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The human right to respectfor sexual orientation and gender identity in the Caribbean and Latin America: Currentsituation and prospects

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Instituto Interamericano de Derechos Humanos

CON EL APOYO DE:

THE HUMAN RIGHT TO RESPECT FOR SEXUAL ORIENTATION AND GENDER IDENTITY IN THE CARIBBEAN AND LATIN AMERICA:

CURRENT SITUATION AND PROSPECTS

The human right to respect for sexual orientation and gender identity in the Caribbean and Latin America

Current situation and prospects

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Inter American Institute of Human Rights
Instituto Latinoamericano de las Naciones Unidas para la Prevención del Delito y el Tratamiento del Delincuente
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CHAPTER 1

1. INSTITUTIONAL PRESENTATIONS

A. Inter-American Institute of Human Rights

As part of the commemoration of the fortieth anniversary of the Inter-American Institute of Human Rights (IIHR), it is a great pleasure to offer this work to people interested in human rights, particularly those of sexually diverse people. In it we culminate an investigation process that lasted for more than a year in which, the persistence of offenses criminalizing relationships between people of the same sex in the English-speaking Caribbean was analyzed first, and then it ventured into the study of other criminal figures (or related) as well as practices and procedures that violate the rights of those who are part of LGTBI groups in Latin America.

The Inter-American Human Rights System (ISHR) has clearly established the inadmissibility of discrimination based on sexual orientation or gender identity. The Inter-American Commission on Human Rights has stated, both in the resolutions issued in individual cases and in the works and reports of the Rapporteurship on the Rights of LGTBI Persons; it has also been determined by the Inter-American Court of Human Rights in judgments as relevant as those of the cases Atala Riffo and daughters v. Chile and, more recently, Azul Rojas Marín et al. vs. Peru and in the advisory opinion "Gender identity and equality and non-discrimination against same-sex couples", OC-24/17, of particular importance in the matter.

However, as shown in this publication, LGTBI people continue to suffer discrimination, persecution and violence in Latin America and the Caribbean, phenomena that sometimes arise under the protection of primary or secondary criminal laws and, sometimes, by practices that are intended to be justified with legal or pseudo-legal considerations. It is necessary to prove that such norms and practices are contrary to the obligations acquired by the States within the framework of the Inter-American Human Rights System, the mere existence of which may imply their international responsibility. In this context, this work -which is important in itself- also seeks to

raise awareness about the need to modify or repeal these regulations and stop these practices in order to be aligned with the standards of the ISHR.

For the IIHR, this investigation is twice as significant. On the one hand, it reaffirms the institutional commitment to the generation of doctrine derived from the evolution of the ISHR from the dynamic interpretation of the instruments and rights of its protection bodies. On the other hand, it reaffirms that the Institute, as established in its Strategic Framework, seeks to promote the recognition and appreciation of diversities.

The United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD), a close and supportive institution, has been an invaluable partner in completing this research; for its part, the International Bar Association (IBA) was an essential support to develop it. To both entities we express our gratitude and recognition.

Furthermore, the IIHR wishes to highlight the decisive work of the researchers headed by Eugenio Raúl Zaffaroni and Leonardo Raznovich, with the support of Lucas Ciarniello Ibáñez and Selene Pineda, and that of all the people who, from their geography or expertise, nurtured the findings now featured in this book. Unquestionably, a great team for the development of this process.

Likewise, we underline the importance of the experts' participation in virtual activities that made it possible to share, corroborate or rectify the results of the investigation at the beginning, and we record our gratitude for their commitment and the valuable contributions that made it possible for this publication to be released.

Finally, the IIHR wishes to dedicate this work to the courageous struggle of thousands of people who face daily acts and norms that pretend to deny them their rights to be and to love: to the adolescents and young people who experience incomprehension or harassment in their homes or educational centers, to those who suffer it in the private or public spheres of their workplaces; to those who must survive it on the street, simply due to being different... In short, to all the people who struggle to overcome derision and face the threat of violence on a daily basis simply because of their gender identity or sexual orientation.

San José, Costa Rica, December 2020.

José Thompson J.

Executive Director.

B. United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders.

The Latin American Institute of the United Nations for the Prevention of Crime and the Treatment of Offenders (ILANUD), is pleased to present this publication, the result of a strategic alliance between our institution, the Inter-American Institute of Human Rights (IIHR) and the International Bar Association (IBA) promoted with the purpose of conducting an investigation to prove the situation of rights of LGTBI people in the region, and advocate for dialogue and reflection spaces about the journey already taken to overcome the structural discrimination that affects these populations, as well as on pending tasks and the actions necessary to attend to them.

This project would not have been possible without the dedication, support and leadership of the IIHR director, Joseph Thompson, the IBA president, Horacio Bernardes Neto, the emeritus director of ILANUD, Elías Carranza, the research coordinators Raúl Eugenio Zaffaroni and Leonardo Raznovich, and the research team made up of Lucas Ciarniello, Carla Moore, Hilda Orsolya Szotyori, Ana Selene Pineda Neisa and Miranda Cassino. To all of them, as well as to those who participated and enriched the different stages of this project, I would like to extend our heartfelt gratitude on behalf of ILANUD.

Likewise, I would like to take this opportunity to pay a well-deserved tribute, through this publication, to all the people who suffer different forms of violence and exclusion due to their sexual orientation and gender identity, and to those who fight to claim their right to a life free of violence and discrimination.

Probably the most significant contribution of these pages focuses on the critical analysis carried out, from a fundamentally legal perspective, on criminalization and the various forms of discrimination that affect these populations. This analysis draws on some of the main findings evidenced in the aforementioned research undertaken in Latin America and the Caribbean, as well as the reflections and questions of representatives of civil society, academia, activists, representatives of social organizations and of public institutions in the region, who participated in different stages of this project.

The following sections also review some advances in the field of the Inter-American System, mainly based on the jurisprudential development of the Inter-American Court of Human Rights (hereinafter I/A Court HR) on sexual orientation and gender identity as prohibited categories of discrimination. These advances prove, on the other hand, that the necessary transformations require greater political will to guarantee compliance with said judicial

decisions, a particularly relevant issue if one takes into account that these decisions not only affect the specific case, but must be understood as guiding referents for the States in the region in matters of human rights protection. In this regard, it is worth highlighting the importance of strengthening conventionality control, understood as the obligation that States have to verify the conformity of national norms and practices with the American Convention on Human Rights and the jurisprudence of the Inter-American Court.

For 45 years, ILANUD has been working in Latin America and the Caribbean in the areas of crime prevention and criminal justice, through training activities, technical assistance, and research projects aimed at the enforcement of the framework of rights and obligations of the United Nations in complex contexts, from a human rights perspective. In the development of our mandate, this publication reflects our commitment to safeguarding the fundamental rights of all populations in contact with the judicial systems and draws attention to the historical debt of the region in terms of the need to adjust legal frameworks to eliminate the norms that criminalize and discriminate directly and veiled against populations that do not conform to the dominant heteronormative standards in our societies.

The challenges are not just a few and unfortunately, the recognition of fundamental rights through international instruments is not enough. Preventing violence, discrimination and criminalization, that disproportionately affects certain segments of the population in our region, exceed mere regulatory changes and the scope of a criminal policy at the national level. These are undoubtedly essential tasks, but it is also necessary to articulate a social policy that, at the same time, addresses the profound inequality that limits sustainable human development in our societies and that seriously affects populations that face multiple conditions of vulnerability. Overcoming the gap between the formal recognition of rights and their fulfillment must be a commitment that we must assume from our role in society and as citizens. Ultimately, only social and democratic mobilization can achieve the changes that our communities require.

All in all, we trust that this publication will provide inputs to promote the necessary changes in our countries, to move towards a fairer and inclusive society, in which we leave no one behind regarding the guaranteeing of their fundamental rights.

San José, Costa Rica, December 2020.
M.Sc. Douglas Durán Chavarría.
Director ILANUD

C. International Bar Association

It is a true honor and privilege for the International Bar Association (IBA) to be able to present the publication of the final report of the investigation "*The human right of respect for sexual orientation and gender identity in the Caribbean and Latin America - Current situation in the region and perspectives."* This research and the publication of its results is the result of a strategic alliance between our association, the Inter-American Institute of Human Rights (IIHR) and the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD).

The IBA was born from the conviction that an organization made up of the bar associations of the world could contribute to global stability and peace through administration of justice and the strengthening of the rule of law. In the 70 years since its creation, the IBA has evolved from an association composed exclusively of bar associations and law societies, to one that incorporates individual international lawyers and entire law firms. Currently, the IBA It is made up of 190 bar associations and societies covering more than 170 countries which include 80,000 attorneys,the majority from the world's leading law firms. Over these decades, the IBA has developed considerable experience in providing assistance to the global legal community and, through its members, has influenced the development of international law reform. It is in this spirit that the role and decision of the IBA to join the alliance, that has allowed us to carry out this investigation successfully, is framed.

In this framework, the investigation was launched in 2017 with a specific objective that was to contribute to the elimination in the American continent of the colonial remnants of legislation that criminalizes consensual sexual activities between two adults of the same sex. To this end, the investigation aim to evidence said legislation and other institutional mechanisms of discrimination and violence against LGTBI persons or persons perceived as such and evaluate the social impact of these mechanisms. The final report far exceeds this goal. The collected material shows serious violations of human rights that affect LGTBI people in the region. The report proves that this minority of people face not only situations of criminalization, concentrated in the Caribbean region, but is also a victim of structural discrimination throughout Latin America including the Caribbean region. The IBA is proud to be able to present a report that will undoubtedly become a source of resources for the effective fight, guiding actions in domestic law and, eventually the international route, not only

against criminalization but also structural discrimination that affects LGTBI people in Latin America and the Caribbean.

This project would not have been possible without the dedication and work of the two coordinators of the investigation, the judge of the Inter-American Court of Human Rights Eugenio Raúl Zaffaroni and IBA officer Leonardo J Raznovich. The effort to bring to fruition a project of such magnitude is a merit that must be recognized in the same way so that those who with their work and intervention participated and enriched the different stages of this project. On behalf of the IBA I extend the most sincere recognition and gratitude to all of them.

Finally, I would like to share in my own name and that of the IBA, the most affectionate greetings and transmit our support to all LGTBI people in Latin America and the Caribbean who still suffer the horror of criminalization at the hands of governments that inherited those laws from the British Empire and that in the third millennium they absurdly resist to abolish them. Our greeting and support is also directed to those who suffer other forms of violence and exclusion due to their sexual orientation and gender identity, even if they are less archaic and violent, do not cease to constitute an intolerable affront to the human dignity to every nation that claims to be governed by the rule of law.

Sao Paulo, Brazil, December 2020
Horacio Bernardes Neto
President of the International Bar Association

2. Introduction

This report compiles the results of an investigation carried out during the years 2017 and 2019 in Latin America and the Caribbean, based on a joint effort between the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD), the Inter-American Institute of Human Rights (IIHR) and the International Bar Association (IBA). The collection of information from the countries of the English-speaking Caribbean was assumed and coordinated by Dr. Leonardo Raznovich[1], while the coordination for the countries of Latin America, as

1 Dr. Leonardo Raznovich was a professor and director of the law and dispute resolution program in the United Kingdom and a law professor in the Cayman Islands, Co-Vice Chair of the IBA LGTBI Law Committee, and is currently a lawyer in England and Wales and the IBA Rapporteur on LGTBI matters for the Caribbean.

well as the writing of the analysis of the information collected that is presented in Chapter 2 , was in charge of Dr. Eugenio Raúl Zaffaroni[2].

The purpose of the project consisted of collecting data to establish the modalities assumed by violations of the right to equality and the principles of non-discrimination against LGTBI[3] people throughout the region, and to highlight some of the reasons why they have this character. At the same time, the project proposed to account for the legislative, administrative, political and social efforts that seek to avoid these Human Rights violations and advance towards equality for LGTBI people, evaluating their effectiveness, as well as the difficulties they face in this part of the world. In the particular case of the English-speaking Caribbean, the investigation sought to identify the legislative figures that criminalize relations between people of the same sex and their eventual judicial or administrative enforcement.

Through the reflective analysis of the material compiled throughout the investigation, an estimate of the serious human rights violations that affect LGTBI people in the region, was achieved. Thus, it was possible to identify some of the critical obstacles that disproportionately restrict the rights' guarantee of populations that face situations of criminalization and structural discrimination in Latin America and the Caribbean, in order to provide inputs to guide eventual advocacy actions that allow the removal of barriers that restrict the full exercise of these people's rights.

Likewise, it was possible to account for some of the contradictions between the internal norms of some countries and the jurisprudence and recommendations of the bodies of the Inter-American System for the protection of Human Rights, as well as with the framework of rights and obligations of the United Nations System. And, finally, it was possible to suggest a few paths or strategies to overcome these unfortunate situations, taking into account the difficulties that could arise at the time of their implementation.

2 Dr. Eugenio Raúl Zaffaroni was director of ILANUD and Minister of the Supreme Court of Justice of the Nation (Argentina). He is currently a Judge of the Inter-American Court and Emeritus Professor of the UBA. He has received 45 Doctor *Honoris Causa* degrees from European and American Universities.

3 Without prejudice to the different categorizations that exist to name the group of lesbian, gay, bisexual, trans and intersex people, for the purposes of this Study, allusion will be made in some sections to the acronym LGTBI when referring to these populations. The foregoing, in accordance with the provisions of the Inter-American Commission on Human Rights when creating the Special Unit for the rights of lesbians, gays, trans, bisexual, and intersex persons. This is in no way intended to homogenize these populations or to ignore the multiplicity of terms and identities with which different people can feel recognized or identified.

It should be taken into account that throughout this report there will be references to cases and countries that are always indicated as an example, it is not intended to quantitatively account for all human rights violations of LGTBI persons in the countries of the region. On the contrary, this exemplification mode used throughout the report, was sufficient for the objectives of this work consisting of reflections, conclusions and recommendations to avoid or putting an end to these violations and, more generally, contribute to a cultural change that tends to eliminate or, at least, to prove and try to mitigate the prejudices that feed discrimination against its victims, still strongly in force in the region.

3. About the authors

Eugenio Raúl Zaffaroni:

Doctor in Legal and Social Sciences from the National University of the Littoral and lawyer from the Faculty of Law and Social Sciences of the University of Buenos Aires, both Argentine institutions. He is Emeritus Professor at the University of Buenos Aires and has received *Honoris Causa* Doctorates from 46 European and American universities.

He was appointed Judge of the Inter-American Court of Human Rights in 2015 for the period 2016-2022, and began his functions on January 1st, 2016. He was Minister of the Supreme Court of Justice of the Argentine Nation (2003-2014), and served on the judiciary for more than two decades. He was elected Representative of the City of Buenos Aires and President of the "Frepaso" Coalition (1997-2000), President of the Drafting Commission of the Constituent Convention (1996) and Third Vice-President of the Drafting Committee of the National Constituent Assembly .

He served as Director General of the United Nations Latin American Institute for Crime Prevention (ILANUD) and as Attorney General for the province of San Luis. He also served as Controller of the National Institute for the Fight against Discrimination, Xenophobia and Racism.

Miranda Cassino:

Graduated in Political Science from the University of Buenos Aires, Master in Human Rights from the National University of Tres de Febrero, Argentina, and PhD candidate in Social Sciences from the National University of Quilmes (Argentina). She works as a postgraduate professor on gender and violence issues at the National Universities of Quilmes and Lanús. She is a researcher at the Center for Studies in History, Culture and Memory (Observatory of Memory, Gender and Human Rights) of the National University of Quilmes.

She worked for several years at INADI (National Institute Against Discrimination), in particular in the project for the design and implementation of the National Plan Against Discrimination (OHCHR-PNUD-INADI in Spanish). She is a consultant specialized in human rights education and issues related to various forms of discrimination and racism. She currently works as an education advisor at the National Human Rights Secretariat.

Lucas Ciarniello Ibañez:

Lawyer from the National University of Rosario (Argentina), Master in Forensic Sciences from the University of Valencia (Spain), and PhD candidate in Criminal Sciences at the University of San Carlos of Guatemala. He works as a specialized advisor in the National Directorate of Investigation of the disappearance of children as a result of the actions of State terrorism, National Commission for the Right to Identity, National Human Rights Secretariat.

He worked as a specialized advisor on issues of Institutional Violence and responsible for the Unit of Registration of Acts of Torture, Forced Disappearance of Persons and other Serious Human Rights Violations, of the National Directorate of Legal Affairs on Human Rights of the National Human Rights Secretariat. He has served legally representing the National Human Rights Secretariat, the Civil Association Abuelas de Plaza de Mayo and victims of State terrorism in Argentina, as plaintiff, in cases where crimes against humanity were investigated and tried in the localities from Rosario, San Nicolás and Paraná (Argentina).

Selene Pineda:

Lawyer from the Pontificia Universidad Javeriana (Bogotá, Colombia), Master's Degree in Latin American Studies from the Autonomous University of Madrid, Spain, and a fellow from the Carolina Foundation. Since 2010 she has been linked to the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD). She currently works as a researcher and project coordinator at said Institution, which is based in San José, Costa Rica. Her lines of work are fundamentally focused on criminal justice systems, penitentiary systems and populations that face particular conditions of vulnerability, from a gender and human rights perspective.

In her professional career, she has experience as a consultant in different institutions, including: the Inter-American Institute of Human Rights (IIHR), the University for Peace, created at the request of the United Nations, the Center for Justice and International Law (CEJIL), particularly on issues related to human rights and access to justice.

Leonardo Raznovich:

Lawyer from the University of Buenos Aires in 1995 (Argentina), he also obtained a Master of Laws (LL.M.) from Harvard University Law School in 1997 and finally his PhD from Oxford University in 2003. He is currently practicing as a bar lawyer in England and Wales after being called and admitted by the Bar of those jurisdictions (Honorable Inner Temple Society) in 2010. Since 1995, he has acquired experience in civil law and common law jurisdictions in international arbitration and litigation in the areas of public and private law with an emphasis on human rights and civil liberties.

He was Director of Law (2008-2010) and Professor (until 2012) at the University of Canterbury Christ Church in the UK and served as a Professor at the Truman Bodden School of Law in the Cayman Islands until 2015. He has also been a Lovells Visiting Professor of Anglo-American Law (2002-2003) at the Faculty of Law of the Heinrich Heine Universität, Düsseldorf, Germany; of the Universidad Católica of Valparaíso in Chile (2007) and visiting professor at universities in the USA, France and China. He is currently a member of the Diversity and Inclusion Council of the International

Bar Association, an entity in which he previously served as Co-Vice Chair of the Lesbian, Gay, Bisexual, Transgender and Intersex Law Committee until 2018.

4. Institutional Acknowledgements

The team of authors of this work wants to deeply thank all the members of the Committee of Experts, who accompanied the different stages of this research. From now on, none of the people who make up this Committee is responsible for the errors or opinions in this Report.

Likewise, we want to extend this acknowledgement to the institutions that trusted in this research from the beginning and in the contributions they provided and that are made explicit in this text. We believe that our work would not have been possible without the commitment of the International Bar Association, the Inter-American Institute of Human Rights and the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders. The contribution of the people who make up and direct these institutions was decisive in order to carry out this work. It would not have been possible to complete this research without the leadership of José Thompson, Douglas Durán Chavarría and Horacion Bernardes Neto.

We especially wish to thank the President of the Inter-American Court of Human Rights, Elizabeth Odio Benito, for providing her valuable contribution and commitment that allowed the final stages of this investigation to be completed. Likewise, we deeply appreciate the good predisposition of the staff of the Inter-American Court for the organization of the Discussions and the International Seminar.

Finally, our deep gratitude to the emeritus director of ILANUD, Elías Carranza, for having supported this work since its inception. The support and commitment of Elías at the beginning of this research was essential to be able to advance and achieve our objective.

5. Methodological notes

A. Establishment of the Committee of Experts

The investigation began in May 2017 and was carried out in different stages. In the first one, a Committee of Experts was formed as a strategy that offers several advantages when preparing data collection tools and preparing a final report. In other words, the Committee allowed a sort of validation of the different instances of the investigation as they were evaluated by people with extensive experience in the subject. In order to do this, people with knowledge of the subject were selected due to their academic training or work experience.

This methodological strategy facilitated the gathering of opinions with a level of depth in the assessment of the facts and situations analyzed that made it possible to collect new and complex knowledge, content and judgments regarding the subject. Expert judgment represents an informed opinion of people not only with experience in the matter, but who are recognized by others as "experts" and who can provide evidence, support and informed assessments.

Accordingly, the Committee of Experts was consulted in two instances of the investigation, at first to improve the data collection tool, and in a second instance to review the preliminary report. Likewise, it was possible to count with their participation in the discussion sessions prior to the preparation of this final report.

The Committee of Experts was made up of Daniel A. Borrillo[4], Juan E. Méndez[5], Myrta Morales Cruz[6], Wendy Singh[7], Maurice Tomlinson[8] and Robert Wintemute[9].

B. Development of the data collection tool

Subsequently, we proceeded to develop a data collection tool made of a protocol of questions through which it was intended to address the different problematic points of the subject. The questionnaire was organized into five segments:

a. equality and non-discrimination;
b. criminalization;
c. access to justice and the judicial system;
d. situations of violence and/or discrimination;
e. situation of trans and intersex people.

An effort was made to develop an extremely broad protocol that covers a multiplicity of situations and problems related to violations of the rights of LGTBI persons. This

4 Daniel Borrillo, professor of law at the University of Paris Nanterre, researcher at the CERSA Paris II and at the multidisciplinary center for bioethics at the Federico II University in Napoli. Author of several essays and studies on the congress topic, he is currently conducting research on the right of asylum for sexual minorities in the European Union.

5 Juan E. Méndez, Argentine lawyer, Professor of Human Rights, Washington College of Law, American University, former United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. He is a Commissioner of the International Commission of Jurists. He has extensive international experience as an academic and jurist on transitional justice, prevention of genocide and atrocious crimes, rights of persons deprived of their liberty and the right to personal integrity.

6 Myrta Morales Cruz, graduated in Government and French from the University of Georgetown (USA) and in Law from the University of Puerto Rico, with master's degrees in law from Harvard Law School and the University of Oxford and in Sociology of Law from the International Institute of Sociology of Law of Oñati, she is currently an adjunct professor at the Inter-American University of Puerto Rico where she directs the Center for Education and Citizen Participation that she founded in 2013.

7 Wendy Singh, Bachelor of Arts from the University of the West Indies, Bachelor of Laws from the University of London and a Master of Law and Diplomacy, specialized in International Human Rights Law from the Fletcher School of Law and Diplomacy.

8 Maurice Tomlinson, Jamaican lawyer and law professor. He is currently a Senior Policy Analyst for the Canadian HIV/AIDS Legal Network. Maurice has been a leading activist for the rights of LGTBI people and people living with HIV in the Caribbean for more than 20 years.

9 Robert Wintemute, Professor of Human Rights at King's College, his research areas focus on human rights, discrimination based on sexual orientation, and anti-discrimination laws.

questionnaire consists of fifty-four guiding questions and is attached as an annex to this report.

The people who make up the Committee of Experts received the protocol of questions to be refined with their contributions or observations. The responses to the protocol were worked in each country of the Caribbean and the Latin American region by different non-governmental organizations dedicated to the defense and promotion of the rights of LGTBI persons.

C. Data collection and development of the preliminary report

The data collection procedure began in October 2017 and lasted 14 months. It was preceded by a survey of non-governmental organizations dedicated to the subject based in the different States of the region. Following, contact was made with each of these NGOs in order to invite them to participate in the research.

Those organizations that agreed to participate received the question protocol and were guided in their response work. Without going into specifying each of the reports received, it is worth noting that in some states the NGOs were organized in such a way that they answered the protocol as a whole (Brazil, Nicaragua, Costa Rica).

In the Caribbean region, it was ordered that, in addition to remote investigations, in the countries of Guyana, Jamaica and Barbados, field investigators were sent to carry out work in the territory. Without delving into the tasks carried out by the field researchers, which can be consulted in their respective reports, which are part of the digital version of this report as annexes, the work consisted of identifying different civil society organizations or their referents to be able to carry out semi-structured interviews based on the protocol of fifty-four questions. The researchers were the following:

a. Selene Pineda[10], who did her work in Guyana.
b. Carla Moore[11], who worked in Jamaica.

10 Selene Pineda, lawyer from the Pontificia Universidad Javeriana, Bogotá, Colombia and Master in Latin American Studies from the Autonomous University of Madrid, Spain. She is a researcher at ILANUD.

11 Carla Moore, Researcher, Activist and Associate Professor at the Institute for Gender and Development Studies, Mona Unit, University of the West Indies.

c. Hilda Orsolya Szotyori[12], who developed her tasks in Barbados.

Regarding the Latin American region, the data collection was in charge of Lucas Ciarniello Ibañez[13]. The work was done remotely through contact with different non-governmental organizations based in the different States. Unfortunately in some states there was no response from the NGOs contacted and we resorted to data from the State-Sponsored Homophobia reports of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA).

Taking into account the particularities mentioned in the collection of information, the focus of this study is fundamentally qualitative, in this sense it takes elements of the concept of action research, insofar as it aims to draw attention to social problems that affect certain segments of the population, in order to promote the changes deemed necessary. Regarding the research techniques used to collect information, semi-structured interviews were used, surveys sent to key stakeholders, desk research and documentary review. The exceptions, as already noted, were Jamaica, Barbados and Guyana where a field investigation was conducted. Both for field investigations and for those done remotely, the question protocol was the fundamental tool used.

Consequently, the preparation of the report, both preliminary and final, did not pretend to conform to the norms of scholastic work, nor does it propose to document, nor carry out an exhaustive review on the serious human rights violations that affected LGTBI persons in the region during the study period. The approach to this problem was carried out through a reflective analysis of the collected material, aimed at identifying the critical obstacles that disproportionately restrict the guarantee of the rights of populations that face situations of criminalization and structural discrimination in Latin America and the Caribbean, in order to provide inputs to guide eventual advocacy actions to eliminate the barriers that restrict the full exercise of rights of these groups.

12 Hilda Orsolya Szotyori, graduated in Law from the University of Liverpool and is currently in the process of becoming a lawyer in Canada. As a former Romanian refugee, she has a unique perspective on the importance of living in a nation where basic rights, freedoms and civil rights are available to everyone equally.

13 Lucas Ciarniello Ibañez, lawyer from the National University of Rosario, Santa Fe, Argentina and Master in Forensic Sciences from the University of Valencia, Spain.

D. Discussion workshops

Once the data collection stage was closed, the data were analyzed and a preliminary report was prepared between April and December 2019. Once the preliminary report was completed, and improved by the suggestions and observations of those who make up the Committee of Experts, the implementation of the next stage was designed. This was carried out in three days, which consisted of two Closed Discussions and an International Seminar open to the public.

On October 23 and 24, 2020, the two discussions were held, and on October 28 of the same year, the "International Seminar on Sexual Diversity and Human Rights" was held, open to the general public and broadcasted through the social media of the Inter-American Court of Human Rights.

The discussions were programmed for the purposes of generating an exchange of ideas between academics, experts on the subject and members of civil society organizations dedicated to the promotion and defense of the rights of LGTBI people. In order to organize the topics of discussion, each of the participants was sent a document with a list of five guiding questions to go through during the discussion. This document is the preliminary report of the investigation that was previously observed and enriched by the members of the Committee of Experts.

The participants of such discussions were Juan E. Méndez, Carla Moore, Hilda Orsolya Szotyori, Edwin Cameron[14], Joel Simpson[15], Diana Maffia[16], Pedro Paradiso

14 Edwin Cameron was a judge in South Africa between 1994 and 2019, and a judge of the Constitutional Court for eleven years. He is an inspecting judge of prisons and rector of Stellenbosch University. He helped ensure the inclusion of sexual orientation in the Constitution of South Africa in 1994.

15 Joel Simpson, CEO of SASOD - Society Against Sexual Orientation Discrimination based in Guyana. Joel is a lawyer, activist, human rights defender, has a master's degree in human rights from the University of Nottingham.

16 Diana Maffia, Doctor of Philosophy (UBA) Teacher of "Feminist Philosophy" at the Faculty of Philosophy UBA, Director of the postgraduate course in "Gender and Law" at the Faculty of Law UBA, Director of the Observatory of Gender in Justice of the Council of the Magistracy of the City of Buenos Aires, Argentina.

Sottile[17], Robert Wintemute, Margarita Salas[18], Jean Wyllys[19], Victoria Vasey[20], Maurice Tomlinson, Greta Pena[21], Daniel Borrillo, Mauro Cabral[22], Michael Kirby[23], Adrian Saunders[24], Jason Jones[25] and members of civil society organizations. Regarding the Seminar, the panel was made up of people with a high institutional profile, these were: Baroness Helena Kennedy[26], Ana Helena Chacón Echeverría, Flavia Piovesan, Víctor Madrigal Borloz and Adrian Saunders and Eugenio Raúl Zaffaroni.

These activities were programmed in order to discuss the main research findings and thus enrich the preliminary report.

As previously mentioned, the interventions both in the discussions and in the seminar were guided by five questions that generally cross the great Gordian knots of this report. The participants of the different sessions chose to deepen some of the proposed

17 Pedro Paradiso Sottile, Executive Director of ILGALAC. Argentine lawyer, activist, defender of human rights of LGTBI people.

18 Margarita Salas, current LGTBIQ + Commissioner of Costa Rica. Margarita has a Master's Degree in Public Administration from Harvard University, and a Bachelor of Psychology from the University of Costa Rica. She has extensive experience in national and international development organizations on gender issues, information and communication technologies, and social economy. She has a long career as an LGTBI feminist activist, she has been the co-founder of several LGTBI organizations and co-founder and president of the VAMOS party in Costa Rica, from which she was a Representative candidate in 2018.

19 Jean Wyllys, Professor and researcher at the Afro-Latin American Research Institute of the Hutchins Center at Harvard University. Brazilian journalist and politician. He is an active defender of the rights of LGTBI populations.

20 Victoria Vassey, Director of the Legal Department of the Human Dignity Trust organization. She graduated from Oxford and has a Master's degree in human rights and international humanitarian law from the University of Paris II (Pantheon-Assas). Victoria has extensive experience in strategic human rights litigation cases in different European jurisdictions, before the European Court of Human Rights, the European Committee of Social Rights and before the United Nations treaty bodies.

21 Greta Pena, President of the organization 100% Diversidad y Derechos. She studied law and journalism, she is an activist for equality in politics and in the organization that she directs. She has developed her work in criminal anad family matters. Her areas of work are related to human rights, gender, diversity, childhood, disability and freedom of expression.

22 Mauro Cabral, is an Argentine transgender activist for the rights of intersex and trans people. He is co-director of GATE (Global Action for Trans Equality) and a signatory to the Yogyakarta Principles.

23 Michael Kirby, an Australian academic and jurist, was a judge at the High Court of Australia.

24 Adrian Saunders is President of the Caribbean Court of Justice. Born in Vincent and the Grenadines, he graduated from the West Indies University (Cave Hill) with a law degree and obtained his certificate in Legal Education from the Hugh Wooding Law School in Trinidad and Tobago.

25 Jason Jones, a gay activist from Trinidad and Tobago, successfully challenged the constitutionality of Articles 13 and 16 of the Sex Crimes Act, which prohibited consensual sexual relations between adults of the same sex.

26 Baroness Helena Kennedy withdrew a few minutes before her speech, citing scheduling problems.

axes and that allowed to fortify the conclusions and reflections stated in the report from the data collected. Those questions were the following:

a. Is it possible to think of a common regional agenda (Latin America and the Caribbean) from civil society organizations to seek, defend and guarantee the rights of LGTBI people? If feasible, what should be the central themes? What action strategies should be prioritized both at national and regional levels and how should they be coordinated?
b. Is it possible to think of strategies to influence the actions of the security forces of the countries in the region? What action strategies could be proposed to contain the forms of violence used by the police against LGTBI people? Do you consider the design of specialized areas within the security forces, judicial powers or public ministries feasible?
c. One of the major concerns raised by civil society organizations refers to the absence of official data or statistics regarding crimes committed against LGTBI persons. What initiatives do you think should be promoted to improve the collection of statistics at the national and regional level? Is it possible to think about the design of an administrative and judicial information system that establishes criteria for convergence and comparability of data regarding crimes committed in the countries of the region?
d. Criminalization is a relic left by the British Empire in the countries that were part of it. The permanence of these criminal offenses also falls on the British Crown particularly since the *Boyce* case decided by the UK Privy Council (UKPC) in 2003. Indeed, the British Crown with the advice of its Private Council is one of the legal obstacles to change in the countries that retain it as the final court of appeals. What responsibility does the British Crown have under international law for these actions and what would be the best way to determine and make it visible?
e. In relation to the States that refuse to repeal these criminal offenses nor do they want to implement decisions of the Inter-American Court such as OC-24/17, what is their responsibility under international law for such refusal and what is the most suitable way to determine such responsibility? Would another opinion/decision of the Inter-American Court regarding criminalization be important after OC-24/17?

Next, nodal points of agreement on which the exchanges and reflections were articulated are detailed:

1. It was agreed that the research constitutes a fundamental contribution to the understanding and visibility of the situations of human rights violations that the LGTBI community goes through, as well as a key tool for designing work agendas and public policy guidelines.
2. There was also agreement that the approach according to types of criminalization (primary and secondary) constitutes a fundamental contribution for the conceptualization, analysis and correct treatment of the human rights situation of the LGTBI community.
3. It was agreed that the different forms of discrimination, mistreatment, torture and other denial of rights of the LGTBI community can be considered cultural, administrative and legal inheritances of colonialism.
4. Regarding this point, some of the Anglophone Caribbean countries that were British colonies continue to be subject to the ultimate resolution of certain issues by the British Crown and its Privy Council, which is determined to maintain the validity of colonial laws over the constitutions of independent nations and hinders the progress of the rights of the LGTBI collective. Some participants contributed their views on what to do in this particular situation and to inquire about the possible violation of international law.
5. Finally, it was agreed that the different forms of discrimination, mistreatment, torture and other denial of rights of the LGTBI community are expressions of naturalized and institutionalized violence that impact differently on people with different sexual orientation and on people with non-hegemonic gender identities and expressions.

During the three days Miranda Cassino[27] was in charge of a Rapporteur service that was used. Thus it was possible to collect and systematize the contributions made by the participants throughout these meetings. Many of the contributions made are incorporated into this final document, and others are part of the conclusions, as proposals for the creation of an agenda of advocacy strategies in the countries of the region.

27 Miranda Cassino has a degree in political science and a master's degree in human rights. She is a postgraduate professor on gender and violence issues (UNLa-UNQ). She worked for several years at INADI (National Institute Against Discrimination), in particular in the National Plan Against Discrimination project (OHCHR-PNUD-INADI). Since 2010 she is the Coordinator of Training Content of the National Human Rights Secretariat (Argentina).

6. Conclusion to this introductory chapter

As stated before, this research has been carried out through consultations, reports and interviews, guided by a protocol of questions to non-governmental organizations and individuals, but it was initially not programmed to produce a survey that exhausts data on the situation of LGTBI people in Latin America and the Caribbean.

The main objective has been to detect the various forms and modalities of the different Human Rights violations that harm LGTBI people, and the magnitude of the damage that derives or may derive from them. It is an investigation of *facts* and their *legal assessment*, which forces us to constantly move from social reality to the normative and vice versa, which, although it should be a constant rule in all law, in the field of Human Rights it becomes absolutely inexcusable, with the consequent difficulty that this realistic methodology imposes.

Consequently, any contribution that allows us to deepen our reflection, improve our conclusions and recommendations, will be welcomed by all the participants in the research. The nature, both complex and dynamic, of the issue at hand, requires us to be extremely aware of the limitations of our knowledge and of the need for its constant enrichment with new data and reflections.

It should be borne in mind that the main objective of this research is directly linked to the elaboration of a regional agenda of advocacy actions, that is, to the planning of contextualized proposals to address the Gordian nodes evidenced throughout the report. When we talk about contextualizing the proposals, we mean that we are aware of the existence of social, political and cultural differences that are manifested in the different practices of violation of the rights of LGTBI people. Based on the information collected throughout the investigation, it can be observed that, although there is a certain cross-sectional nature in discriminatory practices, these are carried out following certain structural patterns according to the different regions and even the different States.

Finally, it should be noted that this report has received contributions from the Committee of Experts of this investigation. Many of their comments have been added to the final text and have also been debated during the workshops.

Chapter 2

1. American international jurisprudence

This report begins with a selection of judgments of the Inter-American Court of Human Rights referring to the subject matter of this investigation. The purpose of this first segment is to be able to refer to the main pronouncements of this court which has great influence in the region, and then to address the analysis of the data obtained in the different States.

A. Jurisprudential overview and OAS context

The jurisprudence of the Inter-American Court of Human Rights (I/A Court HR) referring to equality and non-discrimination for reasons of sexual diversity, is specified in -at least- four judgments in contentious cases and an Advisory Opinion: the Atala Riffo and daughters v. Chile (2012), Duque v. Colombia (2016), Flor Freire v. Ecuador (2016) and Azul Rojas Marín v. Peru (2020) cases, and Advisory Opinion OC-24/17 (2017).

It should be noted with surprise that until 2012 only one contentious case specifically referred to this matter had reached the Inter-American Court. Undoubtedly, the raising of this issue before the regional human rights court is largely due to the constant work of the NGOs dedicated to the issue, whose growing organization allowed their struggles to be translated into State policies.

However, the measures to recognize and protect the LGTBI population are still emerging and recent, since only in 2015, the Inter-American Commission on Human Rights (IACHR) issued the first report with interest and scope for the member states of the OAS on violence against LGTBI persons. In this regard, the particularity of our regional protection system must be taken into account, in which contentious cases reach the jurisdiction of the Inter-American Court after a long selection process carried out by the IACHR.

In any event, there are previous decisions of the Inter-American Court regarding non-discrimination in general, which must be considered as antecedents of the particularized jurisprudence on this form of discrimination. Accordingly, it is necessary to mention Advisory Opinions No. 04/1984 and No. 18/2003, where the Court reaffirms that equality is an essential condition of a person's dignity, prohibiting any measure that considers a group of people greater than the rest. In addition, the Court establishes a direct relationship between the obligations contemplated in Articles 1.1 and 24 of the American Convention on Human Rights (ACHR), because the first prohibits discrimination in the exercise of the rights enshrined in the international legal text, while the second provision establishes the prohibition of discrimination with regard not only to the rights listed in the ACHR, but also in all the norms approved by the States and in their implementation.

Regarding the obligations imposed by the rights to equality and non-discrimination, the Inter-American Court established certain general rules for the States: refrain from including discriminatory norms in their legal system or that have discriminatory effects on different groups; revoke discriminatory regulations; combat discriminatory practices and adopt norms and actions necessary to recognize and ensure effective equality of all persons before the law.

The incorporation of discrimination based on sexual orientation to the agenda of the regional jurisdictional body was preceded by its incorporation into the regional political bodies, which began on June 3, 2008, when the OAS General Assembly approved Resolution No. 2435 (XXXVIII-0/08), entitled *Human Rights, Sexual Orientation and Gender Identity.* In 2009, the General Assembly insisted on the issue through Resolution No. 2504 (XXXIX-0/09), which, with the same title, requested the States to adopt measures to hold criminally responsible those who perpetrate acts of violence against persons, based on their sexual orientation or gender identity.

In 2010 the brought up again with resolution AG/RES. 2600 (XL-0/10), which reiterated the previous ones and, in addition, determines that the States must adopt guarantees of non-repetition and access to justice and decides that the IACHR should study the possibility of preparing a thematic report and include the issue in its ordinary session.

In 2011, Res. No. 2653 (XLI-0/11) was issued, which determines that the States implement public policies against discrimination based on sexual orientation and gender identity. At the same time, it determined that the IACHR should include the

issue in its work plan, present a report on the matter prepared with the help of the States, and that, in cooperation with the Juridical Committee, carry out a study on the legal implications and the conceptual and terminological aspects that make the issue.

The Committee of Juridical and Political Affairs of the General Assembly of the OAS presented a draft resolution in May 2013 reiterating the provisions of previous resolutions and requesting the IACHR to conduct a study of the laws and provisions in force in the member states of the OAS that limit the human rights of people based on their sexual orientation or gender identity, so that, based on this study, a guide can be drawn up.

Finally, on June 5, 2013, the OAS General Assembly approved the *Inter-American Convention Against all Forms of Discrimination and Intolerance*, which includes a clear reference to sexual orientation, gender identity and expression, as prohibited forms of discrimination. This Convention urges the adhering states to adopt special public policies and affirmative actions to promote fair conditions of equal opportunities; to take legislative measures that prohibit discrimination and intolerance; to establish political and legal systems that contemplate diversity; and to adopt judicial measures that promote access to justice for victims of discrimination.

In this context generated in the regional political bodies, the Inter-American Court inaugurated its jurisprudence, in accordance with the trend clearly marked by the General Assembly of the OAS.

B. The contentious case Atala Riffo and daughters v. Chile (ruling of February 24, 2012)

This case is about the process of control and custody of three girls that was processed in the Chilean justice system, promoted by the girls' father in order to deny their mother parental authority, on the grounds that she lived with her partner of the same sex, pretending that this would cause serious damage to the mental health of their daughters. The case was the subject of intense litigation that reached the Chilean Supreme Court of Justice, which decided to grant custody to the father of the three girls in a judgment divided 3 to 2, since, after the divorce, the wife and mother of the girls lived with a person of the same sex.

The arguments of the Chilean justice (in its different instances) can be summarized in the following points:

- The coexistence of the mother with her partner of the same sex would alter the normality of the family routine, prioritizing the interests and personal well-being of the mother, over the emotional well-being and adequate process of socialization of the daughters. The mother would then have privileged her well-being and her personal interest over the fulfillment of her maternal role, in conditions likely to affect the later development of the children. The arguments of the father are more favorable to the best interests of the children, since in the context of a heterosexual, and traditional society, they assume great significance.
- The eventual confusion of sexual roles that can occur in children, due to the lack of a male father in the home and his replacement by another female, constitutes a risk situation for the integral development of minors from which they must be protected.
- It is evident that the exceptional family environment of the children differs significantly from that of their fellow students and their relationships in the neighborhood in which they live, exposing them to isolation and discrimination that will also affect their personal development.

Before the Inter-American Court, it was argued that the decision of the Chilean justice and the previous arguments held the State responsible for discriminatory treatment and arbitrary interference in the private and family life of the mother and the children. It was the unanimous opinion of the Inter-American Court in this case, that the State of Chile thus violated the principle of equality and the prohibition of discrimination set forth in Articles 1.1 and 24 of the Convention.

Regarding the right to equality and non-discrimination, the Court established that sexual orientation and gender identity are categories protected by the ACHR with the expression *other social condition*, established in Article 1.1 of the Convention. For this reason, the ACHR proscribe any discriminatory norm, act or practice based on the sexual orientation of the person. Consequently, no norm, decision or practice of domestic law, whether by state authorities or individuals, should diminish or restrict, in any way, the rights of a person based on their sexual orientation.

The Inter-American Court observed that although the *best interest of the child* is a legitimate aim, the mere reference to it in the abstract, without specifically proving the risks or damages that the mother's sexual orientation could entail for the daughters, cannot serve as ideal argument for the restriction of the exercise of all Human Rights without any discrimination based on sexual orientation, that is, the best interests of the child in the abstract cannot be used to protect discrimination against the mother or father based on sexual orientation of any of them. Thus the judge cannot take into consideration this social condition as an element to decide on control or custody.

The Court found that, within the framework of contemporary societies, there are social, cultural and institutional changes, aimed at more inclusive development of all the life options of its citizens, which is evidenced in the social acceptance of interracial couples, single parents or divorced couples, which in former times had not been accepted by society. In this sense, the law and the States must help social progress, because otherwise there is a serious risk of legitimizing and consolidating different forms of discrimination that violate Human Rights.

The Inter-American Court stated that the sexual orientation of a person is linked to the concept of freedom and the consequent possibility of human beings to determine themselves and freely choose the options and circumstances that give meaning to their existence, according to their own options and convictions. Therefore, affective life with a spouse or permanent partner, which logically involves sexual relations, is one of the main aspects of this sphere or circle of intimacy.

Finally, it should be noted that when mentioning that the interpretation of Article 1.1 of the ACHR, that in *another condition* also includes sexual orientation, from this case served for the court's jurisprudence to address the other cases and also what was expressed in the OC 24/2017.

C. The contentious case Duque v. Colombia (ruling of February 26, 2016)

The Inter-American Court condemned the State of Colombia for violating Ángel Duque's right to equality before the law and to non-discrimination, for not allowing him to access the survivorship pension on equal terms after the death of his partner in 2001, due to them being a same-sex couple.

Mr. Duque lived with his partner of the same sex until the latter died on September 15, 2001. Mr. Duque's partner, Mr. J.O.J.G, was affiliated with the Compañía Colombiana Administradora de Fondos de Pensiones y Cesantías (COLFONDOS S.A.). The year following the death of Mr. J.O.J.G, exactly in March 2002, Mr. Duque requested by means of a letter that the requirements to obtain the survivor's pension for his partner be indicated. On April 3, 2002, COLFONDOS responded by indicating that he did not hold the status of beneficiary in accordance with the applicable law to access the survivor's pension.

On April 26, 2002, in the face of the negative response provided by COLFONDOS, Mr. Duque filed a petition for guardianship in order to have his right recognized and to pay the replacement of the pension in his favor as a temporary mechanism while the respective judicial action began. On June 5, 2002, the Tenth Municipal Civil Court of Bogotá denied the protection promoted, stating that *the plaintiff does not meet the qualifications that the law requires to figure as the replacement of the deceased's pension and that no regulations nor through jurisdictional means have recognized in this sense*, *any right to homosexual couples.* The same sentence added that t*he plaintiff's disagreement can be solved through the judicial processes indicated in the law, (contentious-administrative procedure) and/or the filing of remedies for reconsideration and appeal within the legal terms against the provision issued on April 3, 2002 from COLFONDOS. The conflict that the plaintiff exposes is of a legal nature and it is not possible to resort to the petition for guardianship for its resolution, so that said pension is recognized in this way, to which it must access through ordinary procedure, so that it may eventually recognize such right*. The previous resolution was challenged by Mr. Duque and confirmed in its entirety on July 19, 2002 by the 12th Civil Court of the Bogotá Circuit.

The Colombian regulations in force at the time of the occurrence of the events indicated that the beneficiaries of the survivors' pension *for life, were the spouse or the surviving partner or permanent partner* (Law 100 of December 23, 1993) and that, *for all civil effects, it is called a Marital Union of Fact*, *the one formed between a man and a woman, who without being married make a permanent and singular community of life. Likewise, (...) the man and the woman who are part of the de facto marital union are called companions and permanent companions* (Law 54 of December 289, 1990).

Just in 2007, the supreme judicial instance of Colombia jurisprudentially recognized the right to pension for same-sex couples, as well as social security and property rights, declaring that Law 54 of 1990, by regulating the marital union of fact, it is also applicable to same-sex couples. Later, it determined the same for the coverage of the social security system in health, of the contributory regime. Likewise, Colombian jurisprudence decided even if the death of one of the members of the same-sex couple had occurred before the notification of judgment C-336, the survivor's pension could not therefore be denied and that, in addition, those couples have the same means of proving their permanent union as those suitable for heterosexual couples.

When solving the case, the Inter-American Court ruled that denying equal access to the survivor's pension constituted an international wrongful act, for which it declared the State responsible for the violation of the right to equality and non-discrimination contained in Article 24 of the ACHR, in relation to Article 1.1 of the same instrument, establishing the corresponding and customary measures of reparation and non-repetition in its convictions.

In this case, the Inter-American Court ratified that the expression *any other social condition* of art. 1.1 of the ACHR includes discrimination based on sexual orientation.

It should be noted that it was also specified the concept of *discrimination* in this case, understanding that a difference in treatment has this character when it lacks a reasonable objective justification, that is, when it does not pursue a legitimate purpose and there is no reasonable relationship of proportionality between the means used and the end pursued. This implies that the eventual restriction of a right requires a rigorous foundation, and the reasons that a State uses to limit rights must be particularly serious.

Given that in the case the State did not provide any satisfactory explanation about the need to establish the difference in treatment, the court concluded that the differentiation established in Articles 1 of Law 54 of 1990 and 10 of Decree 19,889 of 1994, which excluded the same-sex couples of the survivor's pension was discriminatory and in violation of Article 24 of the ACHR.

Finally, it is worth mentioning that this was not a ruling by which the Inter-American Court of Human Rights has delved into or advanced much in equality and non-discrimination rights in matters of sexual diversity, since it practically reaffirmed the jurisprudence it had adopted in the previously explained Atala Riffo case.

The Inter-American Court did not enter into this judgment either in the consideration of the complex contextual elements of discrimination that exist in society and in Colombian jurisprudence, but rather limited itself to a normative analysis of the problem. The social patterns of structural exclusion that could have been the object of analysis in this jurisprudence, in order to advance further in the defense of the LGTBI population, appeared later, with OC/24 of 2017.

D. The contentious case Flor Freire v. Ecuador (ruling of August 31, 2016)

Homero Flor Freire joined the Ecuadorian Ground Force with the rank of Second Lieutenant of Armored Cavalry on August 7, 1992. At the time of his separation from the ground forces, he had the rank of Lieutenant and served in the Fourth Military Zone.

The case originates from the events that took place on November 19, 2000, at the facilities of the Amazonas Military Fort, located in the city of Shell in the Province of Pastaza, which led to a disciplinary process in the military jurisdiction. Regarding these facts, two incompatible versions have been upheld, with respect to which the Inter-American Court determined that it did not have sufficient evidence to allow it to discard any of them.

Indeed, regarding these events, several military officials affirmed that they had seen that day the petitioner Flor Freire and a soldier having sexual relations in the Lieutenant's room at the Military Fort. This version was accepted in the decisions that were later adopted by the various bodies that intervened in the case.

On his part, Mr. Flor Freire strictly denied the previous version, explaining that on November 19, 2000 he was fulfilling his duties as a Military Police Officer. According to his account, around 5:20 a.m. that day, on the outskirts of the Coliseum in the city of Shell Mera, he noticed that a soldier was in a drunken state and would have had problems with some people who attended the dance that took place there *jeopardizing his physical integrity and also the honor and prestige of its armed function*. For this reason, he would have decided to transfer the soldier from the outskirts of the Coliseum to Fort Amazonas. Upon entering the military compound, Mr. Flor Freire says that he had left him in the Military Prevention in charge of the officers on duty.

However, at that time the soldier would have tried to return to the place where the party was taking place, so Mr. Flor Freire would have chosen to transfer him to his room where there was an additional bed so that he could sleep there. Mr. Flor Freire has stated that, shortly after entering his room, a Major would have entered without authorization *in an arbitrary and violent manner*, to inform him that *he was in trouble* and order the surrender of his weapon. When requesting an explanation, the Major reportedly informed him that *"there were witnesses who [had] seen [him] in a situation of homosexuality."*

According to the petitioner's version, his discharge was due to revenge for his decisions to reduce undue and corrupt spending on the force, since he was in charge of purchasing food and other goods in the military fort where he worked.

The petitioner made a free statement on November 19, 2000 before Intelligence Group No. 4 about what happened, which includes his version of the events. According to the alleged victim, shortly after, he began to receive pressure to request discharge or voluntary retirement.

The regulation then in force contemplated a less serious sanction for *illegitimate sexual acts* and a more serious one for *acts of homosexuality*, for which reason the IACHR alleged before the Inter-American Court the discriminatory nature of this difference in treatment. In addition, the IACHR argued that, *in the specific process, both in the evidentiary activity and in the judicial motivation, discriminatory biases and prejudices were present with respect to the aptitude of a person to exercise their functions within a military institution due to their real or perceived sexual orientation.*

In summary, in this case the international responsibility of the State is discussed as a consequence of decisions that led to the separation of Mr. Homero Flor Freire as a military official of the Ecuadorian Ground Force, based on the then-in place Military Discipline Regulations and, particularlly, in the rule that sanctioned sexual acts between persons of the same sex with separation from service.

The IACHR argued that in the proceeding the petitioner had violated the guarantee of impartiality and that the petition for protection presented would not have constituted an effective remedy to protect his rights. During the process, the petitioner not only denied the veracity of the sexual act with another man, but also kept on insisting that he did not identify as homosexual.

It is important to highlight that the Inter-American Court ratified in this judgment that sexual orientation is linked to the concept of freedom and the consequent possibility of every person to self-determine and freely choose the circumstances that give meaning to their existence, according to their own options and convictions. In this sense, the sexual orientation of a person will depend on how they choose to identify, therefore, for the court the only relevant thing when defining his sexual orientation is the way in which the petitioner identifies himself. However, for the decision of the case, what was decisive for the Inter-American Court was whether the petitioner had been separated from the force by virtue of a diverse sexual orientation, regardless of whether it was real or perceived by third parties.

In this regard, the Court pointed out that it is possible for a person to be discriminated against because of the perception that others have about their relationship with a group or social sector, regardless of whether this corresponds to the reality or to the victim's self-identification. Like other forms of discrimination, discrimination based on perception has the purpose or effect of preventing or nullifying the recognition, enjoyment or exercise of human rights and fundamental freedoms of the person who is reduced to the only characteristic brought against them, disregarding other personal conditions.

In its defense, the State alleged that at the time of the events there was no international obligation to consider sexual orientation as a prohibited category of discrimination. The Inter-American Court assumed this argument, responding that the obligations enshrined in the ACHR -among them the prohibition of discrimination- must be fulfilled by the member States from the moment they ratify the treaty, reaffirming that the prohibition of discrimination and the adherence with the principle of equality before the law, are obligations of immediate compliance.

In particular, regarding discrimination based on sexual orientation, the Inter-American Court reiterated in this judgment that the alleged lack of consensus within some countries at the time of the events regarding full respect for the rights of sexual minorities cannot be taken into account as a valid argument to deny or restrict the rights of the affected people nor to perpetuate and reproduce the historical and structural discrimination that these minorities have suffered. Furthermore, the Court also observed that, at the time of the events, this form of discrimination was constitutionally prohibited in the domestic law of the State.

Consequently, the Inter-American Court concluded that the separation of the petitioner from the Armed Forces constituted a discriminatory act to the extent that it was based on the implementation of internal norms that sanctioned *homosexual acts* in a more serious manner compared to *non-homosexual sexual acts*. Therefore, it declared the State of Ecuador internationally responsible for the violation of the right to equality before the law and the prohibition of discrimination established in Article 24 of the ACHR, in relation to Articles 1.1 and 2 thereof.

E. Advisory Opinion OC-24/17 (November 24, 2017): *gender identity*

When dealing with equal marriage (VIII,2) and the right to self-perceived identity (IX,9) we have referred to this November 2017 Advisory Opinion of the Inter-American Court, notified on January 9, 2018, on *gender identity, and equality and non-discrimination to same-sex couples*, issued in response to a request submitted by the State of Costa Rica that sought to answer five questions on these two issues.

Given the importance that this document has for the entire issue of discrimination based on sexual orientation, a pause its needed to summarize its main considerations, beyond the brief references above.

In this AO, the Inter-American Court referred to the context related to the rights of LGTBI persons, specifying that they constitute a minority that has historically been the victim of structural discrimination, stigmatization, various forms of violence and violations of their fundamental rights. This jurisprudential recognition by the regional jurisdictional instance signified a qualitative advance with respect to the decisions in the previous contentious cases, since it formulated a general conceptualization of the factual situation of this extensive group of people.

In order to respond to the issues of the consultation, the court also formulated general considerations regarding the principle of equality and non-discrimination, the right to gender identity, the right to recognition of legal personality, the right to a name and the procedures for name change and other identity data for gender reasons, to the conventional protection of the bond between same-sex couples, as well as to the mechanisms by which the State could protect diverse families.

Regarding the principle of equality and non-discrimination, the Court reiterated that, in accordance with the general obligations of respect and guarantee established in Article 1.1 of the ACHR, the interpretation criteria established in Article 29 of said Convention, the provisions of the Vienna Convention on the Law of Treaties, the Resolutions of the General Assembly of the OAS and United Nations organizations, that sexual orientation and gender identity and expression are categories protected by the Convention.

Hence - they insisted in more detail - any discriminatory norm, act or practice based on sexual orientation, gender identity or expression is prohibited by the ACHR. Consequently, no norm, decision nor practice of domestic law, coming from state authorities and officials or individuals, may diminish or restrict, in any way, the rights of a person based on their sexual orientation, gender identity or expression.

Regarding *gender expression*, the Court reiterated what was indicated in the case Flor Freyre v. Ecuador, in the sense that it is possible for a person to be discriminated against because of the perception that others have about their relationship with a group or social sector, regardless of whether this corresponds to the reality or to the victim's self-identification, based on that, in this case the person is also reduced to the only characteristic brought against them, disregarding other personal conditions.

This insistence and conceptual perfection is of great practical importance (as evidenced in this research), since paranoid prejudices and their consequent phobias are too often used to disqualify people in their work or professional aptitude, as a perverse resource within the framework of the current extremely *competitive* societies, regardless of the fact that the allocation of unconventional sexuality responds to reality.

On a different note, specifically with regard to the scope of the right to non-discrimination based on sexual orientation, the Court indicated that this was not limited to the homosexual condition itself, but included its expression and the necessary consequences in people's lives. In this sense, for example, sexual acts are a way of expressing the sexual orientation of the person, so they are protected within the same right to non-discrimination based on sexual orientation.

The court also affirmed that emotional life with the spouse or permanent partner, including sexual relations, is a central aspect of the sphere or circle of intimacy, on

which the sexual orientation of the person operates, depending on the established identity according to how they identifiy themselves.

For the Inter-American Court, the recognition of gender identity is necessarily linked to the idea that sex and gender should be perceived as part of an identity construction that results from the free and autonomous decision of each person, without being subject to to their genitality.

On the other hand, the Court considered that the right to identity, and in particular the manifestation of identity, is also protected by Article 13 of the ACHR, which recognizes the right to freedom of expression. From this perspective, arbitrarily interfering with the expression of identity may imply a violation of that right.

Therefore, the lack of recognition of gender or sexual identity could result in indirect censorship of gender expressions that deviate from heteronormative standards, which would imply sending a generalized message warning people that do not follow these *traditional* standards, that they will not have legal protection and recognition of their rights under equal conditions with respect to those who respond to such standards.

Every time gender identity is a constitutive element of people's identity, its recognition by the State is of vital importance to guarantee the full enjoyment of Human Rights of transgender people, including protection against violence, torture, abuse, the right to health, education, employment, housing, access to social security, as well as the right to freedom of expression and association.

This is when, the Inter-American Court pointed out that *the recognition of people's identity is one of the means [that] facilitates the exercise of rights such as legal personality, name, nationality, and enrollment in the civil registry, as well as family relations, among other rights recognized in international instruments such as the American Declaration of the Rights and Duties of Man and the American Convention.*

They added that the right to identity has *an instrumental value for the exercise of certain civil, political, economic, social and cultural rights, in such a way that its full validity strengthens democracy and the exercise of fundamental rights and freedoms, which stands as a means for the exercise of rights in a democratic society, committed to the effective exercise of citizenship and the values of representative democracy, thus facilitating social inclusion, citizen participation and equal opportunities.*

In accordance with the foregoing, the Court concluded that the right of each person to autonomously define their sexual and gender identity, and the data that appear in the records, as well as in the identity documents, to be consistent or correspond to the definition they have of themselves, are protected by the ACHR in the provisions that guarantee the free development of personality (articles 7 and 11.2), the right to privacy (article 11.2), recognition of legal personality (article 3), and the right to a name (article 18).

In response to the first question raised by Costa Rica, the Court concluded that the change of name, the adequacy of the image, as well as the rectification of the mention of sex or gender, in the records and in the identity documents - so that they are consistent with the self-perceived gender identity-, it is a right protected by the following rules of the ACHR: article 18 (right to a name), and also articles 3 (right to recognition of legal personality), 7.1 (right to freedom) and 11.2 (right to privacy).

As a consequence of the foregoing, in accordance with the obligation to respect and guarantee rights without discrimination (Articles 1.1 and 24 of the Convention), and with the duty to adopt the provisions of domestic law (Article 2 of the Convention), the I/A Court HR affirmed that the States are in the obligation to recognize, regulate, and establish adequate procedures for such purposes.

F. Advisory Opinion OC-24/17 (November 24, 2017): *same-sex couples*

Regarding the conventional protection of the bond between same-sex couples, the Inter-American Court notes that the ACHR protects the family bond derived from a same-sex couple relationship, in accordance with art. 11.2 (right to protection of private and family life) and article 17 (right to protection of the family).

Based on articles 1.1 and 24 (right to equality and non-discrimination), the Court also understands that economic rights derived from family ties must be protected without any discrimination like those of heterosexual couples, in accordance with the right to equality and non-discrimination (articles 1.1 and 24).

Notwithstanding the foregoing, this jurisprudence understands that the international obligation of States transcends issues related only to economic rights and extends

to all internationally recognized Human Rights, as well as the rights and obligations enshrined in the domestic law of each State, formed from the family ties of heterosexual couples.

Regarding the mechanisms by which the State could protect diverse families, the Court observed that there are administrative, judicial and legislative measures of various kinds that can be adopted by the States to guarantee the rights of same-sex couples.

The Inter-American Court insists that Articles 11.2 and 17 of the ACHR do not only protect a particular model of family, so that none of these provisions can be interpreted in an exclusive way of the rights established there for any group of people.

The Court added that if a State decides that in order to guarantee the rights of same-sex couples it is not necessary to create new legal figures, and therefore, it chooses to extend the existing institutions to couples made up of people of the same sex - including marriage -, in accordance with the *pro persona* principle contained in Article 29 of the ACHR, such recognition would imply that these extended figures would also be protected by Articles 11.2 and 17 of the Convention. The Court considered that this would be the simplest and most effective means to ensure the rights derived from the bond between same-sex couples.

On the other hand, the Court reiterated its constant jurisprudence in that the alleged lack of consensus within some countries regarding full respect for the rights of sexual minorities, cannot be considered as a valid argument to deny or restrict humans rights or to perpetuate and reproduce the historical and structural discrimination that these minorities have suffered.

Regarding the institute of marriage, the Inter-American Court indicated that establishing a different treatment between heterosexual couples and those of the same sex regarding how they can form a family - be it through a de facto marital union or a civil marriage - fails to pass a strict equality test because, in the court's opinion, there is no conventionally acceptable purpose for imposing this distinction.

Consequently, the Inter-American Court indicated that the existence of two kinds of solemn unions to legally consolidate the community of heterosexual and homosexual coexistence was not conventionally admissible, because this would led to a distinction based on the sexual orientation of the people, which would be discriminatory, and

therefore incompatible with the American Convention. The court saved the transitory situations to which we referred to earlier.

G. Case of Azul Marín and another v. Peru (Judgment of March 12, 2020)

Azul Rojas Marín was born on November 30, 1981. On February 25, 2008, she was illegally detained. At that time, she perceived herself as a gay male. She currently perceives herself as a woman.

On February 25, 2008, in the early hours of the morning, Mrs. Rojas Marín was walking alone to her house when a police vehicle approached her, one of the occupants asked her where she was going and told her: "this late? Be careful because it is too late". A few minutes later, the state agents returned, searched her, beat her, and forced her to get into the police vehicle while they shouted "buscar esto." The insults and derogatory words with clear reference to her gender identity continued while she was detained. She was taken to the Casa Grande Police Station, where she was forcibly stripped, beaten on several occasions, and she was a victim of torture and rape, since on two occasions the state agents inserted a police rod into her anus.

The Court determined that the detention of Azul Rojas Marín was illegal in light of Article 7 of the American Convention, since the requirements established by the Peruvian Criminal Procedure Code for identification purposes' detentions were not met. Likewise, it indicated that in the absence of a motive under the law for which Mrs. Rojas Marín was subjected to an identity check and the existence of elements that point to discriminatory treatment for reasons of sexual orientation or gender expression, the Court must presume that the detention of Mrs. Rojas Marín was carried out for discriminatory reasons. Therefore, it was a manifestly arbitrary detention. Lastly, the Court indicated that the (agents) did not inform Mrs. Rojas Marín of the reasons for her detention.

After an analysis of the victim's statements, the legal medical examination, the psychological expert opinions, the analysis of the victim's blood and clothing, as well as various indications of discriminatory treatment against the victim, the Court concluded that Mrs. Rojas Marín was forcibly stripped naked, beaten on several occasions, state agents made derogatory comments about her sexual orientation,

and was a victim of rape. The Court examined the intentionality, the severity of the suffering, and the purpose of the act, and concluded that the series of abuses and assaults suffered by Azul Rojas Marín, including rape, constituted an act of torture by state agents.

2. Criminalization in colonizing Europe

The countries of the region covered suffered colonization for five hundred years, most of them by Spanish and Portuguese and, to a lesser extent, English, French and Dutch. An important pre-colonial anthropological and historical trend reports - including testimonies from the colonizers such as the *Apologetic Summary History* by Fray Bartolomé de las Casas (or Casaus) - that people with sexual orientation that we today identify as LGTBI were not repressed nor stigmatized in the original cultures, but even positively valued. These practices collided head-on with the culture and legislation of the colonizing countries, which throughout European history had become brutal and sadistic towards these people.

In Spain, Laws V and VI of Title V of Book III of the *Fuero Juzgo* penalized sodomy with castration and death; no less cruel was Law II of Title XXI of the Seventh Item, dragging those penalties to Laws I and II of Title XXX of Book XII of the Newest Compilation. In Portugal, Title XIX of Book V of the *Ordenações Manuelinas* contained similar rules, in addition to penalizing the man who dressed as a woman and the woman who dressed as a man (Title XXI of Book V), which the *Ordenações Alfonsinas* (Title XVII of Book V) repeated as well.

In England, the punishment for sexual acts with Jews of both genders, animals and sodomites was being buried alive and it dates back to a treatise by a questionable author, apparently from the 14th century, known as *Fleta* and the title is *Commentarius juris Anglicani*, in which shortly after another author - also questionable - was inspired to write his treatise, known as *Britton (Summa de legibus Anglie que vocatur Bretone*), establishing the burning alive punishment for sodomites, sorcerers, renegades and non-believers. In 1533 a law established the death penalty for sodomites, buggery in English that included the anal penetration of a man to a woman, to another man or, to an animal, repealed during the reign of Queen Mary and reimplanted in 1563 and which remained in force until the law of *crimes against persons* of 1861, which

established the penalty of ten years to life imprisonment. Between 1800 and 1836, some 58 people were executed under this law.

A. Continental European Illuminist decriminalization

The French revolutionary Penal Code of 1791 inaugurated the decriminalization of sodomy in continental Europe, which was followed by the Napoleon Code of 1810 and, like this, by other continental European codes, which limited themselves to criminalizing public scandal, unlike England and Wales, that maintained the incrimination until 1967.

B. Decriminalization in independent codes

These two European legislative lines had their clear effect on the laws of the region. With exceptions, the French model was adopted in most of the Spanish, Portuguese and French colonization region; thus, the first two Latin American penal codes always referred to *public morals*, but not to private acts. The Code of the Empire of Brazil of 1831, typified in art. 280 actions contrary to morality, but only committed in a *public place*. The Santa-Cruz code for Bolivia of 1830 followed the same criteria in its art. 484, and its art. 487 typified public exhibitionism, but only to people of the opposite sex. Haiti directly sanctioned the Napoleon code. In Argentina, since the Statute of 1817, all its constitutions contain a norm that only admits state interference in *public morals*.

In independent legislation, sodomy was never criminalized in Argentina, Brazil, El Salvador, Haiti, Mexico (federal), Paraguay, the Dominican Republic and Venezuela, that means that *the majority of the population of the non-English colonization region*, since its independence lived under the tradition of penal codes that did not criminalize sodomy.

C. Historical exceptions in the region

Although not since independence, but in the subsequent encoding process, these behaviors were decriminalized in Guatemala (1871), Honduras (1899) and Peru (1924),

Uruguay (1934). The latest decriminalization are those of Colombia (1980), Ecuador (1997), Chile (1999), Costa Rica (2002), Nicaragua (2007) and Panama (2008). In Cuba, the reference to *homosexual acts* was repealed in 1987. Criminalization is only maintained in some military codes (Brazil, Venezuela and the Dominican Republic). In any case, at present, sexual acts or manifestations of sexual orientation and/or non-hegemonic gender identity are not criminalized in any of these countries.

However, it is necessary to specify that the so-called question of *bad life,* brought from Italy and Spain, spread throughout the region in times of reductionist positivism -biologist and racist-, which later led to *dangerous state laws and projects without crime or pre-criminal*, later concretized in legislation copied from the unfortunate example of the Spanish *Vagrancy Act* of 1933 (later replaced in Spain by the Francoist *Dangerous* Law), which allowed the criminalization of LGTBI people outside the codified criminal legislation (thus, Venezuela from 1936 to 1997).

It should not be believed that LGTBI people have not been materially punished and subjected to harassment based on legislation in countries that did not know of the primary criminalization nor *dangerousness without crime*, because until the end of the last century many have used a regulation that did not draws a lot the attention of legal academics because of an alleged and false punitive incidence - and also because it falls preferentially on people considered *marginal* and from poor sectors of our societies, which is c*ontraventional legislation*.

In a certain sense, this legislation is more in violation of individual guarantees than criminal or *dangerous* criminalization, because it is left up to police decisions, opening an enormous field to arbitrariness and selective discretion, while enabling the generation of *saving banks* or sources of autonomous collection of the executive agencies of the penal system, by means of extortion or payment of *impunity* (thus, Argentina until 1994).

In recent years, the idea that criminal law should be handled by *speeds* has spread in academic penalism, with the greatest limitations and guarantees corresponding to the threats of more serious penalties and vice versa. This thesis ignores that infringement laws are much more important as shaping social behaviors than criminal laws for serious crimes, since the latter are exceptional and the public finds out about them through the media, while the petty crime legislation is the one that opens the space

for the exercise of punitive power that is exercised and experienced daily, directly and without advertising.

D. British colonial criminalization

Unlike the strictly criminal laws of the countries of Spanish, Portuguese, French or Dutch colonization, the classification of sodomy is maintained in the English-speaking Caribbean countries, which received British colonial legislation.

It is a known fact, that the population of the Caribbean countries is largely the result of the crime against humanity known as the slave trade, that is, of the colonial assembly of a *slave* production system. Along these lines, Moore[28] contributes that the paradigm of "anti-blackness" should be taken into account as a basic problem in States with a predominantly black population, as well as hypermasculinization, toxic masculinities and misogyny that are at the root of violence against the LGTBI collective.

It is often argued by officials from these countries that one of the difficulties for the decriminalization of sodomy is that it was condemned by the African ancestors of the current populations, which seems to be false to the testimony of anthropologists of the stature of Evans-Pritchard on the sexual habits of African warriors. Everything would indicate that these practices disappeared in Africa in the first decades of the last century, when Europeans took control of the interior of the continent, that is, that the criminal prosecution of these behaviors would also be the product of the irruption of the brutal colonial laws.

Indeed: almost all the English colonial penal codification was inspired by the Indian code of 1860 (original by Thomas Babington Macaulay) that typified sodomy in the following way in article 377: *Who, voluntarily has carnal relations against the order of nature with any man, woman or animal, will be punished with life imprisonment, or with imprisonment of any description for a period that can be extended to ten years, and will also be subject to fines. The penetration is sufficient to constitute the carnal relationship necessary for the offense described in this section.*

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This criminal type is clearly a violation of the principle of legality due to its extreme generality, called *an attack on honesty* –although it also registers other names-, diffusely conceptualized as *unnatural sexual relations on the part of a person who uses the sexual organ to awaken or satisfy sexual desire.*

In this matter, the code of Macaulay finally adopted, followed the model of the metropolis that - as described above - from 1861, repealed the death penalty in England and Wales for sodomites, replacing it with prison. This law was amended in 1885 by the Criminal Law Amendment Act, which extended the criminal offense to any sexual practice between men and not only to anal sex. These laws were in force in the English metropolis until 1967 and are the ones that legitimized the conviction of Oscar Wilde and, much later, the imprisonment and castration of the scientist Alan Turing, father of Computer Science, who was tortured to the point of suicide in 1954.

This is the matrix that - with minor variables - until now maintains the classification of sexual acts or manifestations of non-hegemonic sexual orientation in the Caribbean countries, despite the repeated observations of the UN Human Rights Committee.

The validity of these colonial laws in those countries - which have been independent for more than half a century - is explained in their positive law, due to a complex question of constitutional order, which goes back to the conditions of their independence and which deserves to be mentioned.

E. Intangible colonial constitutions and laws

The independence of the first four countries (Jamaica, Trinidad and Tobago, Guyana and Barbados) were granted last century in the sixties by the United Kingdom. In doing so, the British Parliament delegated to the Crown and the Privy Council the promulgation of the constitutions of these countries (as opposed to what happened with Australia, Canada and New Zealand), that is, the constituent power did not emerge from their peoples but from the Crown. In the exercise of the constituent power delegated by the British Parliament, the Crown kept all colonial laws in force, but provided they were compatible with the new constitutions.

So far everything is understandable, but in the constitutional texts themselves a clause (*saving clause* or *general exemption clause*) was included that prohibits any

constitutional challenge to the colonial laws in force at the time of independence, even if they were contrary to the declaration of rights and guarantees of the new constitutions.

It is obvious that this clause, understood to the letter, is in open contradiction with the provision according to which these colonial laws remain in force as long as they are compatible with the constitution. Clearly, it is necessary to make both standards compatible to give them a rational scope.

F. The Crown, as the last judicial resort of the Caribbean

But another curiosity about the independence processes of the Caribbean countries is that, as long as they did not renounce it, the Crown remained the last of its judicial instances with the advice of the Judicial Committee of the Privy Council of the Crown based in London. It is relevant to note, following Raznovich[29], that these British judges do not use the type of restrictive constitutional interpretation of fundamental rights when they address and make decisions as members of the Supreme Court of the United Kingdom but they do in the cases of the Caribbean, as illustrated with the 2007 *Suratt* decision. This is why an in-depth study of the responsibility of the British Crown for these decisions is required.

When in 2003, it was contemplated that the death penalty as a mandatory penalty for homicide had the character of cruel, inhuman and degrading, being incompatible with the Trinidad and Tobago constitution, the questioning was first admitted, but the following year in *Boyce* (2004) resolved otherwise, reaffirming that colonial law (unless it was modified after independence according to the precedent established in the *Lambert Watson* case) was intangible despite its constitutional incompatibility. Regarding this issue, Saunders[30] added that decisions such as those mentioned in *Suratt* and *Boyce*, can be elucidated on the grounds that the judges who make them do not live in the jurisdictions over which they judge, and in many cases they have never in their lives set foot in them; ergo, they look at their citizens in the distance with whom they will never cross or to whom they will never have to explain their decisions. In this sense, the British judge Hoffmann, recognized this dilemma of legitimacy

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illustrating with his own experience when saying publicly how extraordinary it has been that his first visit to Trinidad and Tobago in 2003, was nine years after he began to serve as a member of the Private Council.

In 2001, the Caribbean Court of Justice was created among twelve countries (Antigua and Barbuda, Barbados, Belize, Grenada, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, Suriname and Trinidad and Tobago, Dominica and Saint Vincent and the Grenadines) and then Barbados, Belize, Guyana and Dominica renounced the jurisdiction of the Privy Council, to recognize that Court as the last instance. Thus, the Caribbean justice began to finally become independent from Great Britain at least in relation to these nations. Despite this break with the imperial court in London, common law still maintains its authority and detains the advancement of human rights in some cases.

In 2018 in the *Nervais* case, the Caribbean Court of Justice once again heard the question of the death penalty as a mandatory sentence, solving in the correct sense - contrary to the previous one of the British Privy Council - understanding that the two norms would not be contradictory , but provided that priority was given to the mandate that conditions the enforcement of colonial laws to their compatibility with the constitution, because otherwise, citizens would be perpetually deprived of rights. In this sense, the majority vote of Judge Saunders states: *This cannot be the meaning attributed to that provision, since it would forever frustrate the basic underlying principles that the Constitution is the supreme law and that the judiciary is independent.* The Caribbean Court of Justice confirms this decision in *McEwan v Guyana*, thus finally ending in the nations over which the effect of the general exemption clause has jurisdiction (particularly in Barbados and Guyana) where it prohibited any constitutional challenge to colonial laws. This is in contrast to the British Privy Council for whom according to *Boyce* the laws passed during the empire by the crown are above the constitutions and therefore remain in force even when they are compatible with the constitution by virtue of the *general exemption clause*, this until they are modified.

The ruling in *McEwan et al v Guyana* states that:

> *By shielding pre-independence laws from judicial scrutiny, Saving Clauses pose severe challenges for the Courts and for constitutionalism. The time-honored concept of constitutional supremacy is seriously eroded by the*

notion that a Court is unable to weigh whether a pre-independence law, or any law, is inconsistent with a fundamental human right.

This ruling that nullifies the interpretation of *Boyce's* "saving clause" for the four jurisdictions over which the Caribbean Court of Justice is the last instance, declared that the colonial law regarding the inadequacy of dress (*cross-dressing*) was unconstitutional since, among other things, it violated the principle of equality before the law while denying trans people the right of expression and it functioned as a useful tool to justify harassment of the trans community. This conclusion is supported, according to its first paragraph, that "differences are as natural as breathing. (…) Civilized society has the responsibility to make room for differences between human beings. Only in this way can we adequately respect the humanity of each person".

G. Declarations of unconstitutionality

The validity of the colonial laws that typify sodomy and the attack on honesty are also incompatible with the constitutions, so that they should face the same fate as the provision of the fixed death penalty, although so far this only seems to have occurred in 2016 in Belize and in Trinidad and Tobago in 2018 (this first instance ruling has been appealed by the government).

Belize's first instance ruling that declared the criminalization unconstitutional ordered the addition of the following paragraph: *This section shall not apply to consensual sexual acts between adults in private.* The government of Belize appealed the ruling and in December 2019 the Belizean appeals court rejected the government's appeal and declared the criminalization unconstitutional and absolutely and irreparably null and void. In his vote, Judge Samuel Lungole-Awich said that the constitutional prohibition of discrimination on the basis of sex includes discrimination based on sexual orientation, and that this gives the word *sex* a broad and liberal meaning. The court determined that sexual expression is part of the constitutional right to freedom of expression and therefore also protects sexual orientation.

The courts in the first instance in Trinidad and Tobago declared *unconstitutional, illegal, void, of absolute nullity, invalid and without any effect to the extent that they criminalize any act that constitutes consensual sexual conduct between adults.* This last ruling is under review before the Court of Appeals and will eventually reach the

Privy Council, which if confirmed will have consequences for the English-speaking Caribbean that still maintains this imperial Council as the last court of appeals.

Regarding this issue, Wintemute[31] argued that for the removal of these criminalizations in the Caribbean there seem to be three possibilities, namely: 1) modify the legislation; 2) litigate in national courts or in the Caribbean Court of Justice or before the Privy Council (a ruling by the Privy Council could have influence in the Caribbean that remains under its jurisdiction); and/or 3) take a case before the Inter-American Court of Human Rights.

In relation to the parliamentary route, he argued that "it has not happened that they pass laws recognizing the right to marriage between same-sex couples without having abolished antisodomy laws or without having antidiscrimination laws. No country recognized the love of a couple of the same sex while at the same time prohibiting the sexual expression of that couple".

Consequently, so far, the typification of sodomy and the *attack on honesty* (although it registers several different names) in accordance with the colonial matrix mentioned above, is maintained in the Caribbean.

Among other peculiarities, in Antigua and Barbuda a prosecutor declared himself homophobic; another one considered that some time is needed before decriminalization can be achieved; in Grenada, a *referendum* was held in 2016, in which the majority spoke out against gender equality, which is attributed to the *churches* that argued that such equality would lead to disincrimination and eventually equal marriage. However, it should be noted that in Dominica the Catholic bishop publicly urged decriminalization among adults. Likewise, in Guyana, some religious leaders and in particular the leader of the Catholic Church have publicly rejected discrimination against LGTBI people.

With regard to the *referendum*, it is necessary to note that Human Rights cannot be subject to majority opinion: there is no doubt that, if there had been a *referendum* in inquisitorial times, the majority would have ruled that witches continued to be burned, and if had there been in Nazi Germany about discrimination against Jews, the result would have been favorable to it.

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A truly curious rationalization - false reason - has circulated through the Caribbean countries to claim that the punishment of sodomy was not discriminatory. Thus, it has been said that, if the definition of this type consists of penetration *per anum*, it can take place both from a man to another man as well as for a woman, so it would not be a norm directed against people LGTBI. This perverse logic tries to ignore that the criminalization of a private sexual act between adults violates human rights without distinction of gender or sexual orientation.

Obviously, these false reasonings belong to the category of those such as, in times of punishment of mixed marriages in the United States, it was stated that they did not affect the freedom to celebrate marriages, because whites and African Americans could marry each other.

As Kirby[32] put it, we consider that "the national courts of all Caribbean countries will eventually come to accept that criminalization is incompatible with any principle regarding fundamental human rights and that states must eliminate this criminalization. But this is an urgent matter".

H. The Inter-American Court and primary criminalization

When considering the position of the States that are reluctant to repeal these criminal offenses, the participants expressed the importance of having such a hierarchical regional body for the protection of human rights. Méndez[33] considers that "the great legitimacy, especially in judicial spheres, that the Inter-American Court of Human Rights has in our continent is very remarkable. That is an advantage that other regions do not have". Even when some participants in the Discussions pointed out as an obvious problem the extreme slowness of the processing of cases in the inter-American system, its fundamental place is unanimously recognized and they even urged the implementation of reforms that could speed up these procedures and evaluate the possibility of submitting a request for an advisory opinion before the Inter-American Court on the criminalization of consensual sexual relations between persons of the same sex in the Anglophone Caribbean jurisdictions that still criminalize them.

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Regarding the feasibility of the Inter-American Court ruling on the matter, Wintemute[34] pointed out that it is difficult because some countries have not submitted to legal jurisdiction. The expert proposed to consider the viability of finding an opportune moment for the Court to express itself in the sense that the Convention does not allow the existence of criminalization laws. From his perspective it would be valuable to have a ruling on a criminal law that was clear and binding.

Regarding the question of whether we should use the American Convention on Human Rights, Kirby[35] considered that "we should use everything that is available" and that nothing is futile as some countries continue to have criminalization laws against LGTBI people. The expert considered that since they are laws that respond to a separate legal category, they should receive separate and specific treatment. In Kirby's words:

"The law is built on the basis of categories, therefore, if a country criminalizes homosexual sexual relations, it cannot at the same time have a law against the discrimination of homosexual people. (...) The point is that lawyers think in categories and the category of anti-discrimination or equal marriage is different from that of criminalization. If there is no specific decision of the Inter-American Court regarding the illegality before the American Convention of the existence of these criminal laws, it is something that would be worth doing ".

In turn, he argued that a sentence of this type would influence the judges (although it does not imply obligation on the way in which they must interpret their Constitutions) as it is a fundamental principle that the judges will treat to the extent of their possibilities to adapt the expression and interpretation of local laws in order to harmonize both systems, the national Constitution and the international or regional protection system.

I. Latin American comparative constitutional law

Unlike the aforementioned cases of the Caribbean countries, in the rest of the region, it is considered - by constitutional doctrine and jurisprudence - that the constitutions, by establishing the principle of equality, prohibit discrimination based

34 Intervention in the Discussion on October 22, 2020.

35 Intervention in the Discussion on October 23, 2020.

on sexual orientation , although in their texts it is not mentioned in a particularized way. Given that the hierarchical creativity of human beings knows no limits, when the constitutions mention the different forms of discrimination they condemn, they usually have no choice but to appeal to analogy and, therefore, when the prohibition of discrimination based on sexual orientation is not specified, interpreters consider it covered by reference to other grounds of discrimination prohibited by reason of the principle of equality.

In this matter, Piovesan[36] remarked that the right to a life free of violence based on sexual orientation and gender identity assigns the "state legal responsibilities, such as due diligence to prevent, investigate, punish and repair." And she highlighted: "there is a very direct correlation between the norms that criminalize and the violence against LGTBI people. The norms promote a social message of hostility, discrimination of violence and tolerance of these rights' violations".

In Argentina, although the National Constitution does not expressly mention it, it enters into constitutional law through the incorporation of Human Rights treaties with the same normative hierarchy as the Constitution (section 22 of art. 75, in accordance with the 1994 reform) and in accordance with the interpretation indicated by the Inter-American Court. The Constitution of the Autonomous City of Buenos Aires (1996) expressly mentions it (art.11).

In Brazil, although it is not expressly mentioned in the Federal Constitution, it is expressly listed in the constitutions of the States of Alagoas of 2001 (article 2,1), of the Federal District of 1993 (article 2.5), of Mato Grosso of 1989 (art. 10,3), of Pará of 2007 (art. 3,4), of Santa Catarina of 2002 (art. 4,4) and of Sergipe of 1989 (art. 3,2).

Article 14 of the 2009 Constitution of the Plurinational State of Bolivia expressly prohibits discrimination based on sexual orientation, as does art. 11.2 of the Constitution of Ecuador. This last text also contains several provisions that are relevant to this matter: it enshrines the right to make free, informed, responsible and voluntary decisions regarding their sexuality, life and sexual orientation (art. 66,9), it protects confidentiality regarding sexual life (art. 66,11) establishes the duty for every Ecuadorian to respect and recognize the various sexual orientations (art. 83,14).

36 Intervention at the International Seminar on October 28, 2020.

The art. 1 of the Political Constitution of the United Mexican States prohibits discrimination based on sexual preferences. This same prohibition is enshrined in the following constitutions of the Mexican States: Campeche of 2005 (art. 7), Chihuahua of 2013 (art. 4), Coahuila of 2013 (art. 7), Colima of 1012 (art. 1), Durango, 2013 (art. 5), Guanajuato, 2015 (art. 1), Michoacán, 2012 (art. 1), Morelos, 2016 (art. 1 bis), Nuevo León, 2016 (art. 1), Oaxaca, 2016 (art. 4), Puebla of 2011 (art. 11), Querétaro of 2016 (art. 2), Quintana Roo of 2010 (art. 13), San Luis Potosí of 2014 (art. 8), Sinaloa of 2013 (art. 4 bis), Sonora of 2013 (art. 1), Tlaxcala of 2012 (art. 14), Veracruz of 2016 (art. 4), Yucatán of 2014 (art. 2) and Zacatecas of 2012 (art. 21).

3. Age capacity and non-hegemonic sexuality

A. The age capacity to exercise sexuality

The obvious need to protect children and adolescents from criminal behavior by pedophiles and the like imposes and legitimizes the classification of such criminal behavior. However, these rational typifications must be carefully observed, to avoid that under the pretext of this criminalization, new - or old - ways of criminalizing the conduct of LGTBI people or limiting their sexuality, do not leak into the criminal laws.

The law is required to enable the exercise of human sexuality for age reasons, establishing limits objectively, which has consequences in the field of criminal law. Criminal law is a legal branch especially reluctant to *juris et de jure* fictions or presumptions (which do not admit evidence to the contrary), but which cannot avoid establishing fixed age limits on its types, for elementary reasons of legal certainty.

The very regime of the criminal responsibility of children and adolescents is required to set a minimum age, which varies in comparative legislation and we know that punitive demagogy means that when politicians seek to obtain votes, they postulate lower age limits as a means to satisfy the punitive desire of the common citizen. In short, comparative criminal law was found in this matter faced with the dilemma of establishing a diffuse and arbitrary t*est of emotional maturity,* or of setting a minimum age of responsibility and, consequently, today our region is inclined towards the second path.

Something similar happens with the ability of the person to decide about their sexual behavior, despite the fact that the setting of a minimum age of capacity for the practice of sexuality means that by law a person, from the first minute of the day of their birthday anniversary, is able to decide about their body, but two minutes before they could not do that, which is not very rational. It is simply a *forced fiction* that criminal law must incur, despite its general rejection for this type of remedy, given that other solutions would be much more complex and harmful to strict legality and the consequent predictability of the population in general about the lawful or illegal quality of their conduct.

B. Protection or prohibition?

Like any *legal fiction*, it is not possible to deny its drawbacks. Above all, it should be taken care that, under the pretext of guardianship, a person is not deprived of their right to sexuality, regardless of their orientation and/or gender identity and/or expression.

But, in addition, the law also frequently incurs dangerous discrimination between the age of ability to decide the practice of hetero-normative sexuality and that of LGTBI persons, which goes beyond the *fictional framework necessary for guardianship*, with *discriminatory* consequences that, in short, do nothing other than prohibit adolescent sexuality of a non-hegemonic sexual orientation, by threatening punishment to the person who shares it, allowing only the practice of sexuality that does not correspond to their orientation.

It is irrational that some laws subject adolescents to punishment from the age of 16, for example, that allow them to marry or enter into contracts from that age (some with parental or judicial authorization), or to vote, but still consider them disabled to decide about their sexuality until they are 18 years of age or older if their sexual orientation is not heteronormative.

C. Problems of age capacity in legislation

Comparative legislation in the region is highly unequal. In the Caribbean countries, the circumstance of maintaining the classification of sodomy and the diffuse type that as a rule accompanies it, complicates things more, because in principle there is no

age limit for the consent of homosexual relationships, since they are always criminal (Guyana, Barbados, Dominica, Saint Kitts and Nevis, Saint Lucia).

Furthermore, in some countries, if it is practiced between a person over 18 and a minor of that age, the penalty can be perpetual (Antigua and Barbuda). Regarding sexual relations between children, the eventual decriminalization does not include those practiced by children of the same sex (Trinidad and Tobago). In any event, it contributes to aggravating the problem that, according to Anglo-Saxon law, the age of criminal responsibility for children and adolescents is often diffuse.

In most countries, where sexual relations between people of the same sex are not criminalized, the issue is still complex in several ways.

The age of full consent for sexual relations in general ranges between 14 years (Brazil) and 18 years (Dominican Republic) and the intermediate age of 16 years (Nicaragua). But although no distinctions are made regarding sexual orientation, in some of them the *corruption of minors* is typified in an unclear way, without specifying what the acts of corruption specifically consist of, which leaves a huge scope of jurisprudential arbitrariness, therefore, makes it possible for all sexual acts between people of the same sex to be considered typical of *corruption*, which has happened far too often.

Thus, in some of our countries (Argentina), although the relevant age of consent is 13 years, it is considered a crime to have a sexual relationship with a person under 16 years of age only if it implies taking advantage of their immaturity, but subsequently, the diffuse type of *corruption* extends up to 18 years of age (before 1999 up to 22 years), which led to the criminalization of simply homosexual and even heterosexual acts considered premature by a vacillating jurisprudence. Given the lack of typical precision, *premature acts* and even oral sex with full consent were considered indeterminate. Something similar happens in Chile, because consent to sexual intercourse is set at 14 years, but sodomy is punishable up to 18 years.

D. Sex between adults and minors

On the other hand, in the aforementioned cases in which LGTBI relationships are not admitted until the age of 18 or more, the case is raised in which the two participants

were minors, being absurd that both were penalized as victims and victimizers at the same time.

To solve this, some code only typifies these relationships when one person was younger than those ages and another one is older. In Paraguay, for example, article 138 of the Penal Code establishes that an adult that has sexual relations with someone under the age of sixteen and of the same sex, will be punished with a custodial sentence or a fine. This does not solve the problem, because in the case of a continuing relationship that began when both were under that age, if one of the people reached the age limit, theoretically they should stop having sexual relations with the other person, until this one also reached the same age. It is obvious that this solution is not reasonable.

Faced with this curious question, the no less curious legislative ingenuity has sometimes incurred new fictions: relationships with children under 15 years of age are penalized if the older person exceeds the age of the minor by five years or more, but also that of a person between 15 and 18 years old, if the age difference of the oldest is seven years or more, meaning that sexual relations between a 17-year-old man or woman with a 24-year-old man or woman are typical (Costa Rica.

4. Primary and secondary criminalization

A. The law and the reality of the exercise of punitive power

If we call punitive power to what exercises a punishment on a person, it should be noted that criminal law imposes a *duty* that enables its exercise for all cases of human conduct that it typifies, which is called *primary criminalization*.

But this empowerment cannot only arise from formal criminal laws (whose manifest objective is punishment), but also from other laws that are only *tacitly* punitive, that is, there are laws that manifestly have other objectives (health, tax, preventive, etc.), but that the power they enable can be used punitively.

Therefore, if we want to consider all the real or possible exercise of punitive power in a society - and not stay in the formal and express legal way -, we cannot do anything else but proceed by exclusion. Given that state coercion is not only punitive, *punitive power* will be the one that does not fit into the other forms of state coercion.

These forms of coercion, present in every society -even in pre-state ones-, and which are not punitive powers, are *reparative* (civil, labor law, etc.) and *direct administrative coercion* (exercised in the face of imminent or in progress danger).

In short, from the social reality, that is, from citizens feeling as a threat that limits their space of social freedom, we can say that any injunction or effective exercise of power that does not fit into *reparation* nor respond to the needs of *direct administrative coercion*, is punitive power.

But the punitive power is not exercised mechanically nor could it be, that is, the laws enable it in what is called *primary criminalization*, but as this is always a project - a duty - very broad that can never be fully exercised in the form in which the primary criminalization projects it, for which the police agencies must necessarily *select* the people on whom it will effectively fall and who, in no case, can be all those that the exorbitant project of primary criminalization intends to cover.

Therefore, the punitive power, for structural reasons -that is, not for temporary reasons of simple defects of the penal systems in particular- is always exercised *selectively* by the executive agencies (police), which are the ones that *select* its power's vulnerable people; this is what is called *secondary criminalization*.

Although selectivity may be greater or lesser - and sometimes frankly irritating - due to the particular characteristics of each penal system, it must be clear in this regard that secondary criminalization is always police, since it is not the judges - nor the legislators - those who exercise punitive power: the latter only enable its exercise, and judges - if they fulfill their job well - can limit or contain it, but they do not go out on the streets looking for people to criminalize.

Consequently, it is clear that it should not be understood that, due to the fact that in the countries of the region whose laws never typified - or no longer typify - sexuality that is not cis-heteronormative, no punitive power is exercised over it, by action or omission of state officials, making use of other normative pretexts.

Throughout the region, whoever wants to know the reality of the exercise of punitive power in general, cannot remain at the mere level of analysis of the norms -which only open a space for selection-, without observing how this is carried out, because

in general, it can be said that, in any order, *the law and reality tend - too often - to scandalously distance themselves in the region.*

B. Arbitrary secondary criminalization throughout the region

In the social reality of the region, although there are important differences of degree in the behavior of the executive agencies (police) with respect to the LGTBI population, these are not even due to the legal authorizations for the police agencies to exercise punitive power.

The information gathered shows that the police persecution of LGTBI people - especially trans people, although not only of them - does not require any specific legal basis to enable it, since the fact that there are no criminal nor offensive types does not prevent it . This is the experience that is gathered from several countries in the region, without much distinction between those of continental and English legal tradition.

Thus, the laws on *vagrancy* are used as a pretext in several countries (Barbados, Trinidad and Tobago), in others the criminal types of obscene exhibitions are used to harass same-sex couples who have public displays of affection in squares and other places, including on the part of the municipal or *serenazgo* guards (Peru), provisions referring to public scandal, public order or attacks on morale and protection of children (Paraguay), powers of preventive police detention (Jamaica), authorization for detentions due to *background checks* (Argentina), etc.

It is not in any way necessary for a formal law to criminalize the conduct of LGTBI people or any unconventional sexuality, for these people to be subject to an exercise of punitive power.

Although on many occasions they use misdemeanor legislation, to which - as we have said - as a rule little attention is paid in doctrine and jurisprudence, these laws are not even necessary, but rather any rule that enables the police to detain people, whatever the manifest function of that rule, is used in the region to victimize these people with deprivation of liberty, harassment, humiliation and extortion.

It even seems that in some countries this legal basis does not even exist, that is to say that it is only proceeding because of the repealed legislation, but that it has become a police custom (Venezuela, whose law on vagrants was repealed in 1997).

In another country (Argentina), the police had for more than a century the power to legislate and judge violations, even having a special section on *morality* in the police organization chart. These arbitrary powers were repealed in 1997, but now the provisions of the drug law are used - which makes simple possession for consumption a penalty - and the aforementioned authorization to arrest for alleged *background checks*. Much worse are offensive types such as the *supply and demand of sex in public*, the indefinite *loitering* behavior (Argentina), or arrest powers for suspicion of a crime not yet committed (Jamaica).

Any more or less open or indefinite legal provision is used to exercise punitive power over LGTBI people, such as the provisions that prohibit wearing clothes of the *other sex*, which in principle would not be a crime, unless it had an *improper purpose*, indefinition that was even used by the judges to reject the presence of a trans person in the courtroom, precisely when their case was being judged (Guyana).

C. Formal primary criminalization in the Caribbean

In general, there are no - or very few - cases of formal primary criminalization, that is, of convictions for consensual relationships between adults, at least due to the official information provided and corroborated by some non-governmental organizations (Antigua and Barbuda; Barbados; Belize ; Grenada; Dominica; Guyana; Saint Kitts and Nevis; Saint Lucia; Trinidad and Tobago).

In any case, as the same type is applicable to cases that in continental law are of rape (carnal access with children) and the statistics do not distinguish, only absolute data are available. Anyway, it seems that there is no high incidence and in some it could be said that it is not formally criminalized, although there is some doubt (Jamaica).

The disuse of these laws is usually an argument put forward by the Caribbean states before the UN Human Rights Committee (Antigua and Barbuda; Grenada; St. Lucia), although one person was sentenced in Grenada to six years in prison in 2011. In any case, it is recognized that these laws are used by the police to persecute LGTBI people,

in some cases extort money (Belize; Dominica) or subject them to harassment or ridicule in police offices (Saint Vincent and the Grenadines, Antigua and Barbuda, Trinidad and Tobago), although the charges are often dropped later. A scandal broke out in Dominica over the arrest of two men who arrived on a cruise ship.

On this issue, Borrillo[37] considers relevant the European experience of moving from the criminalization of homosexuality to the criminalization of homophobia. Along these lines, he highlights various jurisprudential sources, including the sentence in the case *Dudgeon v. UK*. In the case, the Government maintained that there was no discrimination in the United Kingdom because it was about a legislation that was not applied. The European Court considered that regardless of the effectiveness of the rule, the very existence of repressive legislation constitutes a violation of article 8 of the European Convention on Human Rights on the protection of privacy.

D. Police secondary criminalization

Apart from any legal authorization, the police often impose unlawful penalties on LGTBI people. It is a generalized phenomenon that attempts to reduce through courses and special instruction to the police, but these are carried out with insufficient insistence on the subject in Argentina, Costa Rica, Brazil, Paraguay, without knowledge of this particular instruction in other countries. There appear to be some efforts in Jamaica, Antigua and Barbuda, Barbados, Grenada, Dominica, Guyana, Saint Kitts and Nevis, and Saint Lucia.

As for special protocols for cases of personal searches, except in Costa Rica there do not seem to be any and, therefore, these tend to be humiliating, particularly for trans women, who are requisitioned by men.

The police abuses against LGTBI people collected in the investigation are numerous and indicate the enormous frequency of these events, which seem to be normalized. A case of arbitrary detention and physical abuse was brought before the IACHR (Peru). Lesbian and trans women are apparently molested in Costa Rica and acts of police harassment are recognized, as in Nicaragua. The police commit cruel treatment in Venezuela, especially in the states of Carabobo, Aragua and Mérida, which the

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victims do not report, due to ignorance and due to the delay and ineffectiveness of the procedures. There are cases of rape, verbal harassment and threats in Jamaica. Couples of women are harassed in Argentina, where a woman was convicted of kissing her wife, alleging subsequent resistance to authority. Harassment of trans women, arbitrary detentions and the rape of a man at a police station in Guyana are reported. Verbal harassment appears widespread in Saint Vincent and the Grenadines and Grenada. In Barbados a trans person was forced to undress in front of men and ridiculed because they had male genitalia and breasts; she then was taken to court and the officers wore gloves to avoid touching their body. In Belize, police officers stripped two gay men and took them to the police station, where their clothes were returned. In Antigua and Barbuda, two people were beaten and one lost sight of one eye, but also a senior police chief is on trial for sexually harassing his young subordinates. There was also police violence in Jamaica, where the beating of a man was reported, and he ended up dying the next day.

Although no deaths are recorded in police premises, there were riots of prisoners with multiple deaths (68 in Carabobo, Venezuela; 14 in Nicaragua), among which it is suspected that there were gays. In Jamaica there were some riots known as the 'condom riots' in 1997. It happened after it was suggested that condoms should be distributed in prisons due to the high rates of HIV/AIDS spread. The guards left work leaving the prisoners. Suspected homosexuals were murdered. It is also suspected that the guards allowed the other inmates to kill their lovers so that there was no evidence of their homosexual activity. In the end, 16 inmates died, certainly several homosexuals, and 20 inmates were wounded.

E. LGTBI phobia or other reasons?

The repeated regional criminological experience does not allow us to share the opinion expressed by some of the informants, according to which these police attitudes would only respond only to *LGTBI phobias*, despite acknowledging that this plays an important motivational role.

In general, it is very difficult for a complex phenomenon, such as the abuse and illegal exercise of punitive power by the police in the region, to be approached as a product of a single factor.

The most serious problem of the States of the region is their growing weakness, as a consequence of the fact that their collection is pluralized, that is, there are different entities that collect on their own and, of course, require a coercive power that escapes the wishes of the political leadership of the States themselves. This is usually defined as *corruption* and, therefore, minimized in its political significance, because by reducing it to a *criminal issue*, it is overlooked that, in reality, it is a weakening of the state sovereignty itself.

Thus, the first to become autonomous is the police, who collect on their own account and threaten to exercise their own punitive power. This is the first step in a deterioration of state power that, unfortunately, most of the countries in the region suffer to different degrees. When the weakening of the States is accentuated by the effect of the fragmentation of the collection, and its power is degraded to a greater extent, other collection entities arise that also exercise punitive power: the so-called *organized crime*, self-defense groups, parapolice, etc.

LGTBI people, due to the particular state of vulnerability in which they find themselves, become a source of benefits, especially those who practice prostitution, who are usually forced to pay a *fee* - which happens with street prostitution, even heterosexual - but also others, who can be easily extorted: the mere fact of detaining a person can cause a very serious family conflict, professional discredit, put their source of work at risk, etc.

To all this, it must be added that there is a widespread police culture imposed by regulation or customary law, which obliges personnel to carry out and record a minimum number of procedures, even if they do not have any practical or preventive sense of crime, but whose figures are computed to justify their activity before superiors, so that they give proof of a supposed effectiveness before the political leaderships and also to be taken into account as merits for the promotion of their bosses. This police activity with no practical social objective is known in several countries - in police jargon - as *doing numbers or statistics*.

On the other hand, *LGTBI phobia* is often denied as a sole motivation, among other things because bisexual behaviors or non-hegemonic sexuality are often recorded by police officers themselves. Thus, in some countries there are non-heteronormative sexual acts –particularly oral sex- with trans people in detention, and also cases of rape of gay men.

These considerations do not completely rule out, far from it, the *LGTBI phobia* factor because - as is well known - the practice of non-hegemonic sexual acts does not exclude it, sometimes it empowers it to reinforce the *sexist* sexual identity of the perpetrators or as a rejection of their own sexual orientation. In any case, it forces to recognize that it cannot be considered the only determining factor in police attacks on people with other than cis-heteronormativity sexual orientation and gender identity.

It is advisable to take this circumstance into account, because it shows that this type of aggression will not be eliminated only with specialized instruction to police personnel, but demands more comprehensive solutions, such as the recovery of the monopoly of collection and the exercise of punitive power by part of our States, which is not simple, because it is a problem that encompasses all state criminal policy and even issues of territorial sovereignty.

F. The Human Rights of police personnel

With what has been said before, it is clear that police conduct towards LGTBI people is not an easy problem to solve. It is not only about eradicating phobias, neither unilaterally about the general problem of the State's weakening, but in this multifactoriality there are also issues that concern the health of the police personnel themselves, since some of the behaviors that are recorded in the reports cannot be considered less than serious or even downright pathological misconduct.

Here is where other Human Rights violations come into play that have repercussions and largely condition not only the discrimination that concerns us here, but also a much broader range of behaviors that violate Human Rights. As paradoxical as it may seem, *our States often violate Human Rights through Human Rights violations*, and one of them is that of those that correspond to police workers.

In almost all of our countries the most elementary labor Human Rights of police workers are violated. Thus, unionization is prohibited, they are prevented from formulating collective petitions, being a civil service it is intended to impose a military order on it, they are subject to an arbitrary system of sanctions, they cannot horizontally discuss their working conditions nor their salary, that is, they lack of all the rights inherent to workers and other public officials.

But in addition to their labor rights, their right to health is affected, since occupational diseases are not recognized and, in general, they must face risky and traumatic situations without the proper subsequent psychological assistance, not being uncommon that the demand of this attention is considered a sign of weakness, contrary to the prevailing machismo in corporate culture.

The responsibility of the chains of command for crimes committed by police personnel cannot be presumed or become strict liability incompatible with criminal guarantees, but the possible *fault-based liability of political leaders* cannot be ruled out, when they use police forces that for their autonomization, due to their lack of professional preparation, the inadequacy of their equipment or their low level of mental health, stress or untreated traumatic experiences, rather seem like hordes and not security forces. In such a case, criminal liability for the negligent conduct of corporate and political leaders cannot be ruled out.

5. Assaults on LGTBI people

A. Hate homicides

Across the region, there is the difficulty of the lack of statistics and complete records regarding homicides in which LGTBI people are victimized, despite the fact that several international organizations observed this fairly generalized official indifference and demanded or advised to implement data collection systems, which has yielded some isolated results so far (Guyana launched a registry as of 2017).

It should be noted that the lack of statistics and, even more so, of field research on homicides, is not exclusive to the victimizations of LGTBI people, but a defect shared by all our countries, where the little official information available is always of doubtful fidelity and collected without preventive objective. It is known that no statistics are *naive*, but rather that all of them presuppose a certain hypothesis or, at least, a certain practical objective that, in the case of homicides, it is assumed that it will be to try to avoid or reduce them.

Therefore, if this information is to serve that objective, it should not be reduced to numerical accounting, but should be carried out with technical criteria and in accordance with social knowledge. The carelessness in this regard, which constitutes a significant omission of our States - and an injury to life by omission - is still striking, given the high rates of intentional homicides in some of our countries.

In any event, although it is not possible to accurately verify the frequency of these events in each country, NGO reports, some official homicide statistics that introduce a few differential data, journalistic news and the testimonies of victims and Human Rights activists allow us to approach this sad reality in the region, revealing its high frequency.

In the case of Brazil, between 2016 and 2017 homicides that victimized LGTBI people increased by 40%, given that in the last year 445 deaths were reported (43% gay men, 42% trans people and 43% lesbian women). 37% were committed in private residences, 56% on public roads and 6% in public access establishments. In less than 25% of the cases the murderer was identified and in less than 10% they were criminally convicted. Most of the homicides were committed between strangers or casual relationships, and only 4% between stable partners.

In Colombia, 109 deaths were reported in 2017, with an increase over the previous year and also committed by armed groups. Among the victims 45 gay men and 35 trans women.

In Peru between 2015 and 2016 there were at least 8 homicides, but 43 cases of torture and physical abuse have also been reported. Other information indicates an increase in homicides in 2015, indicating 14 deaths and 65 cases of violence.

In Venezuela, it is indicated that there were 18 homicides of people from the LGTBI community based on their sexual orientation, gender identity and gender expression between June 2015 and May 2016.

In Mexico, 137 homicides of people from the LGTBI community were officially reported between 1995 and 2005; In recent times, gay and transgender homicides continue to be committed, which, according to NGOs, go unpunished and the police attribute the deaths to the victims.

In Costa Rica –although (it is not?) the period covered is stated, 23 homicides of gay men and eight of trans people are mentioned. Apparently, in the latter country the perpetrators have been detected more, noting the frequency of minors, with whom the victims maintained relationships of trust.

Other partial data from different countries are still particularly alarming, such as four homicides, one involving gasoline (Belize), another homicide is reported that the police do not consider hateful (Belize), three homicides, among them that of an 18-year-old (St. Lucia) and a monthly death is estimated, according to one source, in Jamaica.

While in all these cases the victims are LGTBI persons, it is not possible to establish how many of these homicides make up what is criminologically known as *hate crimes*, according to the most accepted concept in the academic field. In any case, the high victimization of people with non-cis-heteronormative sexual orientation is alarming.

Regarding the lethal victimization of LGTBI people, the jurisprudence of some Caribbean countries has admitted a defense that they call *gay panic* (St. Lucia, Jamaica, Dominica and Guyana), which is not clear if in continental law it is equivalent to a legitimate *incomplete* or *excessive* defense or an alleged imputability out of fear. In any event, it seems that it goes beyond the limits of the legitimate defense of continental criminal law (in particular the strict necessity of the defensive means), based on an alleged extreme fear.

B. Accuracy of the hate crime concept

The indicated lack of official information, due to the fact that the statistics do not register nor indicate all the cases of fatal victimization of people from the LGTBI group, makes it even more impossible for us to characterize the different modalities of each case. Hence, we cannot know exactly what are true cases of hate crimes *stricto sensu*, to differentiate them from those that respond to other motivations or characteristics.

It is understood –according to the most common criminological criteria- that the hate crime is the one committed against any person of the *hated* group, without the perpetrator taking into account or being interested in their identity or individualization,

as a way of intimidating the entire group of which the person is part (any gay or trans person by the fact of being, in general, although not necessarily unknown to the murderer). Hate crime can serve as a message to any discriminated group, according to the societies and their particular prejudices: immigrant, non-European community, Jew, gypsy, etc.

Consequently, in our case, homicides resulting from violence between couples are excluded from the concept, as well as those committed with the sole intent of theft, taking advantage of vulnerability situations of the victim. In these latter cases, in the desirable case of a meticulous record of facts, it should be clarified that it would not be easy to distinguish them from pure *hate crimes*, *because also in them, on the occasion of the homicide, the occasion of the robbery may arise*, unlike what happens when a homicide is committed *during the robbery*, that is to say that in many cases it will be difficult to establish whether the determining motivation was robbery or homicide.

The clue to the frequency of *hate homicides* in the strict sense is provided by the circumstance that in most of these crimes the active subjects had been unknown or eventually related - without prior knowledge - to the people who were victims. Although this data is not decisive to allow a relatively precise quantification, it is a good trend indicator.

In a country, *cruelty* was stated as an indicator of *hate crimes* (Costa Rica), which we consider more distant as an indicator: *cruelty* is usually a qualifier that reveals *hatred*, but not every hate crime is committed with cruelty, far from it .

Thus, among the fundamental aspects to work towards the protection of the rights of the LGTBI collective appears the question of the classification of hate crimes. It was argued that there are few investigations that define what a hate crime is, that there is no consensus regarding its characteristics. In this sense, Maffía[38] pointed out the relevance of data production including the transvestite/trans community when defining indicators for data collection since, for example, in the case of transfemicide its characteristics differ markedly from the characteristics of other violent crimes (place of the fact, characteristics, etc). She in turn pointed out that these indicators must be unified to allow comparison and measurement of the impact of public policies.

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C. Other attacks against LGTBI people

The frequency of *physical attacks* on people of the LGTBI group is usually very high in the region and, practically, there is no country in which they are not reported. In this case, it is much more common that they come from unknown persons, which reveals that they are criminally injuries as true *hate crimes*, being of all kinds: bottle blows, bricking, injuries with a knife, attacks by masked people, even rapes and attempted rapes, etc.

The most common and least serious are verbal attacks in public places, including threats, recently uttered by a President of the Republic (Brazil). In some country it is estimated that 33% of gay men receive this type of assault on a monthly basis (Antigua and Barbuda), indicating the greatest vulnerability of trans and gay people and fewer of lesbians (Belize). In another, there are complaints of violation of the rights of gays and lesbians, between February 2013 and 2014, in 97 cases (Peru), which is clearly demonstrative of much greater frequency, given the number not reported.

It should be noted that the number not reported is higher because it is not uncommon for the police to refuse to take complaints (Antigua and Barbuda), not to pay due attention to reports of physical attacks against LGTBI persons or not to be investigated (San Cristobal and Nieves, Saint Lucia, Trinidad and Tobago, Dominica). In any case, it is quite common that they go unreported, considering that in general LGTBI people fear the police. It is obvious, therefore, that the attacks that are registered are only a tiny part of those that take place, meaning that the number of complaints is far from reflecting the real frequency of these events.

To clarify a bit more the concepts and the difficulties of investigations with preventive purposes, we must clarify that homicides, in general and when there is not a profusion of them and of disappearances of people, are what criminology calls *hard figures*, because almost all those that occur are registered, although they are not solved. Instead, injuries - and even more so, property crimes - have what we mentioned here before, which is a *dark figure (dark figure or schwarze Figur)*, of unrecorded facts, which are usually the vast majority of the cases. Statistics in these latter cases - as well as when homicides cease to be *hard figures* - are indicative of the activity of the penal system, but not of the frequency of offenses in social reality.

D. Assaults by homophobic groups

Although there have been numerous brutal attacks, such as the aforementioned burning of a young man with gasoline in Venezuela and others no less criminal in Brazil, Peru, Argentina, Paraguay, Costa Rica, Nicaragua. However, these attacks do not always - far from it - come from organized violent groups that, in general, do not exist or are difficult to detect.

Nonetheless, in all countries the campaigns of some religious groups assume violent language and incitement to violence (Jamaica, Paraguay, Costa Rica), sometimes openly. In Jamaica, a fire of the premises of an NGO has been caused and in Guyana a Christian religious leader has come to publicly maintain that since homosexuality *is a learned vice*, it would be necessary to put all gays on an island to avoid contagion. These organizations are penetrating politics (Brazil, Caribbean, Costa Rica) taking refuge in religious freedom. However, in Jamaica the entry of an anti-gay pastor was prohibited in 2018. In countries where such penetration is not strong, some *skinhead* groups that pretend to be *neo-Nazis* are active, but in general they operate by imitation and have little political training (Argentina).

It has been pointed out that the escalation to the installation of a State policy of extermination begins with isolated and inorganic demonstrations, reaches a greater degree of progress when organized groups emerge and spread, with publications and propaganda, and they co-opt politicians and cultural personalities, propose in a next step policies of extermination to the State, until, finally, the State adopts them.

As for the discrimination that concerns us, to date there are no groups that are too organic, since religious groups themselves do not penetrate the whole of society, neither do all religious - far from it - participate in this attitude and those who do, do not usually move on from allegedly dogmatic invocations. It would seem that we are far from walking the path towards a State policy of extermination.

Rather, in our region, the fight for the rights of LGTBI people does not face - at least until now - organic movements that want to impose a *State policy of extermination*, but, on the contrary, it is about fighting for dismantle a State policy of discrimination and, consequently, the harm that comes from existing homophobic groups consists in their having the possibility of containing or postponing the disruption of discrimination that is underway.

In any case, it is necessary to pay attention to their behavior and especially to their political penetration, since the risk of a future unfavorable dynamic of power relations in our societies should not be ruled out, although if it occurs it would necessarily imply the failure of our structures. In other words, it would go far beyond the mere question of discrimination based on sexual orientation or gender identity, to project itself onto the entire democratic political landscape of the region.

There remains, however, a question as to whether Jamaica is not showing signs of taking steps that go beyond containing or postponing the disruption of discrimination currently under way. Its political class shows a high degree of permeability to pressure from religious groups, which is illustrated by the constitutional reform of 2011, the new article 13 (12) of which establishes that nothing contained in the Offences Against the Person Act (acronym OAPA) related to sodomy, abortions or obscene publications will be considered incompatible with the provisions of the Charter of Fundamental Rights of the Constitution or in contravention of it. This reform in effect eliminates the general clause mentioned earlier (see saving clause in Chapter 2 point 2.F), which is positive, but unfortunately it maintains it for sexual crimes. The latter is alarming since the judicial power is prevented from ensuring the supremacy of the rights and guarantees of the Constitution only in this matter, which in itself marks a break with two basic and fundamental principles of the democratic system: supremacy of the Constitution and separation of powers as the laws against sodomy can only be annulled by another law of the Jamaican parliament without due control of constitutionality by the judiciary.

E. Family group assaults and adolescent suicide

In general, discrimination such as racist or religious is perceived from childhood and families - who share discriminatory victimization - tend to prepare people from that age and serve as an emotional protective shield.

Discrimination based on sexual orientation or gender identity has the particularity that it usually manifests itself much later, only when the person's sexual orientation is revealed in adolescence or puberty, and the person lacks any prior preparation to reject such discrimination.

Adolescents who find themselves in this situation in a society with deep prejudices against LGTBI people, throughout their childhood have received and even internalized the stigmatization of their sexual orientation or gender identity by their own family environment and also of their small environment (school, neighborhood, etc.), which makes their situation particularly traumatic -in a difficult evolutionary psychological moment- and, precisely for this reason, they find themselves in greater need -and at the same time lack of - an emotional shield that enables their resilience.

Unfortunately, many times the family reaction, instead of providing for this need, reacts aggressively, causing rejection and mortification and even forcing the submission to the absurd conversion therapies, which we will deal with later in the report.

In prejudiced cultural contexts, the family reacts with reproaches that deprive the person of a relatively normal development or maturation of their affectivity, generating strong feelings of guilt and traumas that are difficult to overcome later, which makes the family often less than a safe place, as it becomes a serious threat to the adolescent in developing their sexual orientation or gender identity.

In extremely serious cases, discrimination and family rejection lead to situations of abandonment, such as expulsion from the paternal or maternal home (Jamaica), death threats to gay sons or lesbian daughters, even filicide for being the gay son (Peru, in January 2019), of injuries to children (Trinidad and Tobago), of allegedly *corrective* violations of lesbian women (Antigua and Barbuda), all of which often, in highly prejudiced societies or circles, the family should be considered as a real risk environment for these people (Paraguay, Guyana).

Along these lines, Madrigal[39] refers to the depathologization process that began four decades ago, which has been deconstructing these notions, but it has been a slow process. He recalls that only in 2019 is gender dysphoria removed from the chapter on mental illnesses and transferred to sexual conditions, ensuring that the support of public systems is allowed in all identity affirmation processes. The problem, he sees, is that all of these classifications mark deep furrows in the mindset of the medical profession and of psychology and related disciplines. The expert maintains that these are very widespread situations, even regarding terrible practices of cruel and degrading inhuman treatment such as so-called conversion therapies and considers

39 Intervention at the International Seminar on October 28, 2020.

that it is a long-term task that requires sustained work from public policy, judicial work and legislation to ensure deconstruction.

For his part, Cabral[40] maintains that, although Advisory Opinion 24/17 does not specifically include references to intersexuality, it does include protection against any form of pathologization that is not consented to by the persons themselves and considers it possible to make progressive interpretations of the Advisory Opinion. Thus, it highlights that in the 1st Regional Intersex Forum, in the Declaration of San José, Costa Rica, the Advisory Opinion is used assuming that it includes the intersex population to the extent that it speaks of the LGTBI population, although it does not specifically mention the prohibition of interventions. These types of practices were considered as forms of torture, ill-treatment, cruel, inhuman and degrading punishment in the 2013 report of the Rapporteur against Torture, Juan Mendez. Regarding this issue, Cabral maintains that normalizing interventions in intersex minors are carried out in all the countries of the region: "what we see in relation to trans people and intersex people and minors who express their sexuality, their identity and their gender expression in a different way with respect to the standard, is that there is a war against childhood and that this war is seriously affecting their health and well-being, but also access to the rights of minors in different countries ".

It is very difficult to establish to what extent these aggressions from the family environment, combined with harassment between peers in the school environment and rejection from the neighborhood environment or from habitual groups of young people, are determinants of adolescent suicides, although recognizes the existence of these tragic endings in Peru, Venezuela, Guyana, Colombia and Jamaica and a case is being investigated in Costa Rica.

The fact that cases are not reported in other countries does not mean in any way that they do not occur, because the investigation of suicide in general always has difficulties, among other things because not all suicides are conscious, given that certain games or the exposure to high risks often conceal unconscious suicides. These difficulties are increased in cases of adolescent suicides due to difficulties created in the development of sexual orientation or gender identity, since these motivations are

40 Intervention in the Discussion on October 23, 2020.

generally made invisible, even by the action of the relatives themselves, who consider them shameful and they prefer to leave them as *inexplicable*.

Despite these difficulties, some empirical research has been carried out in Brazil, revealing a greater tendency to ever think about suicide among adolescents in the developmental stage of their sexual orientation or gender identity.

6. The incidence of paranoid social discrimination

A. Paranoid discrimination and public health

Although discrimination against people based on their sexual orientation or gender identity does not always translate into aggressions by the entity of some of those mentioned, in any case, it has a serious disturbing effect on the affective sphere of those who suffer them.

The human being is not an entity that develops and jumps into adult life in parts, that is, although there is an affective and an intellectual sphere, the disturbance of the emotional development of someone whose sexual orientation or gender identity is questioned, rejected and stigmatized, cannot help but damage their personality in an integral way. The eventual decline in school performance due to emotional disturbances, conflictive relationships with the environment, in more serious cases victimization by bullying among peers, rejection and even open or tacit aggression in the family, interfere and deprive the adolescent of the possibility of approach and human communication in which socialization usually takes place at this stage of life.

Public health, in short, is nothing more than that of the people who make up a society. When many of these people consider that the sexual orientation or gender identity of others constitutes a danger to their existence, it is quite clear that they adopt a paranoid attitude that indicates a certain deterioration in the standard of general mental health. But when these paranoid prejudices translate into discrimination against adolescents with non-heteronormative sexual orientation or because of their gender identity, one has the feeling that the paranoid part of the discriminating society is determined to prepare people to behave neurotically in their social interaction. In short: whoever

takes some distance from the phenomenon, cannot help but observe that th*e less healthy part of that society is determined to prevent the healthy evolution of others.*

It is not a phenomenon that affects a small group, because since the famous Kinsey reports of the middle of the last century, it is known that it is a significant percentage of people, no matter how much the precise figures are disputed. Consequently, the impact of discriminatory paranoid attitudes and the reactions they provoke necessarily have repercussions on social interaction in general, that is, they operate on the mental health level of the entire society. It is not good, the degree of mental health of a society in which a high percentage behaves neurotically in a discriminatory way when compared to another percentage, which in turn conditions for neurotic reactions.

B. Discriminatory practices of civil servants

It is obvious that attacks of all kinds against people from the LGTBI group are *directly related to the degree of prejudicial or paranoid discrimination in each society*, which will also have to be projected at the institutional level, since people who are dedicated to dirty politics often bend to prejudice to obtain more votes - just like mercenaries who in the media only care about *rating* - which reinforces paranoid social attitudes, affecting civil servants or, at least, making it difficult for them to become aware of the discriminatory nature of their behaviors. It is good to keep in mind that discriminatory practices are *morals or social customs*, which must be dismantled to introduce others of non-harmful or conflictive coexistence, which requires a call for reflection -so to speak-, which is hampered by the reiteration of paranoid speeches, sometimes from the political leaderships of the State (Brazil, Venezuela, the Caribbean).

This causes that throughout the region numerous discriminatory behaviors of civil servants are observed in areas that have nothing to do with the police.

Thus, calling people by name without paying attention to their gender identity or ignoring same-sex couples (countries of the English-speaking Caribbean, Paraguay, Peru, Venezuela, Guatemala, Nicaragua, etc.); denying LGTBI people the right to donate blood, as they are considered risk groups (thus Colombia until the Constitutional Court ruling of 2012; until the new regulations of Mexico in 2012, of Chile in 2013, of Peru in 2018); oppose difficulties in civil registries to enroll families with people of trans identity by illegally demanding court orders (Argentina); and, what is more

frequent, the homophobic comments and opinions of civil servants, even by the media, often invoking supposed Christian values (Antigua and Barbuda; Barbados, Jamaica). In general, all these behaviors of the civil service are not subject to any sanction, especially in countries where they are not provided for in anti-discrimination provisions and, even less, in those that retain the primary criminalization of non-heteronormative sexual behaviors (Santa Lucía, San Cristobal and Nieves, Jamaica, Guyana). In other countries, these events are beginning to be the object of complaints (Costa Rica before the Ombudsman's Office), although, also in Costa Rica, there is a growing tendency to invoke the principle of conscientious objection to refuse to carry out marriages between people of the same sex, a practice that would be covered by the Constitutional Chamber.

C. Judicial discrimination

Apart from the express and open discrimination on the part of civil servants, special care must be taken with that which can be practiced by judges and prosecutors, whose conduct may be - after the police - the most dangerous for any stigmatized group and not even always consciously.

Apart from any hallucination that claims that the magistrates lack ideologies and personal values that influence their decisions, the truth is that in any magistracy of a rule of law people coexist with different ideologies, training, social origin and also with their respective life's experiences. In the same way, these people are not alien to the prejudices that exist in the respective society.

In this sense - and without incurring open discrimination (although this has been observed in Guyana) - it is still observed that in too many convictions the habits and ways of life of the people who are tried are taken into account, at least as criterion for quantifying the penalty, but in some cases –more problematic- such as alleged prosecution evidence regarding responsibility for crimes, which may well be homicides, robberies, etc.

Just as there is a tendency to remove all suspicion –and line of investigation- regarding who appears as the *good family man*, the opposite happens with those who lack work habits, it is not clear how they provide for their needs or lead a life that deviates from current patterns.

In this second sense, the enemy stereotypical link of LGTBI people with the gloomy, dirty, marginal, even esoteric, tends to make them *suspicious* when they appear in the environment of any crime. It is not true that this risk is more accentuated in the case of *popular* judges (jury) than in that of technical judges, because - as has been pointed out before - they are also part of the same society and are not exempt from their prejudices, although it is not even necessary that these prejudices reach their conscious plane.

D. Aggressions and paranoid prejudicial culture

Despite the above, it is undeniable that our societies have advanced in this sense, that is, that the movement that was being prepared, and was precipitated with *Stonewall* in 1969, spread throughout the world and also reached the region.

This progress is evident in the region especially with the numerous cases of people whose sexual orientation and/or non-hegemonic gender identity is publicly known and - nevertheless - advance in their careers and in their own political function, which it is not reduced exclusively to militants or activists for the rights of LGTBI persons: the recently elected a female mayor of Bogotá is married to a woman who, in turn, is a national deputy; in 2012 an LGTBI activist in Ecuador was appointed to the health ministry; in Mexico, in 1997, the first LGTBI legislator was elected; in Chile in 2013, a gay deputy; in Uruguay in 2017 the first trans legislator; in Brazil a gay deputy and President Lula da Silva attended an LGTBI conference. In Antigua and Barbuda, the Prime Minister appointed a lesbian woman as senator.

It is healthy in terms of plural and democratic social coexistence, that there are more and more people who value the other for the capacity of service, leaving aside their sexual orientation or gender identity.

Despite all this, it cannot be overlooked that Brazil later elected a homophobic president and, furthermore, these progresses are not of the same level in all countries and not even throughout the territory in large countries (they tend to be greater in large cities), nor in all orders. Cultural changes are slow, the eradication of paranoid social components takes time and healthy drives permeate societies unevenly, according to their different classes and corporations.

As a general rule, in any healthy society, the aggression against a person in a vulnerable situation causes indignation and rejection, as it happens with aggressions against the elderly or people with disabilities, since they are devalued as intolerable acts of cruelty, which is expressed in the laws themselves, which impose more serious penalties on acts against people who are in vulnerable situations.

In the case of LGTBI people, prejudices neutralize the experience of this cruelty in the local culture, by spreading the supposed danger that this social sector represents, which is stigmatized as an *enemy* that must be destroyed in order to preserve the dominant social values.

E. Reinforcement of phobic prejudices

Hate prejudices are socially maintained and strengthened in various ways, such as the symbolization of non-cis-heteronormative sexual orientation as a crime (even if the penalty is not applied or is not done frequently), identification or media confusion of this sexuality with *pedophilia* (although the majority of pedophiles are not gay or lesbian), the unpunished dissemination of anti-gay expressions, taunts, stereotypes, shows and music ("crush the gays" says a popular song in Jamaica and songs with similar lyrics in St. Vincent and Grenadines), impunity for peer harassment in schools or ridiculing or humiliating treatment by police officers and other civil servants, institutional indifference to attacks, etc.

In recent times, religious hate campaigns have been observed in the region (Costa Rica, Jamaica) or that postulate supposed *sexual reorientation therapies* that have even been tried to be applied to prisoners in a bill in 2016 (Brazil). Although the Catholic Church in recent years has manifested from its ecclesial leadership a considerable and positive openness -which coincides with several syncretic manifestations of popular religiosity in the region-, the same does not happen with some of the Pentecostal groups, who consider them *diabolical* or pathological in phobic speeches that, sometimes, for electoral reasons, become part of political campaigns with high legislative incidence (Brazil, Costa Rica).

In countries where more progress has been made in reducing phobic prejudices, they still remain in society and, although the frequency of open attacks is lower, this does not mean that people stop suffering discrimination due to their sexual orientation or

gender identity in the workplace, education, housing and health (Argentina, Peru, Paraguay, Nicaragua, etc.). These attacks are manifested in the rejection of jobs, in the postponement of promotions, in the dismissal of teachers, in the annoyance or intolerance in certain neighborhoods, in housing complexes, in the differential treatment in public health centers, etc.

Of course, discrimination in health matters reaches its maximum when it creates difficulties for campaigns against HIV-AIDS, since no one wants to admit the practice of a non-heteronormative sexual orientation in countries where - at least formally - it is criminalized (Santa Lucía), where the organization of NGOs dedicated to the issue has not even been possible (Saint Kitts and Nevis) and population hatred reaches high levels: 17% versus 28% acceptance and 39% merely tolerant (Barbados).

F. Feminism as a positive egalitarian impulse

It is undeniable that in recent times there has been a notable progress in the struggle of women for equal rights.

This struggle, carried out throughout the region, is the result of a long process that began with the consecration of civil rights first, electoral rights later, and is now crowned by seeking the elimination of the *patriarchy* in force in our societies. In our days, their determined struggle seeks to finally obtain complete equality of rights, which was denied by patriarchal knowledge, which dominated in all fields, surviving all paradigm shifts, however radical they may seem.

When the world put aside the theocratic paradigm and turned to the scientist positivist of biological and racist reductionism, the situation of women was not altered in that new paradigm. It should be kept in mind, from the very origin of positivism, Augusto Comte considered the family as the *social cell* of his *scientific* society, keeping the woman subordinate to the man as a guarantee of his particular concept of order.

Subsequently, scientists continued to consider women as an inferior human being and even their lower incidence in crime was attributed to the fact that this inferiority, since what manifested itself in crime in men, in women did in prostitution (Lombroso). The idea of the woman as an *incomplete man* went from Adam's rib to biological reductionism without major changes.

Until less than a century ago, in much of the region, women could not freely dispose of their patrimony without the control or authorization of a man, that is to say, civil rights were not even fully recognized, a remnant of their ancestral consideration as a non-full human being. Until less than seventy years ago, women throughout our region did not have the right to vote or be elected, in other words, they were deprived of political rights.

It is obvious - and we reiterate - positive law is not enough to change reality, when real power remains in the hands of those who can discriminatorily exercise it. The law is not omnipotent and, if reality data is dispensed with, the law becomes a hypocritical discourse. Formal equality for women did not translate into real equality, because patriarchy continued to prevail; formal - legal - equality only paved the way for their struggle for real equality, which is now in full swing.

Beyond all the theoretical discussions that may occur - given the disparity of discourses typical of any complex movement - the struggle of women cannot be separated from the struggle of LGTBI people for their respective rights. This inseparableness is imposed for elementary historical and even anthropological reasons, since both discriminations come from the same source: *patriarchy*.

Our colonizers imposed the strict verticalism of their European societies, empowering men as agents of the orthodoxy of order and honor and for that, bringing with their colonial power the guidelines of *sexual orthodoxy* that they had set in Europe around the 10th century and that were punishing to the woman who departed from her role by burning her, but burning at the same stake the man who disdained his dominating role by practicing a *heterodox* sexuality.

The corporate verticalization of European societies, with its imperative sexual orthodoxy - orderly society in the form of an army - was the necessary condition for the European powers to genocidal themselves in America and Africa. Hence, the witches and the European religious and sexual heterodox burned in the same fire, and that fire was also the fuel of the American and African colonialist genocides.

Since then and up to the present, the world has not known any human rights-denying ideology that was not simultaneously subject to women and all sexually *heterodox* people.

Anti-discrimination struggles are usually biased by minor issues, but those who impose discrimination always do so as a block, they do not divide, because they are aware that their objective is a vertically hierarchical society, not egalitarian, but homogenizing. For this reason, every reactionary and retrograde movement strives to legitimize all imaginable discriminations and, as far as our subject is concerned, this is verified throughout all of history, from the most remote to the relatively most recent: Nazism persecuted gays but also underestimated women as *reproducers*.

This *macro perspective* cannot be overlooked when it comes to dimensioning the fight for Human Rights of both women and LGTBI people, since both are part - no less - than a true civilizational transformation of an unquestionable democratic political character. It is always good to measure the magnitude of any struggle, beyond the particular and urgent demands of each sector, to be aware of the nature of the power that is being faced.

G. Phobic discourses or contemporaneity of the non-contemporary

As we have seen, all discriminatory ideology requires a paranoid component that identifies an *enemy*, which it devalues by attributing negative characteristics that make it *extremely dangerous* and that are specified in a *hateful* stereotype, which serves to neutralize any gesture of commiseration or pity. This stereotype denies the person of the stereotyped *other*: ceases to be the concrete person, to become seen only as an entity that is part of an enemy and dangerous group and, therefore, in need of being neutralized and, in extreme cases, removed.

As in the case of the alleged inferiority of women, the negative or *enemy* stereotype of the person with a non-hegemonic sexual orientation or gender identity was fed with different elements, according to the paradigm of each historical period, that is, according to to the different cultural moments that were providing discursive elements of varied nature for the human devaluation of these group.

In the case of Barbados, for example, Szotyori[41] maintains that "there is a Christian fundamentalist ideology respected by the majority of the population" and that people feel authorized when they discriminate and carry out actions against the LGTBI

41 Intervention in the Discussion dated October 22, 2020.

community. Cabral[42] considers that in the case of trans and intersex people they are in a situation of deep danger, among other things due to the so-called conservative anti-gender movements that include churches (Catholic and different evangelical churches), parties and right-wing groups. What these religious groups have in common is the desire to not recognize rights for the LGTBI community and urge their States and communities (through many strategies) to uphold this conviction.

The truth is that today, in our societies, there is not a single discourse that feeds paranoid prejudices against LGTBI people, but rather different and contradictory arguments appear in a way that, at first glance, seems completely disorganized and inorganic.

Going deeper into the question, although the disorder and inorganicity mentioned are verified, it is observed that its contents are not new by any means, but rather, the curious thing is that they come from all previous historical moments in which, with different bases, non-cis-heteronormative sexuality was stigmatized and penalized.

Faced with this discursive heterogeneity that is materialized in an accumulation of discourses from different moments in the past, the impression cannot be denied that, when the absurd contents of the previous discriminatory discourses become undeniable and, in the absence of a new discourse, it appeals to the messy mixing and overlapping of all of the above.

In this sense, it is extremely curious that today the appeal to religion by some groups of pastors and some retarded sector of the Catholic Church, although no longer its leadership, resurfaces as a discourse. Practically, it is a return to medieval times, when unconventional sexuality was considered a *vice* and, therefore, as the choice for a sin that, if spread, would make everyone homosexual or something similar and, of that, mankind would be extinguished.

This argument - which sounds ridiculous today - does not cease to lie at the bottom of the orthodox religious invocations of only reproductive practice of sexuality, but the threat it wields is inevitably presupposing the *plurisexuality* of all human beings: if homosexuality were a vice adopted by choice, all human beings would be potentially homosexual and would be tempted to commit sodomy and abandon cis-heteronormative sexuality. It is curious and extremely paradoxical, but this argument -which comes

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from older times- coincides in this sense with some contemporary theories, which from radical perspectives affirm *human pansexuality* today.

It should be clarified with respect to the biblical condemnation of *Sodom and Gomorrah*, which, in the theological field and for many years, has been held by some scholars of the matter, that the biblical sanction is not due to the practice of sodomy, but to the violation of the rules of hospitality, that is, of care and respect for guests, transgressed by the inhabitants by attempting to carry out a sexual assault on guests.

But as the culture changed from the 18th century onwards, it shifted to *scientism* and unconventional sexual behaviors were *pathologized* as ridiculously in our eyes as the earlier arguments against sodomy.

To verify the discursive coherence of each moment, it is good to remember that racial superiority and the legitimacy of patriarchy went through the same stages: first they were founded on the truth of faith, but later on the *scientific* superiority of the most evolved colonizing race and that of men over women.

Ambroise Tardieu, one of the greatest exponents of French legal medicine, argued in 1880 that male homosexuality was detected by anal signs in the *passive* and *pear-shaped* in the head of the penis of the *active*. Morel's theory of degeneration made its contribution, Lombrosian biologism gave him popularity, and that is how the colonized and women were considered inferior, the mestizo degenerate, and those who practiced unconventional sexualities, sick.

These aberrations were sustained by the academics of our region until the middle of the last century, even in substantial treatises disseminated in our universities. Our *scientists* - and especially our criminologists - were no less homophobic than the inquisitors. With a certain sense of humor, a Uruguayan historian argued that, in this matter, the woman in daily communion would completely coincide with her husband, her atheist positivist doctor.

In the second part of the last century, the aforementioned *Kinsey report* drew the veil of reality, with *Stonewall* fear was lost and, in 1974, the American Psychiatric Association shed the medical social control of homosexuals, followed by the American Psychological Association and finally, in 1993 WHO eliminated sexual orientation from its list of diseases. Added to this, only in 2019 were trans and gender diverse

identities de-pathologized with the official adoption of the International Classification of Diseases, 11th revision (ICD-11).

But today the phobic argumentation of our region piles up the supposedly *theological* discourse with the supposedly *scientific* one and, this is how some homophobic Christian groups advocate pseudoscientific sexual conversion therapies. With this, the existence of *scientific healing treatments for sin* is intended, meaning, a true *contemporary of the non-contemporary*, which mixes the theocratic Middle Ages with the atheistic scientist reductionism of the 19th century.

H. Conversion therapies

Apart from what is offered as "therapy", there have been some curious cases, such as that of a pastor who was convicted of rape for trying to get a *homosexual spirit* out of young people, arguing that he was doing it for the good of the victims (Grenada).

Outside of these cases of sexual fraud, in general - as we have just seen - these alleged *therapies* are offered by some religious groups, although not officially (Barbados, Grenada, Jamaica).

The announcements of these groups provoked reactions from the College of Psychologists in Costa Rica, while public health organizations spoke out against it in Paraguay.

In Argentina, law 26.657 (mental health law) prohibits this kind of treatment. In Brazil, resolution 1/99 of the Federal Council of Psychology prohibited the so-called *gay cures*, but in 2013 the Human Rights Commission of the Chamber of Deputies - chaired by a homophobic pastor - approved a bill to revoke that resolution, which was later abandoned.

In Ecuador, acts that tend to modify sexual orientation are prohibited by Ministerial Agreement No. 767, and acts that tend to modify sexual orientation are considered torture.

In 2019, a bill was being processed in Mexico to prohibit these therapies and punish up to three years in prison for those who practice them.

Apart from these so-called "therapies", apparently some young trans people were psychiatrized and admitted by their families to the psychiatric hospital in Nicaragua, which constitutes a total survival of the old pathologization.

The pathologization of sexual orientation and heterodox gender identity and expression and the submission to these *tortures* have very serious psychological consequences, introjecting the idea of a biological inferiority, of a chronic disease that prevents concrete affective ties and that, although later the serious traumas that remain as a consequence of these manipulations can be overcome, almost always the people will feel the emotional scar of having been deprived of an important emotional stage in their life.

7. Discrimination in marginalization: prisons

A. Double discriminatory-selectivity

Secondary criminalization in the region is highly selective, since, except for some very serious crimes against life or sexual crimes that border on pathology and cases of political persecution –product of the new variable called lawfare-, imprisonment falls on people from the most poor social segments, who, due to their precarious training, usually only commit gross crimes against property (much without any force or violence) or survive with the retail trade of prohibited toxics or the like.

In addition, the majority of the region's prison population is not sentenced, but is subject to preventive detention. Under these conditions, prisons tend to turn into concentration camps, with a criminal overcrowding that sometimes doubles cell capacity.

On the other hand, the disproportion between prison staff and prisoners is usually enormous, which denotes that officials lose internal control of the establishments, whose hierarchical order inside the walls transfers into the hands of the prisoners themselves, with the gangs dominating the rest .

Although there are differences between the various countries, this general trend is manifested, driven by media punitiveness on which unscrupulous politicians are mounted, translating it into irrational laws and media lynching intimidation of judges.

In the case of Brazil, the Inter-American Court of Human Rights has had to order provisional measures to resolve the extremely serious situation in the Rio de Janeiro and Recife prisons. Regarding Argentina, it has also insisted on its jurisprudence on the term and conditions of origin of the preventive detention.

Consequently, with regard to the situation of LGTBI people in prisons, it must be taken into account that we are faced with cases of plural or multiple discrimination: (a) on the one hand, criminal selectivity, which is exercised through the police selection of people according to *criminal stereotypes*, which configure the media, summarizing in them the discriminatory prejudices of every society and, in particular in our region, those of a classist and racist nature; (b) on the other hand, the discrimination suffered by these people once they are selected for secondary criminalization, such as discrimination in prison because of their sexual orientation and gender identity.

B. Sexuality in prisons

Regardless of the previous situation, the prison is a *total institution*, like the asylum and others.

Total institution is one in which people are forced to carry out all the activities that they carry out in different places (work, recreation, education, etc.).

The confinement in these institutions always has a *deteriorating effect of a regressive nature*, since it takes adults back to the passed stages of their life -to childhood or adolescence-, because everything that the adult person did more or less freely in their free life, in the total institution it is once again regulated, controlled or prohibited as in childhood or adolescence.

Given that the prison population is almost exclusively young, a fundamental aspect of their free life is sexuality, which in prison becomes controlled or deprived of opportunities, which has always been a problem, at least from the very moment in

which, at the end of the 18th century and the beginning of the 19th century, custodial penalties became the axis of all the penalty systems in the world.

It is very difficult to penetrate the enormous number of conflictive forms - sometimes with serious consequences - that prison sexuality assumes, both because most of the protagonists prefer to remain silent about their practices, and because of the myths that circulate about it.

In any case, there are known cases of rape and also the formation of couples. Regarding the former, complaints are not usually recorded, either because officials are accomplices, because they do not receive them, or because the victims fear reprisals (Antigua and Barbuda, Barbados, Belize). It is recognized that anal rapes are frequent in overcrowded and overcrowded prisons (Grenada, Guyana), impacting especially young prisoners. Sometimes the officials themselves omit any measure, because they fear reprisals from the prisoners once they are released (Jamaica).

These are some of the few pieces of information that manage to leak, although in general these events are known in other countries (Nicaragua, Venezuela), also pointing out *fights between couples due to jealous*y (Venezuela), but - as already mentioned - a general rule of silence applies. In the few cases in which some officials agree to speak very confidentially, they formulate unusual explanations regarding their ineffectiveness, such as that *there are prisoners who get used to it and like it* (Costa Rica).

C. LGTBI people in prison

Overcrowding, a product of overpopulation in prisons, makes the conditions of LGTBI people, staying with the rest of the population, vulnerable to sexual abuse.

In some countries there is almost no separated accommodation (Venezuela, Peru, Brazil, Nicaragua, Paraguay, Trinidad and Tobago, Antigua and Barbuda, Barbados, Guyana). A trans inmate asked about her situation in Rio de Janeiro prison, limiting herself to answering that she had no problems with men because she used a *camisinha* (condom).

In the few cases in which LGTBI people are housed in separate wards, in Jamaica in an informal way, they are discriminated against by the rest of the prisoners, who resist having any contact with the isolated population, so these people are deprived of the benefits granted to other prisoners (Jamaica), which is why many of them reject the possibility of differential treatment or separation of pavilions. At the recent hearing before the IACHR on the situation of rights of LGTBI persons deprived of liberty in Latin America, the representative of Almas Cautivas, Ani Vera, pointed out how many trans women prefer to be in male detention centers because of their vulnerable situation, sex work is the only source of income and sustenance in prison.

It is known that one of the most serious problems of prison life - as a generator of conflict - are the so-called *searches*, in which the officials break into the pavilions and not only intervene and mess up the few belongings of the prisoners, but also carry out body searches, even anal. In few countries there are different protocols and different norms for searches of trans people (Costa Rica, the Argentine Federal Penitentiary Service), although there also seem to be some difficulties in respecting gender identity (Argentina).

D. The so-called *intimate visits*

One of the measures adopted for more than half a century in prison administrations to alleviate problems of sexuality in prisons and to sustain the emotional ties of prisoners, were the so-called *intimate visits*, originally planned in special units and with reservation and privacy.

It should be noted that, in cases of marriage or stable couples, the prohibition of the prisoner's sexuality in general violates the principle of irrelevance or personality of the sentence, since it deprives the other person, who is not sentenced, of the exercise of their sexuality.

However, this measure is not authorized in all countries, since they do not even exist for different-sex couples in several of them (Venezuela, Peru, Nicaragua, Guyana, Antigua and Barbuda, Trinidad and Tobago, Jamaica and it is assumed that in the other Caribbean countries either). Furthermore, the deprivation of these visits where they are admitted, like the irregular admission of them where they are not authorized, becomes a source of corruption in some prisons.

Intimate visits with people of the same sex are allowed in Argentina, although sometimes some difficulties and delays are encountered in practice. In Costa Rica they were not allowed, until in 2011 the Constitutional Chamber of the Supreme Court declared that prohibition unconstitutional. In practice, it is pointed out that some discrimination takes place in the queues to access visits.

In this regard, Méndez[43] highlights the importance of the effective and complete implementation of the Bangkok Rules on the detention of women and, more broadly, the Nelson Mandela Rules. Considers that it is very important for the state to ensure unconditional medical assistance to detained women and LGTBI detainees: thus, even when in domestic law it may prohibit, for example, the termination of pregnancy, the detained woman should be given this option, especially if they have been a victim of rape.

Finally, it adds that "the right to health of persons deprived of liberty includes not only the right to health but also the prevention of the disease," which includes situations in which hormonal treatments are suspended for trans people upon admission to a prison establishment and that can have very serious consequences for their health; situations of solitary isolation of LGTBI people in cases of immigration detention; or, for example, permanent deterioration of health due to lack of medical attention (as in the recent case of a trans person who suffered permanent consequences in Argentina).

8. Other variables of discrimination

A. Discrimination in the work area

Sexual orientation or gender identity is not a cause for dismissal or for obstacles to access or promotion at work or in the public function, so it should not be formally used to discriminate. Given that it could not be used openly, throughout the region it is reported that it is practiced covertly, citing other reasons (such as Argentina, Costa Rica, Paraguay, Venezuela, Peru, Brazil, Mexico, the Caribbean countries).

43 Intervention in the Discussion dated October 22, 2020.

The first difficulty is that of access to employment, but then that of getting a promotion or progressing in the chosen job. In societies that are increasingly competitive and problematic in terms of the demand for work, with high unemployment rates and a nourished and pounding dissemination of *meritocratic* values, it is perfectly imaginable that in order to progress or *climb* the job market, anyone who is considered a competitor should be denigrated, while their sexual orientation or non-heteronormative gender identity is the preferred target of the unscrupulous. Consider that even among heterosexuals themselves, *suspicions* about sexuality are suggested, trying to attach labels of non-hegemonic sexual orientation among themselves in any work or professional competition.

It is clear that the deeper and more ingrained the paranoid prejudices that exist in a society, the aforementioned difficulties -and others- will increase, forcing many people to hide their sexual orientation and/or gender identity and others to suffer stigma and postponement.

In general, the second variable is observed as a violation of dignity and Human Rights, but it cannot fail to note that the first is also a violation, since the need to hide sexual orientation, disguise it and even often simulate a sexuality that is not one's own, is an open injury to the full development of the personality and, always, a false basis in the relationship and interaction with other people that, to some extent, translates into a certain degree of inauthenticity in all personal ties (of companionship, friendship, camaraderie, etc.).

B. Teachers with difficulties

A particular case of employment discrimination is that of primary and secondary school teachers - except in the university -, who are forced to hide their sexual orientation, especially in religious establishments - although not only in those - at the risk of being expelled or strongly postponed in their career and in the assignment of tasks and class hours, which affect their salary and professional recognition.

At times, teachers are also strongly criticized for their sexual orientation by authorities and colleagues, and even often made fun of by the students themselves. There have been cases of protests and demands for separation from their work by families who consider that they put their sons and daughters in *moral danger*, etc.

Facts of this nature are reported in almost all countries (Argentina, Peru, Venezuela, Brazil, Nicaragua, Paraguay, the nations of the Caribbean region, etc.). This form of employment discrimination that affects teachers with LGTBI sexual orientation is a variant of group discrimination and, therefore, its intensity is directly related to the degree of penetration of the prejudicial component in each society.

However, in some country where it seems that considerable progress has been made in reducing paranoid prejudices, there have been episodes of unusual and contradictory *moral* demands, even outside the question of discrimination based on sexual orientation, because in some religious establishment a teacher expelled for being a single mother (Argentina), which caused strong rejections that reached the media.

C. Measures against employment discrimination

Measures against employment discrimination are almost always relatively effective, given its hidden nature. However, it is important to at least have a normative basis that prohibits, rejects or condemns it, being the task of judicial casuistry to uncover it under the multiple pretexts that cover it up.

In this sense, in several countries there are legislative provisions of different normative hierarchy that condemn it, from ministerial resolutions to executive decrees and formal laws.

Thus, in Argentina and in terms of public administration, this discrimination is considered prohibited by decree of 2006, in the Autonomous City of Buenos Aires by provision of 2015, in the City of Rosario by ordinance of 1996. In Bolivia it is covered by the law against racism of 2010. Brazil registers laws of almost all the states that expressly prohibit labor discrimination based on sexual orientation (they consider it to be in force at the 12th principle of Yogakarta and ILO convention no. 111 incorporated into domestic legislation). In Costa Rica several decrees were issued in the same sense, while in Cuba and Ecuador it is prohibited by the Labor Code and in Venezuela by the organic labor law. In El Salvador, several decrees were issued regarding public employment. Mexico prohibits it in the federal law against discrimination and, in addition, the federal penal code, same as in Nicaragua.

In other countries, the prohibition is considered to be included in the provisions and punishments of discrimination based on sexual orientation in general, although it does not expressly mention labor discrimination. Jurisprudence also considered it prohibited in some countries, such as Colombia.

An interesting and useful measure to try to prevent this form of discrimination is that adopted by the Brazilian Ministry of Labor, which prohibited employers from requesting documents or information on the sexuality of their employees or applicants.

The situation in the Caribbean countries contrasts with the aforementioned regulations and efforts, because not only is labor discrimination based on sexual orientation not sanctioned, but it is not even expressly prohibited and, in some cases, it is even expressly excluded from the legal protection against employment discrimination (Trinidad and Tobago). This is not surprising, considering that the primary criminalization of non-hegemonic sexual orientation is maintained. Exceptions to this situation can be seen in Jamaica, whose law prohibits discrimination based on sexual orientation, but only for the public sector, and in Barbados, where a law enacted in August 2020 (Employment (Prevention of Discrimination) Act 2020) prohibits discrimination in employment including the sex and gender of the employee.

However, it is surprising that the British Crown, whose Privy Council acts as the last judicial instance of the Caribbean in several jurisdictions and whose judges are almost the same as those who make up the Supreme Court of the United Kingdom, has insisted on maintaining discrimination based on sexual orientation in decisions that have been made this millennium. For example, in the 2007 case of the legislative exclusion of legal protection against discrimination based on sexual orientation in Trinidad and Tobago, the appeals court had ruled that such exclusion violated the principle of equality of the constitution. However, the Privy Crown Council in *Suratt*, in a troubling decision, reversed that ruling and declared such exclusion constitutionally valid. Despite this, there appear to be some positive initiatives in Antigua and Barbuda.

In Argentina, some isolated measures of a positive nature were adopted, since a law in the province of Buenos Aires and also several municipal ordinances established labor quotas for *trans* people. It is important to note that the Transvestite/Trans Labor Quota was recently established in the public sector, which guarantees a minimum of 1% of all positions and contracts for transvestites, transsexuals and transgender people.

It should be understood that, supported by the normative base of all these countries, the jurisprudential casuistry in labor justice would be in a better position to unmask the pretexts with which it is wanted to be hidden, especially in cases of dismissals, but in any case this does not prevent its practice in the case of discrimination in access to employment.

In the latter case, some limitation to the conditions that are announced in the job application advertising is still useful, with the use of different euphemisms that serve to exclude any candidate who manifests or who is suspected of a heterodox sexual orientation (*manly, good looks, delicate treatment*, etc.).

D. Psychotechnical admission controls

Often, joining the public administration is subject to psychological examinations of different intensity, with the risk of possible undue interference with people's sexual orientation and other data on their privacy.

Although it is correct that a State wants to have a bureaucracy with a good level of mental health and that this is a condition of capacity or suitability for the performance of a public function, this does not mean that interference in the privacy of candidates can be legitimized, which sometimes, many injure their human dignity.

It should be borne in mind that the use of evaluations of more than questionable scientific value has even spread, such as the cases in which applicants are subjected to the so-called *polygraph or lie detector test*. These procedures are carried out in some countries even for the appointment of judges and prosecutors, forcing the future magistrates to undergo this degradation of their self-esteem. It will not be necessary to respect the dignity of citizens, who in order to access their difficult function must undergo a procedure that - apart from its more than unclear value - damages their own dignity.

It is not enough to prohibit questions or data directly linked to the person's sexual orientation in psychological tests or reports, so that this does not create -in fact- an obstacle for the experts to investigate it, when they are allowed to do so bordering the subject, through the appeal to nebulous concepts that allow to infer it.

It is known that psychology and psychiatry are in no way exact sciences, and that much is discussed in their fields and depends on the schools and theories of the respective field of knowledge. The impact of the relativity of expert opinions is much less when the examination is limited to ruling out serious pathologies - which is rational, since it is not recommended that an administration be nurtured by psychotic magistrates or officials - but the field becomes extremely more slippery when it comes to establishing personality profiles as a condition of fitness for the role.

Therefore, it is not possible to grant the expert in charge of the psychotechnical examinations for admission to the administration an all-embracing power regarding the interference in the privacy of the people.

This is a resource through which *de facto* discrimination based on sexual orientation can be filtered, regardless of what the laws and regulations provide, so one must be particularly attentive to the way in which it is practiced and the limits that must be imposed on this activity.

It should be noted that the expert activity in court is controlled by the party of experts who may be appointed by the defense, but in this type of intervention to establish the suitability of a person for the performance of a function, there are no party of experts thus, the person remains in the exclusive hands of a single expert, without even ruling out the possibility that the expert is a consciously or unconsciously *LGTBIphobic* person.

E. Anti-discrimination education

The importance of the dissemination of egalitarian values in primary and secondary education for the formation of new generations in respect for Human Rights and healthy social coexistence is well known.

It is quite clear that the fight for equality has a cultural character; law is only a manifestation that can guide a culture, but deep down, we all know that it will not discard its paranoid prejudices but through an educational process of clarification and incorporation of egalitarian values. Hence, it is essential to take care of values education of childhood and adolescence.

Despite the fact that the above is a truism, those who hold paranoid discriminatory criteria and their respective phobias, also aware of their importance for the future, continue to hinder the progress of the dissemination of egalitarian values, creating difficulties and generating different types of conflict in educational establishments.

To these difficulties, it is added that official support is often held back, although not always, the interest of some authorities weighs in to avoid conflicts that they superficially consider unnecessary.

Meanwhile, peer bullying episodes tend to be reported in different countries (Venezuela, Peru, Saint Lucia, Trinidad and Tobago, Grenada, Guyana, Jamaica). The lack of training and adequate preparation of the teaching sector itself -which are also the product of a previous defective education in human rights-, makes them not aware of the enormous damage that these behaviors produce in the personality of children or victimized adolescents.

Nor is it strange that at times it collides with incoherent or contradictory public policies. In Paraguay in 2017, the circulation of printed materials that disseminated in educational institutions what the movements that oppose equality call *gender ideology* was prohibited, which is in contradiction with the law against school bullying, despite the fact that it does not refer specifically to gender or sexual identity.

In 2012, in Belize and Jamaica some attempts were made to introduce sex education, but they were repealed under the pressure from some evangelical groups. In Barbados, boys are forced to wear pants and girls dresses.

There are some programs in other countries (Costa Rica), while in Argentina it is introduced more at the initiative of the teachers themselves, promoted by their own union organizations, where a clear awareness of the matter prevails. There has been in Argentina since 2006 the Law that created the National Program for Comprehensive Sexual Education, which as one of its many objectives has to identify the various historical interpretations of sexuality and its correlates in pedagogical practices to promote permanent reflection on their own interpretations and conceptions of sexuality. The implementation of this law has been extremely difficult since its enactment throughout the country.

F. Migration and refugee discrimination

In general, there is usually no discrimination that, due to sexual orientation, hinders the right to transit between the countries of the region. There are some exceptions - rather curious - in some Caribbean countries, such as Trinidad and Tobago, whose immigration law prohibits the entry of homosexuals into the country, as a result of which a Pentescostal religious organization ordered in 2007 to prohibit the entry of Elton John, although without success. In Belize there is a similar law and its immigration officials, in 2007, deported a group of Russians, later they arrested two men and in 2011 two women.

The Caribbean Community (CARICOM, an acronym that means Caribbean Community and Common Market), originally founded by four States (Barbados, Jamaica, Guyana and Trinidad and Tobago), established by the Treaty of Chaguaramas, in force since August 1st 1973. It is possible to think that these migratory discrimination also ceased in the Caribbean region, since in 2016 the Caribbean Court of Justice interpreted that the States of the Caribbean Community (CARICOM), precisely because of the Charaguaramas treaty, are prohibited to prevent the entry of LGTBI people due to their sexual orientation only.

Regarding refugees, in general the countries of the region are governed by the 1951 Convention on the *charter of refugees* and its 1967 *Protocol*. Argentine law 26,165 of 2006, especially considers as possible refugees those persecuted for sexual orientation. Although Brazil does not expressly include this persecution in the law, by jurisprudential interpretation it was incorporated and in 2002 two Colombian citizens threatened with death were granted refuge in their country.

In Costa Rica and other countries this form of persecution is not expressly mentioned either, but the truth is that no cases of refusal of refuge by it are reported either.

G. Discrimination in the armed forces

In general, a strong rejection of the admission of LGTBI people into the armed forces was always evident, although not only in the region. The idea that the military professional culture is incompatible with sexual orientations and non-cis-heteronormative gender identities is largely maintained, despite the fact that practices of this nature are known

in these bodies in all countries. Beyond the myths, it should be remembered that in times when paranoid values dominated there were great *scandals*. *One in the United States at the navy school in Newport, Rhode Island, which led then-Under-Secretary of the Navy and later President Franklin Roosevelt to launch a witch hunt of gay sailors and officers early in the last century and that It only came to light more than half a century later in the 1980s*. Another in Germany, involving the heir to the crown himself and then German *Kaiser* and, years later, in 1942, another in Argentina, known as the case of the *cadets*, which tragically even included an instigation to the suicide of one of the cadets, carried out by his own father.

The presence of military personnel of non-herteronormative sexual orientation is now admitted in Argentina, in Colombia (sentence of 1999 and later, in the army, since 2015), in Chile since 2012, in Brazil, Costa Rica admits it in its police forces (does not have armed forces), which does not mean that these people do not face some difficulties in the development of their careers.

In Bolivia and Venezuela they are not yet admitted and in the latter country there have been some expulsions and degrading treatment. In Peru, the punishment of homosexuality in the armed forces was declared unconstitutional.

Mexico maintains an ambivalent position, because although it does not prohibit or sanction it, the truth is that some expulsions were registered for reasons of sexual orientation.

In Paraguay there is no provision that expressly allows the incorporation of people with non-heteronormative sexual orientation, but in 2010 the Legislature rejected by a large majority a bill that prohibited the entry of LGTBI people into the armed and security forces, and in 2011 the regulation that prohibited homosexuality in the police was modified.

In the Caribbean countries, although there are no express prohibitions, it is generally thought that LGTBI people hide their status when they are incorporated into the armed forces, which seems highly probable, given the criminalization of such conduct in their criminal laws.

H. Privacy of crime victims

In general, the privacy of crime victims is not taken care of when they are of LGTBI sexual orientation. The media - and not necessarily the *sensational* media - tend to use discriminatory language, more or less covert depending on the country and the degree of diffusion of paranoid prejudices and *LGTBIphobias*, since sensationalism often prevails in search of ratings.

In homage to freedom of expression, there are no regulations that limit these public stigmatizations of crime victims and attitudes vary according to the interests of the media, the decisions of editors and the profile of journalists and directors of news services.

To some extent, these privacy violations contribute to reinforcing the negative stereotype of the paranoid imaginary, which claims that unconventional sexuality is inserted into a gloomy, marginal, even dangerous and pathological underworld, often with the result of criminalizing the victim in the media, even if they do not specifically pursue that purpose, but rather respond to objectives preferably of interest by way of a scandalous rating.

In some country it is observed that in recent times the stories referring to LGTBI people seem to have lost interest (Jamaica), which is not surprising, since to the extent that paranoid prejudices are losing force, these news arouse less morbid interest, although this will never completely disappear when it refers to sexuality, without being limited to non-heterosexual sexuality, because crimes of this nature committed or victimizing heterosexuals continue to arouse public curiosity and unscrupulous media continue to exploit it.

I. Discrimination regarding identity

Every person has the right to have the State recognize the gender identity that corresponds to their self-perception and, consequently, to have it recorded as such in their documentation.

Against the *ideological abomination* that considers gender as an *ideology*, it cannot be overlooked that the *ideological* is ultimately the denial of its reality. *Sex* is biological,

but *gender* is a social construction; its denial clearly responds to an *ideology* according to w*hich there would be only two genders, exactly to the two sexes*. Those who speak denying the social reality of *gender*, do not pretend anything other than the imposition of its binary ideology.

Cabral[44] provides a highly relevant perspective by proposing to introduce a disaggregated analysis of the human rights situation of the different communities: that is, an analysis that is capable of identifying human rights situations and human rights violations on the basis of the sexual orientation and those that are based on gender identity and expression, and those that are based on sexual characteristics. This disaggregation also requires other instruments of analysis. For example, the introduction of a term such as "cisgender" that allows one to distinguish situations. He points out the importance of being able to distinguish between trans people who are heterosexual or who are homosexual and cis people who are heterosexual or who are homosexual, since in this way we can approach to what has to do with the structural discrimination that affects trans people .

In relation to the intersex movement, the introduction of specific categories is essential to understand the situation of the intersex community in Latin America and the Caribbean (such as, taking sexual characteristics as a basis on which a set of human rights violations occurs).). And he adds that if we identify the intersex community with the LGTBI community, everything that has to do with the specific demands of the intersex movement are systematically excluded or minimized. Therefore, when it comes to trans people or intersex people, the human rights violations that occur at the intersection between the legal-normative and psycho-medical systems are a primary concern for our movements.

For her part, Maffia[45] considers that there are many issues that apply to gender identities that are linked to not being fixed, to changing over time, to being explored, to relying on recognition in the social media in which they are developed . And that many of the solutions that we can offer later depend on these definitions. From her perspective, the transvestite-trans condition is the one that disputes the cis-heteronormative binary thought in a way that gays and lesbians do not, where it is revealed that binarism is a deficiency of the policies where they are institutionalized and determine the lack

44 Intervention in the Discussion dated October 23, 2020.

45 Intervention in the Discussion dated October 22, 2020.

of other types of policies. Finally, in agreement with these proposals, Madrigal[46] maintains the importance of an intersectional perspective, accounting for dynamic processes in which the distinctive and unique life experiences of people occur in a given place, at a given time and that vary in relation to time. This highlights the situation of gender diverse older people who have built free and equal lives within their communities and that today are facing care and retirement systems that are unprepared and insensitive to their needs.

Once the binary ideology has been put aside and, therefore, the reality of gender as a social construction has been recognized, it is up to each person to assume their gender identity according to the way they perceive and identify it, that is, according to their gender self-perception , with which it interacts in society.

According to this criterion, some countries follow the guidelines outlined in the Advisory Opinion of the Inter-American Court of Human Rights (OC-24/17 of November 24, 2017), which understands that the provisions of the American Convention require that the rectifications of documentation must take place through quick procedures, at no cost, if possible directly at the administrative headquarters and without the requirement of medical tests or similar, but only according to *self-perceived identity* (Costa Rica, Argentina).

However, this does not mean that all practical difficulties have been eliminated in these countries. Thus, for example, in Argentina, where the law is practically a role model in this matter, when it comes to rectifying names in birth certificates of minor children or in marriage certificates, a court order is required, which complicates the process.

It is obvious that the situation is even worse where there is not even a law that guarantees this right (Nicaragua, Paraguay, the Caribbean countries), or where a complicated judicial process is required and, in addition, medical certification (Venezuela). In some cases, sentences are recorded in favor of this elementary right of *trans* people, but they are not too precise in terms of the requirements (Peru).

The preference for administrative and non-judicial procedures is due to the fact that this - like all discrimination - is suffered to a greater extent by those who are

46 Intervention at the International Seminar on October 28, 2020.

victims of multiple discrimination, usually class-biased, as a result of the high social stratification and polarization of wealth in our societies.

It is clear that people with more resources can access the judicial authorities without difficulty, while those with fewer resources find it very difficult, not only due to professional fees and expenses, but also because of the time required for the procedures, and that they must withdraw it from their work activities, often subsistence.

There are several initiatives to solve typical problems of all people that require that their body and documentation match their self-perceived gender identity, but that have not been received in the region.

Thus, there are cases in which at the time of registering the birth there are doubts regarding the conformation of the genitality, a primary variable for the registration of gender in the official documentation, however, which, according to current legislation, it is necessary to do it with a masculine or feminine name. Later, when the doubts are dispelled, many times the name must be rectified, a procedure that could well be avoided by allowing the newborn to be registered with a *neutral* name in such cases. In no country in the region is this possibility allowed.

Another difficulty is that there is almost no registration in the region that the health services offer treatments and sex reassignment interventions, which is why the cases that are known take place as private medicine practices, with the consequent cost that, of course, the people with the least resources cannot afford. To a similar extent, there are problems in the access to hormonal therapies.

It should be added that this lack of public services generates another risk, which is that of some irresponsible practices, outside of all the rules of medical art, interventions practiced in unsuitable places and even in some cases of quackery, with highly harmful and sometimes lethal results.

9. Positive public measures

A. Public policies against homophobia

The governments of the different countries have not remained indifferent to pressure from NGOs, civil society and a large part of the population. Consequently, a series of political measures of different importance and practical significance have been implemented against discrimination based on sexual orientation, which cannot be ignored and which, obviously, must be strengthened.

Thus, in Brazil, the *National Council to Combat Discrimination* was created in 2001 and in 2011 it was specified that it included LGTBI people, since anti-discrimination law 7,716 of 1989 did not include discrimination based on sexual orientation. On the other hand, the judges of Rio Grande do Sul created an *Observatory Against Homophobia*.

In Costa Rica, the *National Day Against Homophobia* was instituted and an anti-discrimination bill that aggravates hate crimes is in process. In Argentina, the *National Institute for the Fight Against Discrimination, Xenophobia and Racism* was created, which deals with the issue. In Paraguay, an anti-discrimination bill is being processed. Brazil establishes sanctions for discriminatory conduct in several states: Sao Paulo, Minas Gerais, Rio de Janeiro, Puauí, Santa Catarina, Rio Grande do Sul, DF, Alagoas, Bahia, Pará, Paraiba. Ecuador fined and disqualified a candidate in 2013 for discriminatory conduct.

The penalties for hate crimes are aggravated in Argentina, in some Mexican codes, Bolivia, Chile, Colombia, Ecuador, El Salvador, Honduras, Nicaragua, Peru, Uruguay. In Brazil, there has been a project to penalize hate crimes since 2014. In Argentina, the anti-discrimination law 23,592 of 1988 did not expressly include the hate crime due to sexual orientation as an aggravating factor, but they were included by law 26791 of 2012. In Venezuela, despite the difficulties many times mentioned, in 2017 the *Constitutional Law Against Hatred for Peaceful Coexistence and Tolerance* was enacted, although it has been questioned a lot.

There are no similar provisions in the Caribbean, although it is noted that it would be possible to frame them in other regulations (Trinidad and Tobago). In Belize there

seems to be a bill. In Grenada, it was proposed to include sexual orientation among discriminatory behaviors in 2014, and a pastor wrote in a large-circulation newspaper that the project was the work of Satan. However, the constitutions, although they do not mention these discriminations, they barely prohibit them (Dominica; Guyana), which presents the aforementioned constitutional problem.

St. Lucia was the only country in America that in 2008 was opposed to the declaration of the General Assembly that affirmed the international protection of human rights for LGTBI persons. Despite this, its labor law prohibits dismissal for reasons of sexual orientation. *The Equal Opportunity Act* of Trinidad and Tobago excludes sexual orientation from the categories protected against discrimination. However, in Jamaica the law prohibits discrimination based on sexual orientation but only for the public sector and in Barbados a law enacted in August 2020 Employment (Prevention of Discrimination) Bill 2020 prohibits discrimination in employment including discrimination on the basis of sex or gender of the person.

B. Objections to the hate crimes classification

It should be noted that the criminalization of discriminatory speeches and the aggravation of hate crimes was criticized by a certain part of the doctrine, arguing that it was about the criminalization of political ideas.

The same problem arose in several countries and continents due to the crime of *denial*, in particular the Shoah. With the same criteria, it was intended to consider contrary to the principles of a criminal law of guarantees, the classification of aggravation of hate crimes, especially those that injure the life and physical integrity of people.

We are not going to join the *denialism* discussion here, since it is not the objective of this research, but regarding hate crimes the criticism is unfounded, because it is not a simple aggravation of guilt by mere motivation, but of an injury objectively greater than that of the pure type of homicide and non-hate injuries.

The unjust content of a crime is measured by the degree of affectation of legal assets. Thus, it turns out that a crime is more contrary to the legal order when it injures two legal assets, than when it only injures one.

For this reason it is that the injustice of the hate crime is greater than that of a homicide or injury of the basic type, because precisely, in these crimes two legal assets are injured, namely: the life or physical integrity of the victim, but also, since the author is in principle indifferent to the victims' identity and chooses them only to send a message to the entire group to which they belong, it adds to the previous injury, the damage to the freedom that all the people who make up that group and who perceive homicide or injuries as a crime of threats, that is, as a message of strong and bloody limiting power in their areas of social freedom.

C. State agencies to combat discrimination

There are various agencies that the States have created in the region to guarantee equal opportunities and punish discrimination, although not all of them give equal importance to discrimination based on sexual orientation.

In Argentina, the agency in charge is the aforementioned INADI, created in 1988 and strengthened in the past decade. In Costa Rica, the *Office of the Ombudsman for the Inhabitants of the Republic* and the S*pecial Commissioner for LGTBI persons*. In Nicaragua, the *Office of the Attorney for the Defense of Human Rights*. In Brazil, the *Federal Council to Combat Discrimination and Promotion of the rights of lesbians, gays, bisexuals, transvestites and transsexuals*, subsidiary of the Secretariat for Human Rights of the Presidency of the Republic, in addition to numerous state and municipal commissions. In Peru, the *Ministry of Women and vulnerable populations* and the *Office of the Ombudsman*. In Venezuela, the *Ombudsman's Office*. In Mexico, the *National Council to Prevent Discrimination*, created by law in 2003.

Although not all these institutions are equally effective, since many depend on the executive powers and, therefore, suffer the consequences of the various and inevitable political whims, their mere existence indicates a certain degree of official awareness of the problems and - at least - the recognition of its faults and omissions in the matter.

In the Caribbean there are practically no bodies of this nature. In Jamaica, the *Office of the Public Defender* and the *Client Complaint Mechanism of the Ministry of Health* are mentioned as close to these objectives. It should be noted that although the *Office of the Public Defender* was not created with this purpose in mind, it has been taking an interest in these issues. For example, they made important presentations,

unfortunately without success, in order to be admitted as an interested party in the unconstitutionality of the criminal offenses against sodomy; an ongoing lawsuit in Jamaica filed by Maurice Tomlinson. As seen, in Trinidad and Tobago sexual orientation and gender identity are not included in the *Equal Opportunity Law*.

10. Rights of diverse couples

A. Equal marriage

It is known that the negative stereotype constructed culturally and through the media - and lately sustained by paranoid discourses, of some religious groups - claims that all people with a non-hegemonic sexual orientation are ill and promiscuous, incapable of stabilizing affective relationships.

Apart from the obvious falsehood of this phobic stereotype inherent in the aforementioned paranoid prejudice, the truth is that everyone has the right to have their affectivity respected and protected by the States, regardless of their sexual orientation. Every State has the elementary duty to protect the mental health of its inhabitants and, in doing so, the legal guarantee of stability of their affective ties plays a fundamental role.

A huge step is being taken in the region with the introduction of so-called *equal marriage* in several countries. In addition to providing the aforementioned guardianship, the symbolic effect of this institution is much greater than that of other measures, since it prioritizes affective ties without distinction of sexual orientation and, therefore, not only destroys paranoid prejudices, but also spreads - especially among adolescents in the process of developing their identity - the perspective of a full existence, with the recognition of their relevant affectivity, culturally facilitating the development of their affective sphere without irrational setbacks.

Marriage between people of the same sex, under equal conditions to that of cis-heterosexual people, has been established in *Argentina* in 2010, in Mexico City in *Mexico* in 2010 and then followed by 18 States (by law in Baja California Sur, Campeche, Coahuila, Colima, Hidalgo, Michoacán, Morelos, Nayarit, Oaxaca and San Luis Potosí; by administrative decision these marriages are registered in Baja California, Chihuahua and Quintana Roo and, depending on the ruling of the Supreme

Court in Aguascalientes, Chiapas, Jalisco, Nuevo León and Puebla); in *Uruguay* since 2012; in *Ecuador* since 2019; Costa Rica since 2020; in *Brazil* by constitutional ruling since 2011; and in *Colombia*, also by constitutional ruling since 2016. In summary: most of the population of the region is protected by the institution of equal marriage.

A wide debate was also opened with the discussion about the possibility that these married couples or even single LGTBI people could adopt children, an issue that made for new paranoid outbreaks to emerge, although they were absolutely denied by Science, they were still repeated in the mass media anyway. In any case, adoption is admitted in all countries that recognize equal marriage (Argentina, Colombia, Mexico, Uruguay and Brazil), with the exception of Ecuador, due to constitutional impediment.

In Chile civil union between people of the same sex exists since 2015, since 2019 adoption is allowed and there is a marriage project under discussion. In Costa Rica, the situation of uncertainty that the Supreme Court generated when declaring the limitation of marriage of the civil code to persons of different sexes unconstitutional, but granting the legislature eighteen months to legally regulate it, was terminated with the implementation validity of equal marriage in May 2020.

In the remaining countries, no progress has been made in this matter (among them Paraguay, Peru, Venezuela, Guatemala, Nicaragua, etc.). Venezuela rejected the registration of an equal marriage of Venezuelans married in Argentina. Given the primary criminalization in the Caribbean, there is no hint of this in any of its countries. However, it should be mentioned that there is a petition before the Inter-American Commission on Human Rights regarding the lack of legislation for same-sex couples in Jamaica and recently the Prime Minister of Barbados announced a referendum on this issue.

The absence of equal marriage also tends to create serious problems of a patrimonial nature, since outside the countries that establish it - and therefore, resolve the property regime in the same way as in heterosexual marriage -, in the remaining countries it must be handle by different institutions such as wills, different types of companies, etc., without prejudice to the fact that hereditary rights are affected by the unavailable or *legitimate* part of the property that corresponds to the forced heirs.

B. Marriage and the Advisory Opinion of the Inter-American Court

It should be noted that the Inter-American Court of Human Rights, in Advisory Opinion OC-24/17 of November 24, 2017, on gender identity and equality and non-discrimination against same-sex couples, established that the only non-discriminatory institution in this matter is marriage under the same conditions as for heterosexual couples.

The Court understood that although art. 17.2 of the American Convention *literally recognizes the "right of men and women to marry and create a family" this formulation would not be proposing a restrictive definition of how marriage should be understood or how a family should be founded. For the Court, Article 17.2 would only expressly establish the conventional protection of a particular form of marriage. In the Court's opinion, this formulation does not necessarily imply that this is the only form of family protected by the American Convention.*

The Court added that a restrictive interpretation of the concept of "family" that excludes the affective bond between same-sex couples from inter-American protection would frustrate the object and purpose of the Convention. The Court recalls that the object and purpose of the American Convention is "*the protection of the fundamental rights of human beings,*" without any distinction.

The Court left open the possibility that States that have constitutional obstacles may adopt other forms of stabilizing affective relationships between persons of the same sex, such as civil unions: *this Court cannot ignore that some States may have to overcome institutional difficulties to adapt its internal legislation and extend the right of access to the institution of marriage to persons of the same sex, especially when there are rigid forms of legislative reform, susceptible to imposing a procedure not exempt from political difficulties and steps that require a certain waiting-time. Given that these reforms are the result of a legal, judicial or legislative evolution, which is encompassing other geographical areas of the continent and is included as a progressive interpretation of the Convention, these States are urged to really promote in good faith, legislativ, administrative and judicial reforms necessary to adapt their regulations, interpretations and internal practices.*

In any event - and because it is a transitory situation - the Court warned that these institutions must guarantee the same rights as marriage: *States that still do not*

guarantee same sex people their right of access to marriage, are equally obliged to not to violate the norms that prohibit discrimination against them, and therefore must guarantee them the same rights derived from marriage, in the understanding that it is always a transitory situation.

C. Recognition of de facto unions

For a long time, the rights of cohabitants not united in marriage have been recognized throughout the region, which avoided many situations of blatant injustice and helplessness.

There are no reasons to disregard the same rights for partners of same-sex as for those of different sex who are not married either, which is effectively done in some countries, such as Costa Rica and Argentina, but not in others (Venezuela, Nicaragua, Paraguay) and even less so in the Caribbean where relationships between people of the same sex are criminalized. It is noteworthy that in several of the latter countries, legislation and jurisprudence have endowed a series of rights to heterosexual couples living in de facto union. There is no reason why such rights should not extend to same-sex domestic partners who also live in de facto union (Barbados, Belize, Jamaica).

This discrimination has notorious consequences in terms of social security, especially in regard to health care. Therefore, although in some countries the right to social security is recognized quite broadly in the same way as for couples of different sexes, almost fully (Argentina, Brazil, Costa Rica), in others these rights are denied (Venezuela, Peru, Nicaragua, Paraguay, throughout the Caribbean).

In line with the above, the same countries that recognize the rights of same-sex couples (Costa Rica, Argentina, Brazil), in the event of death respect the survivor's right to a pension, while the others deny it (Venezuela, Nicaragua , Paraguay, all Caribbean countries). In Peru, since August 2020 social security has been recognized for the survivor of a same-sex couple, but only for cases of health workers who died from COVID-19.

It should be noted that the helplessness of people partnered with someone of the same sex in some parts of the region is total: they do not have access to the possibility of marriage, therefore, no property regime of the type of conjugal society or equivalent,

their stable relationship is absolutely ignored by the State, they lack any right to social security, is not guaranteed the health care of the partner even if the other person pays for it and, in the event of death, they are totally helpless because the pension is not granted to them like in the case of heterosexual partners.

It cannot be ruled out that, in some cases, this brutal discrimination is due to economic motivations of the administrations, which are saved through it in payment of services and pensions, this is not expressed or manifested publicly, but which cannot be ignored as fundamentally true and decisive motivation.

To these discriminations, sometimes another more perverse is added: life as a couple with someone of the same sex has been tried to be undervalued in sentences, to the point of considering that the divorced father or mother who maintains a relationship with another person of the same sex is unworthy to obtain custody of minor children and even to visit them (Chile, Jamaica). In the latter, precedents from the 70s, 80s and 90s judicial decisions of the courts of appeals of England[47] still apply, which no longer have legal value within the United Kingdom, since the British Parliament changed the family laws precisely to correct the aberrational devaluation of these court decisions. For example, this is illustrated by the sanction of the Human Fertilisation and Embryology Act 2006, which allows couples of women of the same sex to be both legally considered mothers of a child to the exclusion of the biological father or sperm donor. This law reflects the clear intention of the British Parliament to recognize paternity for same-sex couples, although the reform fell short in that it does not include same-sex male couples. Even so, judicial precedents prior to the legislative reform[48] are still used as legal precedents in Jamaica as they were never formally reviewed by the House of Lords or the Supreme Court of the United Kingdom. Even though in Chile there were no impediments of this nature in the legislation, there have been cases in which judicial decisions have accepted this criterion of extreme discrimination, which has even had to face international jurisprudence[49].

47 Such as: In re D (An Infant) (Adoption: Parent's Consent) [1977] AC 602 , 629; S v S (Custody of Children) (1980) 1 FLR 143; In re P (A Minor) (Custody) (1983) 4 FLR 401; C v C (A Minor) (Custody Appeal) [1991] 1 FLR 223).

48 Such as, In re D (An Infant) (Adoption: Parent's Consent) [1977] AC 602 , 629.

49 Atala Riffo v. Chile, Judgment of the Inter-American Court of Human Rights.

11. Legal provisions of a very diverse nature

A. Vision on the legislative set

It would be unfair to ignore other regulations of a very diverse hierarchy and referring to very different matters, but which contribute to neutralizing the phobic and paranoid prejudices of our societies.

Just as it is necessary to caution the States when they fail or omit the necessary measures for the protection and guarantees of Human Rights, it is also essential fairness to recognize the positive efforts made.

Given that the provisions are of a very different hierarchy and, above all, refer to multiple subjects, it is difficult to classify them and give them a certain unity, since they have no other objective than to overcome discriminatory regulations and, on occasions, promote the progress of egalitarian consciousness. Due to this systematic difficulty, we will mention them by country.

B. Argentina, Bolivia, Brazil

Argentina: (a) Article 2 of Law 25,529 of 2009 on *Patient Rights in relation to medical professionals and institutions*, prohibits discrimination based on sexual orientation in the care of health professionals. (b) Article 8 of Law 26,862 –*Medically assisted reproduction law*- of 2013, prohibits discrimination based on sexual orientation in access to assisted reproduction techniques. (c) Resolution 1507/2015 of the Ministry of Health repealed the ban on donating blood for gay men, with effect for the entire country.

Bolivia: (a) Art. 7 of Law 2,298 –*Penal Enforcement Law*- of 2001 prohibits discrimination based on sexual orientation in the execution of sentences. (b) Art. 1 of Ministerial Resolution 668/2006 prohibits this discrimination in access to medical care.

Brazil: (a) Art. 1 of Law 10,216 of 2001 prohibits discrimination based on sexual orientation against people with mental disabilities. (b) Art. 2 of law 11,340 of 2006 (known as *lei Maria da Penha*) enshrines every woman's right to a life free of violence,

regardless of their sexual orientation. (c) Art. 4 of Executive Order 7272/2010 establishes the development of actions that respect sexual diversity among the objectives of the *National Plan for Food and Nutrition Security* (PNSAN). (d) Art. 3 of Law 12414 of 2011 includes sexual orientation among the sensitive data that commercial credit databases are not authorized to record. (e) Art. 17 of Law 12,852 of 2013 - *Youth Statute* - protects young people between the ages of 18 and 29 from discrimination based on sexual orientation. (f) Art. 18 of Law 13,146 of 2015 - *Statute for people with disabilities* - provides that public health services for them must guarantee due respect for their sexual orientation. (g) Art. 6 of Law 13,344 provides for the protection of victims of human trafficking, attending to their needs, among other reasons, based on their sexual orientation.

C. Chile, Peru, Ecuador, Colombia, Panama

Chile: (a) Art. 3 of Law 20,418 of 2010 establishes that everyone has the right to confidentiality of their *sexual preferences* and *sexual conduct*. (b) Art. 2 of Law 20,609 of 2012 (*Law on measures against discrimination*) includes sexual orientation in the definition of arbitrary discrimination. (c) General Technical Rule No. 146 of the Ministry of Health, which regulates blood donation procedures, establishes that the selection of donors must be done without any discrimination based on sexual orientation. (d) Art. 1 of Law 18,838 modified by Law 20,750 of 2014, which creates the *National Television Council*, defines pluralism including respect for different sexual orientations. (e) Art. 150 of the Penal Code in 2016, criminalized any act of torture based on the sexual orientation of the victim, among other reasons. (f) Art. 7 of Law 20,845 of 2006 (*School Inclusion Law*) includes sexual orientation among the grounds of discrimination that it prohibits in schools, referring to all groups within the scope of Law No. 20,609 (*on measures against discrimination*).

Peru: (a) Art. 19 of Executive Order No. 027/2015 prohibits discrimination based on sexual orientation in access to health services and treatment. (b) Numerous jurisdictions, districts, provinces and regions issued local regulations against discrimination based on sexual orientation: thus, Amazonas, Ancon, Apurimac, Ayacucho, Castilla, Chiclayo, Chancamallo, Cutervo, Huamanga, Huancavelica, Huancayo, Huánuco, Ica, Jesus María, Jesús Nazareno, Junín, La Libertad, Lamas, Loreto, Madre de Dios, Matahuasi, Miraflores, Moquegua, Moropó, Nueva Requena, Pachacamac, Picota, San Martín,

San Miguel, Santa Anita, Santa María del Mar, Santiago del Surco, Ucayali, among others.

Ecuador: (a) Art. 6 of law 100/2003 (*Code of Youth and Adolescence*) prohibits discrimination based on sexual orientation, among other reasons. (b) Art. 27 of Law 67/2006 (*Organic Health Law*) prohibits discrimination based on sexual orientation in relation to the dissemination of information on sexual and reproductive health. (c) Art. 61 of the *Organic Law of Communications* of 2013 defines as discriminatory content all discrimination based on sexual orientation. (d) Art. 12 of the penal code, since 2014, prohibits any form of violence based on sexual orientation against persons deprived of liberty. (e) Art. 151 of the penal code criminalizes any act of torture defined in broad terms, perpetrated with the intention of modifying a person's sexual orientation, meaning, the so-called *conversion therapies*.

Colombia: (a) Between 1993 and 2016, a large part of the progress made by LGTBI people was obtained through the Constitutional Court. (b) The Mayor's Office of the City of Bogotá summarized most of the decisions of the Court in a diagram updated up to 2016. The City of Bogotá implemented public policy regulations to promote equality at the local level, among which is the agreement 371/2009.

Panama: (a) Art. 3 of Law 820 (*Law on HIV and AIDS*) of 2012 prohibits discrimination based on sexual orientation. (b) Art. 1 of ministerial resolution 671/2014 prohibits this discrimination in access to health services.

D. Costa Rica, El Salvador, Guatemala and States of the region

Costa Rica: (a) Art. 123 of the penal code, modified by law 8189 (2001), criminalizes torture on the basis of *sexual option*. (b) Decree No. 33877 of 2007 repealed Executive Order No. 1993 that prohibited gay and bisexual men from donating blood. (c) Art. 5 of Executive Order No. 38999 of 2015 establishes that the competent bodies of the Executive Power must recognize unions of people of the same sex, ensuring that they have leave of absence to take care of their partner due to illness or attend their funerals.

El Salvador: (a) Art. 3 and 6 of Decree No. 40/2004, which regulates the HIV law, prohibits discrimination based on sexual orientation in public health matters. (b)

Agreement 202/2009 of the Ministry of Health and Social Assistance establishes measures to eradicate all forms of discrimination based on sexual orientation in public health services.

Guatemala: Art. 10 of the *Childhood and Youth Code* of 1996 prohibits discrimination against children based on their sexual orientation or that of their parents.

Nicaragua: (a) Art. 3 of Law 830/2012 on HIV and AIDS, prohibits discrimination based on sexual orientation. (b) Art. 1 of ministerial resolution 671/2014 prohibits this discrimination in access to health services.

Dominican Republic: (a) Art. 2 of Law 49/2000 (*General Youth Law*) prohibits discrimination based on sexual orientation. (b) Art. 11 of the Code of Criminal Procedure (2007) establishes that judges and prosecutors must take into account the particular circumstances of each person involved in each case, but cannot base their decisions on their sexual orientation. (c) Art. 2 of Law 135/2011 (*Law on HIV-AIDS*) prohibits this discrimination.

Mexico: (a) Art. 1 of the *Federal Law to Prevent and Eliminate Discrimination* (2013) includes *sexual preferences* as one of the prohibited grounds for discrimination. This means that all the provisions of the federal legislation applicable to acts of discrimination contemplate this motivation. (b) Art. 9 was modified in 2014 to prohibit any type of violence based on the way someone dresses, speaks or gestures or publicly assumes their *sexual preferences*. (c) Regulation 253/2012, issued by the Ministry of Health, lifted the ban on donating blood for gay and sisexual men. (d) Art. 5 of the *General Victims Law* (2013) establishes a specialized differential approach regarding reparations granted to victims of crimes motivated by their sexual orientation.

Jamaica: the legislation prohibits discrimination based on sexual orientation but only for the sector and since the beginning of the new century, the police in Jamaica have protocols against discrimination based on sexual orientation in relation to crime victims although none of these measures have been effectively implemented in everyday practice. Barbados: a law passed in August 2020 (Employment (Prevention of Discrimination) Act 2020) prohibits discrimination in employment including discrimination based on the sex or gender of the person.

12. Impulses of civil society

A. Advances and difficulties

Since the end of the 19th century, several civil society organizations emerged in the northern hemisphere in defense of the rights inherent to sexuality, one of the pioneers was a secret English society called the Order of Chaeronea. These efforts took on an incipient European international character with the World League for Social Reform in 1928.

Meanwhile, in the United States, the Society for Human Rights had been organized in 1924.

In Germany, the struggle of Magnus Hirschfeld and his *Wissenschaftlich-humanitäres Komitee* (WhK, 1897) for the rights of homosexuals (men and women) and transgender people and for the repeal of paragraph 150 of the German penal code, was brutally thwarted by the genocide Nazi and its criminal pink triangle (*pink Winkel*), although the German criminalization remained in force until thirty years after the end of the war, to avoid paying compensation to the victims of the pink genocide.

Starting in the sixties of the last century, different social movements against discrimination based on sexual orientation began to appear in the United States that, with a certain approximation, could be said to distinguish between those who claimed that people with a sexual orientation other than the hetero-normative could be admitted with equal rights in the current social structures - generally characterized as *reformists* - and those who identified with other discriminated minorities - especially African Americans - and who called for a profound social change, considered *revolutionary*.

This last aspect had worldwide expression when it affected the European movement of 1968, contemporary to the events of the Stonewall Riot in Greenwich Village, which gave rise to the New York Gay Liberation Front (1969).

As expected, these movements influenced our region to different degrees, but not mechanically. The European movement of 1968, for example, gave rise to the mournful Mexican 68, which had an entirely different local meaning.

However - and despite the *national security* dictatorships of the following decade - Latin American activists did not stop and local organizations began to appear, some sporadic, but still they gradually gave way to a more positive attitude in our societies against discrimination based on sexual orientation.

The genocidal dictatorships of our countries, although they were all *LGTBI phobic*, adopted different degrees of repressive attitudes towards non-hegemonic sexual orientation, some being more *intolerant* than others: raids of stores, massive arbitrary detentions, illegal criminalization, etc. But even in the worst cases, there was always resistance from groups with the precarious organization that the circumstances allowed, whose militant and pioneering value must be highlighted. There is now quite a lot of literature on this in specialized bookstores.

In the Northern Hemisphere, it is interesting to note that to a large extent the framework of consumer societies contributed to social progress in this regard, which soon became aware of the considerable market offered by people of non-hegemonic sexual orientation, who were made visible in the media, although sometimes with unfortunate stereotypical characters.

In our southern hemisphere, although we did not manage to configure true consumer societies - and consequent welfare states - the broadening of the base of real citizenship caused considerable increases in consumption in some stages of development and, therefore, our peripheral capitalism imitated what the north was doing.

Despite what has been said, it has to be highlighted that there are also some setbacks in our region, given that the progress of equality for LGTBI people faces resistance.

Traditionally, the resistance came from the Catholic Church and from some left over groups from biological reductionism entrenched in medicine. But today, the leadership of the Catholic Church sets a different trend (Pope Francis invited the team of investigators to present the preliminary findings of the investigation to him in a private audience at the Vatican in April 2019), while the professional acolytes of biological reductionism - despite some outbreaks - do not have much credit in the academic field. From the traditional retarded resistance there are still far-right Catholic groups, some evangelical groups and some academically discredited racist enclaves. The latter are even forced to cover up their original ideology.

The greatest resistance currently registered against equal rights for people with a non-hegemonic sexual orientation comes from some religious groups that - in agreement with the financial variable of global capitalism - profess an openly *meritocratic* conception to which they give a theological dimension, according to which physical and financial well-being is a divine prize and, consequently, poverty a punishment for sins (the so-called *prosperity theology*).

It is not an exaggeration to think that - paradoxically - this resistance participates in a common ideological background with the *revolutionary* aspect of rights' vindication of the sixties of the last century, since both would agree that it is not possible to socially incorporate people with non-hegemonic orientation or sexual identity, to social life with the current power structures. On that common basis, the *revolutionaries* of the last century proposed to disrupt these structures to incorporate these people, while the *prosperity theologians* propose to reaffirm them, criminalizing those same people.

B. NGOs in the region

There are now multiple non-governmental organizations throughout the region that address the rights of LGTBI people. Apart from those that have this specific objective, other Human Rights NGOs are sensitive to the issue and open programs of activities or participate in those of specialized ones.

Some of the NGOs that in the region focus their activity on these rights and cover the entire LGTBI population, while there are also more that are dedicated to some of the subgroups of the affected population. There are also those that preferably dedicate their attention to people affected by HIV-AIDS.

In some large countries there are provincial, state and regional NGOs. Regarding the situation in the Caribbean countries, it should be noted that there is an *Eastern Caribbean network*.

These NGOs function without major difficulties in several countries, however, there are some rather curious episodes. Thus, in Argentina, the oldest NGO was condemned by the courts to compensate a man who suffered injuries in an act called by it, distorting the jurisprudence of the Supreme Court, which found it necessary to revoke the civil

conviction. Also in 2017, women were arrested for writing on the walls with spray paint, which is common on city streets.

In general, there is no harassment of NGOs in Paraguay, Nicaragua, Costa Rica, Uruguay, Brazil, although in the latter country some isolated threat is reported. They seem to suffer more difficulties in Venezuela and Peru.

In the past they were harassed in some countries (Argentina) by denying them registration and recognition as legal persons, which is obviously a form of censorship. Apart from these distant episodes, no others of a similar nature seem to take place in the region.

The greatest difficulties are registered in the Caribbean, where harassment tends to occur, which is why NGOs prefer not to be too public, not to attract attention with advertisements on the fronts (Barbados) or not to insist on overly controversial issues (Antigua and Barbuda). In some of the media they are disqualified (Dominica) and the so-called *disqualification due to affiliation* also takes place (Jamaica, Guyana), stigmatizing the people who cooperate or work for them. In some of these countries there are cases of public disqualification by reactionary organizations, which are not prohibited (Saint Lucia).

C. Festivals and pride march

In Costa Rica (San José) marches and festivals are organized in which people who have contributed to the advancement of equal rights are rewarded, by electing them marshals. Also on May 17 - international day for the fight against homophobia, biphobia and transphobia - public buildings are illuminated.

Peru hosts the annual LGTBI pride march and also a film festival, as well as a performing arts festival. In Venezuela the LGTBI pride march is organized in Caracas, but also in several other cities of the country; there is also a film series and an exhibition on sexual diversity, with the participation of many artists.

In Brazil, the *pride* of Sao Paulo is very well known, which is replicated in many states and municipalities throughout the country; May 17 is also recognized as the national day against homophobia.

In Argentina, the pride march and the *Asterisco* film festival are also a few years old, which is usually complemented by activities in different cultural centers.

In the Caribbean, like inAntigua and Bermuda, Grenada, Saint Vincent and the Grenadines, there are no such public demonstrations, although it seems that they take place in Belize, Trinidad and Tobago, but in closed places or with restricted access (eg Montego Bay, Jamaica since 2018). More public is the pride march organized by JFLAG or beach sports organized by the University of the West Indies. In Barbados there are also public events and in Guyana and Suriname the pride march is held in March of each year.

These activities, as well as the dissemination of literature on the subject, have an important symbolic role. There are specialized bookstores in some of our countries (for example, in Brazil and Argentina). The literature on the subject is very abundant in recent years, especially in the fields of law and history. The dissemination of this material is essential to promote the cultural change that is advocated.

CHAPTER 3

1. REFLECTIONS AND CONCLUSIONS

A. Range of situations

After reviewing the reports provided, a variety of situations appear, ranging from the formal criminalization of sexual relations between people of the same sex to the full recognition of the discriminatory condition of deprivation of any right under this pretext.

There is no shortage of superficial opinions that attribute this normative and social mosaic to *cultural* differences that, in addition, are used as an argument to legitimize discrimination based on sexual orientation.

In addition to the conviction that the cultural differences in Latin America and the Caribbean are not as deep as claimed, the Inter-American Court rightly and clearly stated that the circumstance that groups or sectors within a country resist the advancement of the principle of equality, this cannot be a valid argument to prevent, stop or obstruct its validity. This reasoning is of elementary rationality, since if the existence of a view in a country - or even of a majority - depended on the validity of Human Rights, this would directly mean its total repeal. In fact, Human Rights are enshrined in the Universal Declaration of 1948, in the face of the panic caused by very serious and massive crimes committed with the approval or indifference of the majority.

B. Primary criminalization

In this sense - and in the first extreme of the situations outlined - there is no doubt that it is imperative to carry out a campaign for the decriminalization of sodomy in the Caribbean countries. This should be focused, although not exclusively, on the legal

field and should not cease until the total abolition of any type of criminal offense that directly or indirectly criminalizes consensual sexual intimacy between adults of the same sex in the American continent. To this end, it is suggested to use all the rapid remedies of internal rights to obtain such abolition until the international path is left open.

At the international level, the IACHR has had the opportunity to hold a hearing in relation to Jamaica and at the close of the hearing the Commission, in the form of a preliminary report, called for the repeal of these criminal offenses. The publication of the final report is expected in these months. Therefore, in view of Jamaica's refusal to repeal these norms and the elements gathered by this investigation, it is suggested that the IACHR, in exercise of the powers conferred upon it by Article 64 of the ACHR, requests an advisory opinion from the Inter-American Court on:

- The conventionality of these criminal types in light of the ACHR and other international instruments for the protection of human rights applicable in the American continent.
- The international responsibility with legal consequences that fits the different subjects of international law responsible for the origin and maintenance of validity in domestic law of these criminal types.

C. Secondary criminalization

It is much more difficult to propose measures to eliminate the secondary criminalization of unconventional sexualities, although this does not mean that the fight should be given up. First of all, it is necessary to carry out a complex but not impossible investigation of the norms that legitimize it, be it of a contraventional nature, such as those that are concealed with other manifest purposes, but that are useful to criminalize, in order to promote its repeal or reform.

Similarly, in order to avoid its formal criminalization even in countries that do not criminalize it, it would be necessary to review the laws that indicate different age limits for heterosexual sexuality and for those that respond to unconventional sexual orientations, in order to advocate an equalization that prevents the exercise of sexuality by punishing the older person. In the cases of relationships between people who exceed the age limit and those who do not exceed it, it is necessary to incorporate

a subjective element to taking advantage of the minor person to avoid punishing sexuality that is based on affective relationships that must be protected by the right.

It is much more arduous to take measures that prevent arbitrary police criminalization, with little or no legal basis, since this depends on the degree of autonomy of the police agencies and their respective interests in their own collection. This is a problem that requires measures of a broader political spectrum, and it is not the objective of this research to propose solutions of this nature.

In any case - and not in this single aspect - it is always healthy for the State to regain the monopoly of punitive power where it has lost it, not to lose it in the countries where it retains it and, in general, that the Human Rights of police workers are recognized and their training is perfected. Obviously, these are recommendations that have a general criminal political character, which far exceed the purpose of this report, because they would result in the improvement of the rule of law and the quality of the democracies of our countries.

However, it is possible to take some measures more directly linked to the issue that, although they will not be able to provide a total solution to these Human Rights violations, they can at least contribute to alleviate them, such as providing training to police personnel, establishing protocols for cases of detention of LGTBI persons and, fundamentally, reinforcing the legal services to which these persons can resort in the event of arbitrary detentions and abuses, as well as making the institutions that receive the corresponding complaints effective.

Along these lines, Méndez[50] maintains that the State has an obligation to protect marginalized or vulnerable people and therefore must examine and reinforce the entire legal, normative and socioeconomic framework that deepens the damage and perpetuates discrimination. Thus, it is necessary to adopt training and sensitization measures for prison and police personnel, as well as for judges, prosecutors, and official defenders, which must be carried out periodically in accordance with the provisions of the Convention against Torture in the sense of periodic review of the practices of the institutions as measures to prevent torture.

50 Intervention in the Discussion dated October 22, 2020.

D. Aggression prevention

The prevention of homicides and other hate crimes requires, above all, to establish the situation framework in each country, that is, to undertake field criminological investigations and improve the system of official statistics that serve as the basis for the design and implementation of policies that take into account the needs and characteristics of people with diverse sexual orientation and gender identity. This would make it possible to establish their frequency, the geographic areas in which they are concentrated, the characteristics of the perpetrators, the circumstances that increase the risk of victimization and others that, together, will indicate the specific prevention measures in each country. This responds to an elementary rule: it is not possible to prevent something that is unknown.

Therefore, the first step must be to investigate the phenomenon and be able to establish for sure what are the true hate crimes and the victimizations that respond to common crime that only takes advantage of the vulnerable state of LGTBI people. This distinction is fundamental, because the prevention of homicides and hate injuries must be the subject of different preventive measures than those that must be taken to avoid the victimizing vulnerability of LGTBI people to common crime against property, for example.

Méndez[51] highlighted the need to create methodological tools that allow the statistical information that is collected to be useful for the purposes of the fight for equality, including the importance of guaranteeing the participation of organizations and people affected by anti-LGTBI discrimination.

The construction of information systems sensitive to the experience of the victims, their reliable compilation and the comparability of the results should guide a process of regional convergence for the prevention of these practices that violate rights.

51 Intervention in the Discussion dated October 22, 2020.

E. The classification of hate crimes

Although we do not believe that it has a preventive effect, but rather a symbolic one, it is perfectly justifiable due to the double damage to legal assets that it implies. In fact, it has a preventive effect and it is therefore recommended to classify discourses that incite hatred and violence.

In the event of individualizing violent homophobic groups, it is necessary, in addition to prevention and, where appropriate, police intelligence, to provide that the penal system is not limited to imprisonment, but rather includes social work and social awareness courses. It is particularly difficult to disarm these groups when homophobia is combined with autonomous political groups (vigilantes, etc.). In such cases, it escapes from concrete measures limited to homophobia, to become part of a much larger political problem.

Family assaults and eventual adolescent suicide should be investigated with more technical resources, but it is essential to empower and financially support the NGOs that provide psychological assistance and guidance to adolescents and, in turn, alert teachers.

The relevance of cultural change, human rights education and the training of public agents is considered fundamental by all the people who contributed to this research. An important problem in relation to this issue was planned by Jones[52], who pointed out the limits of working with the community "when we are criminals who are on the loose, according to the law" (referring to the situation in the English-speaking Caribbean). In a similar sense, Wyllys[53] agreed and emphasized that "visibility in itself has an important impact, but mainly to open spaces in the legislative fabric. We have to ensure that this visibility is not going to increase violence and be prepared for the reactions of reactionaries as we gain visibility and spaces of power ".

Along the same lines, reflection on ways to develop quality and impact training for public agents should be deepened, focusing on education on human rights and LGTBI rights in line with Saunders'[54] perspective: "judges join their magistracies bearing the

52 Intervention in the Discussion dated October 23, 2020.

53 Intervention in the Discussion dated October 23, 2020.

54 Intervention at the International Seminar dated October 28, 2020.

same prejudices and stereotyped thoughts that prevail in the rest of the population. That is why when they receive cases and are presented with objective data, scientific analysis and good international practices, they value it very much". He refers that to get the most out of judicial education programs it is advisable to do so in alliance with the training academies for judges or with judicial associations, and emphasizes that "great care must be taken to structure the programs and that participants must have a direct relationship between the topic of interest and their own personal wishes to improve their competence as judges, to improve themselves as judges ".

Everything that can be done through the media to enlighten the general population and counteract the effect of paranoid prejudices and their consequent phobias will not be much. It is a cultural struggle in which it is necessary to form groups of social communicators that allow them to operate with finer strategies than the usual ones. Officials who adopt discriminatory attitudes and the judges themselves in which the aforementioned prejudices are filtered - even unconsciously - are not spontaneous individual products, but people who incorporate them as a result of the social construction of reality that is produced through the media communication.

In this sense, the importance of the work carried out by the Caribbean Court of Justice, the courts of Belize and the High Court of Trinidad and Tobago, whose decisions during the last five years enshrine international precepts regarding human dignity, equality and non-discrimination of people in this group, cannot be overstated. Unfortunately, with them it is necessary to contrast the decisions of the Privy Council of the British Crown. The latter has become a guardian of colonial norms, imposing the validity of the old colonial laws over the constitutions of the new independent states. This is not only pure judicial neo-colonialism to independent countries, but they do not even conform to the colonial constitutional system that the former British Empire designed and applied for centuries to its colonies and, above all, when granting them independence.

In relation to the subject of this investigation, the Privy Council, unlike the advances of the Caribbean Court of Justice, delays the advancement of the rights of the LGTBI community in the English-speaking Caribbean that still have it as the final Court of appeals interpreting the rights and guarantees of the local constitutions in a restrictive way. This restrictive interpretation of constitutional rights inexplicably goes against the decisions of the local courts that are appealed to the Privy Council, of other Supreme

Courts of States that are part of the commonwealth of nations, but more worrying is that it is also contrary to that of the members of the privy council take internally as judges of the Supreme Court of the United Kingdom. For all this, it would be advisable to carry out an in-depth study of the international responsibility that the British Crown would have for these decisions, since it is the current monarch who is the final judge of all appeal, who only by constitutional custom adopts the legal advice of the Privy Council.

Finally, it should be kept in mind that the importance that at this moment is given to the claims of equal rights by women can offer a very interesting alliance, if taken intelligently.

In short, all anti-discrimination struggle registers the common background of equality, so communication between the different groups of discriminated people is very important: the common tactic between the discriminated allows offering greater resistance to discriminatory impulses, which by the way always operate as a front.

It is important to disrupt the paranoid discourse to highlight its argumentative weakness, the product of which it lacks a discursive renewal: it should be pointed out in the communication that these are contradictory discourses and all coming from a discredited, not only scientifically but also philosophically and theologically, past. In this sense, historical research can make an important contribution.

From the behavioral sciences it is important to insist on the harmful consequences of so-called conversion therapies and to standardize their prohibition.

The problem of discrimination and assaults in prisons has different levels of severity. The first - and one that goes beyond the scope of our topic - is to solve prison overcrowding, since there is no way to prevent any abuse or to avoid atrocities in a prison that exceeds its capacity by more than 50%. Having solved this problem - difficult by the way - it is important to consult LGTBI people about the difficulties they face and if they prefer to be housed in separate pavilions or not. There is no rule to decide this measure, as it largely depends on the characteristics of each particular prison. In the case of intimate visits, it is necessary to promote them by respecting the principle of equality with heterosexual couples.

F. Diverse couples

At the international level and in domestic constitutional law, as in the jurisprudence of the supreme courts of the region, and especially from the legal academic sector, the extension of marriage between persons of the same sex should be promoted, until it is generalized in all the countries of the region. The same rights as heterosexual marriage must be recognized, including adoption.

It is a struggle at the legal level that must not cease until the generalization and normalization of this institution is obtained. Any difference in law or regime in this order should be considered to be discriminatory.

The same is true for the recognition of stable same-sex couples, in respect of which all the rapid resources of internal rights must be used to claim it, until the international route is left open.

G. Other discrimination

Difficulties in combating employment discrimination, given their concealded nature, must generally be overcome by skirting the issue from different angles. A practical one would be the establishment of quotas for trans people.

Regarding the discrimination of teachers, it should raise awareness in the unions to support their discriminated colleagues. Regarding employment income, prohibit the collection of data on sexual orientation to select employees. In the public administration, monitor the psychotechnical examinations and allow the candidates' own experts to attend.

Teachers unions can play an important role in education in equal values, courses and training of teachers are essential.

States should strive to legislate the right to Comprehensive Sex Education to be implemented in schools from early childhood. Comprehensive Sexual Education does not refer to the content of a specific subject but to an educational plan or project that requires interdisciplinary work, and that responds to the different stages of development of children and adolescents.

Discrimination in the armed forces must be removed from laws and regulations, which must be challenged in national courts. In fact, it is important to introduce egalitarian values in the formation of the officers.

Advertising of the sexual orientation of crime victims must be controlled, which does not mean restricting freedom of information. Victims of crime are innocent people and their privacy deserves a protection similar to that afforded to minors, which does not hinder information on the fact.

In matters of identity, laws and regulations should be promoted along the lines indicated by the Inter-American Court in Advisory Opinion 24 already annotated.

In general and with respect to all discrimination, it is advisable to strengthen and - if possible - materially cooperate with NGOs that specialize in filing appeals and exercising actions in domestic law until the instances are exhausted, leaving the international route open to go to this jurisdiction or the UN, etc.

H. Civil society actions

Official support for civil society initiatives such as marches, festivals, cultural and artistic events should be promoted in our countries, especially the support and protection of NGOs that are dedicated to promoting the rights of LGTBI people.

The investigation regarding the relevance that NGOs attribute to a possible common regional agenda resulted in all the people participating in the Discussions considering the articulation and work between organizations of various types that are working on these issues of great importance. Some participants in the Discussions highlighted the importance of picking up the existing networks, while reflecting on the limitations (material and symbolic) for this type of exchange. Regarding material limitations, it was highlighted that human rights work suffers from a lack of monetary resources.

Maffía[55] considered that it is not only possible but necessary to carry out an intersectional regional agenda (racial, linguistic, poverty status, migrant, whether or not they are in prostitution, whether or not they have a disability, all these aspects are very relevant).

55 Intervention in the Discussion dated October 22, 2020.

Likewise, she stressed that there are already multiple spaces for collaboration, both at the level of civil society and state spaces for the enforceability of rights (such as the Ombudsman's Offices) and the same in justice, and that it would be very important to recover them and/or make them more dynamic. Madrigal highlighted the importance of building a work agenda focused on social inclusion (including education, employment, housing and access to health). In turn, he warned about the importance of keeping in mind that there are other experiences in addition to those of white and urban populations.

Moore[56] remarked that the differential access to financing by the organizations entails an adjustment of the priorities of the organizations working in the field based on the financing lines offered, and highlighted the scarce coordination between Latin America and the Caribbean (in the case of of well-differentiated experiences of race-gender intersectionality in each geographic space).

Despite all the resistance and the very long tradition of discrimination, persecution, stigmatization and, in general, violation of the most basic rights of people with a non-hegemonic sexual orientation, it is undeniable that our societies have taken very positive steps towards cultural change in the last decades. It is a process that must continue and deepen. Reflection, intelligence in the strategies of change, clarification of reality, information and promotion of principles of respect for *the other*, are the elements of this fight for Human Rights in this matter that, for the moment, cannot have *conclusions because it has not concluded nor should it end*.

56 Intervention in the Discussion dated October 22, 2020.

Annex

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This work contains the results of an investigation into the persistence of criminal offenses that criminalize relationships between people of the same sex in the English-speaking Caribbean, other criminal figures (or those related to them) and the practices and procedures that violate the rights of individuals. sexually diverse people, who continue to suffer discrimination, persecution and violence in Latin America.

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