Inter-American Human Rights Moot Court Competition Bench Memorandum

Dear Judges,

It is with great pleasure that we present to you the Bench Memo for the case of *Serafina Conejo Gallo and Adriana Timor v. Elizabetia.*

We were very excited when the Washington College of Law and its Human Rights Moot Court Competition asked us to imagine a case with a focus on the rights of lesbians, gays and trans, bisexual and intersex persons. While the disastrous effects of discrimination against sexually diverse populations are wide and reach across continents, cultures and legal traditions, they have also been marked by invisibility, stigma and outright negation.

Lesbians, gays and trans, bisexual and intersex persons have historically been and continue to be victims of persecution, discrimination and abuse, but great progress has been made globally and locally in the recent years to bring their problematic to light.

Following the rightful demands of an articulated and determined civil society, and its allies, OAS Member States have started to fulfill their debt through General Assembly Resolutions 2435, 2504, 2600, and 2653 and the actions that these prescribe. The Atala Case is a milestone at the Inter-American Commission and Court, and the adoption of the Commission's Plan of Action 4.6.i (on the rights of lesbians, gays and trans, bisexual and intersex persons) and the creation of the Unit on their rights have inscribed it firmly in its agenda.

However, much remains to be done to eradicate violence and discrimination and, to that end, increased knowledge of the violence and discrimination perpetrated against these persons and communities is a must. Our intent when creating this case has been twofold. We seek to promote academic visibility of the disastrous situation of violence and exclusion faced by trans women; we also want to bring to light the discussion concerning recognition –or not- of same sex couples as families or marriages, and all the derived legal effects. This is a highly relevant discussion in the Americas of the 2010's, and one that will be a dominant feature in the human rights agenda for years to come.

Serafina Conejo Gallo never existed. However, resemblance with the stories of a great number of brave existing women must be seen as a stark reminder of the enormity of the work that remains to be done so that stories such as Serafina's are relegated to the world of fiction.

Sincerely,

Victor Madrigal-Borloz

Silvia Serrano

Introduction

This memorandum is divided in three parts that address the main legal issues in the case. Initially, international and Inter-American precedent is referenced, and then mention is made of the possible arguments of the parties.

Part A concerns the substantive issues of the case. Part B deals with procedural and preliminary issues. Part C concerns the issues connected to the provisional measures. Finally, the authors have included, as an Annex, the Study on Sexual Orientation, Gender Identity and Gender Expression (some relevant terms and standards). This document was issued by the Unit for the Rights of Lesbians, Gays and Trans, Bisexual and Intersex persons with the aim of providing a baseline in terminology, and is therefore considered an interesting reference document for the Judges.

A. Substantive issues

A.1 Sexual Orientation and Gender Identity in the light of the principle of equality and non-discrimination and the right to private life and autonomy; A.2 Right to a family; A.3 The right to marry; A.4 Legal effects of same-sex unions in comparison those of heterosexual unions; A.5 Possible arguments of the injured party; and A.6 Possible arguments of the State.

A.1. Sexual Orientation and Gender Identity in the light of the principle of equality and non-discrimination and the right to private life and autonomy

1. Pursuant to the American Declaration on the Rights and Duties of Man, “[e]very person has the right to the protection of the law against abusive attacks upon [...] his private and family life”. The right to privacy has spatial and objective components, as the home or correspondence, which are intimately connected

High Court of Delhi at New Delhi[5] and the High Court of Fiji[6], is deeply connected with intimacy, sexual autonomy and self-realization and has been also recognized by the Human Rights Committee of the Organization of the United Nations,[7] the European Court of Human Rights,[8] and the Inter-American Commission. In particular, the Inter-American Commission has stated "[t]here is

5. Further, any measure interfering with privacy in a democratic society must answer to an "imperative social need"[13] In this sense, it is not sufficient that such a measure answer to preferences or the mores of some: it must be proven that it answers to a need the satisfaction of which is an appropriate manner to protect the rights of the majority and, at the same time, has been carefully weighed to

9. A difference in how the law treats persons that are in similar situations must be considered discriminatory unless it aims at an objective that is legitimate, is objective, and is reasonable. The American Declaration refers to different classifications in relation to which distinction of treatment cannot be carried out. They are race, sex, language, creed and "any other factor". The Commission finds reason to believe, as did the United Nations Human Rights Committee[18] and the European Commission on Human Rights[19], that the expression "sex" makes reference to sexual identity. In any event, sexual orientation would be included in the expression "other status" of the non-discrimination clause of the American Convention on Human Rights, a conclusion that is applicable to "any other factor" for the purposes of article II of the Declaration.

10. Therefore, distinctions of legal treatment based solely on a person's sexual identity cannot be legitimate. Lesbian, gay, trans, bisexual and intersex persons have the right to equal protection of the law; and the said protection extends to their sexual choices and behavior. Any measure affecting the enjoyment of their rights will therefore be scrutinized as to whether it is objective and reasonable, that is, whether it pursues a legitimate aim, is conducive to it, and its effects in the enjoyment of rights are not disproportionate.

11. Furthermore, lesbian, gay, Trans, bisexual and intersex persons have historically been the object of violence, discrimination and hatred. In 2012, the General