



Strasbourg, 22 August 2018

CDL-JU (2018)010
English only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**17th meeting of the Joint Council
on Constitutional Justice**

Mini-Conference on

“GENDER, EQUALITY AND DISCRIMINATION”

Lausanne, Switzerland

28 June 2018

**Development in the approach given by the Peruvian Constitutional
Court to gender identity**

REPORT BY

Mr Eloy ESPINOSA-SALDAÑA BARRERA
Constitutional Court Judge, Peru

1. Introduction

We must first set out the existing debate in the Peruvian Constitutional Court and Latin American high courts case law of the recent years regarding the concept of gender identity, which is the result of constant discrimination faced by the LGBT community in our countries, and specifically, by those who belong to the transsexual community. To this effect, some social-demographic studies in Peru show the following data:

- a. Of 450 trans women, only 17% had access to superior education. Only 3.8% had a formal job.
- b. In a sample of 118 trans women, only 28% of them had finished high school. Only 5.1% had finished college.
- c. In the year 2015, the Inter American Commission of Human Rights stated in its Violence Registry that in Latin America 80% of trans women die at age 35 or less due to murders and suicides due to violence.
- d. According to these statistics, currently, 40% of trans people hold no ID in Peru, which means that they rather not get an ID that does not show the name and gender that they socially use.

This data shows the difficult situation that transsexual people face in Latin America in general, and in Peru, where until recently, transsexualism was considered a pathology. Below, we will show the contributions of the Peruvian Constitutional Court in its effort to put an end to the violation to gender identity rights in our country.

2. Karen Mañuca case (File No. 02273-2005-PHC/TC)

This is the first gender identity case before the Peruvian Constitutional Court. The plaintiff filed a writ of Habeas Corpus before the National Register of Identity and Civil Status (RENIEC), for not issuing a duplicate of a national ID document and therefore, violating constitutional rights to life, identity, mental and physical integrity, free development, wellbeing, and personal freedom.

To justify her proposal, the plaintiff claimed that, in 1989, she filed a judicial complaint for correction of her name, which resulted in a Court Order rectifying the name of Manuel Jesús Quiroz Cabanillas to Karen Mañuca Quiroz Cabanillas in the birth certificate. With such a birth certificate, Karen Mañuca Quiroz Cabanillas was given a Peruvian ID document with the name of Karen Mañuca Quiroz Cabanillas. This document was lost by her and when trying to get a duplicate, it was denied.

The Peruvian Constitutional Court declared the claim valid and ordered RENIEC to issue the requested duplicate with the name of Karen Mañuca Quiroz Cabanilla.

We must take into account that this is the first time that the Peruvian Constitutional Court establishes the name change to a transgender person. However, it does not allow any other modification to the identity element, of vital importance to the transsexual community, as is the concept of gender. Controversial decision with some concept deficiencies, but without any doubt a great progress to the previous situation.

3. P.E.M.M. case File No. 00139-2013-PA/TC)

In the instant case, the plaintiff on August 23rd, 2010, in representation of P.E.M.M. files a request for the defense against the National Register of Identity and Civil Status (RENIEC) and the Public Prosecutor requesting gender change (from male to female) in her ID document and therefore, in her birth certificate.

We must point out that P.E.M.M. was a transgender person who had undergone surgery in Spain. To this effect, she claimed that it was not enough to have a female first name, but to also have her gender changed in her Peruvian ID document.

The Constitutional Court, in a previous setting, recognised that gender is part of the identity of a human being. However, it made a mistake stating that sex is the biological sex, the chromosomal or genetic sex which determines whether one is male or female. It also confirmed what was stated in the Karen Mañuca case with respect to the fact that the identification given to a newborn is what determines if that person is male or female for the rest of his/her life; and that among the factors that can contribute to the gender of a human being, only the anatomical gender is taken into consideration, which means, the genetic gender, which is part of the biological gender. A very questionable ruling containing serious mistakes.

With respect to the specific case, the Constitutional Court stated that the plaintiff supported her complaint in psychological reasons only and not in biological ones when she stated that she could not identify with the sex registered at RENIEC. Likewise, the Constitutional Court added that not feeling identified with the male biological gender or, in other words, feeling female, suggests a psychological pathology.

The Court at that time stated that taking a position in favour of the P.E.M.M. case with the consequence of approving same-sex marriage would mean extending the powers and tasks conferred to a constitutional judge since the functions that the Constitution grants to the Congress would be distorted. The Court therefore declared unfounded the complaint, allowing only the change of the first name of P.E.M.M., which confirmed what had been established in the Karen Mañuca case, considering, in addition, as valid positions, ones which were clearly questionable.

4. Romero Saldarriaga case (Exp. 00139-2013-PA/TC)

In this case, Rodolfo Enrique Romero Saldarriaga (also known as Ana Romero Saldarriaga), requested her name and gender to be modified in her national identification documents (birth certificate and national identification document) since she claimed that she had felt female since childhood.

She stated that having always used the name of her biological sex (Rodolfo Enrique), had not stopped her from identifying herself as female. She claimed having been subject to discrimination during her childhood due to her female behaviour, reason for which she decided to travel to Spain to undergo sex change surgery. However, despite now having a female appearance according to her gender identity, the name and gender in her ID documents had generated more discrimination.

4.1. Peruvian Constitutional Court ruling

We must first remember that in the P.E.M.M. case, the Constitutional Court had established as jurisprudential doctrine that gender was an unchangeable element, and that, consequently, it was not allowed to request its modification in ID documents. This was also associated with the idea that any alteration to the identity must have been understood as a "disorder" or "pathology".

However, the Constitutional Court with the current setting, considered in this new ruling, that the jurisdictional labour is subject to constant evolution to the effect that, rights, in time, need new protection scopes that had not been considered before. To this effect, the Peruvian

Constitutional Court established that it was necessary to modify the jurisprudential doctrine and to re-examine the scope of the identity right to ensure the right to access to justice.

Accordingly, the Constitutional Court noticed that there is a strong trend at the national and international level with respect to acknowledging that there is a gender identity right which is part of the constitutional protected content of the personal identify right. Consequently, the Constitutional Court overruled the guidelines which had been previously approved.

At a procedural level, it was established that all gender modification requests in the ID document filed after the publication of this ruling must follow the civil procedure. At this point, it must be pointed out that, should urgent protection be required, a constitutional defense petition could be filed. On the other hand, it was stated that in case of pending requests through constitutional defense petitions filed before the publication of this ruling, would tentatively, be re-conducted to follow the civil procedure. Should urgent protection be required, the constitutional defense petition would remain in effect.

4.2. Personal appreciation contained in my vote justification for case Romero Saldarriaga: how must this ruling ought to be understood in light of Elgo Rios case?

I must start by pointing out that I agree, in part, with the ruling to the extent that it recognises gender identity right, as well as the necessity to overrule the jurisprudential doctrine that considered transsexualism a disease, which at the same time, prevented people such as Ana Romero from requesting their national identity document with the gender with which the petitioner identified. To this effect, I consider that a systematic and according-to-American Convention interpretation of the Peruvian Constitution promotes the protection of gender identity right to every person in general, and specifically, to transsexual persons.

That said and as it is stated in my vote justification, I am of the opinion that the ruling should have been more comprehensive. To give you an example, I consider that the gender modification request by transsexual people must be addressed through an administrative procedure, like in Bolivia or Argentina. It is in this scenario that I urge that the competent authority allow the corresponding administrative authority (RENIEC) to address directly these kind of requests.

Another important point is to clarify that in the instant case, the issues of same-sex marriage and adoption were not addressed. Our Court has not yet expressed its position to this effect.

Likewise, I would like to point out that the Romero Saldarriaga case addresses the gender identity right issue and is not a sexual orientation case. They are different categories which must not be confused.

Finally, we ought to analyse an issue of great importance in the ruling which is thoroughly explained in my vote justification: equally satisfactory proceedings determined by the Court to solve this kind of claims. To this effect, I must point out that in the Ana Romero case, the name and gender modification through a constitutional defense petition has not been ruled out. On the contrary, in the instant case and according to the precedent-setting ruling in Elgo Rios, it was found that there is an existing, equally satisfactory, proceeding to protect Ana Romero Saldarriaga's claim. In any case, the Elgo Rios ruling states a procedural guideline about the grounds for filing a constitutional defense action which ought to be followed by all judges when evaluating its application in a case-by-case basis.

Accordingly, I consider it very important to make the difference between a claim wherein urgent protection is required from the procedure for requesting the protection of a right. Let us not forget that urgent protection of a right may be applicable in Constitutional or in ordinary court, taking into consideration the criteria established in the precedent-setting ruling in the Elgo Ríos case (which entails a case-by-case evaluation). This being the case, it is reasonable to grant this process with a substantive response for the plaintiff and determine that according to the Court's case law, there is an equally satisfactory proceeding to protect such a claim.

In any event, we must quickly remember the criteria established in the precedent-setting ruling in the Elgo Ríos case. This Constitutional Court has stated that pursuant to Article 5, literal 2 of the Code of Constitutional Procedure, the admissibility of the claim must be analysed from an objective and subjective standpoint. Therefore, and from an objective standpoint, attention must be given to the structure of the process, having to verify if the procedural regulation allows to establish that we are in front of an efficient and effective procedure.

On the other hand, and from a subjective standpoint, it must be analysed if for urgency considerations and in an exceptional manner, it is preferably to admit a constitutional defense petition in spite of the existence of a regulated ordinary proceeding. To this effect, it is necessary to assess if using the ordinary proceeding puts at risk the right affected in such a way that the grievances alleged may become irreversible (urgency as an irreparable threat).

With respect to the necessity of urgent protection, because of the importance of the right or harm involved, the Peruvian Constitutional Court has established that a constitutional defense petition must be admitted, in an exceptional manner, when the allegations clearly justify the urgency for the required jurisdictional protection, despite the existence of an equally satisfactory civil proceeding.

In this last context, we may state that gender and first name modification cases may be seen by the constitutional judge through a constitutional defense petition. Is it by any chance, a situation of extreme violence for discrimination reasons in a specific place and time not justify the necessity of urgent protection for protecting the gender identity of a transsexual person? As I mentioned before, the evaluation must be carried out on a case-by-case basis, as it is impossible to deny protection to transsexual people who are seeking to put an end to a constant violation of their gender identity.