

Sexual Rights of Gays, Lesbians, and Transgender Persons in Latin America

Roger Raupp Rios¹

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1. Introduction

The current situation concerning the rights of gays, lesbians, and transgender persons (hereinafter referred to as “GLBT sexual rights”) in Latin America can be examined from various perspectives. These can include analyses on the successes and failures, the limits and possibilities, and the formal recognition of these rights by Latin American national states, in an approach pertaining more to political science. Studies can also be proposed on the effectiveness of existing rights based on the degree of commitment by various government institutions involved in their enforcement, adopting a more sociological perspective. Anthropological research can also point to the impacts that formal recognition of these rights can have on the social representations concerning these groups, both inside and outside the groups themselves.

In this paper I propose to examine the current situation regarding the rights of gays, lesbians, and transgender persons from a legal perspective. What does such an analysis entail? What is the relevance of a legal approach to this issue? One should begin by distinguishing between a legal analysis and a mere inventory of legislation and case law on the topic. A legal analysis involves more than compiling data; on the contrary, it requires a critical examination of the prevailing legislation and its potential and limits for dealing with

¹ Federal Judge. L.L.M. and L.L.D. (UFRGS, Brazil). Associate Researcher, NUPACS/UFGRS. Member of CLAM – Brazil.

these rights, whether or not the legislation is explicit in relation to sexual rights. A legal analysis should also cover the trends and challenges for the recognition and enforcement of these rights, serving as important material for a more adequate understanding of reality, to be incorporated by researchers and activists. To the extent that the law (whether in its official wording or its enforcement by legal bodies) is also a fact of social reality, we must both understand and analyze it in order to adequately reflect on and practice it. Hence the relevance of a legal approach to the sexual rights of gays, lesbians, and transgender persons.

Our study thus begins with a typology of legal frameworks as to the level of repression against (or legal protection of) gays, lesbians, and transgender persons. This initial exercise will be followed by listing the trends and challenges in the Latin American scenario, aimed at an understanding of the current situation and prospects concerning these rights.

1. Typology of legal frameworks concerning the rights of gays, lesbians, and transgender persons.

The relationship is not new between the law, viewed as a legal framework (that is, the set of normative state instruments prevailing at a given moment in a given country, encompassing both legislative acts and court decisions), and sexuality. Traditionally, state law was produced as an instrument to reinforce and preserve the majority and dominant sexual moral norms. In other words, state law acts to confirm hegemonic sexual relations and practices. Examples include the consecration of the petit bourgeois nuclear family, the attribution of sexual rights and duties between spouses, and the criminalization of homosexual acts.

With the emergence of social movements vindicating the acceptance of practices and relations divorced from this model, the issue of sexual rights, and especially that of GLBT rights, was shifted into the political arena and thus into the legal debate. The

emergence of these demands and the recognition of some rights (although slowly and unevenly) launched a new modality in the relationship between these legal frameworks and sexuality. Historically, and concentrating on modernity, one observes the emergence of these rights in the 1980s, when a landmark decision by the European Court of Human Rights overruled a law criminalizing sodomy, on the grounds that said legislation violated a basic human right, namely the right to privacy.

Since then it has been possible to speak of various levels of protection for the sexual rights of gays, lesbians, and transgender persons, and hence the following proposed typology of legal frameworks:

- a) **legal frameworks with a minimal degree of protection**: those that have revoked the traditional prohibition of sexual practices that depart from hegemonic standards (especially linked to penal law);
- b) **legal frameworks with an intermediate level of protection**: those which besides not criminalizing such sexual practices also institute measures to penalize discriminatory acts, especially by prohibiting discrimination on grounds of sexual orientation;
- c) **legal frameworks with a maximum degree of protection**: those which besides not criminalizing the above-mentioned practices and penalizing discriminatory acts also establish positive measures for the protection and recognition of the sexual practices and identities of gays, lesbians, and transgender persons.

In the Latin-American context, the application of this typology of legal frameworks vis-à-vis the degree of protection of GLBT rights allows one to evaluate the situation with such rights in the region. The objective of the current study is not to map the situation in each individual country (a task that would require a joint effort by numerous researchers and detailed data collection, not to mention keeping pace with the dynamism characterizing the legislative and juridical output in such a broad area). Rather, the study seeks to identify

the most salient elements in this scenario, allowing an analysis of the trends and challenges for these rights in Latin America.

An overview of the Latin-American situation, considering the available data, shows that: 1) there is no legal framework in Latin America that criminalizes homosexual sexual practices, except in specific contexts such as military establishments; 2) the majority of legal frameworks in Latin America penalizes acts of discrimination on grounds of expressions of sexuality (Argentina, Brazil, Colombia, Ecuador, Mexico, and Peru, for example); and 3) few legal frameworks establish positive measures for the protection and recognition of these sexual rights (Argentina and Brazil).

In fact, as for the division between repressive and protective frameworks (the latter in their various degrees), only Cuban law explicitly establishes punishment for public homosexual manifestations (Penal Code, article 303). Although legal frameworks such as that of Chile can not be considered repressive (having revoked legislation that criminalizes relations between persons of the same sex), in some cases such relations were still considered a crime until very recently (1998, in the Chilean case).

Meanwhile, in the sphere of protective frameworks, Brazil, Argentina, and Colombia are examples of countries which not only prohibit discrimination, but also institutionally recognize unions between persons of the same sex (in Brazil and Colombia based on court rulings, while in Argentina there is explicit legislation). The degree of protection varies from country to country. Brazil has shown a high degree of institutional protection, at least formally, since the country launched the 2nd National Human Rights Program and the “Brazil without Homophobia” Government Plan, not to mention the govern support (especially through the Ministry of Health) for visibility campaigns and specific attention to gay and lesbian groups.

In the context of protective frameworks, Ecuador should be highlighted for its Constitutional provision explicitly prohibiting discrimination on grounds of sexual orientation, with the following wording:

“Equality before the law. All persons shall be considered equal and shall enjoy the same rights, freedoms, and opportunities, without discrimination on grounds of birth, age, sex, ethnicity, color, social origin, language, religion, political affiliation, economic position, sexual orientation, health status, disability, or difference of any other nature.”

A broader survey of the situation with GLBT rights in Latin America (that is, without a detailed analysis of each national juridical framework, a task beyond the scope of this study) also shows in practice the absence of legal regulation based on a human rights perspective in dealing with the specific situation of transsexualism or that of transvestites. On these fronts, the biomedical approaches usually prevail, especially in relation to transsexualism. As for treatment towards transvestites, even in countries where cross-dressing is not considered illegal, a repressive approach prevails, based on the criminalization of what are considered obscene acts in public byways and repression of prostitution.

Having briefly indicated these elements, we can proceed to an inventory of trends and challenges for GLBT rights in Latin America.

3. Trends in the Development of GLBT Rights

Several trends can be extracted from the emergence and development of GLBT rights in Latin America. In light of the above overview, the following points will be emphasized: (1) recognition of these rights within an overall context of re-democratization in Latin America; (2) the impact of the HIV/AIDS epidemic; (3) the link between these rights and public health concerns; and (4) the affirmation of these rights within demands for social rights.

Since the mid-1980s Latin America has undergone a process of re-democratization resulting from the exhaustion of various military dictatorships and changes related to the international order and stemming from the dismantling of the former Soviet Union and the subsequent détente in East-West relations. Within this broader context there emerged

spaces for the strengthening of civil society and various social movements, among which the feminist and gay movements have played outstanding roles in demanding GLBT rights vis-à-vis the state.

More specifically, this dynamic reached the legislative and judiciary branches, not only by the gradual establishment of alliances and dialogue with progressive Congressional forces, but also by the strengthening of judicial bodies. The latter, encouraged by post-World War II Continental European Constitutionalism, were opened to the possibility of human rights protection, consecrated not only in the international order but also in the respective national Constitutions.

The latter was an important factor for the development of GLBT rights in Latin America. Constitutional courts in various countries such as Brazil, Colombia, and Peru handed down rulings that penalized acts of discrimination on grounds of sexual orientation.

Another important factor in the development of GLBT sexual rights has been their increased impetus since the emergence of the HIV/AIDS epidemic. Although the epidemic was initially a factor in the stigmatization of gays and transvestites, eventually the responses developed to fight the epidemic provided greater reflection and networking among such groups. This in turn helped raise awareness concerning discrimination and has demanded reflection on the relationship between the law and sexuality, highlighting the need to adopt a human rights paradigm in this area.

Along this same line, another important trend in the development of GLBT rights has been their relationship to issues of health services access. Countries with public health services, and especially those that intend to increase the population's access to such services, are faced with multiple demands in this area. This emphasizes the need to provide health services that consider the specific situations of groups claiming sexual rights, such as transvestites.

To conclude this inventory of trends in the development of GLBT rights in Latin America, one should not overlook a Latin American specificity when comparing the issue's evolution here and in Europe and North America.

From the legal point of view, in Europe and North America the recognition of GLBT sexual rights began (and continues to develop) on the basis of demands invoking the right to privacy and the right to non-discrimination. This involves so-called “negative rights”, that is, demands for non-intrusion by either the state or third parties in individual choices and practices. For example, case law history in Europe and the United State has always emphasized privacy as the principal Constitutional premise for the affirmation of GLBT individual and group rights.

Meanwhile, the Latin-American experience has revealed other alternatives. Demands for social rights have fueled the discussion on GLBT rights. An example is the demand for social security rights and health plan entitlement, which has been the pioneering (and most successful) legal strategy for the recognition of these rights in Brazil.

4. Challenges to the Development of GLBT Rights

Although recent, the history of the development of GLBT rights in Latin America has witnessed several challenges, including: (1) the difficulty in developing a specific field related to sexual rights, not necessarily linked to the idea of reproductive rights; (2) the need to base sexual rights on a human rights paradigm rather than merely cultivating sexual health; (3) the conservative religious backlash against the recognition of GLBT sexual rights, and the difficulty in affirming a lay state; (4) the persistence of cultural realities that are incompatible with the development of GLBT sexual rights; and (5) socioeconomic conditions of poverty affecting huge population contingents in the region.

As demonstrated by the history of international human rights instruments, sexual rights were not originally conceived as autonomous in relation to reproductive rights. On the contrary, they were seen as a kind of appendix to the idea of reproductive rights. In fact,

historically speaking the main underlying concern in the expression “reproductive and sexual rights” has been to weigh against the injustice contained in gender relations and the denial of reproductive autonomy. There is no denying the importance of the struggle against reproductive and gender-based injustice.

Still, as GLBT rights make quite clear, the sphere of sexuality extends far beyond these limits. It encompasses freedom of sexual expression and gay, lesbian, transsexual, and transvestite issues. In addition, the affirmation of sexual rights even reaches sexual practices not associated with identities, with sadomasochism as a good example of this reality.

Another important challenge for the affirmation of GLBT sexual rights is the tendency towards a biomedical justification of such rights. To assess this challenge it is necessary to focus on the underlying tenets in the demand for such rights. While it is true that sexual health concerns are important for the achievement of sexual rights, it is equally true that the recognition of sexual rights stems from a broader perspective than merely preserving and cultivating health. Sexual rights in general, and especially GLBT sexual rights, are informed by a human rights perspective, one that may clash with narrower biomedical views. An arena where this conflict is particularly evident is the situation of transvestites.

A highly important aspect of this same challenge is the widespread resistance to the very idea of human rights in our Latin American countries. For a considerable share of our population, the very notion of human rights is perceived in a twisted and prejudiced way, as if human rights were devoted exclusively to protecting criminals. This mindset, the result of a long history of authoritarianism, permeates many institutions and groups both inside and outside the state, thus further hindering demands for GLBT rights based on human rights principles.

The emergence of fundamentalist religious movements poses another major challenge for the development of GLBT rights in Latin America. This trend is seen not only

among many of the so-called neo-Pentecostal churches. Even in the heart of the Catholic Church, conservative currents in relation to sexual conduct have gained force. Together, these groups react to the empowerment of the GLBT movement by proposing, for example, legislation aimed at “converting” homosexuals into heterosexuals, even making use of the public health system for this purpose.

Along this line, the difficulty in affirming the lay nature of the state in the young and immature Latin American democracies is a crucial obstacle, to the extent that our societies bear a historical experience of a strong, centuries-old institutional association between the Catholic Church and the civil state.

Persistent representations of female inferiority and gender subordination, as expressed in such cultural formulations as *machismo*, pose another cultural challenge to the development of GLBT sexual rights in Latin America. We are dealing with a cultural context divorced from human rights principles, reaching such extreme examples as the assassination of gays and transvestites and widespread rape of women.

Finally, the precarious socioeconomic conditions affecting a major portion of the Latin-American population pose a huge challenge for the enforcement of GLBT sexual rights. Poverty and destitution are real barriers against access to various benefits such as knowledge, information, and services related to sexuality. They limit the perception of risks related to unsafe sex. They maintain a barrier to formal schooling and have nefarious consequences for attempts to establish a social life free of prejudices.

5. Conclusion

Considering the above discussion and especially the analysis of the principal trends and challenges related to the development of sexual rights in Latin America, one can reach a conclusion which is both positive and worrisome.

While it is true that in recent years the rights of gays, lesbians, and transgender persons have received greater institutional attention and have even achieved legislative and legal gains at various moments, it is also true that persistent factors challenging such rights still leave their affirmation and consolidation in jeopardy. In addition, if this situation is true for the countries in which these sexual rights have already reached some degree of recognition, all the more so in those countries where such rights have scarcely been achieved.

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