

# QUEERING THE COURTROOM

Resources for Litigation  
for the Human Rights of  
LGBTIQ People

January 27, 2021



**OUTRIGHT**  
INTERNATIONAL



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Outright International works together for better LGBTIQ lives. Outright is dedicated to working with partners around the globe to strengthen the capacity of the LGBTIQ human rights movement, document and amplify human rights violations against LGBTIQ people, and advocate for inclusion and equality. Founded in 1990, with staff in over a dozen countries, Outright works with the United Nations, regional human rights monitoring bodies, and civil society partners. Outright holds consultative status at the United Nations, where it serves as the secretariat of the UN LGBTI Core Group.

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# Introduction

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## **Around the world, LGBTIQ individuals continue to face a broad spectrum of violations of their human rights.**

Even in countries in which have legal frameworks safeguarding against some discrimination, banning hate crime and hate speech based on sexual orientation or gender identity, implementation and application to cases relating the LGBTIQ individuals may be lacking resulting in an inability to access these rights. As such, in addition to awareness-raising activities, trainings, advocacy and other strategies for change employed by LGBTIQ activists around the world, litigation is becoming an increasingly relevant and useful tool in achieving LGBTIQ equality.

In bringing strategic cases to court, claimants apply and challenge laws of their jurisdiction. However, as human rights law stems from international law established at multilateral human rights bodies such as the United Nations, the Organization of American States, or the Council of Europe. As such, when advancing the human rights of LGBTIQ people at national courts, it can be powerful and important to draw upon international case law on similar topics and to refer to the policies and reports of international organisations, international legal texts (such as the International Covenant on Civil and Political Rights), and internationally adopted principles (such as the Yogyakarta Principles). Drawing upon these resources can be a particularly useful tool where there is a lack of explicit protection of the human rights of LGBTIQ people in the jurisdiction's legal framework or within the judicial history of a particular jurisdiction, but where specific international commitments to international law and policies exists.

This report is intended to be a useful starting point for activists around the world who are seeking to bring strategic litigation in their home jurisdiction. The report identifies case law from different jurisdictions that has dealt with the same or similar issues. It also aims to set out how one can apply the Resources in putting forward

legal arguments in favour of the protection of LGBTIQ people.

Reference to UN materials is not limited to cases relating to the rights of LGBTIQ people and, where relevant, this report includes summaries of cases brought in other contexts where the arguments are transferable, for example in cases relating to protections against discrimination, interference with right to privacy, and degrading treatment and punishment, and the importance of family rights.

As part of our research, in addition to those jurisdictions included in this report, we also looked into, but were unable to find, relevant cases in the following jurisdictions:

- Australia (noting that the *Toonen* case involved Australia and is included in the list of Resources);
- the Bahamas;
- Rwanda; and
- the Seychelles.

If you are aware of any relevant cases in the above jurisdictions that have referenced any of the resources identified in the subsequent section in an LGBTIQ context, please contact us at: [hello@Outrightinternational.org](mailto:hello@Outrightinternational.org).

Please note that in each case summary we have generally used the terminology used in the corresponding judgment. We would note therefore that this means that in some instances the terminology will be somewhat outdated. Outright International uses the acronym LGBTIQ to denote the lesbian, gay, bisexual, transgender, queer and intersex community. We believe this acronym is inclusive of a broad range of people across our community. It is not exhaustive, nor is it universally accepted or used. Where quoting sources which use a different acronym, we have either used LGBTIQ or adopted the version used by the source.

# Resources

As part of our research into the case law of the jurisdictions which are the subject of this report, we reviewed cases identified in the below Resources.

## Reports of the Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity

DOCUMENT NO.	LINK
A/HRC/44/53	<b>2020</b> – 44th session of the Human Rights Council, <i>Report of the IE SOGI, Victor Madrigal-Borloz on so-called “conversion therapy” practices</i> – Preparation of thematic report and submissions received.
A/HRC/41/45	<b>2019</b> – 41st session of the Human Rights Council, <i>Report of the IE SOGI, Victor Madrigal-Borloz</i> – Preparation of thematic report and submissions received
A/HRC/38/43	<b>2018</b> – 38th session of the Human Rights Council, <i>Report of the IE SOGI, Victor Madrigal-Borloz</i>
A/HRC/35/36	<b>2017</b> – 35th session of the Human Rights Council, <i>Diversity in humanity, humanity in diversity</i>
A/74/181	<b>2019</b> – 74th session of the General Assembly, <i>Publication of report on socio-cultural and economic inclusion</i> – Preparation of thematic report and submissions received
A/73/152	<b>2018</b> – 73rd session of the General Assembly, <i>Violence and discrimination based on gender identity</i>
A/72/172	<b>2017</b> – 72nd session of the General Assembly, <i>Embrace diversity and energize humanity</i>

## SOGIESC Resolutions

DOCUMENT NO.	LINK
A/HRC/RES/32/2	<i>Protection against violence and discrimination based on sexual orientation and gender identity</i> (adopted 30 June 2016)
A/HRC/RES/17/19	Human Rights Council resolution – <i>Human rights, sexual orientation and gender identity</i> (adopted 17 June 2011)
A/HRC/RES/27/32	Human Rights Council resolution – <i>Human rights, sexual orientation and gender identity</i> (adopted 26 September 2014)
A/RES/69/182	<i>General Assembly resolution – Extrajudicial, summary or arbitrary executions</i>

## SOGIESC Resolutions

DOCUMENT NO.	LINK
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A/RES/67/168	<i>General Assembly resolution – Extrajudicial, summary or arbitrary executions</i>
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A/RES/65/208	<i>General Assembly resolution – Extrajudicial, summary or arbitrary executions</i>
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A/RES/63/182	<i>General Assembly resolution – Extrajudicial, summary or arbitrary executions</i>
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A/RES/61/173	<i>General Assembly resolution – Extrajudicial, summary or arbitrary executions</i>
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A/RES/59/197	<i>General Assembly resolution – Extrajudicial, summary or arbitrary executions</i>
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A/RES/57/214	<i>General Assembly resolution – Extrajudicial, summary or arbitrary executions</i>
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## Yogyakarta Principles

### (Not UN-created, but an analysis of existing UN protection with SOGIESC lens)

Yogyakarta Principles	<a href="http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf">http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf</a>
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Yogyakarta Principles plus 10	<a href="http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf">http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf</a>
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## Resources from Treaty Bodies' Case Digest

Information on the reviewed and pending Treaty Bodies' cases on sexual orientation, gender identity and expression and sex characteristics (SOGIESC) (periodically updated) can be found at <https://ilga.org/Treaty-Bodies-jurisprudence-SOGIESC>.

## General Comments

<i>General comment No. 31 (2004)</i>	Refers to the obligation of State parties not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a risk of irreparable harm
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<i>General comment No. 1 (1998)</i>	On the implementation of article 3 Convention Against Torture
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<i>General comment No. 18 (1989)</i>	On non-discrimination – states that article 26 ICCPR entitled all persons to equality before the law and equal protection of the law, prohibited any discrimination under the law and guaranteed to all persons equal and effective protection against discrimination on any ground
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<i>General comment No. 34 (2011)</i>	On article 19 ICCPR (freedoms of opinion and expression)
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<i>General comment No. 16 (1988)</i>	On the right to respect of privacy and family, which states that article 17 ICCPR protects against “all such interferences and attacks” on a person’s expression of identity.
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## Criminalization of Same-Sex Relations

*Toonen v. Australia* Communication No. 488/1992 of 25 December 1991, views of 31 March 1994

### References to previous jurisprudence:

- ECtHR jurisprudence (*Dudgeon v. United Kingdom*, judgment of 22 October 1981; *Norris v. Ireland*, judgment of 26 October 1988; and *Modinos v. Cyprus*, judgment of 22 April 1993)
- Committee's views of 9 November 1989 on *Bhinder v. Canada*, no. 208/1986, to sustain the existence of "indirect discrimination"

### Cited in:

- IACtHR (*Atala Riffo and Daughters v. Chile*, judgment of 24 February 2012, case 12.502)
- ECtHR (*Fretté v. France*, judgment of 26 February 2002, application no. 36515/97, and *Vallianatos and Others v. Greece*, judgment of 7 November 2013, application nos. 29381/09 and 32684/09).
- India (*Naz Foundation v. Government of NCT of Delhi and Others*, decision of 2 July 2009, the High Court of Delhi)
- Nepal (*Sunil Babu Pant and Others v. Nepal Government and Others*, order of 21 December 2007, Supreme Court of Nepal)
- Philippines (*Ang Ladlad v. Commission on Elections*, decision of 8 April 2010, Supreme Court of the Philippines)
- South Africa (*National Coalition for Gay and Lesbian Equality v. Minister of Justice*, judgment of 9 October 1998, the Constitutional Court of South Africa)
- Zimbabwe (*Banana v. State*, decision of 29 May 2000, the Supreme Court of Zimbabwe)
- Fiji (*McCoskar and Nadan v. State*, judgment of 26 August 2005, the High Court of Fiji at Suva)
- Colombia (Sentencia C-481/98, 9 September 1998, the Constitutional Court of Colombia; *Sentencia C-075/07*, 7 February 2007, Constitutional Court of Colombia)
- *HRCtee review of Australia's response* (accessed on 29 June 2018), pp. 42–43

## Asylum Seekers

*Dean v. Australia* Communication No. 1512/2006 of 8 September 2006, views of 17 March 2009, CCPR/C/95/D/1512/2006

*K.S.Y v. Netherlands* Communication No. 190/2001 of 5 January 2001, views of 15 May 2003, CAT/C/30/D/190/2001

*E.J.V.M. v. Sweden* Communication No. 213/2002 of 17 May 2002, views of 14 November 2003, CAT/C/31/D/213/2002

### References to previous jurisprudence (cited by state party):

- *Y. v. Switzerland* (views of 16 September 1994, no. 18/1994) to challenge the admissibility of the case due to lack of minimum substantiation
- *S.M.R. and M.M.R. v. Sweden* (views of 5 May 1999, no. 103/1998) and *S.L. v. Sweden* (views of 11 May 2001, no. 150/1999), asserting that the circumstances invoked by E.J.V.M. were not sufficient evidence that he run a foreseeable, real and personal risk of being tortured in Costa Rica

## Asylum Seekers

<i>Uttam Mondal v. Sweden</i>	<i>Communication No. 338/2008 of 30 November 2007, views of 23 May 2011, CAT/C/46/D/338/2008</i>
	<p>References to previous jurisprudence:</p> <ul style="list-style-type: none"> <li>The Committee referred to its views on <i>M.A.K. v. Germany</i> of 5 May 2004 (no. 214/2002) and <i>M.S.H. v. Sweden</i> of 14 November 2005 (no. 235/2003) in its general notes related to the scope of the consideration and the assessment of medical documentation provided by the complainant</li> </ul> <p>Cited in:</p> <ul style="list-style-type: none"> <li>The Committee referred to its views on the <i>Uttam Mondal v. Sweden</i> in the <i>general comment No. 4</i> (2017) on the implementation of article 3 of the Convention in the context of article 22</li> </ul>
<i>X. v. Sweden</i>	<i>Communication No. 1833/2008 of 26 November 2008, views of 1 November 2011, CCPR/C/103/D/1833/2008</i>
	<p>Evidence cited:</p> <ul style="list-style-type: none"> <li>UNHCR, <i>Eligibility Guidelines for Assessing the International Protection Needs of Afghan Asylum-Seekers</i> (December 2007); Swedish Ministry of Foreign Affairs, Report on the human rights situation in Afghanistan in 2007 (March 2008)</li> </ul>
<i>M.I. v. Sweden</i>	<i>Communication No. 2149/2012 of 7 May 2012, views of 25 July 2013, CCPR/C/108/D/2149/2012</i>
<i>J.K. v. Canada</i>	<ul style="list-style-type: none"> <li>Communication No. 562/2013 of 29 September 2013, views of 23 November 2015, CAT/C/56/D/562/2013</li> <li><i>US Department of State, Uganda 2013 Human Rights Report</i></li> <li><i>Human Rights Watch, Uganda: Anti-Homosexuality Act's Heavy Toll</i> (May 2014)</li> </ul>
<i>M.K.H. v. Denmark</i>	<i>Communication No. 2462/2014 of 26 September 2014, views of 12 July 2016, CCPR/C/117/D/2462/2014</i>
	<p>References to previous jurisprudence:</p> <ul style="list-style-type: none"> <li>Committee's jurisprudence in <i>M.I. v. Sweden</i>, where it considered that the deportation to Bangladesh of the author, a lesbian woman, would constitute a violation of article 7 ICCPR</li> </ul>
<i>M.Z.B.M. v. Denmark</i>	<i>Communication No. 2593/2015 of 31 March 2015, views of 20 March 2017, CCPR/C/119/D/2593/2015</i>
<i>E.A. v. Sweden</i>	<i>Communication No. 690/2015 of 20 July 2015, views of 11 August 2017, CAT/C/61/D/690/2015</i>
	<p>References to previous jurisprudence:</p> <ul style="list-style-type: none"> <li>The Committee referred to its views on <i>A.R. v. the Netherlands</i> of 14 November 2003, no. 203/2002, and <i>N.S. v. Switzerland</i> of 6 May 2010, no. 356/2008, in its general notes related to the scope of the consideration</li> </ul>
<i>Z.B. v. Hungary</i>	<i>Communication No. 2768/2016 of 23 May 2016, decision of 19 July 2018, CCPR/C/123/D/2768/2016</i>

## Violence / Hate Crimes / Hate Speech

*Ernazarov v. Kyrgyzstan*

*Communication No. 2054/2011 of 11 March 2011, views of 25 March 2015, CCPR/C/113/D/2054/2011*

*D.C. and D.E. v. Georgia*

*Communication No. 573/2013 of 1 July 2013, views of 12 May 2017, CAT/C/60/D/573/2013*

## Freedom of Expression / Freedom of Assembly and Association

*Hertzberg et al. v. Finland*

*Communication No. 061/1979 of 7 August 1979, views of 2 April 1982, U.N. Doc. Supp. No. 40 (A/37/40) at 161 (1982)*

### References to previous jurisprudence:

- *S. Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius* of 9 April 1981, no. 35/1978, stating that it could not review in the abstract whether national legislation contravenes the ICCPR, although such legislation may, in particular circumstances, produce adverse effects which directly affects the individual, thus making them a victim in the sense contemplated by articles 1 and 2 of the OP.

*Fedotova v. Russian Federation*

*Communication No. 1932/2010 of 10 February 2010, views of 31 October 2012, CCPR/C/106/D/1932/2010*

### Cited in:

- In 2017, the ECtHR made a judgment on *Bayev v. Russia* (application nos. 67667/09 and 2 others, judgment of 20 June 2017) stating that the legislation in Russia banning “gay propaganda” breached freedom of expression and was discriminatory. In this judgment, the ECtHR referred to the HRCtee’s views on this case.

*Alekseev v. Russian Federation*

*Communication No. 1873/2009 of 25 March 2009, views of 25 October 2013, CCPR/C/109/D/1873/2009*

### Developments:

- In 2010, restrictions on other public LGBTIQ events organised by Nikolai Alekseev were declared a violation of the right to freedom of assembly and non-discrimination by the ECtHR (see *Alekseyev v. Russia*, application nos. 4916/07, 25924/08 and 14599/09, judgment of 21 October 2010).

*Praded v. Belarus; Androsenko v. Belarus*

• *Communication No. 2092/2011 of 20 June 2010, views of 10 October 2014, CCPR/C/112/D/2029/2011*

• *Communication No. 2092/2011, of 20 June 2010, views of 30 March 2016, CCPR/C/116/D/2092/2011*

### References to previous jurisprudence:

- The authors referred to some cases reviewed by the Committee (*Velichkin v. Belarus*, views of 20 October 2005, no. 1022/2001, *Park v. Republic of Korea*, views of 20 October 1998, no. 628/1995, and *Iskiyaev v. Uzbekistan*, views of 20 March 2009, no. 1418/2005) to support their arguments on the violation of their rights by the Belarusian authorities

## Freedom of Expression / Freedom of Assembly and Association

*Nepomnyaschiy v. Russian Federation*

*Communication No. 2318/2013 of 5 October 2013, views of 17 July 2018, CCPR/C/123/D/2318/2013*

### References to the Committee's Concluding Observations:

- Mentioning negative effects of the “*anti-propaganda*” laws, the Committee referred to its own Concluding Observations on Russia (CCPR/C/RUS/CO/7, para. 10), as well as the Concluding Observations by CRC (CRC/C/RUS/ CO/4-5), paras. 24–25
- Evidence: Assessing the quality of legislation, the Committee referred to the European Commission for Democracy through Law’s Opinion on the Issue of the Prohibition of so-called “Propaganda of Homosexuality” in the light of Recent Legislation in some Member States of the Council of Europe (2013)

## LGBTIQ Families

*Joslin v. New Zealand*

*Communication No. 902/1999 of 30 November 1998, views of 17 July 2002, CCPR/C/75/D/902/1999*

### Cited in:

- The case was cited by the Hong Kong Court of First Instance in a case (*W v Registrar of Marriages*, judgment of 5 October 2010) regarding a refusal to grant the applicant, a transgender woman, a license to marry her male partner, and by the Constitutional Court of South Africa in a case (*Minister of Home Affairs and Another v. Fourie and Another; Lesbian and Gay Equality Project and Eighteen Others v. Minister of Home Affairs and Others*, judgment of 1 December 2005) considering whether the common law and statutory definitions of marriage were unconstitutional.

*Young v. Australia*

*Communication No. 941/2000 of 29 June 1999, views of 6 August 2003, CCPR/C/78/D/941/2000*

### Cited in:

- Young was cited in decisions made by the IACtHR (see e.g., *Atala Riffo and Daughters v. Chile*, judgment of 24 February 2012, and *Duque v. Colombia*, judgment of 26 February 2016, and the Constitutional Court of Colombia (Sentencia C-075/07, 7 February 2007, challenge to the constitutionality of excluding same-sex couples from the economic protections afforded under the national law).

*X. v. Colombia*

• Communication No. 1361/2005 of 13 January 2001, views of 30 March 2007, CCPR/C/89/D/1361/2005

- Human Rights Watch, Colombia: *Court Extends Benefits to Same-Sex Couples. Same-Sex Partnerships Entitled to Health and Pension Benefits* (17 April 2018)

*C. v. Australia*

*Communication No. 2216/2012 of 27 April 2012, views of 28 March 2017, CCPR/C/119/D/2216/2012*

## Legal Gender Recognition

*G. v. Australia*

- Communication No. 2172/2012 of 2 December 2011, views of 17 March 2017, CCPR/C/119/D/2172/2012
- The author also stated that both the *United Nations High Commissioner for Human Rights* (A/HRC/19/41) and the Yogyakarta Principles called for legal recognition of gender identity regardless of marital status.

### References to previous jurisprudence:

- Cited decisions of the ECtHR (*Schalk and Kopf v. Austria*, application no. 30141/04, judgment of 24 June 2010, and *Gas and Dubois v. France*, application no. 25951/07, judgment of 15 March 2012).
- The author referred to the ECtHR's case of *Hämäläinen v. Finland* (application no. 37359/09, judgment of 16 July 2014) distinguishing her situation from that of Hämäläinen (particularly, no same-sex marriages or civil unions were available for G. in contrast to the situation in Finland). She also referred to *Hämäläinen v. Finland and Goodwin v. United Kingdom* (application no. 28957/95, judgment of 11 July 2002).

# Table of Cases

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## **AI (Russia)**

[2016] NZIPT 800944

## ***A.P. Garçon and Nicot v. France***

N°79885/12, 52471/13 y 52596/13

## ***Artavia Murillo v. Costa Rica***

Inter-Am. Ct. H.R. (ser. C) No. 257 (Nov. 28, 2012)

## ***Atala Riffo and Daughters v. Chile***

Inter-Am. Comm. HR, Case 12.502

## ***Atasoy and Sarkut v. Turkey***

Communications Nos. 1853/2008 and 1854/2008; U.N. Doc CCPR/C/104/D/1853-1854/2008

## ***Attorney General of Belize v. Caleb Orozco***

Claim No. 668 of 2010, Supreme Court of Belize

## ***Attorney-General v. Chapman***

[2011] NZSC 110, [2012] 1 NZLR 462

## ***B (SC 60/2016) v. Waitemata District Health Board***

[2017] NZSC 88

## ***C-075-07 (February 7, 2007)***

Constitutional Court, Colombia

## ***C-481-98 (9 September 1998)***

Constitutional Court, Colombia

## ***Camille Iriana Thompson v. the Attorney-General***

[2016] NZSC 134

## **Case No. 1683-2010**

Constitutional Court, Chile

## **Case No. 18.252-2017**

Supreme Court, Chile

## **Case No. 1881-2010**

Constitutional Court, Chile

## **Case N. 2435-2013**

Constitutional Court, Chile

## **Case No. 2681-2014**

Constitutional Court, Chile

## **Case No. 70.584-2016**

Supreme Court, Chile

## **Case No. 7774-2019**

Constitutional Court, Chile

## **Decision No. 2010-91**

French Constitutional Council, dated January 28, 2011

## ***Di Giammarino v. de Ramon***

Second Family Court of Santiago

## **DS (Iran)**

[2016] NZIPT 800788

## ***Dudgeon v. United Kingdom***

[1981] ECHR 5

## **08-002849-0007-CO**

Sala Constitucional, Resolución N° 13800 – 2011

## ***Fitzpatrick v. Sterling Housing Assoc. Ltd***

[1999] 4 All ER 705, [2001] 1 AC 27



***Gelman v. Uruguay***

Inter-Am. Ct. H. R. (ser. C) No. 221 (Feb. 24, 2011)

***Ghaidan v. Mendoza***

[2002] 4 All ER 1162

***Grant v. South-West Trains Ltd***

[1998] ICR 449

***HC 79285 / RJ, 08/31/1999***

Brazilian Supreme Federal Court

***HJ (Iran) v. Secretary of State for the Home Department***

[2010] UKSC 31

***Ioane Teitiota v. the Chief Executive of the Ministry of Business, Innovation and Employment***

[2015] NZSC 107

***I.V. v. Bolivia***

Inter-. Am. Ct. H.R. (ser. C) No. 336, Nov. 30, 2016

***Jones, Jason v. The Attorney General of Trinidad and Tobago (And Others)***

Claim No. CV2017-00720

***Joslin v. New Zealand***

Communication No. 902/1999; U.N. Doc CCPR/C/75/D/902/1999

***Lesbian and Gay Equality Project and Eighteen Others v. Minister of Home Affairs***

[2005] ZACC 20

***Maythem Kamil Radhi v. the District Court at Manukau***

[2017] NZSC 198

***McCoskar and Nadan v. State***

[2005] FJHC 500; HAA0085 & 86.2005

***Min-Kyu Jeong v. Republic of Korea***

Communications No. 1642-1741/2007; U.N. Doc CCPR/C/101/D/1642-1741/2007

***Modinos v. Cyprus***

[1993] ECHR 19; 16 EHRR 485

***National Coalition for Gay and Lesbian Equality and Another v. The Minister of Justice***

[1998] ZACC 15

***National Legal Services Authority and Others v. Union of India and Others***

[2014] 4 LRC 629

***Navtej Singh Johar & Ors. v. Union of India***

[2018] INSC 746

***Naz Foundation v. Government of NCT of Delhi and Others***

160 Delhi Law Times 277

***Norris v. Ireland***

[1988] ECHR 22

***Nystrom v. Australia***

Communication No. 1557/2007; U.N. Doc CCPR/C/102/D/1557/2007

***Orlandi and Others v. Italy***

[2017] ECHR 1153

***Pretty v. United Kingdom***

[2002] ECHR 427

***Refugee and Protection Officer v. CV and CW & Anor***

[2016] NZCA 520

***RT (Zimbabwe) v. Secretary of State for the Home Department***

[2012] UKSC 38

***Samuela Faletalavai Helu v. Immigration and Protection Tribunal***

[2015] NZSC 28

***Sullivan v. Government of the United States of America***

[2012] EWHC 1680

***Sunil Babu Pant and Others v. Nepal Government and Others***

National Judicial Academy Law Journal, 2 NJA Law Journal 2008

**Suresh Kousal v. Naz Foundation and others**

Civil Appeal No. 10972 of 2013

**T-349-06 (5 May 2006)**

Constitutional Court, Colombia

**T-909-11 (1 December 2011)**

Constitutional Court, Colombia

**T-565-13 (23 August 2013)**

Constitutional Court, Colombia

**T-063-15 (13 February 2015)**

Constitutional Court, Colombia

**T-099-15 (10 March 2015)**

Constitutional Court, Colombia

**T-376-19 (20 August 2019)**

Constitutional Court, Colombia

**The Attorney-General v. Taylor & Ors**

[2017] NZCA 215

**Tan Eng Hong v. Attorney General**

[2012] SGCA 45

**Taunoa v. Attorney-General**

[2007] NZSC 70

**Toonen v. Australia**

Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992

**X and Y v. The Netherlands**

[1985] ECHR 4

**Young v. Australia**

Communication No. 941/2000; U.N. Doc CCPR/C/78/D/941/2000

# List of Abbreviations

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**Atala Riffo:** *Atala Riffo and Daughters v. Chile Inter-Am. Comm. HR*, Case 12.502

**Chapman:** *Attorney-General v. Chapman* [2011] NZSC 110, [2012] 1 NZLR 462

**Di Giammarino:** *Di Giammarino v. de Ramon*, Second Family Court of Santiago

**DS (Iran):** DS (Iran) [2016] NZIPT 800788

**ECtHR:** European Court of Human Rights

**HJ (Iran):** *HJ (Iran) v. Secretary of State for the Home Department* [2010] UKSC 31

**IACtHR:** Inter-American Court on Human Rights

**ICCPR:** International Covenant on Civil and Political Rights (1966)

**NALSA:** *National Legal Services Authority and Others v. Union of India and Others* [2014] 4 LRC 629

**National Coalition:** *National Coalition for Gay and Lesbian Equality and Another v. The Minister of Justice* [1998] ZACC 15

**Navtej Johar:** *Navtej Singh Johar & Ors. v. Union of India* [2018] INSC 746

**Naz Foundation:** *Naz Foundation v. Government of NCT of Delhi and Others*, 160 Delhi Law Times 277

**Suresh Kousal:** *Suresh Kousal v. Naz Foundation and others*, Civil Appeal No. 10972 of 2013

**Toonen:** *Toonen v. Australia* (Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992)

**UNHRC:** United Nations Human Rights Council

**Young:** *Young v. Australia*

# Belize

## CASE SUMMARY 1: ATTORNEY GENERAL OF BELIZE V. CALEB OROZCO (COURT OF APPEAL)

<b>Case Name</b>	<i>Attorney General of Belize v. Caleb Orozco</i>
<b>Citation</b>	Claim No. 668 of 2010, Supreme Court of Belize
<b>Link to Case</b>	English: <a href="https://www.humandignitytrust.org/wp-content/uploads/resources/Judgment-Orozco-v-The-Attorney-General-of-Belize.pdf">https://www.humandignitytrust.org/wp-content/uploads/resources/Judgment-Orozco-v-The-Attorney-General-of-Belize.pdf</a>
<b>Jurisdiction</b>	Belize
<b>Court in which the Case was Heard</b>	Originally heard in the Supreme Court of Belize in 2016, appealed to the Court of Appeal.

### SUMMARY OF KEY FACTS

Caleb Orozco (the “**Claimant**”), a citizen of Belize, challenged the constitutional validity of section 53 of the Belize Criminal Code to the extent it criminalised anal sex between two consenting male adults.

The accepted statutory interpretation of section 53 of the Belize Criminal Code was that it included anal sex between two consenting male adults. The applicable provision of the Criminal Code states: “Every Person who has carnal intercourse against the order of nature with any person or animal shall be liable to imprisonment for ten years.” The Claimant argued that this interpretation violated a number of rights under the Constitution of Belize (for the purposes of this section, “Belize”, the “Constitution”), including: (i) the right to dignity and personal privacy under the Preamble, including privacy of the home and human dignity as fundamental freedoms under section 3 of the Constitution; (ii) equal protection under section 6; and (iii) article 14 that provides protection against non-arbitrary or unlawful interference in private and family life. The Claimant also invoked sections 11, 12 and 16 of the Constitution, on freedom of conscience, freedom of expression and protection from discrimination, respectively.

The Claimant produced evidence that suggested criminalisation of sex between consenting adult men resulted in serious harms. This included reports showing that gay men were less likely to report acts of violence or rape for fear of discrimination and lack of protection from the police. Evidence suggested that gay men shunned testing and treatment of HIV/AIDS because of the stigma of being a gay man, which was reinforced by criminalisation. He further produced expert reports, which showed that Belize had the highest prevalence of adult HIV among Central American countries. Further, the expert report challenged the theory that homosexuality is a mental disorder and stated that it is a part of the range of human sexuality and sexual expression.

### SUMMARY OF JUDGMENT

#### Standing

The Supreme Court first determined that the Claimant had standing to bring the claim by determining that continuing the sexual activity in breach of section 53 put him at perpetual risk of being prosecuted. The Court recognised that prosecutions in fact continue to be brought, however few. At paragraph 49, the Court cited dictum from *Dudgeon v. United Kingdom* [1981] ECHR 5,

in the ECtHR, in making its determination, which states that the very existence of similar legislation in the UK “continuously and directly affects [the claimant’s] private life.” The Court further cited *Tan Eng Hong v. Attorney General* [2012] SGCA 45, a case heard in the Court of Appeal of Singapore, which rejected the proposition that a violation of constitutional rights can only be shown by a subsisting prosecution.

## Separation of Powers

The Court further held that it had standing to rule on this issue and rejected the argument raised by the Attorney General that the matter represented a clash of worldviews and therefore was within the “domain of the National Assembly.”<sup>1</sup> The Court rejected the argument brought by the Attorney General and the Roman Catholic Church of Belize, the Belize Church of England Corporate Body and the Belize Evangelical Association of Churches (“the Churches”) joining in the action that the Court would be in effect substituting its own moral judgment for those of the people’s elected representatives, the National Assembly of Belize. Rather, it stated that this was an issue concerning alleged violations of fundamental constitutional rights as opposed to a moral issue; and therefore it was the Court’s duty to rule on the issue and this duty is essential for the conservation of democracy. The Court stated that despite the Churches’ respect and influence in Belize, Belize is a secular state with a written Constitution which provides for the protection of fundamental human rights and freedoms.

## Constitutional Rights

The Court acknowledged the previous judicial pronouncements that the Constitution is a living instrument and noted that the Court reviewed certain international human rights laws in connection with construing the provisions of the Constitution for the purposes of this case. The Court found that section 53 of the Criminal Code violated the following Constitutional rights:

- The right to dignity of the human person protected by section 3(c) of the Constitution. The Court found that gay men are degraded and devalued by a law punishing a form of sexual expression, making the law a violation of their dignity. The Court found that although the language of section 53 was gender-

neutral, it disproportionately impacted homosexual men.

- Freedom from discrimination based on sex, which the Court extended to include “sexual orientation”, consistent with the UNHRC’s interpretation of the ICCPR.
- Equality under section 6(1), stating that the Claimant has been discriminated against on the basis of sexual orientation with no justifiable basis.

The Court also found that section 53 violated the right to freedom of expression and right to personal privacy protected by sections 3, 6(1), 12 and 16 of the Constitution to the extent it criminalised private sexual activities between consenting adults. The criminalisation amounted to a breach of an individual’s right to express his sexual orientation.

The Attorney General appealed on two grounds: freedom of expression and non-discrimination on the grounds of “sex” under sections 12 and 16 of the Constitution, respectively. The Court of Appeal heard the case on 29 October 2018 and returned the ruling on 30 December 2019, finding against the Appellant and upholding the judgment of the Supreme Court. In particular, the Court of Appeal upheld Chief Justice Benjamin’s reasoning in the Supreme Court that non-discrimination on the grounds of “sex” under sections 3 and 16 of the Constitution encompasses sexual orientation.

## SUMMARY OF ANY ADDITIONAL COMMENTARY IN THE JUDGMENT OR ANY USEFUL DISSENTING OPINION

The Belize Constitution. In interpreting the provisions of the Constitution, the Court relies on international authority as described below:

### Right to Dignity

In attempting to define the “dignity of the human person”, the Court cites the following interpretations of similar constitutional provisions internationally:

- *Law v. Canada* (Minister of Employment and Immigration) [1999] 1 SCR 497 (at paragraph 53): “Human Dignity means that an individual or group feels self-respect and self-worth. It is concerned

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<sup>1</sup> See paragraph 51 of the judgment.

with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to the individual needs, capacities or merits. It is enhanced by laws which are sensitive to the needs, capacities and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalised, ignored or devalued, and is enhanced when laws recognise the full place of all individuals and groups within Canadian society.”

- *National Coalition for Gay and Lesbian Equality v. Minister of Justice* [1998] ZACC 15: In holding a sodomy law unconstitutional and in violation of the following provision of the South African Constitution: “Everyone has inherent dignity and the right to have their dignity respected and protected,” the Constitutional Court of South Africa said in dictum that the symbolic effect of the law was to label all gay men criminals in the eyes of the legal system. This resulted in gay men being subject to arrest, prosecution and conviction simply for engaging in sexual conduct that is a part of their experience of being human.

## Right to Privacy

In determining that the Claimant’s statute violates the right to privacy, the Court cited the following:

- The following cases in the European Court of Human Rights upholding a breach of the right to privacy in relation to legislation criminalising certain acts between consenting males: *Dudgeon v. UK* [1981] ECHR 7525/76; *Norris v. Ireland* [1988] ECHR 105812/83; and *Modinos v. Cyprus* [1993] ECHR15070/89.
- In determining that, from the perspective of legal principle, the Court cannot act upon prevailing majority views or what is popularly accepted as moral, the Court cites *Patrick Reyes v. R.*, in turn citing the *South African Constitutional Court in State of Makwanyana* [1995] (3) SA 391 in its discussion that public opinion may have relevance but is not a substitute for the Court’s duty to interpret the Constitution without fear or favour in order to protect marginalised people.

- In supporting the conclusion that the reference to the Supremacy of God in the Constitution does not import a specific religious perspective, the Court compares the Constitution to the Canada Charter of Rights and Freedoms and its interpretation in the *María Roches* case, *G. O’Sullivan v. M.N.R. (No. 2)*, [1991] 2 C.T.C. 117, affirming that Canada is a secular state, notwithstanding references to God.

## RESOURCES CITED

ICCPR  
*Toonen*

### Description of How the Resources were Used

The Court states at paragraph 58 that “the Belize Constitution owes its provenance to the European Convention on Human Rights which in turn was influenced by the UN Declaration on Human Rights. As such, decisions in relation to human rights issues have been informed by developments in international law.” The Court goes on to acknowledge that the Caribbean Court of Justice has acknowledged the application of precedent from international bodies to domestic law. The Court specifically states that it reviewed international law in construing the human rights provisions of the Belize Constitution.

The Court extended the interpretation of “sex” in section 16(3) of the Constitution to include “sexual orientation”, noting that the UNHRC held in *Toonen* that “sex” in articles 2 and 26 of the ICCPR was to be interpreted as including sexual orientation. He pointed out that international bodies and the United Nations had also embraced this interpretation. According to Justice Benjamin at paragraph 94, as Belize had acceded to the ICCPR in 1996, two years after *Toonen*, “it can be argued that in doing so, it tacitly embraced the interpretation rendered by the UNHRC.” The Court said that the same reasoning applies to the interpretation of the “right to equality.”

## NEWS/PRESS ARTICLES/SCHOLARSHIP IN RELATION TO THE CASE (IF APPLICABLE) WITH BRIEF SUMMARY

Caleb Orozco is a relatively well-known LGBTIQ rights activist from Belize. The New York Times covered his



activism in 2015 and NBC issued a release about the initial judgment in 2016. Following the issuance of the 2019 appeal, there has been some additional press about the case and Mr. Orozco.

- **New York Times** – 2015 article: <https://www.nytimes.com/2015/05/24/magazine/the-lonely-fight-against-belizes-antigay-laws.html>
- **Initial NBC release** – <https://www.nbcnews.com/feature/nbc-out/belize-supreme-court-overturns-anti-gay-law-n627511>

### Other News Coverage

- <https://monitor.civicus.org/updates/2016/09/15/court-decision-belize-victory-lgbt-rights-defender-caleb-orozco/>
- <https://www.hrc.org/news/inside-caleb-orozcos-fight-to-overturn-belizes-anti-gay-laws>

- <https://www.lawandreligionuk.com/2020/01/08/criminalisation-of-same-sex-relations-in-belize-unconstitutional-orozco/>
- <https://www.washingtonblade.com/2020/01/03/belize-court-of-appeal-upholds-ruling-that-struck-down-sodomy-law/>
- <https://Outrightinternational.org/content/crosspost-unibam-press-release-belize-court-appeal-decision-about-caleb-orozco-case>
- <https://www.pinknews.co.uk/2020/06/06/caleb-orozco-pinknews-pride-for-all-kaleidoscope-trust/>
- <https://sports.yahoo.com/news/huge-news-international-lgbt-rights-231841513.html>

# Chile

## CONSTITUTIONAL COURT CASES

**Note:** All of the cases summarised in this section, “Constitutional Court Cases”, involve “Motions of Inapplicability”, through which other Chilean Courts, or one or more parties in proceedings before such Chilean Courts, may request the Constitutional Court of Chile to rule on whether the application of an otherwise valid provision (in each case, a “**Contested Provision**”) would be unconstitutional in the specific case that is being litigated (in each case, the “**Underlying Case**”). Motions of Inapplicability trigger an exceptional, case-specific, ex post constitutionality control that does not produce erga omnes effects and must comply with certain prerequisites in order to be granted (e.g., the inapplicability of the Contested Provision(s) must change the outcome of the Underlying Case).

### CASE SUMMARY 1: CASE NO. 1683-2010 (CONSTITUTIONAL COURT)

<b>Case Name</b>	Case No. 1683-2010 – Motion for Inapplicability regarding article 365 of the Chilean Criminal Code
<b>Link to Case</b>	Spanish: <a href="http://www.tribunalconstitucional.cl/descargar_sentencia2.php?id=1715">http://www.tribunalconstitucional.cl/descargar_sentencia2.php?id=1715</a>
<b>Jurisdiction</b>	Chile
<b>Court in which the Case was Heard</b>	Constitutional Court

### SUMMARY OF KEY FACTS

The Contested Provision (being article 365 of the Chilean Criminal Code) criminalised same-sex intercourse if an individual “carnally penetrates” another one who is younger than 18 and older than 14 (and thus was broadly interpreted to apply only to males), regardless of consent. It provided a lighter penalty than other cases which could be deemed violation or rape (such as any kind of intercourse with someone that is younger than 14).<sup>2</sup>

The claimant in this action (the “**Claimant**”) was a 33-year-old male who had been accused by National Prosecutors under the Contested Provision for having had consensual intercourse with a 14-year-old male. The Claimant argued that applying the Contested Provision

in the criminal proceedings followed against him would violate his rights to dignity, equal treatment before the law, liberty, and privacy provided by the Chilean Constitution and various Human Rights treaties to which Chile is a party.

### SUMMARY OF JUDGMENT

#### Majority Opinion: The Motion Must be Denied

The legislative history of the law that instituted the Contested Provision reveals that legislators passed it with the specific intent of decriminalising same-sex male intercourse between adults. However, they decided not to decriminalise such conduct when a minor was involved under the assumption that children between 14 and 18

<sup>2</sup> Note: The minimum age of consent in Chile is 14. However, this is increased to 18 for consensual same-sex relations (as well as in other circumstances).

years old may not be mature enough to fully understand the consequences of such actions and, thus, consent freely. Referring to cases in which boys that engaged in such activities only realised they had been used as sexual objects years after reaching adulthood, the Contested Provision sought to protect children's physical and psychological wellbeing. In Congress's view, being subject to penetration at that age could determine or condition children's freedom to define their own sexual identity.

The Constitutional Court's role is not to supplant legislators or administrative decisions, but only to control whether such decisions were taken within the boundaries set by the Constitution to legislative action.

Protecting minors was a constitutionally admissible justification for the Contested Provision not to violate the prohibition on arbitrary discrimination. In fact, many criminal and other legal provisions were intended as special protections of minors. The Best Interests of the Child mandate is recognised in various international human rights treaties, and other Constitutional Courts have acknowledged the need to protect children because they may be more vulnerable or defenceless. Cfr. Convention of the Rights of the Child, art. 1; IACtHR, OC-17/02; Constitutional Court of Colombia, case C-318/03; Geneva Declaration of the Rights of the Child of 1924, Declaration of the Rights of the Child of 1959, Vienna Declaration and Programme of Action; and American Convention on Human Rights, art. 19. Thus, legislators did not breach any constitutional limits by trying to prevent children from having intercourse that could harm their dignity given the immaturity of their psychological and sexual development.

The Contested Provision does not arbitrarily discriminate against gay men vis-à-vis lesbians either. First, like the crimes of violation and rape established under the same Title of the Criminal Code, the Contested Provision punishes those who "carnally penetrate" another person. Since this is not possible amongst two women, there is no arbitrary discrimination. Second, the Contested Provision is not based on the sexual orientation of either perpetrator or victim, but on the impact that anal penetration may have on the psychosocial development of a male minor, something that is not at issue regarding intercourse between two women.

While criminal law may not criminalise sexual orientation, it may criminalise certain practices that could potentially cause irreversible harm to others. Moreover, if engaging in intercourse with minors were accepted as a means to reinforce the perpetrator's sexual orientation, the child victim would be rendered a mere object to satisfy the former's sexual self-determination, thus violating the latter's constitutionally protected dignity. This confirms that the Contested Provision does not entail an arbitrary discrimination.

The right to privacy is likewise not absolute. It might be limited, for example, regarding criminal actions, Cfr. ECtHR, *Pretty v. United Kingdom*, and especially those of a sexual nature. The right to privacy may not justify sexual conduct that could harm others. Cfr. Brazilian Supreme Federal Court, HC 79285 / RJ, 08/31/1999; ECtHR, *X and Y v. The Netherlands*, cited in IACtHR, OC-17/02. To the extent it aims to protect minors from the harmful consequences of particular sexual conduct, the Contested Provision is thus a constitutionally admissible limitation to privacy.

Likewise, the right to free development of personality, implied in article 1 of the Chilean Constitution, may not justify the violation of the rights of other, equally dignified, human beings. Thus, even though the "carnal penetration" of minors may be an expression of some individual's personality, such actions may be limited by legislators if they deem the conduct to be harmful to the psychosocial development of minors that are not fully aware of such actions or consequences.

## SUMMARY OF ANY ADDITIONAL COMMENTARY IN THE JUDGMENT OR ANY USEFUL DISSENTING OPINION

### **In their dissenting vote, Justices Vodanovic, Carmona, and Viera-Gallo also noted that:**

- Sex or sexual orientation is a suspect classification (see articles 2.1 and 24 of the ICCPR; article 1.1 of the American Convention on Human Rights; article 45 of the Charter of the Organization of American States; article 21.1 of the Charter of the Fundamental Rights of the European Union; the Yogyakarta Principles; *Toonen*; and the Committee on Economic, Social and Cultural Rights, General Comment No. 20, 2009) and as such the presumption of constitutionality is

inverted. Applying such presumption is further justified considering that sexual minorities have historically been subject to degrading treatment, both by individuals and by the State;

- The criminalisation of consensual male same-sex intercourse has been declared unconstitutional by various national and supranational courts around the world and, consistently, legislators in different countries (including Latin American countries such as Argentina, Brazil, Honduras, Ecuador, Mexico, Paraguay, Peru and Uruguay) have de-criminalised same-sex intercourse and eliminated differentiated ages of consent for different sexual orientations;
- Beyond the prohibition on arbitrary discrimination, the Contested Provision also violates the right to the free development of personality, regarding both the perpetrator and the victim. Given its underlying homophobic rationale, the Contested Provision is not compatible with a pluralistic society in which people relate to each other based on an equal standing and mutual respect; and
- The Contested Provision also violates the right to intimacy. Sexual intercourse is amongst the most private and intimate of human conduct and may only be intervened by the State to protect the freedom of the parties involved; prevent the use of force, coercion, deceit or other abuses; and ensure parties are not bound by a familial relationship. The Contested Provision thus violates the right of the consenting minor, who is treated as an object of protection instead of a subject of human rights.

## RESOURCES CITED

*Toonen*

Yogyakarta Principles

## DESCRIPTION OF HOW THE RESOURCES WERE USED

Both of the Resources were cited in Justices Vodanovic, Carmona, and Viera-Gallo's dissenting opinion.

## **Toonen**

**Toonen was cited in support of the following two propositions:**

1. **First**, that various international courts and organisations have found that the criminalisation of same-sex intercourse violated human rights. Regarding Toonen, in particular, the dissenting opinion explained that the UNHRC stated that sanctioning consensual sexual intercourse between men violated the rights of privacy and equality, and that sexual orientation was a suspect classification covered under the term "sex" used in the ICCPR. Notably, in support of the same proposition, the dissenting opinion also cited ECtHR jurisprudence that is cited in *Toonen*, namely *Dudgeon v. United Kingdom* [1981] ECHR 5; *Norris v. Ireland* [1988] ECHR 22; *Modinos v. Cyprus* [1993] ECHR 19; and one of the subsequent cases that cites *Toonen*, namely *Naz Foundation*.<sup>3</sup> The dissenting opinion highlighted these cases to show that the Contested Provision, like those already declared to be unconstitutional in other countries, is based on an impermissible arbitrary discrimination.
2. **Second**, that sexual orientation is a suspect classification akin to the more general term "sex." The dissenting opinion again relied on the UNHCR decision in *Toonen*, stating that sexual orientation is a suspect category covered by the term "sex" as used in article 2 of the ICCPR. As a suspect classification, the presumption of constitutionality is inverted whenever a provision is based on differences in sexual orientation.

## **Yogyakarta Principles**

When arguing that sexual orientation is a suspect classification, the dissenting opinion made reference to the definition contained in the Yogyakarta Principles' preamble, which defines sexual orientation as "each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender." When provisions are based on such a suspect classification, the presumption of constitutionality is inverted.

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<sup>3</sup> Note: It is worth noting that the Supreme Court of India overruled this decision in *Suresh Koushal*. However, this decision was then overturned by the landmark decision of *Navtej Johar*.

The dissenting opinion also stated that, during the 2009 Universal Periodic Review conducted by the UNHRC, Chile supported recommendations regarding its need to prohibit, by law, discrimination based on sexual orientation and gender identity, and to use the Yogyakarta Principles as guidance for future policies.

Quoting Principle 2 of the Yogyakarta Principles, the dissenting opinion also noted that the Yogyakarta Principles, which Chile pledged to respect, provide that states shall “[r]epeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity.” Chile’s commitment to repeal provisions like the Contested Provision confirmed that the Contested Provision should be declared inapplicable in the Underlying Case.

## NEWS/PRESS ARTICLES/SCHOLARSHIP IN RELATION TO THE CASE (IF APPLICABLE) WITH BRIEF SUMMARY

### News/Press Articles

- **Cooperativa** – *CC ruling considers homosexual intercourse between women to be legal*. Summarises the decision highlighting the consensus on the legality of lesbian intercourse involving minors that are older than 14 years of age. It also reproduces part of LGBTIQ rights NGO Movilh’s statement rejecting the majority opinion as homophobic and welcoming the dissenting opinion and the consensus on the legality of lesbian intercourse between minors.
- **El Ciudadano** – *Lesbian intercourse is legal from 14 years of age according to the Constitutional Court of Chile*. (Reproducing Movilh’s news post on the matter.) Focuses on Movilh’s characterisation as a “bittersweet” ruling, quoting various passages. On the one hand, the majority ruling perpetuated inequality and was based on homophobic reasoning. On the other, it made clear that lesbian intercourse between minors who are older than 14 years of age is not criminalised, and the dissenting opinion provided strong arguments against the criminalisation of same-sex intercourse.

### Scholarship Articles

- **Antonio Bascuñán** – *The Criminal Prohibition of Male Juvenile Homosexuality*. The author is highly critical of the decision. He argues that the Contested Provision does not follow the logic of other criminal provisions that intend to protect minors, that a complete reading of the international cases on which the majority relies actually works against it, or that the majority does not adequately explain how the prohibited “carnal penetration” would hurt the minors that legislators allegedly intended to protect. He also shows how other jurisdictions abandoned this position decades ago.
- **Luciano Cisternas Velis** – *Commentary to the Constitutional Court’s decision on case No. 1683-10 regarding the Motion of Inapplicability of art. 365 of the Chilean Criminal Code*. The author argues that the majority opinion did not appropriately interpret the Constitutional principles and foundations of Criminal Law. In particular, the majority did not consider the principle of minimum intervention of criminal laws, and the fact that criminal law also must contain safeguards guaranteeing the rights of those accused. He dismisses the majority’s arguments, which are characterised as homophobic.
- **José Ángel Fernández Cruz** – *The Constitutional Validity of the Chilean Sodomy Law in the New Context of the Antidiscrimination Act and the Atala Case*. The author is critical of the decision. He surveys the prohibition of discrimination based on sexual orientation and recent developments in LGBTIQ rights (the enactment of Law No. 20.609 and Atala Riffo before the IACtHR) and concludes that the current high standards against discrimination based on sexual orientation support the unconstitutionality of the Contested Provision.

## CASE SUMMARY 2: CASE NO. 1881-2010 (CONSTITUTIONAL COURT)

<b>Case Name</b>	Case No. 1881-2010 – Motion for Inapplicability regarding article 102 of the Chilean Civil Code
<b>Link to Case</b>	Spanish: <a href="http://www.tribunalconstitucional.cl/descargar_sentencia2.php?id=2213">http://www.tribunalconstitucional.cl/descargar_sentencia2.php?id=2213</a>
<b>Jurisdiction</b>	Chile
<b>Court in which the Case was Heard</b>	Constitutional Court

### SUMMARY OF KEY FACTS

Three gay couples (the “**Claimants**”), two of which married abroad, either requested the Chilean Civil Registry Service to marry them or to recognise their foreign marriages. Arguing that Chilean law did not allow it to marry or recognise foreign marriages of same-sex couples, the Chilean Civil Registry Service refused. The Claimants argued that the Civil Registry Service’s decision amounted to discrimination based on sexual orientation and arbitrarily deprived them of the special protections provided by marital status.

The Claimants filed an Acción de Protección before the Santiago Court of Appeals requesting that the Chilean Civil Registry Service be forced to register all three marriages. While this Underlying Case was pending, the Court of Appeals requested the Constitutional Court to decide whether the application of the Contested Provision (which defines marriage as an agreement between a man and a woman) would produce unconstitutional effects in the Underlying Case.

### SUMMARY OF JUDGMENT

#### Majority Opinion: The Motion Must be Denied

Under article 63 of the Constitution, the regulation of marriage is a matter of legal reserve. In fact, the characteristics of marriage have changed over time through legal amendments.

Claimants seek the reformulation of complex legal institutions that currently do not apply to them. However, the Constitutional Court lacks powers to amend legal institutions when deciding a Motion of Inapplicability.

Moreover, even if the motion would have been granted, that would not have changed the outcome of the Underlying Case with respect to two of the three Claimant couples, as article 80 of the Civil Marriage Law, which provides that only different-sex foreign marriages may be recognised as such in Chile, would still remain applicable.

Justices Fernandez, Carmona, Viera-Gallo and Garcia noted that while “sex” and “sexual orientation” are suspect classifications for the purposes of the ICCPR, and that there is therefore a presumption against constitutionality, it is the duty of Congress, not the Constitutional Court, to either regulate some form of civil union between two people, independent of their sexual orientation, or extend marriage to such couples if they so deem appropriate.

### SUMMARY OF ANY ADDITIONAL COMMENTARY IN THE JUDGMENT OR ANY USEFUL DISSENTING OPINION

Justice Vodanovic gave the sole dissenting opinion, but his reasoning did not draw on any of the Resources.

### RESOURCES CITED

Articles 23.2 and 2.1 of the ICCPR.  
 UNHRC General Comment No. 19 (1990)



## DESCRIPTION OF HOW THE RESOURCES WERE USED

### ICCPR

Articles 23 and 2 of the ICCPR were discussed by different justices in deciding to dismiss the application.

- **Article 23.2.** Justice Bertelsen’s concurring opinion argues that the legislative choice to reserve marriage to heterosexual parties is consistent with certain international treaty provisions, including article 23.2 of the ICCPR, which recognises the right “of men and women” to marry, as opposed to other rights which are recognised with respect to “everyone” or “every human being.”
- **Article 23.** Justice Peña’s concurring opinion made a similar argument, albeit emphasising that marriage between a man and a woman is an essential human right recognised in various international treaties, including article 23 of the ICCPR.
- **Article 23.2.** Justices Fernandez, Carmona, Viera-Gallo and Garcia’s concurring opinion likewise cited the different international human rights treaties that recognise marriage as a human right (including article 23 of the ICCPR), but interpreted them differently, arguing that: (i) such treaties do not limit the right to marry to men with women or vice versa, even if an originalist interpretation would deny such diversity; (ii) that such right must be given effect and configured by each country’s internal legislation, and that legislators may thus decide the rules of legal capacity, consent, form and effect applicable to marriage; and (iii) that, as other rights recognised in human rights treaties, the right to marry must be interpreted consistent with the pro homine and pro libertatis principle. Ultimately, this interpretation supported their overall arguments that legislators have a duty to recognise and protect de facto unions, including same-sex couples, through legal institutions, and that nothing in the Constitution or human rights treaties prevents legislators from expanding marriage to same-sex couples if legislators so decide.

- **Article 2.1.** Justices Fernandez, Carmona, Viera-Gallo and Garcia’s concurrent opinion also stated that article 2.1. of the ICCPR listed “sex” – which, in turn, comprised sexual orientation – as a suspect classification. They further noted, at reason no. 27, that the use of suspect classifications may violate the right of equality when it is an expression of a “purpose of hostility against certain people or groups of people.”

### UNHRC General Comment No. 19 (1990)

This Resource was cited in Justices Fernandez, Carmona, Viera-Gallo and Garcia’s concurring opinion.

It was cited in support for the proposition that international human rights treaties recognise different concepts of family. Human rights protection is thus not limited to families based on different-sex marriage nor any particular familial model. The opinion quoted paragraph 2 of the Resource that states that “the concept of the 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.”

Justices Fernandez, Carmona, Viera-Gallo and Garcia also noted at reason no.15 that, while the Chilean Constitution considers the family to be “the cornerstone of society”, it does not protect any particular familial model, and thus should not be misunderstood as a protection of different-sex marriage to the detriment of other types of family not based on said institution. They further noted that the Chilean Constitution also provides that the State must contribute to create the conditions for all individuals to thrive spiritually and materially, and to promote social integration.

Thus, they concluded, the Chilean State has a duty to recognise and protect, through legal institutions, the different familial models that arise as the social and cultural understanding of the family evolves. This includes different types of de facto unions which, in turn, include same-sex couples. However, they concluded that it was the role of Congress to make such changes rather than the Constitutional Court.

## NEWS/PRESS ARTICLES/SCHOLARSHIP IN RELATION TO THE CASE (IF APPLICABLE) WITH BRIEF SUMMARY

### News/Press Articles

- **El Mercurio Online** – *CC denies motion regarding gay marriage and evidences legal vacuum for de facto unions*. Summarises the decision, using quotes.
- **Cooperativa** – *CC denied motion filed by three homosexual couples to validate their marriage in Chile*. Summarises the decision and the history of the case, including a statement by one of the claimants.
- **Movilh** – *Constitutional Court rules that Marriage Law may be amended by Congress*. Emphasises that, while it did not declare that the restriction of marriage to different-sex couples constitutes an arbitrary discrimination, the Constitutional Court's decision opened up the opportunity for the issue to be debated in Congress.
- **El Dinamo** – *Fundación Iguales rejects CC decision on homosexual marriage*. LGBTIQ rights NGO Fundación Iguales lamented the decision and rejected some of its arguments, but appreciated that the decision gave Congress leeway to legislate on the matter.

### Scholarship Articles/Op-eds

- **Hernan Corral** – *Constitutional Court and Homosexual Marriage. Commentary of the award No. 1881-2010 of November 3rd 2011*. The author summarises the decision and its history; explains that there are two pending bills on the matter (one regarding a separate civil union for both different-sex and same-sex couples, and another one regarding same-sex marriage); and argues that the decision is no guarantee that, if approved by Congress, any of them would be declared to be constitutional. Inapplicability decisions such as these are not binding precedent and concurrent opinions are not even binding regarding the justices that drafted them. It is also doubtful that there is a quorum for such a decision, and the Court's composition may change. The author also praised the Court's decision not to be used to further legal changes that lack enough votes in Congress.
- **Hernan Corral** – *Regarding the Constitutional Court's decision on marriage, would a law that extended*

*marriage to homosexual unions be constitutional?*

The author argues that legislating in favour of same-sex marriage would be unconstitutional, as the Constitution and international human rights treaties protect different-sex marriage as the basis for the protection of the family. He further argues that it is not possible to legislate in favour of same-sex marriage without changing essential elements of the institution beyond recognition, thus affecting the right of different-sex couples to access an institution tailored to pursue procreation.

- **Pablo Contreras** – *It is time to discuss the kind of marriage we want*. The author argues that, while the majority opinion didn't clearly specify how much deference would be given to legislators regarding the regulation of marriage, the concurrent and dissenting opinions suggest at least 8 of the 10 justices favour some kind of regulation of same-sex unions. He also thinks political circumstances support this discussion, as changes to relevant characteristics of marriage have accelerated in recent years.
- **Juan Pablo Pinto** – *Critical analysis of the Chilean Constitutional Court's November 3rd, 2011 decision regarding equal marriage*. Survey of historical, constitutional, legal, systematic and teleological arguments in favour of and against the legalisation of same-sex marriage. The author concludes that the Constitutional Court's decision was incorrect, and that the legalisation of same-sex marriage is imperative under the Constitution and international human rights treaties.

## IF APPLICABLE, A NOTE AS TO WHETHER SUCH CASE WAS OR IS PLANNED TO BE APPEALED TO ANY SUPRANATIONAL COURT

- N/A. However, a complaint was filed with the Inter-American Commission of Human Rights based on this and other judicial decisions that declined to order the Civil Registry Service to register same-sex marriages. Parties entered into a Friendly Settlement Agreement in 2016 and a bill was subsequently introduced to recognise same-sex marriage. The bill, however, has not yet been passed and the Chilean government has been accused of violating the agreement.

## CASE SUMMARY 3: CASE NO. 2435-2013 (CONSTITUTIONAL COURT)

<b>Case Name</b>	Case No. 2435-2013 – Motion for Inapplicability regarding article 54, paragraph 2, number 4 of the Civil Marriage Law
<b>Link to Case</b>	Spanish: <a href="http://www.tribunalconstitucional.cl/descargar_sentencia2.php?id=2954">http://www.tribunalconstitucional.cl/descargar_sentencia2.php?id=2954</a>
<b>Jurisdiction</b>	Chile
<b>Court in which the Case was Heard</b>	Constitutional Court

### SUMMARY OF KEY FACTS

An adult gay man (the “**Claimant**”)’s wife filed for *guilty* divorce on the grounds of “homosexual conduct” under the Contested Provision. According to the Claimant’s wife, their relationship ended because of the Claimant’s homosexuality. She further alleged that the Claimant started dating other men while they still lived together. The Claimant, on the other hand, alleged that it was only after he and his wife had separated that he became aware that he was gay and started dating a man. The case was brought before the Family Court of Antofagasta.

*Guilty* divorce, by definition, involves a serious violation of the duties of marriage. The Claimant alleged that, by including “homosexual conduct” (even in absence of actual sexual intercourse) alongside other *guilty* divorce cases such as alcoholism, drug addiction, and attempting to prostitute the couple’s children, the Contested Provision was a derogatory sanction that treated sexual orientation as a disease or vice. Moreover, infidelity was already considered an independent form of *guilty* divorce, evidencing that the Contested Provision did not intend to protect the duty of fidelity and was only based on sexual orientation, thus violating the prohibition on arbitrary discrimination.

### SUMMARY OF JUDGMENT

#### Majority opinion: The Motion Must be Denied

Under the Constitution, the regulation of marriage is a matter of legal reserve (article 63 of the Constitution), and Chilean laws define marriage as between a male and female individuals, and monogamic. This legislative choice is constitutionally admissible under article 1 of the

Constitution (providing that the family is the fundamental stone of society) and article 17 of the American Convention on Human Rights (recognising the right of a man and a woman to be united in marriage).

Fidelity is a marital duty under Chilean law, but adultery is not the only way that duty can be violated. First, as defined in Chilean law, adultery can only be committed when a married woman has intercourse with a man who is not her husband, or a married man has intercourse with a woman who is not his wife. Second, even if there is no intercourse, the Supreme Court has clarified at reason no. 10 that the duty of fidelity can also be violated through other kinds of severe infidelity such as the “*reiterated relationship with somebody from the opposite sex involving displays of affection and passion that are improper with anybody besides the husband or wife.*”

Both the letter and the history of the Contested Provision make clear that mere feelings of attraction towards somebody from the same sex are not enough to trigger *guilty* divorce. Rather, *guilty* divorce is triggered by facts, or manifested conduct. The Contested Provision therefore does not punish sexual orientation in itself.

Therefore, under Chilean law, the duty of fidelity would be violated by the same kind of conduct regardless of whether the conduct involved somebody from a different or the same sex as the liable spouse. Such conduct includes not only intercourse but improper extramarital demonstrations of affection. Importantly, sexual orientation (whether towards somebody from the same or a different sex) in itself is not punished. Therefore, the Contested Provision does not arbitrarily discriminate.

While Law No. 20,609 provides that Relief against Discrimination defines sexual orientation as a suspect category, it expressly provides that suspect categories cannot be invoked to justify, validate, or exonerate conduct that violates the law or public order. Thus, sexual orientation cannot be invoked to avoid compliance with the Civil Marriage Law.

## SUMMARY OF ANY ADDITIONAL COMMENTARY IN THE JUDGMENT OR ANY USEFUL DISSENTING OPINION

### Justices Vodanović, Carmona, García, and Brahm, dissenting:

- The Motion should have been granted.
- The history of the Contested Provision makes clear that it was only intended to cover external and objective behaviour, not mere sexual inclinations or preferences.
- Sex may be a suspect classification when used to reinforce archaic stereotypes, conditions which people can't control, or when it is directed against historically discriminated groups, such as the gay community. Sexual orientation in particular is a suspect classification (see article 26 of the ICCPR, *Toonen*; *Young*; articles 1.1 and 24, American Convention on Human Rights; and *Atala Riffo*). Thus, it is not enough to justify the Contested Provision based solely on its coherence with the different-sex model of marriage chosen by legislators. Its restrictive effects on other rights must also be considered.
- The Contested Provision could not have been intended to punish acts of infidelity, as all such acts are broadly covered by article 54, paragraph 2, number 2 of the Law of Civil Marriage. It must therefore have an independent purpose.
- Regardless of the legislators' intent, the term "homosexual conduct", by definition, may encompass a mere condition or way of living, and therefore is not restricted to unambiguous external action (as is generally the case for other heads of *guilty* divorce).
- The prohibition of arbitrary discrimination must be

observed not only at the time during which a couple is married but also when wedlock is dissolved (see articles 3 and 23.4 of the ICCPR and UNHRC, General Comment No. 28). Thus, being directed towards a suspect category, and given its ambiguity and subjectivity, low standard of configuration (in the sense that, unlike other types of *guilty* divorce that, in addition to a specific conduct, require a final judicial decision, a certain persistence over time, or a tangible harm towards the spouse and/or children), and detrimental effects, the Contested Provision fails the test of proportionality and constitutes an arbitrary discrimination.<sup>4</sup>

## RESOURCES CITED

*Toonen*

*Young*

ICCPR, articles 3, and 23.4

UNHRC, General Comment No. 28 (2000)

## DESCRIPTION OF HOW THE RESOURCES WERE USED

All of the aforementioned Resources were cited in Justices Vodanovic, Carmona, García, and Brahm's dissenting opinion.

### ***Toonen and Young***

Both Resources were cited in support for the proposition that sexual orientation is a suspect classification.

- First, the dissenting opinion cited *Toonen* in support for the proposition that sexual orientation is akin to the more general term "sex" contained in article 26 of the ICCPR, which lists different suspect classifications that form part of the right to non-discrimination.
- The dissenting opinion then cited *Young's* argument that sexual orientation is also encompassed by the general reference to "any other condition" contained in article 26 of the ICCPR.
- Notably, the dissenting opinion also cited *Atala Riffo* (which also cites both *Toonen* and *Young*) in support of the same proposition. In particular, the

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<sup>4</sup> Guilty divorce works as a penalty for the spouse who caused it, certain rights of whose are diminished as a result. For example, once guilty divorce is declared, such spouse may not obtain "economic compensation" (a kind of lump sum alimony provided by Chilean law in certain circumstances) and the "victim" spouse may revoke all donations made to the "liable" spouse.

dissenting opinion stated that, as noted in *Atala Riffo*, sexual orientation and gender identity are suspect classifications under the American Convention of Human Rights and that rights, therefore, may not be limited or restricted based on an individual's sexual orientation.

- Based on these and other cases, the dissenting opinion argued that it is not enough to justify the Contested Provision (under which, as explained above, "homosexual conduct" is deemed grounds for *guilty* divorce)'s constitutionality based solely on its coherence with the different-sex model of marriage chosen by Chilean legislators. Rather, given that sexual orientation is a suspect classification, the Court should have also analysed whether and how the Contested Provision restricted the Claimant's rights because of his sexual orientation.

### ICCPR, Articles 3 and 23.4; and UNHRC, General Comment No. 28 (2000).

Both resources were cited in support for the proposition that the prohibition of arbitrary discrimination must be observed not only at the time during which a couple is married but also when wedlock is dissolved.

- The dissenting opinion first quoted article 3 of the ICCPR, which guarantees "*the equal right of men and women to the enjoyment of all civil and political rights (...)*"
- It then quoted article 23.4 of the ICCPR, which provides that "*States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution (...)*" (emphasis in the dissenting opinion).
- Finally, the dissenting opinion quoted paragraph 26 of the UNHRC's General Comment No. 28, which, interpreting the aforementioned provisions, emphasised that the grounds for divorce and the consequences of the same must respect the right to equal treatment. As quoted by the dissenting opinion at paragraph 29: "*States parties must also ensure equality in regard to the dissolution of marriage, which excludes the possibility of repudiation. **The grounds for divorce and annulment should be the same for men and women, as well as decisions with regard***

*to property distribution, alimony and the custody of children. Determination of the need to maintain contact between children and the non-custodial parent **should be based on equal considerations.** Women should also have equal inheritance rights to those of men when the dissolution of marriage is caused by the death of one of the spouses"* (emphasis in the dissenting opinion).

Thus, these resources reinforce the dissenting opinion's ultimate conclusion that the Contested Provision entails an impermissible arbitrary discrimination.

## NEWS/PRESS ARTICLES/SCHOLARSHIP IN RELATION TO THE CASE (IF APPLICABLE) WITH BRIEF SUMMARY

### News/Press Articles

- **Diario Constitucional** – *CC denied Inapplicability of provision that allowed invoking homosexual conduct as grounds for guilty divorce.* The article summarises the decision, including a link to the same.
- **El Mercurio Legal** – *CC declares "homosexual conduct" to be constitutional as grounds for divorce.* The article summarises and quotes the decision.
- **CNN Chile** – *Rejection to the regulation that considers homosexuality as grounds for divorce.* Interview in which the Director of LGBTIQ rights NGO Movilh laments the decision, argues that the Contested Provision impermissibly discriminates by comparing homosexual conduct to certain crimes, and complains of Congress' "homophobic culture."
- **Movilh** – *For 6 votes against 4 the Constitutional Court validates homophobic article of the Marriage Law.* Summarises and quotes the decision and reports on Movilh's reaction of lamenting the decision.
- **Fundación Iguales** – *Fundación Iguales unhappy with the Constitutional Court Decision that denies Motion of Unconstitutionality of Provision regarding Homosexuality as Grounds for Divorce.* LGBTIQ rights NGO Fundación Iguales also lamented the decision, highlighting that the Contested Provision considered homosexual conduct a vice and prohibited it more severely than different-sex acts of infidelity.



## Scholarship

- **Tomás Vial Solar and Sebastián Del Pino Rubio**  
– *The Constitutional Court and Homosexuality: Analysis of Decisions Nos. 2435 and 2681 in light of its previous decisions on discrimination based on sexual orientation* (See pp. 259–90.). The authors summarise Decisions Nos. 2435 and 2681 and compare the

discussions and arguments supporting them with those underlying the Constitutional Court’s previous decisions on LGBTIQ rights. They conclude that a majority of the Constitutional Court defends a view of same-sex couples as inherently inferior to different-sex couples.

## CASE SUMMARY 4: CASE NO. 3205–2016 (CONSTITUTIONAL COURT)

<b>Case Name</b>	Case No. 2681–2014 – Motion for Inapplicability regarding article 54, paragraph 2, number 4 of the Civil Marriage Law
<b>Link to Case</b>	Spanish: <a href="http://www.tribunalconstitucional.cl/descargar_sentencia2.php?id=3065">http://www.tribunalconstitucional.cl/descargar_sentencia2.php?id=3065</a>
<b>Jurisdiction</b>	Chile
<b>Court in which the Case was Heard</b>	Constitutional Court

### SUMMARY OF KEY FACTS

A married adult man (the “**Claimant**”) filed for unilateral divorce, accusing his then wife of *guilty* divorce based on “homosexual conduct”, as provided by the Contested Provision. While this Underlying Case was pending before the First Family Court of Santiago, the appointed judge requested the Constitutional Court to decide whether the application of the Contested Provision would produce unconstitutional effects in the Underlying Case, as it seemed to punish the accused wife based only on her sexual orientation.

The appointed judge emphasised that all types of *guilty* divorce based on infidelity were covered by article 54, paragraph 2, number 2 of the Civil Marriage Law. The Contested Provision thus seemed to punish a spouse for homosexual conduct that did not amount to infidelity, whereas such types of homosexual conduct did not seem comparable to other cases of *guilty* divorce under the Civil Marriage Law such as “*serious treatment against the integrity of the family*” or “*attempt to prostitute the couple’s children.*”

### SUMMARY OF JUDGMENT

- **Note 1:** Votes were tied, with four justices in favour of granting the motion and another four in favour of denying it. Given the lack of quorum, the Motion had to be denied.
- **Note 2:** Both the opinions in favour of denying and granting the motion generally reiterate the arguments of the majority and dissenting opinions in Case No. 2435–2013, summarised above. We have therefore only included any new considerations.

#### **Justices Bertelsen, Fernandez, Aróstica, and Hernández’s opinion in favour of denying the Motion**

- The Civil Marriage Law does not place homosexual conduct and other, more egregious, conduct at the same level. Article 54 only provides a non-exclusive list of cases in which the duties of marriage are deemed severely violated, but that does not imply that all such cases are equivalent. For example, only some of these cases may also be criminally prosecuted.



## Justices Carmona, Vodanovic, Garcia, and Brahm’s opinion in favour of granting the Motion

- It is not correct that the Contested Provision intends to protect the different-sex element of marriage by punishing conduct not covered by “infidelity”, understood as adultery (the legal definition of which only covers different sex intercourse with somebody other than the husband/wife). First, legal interpretation could expand the term “infidelity” beyond different-sex adultery, even if beyond the scope originally conceived by legislators. Second, even before the Contested Provision, courts considered certain homosexual conduct to constitute infidelity. Third, while it could be plausible that the Contested Provision intended to punish same-sex intercourse, the Claimant in the Underlying Case has not alleged that the defendant engaged in such intercourse, rendering this interpretation irrelevant in this specific case. Fourth, if the Contested Provision was trying to punish any “homosexual conduct”, it would be arbitrarily discriminatory vis-à-vis different-sex infidelity, which would only be punished if the allegedly unfaithful spouse reached the point of intercourse.
- As noted in Case No. 2435–2013, summarised above, the prohibition of arbitrary discrimination must be observed not only at the time during which a couple is married but also when wedlock is dissolved (see articles 3 and 23.4 of the ICCPR and UNHRC, General Comment No. 28). Thus, being directed towards a suspect category, and given its ambiguity (as opposed to that applicable to different-sex infidelity which would only be punishable in case of intercourse), subjectivity (as it does not allow gay people to adequately consider whether they are being punished because of their actions or merely because of their sexual orientation), low standard of configuration (in the sense that, unlike other types of guilty divorce that, in addition to a specific conduct, require a final judicial decision, a certain persistence over time, or a tangible harm towards the spouse and/or children), and detrimental effects, the Contested Provision fails the test of proportionality and constitutes an arbitrary discrimination.
- Unlike Case No. 2435–2013 (summarised above), the defendant in the Underlying Case denies that she had been involved in a homosexual relationship and rather

alleges that her relationship with the Claimant ended because of the latter’s violent conduct. Moreover, no one is alleging that the defendant engaged in homosexual intercourse. Despite the fact that it is up to the court in the Underlying Case to determine the effects of a potential declaration of guilty divorce, it is clear that the Contested Provision creates privileged positions that exacerbate an already unfortunate case of familial separation.

## RESOURCES CITED

*Toonen*

*Young*

Articles 3 and 23.4 of the ICCPR.

UNHRC, General Comment No. 28 (2000).

## DESCRIPTION OF HOW THE RESOURCES WERE USED

All of the aforementioned Resources were cited in Justices Carmona, Vodanovic, García, and Brahm’s dissenting opinion in the same manner as in Case No. 2435–2013, summarised above. We have therefore not repeated them here.

## NEWS/PRESS ARTICLES/SCHOLARSHIP IN RELATION TO THE CASE (IF APPLICABLE) WITH BRIEF SUMMARY

### News/Press Articles

- **Diario Constitucional** – *CC denied Inapplicability of provision about divorce for guilty conduct*. The article summarises the decision, including a link to the same.
- **Movilh** – *Constitutional Court validates homophobic provision in Marriage Law for lack of quorum*. While it criticised the Court’s decision, Movilh welcomed the solidly argued opinion to grant the Motion, which the article repeatedly quotes. Movilh also considered the Court’s tied votes to be an improvement from the Court’s previous decision on homosexual conduct as grounds for *guilty* divorce, and welcomed the fact that it was the judge in the Family Court in the underlying case who decided to file the Motion. It also lamented Justice Cristian Letelier (who the article describes as a known homophobic)’s then recent appointment.

## Scholarship

- **Tomás Vial Solar and Sebastián Del Pino Rubio** – *The Constitutional Court and Homosexuality: Analysis of Decisions Nos. 2435 and 2681 in light of its previous decisions on discrimination based on sexual orientation* (See pp. 259–90). The authors summarise Decisions Nos. 2435 and 2681 and compare

the discussions and arguments supporting them with those underlying the Constitutional Court’s previous decisions on LGBTIQ rights. They conclude a majority of the Constitutional Court defends a view of same-sex couples as inherently inferior to different-sex couples.

## CASE SUMMARY 5: CASE NO. 3205-2016 (CONSTITUTIONAL COURT)

<b>Case Name</b>	Case No. 3205-2016 – Motion for Inapplicability regarding article 365 of the Chilean Criminal Code
<b>Link to Case</b>	Spanish: <a href="https://www.tribunalconstitucional.cl/descargar_expediente2.php?id=82162">https://www.tribunalconstitucional.cl/descargar_expediente2.php?id=82162</a>
<b>Jurisdiction</b>	Chile
<b>Court in which the Case was Heard</b>	Constitutional Court

### SUMMARY OF KEY FACTS

As explained above (see Case No. 1683-2010), the Contested Provision criminalised same-sex intercourse if an individual “*carnally penetrates*” another one who is younger than 18 and older than 14 (and thus was broadly interpreted to apply only to males), regardless of consent.

The Underlying Case involves an adult male (the “**Defendant**”) who was prosecuted for the rape of a 17 year-old male minor, whom he allegedly forced to have oral and anal intercourse. The Defendant alleged that such intercourse had been consensual, and thus, at most he could be prosecuted under the Contested Provision, but not under the crime of rape. He then claimed that the Contested Provision should be declared inapplicable because it violated the prohibition on arbitrary discrimination based on sex and age and the right to intimacy. The Court in the Underlying Case thus requested the Constitutional Court to decide whether the application of the Contested Provision would produce unconstitutional effects in the Underlying Case.

### SUMMARY OF JUDGMENT

**Note:** Votes were tied, with five justices in favour of granting the Motion and another five in favour of denying it. Given the lack of quorum, the Motion had to be denied.

#### **Justices Aróstica, Peña, Hernández, Romero, and Letelier’s opinion in favour of denying the Motion.**

- The Contested Provision is consistent with the principle of equal dignity. It was enacted to protect minors’ sexual identity from conduct that, at certain ages, could interfere with the free development of their sexual identity. This is consistent with the mandate, described on the Convention on the Rights of the Child, of protecting children from any type of physical or psychological harm, including sexual abuse. In fact, on its second periodic report on Chile, the UN Committee on the Rights of the Child urged Chile to “reinforce the mechanisms to control the number of cases and the extent of rape, sexual abuse, exploitation and mistreatment.” It is the legislator who must determine the ages at which certain conduct may produce legal effects, and, far from harming it, the Contested Provision protects minors’ dignity and fulfils Chile’s obligations under international human rights treaties.

- While it is true that, given its purpose, the Contested Provision relies on an unreasonable difference between men and women, that only suggests that the Contested Provision should be extended to protect women under 18 years of age, who deserve as much protection as men. Thus, the legislator may have been liable of an unconstitutional omission, but that does not render the Contested Provision unconstitutional, and the Constitutional Court does not have powers to remedy such an omission. In any case, it was not the sexual orientation of victims and perpetrators that motivated the Contested Provision, but the protection of minors.
- The right to privacy may be limited when criminal activity is involved and to protect a superior legal interest. The right to privacy may not be invoked to protect situations in which the rights of others, such as the victim in this case, are threatened.
- Likewise, the right to personal freedom and sexual self-determination does not allow individuals to use others (such as minors, who are not in a position to evaluate the whole range of consequences of their sexual conduct) as sexual objects to reinforce their personal sexual preferences.
- The minor in the Underlying Case denies that they consented to the sexual conduct at issue. Thus, in this concrete case, there are no circumstances suggesting the free expression of a sexual choice.

### **Justice Romero, concurring:**

It does not appear that the Contested Provision will be applied to the Underlying Case. The Defendant is being prosecuted for the crime of violation established in article 361 of the Criminal Code (*i.e.*, not the Contested Provision), supported by declarations from the alleged victim and his relatives and by psychological expert reports suggesting the alleged victim was forced to engage in the sexual conduct at issue. The lack of applicability of the Contested Provision is enough to deny the Motion, as provided under the Constitution.

### **Justices Carmona, García, Brahm, Pozo, and Vásquez's opinion in favour of granting the Motion:**

**Note:** *The opinion in favour of granting the motion generally reiterates the dissenting opinion in Case No. 1683-2010, summarised above (except for its finding that the Contested Provision violated the right to the free development of personality). We have therefore simply included any new considerations.*

- As noted in Case No. 1683-2010, the criminalisation of consensual same-sex intercourse has been declared unconstitutional by various national and supranational courts around the world. The Chilean legislator had also recently enacted the Anti-Discrimination Act (Law No. 20,609) and the Civil Union Agreement Act (Law No. 20.830) to protect the rights of gay people. Twenty five countries worldwide (including Argentina, Uruguay, Brazil, and Colombia) have made same-sex marriage legal since 2001, either through legislative or judicial action.
- It was also noted that homosexual people may be considered "persons" under the Constitution, and no part of the Constitution suggests that they are inferior to heterosexuals.
- In relation to the arguments made in Case No. 1683-2010 about the right to intimacy, it was further noted that the Contested Provision presumes that certain sexual conduct involves abuse, deceit, or coercion based only on the fact that a minor between 14 and 18 years of age engages in that conduct, whereas consent in sexual relationships should be given more weight given its inherently personal and private character.

## **RESOURCES CITED**

Toonen  
Yogyakarta Principles

## **DESCRIPTION OF HOW THE RESOURCES WERE USED**

Both Resources were cited in Justices Carmona, García, Brahm, Pozo, and Vásquez's opinion in favour of granting the motion.

## Toonen

- *Toonen* was cited in support for the proposition that sexual orientation is a suspect classification akin to the more general term “sex.” The opinion in favour of granting the motion noted that, in *Toonen*, the UN Committee of Human Rights stated that sexual orientation is a suspect category covered by the term “sex” used in article 2 of the ICCPR. As a suspect classification, the presumption of constitutionality is inverted whenever a provision is based on differences in sexual orientation.
- Notably, this opinion also cited *Naz Foundation*—which, as we know, relies on *Toonen*—as an example of a foreign court prohibiting the criminalisation of same-sex intercourse.

## Yogyakarta Principles

- When arguing that sexual orientation is a suspect classification, the dissenting opinion made reference to the definition contained in the Yogyakarta Principles’ preamble, which defines sexual orientation as “each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.” When provisions are based on such a suspect classification, the presumption of constitutionality is inverted.
- The opinion in favour of granting the Motion also stated that, during the 2009 Universal Periodic Review conducted by the UN Human Rights Council, Chile supported recommendations regarding its need to prohibit, by law, discrimination based on sexual orientation and gender identity, and to use the Yogyakarta Principles as guidance for future policies.
- Quoting Principle 2, the opinion in favour of granting the Motion also stated that the Yogyakarta Principles,

which Chile pledged to respect, provide that states shall “[r]epeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity.” Chile’s commitment to repeal provisions like the Contested Provision confirmed that the Contested Provision should be declared inapplicable in the Underlying Case.

## NEWS/PRESS ARTICLES/SCHOLARSHIP IN RELATION TO THE CASE (IF APPLICABLE) WITH BRIEF SUMMARY

### News/Press Articles

- **El Mostrador** – *CC validates Criminal Code article that half of its Judges described as homophobic.* The article summarises and provides various quotes from the decision, with an emphasis on the opinion in favour of granting the Motion. It also quotes LGBTIQ rights NGO Movilh, according to which a solid opinion in favour of granting the Motion “brings us closer to [the Contested Provision’s] imminent repeal”, especially given that the Chilean State committed to do so before the Inter-American Commission of Human Rights.
- **La Tercera** – *CC once again discriminates intercourse involving juvenile homosexuals.* The article describes the case in the context of what was then expected to be an even more pronounced turn towards conservatism by the Constitutional Court, given recent appointments. It also compares it to a contemporaneous case in which India’s Supreme Court repealed a similar provision. The article then describes the history of the case, the judges’ diverging opinions regarding the constitutionality of the Contested Provision, and the alleged homophobic arguments used in its legislative discussion.

## CASE SUMMARY 6: CASE NO. 7774-2019 (CONSTITUTIONAL COURT)

<b>Case Name</b>	Case No. 7774-2019 – Motion for Inapplicability regarding the final paragraph of article 12 of Law No. 20.830, and the phrase “as long as it involves the union of a man and a woman” contained in the first paragraph of article 80 of Law 19.947.
<b>Link to Case</b>	Spanish: <a href="http://www.tribunalconstitucional.cl/descargar_sentencia2.php?id=6834">http://www.tribunalconstitucional.cl/descargar_sentencia2.php?id=6834</a>
<b>Jurisdiction</b>	Chile
<b>Court in which the Case was Heard</b>	Constitutional Court

### SUMMARY OF KEY FACTS

A Chilean-Spanish lesbian couple (the “**Claimants**”), married in Spain in 2012, undertook treatment for one of them to give birth. The Claimants then moved to Chile and sought their marriage to be recognised before the Chilean Civil Registry Service, which, based on the Contested Provisions, registered their union as a “civil union agreement” instead. This, they claimed, (i) deprived them of the special protections provided by their status as a married couple; (ii) constituted an arbitrary discrimination on the basis of sexual orientation; and (iii) entailed that the maternity of their son would not be recognised and that their son would be denied the benefits of such status, thus violating their son’s right to identity, dignity, and the *Best Interests of the Child* mandate.

Claimants filed an *Acción de Protección* before the Santiago Court of Appeals, requesting that the Chilean Civil Registry Service be forced to register their union as a marriage. While this Underlying Case was pending, Claimants filed a Motion of Inapplicability requesting the Constitutional Court to declare that the application, by the Court of Appeals, of the Contested Provisions, would produce unconstitutional effects.

### SUMMARY OF JUDGMENT

#### Majority Opinion: The Motion Must be Denied

- The Constitution provides that the family is the foundation stone of society. While it does not conceptualise the term (i.e., restricting it to a particular type of family), an original/historical interpretation suggests a family encompasses a husband, a wife,

and children. This would also be consistent with article 17 of the American Convention on Human Rights.

- While an originalist interpretation should not allow Courts to ignore changing social realities, constitutional provisions cannot be changed through creative interpretations (see also Decision No. 138/2010 of the Italian Constitutional Court).
- Chilean legislators have enacted a legal scheme for family relations, which recognises and protects the union of same-sex couples through the institution of civil union agreements. Civil union agreements are similar in their effects to the institution of marriage and provide same-sex couples with enough recognition and certainty so as not to violate their dignity. It is thus the duty of the legislature, and not the Constitutional Court, to amend such legal institutions as it so deems appropriate (see also *Orlandi and Others v. Italy* [2017] ECHR 1153 and French Constitutional Council, Decision No. 2010-91, dated January 28, 2011). In fact, a bill is currently being discussed in Congress to recognise same-sex marriage.
- If the Claimants’ argument were accepted, there would be no limit to the kinds of legal marriage relationships that the Chilean State would be forced to accept based only on recognition by a foreign State. For example, these could include polygamous, underaged, and arranged marriages.
- The issue is not a matter of arbitrary discrimination, but rather of the legal definition of marriage as the union between a man and a woman. Homosexual individuals could get married if they were to do so with an individual of the opposite sex.



- Chilean law still declares all children to be equal (article 33 of the Chilean Civil Code) and the child at issue seems to have been treated with dedication and care, so his dignity and best interests do not appear to be threatened in this particular case.
- Even if the Claimants' marriage were to be recognised, Chilean law only recognises a child's father and mother, so, even if the child at issue's biological mother's marriage to another woman were to be recognised, said child would not be able to be registered under two mothers. This is also a matter of legislative discussion regarding family law institutions, which does not raise constitutional concerns. Thus, the Motion is inapposite in this respect because declaring the inapplicability of the Contested Provisions would have no effect in the child's legally recognised parentage.
- Justices Arostica, Vasquez and Romero each made the point that a change to the nature of marriage would be for Congress and not the Constitutional Court. Justice Romero further notes, however, that a broad understanding of the term "family", which the Constitution protects, encompasses a wide range of legal modes, including those that differ from marriage itself. Thus, same-sex marriage cannot be the only tolerable option. The UNHRC itself has acknowledged that there may be different concepts of family that may be subject to different degrees of protection. General Comment No. 19 (1990).

## SUMMARY OF ANY ADDITIONAL COMMENTARY IN THE JUDGMENT OR ANY USEFUL DISSENTING OPINION

While a dissenting opinion was given, it did not refer to the Resources in order to support its conclusions.

## RESOURCES CITED

UNHRC General Comment No. 19 (1990)

## DESCRIPTION OF HOW THE RESOURCES WERE USED

Justice Romero cited General Comment No. 19 in support for the proposition that States can legitimately recognise

different concepts of family which may, in turn, be subject to different degrees of protection and therefore that the Motion of Inapplicability in this case be denied.

- For Justice Romero, acknowledging that there are different types of familial models implies that the family is the genus covering other familial models beyond those founded in marriage.
- This, in turn, implies that there must be different legal options to regulate such different familial models. Marriage (with all its rights and obligations) is not the only constitutionally tolerable option for all different kinds of families.
- In its General Comment No. 19 (which, according to Justice Romero is not binding), the UNHRC recognised that different familial models may be subject to different degrees of protection. Justice Romero quoted the following part of paragraph 2: "[...] Where diverse concepts of the family, 'nuclear' and 'extended', exist within a State, this should be indicated with an explanation of the degree of protection afforded to each. In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, States parties should also indicate whether and to what extent such types of family and their members are recognized and protected by domestic law and practice."

## NEWS/PRESS ARTICLES/SCHOLARSHIP IN RELATION TO THE CASE (IF APPLICABLE) WITH BRIEF SUMMARY

### News/Press Articles

- **Diario Constitucional** – *CC denies inapplicability regarding provisions that impede registering the marriage of same-sex individuals*. Summary of the decision, including a link to the same.
- **DiarioUchile** – *What is the family? The opposing visions of the Constitutional Court and the regular courts*. The author describes LGBTIQ rights organisations' rejection of the decision, especially given offensive comparisons with child marriage. It also reports the opinions of different legal academics: one of them criticises the majority for making a statement regarding matters that should be settled



by Congress; another believes the various concurrent opinions reveal that there was no real consensus on the reasons to deny the Motion; and yet a third one argues that, unlike the Family Court in *Di Giammarino* (summarised below), the Constitutional Court does not seem to recognise the dynamic aspect of the family as an institution.

- **El Univesral** – *VERY SERIOUS: CC rules against equal marriage and links it to child abuse*. The article reports on Movilh’s reaction and denounces reliance of “homophobic arguments” quoting some passages.
- **Dos Manzanas** – *Chilean Constitutional Court denies the recognition of the marriage of two women married in Spain using an ultraconservative argument*. Highly critical article focusing on the Court’s “openly homophobic” arguments. It quotes passages from the decision’s majority and dissenting opinions. It also covers LGBTIQ rights NGO Movilh’s critical reaction and efforts to push a pending bill that would legalise same-sex marriage. Finally, it surveys Movilh’s efforts to promote LGBTIQ rights in Chile and the allegedly broken promise of the Chilean state to legislate in favour of same-sex marriage.

### Scholarship Articles/Op-eds

- **Yañira Zúñiga Añazco** – *Heterosexuality as a norm in the Constitutional Court’s jurisprudence*. The author argues that the majority opinion is poorly argued and based on fallacies, and that it masks an ideological position in favour of heteronormative social constructs. She further argues that there is no compelling reason that would justify a legislative choice of different-sex marriage, which necessarily discriminates based on the suspect category of sexual orientation. It also criticised Justices Arostica and Vasquez’s reading of international human rights treaties as supportive of different-sex marriage.
- **Rodrigo Mallea** – *Constitutional Court against LGBTIQ+ individuals: constitutional control or political control?* The author explains that the Constitutional Court has a long history against the LGBTIQ community that seems tied to an anachronistic ideology in the light of further advances in LGBTIQ rights in international and even Chilean law.
- **Marco Velarde** – *The Constitutional Court offends and discriminates the LGTBI+ community*. The author argues that the Constitutional Court has become a forum in which conservative interests are over-represented and silence a clear social majority in favour of expanding LGTBI+ rights. It also claims that the Court has lost touch of both international and national developments in these matters.
- **Hernan Corral** – *Gay activism and the instrumentalisation of courts*. Describes the Constitutional Court’s decision and the Second Family Court of Santiago’s decision in *Di Giammarino* (summarised below) as two cases involving an attempt by “gay activism” to instrumentalise courts to reach outcomes that have been denied in Congress. The author praises the Constitutional Court decision that the regulation of the different types of families must be settled by Congress and denounces the Family Court’s decision as validating a “collusion” between the parties and thus unable to produce legal effects. In his view, the scope and regulation of marriage and parenthood must be settled in Congress.

## SUPREME COURT CASES

### CASE SUMMARY 7: CASE NO. 70.584-2016 (SUPREME COURT)

<b>Case Name</b>	Supreme Court Case No. 70.584-2016
<b>Link to Case</b>	Spanish: <a href="https://suprema.pjud.cl/SITSUPPORWEB/DownloadFile.do?TIP_Documento=3&amp;TIP_Archivo=3&amp;COD_Opcion=1&amp;COD_Corte=1&amp;CRR_IdTramite=3229112&amp;CRR_IdDocumento=2736815&amp;Cod_Descarga=11">https://suprema.pjud.cl/SITSUPPORWEB/DownloadFile.do?TIP_Documento=3&amp;TIP_Archivo=3&amp;COD_Opcion=1&amp;COD_Corte=1&amp;CRR_IdTramite=3229112&amp;CRR_IdDocumento=2736815&amp;Cod_Descarga=11</a>
<b>Jurisdiction</b>	Chile
<b>Court in which the Case was Heard</b>	Supreme Court, Fourth Chamber

### SUMMARY OF KEY FACTS

A transgender woman, who had been known by her female name for five years and had not undergone sex reassignment surgery, (the “**Claimant**”) requested a first instance Civil Court to change her registered name and sex. The Civil Court refused.

The Claimant appealed before the Santiago Court of Appeals, but this court denied the appeal based on the lack of evidence of the Claimant’s status, reassignment surgery, or psychosocial conditions. The Claimant appealed in cassation before the Supreme Court.

### SUMMARY OF JUDGMENT

#### Majority Opinion: The Name and Sex Change Must be Granted

- Even though name and sex change for transgender individuals is not expressly regulated in Chilean law, courts are still bound by the Constitution and international treaties, and Chile’s international obligations include the prohibition of discrimination based on sexual orientation (see article 1.1 of the American Convention on Human Rights, article 2.1, International Covenant of Economic Social and Cultural Rights; Atala Riffo; 63rd session of the General Assembly (2008) – Document No. A/63/635, “Declaration on Human Rights, Sexual Orientation and Gender Identity”; and Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities, in connection with Law. No. 20.609).

- In particular, the IACtHR has concluded that, as a prerequisite for a dignified life and the exercise of other rights, States are obliged to guarantee the right to alter public records in order to reflect an individual’s self-perceived gender identity without production of medical records or interventions (see the IACtHR’ Advisory Opinion on Gender Identity, Equality and Non-Discrimination of Same-Sex Couples, 24 October 2017).
- In Chile, the Constitution provides that everyone is equal in rights and dignity, and identity is a prerequisite for a dignified life. Law No. 20.609 prohibits discrimination based on gender identity, regardless of biological sex.
- The Yogyakarta Principles further provide that everybody has a right to legal personality and that gender identity is relevant to each individual’s personality and self-determination that medical procedures, including sex reassignment/affirmation surgery, shall not be required as a condition to legal recognition of gender identity; and that States shall “take all necessary legislative, administrative and other measures 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.”
- Requiring medical surgery as a prerequisite to concede the change of name and sex in public records would reduce the legal meaning of “sex”

to only one of its external manifestations (genitals) (see also *A.P. Garçon and Nicot v. France*, N°79885/12, 52471/13 y 52596/13).

## RESOURCES CITED

Yogyakarta Principles

Document No. A/63/635 of the 63rd session of the General Assembly: “Declaration on Human Rights, Sexual Orientation and Gender Identity”

## DESCRIPTION OF HOW THE RESOURCES WERE USED

### Yogyakarta Principles

The majority opinion cited the Yogyakarta Principles in support for three propositions:

1. **First**, that recognising gender identity is an integral part of the right to legal personality, dignity, and self-determination.
2. **Second**, that medical procedures, including sex reassignment/affirmation surgery, shall not be required as a precondition for the legal recognition of an individual’s gender identity.
3. **Third**, that states are bound to ensure that state-issued identity papers reflect a person’s self-defined gender identity.

In its support of all propositions, the majority quoted part of the opening paragraph of Principle 3 and letter C of the list of State Parties’ obligations as follows: “Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No 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. States shall: C. Take all necessary legislative, administrative and other measures 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.”

## DOCUMENT NO. A/63/635 OF THE 63RD SESSION OF THE GENERAL ASSEMBLY: “DECLARATION ON HUMAN RIGHTS, SEXUAL ORIENTATION AND GENDER IDENTITY.”

- The majority opinion cited this document—which was signed by Chile, among other countries—in support for the proposition that Chile is bound to prohibit discrimination based on gender identity.
- In particular, it quoted paragraph 3, reaffirming “the principle of non-discrimination, which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity.”
- This supported the Court’s overall conclusion that an individual’s gender identity should be reflected in the relevant public records.

## NEWS/PRESS ARTICLES/SCHOLARSHIP IN RELATION TO THE CASE (IF APPLICABLE) WITH BRIEF SUMMARY

### News/Press Articles

- **T13 – Minister of Justice and decision in favour of trans person: “It shows the urgent need to legislate.”**  
This article includes interviews to the Director of the Universidad de Chile Legal Clinic (which represented Claimant in this action), the Director of LGBTIQ rights NGO Movilh, and the Minister of Justice. While the first two generally praised the decision, the Minister of Justice also referred to a bill previously sponsored by the government to legislate in favour of changing legal records to reflect self-determined gender identity. The article also mentions that the University of Chile and the Chilean Catholic University both allowed trans students to enrol using their social names.
- **Cooperativa – Supreme Court authorised change of registered name and sex without requiring surgery.**  
The article summarises and quotes various parts of the decision. It also quotes the President of the Supreme

Court who referred to the decision as an example of how law advances to recognise new realities.

- **DiarioUchile** – *Supreme Court authorised change of registered name and sex of transgender person*. The article summarises the reactions of the President of the Supreme Court, the Minister of Justice, and the Director of the Universidad de Chile Legal Clinic, all of whom praised the decision. The President of the Supreme Court added that they are not dictating public policy, but it is likely that such a decision will guide policy discussions. The article also summarises and quotes various parts of the decision.
- **Chilean Attorneys Bar** – *S. Court Decision on gender identity opens a debate regarding regulation in these matters*. Besides explaining the decision and summarising the declarations of the Minister of Justice and the President of the Supreme Court, the article summarises different legal academics’ positions on the need to regulate the matter. Some think legal amendments are warranted, another one thinks that

administrative changes in the information contained in ID cards would suffice, and yet another warns of the impacts that legislating in favour of self-determined gender identity could have in other areas of the law, such as social security.

- **El Mostrador** – *Without requiring surgical intervention: Supreme Court authorises name and sex change of transgender individual*. The article summarises the decision, emphasising it is the first time the Supreme Court has issued such a ruling.
- **Microjuris** – *Supreme Court rules in favour of name and sex change of transgender individual without requiring medical surgery or hormonal treatment*. The article summarises the decision, highlighting its main quotes.
- **Diario Constitucional** – *Supreme Court rules in favour of recorded name and sex change of transgender individual*. The article summarises the decision, including a link to the same.

## CASE SUMMARY 8: CASE NO. 18.252-2017 (SUPREME COURT)

<b>Case Name</b>	Supreme Court Case No. 18.252-2017
<b>Link to Case</b>	Spanish: <a href="https://suprema.pjud.cl/SITSUPPORWEB/DownloadFile.do?TIP_Documento=3&amp;TIP_Archivo=3&amp;COD_Opcion=1&amp;COD_Corte=1&amp;CRR_IdTramite=3366704&amp;CRR_IdDocumento=2869668&amp;Cod_Descarga=11">https://suprema.pjud.cl/SITSUPPORWEB/DownloadFile.do?TIP_Documento=3&amp;TIP_Archivo=3&amp;COD_Opcion=1&amp;COD_Corte=1&amp;CRR_IdTramite=3366704&amp;CRR_IdDocumento=2869668&amp;Cod_Descarga=11</a>
<b>Jurisdiction</b>	Chile
<b>Court in which the Case was Heard</b>	Supreme Court, Fourth Chamber

### SUMMARY OF KEY FACTS

Despite having lived most of his life as a woman, been previously married, and given birth to two children, a transgender man (the “**Claimant**”) who had been socially known for more than five years by his male name requested a Civil Court to change his registered name and sex. As evidence, he presented a medical certificate supporting his transgender psychological condition. He also underwent sex reassignment surgery. The Civil Court nevertheless refused to change his name and sex.

Claimant appealed before the Santiago Court of Appeals, which remanded the Civil Courts decision regarding the Claimant’s name, but not his sex. The Claimant appealed in cassation before the Supreme Court.

### SUMMARY OF JUDGMENT

#### Unanimous Opinion in Support of the Claimant

- Gender identity is protected under Chilean law as a “suspect classification” under Law 20.609. Chile

must also observe its international obligations regarding these matters (see article 1.1 of the American Convention on Human Rights, article 2.2 of the International Covenant of Economic, Social and Cultural Rights; and article 2.1 of the ICCPR).

- The protection of gender identity encompasses transgender individuals, that is, those whose personal gender identity differs from the one traditionally assigned to their biological sex (see also the Yogyakarta Principles). If unprotected, being transgender can hinder the societal inclusion of individuals as it impairs their social, work and political relationships and rights. Being transgender is thus directly related to the identity, quality of life, and rights of such individuals.
- The Inter-American Court on Human Rights has acknowledged that recognising self-determined gender identity is directly linked with the rights that arise from legal personality (such as the right to a name, nationality, and certain rights related to familial relationships), and that the American Convention on Human Rights protects individuals' right to change public registers to reflect their self-perceived gender identity, without requiring medical interventions (see paragraphs 11.2 and 18.3.3 of the Opinion on the Right to Identity, presented at the 71st Regular Session of the Organisation of American States on 10 August 2007 (CJI/doc.276/07 rev. 1)).
- The Chilean Constitutional Court has likewise acknowledged the connection between people's dignity and their right to identity.
- This case goes beyond mere administrative procedures to change public records, rather affecting the Claimant's fundamental rights. Given the evidence that the Claimant has been known for more than five years with different names, some of which may cause moral damage, both the Claimant's name and sex should have been changed. An individual's life story does not preclude that individual from currently having a different gender identity. In this case, the Claimant had even undergone sex reassignment/affirmation surgery. Forcing the Claimant to live in contradiction with his sexual identity violates his rights to psychological integrity, autonomy, and dignity.

- Changing the Claimant's name without changing his sex is also incoherent and violates Chilean law providing that the name must be consistent with sex.

## RESOURCE CITED

Yogyakarta Principles

## DESCRIPTION OF HOW THE RESOURCES WERE USED

### Yogyakarta Principles

- The Court cited the Yogyakarta Principles' definition of gender identity as "each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms."
- Based on this definition, the Court then noted that the discrepancy between a person's biological sex and gender identity may hinder such person's relational abilities in the social and work spheres and other important areas of life. Recognition of sexual identity thus goes beyond recognising someone's preferences or desires. Rather, it is a need associated with an individual's identity, quality of life, and rights. Not recognising gender identity leaves transgender people in a vulnerable position.

## NEWS/PRESS ARTICLES/SCHOLARSHIP IN RELATION TO THE CASE (IF APPLICABLE) WITH BRIEF SUMMARY

### News/Press Articles

- **CNN Chile** – *Supreme Court granted cassation appeal and ordered the change of applicant's registral sex.* The article summarises the decision, which was made public the same day that the Government announced it was ready to enact a new Gender Identity Act. It mentions the reference to the Yogyakarta Principles.

- **BioBioChile.cl** – *Supreme Court jumps the gun on Gender Identity Act and orders change of registral sex.* The article summarises and quotes various passages from the decision and highlights its connection with the Gender Identity Act enacted that same day. It also mentions that the decision is based on international law and the Yogyakarta Principles.
- **DiarioUchile** – *Supreme Court rules in favour of trans-gender individual and orders change of registral sex.*

The article summarises and quotes from the decision and records the positive reaction of the Director of the Universidad de Chile Legal Clinic, which represented Claimant in this action.

- **Diario Constitucional** – *SC grants cassation appeal and orders change of registral sex.* Summary of the decision, including a link to the same.

## ADDITIONAL LANDMARK CASE

### CASE SUMMARY 9: *DI GIAMMARINO V. DE RAMON* (SECOND FAMILY COURT OF SANTIAGO)

While decided by a family court, the case summarised below was the first to order the Chilean Civil Registry Service to register a lesbian couple as the two mothers of the same child and is thus highly regarded as a landmark achievement in favour of LGBTIQ rights in Chile. The decision was not appealed and will thus not be reviewed by either the Constitutional Court or the Supreme Court.

<b>Case Name</b>	<i>Di Giammarino v. de Ramon</i>
<b>Link to Case</b>	Spanish: <a href="http://secretariadegenero.pjud.cl/images/stignd/noticias/derFiliat/derechosFiliativos.pdf">http://secretariadegenero.pjud.cl/images/stignd/noticias/derFiliat/derechosFiliativos.pdf</a>
<b>Jurisdiction</b>	Chile
<b>Court in which the Case was Heard</b>	Second Family Court of Santiago

## SUMMARY OF KEY FACTS

A lesbian couple, who had been together for nine years and had entered into a Civil Union Agreement in 2015, underwent assistive reproductive treatment and had a child. When the child was born, however, the Civil Registry Service only recognised the maternity of the woman who gave birth (the “**Claimant**”). The other woman (the “**Defendant**”), therefore, was not mentioned in the child’s birth certificate.

The couple filed an *Acción de Protección* requesting the Civil Registry Service to register both parties as the child’s mothers, but the claims were dismissed by both the Santiago Court of Appeals and the Supreme Court. Then, based on Chilean law providing that maternity is to be determined by childbirth, voluntary acknowledgement, or a judicial decision in a parentage suit, the Claimant

filed a maternity claim against the Defendant before the Santiago Family Courts.

On trial, the Court found that both parties had jointly decided to form a family and participated in the assistive reproductive process undertaken by the Claimant. They were together during pregnancy and the Defendant was also there at the time of birth. Moreover, experts and witnesses observed that the child at issue had a maternal relationship with the Defendant, who regularly took care of him.

## SUMMARY OF JUDGMENT

International human rights law protects the family without limitation to a particular familial model (see article 23, ICCPR; article 17.1, American Convention of Human Rights; UNHRC, General Comment No. 19 (1990)



(implicitly cited); and IACtHR, Advisory Opinion OC-21/2014). Chilean law has likewise advanced towards protecting different familial models, and the Civil Union Agreement, in particular, was conceived as a way to protect “*other familial models*.”<sup>5</sup> See, e.g., Laws Nos. 21.150 and 20.830. Moreover, while international childhood law requires familial institutions to recognise the rights and duties that arise with parenthood, the Civil Union Agreement does not regulate the situation of children born in a family of same-sex cohabitants. The Chilean Civil Code also espouses the principle of equality amongst all types of children regardless of their parents’ condition.

- The Chilean State is thus obliged to protect and integrate all types of family without discrimination. This requires that the civil status of a child that is raised by same-sex parents reflects this reality. Otherwise, same-sex parent families would be doubly discriminated against: first, regarding their recognition before the law, and, consequentially, as a product of the day-to-day problems that would arise because of the lack of recognition.
- Chilean law does not completely regulate parenthood arising from assisted reproduction techniques. Article 182 of the Civil Code only provides that the father and mother that underwent assisted reproduction treatment will be deemed as parents, making an exception from the primacy of biological parenthood. This legal vacuum as to same-sex couples undertaking assisted reproduction treatment must be integrated by Constitutional and international law principles (see *Artavia Murillo v. Costa Rica* (Inter-Am. Ct. H.R. (ser. C) No. 257 (Nov. 28, 2012)), paragraph 272).
- The right to equal treatment of all children in matters of parenthood would also be violated if maternity of the child at issue was not ascribed to the Defendant. In fact, if the Defendant were a man, she could have recognised the child despite the lack of a biological bond under article 182 of the Civil Code. Notably, this article predates the Civil Union Agreements Act, and the IACtHR decision in *Atala Riffo* which prohibited discrimination based on sexual orientation.
- Parenthood involves different kinds of “truths” including affective, biological, sociological, volitional,

and chronological truths. Here, Chilean law excludes the donor of the gamete from claims of parenthood, and the child recognises the Defendant as his mother. This is an essential component of the child’s right to identity, which the Chilean State is obliged to protect (see *Gelman v. Uruguay* (Inter-Am. Ct. H. R. (ser. C) No. 221 (Feb. 24, 2011)), *Artavia Murillo v. Costa Rica* (Inter-Am. Ct. H.R. (ser. C) No. 257 (Nov. 28, 2012)), *I.V. v. Bolivia* (Inter-Am. Ct. H.R. (ser. C) No. 336, Nov. 30, 2016)), and Advisory Opinion OC 24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017)).

- Guaranteeing the best interests of the child requires considering the child’s right to identity (see the UN Committee of the Rights of the Child). In this case, the best interests of the child require his actual familial situation to be legally recognised. Otherwise, the child’s situation may be subject to reduced social recognition and the loss of certain rights including scholarship, birth, and orphanage bonds; child support; and hereditary rights, amongst others.

## RESOURCE CITED

UNHRC, General Comment No. 19 (1990).

## DESCRIPTION OF HOW THE RESOURCES WERE USED

While not expressly cited, the Court makes an unsupported reference to the UNHRC’s interpretation of Article 23 of the ICCPR in a manner consistent with General Comment No. 19.

- General Comment No. 19 (1990) was implicitly referred to in support for the proposition that international human rights law protects different familial models.
- It was referred to together with article 17.1 of the Inter-American Covenant on Human Rights, the IACtHR Advisory Opinion 21/14, Inter-Am. Ct. H.R. (ser. A) No. 21 (19 August 2014), and various Chilean laws in further support of the proposition that Chilean Law does and the Chilean State must recognise different familial models beyond that based in marriage.
- The Court further noted that the Chilean state has a duty to protect every existent familial model and strive

<sup>5</sup> See reason no. 9 of the judgment.

to integrate them into national life. It thus concluded that, for this to happen, the civil status of a child that is born into and raised within a family with same-sex parents is reflected with such child's legal parentage and identification documents. The lack of legal recognition of de facto families such as this one is discriminatory vis-à-vis other families and may entail concrete issues in their daily life.

- Ultimately, this would support the Court's argument that, given that Chilean Law does not regulate the status of children born to same-sex parents using assisted reproduction treatment (unlike those born to different-sex parents using the same treatment), Courts must integrate this legal vacuum with Constitutional and international law principles that favour protecting the child and recognising the child's family in public records.

## NEWS/PRESS ARTICLES/SCHOLARSHIP IN RELATION TO THE CASE (IF APPLICABLE) WITH BRIEF SUMMARY

### News/Press Articles

- **La Tercera** – *Attilio will have two mothers: Family court recognises rights of two women over their son and orders the Civil Registry to undertake registration.* Summarises the case's history and the decision. It also quotes the Director of LGBTIQ advocacy NGO Fundación Iguales, who praises the decision and compares it to the Constitutional Court's decision in case 7774-2019 (summarised above).
- **El Mostrador** – *Historic: for the first time a legal decision recognises lesbian mothers in Chile.* Summarises the decision and interviews with leaders of LGBTIQ advocacy NGOs Fundación Iguales, Movilh, and Familia es Familia, all of which praise the decision. Familia es Familia requests Congress to pass a pending bill to regulate the rights of LGBTIQ families and their children.
- **El Mercurio Online** – *Experts debate over the scope of decision that recognised two mothers for a child.* Summary of expert opinions in civil and family law, ranging from those who denounced the decision as fraudulent because there was no real conflict between

the parties, to those who praised the decision as legally correct and an important judicial shift in favour of same-sex families. A reference was also made to pending bills that would recognise same-sex families, and the speaker of the Supreme Court explained that they would not be able to review the decision unless one of the parties appealed.

- **Cooperativa** – *Historic: Chilean court ordered the Civil Registry to record child as son of two mothers.* Summarises the case's history and main arguments, as well as declarations from the Director of Fundación Iguales and a Congresswoman, both of whom praised the decision. The Congresswoman also mentioned the urgent need to pass a pending bill that would legislate in favour of same-sex families. The government mentioned that they were still analysing the decision.
- **Radio Agricultura** – *Government will comply with decision that orders registering a child as the son of two mothers.* Reports the Ministry of Justice's announcement that the Civil Registry Service will comply with the decision.
- **24Horas** – *Attorney and decision allowing women to register a child: the child was suffering the "cancellation of his rights."* Interview with the Director of Fundación Iguales, who represented the couple. He explains the arguments supporting the action and the decision, and he requests Congress to pass a pending bill that would recognise same-sex families.
- **BioBio** – *Family Court decision orders Civil Registry to register a child as the son of two women.* Summarises the case's history and the decision, highlighting its main quotes.
- **CNN Chile** – *Family Court issues historic decision and orders the Civil Registry to register two women as mothers of a child.* Summarises the case's history and the decision, highlighting its main quotes.
- **DiarioUchile** – *What is the family? The opposing visions of the Constitutional Court and the regular courts.* On the wake of the debate rising out of the seemingly contradictory decisions issued by the Constitutional Court (summarised above) and a Family Court judge, the article reports the opinion of legal academics. One of them believes the Family

Court decision emphasises the importance of the Best Interests of the Child mandate. Another argues that, unlike the Constitutional Court, the Family Court acknowledged the dynamic aspect of the family as an institution and sought the best outcome given unregulated realities.

- **Diario Constitucional** – *Family court grants lawsuit and declares that a 2-year-old child is the son of two women*. Summary of the decision, including a link to the same.

### Scholarship/Op-eds

- **Hernan Corral** – *Gay activism and the instrumentalisation of courts*. Describes the Constitutional Court’s decision in case No. 7774-2019 (summarised above) and the Second Family Court of Santiago’s decision in *Di Giammarino* as two cases involving an attempt by “gay activism” to instrumentalise courts to reach outcomes that have been denied in Congress. The author praises the Constitutional Court decision that the regulation of the different types of families must be settled by Congress

and denounced the Family Court’s decision as validating a “collusion” between the parties and thus unable to produce legal effects. In his view, the scope and regulation of marriage and parenthood must be settled in Congress.

- **Jose Maria Eyzaguirre** – *There’s only one mother*. Argues that the Family Court overlooked other provisions of the Civil Code, according to which it should have dismissed the claims, and that maternity claims were not conceived for cases in which both parties agreed on the outcome.
- **Leticia Morales and Yanira Zúñiga Añazco** – *Courts and the rule of law: Who sets the rules of the game?* Argues that courts are directly required to enforce the Constitution and thus may, especially when faced with a legal vacuum, decide cases based on applicable Constitutional and international law principles. In practice, courts have also become important to protect the rights of disadvantaged groups whenever Congress is slow to respond, and that this is desirable in a democratic society.

# Colombia

## CASE SUMMARY I: C-075-07 (CONSTITUTIONAL COURT)

**Note:** A number of cases in Colombia have looked to the Yogyakarta Principles in order to provide definitions of certain concepts in relation to gender identity and sexual orientation. While they did not use the Yogyakarta Principles as part of the legal reasoning in the case, in our view this demonstrates that in understanding what certain terms mean, the Colombian courts are persuaded by the definitions used in the Yogyakarta Principles. Examples of such cases include C-006-16, T-248-12, T-143-18, and T-447-19.

The Colombian Constitutional court has also been heavily influenced by *Toonen* and *Young*, especially since they were used in C-075-07, a landmark same-sex civil union case.

The use of these Resources and other instruments of international human rights law have generated a robust system of local constitutional case law for the protection of LGBTIQ rights in Colombia. However, given the wide range of progressive local precedents, recent decisions tend to rely, for the most part, in the Constitutional Court’s case law or in the use that it has given the Resources in prior cases.

<b>Case Name</b>	C-075-07 (February 7, 2007) <sup>6</sup>
<b>Link to Case</b>	Spanish: <a href="https://www.corteconstitucional.gov.co/relatoria/2007/c-075-07.htm">https://www.corteconstitucional.gov.co/relatoria/2007/c-075-07.htm</a> English (summary): <a href="https://www.icj.org/sogicasebook/sentencia-c-07507-constitution-al-court-of-colombia-7-february-2007/">https://www.icj.org/sogicasebook/sentencia-c-07507-constitution-al-court-of-colombia-7-february-2007/</a>
<b>Jurisdiction</b>	Colombia
<b>Court in which the Case was Heard</b>	Constitutional Court

## SUMMARY OF KEY FACTS

Certain citizens filed an action before the Constitutional Court to declare articles 1 and 2 of Law 54 of 1990 (*whereby civil unions and economic benefits thereunder are established*) partially unconstitutional because the definition of civil union thereunder did not cover same-sex couples.

## SUMMARY OF JUDGMENT

There was no *res judicata* effect since after the court’s initial ruling on the constitutionality of the relevant articles (1996)<sup>7</sup> (i) such provisions and their effects had been modified by means of Law 979 of 2005 and (ii) Colombia’s constitutional framework had changed.

- The court found that Congress’s legislative powers had to operate within the limits of the Constitution.

<sup>6</sup> Several opinions cite the use that the court gave to the Resources in this case, including: C-811-07, C-336-08, C-798-08, T-716-11, T-717-11, C-071-15 and T-371-15. We have, however, only summarised this landmark case in this report.

<sup>7</sup> The Constitutional Court had initially ruled on the constitutionality of these provisions under a previous unconstitutionality action based on the alleged violation of equal treatment and the right to free development of personality (C-098-96).

It held that the lack of legislation providing for economic protections for same-sex partners was a legislative “vacuum” that conflicted with Colombia’s constitutional regime, given that such protections had been granted to different-sex couples.

- The court indicated that, although it has determined that sexual diversity is clearly protected by the Constitution, the homosexual community has been traditionally discriminated against in Colombia. Moreover, based in part on the Resources, it highlighted how the prohibition against discriminating on the basis of sexual orientation was also derived from instruments of international human rights law that were part of the Colombian Constitution under the “constitutionality block” doctrine.

## CONCLUSION

The absence of economic protections for same-sex partners, such as those provided for different-sex couples, violated human dignity and the right to free development of personality, and unjustifiably discriminated against same-sex couples. Thus, the court found that the relevant provisions were constitutional only to the extent that the economic protections granted thereunder were construed as applicable to same-sex couples.

## SUMMARY OF ANY ADDITIONAL COMMENTARY IN THE JUDGMENT OR ANY USEFUL DISSENTING OPINION

Congress has to implement necessary measures to meet the needs for protection of certain groups of individuals and gradually advance in the protection of marginalised groups.

## RESOURCES CITED

*Toonen*

*Young*

## DESCRIPTION OF HOW THE RESOURCES WERE USED

In making its judgment, the court used the Resources to show how international human rights case law had recognised equal treatment rights for same-sex partners.

### **Toonen**

The court highlighted that, under *Toonen*, “sexual orientation” was considered a “suspect differentiation criterion” and that same-sex couples were, *per se*, protected against discrimination.

### **Young**

The court noted that under *Young*, the fact that same-sex couples did not receive the same pension benefits as those granted to the surviving partner of a different-sex couple was considered as unjustified discrimination and therefore violated article 26 of the ICCPR. The court heavily relied on *Young* to argue that different treatment without any reasonable or objective justification violated the equal protection clause under the Colombian Constitution. Thus, the court concluded that, since there was no justification for the exclusion of same-sex couples from the civil union regime and the economic benefits thereunder, equal treatment rights of same-sex couples had been violated.

## NEWS/PRESS ARTICLES/SCHOLARSHIP IN RELATION TO THE CASE (IF APPLICABLE) WITH BRIEF SUMMARY

- **Universidad de los Andes** – *Colombia Diversa*. *Parejas del mismo sexo: el camino hacia la igualdad (Sentencia C-075/07) (Same-sex couples: the road to equal treatment)* February 2008: This book highlights the importance of this opinion in the Colombian LGBTIQ rights activism movement and the process behind the suit that led to it.
- **Juan Pablo Sarmiento E.** – *Las uniones materiales de hecho entre parejas del mismo sexo, una lucha inconclusa contra la discriminación (Same-Sex Civil Unions: an unfinished struggle against discrimination)*. *Revista de Derecho de la Universidad del Norte*, No. 32, 2009: Based on field research, this article evidenced how, two years after the court’s opinion, notaries public in Colombia still refused to register same-sex civil unions.
- **BBC** – *Rights for Colombia gay couples*. February 8, 2007: This news article highlights the opinion as a “great step” in the quest for LGBTIQ rights in Colombia.

## CASE SUMMARY 2: C-481-98 (CONSTITUTIONAL COURT)

<b>Case Name</b>	C-481-98 (9 September 1998)
<b>Link to Case</b>	Spanish: <a href="https://www.corteconstitucional.gov.co/relatoria/1998/c-481-98.htm">https://www.corteconstitucional.gov.co/relatoria/1998/c-481-98.htm</a> English (summary): <a href="https://www.icj.org/sogicasebook/sentencia-c-48198-constitution-al-court-of-colombia-9-september-1998/">https://www.icj.org/sogicasebook/sentencia-c-48198-constitution-al-court-of-colombia-9-september-1998/</a>
<b>Jurisdiction</b>	Colombia
<b>Court in which the Case was Heard</b>	Constitutional Court

### SUMMARY OF KEY FACTS

Germán Humberto Rincón Perfetti filed an action before the Constitutional Court to declare article 46 of Decree 2277 of 1979 (whereby rules governing the public teaching profession were adopted) partially unconstitutional because it included “homosexuality” as grounds for disciplinary sanctions against teachers.

### SUMMARY OF JUDGMENT

As a preliminary procedural point, the court indicated that, although the relevant provision was repealed by Law 200 of 1995 (or “CUD”), it had to rule on the merits in this case due to the fact that: (i) teachers could have been sanctioned based on that provision and that the effect of such sanctions (which could themselves be unconstitutional) survived the repeal; (ii) a decree issued following the repeal created legal uncertainty regarding the continued application of such provision; and (iii) the CUD did not repeal the application of such provision to teachers who worked in private institutions.

The court stated that, given that the expression “homosexuality” was not clear on whether the provision punished teachers just for being homosexuals or if it only covered teachers that engaged in “homosexual behaviour” it would analyse both scenarios.

The court stated that homosexuals had long been marginalised from society due to social misconceptions, which were contrary to the Colombian Constitution and international treaties on human rights, since they protected the right to intimacy and free development of personality, which, in its core, included the right to self-

determination on the basis of sexual orientation, and shielded citizens against discrimination on such basis.

The court further noted that homosexual citizens were subject to special protection under the Colombian Constitution and international human rights treaties. The court also indicated that homosexuality was a “suspect criterion” and that, based on constitutional case law, unequal treatment on such basis would be subject to strict scrutiny of such distinct treatment in order to determine if it violates the equal treatment clause of the Colombian Constitution. This version of the court’s strict scrutiny test included three prongs: (i) that the purpose was an urgent social need; (ii) that unequal treatment was strictly necessary for such purposes; and (iii) the proportionality of such unequal treatment.

### CONCLUSION

The court only applied the first prong of its strict scrutiny test. It indicated that, apparently, the provision was meant to: (i) prevent sexual abuse of minors by homosexual teachers, which although the court found to be an urgent purpose, it did not find evidence that homosexuals have a higher tendency to sexually abuse children and, thus, found it to be inadequate for such end; and (ii) prevent undue influence from homosexual teachers on children’s sexual identity and development, which the court also disregarded because it was inherently contradictory since it did not fully consider the complexities of the development of human sexuality and, in the end, it entailed a misconception that the Government had to prevent children from becoming homosexuals.



Thus, the court held that the provision was unconstitutional.

## RESOURCE CITED

*Toonen*

## DESCRIPTION OF HOW THE RESOURCES WERE USED

In making its judgment, the court cited the Resources as an applicable source for the interpretation and application of international binding human rights treaties under article 93 of the Colombian Constitution. The court used the Resources to:

- Note that article 17 of the ICCPR protected the intimacy of sexual behaviour among adults and, thus, criminalisation of homosexuality was an outright violation of the ICCPR.

- Indicate that article 2.1 and article 26 of the ICCPR prohibited any sort of discrimination on the basis of sex, which also included individuals' sexual orientation.

## NEWS/PRESS ARTICLES/SCHOLARSHIP IN RELATION TO THE CASE (IF APPLICABLE) WITH BRIEF SUMMARY

- **El Tiempo** – *Debate por Profesores Homosexuales (Debate surrounding homosexual teachers)*. April 18, 1998: This news article describes the heated debate involving this case before it was decided by the court and explains different postures from prominent constitutional lawyers, teachers, psychologists, students, and public opinion polls.

## CASE SUMMARY 3: T-349-06 (CONSTITUTIONAL COURT)

<b>Case Name</b>	T-349-06 (5 May 2006)
<b>Link to Case</b>	Spanish: <a href="https://www.corteconstitucional.gov.co/relatoria/2006/t-349-06.htm">https://www.corteconstitucional.gov.co/relatoria/2006/t-349-06.htm</a>
<b>Jurisdiction</b>	Colombia
<b>Court in which the Case was Heard</b>	Constitutional Court

## SUMMARY OF KEY FACTS

### The court found that:

- The claimant<sup>8</sup> lived with his same-sex partner for eight years before his partner passed away due to HIV. The claimant was also HIV+.
- The claimant's employer terminated his labour contract, and he was removed from the mandatory health plan. Thus, the claimant stopped receiving retroviral medicine to treat his illness.
- The claimant filed a request before the Social Security Institute to obtain his survivor's pension. The Social Security Institute denied his request and although he filed a motion to reconsider and to appeal, they were also denied.
- The claimant brought a constitutional injunction against the Social Security Institute to protect his rights to equal treatment, seeking (i) that the Social Security Institute grant him a survivor's pension and (ii) that pension payments owing as of the death of his partner be duly recognised. In The first instance court denied protection. The claimant appealed the decision, but the appeals court upheld it. The Constitutional Court decided to review the case.

<sup>8</sup> The name of the claimant was not included in the opinion in order to protect his right to privacy.

## Summary of Judgment

The court indicated that, under article 48 of the Colombian Constitution, social security was both a mandatory public service and the right of every citizen. However, it noted that wholly subsidised pensions were merely subsidiary and that they only applied when individuals could not provide for themselves.

- Regarding survivor's pensions, the court indicated that they were put in place to cover the risk of death of the person affiliated to the mandatory pension system. It also mentioned that local law did not require permanent partners to depend economically on the income of the deceased or to be unable to work to obtain a survivor's pension.
- However, the court reiterated that same-sex partners were not entitled to survivor's pension since, as the court had previously determined, the applicable law only covered different-sex partners, since it was designed to protect the deceased's "family." The court further noted that this distinction did not discriminate against same-sex couples, since unequal treatment was not based on their sexual orientation, but derived from the fact that they were not part of a family group and that this special protection was allegedly initially tailored to benefit widows.

## Conclusions

- The court held that denying the claimant a survivor's pension was not discriminatory against him, since the Social Security Institute acted within the applicable legal framework. Moreover, it indicated that such framework was not contrary to the Constitution or international treaties on human rights, since unequal treatment was based on "objective" differences and that same-sex partners were not left unprotected by the Colombian pension regime, since they could benefit from disability and old-age pensions.
- The court also held that *Young* did not undermine the abovementioned considerations, given that in that case Australia did not present any argument to demonstrate that the distinction between same-sex partners was justified, whereas in this case such distinct treatment was found to be justified.
- The court upheld the appellate court's ruling.

## SUMMARY OF ANY ADDITIONAL COMMENTARY IN THE JUDGMENT OR ANY USEFUL DISSENTING OPINION

### Justice Jaime Córdoba Triviño dissented on the following grounds.

- On the one hand, Justice Córdoba argued that pension substitution had been protected by the court as a fundamental right and that social security rights were governed by the principle of "universality." Thus, access to social security should be provided to any and all citizens without discrimination. Moreover, Córdoba indicated that superior bodies of law governing social security (*i.e.*, Law 100 of 1993) did not include any distinct treatment for homosexual couples and, thus, the decree governing survivor's pensions, due to its lower legal hierarchy, could not include any such distinction.
- On the other hand, Córdoba reminded the court that, although it had not previously ruled on pension substitution in favour of a surviving same-sex partner, the court had time and again protected rights of homosexuals to free development of personality and that the Constitution banned discrimination on the basis of sexual orientation. Thus, any distinct treatment on those bases was subject to strict scrutiny. However, he did not apply the strict scrutiny standard to the relevant provision, since he said that its purpose was, in and of itself, unconstitutional.
- Justice Córdoba argued that his conclusion on the constitutional rejection towards discrimination on the basis of sexual orientation was not only grounded on the Constitution itself, but also on international human right treaties that had been ratified by Colombia, as those instruments had been construed by relevant jurisprudence, which were also part of the Colombian "constitutional block." Based on *Young*, Córdoba established that, under international human rights law, it was inadmissible to deny access to benefits or rights on the grounds of a person's sexual orientation.
- In light of the above, Córdoba concluded that, in this case, in application of the court's own "unconstitutionality exception" doctrine, it should have overlooked the application of the relevant provisions that set forth that only different-sex couples could benefit from survivor's pension, since it was outright unconstitutional.

## RESOURCE CITED

*Young*

## DESCRIPTION OF HOW THE RESOURCES WERE USED

In making its judgment, the court responded to the claimant’s argument based on the Resources by mentioning that such case did not undermine the court’s considerations, given that in *Young*, Australia did not present any argument to demonstrate that the distinction between same-sex partners (who were not entitled to pension) and different-sex partners (who were) was reasonable and objective or any evidence of factors that could justify such distinction. From the court’s perspective, unequal treatment for same-sex partners was justified (as described above).

- As part of his dissenting opinion, Justice Córdoba explicitly cited article 26 of the ICCPR and highlighted how *Young* had interpreted it so as to cover sexual orientation as a suspect category under the general prohibition to discriminate on the basis of sex set forth thereunder. Córdoba highlighted the similarities between *Young* and the case at hand; namely that in *Young* the claimant had also been denied pension as a veteran’s dependent on the basis that “partners” protected under the relevant statute only covered different-sex couples and, thus, contrary to what the majority opinion indicated, both decisions were reached by considering sexual orientation as a crucial factor for determining whether claimants in both cases had the right to receive their pensions. Based on *Young*, Córdoba concluded that, under international human rights law, it was inadmissible to deny access to benefits or rights on the grounds of a person’s orientation.

## CASE SUMMARY 4: T-909-11 (CONSTITUTIONAL COURT)

<b>Case Name</b>	T-909-11 (1 December 2011)
<b>Link to Case</b>	Spanish: <a href="https://www.corteconstitucional.gov.co/relatoria/2011/T-909-11.htm#_ftnref92">https://www.corteconstitucional.gov.co/relatoria/2011/T-909-11.htm#_ftnref92</a>
<b>Jurisdiction</b>	Colombia
<b>Court in which the Case was Heard</b>	Constitutional Court

## SUMMARY OF KEY FACTS

### The court found that:

- Jimmy Moreno and his partner, Robbie Pérez, were at a mall and kissed in public. Moments later, security guards from the mall approached them. They told Moreno and Pérez that, although they respected their lifestyle, they had to “behave” or else they would need to exit the mall, since there were families and children present. One of the guards told them that if they did not leave they would be forcibly removed from the premises. The court later determined that the kiss had not been “obscene.”
- Footage from the mall’s security cameras evidenced that different-sex couples were not reprimanded by security guards when they kissed in public.
- The Office for the Defence of the People (*Defensor del Pueblo*)<sup>9</sup>, acting on Moreno’s behalf, brought a constitutional injunction against the mall to protect his rights to intimacy, free development of personality and equal treatment seeking that the mall be compelled to: (i) present public and written apologies to Moreno for what had occurred; (ii) revoke any internal orders to staff members from the mall to coerce people in order to prevent them from performing any similar acts; and (iii) organise human rights training that involved

<sup>9</sup> Governmental agency in charge of defending and furthering human rights.

lectures on discrimination and the human rights that were allegedly violated. The first instance judge denied protection. The claimant appealed the decision and the appeals court upheld it. The Constitutional Court decided to review the case and, *ex officio*, included the relevant security company as a defendant.

## SUMMARY OF JUDGMENT

As a preliminary procedural point, the court clarified that constitutional injunctions could be filed against private entities when, among others, there was a lack of physical or legal means of defence to resist or counter aggression, threat, or a violation of fundamental rights. The court further noted that such entities were responsible for the acts of their employees or subordinates.

- The court reiterated that, based on the Colombian Constitution and the court's own precedent, human dignity was the keystone of the Colombian constitutional system, and each individual's dignity was protected under his/her/their right to autonomy, free development of personality, and to self-determination. According to the court, the right to autonomy also calls for the protection of intimacy, which protects each individual's private life for it not to be arbitrarily interfered with by other persons.
- Although the court mentioned that liberties are subject to limits imposed by others' rights and the rule of law, it also determined that for such limits to be constitutional they needed to: (i) protect constitutional interests; (ii) be authorised by law; (iii) be reasonable and proportional; and (iv) respect the possibility of individuals to autonomously develop their personal way of life. The court also indicated that human dignity entailed that Colombian citizens were not to be humiliated for any public displays of their right to self-determination.
- In this regard, the court pointed out how some misdemeanours included in the police code could lead to the removal of an individual from a public or open place, like "altering tranquillity." In contrast, according to the applicable laws and regulations, private security guards could not alter the conditions for the exercise of the citizen's rights and liberties and were explicitly banned from exercising powers reserved for the relevant authorities.

- The court mentioned how the constitutional framework regarding equal treatment protected individuals against discrimination based on "suspect criteria", including sexual orientation. The court reiterated its line of cases indicating that Outright discrimination on the basis of sexual orientation had no legal grounds. The court acknowledged that, to arrive to such conclusion, since no specific protection was set forth in the Colombian Constitution regarding persons with diverse sexual orientation, at first, constitutional judges had to refer to international case law (explicitly citing the Resources) to correctly apply human rights instruments to cases involving their rights.
- The court also determined that, based on Moreno's vulnerability due to his sexual orientation, there was a presumption of discrimination and, thus, the burden of proof was shifted to the defendants.

## CONCLUSION

- The court held that rights to dignity and free development of personality were violated since the guard's reprimand of the couple's kiss was construed as an act of control over their freedom to express their choices in life. The court mentioned that this sort of public display of affection was not set forth as a misdemeanour and, thus, the guards could not have acted in support of police authorities.
- The court also found that Moreno and Pérez had been discriminated against because the defendants could not overcome the presumption of discrimination.
- The court reversed the appellate court's ruling and ordered the mall and the private security company to: (i) present public and written apologies to Moreno for what had occurred; (ii) implement a program to make the opinion known in order to explain the limits that security guards have, especially regarding human rights; and (iii) organise human rights training involving lectures on discrimination and the human rights that were violated in this case.

## RESOURCE CITED

Toonen

## DESCRIPTION OF HOW THE RESOURCE WAS USED

In making its judgment, the court used the Resources to show how certain voids and vacuums of international human rights law regarding individuals with diverse sexual orientation had been covered by case law. It first indicated that, based on *Toonen*, the ICCPR prohibition on any sort of discrimination on the basis of sex also included individuals' sexual orientation. The court also used the Resources to exemplify how the criminalisation or punishment of sexual behaviour among consenting and adult men was contrary to article 17 of the ICCPR.

## NEWS/PRESS ARTICLES/SCHOLARSHIP IN RELATION TO THE CASE (IF APPLICABLE) WITH BRIEF SUMMARY

- **El Tiempo** – *Corte regaña a centro comercial por prohibir a pareja gay besarse (Court reprimands mall for forbidding a gay couple from kissing)*. May 25, 2012: This news article outlines the orders that the court gave in this case and some parts of the court's reasoning.
- **El País** – *Centro Comercial debe dar disculpas a homosexuales que se abrazaban (Mall shall apologise to homosexuals that hugged)*. May 25, 2012: This news article highlights the unprecedented nature of this decision and outlines the orders that the court issued.

## CASE SUMMARY 5: T-565-13 (CONSTITUTIONAL COURT)

<b>Case Name</b>	T-565-13 (23 August 2013)
<b>Link to Case</b>	Spanish: <a href="https://www.corteconstitucional.gov.co/relatoria/2013/T-565-13.htm">https://www.corteconstitucional.gov.co/relatoria/2013/T-565-13.htm</a>
<b>Jurisdiction</b>	Colombia
<b>Court in which the Case was Heard</b>	Constitutional Court

## SUMMARY OF KEY FACTS

### The court found that:<sup>10</sup>

- José,<sup>11</sup> a teenager, attended high school. He identified himself as a female and, thus, decided to leave his hair long and start wearing makeup at school.
- School authorities confronted José and his mother (the "**Claimant**") because they considered that he had infringed the school's code of conduct, which established that male students should have an "adequate" haircut and personal appearance. Later, José was subject to a two-day suspension from school.
- The Claimant filed a petition (*derecho de petición*) with the school in order for José to be able to have the physical appearance that suited his personality. The petition was denied.
- The Claimant brought a constitutional injunction against the school to protect José's rights to human dignity, physical integrity, and free development of personality, seeking: (i) that the school's rector abstained from turning the fact that her son did not modify his physical appearance into a "serious offence"; (ii) that he was once again allowed to attend school; and (iii) to adapt the code of conduct

<sup>10</sup> Although José identified as a female, the pronouns used by the court to refer to José in the case were "he/him/his." We have therefore adopted those pronouns for the purpose of this Case Summary.

<sup>11</sup> The name of the Claimant's son was changed in the published opinion in order to protect his right to privacy.

to constitutional parameters. The first instance court denied protection. The Claimant appealed the decision and the appeals court partially upheld it and only ordered the school to abstain from forcing José to cut his hair, without prejudice to requiring him to wear it “discreetly” in school. The Constitutional Court decided to review the case.

## SUMMARY OF JUDGMENT

- The court indicated that, according to its own case law, education institutions could not impose prohibitions or sanctions on students based on their decision to opt for a specific physical appearance, since the authority of schools to determine internal rules were limited by the Colombian Constitution. According to the court, students had certain level of progressive autonomy as they grew older, all of which was protected under the right to free development of personality, which also related to the right to sexual and gender identity. Students’ decisions involving their physical appearance should not be limited, since they did not affect others or the academic environment. Moreover, the court mentioned that the acknowledgement of diversity in sexual and gender identity is one of the objectives of the education process.
- The court also highlighted that education institutions have to abide by procedural and substantial due process when imposing prohibitions or sanctions on students, especially when determining the reasonableness and proportionality of sanctions. Any such punishments should be coherent with the institution’s pedagogical purpose.
- The court also noted that sexual orientation was a suspect criterion and that unjustified limitations on the adoption of a certain sexual identity by way of the adoption of any given physical appearance would violate rights to human dignity, free development of personality, and equal treatment. In this sense, the court alluded to certain international rulings (including the Resources) to indicate that rights under international human rights instruments had to be respected despite the individual’s sexual orientation. This rule, as the court established on prior cases, was also applicable in educational environments.

- In light of the above, the court analysed if in this case: (i) due process was observed; and (ii) the relevant sanction was compatible with José’s rights to human dignity, free development of personality, equal treatment, and education.

## CONCLUSION

- The court held that due process was not observed in this case, particularly due to the fact he (or his mother) had no opportunity to contradict or defend against the sanctions imposed by the school, even though the code of conduct explicitly set forth provisions to that end.
- The court also found that José was subject to unjustified discrimination based on sexual orientation, given that the school tried to impose the sanctions considering that a heterosexual orientation and identity were the ones that were indeed desirable for the school and its academic process.
- The court upheld the appellate court’s orders. It also: (i) cancelled the sanctions imposed on José; (ii) ordered the school to conform the code of conduct with the rights to sexual identity and orientation; and (iii) ordered the school to communicate this opinion among school officials and teachers in order to prevent future violation of students’ rights.

## RESOURCE CITED

*Toonen*

## DESCRIPTION OF HOW THE RESOURCE WAS USED

In making its judgment, the court used the Resources to indicate that article 2.1 of the ICCPR prohibited any sort of discrimination on the basis of sex and that this also included individuals’ sexual orientation. This was crucial in this opinion, since the court indicated that it applied this rule to the case to determine that José was subject to unjustified discrimination.



## CASE SUMMARY 6: T-063-15 (CONSTITUTIONAL COURT)

<b>Case Name</b>	T-063-15 (13 February 2015)
<b>Link to Case</b>	Spanish: <a href="https://www.corteconstitucional.gov.co/RELATORIA/2015/T-063-15.htm#_ftn122">https://www.corteconstitucional.gov.co/RELATORIA/2015/T-063-15.htm#_ftn122</a>
<b>Jurisdiction</b>	Colombia
<b>Court in which the Case was Heard</b>	Constitutional Court

### SUMMARY OF KEY FACTS

#### The court found that:

- Sara Valentina López Jiménez was born Diego Alberto López Jiménez (a man), but since the age of five she has felt and acted like a woman.
- Sara had won a previous constitutional injunction claim in virtue of which the court ordered her health insurer (*empresa promotora de salud*) to authorise her gender-affirming surgery. Sara effectively underwent said surgery.
- Sara requested the change of her name and her sex in the birth register (*registro civil de nacimiento*) and other official ID documents before a notary public. Although the notary public responded that although she could change her name, she could not amend her sex in such documents because the initial ruling did not explicitly include such order. The notary public further indicated that she should initiate proceedings before a family court in order to change her sex.
- Sara has been discriminated in the workplace due to the sex reflected in her ID documents. Namely, she had been denied employment, could not get her US-issued pilot's license validated in Colombia and was even discriminated against when she voted in national and regional elections.
- Sara brought a constitutional injunction against the National Civil Status Registrar (*Registraduría Nacional del Estado Civil*)<sup>12</sup> to protect her rights to human dignity, free development of personality, sexual identity, and

legal personality (*personalidad jurídica*), seeking: (i) that the notary public amended the sex reflected in the birth register and other official ID documents; and (ii) the number in her citizenship card (*cédula de ciudadanía*) be changed to reflect female nomenclature.<sup>13</sup> The first instance court denied protection. The Constitutional Court decided to review the case.

### SUMMARY OF JUDGMENT

- As a preliminary procedural point, the court, based on prior case law, held that, since the subject matter of Sara's claim was of constitutional relevance and there was no clear action to change how her sex was reflected in official ID documents, the constitutional injunction could be used as a mechanism to protect human rights in this case.
- The court reiterated that, based on the Colombian Constitution and its own precedent, human dignity was a keystone of the Colombian constitutional system, and each individual's dignity is protected under his/her right to autonomy, free development of personality and self-determination.
- These prerogatives, in addition to the right to legal personality, in turn, derive in the right of any individual's sexual orientation and gender identity to be properly reflected in ID data included in civil registries, including the person's name and civil status (which includes a person's sex). The court also cited certain sources of international (*i.e.*, the Resources) and comparative case law to support the fact that names and gender

<sup>12</sup> The court, *ex officio*, included the notary public, the Ministry of Foreign Relations, and the relevant passport office.

<sup>13</sup> In Colombia, up until the year 2000, official IDs included certain initial serial numbers that were set according to the person's gender.

preference should be properly reflected on ID documents and how governmental authorities were obligated to provide for the implementation of such changes.

- The court highlighted the fact that constitutional case law has re-evaluated the fact that sex is an objective feature of each individual and established that it can be determined based on each individual's identity and that the court has recognised and protected several manifestations of gender diversity, including being transgender (e.g., in cases involving gender-affirming surgery, name changes, access to public events and employment opportunities, and physical appearance of transgender prison inmates). Nonetheless, it acknowledged that transgender communities were still widely discriminated in Colombia.
- The court also indicated that current local legislation provided for the possibility to correct and modify certain public registries which, in the case of the individual's sex, entailed a change of civil status by means of a public deed or by judicial means, in this last case if there was any sort of dispute or opposition. In this sense, it reiterated its jurisprudence allowing for the modification of civil registries due to sex change and abolishing unnecessary obstacles for transgender persons to correct the sex reflected in the civil registry for it conform to their identity, without the need to file any judicial claims (which, in and of itself, presents several obstacles for such purposes), provided there is medical or psychological proof that supports such request.

## CONCLUSIONS

- The court reversed the first instance decision and held that the notary public and the National Civil Status Registrar violated Sara's rights to equal treatment, legal personality recognition, free development of personality, sexual identity, and human dignity by requiring that she initiated judicial proceedings to modify the sex reflected in her birth register and other official ID documents. However, the court denied the request to change the nomenclature of the citizenship card because it was issued after the years 2000 and, thus, such number did not have any relation to Sara's sex.

- The court ordered: (i) the notary public to issue the requisite public deed to change Sara's name and correct her sex to coincide with those of her preference and to initiate the administrative procedure for the National Civil Status Registrar to modify the relevant information in the birth register; and (ii) the National Civil Status Registrar to keep the initial birth register confidential for it to be made available only to Sara.

## SUMMARY OF ANY ADDITIONAL COMMENTARY IN THE JUDGMENT OR ANY USEFUL DISSENTING OPINION

The court held that no person should be forced to undergo any medical procedures as a requirement for the legal recognition of his or her gender identity.

## RESOURCES CITED

Yogyakarta Principles  
A/HRC/RES/17/19

## DESCRIPTION OF HOW THE RESOURCES WERE USED

In making its judgment, the court used the Resources as sources of international law to further support the fact that names and gender preference should be properly reflected on ID documents and how governmental authorities were obligated to provide for the implementation of such changes.

### Yogyakarta Principles

- The court indicated that the Yogyakarta Principles laid out guidelines regarding international bodies of law concerning human rights involving sexual orientation and gender identity, including the need to adopt legislative and administrative measures to establish efficient procedures aimed at having ID documents reflect the gender identity that each individual has determined for him/herself.
- The court also relied on the Yogyakarta Principles to state that sexual orientation and gender identity are essential to an individual's personality and are key aspects of the rights to self-determination, dignity, and freedom. Based on the above, the court held that

no person should be forced to undergo any medical procedures as a requirement for the legal recognition of his or her gender identity.

### A/HRC/RES/17/19

- The court cited this resolution to indicate how the UNHRC had also warned about the need for States to facilitate legal recognition of the gender of preference for transgender individuals and to provide for the reissuance of ID documents including the preferred gender and name.

## NEWS/PRESS ARTICLES/SCHOLARSHIP IN RELATION TO THE CASE (IF APPLICABLE) WITH BRIEF SUMMARY

- Ámbito Jurídico** – *Transgénero puede modificar sexo en registro civil por vía notarial (Transgenderers may modify sex in the civil registry via notaries public)*. May 20, 2015: This news article briefly outlines the court’s opinion in this case.
- Asuntos Legales** – *Derecho a la Identidad Sexual (The Right to Sexual Identity)*. July 23, 2015: This op-ed describes the regulation issued by the Colombian Government regarding change of sex in civil registries, which was issued shortly following and due to the court’s decision.

## CASE SUMMARY 7: T-099-15 (CONSTITUTIONAL COURT)

<b>Case Name</b>	T-099-15 (10 March 2015) <sup>14</sup>
<b>Link to Case</b>	Spanish: <a href="https://www.corteconstitucional.gov.co/RELATORIA/2015/T-099-15.htm">https://www.corteconstitucional.gov.co/RELATORIA/2015/T-099-15.htm</a>
<b>Jurisdiction</b>	Colombia
<b>Court in which the Case was Heard</b>	Constitutional Court

## SUMMARY OF KEY FACTS

### The court found that:

- Gina Hoyos Gallego (the “**Claimant**”), a transgender woman, was forcibly displaced from her native city due to death threats she received from criminal bands because of her work as a local leader for the LGBTIQ movement. Thus, she was registered as a victim of Colombia’s internal armed conflict in the Sole Victim Registry (RUV for its acronym in Spanish).
- The Claimant filed to obtain her “military exemption card”<sup>15</sup> with military recruitment authorities based on her status as a registered victim, but was charged a fine because she had not timely presented herself before the relevant authorities for such purposes.
- The Claimant brought a constitutional injunction against the relevant military recruitment authorities to protect her rights to autonomy, human dignity, equal treatment and free development of personality in order: (i) for them to promptly issue her military exemption card without any discriminatory limitations; (ii) to recover damages; and (iii) for military recruitment authorities to lay out a special protocol for transgender women to obtain their military exemption

<sup>14</sup> Several other opinions cite this case and the manner in which is used the Resources (see: C-006-16, T-077-16, T-143-18, and T-447-19).

<sup>15</sup> In Colombia, subject to certain exceptions (including being a registered victim of Colombia’s internal armed conflict), military service is mandatory for men who have completed their high school studies. Those exempted from military duty still need to obtain a “military exemption card” (libreta militar) from military recruitment authorities by the time they reach 18 years of age. Having a military exemption card is usually required to secure a formal job. 59

cards. The first instance court ruled in favour of the Claimant and ordered the relevant military authorities

to promptly issue and deliver the Claimant's military exemption card and compelled the government to include a section on recruitment for LGBTQ+ individuals in the relevant public policy instrument and denied to claim for damages. Although the ruling was not timely appealed by the defendant, the Constitutional Court selected this case for its review.

## SUMMARY OF JUDGMENT

As a preliminary procedural point, the court held that a constitutional injunction could be used to protect human rights in this case, since, although there were other judicial means of protection, the Claimant was in a state of vulnerability and expedited means of protection (*i.e.*, constitutional injunction) were indeed required to shield the Claimant against any further violations of her human rights.

- The court reiterated that, based on the Colombian Constitution and its own precedent, human dignity was the keystone of the Colombian constitutional system, and each individual's dignity is protected under his/her right to autonomy, free development of personality, personal identity, and equal treatment.
- The court highlighted how the right to equal treatment derived from a prohibition on the Government discriminating against individuals based on "suspect criteria", which included gender identity and how its own case law had long-established that distinctions based on gender identity and sexual orientation were subject to strict scrutiny. Thus, the purpose of such distinction had to be urgent and the means for that purpose had to be necessary for it not to violate the equal treatment clause of the Colombian Constitution.
- The court pointed out that its only precedent regarding military exemption cards for transgender women (T-476 of 2014)<sup>16</sup> did not rule on the requirement for them to obtain such a document.

## CONCLUSIONS

- The court held that the fact that the recruitment authorities treated Gina as a man for the purposes of the issuance of her military exemption card and, thus, imposed a fine for her alleged late request, violated her rights to human dignity.
- The court also determined that the relevant military recruitment authorities acts did not meet the first prong of the strict scrutiny test, since there was no urgent purpose that needed to be met by giving the Claimant a different treatment than that given to cisgender women. Thus, the court found that in this case, the relevant military recruitment authorities violated the right to equal treatment.
- In light of the above, the court held that transgender women were not required to obtain military exemption cards. Thus, the court partially reversed the first instance ruling and ordered the relevant military recruitment authorities to cease any process initiated to issue the Claimant's military exemption card.
- The court also held that, given that there were no reasonable or expedited means for transgender women to modify their official ID to reflect their true sexual identity, military recruitment authorities had to solely rely on such individuals' oral statement attesting to their sexual identity for the purposes of processing any applications or requests.
- Moreover, given the critical state of affairs regarding the transgender population, the court compelled: (i) the Executive Branch to incorporate certain provisions into an upcoming bill that it would present to Congress for the purposes of implementing protocols to properly reflect gender identity in official ID documents and to implement a protocol for the admission of transgender men into mandatory service and of transgender women into voluntary service; and (ii) Congress to legislate on the change of official ID.

## RESOURCE CITED

Yogyakarta Principles

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<sup>16</sup> In this case, the Constitutional court ruled that the requirement for male applicants for governmental positions to have a military exemption card was not applicable to transgender women since it violated their right to self-determination.

## DESCRIPTION OF HOW THE RESOURCE WAS USED

### In making its judgment, the court used the Yogyakarta Principles as follows:

- Conceptual framework to define “sexual identity”, “sexual orientation”, “transgender person”, and “cisgender person.”
- A soft law instrument. The court held that, although the Yogyakarta Principles were not issued by a body of the international human rights system, such principles could be applied to guide the application of international human rights instruments for the protection of gender identity and sexual orientation since they established obligations for the implementation of human rights and included recommendations for their protection and promotion. The court also highlighted how such principles were applied in other jurisdictions (*i.e.*, in *Sunil Babu v.*

*Nepal* before the Supreme Court of Nepal (National Judicial Academy Law Journal, 2 NJA Law Journal 2008)). Although the court mentioned the Yogyakarta Principles as one of the sources of international human rights law that was applicable to this type of cases, it did not explicitly apply the principles to this specific case other than to define certain relevant terms (as described above).

## NEWS/PRESS ARTICLES/SCHOLARSHIP IN RELATION TO THE CASE (IF APPLICABLE) WITH BRIEF SUMMARY

- **Semana** – *La orden que dejará entrar a los transexuales al Ejército (The Court Order that would allow transgenders into the Army)*. May 15, 2015: This news article describes the facts surrounding the case and highlights some of the orders issued by the Constitutional Court in its opinion.

## CASE SUMMARY 8: T-376-19 (CONSTITUTIONAL COURT)

<b>Case Name</b>	T-376-19 (20 August 2019)
<b>Link to Case</b>	Spanish: <a href="https://www.corteconstitucional.gov.co/relatoria/2019/T-376-19.htm">https://www.corteconstitucional.gov.co/relatoria/2019/T-376-19.htm</a>
<b>Jurisdiction</b>	Colombia
<b>Court in which the Case was Heard</b>	Constitutional Court

## SUMMARY OF KEY FACTS

### The court found that:

- Gabriel<sup>17</sup> (the “**Claimant**”) was HIV+.
- According to the Claimant, he was constantly discriminated against, ill-treated, and humiliated by the staff of the military hospital that handled his treatment due to the fact that he was a homosexual. Namely, administrative staff denied his requests for medicine and to schedule medical appointments, and physicians openly divulged his condition and his sexual orientation verbally and in his medical records.
- The Claimant also stated that the precarious conditions in which he was treated also affected his health, due to the fact that he was constantly exposed to other patients with highly contagious diseases.
- The Claimant brought a constitutional injunction against certain medical authorities from the Army and individual hospital and dispensary staffers to protect his rights to health, a dignified life, equal treatment,

<sup>17</sup> The name of the claimant was changed in the published version of the opinion to protect his right to privacy.

*habeas data*<sup>18</sup>, and free development of personality seeking: (i) that staffers abstain from discriminating against him and for them to prioritise his requests for medicine and medical appointment scheduling; and (ii) to eliminate to include information regarding his sexual orientation from his clinical history. The first instance judge ruled in favour of the Claimant based on the violation of his rights to a dignified life and free development of personality, given that there had been previous opinion on the other two grounds for protection and, thus, it had *res judicata* effects. It also denied the Claimant's claims regarding his clinical history. One of the defendants filed an appeal and the appeals court reversed the decision.

## SUMMARY OF JUDGMENT

- The court found that the previous ruling only had partial *res judicata* effects that covered only certain aspects of the right to health and the delivery of medicine. Thus, the court found it could rule on all additional matters.
- As a preliminary procedural point, the court held that the constitutional injunction could be used as a mechanism to protect human rights in this case, since the claimant was in a state of vulnerability for his sexual orientation and his medical condition and, based on the court's case law, this action was the only effective judicial mechanism to protect human rights of the gay community against acts of discrimination.
- The court indicated that Outright discrimination was a form of arbitrary distinct treatment, since it lacked an objective, reasonable, and proportional justification and, thus, it was contrary to the equal treatment clause of the Colombian Constitution. Based on its own jurisprudence, the court indicated that discrimination could present itself as a discriminatory act or a discriminatory environment (*escenario de discriminación*). Regarding the latter, the court set forth the following criteria to establish if a discriminatory environment existed: (i) the existence of a power relationship; (ii) the relationship between all parties involved, including witnesses to discriminatory behaviour; (iii) the physical space where discrimination took place; (iv) duration of the discriminatory behaviour; (v) the alternatives that the individual who is subject to discrimination has to deal with the relevant situation; and (vi) the positive response from those discriminating (e.g., correction, reconciliation).
- The court stated that more than one discriminating factor or suspect criterion can be present in the same case (citing, among others, the Report of the Independent Expert – A/72/172 (2017)). According to the court, this was the case of HIV patients who were discriminated against due to their health condition and social stigma related thereto, and who were also part of the LGBTIQ community who were discriminated against because of their sexual orientation. Both of these categories under constitutional case law were subject to special constitutional protection. The court also mentioned how a discrimination-free environment is necessary to secure due access to health services.
- Regarding evidence in discrimination cases, the court reiterated how it has acknowledged the difficulty for individuals who have been discriminated against to access sufficient evidence supporting the alleged acts of discrimination or discriminatory environment. Thus, the court established a presumptive discrimination rule in favour of those subject to special constitutional protection and the burden of proof then fell on the defendants to reverse such presumption. In the case at hand, the court found that the defendants did not meet their requisite burden of proof, since they did not provide sufficient evidence of the implementation of effective action to prepare medical and administrative staff to deal with patients such as the Claimant.
- On *habeas data*, the court mentioned that although patients have the right to access, update, and rectify the information included in their medical records and that such information should be kept confidential, the Health Ministry's guidelines on the subject indicated the need to include information that was relevant to determine "*tolerance to certain medicines and potential adverse effects*", which, in the case of HIV patients included certain habits of the patients, e.g., their sexual behaviour.

<sup>18</sup> In Colombia, citizens have the right to *habeas data*, whereby they can know (or demand to be informed of), update, and rectify personal information that has been included in databases.



## CONCLUSION

- The court held that discrimination against the Claimant had occurred, based on the fact that the relevant presumption was not reversed by the defendants.
- The court found that, in the case at hand, discrimination took the form of a discriminatory environment, since: (i) there was a power imbalance between the Claimant and the defendants, given the patient's need for treatment and medicine; (ii) the patient had to constantly visit the hospital, where he had to suffer discrimination, which was witnessed by other patients; (iii) the scenario where discrimination took place was open and public, and the hospital had to have suitable protocols in place to admit HIV+ patients; (iv) the duration of the discriminatory acts could lapse for a whole medical appointment or the time it took for the Claimant to receive his medicine; (v) the Claimant did not have many more options to access medical services; and (vi) there was no evidence that there was any action taken to change the discriminatory behaviour.
- The court also held that the hospital had to adapt the procedure to deliver medicine in order to avoid constant visits to the hospital in order to protect the patient's right to privacy. As for the scheduling of appointments, since the hospital had a call centre set up for such purposes, no additional measures were required by the court.
- Regarding *habeas data* rights, the court concluded that the medical history should be kept confidential. Nonetheless, it held that information regarding sexual behaviour from the patient had to be registered in his/her medical records. However, it also held that no one other than the patient and the relevant physicians should have access to such information.
- The court confirmed the first instance ruling and ordered the defendant entities to: (i) put a plan in place to register and prevent discriminatory behaviour, and to enable patients to file complaints in that regard; (ii) adopt the Ministry of Health's guideline to treat HIV patients; (iii) adopt "good practices" to keep medical records confidential; (iv) hold a meeting with the staffers that were included as defendants in this

constitutional injunction to raise awareness among them regarding the content of this opinion; (v) adopt the technical measures required for HIV patients to be able to download their treating physician's authorisations and prescriptions online, in order to avoid their exposure to other patients who could worsen their health; and (vi) eliminate any records regarding HIV patient's diagnosis from the relevant digital platform and to abstain from including any such information therein.

## SUMMARY OF ANY ADDITIONAL COMMENTARY IN THE JUDGMENT OR ANY USEFUL DISSENTING OPINION

According to the court, an unlawful "discriminatory" act has the following features: (i) it does not require the will to discriminate; (ii) it entails exercising violence against someone; and (iii) can be identified by means of "suspect classifications." However, the court only analysed the existence of a discriminatory environment and did not apply this test.

## RESOURCES CITED

Report of the Independent Expert – A/72/172 (2017)<sup>19</sup>

## DESCRIPTION OF HOW THE RESOURCES WERE USED

In making its judgment, the court used the Report to show how several discriminatory factors could converge in some cases. Namely, the court cited the Report to illustrate how sexual orientation and gender identity could also be present along with other factors, such as race, poverty, migration, and disability.

## NEWS/PRESS ARTICLES/SCHOLARSHIP IN RELATION TO THE CASE (IF APPLICABLE) WITH BRIEF SUMMARY

- **Semana** – *El oficial de la fuerza aerea con VIH al que discriminan en el hospital militar (The air force official who is discriminated in the army hospital)*. February 9, 2019: This news article describes the facts surrounding the case and highlights some of the decisions and the orders issued by the Constitutional Court in its opinion.

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<sup>19</sup> Although the Yogyakarta Principles were cited by one of the intervening parties, the court did not address them in this opinion.

# Costa Rica

## CASE SUMMARY 1: 08-002849-0007-CO (CORTE SUPREMA DE JUSTICIA)

<b>Case Name</b>	08-002849-0007-CO
<b>Citation</b>	Sala Constitucional, Resolución N° 13800 – 2011, 12 October 2011
<b>Link to Case</b>	Spanish: <a href="https://nexuspj.poder-judicial.go.cr/document/sen-1-0007-574777">https://nexuspj.poder-judicial.go.cr/document/sen-1-0007-574777</a>
<b>Jurisdiction</b>	Costa Rica
<b>Court in which the Case was Heard</b>	Corte Suprema de Justicia

### SUMMARY OF KEY FACTS

Request to the Supreme Court to declare as unconstitutional the Technical Penitentiary Regulation in Costa Rica, in as much as it does not allow an intimate visit for prisoners of a visitor of the same sex.

#### Summary of Judgment

The Court considers that article 66 of the Technical Penitentiary is in breach of the principle of equality, and therefore unconstitutional.

- The principle of equality only forbids arbitrary discrimination. This means that individuals who are in the same situation must be treated equally, but those who are not may be treated unequally. The principle of equality is not violated when the difference in treatment may be justified in objective differentiating factors among those being compared and is reasonable and proportionate to the legitimate end it pursues.
- The level of scrutiny depends on the relationship between the particular difference in treatment and the end it pursues. If such end contradicts constitutional

or international principles or provisions, then the difference in treatment shall be prohibited; if such end is not expressly protected by the Constitution, but does not contradict it, the difference in treatment must be strictly scrutinised; and if such end is expressly protected by the Constitution, the reasonability of the difference in treatment is presumed, despite being subject to the general requirements of the principle of equality.

- Being based on criteria of sexual orientation, article 66 of the Technical Penitentiary Regulations lacks an objective justification, and therefore arbitrarily discriminates against those whose sexual preferences do not conform a majority. Intimate visits for prisoners are intended to allow prisoners to have contact with the outside world and exercise their sexual freedom. This is equally important for prisoners with a sexual orientation towards people from the same sex as it is for prisoners with a sexual orientation towards people from a different sex. Moreover, the exercise of non-heterosexual prisoners' sexual freedom does not affect in any way the rights or interests of the heterosexual majority. In conclusion, the provision in question entails the limitation of certain inmates' rights based

solely on their sexual orientation lacking an objective and reasonable justification for such difference of treatment, thus violating the principle of equality.<sup>20</sup>

## SUMMARY OF ANY ADDITIONAL COMMENTARY IN THE JUDGMENT OR ANY USEFUL DISSENTING OPINION

While a concurring and a dissenting opinion were given, they did not refer to the Resources in order to support their conclusions.

## RESOURCES CITED

Articles 2 (1) and 17 (1) of the ICCPR

Articles 1.1, 5.1, 5.2, 11.1 and 24 of the American Convention on Human Rights

## DESCRIPTION OF HOW THE RESOURCES WERE USED

- Claimant argued that the aforementioned Resources had been breached by article 66 of the Technical Regulations of the Penitentiary. While the Court did not discuss them expressly, it did conclude that intimate visits of prisoners are intended to allow them to have contact with the outside world and exercise their sexual freedom, and that there is no objective justification to limit such right only to heterosexual prisoners.
- As argued by the Court, heterosexual prisoners are in the same “factual situation” (*i.e.*, the same need for contact with the outside world and to exercise their sexual freedom) than prisoners with a different sexual orientation. It further noted that the rights or interests of the heterosexual majority are not affected by non-heterosexual prisoners’ exercise of their sexual freedom. While it based its judgment on article 33 of the Constitution of Costa Rica, the Court could have arguably reached the same conclusion applying the Resources.

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<sup>20</sup> In paragraph V, the court concluded that “Human dignity cannot be violated through legal norms that do not respect the inalienable right that each person has to diversity, as happens with the norm challenged in this action, which establishes a prohibition contrary to human dignity, devoid of an objective justification, since it is based on criteria of sexual orientation, illegitimately discriminating those who have different preferences from those of the majority, whose rights or interests are not affected in any way by the free expression of their freedom. Taking into account that the rule is intended to allow contact with the outside world in order to consent to the sexual freedom of inmates, the difference in treatment is not justified, since those deprived of liberty with a sexual orientation towards persons of the same-sex, they are in the same factual situation of those deprived of liberty with a heterosexual orientation, a situation that is contrary not only to the right to equality, but also to the right of those deprived of liberty to exercise their right to communicate with the outside world through intimate visits.”

# India

## CASE SUMMARY 1: NATIONAL LEGAL SERVICES AUTHORITY AND OTHERS V. UNION OF INDIA AND OTHERS (SUPREME COURT OF INDIA)

**Case Name** *National Legal Services Authority and Others v. Union of India and Others*

**Case Citation** [2014] 4 LRC 629

**Link to Case** English: <http://www.liiofindia.org/in/cases/cen/INSC/2014/282.html>

**Jurisdiction** India

**Court in which the Case was Heard** Supreme Court of India

**Date of Decision** 15 April 2014

### SUMMARY OF KEY FACTS

#### The court found that:

- Transgender people, as a whole, face multiple forms of oppression in India.
- Discrimination against transgender people in India is large and pronounced, particularly in the fields of health care, employment, and education.
- Social exclusion and discrimination on the ground of gender, stating that one does not conform to the binary gender (male/female) prevails in India.

### ISSUES PRESENTED

#### Two issues were brought before the Court:

1. Whether a person who was born as a male but had predominately female orientation had a right under the Constitution of India (“Constitution”) to be treated as a female, or vice versa, if he or she so chose, especially if he or she had undergone an operation to change his or her sex; and
2. Whether transgenders,<sup>21</sup> being persons who were neither males nor females, had a right under the Constitution to be identified and recognised as a “third gender.”

<sup>21</sup> The Court explains at paragraph 11 that “[t]ransgender is generally described as an umbrella term for persons whose gender identity, gender expression or behavior does not conform to their biological sex. Transgender may also take in persons who do not identify with their sex assigned at birth, ... persons who intend to undergo sex re-assignment surgery (SRS) or have undergone SRS to align their biological sex with their gender identity in order to become male or female. They are generally called transsexual persons. Further, there are persons who like to cross-dress in clothing of the opposite gender, i.e., transvestites.”

## SUMMARY OF JUDGMENT

### With respect to the first issue, the Court held that:

1. Article 14 of the Constitution states that the state shall not deny to 'any person' equality before the law or the equal protection of the laws within the territory of India. Article 14 does not restrict the word 'person' and its application only to male or female. Hijras<sup>22</sup>/transgender persons who are neither male/female fall within the expression 'person' and, hence, are entitled to legal protection of the laws in all spheres of state activity, including employment, healthcare, education, as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country. Discrimination on the ground of sexual orientation or gender identity, therefore, impairs equality before the law and equal protection of the law and violates article 14 of the Constitution.
2. Articles 15 and 16 of the Constitution prohibit discrimination against any citizen on certain enumerated grounds, including the ground of 'sex'. In fact, both articles prohibit all forms of gender bias and gender-based discrimination. Discrimination on the ground of 'sex' under articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression 'sex' used in articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male nor female.
3. Article 19(1)(a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender. Values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under article 19(1)(a) of the Constitution and the state is bound to protect those rights.
4. Article 21 of the Constitution states that *"No person shall be deprived of his life or personal liberty except according to procedure established by law."* Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under article 21 of the Constitution.

### With respect to the second issue, the court held that:

1. Article 21 of the Constitution protects one's right of self-determination of the gender to which a person belongs. Determination of gender to which a person belongs is to be decided by the person concerned. In other words, gender identity is integral to the dignity of an individual and is at the core of 'personal autonomy' and 'self-determination'. Hijras/eunuchs, therefore, have to be considered as third gender, over and above binary genders, under the Constitution and India's laws.
2. Articles 14, 15, 16, 19 and 21 of the Constitution do not exclude Hijras/transgenders from their ambit, but Indian law on the whole maintains the paradigm of binary genders of male and female, based on one's biological sex. Non-recognition of the identity of Hijras/Transgenders in various legislation denies them equal protection of the law and they face widespread discrimination.
3. Article 14 of the Constitution has used the expression 'person' and article 15 has used the expression 'citizen' and 'sex', so also article 16. Article 19 has also used the expression 'citizen'. Article 21 has used the expression 'person'. All these expressions, which are 'gender neutral', evidently refer to human beings. Hence, they take within their sweep Hijras/transgenders and are not as such limited to male or female gender. Gender identity forms the core of one's personal self, based on self-identification, not on surgical or medical procedure. In the Court's view, gender identity is an integral part of sex and no citizen can be discriminated against on grounds of gender identity, including those who identify as a third gender.

## CONCLUSIONS

The court concluded that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under the Constitution and stated that it is inclined to give various directions to safeguard the constitutional rights of the members of the transgender community.

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<sup>22</sup> The Court explains at paragraph 11 that "[h]ijras are not men by virtue of anatomy appearance and psychologically, they are also not women, though they are like women with no female reproduction organ and no menstruation. Since Hijras do not have reproduction capacities as either men or women, they are neither men nor women and claim to be an institutional 'third gender'."

### The court declared that:

1. Hijras, eunuchs, apart from binary gender, are to be recognised as a ‘third gender’ for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by Parliament and state legislatures.
2. Transgender persons’ right to decide their self-identified gender is also upheld and the central and state governments are directed to grant legal recognition of their gender identity, such as male, female or as third gender.
3. Central and state governments are directed to take steps to treat transgender persons as socially and educationally backward classes of citizens and to extend all kinds of reservation in cases of admission in educational institutions and for public appointments.
4. Central and state governments are directed to operate separate HIV sero-surveillance centres, since Hijras/transgenders face several sexual health issues.
5. Central and state governments should seriously address the problems being faced by Hijras/transgender people, such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma etc. and any insistence for SRS for declaring one’s gender is immoral and illegal.
6. Central and state governments should take proper measures to provide medical care for transgender people in hospitals and also provide them with separate public toilets and other facilities.
7. Central and state governments should also take steps for framing various social welfare schemes for their betterment.
8. Central and state governments should take steps to create public awareness so that transgender people will feel that they are also part and parcel of the social life and not be treated as untouchables.
9. Central and state governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.

### RESOURCES CITED

Articles 6, 7, 17 and 26 of the ICCPR  
Yogyakarta Principles, in particular principles 1 – 19, which are set out over several pages in the Court’s decision.

### DESCRIPTION OF HOW THE RESOURCES WERE USED

In making its judgment, the court used the principles of the Resources to interpret gender equality in the absence of: (a) Indian law dealing with the rights of the transgender community; and (b) Indian law in conflict with the Resources. The court stated that:

1. Indian law, on the whole, only recognises the paradigm of binary genders of male and female, based on a person’s sex assigned by birth, which permits a gender system, including the law relating to marriage adoption, inheritance, succession and taxation and welfare legislation;
2. International Conventions and norms are significant for the purpose of the interpretation of gender equality.
3. In the absence of specific legislation in India protecting the rights of members of the transgender community the court could not be a mute spectator when their rights were violated, especially as those rights had gained universal recognition and acceptance in international Conventions, including the ICCPR, and legal principles, including the Yogyakarta Principles.
4. If Indian law is not in conflict with the International Covenants, particularly pertaining to human rights, to which India is a party, the domestic court can apply those principles in Indian conditions.
5. The International Conventions, including the Yogyakarta Principles, which the court found not inconsistent with the various fundamental rights guaranteed under the Indian Constitution, must be recognised and followed, having sufficient legal and historical justification in India.
6. With respect to the **ICCPR**, the court stated:



- a. Article 6 of the ICCPR affirms that every human being has the inherent right to life, which right shall be protected by law and no one shall arbitrary deprived of his life.
  - b. Article 7 of the ICCPR provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
  - c. Article 16 of the ICCPR recognises that every human being has the inherent right to live and this right shall be protected by law and that no one shall be arbitrarily denied of that right.
  - d. Article 17 of the ICCPR states that no one shall be subjected to “arbitrary or unlawful interference with his privacy, family, home or correspondence.”
- 7. With respect to the **Yogyakarta Principles**, the court stated:
    - a. UN bodies, regional human rights bodies, national courts, government commissions and the commissions for human rights, the Council of Europe etc. have endorsed the Yogyakarta Principles and have considered them as an important tool for identifying the obligations of states to respect, protect and fulfil the human rights of all persons, regardless of their gender identity.

## CASE SUMMARY 2: NAVTEJ SINGH JOHAR V. THE UNION OF INDIA (SUPREME COURT OF INDIA)

<b>Case Name</b>	<i>Navtej Singh Johar v. The Union of India</i>
<b>Citation</b>	[2018] INSC 746
<b>Link to Case</b>	English: <a href="http://www.liiofindia.org/in/cases/cen/INSC/2018/746.html">http://www.liiofindia.org/in/cases/cen/INSC/2018/746.html</a>
<b>Jurisdiction</b>	India
<b>Court in which the Case was Heard</b>	Supreme Court of India
<b>Date of decision</b>	6 September 2018

### SUMMARY OF KEY FACTS

#### There were two issues brought to the court:

1. Whether Section 377 of the Indian Penal Code 1860 (“**Section 377**”)<sup>23</sup> violated the fundamental rights guaranteed under the Constitution of India (“**Constitution**”); and
2. Whether the Supreme Court’s decision in *Suresh Kousal*<sup>24</sup> was correct.

### SUMMARY OF JUDGMENT

#### First Issue

The Supreme Court considered Section 377 (to the extent applicable to consenting adults) and held that by failing to recognise voluntary consensual relationships between LGBTIQ persons in their totality:

1. Section 377 violates article 14 of the Constitution (which enshrines the principle of equality before the law);

<sup>23</sup> Section 377 prohibited “carnal intercourse against the order of nature” and was punishable by life imprisonment or imprisonment of up to 10 years. The section applies irrespective of gender, age or consent. The quoted terms are not defined in the legislation but have been taken by courts to mean acts falling outside the penile-vaginal intercourse and which are not for the purpose of procreation.

<sup>24</sup> In *Suresh Kousal*, the Supreme Court held that: (i) Section 377 did not criminalise people but acts; and (ii) even if it did target LGBTIQ persons, they only constitute a “miniscule fraction” of the country’s population and therefore did not require specific protection.

2. Section 377 violates article 15 of the Constitution, which prohibits the State from discrimination against any citizen on the grounds of religion, race, caste, sex or place of birth. The court applies a wide interpretation of “sex” to include (i) “sexual identity and character” as per *NALSA* and (ii) “sexual orientation” as per *Toonen*.
3. Section 377 violates article 21 of the Constitution, which provides that no person shall be deprived of his life or personal liberty except according to a procedure established by law and which is fair, just and reasonable. The court interpreted “life and personal liberty” to include a right to live with dignity and, as a result, to encompass the right to sexual autonomy and freedom of expression. The court also held that a right to privacy (including spatial privacy, decisional privacy and privacy of choice) is intrinsic to the right to “life and personal liberty.” The court finally held that a right to life implies a right to health and access to healthcare. The court concluded that Section 377 inhibited LGBTIQ persons from seeking medical help with relation to HIV and safe spaces to engage in safe sex practices.
4. Section 377 violates article 19 of the Constitution, which guarantees freedom of expression of all citizens (subject to reasonable restrictions).

## Second Issue

The court disagreed with the decision in *Suresh Kousal*.

1. On the first decision, the court held that the prohibition was too wide and open-ended and had the effect of criminalising all consensual LGBTIQ relationships. As discussed, this is a violation of articles 14, 15, 21 and 19 of the Constitution.
2. On the second decision, the court held that the fact that the LGBTIQ community forms a small percentage of the population is not grounds to deny them their constitutional rights.

## CONCLUSIONS

### It was therefore declared that:

1. Insofar as it criminalises consensual sexual acts of adults in private, section 377 is unconstitutional;

2. The decision may not lead to re-opening of concluded prosecutions but can be relied upon in all pending matters;
3. The provisions of Section 377 will continue to govern non-consensual sexual acts against adults and all acts of carnal intercourse against minors and animals; and
4. The decision in *Suresh Kousal* is overruled.

## RESOURCES CITED

Articles 17 and 26 of the ICCPR  
*Toonen*  
UNHCR General Comment No. 16  
Yogyakarta Principles

## DESCRIPTION OF HOW THE RESOURCES WERE USED

The court, in making its judgment, stated that India has a constitutional duty (under article 51 of the Constitution) to honour internationally recognised rules and principles.

### It stated specifically that:

1. India is required to guarantee equality before the law (according to article 26, **ICCPR**);
2. India is required to protect the right to privacy which includes in its ambit the right to engage in consensual same-sex sexual relations (according to **Toonen**); and
3. India is required to adopt legislative and other measures to give effect to prohibitions against interference with the right to privacy (according to article 17, **ICCPR**) and that any such interference should be in accordance with provisions, aims and objectives of the ICCPR (according to **General Comment No. 16**).

The court held that section 377 was in breach of India’s international law obligations.

With regards to the **Yogyakarta Principles**, the court referred to their recognition by the Supreme Court in *NALSA* and the fact that they were applied as part of Indian law. The court in this case stated that while the principles are not legally binding, the decision

in *NALSA* signified an affirmation of the right to non-discrimination on the grounds of gender identity as well as the relevance of international human rights norms in addressing violations of these rights.

With regards to *Toonen*, the case is examined alongside a series of international case law on LGBTIQ persons and particularly the criminalisation of same-sex relationships. From the analysis, the following principles emerged:

1. Sexual orientation is an intrinsic element of liberty, dignity, privacy, individual autonomy and equality;
2. Intimacy between consenting adults of the same sex is beyond the legitimate interests of the state;
3. Sodomy laws violate equality by targeting a segment of the population for their sexual orientation;
4. Such laws have a chilling effect on the exercise of freedom;
5. The right to love and to find fulfilment in a same-sex relationship is essential to a society which believes in freedom under a constitutional order based on rights;
6. Sexual orientation implicates negative and positive obligations on the state (*i.e.*, both non-discrimination and active recognition of rights); and
7. The law must take positive steps to achieve equal protection.
8. While these principles are not legally binding, the court at paragraph 126 did consider the “*overwhelming weight of international opinion*” and “*growing consensus towards sexual orientation equality*.” It stated that the principles did not affect their interpretation of the Constitution, but rather confirmed their conclusions.

## NEWS/PRESS ARTICLES/SCHOLARSHIP IN RELATION TO THE CASE (IF APPLICABLE) WITH BRIEF SUMMARY

- **Living with Dignity – Sexual Orientation and Gender Identity-Based Human Rights Violations in Housing, Work, and Public Space in India** (International Commission of Jurists, June 2019). The report is extensive and frequently refers to the rationale followed by the

court in *Navtej Johar*. Of particular interest are the following two examples of how the precedent set by the case has been used (or could be used):

1. *Navtej Johar* established that LGBTIQ persons are a vulnerable and marginalised group which requires protection. This fact can be used as a basis for LGBTIQ person to (i) avoid discrimination with relation to housing, work etc. and (ii) gain access to priority housing or other benefits due to their status as a vulnerable population;
  2. *Navtej Johar* has been used by courts to enforce *habeas corpus* petitions in favour of LGBTIQ persons who have been unlawfully confined by their family.
- **Case Digest – *Johar v. India 2018*** (Human Dignity Trust, January 2019). The digest focuses on certain rationales followed by the court in its analysis, *inter alia*:
    1. The interpretation of the Constitution in a dynamic manner (as opposed to using it as a tool to entrench pre-existing values);
    2. The notion that the fundamental rights under the Constitution should not be determined by reference to “societal morality”; and
    3. The emphasis on homosexuality being a natural quality.
  - ***Navtej Johar: A Verdict For All Times*** (Michael Kirby and Ramesh Thakur, December 2018) A brief article highlighting the potential of *Navtej Johar* to pave the way for legal reform in former British colonies.
  - ***Identity as Data: A Critique on the Navtej Singh Johar Case and the Judicial Impetus Towards Databasing Identities***

**NB:** We do not have access to this article without subscription, however the abstract presents an interesting argument. The author explores the question of whether the fact that sexual orientation and gender identity were deemed to be innate to a person (and may be coded as such in legislation) is likely to inhibit LGBTIQ persons from proclaiming and performing these fluid identities.

# New Zealand

## CASE SUMMARY 1: REFUGEE AND PROTECTION OFFICER V. CV AND CW & ANOR (COURT OF APPEAL OF NEW ZEALAND)

<b>Case Name</b>	<i>Refugee and Protection Officer v. CV and CW &amp; Anor</i>
<b>Citation</b>	[2016] NZCA 520; CA196/2015
<b>Jurisdiction</b>	New Zealand
<b>Court in which the Case was Heard</b>	Court of Appeal (originally heard in Immigration and Protection Tribunal (the “Tribunal”), then leave to appeal or judicially review the Tribunal’s decisions was sought from the High Court)
<b>Date of Decision</b>	Heard on 25 May 2016 and decided on 28 October 2016

### SUMMARY OF KEY FACTS

Brothers CV and CW are citizens of Iran conscripted for military service but will refuse to serve if returned to Iran on the grounds that they belong to an ethnic minority (Azeri) which suffers prejudice and discrimination to Islamic culture.

1. They may not learn in their own language, are not allowed to publish in their language, not allowed to have traditional Azeri music at music centres, not allowed to use Azeri names, and not allowed to commemorate Azeri cultural traditions.
2. The brothers claimed refugee status in New Zealand under art. 18 of the ICCPR and art. 1A of the Refugee Convention.

### ISSUES PRESENTED

#### Three issues were brought before the Court:

1. Whether there was a breach of natural justice in granting leave to review and simultaneously determining the substantive application on reformulated grounds.
2. Whether reformulation was not open to the High Court because of the basis of claim and the Immigration and Protection Tribunal’s (the “**Tribunal**”) factual findings.
3. Whether the High Court judge misstated the test for refugee status in New Zealand by equating a breach of human rights with persecution and failing to consider the additional requirement of serious harm.

## SUMMARY OF JUDGMENT

### The Court held that:

1. The grounds reformulated by the High Court Judge were a more concise expression of the grounds set forth by CV and CW and the Appellant consented to the grant of leave in respect of a ground that squarely raised an issue of discrimination on the grounds of religious belief (although now this is the argument advanced on appeal). And even if the Appellant was prejudiced as claimed, the prejudice is cured by hearing this appeal and the Appellant has had the full opportunity to address the court;
2. The brothers' claims are not advanced solely on a political basis but a religious one as well, as evidenced by their prior statements. The Tribunal did not find as fact that the brothers would refuse to serve on their return. It was not conceded by counsel that military service would be a justified limit on the brothers' freedoms of religion and political freedom and therefore could not serve as the basis of a refugee claim. The narrative by counsel was used to link the brothers' objection to the Tribunal's usual approach to claims under the ICCPR and, in fact, counsel was noted that "*suppressing dissent and enforcement of Islamic moral codes and laws are not necessary for public safety or national security*";<sup>25</sup> and
3. The Court agrees that the High Court Judge extracted the wrong test from her review of authorities including *HJ (Iran)* (see details of *HJ (Iran)* below) and the High Court Judge wrongly equates discrimination in breach of human rights with persecution. However, in application of the principal the High Court Judge required the claimants establish the required level of risk for serious harm and the High Court Judge did not equate discrimination with persecution. The High Court Judge explained what constitutes serious harm and that there must be a real risk of being persecuted as well as the fact that there needs to be a nexus between the risk of serious harm and the Refugee Convention grounds.

## SUMMARY OF ANY ADDITIONAL COMMENTARY IN THE JUDGMENT OR ANY USEFUL DISSENTING OPINION

The Court of Appeal distinguishes *HJ (Iran)* from the propositions for which Appellant argues it stands for and which Appellant criticises it. The passage in *HJ (Iran)* is to be read in the context of the judgments overall and against the background of the issues before the court. The *HJ (Iran)* appeal was focused (as part of the test to determine a claim to refugee status) upon the Court of Appeal's approval of an inquiry as to whether discretion in matters of sexual activity and sexual identity was something the applicant could reasonably be expected to tolerate in order to avoid persecution.

The decision of the Supreme Court in *HJ (Iran)* is foremost a rejection of the notion that a claimant can be denied refugee status on the grounds that he or she should conceal their membership of a persecuted group to avoid persecution. The discussion of the right to live openly and freely as a gay man is to be read in this context. There is no detailed discussion of what the Court considers to be persecution but that omission, it seems to us, is because the appeal proceeded upon the basis that an openly gay man would, on return to their country of origin, be persecuted (*i.e.*, it was a settled issue that an openly gay man would be persecuted).

For the inquiry as to serious harm for an asylum applicant applying on ground of fear of persecution for being gay, *HJ (Iran)* said that (1) the tribunal must be satisfied that he is gay or would be treated as gay and then (2) if the tribunal is satisfied at the available evidence that openly gay people in the home country would be subject to persecution then, (3) the tribunal must consider would the individual would do if he were returned to his home country.

*HJ (Iran)* notes that people should be able to live their lives without fear of persecution, suggesting that at no point did the judge in *HJ (Iran)* think that requirement of serious harm, that is persecution, can be foregone in the inquiry as to refugee status.

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<sup>25</sup> See paragraph 55 of the judgment.

The Court of Appeal then noted that *DS (Iran)* in New Zealand addressed a similar argument that *HJ (Iran)* stood as authority for a new and erroneous approach to the issue of persecutory harm – that if a society didn't protect the right to live openly as a member of protected class, such would amount to serious harm and it would be a breach of human rights. *DS (Iran)* rejected that argument, saying that the court was not re-ordering the analysis but was merely asserting the uncontroversial position that it is hardly in keeping with the purpose of the Refugee Convention that a refugee is required to hide the very characteristics contained in the 5 Refugee Convention grounds which, alongside the concept of "persecution", the drafters had expressly included in art. 1A(2) to delineate the specificity of the refugee predicament.

The Court of Appeal agrees that the High Court Judge extracted the wrong test from her review of authorities including *HJ (Iran)* and the High Court Judge wrongly equates discrimination in breach of human rights with persecution. However, in application of the principal the High Court Judge required the claimants establish the required level of risk for serious harm and the Judge did not equate discrimination with persecution.

The Tribunal sets forth the following questions that need to be answered in the affirmative to establish legitimacy under art. 18(3) are:

1. Is military service in Iran prescribed by law and is of general application?
2. Is the imposition of military service in Iran in pursuit of one of the aims legitimated by art. 18(3) (public safety or national security)?
3. Is the imposition of such military service necessary to achieve public safety or national security (the measure adopted must have an inherent relationship of proportionality to the legitimate aim)?

## RESOURCES CITED

Article 18, ICCPR; and  
Article 1A, the 1951 Refugee Convention, UNCHR (the "**Refugee Convention**")

## DESCRIPTION OF HOW THE RESOURCES WERE USED

In making its judgment, the Court first noted how the Refugee Convention shapes New Zealand's framework of the determination of a refugee.

### The Court stated the following:

1. New Zealand's immigration act sets forth that a person is a refugee if he or she is a refugee within the meaning of the Refugee Convention. The Court further discusses the meaning of "refugee" within the Refugee Convention.
2. The Court notes that it is dangerous to use concepts designed to explain the meaning of the Refugee Convention terms as substitutes for the definition of refugee in the Refugee Convention (as is done by the Tribunal routinely applying the "Hathaway concept" to determine what amounts to persecution).
3. The Court noted that the lower court judge derived a checklist for the New Zealand context governing refugee claims from *HJ (Iran)* and *RT (Zimbabwe) v. Secretary of State for the Home Department*. The Court pointed out that *HJ (Iran)* doesn't stand for the proposition that if society didn't protect the right to live openly as a protected class such is serious harm and would be a breach of the claimant's human rights – that simply the court was asserting an uncontroversial general proposition in dicta that it is hardly keeping with the purpose of the Refugee Convention for a claimant to hide the characteristics contained in the five Refugee Convention grounds which, alongside the concept of "persecution", the drafters had expressly included in article 1A(2) to delineate the specificity of the refugee predicament.
4. The Court agrees with *DS (Iran)* that the core/margin language concepts used to interpret the Refugee Convention should be abandoned as confusing. The Court notes that this exemplifies the danger in allowing Tribunal or Judge-made concepts to obscure the fundamental inquiry under article 1A.
5. The Tribunal has since noted in *DS (Iran)* a recent shift in thinking on the issue of compulsory military service in decisions of the UNHRC. For example, in



*Min-Kyu Jeong v. Republic of Korea* and *Atasoy v. Turkey*, the Committee has held that the right to conscientious objection is inherent in article 18(1), such that any failure to provide for a proportionate form of alternative service amounts to a breach of article 18(1). In *DS (Iran)*, the Tribunal declined to adopt that analysis and applied the “orthodox” analysis applied in this case.

6. Article 18(3) is referenced by the lower court judge as she stated that it is hard to see how any of the limitations allowed in article 18(3) could be applied in the particular circumstance. The lower court judge also noted that the Tribunal applied an incorrect view of coercion in terms of article 18(2) when it held that Islamic observances in the Iranian army would not force the applicants to change their beliefs.

## CASE SUMMARY 2: IOANE TEITIOTA V. THE CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT (SUPREME COURT OF NEW ZEALAND)

<b>Case Name</b>	<i>Ioane Teitiota v. the Chief Executive of the Ministry of Business, Innovation and Employment</i>
<b>Citation</b>	[2015] NZSC 107; SC 7/2015
<b>Jurisdiction</b>	New Zealand
<b>Court in which the Case was Heard</b>	Supreme Court
<b>Date of Decision</b>	Heard on 1 April 2015 and decided on 20 July 2015

### SUMMARY OF KEY FACTS

The Immigration and Protection Tribunal held that the Applicant could not bring himself within either the Refugee Convention or New Zealand’s protected person jurisdiction on the basis that his homeland, Kiribati, was suffering the effects of climate change.

#### Issues Presented

Whether the Court has jurisdiction to grant leave in terms of the Immigration Act and the Supreme Court Act 2003.

1. Whether as a matter of public international law an “environmental refugee” qualifies for protection under article 1A(2) of the Refugee Convention.
2. Whether, in the alternative, the manner in which article 1A(2) is incorporated into New Zealand law provides a basis for a broader interpretation of “refugee” in section 129(1) of the Immigration Act.

3. Whether the United Nations Convention on the Rights of the Child is relevant to the assessment of “harm” for the purposes of the Refugee Convention.
4. Whether the right to life under the ICCPR includes a right of a people not to be deprived of its means of subsistence.

### SUMMARY OF JUDGMENT

#### The Court held that:

1. The Court does have jurisdiction over the appeal of a decision of the Immigration and Protection Tribunal.
2. The factual context does not raise an arguable question of law of general or public importance.
3. In relation to the Refugee Convention, the Applicant does not, if returned, face serious harm and there is no evidence that the government in his home country

is failing to take steps to protect its citizens from the effects of environmental degradation to the extent it can. Nor does the Court consider that the ICCPR relied on the application of any of the facts of the case. The Court is also not persuaded that there is any risk of substantial miscarriage of justice.

### SUMMARY OF ANY ADDITIONAL COMMENTARY IN THE JUDGMENT OR ANY USEFUL DISSENTING OPINION

The Court also noted that the decisions of the Tribunal and the High Court did not mean that environmental degradation resulting from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction.

### RESOURCES CITED

Section 131 ICCPR; and Section 129 of the UNHCR the 1951 Refugee Convention (“**Refugee Convention**”)

### DESCRIPTION OF HOW THE RESOURCES WERE USED

- The Applicant raised the question of whether the right to life under the ICCPR includes a right of a people not to be deprived of its means of subsistence.
- The Court noted that the provisions of the ICCPR relied on do not have any application to the current facts.
- The Court also noted that with respect to the Refugee Convention that the Applicant does not face “serious harm” and there is no evidence that the government is not taking steps to protect its citizens from environmental degradation.

## CASE SUMMARY 3: AI (RUSSIA) (IMMIGRATION AND PROTECTION TRIBUNAL OF NEW ZEALAND)

<b>Case Name</b>	<i>AI (Russia)</i>
<b>Citation</b>	[2016] NZIPT 800944
<b>Link to Case</b>	English: <a href="http://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZIPT/2016/800944.html?query=Y-ogyakarta">http://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZIPT/2016/800944.html?query=Y-ogyakarta</a>
<b>Jurisdiction</b>	New Zealand
<b>Court in which the Case was Heard</b>	Immigration and Protection Tribunal
<b>Date of Decision</b>	Heard on 12 September 2016 and decided on 10 October 2016

### SUMMARY OF KEY FACTS

Appeal against a decision of a refugee and protection officer declining to grant refugee status to the appellant, a citizen of Russia.

The Appellant is a woman in her early 20s who fears serious harm at the hands of state and non-state actors

due to the fact she is a lesbian. The appellant was born in a small town to an Orthodox Christian family. The Appellant had her first girlfriend in high school and the two dated secretly, fearing the consequences if the Appellant’s family found out. In 2011, after finishing high school, the Appellant travelled to New Zealand on a student visa to study abroad – she completed her

bachelor's degree in New Zealand. She has been able to (and relishes such ability to) live freely as a lesbian and has formed relationships with women. She has felt accepted and comfortable and truly able to be who she is. The Appellant has also been open about her sexuality online and has posted photographs of herself with her partners. The Appellant became aware of an online LGBTIQ youth organisation in Russia called DEF organisation. She proactively reached out to the organisation and asked to become involved. She wanted to provide support to young people in Russia who struggled with their sexuality. She was eventually made an administrator for the group, information that was publicly disclosed on the website and accessible to anyone who visited it. In 2012, the Appellant's mother was informed by her employees that the Appellant may be a lesbian. In response, the mother sent the Appellant a strongly worded email asking her why she was disgracing her family. They ceased contact for several weeks. Following this episode, the Appellant discontinued her involvement with DEF group and deleted her account on the organization's website.

In June 2013 Federal Law No 135-FZ, the so-called "anti-gay propaganda" law, came into effect in Russia and the Appellant became fearful of its consequences. Although LGBTIQ individuals were not accepted by society prior to the passage of the law, it has been followed by a huge rise in anti-gay sentiment. LGBTIQ people are now victimised, abused and physically assaulted in the streets. Some are attacked, others are blackmailed and/or lose their jobs. There is also widespread public abuse including through state media. The appellant has been very scared by the levels of hatred and rage that are being expressed towards her and others in the LGBTIQ community.

At the end of 2013, the Appellant returned to Russia on holiday. During her visit, the Appellant told friends that she was a lesbian and they reacted very negatively, some even stopped speaking to her entirely. Neighbours also stopped speaking to her and most people in her town became aware that she is gay. Upon her return to New Zealand, the Appellant commenced a new relationship which ended badly, with the new partner being violent against her. As the Appellant suffered bad grades due to the emotional and physical tolls of domestic abuse, she disclosed the relationship and the domestic violence to her mother, who reacted very badly.

In August 2015, the mother came to New Zealand in an attempt to take the Appellant back to Russia, where she could prevent her from being gay. The Appellant was too scared to see her mother and only made contact after her mother went to the police to file a missing persons report. After the Appellant advised her mother that she wished to stay in New Zealand, the mother cut her off financially and told her that she should not tell anyone that she was gay. Since this time, they have had a very strained relationship and have not discussed any aspect of the Appellant's sexuality or what would happen if she returned to Russia.

The Appellant fears what will happen to her if she has to return to Russia. If she is forced to hide her sexuality, it will cause her a great sense of internal shame and stress. Because of cultural pressures she will feel forced to undertake steps to cover-up her sexuality. However, the Appellant also believes she will find it extremely difficult to be "in the closet" in Russia. As much as she believes she will need to, for her own safety, she foresees that she will most likely be open about her sexuality in an attempt to meet a partner. If she does, she fears being physically harmed, harassed and oppressed by members of her community, her family (including her alcoholic, violent father) and the wider public. Other than briefly working as an educator in her mother's school over the course of a summer, the Appellant has no skills or qualifications to perform any profession in Russia.

The Appellant is currently in a same-sex relationship with a New Zealand citizen. They are engaged and plan to have children one day. The Appellant fears that her children could be taken from her if she was to return to Russia.

The central issue to be resolved in the appeal is whether the appellant holds a well-founded fear of being persecuted.

## SUMMARY OF JUDGMENT

The Tribunal finds that the Appellant has a well-founded fear of being persecuted in Russia for a Convention reason and recognises her as a refugee within the meaning of article 1A(2) of the Refugee Convention and section 129 of the Act. The Tribunal also finds that the Appellant is not a protected person in New Zealand as her refugee status precludes her from being deported

and there are, therefore, no substantial grounds for believing that she would be in danger of being subjected to torture or being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.

1. On the issue of whether the Appellant has a well-founded fear of being persecuted, the Tribunal concluded that the country information confirms that there has been a marked increase in violence, intimidation, public humiliation and harassment of the LGBTIQ community in Russia in recent years and that state protection is not available. In addition to being at risk of physical and psychological abuse by members of the public, LGBTIQ individuals who are identified as LGBTIQ and work in an educator role face the risk of being blackmailed and forced out of their employment. The Tribunal found that, in light of the country information and the evidence presented by the Appellant, it is apparent that she would be at risk of physical violence, public humiliation and harassment if she were to return to Russia at the hands of the public and she would live in constant fear of being harmed, ridiculed and ostracised.

The Tribunal concluded that because state protection would not be available to the Appellant due to the state's discrimination against the LGBTIQ community, and the resulting violations of the Appellant's fundamental rights under articles 2, 17 and 26 of the ICCPR, the Appellant's risk of cruel, inhuman and degrading treatment reaches the level of a real chance of the Appellant being persecuted upon her return to Russia.

2. On the issue of whether there is a Convention reason for the Appellant's persecution, the Tribunal found that there is. Sexual orientation can be the basis of finding the existence of a particular social group, as it is a characteristic which is innate and unchangeable and fundamental to identity and human dignity, and an individual should not be forced to forsake or change such a characteristic. As such, the Tribunal concluded that the Appellant's predicament arises as a result of her being a member of a particular social group (*i.e.*, the LGBTIQ community) in Russia.

## RESOURCES CITED

### Yogyakarta Principles

1. Section 129 of the Refugee Convention
2. Section 130 of the Convention Against Torture
3. Article 7 of the ICCPR
4. Articles 17, 26 and 2 of the ICCPR
5. Section 131 of the ICCPR

## DESCRIPTION OF HOW THE RESOURCES WERE USED

### Yogyakarta Principles

The Applicant presented the Yogyakarta Principles regarding the assessment of claims based on sexual orientation as part of country information regarding the treatment of the LGBTIQ community in Russia.

1. *Section 129 of the Refugee Convention*: The Tribunal analysed whether the Appellant is a refugee and the harm she may face if she were to return to Russia. The Tribunal reviewed the definition of a refugee in article 1A(2) of the Refugee Convention and analysed if, whether objectively, on the facts found, there is a real chance of the Appellant being persecuted if she returned to her country of nationality and if so, whether there is a Convention reason for such persecution. The Tribunal noted that "being persecuted" requires serious harm arising from sustained or systemic violation of internationally recognised human rights, demonstrative of a failure of state protection. In determining whether the fear is "well-founded" the Tribunal looked to the existence of a real (as opposed to remote or speculative) chance of such persecution occurring. The Tribunal also reviewed and considered extensive relevant country information, ranging from the relevant applicable laws through local and international public opinion polls to local and international press coverage.

2. *Section 130 of the Convention Against Torture*: The Tribunal cites this provision to set out the test for determining whether the claimant is a protected person in New Zealand. The Tribunal concluded that as the Appellant is recognised as a refugee, and therefore cannot be deported from New Zealand, there are no substantial grounds for believing that she would be in danger of being subjected to torture if deported and therefore she does not require the protection of the Convention Against Torture.
3. *Article 7 of the ICCPR*: The Tribunal noted in its analysis that the combination of threats to the Appellant's physical health and mental safety as a result of the "anti-gay propaganda law" in Russia would amount to cruel, inhuman and degrading treatment in breach of article 7 of the ICCPR.
4. *Articles 17, 26 and 2 of the ICCPR*: The Tribunal considers the right to freedom from interference with private life (article 17 of the ICCPR) and the principle of equality or non-discrimination (article 26 of the ICCPR), both in light of the finding in *Toonen* that neither of the rights identified in articles 17 and 26 can be undermined on the basis of one's sexual orientation. The Tribunal notes that the Appellant is under no duty to forego her fundamental human right to freedom from arbitrary or unlawful interference with her privacy, family and home, in order to protect herself from the type of serious harm identified as applicable to her. To impose a form of self-censorship and denial in order to avoid other forms of serious harm would in itself give rise to serious harm for the Appellant.
5. *Section 131 of the ICCPR*: The Tribunal analysed whether the Appellant is a protected person *i.e.*, whether there are substantial grounds for believing that the Appellant would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand. The Tribunal again concluded that as the Appellant is recognised as a refugee, and therefore cannot be deported from New Zealand, there are no substantial grounds for believing that she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand, and she therefore does not require protection under the ICCPR.

# South Africa

## CASE SUMMARY 1: LESBIAN AND GAY EQUALITY PROJECT AND EIGHTEEN OTHERS V. MINISTER OF HOME AFFAIRS (CONSTITUTIONAL COURT)

<b>Case Name</b>	<i>Lesbian and Gay Equality Project and Eighteen Others v. Minister of Home Affairs</i>
<b>Citation</b>	[2005] ZACC 20
<b>Link to Case</b>	English: <a href="http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZACC/2005/20.html&amp;query=IC-CPR">http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZACC/2005/20.html&amp;query=IC-CPR</a>
<b>Jurisdiction</b>	South Africa
<b>Court in which the Case was Heard</b>	Constitutional Court

### SUMMARY OF KEY FACTS

#### This case combines two cases:

- 1. The Fourie Case:** The Fourie case involved a complaint from a lesbian couple that the common law definition of marriage in South Africa as a union of one man with one woman excluded them.
- 2. The Equality Project Case:** The Equality Project case involved a complaint that section 30(1) of the Marriage Act's required question by marriage officers to refer to husband and wife unconstitutionally excludes same-sex couples.

### SUMMARY OF JUDGMENT

#### The key questions presented were:

1. Does the failure of the common law and the Marriage Act to provide the means for a same-sex couple to marry constitute unfair discrimination?
2. If yes, what is the appropriate remedy?

#### The key judgments were:

1. Even if the Bill of Rights does not expressly include a right to marry, it does not mean the Constitution does nothing to protect the right.
2. South Africa has a multitude of family formations that are evolving rapidly as society develops, so it is inappropriate to entrench any particular form as the only socially and legally acceptable one.
3. There is an imperative and constitutional need to acknowledge the long history in South Africa of the marginalisation and persecution of gays and lesbians.
4. There is no comprehensive legal regulation of the family law rights of gays and lesbians.
5. Affirmed the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others.
6. Marriage has various legal implications and the exclusion of same-sex couples causes material deprivation.



7. Same-sex couples are not afforded equal protection because of the legacy of severe historic prejudice against them. The omission from the benefits of marriage is a direct consequence of prolonged discrimination, which is in direct conflict with section 9(3) of the Constitution.
8. Religious sentiments should not be used as a guide to the constitutional rights of others.

## CONCLUSION

The failure of the common law and the Marriage Act to provide a means for same-sex couples to enjoy the same status, entitlements and responsibilities accorded to different-sex couples through marriage, constitutes a violation of their equal protection of the law under section 9(1) and not to be discriminated against unfairly in terms of section 9(3). Such failure represents an unjustifiable violation of their right to dignity in terms of section 10 of the Constitution. The exclusion to which same-sex couples are subjected affects their dignity as members of society.

## SUMMARY OF ANY ADDITIONAL COMMENTARY IN THE JUDGMENT OR ANY USEFUL DISSENTING OPINION

The Judge writing for the unanimous decision made efforts to discuss the character of the South African society, of one based on equality and respect by all for all. He specified that the test of tolerance is not how one finds space for people with whom one feels comfortable, but how one accommodates the expression of what is discomfoting.

The Court noted that legislature had at least two ways to deal with the gap that exist in the law:

1. Use the words “or spouse” after the words “or husband” in the Marriage Act; or
2. Set out to prepare a new generic marriage act that would be enacted to give legal recognition to all marriages and rename the current Marriage Act.

The Court’s direction was ultimately towards parliament to provide legislative remedy that would be generous and accepting towards same-sex couples within 12 months from the date of the judgment, if parliament’s corrections remain defective, (1) will apply.

## RESOURCE CITED

ICCPR

## DESCRIPTION OF HOW THE RESOURCE WAS USED

The Court considers an international law argument made by the state, that international law recognises and protects only different-sex marriage, so the issue at hand of excluding same-sex couples from the institution of marriage is not unfair discrimination.

The Court also considers the argument that similar provisions, like one in New Zealand that denies marriage licences to same-sex couples, do not violate the ICCPR in a decision by the UNHRC in *Joslin v. New Zealand* (Communication No. 902/1999; CCPR/C/75/D/902/1999). The Court then considers the Committee’s decision in that particular case, noting that while the Committee held that the ICCPR did not have a provision forbidding discrimination on sexual orientation, it did not mean that ICCPR forbids the recognition of same-sex marriages or that ICCPR excludes same-sex couples from participating in marriage or establishing families. The Court further distinguished that the South African Constitution, unlike the ICCPR, explicitly proclaims the anti-discriminatory right of same-sex couples. Based on the above, the Court also concluded that it would be odd to interpret the South African Constitution with a reading of the ICCPR that takes away a guaranteed right, which cannot be the intent of international human rights laws.

## CASE SUMMARY 2: NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY AND ANOTHER V. THE MINISTER OF JUSTICE (CONSTITUTIONAL COURT)

<b>Case Name</b>	<i>National Coalition for Gay and Lesbian Equality and Another v. The Minister of Justice</i>
<b>Citation</b>	[1998] ZACC 15
<b>Link to Case</b>	English: <a href="http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZACC/1998/15.html&amp;query=IC-CPR">http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZACC/1998/15.html&amp;query=IC-CPR</a>
<b>Jurisdiction</b>	South Africa
<b>Court in which the Case was Heard</b>	Constitutional Court

### SUMMARY OF KEY FACTS

The applicants claimed that the common law offence of sodomy and the inclusion of it under the Sexual Offences Act is unconstitutional. The Constitutional Court confirmed that the listed offences aimed at prohibiting sexual intimacy between gay men violated the right to equality and are unconstitutional when the Constitution expressly includes sexual orientation as a prohibited ground of discrimination. In the Court’s justification of its ruling, it cited that the UNHRC found in *Toonen* that Tasmanian law prohibiting sexual activity between men to violate the privacy provision of the ICCPR.<sup>26</sup>

### SUMMARY OF JUDGMENT

The key question presented was: Is there a rational connection between the different treatment of sodomy between men and sodomy between men and women with a legitimate government interest?

#### The key judgments were:

1. The Constitutional Court declared that the common law offense of an “unnatural sexual act” was unconstitutional under section 8 of the interim Constitution (which deals with equal protection under the law and provides that no person may be unfairly discriminated against due to gender or sexual orientation, among other characteristics), to the extent it criminalised acts committed by a man or between

men, but did not criminalise such acts between women or between a man and a woman.

2. The High Court found that the common law offense of sodomy violated equal protection on two grounds:
  - a. the first was on sex/gender grounds because the statute only criminalised behaviour of men.
  - b. the second was on sexual orientation grounds because “*the target of the [statute] is plainly men with homosexual tendencies albeit that the wording is wide enough to embrace homosexuals.*”<sup>27</sup>
3. There was no justifiable governmental reason for the law, which was clearly to conform to then-prevailing cultural and religious norms.
4. The Court found that the discrimination was unfair on the following grounds:
  - a. The discrimination affects the dignity, personhood and identity of gay men at a deep level
  - b. There is no other purpose of the law other than to criminalise conduct that fails to conform with the moral or religious views of a section of society
  - c. The discrimination gravely affected the rights and interests of gay men and deeply impaired their fundamental dignity.

<sup>26</sup> See paragraph 46 of the judgment.

<sup>27</sup> See paragraph 13 of the judgment.

5. The discrimination is also unfair because it independently breaches rights of privacy and dignity.
6. The enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as a legitimate purpose, so there is no legitimate governmental purpose.

## SUMMARY OF ANY ADDITIONAL COMMENTARY IN THE JUDGMENT OR ANY USEFUL DISSENTING OPINION

Since the law was broad and covered both consensual and non-consensual acts, the High Court considered whether it had authority to declare the law unlawful only to the “extent of its inconsistency” or with regards to sodomy in general. The High Court held that the court had the power to declare the core matter of the unlawful law, offences related to sodomy, unconstitutional, and the criminal law system could still protect against “male rape” under existing assault laws.

In addition to the Resources, the Court referred to the Constitution of the Republic of South Africa 1996 (the “**1996 Constitution**”):

1. The Court noted that sexual orientation was grounds for discrimination in the 1996 Constitution.
2. The Constitution requires a connection between the differentiation involved in the law and a legitimate governmental purpose.
3. The equality jurisprudence developed by the Court in relation to section 8 of the interim Constitution is equally applicable to section 9 of the 1996 Constitution.
4. The concept of sexual orientation as used in the 1996 Constitution must be given generous interpretation.
5. The 1996 Constitution differs substantially from the U.S. Constitution in that U.S. jurisprudence on the issue is not applicable. It contains express protections of dignity and protection against discrimination based on sexual orientation.

## RESOURCES CITED

ECtHR cases

Cases from Supreme Court of Canada

ICCPR

## DESCRIPTION OF HOW THE RESOURCES WERE USED

### ECtHR/Supreme Court of Canada

1. The High Court used the resources from the ECtHR and from the Supreme Court of Canada to demonstrate the psychological harm for gay people that results from discriminatory provisions and uses such demonstration to further justify the case that the sodomy statutes were unfair.
2. ECtHR held that sodomy laws were a breach of article 8 privacy provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

### ICCPR

1. Laws prohibiting the sexual activity between men violates the privacy provision of the ICCPR.

# Trinidad and Tobago

## CASE SUMMARY 1: JONES, JASON V. THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO (AND OTHERS) (HIGH COURT OF JUSTICE)

<b>Case Name</b>	In re an application for constitutional redress under section 14 of the Constitution between <i>Jones, Jason v. The Attorney General of Trinidad and Tobago</i> [defendant]; <i>The Equal Opportunity Commission; The Trinidad and Tobago Council of Evangelical Churches ("TTCEC"); The Sanatan Dharma Maha Sabha of Trinidad and Tobago</i> [interested parties]
<b>Citation</b>	Claim No. CV2017-00720
<b>Link to Case</b>	English: <a href="http://webopac.ttlawcourts.org/LibraryJud/Judgments/HC/rampersad/2017/cv_17_00720DD12apr2018.pdf">http://webopac.ttlawcourts.org/LibraryJud/Judgments/HC/rampersad/2017/cv_17_00720DD12apr2018.pdf</a>
<b>Jurisdiction</b>	Trinidad and Tobago
<b>Court in which the Case was Heard</b>	High Court of Justice

### SUMMARY OF KEY FACTS

Jason Jones is an adult male who is openly homosexual. He is a citizen of Trinidad and Tobago but resides in London and habitually visits his home country. He petitioned the Court to strike down sections 13 and 16 of the Sexual Offences Act Chapter 11:28 (the "**Act**") claiming that it was unconstitutional for it to criminalise buggery (sexual intercourse per annum by a male person with a male person or by a male person with a female person) between consenting adults.

### SUMMARY OF JUDGMENT

The Court declared that sections 13 and 16 of the Sexual Offences Act Chapter 11:28 are unconstitutional, illegal, null, void, invalid and are of no effect to the extent that

these laws criminalise any acts constituting consensual sexual conduct between adults.

### SUMMARY OF ANY ADDITIONAL COMMENTARY IN THE JUDGMENT OR ANY USEFUL DISSENTING OPINION

Bereaux JA (for the majority) stated that following the approach of whether a particular law was a feature of democratic societies and how democratic societies would ordinarily apply such legislation, may result in practical difficulties in establishing what is an acceptable norm across the board. For example, a norm accepted in some but not all democratic societies may become the subject of ambiguity, and ascribing weight to any particular such inconsistency of approach can become decidedly problematic. For example, in the case at hand,

buggery laws have been found to be unacceptable in several democratic societies and found to be acceptable in others.

The minority (who agreed with the outcome) approached the test differently. They provided that what is ultimately at stake in the differences between their opinion and that of the majority, is whether the power of Parliament and the Executive will be enlarged at the expense of the protection of the fundamental rights and freedoms, or whether the protection of the rights will be preserved and the power of Parliament and the Executive limited. The minority's opinion is that the Constitution provides for the latter, which they uphold; whereas the opinion of the majority permits (by way of judicial intervention) the former, which they repudiate.

## RESOURCES CITED

### Toonen

- ECtHR jurisprudence:
  - *Dudgeon v. United Kingdom* [1981] ECHR 5; *Norris v. Ireland* [1988] ECHR 22; and *Modinos v. Cyprus* [1993] ECHR 19.
- *National Coalition*
- *Naz Foundation*
- Article 17 of the ICCPR
- *Sunil Babu Pant and Others v. Nepal Government and Others*, order of 21 December 2007, Supreme Court of Nepal
- *McCoskar and Nadan v. State* [2005] FJHC 500; HAA0085 & 86.2005

## DESCRIPTION OF HOW THE RESOURCES WERE USED

Generally, the resources were cited by the petitioner and acknowledged by the Court for the proposition that many other democratic societies have repealed or invalidated laws that criminalise homosexuality or the consensual sexual relations between people of the same sex. More particularly, petitioner noted to the court

that Trinidad and Tobago are a signatory to the ICCPR and that article 17 of the ICCPR protects privacy rights and was interpreted as preventing the criminalisation of consensual intimacy between same-sex adults by the UNHRC in *Toonen*. The petitioner also cited *National Coalition* to rebut the argument that the religious views of some should not be relevant or imposed on the whole of society.

In reviewing the history of the Act, the Court cited the history of the legislation as summarised in *Naz Foundation* and respectfully held that such summary does not give a complete picture of the attitude and thinking behind the formulation of the provisions as it does not give the full picture of its genesis. The Court then proceeded to cite an article written by The Honourable Michael Kirby AC CMG for a detailed analysis of such genesis.

- In making its judgment, the Court cited the Resources listed above and noted that other democratic nations have also embarked on decriminalising homosexual acts between adults which are conducted at the very least in private. It further stated that it is patently obvious that democratic societies are moving away from the criminalisation of homosexuality. Lastly, the Court held at paragraph 92 that “*human dignity is a basic and inalienable right recognized worldwide in all democratic societies.*”
- Additionally, at paragraph 166, the Court cited *Toonen* to foreclose on TTCEC’s argument that legalising homosexuality would result in the proliferation of HIV-AIDS. The court held that this issue was dealt with and debunked in paragraph 8.5 of *Toonen* where it stated:
- “*As far as the public health argument of the Tasmanian authorities is concerned, the Committee notes that the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV. The Australian Government observes that statutes criminalizing homosexual activity tend to impede public health programmes ‘by driving underground many of the people at the risk of infection’. Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education*

*programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus."*

## NEWS/PRESS ARTICLES/SCHOLARSHIP IN RELATION TO THE CASE (IF APPLICABLE) WITH BRIEF SUMMARY

- **Human Rights Watch: *Trinidad and Tobago: Court Overturns Same-Sex Intimacy Ban.*** Reporting on the Decriminalization of Consensual relations between people of the same-sex
- ***The Guardian: Trinidad and Tobago judge rules homophobic laws unconstitutional.*** Reporting that homophobic laws are unconstitutional
- ***Religion News Service: Trinidad and Tobago's religious leaders call on government to uphold anti-LGBT laws.*** Reporting on religious leaders' responses and requests of the government to uphold traditional marriage in response to the Court's ruling.

## IF APPLICABLE, A NOTE AS TO WHETHER SUCH CASE WAS OR IS PLANNED TO BE APPEALED TO ANY SUPRANATIONAL COURT

The Attorney General Faris Al-Rawi planned to appeal the ruling and said that it was a case that must be settled before the Privy Council. Before it can go to the Privy Council it will need to be decided in the Trinidad Court of Appeal, but the Attorney General has stated that, regardless of the outcome, it will be appealed to the Privy Council. We have not been able to find the court judgment for the Trinidad Court of Appeal and note that in a recent debate in the Trinidadian Senate, proposed amendments to a bill to include same-sex relationships was voted against by the Government in favour of awaiting the outcome of the appeals.<sup>28</sup>

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<sup>28</sup> "Passing the buck on rights", 24 June 2020 (updated 25 June 2020), Trinidad Express [https://trinidadexpress.com/opinion/editorials/passing-the-buck-on-rights/article\\_1527eda4-b684-11ea-a3a8-6f937f2af42a.html](https://trinidadexpress.com/opinion/editorials/passing-the-buck-on-rights/article_1527eda4-b684-11ea-a3a8-6f937f2af42a.html) (accessed 08 September 2020).



# United Kingdom

## CASE SUMMARY 1: *GHAIDAN V. MENDOZA* (COURT OF APPEAL)

**Note:** The decision summarised below is not from the UK's highest appellate court and the appeal was rejected by the House of Lords. It has, however, been included on the basis that the arguments made may be useful, particularly given the time that has passed since it was first brought.

<b>Case Name</b>	<i>Ghaidan v. Mendoza</i>
<b>Citation</b>	[2002] 4 All ER 1162
<b>Link to Case</b>	English: <a href="https://www.bailii.org/ew/cases/EWCA/Civ/2002/1533.html">https://www.bailii.org/ew/cases/EWCA/Civ/2002/1533.html</a>
<b>Jurisdiction</b>	UK
<b>Court in which the Case was Heard</b>	Court of Appeal, Civil Division
<b>Date of Decision</b>	16, 17 October, 5 November 2002

## SUMMARY OF KEY FACTS

1. From 1983, the defendant, Mendoza, and his same-sex partner, HWJ, shared a flat for which HWJ held a statutory tenancy under the Rent Act 1977 (the “**Rent Act**”). Mendoza and HWJ lived together in the way that spouses lived together.
2. On HWJ’s death in 2001, the landlord, Ghaidan, brought proceedings against Mendoza in County Court, seeking possession of the flat.
3. Mendoza argued that he had succeeded to the statutory tenancy as spouse of the deceased HWJ, under the provisions of schedule 1, para 2 of the Rent Act, relying on para 2(2), which provided that a person who was living with the tenant “as his or her wife or husband” was to be treated as the spouse of the original tenant.<sup>29</sup>
4. The County Court judge found that a same-sex relationship was not equivalent to a spousal relationship, relying on a decision of the House of Lords, *Fitzpatrick v. Sterling Housing Assoc. Ltd* [1999], which
  - a. held that while a person living with a tenant in a stable, monogamous same-sex relationship was to be considered a member of the tenant’s family under para 2(3) of schedule 1 to the Rent Act and entitled to an assured tenancy, para 2(2) of the

<sup>29</sup> 2. (1) The surviving spouse (if any) of the original tenant, if residing in the dwelling-house immediately before the death of the original tenant, shall after the death be the statutory tenant if and so long as he or she occupies the dwelling-house as his or her residence. (2) For the purposes of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant. 3.(1) Where paragraph 2 above does not apply, but a person who was a member of the original tenant’s family was residing with him in the dwelling-house at the time of and for the period of 2 years immediately before his death then, after his death, that person shall be entitled to an assured tenancy of the dwelling-house by succession.’

Rent Act could not include persons in a same-sex relationship, and

- b. pre-dated the implementation of the Human Rights Act 1998 (“HRA”).
5. The County Court Judge awarded Mendoza an assured tenancy.
6. Mendoza appealed the County Court decision.

## ISSUES PRESENTED

On Mendoza’s appeal, the Court of Appeal stated at paragraph 1 that “[w]e are required in this appeal to revisit, in the light of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 and the [HRA], the decision of the House of Lords in *Fitzpatrick v. Sterling Housing Association Ltd* [1999] 4 All ER 705, [2001] 1 AC 27.”

The Court of Appeal considered:

1. Whether para 2(2) of the Rent Act, as previously interpreted, was incompatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, (as set out in schedule 1 to the HRA) (the “**Convention**”) and, if so,
2. Whether para 2(2) of schedule 1 of the Rent Act could be construed in a manner that rendered it compatible with the Convention.

In order to consider these issues, the Court had to determine:

1. Whether para 2 fell within the ambit of the right to respect for a person’s home under Article 8 of the Convention,<sup>30</sup> and
2. Whether the exclusion of same-sex partners from the succession to statutory tenancies constituted discrimination in the enjoyment of a convention right on any ground such as *inter alia*, sex, race, colour, relation or other status within the meaning of article 14 of the Convention.<sup>31</sup>

## SUMMARY OF JUDGMENT

### The Court of Appeal held that:

1. In order to render paragraph 2(2) of schedule 1 to the Rent Act compatible with the Convention, it had to be construed as including persons in a same-sex relationship, and accordingly at paragraph 35, the words “*as his or her wife or husband*” were to be read to mean “*as if they were his or her wife or husband*”
2. The positive obligation on the part of the state to promote the values protected by Article 8 of the Convention brought legislation affecting the home within its ambit.
3. Once the state intervened in a factual area characteristic of these protected by Article 8 of the Convention, article 14, was engaged if there was relevant discrimination in the mode of that intervention.
4. Sexual orientation was now clearly recognised as an impermissible ground of discrimination and paragraph 2, as previously construed, inferring article 14.
5. Mendoza was entitled to be treated as HWJ’s spouse and to succeed to a tenancy of the flat as a statutory tenant under paragraph 2 of schedule 1 of the Rent Act.

## RESOURCE CITED

Minor reference to the ICCPR

## DESCRIPTION OF HOW THE RESOURCE WAS USED

The court acknowledged at paragraph 29 that the ICCPR “is recognised as a source of the fundamental principles of [European] Community law”, but further acknowledged the recognition by the Court of Justice of the European Community in its decision in *Grant v. South-West Trains Ltd*. [1998] ICR 449 that the reach of European Community

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<sup>30</sup> Article 8, in relevant part, provides: “1. Everyone has the right to respect for . . . his home.”

<sup>31</sup> Article 14 reads: “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.” 88

law, and therefore of decisions of the Court of Justice, is limited by the subject matter addressed by European Community treaties. In response to an argument that it should refer to the ICCPR in deciding *Grant v. South-West Trains Ltd.*, the Court of Justice determined that the relevant EU treaty only referred to the concept of “sex”, and, therefore, the ICCPR could not be used in order to widen the scope of “sex” to cover “sexual orientation.”

## IF APPLICABLE, A NOTE AS TO WHETHER SUCH CASE WAS OR IS PLANNED TO BE APPEALED TO ANY SUPRANATIONAL COURT

N/A. However, we note that Ghaidan appealed the Court of Appeals’ decision to the House of Lords, which rejected his appeal.

# Conclusion

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Litigation is a crucial advocacy tool for realizing the human rights of LGBTIQ people. Where implementation of existing legal frameworks falters, where LGBTIQ people fail to receive access to their human rights, strategic litigation provides an avenue for testing and achieving these rights through the courts. As the use of strategic litigation grows in prominence and importance in the fight for LGBTIQ equality, we set out to identify the most useful international resources, case law and policies which have been used in landmark cases around the world.

Through this report, we surveyed a wide range of countries with differing legal systems from across the. While each country and legal system is different, there are some patterns that have emerged from our research so far that we think may be useful for activists and advocates who are seeking to bring similar cases in their jurisdictions.

## We would note:

- The courts of some jurisdictions are willing to read discrimination on the grounds of “sex” to encompass sexual orientation and gender identity even if the relevant legislation does not expressly mention it. See for example, *Toonen and Attorney General of Belize v. Caleb Orozco*.<sup>32</sup>
- The courts of some jurisdictions are, in seeking to understand the meaning of certain words as they pertain to LGBTIQ issues or how they should be interpreted, open to adopting the definitions under the non-binding Yogyakarta Principles. See for example, the *Chilean Supreme Court Case No. 70.584-2016*. It was also used in the dissenting opinion in *Chilean Case No. 1683-2010*.

- Certain jurisdictions have looked to international conventions and a number of the Resources identified in this report to fill gaps in their own legislation or constitutional tradition. For example, in *NALSA*,<sup>33</sup> the court stated at paragraph 49 that it could not be a “mute spectator” as the rights of people who were not specifically protected were being violated and reference was made to the ICCPR and Yogyakarta Principles, in particular, to reach this view.
- Finally, in the context of same-sex marriage, some jurisdictions note that even though the ICCPR may not expressly permit same-sex marriage, it also does not forbid it. It was noted in the South African case, *Lesbian and Gay Equality Project and Eighteen Others v. Minister of Home Affairs*,<sup>34</sup> that it would be odd to read the ICCPR in a way that takes away what would otherwise be a guaranteed right under the South African Constitution, as this cannot have been the intention of international human rights laws. Therefore, the fact the ICCPR limits its concept of marriage to different-sex marriage does not mean State parties cannot broaden this definition.

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<sup>32</sup> Claim No. 668 of 2010, Supreme Court of Belize

<sup>33</sup> [2014] 4 LRC 629

<sup>34</sup> [2005] ZACC 20



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