

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

I. MANDATO

This mandate originated in the forty-first regular session of the General Assembly of the Organization of American States (OAS), held in San Salvador, El Salvador en junio del 2011 por resolución AG/RES. 2653 (XLI-O/11) por medio de la cual se solicitó a la Comisión Interamericana de Derechos Humanos (CIDH) y al Comité Jurídico Interamericano (CJI)

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 79th 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 80th 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.

During the 81st regular session of the Inter-American Juridical Committee, held in the city of Rio de Janeiro, Brazil, from August 6 to 11, 2012, as the rapporteur for the topic I 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 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. Taking those parameters into account, the following rapporteur's report is hereby submitted.

At its forty-second regular session, held in Cochabamba, Bolivia, in June 2012, the General Assembly adopted AG/RES. 2722 (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 82nd 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 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 42rd Regular Session, held in Cochabamba, Bolivia, in June 2012, the General Assembly adopted AG/RES. 2722 (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."

At this regular session, the Committee members requested a new report that would consult the member states of the Organization of American States about their legislation on the subject of sexual orientation, gender identity, and gender expression, and would investigate European legislation on the topic.

In this regard, at the 83rd regular session of the Inter-American Juridical Committee, held in Rio de Janeiro, Brazil, from August 5 to 9, 2013, it was presented the advancement that had place at the 43rd Regular Session of the General Assembly held in La Antigua, Guatemala, on 4-6 June 2013, approved resolutions AG/RES. 2804 (XLIII-O/13), denominated “Inter-American Convention against All Forms 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 recognition human diversity is a valuable element for the development and welfare of humankind in general.

The preamble of that Convention declares that the Member States are

that certain persons and groups experience multiple or extreme forms of discrimination and intolerance, driven by a combination of factors such as gender; age; sexual orientation; language; religion; political or other opinion; social origin; economic status; migrant, refugee or displaced status; birth, stigmatized infectious-contagious condition; genetic trait; disability; debilitating psychological distress; or other social condition; as well as others recognized in international instruments

Furthermore,

alarmed by the surge in hate crimes motivated by gender, religion, sexual orientation, disability, and other social conditions; and

The rapporteur’s report noted that the fortieth regular session of the OAS General Assembly approved resolution AG/RES. 2807 (XLIII-O/13) corr. 1 titled “Human Rights, Sexual Orientation, and Gender Identity and Expression” on June 6, 2013, which among other matters resolved

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.

In view of the substantive developments in the area, with the approval of the “Inter-American Convention against Racism, Racial Discrimination, and Related forms of Intolerance,” and the establishment of **sexual orientation** as a specific type of discrimination, it is no longer necessary to use another category such as “sex and any other social condition” to refer to this form of discrimination, in order to guarantee the protection of the basic rights of persons with a specific sexual orientation.

As suggested by the members of the Inter-American Juridical Committee, the rapporteur’s report referred to the European Union norms for protection against discrimination because of **sexual orientation**.

With respect to domestic legislation of the member states of the Organization of American States, the report analyzed the legislation submitted by Ecuador, Peru, Bolivia, and El Salvador, which substantially guarantee the rights of these persons, prohibiting discriminatory treatment, which has been clearly established in their constitutions, domestic legislation, jurisprudence, municipal ordinances, and even in national plans and policies, as applicable.

At the 83rd regular session of the Inter-American Juridical Committee the Committee members decided that it was important to continue consulting the member states of the Organization about advances in their domestic legislation on the subject.

As a result, information was obtained from Paraguay, Argentina, and Costa Rica, which is described in the following point of this rapporteur’s report.

II. REPORTS

- A) Information from the Republic of Paraguay on sexual orientation, gender identification, and gender expression:

The Republic of Paraguay has made progress in this area with the Principles of Corporate Responsibility in the Area of Human Rights, according to which the companies work with philosophies aimed at creating equality, eradicating all forms of discrimination, supporting care of the environment, and supporting social development initiatives. One of the principles is “promoting nondiscrimination.”

- B) Information from Costa Rica on sexual orientation, gender identification, and gender expression:

Article 33 of Costa Rica’s Constitution states: “All persons are equal before the law and there shall be no discrimination against human dignity.

The General Law on Young Persons, N°8261 of May 2, 2002, in Chapter II on rights, states in Article 4, section h): “The right not to be discriminated against for reasons of color, national origin, belonging to a national, ethnic, or cultural minority, **sexual orientation**, language, religion, opinions, social condition, physical ability or disability, place of residence, financial resources, or any other personal or social condition or circumstance of the young person.”

The Law against Trafficking in Persons and for Establishment of the National Coalition against Illicit Trafficking in Migrants and Trafficking in Persons (CONATT), N° 9095 of October 26, 2012, stipulates in Article 2, on General Principles: “The following principles shall be taken into account when applying this law: (a) the principle of equality and nondiscrimination: regardless of the judicial or administrative proceeding undertaken to investigate the crime of trafficking in persons, the provisions of this law shall be applied so as to guarantee respect for the human rights of persons who are victims of this crime, with no discrimination whatsoever for reasons of ethnicity, disability, sex, gender, age, language, religion, **sexual orientation**, political or any other opinions, origin, nationality, financial condition, or any other social or migratory condition.”

The Minimum Standards for the Operation of Services that Care for Minors, with problems deriving from the use of psychoactive substances, Executive Decree N°37326 of September 7, 2012, in section (A), which regulated the Standard for Access, Availability and Admission, established in paragraph A.5: “For admission to the program there shall be no discrimination at the general level in the following aspects: (a) racial, ethnic, cultural, ideological, political, religious, philosophical, and **sexual orientation**.”

A Policy Respecting Sexual Diversity in the Judicial Branch, N°123-11, has been established.

The Full Court, in its session N°31-11, held on September 19, 2011, approved Article XIII, “Policy Respecting Sexual Diversity,” in which the Costa Rican Judicial Branch undertakes:

1. To avoid discrimination based on **sexual orientation** with respect to services provided to users and to opportunities for persons who work in the institution.
2. To carry out all administrative, regulatory, procedural, and operational measures necessary to guarantee respect for the rights of sexually diverse persons who are users of the system or judicial employees.
3. To ensure the availability of human, material, financial, and technical resources needed, and the establishment of adequate organs, methods, and procedures to implement this policy and incorporate criteria of decentralization to make it effective.
4. To define and execute affirmative actions or measures needed to eliminate inequalities in access to justice that affect sexually diverse persons.
5. To carry out continuing training and awareness programs for judicial employees to change the attitude of the institutional culture regarding sexually diverse persons.
6. To ensure the provision of services based on reliable criteria of efficiency, celerity, courtesy, and accessibility in accordance with the needs of sexually diverse persons,

taking into account their specific characteristics, and eliminating all regulations, practices, and customs that have a discriminatory effect or result.

7. To provide reliable, understandable, and accessible information on legal services for sexually diverse persons.
8. To require the application of guidelines for non-revictimization in cases where the parties are sexually diverse minors.”

Regulations for Refugees, Executive Decree N^o 36 831 of September 28, 2011.

Article 6 of these Regulations stipulates: “Principle of equality and nondiscrimination. Regardless of the migration proceeding begun, migration officials shall respect and guarantee the human rights of the persons requesting refugee status, refugees, and stateless persons, with no discrimination whatsoever for reasons of ethnicity, origin, nationality, gender, age, language, **sexual orientation**, political opinions, financial condition, or any other social or migratory condition.”

May 17 of each year is officially declared “the National Day against Homophobia, Lesbophobia, and Transphobia” by Executive Decree N^o34399 of February 12, 2008.

This decree, promulgated by the President of the Republic and the Minister of Health, established in Article 1: “May 17 of each year is hereby declared ‘the National Day against Homophobia, Lesbophobia, and Transphobia.’” Article 2 states: “Government institutions shall disseminate the objectives of this observance widely and facilitate, promote, and support actions working to eradicate homophobia, lesbophobia, and transphobia.” Article 3 provides that said decree shall “be in force as of the date of its publication.”

There are also the “Regulations on Photographs for Identity Cards,” the Decree of the Supreme Electoral Tribunal No. 8 of June 22, 2010.

Article 2 of this decree, governing its scope, specifies: “All persons have the right to respect for their image and sexual identity when taking the picture to be included on their identity card. This right must be reconciled with the public interest to have a suitable, secure, and reliable identification document.”

In this regard, Article 4 of the Regulations provides: “Employees’ duties. Persons responsible for reception and entry of data provided by applicants for identity cards, and those responsible for examining it, shall ensure that each transaction is conducted in the framework of full respect for the user’s image and sexual identity, and complies with the provisions of the Organic Law and these Regulations.”

Costa Rica also has the Ministry of Public Education’s “Curriculum for Sensitivity and Comprehensive Human Sexuality.”

This program incorporates content, values, objectives, and attitudes that endeavor to develop, among other things, people who are respectful, capable of expressing emotions, capable of enjoying and respecting sexual diversity, and living a more complete, responsible, and enjoyable sexuality, respectful of the rights of sexually diverse persons, and therefore less likely to engage in discriminatory actions.

The background for this program is that sex education in Costa Rica had been taught in the curriculum and extracurricular activities since 2001, and the Ministry of Public Education had an “Education Policy on the Expression of Human Sexuality” that integrated the subject in a crosscutting manner in the school curriculum.

In 2009 the Civic Education program included the components of youth identity, sexual identity and diversity (interculturality) for the first time. In 2011 an executive decree approved the Coexistence Program, whose objective was to promote the execution of participatory activities in the schools to strengthen relations of coexistence in the educational community and to promote relations based on respect, enjoyment of diversity, participation, and a sense of belonging and identity.

That same year there was a participatory diagnostic study involving teachers, parents, researchers, and civil society organizations to consider how to teach sex education in the schools. The

results of that study led to the “Curriculum for Sensitivity and Comprehensive Human Sexuality” approved by the Higher Council for Education three years later.

In the area of “Sexual Diversity Theory,” there were analyses of topics related to binary logic of sexuality, definition of sexual diversity, sexual diversity depending on sexual orientation, definitions of homosexuality, biological theories of homosexuality, psychological theories of homosexuality, sociocultural theories, and multifactor theories. There were also studies on bisexuality, sexual diversity depending on sexual identity and generic expressions, and as for participatory methodology, methodological guidelines were developed for talking about sexuality in the classroom.

C) Information from the Republic of Argentina on this subject:

Article 17 of the Employment Contract Law approved by Law 20744 provides “the prohibition of discrimination” and states: “This law prohibits any type of discrimination against employees on the basis of sex, race, nationality, religion, political or union affiliation, or age.”

Article 81 of the same law regulates equal treatment and stipulates that the employer must give all employees equal treatment in identical situations.

III. CONCLUSION

We have noted the information received from the member states of the Organization of American States (OAS) during the 83rd and 84th regular sessions of the Inter-American Juridical Committee; the European Union norms; the reports of the Inter-American Commission on Human Rights; the Judgment handed down by the Inter-American Court of Human Rights in the case of *Atala vs. Riffo*; the “Inter-American Convention against All Forms of Discrimination and Intolerance” and resolution AG/RES. 2807 (XLIII-O/13) titled “Human Rights, Sexual Orientation, and Gender Identity and Expression,” approved at the forty-third regular session of the OAS General Assembly, held in La Antigua, Guatemala, from June 4 to 6, 2013.

We therefore conclude that there has been significant progress in this matter, especially the establishment of “**sexual orientation**” as a specific reason for discrimination, so it is no longer necessary to use another category such as sex and any other social condition when referring to it, thereby effectively ensuring the protection of the basic rights of persons with a given sexual orientation.

Based on the foregoing facts, this rapporteur considers it appropriate to regard the Inter-American Juridical Committee’s studies on the present topic concluded.