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| Team #209 |
| **2013 INTER-AMERICAN HUMAN RIGHTS MOOT COURT COMPETITION American University Washington College of Law | May 2013** |
| **In the INTER-AMERICAN COURT OF HUMAN RIGHTS** |
|  |
| **Case of Serafina Conejo Gallo and Adriana Timor** |
| *Petitioners*v.**The State of Elizabetia***Respondent* |

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| **MEMORIAL FOR THE STATE** |

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# STATEMENT OF FACTS

Elizabetia ratified all Inter-American Human Rights instruments, including the American Convention on Human Rights (ACHR), and accepted all optional clauses without reservation on January 1, 1990.[[1]](#footnote-1) Elizabetia has been a democratic State since the adoption of its Constitution in 1960.[[2]](#footnote-2) Executive power has alternated every five years between the Conservative Pink Party, and the more liberal Blue Party.[[3]](#footnote-3)

Before European colonization, Elizabetia was the ancestral home of the Granti indigenous people.[[4]](#footnote-4) The Grantis occupied all of Elizabetia, but lived mainly in the southeastern region.[[5]](#footnote-5) Granti’Itna, a supreme deity worshipped by the Grantis, who was born as a man and died as a woman, was ideal because of this transformation.[[6]](#footnote-6)

 Fernando Caceres studied the Granti people from 1505 to 1509.[[7]](#footnote-7) His journals chronicle ceremonial worship of sexual transformation, without specific reference to marriage or unions between people of the same sex.[[8]](#footnote-8) Colonial elites considered Granti customs barbaric and immoral.[[9]](#footnote-9) Over time, Granti culture and language disappeared, though many aspects have been assimilated into the Elizabetian culture.[[10]](#footnote-10) Inhabitants of the southeast provinces maintain agrarian practices passed down by their Granti descendants,[[11]](#footnote-11) and often live under the dominance of descendants of aristocrats.[[12]](#footnote-12)

 Elizabetia adopted its Constitution after the victorious faction of the final civil war created the Constituent Assembly.[[13]](#footnote-13) This Constitution establishes many important legal definitions and rights, including a definition for a marriage and domestic partnership, right to family, the right to equality and nondiscrimination, and an unconstitutionality action for the possible removal of a defective provision in the legal system.[[14]](#footnote-14) In 2010, the legislature made respective changes, considering the phrase “between a man and a woman,” in regards to domestic partnerships upon a finding that existing laws in this area were unconstitutional.[[15]](#footnote-15) If two individuals can prove, with suitable evidence, uninterrupted cohabitation for at least five years, it would constitute a domestic partnership.[[16]](#footnote-16) A domestic partnership has all of the effects of a married couple, with the exception that they are not authorized to jointly adopt.[[17]](#footnote-17)

Serafin Conejo Gallo was born male in the Southeast of Elizabetia, where her family worked as farm workers for the de la Goblana de Atelo family, descendants of the aristocracy.[[18]](#footnote-18) Serafin exhibited feminine behavior from a young age. At eleven years old, Serafin’s teacher and Mrs. De la Goblana felt that due to their “Indian” roots, her parents tolerated Serafin’s perverse behavior.[[19]](#footnote-19) Child Protective Services accused Serafin’s parents for refusing to let go of the barbaric Granti values, and removed Serafin from their custody.[[20]](#footnote-20) Serafin was placed at an abandoned Youth Center where fellow detainees and custodians repeatedly raped her.[[21]](#footnote-21)

 When Serafin was sixteen, became a prostitute under the name Serafina, and underwent several operations to relinquish her male identity.[[22]](#footnote-22) In 1990, Serafina started the Mariposa movement, an informal organization to engage in activism, education, and training in light of the HIV-AIDS pandemic.[[23]](#footnote-23) From 1993 to 1999, Serafina sought to gain acknowledgement of her name and identity as a woman, but was unable to gain this recognition through the Offices of Vital Records and the Constitutional Chamber of the Supreme Court.[[24]](#footnote-24)

 In 2000, Serafina filed an individual petition before the Commission for Elizabetia’s refusal to recognize her gender identity as a female.[[25]](#footnote-25) The Commission issued a report on 10 March, 2005, finding Elizabetia in violation of Articles under the ACHR.[[26]](#footnote-26)

 Following elections in December 2005, President Marcela Aldana de Zambrano of the Blue Party declared full compliance with the recommendations from the Commission Report.[[27]](#footnote-27) In apologizing to Serafina, President Zambrano implemented the Gender Identity Act advocated by Mariposa for the social inclusion of trans-gender women in Elizabetia, with Serafina being the first trans-gender woman in Elizabetia to obtain recognition of her identity.[[28]](#footnote-28)

In January 2010, newly elected Pink Party candidate, Antonio de la Goblana del Atelo, stated in his inaugural address that there would be no discrimination against any man or woman, but that the sacred institution of marriage would not be sacrificed.[[29]](#footnote-29) A public opinion poll, administered by the private company *Consultex*, showed that 59% of Elizabetians approved of domestic partnerships between same sex couples, but that 76% disapproved of its being equal to marriage.[[30]](#footnote-30) Civil society and academia have both broadly accepted this poll as an accurate reflection of the social perceptions in Elizabetia.[[31]](#footnote-31)

 In 2010, Serafina began a romantic relationship with Adriana Timor, and after living together for a year, the two women decided to get married.[[32]](#footnote-32) On 15 March, 2011, Serafina and Adriana requested marriage authorization from the National Secretariat of the Family, indicating that Article 9 prohibited all discrimination based on sexual orientation, and superseded Article 396 which establishes marriage between a man and a woman.[[33]](#footnote-33) On 29 May, 2011, the National Secretariat denied the application on the legal basis of Article 396; Serafina and Adriana’s later motion for reconsideration was also denied.[[34]](#footnote-34)

 Serafina and Adriana timely filed a motion to vacate before Court No.7 for review of the legality of the administrative decision, and expressed that the institution of marriage should enable them to be considered a family in the constitutional sense.[[35]](#footnote-35) Court No. 7 denied this motion on August 5, 2011 because the challenged administrative decision was not unlawful in light of Article 396.[[36]](#footnote-36) The court held that excluding a same sex couple from marriage was a reasonable restriction necessary to preserve the concept of family.[[37]](#footnote-37) This decision was final and not subject to appeal.[[38]](#footnote-38)

 On 18 November, 2011, Serafina and Adriana challenged Court No. 7’s decision and filed a petition for constitutional remedy, where the judicial authority must render a decision immediately, or within three months for complex cases.[[39]](#footnote-39) On 18 February, 2012, Family Court No.3 dismissed Serafina’s case without ruling on the merits, because she did not provide sufficient facts to demonstrate manifest arbitrariness.[[40]](#footnote-40) Serafina appealed this decision to the Three-judge Plenary Tribunal, who affirmed Family Court No. 3’s decision on 16 May, 2012.[[41]](#footnote-41)

 Mariposa filed a petition before the Commission on 1 February, 2012.[[42]](#footnote-42) The Commission began processing the petition on 10 May, 2012, providing notice to Elizabetia and initiating the admissibility stage.[[43]](#footnote-43) During this stage, Elizabetia objected because the petition did not describe any ACHR violations and because it was inadmissible for failure to exhaust domestic remedies.[[44]](#footnote-44) Nevertheless, the Commission issued its Report on 22 September, 2012, and declared that domestic remedies had been exhausted when admissibility was determined and it was irrelevant to examine the status of exhaustion at the time the petition was submitted.[[45]](#footnote-45) The Commission also indicated it was unnecessary to require exhaustion of the unconstitutionality action because the facts alleged in the petition could amount to possible violations of Articles 11, 17, 24, 8 and 25, in conjunction with Article 1.1.[[46]](#footnote-46)

 On 3 January, 2013, the Commission issued a Merits Report and found Elizabetia violated Articles 11, 17, 8.1, 24, and 25 in conjunction with Article 1.1.[[47]](#footnote-47) It also found an Article 2 violation under the principle of *iura novit curia*.[[48]](#footnote-48) On 1 February, 2013, Elizabetia submitted the case to the Inter-American Court of Human Rights (IACtHR) to review the legality of the Commission’s proceedings.[[49]](#footnote-49) The IACtHR allowed all procedural issues raised to be treated as preliminary objections, and set a hearing on preliminary objections, merits, reparations, and costs, for May of 2013.[[50]](#footnote-50)

Three days before the hearing, Mariposa filed a request for provisional measures in order to give Serafina the opportunity to provide consent in an urgent health situation.[[51]](#footnote-51) Adriana suffered a congenital cerebral aneurysm, and two options are available for dealing with the effects of the hemorrhage: (1) doctors could perform a high-risk intracranial surgery with consent of a spouse or relative; (2) or doctors could continue monitoring the situation.[[52]](#footnote-52) The latter is less risky, but entails near certainty that Adriana would experience anterograde amnesia.[[53]](#footnote-53) Without informed consent, Adriana’s doctor will take the second course of least risk; however, Serafina knows Adriana would prefer to risk death rather than live with anterograde amnesia.[[54]](#footnote-54)

 A relative of Adriana’s, no matter how distant, must consent to the surgery or the decision will be submitted to the Regional Medical Committee in five days.[[55]](#footnote-55) However, Adriana’s parents died in a natural disaster and she lost all contacts with her relatives 15 years ago, so Mariposa asks that the IACtHR require Elizabetia to allow Serafina to provide informed consent for Adriana.[[56]](#footnote-56)

# LEGAL ANALYSIS

## PRELIMINARY OBJECTIONS

Elizabetia has ratified all regional and universal human rights instruments, including the ACHR. Elizabetia accepted this Court’s jurisdiction on January 1, 1990. Nonetheless, the Commission has prematurely and improperly invoked the Court’s authority.

### Petitioners Did Not Exhaust All Domestic Remedies

The Commission improperly lodged this petition because Petitioners had not exhausted all available domestic remedies at the time when Mariposa filed the petition. Petitioners do not have to exhaust domestic remedies if: (1) domestic law does not afford due process, (2) the State has denied access to domestic remedies, or (3) there has been a delay in rendering a final judgment.[[57]](#footnote-57) Domestic remedies must be adequate and effective in character, in order for exhaustion to be required.[[58]](#footnote-58) The rule is designed for the “benefit of the State,” protecting a State from unwarranted international proceedings, and allows it to resolve the problem under its internal law.[[59]](#footnote-59)

 The Commission has stated that exhausting domestic remedies enables national authorities to resolve an alleged violation prior to any submission before an international mechanism.[[60]](#footnote-60) Under the OAS Guide for Submitting a Petition, parties who want to file a petition must first attempt to have domestic courts decide on the situation, or raise an exception.[[61]](#footnote-61) Indigency, or a lack of available domestic representation, exempts a person from exhaustion.[[62]](#footnote-62)

 The Commission failed to regard the procedural status of Petitioners’ case at the time of filing. Additionally, Petitioners did not exhaust all domestic remedies prior to filing. No exception applies to Petitioners’ situation because they were not indigent or precluded from seeking domestic representation. On the contrary, Petitioners had a growing sphere of influence and was familiar with the legal system.[[63]](#footnote-63) Family Court No. 3 did not rule on the petition for constitutional remedy until 18 February, 2012, but Mariposa, Petitioners’ activistorganization, filed the petition before the Commission on 1 February, 2012.[[64]](#footnote-64) The Tribunal did not rule on Petitioners’ appeal until 16 May, 2012, yet the Commission began its admissibility stage on 10 May, 2012, prior to the final ruling.[[65]](#footnote-65) In effect, the Petitioners filed with the Commission while domestic remedies were still pending.

 The Commission ignored the fact that Petitioners could have pursued an unconstitutionality action. After the final judgment by the Plenary Tribunal, Petitioners could have filed a public right of action under Article 110 of Elizabetia’s civil code.[[66]](#footnote-66) This remedy is *sui generis*, unlike any previous judicial recourse, and the Constitutional Chamber of the Supreme Court of Justice could potentially have removed Article 396 if it found the provision defective.[[67]](#footnote-67) The unconstitutionality action is not inadequate or ineffective in this case because the remedy was effective in 2009 when the Constitutional Chamber ruled that limiting domestic partnerships between a man and a woman was unconstitutional.[[68]](#footnote-68) The 2009 judgment shows how Elizabetia has resolved similar questions under its own internal law in the past, without the intrusion of international proceedings.

### The Commission Cannot Invoke The Court’s Jurisdiction Because It Violated the Fourth Instance Formula

The IACtHR has no jurisdiction to act as a fourth instance appellate forum. The rule of prior exhaustion of domestic remedies requires that this Court not act as the state’s domestic court of appeals.[[69]](#footnote-69) Therefore, the IACtHR cannot issue a ruling on the scope of domestic law, or a dispute between different sectors of local doctrine.[[70]](#footnote-70) The Commission has no right to examine alleged errors committed by the domestic courts acting within their jurisdiction, unless the mistakes entail a possible violation rights set forth in the ACHR.[[71]](#footnote-71) Same-sex marriage is not a clearly recognized custom or principle of international law and the ACHR includes no rights or provisions that specifically obligate signatories to allow same sex couples to marry.[[72]](#footnote-72)

 In the *Case of* *Clifton Wright*, the Commission reasoned that the Jamaican domestic system had no process of appeal, leaving Mr. Wright without recourse once the state entered a death sentence against him.[[73]](#footnote-73) Since the domestic legal process did not allow for a correction of judicial error, the *Clifton* case posed a prima facie violation of fundamental rights and the Commission fulfilled its role to investigate a government action in violation of a right protected by the ACHR.[[74]](#footnote-74)

 In the case of Petitioners, the Commission violated the fourth instance formula when it inserted its authority despite the availability of continued recourse to Elizabetia’s appellate courts. The petition did not pose any prima facie violation of rights under the ACHR because Article 17(2) identifies marriage between men and women, and does not refer to same-sex marriage.[[75]](#footnote-75) The Commission should not have presumed a violation of human rights in light of the legal effects Elizabetia gives to same-sex domestic partnerships.[[76]](#footnote-76) The Commission should not have overstepped its jurisdiction by initiating the admissibility stage, especially while domestic courts were still in the process of reviewing this issue.

## ELIZABETIA DID NOT VIOLATE THE PETITIONERS’ RIGHT TO FAMILY

Elizabetia did not violate the alleged victim’s right to family because it interpreted the ACHR articles under a good faith common meaning, did not discriminate based on religion or indigenous origin, and justified the separate standards for domestic partnerships through its sovereign right to put the national needs before the individual. Article 17 of the ACHR specifically states that men and women of marriageable age have the recognized right to marry and raise a family.[[77]](#footnote-77) In the case of *Joslin v. New Zealand*, the International Covenant on Civil and Political Rights (ICCPR) Committee decided whether New Zealand had violated the petitioner’s rights to marriage and family under Article 23 of the ICCPR.[[78]](#footnote-78) Article 23 of the ICCPR recognizes that men and women of a marriageable age have a right to marry and found a family.[[79]](#footnote-79) The Committee cited the special use of the phrase “men and women” as opposed to the terms “every human being” or “everyone” in the Covenant as the basis for refusing to find a violation.[[80]](#footnote-80) It also determined that the explicit and unique use of the phrase “men and women” specifically, had been “consistently and uniformly” understood to indicate that the obligation of the state was to recognize marriage between men and women only.[[81]](#footnote-81) This was consistent with the Vienna Convention on the Law of Treaties, which instructs states to interpret treaty terms according to the ordinary meaning and in good faith.[[82]](#footnote-82) Moreover, in the case of *Atala Riffo and Daughters v. Chile*, the IACtHR stated that the concept of family life is not limited only to marriage and allows other *de facto* family forms; thus, a heterosexual marriage is not the exclusive form of family.[[83]](#footnote-83)

Similar to the *Joslin* case, here the ACHR distinctively uses the phrase “men and women” to define the recipients of the right to family, but elsewhere in the text, the words “every person” and “everyone” describe the particular individuals in whom such rights vest.[[84]](#footnote-84) Similarly, Article 85 of Elizabetia’s constitution mirrors Article 17 of the ACHR and only addresses families that are a specific result of the cohabitation of a man and woman, leaving open the possibility of families resulting from other relations.[[85]](#footnote-85) As a result, Elizabetia’s Constitution is consistent with this *Atala*, because it does not limit the concept of family life only to marriage between heterosexuals and does not preclude other *de facto* family ties. Looking to the plain language of the Convention, Elizabetia acted in good faith under the ACHR and the Vienna Convention of the Law of Treaties when it relied upon the exclusive textual use of “men and women” and left the status of families not resulting from the cohabitation of a heterosexual couple as an open issue.

### Elizabetia Did Not Discriminate Based On The Bra’granti Religion Or Culture

There is no evidence that Elizabetia improperly discriminated against the Petitioners based on religion or indigenous identification because they do not self-identify nor qualify under international definitions as indigenous people. Article 12 of the ACHR mandates that all individuals have the right to freedom of religion and that no one shall be subject to restrictions that impair belief or change in religion.[[86]](#footnote-86) However, the freedom to religion is subject to those laws that are necessary to protect public safety, order, health, morals, or the rights and freedoms of others.[[87]](#footnote-87)

Violations of religion based on Article 12 depend on whether the state action impaired or deprived any individual of their right to maintain, change, profess, or disseminate their religious beliefs with total freedom.[[88]](#footnote-88) In the case of *“The Last Temptation of Christ” v. Chile*, this Court did not believe that prohibition of a religious movie was tantamount to a violation of Article 12 because there was no evidence that the prohibition affected the right of individuals to maintain, change, profess, or disseminate their religious beliefs.[[89]](#footnote-89) This Court upheld the decision to protect the values of the nation and found that the prohibition of religious media alone was not enough to affect religious rights.[[90]](#footnote-90)

Elizabetia did not violate the ACHR because of either religion or indigenous identification. Similar to “*The Last Temptation of Christ*,” Elizabetia is maintaining the values of marriage that does impair the ability to maintain, change, or disseminate religious beliefs. The alleged victim fails to show that the state is discriminating against her because of her identification as an indigenous person because she neither identifies with the group nor is there any evidence that the social, economic, cultural, and political aspects of the Bra’granti people remains distinct in Elizabetia today. Elizabetia could not logically discriminate against her on the basis of a religion with which she does not identify or espouse.

Furthermore, Elizabetia recognizes and supports the alleged victim’s transformation by officially recognizing her change in status, as reflected by the President’s proclamation.[[91]](#footnote-91) This approach recently taken by Elizabetia’s Executive branch and its legislature is evidence that the State has fully embraced the Bra’granti culture and has attempted to integrate it into modern society. Rather than discriminate based on indigenous identity, Elizabetia has protected the concept of marriage from alteration due to moralistic concerns that emphasize the importance of the sanctity of marriage and family in accordance with Article 12, and not due to any discrimination towards those who have changed their gender.[[92]](#footnote-92)

### Elizabetia Did Not Withhold The Right To Marriage From The Petitioners And Classification Based On Sexual Orientation Is Justified

Elizabetia granted Petitioners the same fundamental rights afforded to heterosexual couples, because domestic partnerships receive the same legal effects as marriage in Elizabetia. Any differences between the two forms of union are justified by the lack of international consensus and the high value that Elizabetia afford the democratic process. Article 17(2) of the ACHR delineates the rights of the family as the right of men and women to marry and to raise a family.[[93]](#footnote-93) Articles 3(e) and 17 of the Charter of Organization of American States (COAS) acknowledge every State’s right to choose its political, economic, and social system without interference.[[94]](#footnote-94) Also, Article 32 of the ACHR and Article 28 of the American Declaration of the Rights and Duties of Man limit the individual rights of every person according to the general welfare of the community.[[95]](#footnote-95)

Similar to the ACHR, the European Court of Human Rights (ECtHR) has articles within the European Convention on Human Rights (ECHR) that protects the right to private life[[96]](#footnote-96) and the right to family.[[97]](#footnote-97) In *Schalk and Kopf v. Austria*
, domestic partnerships allowed homosexual couples to give legal effect to their relationships and gain many of the same benefits attributed to heterosexual marriages with the exception of the possibility to adopt children or have access to artificial insemination.[[98]](#footnote-98) The ECtHR declined to find a violation due to the fact that the State’s reverence of marriage was sufficient reason for the continued limitation of marriage which was within the power of the State through regulation of its own national law.[[99]](#footnote-99)

Furthermore, the ECtHR found no violation of the right to family despite concession that the ECHR was a living document open to interpretation with the changing of the times,[[100]](#footnote-100) and that a previous case decided by that Court indicated a shift towards acceptance of same sex marriages.[[101]](#footnote-101) The ECtHR found a lack of consensus with only six out of forty-seven signatories of the ECHR allowing same sex marriages; this general lack of consensus was an insufficient basis to find a violation.[[102]](#footnote-102) The ECtHR emphasized the strong cultural and social connotations that differ between states closely relating to marriage while emphasizing its reluctance in supplanting national authorities better situated to know the requirements of their own societies.[[103]](#footnote-103)

Elizabetia did not discriminate against the Petitioners because a domestic partnership affords her the same legal benefits as marriage. In its Constitution, Elizabetia refers to families in the context of "cohabitation of a man and a woman" while marriage is defined as an agreement by "any couple consisting of one man and one woman.”[[104]](#footnote-104) In addition to marriage, Elizabetia allows for domestic partnerships, which are defined by two individuals of the same sex who have lived together uninterrupted for five years and have been judicially decreed to be a domestic partnership.[[105]](#footnote-105) Both marriages and domestic partnerships have the rights delineated in Constitutional Article 397,[[106]](#footnote-106) and Elizabetian courts have construed this to mean that because couples care and provide for each other, they may give informed consent for medical procedures.[[107]](#footnote-107) Thus, Elizabetia has given Petitioners the opportunity to give medical consent under the rights attributed to marriage in Article 397.[[108]](#footnote-108)

Because domestic partnerships have the same exact rights as marriage under Article 397 to give medical consent,[[109]](#footnote-109) the alleged victim is improperly arguing that the state is discriminating against her by entirely barring her ability to marry her chosen partner and thus barring her from giving medical consent. In reality, Elizabetia has given her the same rights as a heterosexual couple and the same opportunity to give medical consent under the provision for the rights attributed to marriage in Article 397 of the Constitution.[[110]](#footnote-110) The alleged victim’s main contention then is that, because those who are not heterosexual must cohabitate for an additional 5 years, Elizabetia is discriminating against homosexuals by requiring a cohabitation period that is not required of heterosexual couples.[[111]](#footnote-111) While this may be discrimination, the COAS specifically delineates in Article 3(e) and 17 that “every state has the right to choose, without external interference, its political, economic, and social system and to organize itself in the way best suited to it.”[[112]](#footnote-112) Furthermore, Article 32 of the ACHR and Article 28 of the American Declaration of the Rights and Duties of Man similarly mandate that every individual has responsibilities to his community and that the rights of others based on the just demands of general welfare in a democratic society limit the rights of individuals.[[113]](#footnote-113) Lastly, the alleged victim has failed to show there is a consensus sufficient to uphold the finding of a violation as determined in *Schalk*. With only two States that currently allow homosexual marriage in the OAS, there is a definite lack of consensus to suggest a changing of the times.[[114]](#footnote-114)

By forcing Elizabetia to recognize same-sex marriages the same, the IACtHR would force Elizabetia to allow virtually all marriages, undermining the sanctity of marriage and opening the door for significant fraud. The reading of international law is context dependent and must change with the times.[[115]](#footnote-115) Elizabetia is continuing its long tradition of moral sanctity and public harmony in regards to marriage, as evidenced by the 76% of Elizabetians who disapprove of the idea that domestic partnerships should be equal to marriage.[[116]](#footnote-116) This is the political, economic, and social system that Elizabetia authorized and implemented in a way best suited to it as authorized by COAS Articles 3(e) and 17.[[117]](#footnote-117) In this way, Elizabetia’s democratically elected officials honor the public’s concerns regarding tradition, yet respect the legal sanctity of same-sex domestic partnerships.[[118]](#footnote-118) As a result, because democracy is one of the most important concerns of the ACHR and the COAS, this Court must give it the proper deference when addressing the alleged victims’ claims.[[119]](#footnote-119) To overturn Elizabetia’s courts and redefine marriage under its constitution, this Court would act as a super-legislature and would impose its own laws for those democratically enacted by Elizabetia’s own people. Lastly, the rights of the few are subject to the needs of many under Article 32 and Petitioners have a duty to recognize the moral and democratic goals of their country.[[120]](#footnote-120)

Because of the revered nature of the institution of marriage, Elizabetia has reasonably chosen to extend the institution carefully.[[121]](#footnote-121) Based on the aforementioned deference to the democratic process, Elizabetia’s legislature acted in the most feasible way to allow homosexual partners to join while preserving the sanctity of marriage. Such exclusion is preferable to a society that allows marriage between any two entities for any given reason and inconsistent with the Elizabetian veneration for marriage.[[122]](#footnote-122)

## ELIZABETIA DID NOT VIOLATE PETITIONERS’ RIGHT TO PRIVACY BECAUSE DENIAL OF SAME-SEX MARRIAGE IS A REASONABLE LIMITATION ON PRIVACY

 Elizabetia did not violate Petitioners’ right to private life because it respected the democratically enacted laws of its people in refusing to expand the traditional concept of marriage. The IACtHR has stated that the right to private life is not absolute, and States may restrict the right to private life provided the intrusions are neither abusive nor arbitrary.[[123]](#footnote-123) In protecting against arbitrary interference of private life, a State must strike a balance between the general public interest and the individual interest.[[124]](#footnote-124) The IACtHR has stated that if a restriction on privacy is statutorily enacted it does not constitute an arbitrary interference with an individual’s private life.[[125]](#footnote-125) Since sexual orientation is part of one’s private life, a state may interfere through regulated law, made pursuant to a legitimate goal, and that meets standards of “suitability, necessity, and proportionality.”[[126]](#footnote-126) In analyzing invasions of privacy, the IACtHR and ECtHR look at how a domestic court deals with the applicant’s claims.[[127]](#footnote-127)

 In Atala, the IACtHR decided that the state’s interference in Ms. Atala’s private life was arbitrary, because the Court decided custody decision based on discriminatory prejudices driven by her sexual orientation.[[128]](#footnote-128) The IACtHR considered whether the lower court’s treatment of Ms. Atala’s cohabitation with her lesbian partner was proper, ultimately reasoning that the domestic court’s inquiry into the victim’s sexual orientation was neither relevant nor proportional in examining suitability as a parent.[[129]](#footnote-129)

 The ECtHR has had further occasions to consider how the concept of “private life” relates to sexual orientation. In *Van Kuck v. Germany*, the ECtHR found a right-to-privacy violation when a domestic court required a transsexual woman to prove necessity for her hormone replacement therapy.[[130]](#footnote-130) In *Van Kuck*, the issue touched upon the intimate matter of the applicant’s freedom to define herself as a female. In evaluating the applicant’s claims for reimbursement of gender re-assignment surgery, the domestic court violated the right to privacy when it failed to obtain supplementary medical information before substituting its own views for questioning the necessity of the re-assignment surgery.[[131]](#footnote-131)

 Unlike the irrelevant inquisition into the victim’s sexual orientation in *Atala*, the judicial authority here took account of Petitioners’ sexual orientation for the prudent purpose of interpreting the plain text of the applicable law. When petitioners submitted their request for marriage to the National Secretariat of the Family, the administrative body considered their sexual orientation vis-a-vis the nature of her request, and its direct conflict with Article 396 of Elizabetia’s Constitution.[[132]](#footnote-132) There is no evidence that Elizabetia’s courts considered details of Petitioners’ relationship for any purpose other than a logical and simple interpretation of its Constitution.

 Elizabetia met its obligation to respect the identity of the individual, when it followed the Commission’s report and instructions in March 2005 in regards to registering Serafina with the appropriate gender in its vital records. Then-president, Aldana de Zambrano issued the Gender Identity Act, allowing Serafina to obtain recognition of her gender identity.[[133]](#footnote-133) Elizabetia properly balanced the individual interests of Petitioners with the general interest of the public in determining that Elizabetia’s law defining marriage controls, while still providing same-sex domestic partnerships with the same legal effects as marriage.[[134]](#footnote-134)

## ELIZABETIA PROVIDED THE RIGHT TO JUDICIAL PROTECTION

Elizabetia ensured Petitioners’ right to judicial protection by providing effective recourse at all stages of their petitions. The right to judicial recourse under Article 25 of the ACHR does not obligate the State to award relief, but requires the State to ensure: (1) a competent, impartial authority determines the claimant’s rights, (2) the authority provides the possibility of judicial remedy, and (3) that a court enforce a remedy when granted.[[135]](#footnote-135) Judicial guarantees, or the right to have rights, are in both Articles 8 and 25 of the American Convention.[[136]](#footnote-136)

### A Competent Authority Reviewed The Petitioners’ Rights

Lack of judicial impartiality must cite on specific elements that indicate a situation in which “the judges have clearly allowed themselves to be influenced by aspects or criteria outside of the legal provisions.”[[137]](#footnote-137) A main objective for the separation of public powers is to guarantee independence of judges and safeguard those judges against external pressures.[[138]](#footnote-138) The IACtHR presumes impartiality, but it has applied an objective approach test to determine if the judge has approached the facts of the case free of all prejudice.[[139]](#footnote-139) A judge must appear to act only and exclusively according to the law.[[140]](#footnote-140)

In *Atala*, an interpretation of the provisions of the Chilean Civil Code in a manner contrary to the ACHR in matters concerning a homosexual individual was not enough, in itself, for the IACtHR to declare a lack of objective impartiality.[[141]](#footnote-141) A court’s impartiality implies that its members have no direct interest in a pre-established viewpoint, or a preference for one of the parties, and that they are not involved in the controversy.[[142]](#footnote-142) In the *Atala*, the Chilean legal doctrine reserved a remedy for serious acts of abuses by a judge allowing a higher domestic court to revoke a decision for an arbitrary interpretation of law but not for errors of interpretation.[[143]](#footnote-143) No evidence of external pressure, or lack of impartiality, existed for the IACtHR to find that the higher court judges ignored their duties of judicial independence.[[144]](#footnote-144)

The purpose of Elizabetia’s constitutional remedy through Family Court No.3 is not to correct simple errors of interpretation, but is only proper to challenge cases of “manifest arbitrariness.”[[145]](#footnote-145) There is no evidence to infer external pressures, or bias, existed among the judges who reviewed Petitioners’ request for marriage authorization. Each domestic court they accessed was a separate judicial authority whose job was to review the legality of decisions made by lower court judges.[[146]](#footnote-146) Beyond a presumption that Elizabetia’s domestic judges acted impartial, the reviewing judges at the administrative and Family Court levels all based their decisions *exclusively and according to* Article 396 of Elizabetia Law.[[147]](#footnote-147) Petitioners’ mere interpretation of Article 396 as contrary to the ACHR is not enough to declare a lack of impartiality or judicial incompetence.

### Elizabetia Offered The Possibility Of An Effective Remedy

As soon as an authority can provide safeguards of independence, impartiality, and procedure, it has offered the petitioner an effective remedy.[[148]](#footnote-148) The IACtHR has firmly stated that for a remedy to be effective, it has to be capable of producing its intended result.[[149]](#footnote-149) A state’s domestic process violates judicial protection when it does not allow for the correction of judicial error,[[150]](#footnote-150) or when it precludes judicial remedy by dismissing the petitioner's extraordinary writ.[[151]](#footnote-151)

Petitioners had access to a competent authority that provided them with an effective remedy. If administrative judges had based their opinions on an arbitrary standard instead of on Article 396, Petitioners could have vacated their decision upon appeal.[[152]](#footnote-152) If Petitioners had argued that Article 396 was defective, they could have pursued Elizabetia’s public right of action remedy which has prevailed in overturning Constitutional provisions relating to homosexual discrimination in the past.[[153]](#footnote-153) The administrative courts did not have jurisdiction to alter a constitutional provision, yet they still safeguarded Petitioners from the possibility of an arbitrary or illegal decision.

### *Administrative And Judicial Review of Petitioners’ Requests Satisfied Due Process*

Elizabetia complied with procedural equality despite granting the Petitioners an unfavorable result. “For ‘the due process of law’ a defendant must be able to exercise his rights in full procedural equality with other defendants.”[[154]](#footnote-154) A State-entrusted administrative body that determines a person’s rights observes this norm.[[155]](#footnote-155) If a state respects the right to a hearing and carries it out in a reasonable period, and the petitioner does not claim a lack of competence, independence, or impartiality of the court in any instance, then no due process violation has occurred.[[156]](#footnote-156)

In a 1996 Commission report to Argentina, there was no violation of due process when the Supreme Court of Argentina dismissed a petitioner’s extraordinary writ without ruling on the merits.[[157]](#footnote-157) Before the domestic court granted the writ, petitioner had access to a labor court and received full and prompt recourse resulting in an unfavorable decision.[[158]](#footnote-158) The Commission explained, “a negative result in a fair adjudication, in itself, does not constitute a violation of the Convention.”[[159]](#footnote-159)

Elizabetia catered to all procedural aspects of Petitioners’ request for marriage, and was not required to grant a favorable decision in order to prove a fair adjudication. The administrative courts ruled according to Article 396 and articulated Elizabetia’s interest in preserving the concept of family.[[160]](#footnote-160) There is no evidence that Elizabetia did not offer Petitioners the same procedural equality as other defendants. They were able to defend their interests within eleven months from the date they first requested marriage authorization on March 15, 2011.[[161]](#footnote-161) Furthermore, Elizabetia’s multi-tiered review process demonstrates that protective measures against an arbitrary decision were in place.

### *A State Has The Right To Legislate According To Its Own Interest*

The drafters of the ACHR intended for signatory States to retain their autonomy while still committing to a system of respect for the essential rights of man. By “reinforcing or complimenting”[[162]](#footnote-162) the domestic laws of a signatory State, the ACHR acknowledges that States retain a certain degree of independence. Furthermore, the ACHR’s requirement that parties exhaust all domestic remedies limits the Commission’s jurisdiction, and allows the State to legislate within its own framework.[[163]](#footnote-163) Through jurisprudence, both the IACtHR and the ECtHR have stated that international protections are subsidiary to national systems.[[164]](#footnote-164) Article 30 of the ACHR provides that certain restrictions on the rights and freedoms recognized by the Convention are possible by laws enacted for reasons of “general interest,” meaning the public order or protection of public morals.[[165]](#footnote-165) Even if textually absent, it is implicit in privacy rights and the right against discrimination, that state action may be necessary for meeting the just requirements of morality.[[166]](#footnote-166)

Under Chapter IV of the OAS, the rights and duties of a State include “the right to organize itself as it sees fit and to legislate concerning its own interests.”[[167]](#footnote-167) The OAS counsel charges the Commission with furthering human rights set forth in the American Declaration of the Rights and Duties of Man.[[168]](#footnote-168) The ACHR imports obligations of the Declaration because no provision of the ACHR can limit the effect of the American Declaration.[[169]](#footnote-169)

Petitioners’ inability to have their relationship recognized as a “marriage” is not a failure of judicial protection. It is necessary for Elizabetia restrict the concept of family in order to respect the values of its community. Elizabetia chose to interpret its Constitution in light of public opinion polls showing general disapproval of same sex couples’ domestic partnerships being equal to marriage.[[170]](#footnote-170) The restriction on same-sex marriage is justified on account of Elizabetia’s democratic voice.

### *Elizabetia Allowed Petitioners To Timely Conduct Their Administrative Proceedings*

The IACtHR examines reasonableness of the proceeding in light of four criteria: a) the complexity of the case, b) the procedural activity of the interested party, c) the conduct of the judicial authorities, and d) the adverse effect of the duration of the proceeding.[[171]](#footnote-171) By satisfying each element, Elizabetia administered Petitioners’ claim in a reasonable time.

Petitioners’ own procedural conduct did not impact the proceeding because they filed everything in a timely manner.[[172]](#footnote-172) It would be unreasonable to find that judicial authorities delayed the proceedings, given the eleven months taken to review the claim. Had Petitioners submitted their case before the Constitutional Chamber of the Supreme Court of Justice in an unconstitutionality action, the judicial authority may have considered the more complex issue regarding the constitutionality of Article 396.[[173]](#footnote-173) However, for Court No.3, Petitioners’ case was not complex because the facts of their petition did not reflect any bias of the judges or manifest arbitrariness.[[174]](#footnote-174) Furthermore, Court No.7 was attentive and responsive when it explained the reasonable restriction to marriage in Elizabetia within five months of the initial petition for marriage.[[175]](#footnote-175)

1. **ELIZABETIA VALIDLY DEFINED “MARRIAGE” TO THE RESTRICTION OF SAME-SEX MARRIAGE PURSUANT TO DEMOCRATIC VALUES**

There is norequirement under the Convention that states permit same sex couples to marry. This requirement is also not evident in other international treaties and conventions, including the ICCPR and the ECHR.[[176]](#footnote-176) Lack of using general terms in the ICCPR in regards to marriage indicates that the treaty obligation of State parties is to extend the right to marriage only upon unions between a man and a woman.[[177]](#footnote-177) According to the interpretative maxim, *generalia specialibus non derogant*, the general provisions of the Convention should not detract or contradict the more specific meaning of marriage found in Article 17(2) of the Convention.[[178]](#footnote-178)

In *Joslin*, where the Human Rights Committee found no requirement of its signatory States to permit gay marriage,[[179]](#footnote-179) the Registrar-General indicated it was acting lawfully in interpreting New Zealand’s Marriage Act as confined to marriage between a man and a woman.[[180]](#footnote-180) The nature of the couple, not the individual, is determinative in a state’s decision not to allow same-sex marriage.[[181]](#footnote-181) The principle of “non-discrimination” under ICCPR Article 23(2) does not mean “identical treatment.”[[182]](#footnote-182)

When discrimination in a case refers to unequal protection by domestic laws, the IACtHR must analyze the facts in light of Article 24 of the ACHR.[[183]](#footnote-183) This is distinct from a situation in which the State discriminates in the guarantee of a right *contained* *in* the Convention, which is a failure to comply with Article 1(1) and the substantive law in question.[[184]](#footnote-184) The EU Council has disagreed on policy grounds to treat same-sex marriages on equal terms as different-sex marriages for purposes of EU employment benefits.[[185]](#footnote-185) In 2004, the ECtHR held that the state infringed “the very essence” of a transsexual woman’s right to marry because the state did not allow her to marry a man, and did not recognize the transsexual’s changed sex for all legal purposes.[[186]](#footnote-186) Nevertheless, the ECtHR has not gone further than recognizing the right to marry as between persons of opposite sex.[[187]](#footnote-187)

Refusal to authorize same-sex marriage is a valid restriction of equal protection in regards to laws regulating the concept of marriage that various international organs recognize. The discrimination alleged in our case in regards to Elizabetia’s domestic laws invokes analysis under ACHR article 24, but there was no express violation under the ACHR. Moreover, Article 396 expressly applies to a couple consisting of one man and one woman, and is thus restrictive as to the nature of the couple, not the individual.[[188]](#footnote-188) As the Registrar-General did in *Joslin*, Elizabetia acted lawfully in rejecting Petitioners’ request for marriage authorization upon interpretation of Article 396.[[189]](#footnote-189) The state of the law may change in the future for Elizabetia or in the international context. However, under the laws currently in place, Elizabetia committed no violations of equal protection.

## Elizabetia Did Not Violate the Petitioners’ Right to Life Nor Did It Fail to CONFORM TO THE ACHR

Elizabetia did not violate Article 1 or 2 of the ACHR[[190]](#footnote-190) by discriminating against the alleged victim on the basis her status as an indigenous person because there is no evidence that the indigenous religion induced her to desire a homosexual marriage. Moreover, Elizabetia did not withhold marriage from the alleged victim. Despite the five-year cohabitation requirement, Elizabetia did not improperly discriminate against the petitioners because its marriage standards are justified by strong societal beliefs and Elizabetia’s democratic process. Lastly, Elizabetia did not violate the alleged victim’s right to family because the ACHR itself confines marriage to heterosexual relations upon which the State relied when forming its Constitution. In addition, Elizabetia does not confine family to strictly those that result from a heterosexual relationship. Elizabetia recognizes there are several types of families and does not preclude those families from existing. Even if the IACtHR does find that Elizabetia is limiting families to those resulting from heterosexual relationships, the discrimination is justified by societal values projected through a democratic voice.

Elizabetia also did not violate the alleged victim’s right to privacy because the strong public interest in preserving the traditional concept of marriage allows the State to tip the balance between individual interests and communal norms in favor of the larger community. The domestic courts of Elizabetia did not arbitrarily intrude upon the personal relations of the alleged victim. In dealing with her initiated action, Elizabetia’s courts prudently considered her sexual orientation only for purposes of applying the plain text of its Constitution.

Furthermore, Elizabetia kept its commitments as a signatory to the ACHR by respecting the right to fair trials and judicial protection. The State has not violated Petitioners’ rights by administering a negative result in its judicial proceedings. Arguments that the complexity of the case impacted the proceedings timeliness or that the court unfairly sped through review of the issues are unfounded due to the sole responsibility of the court to find illegality or manifest arbitrariness of which there was none. Petitioners’ failure to file an unconstitutionality action regarding Article 396, under which the larger constitutional issue would have come under review, is not the fault of the State. Elizabetia ensured the integrity of its judicial system by allowing individuals to initiate unconstitutionality actions. Moreover, there is no evidence that the judges who reviewed Petitioners’ claims based its decision on biases or non-legal provisions. In fact, Elizabetia separated powers among each of the tribunals to review legality of previously issued decisions. Establishment of the Gender Identity Act[[191]](#footnote-191) and the amendment of the Constitution to allow domestic partnerships reflect Elizabetia’s efforts to conform to the spirit of the ACHR.[[192]](#footnote-192) Lastly, Elizabetia has the right to legislate according to its own national interests. Not recognizing the right to marriage for homosexuals is a justified limitation in light of the present order of the community.

Elizabetia did not violate the Petitioners’ right to equal protection under Article 24 because the ACHR does not mention same-sex marriage nor is it supported by consensus in international law.[[193]](#footnote-193) The ACHR does not obligate identical treatment of same-sex couples and different-sex couples regarding marriage. Elizabetia’s good faith following of the plain text meaning of the Convention indicates that the right to marry vests only in same-sex couples.

## Provisional Measures

The power of the IACtHR to grant provisional measures provided in Article 63(2) for situations of extreme gravity and urgency in addition to irreparable damage.[[194]](#footnote-194) Requirements of extreme gravity and urgency mandate that the situation is factual, not just theoretical.[[195]](#footnote-195) Any violations alleged must show *prima facie* symptoms of extreme gravity and urgency.[[196]](#footnote-196) In the petition of *Acevedo Jaramillo*, the Court rejected the petition for protection because petitioners based it on a speculative violation based on imminent proceedings.[[197]](#footnote-197) On the other hand, the Court may refuse to hear the petition altogether if it would lead to a judgment on the merits of the case or are unrelated to the subject matter of the case.[[198]](#footnote-198)

In the instant case, the request to be empowered to provide informed consent for medical procedures is improper. The situation, while urgent and grave, is purely theoretical and thus improper as a basis for provisional measures. The harm that Ms. Timor might face is insufficiently imminent, similar to the *Acevedo Jaramillo* petition,[[199]](#footnote-199) and not a result of any state action. There is no State obligation to protect Ms. Timor from having someone other than her lover choose her medical care and thus this alleged violation that the petition is based upon is improper. Second, the petitioner is not alleging that if the Court does nothing that irreparable harm will befall Ms. Timor. In fact, a thoroughly qualified Regional Medical Committee will consider the medical risks and make a decision on behalf of the patient. Lastly, by granting this request the Court opens itself up as a venue that allows other individuals in these situations to seek aid from the Court despite not having any basis on an ACHR violation. To decide whether Serafina should have the power to give consent the Court must decide whether to grant marriage to a homosexual couple decide the merits of the case *in limine litis*.

## Request for Relief

Elizabetia respectfully requests that the Court find that Petitioner has not exhausted all available remedies as required by Article 46 and the Court’s jurisdiction cannot be invoked. However, Elizabetia requests that if the Court does invoke jurisdiction it find that Elizabetia did not violate the alleged victim’s rights based on Articles 1, 2, and of the ACHR.

1. Hypo ¶ 19. [↑](#footnote-ref-1)
2. Hypo ¶ 4. [↑](#footnote-ref-2)
3. Hypo ¶ 3. [↑](#footnote-ref-3)
4. Hypo ¶ 1. [↑](#footnote-ref-4)
5. Hypo ¶ 6(c). [↑](#footnote-ref-5)
6. Hypo ¶ 8. [↑](#footnote-ref-6)
7. Hypo ¶ 9. [↑](#footnote-ref-7)
8. *Id*.; Clarification Question 5. [↑](#footnote-ref-8)
9. Hypo ¶ 10. [↑](#footnote-ref-9)
10. *Id*. [↑](#footnote-ref-10)
11. Hypo ¶ 6(c). [↑](#footnote-ref-11)
12. Hypo ¶ 11. [↑](#footnote-ref-12)
13. Hypo ¶ 2. [↑](#footnote-ref-13)
14. Hypo ¶¶ 12-15 & 17; Clarification Question 11. [↑](#footnote-ref-14)
15. Hypo ¶ 16 & 17. [↑](#footnote-ref-15)
16. Hypo ¶ 17. [↑](#footnote-ref-16)
17. Hypo ¶ 17 & 18. [↑](#footnote-ref-17)
18. Hypo ¶ 20. [↑](#footnote-ref-18)
19. Hypo ¶ 23. [↑](#footnote-ref-19)
20. Hypo ¶ 24. [↑](#footnote-ref-20)
21. Hypo ¶ 26. [↑](#footnote-ref-21)
22. Hypo ¶ 27. [↑](#footnote-ref-22)
23. Hypo ¶ 28. [↑](#footnote-ref-23)
24. Hypo ¶¶ 30 & 31. [↑](#footnote-ref-24)
25. Hypo ¶ 32. [↑](#footnote-ref-25)
26. Hypo ¶¶ 33 & 34. [↑](#footnote-ref-26)
27. Hypo ¶ 35. [↑](#footnote-ref-27)
28. Hypo ¶ 38. [↑](#footnote-ref-28)
29. Hypo ¶ 39. [↑](#footnote-ref-29)
30. Hypo ¶ 40, Clarification Question 1. [↑](#footnote-ref-30)
31. Clarification Question 1. [↑](#footnote-ref-31)
32. Hypo ¶ 41. [↑](#footnote-ref-32)
33. Hypo ¶ 42. [↑](#footnote-ref-33)
34. Hypo ¶ 43. [↑](#footnote-ref-34)
35. Hypo ¶¶ 44 & 45. [↑](#footnote-ref-35)
36. Hypo ¶ 45. [↑](#footnote-ref-36)
37. *Id*. [↑](#footnote-ref-37)
38. Hypo ¶ 46. [↑](#footnote-ref-38)
39. Hypo ¶ 48. [↑](#footnote-ref-39)
40. *Id*. [↑](#footnote-ref-40)
41. Hypo ¶ 49. [↑](#footnote-ref-41)
42. Hypo ¶ 50. [↑](#footnote-ref-42)
43. *Id*. [↑](#footnote-ref-43)
44. Hypo ¶ 51. [↑](#footnote-ref-44)
45. Hypo ¶ 52. [↑](#footnote-ref-45)
46. *Id*. [↑](#footnote-ref-46)
47. Hypo ¶ 53. [↑](#footnote-ref-47)
48. *Id*. [↑](#footnote-ref-48)
49. Hypo ¶ 54. [↑](#footnote-ref-49)
50. Hypo ¶¶ 56 & 57. [↑](#footnote-ref-50)
51. Hypo ¶ 58. [↑](#footnote-ref-51)
52. Hypo ¶ 59. [↑](#footnote-ref-52)
53. *Id*. [↑](#footnote-ref-53)
54. Hypo ¶ 60 & 61. [↑](#footnote-ref-54)
55. Hypo ¶ 63. [↑](#footnote-ref-55)
56. Hypo ¶¶ 63 & 64. [↑](#footnote-ref-56)
57. American Convention, art. 46(2). [↑](#footnote-ref-57)
58. *Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights)*, Advisory Opinion OC-11/90, Inter-Am. Ct. H.R., Ser. A, No. 11
 (10 Aug., 1990), ¶ 36. [↑](#footnote-ref-58)
59. *Viviana Gallardo et al*. (Advisory Opinion), Inter-Am. Ct. H.R., Ser. A, No. G 101/81 (15 July, 1981)

, ¶ 26. [↑](#footnote-ref-59)
60. *David Austin Smith v. Commonwealth of the Bahamas*, Case 12.399, Report No. 26/07, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.130 doc. 22, rev. 1 (9 March, 2007)
, ¶ 18. [↑](#footnote-ref-60)
61. Inter-American Commission on Human Rights Petitions and Case System Informational Brochure <http://www.oas.org/en/iachr/docs/pdf/HowTo.pdf>, ¶¶ 19-20. [↑](#footnote-ref-61)
62. *Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights)*, Advisory Opinion OC-11/90, Inter-Am. Ct. H.R., Ser. A, No. 11 (10 Aug., 1990), ¶ 19. [↑](#footnote-ref-62)
63. Hypo ¶¶ 31, 31. [↑](#footnote-ref-63)
64. Hypo ¶¶ 28, 48, 50. [↑](#footnote-ref-64)
65. Hypo ¶ 49, 50. [↑](#footnote-ref-65)
66. Hypo ¶ 14. [↑](#footnote-ref-66)
67. Hypo ¶ 14; Clarification Question 11 and 12. [↑](#footnote-ref-67)
68. Hypo ¶ 16. [↑](#footnote-ref-68)
69. *Santiago Marzioni v. Argentina*, Case 11.673, Report No. 39/96, Inter-Am. Comm’n HR, OEA/Ser.L/V/II.95, doc. 7 rev. (15 Oct., 1996), ¶ 49-50. [↑](#footnote-ref-69)
70. *Case of*
*Atala Riffo and Children v. Chile*, (Judgment) Inter-Am. Ct. H.R., Ser. C, No. 239, (24 Feb., 2012), ¶ 188. [↑](#footnote-ref-70)
71. *Santiago Marzioni*, ¶ 51. [↑](#footnote-ref-71)
72. David Brown, *Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles*, 31 Mich. J. Int’l L. 821, 855-56 (2010); American Convention art. 17(2). [↑](#footnote-ref-72)
73. *Clifton Wright v. Jamaica*, Case 9260, Inter-Am. Comm’n H.R., Report No. 29/88, OEA/Ser.L/V/II.74, doc. 10 rev. (14 Sept., 1988)

, ¶ 3 “Considering.” [↑](#footnote-ref-73)
74. *Clifton Wright*,¶ 7 “Considering.” [↑](#footnote-ref-74)
75. American Convention art. 17(2). [↑](#footnote-ref-75)
76. Hypo ¶ 17. [↑](#footnote-ref-76)
77. American Convention art. 17(2). [↑](#footnote-ref-77)
78. *Joslin v. New Zealand*, U.N. Hum. Rts. Comm., Commc'n No. 902/1999, U.N. Doc. A/57/40, ¶ 8.2 (2002). [↑](#footnote-ref-78)
79. International Covenant on Civil and Political Rights art. 23(1 & 2). [↑](#footnote-ref-79)
80. *Joslin*,¶ 8.2. [↑](#footnote-ref-80)
81. *Joslin*, *¶* 8.2. [↑](#footnote-ref-81)
82. Vienna Convention of the Law of Treaties art. 31(1). [↑](#footnote-ref-82)
83. *Atala Riffo and Daughters*,¶ 142. [↑](#footnote-ref-83)
84. American Convention arts. 3, 4, 5, 7, 8, 10, 11, 12, 13, 16, 18, 20, 21, 22, 24, 25, & 32 compared to art. 17. [↑](#footnote-ref-84)
85. Hypo ¶ 12. [↑](#footnote-ref-85)
86. American Convention art. 12(1) & (2). [↑](#footnote-ref-86)
87. American Convention art. 12(3). [↑](#footnote-ref-87)
88. *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile* (Judgment), Inter-Am. Ct. H. R., ser. C, No. 73, (5 Feb., 2001)
, ¶ 30. [↑](#footnote-ref-88)
89. *“The Last Temptation of Christ*,*”* ¶ 79. [↑](#footnote-ref-89)
90. *“The Last Temptation of Christ*,*”* ¶ 80. [↑](#footnote-ref-90)
91. Hypo ¶¶ 36-38. [↑](#footnote-ref-91)
92. Hypo ¶¶ 39-40. [↑](#footnote-ref-92)
93. American Convention art. 17(2). [↑](#footnote-ref-93)
94. Charter of the Organization of American States arts. 3(e) & 17. [↑](#footnote-ref-94)
95. American Convention art. 32; American Declaration of the Rights and Duties of Man art. 28. [↑](#footnote-ref-95)
96. European Convention art. 8. [↑](#footnote-ref-96)
97. European Convention art. 12. [↑](#footnote-ref-97)
98. *Case of Schalk and Kopf v. Austria* (Judgment), App. No. 30141/04, (24 June 2010), ¶¶ 9, 15, 16, & 23. [↑](#footnote-ref-98)
99. *Schalk and Kopf*, ¶ 51. [↑](#footnote-ref-99)
100. *Schalk and Kopf*, ¶ 57. [↑](#footnote-ref-100)
101. *Schalk and Kopf*, ¶ 58. [↑](#footnote-ref-101)
102. *Schalk and Kopf*, ¶ 58. [↑](#footnote-ref-102)
103. *Schalk and Kopf*, ¶ 62. [↑](#footnote-ref-103)
104. Hypo ¶ 12. [↑](#footnote-ref-104)
105. Hypo ¶ 17. [↑](#footnote-ref-105)
106. *Id*. [↑](#footnote-ref-106)
107. Clarification Question 36. [↑](#footnote-ref-107)
108. Hypo ¶ 17; Clarification Question 36. [↑](#footnote-ref-108)
109. Hypo ¶ 17. [↑](#footnote-ref-109)
110. Clarification Question 36. [↑](#footnote-ref-110)
111. Hypo ¶ 17. [↑](#footnote-ref-111)
112. Charter of the Organization of American States arts. 3(e) &17. [↑](#footnote-ref-112)
113. American Convention art. 32; American Declaration of the Rights and Duties of Man art. 28. [↑](#footnote-ref-113)
114. Only Argentina and Uruguay gives same sex couples marriage, British Broadcasting Corporation, *Uruguay Gay Marriage Bill Approved in Lower House* (12 Dec. 2012) http://www.bbc.co.uk/news/world-latin-america-20691378. [↑](#footnote-ref-114)
115. *Atala Riffo and Daughters*, ¶ 29. [↑](#footnote-ref-115)
116. Hypo ¶ 40. [↑](#footnote-ref-116)
117. Charter of the Organization of American States arts. 3(e) & 17. [↑](#footnote-ref-117)
118. Hypo ¶ 17. [↑](#footnote-ref-118)
119. American Convention art. 23; Universal Declaration of Human Rights art. 21; Charter of the Organization of American States art. 2(b). [↑](#footnote-ref-119)
120. American Convention art. 32. [↑](#footnote-ref-120)
121. *Id*. [↑](#footnote-ref-121)
122. Hypo ¶¶ 39-40. [↑](#footnote-ref-122)
123. *Atala Riffo and Daughters*, ¶ 164. [↑](#footnote-ref-123)
124. *Case of Van Kück v. Germany*
, App. No. 35968/97, Judgment (12 June, 2003), ¶ 71. [↑](#footnote-ref-124)
125. *Case of Tristán Donoso v. Panama* (Judgment) Inter-Am. Ct. H.R., Ser. C, No. 193, (27 Jan., 2009
), ¶ 56. [↑](#footnote-ref-125)
126. *Atala Riffo and Daughters*, ¶ 165. [↑](#footnote-ref-126)
127. *Van Kück*, ¶¶ 74 & 75; *Atala Riffo and Daughters*, ¶¶ 166 & 167. [↑](#footnote-ref-127)
128. *Atala Riffo and Daughters*, ¶ 167. [↑](#footnote-ref-128)
129. *Atala Riffo and Daughters*, ¶¶ 167 & 168. [↑](#footnote-ref-129)
130. *Van Kück*, ¶ 82. [↑](#footnote-ref-130)
131. *Van Kück*,¶¶ 75 & 80. [↑](#footnote-ref-131)
132. Hypo ¶ 15. [↑](#footnote-ref-132)
133. Hypo ¶¶ 37 & 38. [↑](#footnote-ref-133)
134. Hypo ¶ 17. [↑](#footnote-ref-134)
135. American Convention art. 25. [↑](#footnote-ref-135)
136. L. Burgorgue-Larson & A. Úbeda de Torres, The Inter-American Court of Human Rights: Case Law and Commentary (Oxford 2011) 645, ¶25.01. [↑](#footnote-ref-136)
137. *Atala Riffo and Daughters*, ¶ 190. [↑](#footnote-ref-137)
138. *Atala Riffo and Daughters*, ¶ 186. [↑](#footnote-ref-138)
139. *Case of Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*, (Judgment) Inter-Am. Ct. H.R., Ser. C, No. 182, (5 Aug., 2008)
, ¶ 56. [↑](#footnote-ref-139)
140. *Atala Riffo and Daughters*, ¶ 189. [↑](#footnote-ref-140)
141. *Atala Riffo and Daughters*, ¶ 191. [↑](#footnote-ref-141)
142. *Case of* *Palamara Iribarne v. Chile* (Judgment) Inter-Am. Ct. H.R., Ser. C, No. 135, (22 Nov., 2005)
, ¶ 146. [↑](#footnote-ref-142)
143. *Atala Riffo and Daughters*, ¶ 185. [↑](#footnote-ref-143)
144. *Atala Riffo and Daughters*, ¶¶ 186 & 187. [↑](#footnote-ref-144)
145. Hypo ¶ 48. [↑](#footnote-ref-145)
146. Hypo ¶¶ 45-48. [↑](#footnote-ref-146)
147. Hypo ¶¶ 43-45, 48. [↑](#footnote-ref-147)
148. *Calogero Diana v. Italy* App. No. 56/1995/562/648, Judgment (15 Nov., 1996)
, ¶¶ 39-40; *Case of Klass and Others v. Germany*, App. No. 5029/71, Judgment (6 Sept., 1978)
, ¶ 67. [↑](#footnote-ref-148)
149. *Case of Velásquez Rodríguez v. Honduras* (Judgment) Inter-Am. Ct. H.R., Ser. C, No. 4, (29 July, 1988)
, ¶ 66. [↑](#footnote-ref-149)
150. *Santiago Marzioni*,¶ 52. [↑](#footnote-ref-150)
151. *Santiago Marzioni*, ¶ 28. [↑](#footnote-ref-151)
152. Hypo ¶¶ 43-45. [↑](#footnote-ref-152)
153. Hypo ¶¶ 14 & 16. [↑](#footnote-ref-153)
154. *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* Advisory Opinion OC-16/99, Inter-Am. Ct. H.R., Ser. A, No. 16 (1 Oct., 1999)
, ¶¶ 117 & 119. [↑](#footnote-ref-154)
155. *Case of Barabani Duarte et al. v. Uraguay* (Judgment) Inter-Am. Ct. H.R., Ser. C, No.234 (13 Oct., 2011)
, ¶ 118. [↑](#footnote-ref-155)
156. *Santiago Marzioni*, ¶ 46. [↑](#footnote-ref-156)
157. *Santiago Marzioni*, ¶ 46. [↑](#footnote-ref-157)
158. *Santiago Marzioni*, ¶ 46. [↑](#footnote-ref-158)
159. *Santiago Marzioni*, ¶ 47. [↑](#footnote-ref-159)
160. Hypo ¶ 45. [↑](#footnote-ref-160)
161. Hypo ¶ 42. [↑](#footnote-ref-161)
162. American Convention, Preamble. [↑](#footnote-ref-162)
163. *Santiago Marzioni*, ¶ 49. [↑](#footnote-ref-163)
164. *Santiago Marzioni*,¶¶ 48-50; *Velásquez Rodríguez*, ¶ 61. [↑](#footnote-ref-164)
165. American Convention, art. 30; Aaron Xavier Fellmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, 50 Wm. & Mary L. Rev, 797, 806 (2008). [↑](#footnote-ref-165)
166. American Convention, art. 30; Fellmeth, 50 Wm. & Mary L. Rev 797, 806. [↑](#footnote-ref-166)
167. Organization of American States, Article 13. [↑](#footnote-ref-167)
168. Dinah Shelton, *The Jurisprudence of the Inter-American Court of Human Rights*, Am. U. J. Int’l L. & Pol’y 10, no. 1, 335 (1994). [↑](#footnote-ref-168)
169. American Convention, art. 29(d). [↑](#footnote-ref-169)
170. Hypo ¶ 40. [↑](#footnote-ref-170)
171. *Case of* *Valle Jaramillo v. Columbia*, (Judgment) Inter-Am. Ct. H.R. Ser. C, No. 192, (27 Nov., 2008)
, ¶ 155. [↑](#footnote-ref-171)
172. Hypo ¶ 44. [↑](#footnote-ref-172)
173. Hypo ¶¶ 14 & 15. [↑](#footnote-ref-173)
174. *Id*. [↑](#footnote-ref-174)
175. Hypo ¶¶ 42 & 45. [↑](#footnote-ref-175)
176. Brown, 31 Mich. J. Int’l L. 821, 856. [↑](#footnote-ref-176)
177. *Joslin*, ¶ 8.3. [↑](#footnote-ref-177)
178. *Joslin*, ¶ 4.5; American Convention, art. 17(2). [↑](#footnote-ref-178)
179. *Joslin*, ¶ 8.2; Anna C. Forgie, *El Derecho A Amar (The Right to Love): Same-Sex Relationships in Spain and El Salvador*, 9 Nw. U. J. Int'l Hum. Rts. 185 (2011), ¶ 14. [↑](#footnote-ref-179)
180. *Joslin*, ¶ 2.2. [↑](#footnote-ref-180)
181. *Joslin*, ¶¶ 4.13 & 8.3. [↑](#footnote-ref-181)
182. *Joslin*, ¶ 4.12. [↑](#footnote-ref-182)
183. *Atala Riffo and Daughters*, ¶ 82. [↑](#footnote-ref-183)
184. *Atala Riffo and Daughters*, ¶ 82. [↑](#footnote-ref-184)
185. Fellmeth, 50 Wm. & Mary L. Rev 797, 851. [↑](#footnote-ref-185)
186. *Case of Christine Goodwin v. United Kingdom*, App. No. 28957/95, Judgment (11 July, 2002)
, ¶ 101. [↑](#footnote-ref-186)
187. Fellmeth, 50 Wm. & Mary L. Rev 797, 852. [↑](#footnote-ref-187)
188. Hypo ¶ 15. [↑](#footnote-ref-188)
189. *Joslin*, ¶ 2.2; Hypo ¶ 45. [↑](#footnote-ref-189)
190. American Convention art. 1 & 2. [↑](#footnote-ref-190)
191. Hypo ¶ 37. [↑](#footnote-ref-191)
192. Hypo ¶ 17. [↑](#footnote-ref-192)
193. American Convention art. 24. [↑](#footnote-ref-193)
194. American Convention art. 63(2). [↑](#footnote-ref-194)
195. Burgorgue-Larson & Úbeda de Torres, 206, ¶ 9.22. [↑](#footnote-ref-195)
196. Burgorgue-Larson & Úbeda de Torres, 206, ¶ 9.22. [↑](#footnote-ref-196)
197. Burgorgue-Larson & Úbeda de Torres, 206, ¶ 9.23 (citing the *Acevedo Jaramillo* petition). [↑](#footnote-ref-197)
198. Burgorgue-Larson & Úbeda de Torres, 206, ¶ 9.23. [↑](#footnote-ref-198)
199. Burgorgue-Larson & Úbeda de Torres, 206, ¶ 9.23 (citing the *Acevedo Jaramillo* petition). [↑](#footnote-ref-199)