Convention.

150. Nevertheless, this does not mean that the Court's advisory opinions do not have special relevance. Indeed, their importance stems precisely from the fact that, based on the Court's moral and intellectual authority, they allow it to exercise a preventive control of conventionality. In other words, they indicate to the States that have accepted the Court's contentious jurisdiction that, if they do not adapt their conduct to the Court's interpretation of the Convention, they run the risk of a case related to the opinion being submitted to the consideration of the Court and a decision declaring the international responsibility of the respective State. In addition, they provide the other States with guidance on full and complete respect for the human rights they undertook to respect, either as parties to the Convention, or as parties to other international legal instruments.

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<sup>125</sup> Currently, Chapter VIII: "Art. 53: The Organization of American States accomplishes its purposes by means of:

- a) The General Assembly;
- b) The Meeting of Consultation of Ministers of Foreign Affairs;
- c) The Councils;
- d) The Inter-American Juridical Committee;
- e) The Inter-American Commission on Human Rights;
- f) The General Secretariat;
- g) The Specialized Conferences, and
- h) The Specialized Organizations.

There may be established, in addition to those provided for in the Charter and in accordance with the provisions thereof, such subsidiary organs, agencies, and other entities as are considered necessary."

<sup>126</sup> For example, Art. 96 of the Charter of the United Nations: "1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question. 2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."

<sup>127</sup> Unless the respective State unilaterally assigns them a binding nature, as can be inferred from the decision in judgment 0421-S-90 of the Constitutional Chamber of Costa Rica, which indicated that the Court's jurisprudence "shall – in principle – have the same status as the interpreted provision."

## ii. Jurisprudence

151. Thus, as the Court has stated:

"When affirming its jurisdiction, the Court recalls the broad scope of its advisory function, unique in contemporary international law, owing to which, and contrary to the attributes of other international courts, all the organs of the OAS listed in Chapter X of the Charter and the Member States of the OAS are authorized to request advisory opinions, even if they are not parties to the Convention. Another characteristic of the breadth of this function relates to the purpose of the consultation, which is not limited to the American Convention, but includes other treaties concerning the protection of human rights in the States of the Americas. Moreover, all OAS Member States may request opinions regarding the compatibility of their domestic laws with the aforesaid international instruments."<sup>128</sup>

152. Meanwhile, in the advisory opinion that motivated this concurring opinion, the Court stated that it:

"... also finds it necessary to recall that, under international law, when a State is a party to an international treaty, such as the American Convention, this treaty is binding for all its organs, including the Judiciary and the Legislature, so that a violation by any of these organs gives rise to the international responsibility of the State. Accordingly, the Court considers that the different organs of the State must carry out the corresponding control of conformity with the Convention; based also on the considerations of the Court in exercise of its non-contentious or advisory jurisdiction, which undeniably shares with its contentious jurisdiction the goal of the inter-American human rights system, which is 'the protection of the fundamental rights of the human being.' Furthermore, the interpretation given to a provision of the Convention through an advisory opinion provides all the organs of the OAS Member States, including those that are not parties to the Convention but that have undertaken to respect human rights under the Charter of the OAS (Article 3(l)) and the Inter-American Democratic Charter (Articles 3, 7, 8 and 9) with a source that, by its very nature, also contributes, especially in a preventive manner, to achieving the effective respect and guarantee of human rights. In particular, it can provide guidance when deciding matters relating to the respect and guarantee of human rights in the context of the protection of LGBTI persons, to avoid possible human rights violations."<sup>129</sup>

## iii. Comments

153. In this way, the Court clarified the scope of the control of conventionality in a situation it had not anticipated previously; that is, in the exercise of its advisory and non-contentious jurisdiction.

154. Above all, it clarified that the preventive effect differs from the effect of the control of conventionality executed by the State, because the control exercised by the Court through an advisory opinion enjoys a degree of certainty that the former lacks. Evidently, this certainty is not total or definitive, because the jurisprudence may change, Nevertheless, as indicated, it is supported by the Court's authority expressed in the wisdom, impartiality and justice that should emanate from its rulings. From this perspective, the judicial function consists in convincing rather than imposing.

### a. Control of conventionality and the contentious jurisdiction

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<sup>128</sup> Para. 23, OC-21.

<sup>129</sup> Paras. 26 and 27 of the OC.

### i. Applicable provisions

155. In relation to the control of conventionality exercised in the sphere of the Court's contentious jurisdiction,<sup>130</sup> the applicable provisions refer to the content of the judgment it delivers;<sup>131</sup> they confirm its status as *res judicata*,<sup>132</sup> declare its binding nature for the State party to the respective case<sup>133</sup> and establish what will happen if the ruling is not complied with.<sup>134</sup>

### ii. Contentious jurisdiction

156. In this regard, the control of conventionality occurs in cases in which, when there is a discrepancy between the provisions of the Convention and those of the Constitution or another domestic law or practice of the State in question, the respective state organ has given preference to the latter over the former in the domestic sphere.

157. If this happens, the control is exercised based on the reinforcing and complementary nature that the inter-American jurisdiction has in relation to the domestic jurisdiction,<sup>135</sup> which is revealed by compliance with the prior exhaustion of domestic remedies<sup>136</sup> or, in other words, when the respective State has had the opportunity to exercise its own control of conventionality.

### iii. Jurisprudence

158. Evidently, it is based on the said provisions that the Court, in an order on compliance with judgment, indicated that:

"When an international judgment exists that is *res judicata* with regard to a State that has been a party to a case submitted to the jurisdiction of the Inter-American Court, all its organs, including its judges and organs involved in the administration of justice, are also subject to the treaty and to the judgment of this Court, which obliges them to ensure that the effects of the provisions of the Convention and, consequently, the decisions of the Inter-American Court, are not diminished by the application of norms that are contrary to its object and purpose, or that judicial or administrative decisions do not make full or partial compliance with the international obligations illusory. In other words, in this case there is an international *res judicata* based on which the State is obliged to comply with and execute the judgment. The State of Uruguay finds itself in this

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<sup>130</sup> *Supra* footnote 8.

<sup>131</sup> *Supra* footnote 23.

<sup>132</sup> Art. 67: "The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment."

<sup>133</sup> *Supra* footnote 22.

<sup>134</sup> Art. 65: "To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations".

<sup>135</sup> Second paragraph of the Preamble: "Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states."

<sup>136</sup> Art. 46.1.a): "Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law."

situation in relation to the judgment handed down in the Gelman case. Therefore, precisely because the control of conventionality is an institution that serves as an instrument to enforce international law, in this case in which *res judicata* exists, it is simply a question of using this to comply fully and in good faith with the rulings made in the judgment delivered by the Court in the specific case, so that, based on the foregoing, it would be incongruent to use this tool as a justification to fail to comply with the judgment.<sup>137</sup>

#### iv. Comments

159. In this regard, it should be stressed that, in cases in which it has considered that some law or action of the State concerned violates the provisions of the Convention, the Court has not indicated that, in the domestic sphere, the Convention has pre-eminence over the provisions of inter-American legal systems; rather, it has ordered the State to “nullify” the respective action that violates the Convention,<sup>138</sup> or to ensure that the domestic norm “does not continue to represent an obstacle to the continuation of the investigations,”<sup>139</sup> or that it “should amend its domestic laws,”<sup>140</sup> or ensure that the norm contrary to the Convention “never again represents an obstacle to the investigation of the facts that are the subject of this case or to the identification and punishment, as appropriate, of those responsible.”<sup>141</sup>

160. However, all this is with a view to the respective State ceasing to commit an internationally wrongful act, thus ending its international responsibility. Consequently, it leaves to the reserved domain or sphere of the internal, domestic or exclusive jurisdiction of the State, the manner or form of complying with the obligation “of result” determined in the respective judgment. This means that the domestic law or action of the corresponding state organ must not impede full compliance with the rulings of the Court and, consequently, the provisions of the Convention, which the State Party to the Convention has freely and solemnly undertaken to respect.

161. Therefore, and based on the provisions of the aforementioned norms and jurisprudence, the Court exercises the control of conventionality under Article 62(3) of the Convention, applying and interpreting the Convention as a treaty;<sup>142</sup> in other words, as an agreement between States under which they contract obligations that can be enforced among them.<sup>143</sup> These include allowing “any

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<sup>137</sup> *Case of Gelman v. Uruguay. Monitoring compliance with judgment.* Order of the Inter-American Court of Human Rights of March 20, 2013, para. 68.

<sup>138</sup> For example: *Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs.* Judgment of August 29, 2014. Series C No. 282.

<sup>139</sup> For example: *Case of the Members of the Village of Chichupac and Neighboring Communities of the Municipality of Rabinal v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of 30 November 30, 2016. Series C No. 328.

<sup>140</sup> For example: *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.

<sup>141</sup> For example: *Case of Gelman v. Uruguay. Merits and reparations.* Judgment of February 24, 2011. Series C No. 221.

<sup>142</sup> Art.2.1(a) of the Vienna Convention on the Law of Treaties: “Use of terms. 1. For the purposes of the present Convention: (a) “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”

<sup>143</sup> Art. 1 of the Vienna Convention on the Law of Treaties: “Scope of the present Convention. The present Convention applies to treaties between States.”

person or group of persons or any non-governmental entity”<sup>144</sup> to initiate proceedings that may, ultimately, lead to the intervention of the international organs established in the Convention<sup>145</sup> and, in the case of the Court, because this is requested by any State or the Commission.<sup>146</sup>

162. In addition, and as clearly revealed by the provisions of both the Vienna Convention on the Law of Treaties and the American Convention, the purpose is not to grant the Convention a specific hierarchy under either the domestic or the international legal system, but simply to establish that the international commitments made by the State that is a party to this instrument should be interpreted and applied in the international sphere, that is within the framework of the relations between the States Parties, and are enforceable in that sphere, as well as by persons or groups of persons or non-governmental entities, and that if domestic laws do not guarantee the rights recognized by the Convention, the States Parties should adopt the appropriate measures to ensure this.

163. Therefore, the pre-eminence, in the international sphere, of international law and of the Convention over any provision of domestic law is evident and unquestionable precisely because the Convention is an international instrument; that is, an instrument agreed between States and binding in their reciprocal relations in matters that concern the relations between the State and the persons subject to its jurisdiction and that, consequently, are no longer part of the State’s internal, domestic or exclusive jurisdiction or its margin of appreciation.

164. Accordingly, as established above, the control of conventionality by the Court is appropriate if the Commission finds that a decision of the State has violated the Convention, either because the State has not exercised the control of conventionality, or because, having done so, it has given its Constitution or domestic laws prevalence over the provisions of the Convention. In that case, and pursuant to Article 63(1) of the Convention, the Court shall indicate this in the judgment, ruling that the State must ensure the enjoyment of the right that was violated and remedy the consequences. Thus, the Convention reflects the provisions of the customary norms on State responsibility for internationally wrongful acts.<sup>147</sup> It should be recalled that the Court’s judgments

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<sup>144</sup> Art. 44 of the Convention: “Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.”

<sup>145</sup> Art. 33 of the Convention: “The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention: a. the Inter-American Commission on Human Rights, referred to as “The Commission;” and b. the Inter-American Court of Human Rights, referred to as “The Court.”

<sup>146</sup> Art. 61(1) of the Convention: “Only the States Parties and the Commission shall have the right to submit a case to the Court.”

<sup>147</sup> Art. 29: “Continued duty of performance. The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached

Art. 30. Cessation and non-repetition. The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, circumstances so require.”

Art. 31. Reparation. 1. The responsible State is under an obligation to make full reparation for the injury caused by the inter-nationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Art. 34. Forms of reparation. Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter

Art. 35. Restitution. A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit derived from restitution instead of compensation

usually include, in addition to restoration of the right that has been violated and the obligation of non-repetition, most of the forms of reparation established in the relevant customary norms; in other words, restitution, compensation and satisfaction. In sum, when complying with the provisions of the Convention, the Court is, ultimately, giving effect to the international responsibility of the State that is a party to the respective case.

165. In addition, and pursuant to Article 68 of the Convention,<sup>148</sup> the judgment delivered in the exercise of the control of conventionality by the Court in a contentious case submitted to it, is binding for the State Party to the respective case and for that particular case. Conversely, it is not binding for other cases concerning the same State or for the other States Parties to the Convention that have accepted the Court's jurisdiction but were not parties to the case in question. No international norm establishes that the Court's judgment has binding effects that go beyond the State that is a party to the respective case, or beyond that case. Thus, the Court follows the same tendencies as other international courts.<sup>149</sup> Consequently, its case law is not binding for States that are not parties to the case in question, unless a State, unilaterally, establishes this in its domestic law,<sup>150</sup> which could only be binding for that State.

166. Also, and pursuant to Article 68(1) of the Convention, it is the State that is a party to the case in which a judgment is delivered that must comply with this judgment; therefore, the judgment cannot be executed in its territory without its consent or participation. The Court was not designed to be, nor is it, a supranational organ; that is, with the authority to issue decisions directly applicable or enforceable in its States Parties without the intervention of the State affected by such decisions. Thus, it always requires the participation of that State, and this is so because there is no norm that accords the Court this authority. Rather, to the contrary, in this regard the Convention follows the general rule applicable to international courts.<sup>151</sup>

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Art. 36. Compensation. 1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Art. 37. Satisfaction. 1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation. 2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. 3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Art. 38. Interest. 1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result. 2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled."

<sup>148</sup> *Supra* footnote 22.

<sup>149</sup> Art. 59 of the Statute of the International Court of Justice: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

Art. 46(1) of the European Convention on Human Rights: "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties."

Arts. 46. and 3 of the Statute of the African Court of Justice and Human Rights: "Binding Force and Execution of Judgments. 1. The decision of the Court shall be binding on the parties. [...] 3. The parties shall comply with the judgment made by the Court in any dispute to which they are parties within the time stipulated by the Court and shall guarantee its execution.

<sup>150</sup> This could be the case of Costa Rica, where the Constitutional Chamber of the Supreme Court of Justice asserted in its Judgment 0421-S-90 that the jurisprudence of the Inter-American Court "shall – in principle – have the same status as the interpreted provision."

<sup>151</sup> Art. 46(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms or the European Human Rights Convention (amended by Protocol No. 14, which entered into force on June 1, 2010): "Binding force and execution of judgments. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties."

167. Lastly, it should be emphasized that, when the Court advises the General Assembly of the Organization of American States that the respective State Party has not complied with the judgment in a case to which it is a party, this ceases to be a jurisdictional matter, and becomes a political issue, in which the States of the inter-American human rights system must take the diplomatic measures they deem appropriate.<sup>152</sup>

168. It should be pointed out, however, that even in this eventuality, and given that the Court, pursuant to its rules of procedure, monitors compliance with the respective judgment,<sup>153</sup> compliance with the judgment could return to or continue in the domestic sphere.

169. Based on the above, it can be considered that the control of conventionality executed by the Court in the exercise of its contentious jurisdiction is similar to the control of constitutionality that exists under domestic legal systems, inasmuch as it is supported by the binding nature of the Convention, in the international sphere, for the States Parties that have accepted its jurisdiction. In other words, it does not have the preventive nature that characterizes the prior control of conventionality exercised by a state organ or the control executed by the Court in the sphere of its advisory and non-contentious jurisdiction, because the Court's decisions, under Articles 67 and 68 of the Convention, in other words, pursuant to its contentious jurisdiction, are final and non-appealable, and also compulsory for the State party to the case. Thus, in the international sphere, the control of conventionality executed by the Court is binding.

170. In short, compliance with the judgments of the Court and the system of international responsibility for non-compliance have been incorporated into the contemporary international legal system, under which the judgments lack direct binding force within the States Parties to the Convention that have accepted the Court's jurisdiction and, therefore, the Court does not have jurisdiction to execute or enforce compliance with its decisions. Accordingly, as indicated above, failure to comply with its decisions may ultimately become a political or diplomatic matter and leave the judicial sphere.

171. Without doubt, the control of conventionality exercised under the Court's contentious jurisdiction is useful, as the Court itself has indicated, "to apply international law, in this case international human rights law, and specifically, the American Convention and its sources, including the jurisprudence of this Court."<sup>154</sup> However, it is also true that it still does not play this role fully; of the 203 judgments on merits handed down by the Court, 25 have been archived because they have been executed fully, but 168 are at the stage of monitoring compliance with judgement within

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<sup>152</sup> Art. 46(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms or the European Human Rights Convention (amended by Protocol No. 14, which entered into force on June 1, 2010): "The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

<sup>153</sup> Art. 69 of the Court's Rules of Procedure: "Procedure for Monitoring Compliance with Judgments and Other Decisions of the Court. 1. The procedure for monitoring compliance with the judgments and other decisions of the Court shall be carried out through the submission of reports by the State and observations to those reports by the victims or their legal representatives. The Commission shall present observations to the State's reports and to the observations of the victims or their representatives. 2. The Court may require from other sources of information relevant data regarding the case in order to evaluate compliance therewith. To that end, the Tribunal may also request the expert opinions or reports that it considers appropriate. 3. When it deems it appropriate, the Tribunal may convene the State and the victims' representatives to a hearing in order to monitor compliance with its decisions; the Court shall hear the opinion of the Commission at that hearing. 4. Once the Tribunal has obtained all relevant information, it shall determine the state of compliance with its decisions and issue the relevant orders. 5. These rules also apply to cases that have not been submitted by the Commission.

<sup>154</sup> *Supra* footnote 98.



the system because they have not been fully complied with, and the OAS General Assembly has been advised about another 15 in application of Article 65 of the Convention.<sup>155</sup>

## CONCLUSION

172. Two different issues have been discussed above. One, the “recognition of the change of name in accordance with [or based on] gender identity” and “the patrimonial rights derived from a relationship between persons of the same sex,” and the other on the control of conventionality. However, among other aspects the two issues have one element in common; that is, they raise the issue of the Court’s role, its possibilities and its limitations with regard to the development of international human rights law and, consequently, of general international law also.

173. Indeed, the question arises in both cases of how far the Court’s jurisprudence can go in matters that are not expressly established in the Convention, and even in matters regarding which a margin of doubt exists about whether it does so implicitly.

174. Regarding the first issue, in this opinion, the undersigned has concluded that if the recognition of unions of same-sex couples and even marriage between them is sought, either the States of the Americas must recognize this, unilaterally, as some – the minority – already have, or that a treaty establishing this be adopted.

175. With regard to the control of conventionality, it could be said that if the intention was to establish the supranational nature of the Convention in the domestic sphere, so that the its provisions had a direct binding force within the States Parties to the Convention, even without the participation of its organs and with prevalence or primacy over their respective Constitutions – thus providing a definitive response to the issue of the relationship between the domestic law of the States and international human rights law – rather than a jurisprudential act of the Court, this would require the pertinent explicit and unequivocal decision by those with the authority to create an autonomous source of international law, such as a treaty, custom, general principles of law, or a unilateral legal act.

176. And the legitimacy and effectiveness of changes such as this would require a source that is not supplementary such as jurisprudence, which according to Article 38 of the Statute of the International Court of Justice is only a “subsidiary means for the determination of rules of law,” but rather one that serves, or is sufficient in itself, pursuant to the same article “to decide in accordance with international law” the pertinent disputes; that is, as indicated, an autonomous source of international law.

177. This requirement is even clearer in the case of States that are obliged to exercise democracy effectively, as are the States of the Americas under the Inter-American Democratic Charter, which interprets the provisions of the OAS Charter and of the Convention.<sup>156</sup> Therefore, it

<sup>155</sup> Annual Report, Inter-American Court of Human Rights, 2016.

<sup>156</sup> “BEARING IN MIND that the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights contain the values and principles of liberty, equality, and social justice that are intrinsic to democracy; REAFFIRMING that the promotion and protection of human rights is a basic prerequisite for the existence of a democratic society, and recognizing the importance of the continuous development and strengthening of the inter-American human rights system for the consolidation of democracy” and “BEARING IN MIND the progressive development of international law and the advisability of clarifying the provisions set forth in the OAS Charter and related basic instruments on the preservation and defense of democratic institutions, according to established practice,” Paras. 8, 9 and 20, respectively of the Preamble of the Inter-American Democratic Charter (adopted at the first plenary session of the OAS General Assembly, held on September 11, 2001)

would not be the most appropriate way forward that the jurisdictional function<sup>157</sup> replace the normative function expressly assigned by the Convention to the States Parties<sup>158</sup> in matters concerning such profound changes as those mentioned.

Eduardo Vio Grossi  
Judge

Pablo Saavedra Alessandri  
Secretary

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<sup>157</sup> *Supra* footnote 8.

<sup>158</sup> *Supra* footnotes 16 and 17.

**CONCURRING OPINION OF  
JUDGE HUMBERTO ANTONIO SIERRA PORTO**

**INTER-AMERICAN COURT OF HUMAN RIGHTS**

**ADVISORY OPINION OC-24/17  
OF NOVEMBER 24, 2017  
REQUESTED BY THE REPUBLIC OF COSTA RICA**

**GENDER IDENTITY, AND EQUALITY AND NON-DISCRIMINATION WITH  
REGARD TO SAME-SEX COUPLES**

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

1. With my usual respect for the decisions of the Court, I submit the following concurring opinion attached to Advisory Opinion – 24/17 (hereinafter “OC-24”) with the intention of presenting in detail the reasons why I voted in favor of operative paragraphs 3 and 5 of the decision. The analysis will be made as follows: A. Introduction; B. The requirement of law (“*reserva de ley*”) in the American Convention; C. The requirement of law and the functions of law in relation to human rights, and D. the Costa Rican case.

**A. INTRODUCTION**

2. The purpose of this opinion is to elaborate on one aspect of a specific point that, although it was touched on by the Court in the text of OC-24, was not developed fully and extensively: this is the bases on which the powers of the Executive branch are founded to regulate human rights by regulations in certain cases. Thus, the main hypothesis of this opinion is to demonstrate that the principle of legality and the guarantee of the requirement of law cannot be used to prevent the full exercise of human rights, because this principle and the consequent guarantee also have limits.

3. In this regard, paragraph 161 of the opinion establishes that: “it can [...] be indicated that the procedure for a change of name, amendment of the photograph and rectification of the reference to sex or gender in the records and on the identity documents so that these conform to the self-perceived gender identity does not necessarily have to be regulated by law, because it should consist of a simple procedure to verify the applicant’s intention.”<sup>1</sup>

4. Meanwhile, paragraph 171 of OC-24 determines, with regard to the Costa Rican procedure for changing identity data so that it conforms to the self-perceived gender identity of the applicant, that “[t]he State of Costa Rica, to ensure a more effective

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<sup>1</sup> OC-24, para. 161.

protection of human rights, may issue regulations that incorporate these standards into an administrative procedure that it may provide in parallel.”<sup>2</sup>

5. Consequently, the intention of this opinion is to present in detail the reasons why I voted in favor of operative paragraphs 3 and 5 of OC-24 and, in more general terms, to examine the international principle on which the Inter-American Court determined the need for States to introduce – by regulation and in specific circumstances – ways other than the voluntary jurisdiction proceeding in the case of requests to change data in official records and documents based on the self-perceived gender identity. It describes what, in my opinion, is the *ratio decidendi* for the Court's decision that the Executive branch, or the Administration, as applicable, may issue, in certain circumstances such as those of this case, regulations that ensure the effective observance of human rights.

## **B. THE “REQUIREMENT OF LAW” IN THE AMERICAN CONVENTION**

6. I consider that this Advisory Opinion of the Court did not rule clearly and systematically on the circumstances in which a “law” in a formal and substantive sense<sup>3</sup> is required for States to comply with their international obligations. The Opinion adopted by the Court refers to the possibility that the procedure to amend the photograph and rectify the reference to sex or gender in the respective public records does not necessarily need to be regulated by a law, but rather this can be done by a regulation or a decree issued by the Executive branch.

7. During the public hearing held on May 16 and 17, 2017, the delegation from the Office of the Costa Rican Ombudsperson referred to the problem underlying the position of some public institutions that insist on the need to apply the “requirement of law” to allow the exercise of a right such as the right to gender identity. In this regard, this Office indicated that, “in the jurisprudence [...] and, in reality, in the discourse, above all, in the Legislative Assembly, there is a tendency to reverse the idea of the principle of the “requirement of law”; in other words, increasingly we see in statements of both the Constitutional Chamber and legislators that a law must be enacted to allow an action, although not necessarily to limit it [...]. In the opinion of the Office of the Ombudsperson, under the Civil Registry's current normative framework, an amendment would not be necessary, but rather simply an interpretation by this Court that permits applying a control of conventionality directly to interpret that there is no restriction to the right to identity that limits the possibility of a name change using administrative channels.”<sup>4</sup>

8. Regarding the “requirement of law,” it should be recalled that, historically, this mechanism was created to distribute the legislative competence between Congress (Parliament) and the Executive (King) at a time when the basis for the State's legitimacy was the result of the concurrence between the democratic principle and the monarchic principle. Nevertheless, today, the normative status of the Constitution is derived from the democratic principle (whether it be called the sovereignty of the

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<sup>2</sup> OC-24, para. 171.

<sup>3</sup> See, in this regard, The Word “Laws” in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, paras. 26, 27 and 32.

<sup>4</sup> Cf. Public hearing of May 16, 2017, intervention of the Office of the Costa Rican Ombudsperson.

people or national sovereignty), and the basis for the validity and effectiveness of laws in the domestic sphere lies with the will of the people.

9. According to this logic of democratic legitimacy, the main grounds for the fundamental rights and freedoms recognized in the American Convention include the democratic principle and the values inherent in the rule of law. Thus, the Inter-American Court has indicated that “[t]he concept of rights and freedoms as well as that of their guarantees cannot be divorced from the system of values and principles that inspire it. In a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning.”<sup>5</sup>

10. Nevertheless, I consider it appropriate to recall that the Court has indicated that the mere existence of a democratic regime does not guarantee, *per se*, permanent respect for human rights.<sup>6</sup> In this regard, the Court has asserted that “[t]he democratic legitimacy of specific acts or deeds in a society is limited by the international norms and obligations that protect the human rights recognized in treaties such as the American Convention, so that the existence of a truly democratic regime is determined by both its formal and substantial characteristics.”<sup>7</sup> It is a historical reality that rights, and particularly those of minorities or sectors subject to deeply-rooted discriminatory stereotypes, may be subject to abuse by the parliamentary majorities.

11. The Court also ruled on the “requirement of law” in matters related to fundamental rights in the order on monitoring compliance in the *case of Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*. In the order, the Inter-American Court indicated that the need to regulate the technique of *in vitro* fertilization “should not represent an impediment to the exercise of the human rights to privacy and family life,”<sup>8</sup> because such rights should “have direct legal effects.”<sup>9</sup> On these grounds, added to the fact that the Court did not indicate what specific type of norm should be issued to comply with its judgment,<sup>10</sup> the Court considered that the technique of *in vitro* fertilization “could be carried out and monitored under the laws, technical regulations, medical protocols and health standards or any other applicable type of norm.”<sup>11</sup> This was established to prevent the rights protected by the Court’s judgment becoming

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<sup>5</sup> *Habeas corpus in Emergency Situations (Arts. 27.2, 25.1 and 7.6 American Convention on Human Rights)*. Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 26.

<sup>6</sup> *Cf. Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, para. 239.

<sup>7</sup> *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, para. 239.

<sup>8</sup> *Case of Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of February 26, 2016, *Considerandum* 36.

<sup>9</sup> *Case of Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of February 26, 2016, *Considerandum* 36.

<sup>10</sup> *Cf. Case of Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of February 26, 2016, *Considerandum* 35.

<sup>11</sup> *Case of Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of February 26, 2016, *Considerandum* 36.

illusory.<sup>12</sup> The foregoing was understood to be “without prejudice to the Legislature issuing a subsequent regulation in keeping with the standards indicated in the judgment.”<sup>13</sup>

12. That said, it is undeniable that the Court has been consistent in indicating the “requirement of law” for certain actions of the public authorities, specifically those aimed at limiting basic rights. From its early jurisprudence, this Court has indicated that “[i]n the spirit of the Convention, this principle [of legality] must be understood as one in which general legal norms must be created by the relevant organs pursuant to the procedures established in the Constitutions of each State Party, and one to which all public authorities must strictly adhere. In a democratic society, the principle of legality is inseparably linked to that of legitimacy by virtue of the international system that is the basis of the Convention as it relates to the ‘effective exercise of representative democracy,’ which results in [...] the respect for minority participation and the furtherance of the general welfare, *inter alia*”<sup>14</sup> [underlining added].

13. Bearing this in mind, I consider that Article 2 of the Convention<sup>15</sup> is especially relevant to determine whether it is necessary to issue laws in the formal sense so as to respect and ensure the rights recognized in the Convention. Regarding the general obligation to adapt domestic laws to the Convention, on several occasions the Court has asserted that “[u]nder the law of nations, a customary law prescribes that a State that has concluded an international agreement must introduce into its domestic laws whatever changes are needed to ensure execution of the obligations it has undertaken.”<sup>16</sup> In the American Convention this principle is contained in Article 2, which establishes the general obligation of each State Party to adapt its domestic law to the provisions of the Convention in order to ensure the rights recognized therein, which means that the domestic legal measures must be effective (principle of the *effet utile*).<sup>17</sup>

14. In this regard, I consider that the scope of Article 2 cannot be understood as if this provision meant that the fundamental rights and freedoms always require a law or “legislative interpretation.” In my opinion, it would be a reasoning *ad absurdum* to understand that no fundamental or human right could be applied, respected or made effective if there was no legislation. Thus, human rights treaties are typically considered to be self-executing treaties. For example, it would be irrational to consider

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<sup>12</sup> Cf. *Case of Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of February 26, 2016, *Considerandum* 36.

<sup>13</sup> *Case of Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of February 26, 2016, *Considerandum* 36.

<sup>14</sup> The Word “Laws” in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 32.

<sup>15</sup> Article 2. Domestic Legal Effects: Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

<sup>16</sup> *Case of Garrido and Baigorria v. Argentina. Reparations and costs*. Judgment of August 27, 1998. Series C No. 39, para. 68; and *Case of Heliodoro Portugal v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of August 12, 2008. Series C No. 186, para. 179.

<sup>17</sup> Cf. *Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2009. Series C No. 209, para. 288.

that, without laws allowing conscientious objection in educational matters, the right to freedom of thought could not be effective.

15. Consequently, the “requirement of law” is not a mechanism that seeks to weaken the effectiveness of international human rights treaties and cannot be used as a mechanism to suspend their effectiveness. To the contrary, the American Convention calls for an integral reading and States must ensure its practical effects on this basis.

16. In this regard, it is pertinent to recall that, since the landmark judgment in the case of *Velásquez Rodríguez v. Honduras*, the Court has considered that the obligation to ensure rights entails “the duty of the States Parties to organize the government apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.”<sup>18</sup>

17. That said, the doctrine of the control of conventionality developed by the Court means that not only the enactment or elimination of provisions under domestic law ensures the rights contained in the American Convention in keeping with the obligation included in Article 2 of this instrument. It also requires the development of state practices leading to the effective observance of the rights and freedoms that the Convention embodies. Consequently, the existence of a norm does not guarantee, *per se*, that its application is satisfactory. It is also necessary that the application of the laws or their interpretation, as judicial practice and a manifestation of state public order, is adapted to the purpose sought by Article 2 of the Convention.<sup>19</sup>

18. This means that the Convention – and the rights recognized therein – have direct legal effects, which supposes or signifies that all judicial agents have a direct application mandate and, in general, this does not require *interpositio legislatoris*, legislative interpretation.

19. Consequently, in my opinion, it is necessary to weigh the requirements of legality against the categorical imperative of the validity and effectiveness of human rights and against the direct effects of the international treaties that recognize and protect them. The only restrictions or limitations that are permitted, as noted above, are those that require the intervention of the people’s representatives through the State legislature. However, this does not mean that laws, in the formal or substantive sense, are always required to make human rights effective or to ensure their respect and guarantee. Indeed, it would be erroneous to consider that the regulation of a right is the same as its restriction or limitation. As indicated, the guarantee of the “requirement of law” seeks to create a system of checks and balances that calls for greater democratic legitimacy when restricting the exercise of a right, but it is not viable to require this same standard when the purpose is to guarantee a specific right, especially when the intention is to protect those who face numerous inequalities.

### **C. THE “REQUIREMENT OF LAW” AND THE FUNCTION OF LAW IN RELATION TO HUMAN RIGHTS**

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<sup>18</sup> *Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 166.

<sup>19</sup> *Cf. Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2009. Series C No. 209, para. 338.

20. Based on the considerations in the preceding section, even though the importance of the guarantee of the “requirement of law” has been emphasized as a safeguard and a limitation to the restriction by the State of the rights contained in the Convention, it was also noted that this same “requirement of law” cannot be used as a mechanism to obstruct real compliance with the fundamental rights or to suspend the full force of human rights. Neither the “requirement of law,” nor the principle of legality, nor the will of parliamentary majorities can be used to nullify human rights; such mechanisms cannot diminish the effectiveness of the rights, and they cannot be used as grounds to oppress certain sectors of society.

21. A recurring argument used to consider that the “requirement of law” is a mechanism that always requires *interpositio legislatoris* for the application and enjoyment of human rights, consists in understanding that the “requirement of law” is a mechanism to establish the content of the essential core of fundamental or human rights (as appropriate in the domestic or the international sphere). That is, we can only determine the intangible content of human rights if the legislator defines this in a law. This argument seeks to make the law a requirement *sine qua non* for the effective enjoyment of the right. This way of understanding the validity of treaty-based rights and, possibly, fundamental constitutional rights (when these coincide, I insist) is based on understanding that in order to regulate a right a “formal” law must be produced; that is, a law enacted by the Legislature. This argument is erroneous, among other reasons, because the very concept of the core or essential content means that the law cannot nullify or modify it.<sup>20</sup>

22. The starting point for the need to use the “requirement of law” is that, although *prima facie* it is necessary – in certain circumstances, *interpositio legislatoris* is a treaty-based requirement – it may be desirable but not essential for the effective enjoyment of the human rights recognized in the Convention.

23. The distinction between the two scenarios in which the principle of the “requirement of law” would or would not be applicable can be evaluated and analyzed by approaching the problem of the “requirement of law” in the case of fundamental rights from the perspective of the role played by the law in relation to those rights.

24. Thus, in general, it could be understood that, essentially, the law has three functions in relation to the fundamental human rights: (i) it systematizes them within the legal system by weighing and harmonizing them; (ii) it establishes or defines human rights, and (iii) it updates the content of human rights.

25. Regarding the first function, that of systematizing human rights within the legal system by weighing and harmonizing them, it should be recalled that human rights permeate the whole legal system. Accordingly, all laws are directly or indirectly related to them, either by establishing limits, conditions or assumptions for their exercise, or by defining precedence *prima facie* when there is a conflict between human rights or between these rights and other internationally protected rights.

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<sup>20</sup> The problem of when it should be understood that the “requirement of law” is necessary, and also the limits and purpose of this mechanism have been the subject of debates in Colombian constitutional jurisprudence owing to the sphere of competence of the statutory law to regulate fundamental rights (art. 152(a)). The main criterion traditionally employed by the Colombian Constitutional Court consists in using the concept of “essential content” as a criterion to determine the need to enact laws. Some aspects of this discussion can be seen in my separate opinion to the Judgment of the Constitutional Court of Colombia C-662 of 2009 on the President’s objections to the draft Sandra Ceballos Act establishing actions for the comprehensive treatment of cancer in Colombia.



26. However, when the right and its essential content is clearly described in the American Convention on Human Rights, or eventually in domestic law (for example, in the Constitution), the existence of laws to weigh or harmonize them is not essential (although always desirable). In this situation, in specific cases, the legal protection provided by domestic law may be sufficient. For example, the foregoing could be implemented by the effective protection of these rights by either ordinary mechanisms or special mechanisms such as the *amparo* proceeding or the remedy for protection of constitutional rights. Consequently, the laws that weigh rights may not be necessary, despite their importance and validity. The need to weigh and harmonize rights that could conflict does not negate the validity of rights that are worded clearly. The requirement of weighing rights is a concept that is not opposed to the effective validity of the treaty-based rights.

27. Based on the above and bearing in mind the *pro persona* principle, it can be understood that laws to weigh rights do not constitute a requirement *sine qua non* for the validity or the protection of various human rights, such as the right to life and to dignity. Indeed, the *pro persona* principle contained in Article 29 of the American Convention stipulates that no provision of this Convention shall be interpreted as: "(a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party [...]"<sup>21</sup> A correct interpretation, *favor libertatis*, does not understand that the "requirement of law" is a prerequisite for the effective exercise or enjoyment of the right to life or, in this case, to a name and to recognition of juridical personality.

28. With regard to the second function, which relates to establishing or defining human rights, it is understood that, as a general rule, legal definitions of fundamental rights contained in the Convention and in the Constitutions of the States are extremely abstract and general, so that it is for the interpreters – in particular, the legislators – to establish the scope of these rights as well as their sphere of application, and to indicate their boundaries and their internal limits. Therefore, under this function, according to which implementing legislation is required when the right is "merely expressed," the sphere of the "requirement of law" becomes pertinent when the wording of the right is vague or ambiguous so that it does not permit, with acceptable levels of objectivity, the application and/or respect for the right in specific cases. Consequently, if clarification of the content of human rights is sought, the enactment of a formal law is necessary and the "requirement of law" arises.

29. In this regard, it should be clarified that not all provisions that define the sphere of conduct protected by a human right should be covered by a formal and substantive law, because this would suppose an impossible burden for the legislator who would be required to define, in abstract, all the possible manifestations of the fundamental right regulated. Furthermore, it would entail the risk that those conducts that were part of the sphere of protection of the right and had not been explicitly included would not be protected by the domestic mechanisms for the defense of human rights.

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<sup>21</sup> American Convention on Human Rights, Article 29.

30. The third role that the law plays is that of updating the content of human rights. Indeed, the legal system should evolve in parallel to society and cannot ignore the changes in society, at the risk of becoming ineffective. Thus, in the case of human rights, the law must maintain in effect the scope of the rights and freedoms recognized by the Convention and by domestic law. Thus, the law must regulate new ways of exercising human rights, closely linked to technological progress and developments. Like the function of establishing rights, the laws that update rights, indicate meanings, scopes and contents that the law did not foresee or that simply did not exist when the right was established. One example of this would be the scope of freedom of expression and *habeas data*, which could not be imagined 50 or 100 years ago. However, it cannot be supposed that updating the scope of the provisions occurs exclusively through the enactment of new laws, because the Legislature usually does not have the capacity to respond promptly to the new needs; thus, in many cases, this evolution is implemented by the organs with competence to interpret human rights treaties or the Constitutions of the States.

31. In conclusion, the direct judicial effectiveness, the normative effects of the rights established in the American Convention, is compatible with the existence of the “requirement of law” when this is necessary or appropriate in accordance with the functions of the definition, harmonization or updating of rights. However, in the absence of a law, the exercise of the treaty-based rights and the obligation to ensure their effective enjoyment allows judges to take a decision that protects those whose rights have been violated. Furthermore, in situations in which the requirements of defining, weighing or harmonizing rights are not essential for determining the obligations derived from the treaty-based right, in addition to judicial protection, the right may be protected by regulation – or rather there is obligation to protect it in this way.

#### A. THE CASE OF COSTA RICA

32. Regarding the specific situation referred to in the questions raised by Costa Rica in the request for an advisory opinion concerning the regulation of the procedure to amend the data in the official records and document to conform to the self-perceived gender identity, it can be seen that the rights to a name and to recognition of juridical personality are established in the American Convention.<sup>22</sup> Furthermore, the recent case law of the Inter-American Court has clearly established that the right to identity is a right protected by the American Convention even though it is not expressly established among the treaty provisions.<sup>23</sup>

<sup>22</sup> American Convention on Human Rights, Article 3. Right to Recognition of Juridical Personality. Every person has the right to recognition as a person before the law. Article 18. Right to a Name. Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.

<sup>23</sup> Cf. *Case of Gelman v. Uruguay*. Merits and reparations. Judgment of February 24, 2011. Series C No. 221, para. 122; *Case of Fornerón and daughter v. Argentina*. Merits, reparations and costs. Judgment of April 27, 2012. Series C No. 242, para. 123, and *Case of Rochac Hernández et al. v. El Salvador*. Merits, reparations and costs. Judgment of October 14, 2014. Series C No. 285, para. 116. Also, OC-24, para. 90: “[...] regarding the right to identity, the Court has indicated that, in general, it may be conceived as the series of attributes and characteristics that individualize a person in society and that encompass several rights according to the subject of rights in question and the circumstances of the case. The right to identity may be affected by numerous situations or contexts that may occur from childhood to adulthood. Although the American Convention does not specifically refer to the right to identity under this name, it does include other rights that are its components. Thus, the Court recalls that the American Convention protects such elements as rights in themselves; however, not all these elements will necessarily be involved in all cases

33. Consequently, regarding the hypotheses for the name change procedure based on gender identity, there can be no doubt about the right in question or how it is expressed. Accordingly, in the situation described in OC-24 regarding the judicial nature of the procedure, its regulation in order to give effect to an individual's gender identity does not constitute a law of "implementation" in the sense that the provision regulating the procedure must comply with the functions of defining or updating a right. Moreover, the situation does not necessarily entail a weighing or harmonizing function, because the procedure for recognition of gender identity does not refer, nor should it refer to a disputed issue, to a learning process, to the settlement of a dispute, or to the determination of rights.

34. To the contrary, as indicated in this Advisory Opinion, it is a procedure that should be merely declarative and "may never become an occasion for external scrutiny and validation of the sexual and gender identity of the person requesting its recognition."<sup>24</sup> Indeed, it has been established that "any decision concerning a request for amendment or rectification based on gender identity should not be able to assign rights, it may only be of a declarative nature because it should merely verify whether the applicant has met the requirements related to the request."<sup>25</sup>

35. Therefore, the position maintained in this opinion and, in my understanding, in the Advisory Opinion, is that the nature of the provision that regulates the procedure for recognition of the self-perceived gender identity corresponds to those provisions that constitute or define human rights that are clearly described in the American Convention (the rights to a name and to recognition of juridical personality – Articles 18 and 3 of the American Convention) or in the case law of the Inter-American Court (right to identity). Thus, taking into account that this type of regulation regarding the path for recognition of the right to a change of name does not necessarily need to be included in a law, although it should be included in a general legal norm (*supra* para. 27), this type of procedure can be regulated by administrative regulations or decrees issued by a State's Executive branch.<sup>26</sup>

## B. CONCLUSION

36. Based on the above, I consider that I have explained in greater detail the reasons why I have agreed with the position of the Inter-American Court in this matter. This is an extremely important issue for the effective enjoyment of human rights, not only in Costa Rica, but also in other countries of the region where a restrictive interpretation of the guarantee of the "requirement of law" has prevented or paralyzed the regulation of such rights. For example, in some States of the region this same argument has been used to obstruct the regulation of two issues on which it is urgent to have clarity regarding their application; these are access to abortion in the three situations in which it is permitted, and the type of procedures required to be able

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that concern the right to identity. Moreover, the right to identity cannot be confused with, or reduced or subordinated to one of the rights that it includes, nor to the sum of them. For example, a name forms part of the right to identity, but it is not the only component. In addition, this Court has indicated that the right to identity is closely related to human dignity, the right to privacy and the principle of personal autonomy (Articles 7 and 11 of the American Convention)."

<sup>24</sup> OC-24, para. 158.

<sup>25</sup> OC-24, para. 160.

<sup>26</sup> Cf. OC-24, paras. 161 and 171.

to apply euthanasia legally. Thus, I hope that this opinion contributes to convincing States to consider that the guarantee of the "requirement of law" cannot be used as an obstacle to the development of rights and, particularly, to compliance with the obligations of international law that they assume on ratifying human rights treaties such as the American Convention.

Humberto A. Sierra Porto  
Judge

Pablo Saavedra Alessandri  
Secretary

Appendix 4:  
Declaration by the Petitioner  
(including Exhibits MAT1 and MAT2)

**DECLARATION OF MAURICE ARNOLD TOMLINSON**  
**IN SUPPORT OF PETITION BEFORE THE**  
**INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**  
**CONCERNING JAMAICA'S CONSTITUTIONAL BAN**  
**AGAINST SAME-SEX MARRIAGE**

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**BETWEEN:**

**MAURICE ARNOLD TOMLINSON**

**PETITIONER**

**AND**

**THE STATE OF JAMAICA**

**DEFENDANT**

I, **MAURICE ARNOLD TOMLINSON**, declare as follows:

1. I am a Jamaican national and have residences at 19 Angella Close, West Green, Montego Bay in the parish of Saint James, Jamaica and at 411 Fieldstone Drive, Kingston, Ontario, Canada. I am the Petitioner in this matter.
2. I regularly travel between my homes in Jamaica and Canada.
3. I am an attorney-at-law called to the Jamaican bar in 2006 and I am a gay man.
4. Due to intense societal homophobia and religious doctrine that I believed, which said that I could be "cured" of my homosexuality through marriage to a woman, I married my best female friend in 1999. Although she knew about my homosexuality she also subscribed to the fallacy that an opposite-sex marriage could end my same-sex attraction. Our marriage ended in an acrimonious divorce in 2004 because I was not able to deny my homosexuality. I eventually admitted to my wife that I could only be intimate with her by thinking about other men. I also cheated on her with other men.

5. After my divorce I then had relationships with men and in 2010 I met Thomas (Tom) Decker at a conference.
6. Tom was a gay Toronto Police Officer and at the conference he spoke about his work trainings police on the human rights of LGBT people. As described below, my own work involved interacting with police on behalf of LGBT people and so Tom and I connected about our similar areas of work.
7. A mutual friend at the conference noticed that there was also an attraction between Tom and I and she arranged for a double-date. Once the conference ended Tom and I continued dating and in 2011 we married under the laws of Canada.
8. Tom and I celebrate our seventh wedding anniversary this year.
9. I migrated to Canada in 2012 after my marriage to join my husband. I became a Canadian citizen in 2018.
10. I had to flee to Canada before my application for Canadian residence was complete because of death threats that I received when a Jamaican newspaper published an unauthorized photo of my Canadian wedding on their front page<sup>1</sup>. I have since returned to Jamaica on multiple occasions to work and visit my very sick parents, both of whom suffer from degenerative diseases. My return to Jamaica is always done with a private security protocol after Jamaican police failed to offer me protection, despite repeated requests and an IACHR Precautionary Measure against the state of Jamaica on my behalf<sup>2</sup>. As a former Toronto Police Service officer Tom developed a rigorous security protocol to ensure my safety in Jamaica. I continue to rely on his support for my protection.
11. Prior to my migration I was the only child of my parents and their closest family member left in Jamaica. My two other bothers as well as my aunt and uncles on both sides have all migrated. I therefore provided physical, financial and emotional support to my parents who both suffer from chronic degenerative illnesses.
12. Both my parents have recently suffered significant health setbacks and had to be hospitalized on multiple occasions.<sup>3</sup> I therefore wish to return to Jamaica to look after my parents in their rapidly declining health as they are now being largely cared for by strangers. And even some friends on whom they rely are preying on their increased vulnerability.<sup>4</sup>

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<sup>1</sup> <http://www.jamaicaobserver.com/news/Jamaican-gay-activist-marries-man-in-Canada>.

<sup>2</sup> Exhibit MAT 2.

<sup>3</sup> <http://jamaica-gleaner.com/article/letters/20180213/anti-gay-rant-cornwall-regional>.

<sup>4</sup> <http://jamaica-gleaner.com/article/letters/20170304/religious-bigots-preyed-sick-mom>.

13. I plan to repatriate to Jamaica with my husband and I understand that in order for him to live and work in the country<sup>5</sup> with me he must pay JA\$108,000 for a maximum one-year work permit<sup>6</sup> that he is not guaranteed to receive. To avoid this exorbitant annual fee, he must become a naturalized citizen of the country. If he is not a naturalized citizen, he is only allowed to remain in the country for a maximum of three months at a time.
14. However, I further understand that although section 7(1) the constitution of Jamaica grants the right to heterosexual spouses to become naturalized citizens, this is impossible for homosexual spouses. This is because section 18 (2) of constitution, which is part of the Charter of Fundamental Rights and Freedoms (the Charter) bans the legal recognition of any form of non-heterosexual union, including marriage.
15. As a result of the ban on the legal recognition of our marriage my husband would also not qualify for any spousal benefits that as a Jamaican I would be able to grant to an opposite-sex partner. This includes national insurance and pension. He would also be a legal stranger to me and so would not be able to make any urgent health related decisions on my behalf if I were incapacitated. My only other relatives in Jamaica are my aged and very ill parents. Without my husband I could be left to the mercy of strangers making decisions about my welfare and health care.
16. I therefore believe that section 18(2) of the Jamaican constitution violates my rights to non-discrimination; respect for physical, mental and moral integrity; liberty; a hearing for determination of rights; privacy; freedom of expression; family life; non-discrimination and judicial protection guaranteed under articles 1, 5, 7, 8, 11, 13, 17, 24 and 25 of the American Convention on Human Rights (the Convention), to which Jamaica is a state party.

### **My Work for LGBT Human Rights**

17. For the past 20 years, I have worked to eliminate stigma and discrimination against lesbian, gay, bisexual and transgender (LGBT) persons in general and men who have sex with men (MSM) in particular. I pursue this work because of my commitment to universal respect for human rights that reflect the essential dignity of the person. I believe that this constitutional ban on the recognition of my same-sex marriage violates my dignity and several other rights guaranteed under the Convention.

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[https://www.mset.gov.jm/sites/default/files/pdf/Foreign%20Nationals%20and%20Commonwealth%20Citizens,%20etc.%20Act\\_0.pdf](https://www.mset.gov.jm/sites/default/files/pdf/Foreign%20Nationals%20and%20Commonwealth%20Citizens,%20etc.%20Act_0.pdf).

<sup>6</sup> <https://jis.gov.jm/information/faqs/applying-for-a-jamaican-work-permit/>.



18. From January to December 2010, I served as Corporate Secretary and Legal Advisor for the Jamaica Forum for Lesbians, All-Sexuals and Gays ("J-FLAG"), which is Jamaica's major LGBT organization.
19. From August 2009 to August 2012, I was a lecturer in law at the University of Technology, Jamaica where I taught a variety of law courses, including human rights and discrimination law.
20. In 2010, I was appointed Legal Advisor, Marginalized Groups for the international non-governmental organization (NGO) AIDS-Free World. In this capacity, I worked with J-FLAG and other Jamaican LGBT and HIV groups to document abuses against LGBT Jamaicans, including MSM in particular, in an attempt to advocate for changes to anti-gay laws and policies across the region.
21. Since January 2015, I have been employed as a Senior Policy Analyst with the Canadian HIV/AIDS Legal Network ("Legal Network"). In this capacity, I continue working with various Caribbean LGBT groups to document abuses and other acts of violence against Caribbean MSM and other LGBT people and to advocate for the human rights of LGBT people in countries of the region.
22. In 2015 I filed a constitutional claim before the Jamaican Supreme Court challenging sections 76, 77 and 79 of the *Offences Against the Person Act*. This 1864 British-colonially imposed anti-sodomy law criminalizes any form of male same-sex intimacy. This matter is currently on hold while the Court of Appeal decides on whether the Public Defender has standing to join the case.<sup>7</sup> I had acted as the lawyer for another claimant challenging this law, but he was eventually forced to drop the case because of death threats that he and his family received. I decided to become the new claimant because, among other things, this outdated and unjust law directly affects my right to intimacy with my husband in Jamaica and threatens us with imprisonment every time we visit my homeland.
23. As a result of my advocacy for the human rights of LGBT people, including in Jamaica, I have been subjected to numerous death threats as described below. These threats significantly intensified in 2012 after my marriage became known in Jamaica.<sup>8</sup>
24. As described above, my husband was a Toronto Police Officer and he designed a security protocol to ensure my safety on my frequent trips to Jamaica to see my sick parents and for work. I would therefore need his emotional, financial and physical support for my return to Jamaica as he will be indispensable to ensure my protection. As described below, the Jamaican police have done little to protect me from threats associated with my advocacy despite being specifically instructed to do so by the Inter-American Commission on Human Rights.

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<sup>7</sup> <http://nationwideradiojm.com/public-defender-appeals-rejection-from-buggery-law-challenge/>.

<sup>8</sup> <http://www.jamaicaobserver.com/news/Jamaican-gay-activist-marries-man-in-Canada>.

## **Personal knowledge and experience of my sexual orientation**

25. From as far back as I can remember I have been sexually attracted to males. I and many others have been told, including by members of the public and some religious leaders, that homosexuality is a function of some childhood abuse or absent parents<sup>9</sup>. However, my two brothers and I were raised in a loving Christian home with two heterosexual parents and I was never sexually molested or suffered any unusual childhood trauma – other than the substantial psychological harm of constantly being subjected, from various quarters, to the message that my sexual attraction to males was wrong, sinful and criminal.

26. In 2011 bioethicist Professor Udo Schuklenk of Queen's University conducted research on the disturbingly high HIV prevalence rate among Jamaican MSM (31.8%) and the implications for public health. Among other things he found that anti-gays laws drove MSM underground, away from effective HIV interventions and:

***Homosexual men in Jamaica rarely ever live in monogamous relationships because of the security risks involved in living with a member of the same sex over longer periods in the same household.***

A copy of Professor Schuklenk article is attached and marked as Exhibit "MAT 1".

27. Sadly, the situation described by Dr. Schuklenk remains much the same today as MSM and other LGBT couples who wish to live undisturbed and free from harassment and violence must either pay a very high premium for accommodation or risk being forcibly evicted or even killed.

28. Growing up in a fundamentalist evangelical church, I was repeatedly told by my parents and church leaders that being homosexual was wrong. I therefore resisted acknowledging my sexual attraction to men and even though I had relationships with men, they did not last long because I was always consumed with guilt about my sexual orientation and pushed my partners away.

29. After one such relationship with another man ended, I reconnected with my best female friend from university. We had known each other for nearly ten years and she knew about my sexual orientation. However, we both believed in our church's teaching that homosexuality could be "cured" by regular heterosexual intercourse and prayer. We married in 1999 and regrettably, I found that I was only able to be physically intimate with my wife by thinking about men.<sup>10</sup> I also engaged in furtive same-sex encounters while I was married, as the only way to experience full sexual satisfaction. I ended the marriage after four years when I realized that I

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<sup>9</sup> <http://jamaica-gleaner.com/article/letters/20160116/piercing-questions-maurice-tomlinson>.

<sup>10</sup> <http://www.jamaicaobserver.com/news/-I-tried-not-to-be-gay-by-getting-married----Tomlinson>.

could no longer keep cheating on my best friend and using her as a “mask” and “cure” for my homosexuality.

30. I met my husband, Thomas Decker, in 2009 at an International Lesbian and Gay Association (ILGA) conference in São Paulo, Brazil. We were married on August 28, 2011 in Toronto, Canada.
31. I am now able to fully experience my sexuality in a committed, loving, nurturing relationship that harms no one.
32. My family has struggled to accept my same-sex marriage and my older brother has completely cut me off. My father’s oldest sister (my aunt) who lives in the United States has continually urged my father to disown me and to prevent my husband from visiting my parent’s home. My father initially wanted nothing to do with me after my marriage was made public and he asked that my husband not visit their home with me. Thankfully, we are now reconciled, and he has since changed his mind about my husband coming to his home.
33. My parents have been discriminated against because of my marriage. My father drives a tour bus and he is regularly harassed by his co-workers because of my marriage. My very ill mother was told by her pastor that the reason God has not cured her is because she will not disown me.

### **Fear of Persecution**

34. Jamaican LGBT people who dare to engage in same-sex intimacy or form same-sex unions are often subject to persecution.
35. As a lawyer, I have been asked to assist numerous gay Jamaicans who were found by police engaging in intimate relations with other men in private. My clients were usually taken to the police station or the nearest automated teller machine (ATM) and “offered” the option of paying the police officers a bribe or having their personal information released to the local media.<sup>11</sup> Such a revelation would have meant professional and possibly physical death, so my clients often paid the bribes.
36. I have a real and tangible fear, based on such cases, of being prosecuted and convicted for engaging in any form of intimacy with my husband in Jamaica. This fear is heightened since as an activist for the human rights of LGBT people, I am frequently in the public eye.

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<sup>11</sup> <https://76crimes.com/2018/07/27/why-i-have-to-flee-jamaica/>.

37. In my view, the laws of Jamaica that criminalize consensual sexual intimacy between men and the constitutional ban on the recognition of same-sex marriage essentially render me an unapprehended criminal.

### **Threats against my life**

38. It is my experience that the pervasive homophobia in Jamaica has created a culture of fear and rejection that has driven many gay people to repress their sexual identity. Gay men are forced to be very secretive about our identity. My own experience illustrates the risks associated with being identified as a gay man.

39. On December 27, 2010, I went to a beach in Montego Bay with my future husband, Tom, who was visiting from Canada. I have been told that my voice sounds 'gay' and that I walk 'funny' so I ensured that before we left the house we dressed in a "masculine" manner. There is a single entrance and exit to this crowded beach and I walked in front of my Tom so that we did not appear to be together. I also told him not to speak to me until we had found a spot on the beach. Despite my precautions, as we entered the beach, we were met with someone saying, 'here comes the gays' and then a male voice shouted 'bullet, bullet!' It was a very tense moment and so we walked quickly to a spot on the beach and sat down. After approximately one hour, we then exited the beach after observing that the crowd at the entrance had dissipated. Since then, when I am in Jamaica with my husband I do not show any public displays of affection because of my fears of stigmatization, discrimination and violence.

40. I also regularly write letters to the Jamaican newspapers denouncing attacks on members of the LGBT community in the country. I also give radio and television interviews on this subject. Comments are posted on the newspapers' websites in response to my published letters and I also provide an email address where I receive correspondence in response to these published letters. Most of the radio and television programmes on which I appear also have a call-in segment. I regularly receive ill-informed, often vitriolic and hateful, responses that repeat common inaccuracies, fanciful claims and religious denunciations. These include declarations that all violence against gay Jamaicans is self-inflicted, assertions that legalizing same-sex intimacy will have apocalyptic results for Jamaica on the magnitude of the 2010 Haitian earthquake, and condemnations that gays are "perverts" and an "abomination" – which echoes the language of s. 76 of the Offences Against the Person Act criminalizing the "abominable crime" of buggery – and should either leave Jamaica voluntarily or be forcibly removed from the country.

41. In some instances, the responses threaten violence. In February 2011, I wrote a letter to a local newspaper describing police raids on two gay clubs in Jamaica. In response to the letter, I received a death threat via e-mail. The writer threatened that if I did not stop writing such opinions, I would "fucking die!" In a setting where such threats occur against a backdrop of

regular violence against LGBT people, including extreme and vicious assaults and murders, such a threat was not to be taken lightly, particularly given my visibility as a gay man and a human rights activist. When I reported the threat to the police, the recording officer proceeded to hurl homophobic slurs at me. This was reported to Assistant Police Commissioner Les Green, who said that those anti-gay attitudes would not change until the anti-buggery law changes.

42. I subsequently reported the matter to the Inter-American Commission on Human Rights (IACHR) and on March 21, 2011, the IACHR ordered Precautionary Measures for me in light of the risk of human rights abuses. A copy of the IACHR's notification of precautionary measures is attached hereto and marked as Exhibit "MAT 2."
43. In issuing its order requesting the state of Jamaica to take Precautionary Measures, the IACHR found that I faced a situation of risk because of my work as a defender of the human rights of LGBT persons in Jamaica. It indicates that state authorities have not adopted protection measures despite the death threats I have received and drawn to their attention. The IACHR asked the State of Jamaica to adopt, in agreement with me, the necessary measures to guarantee my life and physical integrity, and to inform the IACHR on the steps taken to investigate the facts that led to the adoption of these precautionary measures. I requested that the police investigate the source of the death threat and advise me. The police told me that it would take them a week to identify the sender of the email but despite repeated requests they have failed to do so, more than seven years later.
44. In January 2012, the *Jamaica Observer* carried an unauthorized photo of my wedding in Canada to my husband. Within 24 hours, more than 20 death threats were posted on the newspaper's website as comments to the story. Despite my repeated requests that the newspaper remove the picture, they have failed to do so.<sup>12</sup>
45. In March 2012, I received another email death threat, which I again reported to the police. I was again told that it would take the police a week to trace the email's sender but, once again, despite repeated requests and despite the IACHR's existing order for precautionary measures, the police have failed to provide me with any information on the source of the death threat, more than seven years later.

### **Aggression and Attacks Against Gay Men**

46. My research has shown that organizations such as the IACHR in its 2012 report<sup>13</sup> regarding Jamaica have found, not surprisingly, that homophobia results in LGBT individuals becoming victims of abuse and violence. As a gay man and activist, I have personally experienced such abuse and threats of violence.

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<sup>12</sup> <http://www.jamaicaobserver.com/news/Jamaican-gay-activist-marries-man-in-Canada>.

<sup>13</sup> <https://www.oas.org/en/iachr/docs/pdf/Jamaica2012eng.pdf>.

47. In order to protect ourselves from attack, Jamaican MSM cannot be seen with one male partner for a sustained period, as that will raise undue suspicion. Even straight men have reported that they will not go to the beach with their teenage or adult sons unless a female is present, as they fear being attacked on suspicion that they are gay. In order to mask or “cure” their orientation, many MSM (nearly 60%<sup>14</sup>) have female partners and father multiple children while clandestinely continuing their homosexual relationships. This constitutes a threat to the mental and physical health of the men, women and children as well as the wider public.
48. From my research and experience, many Jamaican gay men and other MSM have been attacked because of our sexual orientation, even if we do not identify ourselves as gay or homosexual. People who are simply perceived to be MSM are equally at risk of violence.
49. The human rights situation for Jamaican MSM remains very difficult. This corresponds with, and is in response to, the dramatic advances for human rights for LGBT people in our major trading partners, such as the United States. The U.S. Supreme Court decision of June 26, 2015 recognizing marriage equality has particularly alarmed and enraged large sections of Jamaica’s highly religious and fundamentalist society. The 2017 U.S. State Department Report on Human Rights noted that during that year alone, 23 reports of human rights violations against LGBT individuals were recorded, including 19 incidents of physical assault, five mob attacks, one case of employment discrimination, and six cases in which police failed to respond adequately to reports.<sup>15</sup> Following the 2016 shooting in Pulse nightclub in Orlando, Florida, the U.S. Embassy in Jamaica flew a rainbow flag, an act that caused outrage in Jamaica and was even called “disrespectful” by Jamaica’s Attorney General.<sup>16</sup> According to the 2015 National Awareness, Attitude & Perception Survey about Issues Related to Same Sex Relationships conducted by Market Research Services for Jamaica’s leading gay lobby, the Jamaica Forum of Lesbians, All-Sexuals and Gays (“J-FLAG”), 60% of Jamaicans say they reject the LGBT lifestyle, a jump from 46% in a 2012 survey. In the same survey, almost half of Jamaicans said they would not allow their gay children to remain in the home and 75% said they would feel uncomfortable “living with gays.”<sup>17</sup>

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<sup>14</sup> According to Professor Peter Figueroa, former head of the National HIV/STI programme in Jamaica and head of the Professor of Public Health, Epidemiology and HIV/AIDS at the University of the West Indies, Mona, Kingston, Jamaica.

<sup>15</sup> <https://www.state.gov/j/drl/rls/hrrpt/2017/wha/277343.htm>.

<sup>16</sup> <http://www.bbc.com/news/world-latin-america-36537088>.

<sup>17</sup> “Study says Jamaicans hate gays but believe in conversion,”: JAMAICA GLEANER, Apr. 11, 2016 <http://jamaica-gleaner.com/article/news/20160411/study-says-jamaicans-hate-gays-believe-conversion>.

“Most Jamaicans would kick out their gay children”, JAMAICA GLEANER, Apr. 12, 2016: <http://jamaica-gleaner.com/article/lead-stories/20160412/most-jamaicans-would-kick-out-their-gay-children>.

50. After Montego Bay Pride 2016, a young man who attended the event was confronted at his home by gunmen who gave him three days to leave the community of Portmore, St. Catherine because his sister had shared his private Facebook photos of him at Pride. He refused to go to the police to report the incident because the last time he had an interaction with officers (over an altercation at his home) the police told him that they were not interested in his side of the story because he is gay. Subsequent to his Facebook outing, posters of the young man were plastered over his community with the tagline "Pastor Batty Bwoy" (pastor faggot) because he is the son of a popular local pastor and was very active in his church. He was also being groomed to take over the church when his father retires. The youngster has since lost his job and is homeless. In January 2017, he was also arrested and fined for "loitering" when police officers found him sitting with his boyfriend at the Mona Campus of the University of the West Indies. The young man and his boyfriend were targeted, harassed, arrested and charged solely because of their sexual orientation as I have heard of no instance of police treating heterosexual couples in that way. I was once employed as a project manager at that university and know that gays are not liked by university police on the campus.
51. In December 2016, Jamaica's most popular daily newspaper, the Jamaica Gleaner carried an editorial detailing the murder of Devon Fray, a 20-year-old who was killed after a short video of him was released on social media which seemed to indicate that he was gay and in a relationship with a popular male pastor<sup>18</sup>. After the video release, Mr. Fray had repeatedly used social media to protest that he was straight, but he nevertheless received multiple death threats before he was eventually murdered.
52. On May 27, 2016, the Jamaica Gleaner reported that gunmen shot up the home of two gay men while they slept, killing them, but community members refused to help the police because they objected to gays living in their community.
53. In October 2015, a gay man and an ally who were assisting some homeless LGBT youth living in an abandoned Cholera cemetery in Kingston, were attacked by a violent mob. The men were savagely beaten, and the young man's face was cut and his chest slashed. When he was taken to the main hospital in Kingston in critical condition the non-medical staff refused to assist him because he was gay. He subsequently had to try and scrub all references to his sexuality from his social media and begged persons not to tell his parents why he had been attacked as he had not yet come out to them. When I contacted the Minister of Justice, a legal colleague of mine, about the incident, he advised me that the police told him that the reason the young man was attacked was because of an internal conflict between gays. I had to point out to the Minister that the police regularly misrepresent these attacks so that they do not have to investigate them. For example, when some of these same homeless LGBT youth were attacked by a mob

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<sup>18</sup> <http://jamaica-gleaner.com/article/commentary/20161221/editorial-devon-fray-age-homophobia>.

leaving a sporting event in 2015, a video crew from the UK was coincidentally recording the incident and when they asked the police who stood by doing nothing what was the cause of the attack, the officer said, on tape, that the youth had started the altercation. A former Assistant Commissioner of Police (ACP) also characterized homophobic attacks as largely “gay on gay” violence. In 2011, this same ACP dismissed my complaint after I was chased out of a police station by an officer when I went to report death threats. According to the ACP, attitudes like those displayed by the officer were “unfortunate,” but they would not change until the anti-sodomy law is repealed. One of my legal colleagues also took some LGBT victims to report attacks at the New Kingston police station in 2015, and the senior officer was recorded saying that the victims would have to first provide the names and addresses of their attackers before the police would do anything to assist. There is no such requirement for heterosexual victims.

54. In October 2016, the major LGBT organization on the island, J-FLAG, in collaboration with several local and international organizations, published a Shadow Report for the 118th session of the United Nations Human Rights Committee to assess Jamaica’s compliance with the International Covenant on Civil and Political Rights (ICCPR). The Report found, among other things, that despite a new police policy against discrimination on the basis of sexual orientation, officers continue to stand by in the face of LGBT violations, and/or have in fact been the perpetrators of these attacks themselves. The Report also highlights that from January to June 2016 alone, 23 persons reported to J-FLAG that they had been physically assaulted or attacked due to their sexual orientation or gender identity.
55. On October 6, 2014, Jamaica’s major daily newspaper, the Jamaica Gleaner, released the findings of a poll by one of the island’s most respected pollsters, Bill Johnson.<sup>19</sup> This poll indicated that 91% of Jamaicans opposed repealing the island’s anti-sodomy law. At the same time, 82% of Jamaicans said they believed homosexual men were not treated fairly by either the legal system or the police in Jamaica. However, 68% said they should not have the same rights as others.
56. Pursuant to Section 76 of the Jamaica *Offenses Against Person Act* (JOAPA), the crime of buggery, which is similar to sodomy, is punishable by 10 years of imprisonment with hard labor. Pursuant to Section 77 of the JOAPA, attempted buggery is punishable by seven years of imprisonment with hard labor. Pursuant to Section 79 of the JOAPA, any act of gross indecency, public or private, by one male with another is a misdemeanor punishable by two years of imprisonment. Gross indecency includes the act of two men kissing in the privacy of their bedroom.

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<sup>19</sup> <http://jamaica-gleaner.com/article/lead-stories/20141006/majority-jamaicans-resolute-keeping-buggery-law-intact>.



57. In 2012, the Sexual Offences Regulations came into effect and impose the additional requirement that MSM convicted under Sections 76-79 of the JOAPA must now be registered as sex offenders and always carry a pass or face a J\$1 million fine and up to 12 months imprisonment for each offence for failing to carry their pass.
58. The overwhelming majority of Jamaicans also identify as Christian, and most pastors regularly reinforce the homophobic rhetoric espoused by Jamaican dancehall and reggae artistes, citing biblical condemnation of the 'abomination' of homosexuality.
59. On June 29, 2014, Christian groups organized the largest anti-gay demonstration in the nation's history up to that point.<sup>20</sup> This took place in the heart of the capital city, Kingston, and was reported to have at least 25,000 persons in attendance. One of the primary messages of the demonstrators at this rally was against same-sex marriage. There have since been other large anti-gay religious demonstrations in major cities across the island. These include the tourist resorts of Montego Bay and Ocho Rios.
60. On September 27, 2015, anti-gay religious leaders and their allies again organized a massive rally against LGBT human rights in the capital, Kingston, ahead of a visit by then British Prime Minister David Cameron.<sup>21</sup> They accused Mr. Cameron of pushing a "gay agenda" and called gays a threat to the Jamaican family. Dr. Alveda King, niece of Dr. Martin Luther King, Jr. also spoke at the rally to condemn LGBT people as being part of an "evil agenda." Jamaica's new Prime Minister, Andrew Holness, attended this event, which was televised across the island. Evangelical church groups also held another massive anti-gay rally on August 1, 2018 in Kingston's main square, Half-Way-Tree.
61. Although Jamaica's former Prime Minister Simpson-Miller had pledged to call for a Parliamentary conscience vote on the country's anti-sodomy law and has publicly disavowed the homophobia of her predecessor, Bruce Golding, she faced strong opposition from her own party and the general public as a result of her courageous stance. She ceased making any positive statements in support of LGBT individuals despite growing anti-gay sentiment in the country as a result of the advocacy of powerful religious fundamentalist groups. On April 2014, at the state opening of Parliament, she publicly backed away from her calls for a review of the anti-gay laws and claimed that there would be no timetable for this review as it does not concern the majority of Jamaicans who are poor. The new Prime Minister, Andrew Holness, who assumed office in February 2016 belongs to a very conservative church and campaigned on a "family values" platform. He also declared that the anti-sodomy law should be put to a national referendum. Considering the significant level of homophobia in the country, the result of such a referendum would be a foregone conclusion against repeal. Therefore, the situation for MSM

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<sup>20</sup> [http://www.jamaicaobserver.com/news/No-to-homo-agenda\\_17050490](http://www.jamaicaobserver.com/news/No-to-homo-agenda_17050490).

<sup>21</sup> [http://www.jamaicaobserver.com/news/Government-warned-\\_19231117](http://www.jamaicaobserver.com/news/Government-warned-_19231117).

has not significantly changed in Jamaica. As is set forth above, there is a high level of persecution from both public and private actors, and the government remains unconcerned.

62. Recently Mr. Holness said that he would allow gays in his cabinet<sup>22</sup> and faced severe backlash from powerful evangelical church leaders. Since then he has done nothing to alleviate the homophobia and violence faced by LGBT Jamaicans.
63. Jamaican government officials ignore or condone attacks against homosexuals, and police often engage in or refuse to properly investigate, if at all, homophobic attacks.
64. In addition to the above-noted J-FLAG report, there have been reports on homophobia in Jamaica by several international entities such as the IACHR and the Non-Governmental Organization Human Rights Watch (HRW)<sup>23</sup>.
65. When in Jamaica, I am constantly reminded that I might become a statistic in these reports. I and many Jamaican LGBT people know well the fear of such violence. In the absence of protection from the Jamaican police my husband's experience as a former Toronto Police Officer has kept me safe thus far. This is because of the rigorous security plan that he designed for me and my family. I therefore do not feel safe returning to the country permanently without him.
66. It is my experience that targeted assaults are routinely perpetrated against MSM or suspected MSM. The violence can be verbal or physical. Verbal assaults include homophobic slurs, and frequently include threats on a person's life. Physical assaults include beatings, pistol whippings and stabbings. In the worst instances, MSM are killed. It has been my experience that police rarely, if ever, arrest any of the perpetrators, even when the crimes occur in plain view. This adds to the atmosphere of impunity for these attacks. I read the following from the Inter-American Commission on Human Rights in its 2012 Report on the Human Rights Situation in Jamaica, which I have found to be true:

The IACHR is concerned that laws against sex between consenting adult males or homosexual conduct may contribute to an environment that, at best, does not condemn, and at worst condones discrimination, stigmatization, and violence against the LGBT community. The law provides a social sanction for abuse, as LGBT persons are already thought of as engaged in illegal activity. Because LGBT individuals are believed to be engaged in criminal activity, it is logical to infer that police are less likely to investigate crimes against them.

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<sup>22</sup> <http://jamaica-gleaner.com/article/lead-stories/20180417/no-problem-gays-my-cabinet-holness>.

<sup>23</sup> <https://www.hrw.org/report/2014/10/21/not-safe-home/violence-and-discrimination-against-lgbt-people-jamaica>.

67. As mentioned above, homophobia and societal pressure force Jamaican gay men, like me, to form relationships with women as a cover for our homosexuality. I married a female friend whom I had known for 10 years. She knew about my homosexuality but agreed to marry me because we were a part of a church that taught that a heterosexual marriage would cure me of my homosexuality. The marriage broke down shortly after because I remained sexually attracted to men and could no longer be sexually aroused by my wife.

68. In the past five years alone, I have recorded horrendous reports of violence against Jamaican LGBT people in addition to the incidents detailed above. Some of these other attacks, which have been reported by local media, include:

- a) July 22, 2013: 16-year-old Dwayne Jones was stabbed, shot, run over by a car, and subsequently dumped in a nearby ditch for wearing a dress to a public street dance in Montego Bay. No one has been arrested for this murder.<sup>24</sup>
- b) August 1, 2013: A mob attacked the home of two gay persons in St. Catherine. The police responded but there were no arrests.<sup>25</sup>
- c) August 10, 2013: A mob attacked a cross-dresser in St. Catherine. The police again responded but no arrests were made.<sup>26</sup>
- d) August 22, 2013: A mob attacked five allegedly gay men, who were trapped in their house in Green Mountain, Manchester. The police responded but again no arrests were made.<sup>27</sup>
- e) August 26, 2013: A mob surrounded two allegedly gay men who were involved in a minor traffic accident in Old Harbour, St. Catherine. A member of the mob said that homosexuality might be acceptable elsewhere, but not in Old Harbour. The men had to flee into a nearby police station to escape harm. The police made no arrests.<sup>28</sup>
- f) October 8, 2013: A mob firebombed the abandoned building in Montego Bay which was the former home of murdered teen, Dwayne Jones, where his surviving friends continued to live. When the friends sought refuge in a police station, the police

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<sup>24</sup> "Justice Minister Condemns Murder Of MoBay Cross-Dresser," *The Gleaner*, Kingston, 29 July 2013, online: <http://jamaica-gleaner.com/power/46809>.

<sup>25</sup> "Alleged Gay men in St Catherine Home," *CVM-TV*, Kingston, 1 August 2013, online: [https://www.youtube.com/watch?v=bmL-Cyyn\\_KU](https://www.youtube.com/watch?v=bmL-Cyyn_KU).

<sup>26</sup> Rasbert Turner, "Cops rescue man in girl clothes - Save him from angry mob," *The Star*, Kingston, 14 August 2013, online: <http://jamaica-star.com/thestar/20130814/news/news1.html>.

<sup>27</sup> "5 Gay Men Trapped by Angry Mob," *CVM-TV*, Kingston, 22 August 2013, online: <https://www.youtube.com/watch?v=F1XxeqOIBao>.

<sup>28</sup> "Mob Descends on Old Harbour Police Station to demand Gay Men," *CVM-TV*, Kingston, 26 August 2013, online: [https://www.youtube.com/watch?v=A4\\_qE9IRM3M](https://www.youtube.com/watch?v=A4_qE9IRM3M).

- asked them to leave, stating that the station would itself be attacked if it was known to be "harbouring" gays.<sup>29</sup>
- g) June 14, 2014: A mob attacked a young man at a shopping mall in May Pen, Clarendon because he was allegedly seen putting on lipstick. The police responded but no arrests were made.<sup>30</sup>
  - h) August 28, 2014: A young Jamaican man who had filed a constitutional challenge against the anti-buggery law withdrew his claim because of threats against his family and himself.<sup>31</sup>
  - i) May 15, 2015: The Jamaica Star newspaper reported that a mob attacked and beat three schoolboys whom they accused of engaging in homosexual relations.<sup>32</sup>
  - j) Oct. 4, 2015: The Jamaica Observer reported that three men beat a man whom they accused of being gay because he was seen to be holding his penis while he slept.<sup>33</sup>

69. In the past eight years, there have been other gruesome, anti-gay murders and attacks, with no arrests. On October 18, 2011, CVM TV, one of the major television stations on the island, reported that in the early hours of that morning armed men invaded the home of 16-year-old Oshane Gordon and his mother in the resort city of Montego Bay. The men chopped off his foot as he tried to escape through a window in order to slow his escape, and when they caught up with Oshane the men administered several more chops, killing him. CVM reported that Oshane was attacked because of "questionable relations" with another man. Oshane's mother was also chopped several times.<sup>34</sup> This was the second homophobic murder reported by CVM in three months. On August 2, 2011, the station also reported that on that day a 26-year-old hair stylist, Ricardo Morgan, was almost completely decapitated in Kingston. He had been jeered

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<sup>29</sup> Adrian Frater, "House Occupied By Gays Firebombed," *The Gleaner*, Kingston, 10 October 2013, online: <http://jamaica-gleaner.com/gleaner/20131010/lead/lead6.html>.

<sup>30</sup> "Gay Man saved from mob by police in May Pen, Clarendon," *TVJ*, Kingston, 14 June 2014, online: <https://www.youtube.com/watch?v=Hmu7SvFTbnc>.

<sup>31</sup> "Jamaican Gay Man Drops Court Challenge Against Anti-Buggery Law," *The Gleaner*, Kingston, 29 August 2014, online: <http://jamaica-gleaner.com/power/55113>.

<sup>32</sup> Horace Fisher, "Mob beats schoolboys caught in threesome," *The Star*, Kingston, 15 May 2015, online: <http://jamaica-star.com/thestar/20150515/news/news1.html>.

<sup>33</sup> Tanesha Mundle, "Man allegedly beaten for holding his penis while sleeping," *The Jamaica Observer*, Kingston, 4 October 2015, online: [http://www.jamaicaobserver.com/news/Man-allegedly-beaten-for-holding-his-penis-while-sleeping\\_19231808](http://www.jamaicaobserver.com/news/Man-allegedly-beaten-for-holding-his-penis-while-sleeping_19231808).

<sup>34</sup> *CVM-TV* Kingston, 18 October 2011, online: [http://www.youtube.com/user/cvmtelevision#p/u/18/ZYgGDH\\_SgbI](http://www.youtube.com/user/cvmtelevision#p/u/18/ZYgGDH_SgbI) [at 9:50mins].

about his gender non-conformity for some time and he was finally killed after an altercation with a group of men in his community about his sexual orientation.<sup>35</sup>

70. It is my experience that MSM do not trust the police and consequently many attacks against them in Jamaica are not reported to the police. As explained below, I believe MSM have good reason not to trust the police, because I have found that some police officers themselves are often responsible for attacks against gay men and other MSM and/or are unwilling to take seriously the investigation of attacks and threats when these are reported to them.

### **Treatment of the of the LGBT Community by the Jamaican Police**

71. Since 2010, I have researched and documented the attitude of Jamaican police toward gays. It is my conclusion that, far from a desire to 'serve and protect,' Jamaican police are complicit in the horrendous abuses perpetrated against Jamaican gays, and on many occasions are the perpetrators themselves.

72. Anti-gay laws are often used by the police to harass the LGBT community. Police officers use the law to arrest men who are suspected of being gay or bisexual. Thereafter, the police contact the family demanding bribes. If the family of the gay or bisexual person refuses to pay, the police publicly displays the arrest record, or publishes the record in a local newspaper. A public display of an arrest record involving homosexuality will likely result in that person being attacked or killed, as illustrated by the following examples:

- a) In June 2006, the police instigated a mob leading to the death of a gay man, Victor Jarrett, on Dump-Up beach in Montego Bay.
- b) In 2007, police refused to act when the burial of a gay man was disrupted by a mob in Mandeville.
- c) In February 2008, police 'rescued' three gay men from a mob attack in Half-Way-Tree, Kingston and then proceeded to hurl homophobic insults at and pistol-whip the men on the way to the station.
- d) In 2013 and 2014, there were several reports of anti-gay mob attacks (as described above) and despite being present, the police have never made any arrests in these very public assaults.
- e) In April 2010, I was organizing the 'Walk for Tolerance' in Montego Bay. On multiple occasions, I requested permission and police presence for this event from the Jamaican police headquarters in Montego Bay. The office 'misplaced' my request several times.

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<sup>35</sup> "Murder in Torrington Park," *CVM-TV* Kingston, 2 August 2011, online: <https://www.youtube.com/watch?v=XYy-W7MgygE>.

Eventually, I had to stage a 'solo sit-in' at a police station in Montego Bay to get police presence at the event. However, we were only supplied with a single police officer on a motorbike.

- f) In February 2011, police raided two gay clubs in Kingston and Montego Bay.
- g) In March 2011, the police officer who took my report of a death threat went on a homophobic tirade. In April 2011, police in Montego Bay refused to offer protection for an effeminate man who reported homophobic death threats made to him by a gang of thugs in his community, ostensibly because the young man could not provide the names and addresses of the attackers.

73. Jamaican police largely blame gays for our vulnerability.

74. The Jamaican police are clearly complicit in the attacks against MSM and their complicity continues to this day. The former Public Defender has also claimed that MSM are responsible for our own attacks because we are too visible. While the government is well aware of the severity of the homophobic attacks, it has done little to stop them, primarily because this would anger the fundamentalist religious right that is so dominant. There are widely held homophobic views among individual police officers and government officials, who further permit homophobic attacks and impede any efforts to protect the LGBT population.

### **Breaches of the American Convention on Human Rights**

75. In light of the circumstances outlined above, I am advised by my attorneys and do verily believe that by virtue of the continued criminal prohibition and punishment of consensual sexual activity between men above the age of consent, and in particular the constitutional non-recognition of same-sex unions the state of Jamaica has violated and continues to violate my rights, and the rights of other gay men and MSM, contrary to various provisions of the American Convention.

76. These provisions place me, as a gay man married to another man, at risk of being arrested, prosecuted and convicted – and subjected to all the stigma and adverse physical consequences of a criminal sentence – simply because, in the exercise of my own personal freedom, I seek to engage in consensual sexual conduct and form a union that is integral to the expression of my identity and intimacy with my husband. As a result, I am forced to deny my identity and my relationship or contravene the law.

77. The impugned section 18 (2) of the Jamaican constitution criminalizes and penalizes my family life and sexual conduct which, by my sexual orientation, I am naturally inclined to engage in with another, consenting male, my husband, Tom. This amounts to a direct and blatant denial of equality before the law for me and for other homosexual persons in Jamaica. This officially

sanctioned stigmatization and discrimination by the state further invites and incites the public to subject me and other homosexual persons to unjustifiable discrimination in other spheres of life, including actual acts of – and the ever-present risk or threat of – blackmail, harassment, violence, and reduced and unequal access to facilities and services, including such services as protection that should be provided by law enforcement.

78. It is my belief that there is no legitimate state interest that could be used to justify the banning of same-sex marriages in a free and democratic society. On the contrary there is overwhelming evidence that banning same-sex unions has many deleterious societal implications, including lower health outcomes for LGBT people<sup>36</sup>, which undermines public health. There are also real threats to family cohesion and well-being as the absence of legal same-sex unions force some gays to enter into “sham” relationships with opposite-sex partners in order to placate public pressure. Since the family is the bedrock of the society, when these forced unions are in trouble or break down this in turn harms society.

79. I am also advised by my attorneys and verily believe that I may humbly ask the Inter-American Commission to provide relief by way of the following remedy:

- 1) A declaration that, to the extent that section 18 (2) of the constitution of Jamaica bans the legal recognition of marriage or other relationship between two consenting adults of the same sex then this section contravenes articles 1, 5, 7, 8, 11, 13, 17, 24 and 25 of the American Convention on Human Rights:
  - a. Article 1: the right to freedom from discrimination;
  - b. Article 5: the right to respect for physical, mental and moral integrity;
  - c. Article 7: the right to liberty;
  - d. Article 8: the right to a hearing for determination of rights;
  - e. Article 11: the right to privacy;
  - f. Article 13: the right to freedom of expression;
  - g. Article 17: the right to family life;
  - h. Article 24: the right to equal protection before the law; and
  - i. Article 25: the right to judicial protection.

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<sup>36</sup> <https://www.nejm.org/doi/pdf/10.1056/NEJMp1400254>

- 2) A recommendation that the government of Jamaica allow the naturalization of same-sex spouses of Jamaican citizens on the same conditions as heterosexual spouses of Jamaican citizens.
- 3) A recommendation that the government of Jamaica repeal section 18(2) of the constitution of Jamaica in order to comply with the state's obligations under the American Convention on Human Rights.
- 4) Such other declarations and directions as the Commission may consider appropriate for the purpose of securing the enforcement of the aforementioned declaration and recommendations; and
- 5) Such further and/or other relief as the Commission may deem just.

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The facts and matters deposed to herein are, within my own personal knowledge, true and correct, except where otherwise stated or evidently based on other information or belief, in which case I verily believe the same to be true and correct.

Executed on August 19<sup>th</sup>, 2018,



\_\_\_\_\_  
Maurice Tomlinson

This declaration is filed this 19<sup>th</sup> day of August 2018 by Dr. Emir Crowne, a Barrister, Solicitor, and Notary Public in the Province of Ontario, 380 Wellington Street, Tower B, 6th Floor, London, ON. N6A 5B5, Canada, Tel No. +1-877-511-4600 (toll free), Fax No. +1-877-511-3839 (toll free) and e-mail info@crownes.ca, counsel for the Petitioner.





**EDITORIAL**

**PUBLIC HEALTH ETHICS AND THE LAW OF THE LAND**

It is tempting to feel sorry for Jamaica's Health Minister, the Honourable Rudyard Spencer. There he is, trying his best to do his job, and, among other urgent health matters, reduce the incidence of HIV/AIDS in his nation. Unfortunately, on his own account, this is proving to be next to impossible lest Jamaicans change their cultural attitudes to – you guessed it – sex. The Jamaican Ministry of Health's website quotes him with these eminently sensible concerns about specific attitudes:

These include a widely held belief that sex with a virgin can cure HIV/AIDS, the high level of sexual relations between older men and young girls and a persistently hostile anti-gay environment which all contribute to the stigmatization and discrimination of infected and affected persons. A strong religious culture also inhibits open discussion on matters of sexuality. . . . We to [sic!] need begin the process of unlearning those beliefs that endanger the health lives of others and rethinking the tendency to be obscene and degrading in rejecting values that conflict with our own.<sup>1</sup>

Public health experts are very familiar with the long-standing conflict between a utilitarian approach to harm minimization and harm reduction and a cultural context that prizes firmness in the 'fight against drugs' over demonstrably positive health outcomes for individual drug users.<sup>2</sup> It seems as if this same culture war is being played out in the Caribbean where centuries old religious teachings on sex take precedent over the insights of 20<sup>th</sup> and 21<sup>st</sup> century sex research.

A bit of pertinent background on HIV/AIDS in Jamaica: a 2008 study commissioned by the Ministry of Health concluded that about 31.8% of men who have sex with other men (MSM) are HIV infected in the island state.<sup>3</sup> There is a strong correlation between men being HIV infected and them belonging to lower socioeconomic groups, and them having been victims of antigay violence. The number of AIDS deaths per year is decreasing

<sup>1</sup> Ministry of Health Jamaica (MOH). 2010. *Culture Shift Needed to Help in the Fight Against HIV/AIDS*. Kingston, Jamaica: MOH. Available at: <http://www.moh.gov.jm/general/latestnews/1-latest-news/346-culture-shift-needed-to-help-in-the-fight-against-hiv-aids-> [Accessed 13 Feb 2011].

<sup>2</sup> H. Keane. 2003. Critiques of Harm Reduction, Morality and the Promise of Human Rights. *Int J Drug Policy* 2003; 14: 227–232.

<sup>3</sup> Kaiser Health News. 2009. Continued Discrimination Against Jamaican HIV-Positive MSM Hinders their Efforts to Seek Health Care, Advocates Say. *Kaiser Health News* 12 March. Available at: <http://www.kaiserhealthnews.org/daily-reports/2009/march/12/dr00057435.aspx?referrer=search> [Accessed 13 Feb 2011].

because the country has begun the rollout of antiretroviral medicines.

Jamaica reports the second-highest HIV-prevalence rate among MSM in the world, right after another notorious violator of the human rights of gay people, Kenya.<sup>4</sup> Homosexual men in Jamaica rarely ever live in monogamous relationships because of the security risks involved in living with a member of the same sex over longer periods in the same household. This is partly a result of colonial legislation prohibiting same sexual activities among men. I decided to actually read-up on the relevant legislation. The flowery prose under the heading 'Unnatural Offences' is sufficiently antiquated that I should like to share it with you:

76. Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned and kept to hard labour for a term not exceeding ten years.

77. Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanour, and being convicted thereof, shall be liable to be imprisoned for a term not exceeding seven years, with or without hard labour.<sup>5</sup>

Up to 10 years at hard labour for a mature-age man who has voluntarily sex with another consenting adult male is a fairly draconian penalty for a self-regarding act. One justification for this law is hidden under that well-known Christian natural law moniker of 'unnatural'. There is no such a thing as unnatural conduct. If something is physically possible it is very much within the laws of nature, and therefore by necessity it is natural. The phraseology of the 'unnatural' explains or justifies nothing. However, normatively nothing follows from this trivial insight. Many natural things are not desirable, natural conduct can be unethical, even criminal. Furthermore, as is well known among legal philosophers, even if such behaviour were 'unnatural', and even if we declared it unethical, nothing would follow with regard to the question of whether or not it should be illegal.<sup>6</sup> The Jamaican law is not making a case for why same sex sexual conduct between consenting male adults is problematic, and why it is legislated against.

<sup>4</sup> A. Jimale. 2010. Homophobia Increasing in Kenya. *Behind the Mask* 23 June. Available at: <http://www.mask.org.za/homophobia-increasing-in-kenya/> [Accessed 13 Feb 2011].

<sup>5</sup> *Offences Against the Person Act 1864* (Cap 268, Rev Law Jam 1973) ss. 76, 77. Available at: <http://www.moj.gov.jm/laws/statutes/Offences%20Against%20the%20Person%20Act.pdf> [Accessed 13 Feb 2011].

<sup>6</sup> J. Feinberg. 1988. *The Moral Limits of the Criminal Law* (Vol. 4): *Harmless Wrongdoing*. Oxford, UK: Clarendon Press.

## Exhibit MAT1

Declaring homosexual conduct unnatural is arguably unintelligible and it begs the question of why the law exists to begin with.

For good measure ‘abominable’ has been added to this ‘crime’. Merriam-Webster’s Dictionary enlightens us that the 14<sup>th</sup> century originated adjective ‘abominable’ means that something is variously disagreeable or unpleasant or worthy of causing disgust or hatred. All of these are terrible foundations on which to build sound moral judgments. Finding something disagreeable or unpleasant is insufficient to make it illegal, and frankly, whether I am disgusted by something you do is not a good yard stick by which to determine whether an act ought to be criminal. Well, and what about that hatred criterion? No doubt plenty of Jamaicans hate gay people, but how does that provide a justification in terms of outlawing same sex sexual conduct among consenting adults? One does not have to be an old-fashioned liberal in the tradition of John Stuart Mill to realize that the criminal law has no right to interfere with important self-regarding actions of consenting adults. Surely, by any stretch of imagination, our sexuality determines, to a significant extent, who we are.

Jamaica today finds itself in a difficult situation. Sectarian religious mores has been enshrined in law by its former colonial master, and has since been duly maintained as the gospel by generations of Jamaican politicians. There is little by way of actual enforcement in current-day Jamaica, but as is well-known, legal norms are capable of creating, as well as reinforcing, extra-legal norms.

The US-based human rights organization Human Rights Watch published a report a few years ago highlighting the pervasive nature of oftentimes violent homophobia in Jamaica.<sup>7</sup> The price MSM are paying in Jamaica for this situation is very significant indeed, as can be demonstrated by the extraordinarily high prevalence of HIV/AIDS among this group of Jamaicans. Unsurprisingly research has shown that gay Jamaicans are reluctant to present with health problems that could disclose their sexual orientation to health care providers out of fear of reprisals by health care professionals and others. It goes without saying that health care professionals acting in such a manner would be violating international codes of health care professional conduct such as the World Medical Association’s Declaration of Geneva. The international umbrella organization of the world’s doctors requires, as it does, that doctors ‘WILL NOT PERMIT [sic!] considerations of age, disease or disability, creed, ethnic origin, gender, nationality, political affiliation, race, sexual orientation, social standing or any other factor to intervene between my duty and my patient.’<sup>8</sup> However, many Jamaican MSM patients’ reluctance to consult health care professionals is indicative of

the climate in the country. It is noteworthy that the Medical Association of Jamaica is seemingly not a member association of the World Medical Association.<sup>9</sup>

It cannot surprise then that the country’s health minister laments the harmful impact of existing legislation on reasonable public health objectives. In his government’s report on HIV/AIDS to the United Nations General Assembly (2010) he explicitly acknowledges the problems this legislation is causing:

The political framework towards HIV has not changed. With outdated laws that present obstacles for adolescents, SW [sex workers], MSM and prison inmates, prevention and treatment efforts to these populations are not able to be fully maximized. The existing political framework has also been implicated in contributing to the stigma and discrimination faced by MSM. Several efforts have been made in this area however, through the review of laws that stand as obstacles to prevention, but to date no major achievements are noted in this aspect of political support.<sup>10</sup>

Enlightened politicians such as Jamaica’s Health Minister, the Honourable Rudyard Spencer and his staff find themselves in an unenviable situation. They are representing or working for a government that continues to support legislation that contributes significantly to the high prevalence of HIV/AIDS among MSM. Unlike in South Africa where church leaders have come together to support efforts aimed at reducing the incidence of HIV/AIDS, in Jamaica church leaders are busy trying to preserve the homophobic climate and legislative framework that helped bring about some of the public health problems the country faces today.<sup>11</sup>

It will be interesting to see how the situation will evolve in Jamaica. Many ethical questions arise not only with regard to the country’s unjust discrimination against its gay citizens, but also from a public health ethics perspective. The ethical challenge for Jamaica is far from unique, and it is this: is it ethical to uphold particular cultural values regardless of the human cost involved? The challenge that has been haunting harm minimizing and harm reducing rational drug policies for decades seems to have hit another predictable road block: sex.

## UDO SCHÜKLENK

<sup>9</sup> WMA. 2010. *Members’ List*. Ferney-Voltaire, France: WMA. Available at: <http://www.wma.net/en/60/about/10members/20memberlist/index.html> [Accessed 13 Feb 2011].

<sup>10</sup> MOH. 2010. *UNGASS Country Progress Report 2010 Reporting: Jamaica National HIV/STI Program*. Kingston, Jamaica: 32. Available at: [http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportsubmittedbycountries/jamaica\\_2010\\_country\\_progress\\_report\\_en.pdf](http://www.unaids.org/en/dataanalysis/monitoringcountryprogress/2010progressreportsubmittedbycountries/jamaica_2010_country_progress_report_en.pdf) [Accessed 13 Feb 2011].

<sup>11</sup> T.M. Baklinski. 2008. Jamaican Church Leaders Say Homosexuality Will Not Be Accepted As Normal. *LifeSiteNews.com* February 18. Available at: <http://www.lifesitenews.com/news/archive/ldn/2008/feb/08021804> [Accessed 13 Feb 2011].

<sup>7</sup> R. Schleifer. Hated to Death: Homophobia Violence and Jamaica’s HIV/AIDS Epidemic. *Human Rights Watch* 2004; 16(6B): 1–79.

<sup>8</sup> World Medical Association (WMA). 2006. *Declaration of Geneva*. Geneva: WMA. Available at: <http://www.wma.net/en/30publications/10policies/g1/index.html> [Accessed 13 Feb 2011].



**ORGANIZATION OF AMERICAN STATES**  
WASHINGTON, D.C. 20006 U.S.A.

Exhibit MAT2

March 21, 2011

**RE: Maurice Tomlinson**  
**Request for Precautionary Measures no. MC-80-11**  
**Jamaica**

Dear Sir:

On behalf of the Inter-American Commission on Human Rights (IACHR), I am pleased to address you with respect to your request for precautionary measures in favor of Maurice Tomlinson in Jamaica.

I also wish to inform you that in a note of today's date, the Commission addressed the State of Jamaica pursuant to Article 25 of the Commission's Rules of Procedure in order to request the adoption of urgent measures in favor of the above-mentioned person. Specifically, the Commission requested that the Government of Jamaica:

In light of the aforementioned, the Commission considers it necessary to request the adoption of precautionary measures in accordance with the terms of Article 25(2) of its Rules of Procedure in order to protect the life and physical integrity of Maurice Tomlinson. Accordingly, the Commission requests that the government of Jamaica:

1. Adopt the measures necessary to guarantee the life and physical integrity of Maurice Tomlinson;
2. Adopt these measures in consultation with the beneficiary; and
3. Report on the actions taken to investigate the facts that gave rise to the adoption of the precautionary measures.

In its communication to Jamaica, the Commission also requested that the State provide the Commission with information concerning compliance with these measures within 15 days of receipt of the communication, and thereafter on a periodic basis. In view of the observations of the parties on compliance, the Commission will decide whether to extend or lift the measures.

Mr.  
Maurice Tomlinson  
mauricetomlinson@yahoo.com

The Commission wishes to note that in accordance with Article 25(9) of the Commission's Rules of Procedure that the granting of these measures and their adoption by the State shall not constitute a prejudgment on the merits of a case.

The IACHR posts on its Web site ([www.cidh.org](http://www.cidh.org)) a summary of the precautionary measures that have been granted. The summary identifies the beneficiaries of the precautionary measures by name, with the exception of children and victims of sexual violence. In cases in which the beneficiaries of these precautionary measures prefer that their complete name not be made public on the Web site, they are required to immediately inform the IACHR in writing.

Sincerely,

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Santiago A. Canton  
Executive Secretary