

**REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE.  
SEXUAL ORIENTATION, GENDER IDENTITY AND GENDER EXPRESSION**

**I. MANDATE**

During its forty-first regular session, held in San Salvador, El Salvador, in June 2011, the General Assembly of the Organization of American States adopted Resolution AG/RES. 26/53 (XLI-O/11) in which it asked the Inter-American Commission on Human Rights (IACHR) and the Inter-American Juridical Committee (IAJC):

each to prepare a study on the legal implications and conceptual and terminological developments as regards sexual orientation, gender identity and gender expression. It also instructed the Committee on Juridical and Political Affairs to include on its agenda an examination of the results of the requested studies, with interested civil society organizations participating. This review was to take place prior to the forty-second regular session of the OAS General Assembly.

At the 7<sup>th</sup> regular session of the Inter-American Juridical Committee, held in Rio de Janeiro, Brazil, in August 2011, Dr. Freddy Castillo Castellanos and Dr. Ana Elizabeth Villalta Vizcarra were designated as the rapporteurs for this topic.

During the 80<sup>th</sup> regular session of the Inter-American Juridical Committee, held in Mexico City in March 2012, the rapporteurs presented some initial observations on how the topic would be addressed. Some members of the Juridical Committee thought that the best course of action would be to define the mandate and limit it to international norms intended to put an end to manifestations of violence or discrimination, and that the topic should be approached from a legal perspective.

At its forty-second regular session, held in Cochabamba, Bolivia, in June 2012, the General Assembly adopted AG/RES. 27/22 (XLII-O/12), in which it asked the Inter-American Juridical Committee “to report on progress made on the study of the legal implications and conceptual and terminological developments related to sexual orientation, gender identity and gender expression.”

During the 81<sup>st</sup> regular session of the Inter-American Juridical Committee, held in the city of Rio de Janeiro, Brazil, from August 6 to 11, 2012, the rapporteur presented a first report on the concepts that come into play in connection with this topic; the meeting also saw a related study by the Inter-American Commission on Human Rights and a judgment issued by the Inter-American Court of Human Rights in a case involving sexual orientation. The report (CJI/doc.417/12) was discussed by the members of the Juridical Committee, and they decided that the study would be limited to the legal implications and conceptual developments, and that the relevant works in the areas of doctrine and jurisprudence would be cited.

During the 82<sup>nd</sup> of the Inter-American Juridical Committee held in Rio de Janeiro on 11-15 March 2013, a second report was presented (CJI/doc.417/12 rev.1) with the inclusions requested by the members of the Juridical Committee, on which occasion it was decided that the report will be sent to the Permanent Council of the Organization of the American States, in compliance with the mandate of the General Assembly at its 42<sup>nd</sup> Regular Session; at the same time, the members of the Committee asked that a new report on the theme should show the progress made on the matter, as well as asking the Member States of the Organization of the American States about their legislation on Sexual Orientation and Gender Identity and Expression, together with a study of the European norms on the question.

Accordingly, the following report of the Rapporteur was hereby presented at this, the 83<sup>rd</sup> Regular Session of the Inter-American Juridical Committee held in the city of Rio de Janeiro on 5-9 August 2013.

## I. REPORT

### A) Concerning the progress made on the matter, we present:

That the General Assembly of the Organization of the American States, at its forty-third regular session held in La Antigua, Guatemala, on 4-6 June 2013, approved Resolutions AG/RES. 2804 ( XLIII-O/13), de nominated “Int er-American C onvention a gainst All Form s of Discrimination and Intolerance”, and AG/RES. 2805 (XLIII-O/13), denominated “Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance”, both dated 5 June 2013, in which the principles of equality and non-discrimination are reaffirmed, as well as the recogn ition hu man d iversity is a v aluable elem ent for th e d evelopment and welfare of humankind in general.

Likewise, both resolutions reiterates th e firmest co mmitment of th e Organization of the American States (OAS) toward era dicating all fo rms of di scrimination and i ntolerance, and th e conviction th at su ch discriminatory attitu des repres ent a d enial of un iversal v alues su ch as th e inalienable and i nviolable ri ghts of human bei ngs and th e purposes, principles and guarantees provided in the Charter of the Organization of the American States, in the American Declaration of the Rights and Duties of Man, in the American Convention on Human Rights, in the Universal Declaration of Hum an Rights, in the Soc ial Ch arter of the Am ericas, in the Inte r-American Democratic Ch arter, in the In ternational C onvention on the Elimination of All Form s of Racial Discrimination, and in the Universal Declaration on the Human Genome and Human Rights.

Both resolutions take into special consideration the report of the President of the Working Group assigned to prepare Draft Legally Binding Inter-American Instruments against Racism and Racial Discrimination and Intolerance. Particularly important for this report is the “Inter-American Convention a gainst All Form s of Discri mination and Int olerance” approved by the above-mentioned Resolution AG/RES. 2804 (XLIII-O/13) of the General Assembly of the OAS.

The recital of this Convention established that certain persons and groups are liable to multiple or aggravated forms of discrimination and intolerance motivated by a combination of factors such as sex , age, “sexual orientation”, language, religion, political or any other opinions, social origin, economic position, migrant, refugee or displaced status, birth, stigmatized infecto-contagious condition, genetic characteristic, disability, incapacitating psychic suffering or any other social condition, as well as other conditions recognized in international instruments. It has express its alarm is expressed at the increase in crimes of hatred committed due to sex, religion, “sexual orientation”, deficiency and other social conditions.

Along the same lines, Chapter I of the body of the Convention refers to the Definitions of Discrimination, In direct Discrimination and Mu ltiple or Aggravated Di scrimination, expressing that

discrimination may be based on reasons of nationality, age, sex , ‘sexual orientation and gender identity and expression’, language, religion, cultural identity, political or other opinions, social origin, socioeconomic states, educational level, migrant, refugee, repatriated, stateless or internally displaced status, disability, genetic trait, mental or physical health condition, including infectious-contagious, debilitating psychological condition.

How can sexu al o rientation and g ender identity and ex pression be reaso ns fo r discrimination?

Chapter II refers to Protected Rights, stating that all human beings are equal before the law and are entitled to the same p rotection against all fo rms of discrimination and intolerance in any sphere whatsoever of public or private life.

Chapter III i nvolves the Duties o f th e St ates, d etermining th at th ese should co mmit themselves “to p revent, eliminate, prohibit and sanction, in acco rdance with their co nstitutional rules and th e pr ovisions of th e C onvention, al l act s and m anifestations o f di scrimination and intolerance”. The Member States thus pledge to adopt the special policies and affirm ative actions to ensur e th e exercise of the fu ndamental ri ghts and freed om o f p ersons and gr oups liab le to discrimination or intolerance fo r th e purpo se of p romoting equ al cond itions of op portunities, inclusion and progress for those persons or groups. The Party States pledge to adopt the legislation that cl early defi nes and p rohibits di scrimination and intolerance and ap plicable to al l publ ic authorities as well as to all in dividuals and corporations, both in th e public and private sector, in

particular in the areas of employment, participation in professional organizations, education, professional training, housing, health, social protection, exercise of economic activity, access to public services, among others, and to amend or change any legislation that constitutes or allows discrimination and intolerance.

Party States also commit themselves to ensure that the victims of discrimination and intolerance are treated equally, with equal access to the system of justice, agile and effective legal process and fair reparation in the civil or penal sphere, as is the case. Another commitment is to ensure conformity with their internal rules, to establish or designate a national institution to be responsible for following up on compliance of this Convention, to be communicated to the Secretary General of the OAS.

Chapter IV refers to the mechanisms to protect and monitor the Convention in order to set up an Inter-American Committee for the Prevention and Elimination of Racism, Racial Discrimination and All Forms of Discrimination and Intolerance, which will be prepared by a specialist appointed by each Party State to exercise such functions independently and for the purpose of monitoring the commitments assumed in this Convention.

Such Committee will be set up when the first Convention comes into force and its first meeting will be convoked by the Secretary General of the OAS as soon as the tenth instrument of ratification of any of the Conventions has been received. The Committee will be the forum for exchanging ideas and experiences, as well as to examine the progress made by the Party States in applying same and any circumstance or problem that affects the extent to which the Convention has been complied with.

With this new Convention we now have a specific regulation of the categories “Sexual Orientation and Gender Identity and Expression” within the grounds for non-discrimination, thus rising above their being treated under the grounds of “sex” or “any other social condition”.

It is also appropriate to mention that during the 43rd Regular Session of the General Assembly of the OAS held in La Antigua, Guatemala, Resolution AG/RES. 28/07 (XLIII-O/13), denominated “Human Rights, Sexual Orientation and Gender Identity and Expression” was approved on 6 June 2013, resolving, among other matters, the following:

1. To condemn all forms of discrimination against persons by reason of their sexual orientation and gender identity or expression, and to urge the states within the parameters of the legal institutions of their domestic systems to eliminate, where they exist, barriers faced by lesbians, gays, and bisexual, transsexual, and intersex (LGBTI) persons in equal access to political participation and in other areas of public life, and to avoid interferences in their private life.

2. To encourage Member States to consider, within the parameters of the legal institutions of their domestic systems, adopting public policies against discrimination by reason of sexual orientation and gender identity or expression.

3. To condemn acts of violence and human rights violations committed against persons by reason of their sexual orientation and gender identity or expression; and to urge states to strengthen their national institutions with a view to preventing and investigating these acts and violations and ensuring due judicial protection for victims on an equal footing and that the perpetrators are brought to justice.

4. In addition, to encourage states, within their institutional capacities, to produce data on homophobic and transphobic violence, with a view to fostering public policies that protect the human rights of lesbians, gays, and bisexual, transsexual, and intersex people (LGBTI).

5. To urge Member States to ensure adequate protection for human rights defenders who work on the issue of acts of violence, discrimination, and human rights violations committed against individuals on the basis of their sexual orientation and gender identity or expression.

**B) With regard to how the norms of the European Union offer protection against discrimination due to sexual orientation, we present the following:**

Article 21 of the Charter of Fundamental Rights of the European Union contemplates general prohibition of discrimination for an extensive list of reasons, including sexual orientation, when it states that: “Any discrimination based on any ground such as sex (...) or sexual orientation shall be prohibited”.

Article 13 of the Treaty establishing the European Community permits the European Union (EU) to adopt laws opposing discrimination for reasons of sexual orientation. The European Union has legislated a great deal against discrimination for sexual orientation, especially in the sphere of labor. The Directive of Equality in Employment prohibits discrimination in access to and conditions of employment, self-employment and professional training, as well as in orientation and participation in organizations of workers and trade associations. This Directive is to be applied both in the public and private sector.

This new juridical framework created by these instruments is fundamental since of discrimination on account of sexual orientation, including as an independent category of discrimination on account of sex.

In this sense, many Member States of the European Union have decided to move beyond what the Directive of Equality in Employment sets forth and extend protection beyond the workplace. In this way, it offers to lesbians, gays, bisexuals and transsexuals protection in a wider range of social spheres, such as education, social protection, social security and sanitary attention, as well as access to goods and services, including housing.

Along the same lines of ideas, we see that in eight Member States of the European Union (Belgium, Bulgaria, Germany, Spain, Austria, Romania, Slovenia and Slovakia) the legislation against discrimination on account of sexual orientation addresses not only the area of labor but also the other areas specified in the Directive of Racial Equality.

Likewise, we see that in ten Member States of the European Union (The Czech Republic, Ireland, Latvia, Lithuania, Luxembourg, Hungary, the Netherlands, Finland, Sweden and the United Kingdom) the legislation against discrimination on account of sexual orientation has partially expanded to address other spheres besides labor.

In the rest of the Member States of the European Union, legislation against discrimination on account of sexual orientation covers only the areas mentioned in the Directive of Equality in Employment. Notwithstanding of the above, we note that in Estonia, France, Greece and Poland, debate is ongoing as regards expanding the legislation.

What is being established in the European Union is an Equal Right to Equal Treatment, that is, people have a right equal to equality of treatment, so that prohibiting discrimination on account of sexual orientation has to be broadened to offer protection outside the labor sphere so as to include goods and services, like people discriminated against because of race or ethnic origin.

**C) Concerning the Internal Legislation of the Member States of the Organization of the American States, legislation has been sent by Ecuador, Peru, Bolivia and El Salvador**

With regard to Ecuador, the legislation was sent through the Ministry of Justice, Human Rights and Cults, particularly the Sub-Secretariat of Human Rights and Cults, Department of Human Rights, denominated “Normative Compilation and Jurisprudence on the theme of LGBTTI (Spanish Acronym) in Ecuador”.

Article 11, item 2 of the constitutional rules states that:

All people are equal to enjoy the same rights and opportunities.

No-one can be discriminated against for reasons of race, birthplace, age, sex, ‘gender identity’, cultural identity, marital status, language, religion, ideology, political affiliation, judicial record, socio-economic condition, migration status, ‘sexual orientation’, state of health, HIV condition, disability, physical difference; or by any other distinction, personal or collective, temporary or permanent, the object or result of which is to diminish or annul recognition, enjoyment or exercise of their rights. The law will sanction all and any form of discrimination.

The State will adopt affirmative-action measures to promote true equality in favor of the holders of rights who find themselves in a situation of inequality.

As can be seen, this is a very advanced constitutional provision on the question, since it expressly establishes non-discrimination on account of gender identity and sexual orientation.

Item 9 of article 66 of said Constitution rules on the Right to Personal Integrity states: “The right to take free, informed, voluntary and responsible decisions concerning one’s sexuality, life and sexual orientation. The State shall promote access to the necessary means so that these decisions can be made in safe conditions”.

Article 83 of the Constitution rules that; “The duties and responsibilities of Ecuadorian men and women, without jeopardizing other provisions in the Constitution and the law, are:

14. To respect and recognize ethnic, national, social, generational and gender differences, as well as ‘sexual orientation and identity’”.

As regards criminal law, we note that Article 30 of the Penal Code of Ecuador provides the following:

Aggravating circumstances, when they are not constitutive or modify the infraction, are all those that increase the malice of the act, or the alarm that the infraction produces in society, or establish the dangerousness of the authors, as in the following cases:

6°. To perform infraction motivated by discrimination related to birthplace, age, sex, ethnicity, color, social origin, language, religion, political affiliation, economic position, ‘sexual orientation’, state of health, disability or a difference of any other nature.

It should be noted that the Ecuadorian penal code typifies the Hate-related Crimes, setting forth the following in numbered articles:

“A prison sentence of six months to three years will be served to whoever publicly or through any other medium of public diffusion incites hatred, disregard, or any other form of moral or physical violence against one or more persons on account of the color of their skin, their race, sex, religion, national or ethnic origin, ‘sexual orientation or identity’, age, marital status or disability.

A sentence of six months to two years will be served to whoever commits acts of moral or physical violence of hate or scorn against one or more persons on account of the color of their skin, their race, sex, religion, national or ethnic origin, ‘sexual orientation or identity’, age, marital status or disability. If the acts of violence referred to in this article result in injury to anyone, the authors shall be committed to prison for two to five years. If said acts of violence produce a person’s death, the authors will be sanctioned to imprisonment of twelve to sixteen years.

A sentence of one to three years will be served on whoever in the practice of their professional, commercial or entrepreneurial activities denies anyone a service to which they are entitled, or excludes a person or denies, breaches or limits rights enshrined in the Constitution based on the color of their skin, their race, religion, national or ethnic origin, ‘sexual orientation or sexual identity’, age, marital status or disability.

Any civil servant who commits any of the infringements provided in this chapter or denies or delays a process or service to which the other persons is entitled, will be sanctioned in accordance with the provisions of the previous article. In these cases, the civil servant will be disqualified from holding any public position, job or commission for the same length of time as the imposed deprivation of freedom. (non-official translation)

Article 450 provides the following: “Homicide committed in any of the following circumstances is assassination and will be punished by special major reclusion of sixteen to twenty-five years: item 10 states: with hate or disregard on account of race, religion, national or ethnic origin, ‘sexual orientation or sexual identity’, age, marital status or disability of the victim”.

Article 71 of the Organic Law of Higher Education rules on the Principle of Equal Opportunity, which consists of: “guaranteeing to all the actors of the System of Higher Education the same possibilities as to access to, permanence and mobility in, and departure from the system,

without discriminating in terms of gender, religion, 'sexual orientation', ethnicity, culture, political preference, socio economic condition or disability”.

Likewise Article 91 of the same law rules on selection and Exercise of teaching and research without restrictions, establishing that for the selection of academic personnel, as well as for the exercise of teaching and research in the institutions of the System of Higher Education, no limitations shall be made that imply discrimination based on, among others, their “sexual orientation”.

Article 132 of the Organic Law of Intercultural Education prohibits the legal representatives, directors, teachers, mothers and fathers of the corresponding educational institutions from denying students from enrolling or separating them for reasons, among others, of their “sexual orientation”.

Article 6 of the Code on Childhood and Adolescence rules on Equality and non-Discrimination, and establishes that “all boys and girls and adolescents are equal before the law and will not be discriminated against on the basis, among other reasons, of their ‘sexual orientation’”.

Article 22 of the Law of Public and State Security establishes the following prohibition: no intelligence organization is qualified to obtain information, produce intelligence or store data on persons solely on account, among other reasons, of their “sexual orientation”.

Article 6 of the Law of Extradition provides the following: “Extradition may be rejected: 1) if there are reasonable grounds to believe that the request for extradition is motivated by a crime of common nature, has been presented for the purpose of persecuting or punishing a person because of considerations of race, religion, nationality, political opinion or sexual orientation, or that the situation of that person is in jeopardy of being aggravated by such considerations”.

Article 79 of the Labor Code of Ecuador rules on Equality of Remuneration, and states that: “Equal remuneration corresponds to equal work, without discrimination because of birth, age, sex, ethnicity, color, social origin, language, religion, political affiliation, economic position, ‘sexual orientation’, state of health, disability or difference of any other nature; but specialization and practice in executing work will be taken into account for the effect of remuneration”.

With regard to the Principles of Participation, Article 4 rules on Respect for Difference, and provides that it is the right to participate equally in public affairs without any discrimination based, among others, on “sexual orientation” or on any other personal or collective, temporary or permanent distinction, or of any other nature.

Article 6 of the Law of the National System of Registration of Public Data regulates Accessibility and Confidentiality, and states that: “Data of a personal nature are confidential, such as: ideology, political or trade-union affiliation, ethnicity, state of health, ‘sexual orientation’, religion, migration status and other matters pertaining to personal intimacy, in particular information whose public use violates the human rights enshrined in the Constitution and international instruments”.

Article 20 of the Regulations of Drug Addiction Rehabilitation Centers rules that:

For the processes of admission, treatment and internment of persons with problems of addiction or dependence on psycho-active substances, and in general in their functioning Rehabilitation Centers and their staff cannot: a) offer, receive, practice or recommend treatments or therapies whose objective is to impact their human rights, especially the free development of personality, ‘gender identity’, ‘sexual orientation’ (such as de-homosexualization), freedom, integrity, non-discrimination, health and life, or any other type of practice that ratifies or advocates violence of gender or against boys, girls and adolescents.

The Municipal Code for the Metropolitan District of Quito declares as a public policy special protection of boys, girls and adolescents at risk in the streets of the Metropolitan District of Quito and rules on social inclusion to guarantee effective exercise of their human rights without discrimination for reasons of “sexual orientation”, among others, juridical status or difference of any other nature.

Municipal Regulation N° 205, published in Official Register 111 dated 22 June 2007, regulates the Principle of Equality, among others, aimed at

eliminating the unjust and avoidable situations that hamper the universal access of citizens to full health care according to their particular needs and ensuring non-discrimination because of gender, age, ethnicity, 'sexual orientation', political affiliation, religion or socio-economic situation.

Any type of discrimination is prohibited against young people on grounds of ethnicity, 'gender identity or sexual orientation', age, migrant status, social origin, language, religion, marital status, political affiliation, state of health, physical difference or of any other nature, in accordance with the existing juridical system.

The Ecuadorian Normative also relies on Judicial Decisions in which discrimination for reasons of Sexual Orientation, Homosexuality, Homophobic Declarations of political candidates against the LGBTI Community, Lesbianism, Transsexualism, Bisexualism are sanctioned.

One of the judicial decisions expressly states:

In the case of homosexuality, bisexuality or transsexuality, as mentioned both in the Constitution and in International Conventions and Treaties, can not be considered as diseases or pathological abnormalities that must be cured or combated, but constitute rather legitimate sexual orientations that enjoy constitutional protection both by virtue of the normative force of equality and by the enshrined right to frequent development of the personality. In this same order of ideas, all forms of different treatment based on different sexual orientation are equivalent to possible discrimination on grounds of sexual orientation and even gender identity.

There are also resolutions as to Harmonization of Procedures for the Direction of Council Registers regulating Identity for Transsexuals; the resolution states that the requirements for identity cards in general will be observed, with photographs as the persons are presented, respecting their personality and sexual orientation.

The Ecuadorian Institute of Social Security grants benefits to the insured without any distinction as to sexual orientation, and dispensing with legal resolutions and reforms, since the right is clearly established and must be complied with.

As for Public Policies:

a) On the Ecuadorian Multisectorial Committee for HIV/AIDS, besides the governmental institutions that make it up, there is a representative of civil-society groups, among them gay men and transsexuals;

b) In Ecuador, the National Plan for Eradication of Violence of Gender against Children, Adolescents and Women has assumed the responsibility to build and implement a priority State policy for the eradication of gender violence, constituting various forms of discrimination against persons on account of gender, age, ethnicity, social condition or sexual option.

Likewise, many lesbian women in the city of Quito have been mistreated because of their sexual orientation, and in most cases the aggression has most often come from persons close to them, such as family members and friends. According to the international obtained the lesbian women do not denounce aggressions for fear of being re-victimized. For this reason the Ecuadorian State will guarantee a legal framework that prevents and sanctions all forms of violence against women without distinction of age, ethnicity, class, sexual orientation and origin.

c) The National Welfare Plan, which is aimed at fostering equality, cohesion and social and territorial integration in diversity, and at recognizing and respecting socio-cultural diversity and eradicating all forms of discrimination, whether motivated by gender, sexual orientation, ethnic-cultural diversity, political, economic, religious reasons or those to do with origin, migratory status, geographical origin, age, socio-economic condition, disability or other.

The Report of the Commission of the Truth, May 2010, declared that:

Violation of the human rights of the LGBTTI community has been practiced repeatedly and denounced permanently since before the period of Febrer Cordero. The Commission of the Truth was unable to investigate specific individual cases of arbitrary detentions, sexual violence or torture of persons belonging to the lesbian, gay, bisexual, and transgender group because no individual testimonies were gathered that could document these violations with the necessary guarantees, seeing as the victims did not come before the Commission to give testimony.

However, the Commission carried out several studies on focal groups and interviewed persons belonging to such groups so as to make this problem visible as part of the pending challenges in defense of human rights in the country. This demand is especially important since the people involved are considered different or marginal because of their sexual condition, and their rights are frequently violated.

Concerning the Legislation and Jurisprudence sent by Peru on Non-Discrimination due to sexual orientation, gender identity and gender expression of people, note should be taken of the following:

Item 2 of Article 2 of the Political Constitution of Peru rules the Fundamental Rights of People and literally expresses that: "All people have the right (...), to equality before the law. No-one should be discriminated against for reasons of origin, race, sex, language, religion, opinion, economic condition or of any other nature".

Item 1 of Article 37 of the Procedural Constitutional Code regulates Protected Rights thus: "Protection prevails in defense of the following rights: 1) Equality and non-discrimination on grounds of origin, sex, race, "sexual orientation", religion, economic condition, social condition, language or of any other nature".

As for Jurisprudence, note the following Sentences of the Constitutional Tribunal, the first dated 9 June 2004, ruled in Record N° 0023-2003 AI/TC referring to a case of unconstitutionality filed by the National Ombudsman ("Defensoría del Pueblo") of the People because of discrimination on grounds of homosexuality contained in military laws of Peru.

The Sentence dated 24 November 2004, ruled in Record N° 2868-2004 AA/TC, referring to supposed violations of police decorum and police spirit that provoked a situation of availability of a police officer of intersexual appearance who marries a person of the same sex; the officer was protected and re-admitted to active service.

The Sentence dated 20 April 2006, ruled in Record N° 2273-2005 PHC/TC, referring to the case of Habeas Corpus filed because of the refusal to grant a national identity card, since one had previously been given with masculine sex and then a request was made for another of feminine sex, denied on grounds of double sexual identity. The Constitutional Tribunal provides that Habeas Corpus is in order and rules that the National Election and Identity Register grant the document with the second sexual identity, that of the feminine sex.

The Sentence dated 20 March 2009, ruled in Record N° 01575-2007 PHC/TC, referring to the Habeas Corpus case against the General Directorate of Treatment of the National Penitentiary Institute (INPE) (Spanish acronym) for the purpose of granting the benefit of conjugal visits taking into account fundamental rights violated and discrimination due to gender; such visits had been denied with the argument that the prisoner was condemned for acts of terrorism. The Constitutional Tribunal resolved to declare the Petition well grounded and ordered the National Penitentiary Institute to grant the benefit of conjugal visits to prisoners condemned for acts of terrorism.

The Sentence dated 3 November 2009, ruled in Record N° 00926-2007- PA/TC, referring to a constitutional appeal for a breach of rights against the Director of Inspection and Teaching of the National Police of Peru (PNP), ordered re-admission of a pupil of said police force expelled for having had sexual relations with another pupil; the Constitutional Tribunal declared the appeal valid.

Note should be taken of the following National Plans in Peru:

The National Plan of Human Rights 2006-2010 (PNDH) involves “Fostering actions to promote a social culture of respect for differences, avoiding denigrating or violent treatment based on sexual orientation, within the framework of the Constitution and the law”.

There is also a National Plan against Violence against Women 2009 – 2015 (PNCVHM) and a National Plan of Equality of Gender 2012-2017 (PLANIG).

With regard to resolutions of the National Institute of Defense of Competence and Protection of Intellectual Property (INDECOPI) (Spanish Acronym), note should be taken of the following:

The Commission of Protection of Consumers (Lima Sur Office). Final Resolution N°2264-2010/CPC, dated 24 September 2010, in which case a transsexual denouncer appealed against the Gold’ Gym Jesús María for discriminatory treatment of transsexuals because he wanted to use the ladies’ rest room rather than the men’s, and did not want to be called a man. The Commission considers that the fitness center did not deal with the situation adequately, as it discriminately dealt with a situation involving a transsexual person.

Another resolution is that of the Tribunal for the Defense of Competition and Intellectual Property. In this regard, Resolution No. 1507-2013/SPC-INDECOPI, date June 12, 2013 refers that the Plaza Hotel E.I.R Ltda. was denounced on the basis of sexual orientation discrimination, because it denied lodging and accommodation in a matrimonial suite to a couple who denounced the hotel. The resolution established that the hotel had discriminated the couple for their sexual orientation.

In relation to municipal regulations there are the following:

The Regulation issued by the Apurimac Regional Government under No. 017-2008-CR-APURIMAC prohibits discrimination as a means of infringing human rights, and as violation of the principles on human dignity, in addition to an infringement against the respect that all human beings deserve in Peru. In this regard, Article 5 of the Regulation establishes as follows: “Prohibited Discriminatory Acts. The Regional Apurimac Government recognizes the equality of human beings and therefore rejects any kind of discrimination (among others) due to ‘sexual orientation’ (...) or of any kind.”

The Regulation of the Huancavelica Regional Government under No. 145-GOB.REG-HVCA/CR recognizes as in Article 5 of the previous regulation that: “the Regional Huancavelica Government recognizes equality of human beings and rejects any type of discrimination on the basis of sexual orientation (among others) (...) or of any other kind”.

The Regulation of the Amazonas Regional Government under No. 275-2010-GRA-CR establishes something similar in Article 5, which reads that: “The Regional Amazonas Government recognizes the equality among human beings and rejects any form of discrimination on the basis of Sexual Orientation (among others) (...) or of any other nature”.

The Regulation of the Ucayali Regional Government under No. 016-2010-GRU-CR establishes in Article 1 that it “Recognizes the Equality of Treatment among human beings, rejecting and condemning any discriminatory behavior in all its forms, within the territory of the Ucayali Region, establishing that the vulnerable populations [are] the Lesbians, Gay s, Transsexuals, Bisexuals (LGTB), men that have sex with men (MSM), sexual workers, both male and female (SW) have the same fundamental rights of persons as those that suffer from STD, HIV and AIDS, who enjoy the same fundamental rights established in the Political Constitution of Peru, in the national and supra-national legislation, and cannot be discriminated on the basis of reasons not contemplated in the prevailing legislation, such as sexual orientation or gender identity, which includes any differentiation, exclusion, restriction or preference based on sexual orientation of gender identity seeking the annulment or the diminution of the recognition, enjoyment or exercise [of their rights] and which are protected by the State through local development policies and equality of opportunity.

The wording of the Regulation of the Tacna Regional Government under No. 016-2010-CR/Gob.REG. TACNA establishes in Article One that: “The Equality and Non discrimination on the basis of Sexual Orientation and Gender Identity is hereby established in the TACNA region

therefore any discriminatory condition is rejected, as the equality rights of the persons are fully recognized”.

Other provisions involve:

The Handbook on Human Rights applicable to police duties, approved by Ministerial Resolution No. 1452-2006 –IN of May 31, 2006. Item 6 of the Handbook on Lesbians, Gays, Transvestites and Bisexuals establishes that they are groups of persons who on the basis of their sexual orientations are discriminated against in several areas of society.

As regards the domestic legislation forwarded by the Multi-National State of Bolivia we may cite as follows:

The information was delivered by the Ministry of Justice Article 14 item II of the Political Constitution of the Multinational State of Bolivia currently establishes that: The State forbids and punishes any sort of discrimination on the basis of sex, color, age, sexual orientation, gender identity, origin, culture, nationality, citizenship, language, religious belief, ideology, political or philosophical tendency, marital status, economic or social conditions, kind of occupation, degree of instruction, disability, pregnancy or any other that seek to annul or diminish the recognition, enjoyment or the right to exercise, under egalitarian conditions, the rights vested on human beings”.

Article 5 of Law No. 045 of October 8, 2012, (Law against Racism and Any Form of Discrimination) provides definitions, and Item “a)” of the provision refers to discrimination indicating that:

Discrimination is any form of distinction, exclusion, restriction or preference based on, among others, ‘sexual orientation and gender identity’ (...) that aims to annul or diminish the recognition, enjoyment or exercise, under egalitarian conditions, of human rights and fundamental freedom recognized by the Political Constitution of the State and by the international law. Affirmative action measures are not considered to be discriminative”, (...) g) Homophobia. Refers to the aversion, hatred, prejudice or discrimination against male or female homosexuals, and also includes of her persons included in the idea of sexual diversity (...). h) Transphobia. It is the discrimination of transsexuality and of transsexual or transgender persons, based on their gender identity.

Article 23 establishes that “Chapter V” is incorporated under the Title VIII of the Second Book of the Criminal Code, which is denominated “Crimes against the Dignity of Human Beings” and comprises the following provisions:

Article 281 ter. - (Discrimination)

The person who arbitrarily and illicitly obstructs, restricts, diminishes, prevents or annuls the exercise of individual and collective rights on the basis of ‘sexual orientation and gender identity’ (...) shall be penalized with imprisonment from one to five years”.

Supreme Decree No. 29851 of December 10, 2008 on the National Plan of Action on Human Rights - known as “Bolivia ready to live well 2009-2013” (the PN ADH) (Spanish Acronym) was approved, and Item 7 of Chapter 5 of the Plan on the “Human Rights of the Risk Groups under Vulnerability” which refers to the “Rights of the People with Different Sexual Orientation and Gender Identity” whose purpose is to promote devising public policies granting and to ensure the exercise of human rights of people with different sexual orientation and gender identity, establishes actions in favor of this populations, as these actions should be performed by different State agencies”.

Supreme Decree No. 189 of July 01, 2009, which declares the 28th of June each year as the “Day of the Rights of the Population with Diverse Sexual Orientation in Bolivia”, also known as the ‘Gay, Lesbian, Bisexual and Transsexual Pride Day’, on which this group celebrates the 1969 events in Stonewall, New York, as a result of the constant abuse by police forces in which the society was publicly urged to enhance and practice values such as tolerance and respect for people bearing different sexual orientation and gender identity”.

Supreme Decree No.1022 of October 26, 2011 states that “the 17th of May is the National Fight Day against Homophobia and Transphobia in Bolivia”, in order to effectively protect and grant the rights of the TGTBI population.

In addition, pursuant to the regulations of the PNADH, the Ministry of Justice, through the Vice-Ministry of Justice and Fundamental Rights (VJDF) (Spanish Acronym) has worked in partnership with LGBTI organizations on the following provisions:

- 1- Supreme Decree No. 0189 of July 1, 2009, which establishes the “Day of the Rights of the Population with Diverse Sexual Orientation in Bolivia”.
- 2- Supreme Decree No. 1022 of October 26, 2011, which declares the 17th of May of each year, the date of the Fight against Homophobia and Transphobia in Bolivia, throughout the whole territory.
- 3- Gender Identity Law Draft, which at the recognition of the right of gender identity, allowing such a change once and definitely, with legal backing and by the interested party's own decision of his/her name and information on sex of transsexual and transgender males and females.
- 4- The VJDF has received from organizations such as the ADESPROC (*Libertad*, the Civil Association for the Social Development and Cultural Promotion) and the CDC – Training in Human Rights the draft of a Supreme Decree which - if approved – will derogate Article 16 of Supreme Decree No. 24547 of March 31, 2007, which regulates the Medicine Transfusion and Blood Banks Legislation, as the provision is discriminatory against population with diversified sexual orientation and gender identity, because it does not allow homosexuals or bisexuals to donate blood in view of their alleged promiscuity: The VJDF has invited the pertinent bodies and organizations to hold coordination meetings in order to analyze the proposal.
- 5- The VJDF has received the proposal for the Plan of Action against Homophobia and Transphobia drafted by the National Working Panel (the MNT) with the support of the United Nations Population Fund (UNFPA) as the aim of this Fund is to promote a process of integrated political incidence in order to influence different governmental agencies so that they incorporate policies and actions against homophobia and transphobia. Accordingly, the VJDF has called for coordination meetings with the different pertinent agencies and also with LGBTI groups and the proposing Organization in order to analyze the draft.

It can be seen therefore that the legal provisions of these three OAS Member States, i.e. Ecuador, Peru and Bolivia, envisage the protection of the fundamental rights of Lesbians, Gays, Bisexuals, Transsexuals and Intersexuals, and they consider that the Principle of Equality should be obeyed and that no discriminatory attitude against people should prevail involving Sexual Orientation, Gender Identity and Gender Expression.

As regards the legislation from El Salvador, the information available is the following:

The legislation in El Salvador is not completely exhaustive as regards categories such as sexual orientation, gender identity and gender expressions as regards the prohibition to discriminate, and that most provisions approved by legislative organs are not specific and definitive on these issues.

In addition, the Salvadorian Criminal Code includes a description of a crime known as Labor Discrimination, in Article 246, establishing solely that “whoever commits serious discrimination at work based on sex, pregnancy, origin, marital status, race, social or physical condition, religious or political ideas, membership or non-membership to trade unions and their agreements, and in view of relationship or kinship with other workers in the company, and does not restore egalitarian situations before the law, after summons and administrative penalties, repairing economic damages caused, shall be punished with imprisonment from 6 months to two years.

Legislation contemplating “Sexual Identity” as a source for nondiscrimination involves the recent Integral Special Legislation for a Life Free of Violence for Women, which establishes in Article 5 on Legally Entitled Persons that “The current law will be applied for the benefit of women, without age distinction, within the national borders; therefore any kind of arbitrary discrimination is prohibited, involving any distinction, exclusion, restriction or differentiation on the basis of sex, age, ‘sexual identity’, family situation, rural or urban upbringing, ethnic origin, economic situation, religion or beliefs, physical, psychological or sensorial disability, or any similar cause, either from the State, its Agents or private persons”.

That the duties of the Executive Organ include the issuing of decrees, agreements, orders and measures necessary to fulfill their work. In this context, the President of the Republic issued, on May 4, 2010, Executive Decree No. 56 on the “Provisions to prevent any kind of public discrimination in terms of Gender Identity and/or Sexual Orientation”, through which any kind of discrimination based on gender and/or sexual orientation is prohibited within Public Administration agencies. We have mentioned these provisions in previous reports.

Executive Decree No. 56 is compulsory for all the agencies of the Executive Power, including decentralized bodies and also those attached to them, independently from their delivery - or not - of services to the public.

The aforementioned Decree establishes that “Discrimination” is any kind of distinction, exclusion or restriction on the basis of gender identity and/or sexual orientation, aiming to annul or diminish the recognition, enjoyment or exercise, under egalitarian conditions, of human rights and fundamental freedoms.

It also establishes that the head of the various agencies and organisms within the public administration must ensure the implementation of a culture of respect and tolerance within the activities of those agencies and organizations, whichever person’s only gender identity and/or the sexual orientation.

Since the issuance of the above Decree, the Secretariat of Social Inclusion of the Presidency of the Republic established the Directorate of Sexual Diversity, in order to provide follow-up work on the enforcement of Decree No. 56, and also to provide counseling or the necessary advice to the different departments and agencies of the public administration on the result of the enforcement actions.

As can be seen, the Republic of El Salvador, through its Executive Organ, is ensuring non-discrimination on the basis of “gender identity and/or sexual orientation”. At the same time, public administration agents in the country are being trained in order to ensure a culture of respect and tolerance within their activities, no matter the gender identity and/or the sexual orientation of a certain person.

#### **D) Recommendation**

As established in this report, some substantive progress was made on this issue in the region, as in the Forty-Second Ordinary Session of the Organization of American States – OAS, which took place in La Antigua, Guatemala from 4 to 6 June, 2013, the “Inter-American Convention against All Forms of Discrimination and Intolerance” was approved, and on which it was established that discrimination on the basis of sexual orientation is on a aggravated form of discrimination and intolerance. The Convention governs discrimination against ‘sexual orientation’ as a specific infringement, and therefore it would not be necessary to refer to any other category such as ‘sex’ or any other social condition’ in order to refer to this specific kind of discriminatory conduct, therefore the protection of the fundamental rights of persons bearing certain sexual orientation would be fully ensured.

In this regard, it seems convenient to encourage Member States of the Organization to ratify and adhere to this Convention to protect the fundamental rights of LGTBI persons so as to grant them egalitarian and non-discriminatory treatment. Similarly, it is necessary for all OAS Member States to provide the necessary support to the setting-up of the Inter-American Committee for the Prevention and Elimination of Racism, Racial Discrimination and all the Forms of Discrimination and Intolerance, in order to monitor and follow up on the commitments included in the Convention.

It is also advisable for all the OAS Member States that so far have not amended their domestic legislation, to take into consideration new provisions adopted by other Member States in order to ensure the respect of the fundamental rights of any discriminated person on the basis of their sexual orientation. These provisions can be found in countries such as Ecuador, Peru and Bolivia, which substantially ensure the rights of these persons, and which prohibit any discriminatory treatment, as is stated in their constitutional norms, their domestic legislation, and also their jurisprudence, municipal regulations and finally in their national plans and public policies.

It might also be convenient to have an exchange of experiences, legislation and jurisprudence with other international and regional organizations, so as to have a broader view of their norms, jurisprudence and opinions of the experts, and in this regard it would be convenient to analyze the norms of the European Union, both involving their jurisprudence and directives, in order to potentially include those norms in the jurisprudence of the State Members of the inter-American system, in order to reinforce and strengthen it.

As regards the follow-up work to this Report, the analysis of norms forwarded by other OAS Member States is highly convenient, in order to ascertain progress achieved in the legislation of those States.

\* \* \*