—in both their public and private lives—the Court has provided a constitutional basis for the challenges to the Aadhar regime. The decision will also compel other justices to take seriously the privacy rights of LGBT Indians in future cases, including pending challenges to Section 377.[23] The case may also impact a pending case on interreligious marriage between a Hindu woman and Muslim man,[24] and a challenge to governmental bans prohibiting the possession, consumption, and distribution of beef.[25]

The case has even broader constitutional and political significance for India. With its ruling on privacy, the Court made clear that it appreciates the limitation on freedom of speech and the ability to dissent in India today. All six judgments interpret privacy as linked to the larger political project of democracy and fraternity. It is this judicial imagination of privacy that is important not only to an individual's self-determination but also to a constitutional democracy's endurance that makes *K.S. Puttaswamy* especially significant. By doing so, *K.S. Puttaswamy* is undeniably India's *Brown v. Board of Education* because of its potential to reshape India's national fabric.

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Inter-American Court of Human Rights—entitlement to rights of legal persons, indigenous and tribal communities, and labor union organizations—entitlement to rights—rights of natural persons, exercise and exhaustion of remedies through legal persons—treaty interpretation by regional human rights courts

ADVISORY OPINION OC-22/16. Series A, No. 22. *At* http://www.corteidh.or.cr. Inter-American Court of Human Rights, February 26, 2016.

On February 26, 2016, the Inter-American Court of Human Rights (Court) issued an advisory opinion requested by the Republic of Panama (Advisory Opinion).[1] The request stemmed from "doubts among States" as to whether "legal persons, being legal fictions, are not as such entitled to rights" (Request) (para. 2). The Court unanimously held that legal persons are not entitled to rights under the American Convention on Human Rights (Convention) because Article 1.2 of the Convention establishes rights only in favor of natural persons.[2] The Court, also unanimously, reiterated that indigenous and tribal communities are entitled to rights under the Convention. By majority vote, the Court held that labor union organizations are

[23] Navtej Singh Johar and Ors v. Union of India, Ministry of Law and Justice (Sup. Ct. India 2016).
[24] Shafin Jahan v. State of Kerala (Sup. Ct. India 2017) (case being heard at present).
[25] Akhil Bharat Krishi Goseva Sangh v. State of Maharashtra (Sup. Ct. India 2016).

[1] Advisory Opinion OC-22/16, Inter-Am. Ct. H.R. (ser. A) No. 22 (Feb. 26, 2016), *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_22_esp.pdf (in Spanish). Translations are by the author. The Request listed Articles 1.1, 8, 11.2, 13, 16, 21, 24, 25, 29, 30, 44, 46, and 62.3 of the American Convention on Human Rights and Article 8.1.a and b of the Protocol of San Salvador.

[2] American Convention on Human Rights, Nov. 22, 1969, 1144 UNTS 123, *at* http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm.

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entitled to rights under the Protocol of San Salvador (Protocol).[3] The Advisory Opinion is most significant for its finding regarding labor union organizations and for its analysis of how general international law relates to various aspects of the Inter-American system.

The Court began by considering the applicable law, reasoning that

> the *corpus iuris* of international law of human rights is composed of . . . rules expressly established in international treaties or contained in customary international law . . . as well as general principles of law and . . . norms of general character or of *soft law*, which serve as guidance for the interpretation of the former. (Para. 29)

Furthermore, the Court affirmed that two obligations arise in connection with Article 1.1 of the Convention. Under Article 1.1, states must adopt "measures necessary to make human rights effective . . . also with respect to legal persons which find themselves under their jurisdiction." Relatedly, legal persons are

> bound to respect, in the respective internal or national order, human rights and . . . the relevant states may see their international responsibility engaged to the extent that they do not guarantee their free and full exercise by any natural person subject to their jurisdiction. (Para. 31)

The Court then proceeded to address the questions presented in the Request.

First, the Court examined the entitlement of legal persons to rights in the Inter-American system by applying the Vienna Convention on the Law of Treaties (Vienna Convention or VCLT), which "contains the general and customary rule of interpretation of international treaties" (para. 35). The Court reiterated that the parties to the American Convention intended to give the term "person" in Article 1.2 a "special meaning" under VCLT Article 31.4. The terms "person" and "human being" must accordingly be understood as synonymous (para. 37). It follows "from the literal reading of Article 1.2 of the Convention that other types of persons which are not human beings are excluded from the protection afforded by the treaty" (para. 38). To conclude, "legal persons within the framework of the American Convention are not holders of rights established by it and, therefore, cannot submit petitions nor directly appear, in the capacity of alleged victims and invoking human rights as their own, before the Inter-American system" (*id.*).

The Court then considered whether there are alternative interpretations of Article 1.2 of the Convention, applying "all the other interpretation methods established in Articles 31 and 32 of the Vienna Convention" (para. 39). The Court noted that the Convention's object and purpose is exclusively the protection of human beings (para. 43). The Court reasoned that, as shown by the Preamble to the Convention and the opening statements of the American Declaration of the Rights and Duties of Man,[4] "the concept of legal persons" had not been taken into account when these two instruments were drafted (para. 47). In both instruments, the Court noted, "every person" always refers to human beings (para. 48).

[3] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador), Nov. 17, 1988, 28 ILM 1641, *at* http://www.oas.org/juridico/english/treaties/a-52.html.

[4] American Declaration of the Rights and Duties of Man, May 2, 1948, *at* http://www.oas.org/en/iachr/mandate/Basics/declaration.asp.

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The Court turned to the protection of legal persons in other human rights systems and in the internal law of the parties to the Convention (para. 49). The Court called this analysis "evolutionary interpretation," which it deemed consistent with Article 29 of the Convention and the VCLT (*id.*). In particular, the Court reasoned, VCLT Article 31.3

> authorizes the use for interpretation of means such as agreements or practice or relevant rules of international law that States have expressed regarding the subject of the treaty, which are some of the methods that relate to an evolutionary view of treaty interpretation. (*Id.*)

The Court asked whether "a recurring practice" existed in "the manner in which entitlement to rights and access of legal persons . . . are regulated" (para. 50). The Court's aim was to establish "similarities or differences with the Inter-American system, which may help determine the scope or meaning given to a similar norm or to detect the treaty's peculiarities" (*id.*).

The Court accordingly examined the European Convention on Human Rights (European Convention) and other human rights systems. The Court noted that Article 34 of the European Convention, which refers to "any person, non-governmental organization or group of individuals," has been relied upon by the European Court of Human Rights to entertain petitions of "legal persons," including private entities established for profit (paras. 51, 53). The Court considered whether legal persons should be afforded protection in the Inter-American system, given that Article 44 of the American Convention contains the phrase "any person or group of persons, or non-governmental entity," which is similar to the relevant phrase contained in Article 34 of the European Convention (paras. 54–55). The Court rejected these arguments, reasoning that, unlike the European Convention, the Inter-American system distinguishes between petitioner and alleged victim. Under Article 34 of the European Convention, a petitioner must also be one "claiming to be the victim of a violation . . .," but Article 44 of the American Convention contains no such requirement. Thus, Article 44 of the American Convention furnishes no basis "to infer an authorization whereby legal persons may be alleged victims" (paras. 55–56). As for the universal system, the Court noted that only Article 2.1.a of the Convention on the Elimination of All Forms of Racial Discrimination, which refers to "persons, groups of persons or institutions," might be relevant (para. 60). Since none of the foregoing treaties define "person," the Court added, Article 1.2 of the Convention is a peculiarity of the Inter-American system (para. 61). In conclusion, there is no "clear trend toward granting rights to legal persons or permitting them to have access as victims in individual petition proceedings" (para. 62).

Turning to the practice of the parties to the Convention, the Court observed that it "has used national norms or jurisprudence of domestic courts" and that "the European Court has used comparative law as a mechanism to identify the subsequent practice of States" (para. 63). The Court took note of the position of Argentina, Colombia, Guatemala, and Mexico, whereby "Article 1.2 of the Convention does not entitle legal persons to rights" (para. 66). The Court concluded that, since "not all States acknowledge in the same form and to the same extent" entitlement to human rights and access to remedies of legal persons, and the practice in question corresponded to "the position which the States hold in their internal law," "it is not possible to modify the scope of Article 1.2 of the American Convention by means of this interpretative method" (para. 67).

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Second, the Court addressed the position of "indigenous and tribal communities and labor union organizations" (paras. 27, 71). The Court reiterated that "indigenous communities are entitled to rights protected by the Inter-American system and can appear before it in defense of their rights and those of their members" (para. 72). The Court observed that the entitlement of indigenous and tribal communities in both international and domestic law "has not only been accorded to their members individually but also to the communities as collectives" (para. 82).

The Court then interpreted Article 8.1.a of the Protocol, which relates to labor union organizations. Noting first that Article 8.1.a is ambiguous as to whether it confers upon labor union organizations entitlement to rights, the Court analyzed the ordinary meaning of its terms. The Court observed that Article 8.1.a "makes an apparent distinction between workers, on the one hand, and labor unions, federations and confederations, on the other hand." The Court added that, under Article 8.1.a, states shall ensure "the right of workers to organize labor unions" and "as an extension of this right, 'shall permit'" that labor unions, federations, and confederations operate freely (para. 89). The Court reasoned that "free operation implies . . . the capacity to carry out . . . acts." This capacity, in turn, "implies the existence of the legal personality of labor unions, federations and confederations." Thus, "the use of the term 'permit' . . . presupposes that labor unions, federations and confederations constitute legal persons distinct from their associates" (para. 91). The phrase "as an extension," the Court reasoned, affords workers broader rights than their mere ability "to organize labor unions and to affiliate with the union of their choice" (para. 92).

The Court also relied upon Article 45.c of the Charter of the Organization of American States (OAS Charter) and the "*pro persona* principle." Article 45.c provides for "recognition of the juridical personality of associations and the protection of their freedom and independence." Article 29 of the Convention contains the *pro persona* principle, which provides that "[n]o provision of this Convention shall be interpreted as: . . . excluding or limiting the effect that the American Declaration . . . and other international acts of the same nature may have" (*cf.*, para. 42). Under the *pro persona* principle, the Court reasoned, Article 8.1.a of the Protocol has to be interpreted in the most favorable manner, namely without "excluding or limiting the effect" which the OAS Charter may have, which supports the holding that labor unions organizations are entitled to rights (paras. 94, 95, 97). The Court further resorted to the preparatory works of Article 19 of the Protocol. Article 19.6 establishes that the "system of individual petitions" is applicable if violations of Articles 8.1.a and 13 occur, provided that such violations are directly attributable to the states parties to the Protocol. Although the preparatory works relating to Article 19.6 furnished no basis to infer any entitlement to rights in favor of labor unions organization, they established an "intention to guarantee the rights of labor union organizations as rights of immediate enforcement through the Inter-American system" (para. 100). This followed, most notably, from the reference in the preparatory works to "associations" instead of "association," which "implicitly describes the two types of associations . . . of workers and of labor union organizations" (*id.*).

Third, the Court examined the "protection of human rights of natural persons in their capacity as members of legal persons" under the Convention (paras. 27, 106). The Court noted that "each right implies a distinct analysis as to its content and form of realization." The Court reasoned that, "while some rights are directly related to the vital functions of human beings or to the physical or psychological functions of the human body, such as

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the right to life . . . others are linked to the relation between human beings and society," such as "the rights to property, association, nationality" (para. 110). The Court also distinguished between "the scope of rights of each type of person," as exemplified by the distinction between a legal person and its shareholders (para. 118). The Court added, referring to Article 29.a of the Convention, that "the mere existence and action of the legal person in which the natural person" participates, cannot constitute an obstacle to the Court's jurisdiction (para. 119). Article 29.a provides that

> [n]o provision of this Convention shall be interpreted as . . . permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein.

The Court concluded that "it is not viable to establish a single formula which serves to recognize the existence of the exercise of rights of natural persons through their participation in a legal person" (para. 120).

Lastly, the Court addressed the "exhaustion of internal remedies by legal persons" (paras. 27, 121). The Court reasoned that "Article 46.1.a) of the Convention makes no distinction between natural persons or legal persons, as it focuses exclusively on exhaustion of remedies" (para. 133). Internal remedies may be deemed exhausted under Article 46.1.a) if: (1) the internal proceedings commenced were the "available, appropriate and effective" remedies for the protection of rights of a natural person, even if commenced by a legal person; and (2) "the claims which the legal person submitted in the internal proceedings and the alleged violations argued before the Inter-American system" coincide (para. 136). Since, under the *effet utile* rule, "the Court cannot interpret Article 46.1.a) in a manner which limits access to the Inter-American system," it would be inappropriate "to compel an alleged victim to use nonexistent remedies, when it is proven that the appropriate and effective remedy was the one exhausted by the legal person" (para. 133). Thus, "resort to remedies by legal persons does not *per se* imply that internal remedies have not been exhausted by the physical persons holding conventional rights" (para. 139).

* * * *

The Court found, for the first time, that labor union organizations are entitled to rights under Article 8.1.a of the Protocol. The Court had previously held that freedom of association of labor union organizations falls within the "*corpus iuris* of human rights,"[5] and, in particular, that states are bound under Article 8.1.a to allow labor union organizations to operate freely, without having ever examined their position as rights holders, independently of their members.[6]

The Court's other findings do not depart from its previous positions, although some of its reasoning is significant. The Court had previously reasoned that the Convention only accords

[5] Baena Ricardo y Otros v. Panama, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 72, para. 158 (Feb. 2, 2001), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_72_esp.pdf (in Spanish).

[6] Huilca Tecse v. Peru, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 121, para. 74 (Mar. 3, 2005), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_121_esp.pdf (in Spanish).

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rights to human beings,[7] and, accordingly, that it does not confer any rights upon, for instance, "institutions such as the Armed Forces."[8] The Advisory Opinion, thus, set out in general terms the corollary of the Court's prior analysis, which already confined the scope of conventional rights to natural persons. Previously, the Court had only addressed the position of specific types of legal persons, but not the question of entitlement to rights by legal persons as a whole.[9] The Court had also held that indigenous and tribal communities are entitled to rights independently of their members.[10]

The Court analyzed the applicability of the general rules set out in VCLT Articles 31 and 32 within the Inter-American system (paras. 35, 36). The Court's invocation of these general rules supports the claim that "regional human rights courts" do not "call into question the applicability of the general rule contained in Article 31 VCLT as a basis for their treaty interpretation."[11] Furthermore, until recently, various international courts and tribunals, including the Court, had not addressed the question of treaty modification by subsequent practice.[12] The Court had addressed the role of subsequent practice as a means of interpretation,[13] but not of modification. This absence of express recognition of treaty modification is consistent with VCLT Article 31.3.b, whereby subsequent practice is an interpretation means only, alongside a treaty's "context."[14] The Court, in its finding that "it is not possible to modify the scope of Article 1.2," seems to have accepted the possibility of treaty modification by subsequent practice. The Court's rejection of treaty modification in this case rested solely on its conclusion that the practice it examined was insufficiently uniform and reflected a position held in domestic law only (para. 67).

The Court's analysis of the position of states and legal persons regarding the protection of conventional rights touched upon broader questions at the intersection of state responsibility

[7] Granier y Otros v. Venezuela, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 293, para. 19 (Jun. 22, 2015), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_293_esp.pdf (in Spanish).

[8] Usón Ramírez v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 207, para. 45 (Nov. 20, 2009), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_207_esp.pdf (in Spanish).

[9] Perozo y Otros v. Venezuela, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 195, para. 399 (Jan. 28, 2009), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_195_esp.pdf (in Spanish).

[10] Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Inter-Am. Ct. H.R. (ser. C) No. 245, para. 341 (2, 4) (Jun. 27, 2012), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_245_esp.pdf (in Spanish).

[11] Int'l Law Comm'n Study Group on Treaties over Time, Report on the Work of the Sixty-Third Session, para. 344(3), UN Doc. A/66/10 (2011), *at* http://legal.un.org/ilc/reports/2011; *but see*, Jan Klabbers, *Virtuous Interpretation*, *in* Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on, at 34 (Malgosia Fitzmaurice, Olufemi Elias & Panos Merkouris eds., 2010) (questioning the usefulness of the rules in VCLT Articles 31 and 32 to justify a choice among competing interpretations of the same text).

[12] Int'l Law Comm'n, Second Report by Georg Nolte, Special Rapporteur, Sixty-Sixth Session, para. 136, UN Doc. A/CN.4/671 (2014), *at* http://legal.un.org/docs/?symbol=A/CN.4/671.

[13] Artavia Murillo y Otros ("Fecundación In Vitro") v. Costa Rica, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 257, para. 245 (Nov. 28, 2012), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_257_esp.pdf (in Spanish).

[14] Second Report by Georg Nolte, *supra* note 12, para. 166; *but see* para. 122 (discussing the claim that customary law of treaties not codified in the VCLT allows for modification by agreed subsequent practice) and para. 142 (concluding that certain international courts and tribunals have accepted that "absent indications in the treaty to the contrary, the agreed subsequent practice of the parties may lead to certain limited modifications of a treaty . . .").

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and "business and human rights."[15] According to the Court's analysis, if a legal person operates within a state's jurisdiction, the state has obligations relating to the legal person's relevant conduct, under primary and secondary rules (para. 31). Under primary rules, the state is bound to adopt measures regarding the legal person, particularly in order to prevent that the legal person engages in any conduct contrary to human rights. Under secondary rules, the state engages its responsibility if it fails to guarantee the exercise of human rights by natural persons under its jurisdiction, including when the conduct contrary to human rights is committed by the legal person, and even if such conduct is not attributable to the state. While the legal person's obligations relating to human rights arise only under the state's internal law, the responsibility of the state, if any, remains to arise under international law. The Court's statements on secondary rules reiterate its position on international responsibility of states for omission.[16]

Unlike issues of state responsibility, the field of "business and human rights" has only recently begun to be addressed by international courts and tribunals. Latterly and most prominently, the arbitral tribunal in *Urbaser v. Argentina* reasoned that an investor's "obligation to abstain" from breaching human rights arises under international law.[17] The *Urbaser* tribunal distinguished between positive and negative human rights obligations of investors and posited that negative obligations exist under international law while positive obligations would exist only under domestic law. The Advisory Opinion, by contrast, characterized human rights obligations of legal persons as arising under domestic law, without drawing any distinction between positive and negative obligations. The Court's analysis might prove more suitable to address "business and human rights" issues than the *Urbaser* tribunal's approach, particularly because the Court's analysis is not conditioned upon ascription of any obligation to private entities under international law.

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[15] United Nations Human Rights Council, Guiding Principles on Business and Human Rights, at 3, UN Doc. A/HRC/RES/17/4 (June 16, 2011), *available at* http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. The Court first noted the Guiding Principles in Kaliña and Lokono Peoples v. Suriname, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 309, para. 224 (Nov. 25, 2015), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_309_ing.pdf.

[16] Velásquez-Rodríguez v. Honduras, Merits, Inter-Am. Ct. H.R. (ser. C) No. 4, paras. 170, 172 (Jul. 29, 1988), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf (affirming respectively, that a state is responsible "for the acts of its agents . . . and for their omissions," and "not because of the act itself, but because of the lack of due diligence to prevent the violation").

[17] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, para. 1210 (Dec. 8, 2016), *available at* http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C255/DC9852_En.pdf.

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