ADVANCING SEXUAL HEALTH THROUGH HUMAN RIGHTS IN LATIN AMERICA AND THE CARIBBEAN

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1. Introduction

This paper describes the results of a legal and jurisprudential research undertaken to exploring the relationship between sexual health and human rights in Latin America and the Caribbean (LAC). The research focused on a variety of legal sources from Argentina, Brazil, Chile, Colombia, Peru, Mexico, Costa Rica, Guatemala, Dominican Republic, Jamaica, and the law and doctrine of the Inter-American System of Human Rights (Inter-American Commission on Human Rights and Inter-American Court of Human Rights) on: (1) equality and non-discrimination, (2) criminalization of sexuality and sexual activities, (3) state regulation of marriage and family, (4) violence, (5) health services in relation to sex, (6) information, education, and expression related to sex and sexuality, and (7) sex work.

This paper is part of a global project undertaken by the World Health Organization aimed at exploring how international human rights standards (international, regional, and domestic) have been regionally applied by different legal actors to sexuality and sexual health issues in the region. More precisely, the project endeavors to identify best practices related to human rights and sexuality that would eventually lead to pinpointing specific state human rights obligations to protect, promote, and fulfill a set of human rights related to sexuality and sexual health. As a working hypothesis, this paper suggests that sexual health is promoted and protected through the application of human rights concepts and standards by means of the application of authoritative legal standards internationally, regionally, and nationally.

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1 As explained in the feasibility paper presented at the WHO meeting in Geneva on May 13-14, 2008, these countries were selected after considering existing research in the region on sexual health and sexuality rights, the need for new information, and equitable regional representation. In light of previous regional research on sexual and reproductive rights, Argentina, Colombia, Chile, Mexico, and Peru were selected because they represent 64.37% of the Spanish-speaking population of LAC. See, e.g., CUERPO Y DERECHO. LEGISLACIÓN Y JURISPRUDENCIA EN AMÉRICA LATINA (Luisa Cabal, Julieta Lemaitre & Mónica Roa eds., 2001) [hereinafter CUERPO Y DERECHO]; 1 LA MIRADA DE LOS JUECES: GÉNERO EN LA JURISPRUDENCIA LATINOAMERICANA (Cristina Motta & Macarena Sáez eds., 2008); 2 LA MIRADA DE LOS JUECES: SEXUALIDADES DIVERSAS EN LA JURISPRUDENCIA LATINOAMERICANA (Cristina Motta & Macarena Sáez eds., 2008). In addition to these Spanish speaking countries, Brazil was added insofar as it represents about 33.3% of the total population of LAC. The selection of Brazil, however, is not only related to the size of its population, but also because of a legal landscape including interesting developments on sexual orientation, gender-identity, and HIV/AIDS public policy, among other topics. The selection of Costa Rica and Guatemala reflects the need to equitably represent legal developments in Central America. These two countries were chosen as representative of the Central American Region for two reasons: (1) they have the highest (Costa Rica) and the lowest (Guatemala) social indicators in the region, and (2) while Costa Rica has peacefully developed democratic institutions that haven’t been disturbed by dictatorships, civil wars, or any major political turmoil, Guatemala suffered a protracted and bloody civil war (1960-1996) that was followed by a democratic transition that hasn’t yet fulfilled many of the social commitments stemming from the Peace Accords signed in 1996 (basically regarding poverty-fighting and political inclusion). The option for Jamaica and the Dominican Republic is also based on the need to achieve equitable representation of the Caribbean Region. Jamaica was chosen because of the English common law nature of its legal system and its association to the Commonwealth, which makes it an interesting case for comparison with legal developments in civil law countries. In addition, Jamaica still has buggery and gross indecency laws directed against gay men, among other peculiarities regarding a harsh regulation of sexuality. The Dominican Republic is an interesting case not only because it represents the second biggest Spanish-speaking country in the Caribbean (after Cuba), but also because of its political dynamics. While weak democratic institutions characterized the 20th Century, in the new century the Dominican Republic seems to be developing a stronger democracy that, however, is still struggling with authoritarian and corporatist influences.

2 These seven research topics were defined at the WHO meeting in Geneva on May 13-14, 2008 and further refined at the WHO meeting in Geneva on May 13-15, 2009. The original list included “gender identity and expression” as a separate topic. In this report it will be included as part of the equality and non-discrimination and the access to health topics. All the legal materials that could be gathered on gender identity and expression issues show a regional tendency to handle this issue as an equality and non-discrimination matter or as an issue appearing in the context of access to certain surgical procedures (sex-change surgeries, for example) or as an informed consent matter (in the case of intersexuality, for example).

3 The report is based on the definition of sexual health developed at the WHO Technical Consultation on Sexual Health in January 2002. According to this definition, “sexual health is a state of physical, emotional, mental, and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination, and violence. For sexual health to be attained and maintained, the sexual rights of all persons must be respected and fulfilled.”
Conversely, the paper also suggests that where human rights standards are violated, contradicted or ignored in law and in policy, sexual health, and fundamental rights of persons are compromised. 4

The paper is divided into three sections. The first section briefly introduces the main features of Latin American legal systems, particularly focusing on how law is produced, applied, and interpreted in the region. It also describes the functioning and role of the Inter-American Human Rights System. The second section of the paper analyzes the information found for the seven topics of the research. It summarizes the information on each topic, following a hierarchy of legal sources (Inter-American law when applicable, constitutional norms, statutes, administrative regulations, and domestic judicial decisions), while making some conclusions on each topic and trying to indicate general regional trends. The third section of the paper analyzes, in more abstract terms, what have been the relationships between sexual health, sexuality, and human rights in the LAC region and will make some general conclusions.

2. Production, Application, and Interpretation of the Law in LAC

With very few exceptions, most countries in LAC have legal systems affiliated to the continental/civil law tradition. Their legal traditions developed from colonial law imposed by Spain, Portugal, France, and the Netherlands between the 15th and the 19th centuries. Some countries in the Caribbean, such as Jamaica, are part of the Commonwealth, owing their legal system to the common law tradition. After the independence revolutions of the 19th Century, most countries in LAC remained deeply influenced by European law. French private and administrative law, Italian and German criminal law, and German constitutional and criminal law remain major sources for inspiration when legal reforms are undertaken in the region.

These historical legal influences should be mentioned for they explain how “legal formalism” (or “legalism”) is still the prevailing legal theory in the region. 5 The main implication of legal formalism is that statutory law, passed by a legislature elected by the direct vote of the citizenry, is the main and dominant legal source. Every other legal source —especially judicial decisions— is subordinated to the letter of statutory law. In addition, the traditional form of systematizing law in LAC takes the form of the so-called “codes” (Civil Code, Criminal Code, Commercial Code, Code of Civil Procedure, and so forth), usually one for each of the most important areas of the law (civil law, commercial law, criminal law, and so forth). The “code” is thus considered to be a thorough and exhaustive regulation of the most important areas of human conduct expressed in specific areas of law. 6 In its original ideological form, the codification process sought to make rights and duties as clear and accessible as possible to the common citizen, so recourse to lawyers and judges would be almost unnecessary. 7

According to the ideas of legal formalism underlying this way of legal thinking and law production, democratically elected legislatures are the most conspicuous embodiment of human reason. Through rational debate, a legislature has the power to regulate —almost without loopholes— the minutest aspects of human conduct. Judicial interpretation is consequently deemed to be unnecessary because every

4 I am indebted to Ali Miller for suggesting this framing of the working hypothesis.
7 Id. at 28 (Codification represented “a desire for a legal system that was simple, nontechnical, and straightforward—one in which the professionalism and the tendency toward technicality and complication commonly blamed on lawyers could be avoided… [The code] would be a handbook for the citizen, clearly organized and stated in straightforward language, that would allow citizens to determine their legal rights and obligations by themselves”).
possible dispute or aspect of human life is included in the letter of the law. The judicial application of law takes the form of a “syllogism” where the major premise is the abstract text of a statute and the facts of the case at hand are the minor premise. Judges are supposed to subsume the facts of the minor premise in the abstract legal text of the major premise. This is a purely logical operation that does not require any sort of interpretive activity from the judge and therefore does not lead to any conception of adjudication as a practice creating new law. Accordingly, judicial decisions are only considered to be “auxiliary” sources of law. Legal formalism does not therefore accord any weighty precedent value to judicial decisions, so that a system of stare decisis is not applicable in most legal systems in the LAC region.

Since the mid-1980s, however, with the democratic transitions undergone by some countries in the region (Argentina, Chile, Peru, Brazil, Uruguay, Guatemala, Nicaragua, and El Salvador, among others), and important constitutional transformations in other countries (Colombia, for example), legal formalism has had to cope with (1) the enactment of new constitutions based on expansive bills of rights whose protection is entrusted to supreme or constitutional courts through effective judicial writs, (2) the expansion of new forms of legal interpretation that directly take issue with legal formalism, (3) the mandate of many of these new constitutions or constitutional reforms (Argentina, Peru, and Colombia, for example) to judicially enforce international human rights law at the domestic level or to interpret constitutional fundamental rights in light of international human rights treaties and conventions, and (4) a growing secularization of the region (at least from a formal perspective where constitutions and legislation establish the separation of Church and State and freedom of religion is protected as a fundamental human right).

Progressive legal scholars, influenced by the constitutional transformations in Europe after World War II, developed new legal theories opposing legal formalism. At the center of the arguments of these authors

8 On the role of judicial interpretation in this formalist vision of the law, and especially the gap between the ideal that judges should not interpret the law and the actual judicial interpretive practice, see generally MERRIAM, CIVIL LAW TRADITION, supra note 6 at 39-47.

9 In addition to regional human rights treaty law, all the countries selected for the research project are part of the major international human rights treaties (ICCPR, ICESCR, CEDAW, CERD, CRC, and CAT). With the exception of the constitutions of Mexico, Chile, and Jamaica, the constitutions of all the other countries selected for the research project explicitly establish that international human rights law plays a decisive role at the domestic level. The Constitution of Guatemala (article 46), for example, generally establishes that international human rights treaties are “preeminent over domestic law,” without making any distinction between constitutional and statutory law. In the case of Brazil (article 5-LXXVIII-2 and 3), Argentina (article 75-22), Colombia (article 93), and the Dominican Republic (article 74-3) the Constitution grants domestic constitutional hierarchy to international human rights instruments, which may be directly and immediately applied by domestic courts. The Constitution of Peru (Fourth Final Provision) establishes that constitutional rights and guarantees should be interpreted in accordance with the Universal Declaration of Human Rights and other similar international law instruments. Finally, the Constitution of Costa Rica (articles 7 and 48) sets forth that international treaties are hierarchically superior to statutory law and guarantees the rights of citizens to initiate constitutional injunctions (acción de amparo) to protect not only constitutional rights but also the rights established by international treaties ratified by Costa Rica. The analysis of domestic judicial decisions in several sections of this paper will show that domestic courts in LAC have thoroughly used international human rights law to decide cases or to interpret domestic rights and liberties. For a general discussion on how Latin American domestic courts have been enforcing international human rights law at the domestic level see LA APLICACIÓN DE LOS TRATADOS SOBRE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES (Martín Abregú & Christian Couris eds., 1997); LA APLICACIÓN DE LOS TRATADOS SOBRE DERECHOS HUMANOS EN EL ÁMBITO LOCAL. LA EXPERIENCIA DE UNA DÉCADA (Víctor Abramovich, Alberto Bovino & Christian Couris eds., 2007).

10 See, e.g., CARLOS SANTIAGO NINO, ÉTICA Y DERECHOS HUMANOS 1984 (one of the most important works by one of the foremost legal scholars in the region on human rights as the cornerstone of the legitimacy of any legal system); 1 TEORÍA Y CRÍTICA DEL DERECHO CONSTITUCIONAL: DEMOCRACIA (Roberto Gargarella ed., 2008); 2 TEORÍA Y CRÍTICA DEL DERECHO CONSTITUCIONAL: DERECHOS (Roberto Gargarella ed., 2008) (a recent work on Argentine constitutional law explicitly contradicting legal formalism); PAULO BONAVIDES, CURSO DE DEREITO CONSTITUCIONAL 2007 (a classic Brazilian constitutional law treatise clearly embracing theoretical postulates not affiliated to legal formalism); CÉSAR LANDA, TRIBUNAL CONSTITUCIONAL Y ESTADO DEMOCRÁTICO 1999 (a good overview of the constitutional transformations in Peru after the 1993 Constitution was issued and the Constitutional Tribunal began to operate); JOSÉ RAMÓN CÓSSIO, CAMBIO SOCIAL Y CAMBIO JURÍDICO 2008 (for an interesting argument on the transformative social potential of law in Mexico); MANUEL JOSÉ CEPEDA ESPINOSA, POLÉMICAS CONSTITUCIONALES 2007 (a collection of essays on the progressive transformations in the Colombian legal system brought about by the 1991 Constitution and the doctrine of the Colombian Constitutional Court). For a description of the general theoretical tenets of what has been dubbed “new law” (nuevo derecho) in Latin America see LÓPEZ MEDINA, TEORÍA IMPURA supra note 5.
stands a deep reflection on the relationship between justice and the legitimacy of the legal system. Whereas legal formalists believed that law was just —and therefore legitimate— because it was the product a rational debate undertaken by a legislature elected by the citizenry, the progressives of the 1980s and the 1990s believed that law embodied justice only when it promoted and fulfilled a set of substantive public values represented by human rights. Human rights therefore operate as the standard against which the justice of the legal system is assessed. Law is just and legitimate only when it promotes and fulfills human rights.

This idea was soon to be followed by many of the constitutional and supreme courts in the region. The Supreme Court of Argentina, the Constitutional Court of Colombia, and the Peruvian Constitutional Tribunal, for example, have seriously taken human rights, and, in so doing, have radically reconceived the role of law in a political community. With different degrees of judicial activism, these courts have embraced the protection of fundamental rights as the driving force behind their institutional role. The protection of human dignity, freedom, substantive equality, and solidarity has thus become their main agenda, allowing subordinated social groups to seek judicial redress for their historical plights and frame their claims for social and political emancipation in terms of human rights standards. In addition, the doctrine of these courts has also blurred the distinction between constitutional and ordinary law. Many legal areas, formerly understood in dissociation from human or fundamental rights —such as civil and commercial law, criminal law, and labor law— have now become heavily constitutionalized. In some countries in the region, this trend has allowed the correction of many injustices created by civil, labor, or criminal law by supreme or constitutional courts in the name of human rights.

The development of human rights standards related to sexuality and sexual health in LAC has been one of the consequences of the transformations in the conception of law in the region in the last couple of decades. When legislatures, executive officials, and judges begin to take human rights seriously —and, particularly, dignity, equality, autonomy, and certain social, economic and cultural rights— a whole set of injustices not previously considered in their public agendas begin to surface. Issues such as women’s rights, gay, lesbian and transgender rights, sexual and reproductive rights, and domestic violence, among others, begin to be couched in terms of human rights standards imposing compliance obligations on public authorities. This does not mean, of course, that framing these issues as human rights claims immediately leads to positive results. While the legislatures and the courts of certain countries in the LAC region have protected sexuality rights (through legislation, public policies, and judicial decisions), considering them as human rights, the extension of human rights protections to sexuality issues is still in inchoate state in other countries.

New and progressive legal tendencies in the LAC region should be complemented with the expanding role and legitimacy of the Inter-American Human Rights System. Although the Inter-American Commission on Human Rights (IACHR) has dealt with a handful of cases involving violence against

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The American Convention on Human Rights both creates and regulates the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The Commission hears individual petitions against any of the OAS member-States for human rights violations. The Inter-American Court of Human Rights hears individual complaints when the procedure before the Commission has not produced compliance by member-States. The jurisdiction of the Court is limited to those countries that have accepted its jurisdiction. From the point of view of its *ratione materiae* jurisdiction, the Inter-American Court can only hear complaints related to the violation of the American Convention on Human Rights, articles 8-1-a and 13 of the Protocol of San Salvador on Social, Economic and Cultural Rights, the Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on Forced Disappearance of Persons. Since 2006, however, the Court assumed jurisdiction over violations of the Belém do Pará Convention in the *Miguel Castro Castro Prison Case. See infra Section 3.4.2. For an overview of the structure and procedural aspects of both the Commission and the Court see generally HÉCTOR FAÚNDEZ LEDESMA, EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS: ASPECTOS INSTITUCIONALES Y PROCESALES (1999); CECILIA MEDINA & CLAUDIO NASH, EL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS: INTRODUCCIÓN A SUS MECANISMOS DE PROTECCIÓN (2007); Tara J. Melish, The Inter-American Commission on Human Rights: Defending Social Rights Through Case-Based Petitions, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 339-51 (Malcolm Langford ed., 2008) [hereinafter Melish, Inter-American Commission]; Tara J. Melish, The Inter-American Court of Human Rights: Beyond Progressivity, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 372-81 (Malcolm Langford ed., 2008) [hereinafter Melish, Inter-American Court].
women and sex equality, the Inter-American Court of Human Rights (IACtHR) has basically dealt with human rights abuses committed in armed conflicts or by military or civilian dictatorships and has therefore established standards aimed at eradicating impunity through guaranteeing the rights to truth, justice, and reparation of the victims of gross human rights violations. Although legal commentators in the region have praised the IACtHR for having created a set of legal categories to address the rights of victims, the creativity of the Court has not extended to victims of discrimination. In spite of this general trend, and even though equality issues (including sexuality discrimination) are almost absent from the doctrine of the Court, recent decisions may “signal a positive shift toward gender justice.”

In LAC there have undoubtedly been progress and positive developments in the protection of sexuality through human rights standards. Yet, all these positive steps and progresses—particularly if they are of a legal nature—should be assessed with care. The relationship of most countries in the region with law has not always been one in which legal reform has been conceived of as the most powerful vehicle to further human emancipation and attain progressive social change. The use of law in LAC is always the site of a profound contradiction where legal reform is seen, simultaneously, as liberating and oppressive, as allowing positive social change and restricting it. Jorge Esquirol has interestingly argued that in LAC the use of law as a tool for progressive reform is quite distinctive. Reformers in the region have usually made their proposals against a background that signals the failure of law in the region; a failure that should be understood as the ineffectiveness of law to produce any sort of positive social change. In spite of this “irrepressible image of failure,” however, the discourse of failed law has not worked in a paralyzing way, but—quite paradoxically—as a facilitating force for reform that may serve many simultaneous ends.

Although Esquirol refers to legal reform in the field of development and highlights several reasons as to why the image of the failure of law may produce harmful results, his main idea is useful to critically approach the use of law in LAC in domains other than development. As it will be apparent from the description of legal sources in Section 3 of this paper, most law reforms in LAC related to sexuality have had a legal shape (either through constitutional, statutory, or judicial law) that fit within the dynamics described by Esquirol: in the domain of sexuality law has failed, so let’s produce new law to counteract that failure. The oscillation between law’s failure and hope in the law as a force for progressive social change might, in the end, have a powerful explanatory potential when assessing gaps, trends, and tendencies in the encounter between sexuality and human rights.

The constitutional transformations of the last couple of decades, all of them equality- and freedom-affirming, all of them implying the enforcement of international human rights law at the domestic level, and most of them serving as the platform for a growing judicial rights-activism, have indeed helped to create an inchoate set of human rights principles to protect the myriad expressions of human sexuality.

12 See infra Sections 3.1.1.3.2.1 and 3.4.1.
15 See Esquirol, Failed Law, supra note 5 at 76.
16 Id. (“Law’s failure” can serve to condemn liberal illegality all together or—quite differently—just to advocate for different norms. Progressive scholars in the past, for example, have relied on this concept to argue for legal pluralism and to criticize purely symbolic state laws. In the law and development context, the paradigm of failure has been predominantly employed to introduce new legal policies”).
17 Id. at 77.
When assessing this positive general trend, at least three distinctive factors may play out in the possibility of any positive legal reform to achieve greater human emancipation based upon principles of true substantive freedom and equality: (1) the fact that LAC is still the most unequal region in the world, where social inequality —although receding— is compounded with several forms of political, social, and cultural oppression (racial, sexual, ethnic, and so on),19 (2) the region’s ongoing struggle to achieve a greater degree of secularization,20 and (3) the fact that any progressive constitutional reform always operates against the background of a highly formalist legal system that (very) slowly adapts to the new constitutional principles and a community of legal actors that, in many instances, may resist (for practical and ideological reasons) the progressive pull of these constitutional transformations.21

These three factors should therefore be taken as a source for questions that might help interrogate to what extent any legal step in the protection of sexuality through human rights standards in the LAC region is truly a good or a bad practice that should or should not be replicated in places or instances different from where it was originally adopted. For example, in light of the first factor one could perhaps conclude that any injustice in LAC, when framed in terms of human rights standards, should be couched in terms of equality and the prohibition to discriminate. This certainly might be the case, and putting oppressive and unjust practices in terms of equality may have the powerful social effect of highlighting the plights of specific social groups and individuals devoid of any political power and therefore lacking the necessary political voice to make their claims be heard. Putting sexual injustices in terms of equality and discrimination has thus a minoritizing thrust. But if these groups and individuals are social outcasts because of their sexuality, will the pull of equality towards their characterization as vulnerable minorities in need of special rights not put them in a social spotlight where they will become the object of dynamics produced by the second and third factors that may lead them to a situation of greater vulnerability?22

19 According to recent studies, Latin America’s 2004 Gini Coefficient was 53%. See Nora Lustig, Poverty, Inequality and the New Left in Latin America, in WOODROW WILSON CENTER UPDATE ON THE AMERICAS, No. 5, 4-6 (Oct. 2009). See also David de Ferranti, Guillermo Perry, Francesco H.G. Ferreira & Michael Walton, Inequality in Latin America and the Caribbean: Breaking with History? 81-126 (Chapter III ["Group-Based Inequalities: The Roles of Race, Ethnicity, and Gender"] is particularly interesting for its description of how gender, race and ethnic factors are compounded with socio-economic inequality).

20 See, e.g., Juan Marco Vaggione, Nuevas formas del activismo religioso. La Iglesia Católica frente al reconocimiento legal de las parejas del mismo sexo, 10 ORIENTACIONES. REVISTA DE HOMOSEXUALIDADES (2006); Juan Marco Vaggione, La Sexualidad en un mundo postocular. El activismo religioso y los derechos sexuales y reproductivos, in DERECHO A LA SEXUALIDAD (Mario Silvio Gerlero ed., 2009) (arguing that in matters of sexuality in LAC the Catholic Church should be addressed and confronted in regular political arenas as any other legitimate political actor). But see Julieta Lemaitre-Ripoll, Anti-clericales de nuevo. La Iglesia Católica frente al reconocimiento legal de las relaciones entre personas del mismo sexo, in REVISTA DE HOMOSEXUALIDADES 286-304 (2010) (arguing against Vaggione’s argument and making the point that in LAC the Catholic Church could never be considered a legitimate political actor in sexuality issues because its views on these matters may be characterized as a form of hate-speech).

21 Roberto Gargarella has shown, for example, how the struggles for independence of many Latin American countries (or at least those of Argentina, Colombia, Chile, Ecuador, Venezuela, Mexico, and Peru) were animated by a strong egalitarian ideology that, at the individual level, affirmed “that all people were created equal and endowed with similar basic capacities” and, at the collective level, believed “neither a foreign country nor a particular family or group should rule their societies in the name of the populace.” Roberto Gargarella, The Constitution of Inequality: Constitutionalism in the Americas, 1776-1860, 3 Int’l J. Const. L. 1, 1, 22-23 (2005). This egalitarian promise, however, was later betrayed in the course of the 19th Century by constitutional projects and legal orders that —in a mixture of liberalism and conservatism— entrenched norms inimical to personal autonomy, discouraged popular participation, concentrated great powers in the presidential institution, frankly “rallied the powers of the state in favor of a particular religion,” or in spite of establishing religious tolerance “reserved a distinct place for the Catholic religion.” Id. Many constitutional transformations in countries in LAC in the last twenty years may be characterized as a reaction against the pitfalls of the liberal/conservative dominant form of Latin American constitutionalism prevailing in the region during the 19th Century and most of the 20th Century. These transformations, however, have not completely dispelled deeply entrenched fears to both individual and collective self-governance and substantive equality.

22 Think about, for example, on the activism of the Catholic Church in LAC with regards to same-sex marriage, abortion, or emergency contraception (factor two), or the willingness of legislatures to “hear” moral majorities offended by activist judicial rulings seeking to implement —in the field of sexuality— the emancipatory promises of new constitutional orders (factor three). For a critique of equality and anti-discrimination as the preeminent discourse to frame claims against social oppression see generally Karen Engle, What’s So Special About Special Rights?, 75 DENVER U. L. REV. 1265 (1998) (hereinafter Engle, Special Rights); Richard T. Ford, Racial Culture. A Critique 1-57, 211-14 (2005).
Now, consider the alternative. If equality and freedom are opposing sides of the same coin, how would the situation change if the same injustices are now couched as autonomy claims? Much sexual injustices might be characterized as injustices stemming from the impossibility of being and becoming what one wants to be and become, as impingements on a life-plan, as curtailments on the capacity to decide the ethical norms that will drive human action. Putting sexual injustices in terms of autonomy has a universalizing thrust. Everyone, independently of his or her sexuality, is in a constant process of deciding upon what is best for his or her life. Everyone can relate to the sort of injustice derived from being the instrument of a perfectionist and authoritarian notion of what is good and worthy. If couched in terms of autonomy, the claims of sexual outcasts might be better heard by the “majorities” (factors two and three) that are at the origin of their oppression (a sort of “it can also happen to me”/“they are quite similar to us” argument). When conceived in this way, these claims may therefore be more easily recognized in institutional instances dominated by these majorities. The issue is thus transformed from a claim that only concerns certain special people or some minorities to a matter of universal rights. Some commentators have also explained that an additional advantage of conceiving of sexual injustices in terms of universal rights is that this strategy avoids making assumptions about the relative worth of people’s specific ways of life or social groups’ cultures.

Switching from equality to autonomy might indeed be productive, but there are at least two powerful arguments that should be taken into account when assessing the convenience of this move. To begin with, in the LAC context —riddled with such inequality— what is lost when one abandons the domains of equality (factor one)? Perhaps treating sexual injustices in terms of universal rights simplifies and obscures the myriad ways in which class inequality is compounded and complicated by other forms of cultural injustices —and vice versa— and might therefore operate as an obstacle to achieving real justice. The pull towards universal rights could also be criticized because it is “assimilationist” or “normalizing.” If everyone confronts the same injustices, what place is left for arguments in favor of difference, cultural specificity, and sexual dissidence? Is not the celebration of difference, multiculturalism, and dissidence a distinctive feature of any polity that calls itself democratic? Perhaps the question here is not so much about the place of difference, culture, and dissidence, but about what is the combination of human rights principles that would best accommodate difference, culture, and dissidence in a way that avoids the downsides of minoritizing dynamics and makes the most of the advantages of universalizing strategies.

Are these just “symbolic” trades-offs? These are just examples, but other similar trade-offs between human rights principles may arise in the protection of sexuality and the advancement of sexual health in LAC. The questions they pose are extremely hard to solve and, most probably, they do not have a single correct answer. This paper does not intend to elaborate a fully-fledged theory to help find such answers. Instead, the next section tries to provide a “thick” description of legal sources and materials that takes into account the difficulty of these questions. The presentation of the content of constitutional, statutory and administrative norms, and judicial decisions will endeavor to signal what possibilities they offer to advance substantive notions of sexual health and human sexuality, to what extent they incur in contradictions that might hamper their potential to protect and advance sexual health, and the possibility of everyone to live and enjoy his or her sexuality free from coercion and discrimination, and what trades-offs between human rights principles they imply.

3. Sexual Health, Sexuality, and Human Rights in LAC: A Substantive Description of Legal Sources and Materials

This section of the paper describes, in substantive fashion, the information gathered on each of the eight topics of the WHO research project on sexuality, sexual health, and human rights. The choice of these topics reflects a comprehensive definition of sexual health that is conceptually and pragmatically tied to human rights. A rights-based definition of sexual health is, in turn, an extension of the general definition of the right to the highest attainable standard of health as expressed by article 12 of the International Covenant on Economic, Social, and Cultural Rights and General Comment No. 14 of the Committee on Economic, Social, and Cultural Rights. The research topics therefore reflect a notion of sexual health that emphasizes the possibility to lead pleasurable and safe sexual experiences, free of coercion, discrimination, and violence, and the idea that “[a]ll human rights are universal, indivisible and interdependent and interrelated.”

The substantive description of legal sources and materials to which the next seven subsections are devoted first seeks to highlight to what extent legal transformations in the LAC region on issues related to sexuality and sexual health have been motivated by the will of public authorities to promote, protect, and fulfill certain human rights standards. Secondly, the description seeks to establish which gaps and inconsistencies still exist in the region in the protection of sexual health and sexuality from the point of view of human rights.

The legal materials included in this section try to illustrate what shape the relationship between sexuality, sexual health, and human rights has taken in LAC, in order to signal trends, gaps, and best practices in the protection of sexual health and sexuality through international and domestic human rights standards. The information is therefore not exhaustive. The illustrative information was identified according to the following criteria: (1) the specific legal source establishes a direct or indirect relationship between sexual health and human rights, (2) the legal source establishes a “positive” (or progressive) relationship between some aspect of human sexuality and one or several human rights principles, so it could be characterized as a “good practice” in the protection of sexuality through human rights, (3) the legal

24 In order to gather the information in an efficient, thorough, and systematic fashion, the research tasks were divided between the main researcher and two research assistants. The research focused on locating useful Internet and Colombian library resources. The Internet research sought to locate official and private websites of five types: (1) official country executive and legislative branches websites for constitutional norms, statutes, and administrative regulations, (2) national health/social protection departments or ministries and national education departments or ministries for the development of public policies on sexual health/sexuality rights, (3) websites of national supreme, constitutional, or high courts for judicial decisions on sexual health and sexuality rights, (4) websites of world, regional, and local non-governmental organizations and international organizations working on women’s rights, sexual and reproductive rights, LGBT rights, transender rights, sex worker’s rights, sex trafficking, sexuality-based violence, and HIV/AIDS/STI for country and regional reports on these topics, and (5) press and other media articles relating to the topics of the research agenda. Colombian library basically aimed at locating treatises that systematize legal doctrine on topics such as constitutional law, family law, and criminal law. The information gathered on the topics of the research was classified according to the classic hierarchical —pyramid-like— way in which legal systems in LAC deal with their sources: (1) constitutional norms and amendments, (2) statutes (passed by national legislatures, and, in federal countries, by state/provincial legislatures), (3) administrative regulations (both of the national and provincial/regional levels), which usually reflect interesting public policy developments, (4) judicial decisions (of national supreme or constitutional courts, and, when relevant and appropriate for the topics of the research, state/regional courts in federal countries), and (5) decisions of the Inter-American Commission on Human Rights and the Inter-American Court of Human dealing with the topics of the research.

25 See supra note 3 and accompanying text.

26 According to the Committee, “[h]ealth is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.” General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), U.N. CESC/R (2000) 2nd Sess., U.N. Doc. E/C.12/2000/4 (2000), ¶ 1. In addition, “[t]he right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health… [T]he reference in article 12.1 of the Covenant to “the highest attainable standard of physical and mental health” is not confined to the right to health care. On the contrary, the drafting history and the express wording of article 12.2 acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.” Id. ¶¶ 3-4.

source establishes a “negative” (or retrogressive) relationship between some aspect of human sexuality and one or several human rights principles, so it could be characterized as a “bad practice” in the protection of sexuality through human rights, (4) the legal source fills a gap in the legal protection of one or several aspects of human sexuality through human rights principles, and (5) the legal source seems to signal a regional trend (positive or negative) on the relationship between sexual health and human rights.

As it will be apparent to the reader of this section, a great deal of illustrative good practices on how to advance sexual health through human rights standards by domestic courts are drawn from the doctrine of the Constitutional Court of Colombia. With no doubt, the Colombian Court has the richest and most extensive jurisprudence in the region on issues related to sexuality. This fact is due, to a great extent, to the system of constitutional procedure (lenient standing, relaxed procedural and evidentiary requirements, among other features) that allows a high number of cases to reach the Court. This does not mean, of course, that other domestic courts in the LAC region have produced important decisions on sexuality issues that may be considered good (and sometimes less commendable) practices in the advancement of sexual health through human rights standards. At the level of domestic legislation, the situation is more balanced given the legal tradition in the region affirming the primacy of legislation over other sources of law.28 Most countries in LAC have therefore illustrative legislation on the different sexuality issues selected for the research project.

It is also important to flag at this stage the fact that the advancement of sexual health through human rights standards in the LAC region has basically developed along two main avenues: equality and non-discrimination and the eradication, prevention, and punishment of several forms of sexual violence. This dynamics may be due to two facts, one tied to the history of inequality in the LAC region, and the other related to the development of the Inter-American System of Human Rights. As mentioned above, the region has historically been riddled by profound and persistent inequalities. The need to confront poverty and other forms of discrimination has been a driving force in many constitution-making processes in the region and their judicial development by constitutional or supreme courts and tribunals. Constitutional norms on equality and non-discrimination have therefore occupied a paramount place in the constitutional transformations in the LAC in the last couple of decades. The importance of human rights standards on the eradication, prevention and punishment of sexual violence is basically related to the entry into force of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Pará). This specialized Inter-American treaty has not only led the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights to produce important doctrine on the States’ Parties international obligations to seriously confront sexual violence, but has also generated important dynamics of adaptation of domestic law to the provisions of the Convention of Belem do Pará.

3.1. Sexuality Equality and Non-discrimination29

The right to non-discrimination is a fundamental principle in all human rights, as it is the obligation of the state both to ensure equal protection of the law and to take steps to eliminate discrimination by others to achieve equality. This section of the report on discrimination focuses primarily on protections in law and their positive action against discrimination. In addition, this section highlights laws which fail to offer sufficient guarantees to ensure diverse people equal access to the resources and services needed to enjoy sexual health. Later sections of the report address more indirect (but no less causal) forms of discrimination, such as laws that fail to ensure that police respond equally to abuse committed against people in sex work, or laws which fail to respond to marital rape.

28 See supra Section 2.
29 The notion of “sexuality equality” refers to the principle of equality as applied to all manifestations of human sexuality. More precisely, in this paper it encompasses equality between men and women (also referred as “sex equality” or “gender equality”), equality as applied to issues of sexual orientation, equality as applied to issues of gender identity, and equality as applied to issues of HIV/AIDS status.
This principle of non-discrimination has multiple associations with sexual health. Inequality among and between persons and groups is a strong predictor of the burdens of ill health, including sexual health. Inequalities are manifest through differential access to services and resources, in people's abilities to participate in the policies and laws that govern their lives, as well as to seek remedies for abuses committed against them. Discrimination operates through processes of inequality that are rarely linked solely to one characteristic of a person, but are often fuelled by multiple factors of sex, age, class, race, caste, sexual orientation, marital status, national status, disability as well as health status, including HIV-status, among others.

For example, rape laws which exclude women married to perpetrators from protection, or which include or exclude access to health services based on women’s marital status deny women’s bodily integrity and decision-making, including in regard to unwanted sex, all of which contributes to the burden of ill-health many women face. Poor women and girls, as well as ethnic minority members, are often doubly burdened by these exclusions: the law may be sex-specific but in addition, their racial or social status can exacerbate gender discrimination. Poverty often makes seeking assistance and response for gender-based discrimination from authorities—especially remedies found in the law, even harder to reach. Thus, while denial of access to safe and legal abortion affects all women, poorer or minority women with fewer resources are more likely to face the health consequences of unsafe abortion.

Laws which discriminate—or fail to protect against discrimination (on the basis of sexual orientation, marital status, or sex, for example) in access to health services or housing—can result in people being excluded from vital treatment for sexually transmitted infections and other diseases, as well as contributing to the possible homelessness and deprivation of social capital among stigmatized people. These deprivations in turn make breaks in accessing critical sexual health services and treatment more likely.

Laws which both reserve key social relationships like marriage to a specific pool of adults, and then condition core rights (to insurance or social benefits, for instance) on entering into marriage have discriminatory impacts. Persons excluded from marriage, such as same-sex couples, are thereby excluded from social benefits and services, including health care linked to insurance, which are essential to sexual health.

The inability of many sexually stigmatized persons—rape victims (who may be viewed as dishonoured or complicit), persons in sex work (viewed as criminals or socially unclean)—to participate in assessing and making the laws that affect their lives results in law-making divorced from the needs of those most at risk. Indeed, such laws may exacerbate exclusion and ill-health, as with laws that require extra corroboration for the testimony of rape victims, thus making prosecutions less successful and services for post-assault rape survivors harder to access for many persons.

Research demonstrates that mandatory HIV testing, particularly when separated from therapeutic intervention, is unjustified on public health grounds, as it has not been proven to result in greater access or sustained use of treatment, nor more effective sharing of information with sexual partners. Moreover, such testing also violates rights: to privacy and security of the person, but it is often also discriminatory, as such laws often selectively target marginalized groups believed to be at higher risk of HIV infection, such as people in sex work or prisoners. Because the testing is done in ways that violate privacy (such as when police officials receive results for registered prostitutes) and which do not result in either treatment of the affected persons or good preventive practices more generally, such tests can be criticised as discriminatory.

Beliefs about the appropriate gender roles of women and men, which in turn dictate expected sexual conduct, are significant sources of legal discrimination against women in particular. Other laws discriminate against people who transgress social rules about feminine or masculine social behaviour.
(gender expression), and women or men whose sexual conduct is deemed unsuitable (sex without reproduction, sex outside of marriage, or gender-non-conformity in regard to sexual practices. Many laws which discriminate against women, for example, follow gender-based distinctions which are often tightly linked to legal and cultural norms about women’s sexuality, as when a women’s marital status is a barrier to accessing family planning or reproductive health technologies (RHT) or to adopt, or when the law treats women with a “good reputation” (i.e., chaste) differently and more protectively than women with a “bad reputation” (i.e., sexually promiscuous.)

Men may also run afoul of these rules, when they fail to conform to gender roles of masculinity, confront gender-based dress regulations, or face laws criminalizing their same-sex sexual behaviour. These laws tend to produce both stigmatized persons (whose mental health as well as physical health may suffer) and render health services to such persons harder to deliver.

At national and international levels, one of the critical developments in anti-discrimination law is the recognition that sexual harassment (unwanted sexuality-based verbal or physical activities in workplace or educational settings which create a hostile environment) functions as a barrier to equality, and as such counts as a form of discrimination. Sexual harassment can have health effects in two ways: first, the harassment itself can be coercive or abusive enough to have direct mental or physical health effects; second, in driving the harassed workers out of their employment, it may remove them from a key source of health benefits. Women are disproportionately the targets of this form of harassment, although men may also face this abuse.

While States are obligated, under the rights to non-discrimination and equality, to treat the similar interests of individuals in the same way, they must also treat their significantly different interests in ways that adequately respect and accommodate those differences in line with principles of autonomy, respect for diversity and regardless of gender or racial stereotypes. The assumption that all persons can be reached by the same public health messages about sexually transmitted infections constitutes one example of failed formal equality: married adolescent girls, unmarried women, and men who have sex with men may all need specific, tailored outreach and actions to obtain equivalent health information.

As an overall goal, this sections aims at showing to what extent human sexuality has been regionally protected through equality and non-discrimination as human rights principles. It also seeks to establish what have been the effects of this protection and what gaps tend to appear when sexuality issues are framed in terms of equality and non-discrimination. The section begins with the regional framework of international law on equality and non-discrimination provided by the Inter-American System of Human Rights. It then delves into national constitutional provisions on equality and non-discrimination and describes how they address discrimination based on sex, sexual orientation, gender identity, or other forms of discrimination related to sexuality. This description not only focuses on the text of constitutional norms, but also pays attention to the ways in which regional supreme or constitutional courts have interpreted them and to what extent these interpretations are based on human rights standards. The section next describes statutory developments on the principle of non-discrimination, especially highlighting anti-discrimination statutes, the remedies they provide to counteract discrimination and the institutional structures they create to promote equality.

3.1.1. Inter-American and MERCOSUR Law and Doctrine

This subsection describes illustrative human rights standards on sexuality equality and discrimination in the context of the Inter-American System of Human Rights and the MERCOSUR. After describing treaty

30 The state or provincial constitutional provisions on equality and non-discrimination—as well as the case law—of the states of Brazil and Mexico and the provinces of Argentina will only be mentioned when they illustrate a peculiarly interesting approach to sexuality through equality and non-discrimination.
law provisions related to equality and the prohibition of discrimination in the field of sexuality, the section describes some recent soft-law statements related to discrimination based on sexual orientation, and finally concentrates on the most important doctrine of the IACtHR and the IACHR on issues related to sexuality equality.

3.1.1.1. Treaty Law

Inter-American treaty law that refers to a general right to equality and forbids discrimination in general terms is mainly established in the American Declaration of the Rights and Duties of Man (ADRDM), the American Convention on Human Rights (ACHR), and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (PSS).

The right to equality and the prohibition of discrimination are enshrined in some provisions of the ADRDM. In its Preamble, it ascertains that “[a]ll men are born free and equal, in dignity and rights,” and, then, transforms this general declaration into a right in article II, which establishes that “[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.” The ACHR protects equality and forbids discrimination through several of its provisions. Article 1-1 imposes on the States a general obligation to ensure to all human beings “the free and full exercise” of the rights and freedoms guaranteed by the Convention “without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.” This obligation is complemented by a free-standing right to equal protection before the law—with no mention whatsoever to any specific ground of discrimination—guaranteed by article 24 of the Convention (“All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law”). As a general right, equality is also protected by the ACHR in the access to the “minimum guarantees” of the right to a fair trial (article 8-2). With regards to social, economic, and cultural rights, article 3 of the PSS establishes a general prohibition of discrimination “for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition” in the “guarantee [of the] the exercise of the rights set forth [in the Protocol].” As a general guarantee, equality is also expressed as a condition for the enjoyment of each of the specific rights protected by the PSS through the expression “[e]veryone has the right to...”

The treaty law of the Inter-American System also protects equality and forbids discrimination in more specific ways relevant to discrimination based on sexuality. In addition to the ADRDM, the ACHR, and the PSS, these more specific provisions on sexual equality may be found in the Convention on the Nationality of Women (CNW), the Inter-American Convention on the Granting of Civil Rights to Women (CCRW), the Inter-American Convention on the Granting of Political Rights to Women (CPRW), and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Pará) (CBP). These conventions refer exclusively to sex equality through provisions guaranteeing social, political, and economic equality between women and men, access for women and men to certain sexual and reproductive rights and services, and protection of women from gender-based violence. They therefore do not make any explicit mention of other dimensions of sexual equality such as sexual orientation and gender identity.

31 Right to work (articles 6-1 and 7); right to social security (article 9-1); right to health (article 10-1); right to a healthy environment (article 11-1); right to food (article 12-1); right to education (article 13-1); right to the formation of a family (article 15-2); rights of children (article 16); right to a special protection in old age (article 17); rights of persons with disabilities (article 18).
32 This convention, signed in Montevideo in December of 1933 at the Seventh International Conference of American States, was an initiative of the Inter-Commission of Women and is considered to be the first world’s treaty on women’s equality.
33 Signed at the Ninth International Conference of American States held in Bogotá, Colombia, on May 2, 1948.
34 Also signed at the Ninth International Conference of American States held in Bogotá, Colombia, on May 2, 1948.
The most important sex equality provision of the ADRDM is article VII, which guarantees special protection for all women “during pregnancy and the nursing period.” In the ACHR sex equality is first mentioned in the context of the freedom from slavery when article 6-1 establishes that “[n]o one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.” The most important provision of the ACHR with regards to equality between men and women is article 17 that protects the rights of the family. After defining the family as the “natural and fundamental group unit of society” (§1), article 17 asserts the right of men and women “of marriageable age to marry and to raise a family... if they meet the conditions required by domestic laws,” provided that these laws “the principle of non discrimination established in this Convention” (§2). Finally, article 17 makes obligatory for State Parties the adoption of “appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and the event of its dissolution” (§4). The PSS also mentions sex equality in the context of family rights. In similar terms to the ACHR, article 15 of the PSS defines the family as “the natural and fundamental element of society,” which, as such, deserves the protection of the State, “which should see to the improvement of its spiritual and material conditions” (§1). This article also establishes the right of everyone to form a family (§2) and the obligation of State Parties to “provide special care and assistance to mothers during a reasonable period before and after childbirth” (§3-a).

In addition to the ACHR and the PSS, the treaty law of the Inter-American System also protects the rights of women to equality and to be free from discrimination in more specific ways through special conventions. The oldest conventions of this kind are the CCRW and the CPRW, both entered into force in 1949. While article 1 of the CCRW sets forth that “[t]he American States agree to grant to women the same civil rights that men enjoy,” article 1 of the CPRW establishes that the “High Contracting Parties agree that the right to vote and to be elected to national office shall not be denied or abridged by reason of sex.”

However, the most important piece of Inter-American treaty law that guarantees sex equality and forbids discrimination against women is the CBP, whose main objective is the prevention, punishment, and eradication of violence against women. Although the substantive provisions of this convention will be described in more detail later in this document, it is worth mentioning that, interestingly, the CBP includes the right of women to be free from discrimination as part of the right to be free from violence.

35 It is worth noting that—in contrast to the constitutional provisions of certain countries in LAC—neither the ACHR nor the PSS define family or marriage in gender-specific terms or make dependent their validity upon heterosexuality or monogamy. Article 17-1, 2 and 3 of the ACHR and article 15-1 of the PSS just refer, in general terms, to “family,” “marriage,” and “spouses,” with no reference whatsoever to the sex or gender of the members of the family or the individuals who decide to marry. Even the ADRDM defines family in gender- or sex-neutral terms. Article VI refers to the right of “every person” to “establish a family.” The neutrality of these conventions when referring to family and marriage opens up an interesting interpretive space when considering the possibilities to grant human rights protections to alternative family and marriage arrangements at the Inter-American level.

36 To understand the CBP as a piece of treaty law protecting equality, it is necessary to establish an appropriate conceptual relationship between violence and discrimination. If discrimination is conceived of as a social phenomenon where certain social groups are structurally oppressed or subordinated to others and therefore are second-class citizens, then violence could be characterized as one of the many ways in which cultural and cognitive structures that allow for subordination and oppression are enforced, reproduced, and preserved. For such a theory of discrimination as oppression and subordination and its relationship to violence see generally Iris Marion Young, Justice and the Politics of Difference 61-65 (1990) [hereinafter Young, Justice]. The CBP seems to conceive of violence—in article 6 is instructive about this point—as a way to keep women “down” as inferior and subordinated human beings. Stereotypes affecting women and “social and cultural practices based on concepts of [women] inferiority or subordination”—to use the language of article 6 of the CBP—may be enforced and preserved through the manifold forms of violence to which article 1 of the Convention refers to (violence which “causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere”). The third paragraph of the Preamble to the CBP gives support to the relationship between discrimination and violence when it declares that “violence against women is an offense against human dignity and a manifestation of the historically unequal power relations between women and men.” The doctrine of the IACHR has also explicitly embraced the relationship between discrimination against women and violence. See María Eugenia Morales de Sierra v. Guatemala, Case 11.625, Report No. 4/00 (Merits), Inter-Am. C.H.R., OEA/Ser.L/VII.111 Doc. 20 rev. at 929 (2000) (Jan. 19, 2001) ¶ 52 (“The inter-American system has recognized, for example, that gender violence is a manifestation of the historically unequal power relations between women and men.” “Traditional attitudes
With regards to the right of women to be free from discrimination, article 9 of the Convention guarantees the right of every women “to be free from all forms of discrimination” (§a) and “to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination” (§b).

The importance of article 9 of the CBP lies in that it establishes a “working theory” on the nature of discrimination against women. A joint reading of sections (a) and (b) makes clear that the Convention assumes a mixed theory of the harm discrimination based on sex causes to women. On the one hand, stereotyping causes the harm, and, on the other hand, the harm stems from the debase of women through violence and “social and cultural practices based on concepts of inferiority or subordination.” The CBP thus seem to be based upon two complementary views of equality and discrimination. A “classic,” liberal conception of equality between men and women that sees the remedy against sex discrimination in equality of rights (represented by the characterization of harm as stereotyping) is complemented by a potent, far-reaching view of substantive sex equality aimed at dismantling social practices causing women’s subordination and oppression (represented by the characterization of harm as the product of social practices based on concepts of women as inferior human beings that may even be enforced through recourse to violence). This view of the discrimination theory underlying the CBP is by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse. ‘De jure or de facto economic subordination, in turn, forces many women to stay in violent relationships’); Maria da Penha Maia Fernandes v. Brazil, Case 12.051, Report No. 54/01 (Merits), Inter-Am. C.H.R., OEA/Ser.L/VII/111 Doc. 20 rev. at 704 (2000) (Apr. 16, 2001) ¶ 55 (“The condoning of this situation [the failure of the State to prosecute and convict the perpetrator of the violence suffered by the petitioner] by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women”). More generally, the relationship between violence and discrimination that article 9 of the CBP puts on the table is useful to elaborate on an important analytic distinction that may be helpful to capture part of the complexity of the workings of sexuality discrimination. María Mercedes Gómez has suggested that when talking about discrimination it is useful to make a distinction between discriminatory practices that subordinate and discriminatory practices aimed at excluding. See María Mercedes Gómez, Los usos jerárquicos y excluyentes de la violencia, in MÁS ALLÁ DEL DERECHO: JUSTICIA Y GÉNERO EN AMÉRICA LATINA 19-55 (Luisa Cabal & Cristina Motta eds., 2006). Subordinating discriminatory practices are geared towards keeping the victim of discrimination in a hierarchically subordinated position. In this case, the Other is still considered to be within the realm of the human (although in a lesser position than first-rank forms of humanity), politically viable, and is accorded some sort of recognition (however vile it might be). Consider some modalities of domestic gender-based violence and sexual harassing as forms of discriminatory practices seeking to keep women “down,” in a hierarchically debased position. Practices of discrimination as exclusion, on the other hand, seek to erase and disappear the Other. In the eyes of the perpetrator, the victim is in-human, “monstrous,” frightful. It should therefore be exterminated. This modality of discrimination might be illustrated by hate-crimes such as femicide or social-cleansing violence against transgendered people. In its utmost violent expression it may assume the form of genocide (the mens rea of genocide may be characterized as the state of mind stemming from the horror produced by what is in-human).

As some commentators have pointed out, this “classic” view of discrimination against women stems from a liberal (formal) paradigm of equality that sees equality of rights between men and women as a sufficient remedy against sex discrimination. See, e.g., Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender, 144 U. Pa. L. REV. 1 (1995). Franke’s main argument —the “classic” theory upon which sex discrimination law is usually based— divides sex from gender and, in so doing, reifies biological differences which, in fact, are just the effect of a “normative gender ideology”— should be taken seriously when critically approaching the gaps in women’s equality jurisprudence. Franke cogently and provocatively shows —in the context of American case-law— how the disaggregation of sex from gender and the judicial obsession it entails with “gloss stereotyping” of women as the main harm sex discrimination causes have allowed for a relative ineffectiveness of sex discrimination law in “dismantling profound sex segregation” in several social contexts. Id. at 2. Franke’s critique may be illustrated by some judicial decisions adopted by constitutional courts or tribunals in LAC. For example, in 1995 the Constitutional Court of Colombia adopted a breakthrough decision allowing women to become cadets of Colombia’s Naval Academy. Until the Court’s ruling, the Academy had been an only-male military higher education institution. While affirming a strong view of equality of rights between men and women, the Court was keen to assert that equality of rights had a limit “on the nature of things,” which, “in and of itself,” on certain occasions, “may imply that the principle of formal equality could not be applied because of natural, biological, moral or material obstacles or the prevailing social conscience.” Const. Ct. Col., Decision T-624/95 (Dec. 15, 1995), ¶ III. With such doctrinal statements, what could be done for women who are the subject of profound inequalities that, to some extent, might be tied to “natural” or “biological” factors? In the LAC region, where the ideology of Marianismo dictates that the model of womanhood is that of the Virgin Mary, and therefore motherhood and maternity are some sort of “sanctified” social roles, the reification of “biology” as a limit for equality might have the most perversive effects on the possibility to construct true equality for women. On the ideology of Marianismo in LAC and its effects on women’s equality see Berta Esperanza Hernández-Truyol, Borders (En)Gendered: Normativities, Latinas, and a Latcrit Paradigm, 72 N.Y.U. L. REV. 882, 915-18 (1997).
also reflected by article 7-e, which imposes on States Parties the obligation to “take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women.” In referring both to the amendment or repealing of laws and the modification of practices, this article assumes, at the same time, both the liberal-legalist view of discrimination and a more substantive view aimed at dismantling practices of oppression and subordination.  

3.1.1.2. Soft Law Statements

Soft law on women’s equality produced by the Organization of the American States (OAS) may be sensibly divided according to the organ that produced it. The Inter-American Commission of Women (CIM) has produced some important documents. The Rapporteurship on the Rights of Women of the Inter-American Commission on Human Rights has also produced or sponsored important documents on women’s human rights in the LAC region. Finally, the General Assembly of the OAS has —at least since the 1990s— has been showing a growing concern with strengthening the CIM and promoting women’s human rights and sex equality in the LAC region. While the soft law produced by the CIM and the Rapporteurship —given the position and the nature of these organs in the Inter-American System— is

39 In its report on access to justice of women victims of violence in the Americas, the IACHR has established an explicit relationship between violence and discrimination and has argued that article 7-e of the CBP imposes on States Parties a general (not just related to violence) duty to review its laws, practices, and public policies that discriminate against women. See Access to Justice of Women Victims of Violence in the Americas, Inter-Am. C.H.R., OAS/Ser.L/V/II Doc.68 (Jan. 20, 2007), ¶¶ 71, 101. Although in the context of nationality regulations, the IACHR has ruled that article 24 of the ACHR imposes on States the obligation to review legislation that explicitly discriminates or whose application produces a discriminatory impact on specific groups or persons. See Caso de las Niñas Yean y Bosico v. República Dominicana (Excepciones preliminares, fondo, reparaciones y costas), Inter-Am Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005), ¶ 141.

40 For purposes of this paper, the notion of soft law draws on Jan Klabbers’s provocative definition of this concept. According to Klabbers, soft law designates the “large grey zone” occupied “by those documents and instruments which are not clearly law, but cannot be said to be legally insignificant either.” Jan Klabbers, The Redundancy of Soft Law, 65 NORDIC J. INT’L L. 167, 167 (1996). See also Jan Klabbers, The Undesirability of Soft Law, 67 NORDIC J. INT’L L. 381 (1998). For Klabbers, however, soft law is a redundant concept because, at closer look, when applied (by judicial decisions or in state practice) it is either given full legal binding force —therefore becoming hard law—or it is not given any legal binding force whatsoever. Soft law either fully exists or does not exist at all. Even if one takes Klabbers’s argument seriously, the use of soft law in LAC is so distinctive that it has acquired a peculiar regional importance. As it was mentioned above, see supra note 9 and accompanying text, one of the key features of the domestic constitutional transformations in the region of the last twenty years or so has been the enforcement of international human rights law at the domestic level. One of the consequences of the high degree of permeability of Latin American constitutional orders to international human rights law has been the use of international human rights soft law by constitutional or supreme courts in the region either as an authoritative source to interpret certain constitutional rights or as fully legally binding law at the domestic level. Either use of international human rights soft law in the LAC region may be illustrated by decisions of the Constitutional Court of Colombia. For example, in the field of sexual orientation discrimination and abortion the Court used decisions of the UN Human Rights Committee as interpretive guidelines in the adoption of its decisions. In the case of sexual orientation, the Constitutional Court decided that sexual orientation was sex discrimination partly based on the decision of the Human Rights Committee in the case of Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994). See Const. Ct. Col., Decision C-481/98 (Sept. 9, 1998), ¶ 27. In 2006, the Court established that abortion was not criminal when pregnancy was the result of rape, in the case of non-viability of the fetus and when the life and health of the pregnant woman were at risk. In establishing that forcing a pregnant woman to carry on the pregnancy of a non-viable fetus was a violation of the right to free from torture and cruel and degrading treatments, the Court followed as an interpretive guideline the decision of the Human Rights Committee in the case of Karen Noelia Llantoy Huamán v. Peru, Communication No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005). See Const. Ct. Col., Decision C-355/06 (May 10, 2006), ¶ 8.4. The Constitutional Court of Colombia has also accorded fully legally binding force to certain pieces of soft law. For example, the Court has established that the advisory opinions of the IACHR are binding in Colombia. See Const. Ct. Col., Decision C-408/96 (Sept. 4, 1996), ¶ 24. Similarly, in another decision the Court established that the Guiding Principles on Internal Displacement were binding on Colombian public authorities and that domestic public policy for internally displaced persons ought to reflect their provisions. See Const. Ct. Col., Decision SU-1150/00 (Aug. 30, 2000), ¶ 38.
truly “soft” and therefore operates as a very general guidance on how the Inter-American System has historically evolved in its commitment to protecting and promoting women’s human rights, the soft law of the General Assembly has more “bite” for the Assembly is the supreme organ of the OAS composed by the delegations of all member States.

The Inter-American Commission of Women (CIM) was created in 1928 during the Sixth International American Conference in La Habana, Cuba. It was the first inter-governmental agency to be created in the world in order to guarantee women’s civil and political rights. According to article 2 of the Statute of the Commission its main functions are, among others, the identification of the areas in which it is necessary to bolster the economic, social, political and cultural participation of women (§a), the formulation of strategies “aimed at transforming the roles and relationships between, women and men in all spheres of public and private life to those of two beings of equal worth, equally responsible for the fate of humanity” (§b), urging “governments to take measures to promote full and equal participation by women in civil, economic, social, cultural, and political spheres” (§c), serving “as an advisory body to the Organization of American States and its organs in all matters related to the women of the hemisphere and in any other matters on which they may consult it” (§g), and promoting “the adoption or adaptation of the necessary legislative measures to eliminate all forms of discrimination against women” (§k).

Historically, the CIM has served as a catalyst for the adoption of important regional treaty law guaranteeing women’s equality, as in the case of the CNW, the CCRW, and the CPRW. In addition, the Commission has produced important plans of action aimed at securing the women’s equality and participation in LAC. Among the most important and illustrative of these is the resolution of the Assembly of Delegates that adopted the Strategic Plan of Action of the Inter-American Commission of Women that was presented at the Beijing Conference in 1995. This Plan, which covered the period 1995-2000, was basically aimed at securing the participation of women in politics, decision-making structures and education, the elimination of violence against women, and the eradication of poverty. Similarly, in 1998 the Assembly of Delegates through Resolution 198/98 adopted the Plan of Action of the CIM on Women’s Participation on Power and Decision-Making Structures which identified the need for priority action in the areas of cultural change, training, modernization of institutions, alliance-building, and the development of a system to monitor progress under the Plan of Action by the CIM.

The CIM has also adopted a number of important resolutions with regards to its own strengthening and the promotion and protection of women’s human rights. For example, in Resolution 209/98 the CIM adopted a number of strategies aimed at its own strengthening based, among other actions, on the establishment of information networks among the organs, agencies, and entities of the Inter-American System, the request to the Permanent Council that it addresses women’s rights issues as a priority, the development of strategies to improve the financial situation of the Commission, and the establishment of national committees to cooperate with the Commission. With regards to the promotion and protection of women’s human rights, Resolutions 195/98 and 198/98 are good examples of the position of the CIM on this issue. In Resolution 195/98, also called Declaration of Santo Domingo, the Commission, after reaffirming some of its objectives, declared that “the rights of women, throughout their lives, are an inalienable, integral, and indivisible part of universal human rights” and that “it is imperative to ensure full observance of the human rights of women so as to eliminate all discriminatory situations and recognize women’s legal capacity and equality under the law.” Resolution 198/98 works as a follow-up to the Declaration of Santo Domingo in the sense that the Plan of Action of the CIM on Women’s Participation on Power and Decision-Making Structures thereby adopted contains the most important strategies of the Commission to make women’s human rights a living reality.

41 Strategic Plan of Action of the Inter-American Commission of Women, Doc. OAS/CIM/RES. ___ (XXVII-O/94).
42 Plan of Action of the CIM on Women’s Participation in Power and Decision-Making Structures, Doc. OAS/CIM/RES. 198 (XXXIX-O/98).
44 Declaration of Santo Domingo, Doc. OAS/CIM/RES. 195 (XXIX-O/98).
45 See supra note 42.
The Rapporteurship on the Rights of Women of the Inter-American Commission on Human Rights was created in 1994 with an initial mandate to analyze the compliance of member States to the equality and non-discrimination provisions of the ADRDM and the ACHR. This general mandate boils down to more specific competences aimed at, among others, identifying the necessary actions to ensure that women fully exercise their rights, making recommendations on the compliance of member States to their equality and non-discrimination obligations, promoting the mechanisms for the protection of women’s human rights, the production of special reports, and assisting the IACHR in responding petitions and preparing reports on the violation of women’s human rights in the region. In addition, with increasing force, the Rapporteurship has included in its agenda issues related to violence against women as a form of sex discrimination and the enforcement of the Convention of Belém do Pará.

To fulfill its mandate, the Rapporteurship has carried out important research for what have later become important reports of the IACHR on the situation of women’s human rights in the Americas. The reports Report on the Status of Women in the Americas, The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination, Violence and Discrimination against Women in the Armed Conflict in Colombia and Access to Justice for Women Victims of Violence in the Americas have played an important role in identifying key areas for the IACHR’s work on women’s human rights and to assisting member States in the implementation of sex equality at the domestic level in a way that complies with their Inter-American obligations to advance women’s equality and eradicate sex discrimination. Additionally, the Rapporteurship has played an important role in introducing women’s rights issues in country reports of the IACHR and has advised the Commission in dealing with individual petitions with gender-specific features.

At least since the 1970s, the General Assembly of the OAS has showed a concern with women’s human rights and sex equality and has issued a number of important resolutions on these topics. Although it would be impossible to describe all of these resolutions, some of them deserve to be highlighted as they illustrate the commitment of the General Assembly with women’s human rights, their implication in the process of development, the importance of gender mainstreaming in the programs and policies of the different organs of the Inter-American system, and a concern with the implementation of the Convention of Belém do Pará.

In Resolution 220/76, the General Assembly, following a similar proclamation of the General Assembly of the United Nations, declared that the decade 1976-1985 was to be the “Decade of Women” and, accordingly, resolved “[t]o reiterate to the organs of the Inter-American system that, within their programming procedures, they should adapt existing programs to the needs of the women of the hemisphere, [and] adopt new programs designed to improve the conditions of women.” As an important follow-up to this resolution, Resolution 829/86 reaffirmed its commitment “to adopt measures and take action that will guarantee gains by women and to intensify efforts to integrate them fully as active participants in the process of development.”

47 Id.
53 Id.
participants in and beneficiaries of national development” and decided to instruct the organs of the Inter-American system “to adjust their present programs and future programming in order to take into consideration the strategies and the goals identified in the Plan of Action of the Inter-American Commission of Women—Full and Equal Participation by the Year 2000.”

Similarly, Resolution 1422/96, after considering that “women are an integral part of all social processes and that it is therefore necessary to maintain a gender perspective when drawing up plans for different areas,” decided to invite the organs of the Inter-American system “to work with the Inter-American Commission of Women by drawing up joint action programs within their respective spheres.” In the same date, the Generally Assembly in Resolution 1432/96, considering “[t]hat discrimination against women constitutes an obstacle to the social and economic development of our countries” and taking note of the adoption of the Convention of Belém do Pará which “demonstrates member states’ recognition of the importance of the problem [of women and violence] and their determination to make progress in this sphere,” decided to urge member states that had not yet ratified the CBP to do so and to “recommend to the member states that they strengthen and, where necessary, create mechanisms for the advancement of women and that they bear in mind the need to use gender analysis in devising and executing public policy.”

During the 1990s, an important step of the General Assembly of the OAS in the promotion and protection of women’s human rights was the adoption of the Inter-American Program on the Promotion of Women’s Human Rights and Gender Equity and Equality through Resolution 1732/00. The general objectives of this program are, among others, the systematic integration of a gender perspective in all the organs of the Inter-American system, the encouragement to member states to “formulate public policies, strategies, and proposals aimed at promoting women’s human rights and gender equality in all spheres of public and private life, considering their diversity and their life cycles,” and the promotion of “full and equal participation of women in all aspects of economic, social, political, and cultural development.”

Although Inter-American treaty law does not make any reference to forms of sexuality discrimination different from sex discrimination, two recent pieces of soft-law show an increasing awareness in the System to discrimination based on sexual orientation and gender identity. Resolutions 2435/08 and 2504/09 of the General Assembly of the OAS “express concern about acts of violence and related human rights violations committed against individuals because of their sexual orientation and gender identity.” Although these two resolutions are very similar, Resolution 2504/09 additionally (1) takes note

55 Full and Equal Participation of Women by the Year 2000, Doc. OAS/AG/RES. 829 (XVI-O/86) (Nov. 15, 1986).
57 Status of Women in the Americas, Doc. OAS/AG/RES. 1432 (XXVI-O/96) (June 7, 1996).
58 This resolution has had important follow-ups in Resolutions 1592/98, 1625/99, 2161/06, 2162/06, and 2192/06. See Status of Women in the Americas and Strengthening of the Inter-American Commission of Women, Doc. OAS/AG/RES. 1592 (XXVIII-O/98) (June 2, 1998); Status of Women in the Americas and Strengthening and Modernization of the Inter-American Commission of Women, Doc. OAS/AG/RES. 1625 (XXIX-O/99) (June 7, 1999); Strengthening of the Inter-American Commission of Women, Doc. OAS/AG/RES. 2161 (XXVI-O/06) (June 6, 2006); Mechanism to Follow-Up on Implementation of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, “Convention of Belém do Pará,” Doc. OAS/AG/RES. 2162 (XXXVI-O/06) (June 6, 2006); Promotion of Women’s Human Rights and Gender Equity and Equality, Doc. OAS/AG/RES. 2192 (XXXVI-O/06) (June 6, 2006).
59 Adoption and Implementation of the Inter-American Program on the Promotion of Women’s Human Rights and Gender Equity and Equality, Doc. OAS/AG/RES. 1732/00 (XXX-O/00) (June 5, 2000).
60 The General Assembly has received the reports of the Secretary General on the implementation of this Program through Resolutions 1777/01, 1853/02, 1941/03, 2023/04, and 2124/05. See Implementation of the Inter-American Program on the Promotion of Women’s Human Rights and Gender Equity and Equality, OAS/AG/RES. 1777 (XXXI-O/01) (June 5, 2001); Implementation of the Inter-American Program on the Promotion of Women’s Human Rights and Gender Equity and Equality, OAS/AG/RES. 1853 (XXXII-O/02) (June 4, 2002); Promotion of Women’s Human Rights and Gender Equity and Equality, OAS/AG/RES. 1941 (XXXIII-O/03) (June 10, 2003); Promotion of Women’s Human Rights and Gender Equity and Equality, OAS/AG/RES. 2023 (XXXIV-O/04) (June 8, 2004); Promotion of Women’s Human Rights and Gender Equity and Equality, OAS/AG/RES. 2124 (XXXV-O/05) (June 7, 2005).
61 Human Rights, Sexual Orientation, and Gender Identity, Doc. OAS/AG/RES. 2435 (XXXVIII-O/08) (June 3, 2008).
of the Declaration on Sexual Orientation and Gender Identity presented to the United Nations General Assembly on December 18, 2008, (2) urges “states to ensure that acts of violence and human rights violations committed against individuals because of sexual orientation and gender identity are investigated and their perpetrators brought to justice” (§2); and (3) urges “states to ensure adequate protection for human rights defenders who work on the issue of acts of violence and human rights violations committed against individuals because of sexual orientation and gender identity” (§3).

Even though none of these resolutions expressly condemns discrimination based on sexual orientation and gender identity, their purposive interpretation in light of a substantive conception of the right to equality and the prohibition of discrimination may lead to construct them as powerful declarations showing a growing regional consensus against discrimination based on sexual orientation and gender identity. Indeed, insofar as the main concern of these resolutions is violence, a substantive vision of the equality principle, focusing on the eradication of social oppression and subordination, allows for establishing a conceptual relationship between violence and discrimination —similar to the one the CBP is based on— where the former is perhaps the most aggressive manifestation of the latter. If the most aggressive form of discrimination based on sexual orientation and gender identity is the main concern of Resolutions 2435/08 and 2504/09 then —a maiore ad minus— other less serious forms of discrimination on these grounds are encompassed by these pieces of Inter-American soft law. This argument is further reinforced by the reference in paragraph 1 of both resolutions to “violence and related human rights violations.” An appropriate egalitarian way to read the expression “and related human rights violations” would be to make these violations equivalent to other forms of discrimination different than violence.

MERCOSUR has also produced soft-law seeking to commit its member states (Argentina, Brazil, Paraguay, and Uruguay) to eradicating discrimination based on sex, sexual orientation, and gender identity. On December 10, 1998, the heads of state of the member states of MERCOSUR issued the Social and Labor Declaration of MERCOSUR (Declaración Sociolaboral del MERCOSUR) aimed at guaranteeing a minimum set of labor rights in compliance with international human rights instruments such as the UDHR, the ICCPR, the ICESCR, the ADRDM, the Inter-American Charter of Social Guarantees (1948), the OAS Charter, the Protocol of San Salvador, and the ILO Declaration on Fundamental Principles and Rights at Work (1998). Article 1 of the MERCOSUR Declaration establishes in very substantive terms the rights to equality and non-discrimination of workers. This provision forbids discrimination based on “sex or sexual orientation” and commits member states “to adopting actions aimed at eliminating discrimination affecting disadvantaged groups in the labor market.” Article 3 of the Declaration also commits member states to “guaranteeing, through labor legislation and practices, equality of treatment and opportunity between women and men.”

On August 7, 2007, the Human Rights High Authorities of the member states of MERCOSUR released the MERCOSUR Declaration on the Rights of Sexual Minorities. This declaration aims at expressing “the urgent need to work on the eradication of discrimination based on sexual orientation and gender identity/expression in our countries and recognize the rights of sexual diversity as fundamental human rights.” To achieve this general goal, the declaration recommended the adoption of actions such as (1) repealing or modifying any legislation that discriminates against or criminalizes LGBT citizens, including laws prohibiting that they donate blood, (2) adopting public policies, anti-discrimination statutes, and other measures in the fields of employment, health, and education, among others, that expressly promote non-discrimination against LGBT citizens and facilitate their access to these fields, (3) promoting the inclusion of LGBT human rights issues in the curricula of public and private education and initiating campaigns aimed at the deconstruction of the prejudices upon which discrimination on

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63 See supra note 37 and accompanying text.
64 In 1991, through the Treaty of Asunción, and, later, through the Protocol of Ouro Preto (1994), Argentina, Brazil, Paraguay, and Uruguay created the Southern Common Market (Mercado Común del Sur), MERCOSUR, in order to promote the economic integration of its member states by means of the free circulation of goods and productive factors and the coordination of macroeconomic and sector policies such as foreign trade, agriculture, industry, fiscal and monetary policies, and customs. More recently, Chile, Colombia, Ecuador, and Peru joined MERCOSUR as associated member states.
grounds of sexual orientation and gender identity/expression is based, (4) adopting actions and decisions aimed at eradicating harassment, discrimination, persecution, and repression against LGBT citizens by police forces, and (5) enacting legislation that guarantees LGBT citizens and their families equal protection and rights to those afforded to heterosexual families through the creation of institutions such as partnerships, civil unions or pacts, or same-sex marriage.

3.1.1.3. **Doctrine of the IACtHR and the IACHR**

This subsection discusses the doctrine of the IACtHR and the IACHR on sexuality equality and discrimination. At the outset, it is important to recall that while States Parties to the ACHR are obligated to comply with the judgments of the IACtHR (ACHR, article 68-1), the IACHR, in its reports on individual petitions, can only make recommendations and proposals to the State involved in the dispute (ACHR, articles 50-3 and 51-2). This distinction means that the doctrine of these two organs of the Inter-American system has a differentiated impact in the formation and advancement of human rights standards in the LAC region. While the decisions of the IACtHR are extremely influential in the evolution and interpretation of the domestic legal orders of the countries of LAC, the decisions of the IACHR could be conceived of as a form of soft-law that may have a variable domestic impact depending on how much weight domestic constitutional orders accord to soft regional human rights law.

3.1.1.3.1. **IACtHR**

The sexuality discrimination case law of the IACtHR is quite underdeveloped, not to say almost nonexistent. As it was explained in Section ___ above, the cases that have reached the Court up to this point have mainly dealt with gross and systematic human rights abuses. In dealing with these cases, the IACtHR has basically created a set of legal categories aimed at combating impunity in the region. Although some of these cases offered the Court an opportunity to interpret the equality and non-discrimination provisions of Inter-American treaty law—and even offered a chance to tackle issues of sex discrimination in a substantive fashion—, it decided to skip or ignore these issues and go another way. If cases dealing with discrimination against women are almost absent in the jurisprudence of the IACtHR, cases related to discrimination based on other sexuality grounds such as sexual orientation and gender identity have never reached the Court’s docket.

However, in spite of these conspicuous absences, a couple of declarations of the IACtHR on the extension of the general principles of equality and non-discrimination in the Inter-American System are worth exploring. These declarations are important because they conceive of equality and the prohibition of discrimination in very substantive terms, as principles imposing on States obligations to adopt measures aimed at removing social and cultural oppression and subordination. To that extent, they are useful to validate some of the interpretations previously rehearsed on how discrimination based on sex, sexual orientation, and gender identity might be conceived of in light of the CBP and the two recent resolutions of the General Assembly of the OAS on human rights, sexual orientation, and gender identity.

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65 As Palacios Zuloaga has pointed out, “[t]he decisions of the Court are beginning to be invoked before domestic courts as supranational precedents and can also be found in the drafting history of legislative reform bills and in the justification of public policy papers… [It] can be said that the case law of the Court is a tremendously useful tool for human rights practitioners, NGOs and academics in the Americas.” Palacios Zuloaga, *Path*, supra note 14 at 231.

66 See supra note 40.

67 See Palacios Zuloaga, *Path*, supra note 14 at 228-29.

68 On September 17, 2010, the Inter-American Commission on Human Rights referred to the Inter-American Court of Human Rights the case of *Karen Atala and Daughters v. Chile* after finding that Chile (1) discriminated against Karen Atala on grounds of sexual orientation and violated her rights to privacy and family life, and (2) did not comply with the recommendations set forth in the merits report on this case. This case raises the issue of the validity of sexual orientation discrimination in the context of judicial custody of children decisions in light of the ACHR. For the description of the admissibility and merits decisions of the Commission on this case see *infra* Section 3.1.1.3.2.2.
In two of its advisory opinions, the IACtHR has interpreted the general reach of the equality and anti-discrimination provisions of the treaty law of the Inter-American system. In the advisory opinion Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, the Court first dealt with the meaning of the equality and anti-discrimination provisions of the ACHR. In 1983, the government of Costa Rica requested the Court to advise on the compatibility of an amendment to the articles of the Costa Rican Constitution establishing the conditions to become a national of Costa Rica by naturalization with articles 17 (protection of the family), 20 (right to nationality), and 24 (equality before the law) of the ACHR. Insofar as the constitutional amendment established several forms of differential treatment in the access to citizenship the Court had to deal with issues of equality and non-discrimination. Peculiarly, the amendment established that an alien woman who had married a Costa Rican and had lost its original nationality or had been married to a Costa Rican for two years and had lived in Costa Rica for that same period and wanted to become a citizen of that country was a Costa Rican citizen by naturalization. The amendment did not include the same ground for citizenship by naturalization for alien men.

The IACtHR began its opinion with a general explanation on the nature of the equality and the non-discrimination principles enshrined in article 24 of the ACHR. In the Court’s view,

> 54. The prohibition of discrimination widely included in article 1.1 with regards to the rights and guarantees established in the Convention is extensive to the domestic law of the States Parties. It is therefore possible to conclude that pursuant to [articles 1.1. and 24] the States have assumed the obligation not to introduce in their legal system any discriminatory regulations in the protection afforded by the law.

> 55. The notion of equality directly stems from the oneness of the human family and it is inseparable from the essential dignity of the individual. This principle is violated by any situation in which any group is afforded a privilege because it is considered to be superior, or, conversely, the group is treated with hostility or discriminated against in the enjoyment of its rights because it is considered to be inferior. It is inadmissible to create differences in the treatment afforded to human beings that are not akin to their unique and identical nature.

The Court then clarified that a legal distinction was not in violation of articles 1.1. and 24 of the ACHR if “it is based on substantively different factual grounds that express, in a proportional fashion, a founded connection between these differences and the aims of the norm.”

After these general considerations on the value and extension of the equality and non-discrimination principles, the IACtHR focused on the validity of the constitutional amendment to the Constitution of Costa Rica. With regards to the access to Costa Rican citizenship by naturalization by alien women that had married a Costa Rican, the Court considered that the exclusive reference to alien women was discriminatory, for it reflected an old norm establishing a privilege of the husband over the wife and was therefore a consequence of inequality within marriage. Citing several pieces of relevant international treaty law, including article II of the ADRDM and article 17.4 of the ACHR, the IACtHR advised that “[d]uring the first part of this century a movement to eradicate these traditional principles was started that sought to recognize the capacity of women to decide, to extend the principle of equality between the sexes, and to include it as part of the principle of non-discrimination.”

This doctrine was reasserted in the advisory opinion Juridical Condition and Rights of the Undocumented Migrants. In 2002, the government of Mexico requested the IACtHR an advisory opinion on the validity of the deprivation of the enjoyment and exercise of certain labor rights of undocumented migrant workers in light of the equality and non-discrimination rights guaranteed by the

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70 Id.
71 Id. ¶ 57.
72 Id. ¶ 65.
ACHR. In this opinion, the Court provided the best and most substantive framework available up to date on the meaning of the equality and non-discrimination provisions of the treaty law of the Inter-American System. According to the Court:

83. Non-discrimination, together with equality before the law and equal protection of the law, are elements of a general basic principle related to the protection of human rights. The element of equality is difficult to separate from non-discrimination.

(…)

85. There is an inseparable connection between the obligation to respect and guarantee human rights and the principle of equality and non-discrimination. States are obliged to respect and guarantee the full and free exercise of rights and freedoms without any discrimination. Non-compliance by the State with the general obligation to respect and guarantee human rights, owing to any discriminatory treatment, gives rise to its international responsibility.

(…)

88. The principle of equality and non-discrimination is fundamental for the safeguard of human rights in both international and domestic law. Consequently, States have the obligation to combat discriminatory practices and not to introduce discriminatory regulations into their laws.

The IACtHR went on to clarify the jus cogens status of the non-discrimination principle and the obligation of the States to adopt and implement affirmative action measures at the domestic level. The Court pointed out:

100. (…) The principle of equality before the law and non-discrimination permeates every act of the powers of the State, in all their manifestations, related to respecting and ensuring human rights. Indeed, this principle may be considered peremptory under general international law, inasmuch as it applies to all States, whether or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals. This implies that the State, both internationally and in its domestic legal system, and by means of the acts of any of its powers or of third parties who act under its tolerance, acquiescence or negligence, cannot behave in a way that is contrary to the principle of equality and non-discrimination, to the detriment of a determined group of persons.

101. Accordingly, this Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to jus cogens, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of jus cogens.

(…)

103. In compliance with this obligation, States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of de jure or de facto discrimination. This translates, for example, into the prohibition to enact laws, in the broadest sense, formulate civil, administrative or any other measures, or encourage acts or practices of their officials, in implementation or interpretation of the law that discriminate against a specific group of persons because of their race, gender, color or other reasons.

104. In addition, States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations.

74 Id.
75 Id.
The importance of the *dicta* of the IACHR in both of these advisory opinions must not be underestimated as a doctrinal foundation for future equality cases that might reach the Court.76 First, the Court has interpreted the principles of equality and non-discrimination in very substantive terms as human rights protections not only geared towards the eradication of discriminatory legal classifications, but also aimed at dismantling social and cultural patterns of oppression and subordination (through affirmative action policies, for example). Second, the force of the Court statements asserting the *jus cogens* status of equality and non-discrimination and the consequences derived from that status could be interpreted as a willingness to grant special attention to cases involving the violation of these principles. Third, the assertion of the IACHR on the non-exhaustive listing of the grounds of discrimination established in such norms as article II of the ADRDM (“race, sex, language, creed or any other factor”) and article I.1. of the ACHR (“race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”) opens up an ample possibility for a future judicial consideration of cases involving discrimination based on sexual orientation and gender identity. And, fourth, the IACHR explicitly establishes that the prohibition of discrimination and the obligation to promote equality reaches both the public and the private sphere. Indeed, States have a positive obligation to modify or reverse “discriminatory situations” existing in “their societies,” including those “created, maintained or acquiesced by third parties.”77

As it was already mentioned, issues related to sexuality discrimination in the doctrine of the IACHR are almost absent. Although in the context of violence against women,78 the cases that most directly deal with issues of sex discrimination are the *Miguel Castro Castro Prison* and *Cotton Field* cases.79 However, some commentators have pointed out that these were not the first cases to have reached the Court in which women’s rights issues were at stake. They have argued that previous cases raised issues of this kind that, unfortunately, were ignored or badly handled by the IACHR.80 These were therefore lost opportunities for the Court to develop a cogent doctrine on women’s rights.

Although the facts and the most important legal issues of the *Miguel Castro Castro Prison* and *Cotton Field* cases will be analyzed in more detail in the section of this document devoted to sexuality and violence,81 it is worth noting that the first of these two cases made some findings related to the violation

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77 This obligation was later reaffirmed by the Court in the contentious case of the *Yean and Bosico Girls*. *See* Caso de las Niñas Yean y Bosico v. República Dominicana (Excepciones preliminares, fondo, reparaciones y costas), Inter-Am. Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005), ¶ 141.

78 For the relationship between discrimination and violence *see supra* note 37 and accompanying text.


80 According to Patricia Palacios Zuloaga these cases are: Caso Aloeboetoe y otros v. Surinam (Reparaciones y costas), Inter-Am. Ct. H.R. (ser. C) No. 15 (Sept. 10, 1993) (in establishing the reparations scheme for the Maroon community the Court badly dealt with some customary legal practices that raised women’s rights such as matrilineral descent and the practice of poligyny); Caso Caballero Delgado y Santana v. Colombia (Fondo), Inter-Am. Ct. H.R. (ser. C) No. 22 (Dec. 8, 1995) (the Court ignored that this case raised an issue of forced nudity of an illegally detained woman belonging to Colombia’s M-19 guerrilla group); Caso Loayza Tamayo v. Perú (Fondo), Inter-Am. Ct. H.R. (ser. C) No. 33 (Sept. 17, 1997) (the Court found Peru to be responsible of the mistreatment of Maria Elena Loayza Tamayo during her confinement in a Peruvian prison with the exception of her allegation that she was raped); Caso Maritza Urrutia v. Guatemala (Fondo, reparaciones y costas), Inter-Am. Ct. H.R. (ser. C) No. 103 (Nov. 27, 2003) (the Court failed to consider “the gender-specific facets” of the psychological torture to which Maritza Urrutia was subjected and therefore did not consider “the idea that men and women are [not] interrogated and tortured in the same way”); Caso Masacre Plan de Sánchez v. Guatemala (Reparaciones y costas), Inter-Am. Ct. H.R. (ser. C) No. 116 (Nov. 19, 2004) (although in this case the Court recognized the massive rape of Mayan women in the village of Plan de Sánchez by the Guatemalan Army and the deleterious cultural effects it had on the life of the community and the personal lives of the victims, in its reparations judgment it failed to design a gender-sensitive scheme of reparations). *See* Palacios Zuloaga, *Path*, supra note 14 at 232-47.

81 *See infra* Section 3.4.2.
of the rights of some pregnant victims (they did not receive pre- and post-natal care while they were in detention), the victims in solitary confinement who were mothers (the impossibility to communicate with their children increased their psychological suffering), and the rights of the mothers of the victims (their psychological suffering was enhanced by the fact that they had to search for the bodies of their sons and daughters on Mother’s Day).\textsuperscript{82} Although the special consideration given by the IACtHR to pregnancy and motherhood might \textit{prima facie} be considered a form of positively dealing with more “traditional” issues of discrimination based on sex, commentators have argued that the findings of the Court on these issues are based on perverse reifications of traditional stereotypes affecting women in LAC.\textsuperscript{83}

3.1.1.3.2. IACHR\textsuperscript{84}

In contrast to the doctrine of the IACtHR, the IACHR has developed some important doctrine on women’s rights, discrimination based on sex, sexual orientation, and discrimination based on HIV/AIDS status. Up to this date, the Commission has admitted, decided or friendly settled ten cases that are illustrative of its doctrine on women’s equality. Insofar as eight of them relate to violence against women,\textsuperscript{85} they will be analyzed later in this report.\textsuperscript{86} The remaining two cases are “classic” cases of discrimination against women.\textsuperscript{87} In these cases —that will be described and analyzed in this subsection— the IACHR established important doctrine on equality between men and women in the sphere of politics and the realm of family life. With regards to sexual orientation discrimination, two illustrative cases of the Commission (one declared admissible and the other friendly settled) will be described. Finally, the admissibility decision of the IACHR in the only case involving discrimination on grounds of HIV/AIDS status will be included.


\textsuperscript{83} \textit{Id.} at 243 (“The Court’s findings regarding enhanced suffering of mothers in solitary confinement and as next of kin of the victims are difficult to reconcile with a jurisprudence that does not compound social stereotypes of women that exist in Latin America”). Palacios Zuloaga was particularly disturbed by the individual opinion of Judge Cançado Trindade in which he asserted that “the project as well as the experience of maternity,” as something “sacred,” had been violated in the case. Caso del Penal Miguel Castro Castro v. Perú (Fondo, reparaciones y costas), Inter-Am. Ct. H.R. (ser. C) No. 160 (Nov. 25, 2006) (Cançado Trindade J., individual opinion ¶ 60). See Palacios Zuloaga, \textit{Path, supra} note 14 at 244. In general, Palacios Zuloaga has observed that the efforts of the Court to include women’s rights issues in its doctrine have been hampered by “its failure to extend gendered logic to reparations and in its reliance on stereotypes of women in order to find violations.” See \textit{id.} at 229.


\textsuperscript{86} See infra Section 3.4.1.

\textsuperscript{87} See supra note 38 and accompanying text.
3.1.1.3.2.1. Sex Equality

In the case of *Maria Eugenia Morales de Sierra v. Guatemala*, the Commission decided upon the validity of articles 109, 110, 113, 114, 115, 131, 133, 255, and 317 of the Civil Code of Guatemala in light of articles 1-1, 2, 17, and 24 of the ACHR. The articles of the Civil Code—based on a traditional role scheme of husbands and wives within marriage—generally established the primacy of the husband: the husband had the power to represent the marital union and the administration of the marital property, the wife had the right and obligation to care for minor children and the home and could only be employed or have a profession if this did not prejudice her role as a mother and housewife, the husband had the power to oppose the decision of the wife to have a profession or seek an employment, and the wife, by virtue of her sex, could be excused from exercising certain forms of guardianship. In addition, the Court of Constitutionality of Guatemala had ruled that these provisions of the Civil Code did not violate Guatemala’s Constitution because they were a form of protection for women and children and “provided juridical certainty in the allocation of roles within marriage.” María Eugenia Morales de Sierra was a married Guatemalan woman, a mother, a working professional, and the owner of property jointly acquired with her husband during their marriage. She believed that the above-mentioned provisions of the Civil Code of Guatemala discriminated against her and other similarly situated Guatemalan women on grounds of sex.

In its report on this case, the IACHR decided, inter alia, to recommend to Guatemala “to balance the legal recognition of the reciprocal duties of women and men in marriage.” Based on article II of the ADRDM, articles 11, 17, 24 and 29 of the ACHR, and articles 15§2 and 16 of the CEDAW, the Commission first stipulated that “statutory distinctions based on status criteria, such as, for example, race or sex, therefore necessarily give rise to heightened scrutiny.” According to this analytical framework, the IACHR considered that “[b]y requiring married women to depend on their husbands to represent the union… the terms of the Civil Code mandate a system in which the ability of approximately half the married population to act on a range of essential matters is subordinated to the will of the other half. The overarching effect of the challenged provisions is to deny married women legal autonomy.” In the Commission’s view the challenged articles of the Guatemalan Civil Code violated article 24 of the ACHR (equal protection of the law) because “the gender-based distinctions established in the challenged articles cannot be justified” and they immediately deny to married women, solely on the basis of her sex, certain protections “which married men and other Guatemalans are accorded.” According to the IACHR, the imbalance of rights of husbands and wives within marriage thus reinforces “systemic disadvantages which impede the ability of the victim to exercise a host of other rights and freedoms.”

The IACHR also considered that the provisions of the Civil Code of Guatemala infringed article 17 of the ACHR (protection of the family). On this issue it considered that the challenged articles “apply stereotyped notions of the roles of women and men which perpetuate *de facto* discrimination against women in the family sphere, and which have the further effect of impeding the ability of men to fully develop their roles within the marriage and family. The articles at issue create imbalances in family life, inhibiting the role of men with respect to home and children, and in that sense depriving children of the full and equal attention of both parents.” The Commission finally considered that the Guatemalan legislation at stake violated article 11 of the ACHR (protection of privacy and the free development of personality) because “the mere fact that the husband of María Eugenia Morales de Sierra may oppose that she works, while she does not have the right to oppose this in his case, implies a discrimination. This

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89 Id. ¶ 2.
90 Id. ¶ 3.
91 Id. ¶ 36.
92 Id. ¶ 38.
93 Id. ¶ 39.
94 Id.
95 Id. ¶ 44.
discrimination has consequences from the point of view of her position in Guatemalan society, and reinforces cultural habits… This situation has a harmful effect on public opinion in Guatemala, and on María Eugenia Morales de Sierra’s position and status within her family, community and society.”

In the case of María Teresa Merciadri de Morini v. Argentina,97 the petitioner was a registered voter in the Province of Córdoba, Argentina. She alleged that in the election for national deputies of October 1993 the Radical Civic Union Party (Partido Unión Cívica Radical) of the Province of Córdoba put together a list of six candidates in which “the party would return only five national deputies.”98 Two women were included in the list in the third and sixth places. According to Merciadri de Morini, in fashioning its list of candidates the party ignored Argentina’s Quota Act (Law 24.012) and its regulatory decree (Decree 378/93) that “guarantee that a minimum of thirty percent of the elected offices filled through party lists must be covered by women, ‘in proportions allowing them the possibility of being elected’.99 In the petitioner’s view, this legislation obligated Córdoba’s Radical Civic Union to set up a list in which “two women had to be placed in the first five positions.”100

As a registered voter affiliated to the Radical Civic Union, Merciadri de Morini challenged the list before the Electoral Committee. After her complaint was rejected, she filed an appeal before a federal court. In its decision, the federal judges argued that she lacked standing to challenge the list of candidates because she had not been personally injured by her party’s decisions. The petitioner also appealed this ruling before the Federal Electoral Court, which dismissed her claim under the argument that the elections had already taken place. Finally, Merciadri de Morini requested the Supreme Court of Argentina to hear her case. The Court rejected her complaint arguing that in the October 1993 elections “the Radical Civic Union obtained enough votes for it to return four national deputies and the suit was disputing who should have run as its fifth candidate.”101

The IACHR declared Merciadri de Morini’s petition admissible on September 27, 1999, and established that she had colorable claims with regards to violations of articles 8 (due process), 23 (right to participate in government), 24 (equal protection), and 25 (judicial protection) of the ACHR.102

On October 11, 2001 the Commission approved a friendly settlement signed by the petitioner and Argentina on March 8, 2001.103 The settlement provided that Merciadri de Morini would desist of her petition before the IACHR after the Argentine government issued Decree 1246/00, which repealed Decree 379/93. The new decree developed article 47 of the Constitution of Argentina, Law 24.012, and article 4-1 of the CEDAW in a way that truly respected the intention of these norms to promote women’s participation in Argentina’s political life. The issuance of Decree 1246/00 was not only motivated by Merciadri de Morini’s complaint before the IACHR but also by the need to standardize the implementation of Law 24.012 so that it was absolutely clear “that women have to occupy, at minimum, thirty percent of the places on a party’s ticket that have a reasonable possibility of being elected.”104 The need for standardization arose from “differing interpretations that the various political parties gave to [Law 24.012] and even inconsistent rulings of the courts on this matter.”105 A new decree “[that took] into account the clearest and most protective interpretations by the courts” was therefore necessary.106

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96 Id. ¶ 50.
98 Id. ¶ 5.
99 Id.
100 Id. ¶ 2.
101 Id. ¶ 8.
102 Id. ¶ 29.
104 Id. ¶ 12.
105 Id.
106 Id.
3.1.1.3.2.2. Sexual Orientation

Three cases of the IACHR on issues related to discrimination based on sexual orientation should be considered as illustrative. In two cases the Commission admitted the case and, in the remaining case, the parties reached a friendly settlement.

In the case of Marta Lucía Álvarez Giraldo v. Colombia, the petitioner was a lesbian prisoner who was denied the right to have conjugal visitation by the Colombian penitentiary authority. She argued that Colombian legislation generally guarantees the right of any prisoner to have conjugal visitation, and that, in her case, this right was denied because of her sexual orientation. She considered that the restriction on her right to have conjugal visitation in prison violated the rights guaranteed by articles 5-1 and 2 (personal integrity), 11-1 (honor), and 24 (equality) of the ACHR had been violated by Colombia. The State based the restriction imposed on the petitioner arguing that conjugal visitation for homosexual prisoners would affect the internal discipline of prisons because of “the low toleration of Latin American culture to homosexual practices in general.”

In its admissibility decision, the Commission considered that Marta Álvarez’s claim primarily raised a privacy case. In the IACHR’s estimation, “the petitioner’s claim refers to facts that may —inter alia— amount to violations of article 11-2 of the American Convention if abusive or arbitrary infringements on her private life were to be found. In the merits phase, the IACHR will therefore establish the extent of the concept of private life and the protection that should be afforded to prisoners.” It is worth noting that the Commission considered that the petitioner had exhausted all domestic remedies because, among other reasons, the Constitutional Court of Colombia had decided not to grant review on a domestic constitutional injunction (acción de tutela) brought by Álvarez against penitentiary authorities that had been rejected by trial and appeal judges. In 2003, however, the Colombian Constitutional Court decided to grant review on the case and ruled in favor of Marta Álvarez. The decision of the Court established the right of homosexual inmates to have conjugal visits and important constitutional doctrine on the prohibition to discriminate against prisoners on grounds of their sexual orientation.

The second case raising issues of discrimination based on sexual orientation to have reached the IACHR is the case of Karen Atala and Daughters v. Chile. The petitioner, a Chilean lawyer and judge, married a man in 1993 and had three children with him. In March of 2002, Atala and her husband permanently separated and, by mutual consent, decided that she would retain custody of the daughters. In June of 2002, Atala began a relationship with a woman who, in November 2002, moved in to live with her and her daughters. In January of 2003, the father of the girls filed suit for custody arguing, in general terms, that, because of her sexual orientation, Atala was an unfit mother. After three decisions of trial and appeal judges, who first granted custody of the girls to the father and, then, to Atala, she never regained custody of her daughters because of an injunction brought by the father in order for the girls to remain under his custody.

It was incumbent upon the Supreme Court of Chile to make a final decision on this case. On May 31, 2004, the Fourth Chamber of the Court awarded permanent custody to the father. In its judgment, the Supreme Court —using a “best interests of the children” framework— emphasized the fact that Atala had
decided “to be open about her homosexuality and began to live with a same-sex partner,” and “gave consideration to testimonies that suggested that the girls could become confused about their sexual roles and become the object of social discrimination in the future.”

The petitioner first claimed that, as judge, her due process right was violated because of the threats to be subjected to disciplinary proceedings based on the supposed incompatibility of “the reputation of the legal profession” and her sexual orientation. She then focused on the decision of the Supreme Court of Chile, which, in her view, “is notable for the fact that it centered exclusively on [her] sexual orientation, and not on other grounds of legal incapacity to revoke custody of her children, which contravened the principle of equality before the law inasmuch as it constituted a discriminatory application of the substantive rules on custody.” Atala also argued that the decision of the Chilean Supreme Court infringed on her rights to family and private life because “there were less invasive measures, such as a very ample framework of communication with their father” and it “unnecessarily and arbitrarily [forced her] to choose between the exercise of her sexual orientation and keeping custody of her daughters.”

The petitioner claimed that the ruling of the Supreme Court of Chile violated her mental and moral integrity for it was based on a stereotype that sees homosexuals as people who are “against family values, reject traditional family lifestyles, live selfishly centered on the relationship with the partner, and are unable to develop other affective ties.” In the petitioner’s view, this stereotyped vision of homosexuality excludes “homosexual people from one of the most meaningful aspects of human experience: raising their children.”

On December 18, 2009, the Commission found that Chile violated articles 8 (fair trial), 11 (right to private and family life), 17 (right to family), 19 (special protection of children), 24 (equality and non-discrimination), and 25 (access to justice) of the ACHR when it discriminated against Karen Atala on grounds of her sexual orientation and interfered in her private and family life in the judicial proceedings whereby she was deprived from the custody of her two daughters. As of December, 2010, this report is still confidential. However, on September 17, 2010, the IACHR decided to refer the case to the Inter-American Court of Human Rights after finding that Chile did not comply with its recommendations to repair the violation of the rights of Karen Atala and her daughters. The complaint brought by the Commission before the Court is based on the legal arguments of the merits report on this case and therefore allows establishing on what grounds the Commission declared the international liability of Chile for the violation of Karen Atala’s rights.

To begin with, the IACHR was clear to point out that in child custody judicial proceedings it is not only reasonable but necessary that “judicial authorities examine several factors in order to establish and assess the fitness of the father or the mother to be the custodian of his or her children and hence preserve the best interest of the child. These aspects may include the private, sexual, and affective life of the father or the mother in a measure relevant to the best interest of his or her children. However, the consideration of these factors ought to be performed in way that is compatible with the international obligations of the

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115 Id. ¶ 20.
116 Id. ¶¶ 22-25.
117 Id. ¶ 26.
118 Id. ¶ 28.
119 Id. ¶ 29.
120 Id.
121 Id.
122 See id. ¶¶ 58-68.

states.” In the Commission’s view, the consideration of Atala’s sexual orientation by the Chilean courts in the process of custody violated these international obligations. To reach this conclusion, the IACHR made two important legal moves. First, it recalled that “the right to equality and non-discrimination is the fundamental backbone of the Inter-American System of Human Rights,” that carries “erga omnes obligations of protection that bind all states and generate effects with regards to third parties, even private ones.” Second, the Commission considered that in the Inter-American System of Human Rights sexual orientation is a “suspect category of distinction.” Although sexual orientation is not a ground of discrimination explicitly established in article 1-1 of the American Convention on Human Rights, the IACHR observed that “according to the practice of the Court and the Commission, the American Convention should be interpreted in light of the current social conditions of the countries of the hemisphere, as well as the current status of the international precedent of human rights... The Inter-American Court of Human Rights has indicated that human rights treaties as the Convention are ‘living instruments’ that should be interpreted in accordance with the evolution of the times and current living conditions.” Drawing on the jurisprudence of the European Court of Human Rights and the Human Rights Committee, the Commission observed that not only sexual orientation is included as a prohibited ground of discrimination in international human rights law treaties, but a strict judicial scrutiny should be applied to legal classifications based on it. The IACHR clarified that when a classification is examined under this modality of judicial scrutiny, the authority that made the distinction has the obligation to prove that (1) it was aimed to fulfill a peculiarly important end or a compelling social need, (2) it is strictly necessary to achieving that end or social need, in the sense that there is no other less restrictive alternative, and (3) there is an adequate balance between the sacrifices and the benefits stemming from the differential treatment.

For the IACHR, “sexual orientation is included in the expression ‘other social condition’ established in article 1-1 [of the American Convention on Human Rights], with all the other consequences that this implicates with respect to the other rights established in the American Convention, including article 24. In this sense, every differential treatment of a person based on sexual orientation is suspect, it is presumed to be incompatible with the American Convention, and the state that made the distinction is under the obligation to prove that the differential treatment survives strict judicial scrutiny.” In addition, the Commission indicated that the prohibition of discrimination on grounds of sexual orientation is not limited to homosexual condition per se, but “also includes its expression and the necessary consequences in the life project of individuals.”

Using this analytic framework, the IACHR concluded that insofar as the key factor taken into account by the Supreme Court of Chile to deprive Karen Atala from the custody of her daughters was that she lived with a person of her same sex it could be concluded that this judicial decision established a differential treatment on grounds of sexual orientation. For the Commission, this distinction indeed fulfilled a legitimate purpose or a compelling social need for it sought to advance the best interest of the girls and to comply with the obligation of the state of special protection of children established in article 19 of the American Convention. However, the differential treatment was not the least restrictive alternative available to achieving the aim it pursued because the state never proved that Karen Atala’s sexual orientation or its expressions put at risk the well-being of her daughters. Chilean judicial authorities adopted their decisions exclusively based on presumptions of risk stemming from mistaken prejudices.

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124 Id. ¶ 69.
125 Id. ¶ 74.
126 Id. ¶ 90.
127 Id. ¶ 92.
128 Id. ¶ 89.
129 Id. ¶ 95.
130 Id. ¶ 96.
131 See id. ¶ 97.
132 See id. ¶ 102.
and stereotypes.\textsuperscript{133} In the IACHR’s view, “although the state sought to protect the best interest \[of the girls\], it did not establish a logical causal relation between that purpose and the deprivation of custody on grounds of Atala’s sexual orientation. On the contrary, the decisions did not contribute to protect the girls for they were based on discriminatory prejudices and not on an objective assessment of the capacity of both parents to exercise custody.”\textsuperscript{134}

The Commission also found that Chilean judicial authorities violated Karen Atala’s right to private life guaranteed by article 11-2 of the American Convention. After recalling that this right encompasses “all the spheres of privacy and autonomy of an individual, including his or her personality and identity, his or her decisions about sexual life, and his or her personal or family relationships,” it observed that “sexual orientation is a fundamental part of the private life of a person that must be free from arbitrary and abusive interferences of public authorities, in the absence of convincing and powerful reasons.”\textsuperscript{135}

Applying this rule to the case at hand, the IACHR concluded that although in custody proceedings it is legitimate that judicial authorities examine aspects of the private life of the parents, provided that these aspects are relevant to establish their fitness as custodians, their sexual orientation, in and of itself, “is neither a relevant criterion to establish their capacity to exercise the custody of their children nor a source of risk to their well-being.”\textsuperscript{136} For the Commission, the judicial decisions depriving Karen Atala from the custody of her daughters were an arbitrary interference in her private life because they were based on her sexual orientation—a purely intimate aspect of her life.\textsuperscript{137} Additionally, the IACHR pointed out that “the decision of the Supreme Court \[of Chile\] sent a message making equivalent homosexuality to Karen Atala’s unfitness as a mother,” and reiterated that “the right to privacy protects the right to establish one’s identity and to form personal and family relationships based on that identity, even if it is not accepted or tolerated by the majority.”\textsuperscript{138} In addition, the IACHR observed that the decision of the Chilean Supreme Court, far from fulfilling its supposed aim of protecting Atala’s daughters, contributed to the stigmatization of the girls “for having a homosexual mother and live in a family that is not accepted in the Chilean social environment.”\textsuperscript{139}

Finally, the Commission found that Chile’s courts violated Atala’s judicial guarantees and her right to judicial protection established in articles 8-1 and 25-1 of the American Convention. For the IACHR, Chilean judicial authorities lacked impartiality in the proceedings whereby Karen Atala was deprived from the custody of her daughters when they ruled based on discriminatory prejudices and stereotypes.\textsuperscript{140} The Commission observed that, at the beginning of the custody proceedings, Atala and her ex-husband were in the same situation, but judicial authorities broke this initial equality by exclusively focusing on her sexual orientation. This led to the application of a different standard of assessment of her fitness to hold the custody of her daughters, which “put her in a situation of disadvantage based on an aspect not included in the legislation that governs these matters.”\textsuperscript{141} In the IACHR’s view, “the sexual orientation of a person is completely irrelevant in establishing the ability of a mother or a father to exercise the custody of her or his children… [In the case of Karen Atala] a door was opened for the entrance of stereotyped conceptions of homosexuality in the discussions of the judges and, in sum, in the adoption of arbitrary decisions exclusively based on prejudices and not in applicable law.”\textsuperscript{142}

\textsuperscript{133} See id. ¶ 103.
\textsuperscript{134} Id. ¶ 105.
\textsuperscript{135} Id. ¶ 111.
\textsuperscript{136} Id. ¶ 114.
\textsuperscript{137} See id. ¶ 115.
\textsuperscript{138} Id. ¶ 116.
\textsuperscript{139} Id. ¶ 131.
\textsuperscript{140} See id. ¶ 143.
\textsuperscript{141} Id. ¶ 144.
\textsuperscript{142} Id.
Finally, in matters of discrimination based on sexual orientation the IACHR facilitated a friendly settlement in the case of X v. Chile. In this case, the petitioner was a police officer (carabinera) who alleged that she was harassed by her superiors after a fellow female police reported to them that the petitioner had a lesbian relationship with Y. After this report, X was subjected to several questionings about her private life and every worker at her precinct was called to give a declaration and duly informed on the investigation that had been initiated against the petitioner. In addition, X claimed that the officer in charge of the investigation, “exceeding his powers, ordered a search of her home.” X initiated an injunction against the police authorities before the Court of Appeals of Santiago, but the judges declared it inadmissible. After some time, the authorities in charge of the investigation decided that there was no evidence supporting the allegations of lesbian conduct against X. However, X refused to sign the document whereby she was informed of this decision because it did not reflect “the severe psychological, moral, and personal harm [the investigation had caused her],” “the family and professional loss of prestige,” “the harm to her condition as a woman,” and the “damage caused to police service.” Later, the petitioner received further notice informing her that the police officer that had initially reported her had been sanctioned for lying in matters pertaining to her private life. In spite of this additional decision, X alleged that the sanction against her fellow coworker should have considered that she had lied with regards to the true nature of the relationship she had with Y (a longtime friendship). The petitioner then initiated a complaint before the IACHR based on the violation of the rights guaranteed by articles 5-1 (personal integrity), 11 (honor and dignity), 24 (equality) and 25 (judicial protection), in connection to article 1-1 (general obligation to respect and guarantee the rights set forth in the Convention), of the ACHR.

The parties in the case reached a friendly settlement whereby the Chilean government agreed to (1) formally apologize to the petitioner, (2) implement non-repetition measures aimed at preserving the honor, dignity and due process of police officers in administrative investigations, at guaranteeing that only matters of administrative relevance be investigated in these proceedings, and at guaranteeing that the petitioner is able to normally develop her functions as a police officer, (3) adopt reparation measures consisting in transferring the petitioner to a police precinct outside Santiago and allowing her to take English courses offered by the Chilean National Police, (4) make public the conditions of the friendly settlement through its publication in the Official Daily of the Republic of Chile, and (5) create a special commission, coordinated by the Ministry of Foreign Affairs, to supervise the compliance to the different terms of the agreement.

The IACHR approved the terms of the agreement and considered that its terms had been fulfilled by the Chilean government.

3.1.1.3.2.3. HIV-Status

With regards to discrimination on the grounds of HIV-positive status, the IACHR has declared admissible the case of J.S.C.H. and M.G.S. v. Mexico.
In this case, the two petitioners (both members of the Mexican Army), after being compelled to have blood tests, were discharged from the Mexican Army because of their HIV-positive status. In addition, after their discharge, and because they had been working for the Mexican Army for less than twenty years, they were denied medical care and the drugs necessary for an adequate HIV treatment.\textsuperscript{154} In its admissibility report, the Commission found that the petitioners had a colorable claim in relation to articles 8 (due-process) and 24 (equality before the law), in connection with article 1-1 (obligation of the States to protect the rights set forth in the ACHR), of the ACHR in case it is proven that they were discriminated against because of their HIV-positive status and, as result of this discriminatory treatment, they were discharged from the Mexican Army.\textsuperscript{155} The IACHR also considered that the petitioners had a colorable claim with regards to article 5-1 (right to physical, mental, and moral integrity), in connection with article 1-1, of the ACHR if a link could be established “between the discharge from active duty and retirement of J.S.C.H. and M.G.S., and the alleged suspension of timely and adequate medical treatment.”\textsuperscript{156}

### 3.1.2. Domestic Constitutional Law

The national or federal constitutions of the ten countries selected for the research project have all general equality and non-discrimination clauses. Although most of them include sex as a prohibited ground of discrimination, none of them include sexual orientation or gender identity as prohibited forms of discrimination. This subsection describes the constitutional framework allowing the protection of sexuality equality in the LAC region. The constitutional provisions on sexuality equality in the LAC region may be organized along five analytic axes: (1) countries that have general equality and non-discrimination provisions that establish sex as a prohibited ground of discrimination and/or protect women’s equality in family, marriage, and work, (2) countries that have general equality and non-discrimination provisions where sex is a prohibited ground of discrimination that has been extended — via constitutional interpretation performed by a national or federal constitutional court or tribunal— to include other grounds of sexuality discrimination, (3) countries that have general equality and non-discrimination provisions that establish sex, sexual orientation, gender identity, health status or other grounds relevant to sexuality as prohibited forms of discrimination, (4) the regional constitutional regulation of family and marriage, and (5) the constitutional clauses allowing the restriction of fundamental rights that may affect sexuality equality. The paper now turns to describing each of these forms of constitutionally regulating sexuality equality in the LAC region.

#### 3.1.2.1. Constitutional Protection of Equality Between the Sexes

The first and most common constitutional type of regulation of sexuality equality in the LAC region is the general protection of equality before the law and non-discrimination provisions that include sex as a ground of prohibited discrimination. In strict interpretive terms, “sex” stands for equality of rights between men and women and, historically, it reflects the political struggles of women for equality of rights. In addition, some of these constitutions have special equality clauses aimed at guaranteeing

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\textsuperscript{154} Id. ¶¶ 16-48.

\textsuperscript{155} Id. ¶ 94.

substantive equality for women in several realms of political and social life. The protection of women’s rights by this type of constitutions varies in its substantive content.

Some of these constitutions have quite substantive protections for women’s equality (in the sense that they combine formal and substantive views of equality), including the mandate to implement affirmative action policies aimed at guaranteeing women’s rights to equal opportunity. For example, the 1853 Constitution of Argentina (amended in 1994), whose original text only protects equality before the law and forbids any prerogative “based on birth or blood” (article 16), was thoroughly amended in 1994 with the addition of two special clauses guaranteeing substantive equality for women. Article 37 sets forth equality of opportunities between men and women in the access to popularly elected public offices through affirmative action in the regulation of political parties and elections. More generally, article 75-37 mandates the Argentine Congress to pass statutes aimed at guaranteeing equality of opportunity and treatment for women —among other groups— through affirmative action policies. Similarly, article 13

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157 This is the constitutional framework that has allowed the most common form of sex equality doctrine in the region produced by supreme or constitutional courts or tribunals. See infra Section 3.1.3.1.2. As it will be explained later in this section, this sex equality doctrine mainly focuses on remedying the harm of “gloss stereotyping” of women that appears in many statutory provisions regulating work, social security, family, and marriage, among others. See supra note 38 and accompanying text. Courts and tribunals in LAC have therefore been concentrated on removing legal classifications based on “sex” that reflect a traditional division of roles between men and women. Few judicial decisions have gone further than this form of analysis to perform a constitutional review that confronts the fact that sex discrimination is systemic or structural—in the sense that it is embedded in social and institutional structures that distribute benefits and burdens and people’s cognitive structures—and therefore cannot be completely dismantled just by removing sex-based classifications from the law. If discrimination —understood as oppression or subordination—is structural then it is not the product of the specific intentions of a group of evil rulers (sometimes it may be), but rather it is the result of “everyday practices of a well-intentioned liberal society.” YOUNG, Justice, supra note 37 at 41, that turn out to be the product of “scripted behavior.” See Ian F. Haney López, Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination, 109 Yale L.J. 1717, 1822-25 (2000). Indeed, when oppression is intertwined with the workings of social institutions it becomes almost invisible (only its discriminatory consequences may be perceived) and those who operate these institutions behave —unconsciously— in a routine-like fashion, like following a script. See id. at 1822 (“Script racism, like scripted behavior generally, turns on the absence of conscious thought when certain routines are triggered”). Dismantling sexism (or other forms of oppression such as racism or homophobia) requires new and creative modes of analysis that have the power to dislodge oppressive patterns in social institutions, showing how our institutional routines, in many instances, produce discriminatory results. Although Originalism is not a very influential form of constitutional interpretation in LAC, it could have some power to explain why courts in the region have interpreted sex equality in such formal terms. It could be argued that the constitutional framework supporting sex equality jurisprudence was the product of how historically women’s social movements in the region staged their struggles for political and social equality in terms of formal equality. This argument, however, should be handled with care. If carefully read, the discourse of women’s social movements, at least since the end of the 19th Century, combines formal equality arguments with powerful substantive (anti-subordination) equality arguments that could be used to substantively interpret constitutional norms that prima facie just seem to guarantee formal equality for women. Reva Siegel has made this argument in the context of American constitutional law. See Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 Harv. L. Rev. 947 (2002). A space is open for similar analyses in the context of domestic constitutional law in countries in LAC. In addition, if hope has been deposited in judicial law to combat discrimination, then domestic judicial bodies should entertain the possibility of using alternative modes of approaching discrimination against women focusing on the social and cultural dynamics producing women’s oppression and subordination. The question arises as to whether judges are capable to do such a thing. They may, if they are attuned to the dynamics of the workings of women’s oppression. As it will be apparent from the analysis of sex equality judicial decisions later in this section, some few rulings allow for such a conclusion. See infra Section 3.1.3.1.2.

158 The constitutions of the provinces of Argentina afford different levels of protection to equality between women and men. With the exception of the Constitution of the Autonomous City of Buenos Aires, which prohibits discrimination based on sexual orientation (article 11), and the Constitution of the Province of Buenos Aires that forbids discrimination based on “diseases implying a risk” (article 11), none of the provincial constitutions forbid discrimination on the grounds of sexual orientation, gender identity, HIV status, or other sexuality-related factors. It is worth mentioning that in 1996 the legislature of the Province of Río Negro passed Law 3.055, which establishes that “sexual orientation is an innate right of every person implicit in the provincial Constitution every time it guarantees equality of rights between men and women” (article 1). The less protective constitutions on matters of sex equality are the constitutions of the provinces of Mendoza (article 7), Misiones (article 9), Santa Cruz (article 9), and Santa Fe (article 8), which only guarantee the equal protection of the laws in general terms (with no mention to any ground of discrimination) or, in the case of Misiones (articles 37, 38) and Santa Fe (article 23), only make a very cursory reference to the protection of maternity as part of the general protection the province should afford to the family institution. The majority of Argentine provincial constitutions protects equality before the law, prohibits discrimination on the basis of sex, and affords special rights and protections to women in the context of the family, work, pregnancy and maternity, and political participation. This is the case of the constitutions of the provinces of Buenos Aires (article 36-4), Catamarca (article 65-II), Chaco (article 35), Chubut (articles 6, 7, 24, 26), Córdoba (article 24), Formosa (article 73), Jujuy (articles 25-1, 45), La
of the Constitution of Colombia of 1991 guarantees equality before the law, equality of treatment and protection, and forbids discrimination based on sex. In addition, it mandates substantive equality by obligating state authorities to “promote the conditions so that equality is real and effective and adopt measures in favor of marginalized and discriminated against social groups.” Women’s equality is further guaranteed by articles 40-7 (guaranteeing equal access for women to public office), 42 (equality of men and women within family and marriage), 43 (reinforcing equality of rights between women and men and the prohibition to discriminate against women and establishing a special protection for pregnant women before and after childbirth and women heads-of-households), and 53 (special protection to women and maternity by labor legislation). Similarly, after establishing equality between men and women, article 39-4 of the Constitution of the Dominican Republic of 2010 provides that public authorities have the duty to promote actions aimed at eradicating gender inequality and discrimination.

Less substantive protection for women’s rights, much more clearly based on a formal account of equality between the sexes, but still granting protection to women in specific realms of social life, is illustrated by the constitutions of Brazil, Guatemala, and Costa Rica. While article 1-IV of the Constitution of Brazil of 1988 guarantees “the promotion of the well-being of everyone” without any prejudice based on sex — among other grounds — “or any other form of discrimination,” article 5 works as a general guarantee of equality before the law without “any sort of discrimination,” which is made explicit for equality of rights and duties between men and women by article 5-I and for equality of rights and duties between men and women in the context of marriage by article 226-5. Apart from establishing that all human beings “are

Pampa (article 6), La Rioja (articles 21, 34), Río Negro (article 32), Salta (articles 13 and 32), San Juan (articles 19, 53), San Luis (articles 16, 48), Santiago del Estero (article 18), and Tierra del Fuego, Antártida e Islas del Atlántico Sur (articles 14, 17).

It is worth mentioning that some of these constitutions protect women’s equality in certain aspects of social life (work, maternity, the family, etc.) making clear that they respect women’s “socio-biological characteristics” or that protection (particularly labor protection) is afforded to allow women to “fulfill her essential family function.” Such clauses are set forth in the constitutions of the provinces of Buenos Aires (article 36-4), Chaco (article 35-1), Chubut (article 26), Córdoba (article 24), Salta (article 32), San Juan (article 53), and Tierra del Fuego, Antártida e Islas del Atlántico Sur (article 17). Finally, a third group of provincial constitutions seeks to protect sex equality in very substantive terms. In addition to prohibiting discrimination on the grounds of sex, they mandate the adoption of affirmative action policies to guarantee “real equality of opportunities” for women, they incorporate a “gender perspective” in the design and implementation of public policies, they promote the modification of socio-cultural patterns of women’s inferiority and subordination, they recognize domestic work as a productive activity, and they protect sexual and reproductive rights as human rights, among other substantive sex equality provisions. This kind of women’s equality protection may be found in the constitutions of the provinces of Corrientes (articles 45, 47), Entre Ríos (articles 17, 20), Neuquén (articles 36, 45), Santiago del Estero (articles 18, 28), and Tucumán (articles 24, 67).

159 The constitutions of the states of Brazil are perhaps the most advanced in the protection of sexuality equality in the LAC region. Even if some of these constitutions sometimes do not have specific equality clauses that forbid discrimination on the grounds of sex or other discrimination factors related to sexuality, or just make a cursory reference to discrimination based on sex, they substantively protect certain aspects of women’s equality by guaranteeing state assistance to maternity, the right to family planning and the duty of the state to include it as part of its public health policies, the obligation of state authorities to implement policies against domestic violence, and the duty of the state to assist victims of sexual, family or other forms of violence. This type of state constitutions is represented by the constitutions of Acre (articles 181, 209-1 and 2), Amazonas (articles 83, 186, 210-3, 242-2, 244, 245-I, II and III), Espírito Santo (articles 3, 160-III, 198-1, 199, 204), Maranhão (article 5-III, 174-3, 251), Paraíba (articles 2-VII, 205-I, 215), Pernambuco (articles 166-XII, 222, 223), Piauí (articles 3-III, 4-IV, 248-7), Río Grande do Norte (article 155-3 and 4), Río Grande do Sul (articles 191-I, 194, 243-XIV, 261-II), Rondônia (articles 8-XII, 140-3 and 4, 247-I) and Roraima (articles 5, 143-1). A second type of Brazilian state constitutions has added to its equality clauses the prohibition of discrimination based on sexual orientation and health status. This is the case of the Organic Law of the Federal District of Brasília (article 2-paragraph) and the constitutions of the states of Mato Grosso (article 10-III), Pará (article 3-IV), Santa Catarina (article 4-IV) and Sergipe (article 3-II). Finally, a third type of state constitutions complement their equality and non-discrimination clauses with provisions that thoroughly develop substantive sexuality equality in several realms of social, political, and cultural life. For example, these constitutions mandate that education public policies take account of the “special contribution of women as mothers, workers, and citizens,” guarantee co-ed education, and eliminate discriminatory practices, stereotypes and prejudices in teaching materials. In the context of health they guarantee, for instance, health care for women during all their life-cycle and according to their special needs, assistance to pregnant women and care after and before childbirth, the access to methods of family planning according to the principles of free-choice and informed consent, the provision of services for the interruption of pregnancy in the cases established by law, the provision of health services and assistance to HIV-positive citizens and AIDS patients. Regarding the labor market, some of these constitutions, for example, mandate labor law protection for employed women and establish the prohibition of requiring pregnancy and HIV-tests as a condition for job access. Finally, in the realm of culture most of these constitutions impose on the state — in addition to a general mandate to adopt permanent cultural and education measures geared towards the prevention and eradication of discrimination,
free and equal in dignity and rights,” article 4 of the Constitution of Guatemala of 1985 also sets forth that men and women “have equal opportunities and responsibilities.” In addition, article 47 guarantees equality between men and women in marriage and article 102 mandates labor law protection for pregnant women. Similar regulations may be found in the Constitution of Costa Rica. Article 33 sets forth a general right of “equality before the law” and forbids all forms of discrimination violating “human dignity.” The Constitution complements this general declaration by setting forth, on the one hand, that special protection should be afforded to “mothers, children, the elderly, and the sick” within the more general obligation of the State to protect the family (article 51), and, on the other hand, by obligating Congress to pass legislation protecting working women (article 71).

The less strong constitutional protection for women’s equality — generally circumscribed to only protecting equality of rights between men and women — is exemplified by the constitutions of Chile, Peru, and Jamaica. Chile’s 1980 Constitution generally protects equality before the law in articles 1, 19-2 and 19-3 and has a special clause establishing that men and women are equal before the law, which was added in 1999 at the end of article 19-2. In similar terms, article 2-2 of the Peruvian Constitution of 1993 protects equality before the law and forbids discrimination on the grounds of sex among other factors. Paragraph 13 of Chapter III (fundamental rights and freedoms) of the Constitution of Jamaica of 1962 establishes that everyone is entitled to the rights to life, liberty, security of the person, property, freedom of conscience, of expression, peaceful assembly and association, and respect for private and family life, “whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest.” In turn, paragraph 24 establishes a complex regulation on discrimination. Indeed, even though paragraphs 24-1 and 24-2 generally prohibit discrimination (“no law shall make any provision which is discriminatory either itself or in its effect” and “no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority”), they also establish a set of exceptions to this prohibition in the case of laws related to persons who are not citizens of Jamaica, laws regarding “adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law,” laws adopted in times of public emergency, tax laws (paragraph 24-4), qualifications for public service (paragraph 24-5), discretion related to “the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law,” or when the restriction is reasonably required by the interests of public defense, public safety, public morality and public health. Interestingly enough, in defining the expression “discriminatory” in paragraph 24-3,160 the Jamaican Constitution does not include sex as a prohibited form of discrimination.

3.1.2.2. Constitutional Protection of Sexuality Equality Extended Through Judicial Interpretation

A second type of constitutional regulation of sexuality in the LAC region is derivative of the first type. Although the text of the constitution does not explicitly forbids sexuality discrimination on grounds different than sex, constitutional judges —through constitutional interpretation— have extended the prohibition of discrimination to sexual orientation, gender identity, and HIV/AIDS-status. This...
subsection focuses exclusively on the extension of constitutional protection to sexuality equality by national or federal constitutional courts or tribunals that have the last word on the interpretation of the national or federal constitution.

3.1.2.2.1. Sexual Orientation

The cases of Colombia and Peru are illustrative of this second type of constitutional protection of sexuality. In one of its most important decisions on discrimination against gays and lesbians, handed down in 1998, the Constitutional Court of Colombia made the explicit argument that the prohibition of discrimination based on sex established in article 13 of the Colombian Constitution also included discrimination on the grounds of sexual orientation.161 Cleverly crafted, the argument was based on an interesting thought-experiment. The Court alternatively considered what could happen, from a constitutional standpoint, if sexual orientation was an immutable trait determined by biology (such as sex or race) or purely a matter of personal choice.162 The Court concluded that, in both cases, gays and lesbians are constitutionally protected, albeit through different constitutional fundamental rights. If sexual orientation were to be an immutable feature an individual’s personality, then constitutional protection would fall under the provisions of article 13 (equal protection) of the Colombian Constitution. Conversely, if sexual orientation were to be a personal choice, the constitutional protection would be afforded by article 16 (free development of personality) of the Constitution of Colombia.

The Court first supposed that homosexuality “is produced by a genetic or biological condition”164 and concluded that, if that were the case, any segregation based on sexual orientation would be an unacceptable form of discrimination, inasmuch as the distribution of benefits and burdens in a democratic society should be based on personal desert.165 In the Court’s view, “in constitutional polities that respect human dignity and autonomy, a differential treatment based on the immutability of a trait stemming from an accident of nature —such as race or national origin— is prohibited because of its incompatibility with the principle of individual responsibility and equal consideration and respect for every person.”166 Based on these arguments, the Constitutional Court went on to conclude that any differential treatment based on sexual orientation was subject to the most stringent constitutional scrutiny. Any public authority using sexual orientation as a criterion for the distribution of social benefits or burdens would thus have to prove that the use of that criterion was the only means available to satisfy a compelling public interest.167 For the Court,

161 See Const. Ct. Col., Decision C-481/98 (Sept. 9, 1998). In this case, the Court was presented with a facial challenge against the Public Schools Teachers’ Regime Act (Decree 2277 of 1979) where “homosexuality” was a ground for discharge from public service as a public school teacher. The Court struck down article 46-b of the statute because it violated articles 13 (equal protection) and 16 (free development of personality) of the Constitution of Colombia.

162 Id. ¶¶ 10-27.

163 Even if the analytical and conceptual sophistication of this decision should be praised, some of its assumptions are problematic. To begin with, it makes a clear-cut distinction between the immutability argument and the choice argument. Even if homosexuality were a truly immutable —biologically-determined— feature of an individual’s personality, beyond its personal choice, that person still chooses to act or not on that trait and, thus, she assumes “responsibility” for her sexual orientation. The analogy—even as a thought-experiment— between sexual orientation and sex, race and national origin as “immutable” traits of an individual’s personality is also problematic. Even the most simple and unsophisticated social constructionist theory would have powerful arguments against this view of personal identity. Indeed, our perception of skin color or biological or genetic sex is culturally shaped. Finally, the “sexual orientation discrimination as sex discrimination” argument heavily relies on a formal vision of equality (sexual orientation is a “suspect” classification subject to strict judicial scrutiny) and it therefore could be criticized in similar terms as the ones used to criticize the “gross stereotyping” argument in matters of discrimination against women. Cf. supra note 38 and accompanying text. See also Nan D. Hunter, The Sex Discrimination Argument in Gay Rights Cases, 9 J.L. & Pol’y 397 (2001).

164 Id. ¶ 16. Note that the Court just assumed the biological roots of homosexuality as an argumentative strategy. The Constitutional Court said that scientific evidence was available with regards to both sides of the debate on the biological origins of sexual orientation, see id. ¶¶ 10-14, but that it was not for a court of law to take sides on such debate. In its view, “[t]he Court is a judge of constitutionality and not a scientific research committee.” See id. ¶ 15.

165 Id. ¶ 16.

166 Id.

167 Id. ¶ 17.
"[A]ny differential treatment based on sexual orientation is *prima facie* prohibited, for it is based upon a trait derived from an accident of birth, it denotes historical patterns of segregation, and it is not useful to distribute social goods or burdens… In case science would show one day that, at least in certain cases, there is an essentially biological determination for sexual orientation, that conclusion would never imply that homosexuals could, for that reason, be treated with prejudice. Nobody can deny that for genetic reasons a person is born a man or a woman or from a different race; however, that scientific fact does not allow inferring the ethical or legal superiority of one race over another or one sex over the other… Constitutional equality presupposes that, in spite of their biological differences, these individuals are equal in dignity and rights and should therefore be equally protected by the legal order."\(^{168}\)

The Court continued its thought-experiment arguing that the immutability thesis could be criticized and assumed the alternative view that sexual orientation was a matter of personal choice. The Colombian Constitutional Court asked the question whether law could impose restrictions in the access of a person to certain social goods or impose special burdens on her because she opted for a specific sexual orientation. The Court answered in the negative. In this part of the holding, the Court stressed the fact that the fundamental rights to privacy (article 15) and the free development of personality (article 16) protected all personal options that did not affect the rights of others or the legal order. In the Constitutional Court’s view, “[articles 15 and 16 of the Colombian Constitution] do not establish that certain models of personality are constitutionally admissible and others that are not… [The right to the free development of personality] sets forth a general protection for the capacity of every person for self-determination; that is to say, to establish her own norms and develop those life plans that do not affect the rights of others.”\(^{169}\) The Court then established that insofar as sexual orientation was “one of the essential elements of any life-plan and of our identification as singular persons,” the right to the free development of personality protected it.\(^{170}\) The Court observed,

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\text{[S]ome manifestations of diversity are constitutionally protected by the principle of pluralism [article 1 of the Constitution of Colombia] and they cannot be suppressed by the democratic will. Sexual option is among these manifestations, and because it is a sovereign decision of the individual it does not pose any concern for the State. Public authorities should therefore remain neutral with regards to the sexual orientation of the individuals, unless their conduct objectively produces social harm.}\(^{171}\)
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After having examined these two alternatives, the Constitutional Court concluded —rather hastily— that “based upon these previous reflections and in order to achieve a certain economy of language in the analysis of this issue, the Court concludes that any difference of treatment based on the sexual orientation of a person is, in the end, a possible discrimination *based on sex* that is subject to identical judicial strict scrutiny.”\(^{172}\) In establishing that sexual orientation was sex discrimination, the Court explicitly stated that

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168 Id.
169 Id. ¶ 20.
170 Id. ¶ 22.
171 Id. ¶ 23.
172 Id. ¶ 24 (emphasis added). The “sexual orientation as sex discrimination” argument is certainly not a creation of the Constitutional Court of Colombia. The most important and cogent explanation of this argument is perhaps Andrew Koppelman’s. See Andrew Koppelman, Note, The Miscegenation Analogy: Sodomy Law as Sex Discrimination, 98 YALE L.J. 145 (1988); Andrew Koppelman, Why Discrimination against Lesbians and Gay Men is Sex Discrimination, 69 N.Y.U. L. REV. 197 (1994); Andrew Koppelman, Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein, 49 U.C.L.A. L. REV. 519 (2001). For a critique of Koppelman’s argument see, e.g., John Gardner, On the Ground of Her Sex(uality), 18 OXFORD J. LEGAL STUD. 167 (1998); Edward Stein, Evaluating the Sex-Discrimination Argument for Lesbian and Gay Rights, 49 U.C.L.A. L. REV. 471 (2001). Although the Colombian Constitutional Court’s views on the matter don’t exactly replicate Koppelman’s arguments, its analogy between sexual orientation, sex, race, and national origin in the immutability part of the decision recall some of Koppelman’s views. If the immutability part of the Court’s decision explains, to a certain extent, why sexual orientation discrimination could be sex discrimination, the “sexual orientation as personal choice” part of the decision leaves one to wonder why the right of every person to autonomously decide her life plan makes differential treatments based on sexual orientation a form of sex discrimination. What is truly interesting about the thought-experiment entertained by the Constitutional Court of Colombia is that it illustrates the differences arising from framing issues of sexual orientation —and gender identity for that matter— either as discrimination claims or as human autonomy claims. The decision thus illustrates the oscillation between minoritizing and universalizing arguments about sexual orientation, to recall Eve Sedgwick’s useful and famous distinction. See EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE Closet 82-90 (1990). On the one hand, couching sexual orientation claims as discrimination/equality arguments usually leads courts to hold that gay and lesbian rights are
it was obligated to follow the decision of the Human Rights Committee in Toonen v. Australia,\(^\text{173}\) where the Committee decided that the prohibition of discrimination on the grounds of sex set forth in article 2-1 of the ICCPR should be interpreted to include sexual orientation.\(^\text{174}\)

In a similar way, in 2004 the Constitutional Tribunal of Peru struck down article 269 of the Code of Military Justice, which prohibited “dishonest acts against nature with persons of the same sex” and established this conduct as a ground of discharge from military service and prison in case violence or coercion were involved.\(^\text{175}\) The Tribunal found this provision to be in violation of article 2-2 (equal protection clause) of the Peruvian Constitution, among other constitutional provisions. Although the Constitutional Tribunal neither made the explicit argument that discrimination on the grounds of sexual orientation was sex discrimination, nor, more generally, that sexual orientation discrimination was the sort of discrimination prohibited by the “any other discriminatory ground” clause set forth at the end of article 2-2 of the Constitution of Peru,\(^\text{176}\) the decision established the precedent that unreasonable and disproportionate differential treatments based on sexual orientation were unconstitutional. To reach this conclusion, the Tribunal reflected in formal equality terms. In its view, “it is a violation of the principle of equality that [article 269 of the Code of Military Justice] establishes as an illegal conduct… only the practice of a dishonest act against a person of the same sex and not conversely, for the same reason, the dishonest practice against a person of a different sex. If what is illegal is the practice of a dishonest conduct, there is not an objective nor a reasonable ground for only punishing the acts performed between persons of the same sex.”\(^\text{177}\) The Tribunal further stated that the equal protection clause was violated by the statutory provision at stake because “it sets forth that sexual acts against nature, performed in military premises, are considered to be crimes and/or misdemeanors… and it does not establish, in equal terms — as it should rigorously be the case for any crime and/or misdemeanor—, that the practice, in general, of any sexual intercourse in military premises not geared towards these ends is a crime and/or misdemeanor.”\(^\text{178}\)

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\(^{174}\) Const. Ct. Col., Decision C-481/98 (Sept. 9, 1998), ¶ 27. The Constitutional Court of Colombia has interpreted article 93 of the Colombian Constitution in the sense that it makes the doctrine of the UN Treaty-Based Committees obligatory at the domestic level. See, e.g., Const. Ct. Col., Decisions C-408/96 (Sept. 4, 1996), ¶ 24; C-010/00 (Jan. 19, 2000). ¶ 6-7.


\(^{176}\) Article 2-2 of the Peruvian Constitution establishes: “Every person has the right: (…) 2. To equality before the law. Nobody will be discriminated against on the grounds of origin, race, sex, language, religion, opinion, economic condition or any other discriminatory ground.”

\(^{177}\) Const. Trib. Peru, Decision STC 0023-2003-AI-TC (June 9, 2004), ¶ 87-e. Although this decision might of course be used as a precedent to remove any sexual orientation legal classification that is unreasonable and disproportionate (which is not a small way forward in such conservative countries like Peru), it leaves one to wonder what to make of its acceptance of the “sexual dishonest acts” and “sexual acts against nature” categories. Is the mere “balancing” of the provision (both homosexual and heterosexual dishonest and against nature sexual acts should be punished) a true advance for substantive equality for gays and lesbians? Even though the Tribunal did not say anything about what it understood to be dishonest or against nature sexual activity (probably it did not have to), the fact is that, historically, in the context of Latin American Spanish-influenced law, these forms of sex are inherently tied to same-sex eroticism. “Crimes against nature” were a criminal category that appeared in Spanish criminal law from around the 16th Century. In general terms, they referred to sexual conduct of a non-procreative nature. This sort of crimes included “perfect” sodomy (anal or oral sex between men), “imperfect” sodomy (non-vaginal sex, sex in positions different than the missionary position, or, generally, non-procreative sex between a man and a woman), masturbation, and bestiality. These crimes were considered to be of the gravest nature, for they had the utmost potential to upset the natural order of creation. See, e.g., FEDERICO GARZA CARVAJAL, QUEMANDO

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3.1.2.2. Gender Identity

With regards to the extension of constitutional protection to at least certain aspects of gender identity, the doctrine of the Constitutional Court of Colombia and the Constitutional Tribunal of Peru is again illustrative. Two decisions of the Colombian Constitutional Court have allowed transsexual persons to change their names in the Civil Registry after having undergone sex-change surgery or hormonal treatment. The most interesting issue presented by these decisions is the choice of human rights principles through which the Court decided to protect the transgendered petitioners. Although in both cases the petitioner couched her claim in terms of equality and argued that because of her gender identity she had been denied the change of her name in the Civil Registry, the Constitutional Court couched both rulings in terms of the right to the free development of personality and some freedom-based rights that it considered to be directly related to a far-reaching notion of human autonomy (right to have a name, right to have a legal personality, right to express one’s individuality, and so on). To a great extent, these decisions illustrate how the principles of human autonomy and equality work in tandem and may be characterized as opposing sides of the same coin. Indeed, it may be said that in these cases equality and non-discrimination were obliquely protected through the direct protection of a bundle of rights related to human autonomy.

The first case that reached the Constitutional Court of Colombia involved a post-operative MTF transsexual who wanted to change her original male name to her new female name in the Civil Registry. The petitioner requested the change of her name to a Public Notary (in charge of the Civil Registry) after thirteen years of living with a female gender identity and having undergone a sex-change operation. The Notary rejected the request arguing that, even though Civil Registry legislation allowed citizens to change their names only on one opportunity, such change had to be ordered by a judge. He additionally argued that a citizen could only change her name to “establish her personal identity” and that this change could not be authorized for “flimsy reasons.” The appeals judge and, then, the Constitutional Court enjoined the Notary and ordered the change of name. The Court explained that “a person’s name is aimed at establishing her identity in social relationships and before the State in a way that makes her distinctive. In a strict legal sense, a person’s name derives from the right to the expression of one’s individuality [a “projection” of the right to the free development of personality guaranteed by article 16 of the Constitution of Colombia] for it is a distinctive sign of the individual before others with which she identifies and is recognized as distinct.” The Court then asserted that “it is legally viable that a male identifies himself with a name that is usually a female one or, vice versa, that a female identifies herself with a name that is usually a male one, or that any of them identify with neutral names or with names of things. All this with the purpose of allowing the person to fix her identity in accordance with her way of being, her thoughts, and her convictions about life, in order to fulfill the mandates of the right to the free development of personality.” In a final note the Constitutional Court felt compelled to “reiterate that the petitioner is not requesting a change of sex but a change of name. The protection of the right to change one’s name does not imply that the sex of the petitioner has to be modified in the Civil Registry, for the former does not imply, by force, the latter.”

MARIPosas: SODOMÍa E IMPERio EN ANDALUCÍA Y MÉxico, SIGLOS XVI-XVII 65-114 (2002); Francisco Tomás y Valiente. El crimen y pecado contra natura, in SEXO BARROCO Y OTRAS TRANSGRESIONES PREMODERNAS 33-55 (1990). The historical origin of “dishonest” or “against nature” sexual acts might explain why the ruling of the Peruvian Constitutional Tribunal, in preserving these categories, might have validated a space for profound moral condemnation of same-sex sexual activity. Indeed, by not rejecting or carefully delimiting the very conceptual categories that were created to morally condemn same-sex sexual activity, the Tribunal might have allowed homophobia to go uncontroverted.

180 Id. ¶ II.2.2.
181 Id. ¶ III.2.3.
182 Id.
183 Id.
More recently, the Colombian Constitutional Court decided a second case involving the change of name of a transgendered person.\textsuperscript{184} The petitioner had changed his original male name to a female one and had undergone hormonal treatment “to obtain a more feminine appearance.”\textsuperscript{185} He later decided to reverse his transition and return to his original male identity because “his sexual reorientation led him to a life of prostitution and degradation that made him reflect about his future to the point of deciding to leave behind the life he was leading and seek to form a family and get a dignified job.”\textsuperscript{186} When he requested the Civil Registry authorities the change of name his request was denied because he had already changed his name and the applicable national legislation allowed citizens to change their names on only one occasion. Following its precedent, the Constitutional Court ordered the Civil Registry authorities to change the name of the petitioner and unapplied the statutory provision that allowed citizens to change their names only once because it considered it to be unconstitutional as applied to the case at stake. The Court recalled its previous doctrine on the right to express one’s individuality through a name, and added that “the choice of a name, as an attribute of one’s personality, is a decisive factor in the free development of one’s life plan and the fulfillment of the right to identity. Indeed, an individual’s name is her distinctive sign in the realm of social relations.”\textsuperscript{187} In the Constitutional Court’s view, the statutory provision that allowed citizens to change their names on only one occasion was unconstitutional as applied to the petitioner because “it is an exceptional case in which the inflexible application of [this] legal provision restricts the life plan of a twenty-six year old person who, at an intermediate stage in the process of defining his personality and his sexual identity, hastily decided to change his male name for a female one. This decision can neither tie him forever to a distinctive sign that does not reflect his current sexual identity nor condemn him for the rest of his life to the loss of his dignity, freedom, autonomy, and equality.”\textsuperscript{188}

In Peru, the Constitutional Tribunal also decided an interesting case in which gender identity was constitutionally protected in oblique fashion.\textsuperscript{189} After marrying without the authorization of his superiors, a policeman was arrested for 18 days for having committed a fault against “obedience.” Years later, after it was discovered that the person he had married was a “transsexual” who had assumed a female identity by forging her national identity documents,\textsuperscript{190} he was discharged from service for having committed faults against “decorum” and “police spirit.” The Peruvian Constitutional Tribunal granted the petitioner constitutional relief and ordered his reinstatement to active police duty. After considering —without any mention whatsoever to the gender identity of the person to whom the petitioner had married— that imposing on a police officer the obligation to request permission to marry violated the right to the free development of personality protected by article 2-1 of the Constitution of Peru, the Tribunal considered two different scenarios from which to tackle the marriage of the petitioner to a “transsexual.”

It first asked whether it was constitutionally admissible to impose a punishment on a police officer that had married a person of his same sex who had forged his/her national identity documents in order to assume a female identity.\textsuperscript{191} The Constitutional Tribunal answered this question in the negative. In its view, in light of the principle of personal desert and the presumption of innocence nobody could be

\textsuperscript{185} Id. ¶ 1.3.
\textsuperscript{186} Id.
\textsuperscript{187} Id. ¶ IV.A.3.
\textsuperscript{188} Id. ¶ IV.5.
\textsuperscript{190} It is worth noting that the Tribunal described the person to whom the petitioner had married as a “transsexual.” However, this person was not transsexual but rather presented some modality of intersexuality. At some point in its decision, the Tribunal transcribes the portion of the decision whereby the petitioner was discharged from police duty where it is explained that he had entertained “suspect relationships” with the person he later married in spite of having discovered —because he was an assistant nurse— that this person presented “physical anomalies” in his/her genitalia. In this decision it is asserted that “it is currently impossible to define the initial sex of the patient because there is a previous plastic surgical intervention in [his/her] genital organs.” Id. ¶ 19. According to police authorities, the discovery of the genital ambiguity of the patient and his relationships with him/her were a proof that the petitioner had “totally ignored the moral and ethical qualities of a member of the Peruvian National Police.” Id.
\textsuperscript{191} Id. ¶ 12-18.
punished by a criminal act of forgery committed by a third party. The Tribunal then asked if it was constitutionally legitimate to sanction a police officer for having lived “with a transsexual who had anomalies in [his/her] genital organs.” Based upon the principle of human dignity established in article 1 of the Constitution of Peru, the Constitutional Tribunal emphasized that “the Peruvian Constitution neither distinguishes between persons because of their sexual option and preferences nor because of the sex they might have. The dignity of the human person is respected. In its ontological sense, human dignity is not lost because one has committed a crime or because one is homosexual or transsexual or, in general terms, because one has decided to assume a way of being that is not accepted by the majority.”

The Tribunal then added that state authorities could not punish individuals who had made personal options that were not illegal. In its view, “when the state… punishes a public official for having a certain type of relationships with homosexuals or, as in the instant case, with a transsexual, independently of certain factors that might infringe public order or morality, it is assuming that the sexual option or preference of that person is illegitimate because it is against the law. That is to say, the state is condemning an option or preference that only the individual can adopt as a free and rational agent.”

The Constitutional Tribunal made clear that the use of the power of the state to punish sexual preferences that did not cause any social harm was a “surreptitious” form of “imposing by law what the state or a majority, in an authoritarian way, judges to be morally good.” By the end of its decision, however, the Tribunal felt compelled to clarify that its contentions regarding the protection of sexual options through the right to the free development of personality “did not condone the performance of homosexual practices —nor, indeed, heterosexual practices— within police premises.”

After reading these decisions on gender identity, one is left to wonder on the true extent of the constitutional protection they afford to gender identity as a complex social and cultural phenomenon. The Colombian decisions protect the right of transgendered persons to change their name as an extension of their more encompassing right to the free development of personality. Is the protection of the right to change one’s name protective enough of all aspects of gender identity? Could these decisions be extended to other issues related to gender identity? Should these two decisions be considered good practices in terms of advancing the rights of transgendered persons through an expansive human right to personal autonomy? These decisions could be read in two different ways.

On a first reading, they might be seen as a truly positive step towards of a strong protection of all aspects of gender identity through the right to the free development of personality. To be sure, changing one’s name is just one of the many implications of transiting from one gender to another. If, as many transgendered people argue, being transgendered means living in a state of permanent transition —so the emphasis should be put in the trans of “transgender”— that implies a process of making constant options and decisions as to the meaning of one’s gender identity, then the decisions protecting the mutability of one’s name through a right to personal autonomy could be easily extended to other aspects of gender identity that might also be decided through the autonomous decisions of a free and rational agent. Read in this way, these decisions might be considered as a good practice in the protection of gender identity through the bundle of human rights protecting human autonomy.

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192 Id. ¶ 21. Interestingly, when reasoning on this issue the Tribunal did not say anything about the fact that the petitioner had married a person of his same sex (or so the Tribunal assumed when framing the issue) focusing exclusively on the forgery issue. Why did the Tribunal ignore this issue? Was it because the person to whom the petitioner married was “unclassifiable”? Recall that the discharge from duty document explicitly said that “it is currently impossible to define the initial sex of the patient because there is a previous plastic surgical intervention in [his/her] genital organs.” See supra note 190. In this case, it seems that intersexuality destabilizes every possible legal category the Tribunal might use to “describe” who this person who the petitioner married was. It talks about him/her alternatively as a “transsexual”, as a “hermaphrodite” and, at some point, it begins to talk about sexual option and preferences as if it were ruling on a sexual orientation case.

193 Id. ¶ 23.

194 Id.

195 Id. ¶ 24.

196 Id.
On a second, less charitable reading, these decisions might not be such a good precedent in the protection of gender identity. This reading concentrates on their contradictions between a strong notion of biological sex that human will can never change and a true performative view of gender identity. For example, in the first Colombian decision the Constitutional Court never refers to the petitioner as a woman or by her female name but it insistently uses her former male name. She may have undergone a sex-change operation, she may have changed her name, she may have lived as a woman for thirteen years, but her essence, her true substance, is male. For the Court, changing names does not seem to change the hard fact of immutable biological sex. The second Colombian decision is even more complex given the attention the Court gives to the motivations of the petitioner to want to reassume his original male name. The Constitutional Court was keen to highlight that his decision to assume a female identity was “hasty” and that not allowing him to change his name —reflecting his male identity— would “condemn him for the rest of his life to the loss of his dignity, freedom, autonomy, and equality.”

Does this assertion echo the petitioner’s claim that his decision to assume a female identity led him to “a life of prostitution and degradation”? One wonders if the generosity of the Court, its willingness to protect the right of the petitioner to readopt his original male name, was an answer to his recognition that he was wrong in deciding to change his gender identity—an argument of the sort “one should never change one’s gender identity because it can only lead to a degraded form of life.”

The Peruvian decision is an illustrative and fascinating example of the sort of anxieties transgendered people pose to judges. Ultimately, this is perhaps a good decision insofar as it expresses the rights of transgendered people in terms of a right to human autonomy, and therefore has the advantages derived from this doctrinal move already described in this section. The judges who decided the case, however, did not know what to make of the petitioner’s companion. Was him/her a transsexual, a “hermaphrodite,” a homosexual? What did this companionship say about the sexual preferences of the petitioner himself? The Constitutional Tribunal ended up assuming, quite strangely, that he was a homosexual (as if only a homosexual could have relationships with a person with ambiguous genitalia). It seems that judges need safe, crisp, clear-cut and delimited “identity” categories to adjudicate rights claims. Transgendered people live at the edge or beyond these categories and therefore are a constant source of judicial anxiety.

Another interesting aspect of the Peruvian decision is its striking last note. Again, this note seems to reflect a usual anxiety of judges when dealing with the protection of certain aspects of sexuality through human rights. After defending the right to define one’s sexual preferences from the authoritarian claims to normality of perfectionist public authorities and majorities, the Constitutional Tribunal rushed to make clear that it was not condoning the practice of any sort of sexual activity (be it homosexual or heterosexual) in police premises. What is the meaning of this rushed last note? Why are sex practices (of any kind?) so perverting of police discipline? Or was it rather a way of disciplining the expansive framework of sexual freedom previously construed in the decision by a Court fearful of the potency of its own dictum?

3.1.2.2.3. HIV Status

In the LAC region, the constitutional prohibition of discrimination has been extended through judicial interpretation to HIV/AIDS-status. The case of Colombia is again illustrative of this issue.

Since 1996, the Colombian Constitutional Court has strongly protected the rights of HIV-positive citizens. In the case that first established the tenets of the Court’s doctrine on discrimination based on HIV status, a waiter had been dismissed from a social club when the employer found out he was HIV-positive. The Court protected the rights of the petitioner and ordered the club to pay him punitive damages for the harm the unconstitutional layoff had caused him. In this decision, the Constitutional Court started a doctrine whereby HIV-positive employees have a right to a “reinforced employment

198 Id. ¶ I.3.
stability” (pregnant employees and employees with disabilities also have this right) because they are a “vulnerable group” deserving special protection from the State according to the provisions of article 13 of the Constitution of Colombia (right to equality and prohibition of discrimination). This special right protects HIV-positive employees from being fired because of their status. Although labor legislation in Colombia authorizes employers to terminate labor contracts before they expire with the payment of a compensation and does not impose on them the obligation to renew a labor contract when it expires, the Constitutional Court established in its 1996 ruling that the employer’s autonomy on these issues is limited when it could be proved that the reason to terminate or not to renew a labor contract was the HIV status of the employee. In the Court’s view, “even though an employee’s contract may be terminated and the employer does not have an obligation to ‘perpetually preserve her in her job,’ the employee cannot be dismissed precisely because she is infected with the virus. This motive implies a serious social segregation, a sort of medical apartheid, and the ignorance of the mandates of constitutional equality and the prohibition of discrimination... There is not therefore an absolute freedom of the employer to unilaterally terminate a labor contract.” The Court added that employers have a duty of solidarity with regards to HIV-positive employees that ought to be fulfilled “by preserving the employee in his job or by changing him to other similar or better job if the employer deems inconvenient to keep him in the job he was performing.”

The Colombian Constitutional Court has since then thoroughly developed its doctrine on the “reinforced employment stability” of HIV-positive employees. For example, in a decision where a woman sought reinstatement in her job after being fired because of her HIV status, the Court observed that “persons living with HIV are particularly vulnerable to a host of social, sexual, economic and labor forms of segregation that violates their dignity and their rights to equality, privacy, health, social security and work,” and added that labor discrimination based on the HIV status of employees not only violated their rights but also “reduces the efforts to promote the prevention of the propagation of the epidemic and seriously deteriorates the situation of the infected person.” Based on ILO recommendations on the matter, the Court recalled that employers have a number of obligations towards HIV-infected employees aimed at preserving their dignity and fundamental rights. Among these obligations the Court mentioned the adaptation of the workplace to the needs of the infected employee, the permission to attend medical appointments, the adoption of measures to support the infected employee, the promotion of a non-discriminatory work environment, the prohibition to request blood tests aimed at establishing if a person had been infected by HIV as a condition to access or to remain in a job, and the stability of the employee in her job or in other less dangerous job for her or others. In this decision, however, the Constitutional Court of Colombia clarified that its doctrine on the “reinforced employment stability” of HIV-infected

200 Id. ¶ 2.3.
201 Id. The Court noted, however, that in the case of employees who have AIDS the situation is different. In this case, employers may apply a labor law provision (Decree 2351 of 1965, article 7-1) allowing to layoff employees who have non-professional contagious or chronic illnesses or any illness that incapacitates them and could not be cured within 180 days. In later decisions, the Court has said that the application of this provision does not mean that an employee with AIDS who has been dismissed because of her illness is unprotected. In the Court’s view, the state has to assume her protection through, inter alia, the provision of free health services. See, e.g., Const. Ct. Col., Decisions T-1283/01 (Dec. 3, 2001), T-070/02 (Feb. 7, 2002), T-843/04 (Sept. 2, 2004), T-262/05 (Mar. 17, 2005), T-434/06 (Jun. 1, 2006), T-422/07 (May 25, 2007).
202 Id. ¶ 2.5.
203 Const. Ct. Col., Decision T-469/04 (May 17, 2004), ¶ 6. The Colombian Constitutional Court in several other rulings has reaffirmed the doctrine of this decision. See, e.g., Const. Ct. Col., Decisions T-934/05 (Sept. 8, 2005), T-1218/05 (Nov. 24, 2005), T-992/07 (Nov. 21, 2007). It is worth noting that in a recent ruling the Constitutional Court expressly said that HIV status was a “suspect classification” subjected to “strict judicial scrutiny.” Public authorities and private parties basing their action on the HIV status of a person have thus to show that their action sought to fulfil a compelling state interest and that the use of HIV status as a distributive criterion was the only means available to achieve that interest. See Const. Ct. Col., Decision T-948/08 (Oct. 2, 2008), ¶ 3.2.
205 See id. At this point the Court also recalled the obligation of employers to comply with the provisions of Decree 1543 of 1997, the Colombian national legislation on HIV and other STIs. This legislation, among other provisions, forbids discrimination against HIV-positive citizens (article 39), establishes that employees are not obligated to inform to their employers about their HIV status (article 35), and prohibits the request of blood tests as a condition to access constitutionally guaranteed rights such as education, work, recreation, social security, and so on.
employees was not absolute. For the Court, this special right does not apply when there is evidence that the employer was not aware of the employee’s condition or when the termination of the employee was not related to her HIV status but to other “objective circumstances” that make the termination legal.\textsuperscript{206}

The Colombian Constitutional Court’s doctrine on discrimination based on HIV status is not circumscribed to labor discrimination. Particularly, the Court has extended the prohibition to discriminate HIV-infected citizens to education, the military, and prisons.\textsuperscript{207} With regards to education, the Constitutional Court has protected the rights of prospective or enrolled HIV-infected students. In the first case on this issue, the Court had to establish whether it was constitutionally admissible that the National Police Academy had an admission policy establishing that HIV-positive applicants were not admissible. A prospective student who was rejected from the admission process once the Academy authorities found out that he was HIV-positive raised the case. The Court enjoined the National Police Academy and ordered the admission of the petitioner.\textsuperscript{208} In the Constitutional Court’s view, the autonomy of institutions of higher education—like the National Police Academy—to establish their admission policies is limited by the prohibition of discrimination. If the application of an admission policy discriminates against certain applicants solely because of their HIV-positive status it immediately becomes unconstitutional.\textsuperscript{209} For the Court, preventing healthy HIV-infected applicants from being admitted to the Academy did not fulfill, under any reasonable circumstance, the purposes it aimed to achieve (the preservation of the life and health of the infected applicant or other applicants, the protection of the “general interest” and the preservation of police activities).\textsuperscript{210} As a final point, the Court recalled that the request of blood tests to establish if a person is HIV-positive as a condition to access a constitutionally guaranteed right such as education is unconstitutional.\textsuperscript{211}

The Constitutional Court of Colombia has also extended its doctrine on discrimination based on HIV status to the members of the Colombian Military Forces. In a couple of cases, the Court has ruled that healthy HIV-positive members of the Military Forces cannot be discharged on the exclusive ground of their health status. In the first case on this matter, a trainee of the National Military Academy was discharged when his commanders found out he was HIV-positive after a blood donation rally.\textsuperscript{212} On this occasion, the Constitutional Court established a three-pronged rule: (1) discharging from duty healthy HIV-infected members of the military on the grounds of their status is an unconstitutional discriminatory practice because such a decision “is based on prejudice and not on an objective situation,” (2) if the HIV-infected member of the military develops symptoms that according to “objective and reasonable criteria” make impossible for her to fulfill her military obligations, she might be assigned to other duties compatible with her current health status, and (3) the Armed Forces have the constitutional obligation to guarantee the right to health of their HIV-infected members and therefore have the duty to provide them with full health care, including antiretroviral treatment.\textsuperscript{213} Based on this rule, the Court enjoined the

\textsuperscript{206} See Const. Ct. Col., Decision T-469/04 (May 17, 2004), ¶ 6. See also Const. Ct. Col., Decisions T-826/99 (Oct. 21, 1999) (for the doctrine related to the unawareness of the employer regarding the HIV-positive status of the employee) and T-066/00 (Jan. 27, 2000) (for the doctrine related to the termination of HIV-infected employees for other “objective circumstances”).

\textsuperscript{207} The Constitutional Court has also extended this doctrine to other fields where discrimination against HIV-infected citizens was quite extended. For example, the Court has applied this doctrine to discrimination practiced by insurance companies who denied insurance policies to HIV-positive individuals. See, e.g., Const. Ct. Col., Decision T-1165/01 (Nov. 6, 2001) (an insurance company was enjoined by the Court after denying a life insurance to two HIV-positive individuals). This doctrine has also been applied to the recognition of disability pensions to HIV-infected persons who usually confront significant bureaucratic hurdles in the recognition process that other people do not tend to confront. See, e.g., Const. Ct. Col., Decision T-077/08 (Jan. 31, 2008) (for a very good example of the sort of bureaucratic and legalistic hurdles HIV-infected persons tend to confront when requesting the recognition of a disability pension). Finally, another field where this doctrine has been applied is the field of health services for HIV-infected persons.

\textsuperscript{208} See Const. Ct. Col., Decision T-816/05 (Aug. 8, 2005). This doctrine was later applied to a case where a hospital did not accept the HIV-infected petitioner to perform his professional practice in order to graduate as an assistant nurse. See Const. Ct. Col., Decision T-948/08 (Oct. 2, 2008).


\textsuperscript{210} See id.

\textsuperscript{211} See id.


\textsuperscript{213} Id. ¶ 2.6.1-2.6.4.
National Military Academy and ordered the reinstatement of the trainee. In a second case, a soldier drafted for military service in an artillery battalion was discharged when it was discovered that he was HIV-positive after donating blood for one of his superiors. In this case, the Court applied the doctrine crafted in the earlier case, enjoined the artillery battalion, and ordered the reinstatement of the soldier to active military duty.

Finally, the decision where the Constitutional Court of Colombia applied its doctrine on the prohibition to discriminate on grounds of HIV status to prison inmates represents a very interesting development on this matter. The case was raised by an inmate who had been confined to a special section of the prison because of his HIV status. The warden of the prison justified his decision arguing that most of the prisoners in the special section were “homosexuals” and therefore they were part of “a population that seldom uses protection in their sexual contacts.” It was thus justified to keep them separated to avoid “the propagation of the virus.” The petitioner argued that the decision of the prison authorities prevented from attending the education and work programs organized for the inmates. After subjecting the actions of the prison’s warden to a judicial strict scrutiny, the Constitutional Court enjoined the prison authorities and ordered them to allow the petitioner to attend the education and work programs in equal conditions to non HIV-infected inmates. For the Court, even if the measure adopted by the prison’s warden had a constitutionally legitimate goal (the protection of public health within the prison) the means chosen to achieve that goal were unnecessary. Indeed, there were other measures to achieve this goal that were less restrictive of the dignity and the right to equality of the HIV-infected inmates. The Court observed that the measures adopted by the prison authorities “are based on the prejudices and stigma affecting people living with the virus.” It also added that even if the existence of a special section within the prison for HIV-infected inmates could in part be justified with the argument that their isolation sought to provide them with special health and nutritional care and guarantee their life and personal integrity, these reasons did not justify the violation of the fundamental rights of the inmates, particularly when there was no evidence that other inmates had attacked or discriminated against the HIV-infected inmates.

3.1.2.3. Extended Constitutional Protection of Sexuality

Of the ten countries selected for the research project, the most advanced constitutional text in the protection of sexuality equality is that of Mexico. After a 2001 constitutional amendment, article 1 of the Mexican Constitution forbids discrimination based on “gender” (as a synonym for “sex” discrimination, unless the Supreme Court of Mexico decides to extend its meaning to gender identity), health status, and “preferences.” In addition, the article establishes that any other form of discrimination that violates human dignity or impinges on the rights and liberties of persons is prohibited.

Several constitutions of the states of Mexico have been amended to reflect the new vision of discrimination established in article 1 of the Mexican Federal Constitution. This is the case of the constitutions of the states of Baja California Sur (article 8, with no reference to “preferences”), Coahuila (article 7), Chiapas (article 4, with no reference to “preferences”), Durango (article 2, with no reference to “preferences”), Guanajuato (article 1), Hidalgo (article 4), México (article 5), Michoacán (article 1), Morelos (article 19, with no reference to “preferences”), Nuevo León (article 1), Oaxaca (article 12, with no reference to “preferences”), Puebla (article 11), Querétaro (article 3 with no reference to “preferences”), Quintana Roo (article 13, with no reference to “preferences”), Tabasco (article 4), Tlaxcala (article 19-III), Veracruz (article 4, with no reference to “preferences”), and Yucatán (article 2). It is worth noting that article 19-III of the constitution of Tlaxcala explicitly prohibits discrimination based on “sexual preferences.” Other state constitutions only have general equality clauses limited to guaranteeing equality before the law. This is the case of the constitutions of Aguascalientes (article 2), Baja California (article 7), Colima (article 1), Guerrero (article 1), Jalisco (article 4), Morelos (article 2), Nayarit (article 7-I), Oaxaca (article 2), San Luis Potosí (article 8), Sinaloa (articles 1, 4-BIS, 141), Sonora (article 1), Tamaulipas (article 17), and Zacatecas (article 21).
Since the amendment, the Supreme Court of Mexico has ruled on the prohibition to discriminate on the grounds of “gender” and on the prohibition of discrimination based on health status in the cases of the HIV-infected members of the Mexican Armed Forces dismissed because of their health status.\footnote{221} Up to this point, the Supreme Court has not yet established the sort of “preferences” that are protected by the Mexican Federal Constitution.

These new grounds of sexuality equality have however not been developed by other provisions of the Federal Constitution of Mexico. The remaining text of this Constitution is quite similar to other constitutional regulations of sexuality in the region and limits itself to guaranteeing equality between women and men in several realms of social life. Article 4 begins by establishing that “men and women are equal before the law,” mandates the special protection by law of the organization and development of the family, and guarantees “the right of every person to decide the number and time-spacing between children in a free, responsible and informed fashion.” With regards to the right to work, article 123-A-V imposes on the Federal Congress the obligation to pass legislation protecting pregnant working women. Similarly, article 123-B-XI mandates that social security is organized around the protection of pregnant working women and the recognition of maternity care and insurance, among other principles.\footnote{222}

A distinctive note of the Federal Constitution of Mexico is the protection afforded to indigenous women introduced by a constitutional amendment passed in 2001. Article 2 of the Mexican Constitution recognizes and guarantees the rights to self-determination and autonomy of indigenous communities. This autonomy, however, is limited by the rights of women. For example, indigenous communities have the right to solve their conflicts according to their traditional legal systems provided they respect “the dignity and integrity of women” (article 2-A-II). They also have the right to elect their own political authorities “guaranteeing the participation of women in equal conditions to men” (article 2-A-III). Finally, article 2-B-VIII imposes on state authorities (federal, state, and local) the obligation to implement social policies for migrants of indigenous communities which have to specifically include components aimed at improving the health conditions of indigenous women.\footnote{223}

Although not included in this research project, the constitutions of Ecuador and Bolivia should be mentioned insofar as they represent the most advanced constitutional regulation on sexuality equality in the LAC region. The 2008 Constitution of Ecuador forbids discrimination based on sex, sexual orientation, gender identity, health status, and HIV status (article 11-2). Similarly, the Constitution of Bolivia of 2009 outlaws discrimination based on sex, sexual orientation, and gender identity (article 14-II).

\footnote{221} See supra note 3.1.1.3.2.3 and accompanying text.

\footnote{222} An important number of constitutions of the Mexican states, in addition to prohibiting discrimination based on “sex” or “gender,” have introduced specific clauses guaranteeing equality between men and women, special protection to maternity, equality of women within marriage, the right of parents to decide in a “free, informed and responsible fashion” the number of children and the time spacing between them, the participation of women in political life and public service, the eradication of violence against women, the recognition of domestic work, and the obligation of education institutions to “fight ignorance and its consequences, servitude, fanatisms and prejudices” and to instill in students “the ideals of fraternity and equality of rights between men, avoiding privileges based on races, sects, groups, sexes or individuals,” among other sex equality provisions. Such clauses may be found in the constitutions of Aguascalientes (article 4), Baja California (article 98), Baja California Sur (articles 9, 10, 11), Campeche (article 126), Coahuila (article 173), Colima (article 1), Chihuahua (article 144), Durango (article 12), Guerrero (article 76-BIS), Hidalgo (article 5), México (article 5), Michoacán (articles 2, 139), Morelos (article 19-IV), Nayarit (article 7-XII-2), Nuevo León (article 1), Oaxaca (articles 12, 25-A-II, 126), Puebla (articles 12-II, 26-II, III, IX, and XII), Quintana Roo (articles 13, 31, 32, 49-III), San Luis Potosí (article 8), Sinaloa (articles 4-BIS-B-IV and VIII, 13), Sonora (articles 16-II, 22, 150-A), Tabasco (article 9-A-IV), Tamaulipas (articles 9-A-IV), Tlaxcala (articles 17-III, 20-G), Veracruz (articles 17-III, 20-G), Yucatán (article 2).

\footnote{223} Some constitutions of the states of Mexico have introduced similar amendments. This is the case of the constitutions of Chihuahua (article 13), Durango (article 2-A-II and 2-B-V and VIII), Jalisco (article 4-A-II and III, 4-B-V and VIII), Morelos (article 2-BIS-IX, X, XII-h), Nayarit (article 7-II), Puebla (article 13-I-c), Quintana Roo (article 13-A-II and III and 13-B-V and VIII), San Luis Potosí (article 9-XI and XVI-c), Tabasco (article 2-IV and VI), Veracruz (article 5), and Yucatán (article 2).
In spite of their progressive character with regards to sexuality, these two constitutions seem to restrict their expansive egalitarian power in sexuality matters when it comes to the regulation of family and marriage. Although article 67 of the Ecuadorian Constitution recognizes family “in its diverse types,” and article 68 extends the same rights and obligations of marriage to civil unions, defined as the “stable and monogamous bond between two non-married persons [with no reference to their sex] who form a household,” it restricts the definition of marriage as “the union between a man and a woman” (article 67) and circumscribes the possibility to adopt children to heterosexual couples (article 68). In a similar vein, the Constitution of Bolivia recognizes and protects “families” — in the plural — as the “fundamental unit of society” (article 62), but marriage and civil unions are defined as being formed by legal bonds between “a man and a woman” (article 63-I and II).

3.1.2.4. Constitutional Regulation of Family and Marriage

No landscape of constitutional regulation of sexuality in LAC would be complete without the description of the constitutional regulation of family and marriage. Indeed, as some commentators have observed, the legal regulation of the institutions of marriage and family is one of the most powerful ways to socially organize sexuality. This is why many sexuality equality controversies tend to arise in the context of marriage or, more generally, in the realm of the family. Particularly, constitutional definitions and regulations of family set up the space for struggles on the possibility to construct family arrangements alternative to the monogamous and heterosexual dominant model of the family.

With the exception of Jamaica and Argentina, all the constitutions of the countries selected for the research project have clauses that directly protect the family. While some of these constitutions protect the family as the basic institution of society, others simply establish that the family is constitutionally protected. The first kind of regulation may be found in articles 5 and 42 of the Colombian Constitution (family is “the basic institution of society” and “the fundamental unit of society”), article 1 of the Constitution of Chile (family is “the fundamental unit of society”), article 226 of the Brazilian Constitution (family is “the basis of society”), article 51 of the Constitution of Costa Rica (family is

224 See, e.g., Ariela R. Dubler, In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State, 112 YALE L.J. 1641, 1712 (2003) (“[M]arriage continues to regulate the terrain outside of its formal borders, preserving its legal and ideological supremacy as a normative model for all intimate relationships and as an arbiter of which relationships deserve legal recognition and protection”); Katherine M. Franke, Longing for Loving, 76 FORDHAM L. REV. 2685-86, 2696 (2008) (marriage has a “normatively superior status to other forms of human attachment, commitment, and desire” and therefore functions “as the measure of all things” in matters of “human connection”).

225 In the case of Argentina, family is protected by the Federal Constitution only in the context of social security. Article 14 of the Argentine Constitution establishes that social security legislation must “protect family in a comprehensive fashion,” among other social security issues. However, the constitutions of most of the provinces of Argentina protect family as the basic institution of society. This is the case of the constitutions of Buenos Aires (article 36-I, family is “the primary and fundamental unit of society”), Catamarca (article 58-I, family is “the fundamental basis of society”), Chaco (article 35, family, “based in the union of a man and a woman, is the primary and fundamental cell of society”), Chubut (article 25, family is “the primary and fundamental unit of society”), Córdoba (article 34, family is “the fundamental unit of society”), Corrientes (article 39, family is “the primary and fundamental unit of society”), Entre Ríos (article 18, family is “the fundamental unit of society”), Formosa (article 68, family is “the basic cell of society established, organized and planned through affection”), Jujuy (article 44-I, family is “the natural and fundamental element of society”), La Rioja (article 34, family is “the primary and fundamental unit of society”), Misiones (article 37-I, legislation must be passed to “comprehensively protect family in order for this institution to accomplish its spiritual, cultural, economic and social functions”), Neuquén (article 46, family is “the natural and fundamental element of society”), Río Negro (article 31, family is “the primary cell of society established, organized and planned through affection”), Salta (article 32, family is “the primary and fundamental unit of society”), San Juan (article 52, family is “the natural, spontaneous and fundamental element of society”), San Luis (article 48, family is “primary and fundamental unit of society”), Santa Cruz (article 56, family must be protected through pertinent legislation”), Santa Fe (article 23, “the Province contributes to the comprehensive defense and formation of the family”), Santiago del Estero (article 27, family is “the fundamental unit of society”), Tierra del Fuego, Antártida e Islas del Atlántico Sur (article 28, family is “the fundamental unit of society”), and Tucumán (article 40-2, family is “the primary cell of society”).

226 Most of the constitutions of the states of Brazil protect family in the context of social rights, social security, social assistance, or as the social institution within which state protection should be afforded to children, adolescents, women, the elderly, and the disabled. This is the case of the constitutions of the states of Acre (article 209), Alagoas (articles 190, 229), Amapá (articles 253, 304), Amazonas (article 242), Bahia (article 279), Ceará (articles 272-287), Espírito Santo (article 198-I), Goiás (article 170),
“the natural element and the foundation of society”), the Preamble to the Constitution of Guatemala (family is “the primary and fundamental genesis of the spiritual and moral values of society”), article 55 of the Constitution of the Dominican Republic (family is “the foundation of society and the basic space for a comprehensive development of individuals”), and article 4 of the Peruvian Constitution (family is “the natural and fundamental institution of society”). The second sort of regulation appears in article 4 of the Constitution of Mexico (Congress has to enact laws protecting “the organization and development of family”).

Marriage is also regulated by most of the constitutions of the countries selected for the research project. In every case, constitutional norms tend to establish a tight relationship between marriage and family. Some of these constitutions establish that marriage is the basis of family, such as the Constitution of Costa Rica (article 52, marriage is “the essential basis of family”), the Constitution of Guatemala (article 47, the State will promote the organization of the family “on the legal basis of marriage”), and the Constitution of the Dominican Republic (article 55-3, “the state will promote and protect the family on the basis of the institution of marriage between a man and a woman”). Other constitutions do not set forth a relationship of strict and necessary implication between family and marriage, but still establish a tight relationship between the two institutions. This is the case of the Constitution of Colombia (article 42, family is formed “by legal or natural bonds, by the free decision of a man and woman to marry or by the responsible will to conform it”), the Constitution of Peru (article 4, the State “protects family and promotes marriage” and recognizes that these are “the natural and fundamental institutions of society”), and the Constitution of Brazil (article 226, marriage regulations are part of the special protection the State has to provide to family).

Some constitutions in the LAC region establish directives on how legislation has to regulate marriage and provide grounding for other forms of human affective association such as civil unions. For example, as mentioned above, article 42 of the Constitution of Colombia indicates that family is not only based on marriage (between a man and a woman), but also by “legal or natural bonds” and “the responsible will to conform it.” Additionally, this article establishes that civil legislation has to regulate the forms of marriage, the age and capacity to marry, the rights and duties of the spouses, the grounds upon which marriage may be terminated and the formalities for the termination, the civil effects of religious marriages, and the regime of divorce. Similar provisions may be found in article 226 of the Federal Constitution of Brazil, which indicates that marriage is civil and its celebration is free, that religious

Maranhão (article 251), Mato Grosso (articles 228-1, 233), Mato Grosso do Sul (articles 185-1, 205), Minas Gerais (article 221), Pará (article 295), Paraíba (articles 205-1, 215), Paraná (article 165), Pernambuco (article 222), Piauí (article 247), Rio de Janeiro (article 46), Rio Grande do Norte (article 155), Rio Grande do Sul (article 191-I), Rondônia (article 140), Roraima (article 143-I), Santa Catarina (article 186), São Paulo (articles 277-281), Sergipe (article 206-I), and Tocantins (article 121).

Some of the constitutions of the states of Mexico establish the obligation of the state to protect the family. While some of these constitutions simply state the mandate to protect the family, others additionally establish that family is the “fundamental unit of society.” This sort of provisions may be found in the constitutions of Aguascalientes (article 4), Baja California Sur (article 11), Campeche (article 126), Coahuila (article 173), Colima (article 1-I), Durango (article 12), Guanajuato (article 13), Hidalgo (article 5), Jalisco (article 15-I), Michoacán (article 2), Morelos (article 19), Nuevo León (article 1), Oaxaca (article 12), Puebla (article 26), Querétaro (article 3), Quintana Roo (article 31), San Luis Potosí (article 12), Sinaloa (article 13), Tlaxcala (article 26-VI), Yucatán (article 94), and Zacatecas (article 25).

Although the Federal Constitution of Mexico does not include any regulation on marriage, some Mexican state constitutions protect, define, and regulate this institution. This is the case of the constitutions of Baja California Sur (article 11; marriage and family are the “fundamental basis of community”), Colima (article 147; marriage is “a civil contract between only one man and only one woman for the perpetuation of the species and mutual help”), Michoacán (article 2; only establishes equality between the spouses within marriage), Morelos (article 120; marriage is “the voluntary union between a man and a woman with equality of rights and obligations with the possibility to procreate children and to help each other”), Oaxaca (article 12; marriage, and family are the “fundamental basis of society”), and Yucatán (article 94; defines marriage as the “legal union between a man and a woman, with equality of rights, duties and obligations, with the possibility to generate human reproduction in a free, responsible and informed fashion” and adds that “the State recognizes that it is of vital interest for society that in the union between a man and a woman for procreation limits are established with regards to age and physical and mental health.” Interestingly, this article defines family as a “permanent social institution that functions as the basic foundation of society upon which the State evolves” and adds that it is “formed by the union of two or more persons united or having kinship bonds between them either by blood, affinity or adoption, that, as a community based on affection and coexistence, promotes the free development of all its members”).
marriage has civil effects according to law, and that civil marriage may be dissolved by divorce after the spouses have been judicially separated for more than one year or they have been de facto separated for more than two years. Finally, the constitutions of Peru and Guatemala have similar provisions on the legislative regulation of marriage. Article 4 of the Constitution of Peru sets forth that the forms of marriage and its dissolution, as well as the grounds for the separation of the spouses, should be regulated by appropriate legislation. On the other hand, article 5 of the Peruvian Constitution refers to civil unions as the stable union between a non-married man and a non-married woman who form a de facto household which has patrimonial effects subjected to the same patrimonial regime of marriage. In the case of Guatemala, article 48 recognizes civil unions and defers its regulation to statutory law and article 49 establishes that marriage could be authorized by mayors, council-people (concejales), public notaries, and religious ministers duly authorized by the competent administrative authority.

It is important to note that, with the exception of article 5 of the Constitution of Peru, which only protects civil unions between men and women and article 42 of the Colombian Constitution that defines marriage as the union between a woman and a man, all of the national constitutions of the countries selected for the research project define family, marriage, and civil unions in gender-neutral terms. In terms of gender specificity, the definitions of the family that leave a more generous space to contradicting traditional conceptions of the family as a monogamous and heterosexual institution are those of the Constitution of Colombia and the Brazilian Federal Constitution. In the case of Brazil, although article 226-3 of the Federal Constitution establishes that for purposes of special State protection family will be defined as “the stable union between a man and a woman,” article 226-4 clarifies that family is also “the community integrated by any two parents and their children.” Article 42 of the Constitution of Colombia provides for an interesting combination of possibilities on the formation of the family, where marriage — defined as the union between a man and woman — is only one of them. In addition to marriage, the Colombian family could also be formed by “legal or natural bonds” or “the responsible will to conform it.”

In Colombia, the existence of these three different possibilities of family formation has produced an important constitutional debate on the extent to which they make possible the protection of alternative families. In light of the doctrine of the Colombian Constitutional Court, it is now clear that heterosexual civil unions are constitutionally protected as a form of family in equal footing to marriage. According to the Court, this is the appropriate interpretation that should be accorded to the first family formation option provided for by article 42 of the Constitution of Colombia (the family could be formed either by legal or natural bonds, the former referring to those stemming from marriage, civil-unions, or adoption and the latter referring to those stemming from kinship or blood ties). The third option of family formation (the family could be formed by the responsible will to conform it), however, has been the object of an intense constitutional controversy in the context of the possibility to consider same-sex civil unions as families. The Court — in very tight majority opinions — has held that even if same-sex civil unions have equal patrimonial rights to heterosexual civil unions, this does not mean that, in light of the possibility that a family could be formed by “the responsible will to conform it,” established in article 42 of the Constitution of Colombia, they could be considered as families. Yet, in spite of this majority

229 The Federal Constitution of Mexico does not include any provision on marriage. However, some state constitutions define it in gender specific terms. This is the case of the constitutions of Colima (article 147), Morelos (article 120), and Yucatán (article 94). The provincial constitutions of Argentina do not include any regulation on marriage. The state constitutions of Brazil that do regulate marriage follow the provisions of the Federal Constitution on the matter. This is the case of the constitutions of Bahia (article 279), Rio Grande do Norte (article 155), and Rondônia (article 140).


231 In 1996, when the Court first had to decide whether the Constitution of Colombia allowed same-sex civil unions and answered the question in the negative, part of the Court’s argument was that homosexual civil unions were “differently situated” to heterosexual civil unions (according to article 42 of the Colombian Constitution the latter were families and the former were not) and therefore it was legitimate that legislation treated them differently. See Const. Ct. Col., Decision C-098/96 (Mar. 7, 1996), ¶ 4.2. This argument was reaffirmed in 2001 when the Court denied the extension of social security benefits to the same-sex partner of the petitioner in the case. According to the Constitutional Court, Colombian social security legislation only afforded social security benefits to families and therefore same-sex couples could be legitimately excluded from these benefits.
position, an important number of justices have written concurring and dissenting opinions explaining how this expression could be reasonably interpreted to allow same-sex civil unions to be treated as families.232

3.1.2.5. **Fundamental Rights Limitation Clauses that May Affect Sexuality Equality**

Many constitutions in the LAC region include provisions whereby fundamental rights may be restricted for reasons of “public morality,” “morality and good customs,” “public order,” “public safety,” “public health,” “vagrancy” or “honesty,” among other factors. This sort of provisions should be taken into account when talking about sexuality discrimination given the history these clauses have played in LAC when restricting certain expressions of sexuality. However, before examining the specific domestic constitutional provisions on this matter it is important to study the doctrine of IACHR on restrictions to human rights and, especially, on the conditions that States should meet when legitimately limiting rights guaranteed by the ACHR.

The ACHR allows for the restriction of several of the rights it guarantees on grounds of morality, public order, public safety, public health, and so forth. Article 12-3 of the Convention establishes that the freedom to manifest one’s religion and beliefs “may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.” In the case of free speech, article 13-2 of the ACHR prohibits prior censorship but allows for the imposition of subsequent liability in order to protect “national security, public order, or public health or morals.” Article 13-4 of the Convention authorizes prior censorship of “public entertainments for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.” According to articles 15 and 16-2 of the ACHR, restrictions may also be imposed on the right of peaceful assembly without arms and freedom of association, but only “in conformity with the law” and solely those “necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedom of others.” Finally, article 22-3 of the Convention allows for the restriction of freedom of movement and residence “only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.”

In addition, articles 29 and 30 of the ACHR establish general provisions on the extent and legitimacy of limitations to the rights guaranteed by the Convention. According to article 29, States are prohibited to suppress or limit the rights set forth in the Convention, the ADRDM, other international conventions they have subscribed, their domestic law, or the rights “inherent in the human personality or derived from representative democracy as a form of government” to a greater extent than the limits established in the ACHR. With regards to the scope of the restrictions that may be placed on rights, article 30 sets forth that

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232 For these justices, the fact that the expression “the responsible will to conform it” in article 42 of the Colombian Constitution is preceded by the conjunction “or” leaves room for the constitutional protection of alternative families. See Const. Ct. Col., Decisions SU-623/01 (June 14, 2001) (Araújo, Cepeda, Córdoba, & Montalegre JJ., dissenting ¶ 4), C-814/01 (Aug. 2, 2001) (Cepeda, Córdoba, & Montalegre JJ., dissenting ¶ 1-2), and C-811/07 (Oct. 3, 2007) (Botero J., concurring).
such restrictions “may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.”

In several advisory opinions, the IACtHR has established general directives with regards to the limits that States can legitimately impose on the rights protected by the ACHR. In the advisory opinion Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, the Court referred to the limits to which freedom of speech could legitimately be subjected in light of articles 13, 29, and 32 of the ACHR. The IACtHR first observed that freedom of speech could be limited if the limits fulfilled certain formal and substantive requirements. While the former depended upon “the manner in which they are expressed,” the latter depended on “the legitimacy of the ends that such restrictions are designed to accomplish.” In this opinion, the Court clarified that the reference the Convention makes to “democratic institutions,” “representative democracy” and “democratic society” as institutions to which the restrictions on rights should be compatible with mean that any of these restrictions should be “judged by reference to the legitimate needs of democratic societies and institutions.” The IACtHR also made clear that any limitation on freedom of speech should be “necessary” and therefore the authority restricting the right must show that the restriction is required by a “compelling governmental interest” and is “proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it.” Finally, with regards to the possibility to restrict freedom of speech in order to guarantee “public order” the Court observed that this notion referred “to the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles,” and that it “must be subjected to an interpretation that is strictly limited to the ‘just demands’ of ‘a democratic society,’ which takes account of the need to balance the competing interests involved and the need to preserve the object and purpose of the Convention.”

This doctrine was later complemented by the one advanced in the advisory opinion The Word “Laws” in Article 30 of the American Convention on Human Rights. According to the IACtHR, the spirit of the ACHR imposes the view that in regular circumstances the enjoyment and exercise of the rights protected by the Convention can only be subjected to “restrictions.” Article 30 is therefore not “a general authorization to establish new restrictions to the rights protected by the Convention, additional to those permitted under the rules governing each one of these,” but, “on the contrary, [its purpose] is to impose an additional requirement to legitimize individually authorized restrictions.” For the Court, a simultaneous reading of article 30 and other articles of the ACHR authorizing limitations to specific rights leads to concluding that a restriction is valid only when (1) it is “expressly authorized by the Convention and meet the special conditions for such authorization,” (2) its ends are legitimate, “that is, that they pursue ‘reasons of general interest’ and do not stray from the ‘purpose for which (they) have been established,’” and (3) they are “established by laws and applied pursuant to them.”

The Court then clarified that the meaning of the word “laws” in article 30 of the ACHR should be compatible with a system geared towards the protection of human rights from the arbitrary exercise of the power of the State. In the IACtHR’s view, the most effective way to contain governmental power so it does not violate human rights is through laws passed by a democratically elected legislature,

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234 Id. ¶ 37.
235 Id. ¶ 42.
236 Id. ¶ 46.
237 Id. ¶ 64.
238 Id. ¶ 67.
240 Id. ¶ 14.
241 Id. ¶ 17.
242 Id.
243 Id. ¶ 18.
244 Id. ¶ 21.
following the legislative procedure prescribed in the Constitution. For the Court, “such a procedure not only clothes these acts with the assent of the people through its representatives, but also allows minority groups to express their disagreement, propose different initiatives, participate in the shaping of the political will, or influence public opinion so as to prevent the majority from acting arbitrarily.” The IACtHR observed as well that the limitations to the rights guaranteed by the ACHR should not only be established by “laws” but also that these laws should be “enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.”

With regards to the limitations that may be imposed on the right to equality and the prohibition of discrimination, the Court has established that all differences in legal treatment established by public authorities should be reasonable and subjected to the principle of proportionality. In the advisory opinion Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, the IACtHR closely following the doctrine of the European Court of Human Rights on the matter—clarified that “not all differences in treatment are in themselves offensive to human dignity” and added that “[t]here may well exist certain factual inequalities that might legitimately give rise to inequalities in legal treatment that do not violate principles of justice. They may in fact be instrumental in achieving justice or in protecting those who find themselves in a weak legal position.” The Court also indicated that legitimate differential treatments are only those that have “a legitimate purpose” and do not “lead to situations which are contrary to justice, to reason or to the nature of things.” In conclusion, for the IACtHR “there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.”

The Court reasserted this doctrine in the advisory opinion Juridical Condition and Rights of the Undocumented Migrants. This time the IACtHR not only signaled that “[d]istinctions based on de facto inequalities may be established [when] such distinctions constitute an instrument for the protection of those who should be protected, considering their situation of greater or lesser weakness or helplessness,” but was also clear that “States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations.”

As mentioned above, several of the national constitutions of the countries selected for the research project have clauses allowing for the restriction of fundamental rights on grounds of “morality,” “honesty,” “public order,” and so forth. Some constitutions contain general clauses mentioning the protection of public morality and public order as important state goals. For example, article 19 of the Federal Constitution of Argentina establishes a general protection of “public order and morality” when it sets forth that “the private actions of men that do not offend in any way public order and morality or the rights of third parties are only reserved to God and beyond the authority of magistrates.” A very similar provision may be found in article 28 of the Constitution of Costa Rica, which sets forth that “private

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245 Id. ¶ 22.
246 Id. ¶ 28.
248 Id. ¶ 56.
249 Id. ¶ 57.
250 Id.
252 Id. ¶ 89.
253 Id. ¶ 104.
actions that do not harm morality or public order or infringe the rights of third parties are beyond the reach of the law.” In the case of the Guatemalan Constitution, its Preamble mentions a general protection of the “social moral values of society” in the context of the recognition of the family as the “primary and fundamental genesis of the spiritual and moral values of society.” However, the text of the Constitution of Guatemala only mentions morality as a limit to fundamental rights when, in article 35, it establishes that whoever exercises freedom of thought in violation of private life or morality will be held liable according to law.

A common domestic constitutional authorization to public authorities to imposing limits on fundamental rights in the LAC region appears when the Constitution guarantees specific fundamental rights that may not be exercised in contravention of public morality, public order, good customs, national security, or other similar notions. For example, article 59 of the Peruvian Constitution guarantees freedom to work and freedom of enterprise, commerce and industry, but makes clear that their exercise should not be contrary to public morality, health, and security. Similarly, article 19 of the Chilean Constitution protects freedom of conscience (article 19-6), freedom to teach (article 19-11), freedom of association (article 19-15), freedom to work (article 19-16), and freedom to pursue economic activities (article 19-21) and establishes that the only limits to their exercise are morality, good customs, public order, and national security. The Constitution of Jamaica follows a similar pattern to the one established by the Chilean Constitution when allowing public authorities to limiting fundamental rights. The Jamaican Constitution thus guarantees the exercise of several fundamental rights and freedom and authorizes its limitation by law in the interests of defense, public safety, public order, morality or public health. The specific freedoms and rights that may be limited in this fashion are the freedom of movement (section 16-a-3), the protection against arbitrary searches (section 19-2-a), the right to a public and fair trial (section 20-4-c-ii), the freedom of conscience (section 21-6-a), the freedom of expression (section 22-2-a-ii), and the freedom of peaceful assembly and association (section 23-2-a-i).

In the case of Mexico, article 6 of the Federal Constitution establishes that the freedom to manifest one’s ideas will not be the object of “any judicial or administrative inquiry” unless it violates morality, the rights of third parties, or incites the commission of a crime. In a similar vein, article 7 of the Mexican Federal Constitution guarantees the right to freely write and publish, forbids previous censorship and provides that the only limits to this right are “the respect for private life, morality, and public peace.” An interesting feature of the Federal Constitution of Mexico that also trickles down to the constitutions of several states is the provision set forth in article 34-II whereby Mexican citizenship is subjected to having “an honest way of living.” Morality and good customs are mentioned by article 75 of the Constitution of Costa Rica in the context of freedom of religion when it sets forth that although Roman Catholicism is the religion of the State, other religions may be exercised provided they “do not oppose universal morality and good customs.” Similarly, article 45 of the Constitution of the Dominican Republic of 2010 provides that freedom of conscience and religion may be exercised according to “public order and respect for “good customs.” Finally, the Constitution of Colombia only mentions morality in article 34 as a limit on the right to property when it permits the taking of assets obtained by means detrimental to “social morality.”

The doctrinal elaboration of the concept of “social morality” by the Colombian Constitutional Court is worth exploring as it represents a good example of how in a democratic polity this notion may be construed in a way that does not embrace specific moralities based on particular notions of the good.

254 The majority of Mexican state constitutions conditions citizenship to having “an honest way of living.” This provision may be found in the constitutions of Baja California Sur (article 26), Campeche (article 17-II), Coahuila (article 11-I and II), Colima (article 12-II), Chiapas (article 8-I and II), Durango (article 15), Guanajuato (article 22), Guerrero (article 16), Hidalgo (article 12-IV), Morelos (article 13-II), Nayarit (article 16-III), Nuevo León (article 35), Oaxaca (article 23), Puebla (article 19-II), Quintana Roo (article 40), San Luis Potosí (article 24-II), Sinaloa (article 8-II), Tamaulipas (article 6-II), Yucatán (article 6-III) and Zacatecas (article 13-I). However, some of these constitutions go further and establish that a person loses her state citizenship on grounds of “vagrancy,” “drunkenness,” or “contumacious gambling.” This is the case of the constitutions of Nayarit (article 19-VII), Nuevo León (article 38-V), Puebla (article 22-VII) and Tamaulipas (article 9-V).
Another interesting aspect of this constitutional doctrine is that it has been mainly developed in cases that implicate the constitutional regulation of aspects of human sexuality. The Constitutional Court of Colombia first dealt with the concept of “social morality” when it had to decide upon the constitutionality of an 1887 statute that established that custom was a source of law if it was general and conforming to “Christian morality.” On that occasion, the Court validated the statute, but clarified that the expression “Christian morality” should be understood as “general morality” or “social morality,” which is “the one prevailing in every polity in its own circumstance.” The Court also decided that such an understanding of morality “rules out individual morality; what is individual is the assessment everyone makes of her own acts in relation to social morality.”

The Constitutional Court later clarified this doctrine when it was called to decide on the constitutional validity of the criminalization of incest. In the Court’s view, that criminalization did not violate the Colombian Constitution because, among other reasons, it was compatible with a notion of “positive” or “public” morality. The Constitutional Court explained that “the public morality that may operate as a limit to freedom is the one that is rationally necessary to attune individual life plans that, in spite of being absolutely contradictory, are compatible with a constitutional democracy. In addition, this morality is crucial to combine individual freedom with the responsibility and solidarity that make constitutional democracy possible.” This notion of public morality meant for the Colombian Constitutional Court that “the [constitutional] preference for freedom —and this is of key importance— cannot submit to a vision founded on prejudice, ignorance, the simple generalized preference, or the mere dictates of a religion or a cosmogony that may not be extended to the non-believers. The cost of imposing or maintaining public morality should never translate into making any person an instrument or in the loss of her dignity and self-esteem.” According to this argument, any public decision solely based on the defense of a principle of public morality should, in the Court’s view, be subjected to a “strict proportionality scrutiny.”

This notion of public morality was also used by the Constitutional Court of Colombia to validate a 1989 statute that required that adopting parents be “morally fit” when adopting children. This was the case that first raised the issue of the constitutional validity of adoption of children by same-sex couples. On that occasion, the Court validated the requirement, but clarified that moral fitness had to be understood in light of its previous doctrine on public morality. For the Constitutional Court, this meant that any public official in charge of granting adoptions, when assessing the requirement of moral fitness, is forbidden to resort to “her personal ethical or religious convictions,” and therefore is obligated to base her decisions on the notion of “public” or “social” morality.

The criteria on public morality were applied again by the Court in a case where the Police of a town on the Colombian Caribbean harassed and arrested several gay men who used to gather near a commercial zone on the town’s beach. The Police justified its actions arguing that the owners of several shops in the area had complained that the gay men were behaving in ways “contrary to morality, ethics, and good customs.” The Constitutional Court protected the gay petitioners and ordered the Police authorities to stop harassing them. On this occasion, the Court observed that “reasons based on morality, even if they reflect the opinion of the majority at a certain point in time, may violate the right to autonomy of persons whose life plan is inimical to the vital projects accepted by a majority of citizens.” For the Constitutional Court, the sort of public morality that may operate as the foundation of administrative decisions that affect personal freedom —such as the arrest of citizens— is only a public morality “that

256 Id. ¶ 4.
257 Id.
259 Id. ¶ 10.8.
260 Id.
261 Id. ¶ 10.7.
does not reflect collective or individual perfectionist ideas.”

In the court’s view, any administrative decision exclusively based on reasons of public morality should therefore be subjected to a strict judicial scrutiny of proportionality.

3.1.3. Domestic Legislation and Judicial Decisions

This subsection describes selected illustrative legislative and judicial domestic developments in the countries selected for the research project that may have a positive impact on the advancement of sexual health through human rights standards. The subsection describes developments related to sex equality and sexual orientation.

3.1.3.1. Sex Equality

Although in LAC sex equality has been mainly advanced through legislative initiatives, there is important judicial doctrine that should be highlighted as a way to illustrate how women’s equality is a necessary platform to advancing sexual health through human rights standards. This subsection will thus first describe domestic legislative developments related to women’s rights to equality and non-discrimination, and then will address some domestic illustrative judicial decisions on the same topic.

3.1.3.1.1. Domestic Legislation

Legislative developments concerning women’s rights to equality and non-discrimination in LAC may be fairly represented by (1) general anti-discrimination statutes that guarantee sexuality equality, (2) affirmative action statutes and public policies aimed at promoting substantive sexuality equality, and (3) legislation that criminalizes discrimination based on several sexuality grounds.

Several countries in the region have enacted general anti-discrimination statutes guaranteeing sex equality and prohibiting discrimination based on sex, among other grounds related to sexuality. The cases of Mexico and Argentina are illustrative of this practice of protecting women’s equality rights.

In 2003, Mexico’s Federal Congress enacted the Federal Act to Prevent and Eliminate Discrimination (Ley Federal para Prevenir y Eliminar la Discriminación), which develops article 1 of the Mexican Federal Constitution, thoroughly amended in 2001 to explicitly recognize the existence of discrimination in Mexican society and consequently prohibit discriminatory practices based on several grounds. Article 4 of this law defines as discrimination “any distinction, exclusion or restriction that, based on ethnic or national origin, sex, age, disability, social or economic condition, health status, pregnancy, language, religion, opinions, sexual preferences, marital status or any other, has the effect of preventing or depriving persons of the recognition or the exercise of their rights and their real equality of opportunities” (emphasis added). In addition, while article 2-II of the Federal Law explicitly states that affirmative action legislation and affirmative action public and education policies do not amount to discrimination, article 6 establishes that the provisions of the law, as well as the actions of federal authorities, should be interpreted in accordance with international human rights law on equality and non-discrimination (including “resolutions and recommendations adopted by multilateral and regional bodies”).

Article 4 of this law is further developed by article 9, which defines an important set of discriminatory conducts. Among these, the conducts established in sections II (establishing teaching methods or contents

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264 Id. ¶ 6.3.
265 Id. ¶ 6.1.
266 This subsection does not include issues of women’s sexual and reproductive health (particularly access to abortion and contraception), which may also be conceptualized from the equality and the non-discrimination perspective. See, e.g., Reva B. Siegel, Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression, 56 Emory L.J. 815 (2007). Developments on these topics will be described in Section 3.5 infra.
that assign roles inimical to equality or that communicate a condition of subordination), III (prohibiting the free election of a job or restricting the conditions of access, permanence and promotion in a job), IV (establishing differences in salaries, social security benefits, and work conditions for equal jobs), VI (denying or limiting the information on reproductive rights or preventing the free exercise of the right to decide on the number and time spacing of children), VII (denying or conditioning the access to health services), VIII (preventing the fair participation in a civil, political or any other sort of association), IX (denying or conditioning the right to political participation, and, more specifically, the right to vote, the right to be elected for public office, and the right to participate in the development of government policies and programs), X (preventing the exercise of the right to property), XIII (applying any social use or custom that offends human dignity and integrity), XIV (preventing the free election of a spouse or partner), XV (offending, ridiculing or promoting violence on grounds of sex or pregnancy through messages or images in the media), XVIII (restricting the access to information), XX (preventing the access to social security and its benefits or establishing restrictions in the access to health insurance), and XXIII (exploiting or giving abusive or degrading treatments) are particularly relevant to sex equality.

The Federal Law also defines important affirmative action measures for certain social groups. With regards to women, article 10 sets forth that federal authorities have to adopt affirmative action measures aimed at (1) promoting mixed education and fostering the permanence of girls and women in the education system in every school level (article 10-I), (2) offering complete and updated information, as well as personal counseling, on reproductive health and contraceptive methods (article 10-II), (3) guaranteeing the right to decide on the number and time spacing of children and establishing the conditions for the exercise of this right in health and social security institutions (article 10-III), and (4) endeavoring to create centers for child development and day-care centers and making sure that the access to these institutions is available to women who request the service (article 10-IV).

It is important to note that the Mexican Federal Law on discrimination creates the National Council to Prevent Discrimination (Consejo Nacional para Prevenir la Discriminación), CONAPRED, which is the federal agency in charge of preventing and eliminating discrimination and developing the mandates and obligations established by the Federal Law (articles 16 to 42). In particular, the CONAPRED has to the power to hear complaints for discriminatory conducts committed by public officials or private parties (articles 43 to 82) and adopt administrative measures to prevent and eliminate discrimination in cases where discrimination is verified (article 83).

In 2006, the General Act on Equality between Women and Men (Ley general para la igualdad entre hombres y mujeres) complemented the Mexican anti-discrimination statute. This statute, aimed at “regulating and guaranteeing equality between women and men and proposing institutional lines of action and mechanisms that guide the Nation towards the fulfillment of substantive equality in the public and private realms, and promoting women’s empowerment” (article 1), basically distributes competences between the federal, state, and local levels in order to attain substantive equality between men and women. According to this law (articles 9, 17, 33-45), the basic lines of action of the Mexican national policy on sex equality are the promotion of equality between men and women in all aspects of life, the construction of sex equality in all sectors of the economy, the promotion of a balanced political representation and participation of women and men, the inclusion of a gender perspective in public budgets, the promotion of equality of access for women and men to socioeconomic rights, the design of affirmative action strategies for women, the eradication of gender violence, and the elimination of stereotypes based on sex, among other important institutional actions and strategies.

In the case of Argentina, the Federal Congress enacted the Anti-Discrimination Act of 1998 (Law 23.592). Although this legislation is not as thorough and specific as the Mexican statute, article 1 establishes that “whomever arbitrarily prevents, obstructs, restricts, or impinges upon in any way the full

267 For an overview of the Argentine legislation guaranteeing sex equality and its historical evolution see MÓNICA PETRACCI & MARIO PECHENY, ARGENTINA: DERECHOS HUMANOS Y SEXUALIDAD 47-64 (2006) [hereinafter PETRACCI & PECHENY, ARGENTINA].
exercise on egalitarian grounds of the fundamental rights and guarantees recognized by the National Constitution, will be obligated, upon request of the victim, to leave without effects or to stop the discriminatory act and to repair the material and moral harm it has caused.” Article 1 then adds that its application is mainly geared towards “discriminatory acts or omissions based on grounds such as race, religion, nationality, ideology, political or guild opinion, sex, economic position, social condition or physical characteristics” (emphasis added). The rest of the law basically emphasizes discrimination based on race, ethnic origin and religion, criminalizes racial, ethnic or religious hatred, persecution and propaganda (articles 2 and 3), and makes illegal discrimination in entertainment premises on any of the grounds listed in article 1 of the law (articles 4 to 6).

This anti-discrimination statute was later complemented by Law 24.515, which creates the National Institute against Discrimination, Xenophobia and Racism (Instituto Nacional contra la Discriminación, la Xenofobia y el Racismo), INADI. As the Mexican CONAPRED, INADI is a federal agency in charge of devising national public policies and specific measures aimed at combating discrimination, xenophobia and racism (article 2). Among its more specific functions, that may be relevant to women’s equality, the INADI is the institution in charge of the application of Argentina’s anti-discrimination statute (article 4-b), the design and promotion of education campaigns aimed at highlighting social and cultural pluralism and eliminating discriminatory attitudes (article 4-c), of hearing complaints on discriminatory conducts (article 4-e), providing services of free and comprehensive counseling to victims of discrimination (article 4-g), and informing public opinion on discriminatory conducts and attitudes in any area of national interest, especially in education, health, social security, and employment (article 4-j).

With regards to affirmative action statutes and public policies aimed at promoting substantive women’s equality and political participation or special statutes aimed at promoting and guaranteeing gender equality (not necessarily including affirmative action measures), the cases of Argentina, Colombia, and Peru are illustrative. In the case of Argentina, the Federal Congress enacted the so-called Quota Act (Law 24.012) (Ley de cupo femenino), which guarantees that in any list of candidates submitted for the popular vote at least 30% of the candidates should be women distributed in the list in a way that guarantees their possibility of being elected. As in the Argentine case, the Congress of Colombia enacted the Quota Act (Law 581 of 2000) (Ley de cuotas) that establishes that women should hold 30% of high-ranking offices in the legislative, the executive and the judicial branch at the national, the state, and the local level. In 2007, the Peruvian Congress enacted the Equal Opportunity for Men and Women Act (Law 28.983) (Ley de igualdad de oportunidades entre hombres y mujeres), which, in addition to forbidding sex discrimination (article 2), purports to set up “the normative, institutional and public policy framework to guaranteeing to men and women the exercise of their rights to equality, dignity, free development, well-being and autonomy, forbidding discrimination in every sphere of their public and private lives, and seeking full equality” (article 1). The prohibition of sex discrimination set up in this statute is additionally reinforced by the provisions of article 37-1 of the Code of Constitutional Procedure (Law 28.237 of 2004), which sets forth that the judicial writ aimed at the protection of constitutional fundamental rights (amparo) may be directed towards the protection of the right not to be discriminated against on grounds of sex, among other factors.

Some countries in the LAC region have sought to prevent, eradicate, and punish discrimination based on sex (and other grounds related to sexuality) through their criminal law. This way of combating discrimination may adopt two modalities. Criminal codes can either establish discrimination as a freestanding crime (as in Peru, the Dominican Republic, and Mexico), or they can set forth that discriminatory intention is a general ground for aggravated sentences for all crimes (as in Colombia).

The Criminal Code of Peru penalizes discrimination in article 323. According to this provision, “any person who, directly or through third parties, discriminates against one or more persons or a group of persons, or publicly incites or promotes discriminatory acts on racial, religious, sexual, genetic, birth, age, disability, language, ethnic and cultural identity, attire, political or any other kind of opinion, economic condition grounds, with the purpose of depriving or impinging upon the recognition or the
exercise of the rights of the person, will be punished with imprisonment from to 2 to 3 years or community services between 60 and 120 days” (emphasis added).

In the case of the Dominican Republic, articles 336 and 336-1 of the Criminal Code criminalize discrimination and punish it with imprisonment to up to two years and fines to up to 50,000 Dominican Pesos. Discrimination is defined as “any distinction between persons” on grounds of sex, family situation, health condition, customs and political opinions, among others. Discriminatory acts that may be subjected to criminal sanctions consist in refusing to supply a good or a service, impinging on the regular exercise of any economic activity, refusing to hire, sanction or layoff a person, making dependent the supply of a good or a service upon any of the prohibited grounds of discrimination, and making dependent the offer a job upon any of the prohibited grounds of discrimination.

As a federal country, where criminal law is enacted by state legislatures, Mexico is an interesting case in the study of how discrimination has been criminalized in the LAC region. Seven states and the Federal District included the crime of discrimination in their criminal codes after the 2001 amendment to article 1 of the Federal Mexican Constitution. In every case, discrimination based on sex, pregnancy and marital status —as grounds relevant to sex equality— is criminally punished with imprisonment from six months to three years, community work, and fines that may range between 15 and 200 daily salaries. The discriminatory conducts relevant to sex equality that may be criminally prosecuted are the provocation or the incitement to hatred or violence, the denial of a service or a benefit without a reasonable excuse, the offense to a person or a group of persons or their exclusion, and the denial or restriction of labor rights.

As mentioned before, the second modality of criminalizing discrimination is through making discriminatory intent a general ground for aggravated sentences for all crimes when they are committed with a discriminatory intention. For example, article 58-3 of the Criminal Code of Colombia sets forth that any criminal conduct that is “inspired in intolerant or discriminatory motives related to race, ethnic origin, ideology, religion, beliefs, sex or sexual orientation, or any illness or disability of the victim” (emphasis added) will be punished with an aggravated sentence. Another interesting case of this modality of criminalizing discrimination on grounds of sexual orientation is represented by article 123-bis of the Criminal Code of Costa Rica, which regulates the crime of torture. According to this code, torture is an aggravated form of the crime of “personal injuries” (“lesiones personales”) and it may be committed by anyone who “causes physical or mental sufferings to another person, intimidates or coerces him or her for an act that is suspected he or she has committed, in order to obtain from him or her or a third party any confession or information, for reasons of race, nationality, gender, age, political, religious or sexual option, social position, economic situation or marital status” (emphasis added).

An interesting and distinctive trend in LAC with regards to the penalization of discriminatory conducts based on sex has been the inclusion of the crime of sexual harassment into the criminal codes of several countries. Differently to other parts of the world, where the victim of sexual harassment can only bring a civil action against the harasser (who, after the trial, may be obligated to pay punitive or compensatory damages to the victim), many countries in the LAC region have included sexual harassment as a

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268 This is the case of the Federal District (article 206) and the states of Aguascalientes (article 205 bis), Baja California Sur (article 337), Coahuila (article 383 bis), Colima (article 225 bis), Querétaro (article 169), Quintana Roo (article 124 bis), and Tlaxcala (article 255 bis).

269 For the origins of the argument of sexual harassment as a violation of sex equality see generally Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979). For an overview of how sexual harassment became a sex discrimination concern from the perspective of international human rights law, see generally Christine Chinkin, Sexual Harassment: An International Human Rights Perspective, in Directions in Sexual Harassment Law 655-671 (Catharine A. MacKinnon & Reva B. Siegel eds., 2003). The model of “heterosexual sexual desire” (an ideological construct that has also been termed the “eroticization of domination”) upon which MacKinnon’s now classical vision of sexual harassment is based has been harshly criticized both from the side of feminism and queer theory. For a feminist critique of MacKinnon’s influential views on sexual harassment see, e.g., Vicki Schultz, Reconceptualizing Sexual Harassment, 107 YALE L.J. 1683 (1998); Vicki Schultz, The Sanitized Workplace, 112 YALE L.J. 2061 (2003). For critiques of sexual harassment framed from a queer theory perspective see, e.g., Duncan Kennedy, Sexual Abuse, Sexy Dressing and the Eroticization of Domination, 26 NEW
specific crime in their criminal codes that is generally punished with imprisonment time and fines. Mexico, Colombia, Brazil, and the Dominican Republic are illustrative cases of this trend. Yet, the convenience of the criminalization of sexual harassment has been intensely debated and, in the end, some countries, like Argentina, after some efforts to penalize this form of sex discrimination, decided to combat it through other legal means. 270

In the case of Mexico, the Federal District and twenty-five states have introduced sexual harassment into their criminal codes as a crime against sexual or moral integrity. 271 In general terms, with variations in phrasing, Mexican legislation considers that sexual harassment is a crime committed by any person who, using his or her hierarchical position in the workplace, in a teaching position or in any other social ambit that implies subordination, harasses another person in order for that person to have sexual intercourse or any other sexual act with him or her or a third party. The crime is also committed when the sexual purposes of the harasser are achieved through the use of threats. Punishment for this crime is imprisonment from six months to five years and fines to up to 750 daily salaries.

Similarly, article 333-2 of the Dominican Criminal Code criminalizes sexual harassment as a separate discriminatory crime. This provision of the Code establishes that “sexual harassment is any order, threat, constraint or offer aimed at obtaining favors of a sexual nature performed by a person (a man or a woman) who abuses of the authority of his or her position.” This criminal conduct is punished with prison to up to one year and fines between 5,000 and 10,000 Dominican Pesos. In 2001, the Criminal Code of Brazil was amended to introduce sexual harassment (assédio sexual). This offence is defined by article 216-A as forcing anyone through the use of the power inherent to a hierarchical superior position stemming from a job or office with the intent to obtaining a sexual favor or advantage. The sentence for this crime is imprisonment of one to two years and, if the victim is under eighteen years of age, the sentence will be increased by a third. Finally, in the case of Colombia, article 210-A of the Criminal Code (included by Law 1257 of 2008) establishes the crime of sexual harassment as a crime that is committed by any person who, through the use of his or her (1) “manifest superiority,” or (2) relations of power or authority, or (3) age, sex, working, social, or family position, physically or verbally harasses or persecutes with sexual ends any other person in order to achieve for him or her a third party any sort of benefit. This crime is punished with imprisonment from one to three years.

As mentioned above, the debate on the convenience of criminalizing sexual harassment is well illustrated by the Argentine case. In 2006, the Senate of Argentina approved an initiative seeking to amend the National Criminal Code to introduce the crime of sexual harassment. The initiative raised an important number of objections. The critics generally observed that, because of the nature of the criminal law, it


270 It is worth noting that Chile, Costa Rica, and Peru also elided the regulation of sexual harassment through their criminal law and instead tackled this phenomenon by means of their labor legislation. In the case of Chile, Law 20.005 (2005) amended the Labor Code to introduce sexual harassment as a conduct that affects human dignity. According to this law, sexual harassment conducts should be investigated through administrative procedures and, in case they are proved, the victim may collect damages from the perpetrator. In Costa Rica, Law 7.476 (1995) regulates sexual harassment in the workplace and education institutions. According to this bill, sexual harassment is a discriminatory practice that should be investigated by labor judges. If the perpetrator is found to be responsible of the sexual harassment conducts he or she may be reprimanded, suspended, or laid off from his or her job. Finally, in Peru, Law 27.942 (2003) regulates sexual harassment in the workplace and in education, police, and military institutions. Similarly to the Costa Rican case, sexual harassment could be investigated either through internal procedures conducted in the workplace or in the other institutions where the law is applicable, or by means of judicial procedures. In both cases, if the perpetrator indeed sexually harassed the victim, she or he may collect damages.

271 The crime of sexual harassment may be found in the criminal codes of the Federal District (article 179) and of the states of Aguascalientes (article 120), Baja California (articles 184 bis and 184 ter), Chiapas (articles 237 and 238), Chihuahua (article 247), Coahuila (article 399 bis), Colima (article 216 bis), México (articles 269 and 269 bis), Guerrero (articles 145 bis and 146), Jalisco (article 176 bis), Michoacán (article 246 bis), Morelos (article 158), Nayarit (article 260 bis), Nuevo León (articles 271 bis and 271 bis 1), Oaxaca (article 241 bis), Puebla (article 158 bis and 278 ter), Querétaro (article 180), Quintana Roo (article 130 ter), San Luis Potosí (articles 158 bis, 158 ter, and 158 quater), Sinaloa (article 185), Sonora (article 212 bis), Tabasco (articles 159 bis and 159 bis 1), Tlaxcala (article 227 bis), Veracruz (article 159 bis), Yucatán (article 308), and Zacatecas (article 233).
would be more difficult for victims to prove that they had been harassed. The way in which the criminal law regulates the burden of proof, and especially the fact that sexual harassment generally occurs in private settings, with no witnesses who could validate the claims of the victim — therefore creating a judicial scenario where the version of the harasser is confronted to the version of the victim, who has the burden of proof — makes peculiarly difficult for victims to make their case and prove the crime beyond a reasonable doubt. Critics recommended that treating sexual harassment through labor law — based on the protection of the worker and more lenient evidence standards — was a better alternative that offered more possibilities of reparation to the victims of this conduct. In the end, the Argentine House of Representatives (Cámara de Diputados) did not approve the bill, which therefore did not become a law. In Argentina, sexual harassment is currently regulated through several kinds of legislation, both at the national and the provincial levels. Sexual harassment has thus been tackled either through labor legislation in public employment or as part of laws regulating violence in the workplace.

More recently, the Argentine Congress passed Law 26.485 on the prevention, punishment, and eradication of violence against women (Ley de protección integral para prevenir, sancionar y erradicar la violencia contra las mujeres en los ámbitos en que desarrollen sus relaciones interpersonales), in which sexual harassment is regulated as a form of violence against women. While article 5 of this law includes harassment as a form of psychological and sexual violence against women, article 6 characterizes systematic psychological harassment aimed at excluding a female worker from the workplace as a form of workplace violence against women. The most interesting aspect of this law is that it conceives of violence against women — and hence sexual harassment — as a structural phenomenon of sex discrimination warranting an approach through public policies that implicate the actions of all state organs and even civil society. Although the law establishes a special judicial procedure for victims of violence, it is not of a criminal nature. Once the procedure is over, women affected by any of the acts of violence defined in the bill may collect civil damages from the perpetrator.

3.1.3.1.2. Domestic Judicial Decisions

Several supreme or constitutional courts in the LAC region have protected women's rights to equality and non-discrimination. The regional domestic jurisprudence on this topic will be illustrated with decisions of the Constitutional Court of Colombia and the Supreme Court of Mexico. Issues of sex equality in the doctrine of these courts may be organized along two main themes. The first theme has to do with the "classic" way in which courts have enforced women's formal equality through the eradication of legal classifications based on sex that reflect prejudices against women or reproduce stereotyped gender roles. The second theme is related to a more substantive vision of equality generally appearing in the context of judicial decisions validating legal provisions that seek to eradicate women's subordinated social status. However, the classification of sex equality jurisprudence along these two themes serves explanatory and organizing purposes. As it happens in other equality contexts, such as race equality, where issues may be tackled both from an anti-classification or an anti-subordination


273 See Bergallo, Algunas enseñanzas, supra note 272 at 228-30. For a general overview of Argentina’s current legal regime on sexual harassment see generally ELPIDIO GONZÁLEZ, ACOSEO SEXUAL (2007).

274 The summary of the doctrine of these courts on sex equality has greatly benefited from the information and the arguments included in CUERPO Y DERECHO, supra note 1 at 60-72, 366-72; 1 DEFENSORÍA DEL PUEBLO DE COLOMBIA, TRES LUSTROS DE JURISPRUDENCIA CONSTITUCIONAL: PRIMER INFORME DEL OBSERVATORIO DE JUSTICIA CONSTITUCIONAL DE LA DEFENSORÍA DEL PUEBLO 88-115 (2009) [hereinafter DEFENSORÍA, TRES LUSTROS]; Francisco M. Pou Giménez, Género y protección de derechos en México: virtualidad y límites de la jurisdicción (2009) (unpublished manuscript, on file with author) [hereinafter Pou Giménez, Género y protección de derechos en México].

275 See supra note 38 and accompanying text.
perspective, the language of both ways of thinking about equality may appear and used simultaneously in
the same judicial decision. Reading judicial decisions on sex equality topics should therefore aim at
trying to establish how much work both of these principles do to producing the final decision adopted by
a court or a judge.276 For example, the Constitutional Court of Colombia has generally considered that
legal classifications based on sex are valid when aimed at attaining women’s substantive equality
through “dismantling the discrimination to which the female population has historically been subjected”
(emphasis added),277 or by means of the “remedyng the traditional inferiority of women in society.”278
For the Court, however, such classifications should not be premised exclusively on the “female
condition” of its beneficiaries, but on the “real operation” of “discriminatory conducts or practices that
justify them.”279

According to these views on sex equality, constitutional or supreme courts in the LAC region have, for
example, studied the constitutional validity of social security statutes that establish different ages of
retirement for men and women and protective legislation for pregnant women. A good example of how
both discourses on sex equality (anti-classification and anti-subordination) may be used to validate
legislation promoting women’s equality is the way in which in 1994—and, then, in 1998—the
Constitutional Court of Colombia validated the provisions of the Social Security Act (Law 100 of 1993)
that established a different age of retirement—and therefore a different age for accessing retirement
pensions—for women and men (55 years old for women and 60 years old for men).280

In its decision, the Court began its analysis by framing the issue as a formal equality problem. According
to the Court, “the acknowledgement that certain individuals and groups in spite of being equal before the
law are not equal in reality is utterly important when analyzing a legal provision that takes distance from
such traditional features of law as generality, abstraction, universality, and permanence.”281 In spite of
this language, the Constitutional Court went on to study the differential treatment between men and
women as a legal measure aimed at compensating women for a past of discrimination in the access to
employment. In the Court’s view, the difference in the age of retirement between the sexes could be
reasonably explained through a historical understanding of the participation of women in the workforce.
According to the Constitutional Court, when women first entered the workforce they had to perform
second class jobs. Later, when women were able to access better work positions, they were not only
prevented from developing them in equal terms to men, but they had to keep on performing their
domestic obligations. For the Court, “the addition of domestic and regular work gives an idea of the
complexity and the heterogeneity of the tasks that women who participate in the workforce have to
perform… The hard working days and the lack of free time turn female workers in a group that is
especially prone to the deterioration of their bodily and mental health.”282 In view of this fact, the Court
considered that an earlier age of retirement for women was not sex discrimination.

The most striking example of how the Constitutional Court of Colombia has examined legal
classifications based on sex through an anti-subordination perspective of equality is perhaps the decision
where the Court validated Colombia’s statute providing that women should hold 30% of high-ranking
offices in the legislative, the executive, and the judicial branch at the national, the state, and the local
level (Law 581 of 2000).283 The basic question the Constitutional Court had to answer was if this
affirmative action bill—and, more precisely, the 30% quota—was a form of sex discrimination. In the
Court’s view, a substantive view of equality aimed at correcting the subordination of certain social

276 See generally Jack M. Balkin & Reva B. Siegel, The American Civil Rights Tradition: Anticlassification or
Antisubordination?, 58 U. MIAm L. REV. 9 (2003); Reva B. Siegel, Equality Talk: Antisubordination and Anticlassification
279 Id.
282 Id. ¶ VII.e.
groups not only authorizes but also obligates the State to adopt affirmative action policies. These policies, however, are constitutionally valid only if they are used “not to marginalize certain individuals or groups or to perpetuate inequalities, but to lessen the harmful effect of social practices that have situated these individuals or groups in debased social positions.” Based on this view of the constitutional status of affirmative action in Colombia, the Constitutional Court observed that the 30% quota was “reasonably” and “proportionally” tailored to accomplish its aim of “remedying today’s low participation [of women] in high-ranking public offices.” It therefore did not discriminate against those men who could not access the 30% of high-ranking offices the statute set aside for women. Additionally, the Court considered that the 30% quota established an adequate threshold for women’s participation, for it created “a ‘critical mass’ that allows women to overcome discrimination barriers and exercise a considerable influence in the adoption of public decisions.”

The Colombian Constitutional Court has also validated special treatment and legal classifications based on pregnancy. This doctrine has thoroughly developed article 43 of the Constitution of Colombia, which establishes that “during pregnancy and after childbirth” women will be especially assisted and protected by the State. The Court’s basic position on this issue is that laying off a pregnant woman from a job or a expelling a pregnant student from a school or a university are forms of sex discrimination. This doctrine is interestingly based on a combination of autonomy and equality arguments. While the fundamental right to autonomy (free development of personality) allows women to freely decide to become pregnant and/or carry their pregnancy on, the right to equality prohibits that women who have made these vital options be discriminated against on grounds of these decisions. The Constitutional Court has applied this doctrine in the fields of employment and education.

In employment, the Court has ruled that pregnant women have the right to “enforced employment stability” (*estabilidad laboral reforzada*), which implies that employers are forbidden to lay off women during pregnancy and a period of three months after childbirth. Based on article 11-2 of the CEDAW and ILO’s Recommendation N° 95 and Convention N° 103 on maternity protection, the Court considered that “pregnant women have a right to enforced employment stability because the unjustified layoff of pregnant women aimed at avoiding additional costs and inconveniences for employers has been and still is one of the most conspicuous forms of sex discrimination.” In order to guarantee this right, the Constitutional Court decided that if a pregnant woman is laid off during her pregnancy or during a period of three months after childbirth the layoff is presumed to be unconstitutional unless the employer is able to show that laying off the woman was duly authorized by a Labor Inspector (Colombia’s labor administrative authorities) on a ground for layoff explicitly authorized by labor legislation. This doctrine has been applied to several individual cases where women had been laid off because they were pregnant and employers were consequently enjoined and ordered to reinstate the petitioners, and, in some cases, to pay them punitive and compensatory damages. In these decisions, the Court clarified that the right of pregnant women to enforced employment stability applies if (1) the layoff takes place during pregnancy or the three months after childbirth, (2) when the layoff took place the employer knew or was supposed to know that the employee was pregnant because she had duly notified the employer about her condition, (3) the layoff is a consequence of the pregnancy of the employee, and (4) the Labor Inspector had not previously and expressly authorized the layoff.

The Constitutional Court of Colombia has similarly held that the constitutional prohibition of sex discrimination forbids schools and universities to expel pregnant students because of their condition. In

284 *Id.* ¶ 18.
285 *Id.* ¶ 34.
286 *Id.* ¶ 38.
288 *Id.* ¶ 8.
289 *Id.* ¶¶ 12-17.
the Court’s view, any sort of differential treatment for pregnant students (expulsion, prohibition to wear the school’s uniform, prohibition of attending graduation ceremonies, requiring pregnant students to take courses at times and schedules different to those of non-pregnant students, among others) that seeks to penalize pregnancy is a form of sex discrimination.\textsuperscript{292} For the Constitutional Court, not even Catholic schools or universities that condemn out-of-wedlock pregnancies because of their religious beliefs are allowed to expel pregnant students on religious freedom grounds.\textsuperscript{293}

Being consistent with its general doctrine of validating legal classifications based on sex through an anti-subordination perspective of equality, the Colombian Constitutional Court has overturned sex legal classifications that are not aimed at compensating women for their social subordination and a past of discrimination. In most of these cases, the Court has found that the legal classifications at stake were exclusively based on prejudice and/or stereotyped gender roles. In one case, the Court overturned article 140-7 of the 1887 Civil Code of Colombia, which established that a marriage between an adulterous woman and her “accomplice” was void, without setting forth a similar provision for adulterous men.\textsuperscript{294} In the Court’s view, this provision was unconstitutional because it reproduced “a patriarchal scheme according to which men enjoyed more prerogatives and recognition. This is evident if the implicit content of the provision is taken into account: adulterous women must be ‘punished;’ men, on the contrary, do not have any limit to their will and sexuality.”\textsuperscript{295} In a similar vein, the Constitutional Court deemed unconstitutional article 126 of the Civil Code, which established that civil marriages had to be celebrated by the judge of the district where the marrying woman lived.\textsuperscript{296} Although in this case the Court did not find any historical reason that clearly explained why civil marriage had to be celebrated in the district of the marrying woman, it observed that all hypothetical justifications —the provision either sought to protect women’s autonomy from the effects of marriage at a time in history where married women did not have legal capacity or, alternatively, it reflected the social tradition whereby the parents of the bride had to pay for the wedding— were all inadmissible from the perspective of sex equality for they “perpetuated stereotypes against women.”\textsuperscript{297} In another case, the Constitutional Court overturned article 342-1 of the Labor Code of Colombia, which prohibited female night work in industrial jobs.\textsuperscript{298} For the Court, this norm “far from having a protective aim is paternalistic and has the effect of excluding women from industrial jobs; it therefore amounts to a clear form of sex discrimination.”\textsuperscript{299} More recently, the Court struck down article 1134 of the Civil Code, which established that the person drafting a will could leave some assets to a woman in order to guarantee her “subsistence” provided she “remained single or in state of widowhood.”\textsuperscript{300} In the Constitutional Court’s view, this provision was unconstitutional because it reflected a stereotype according to which women (1) were dependent human beings who could not provide for their own subsistence, and (2) they could only be either married and therefore dependent on their husbands or unmarried and therefore dependent on some other source of income which guaranteed their subsistence.\textsuperscript{301}

If the previous recount of important decisions of the Constitutional Court of Colombia illustrates positive developments in the advancement of equality between men and women—or, at least, the will of a Court trying to advance a strong gender equality agenda—the doctrine of the Supreme Court of Mexico is useful to illustrate an opposite trend where sex equality has fared less better. As some commentators have already observed, the Mexican Court has a record of rationalizing gender stereotypes reflected in legal.

\textsuperscript{295} Id. ¶ VII.4.1.
\textsuperscript{296} See Const. Ct. Col., Decision C-112/00 (Feb. 9, 2000).
\textsuperscript{297} Id. ¶ 13.
\textsuperscript{298} See Const. Ct. Col., Decision C-622/97 (Nov. 27, 1997).
\textsuperscript{299} Id. ¶ V.
\textsuperscript{300} See Const. Ct. Col., Decision C-101/05 (Feb. 8, 2005).
\textsuperscript{301} Id. ¶¶ 3.3-3.4.
provisions (usually family law) by resorting to traditional visions of marriage, traditional family relations in Mexico, traditional Mexican gender roles, and so forth, as appropriate social and cultural lenses to establish the constitutional validity of a legal provision.\(^{302}\) For example, the Supreme Court has ruled that marriage is to be preferred to de facto partnerships (concubinatos) because the former is “the legal and moral form of establishing the family,”\(^{303}\) that women need to be “honest” and “chaste” for they are “the basis of the family,”\(^{304}\) that mothers should be privileged as guardians of their children because they are better endowed to provide for care,\(^{305}\) that while men need to prove their need for alimony it could be presumed that women will always need it,\(^{306}\) and that marriage is an honor to women and a social institution aimed at their protection,\(^{307}\) among other decisions.

This does not mean, however, that some positive sex equality developments may be located in the jurisprudence of the Supreme Court of Mexico. For example, the Court overturned a provision of the Civil Code of the State of Campeche that established different requirements for male and female adultery because it violated the constitutional guarantee of sex equality.\(^{308}\) More recently, it seems to be pulling back from its original view on the difference between marriage and de facto civil partnerships and heading towards a more democratic view on the matter based on the equality of all forms of family establishment.\(^{309}\) Other interesting more progressive recent decisions of the Mexican Supreme Court on sex equality have had to do, for example, with women’s domestic work,\(^{310}\) and the appropriate behavior of women in Mexican society (women as “honest” and “chaste”),\(^{311}\) among other issues.

\[3.1.3.2. \quad \text{Sexual Orientation} \]

In LAC discrimination based on sexual orientation has mainly been confronted through legislation. Some constitutional and supreme courts in the region have, however, adopted some important judicial decisions that advance equality for gays and lesbians. This subsection will first describe domestic legislative developments related to discrimination on grounds of sexual orientation, and then will summarize some domestic illustrative judicial decisions on the same issue drawn from the jurisprudence of the Constitutional Court of Colombia, the federal courts of Brazil, the Supreme Court of Argentina, the Constitutional Panel of the Supreme Court of Costa Rica, and the Supreme Court of Chile.

\[3.1.3.2.1. \quad \text{Domestic Legislation} \]

Legislative developments in LAC concerning the rights to equality and non-discrimination of gays and lesbians have basically taken the form of (1) discrimination prohibitions established in general anti-discrimination statutes and/or criminal legislation that punishes discrimination based on sexual orientation, and (2) family law legislation that has allowed same-sex civil unions or marriage and adoption of children by same-sex couples.

As in the case of sex equality,\(^{312}\) the anti-discrimination statutes enacted by Mexico and Argentina illustrate how gays and lesbians in LAC have gained statutory protection from discrimination based on their sexual orientation. In the case of Mexico, article 4 of the Federal Act to Prevent and Eliminate Discrimination includes “sexual preferences” as a prohibited ground of discrimination. As it was

\(^{302}\) See CUERPO Y DERECHO, supra note 1 at 368-72; Pou Giménez, Género y protección de derechos en México, supra note 274 at __-__.


\(^{309}\) See e.g., Sup. Ct. Mex., CT 1638/87 (Apr. 9, 2007).


\(^{312}\) See supra Section 3.1.3.1.1.
explained in the previous subsection, article 4 of this statute is complemented by the provisions of article 9, which establishes a list of forbidden discriminatory conducts. From the perspective of discrimination against gays and lesbians, the conducts established in sections II (establishing teaching methods or contents that assign roles inimical to equality or that communicate a condition of subordination), III (prohibiting the free election of a job or restricting the conditions of access, permanence and promotion in a job), IV (establishing differences in salaries, social security benefits, and work conditions for equal jobs), VII (denying or conditioning the access to health services), VIII (preventing the fair participation in a civil, political or any other sort of association), IX (denying or conditioning the right to political participation, and, more specifically, the right to vote, the right to be elected for public office, and the right to participate in the development of government policies and programs), XIII (applying any social use or custom that offends human dignity and integrity), XIV (preventing the free election of a spouse or partner), XV (offending, ridiculing or promoting violence on grounds of sexual preferences through messages or images in the media), XX (preventing the access to social security and its benefits or establishing restrictions in the access to health insurance), XXIII (exploiting or treating in an abusive or degrading fashion), XXVII (inciting to hatred, violence, rejection, scorn, defamation, insult, persecution or exclusion), and XXVIII (performing or promoting physical or psychological mistreatment for reasons of personal appearance, attire, way of speaking, gesticulation, or for having publicly assumed one’s sexual preference) have particular relevance.

While the Mexican anti-discrimination statute obligates federal authorities to adopt affirmative action measures and policies for women (article 10), boys and girls (article 11), the elderly (article 12), persons with disabilities (article 13), and indigenous peoples (article 14), it does not include a similar mandate for sexual minorities.

Although Argentina’s Law 23.592 (Anti-Discrimination Act of 1998) and Law 24.515 (creating the National Institute against Discrimination, Xenophobia and Racism, INADI), do not explicitly mention sexual orientation as a prohibited ground of discrimination, certain actions initiated by INADI illustrate how these two statutes operate as an important ground for adopting public policies aimed at eradicating discrimination based on sexual orientation. On the one hand, INADI has adopted programs such as Cities Free from Discrimination and Neighborhoods Free from Discrimination, which include important components aimed at the eradication of discrimination based on sexual orientation. On the other hand, Law 24.515 (article 4-a) entrusts INADI with the power to hear individual complaints of discrimination. If the Institute establishes that a discriminatory action or omission that violates Law 23.592 occurred it could recommend the adoption of actions aimed at eradicating them. Even if Law 23.592 does not explicitly refer to sexual orientation as a prohibited form of discrimination, INADI has generously interpreted article 1 to include sexual orientation as a prohibited form of discrimination. It has thus adopted several decisions in favor of gay or lesbian petitioners who had been discriminated against because of their sexual orientation.

313 Id.
314 For an overview of Argentine legislative developments related to discrimination based on sexual orientation see PETRACCI & PECHENY, ARGENTINA, supra note 267 at 64-89.
315 On these two programs and how they confront discrimination based on sexual orientation see http://www.inadi.gob.ar/inadiweb/?view=article&catid=39:programas&id=40:ciudadlibres&option=com_content&Itemid=1 (last visited May 13, 2010) and http://www.inadi.gob.ar/inadiweb/?view=details&id=60%3Alanzamiento-del-programa-comunas-libres-de-discriminacionoen-comuna-12&option=com_eventlist&Itemid=155 (last visited May 13, 2010).
316 See, e.g., INADI, Dictamen N° 033/07 (May 22, 2007) (INADI found that the gay petitioner was discriminated against because of his sexual orientation when he was verbally offended with homophobic slurs by the drivers of a company of public transportation of the City of Buenos Aires), Dictamen N° 041/07 (Jun. 14, 2007) (INADI found that the gay petitioner had been discriminated against because of his sexual orientation when a social security company did not grant him the pension of his deceased same-sex partner), Dictamen N° 045/07 (Jun. 29, 2007) (INADI found that a lesbian couple had been discriminated against on grounds of sexual orientation when they were harassed by the tenants of the building where they lived who offended them with homophobic slurs and graffiti painted on the walls of the building), Dictamen N° 069/08 (Mar. 31, 2008) (INADI found that the gay petitioner had been discriminated against because of his sexual orientation when a social security company did not extend health benefits to his same-sex partner), Dictamen N° 137/08 (Jun. 30, 2008) (INADI found that the gay
In Brazil, discrimination based on sexual orientation has been legislatively confronted at the state level through laws that specifically address this form of discrimination. The legislatures of the Federal District of Brasilia (Law 2.615 of 2000) and the states of Rio de Janeiro (Law 3.406 of 2000), São Paulo (Law 10.948 of 2001), Minas Gerais (Law 14.170 of 2002), Rio Grande do Sul (Law 11.872 of 2002), Santa Catarina (Law 12.574 of 2003), Paraíba (Law 7.309 of 2003), Mato Grosso do Sul (Law 3.157 of 2005), Maranhão (Law 8.444 of 2006), and Paraná (Law 6.971 of 2007) have all enacted laws aimed at the eradication of discrimination based on sexual orientation. While some of these statutes only refer to discrimination on grounds of homosexual status (Minas Gerais, Rio Grande do Sul, Rio de Janeiro, Brasilia, Pará, Paraíba, and Maranhão), others additionally include bisexual, transgender, and transvestite status (São Paulo, Santa Catarina, and Mato Grosso do Sul). Some of these state laws are more generous than others in their definition of discrimination on grounds of sexual orientation and the actions and omissions amounting to discrimination based on sexual orientation.

However, as some Brazilian commentators have observed, the statute passed by the State of Rio Grande do Sul (Law 11.872 of 2002) is perhaps the most principled, generous, and representative of this trend in the legislative protection of sexual minorities in Brazil. Article 1 of this bill interestingly ties discrimination based on sexual orientation to human dignity when it establishes: “Rio Grande do Sul… recognizes the respect to the equal dignity of every of its citizens and therefore promotes their integration and will punish the acts against that dignity, especially any form of discrimination based on sexual orientation, practices, manifestations, identity, or preferences exercised within the limits of every citizen’s freedom and without prejudices against others.” The main characteristic of the bill is perhaps its expansive thrust for (1) it protects both individuals and organizations (article 1-1 and 2), (2) when the discriminatory act has been committed by several perpetrators, liability equally extends to all of them (article 1-4), and (3) the law not only extends to discrimination against individuals but also to collective or diffuse forms of discrimination (article 1-5).

As to the discriminatory conducts amounting to discrimination based on sexual orientation, these Brazilian state-level laws—with variations—include actions and omissions such as (1) any violent, intimidating, ridiculing, or offensive action of a physical, psychological, cultural, or verbal nature, (2) forbidding the entrance to, the registration in, or the permanence in any public premise, public accommodation, or any private premise open to the public (such as hotels, motels, restaurants, and bars, among others), (3) selecting between customers on the basis of their sexual orientation, (4) charging additional costs to customers because of their sexual orientation, (5) not hiring, preventing the promotion, or laying off employees because of their sexual orientation, (6) restricting or prohibiting the free expression and manifestation of affection of gay, lesbian, bisexual, or transgendered citizens in public places or in private places open to the public if these manifestations are allowed to other citizens, and (7) preventing or making difficult to sexual minorities the purchase, loan, or rent of real estate or, generally, any good or asset.

Although discrimination is not criminalized by any of these statutes, they all establish administrative and pecuniary penalties for those liable of discrimination on grounds of sexual orientation. These penalties include (1) written warnings, (2) fines ranging from 1.000 to 50.000 Reais, (3) loss of tax benefits, (4) prohibitions to enter into contracts with the state, (5) prohibition to be granted credits from the state, and (6) suspension or loss of licenses to operate public accommodations or public premises open to the public.

petitioner had been discriminated against because of his sexual orientation when a health institution did not allow him to donate blood because he was part of a “risk group” formed by “men who have sex with other men”).


Id. at 53.

Id.
Peru offers an interesting case of legislative protections against discrimination based on sexual orientation through a combination of what could be termed a “general indirect prohibition of discrimination on grounds of sexual orientation” and the criminalization of discrimination against sexual minorities. Although Peru does not have a general statutory provision that directly prohibits discrimination based on sexual orientation, article 37-1 of the Code of Constitutional Procedure (Law 28,237 of 2004) establishes that the special judicial writ aimed at the protection of constitutional fundamental rights (amparo) may be used to protect the right not to be discriminated against on grounds of sexual orientation, among other grounds of discrimination. The prohibition of discrimination based on sexual orientation is thus indirectly guaranteed through procedural statutory legislation. This indirect protection is complemented by article 323 of the Peruvian Criminal Code, which, as seen in the subsection devoted to statutory developments related to sex equality, punishes discrimination based on sexual grounds with imprisonment from 2 to 3 years or community services between 60 and 120 days. Although this provision does not explicitly refer to sexual orientation, the generic reference to “sexual grounds” may be reasonably interpreted not only to include discrimination against women but also against sexual minorities.

As it was previously mentioned in this paper, seven states of Mexico and the Federal District criminalized discrimination after article 1 of the Mexican Federal Constitution was amended in 2001. The criminal codes of the Federal District (article 206) and the states of Aguascalientes (article 205-bis), Coahuila (article 383-bis), Colima (article 225-bis), Querétaro (article 169), Quintana Roo (article 124-bis), and Tlaxcala (article 255-bis) punish discrimination based on sexual orientation —among other factors— with imprisonment between six months and three years, community work, and fines that may range between 15 and 200 daily salaries. Discriminatory conducts relevant to sexual orientation equality that may be criminally prosecuted are the provocation or the incitement to hatred or violence, the denial of a service or a benefit without a reasonable excuse, the offense to a person or a group of persons or their exclusion, and the denial or restriction of labor rights.

In the subsection on legislation aimed at guaranteeing sex equality it was explained that criminalization of discrimination in LAC has also adopted the form of aggravated sentences for all crimes when they are committed with a discriminatory intention. For example, article 58-3 of the Criminal Code of Colombia establishes that any criminal conduct that is “inspired in intolerant or discriminatory motives related to race, ethnic origin, ideology, religion, beliefs, sex or sexual orientation, or any illness or disability of the victim” (emphasis added) will be punished with an aggravated sentence. Another interesting case of this modality of criminalizing discrimination on grounds of sexual orientation is represented by article 123-bis of the Criminal Code of Costa Rica, which regulates the crime of torture. According to this code, torture is an aggravated form of the crime of “personal injuries” (“lesiones personales”) and it may be committed by anyone who “causes physical or mental sufferings to another person, intimidates or coerces him or her for an act that is suspected he or she has committed, in order to obtain from him or her or a third party any confession or information, for reasons of race, nationality, gender, age, political, religious or sexual option, social position, economic situation or marital status” (emphasis added).

Several countries in LAC have adopted family law legislation aimed at allowing same-sex civil unions or domestic partnerships. The cases of Argentina, Mexico, and Brazil are illustrative of this trend in the legal protection of the rights to equality and non-discrimination of gays and lesbians in the region. In Argentina, the City of Buenos Aires, the Province of Río Negro, and the towns of Villa Carlos Paz (Province of Córdoba) and Río Cuarto (Province of Córdoba) have all adopted laws that establish same-sex civil unions. The laws passed by the City of Buenos Aires and the Province of Río Negro forcefully illustrate an important trend in the transformation of family law structures through gay and lesbian activism in Argentina.

320 See supra Section 3.1.3.1.1.
321 Id.
322 Id.
In 2002, the Legislature of the City of Buenos Aires passed the Civil Union Act (Law 1.004) (Ley de unión civil), which recognizes same-sex civil unions. Article 1-a of this bill defines civil unions as a “freely established union by two persons independently of their sex or sexual orientation.” In order to establish the union, the partners must (1) have lived together for at least two years in a “public and stable fashion” (article 1-b), (2) be residents of the City of Buenos Aires (article 1-c), and (3) register the union in the Public Registry of Civil Unions (article 1-d). In terms of rights, obligations, and benefits, article 4 of Law 1.004 establishes that same-sex couples in civil unions will be “similarly treated to spouses.” By virtue of this law, same-sex couples living Buenos Aires that have duly registered their civil union have rights and benefits such as the extension of social security benefits to one’s same-partner, access to subsidies and pensions granted by the City of Buenos Aires, maternity and sickness leave, access to official housing plans, the right to visit one’s same-sex partner in a health institution or in a prison, and the right to adopt decisions on one’s same-sex partner’s health or health treatment, among others. It is worth noting that Buenos Aires’s civil unions do not extend marriage federal rights related to economic matters, migration, and adoption to same-sex partners.

Also in 2002, the Legislature of the Province of Río Negro passed the Homosexual Partners Act (Law 3.736) (Ley de convivencia homosexual), which sets forth that “under oath, same sex couples may declare their union before the competent authority” (article 1). The only special formal requirement imposed by this bill is that the declaration be made in the presence of two witnesses (article 2). According to article 4 of Law 3.736, the declaration has the effect of allowing same-sex partners to “exercise all the rights and obligations that provincial legislation affords to couples living in civil unions [be they heterosexual or homosexual].” Same-sex couples living in the province of Río Negro who have duly declared their partnership according to Law 3.736 have rights such as accessing provincial housing plans, social security benefits, and sickness leave, among other benefits. This bill does not extend the right to marry or adopt children to same-sex couples who have formalized their civil union.

In Mexico, both the Federal District (Mexico City) and the State of Coahuila passed laws guaranteeing domestic partnerships for same-sex couples. In 2006, the Legislature of Mexico City enacted the Partners’ Society Act (Ley de sociedad de convivencia). The partners’ society is defined as “a bilateral legal act whereby two adult persons of a different or the same sex, with full legal capacity, establish a common household with the will to remain together and mutually help each other” (article 1). These societies must be registered before the Legal and Government Direction of the territorial division of the Federal District where the partners establish their home (articles 6 to 12), and they will be governed by the same legal regime applicable to heterosexual de facto partnerships (concubinatos) (article 5). Once the society has been registered, the partners will have a reciprocal duty to mutually provide for alimony (article 13), they will have mutual inheritance rights (article 14), and the patrimonial relationships between them will be subjected to the regular legal regime set forth for any of such relationships (article 18).

In 2007, the State of Coahuila amended its Civil Code to introduce the Civil Pact of Solidarity (Pacto civil de solidaridad), which is defined as “a contract entered into by two adult persons [18 years old] of the same or different sex in order to organize their life in common” (article 385-1). The Civil Code also sets forth that “civil partners must help and assist one another, they must be mutually grateful, and have the obligation to act in their common interest; they also have a mutual right to alimony” (article 385-1). After registering their partnership in the Civil Registry (article 385-3), the partners have mutual benefits in matters such as social security, work benefits, and inheritance, among others (article 385-4). The Civil Pact of Solidarity also produces a patrimonial regime whereby the partners may choose between a “solidarity society” and a regime of “separation of assets” (articles 385-10 and 385-11). With regards to adoption, article 385-7 of the Civil Code of Coahuila explicitly states: “Civil partners of the same sex are

323 See PETRACCI & PECHENY, ARGENTINA, supra note 267 at 67-68.
324 Id. at 68.
325 Id. at 69.
not allowed to adopt children either jointly or individually. They are neither allowed to share or be entrusted with the custody of the children of the other partner.

Brazil offers an interesting and illustrative example of a federal country where economic benefits for same-sex partners have been recognized through a combination of legislative and judicial actions. Although the Brazilian Federal Congress has not yet passed any legislation recognizing same-sex civil unions or partnerships, some specific economic or social security benefits for same-sex couples have been legislatively recognized at the federal or the state level, sometimes as the outcome of previous litigation. A striking example of this tendency at the federal level was the public civil action initiated in 1999 in Porto Alegre by the Federal Solicitor General (Ministério Público Federal) against the National Institute of Social Security (Instituto Nacional do Seguro Social), INSS, for not including same-sex partners as dependents of registered beneficiaries of social security benefits. In April of 2000, a Federal Social Security Court issued precautionary measures ordering the INSS to include same-sex partners as dependents of its registered beneficiaries. The INSS complied with this judicial decision by issuing Normative Instruction N° 25 of 2000 (Instrução normativa N° 25/2000), which basically ordered the adoption of procedures aimed at including same-partners as beneficiaries of death pensions (pensão por morte) and welfare benefits in case their partner was sentenced to prison (auxílio-reclusão).

In its final ruling, handed down in December of 2001, the Court considered that the exclusion of same-sex partners from social security benefits was a form of discrimination based on sexual orientation that violated the constitutional principles of human dignity and equality. Based on article 5 of the Constitution of Brazil, articles 1, 2, and 7 of the UDHR, and articles 5-1, 7-1, 11, and 24 of the ACHR, the Court particularly stressed the similarity between heterosexual and homosexual unions in terms of affection and solidarity between the partners; a fact imposing the constitutional and international obligation on the state to afford equal legal treatment to both forms of union in matters of social security. This decision was confirmed by the Federal Appeals Court of the Fourth Region, which also stressed that the exclusion of same-sex partners from social security benefits was a violation of the principles of equality and human dignity. The appeals decision, however, is particularly striking for its inclusion of same-sex partnerships under the constitutional protection of the family established by article 226 of the Constitution of Brazil.

The Court recognized that “more and more the model of the family founded on the marriage of a man and woman who chose each other as exclusive and eternal partners based on the ideology of romantic love, live together in the same domestic unit, and biologically reproduce in order to perpetuate the species... does not exhaust the notion of what a family should be... The concepts of marriage and love have changed along western history and have assumed new multiple meanings and multifaceted shapes and forms of manifestation and institutionalization that, in a constant movement of transformation, put men and women in front of many possibilities of bringing into reality their affective and sexual exchanges.” The Court then added: “Even if we like it or not, truth is that the world is quickly transforming. Old concepts give way to new ones, old norms about human relationships lose all their force before the pursuit of true happiness, entrusting individuals with the freedom to choose their partners. While the legal order only recognizes as a family the union formed by persons of different sex, in the realm of facts homosexual families have been proliferating. Homosexual love and coexistence are a reality that should be afforded legal protection.”

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326 See VIANNA & LACERDA, BRASIL, supra note 317 at 57-58.
328 Id. ¶ 2.4.
329 Id.
330 See Apealação Cível n° 2000.71.00.009347-0/RS, Tribunal Regional Federal da 4ª Região, 6ª Turma (Jul. 27, 2005).
331 See supra Section 3.1.2.4.
332 Apealação Cível n° 2000.71.00.009347-0/RS, Tribunal Regional Federal da 4ª Região, 6ª Turma (Jul. 27, 2005).
333 Id.
The most up to date regulation of the INSS on social security benefits for same-sex partners of registered beneficiaries following the orders of Brazilian federal judges is Normative Instruction N° 20 of 2007 (Instrução normativa N° 20/2007), which, in articles 30, 52-§ 4, 271, and 292, regulates the procedures allowing same-sex partners of registered beneficiaries to access death pension benefits and welfare benefits if their partner is sentenced to imprisonment.

The legislatures of some Brazilian states have enacted laws that extend social security and health benefits to the same-sex partners of their public employees. The Legislative Assembly of the State of Rio de Janeiro enacted Law 5.034 of 2007, which amends the state’s statute regulating social security benefits for public employees. Article 1 of this law makes equivalent heterosexual partners and “homoaffective partners” (parceiros homoafetivos) in all matters related to social security benefits for the state of Rio de Janeiro’s public servants. Similarly, the Legislature of the State of Paraíba enacted Law 8.351 of 2007 in order to include same-sex partners as dependents of public employees registered as beneficiaries of social security benefits granted by the state. In 2009, the Foundation for Retirement Benefits and Pensions of Public Employees of the State of Pernambuco (Fundação de Aposentadorias e Pensões dos Servidores do Estado de Pernambuco), FUNAPE, enacted Normative Instruction N° 06 of 2009, which extended death pension benefits to the same-sex partners of public employees registered in the social security system of the state. Finally, the Legislative Assembly of the State of Pará issued Law 7.379 of 2010 that includes same-sex partners as dependents for purposes of health benefits afforded by the state to its public employees.

The only places in LAC where same-sex marriage has been established are Mexico’s Federal District and Argentina. In December 2009, the Legislature of the Federal District amended articles 146, 237, 29-bis, 294, 391, and 724 of the Civil Code of the Federal District in order to introduce same-sex marriage. Article 146 of Mexico City’s Civil Code now sets forth that “marriage is the free union of two people to live together whereby they owe each other respect, equality, and mutual help.” In addition to all the rights granted to spouses of different sex, the amended version of article 391 of the Civil Code allows same-sex spouses to adopt children in the same conditions to heterosexual married couples.

On July 15, 2010, the Argentine Congress passed the Egalitarian Marriage Act (Law 26.618) (Ley de matrimonio igualitario), which amended articles 144, 172, 188, 206, 212, 220, 264, 264-ter, 272, 287, 291, 294, 296, 307, 324, 326, 332, 354, 355, 356, 360, 476, 478, 1217, 1275, 1299, 1300, 1301, 1315, 1358, 1807, 2560, 3292, 3969, and 3970 of Argentina’s Federal Civil Code in order to allow same-sex marriage. Law 26.618 suppressed from the Civil Code every reference to marriage as an institution exclusively formed by a man and a woman and extended all the rights, obligations, and duties of heterosexual spouses to same-sex spouses. The Act also reformed family institutions such as adoption, custody of children, and alimony in order to make them compatible with same-sex marriage. Article 42 of Law 26.618 generally establishes that “every reference to the institution of marriage in Argentina’s legal order will be applicable both to the marriage formed by two persons of the same sex or two persons of a different sex,” and adds that “the members of the families originated by a marriage formed by two persons of the same sex, as well as a marriage formed by persons of a different sex, will have the same rights and duties.” As a final note, article 42 prohibits that “any provision of the legal order of Argentina be interpreted or applied in order to limit, restrict, exclude, or suppress the exercise or enjoyment of the same rights and duties both to the marriage formed by persons of the same sex and the marriage formed by persons of a different sex.”

3.1.3.2.2. Domestic Judicial Decisions

Several supreme or constitutional courts in the LAC region have handed down relevant decisions in the field of discrimination based on sexual orientation. While the doctrine of the Constitutional Court of Colombia and some decisions adopted by Brazilian federal courts on issues of sexual orientation represent, in general terms, important positive advancements in the defense of the rights of equality and non-discrimination of gays and lesbians, the decisions of the Supreme Court of Argentina, the Supreme
Court of Chile, and the Constitutional Panel of the Supreme Court of Costa Rica show a less positive record in the protection of equality rights of gays and lesbians in these countries.

This section describes regional judicial doctrine related to discrimination on grounds of sexual orientation. It first describes how constitutional or supreme courts in the region have generally elaborated the principle of equality and non-discrimination in matters of sexual orientation. It then shows how this principle has been applied in more specific social domains such as education, military institutions, conjugal visits in prisons, and the media. Finally, the section ends with a description of regional judicial decisions on same-sex civil unions or domestic partnerships.

At the regional level, the doctrine on sexual orientation of the Constitutional Court of Colombia is, undoubtedly, the one that has more thoroughly and forcefully developed and advanced the prohibition of discrimination based on sexual orientation. Since 1994, the Colombian constitutional doctrine regionally began to set important human rights standards on the eradication of discrimination based on sexual orientation, after some rather grim regional precedents on this issue. An example of this kind of negative domestic judicial decisions on the rights of gays and lesbians is the first decision on this topic issued by the Supreme Court of Argentina. The case was raised by the Homosexual Community of Argentina (Comunidad Homosexual Argentina), CHA, a gay and lesbian rights organization, when the General Inspection of Justice (Inspección General de Justicia) refused to register of the organization. In a decision where all the justices wrote separate opinions, the Court upheld the decision of the General Inspection of Justice because it found that the CHA did not comply with a legal requirement according to which such organizations must pursue the “common good” as their main goal. According to the separate opinions of some of the justices it is clear that the Court considered that the CHA did not pursue the “common good” inasmuch as the defense of the rights of gays and lesbians was equivalent to “the public defense of homosexuality.” For example, one of the justices argued that “any social defense of homosexuality offends public morality and the common good, which, according to the Constitution, should be defended by this Court in order to guarantee the dignity of the human person, created similar to God, who is the source of all reason and justice.”

As mentioned above, the Constitutional Court of Colombia began to decide cases on discrimination based on sexual orientation. The first case that reached the Court was brought by a student of a police academy who was expelled for engaging in “homosexual conducts” with another student. Although the Constitutional Court basically dealt with the violation of due process by the authorities of the police academy when they expelled the plaintiff, the opinion set the first tenets of the Court’s doctrine on the constitutional status of sexual orientation and the rights of gays and lesbians in Colombia. This doctrine basically holds that (1) sexual orientation is one of the most conspicuous manifestations of human autonomy and it therefore protected by the constitutional fundamental right to the free development of personality guaranteed by article 16 of the Colombian Constitution, (2) manifestations of sexual orientation might thus only be restricted if public authorities seeking to impose restrictions can show these manifestations cause an objective social harm, (3) insofar as sexual orientation is a constitutionally protected individual option, public authorities and private parties are forbidden to use it as a criterion to establish differential treatments between heterosexual and homosexual citizens, and (4) if used, sexual orientation is a suspect criterion of differentiation and is hence subjected to judicial strict scrutiny.

In its first opinion dealing with discrimination on grounds of sexual orientation, the Constitutional Court expressed this doctrine—in quite inchoate terms—when it observed that the Constitutional Assembly “gave freedom in matters of personal choice and individual beliefs the status of a fundamental right. It
therefore emphasized the liberal principle according to which public institutions must not impinge on personal matters that do not harm social organization and coexistence. It is evident that homosexuality is protected by such a principle and, consequently, it must not be used as a ground for social discrimination.338 On a more sociological note, the Court also observed: ‘Even though law has played a key role in the transformation of social beliefs related to sexual orientation, these beliefs still lag behind normative ideals. Although tolerance and pluralism are now values deeply ingrained in our legal order, they still need to overcome huge obstacles to become entrenched in everyday life.’339

Between 1994 and 1998, the opinions of Constitutional Court on discrimination based on sexual orientation include similar dicta establishing the relationship between sexual orientation, the right to autonomy, and the right to equality.340 The most advanced and sophisticated statement of the Court’s doctrine on discrimination based on sexual orientation was elaborated in the decision that struck down a provision of the Public Schools Teachers’ Regime Act (Decree 2277 of 1979) establishing that “homosexuality” was a ground for discharge from public service as a public school teacher.341 As it was previously mentioned,342 this decision explicitly established that (1) even though sexual orientation is not explicitly mentioned as a ground of discrimination in article 13 of the Constitution of Colombia, it is included as a form of sex discrimination, (2) sexual orientation is simultaneously protected by the fundamental rights to the free development of personality and equality, and (3) legal classifications based on sexual orientation are suspect and therefore they subjected to judicial strict scrutiny.

Sometimes, however, the Court seemed to be caught in a constitutional paradox: the need to assume a strong defense of the prohibition of discrimination on grounds of sexual orientation and the rights of gays and lesbians was faced to the need that this defense did not look like a public promotion of homosexuality. This paradox resulted, sometimes, in judicial opinions that while defending autonomy and equality for homosexual citizens made, at the same time, quite unfortunate—and even homophobic—observations about the “normality” of homosexuality, the sexual preferences of the majority of the Colombian population vis-à-vis the sexual preferences of homosexuals, the assumption that heterosexuality is the sexual preference of the majority of Colombians, the “private” character of sexual orientation, the need that expressions of sexual orientation do not cause social scandal and be compatible with social standards of decency, and so forth.

For example, in an opinion that enjoined public television authorities for having censored a commercial for the prevention of HIV/AIDS that showed two men kissing in Bogotá’s main square,344 the Constitutional Court noted: “We conclude that homosexuals must not be discriminated against because of their condition. The fact that their sexual conduct is not the same as the one adopted by the majority of the population does not justify that they are treated with inequality. Law protects the interests of homosexuals on the condition that when they exteriorize their conduct they do not harm the interests of other persons and do not become a source of scandal, mainly for children and adolescents.”345 In another case, also brought by a student of a police academy who had been expelled because of “homosexual conducts,” the Court, in a much harsher dictum, noted: “Equality before the law does not mean that a person who has an abnormal condition—as homosexuality—is authorized to explicitly and publicly act

338 Id. ¶ 30.
339 Id.
342 See supra Section 3.1.2.2.1.
344 See infra Section 3.6.
in order to satisfy his or her inclinations and engage—with no possibility of being punished—in conduct that are inimical to the respectability of a school that, moreover, belongs to an institution [the Police] that has a mission demanding from its members the highest virtues.”

The Constitutional Court then remarked: “On the contrary, equality is guaranteed through the application of the same discipline and right behavior requirements to everyone who violates the legal regime governing the school. The principle of equality would be violated—in detriment of the majority of the students—if the authorities of the school would be forced to forgive or ignore every fault of a student only because he or she is a homosexual.”

Even the most generous, positive, and sophisticated statements of the basic doctrine of the Constitutional Court of Colombia on sexual orientation have sometimes been hampered by problematic minoritizing assertions on the social condition of homosexuality. In 1996, when the Court first had to decide if same-sex civil unions were constitutionally protected—and they were not—the majority opinion observed: “From the constitutional point of view, homosexual conduct and behavior are valid and legitimate manifestations, inclinations, orientations, and options of individuals. Heterosexual and homosexual sexuality is an essential element of the human person and its psyche that is thus integrated to the broadest framework of sociability. The constitutional protection of the person, under the right to personality and its free development, include in its very core the autonomous assumption and decision over one’s own sexuality.”

However, after this progressive assertion on the constitutional status of sexual orientation, the Court felt necessary to delimit its force: “Even if heterosexual sexuality is the most general pattern of behavior and the majority of citizens socially condemns homosexual behavior, it would be a violation of the Constitution if law forbids or punishes this behavior with respect to adults that freely consent to homosexual acts and relationships and do it in conditions that do not affect minimum and general standards of public decency.”

Even in spite of its paradoxes and contradictions, the basic doctrine of the Colombian Constitutional Court on discrimination based on sexual orientation and the rights of gays and lesbians represents an important step towards the protection of non-normative sexualities through human rights standards. This doctrine has been applied to several realms of social life where discrimination against homosexual citizens has occurred: (1) education, (2) military forces, (3) employment, (4) prisons, and (5) private organizations, and (6) expressive activities.

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346 Const. Ct. Col., Decision T-037/95 (Feb. 6, 1995), ¶ III (emphasis added).
347 Id. (emphasis added).
349 Id. ¶ 4.1 (emphasis added).
350 See Const. Ct. Col., Decisions T-569/94 (Dec. 7, 1994) (although the fundamental right to the free development of personality prohibits schools to expel students on grounds of their sexual orientation, students cannot manifest their sexual orientation —the male petitioner showed up in school wearing make-up and high heels—in a way that infringes school discipline), C-481/98 (Sept. 9, 1998) (striking down a statute that established homosexuality as a cause of discharge from public service as a teacher of the public school system; the Court—based on the application of judicial strict scrutiny and therefore presuming that legal classifications based on sexual orientation are unconstitutional—found that the statute was based on pure prejudice against homosexuals, stereotypes seeing them as potential sexual abusers, and the false idea that homosexuality could be “transmitted” from teachers to students), T-101/98 (Mar. 24, 1998) (schools are forbidden to use students’ sexual orientation as a criterion of access to education; the decision of a school to accept or dismiss a student on grounds of her or his sexual orientation violates the student’s rights to equality, the free development of personality, and education; public schools are forbidden to base their decisions on the access of students to the right to education on religious views on homosexuality), T-435/02 (May 30, 2002) (schools are forbidden to impinge upon a student’s choice of his or her sexual orientation; schools’ internal regimes cannot include the homosexuality of students as cause for dismissal or disciplinary sanctions).
351 The Court has basically established a sort of “don’t ask, don’t tell” regime. In Colombia, homosexuals may become members of the military and police forces provided they do not disclose their sexual orientation and do not engage in homosexual activities impinging on military discipline. A homosexual member of the military forces or the police cannot therefore be sanctioned for his or her mere status, but for “homosexual conducts” that “clearly and objectively affect the purposes of the armed institution.” See Const. Ct. Col., Decisions T-097/94 (Mar. 7, 1994) (all sexual activities —heterosexual and homosexual—are prohibited in the military forces or the police; these institutions have the right to demand discretion and silence on matters of sexual orientation from its members; a homosexual member of the military forces or the police can be sanctioned for his or her conduct only if clearly and objectively impinges on the purposes of these institutions), T-037/95 (Feb. 6, 1995) (reasserting that only homosexual conducts that “ostensibly” and “seriously” infringe military discipline may be
Since 2007, the Court has applied its doctrine on sexual orientation and the rights of gays and lesbians to uphold the constitutionality of same-sex civil unions. In Colombia, civil unions are regulated by Law 54 of 1990, which, in its original drafting, only applied to heterosexual couples. In 1996, this statute was challenged for the first time before the Constitutional Court with the argument that by leaving unprotected same-sex couples it discriminated on grounds of sexual orientation. Although the Court decided that the bill did not discriminate against homosexuals, it left an open possibility to reconsider the unprotected same-sex couples it discriminated on grounds of sexual orientation. Although the Court challenged for the first time before the Constitution with the argument that by leaving unprotected same-sex couples it discriminated on grounds of sexual orientation. Although the Court began by observing that same-sex couples were a valid option that deserved to be protected, in patrimonial terms, in equal terms to heterosexual couples. In addition, the Constitutional Court remarked that although the Colombian legal order prohibited discrimination based on sexual orientation and constitutional doctrine had enforced that prohibition, only individuals and not same-sex couples had benefited from that protection. For the Court, Colombian law “recognizes the rights that homosexual persons bear as individuals, but, at the same time, deprives them from the instruments allowing them to fully develop as couples. The possibility to form a couple is an essential aspect of personal fulfillment, not only at the sexual level, but also in other dimensions of life.”

In the Constitutional Court’s view, Colombian legislation presented a deficit of protection of the patrimonial rights of same-sex couples that violated the human dignity, the fundamental right to the free development of personality, and the prohibition to discriminate on grounds of sexual orientation. The deficit of protection infringed human dignity and the fundamental right to the free development of personality because it prevents that the decision of homosexual persons “to conform a project of life in common produces legal patrimonial effects, which leads them to a situation of lack of protection that they are not in any capacity to confront. No reason justifies subjecting homosexual couples to a regime that is incompatible with an option reflecting the exercise of their right to the free development of personality.” The Court added that “the legislative decision of excluding homosexual couples from the

sanctioned by the military forces or the police), C-507/99 (Jul. 14, 1999) (members of the armed forces cannot be sanctioned just for the fact of being homosexuals; military discipline forbids any sort of sexual activity —heterosexual or homosexual— in public, during the performance of military duties, or in military premises), C-431/04 (May 6, 2004) (reasserting the doctrine of Decision C-507/99).

See Const. Ct. Col., Decisions T-277/96 (Jun. 20, 1996) (employees cannot be laid off for the sole fact of their sexual orientation), C-373/02 (May 15, 2002) (public notaries cannot be dismissed or sanctioned because of their sexual orientation).

See Const. Ct. Col., Decisions T-499/03 (Jun. 12, 2003) (allowing conjugal visitation for a lesbian prisoner; the denial of such visits for homosexual prisoners violates human dignity and the fundamental rights to privacy and the free development of personality), T-1096/04 (Nov. 4, 2004) (protecting the rights to dignity, life, physical integrity, sexual freedom, and health of a gay inmate who was constantly raped and sexually abused and harassed by other prisoners; ordering Colombia’s national penitentiary authority to transfer the petitioner to a safe prison).

See Const. Ct. Col., Decision T-808/03 (Sept. 18, 2003) (private organizations such as the Boy Scouts of Colombia are forbidden to dismiss its members on grounds of their sexual orientation).

See Const. Ct. Col., Decisions T-539/94 (Nov. 30, 1994) (finding that the National Television Commission did not violate free speech when it did not authorize a TV commercial promoting the use of condom as a form of prevention against HIV that showed two men kissing in a public square; however, the Court was keen to pointing out that the commercial established such a tight relationship between HIV/AIDS and homosexuality that viewers could be misled to think that HIV/AIDS was a problem only affecting homosexuals and could generate negative reactions against homosexual citizens), T-268/00 (Mar. 7, 2000) (enjoining the major of a town who had not authorized a gay parade; public authorities violate the fundamental rights to equality and the free development of personality if they deny to homosexual citizens the access to public places such as streets and squares merely based on their sexual orientation), T-301/04 (Mar. 25, 2004) (police authorities are forbidden to arrest homosexual citizens who are peacefully gathering in public places just because they are homosexuals).
The patrimonial regime of civil unions is an unjustified restriction of the autonomy of the members of such couples and has harmful effects on their rights. Indeed, it not only raises obstacles for the fulfillment of their project of life in common, but it also offers an inadequate answer for situations of conflict that may arise when, for any reason, these couples terminate their relationship. With respect to the violation of human dignity and the free development of personality, the Constitutional Court of Colombia concluded that the deficit of protection also affected the “material conditions of existence” of same-sex couples and made invisible “the reality of homosexual couples.” Finally, as noted above, the Court also concluded that the deficit of protection was discriminatory. In its view, even though there are “objective differences” between heterosexual and homosexual couples, from the patrimonial perspective they are the same and, therefore, law should afford them equal protection.

In further decisions, the Court has extended constitutional protection to several patrimonial dimensions of same-sex couples such as social security health benefits, pension benefits, the duty to pay alimony, housing subsidies, nationality and residence, prohibition of self-incrimination, family, violence, and custody, among others.

The only judicial decision in the LAC region allowing same-sex marriage and adoption was adopted by the Supreme Court of Mexico in August, 2010. This decision is worth describing in some detail for it reflects new forms of human rights reasoning leading to upholding the validity of same-sex marriage and adoption.

After the Legislative Assembly of Mexico’s Federal District amended the Civil Code to permit same-sex marriage and adoption of children by same-sex couples, the Federal Attorney General (Procurador General) challenged the constitutionality of the amendment before the Supreme Court. The first issue the Court dealt with was whether extending the institution of civil marriage to same-sex couples violated any right, value, or principle protected by the Mexican Federal Constitution. To begin with, the Supreme Court inquired if the Attorney General was right in arguing that the Constitution of Mexico explicitly established that marriage and the family could only be based on the union of a man and a woman. The Court answered this question in the negative and affirmed that the Attorney General’s view was constitutionally untenable. In its view, the Mexican Constitution indeed protects the family, but this protection is not restricted to the nuclear family (father, mother, and children) so that heterosexual marriage is not its exclusive foundation. For the Court, “[insofar as what] the Constitution protects is the family, it must hence be asserted that in a democratic state, in which respect for pluralism is part of its essence, what is constitutionally protected is the family as a social reality. This protection is therefore extensive to all forms and manifestations of the family as an existing social reality and encompasses families constituted by marriage and civil unions, those that are constituted by a single father or mother, or any other form expressing similar bonds.”

The Supreme Court was keen to pointing out that the protection to the family afforded by article 4 of Federal Constitution of Mexico does not allude to or define the institution of marriage. The definition of marriage is a competence of the legislature, which is authorized to define it taking into account the fact that the Constitution does not protect an “ideal” form of family, exclusively originated in the marriage of

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363 See id.
364 See id. ¶ 6.2.4.
370 See supra Section 3.1.3.2.1.
372 See id. ¶ 234.
373 Id. ¶ 235.
a man and a woman. In the Court’s view, “marriage is not an immutable or ‘petrified’ concept. It is therefore inconceivable that its traditional conceptualization could not be modified by a legislature, because, as we already remarked, the Constitution does not tie it to predetermined concept. Legislatures should respond to the demands of social reality for it is undeniable that the secularization of society and of marriage itself, as well as the transformation of human relationships, has led to the appearance of diverse forms of affective, sexual, and solidarity relationships that, in turn, have produced modifications in the legal regulation of marriage.”

The Supreme Court then explained that one of the most important transformations in the institution of marriage has been its separation from human procreation. For the Court, if procreation is not an essential element of marriage, then heterosexuality cannot be considered as an element that should be included in the definition of this institution.

The Supreme Court also rejected the argument of the Mexican Attorney General according to which the Legislative Assembly of the Federal District enacted unreasonable legislation because it could have chosen means other than the recognition of marriage (i.e., civil unions) to protect the union between persons of the same sex. To begin with, the Court highlighted the fact that the Federal District’s legislation was a measure aimed at combating discrimination based on sexual orientation and therefore a true development of article 1 of the Constitution of Mexico, which forbids discrimination on grounds of gender or any other factor that violates human dignity. The Supreme Court asserted that the Mexican Constitution includes the right to the free development of personality, which protects, among others, sexual orientation and, in turn, as a manifestation of sexual option, the possibility to conform lasting relationships. For the Court, “a person’s sexual orientation, as part of her or his personal identity, is a relevant element of his or her life project that includes the desire to have a life in common with another person of a different or the same sex… In the case of homosexual persons, just as in the case of heterosexual persons, it is part of their full development the possibility to establish free and voluntary affective relationships with persons of their same sex. Both homosexual and heterosexual relationships, as sociological data show, share as a characteristic that they form a stable and lasting community of life based on mutual affective, sexual, and solidarity bonds.” The Supreme Court finally added that “if one of the aspects in which an individual conducts her or his life and relationships is his or her sexual orientation it is therefore a fact that full respect for his or her human dignity mandates that the state not only recognizes his or her sexual orientation but also his or her unions under the modality that, at a specific historical juncture, [the legislature] decides to adopt (solidarity pacts, de facto unions, and marriage).”

In dealing with the adoption of children by same-sex couples, the Court also rejected the basic argument advanced by the Federal Attorney General. According to this argument, allowing same-sex couples to adopt children would infringe the adopted children’s right to equality because they would be differently positioned —and therefore their best interest affected— to children who are adopted by heterosexual couples. In the Court’s view, this argument had to be rejected in light of the previous decision that the Federal Constitution of Mexico does not protect an “ideal” type of family. For the Supreme Court, although the best interest of children has indeed to prevail in any adoption procedure, this premise does not support presuming that homosexual persons, because of their sexual orientation, are damaging to the appropriate development of a child so that homosexuality must be a reason to exclude an entire category of persons from the possibility to adopt children. Such reasoning clearly infringes article 1 of the Mexican Constitution that forbids discrimination on grounds of the preferences of individuals. In the
Court’s view, barring families formed by same-sex couples from the possibility to adopt children would be a similar discriminatory act as considering that families of a certain racial or ethnic background — because of their race or ethnic origin— are “threatening” or “dysfunctional” and therefore unfit to adopt children.\textsuperscript{383}

The Supreme Court then clarified that, in adoption procedures, the best interest of the child imposes upon state authorities the duty “to enact legislation that delimits the universe of possible adopting persons on the basis that they offer the necessary conditions —clearly established by the law— for the care and development of the child, so that the authority in charge of applying this legislation is able to assess and decides who offers the best option of life… In this sense, the state is not obligated to guarantee the utopian but legally impossible situation to which the Attorney General refers when he talks about the need of giving to the adopted child ‘the best possible parents.’ If the state had the obligation to guarantee ‘the best possible parents,’ the adoption regime would, on the one hand, be completely inoperative and, on the other hand, probably violate the constitutional prohibition of discrimination… In sum, the best interest of the child requires that the state makes sure that children will grow up as adults in family contexts that \textit{prima facie} will guarantee them care, support, and education. Thinking that families formed by same-sex couples will not satisfy these conditions is a form of reasoning that is contrary to the interests of the children that the Constitution seeks to protect.”\textsuperscript{384}

\textbf{3.2. Criminalization of Sexual Activities}

In almost every state, criminal law is used not only to deter and prosecute sexual conduct understood to be violent or otherwise coercive, but it is also applied to a wide range of consensual sexual conduct occurring between adults in private. However, criminal law may also be used selectively to enforce certain moral, religious, or cultural standards, with arbitrary (i.e., not necessary or justifiable in a democratic society) negative impact on rights and grave impact on sexual health.\textsuperscript{385} Moreover, police practices regarding consensual adult sexual conduct in private —sometimes under color of criminal law enforcement, but often without actual juridical basis in the law— has grave effects on health and rights, especially of persons who are already socially marginalized. The criminalization of consensual sexual conduct between adults in private constitutes direct state interference with respect to private life and violates the right to equality and non-discrimination. Criminalization of consensual conduct between adults can proscribe sexual practices ("sodomy," "unnatural offenses," "gross indecency," and so forth\textsuperscript{386}), sexual conduct between same-sex partners, sexual conduct between unmarried partners, and sexual conduct outside of marital relationships.

In addition to discrimination on the basis of marital status or the partner’s sex, regimes of criminalization often impose penalties on women, though not on men, for the same behavior (departures from virginity or chastity), thus constituting additional discrimination on the basis of gender. Criminal statutes prohibiting sexual conduct are often vague and non-specific in their use of language, often using euphemism instead of clear descriptions of sexual activity, thus making it difficult to know what exactly is forbidden and violating a basic principle of criminal law that laws give clear notice of what actions are prohibited.

Criminalization of consensual, private sexual behavior among adults has many consequences for sexual health. Persons whose sexual behavior is deemed a criminal offense strive to hide their behavior and relationships from agents of the state and others, not availing themselves of sexual health services on

\textsuperscript{383} See id \textsection 317.
\textsuperscript{384} Id \textsection 318, 319, 322.
\textsuperscript{385} See \textit{supra} Section 3.1.2.5.
\textsuperscript{386} Definitions of sodomy can include both same-sex and heterosexual anal or oral sex; definitions of unnatural sexual practices are often even broader, but generally capture a range of non-reproductive sexual practices.
Research has documented that those engaged in sexual behavior deemed criminal evade or do not take full advantage of HIV and STI services for prevention and treatment of disease, fearing compromised medical privacy or doubting health providers’ respect for confidentiality. These consequences are often exacerbated by other characteristics of the person, which render them more vulnerable to abuse by authorities under the criminal law such as disfavored sex, gender, race, ethnicity, or national status. Many legal systems fail to create remedies that both eliminate immediate barriers (i.e., the stigma that criminalization causes or exacerbates) and reach the underlying basis for abuse (race, national status, sex, or gender).

Similarly, seeking out sex education, contraceptive information and services, or abortion (even when it is legally permitted) is compromised by fear of identification, arrest, and prosecution for engaging in consensual and desired sexual behavior. Furthermore, sexual practices conducted quickly and secretly to avoid detection do not foster safer sex practices or good communication between partners. Criminalization of consensual behavior is a direct impediment and barrier to the ability to access appropriate care and services for sexual health, leading to no care, self-care, or care at the hands of non-professionals, with predictably poor results.

In addition to reduced ability to access existing information and services, persons who do reach services report being ill-treated by medical providers on the grounds of their illegitimate status, should it become known. Refusal to make clinic appointments, refusal to treat, or treatment with gross disrespect, private shaming, or public disparagement are among the abuses reported, along with hurried and inferior care. Name-calling, violation of medical privacy, and segregation to specific treatment areas removed from other patients are reported. These experiences reduce the likelihood that patients so treated will return for future care. In many contexts, the effect of criminalization of consensual, private adult behavior on sexual health is entirely negative.

Paradoxically, legal and policy reform to remedy discrimination against sexually stigmatized persons in other branches of the law (for example, in administrative law or constitutional equality protections) often coexist with continued criminal enforcement in some nations, leading to incomplete enjoyment of rights and continued ill-effects on health.

Moreover, the criminalization of consensual sexual conduct has additional consequences beyond its direct effect on access to and quality of care for sexual health. Criminalization intensifies and reinforces stigma against persons engaging in, or imagined to engage in, sexual conduct which is against the law. Persons or groups of persons thus stigmatized are targets of violence (sexual and non-sexual), extortion, and other violations by state and non-state agents. Blackmail is frequently reported, with stigmatized persons afraid to report blackmail to the police or other authorities, for fear of arrest (and because extortionists not uncommonly are police officers operating extra-murally). Those committing “consensual sexual crimes” are thus targets for a range of abuses, which can be committed against them with impunity. Persons stigmatized through real or imagined violation of laws against consensual sex face reduced enjoyment of the full range of other rights, particularly rights to bodily integrity, education, expression and association, and employment. For example, impunity for police abuse (sometimes reaching the level of torture) has been associated with many criminal laws against same-sex conducts as well as regimes criminalizing prostitution.

The criminalization of sexual conduct between a person deemed sufficiently mature and a person deemed “below the age of consent” is accomplished in many locations through criminal law regarding “statutory rape,” that is, criminalizing sexual conduct with a person below the age at which the younger person is deemed able to give consent. Legal frameworks regarding statutory rape are complex and vary across national contexts regarding the age at which the young person can give consent, to which sexual

Footnote:
387 Sexual health services include access to health care in regard to sexually transmitted infections, HIV, contraception, abortion, and sexual function and dysfunction, as well as access to comprehensive and accurate information about sexuality. Sexual health services must incorporate principles of non-discrimination, in regard to educational content as well as access.
practices, and with what age difference between the younger and older partners. In addition, these laws often vary greatly in what sexual conduct is prohibited. Statutory rape laws often have a restrictive effect on health and rights. Their existence is used to justify denying young people their rights to health information and services essential to protecting their reproductive and sexual health, as well as their decision-making capacity. Thus, statutory rape laws must balance the objective of protecting younger persons in situations of vulnerability, while not interfering with their ability to access sexual information and engage in sexual behavior appropriate to their ages and evolving capacities.

While human rights standards set the age of marriage at eighteen for men and women, the age of consent for sex is generally understood in international rights standards to be lower than the age of marriage. To avoid discrimination, statutory rape laws must not impose different standards for boys and girls, or for homosexual or heterosexual activities, for differently-gendered partners, or assume a priori that the “offender” in the case of two young people close in age is the male.

Specific criminalization of HIV transmission (through sexual and other behavior) has recently become a popular state response to HIV, although a rights and health analysis suggests many problems with this approach and leads to concluding that other forms of existing criminal law (on assault, for example) may be more suitable and effective. Criminal statutes vary greatly in terms of what is prohibited: intentional sexual conduct (i.e., intending to cause transmission and infection) or sexual behavior that is deemed reckless. To avoid criminal penalty, some laws require the infected person to announce his or her status to the potential partner prior to sexual relations, while others require taking protective steps (using a condom). Across such laws, the definition of prohibited sexual practices is often vague, violating basic principles of criminal law (that conduct must be described with sufficient clarity to give notice). Other laws explicitly (or de facto) are used to address only specific populations perceived to be particularly prone to “risky behavior” (for example, persons in sex work or men who have sex with men), such that the laws may be discriminatory in substance or application. Efforts to criminalize reckless or intention transmission of HIV are often undertaken on the grounds of protecting vulnerable women (especially wives) against infection by male partners. Paradoxically, these laws are often turned against women, particularly those exceeding the bounds of conventional womanhood.

Although laws criminalizing intentional or careless HIV transmission might serve as strong statements of social disapproval about harmful or reckless sexual behavior, the most significant effect on sexual health is that such laws discourage people from being tested and knowing their HIV status. Weighing the very small number of cases prosecuted under these laws against their impact suggests legislators turn to them as symbolic rather than functional interventions—nonetheless, their negative rights and health consequences, in part through discriminatory policing and associated abuses, are felt by already stigmatized populations.

The relationship between sex and criminal law in LAC has some regional particularities that should be taken into account when analyzing to what extent human rights standards have been truly respected by sexual criminal legal regulations and the impact of these regulations on sexual health. In the first place, criminal law in LAC has been used in a peculiarly striking symbolic fashion. In many instances, criminal legislation is enacted by governments to show their concern and strong willingness to address certain social problems whose root causes should perhaps be better addressed through public policies and actions not of a criminal nature. Adopting non-criminal measures that would go to the core of the problem may be more time- and resource- consuming, take longer periods of implementation, and show their results after the public opinion has lost its interest in the problem. In some political junctures, the

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388 Criminal statutes against intentional or reckless transmission may have perverse effects, when applied to pregnant women in childbirth, who may be viewed as infecting the newborn.

The mere enactment of criminal legislation thus sends the signal that the government is “on top” of a problem and is taking it seriously. This characteristic of criminal law in LAC is important when establishing if a specific criminal law reform was just enacted for purely symbolic purposes or it was intended to address a real criminal phenomenon. In the first case, it is most likely that enforcement and prosecution will not be carried out by public authorities, whereas in the second case prosecution and enforcement will most probably follow the enactment of a criminal law reform.

On the other hand, the differences in the legal traditions coexisting in LAC are particularly striking when it comes to the regulation of sexuality through the criminal law. While the criminal law of countries in the region affiliated to the continental/civil Law tradition seems —with some exceptions— to have evolved in a similar way to its Spanish, Italian, or German counterparts, towards a more liberal vision of the relationship between sex and criminal legislation, the same has not been the case in countries of a British common law heritage. Paradoxically, some common law countries in the Caribbean and Central and South America still stick to visions of the social role of criminal law that have already been abandoned in the United Kingdom.

Since the 1960s, criminal law in Spain, Italy, Germany, and in Spanish- and Portuguese-speaking countries in LAC has struggled to establish a clear separation between crimes and sins or, more generally, between crimes and morality. For a long time, the Continental tradition conceived of sexual criminal law as a way of protecting society through the protection of Christian morality, which was deemed to be deeply ingrained in the social fabric. This religious worldview had an essentially negative conception of sexuality where “the rejection of everything related to the body was coupled to deep fears to sexuality and a strong ambivalence between desire and repression.” The intertwine of morality and sexual criminal law led to “extensive interpretations of the definitions of the crimes, the use of moralizing words with a strong emotional investment, [and] the resort to presumptions that could only be understood from the standpoint of a moralizing view.”

The liberalization of sexual social mores beginning in the 1960s slowly influenced the relationship between criminal law and sexuality in at least four ways: (1) purely moral judgments on sexual activity leading to emotional reactions of scandal were abandoned, (2) sexuality began to be positively considered as an expression of human autonomy and a key factor in the development and self-realization of every individual’s personality, that may be exercised in ambit other than marriage, (3) the rise of higher levels of toleration towards the sexual behavior of others, even if it does not conform to one’s sexual views on sexual propriety, and (4) the impact of the women and sexual minorities rights’ movements in the political and social agendas. While before the 1960s the sexual crimes included in the criminal codes of the above-mentioned countries protected social values such as “the existing sexual order,” “the social order of sexual life,” “the legal and moral order of sexual life as socially relevant,"

390 Id. See supra Section 2 on the influence of German and Spanish law in Spanish- and Portuguese-speaking Latin America.
391 See generally JOSÉ LUIS DIEZ RIPOLLÉS, EL DERECHO PENAL ANTE EL SEXO. LÍMITES, CRITERIOS DE CONCRECIÓN Y CONTENIDO DEL DERECHO PENAL SEXUAL 1-11 (1981) [hereinafter DIEZ RIPOLLÉS, EL DERECHO PENAL ANTE EL SEXO].
392 Id. at 2.
393 Id. at 5. For example, one of Italy’s greatest criminal law commentators of the 1930s and the 1940s once wrote that there was no such thing as “sexual freedom.” He wrote that it was better to talk about “a right to chastity or continence, but not about a right to the free disposal of the obscene organs; unless one wants to legitimize the right to canine licenses between men.” 4 GIUSEPPE MAGGIORIE, DERECHO PENAL. PARTE ESPECIAL 51 (1955). Similarly, one of Colombia’s leading criminal law commentators, writing in 1972, observed: “Without exaggerating, it is possible to assert that Christianity introduced freedom, respect, and order in sexual life. Before its advent, it was the reign of anarchy, disrespect, classist imbalance, and the omnipotence of the powerful… Christianity tried to impose order in sexual relationships, regulating them through marriage, equality between social classes, freedom to decide upon one’s own body, the sanction of violent relationships, and the condemnation of the victor’s rights.” 1 LISANDRO MARTINEZ ZÚÑIGA, DERECHO PENAL SEXUAL 13, 18 (1972).
394 DIEZ RIPOLLÉS, EL DERECHO PENAL ANTE EL SEXO, supra note 392 at 4.
395 Id. at 8.
“the moral and social norms of sexual relationships,” “sexual honor,” and “sexual modesty,” and were generally aimed at “morally disapproving certain forms of sexual behavior” or at “avoiding morally disorderly sexual pleasure.” Newer criminal codes sought the protection of a secular notion of sexual freedom not related to any specific moral vision on sexuality. This new posture on the criminal regulation of sex therefore sought to be compatible with the myriad ways of life and worldviews coexisting in pluralist societies and a notion of sexuality as a space for self-fulfillment.

In the Anglo-American legal context, it is possible to identify a similar trend in the evolution of the social purposes of sexual criminal law. At the beginning of the 1980s some English commentators still divided sexual offences in crimes that amounted to sexual aggression and crimes that were “breaches of sexual taboos.” While in the first kind of offences “the predominant motive of the law is to protect an innocent person against an aggressor,” and therefore the more general legislative motivation was the protection of sexual freedom, the second group of offences included crimes such as buggery, gross indecency between men, and bestiality, where the legislative protection had more overt moral overtones. To be sure, the category of “crimes against nature,” “unnatural sex acts,” or “unspeakable crimes” was historically construed as a set of offences that violated “a transcendental natural order,” endangered by human instincts that had to be controlled through criminal law prohibitions.

More recent commentators of English criminal law seem to have put aside the “sexual taboo” justification for sexual criminal law and have instead observed that “the essence of many sexual offences lies in their destruction of freedom of choice in the most intimate area of personality, and in psychological damage.” According to this more modern view, sexual criminal law ought not to be an instrument for the protection of specific moral worldviews, but a means to preserve human autonomy. Human conduct should thus only be deterred through criminal law prohibitions when it objectively produces social harm or harm to the rights of others. In the end, the justifications for sexual criminal law in the Anglo-American legal tradition are coincident with these justifications in the civil/continental context: criminal regulation of sexuality ought to be compatible with the most salient features of modern pluralist and democratic societies. As George Fletcher has pointed out, “the clear tendency of the criminal law in the post-religious societies of the West is to abandon the sacred and concentrate on concrete harms to particular individuals. It is surely the case that in a heterogeneous society, rent by moral dissensus, there is likely to be more agreement whether homicide and larceny violate significant interests than whether sodomy and profaning the Sabbath tread upon transcendentental interests.”

This section illustrates the encounter between sexuality and criminal law regulations in the LAC region with regards to four topics: (1) the criminalization of same-sex conduct, (2) the regime of statutory rape,

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397 Id. at 202-214.
398 Id. at 214-26. See also Octavio García Pérez, La regulación del derecho penal sexual en España, in LOS DELITOS CONTRA LA LIBERTAD E INDEMNIDAD SEXUAL, ENFOQUE DOGÓMATICO Y JURISPRUDENCIAL 233-41 (Luis Reyna Alfaro ed., 2005).
400 Id.
401 Id.
403 Id. at 382 (“[T]he ‘natural order’ infringed by sodomy is not the revealed nature that we perceive, but a transcendental nature that renders some acts sacred and others ‘an abomination’ in the sight of God”).
404 ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 311 (2003) [hereinafter, ASHWORTH, CRIMINAL LAW].
405 This view follows John Stuart Mill’s classic statement that “the only purpose for which power can be rightfully exercised over any member of a civilized community against his will, is to prevent harm to others.” John Stuart Mill, On Liberty, in ON LIBERTY AND OTHER ESSAYS 14 (1998). Following this Millian premise, Andrew Ashworth has more recently observed: “Although it was accepted earlier that there is no litmus test of moral wrongness, and that many judgments depend on principled argument within a particular cultural context, we can at least state this: that respect for personal autonomy means protecting individuals from being forced to act or debarred from acting in certain ways by the conduct of others, and that this may mean penalizing those who act towards others in these coercive ways. This is a minimum principle: how much further, if at all, should we go?” ASHWORTH, CRIMINAL LAW, supra note 404 at 44-45.
406 FLETCHER, RETHINKING, supra note 402 at 382-83.
paying special attention to the age and the sex of those involved in this crime, and (3) the criminalization of transmission of HIV/STIs.

3.2.1. Criminalization of Same-sex Sexual Conduct

In general terms, Latin American countries that belong to the civil law tradition either never criminalized homosexuality, sodomy, or, more generally, consensual same-sex sexual activity or have decriminalized them.\footnote{This section exclusively considers penalization of consensual same-sex sexual activity by the criminal law. It therefore does not deal with \textit{administrative} legislation that may impose sanctions for homosexual behavior. In many countries in Spanish-speaking Latin America, even though homosexuality or sodomy are not a crime, local administrative regulations may sanction public displays of same-sex affection, other forms of homosexual behavior in public, and public non-conforming gender behavior. These sanctions—in Latin-American legal jargon—are usually dubbed “contraventions” (“\textit{contravenciones}”) or “administrative faults” (“\textit{faltas administrativas}”). The problem with these measures is that although they do not amount to criminal sanctions, they may be punished with arrest or fines. Examples of these of regulations are the “fault codes” (“\textit{códigos de faltas}”) of some Argentine provinces. This is the case of the fault codes of the provinces of Buenos Aires (articles 68 and 92-c), Catamarca (article 101), Formosa (articles 98 and 99), La Rioja (article 60), Mendoza (articles 54 and 80), Neuquén (articles 59 and 61), San Juan (article 96), Santa Cruz (article 55), Santa Fe (article 87), and Santiago del Estero (article 78-c).} For example, Colombia removed homosexuality as an offence from its criminal law in 1980, Chile repealed the crime of sodomy from the Criminal Code in 1998, and Nicaragua amended its criminal law to remove the offence of homosexuality in 2008. In all these cases, the reasons to decriminalize same-sex sexual conduct were directly tied to a principled position on the need to establish a clear separation between specific moral views condemning same-sex sexual activity and the law. According to this view, engaging in same-sex sexual activity is a personal option that does not cause a social harm legitimating the limitation of personal freedom by means of criminal punishment. This position is clearly illustrated by the arguments leading to the decriminalization of homosexuality in Colombia by the Criminal Code of 1980. Indeed, liberal criminal law commentators were very critical of article 323 of the Criminal Code of 1936, which penalized consensual homosexual sexual intercourse. For these commentators, sexual activity between consenting adults of the same sex did not violate any sort of right or impinged upon any important social interest.\footnote{\textit{Id}. at 495-96.} The fact that some people considered homosexuality “profoundly immoral,” “against personal aesthetics,” or “offensive to virility” did not warrant the criminal repression of consensual homosexual sexual behavior.\footnote{See 4 \textsc{H U S C A R L O S P E R E Z}, \textsc{Tratado de Derecho Penal} 491-97 (1971).}

In the LAC region, unfortunately, there are still some countries—mostly belonging to the common law tradition—that criminalize same-sex sexual conduct between consenting adults in public and/or in private. A cursory revision of the regional sexual criminal legislation shows that same-sex sexual activity is penalized either \textit{directly} or \textit{indirectly} through criminal law prohibitions. \textit{Direct} criminalization of sexual same-sex conduct means that criminal legislation includes a set of offences that make criminal different forms of sexual contact (basically anal and oral sex) between consenting adults of the same sex either in public or in private. On the other hand, \textit{indirect} criminalization means that sexual contact between consenting adults of the same sex is not a crime in itself, but sexual orientation may have some consequence in sentences meted out for certain crimes or in the prosecution of certain offences.

As reported by The International Lesbian, Gay, Bisexual, Trans and Intersex Association, ILGA,\footnote{See \textsc{D A N I E L O T T O S S O N}, \textsc{State-sponsored Homophobia: A World Survey of Laws Prohibiting Same Sex Activity Between Consenting Adults} (an ILGA Report) 31-38 (2010).} one country in Central America (Belize), one country in South America (Guyana), and nine countries in the Caribbean (Antigua and Barbuda, Barbados, Dominica, Grenada, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and Trinidad and Tobago) still \textit{directly} criminalize same-sex sexual activities between consenting adults in public and/or in private. The criminal law of these countries includes the offences of buggery, serious or gross indecency, unnatural crime, unnatural connexion, and outrages on decency.
The crime of buggery is defined as “sexual intercourse per anum by a male person with a male person or by a male person with a female person” (Antigua and Barbuda and Dominica), as anal intercourse “with a human being or with any other living creature” (Guyana), as anal intercourse “committed either with mankind or with any animal” (Jamaica), and as “sexual intercourse per anus by a male person with another male person” (Saint Lucia). Some regulations of this crime are harsh and straightforward, for the sentence may amount to imprisonment for life. For example, section 9 of the Sexual Offences Act of Barbados (1992) states that “[a]ny person who commits buggery is guilty of an offence and is liable on conviction on indictment to imprisonment for life.” Similarly, section 354 of Guyana’s Criminal Law (Offences) Act sets forth that “[e]veryone who commits buggery, either with a human being or with any other living creature, shall be guilty of felony and be liable to imprisonment for life.” It is worth noting that, in Guyana, attempt to commit buggery and assault with the intention to commit buggery are punished with imprisonment for ten years (section 353 of the Criminal Law [Offences] Act).

Other equally straightforward but less harsh criminal regulations — they do not carry imprisonment for life sentences — of buggery are those of Jamaica, Saint Kitts and Nevis, and Saint Vincent and the Grenadines. In the case of Jamaica, sections 76 and 77 of the Offences against the Person Act establish the offences of buggery and attempt to commit buggery. According to section 76, “[w]hosoever shall be convicted of the abominable crime of buggery committed either with mankind or with any animal, shall be liable to be imprisoned and kept to hard labour for a term not exceeding ten years.” Under its attempt modality (article 77), the crime of buggery may carry a sentence of up to seven years in prison with or without hard labor. Section 56 of the Offences against the Person Act of Saint Kitts and Nevis also penalizes “the abominable crime of buggery” with sentences to up to ten years in prison with or without hard labor. In Saint Kitts and Nevis, the attempt to commit buggery, the assault with the intent to commit buggery, and “any indecent assault upon any male person” are punished with imprisonment to up to four years with or without hard labor. Finally, section 146 of the Criminal Code of Saint Vincent and the Grenadines punishes buggery with imprisonment for ten years. This section specifies that buggery is committed by a person “with any other person” or “with an animal,” or by a person who “permits any person to commit buggery with him or her.”

A third modality of regulation of buggery establishes a more complex regulation of this offence. The complexity arises from a differentiated regime of sentencing that basically depends on the age of the participants in the crime and the different forms of sentences that may be imposed. Regulations of this kind exist in Antigua and Barbuda, Dominica, Saint Lucia, and Trinidad and Tobago. Section 12 of the Sexual Offences Act of 1995 of Antigua and Barbuda sets forth that a person who commits buggery may be imprisoned (1) for life if the offence is committed “by an adult on a minor,” (2) for fifteen years if it is committed “by an adult on another adult,” and (3) for five years if it is committed “by a minor.” The provisions on buggery established in section 16 of the Sexual Offences Act of 1998 of Dominica perhaps represent the most complex regulation of this crime in the Caribbean region. In Dominica, the imprisonment periods for those liable of buggery are regulated in the same way as in Antigua and Barbuda. However, section 16 additionally establishes that, in addition to prison, “if the Court thinks it fit, the Court may order that the convicted person be admitted to a psychiatric hospital for treatment.” Additionally, attempt to commit this offence is punished with time in prison of four years plus psychiatric treatment if a court of law orders it. Both section 133 of the Criminal Code of Saint Lucia and section 13 of the Sexual Offences Act of 1986 of Trinidad and Tobago regulate buggery in very similar terms to the model followed by Antigua and Barbuda.

The legislation of some of the countries in the LAC region that still criminalize same-sex sexual activities do not refer to buggery or gross indecency but to offences such as “unnatural crime,” “unnatural connexion,” or “unnatural offences.” For example, section 53 of the Criminal Code of Belize refers to “unnatural crimes” and states: “Every person who has carnal intercourse against the order of nature with any person or animal shall be liable to imprisonment for ten years.” Similarly, section 435 of the Criminal Code of Grenada establishes: “If any two persons are guilty of unnatural connexion, or if any person is guilty of an unnatural connexion with an animal, every such person shall be liable to
imprisonment for ten years.” Finally, section 353 of the *Criminal Law (Offences) Act of Guyana* penalizes with imprisonment for ten years the attempt to commit “unnatural offences.” These offences are: (1) “attempts to commit buggery,” (2) assaults on “any person with the intention to commit buggery,” and (3) “being a male, indecently assaults any other male person.”

Serious or gross indecency is another category of offence whereby some countries in the English-speaking Caribbean and South America have penalized certain modalities of same-sex sexual activity (Antigua and Barbuda, Barbados, Dominica, Guyana, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, and Trinidad and Tobago). All across the region this crime is defined as “an act, other than sexual intercourse (whether natural or unnatural), by a person involving the use of the genital organs for the purpose of arousing or gratifying sexual desire.” As in the case of buggery, the regulations on this crime vary in their complexity: while in some countries gross indecency is a crime that only punishes sex between men, in other countries it equally applies to men and women; whereas in certain countries this offence is committed both in public and in private, in other countries acts of gross indecency are not punished when committed in private under some conditions; while some countries take into account the age of the victim for sentencing purposes, other countries do not consider the age of the participants; while some countries regulate consent, others do not.

The less complex regulations of the crime of gross indecency are those of Guyana, Jamaica, and Saint Vincent and the Grenadines. In the first two cases, the offence is exclusively male, it may be committed both in public and in private, and the sentences are similar. Section 352 of the *Criminal Law (Offences) Act of Guyana* states: “Any male person, who in public or private, commits, or is a party to the commission, or procures or attempts to procure the commission, by any male person, of an act of gross indecency with any other male person shall be guilty of misdemeanour and liable to imprisonment for two years.” In a similar vein, section 79 of the *Offences against the Person Act of Jamaica* establishes that “[a]ny male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour, and liable to imprisonment for a term not exceeding 2 years.” In Saint Vincent and the Grenadines, the crime is gender neutral, it may be committed in public and in private, and the sentence is harshest. Section 148 of the *Criminal Code of Saint Vincent and the Grenadines* sets forth that “[a]ny person, who in public or private, commits an act of gross indecency with another person of the same sex, or procures or attempts to procure another person of the same sex to commit an act of gross indecency with him or her, is guilty of an offence and liable to imprisonment for five years.”

In some jurisdictions, criminal regulations on gross or serious indecency establish a scale of sentences according to the age of the victim. This is the case of Antigua and Barbuda, Barbados, and Trinidad and Tobago. According to section 15-1 of the *Sexual Offences Act of 1995 of Antigua and Barbuda* and section 16-1 of the *Sexual Offences Act of 1986 of Trinidad and Tobago*, if serious indecency is committed “on or towards a minor under sixteen years of age” the perpetrator will be convicted to imprisonment for ten years, if it is committed “on or towards a person sixteen years of age or more” the imprisonment time is five years. Barbados’ legislation regulates both serious indecency and incitement to commit this offence. Section 12-1 and 2 of the *Sexual Offences Act of 1992 of Barbados* establish that if someone commits this crime or incites another to commit it with him or her or with another person, he or she will be sentenced to imprisonment for ten years if the victim is sixteen years of age or older. The sentence goes up to fifteen years if serious indecency is committed with a child under the age of sixteen or the child is incited to commit this offence with the perpetrator or another person.

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411 In Trinidad and Tobago the ten-year sentence applies “for a first offence.” In case of “subsequent offences,” the sentence is 15 years in prison.
Another interesting feature of the more complex regulations on serious or gross indecency in the Caribbean region is the public/private distinction some of these regulations make. Such regulations appear in the legislation of Antigua and Barbuda, Dominica, Saint Lucia, and Trinidad and Tobago. In these four cases, acts of serious or gross indecency are not criminal only when committed in private by consenting adults of different sexes. Section 15-2 of the Sexual Offences Act of 1995 of Antigua and Barbuda and section 16-2 of the Sexual Offences Act of 1986 of Trinidad and Tobago set forth that acts of serious indecency are not penalized if committed in private between “a husband and his wife” and “a male person and a female person each of whom is sixteen years of age or more.” The legislation of Dominica and Saint Lucia has more specific regulations on how to establish the consent of participants in acts of gross indecency in private. Both section 14-2 of the Sexual Offences Act of 1998 of Dominica and section 132-2 of the Criminal Code of 2004 of Saint Lucia establish that gross indecency is not punishable if “committed in private between an adult male person and an adult female person, both of whom consent.” With regards to the public/private distinction, both statutes cursorily state that “an act shall be deemed not to have been committed in private if it is committed in a public place” (Sexual Offences Act of 1998 of Dominica, section 14-3-a; Criminal Code of 2004 of Saint Lucia, section 132-3-a). Lack of consent is also similarly regulated by the regulation on gross indecency of these two countries. In both cases, it is presumed that a person did not consent to an act of gross indecency in private if (1) “the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent representations as to the nature of the act,” (2) “the consent is induced by the application or administration of any drug, matter or thing with intent to intoxicate or stupefy the person,” and (3) “that person is, and the other party to the act knows or has good reason to believe that the person is suffering from a mental disorder” (Sexual Offences Act of 1998 of Dominica, section 14-3-b-i, ii, and iii; Criminal Code of 2004 of Saint Lucia, section 132-3-b-i, ii, and iii).

As mentioned above, countries in Spanish- and Portuguese-speaking LAC affiliated to the continental/civil law tradition have liberalized their criminal law since the 1960s. In the realm of the criminalization of same-sex sexual activity, this trend means that neither homosexuality nor sodomy have any sort of current status in the criminal legislation of these countries. This does not mean, however, that, in certain countries, there are still some criminal norms whereby moral and social condemnation of homosexuality, same-sex sexual activity, or same-sex displays of affection may be channeled. These norms thus indirectly penalize homosexuality or same-sex sexual activities. The criminal legislation of six states of Mexico, an article of the Chilean Criminal Code, and the provisions on “security measures” of the Criminal Code of Costa Rica are useful to illustrate this phenomenon.

Although none of the Mexican states criminalize homosexuality or sodomy per se, the criminal codes of the states of Aguascalientes (article 191), Campeche (article 176), Chihuahua (article 177), Durango (article 221), San Luis Potosí (articles 180 and 180 bis), and Tamaulipas (articles 192 and 193) regulate an offence called “corruption of minors” (corrupción de menores), which basically consists in impinging upon what is deemed to be the normal development of the psychic or sexual life of a child. This crime encompasses conduct such as “inducing a child to the practice of mendicity, drunkenness, use of drugs, prostitution, or any other vice,” “teaching perverse or premature sexual acts that alter the normal psychosexual development of a child,” “employing children in places that, by their nature, may be harmful to their moral formation,” “selling or providing children with toxic substances such as solvent materials, alcohols, medications, or any other substance that produces similar effects,” “initiating a child [under twelve years of age] to sexual life or sexually depraving him or her,”412 “inciting a child to become part of a criminal organization,” “inciting, facilitating, or forcing a child to commit exhibitionism or lewd or sexual acts,” “inviting, facilitating, allowing, or tolerating the entrance of children to bars, places of night entertainment, or breweries (cervecerías and pulquerías),” and “inciting a child to the practice of homosexuality.”413 The minority of age to which this crime refers is differently set in twelve years of age (Campeche), sixteen years of age (Aguascalientes), and eighteen years of age (Chihuahua,

412 This form of the offence only appears in the Criminal Code of the State of Campeche, where the age of the victim is of twelve years.

413 This form of corruption of minors only appears in article 193 of the Criminal Code of the State of Tamaulipas.
The offence, however, also applies if the victim, independently of her or his age, “does not have the capacity to understanding the meaning of the act” or “is unable to resist the act.” Sentences for this crime are imprisonment between three months and ten years and fines between ten to one thousand daily salaries.

The most interesting feature in the regulation of the crime of corruption of minors is that in all six states the basic regulation on corruption of minors is complemented by a provision establishing that if the acts of corruption are repeatedly performed on the same child and, as an outcome, the child becomes alcoholic or drug addict, becomes part of a criminal organization, or engages in prostitution or “homosexual practices,” the applicable sentence will be aggravated. If the these outcomes of repeated acts of corruption are indeed verified, the sentences are imprisonment from three to sixteen years and fines that may range between twenty and two thousand daily salaries. The “homosexual practices” outcome in the regulation of the crime of corruption of minors leaves one to wonder to what extent it works as a strong statement of social and moral disapproval of homosexuality, particularly when the criminal codes of these six states of Mexico do not define what is to be understood by “homosexual practices,” in what context they should take place, or with what frequency—as if such a definition would not make matters worse.

The only possible explanation for the existence of this outcome is pure prejudice. On the one hand, the “homosexual practices” outcome stands in equal terms to what many societies deem to be social evils that should be eradicated such as alcoholism, drug addiction, participation in criminal activities, and prostitution. In most of the Mexican state regulations, it is equally bad to be part of a criminal organization and engaging in “homosexual practices.” Homosexuality is as abnormal as criminality and it should hence be similarly eradicated. On the other hand, the lack of any definition on what is to be understood by “homosexual practices” allows one thinking that these criminal provisions reproduce very old prejudices on homosexuality: that, like a disease, homosexuality may be transmitted from one person to another, or that sexual abuse in childhood may function as a root cause for homosexuality.

Another modality of criminal legislation that indirectly criminalizes homosexuality or same-sex sexual activities is represented by article 373 of the Chilean Criminal Code. This provision in included in a chapter of the Criminal Code that establishes a set of offences generally designated as “public outrages to good customs.” Article 373 is applicable to “anyone that in any way offends decency (pudor) or good customs with acts of grave scandal or significance.” This crime carries a sentence of imprisonment between 61 days and three years. Although this provision does not make any reference to homosexuality or same-sex sexual activities it indeed refers to offenses to “decency” and “good customs,” a couple of notions—among many others—that in certain countries in the LAC region have historically been used to disapprove, sanction, and persecute non-normative sexualities. As it was mentioned before in this paper, the IACtHR and certain constitutional or supreme courts in the region have sought to delimit this sort of concepts in order to make them compatible with basic human rights standards, so they do not become a source of power abuse. In Chile, however, both commentators and LGBT rights NGOs have for a long time criticized article 373 of the Chilean Criminal Code for being a constant source of police persecution and discrimination against LGBT citizens. As reported by researchers and human rights

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414 It must be recalled that article 205-bis of the Criminal Code of the State of Aguascalientes also criminalizes discrimination based on sexual orientation, among other grounds of discrimination. See supra Section 3.1.3.2.1. Interestingly and paradoxically enough, this criminal code inurs in a form of discrimination that, at the same time, it criminalizes.

415 See supra Section 3.1.2.5.

groups and centers in Chile, this provision has allowed police authorities to legitimize illegal arrests, physical violence, and other abuses against individuals with diverse sexual orientations or gender identities.417

Finally, articles 98-6 and 102-e of the Criminal Code of Costa Rica provide that judges must impose a “security measure” (“medida de seguridad”) consisting in the prohibition to frequent certain places “when prostitution, homosexuality, drug dependency, or alcoholism are usual and have caused the criminal conduct of the agent” (emphasis added). In civil/continental criminal law, “security measures” are a form of preventive punishment. Taking into account the personal conditions of the agent of a specific crime, they are imposed in order to prevent him or her from committing a new offence.418 Security measures thus generally proceed when (1) the agent is incapable to fully understanding the meaning of his or her actions because he or she is underage or has a mental disability, and (2) certain traits of the perpetrator’s personality make him or her prone to committing certain crimes. This second hypothesis was propounded by certain schools of criminal law —starkly inimical to basic tenets of human dignity and personal freedom— that suggested that some individuals presented “dangerous” personalities leading them to criminality. They were therefore penalized because of their mere status and not to make them accountable for their conduct.419 Prostitutes, homosexuals, drug addicts, and alcoholics were historically on top of the list of “dangerous personalities.”

3.2.2. The Legal Regime of Statutory Rape

All the criminal legislations of the countries selected for the research project regulate statutory rape and other sexual offences where the victim is a child or an adolescent with diverse degrees of complexity. With the exception of certain legislative regulations of Chile, Costa Rica, Guatemala, and Jamaica, that include problematic provisions from the point of view of human rights standards, the remaining countries have legislations that generally comply with basic human rights. The regional regulations of statutory rape and other sexual crimes involving children have several similarities that should be pointed out at the outset.

First, all of the studied countries have legally set at eighteen years the age when a person reaches adulthood. Below this age, a person is considered to be a child or an adolescent and has a limited legal capacity. A child is presumed to have a restricted autonomy and therefore (1) a limited ability to decide with full freedom on certain matters, and (2) a limited understanding of the extent and consequences of his or her actions and the actions of others.

In countries affiliated to the civil/continental tradition, the classification of persons by their age for different legal purposes is a matter that is mostly regulated by civil codes.420 After establishing adulthood at eighteen years of age, these codes also set an age-range below the age of eighteen where children may be legally capable to give consent for some legal acts.421 Marriage is one of the important legal acts

417 See id.
418 See, e.g., FERNANDO VELÁSQUEZ VELÁSQUEZ, DERECHO PENAL. PARTE GENERAL 264-71 (2009).
419 Id. at 819.
420 Argentina (article 126), Brazil (article 5), Chile (article 26), Colombia (article 34), Costa Rica (article 37), Dominican Republic (articles 388 and 488), Guatemala (article 8), Mexico (article 646 of the Civil Code of the Federal District which is also the Federal Civil Code), and Peru (article 42). In Jamaica, section 2-1 of the Child Care and Protection Act of 2004 defines an “adult” as “a person who has attained the age of eighteen years” and a “child” as “a person under the age of eighteen years.”
421 The civil codes of Argentina, Chile, Colombia, and Peru set three age-ranges. In Argentina, article 126 establishes that “minors” (“menores”) are persons under eighteen years of age and article 127 sets forth that “minor adults” (“adultos menores”) are persons between the ages of fourteen and eighteen and “non-pubescent minors” (“menores impúberes”) are persons under fourteen years of age. In Chile and Colombia, the same age regulation. Article 26 of the Chilean Civil Code and article 34 of the Civil Code of Colombia establish that a child is a person under seven years of age, a “non-pubescent minor” is a boy between the ages of seven and twelve, and a “pubescent minor” (“púberes”) is a boy between the ages of fourteen and eighteen and a girl between the ages of twelve and eighteen. In Peru, article 43-1 of the Civil Code sets forth that persons below the age of sixteen are completely devoid of any legal capacity, and article 44-1 establishes that persons between the ages of sixteen and eighteen have “relative” legal capacity. The three age-
where civil legislation in countries in the LAC region makes exceptions to the age of full legal capacity: minors may get married under the age of eighteen provided they have parental or judicial authorization.\textsuperscript{422} When talking about statutory rape, the legal age to validly marry should be taken into account for across the region marriage was historically defined as a contract between the spouses that imposes on them the obligation —among others—to having sexual intercourse in order to procreate.\textsuperscript{423} Legal regulations on the age to validly marry thus reflect a presumption on the age of sexual maturity and the capacity of persons to consent for sexual relations.\textsuperscript{424} In LAC, legal regulations on statutory rape usually follow the regulations on age minority and legal capacity to marry established in civil codes. The age for statutory rape will thus usually be set at the age where persons are deemed to be totally incapable to consent to marriage.\textsuperscript{425}

Second, since the end of the 1990s the majority of countries selected for the research project amended their statutory rape legislation in order to (1) increase the age at which consented sexual intercourse with a minor is considered to be statutory rape from around twelve years of age to around fourteen years of age, (2) equalize the age at which both men and women may be statutorily raped,\textsuperscript{426} and (3) make applicable statutory rape legislation to women and men in equal terms. As explained earlier in this section, the transformation in the legislation on sexual offences of many countries in LAC—including statutory rape—stems from a new vision on the foundations of sexual criminal law in light of the principle of human dignity and human rights standards. From a perspective that viewed “honor,” “decency,” “modesty,” and “chastity,” (usually of women and girls), among others, as the social values

ranges are also established in other countries just by mentioning the age where adulthood is reached and the age-range where minors have relative legal capacity or are devoid of any legal capacity. In Brazil, while article 5 of the Civil Code sets adulthood at eighteen years of age, article 4 indicates that persons have relative legal capacity between the ages of sixteen and eighteen. Similarly, article 8 of the Civil Code of Costa Rica establishes, on the one hand, that adulthood is reached at eighteen and, on the other hand, that persons below fifteen years of age lack any legal capacity. In Guatemala, article 8 of the Civil Code sets the age of adulthood at eighteen and the range of relative legal capacity between fourteen and eighteen years of age. Finally, some countries have established differentiated age-ranges only when referring to the legal capacity to marry. See infra Section 3.3.1.\textsuperscript{427} See id.\textsuperscript{428} In the continental/civil Law tradition, the age to validly consent to marriage for girls was generally set at twelve years of age and for boys at fourteen years of age based on the empirical observation that this was the age where they reached their sexual maturity and therefore were able to procreate. This rule was drawn from classic Roman law. For an explanation and the history of this rule see generally Const. Ct. Col., Decision C-507/04 ((May 25, 2004), ¶ 4.1. See also infra Section 3.3.1.\textsuperscript{429} This was the view adopted by the Constitutional Court of Colombia. According to the Court, constitutional fundamental rights require that criminal law regulations on statutory rape follow civil law regulations on the capacity to marry. See Const. Ct. Col., Decision C-146/94 (Mar. 23, 1994). In this decision, the Court observed that Congress has wide constitutional discretion to fix the age at which a child may be statutorily raped. However, the Constitutional Court—at this early stage of its doctrine—explained the rationale of statutory rape in terms of constitutional fundamental rights. For the Court, “article 5 of the Constitution establishes the primacy of the individual’s inalienable rights without discrimination. One of these rights is the right not to be subjected to degrading treatments enshrined in article 12 of the Constitution. Sexual acts and sexual intercourse are not a form of degrading treatment in the case of an adult who entirely owns her behavior, provided she willingly and freely consents. These same acts, however, amount to a form of highly degrading treatment when they involve a child, whose psychological and physical development are still in formation. In this case, the freedom of a child is not complete for they do not yet have full consciousness of their acts and the consequences they entail.” Id. ¶ V. The Court then went on to observe that Colombian criminal law legislation on statutory rape was consistent with and developed articles 3, 19, 34, and 36 of the Convention on the Rights of the Child. See id. Finally, the Constitutional Court indicated that criminal norms on statutory rape, in order to fully protect the rights of children, should be congruent with civil law legislation on the age to marry. While article 303 of the 1980 Colombian Criminal Code established that anyone who had sexual intercourse with a person younger than fourteen years of age committed the offense of statutory rape, article 140-2 of the Colombian Civil Code establishes that a marriage of a boy below the age of fourteen and a girl below the age of twelve was void. In the Court’s view, “[Congress] should have taken into account the [marriage] regulation and did not for in the case of statutory rape it presumed absence of consent at an age below fourteen, when, in the case of marriage, girls above the age of twelve can validly give consent to marriage.” Id. For the Court, the incongruence existing between the criminal regulation on statutory rape and the civil regulation on consent to marriage produced the unreasonable regulation that the husband of girl between the ages of twelve and fourteen could be charged for statutory rape. The Constitutional Court hence considered that article 303 of the 1980 Criminal Code of Colombia was compatible with the Constitution provided it was not applicable to sexual intercourse with a married girl between the ages of twelve and fourteen. See id. This position was reaffirmed by the Court in 2003. See Const. Ct. Col., Decision C-1095/03 (Nov. 19, 2003).\textsuperscript{426} Some criminal legislations in the region established that women could be statutorily raped at twelve years of age (or around this age) and men at fourteen years of age (or around this age).
that criminal legislation on sexual crimes aimed at protecting, there was a shift towards a more encompassing view of *sexual freedom* or *sexual integrity/indemnity* as the ultimate grounding of legislation on sexual offences.

Third, in order to have a clear picture of how criminal legislation protects children and adolescents’ sexual autonomy in the LAC region, the study of statutory rape provisions in criminal codes should be complemented with provisions that criminalize other forms of sexual abuse. Indeed, criminal codes in the region establish statutory rape as an offence that is generally understood as consented sexual intercourse—generally defined as penetration of the vagina, the anus, or the mouth by the penis, the fingers, or any object and the vaginal or anal penetration of any part of the human body—between an adult of any sex and a person of any sex below an age—between twelve and sixteen years of age depending on the country—where it is presumed that the child has no capacity to understanding the meaning and the extent of his or her decisions in sexual matters. In addition to this basic provision, criminal codes also regulate a set of sexual offences affecting children below the threshold age where the sexual acts involving a minor are not sexual intercourse.\(^{427}\)

The legislative regulations on statutory rape in the LAC region may be classified according to their complexity. The less complex regulations are those that usually set one age below which sexual intercourse with a child is criminal even with his or her consent. The more complex regulations establish several age-ranges—generally for sentencing purposes—between the threshold age for statutory rape and the age of eighteen.

The legislation of Colombia, Dominican Republic, Brazil, and Chile illustrates the less complex form of regulation on statutory rape in the region. The case of Colombia may be considered a model of simplicity in the regulation of this offence. *Articles 208 and 209 of the Colombian Criminal Code of 2000* (amended by Law 1236 of 2008) set forth the offences of “*abusive sexual intercourse (acceso carnal) with a minor younger than fourteen years of age*” and “*sexual acts with a minor younger than fourteen years of age or in his or her presence.*” In article 212 of the Criminal Code of Colombia, “*sexual intercourse*” is defined as the “penile penetration of the anus, the vagina or the mouth, as well as *vaginal or anal penetration of any other part of the human body or other object.*” The “*sexual acts*” to which article 209 refers are acts “different from sexual intercourse.” Whereas the first crime carries a sentence of imprisonment from twelve to twenty years, the second offence is punished with imprisonment from nine to thirteen years.

Brazilian legislation is also quite straightforward in its regulation of statutory rape and other sexual acts with children below the age of fourteen. *Article 213 of the Federal Criminal Code of Brazil* (amended by Law 12.015 of 2009) establishes the basic provision on rape (*estupro*), which is defined as “*constraining anyone by means of violence or grave threat to having sexual intercourse or to practicing or allowing another licentious act [with the perpetrator],*” and entails a basic sentence of imprisonment from six to ten years. The rape of a person *between the ages of fourteen and eighteen* carries an aggravated sentence of imprisonment from eight to twelve years. Statutory rape is criminalized in Brazil by *article 217-A of the Federal Criminal Code (estupro de vulnerável)* and is defined as “*having sexual intercourse with a person below the age of fourteen.*” This offence is punished with imprisonment from eight to fifteen years. A couple of related sexual offences with minors below the age of fourteen are the crimes of “*corruption of minors*” (*corrupção de menores*) and “*satisfaction of lewdness (lascivia) with the presence of a child or an adolescent*” (*satisfação de lascivía mediante presença de criança ou adolescente*). The first offence, set forth by *article 218 of the Federal Criminal Code of Brazil*, consists in “*inducing a person below the age of fourteen to satisfying the lewdness of another*” (emphasis added) and carries a sentence of two to five years of imprisonment. On the other hand, *article 218-A of the Brazilian Federal Criminal Code* defines the second crime as “*performing sexual intercourse or another licentious act in the presence\(^{427}\) This section will only describe criminal offences with minors not involving pornography or forms of "obscene" expression and offences implicating sex-for-money, prostitution, or trafficking. The latter will be dealt with in Section 3.6 and the former in Section 3.7.
of a person below the age of fourteen or inducing him or her to witness these acts with the intent to satisfying one’s own or another’s lewdness” (emphasis added), and punishes it with imprisonment from two to four years.

Although the Dominican Republic and Chile are also examples of a simple regulation of statutory rape and other sexual offences involving children and adolescents from the point of the age-ranges of the victims, their legislation is problematic from the point of view of human rights standards. While the criminal legislation of the Dominican Republic does not include an offence whereby statutory rape is criminalized, the Chilean Criminal Code establishes a differentiated treatment between heterosexual statutory rape and homosexual statutory rape.

Article 331 of the Criminal Code of the Dominican Republic defines rape (violación) as “any act of sexual penetration, of any nature, committed against a person through violence, constraint, threat, or surprise,” and punishes it with a sentence of imprisonment of ten to fifteen years and fines from 100,000 to 200,000 Dominican Pesos. However, the sentence is higher —imprisonment of ten to twenty years and fines from 100,000 to 200,000 Dominican Pesos— if rape is committed against a boy, a girl, or an adolescent. According to this legislation, it seems that in the Dominican Republic having sexual intercourse with a child or an adolescent with his or her consent is not a crime. Sex with children and adolescents seems thus to be an offence only when there is “violence, constraint, threat, or surprise.” The lack of a criminal provision on statutory rape might be in violation of article 4 of the Convention on the Rights of the Child (“States parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized [in the Convention]”). To be sure, as this provision has been interpreted by the Committee on the Rights of the Child, it requires, among other measures, that States adopt legislation setting a minimum age for sexual consent and marriage. Rightly understood, the international obligation of setting a minimum age for sexual consent means that it is not enough just to criminalize events of violent or constrained sexual intercourse or other sexual acts with children, but that it is necessary to criminalize sexual intercourse or other sexual acts with children that, even in the absence of violence or constraint, occur at an age where the child does not have the capacity to fully understand the meaning and the consequences of these sexual acts.

In Chile, statutory rape is criminalized by article 362 of the Criminal Code (amended by Law 19.927 of 2004). According to this provision, a person is liable for statutory rape if he or she has vaginal, anal, or oral intercourse with a person below the age of fourteen even if (1) there is not force or intimidation, (2) the victim has not lost his or her senses or does not resist the intercourse, and (3) the victim has not a mental disease. This crime is punished with imprisonment from five to twenty years. In addition, article 363 of the Chilean Criminal Code establishes a special form of abusive sexual intercourse (“estupro”) with children. In this case, the perpetrator is liable if he or she has vaginal, anal, or oral intercourse with a person between the ages of fourteen and eighteen taking advantage of the following circumstances: (1) the victim is mentally disturbed, even transitorily, but has not a mental disease, (2) a relationship of dependency between the victim and the perpetrator, such as the relationship stemming from custody, education, and employment, (3) the helplessness of the victim, and (4) the victim is deceived by taking

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428 Principle II of the Dominican Code for the System of Protection and the Fundamental Rights of Boys, Girls, and Adolescents (Código para el sistema de protección y los derechos fundamentales de niños, niñas y adolescentes) establishes that a boy or a girl is a person from birth until the age of twelve and an adolescent is a person from the age of thirteen until the age of eighteen.

429 According to the Committee: “In the context of the rights of adolescents to health and development, States parties need to ensure that specific legal provisions are guaranteed under domestic law, including with regard to setting a minimum age for sexual consent, marriage and the possibility of medical treatment without parental consent. These minimum ages should be the same for boys and girls (article 2 of the Convention) and closely reflect the recognition of the status of human beings under 18 years of age as rights holders, in accordance with their evolving capacity, age and maturity (arts. 5 and 12 to 17)” (emphasis added). General Comment N° 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child, U.N. CRC, 33rd Session, U.N. Doc. CRC/GC/2003/4 (2003), § 9.

430 For a general assessment of Chile’s 2004 legislation on statutory rape and its impact on the rights of adolescents see Claudia Ahumada, Statutory Rape Law in Chile: For or against Adolescents?, 2 J. Of Pol. & L. 94 (2009).
advantage of his or her sexual inexperience or ignorance. Sentence for this offence is imprisonment of three to ten years.

The Chilean regulation on statutory rape, however, is problematic in light of human rights standards as it establishes different ages of consent for heterosexual statutory rape and homosexual statutory rape. As mentioned in the previous paragraph, the age of consent for heterosexual statutory rape is fourteen years of age. Yet, article 365 of the Criminal Code of Chile sets forth that anyone who has consented sexual intercourse with a person below the age of eighteen will be punished with imprisonment from sixty-one days to three years.

If these sexual offences are committed by introducing “objects of any sort into the vagina, the anus, or the mouth” or “animals are used,” the sentence will be aggravated. In this case, if the victim is below the age of fourteen the sentence is imprisonment of five to twenty years. Alternatively, if the victim is between the ages of fourteen and eighteen and there is one of the special circumstances mentioned in article 363, the sentence will be imprisonment from three to ten years.

The Criminal Code of Chile also includes sexual offences involving children different from statutory rape. A first category of this kind of offences is what the Criminal Code calls “abusive sexual actions” (acciones sexuales abusivas). Article 366-ter defines these actions as “any act of sexual significance and relevance performed through bodily contact with the victim, or that has affected the genitalia, the anus, or the mouth of the victim even in the absence of bodily contact with him or her.” According to article 366 of the Chilean Criminal Code, if the perpetrator engages in an “abusive sexual action” with a person between the ages of fourteen and eighteen in one of the circumstances set forth by article 363, he or she will be punished with imprisonment from three to five years. If the victim of the “abusive sexual action” is below the age of fourteen, then the sentence will be imprisonment from three to ten years (article 366-bis). The second category of sexual offences is set by article 366-quater of the Criminal Code. In this case, if the perpetrator (1) performs actions of “sexual significance” that do not amount to “abusive sexual actions” in order to produce his or her or another person’s sexual arousal before a person below the age of fourteen, or (2) makes a person below the age of fourteen watch or hear pornographic materials or shows in order to produce his or her or another person’s sexual arousal, he or she will be punished with imprisonment from 541 days to three years. If the perpetrator seeks his or her or another person’s sexual arousal by making a person below the age of fourteen to perform actions of sexual significance before him or her or another person the sentence will also be imprisonment from three to five years. Finally, if the victim of any of these actions is between the ages of fourteen and eighteen and there is force or intimidation or any of the circumstances mentioned by article 363 of the Criminal Code the sentence will be imprisonment from three to five years.

More complex forms of regulation of statutory rape and other sexual offences involving children are those of Argentina, Costa Rica, Guatemala, Jamaica, Peru, and Mexico. As mentioned earlier, the complexity of these regulations stems, on the one hand, from the multiple age-ranges below adulthood where sexual crimes against children of different gravity may be committed, and, on the other hand, from the multiplicity of sexual offences against children different from statutory rape. From the point of view of human rights standards, the legislations of Costa Rica, Guatemala, Jamaica, and some of the states of Mexico are problematic and therefore deserve to be examined more closely.

In Costa Rica, the basic criminal provision on statutory rape is article 156-1 of the Criminal Code (amended by Law 8.590 of 2007). This provision establishes that a person is criminally liable for rape (violación) if he or she “has a person of any sex to have with him or her anal, vaginal, or oral intercourse or performs anal, vaginal, or oral intercourse with a person of any sex” when (1) the victim is under the age of thirteen, (2) he or she takes advantage of the victim’s condition of vulnerability or the victim is incapable to resist, and (3) when he or she uses intimidation or physical violence. This offence is punished with imprisonment from ten to sixteen years. A variant of statutory rape in another age-range is to be found in article 159 of the Costa Rican Criminal Code. In this case, if the perpetrator, “taking
advantage of the age of the victim,” has consented sexual vaginal, anal, or oral intercourse with a person
between the ages of thirteen and fifteen he or she will be punished with imprisonment from two to six
years. The same sentence applies if the perpetrator introduces his or her fingers, objects, or animals into
the vagina or the anus of the victim. In the events established in article 159, the sentence will be
aggravated (imprisonment from four to ten years) if the perpetrator is an ascendant, an uncle, an aunt, a
brother or a sister, a tutor, or a custodian of the victim.

As in other countries in the region, the Costa Rican Criminal Code also includes a set of sexual offences
where the victim is a child but do not implicate sexual intercourse. Article 161 of this Code regulates a
crime called “sexual abuses against minors and incapable persons” (abusos sexuales contra personas
menores de edad e incapaces). A person is liable for this offence if he or she, “in abusive fashion,”
performs “acts with sexual purposes” different from sexual intercourse with a person between the ages of
thirteen and eighteen, or forces the victim to perform these acts with him or her. The sentence for this
crime is imprisonment from three to eight years and has an aggravated form (imprisonment from four to
ten years) if the victim is under the age of thirteen. In addition, article 167 of the Criminal Code of Costa
Rica sets forth a crime called “corruption” (corrupción). The perpetrator of this offence is liable when he
or she “promotes or maintains the corruption of a person [between the ages of thirteen and eighteen] by
making him or her perform or making him or her having another person perform perverse, premature, or
excessive sexual acts, even if the victim consented to participate in these acts or in watching their
performance.” Sentence for this crime is imprisonment from three to eight years.

Finally, article 164 of the Criminal Code of Costa Rica establishes a very peculiar offence dubbed
“improper abduction” (rapto impropio). A person is liable for this crime if he or she “abducts, for
libidinous purposes, an honest woman between the ages of twelve and fifteen with her consent.”
While the regular sentence for this offence is imprisonment from six months to three years, according to article
165 of the Criminal Code it becomes more lenient (half of the regular imprisonment time) if the
abduction (1) was carried out for “marriage purposes” and marriage could be validly celebrated, or (2)
the perpetrator releases the abducted woman or safely returns her to her family without having tried with
her any “dishonest act.” In light of human rights standards related to women’s equality, this provision
might be quite problematic. To begin with, it seems to protect a stereotyped view of women as honest
and chaste, so that women who do not conform to the stereotype are not socially worthy and therefore do
not deserve the protection of the criminal law. Secondly, in making abduction less serious when marriage
between the victim and the perpetrator mediates these provisions also reflect a common understanding
that marriage is the social institution where women’s sexuality will “naturally” flourish and develop.

The basic provision on statutory rape in Argentina is article 119 of the Criminal Code (amended by Law
25,087 of 1999). This article regulates three different hypotheses. The first is similar to what other
criminal codes in the region have called “abusive sexual acts” and refers to cases where the perpetrator
“sexually abuses a person of any sex” when (1) the victim is under the age of thirteen, (2) the perpetrator
uses violence, threats, or coercive or intimidating abuse of a relationship of dependency, authority, or
power, and (3) the perpetrator takes advantage of a victim who, for any reason, was not able to consent to
the sexual act. This offence is punished with imprisonment from six months to four years. The second
hypothesis is an aggravated form of the first and occurs when the abuse, because of its duration or the
circumstances of its performance, represents a “seriously outraging sexual subjugation of the victim.”
Under this modality, the sentence for this crime is imprisonment from four to ten years. Finally, the third
hypothesis is statutory rape per se. Indeed, it occurs in the circumstances of the first hypothesis but the
sexual act at stake is sexual intercourse. Here, the perpetrator is punished with imprisonment from six to
fifteen years. It is worth noting that article 120 of the Argentine Criminal Code specifies that if the

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431 The text of the provision does not explicitly require that the perpetrator be a man. However, this provision dates back from
1970 and was left untouched by Law 8,590 of 2007, which thoroughly reformed the regime of sexual crimes in Costa Rica. This
historical fact may lead to concluding that the provision was originally enacted to include only heterosexual “abduction.” In
addition, article 165 establishes a more lenient sentence for this crime if the perpetrator marries the victim, and article 14-6 of
the Family Code of Costa Rica is explicit in making “legally impossible” a marriage between persons of the same sex.
perpetrator engages in any of the sexual acts described by the second and third hypotheses with a victim *under the age of sixteen*, “taking advantage of the victim’s sexual immaturity” because the perpetrator (1) is an adult, or (2) is in a position of dominance over the victim or in any other similar circumstance, he or she will be sentenced to imprisonment from three to six years.

With regards to other sexual offences involving children different from statutory rape, the Criminal Code of Argentina refers to the crimes of “corruption of minors” and what could be called “abduction” or “kidnapping for sexual purposes.” The first offence is set forth by *article 125 of the Argentine Criminal Code*, which simply states that a person is liable for the crime of “corruption” if he or she “promotes or facilitates the corruption of person under the age of eighteen even with his or her consent.” Sentence for this offence is imprisonment from three to ten years. Punishment is aggravated on two grounds: (1) if the victim is *below the age of thirteen* sentence will be imprisonment from six to fifteen years, and (2) if the perpetrator uses deception, violence, threats, abuse of authority or any other form of intimidation or coercion, or if he or she is an ascendant, a spouse, a brother or sister, a tutor, a guardian or a custodian, sentence will be imprisonment from ten to fifteen years. Interestingly enough, neither this article nor any other provision of the Argentine Criminal Code defines the meaning of “corruption.”

“Forbidding” or “kidnapping for sexual purposes” is defined by *article 130 of the Criminal Code of Argentina*. This offence presents three hypotheses. In the first case, the perpetrator, using force, intimidation or fraud, abducts or holds in captivity a person of *any age* in order to “undermine his or her sexual integrity.” Sentence for this modality of the offence is imprisonment from one to four years. The second hypothesis applies to cases where the victim is *under the age of sixteen* and has consented to his or her abduction or holding in captivity. In this case, the sentence is imprisonment from six months to two years. Finally, if the victim is *below the age of thirteen* and he or she has been abducted or held in captivity by force, intimidation or fraud, the perpetrator will be punished with imprisonment from two to six years.

In Peru, most of the provisions of the Criminal Code referring to rape and other criminal offences involving children and adolescents were amended by Law 28.704 of 2006. Statutory rape is regulated by *article 173 of the Peruvian Criminal Code*. A person is liable for this crime if he or she “has vaginal, anal, or oral sexual intercourse, or performs similar acts introducing objects or parts of the body in the vagina or the anus, with a minor.” Sentences are meted out according to the age of the victim: (1) if the victim in *under the age of ten*, punishment is life in prison, (2) if the victim is *between the ages of ten and fourteen*, sentence is imprisonment between thirty and thirty five years, and (3) if the victim is *between the ages of fourteen and eighteen*, sentence is imprisonment from twenty five to thirty years. If statutory rape (1) is committed by a perpetrator who is in a position of authority over the victim or gains his or her trust (article 173), or (2) the victim dies or is seriously injured (article 173-A), the perpetrator will be sentenced to life in prison.

As other countries in the region, Peruvian criminal legislation also includes a set of offences involving children and adolescents where the sexual acts at stake are not sexual intercourse. *Article 176-A of the Criminal Code of Peru* establishes an offence called “acts against modesty with minors” (*actos contra el pudor en menores*) that imposes liability on anyone who “improperly touches the intimate parts” or “performs libidinous acts against modesty” on a person *under the age of fourteen* or forces him or her to improperly touch his or her intimate parts or those of a third party or forces the victim to perform libidinous acts against modesty on him or herself or a third party. As with statutory rape, sentencing varies according to the age of the victim: (1) if the victim is *under the age of seven*, the offence is punished with imprisonment from seven to ten years, (2) if the victim is *between the ages of seven and ten*, sentence is imprisonment from six to nine years, and (3) if the victim is *between the ages of ten and fourteen*, punishment is imprisonment from five to eight years.

The Guatemalan regulation on statutory rape and related sexual offences involving children is both interesting and quite problematic from the standpoint of human rights standards, for its provisions on
rape are gendered and only protect women and girls. The basic regulation on rape is article 173 of the Criminal Code of Guatemala, which establishes all cases where this offence may be committed. The chapeau of the article sets forth that “a person commits the crime of rape when he or she has sexual intercourse with a woman” in three events: (1) when using violence, (2) when taking advantage of the situation of a victim who cannot resist, is incapacitated, or has lost her senses, and (3) in any case, when the victim is under the age of twelve. In all these cases, sentence is imprisonment from six to twelve years. Rape is aggravated on four circumstances: (1) when it is committed by two or more persons (article 174-1), (2) when the perpetrator is a relative of the victim or is in charge of her education or custody (article 174-2), (3) when the crime seriously harms the victim (article 174-3), and (4) when the victim dies as a consequence of the crime (article 175). In the first three hypotheses, sentence is imprisonment from eight to twenty years. In the fourth case, sentence is imprisonment from thirty to fifty years and, if the victim is under the age of ten, death penalty.

A modality of statutory rape —called “estupro”— regulated by the Criminal Code of Guatemala is when sexual intercourse with the victim is obtained by the perpetrator through deception or promises, by taking advantage of her inexperience, or by gaining her trust. In this case, the regulations become even more problematic from a human rights perspective. They also only protect women and girls, but, in addition, the victim has to be “honest.” According to article 176 of the Guatemalan Criminal Code, sexual intercourse with an honest woman between the ages of twelve and fourteen, taking advantage of her inexperience or by gaining her trust, is punished with imprisonment from one to two years. If the victim is between the ages of fourteen and eighteen, sentence is imprisonment from six months to one year. Article 177 of the Criminal Code of Guatemala establishes that if the perpetrator gains sexual intercourse with the victim through deception or a false promise of marriage sentence will be (1) imprisonment from one to two years if the victim is between the ages of twelve and fourteen, and (2) imprisonment from six months to one year if the victim is between the ages of fourteen and eighteen.

The Guatemalan Criminal Code includes a set of sexual offences —called “dishonest abuses” (“abusos deshonestos”)— involving children that refer to the performance of sexual acts different from sexual intercourse. The regulation of these crimes is contradictory vis-à-vis statutory rape. Indeed, while the latter aims at protecting both women and men and boys and girls, the former only protects women and girls. According to article 179 of the Criminal Code of Guatemala, a person commits a “dishonest abuse” if he or she performs sexual acts other than sexual intercourse with a person “of his or her same or different sex” using the means or in the circumstances established in articles 173, 174, and 175 of the Criminal Code (see supra). Punishment for this crime is (1) imprisonment from six to twelve years if the offence is committed in the circumstances set forth by article 173,\(^\text{432}\) (2) imprisonment from eight to twenty years in the circumstances described by article 174, and (3) imprisonment from twenty to thirty years if the offence is committed in the events established by article 175. In any case, if the victim is below the age of ten and dies, sentence is imprisonment for fifty years. Article 180 of the Guatemalan Criminal Code refers to a modality of “dishonest abuse” where sexual contact with the victim is obtained by the perpetrator using the means described in articles 176 and 177 of the Criminal Code (through deception or promises, by taking advantage of the inexperience of the victim, by gaining the trust of the victim, through false promise of marriage). In this case, sentences for this crime are (1) in the circumstances of article 176, imprisonment from two to four years if the victim is between the ages of twelve and fourteen, (2) in the circumstances of article 176, imprisonment from one to two years if the victim is between the ages of fourteen and eighteen, (3) in the circumstances of article 177, imprisonment from four to six years if the victim is between the ages of twelve and fourteen, and (4) in the circumstances of article 177, imprisonment from two to four years if the victim is between the ages of fourteen and eighteen.

\(^{432}\) Recall that in the circumstances described by article 173-2 this crime is always committed when the victim is under the age of twelve, even if the perpetrator does not use violence.
As other criminal codes in the LAC region, the Criminal Code of Guatemala also regulates the offences of “abduction” (raptó) and “corruption of minors” (corrupción de menores). “Abduction” is a sexual offence aimed exclusively at protecting women and girls. The basic modality of this crime, regulated by article 181 of the Guatemalan Criminal Code, imposes liability on the person who, “for sexual purposes,” abducts or holds in captivity a woman without her consent or using violence or deception. Sentence for this offence is imprisonment from two to five years. A variant of this crime, set forth by article 182 of the Criminal Code of Guatemala, occurs when the victim is between the ages of twelve and sixteen and she is abducted or held in captivity for sexual purposes or for purposes of marriage or de facto civil union. This modality of the offence is punished with imprisonment from six months to one year and, if the victim is under the age of twelve, from four to ten years (article 183).

According to article 188 of the Guatemalan Criminal Code, a person is liable for “corruption of minors” if he or she “promotes, facilitates, or favors the prostitution or the sexual corruption of a minor even if the victim consents to participate in sexual acts or in watching their performance.” Under this basic modality, the offence is punished with imprisonment from two to six years. An aggravated form of the crime—established by article 189 of the Criminal Code of Guatemala—occurs, among others, when (1) the victim is under the age of twelve, (2) if corruption is performed through perverse, excessive, or premature sexual acts, and (3) the perpetrator is an ascendant, a sibling, a tutor, or a person in charge of the custody or the education of the victim. In these cases, sentence is increased by two thirds. Additionally, article 190 of the Guatemalan Criminal Code indicates that if corruption is performed “by means of a promise or a pact, even with an appearance of legality,” punishment is imprisonment from one to three years. Interestingly, the sexual acts amounting to “corruption” are not defined by the Code.

The Jamaican and Mexican legislations regulating statutory rape and other sexual offences involving children and adolescents are the most complex among the legislations of the countries selected for this research project. In the case of Jamaica, complexity is due to the number of different crimes and the diversity of age-ranges where these could be committed. The complexity of the Mexican legislation stems from the diversity of state legislations on sexual crimes. Every state of Mexico has a criminal code that establishes a peculiar regulation of statutory rape and other sexual crimes affecting minors. In addition, both Mexico and Jamaica present criminal legislations on sexual offences that are still problematic from the point of view of human rights standards. The most common problem is that many provisions of the criminal legislation of these two countries are instances of sex discrimination, for they are based on stereotyped visions of women’s sexuality.

In Jamaica, most sexual offences are regulated by the Offences against the Person Act. Although section 44-1 of the Jamaican Offences against the Person Act is sex-neutral in its definition of the victims of rape, the victims of statutory rape, regulated by section 48-1 of the Act, could only be girls under the age of twelve.Both rape and statutory rape are punished with imprisonment for life. A second modality of statutory rape appears in section 50 of the Offences against the Person Act of Jamaica. In this case, the “unlawful and carnal knowledge and abuse” of a girl between the ages of twelve and sixteen is a misdemeanor punished with “imprisonment for a term not exceeding seven years.” A related offence to statutory rape is indecent assault, which is regulated by section 53 of the Jamaican Offences against the Person Act. According to this provision, “[w]hossoever shall be convicted of any indecent assault upon any female, or of any attempt to have carnal knowledge of any girl” between the ages of twelve and sixteen will be sentenced to imprisonment for a term “not exceeding three years, with or without hard labour.” Section 54 of the Act clarifies that the perpetrator of indecent assault is barred to argue the consent of the victim to the act of indecency as a defense in the trial.

433 Section 44-1 states: “Whosoever shall be convicted of the crime of rape shall be guilty of felony, and being convicted thereof, shall be liable to imprisonment for life.”

434 Section 48-1 reads: “Whosoever shall unlawfully and carnally know and abuse any girl under the age of twelve years shall be guilty of felony, and, being convicted thereof, shall be liable to imprisonment for life” (emphasis added).
Jamaican legislation regulates a sexual crime that may be generically dubbed as “defilement of girls,” similar to what some jurisdictions in LAC affiliated to the civil/continental tradition have called “estupro” (see supra). The first modality of this offence, set forth by section 45 of the Jamaican Offences against the Person Act is applicable to “[w]hosoever shall, by false pretences, false representations, or other fraudulent means, procure any woman or girl under the age of eighteen years to have illicit carnal connection with any man” (emphasis added). This offence is a misdemeanor carrying a sentence of imprisonment “not exceeding three years, with or without hard labour.” A second modality of the crime of defilement, regulated by section 51 of the Offences against the Person Act of Jamaica, applies to the owner, occupier, or manager of any premises who allows that any girl is “unlawfully and carnally known by any man” in those premises. If the victim is under the age of twelve the offence is a felony punished with imprisonment for life, “with or without hard labour.” If the victim is between the ages of twelve and sixteen, sentence is imprisonment for a term “not exceeding five years, with or without hard labour.”

The Jamaican version of the crime of “abduction of girls” has three modalities. The first modality, regulated by section 57 of the Offences against the Person Act of Jamaica, imposes criminal liability on “[w]hosoever shall unlawfully take, or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her” (emphasis added). Under this modality, the abductor will be guilty of a misdemeanor punished with imprisonment for a term “not exceeding three years with or without hard labour.” The second modality of this offence is called “abduction from motives of lucre” and is regulated by section 55 of the Jamaican Offences against the Person Act. The perpetrator is liable if he or she acts “from motives of lucre” on two different circumstances: (1) he or she takes away or detains the victim “against her will, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person,” and (2) he or she “shall fraudulently allure, take away, or detain such woman, being under the age of eighteen years, out of the possession, and against the will of her father or mother, or of any other person having the lawful care or charge of her” (emphasis added). In both circumstances, the offence is a felony punished with imprisonment for a term “not exceeding fourteen years with or without hard labor.” Finally, the third modality, regulated by section 60 of the Offences against the Person Act of Jamaica, imposes liability on a perpetrator who abducts “any unmarried girl under the age of eighteen years” with the intent that she is “unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally.” In this case, the offence is a misdemeanor punished with imprisonment for a term “not exceeding three years, with or without hard labour.”

A related crime to abduction is what section 61 of the Jamaican Offences against the Person Act calls “unlawful detention with intent to have carnal knowledge.” Any person is liable for this offence if he or she “detrains any woman or girl against her will and holds her (1) in any premises “with intent that she may be unlawfully and carnally known by any man, whether any particular man, or generally,” or (2) in a brothel. Sentence for this crime is imprisonment for a term “not exceeding three years, with or without hard labour.” Section 62 of the Act establishes a set of presumptions whereby a judge can establish if a woman or girl has been “unlawfully detained for immoral purposes.” This presumption has two elements. First, the woman or girl has been detained “for the purpose of being unlawfully and carnally known by any man, whether any particular man or generally.” And, second, the woman or girl (1) is under the age of sixteen, (2) if she is between the ages of sixteen and eighteen she has been detained “against her will, or against the will of her father or mother or any other person having the lawful care or charge of her,” and (3) if she is above the age of eighteen has been detained against her will.

435 The “motives from lucre” may be defined as the interest of the perpetrator in the wealth of the abducted woman, defined, in turn, as “any interest [of the victim], whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be a presumptive heiress, or co-heiress or presumptive next of kin, or one of the presumptive next of kin, to anyone having such interest.”
Another category of sexual offence involving girls regulated by Jamaican criminal legislation is the crime of “procuration,” regulated by sections 58 and 59 of the Offences against the Person Act of Jamaica. While section 58 sets forth “procuration” without using violence, threats, or fraud, section 59 establishes “procuration” using these means. A first modality of this crime refers to procuring women or girls for “unlawful carnal connection.” Section 58-1-(a) of the Jamaican Offences against the Person Act imposes liability on any person who “procures or attempts to procure any girl or woman under eighteen years of age, not being a common prostitute, or of known immoral character, to have unlawful carnal connection, either within or without this Island, with any other person or persons” (emphasis added). Punishment for this offence is imprisonment for a term “not exceeding three years, with or without hard labour.” In addition to this sentence, any male person convicted for this crime may “be sentenced to be once privately whipped and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence” (section 58-2). Insofar as the remaining hypotheses of non-violent or non-fraudulent “procuration” have to do with procuration of women or girls for purposes of prostitution, they will be described later in this paper.\textsuperscript{436}

Similarly, section 59-(a) of the Act punishes any person who “by threats or intimidation procures or attempts to procure any woman or girl to have any unlawful carnal connection, either within or without this Island” (emphasis added). Section 59-(b), (c), and (d) of the Act regulates three similar hypotheses with variants in the way “procuration” is achieved: (1) through “false pretences or false representations” (section 59-(b)), (2) through the application or administration of “any drug, matter, or thing, with intent to stupefy or overpower [a woman or girl]” so as to “enable any person to have unlawful carnal connection with such woman or girl” (section 59-(c)), and (3) “unlawful carnal connection” is achieved while the victim is “partially or entirely stupefied or overpowered as aforesaid” (section 59-(d)). It is worth noting that only section 59-(b) mentions that the victim of this offence should be a woman or girl “not being a common prostitute or of known immoral character.” It remains to be seen if this qualification of the victim applies to the remaining three hypotheses of the crime. In any case, punishment for this offence is imprisonment for a term “not exceeding three years, with or without hard labour.”

As mentioned before, given the federal nature of the country, Mexico presents a complex legislation on statutory rape and other sexual offences involving children and adolescents. Most of the state’s criminal codes regulate statutory rape, sexual abuse of children and adolescents, the crime of “estupro” (see supra), and other sexual offences such as “abduction” and “corruption of minors.” A thorough account of all the states’ legislations on these offences would be impossible to undertake under the space constraints of this paper. This section will first endeavor to describing the regulation of statutory rape and related offences by the Federal Criminal Code of Mexico. Second, it will describe the most salient and important features of the states’ criminal legislations on these matters.

In many states of Mexico, statutory rape is called “equivalent rape” ("violación equiparada"). Mexican criminal legislations make equivalent violent or forcible rape of an adult and consented sexual intercourse ("copulation") with a child. Sentences are therefore the same for both offences. Article 266-I of the Federal Criminal Code of Mexico sets forth the crime of “equivalent rape” in the event that the perpetrator has consented “copulation” with a person under the age of fourteen. “Copulation” is defined by article 265 as “the [introduction of the penis] in the body of the victim through the vagina, the anus, or the mouth, independently from his or her sex” and as “the introduction of any element or instrument different from the penis into the vagina or the anus, by means of physical or moral violence, independently from the sex of the victim.” This offence is punished with imprisonment from eight to fourteen years. However, according to article 266-bis, the sentence could be increased by a half if the crime was committed (1) by two or more people, (2) by an ascendant, a brother or a sister, a tutor, a stepfather or stepmother, (3) by a public employee or by a person who uses his or her professional or job

\textsuperscript{436} See infra Section 3.7.
Two related offences to statutory rape are sexual abuse and “estupro.” Article 261 of the Federal Criminal Code establishes that a person is liable for this offence if he or she engages in any sexual act different from sexual intercourse with a child below the age of twelve. This crime is punished with imprisonment from to two to five years, and, if the perpetrator used physical or moral violence, sentence could be aggravated by increasing it by a half. The offence of “estupro,” defined in very much the same terms as other legislations in the LAC region do (see supra), is regulated by article 262 of the Federal Criminal Code. This provision imposes liability on anyone who deceives any person between the ages of twelve and eighteen in order to have sexual intercourse with him or her.

All of the states of Mexico have criminal codes penalizing statutory rape or “equivalent rape” and sexual abuse of children and adolescents. The first crime is defined as consented sexual intercourse with a child under a threshold age. The second offence, alternatively called “sexual abuse,” “attack against decency” (“atentado al pudor”), “libidinous acts,” “erotic acts,” “dishonest abuse,” and “smut acts” (“impudicia”), is generally defined as consented sexual acts other than sexual intercourse with a child under the threshold age. The basic difference between the states’ regulations of these offences has to do with the age of the victim, which has most commonly been set at twelve years, but also at thirteen, fourteen, fifteen, and eighteen years.

In addition, many of the criminal codes of the Mexican states include the crime of “estupro.” As in other jurisdictions in LAC, this offence is generally defined as engaging in sexual intercourse with a child or an adolescent through deception, seduction, or by taking advantage of the victim’s sexual inexperience. The age-ranges within which this crime may occur have also been differently set by the states. Some states establish the age-range between the ages of twelve and sixteen, twelve and seventeen, twelve and eighteen, thirteen and eighteen, fourteen and sixteen, fourteen and eighteen, fifteen and eighteen, sixteen and eighteen, under sixteen, and under eighteen. Although most of these

437 This is the case of the criminal codes of the states of Aguascalientes (articles 125-I and 127-III), Baja California (articles 186 and 190), Campeche (articles 234 and 228), Chiapas (articles 235-I and 243), Coahuila (articles 386, 397 and 398), Durango (article 292, only for sexual abuse), Guanajuato (articles 181 and 187), Guerrero (articles 140-I and 143), Hidalgo (articles 180 and 183), Jalisco (article 176), Michoacán (articles 240 and 245), Morelos (articles 154 and 162), Nayarit (articles 255 and 260; does not set a numeric age, but refers to “non-pubescent minors” [“impúberes”]), Oaxaca (articles 241 and 247), Puebla (articles 261-II and 272-II), Querétaro (articles 173 and 178; does not set a numeric age, but refers to “non-pubescent minors” [“impúberes”]), San Luis Potosí (article 152-I, only for statutory rape), Sinaloa (articles 180-I and 183), Sonora (articles 213 and 219-II), Tabasco (articles 150 and 157), Tamaulipas (articles 267 and 275-I), Yucatán (articles 310 and 315), and Zacatecas (articles 232 and 237-I).
438 This is the case of the criminal code of the state of Nuevo León (articles 259 and 267).
439 This is the case of the criminal codes of the states of Baja California (articles 177 and 180-bis), Chihuahua (articles 241 and 246-I), Colima (articles 209 and 215), Durango (article 297, only for statutory rape), Quintana Roo (articles 127 and 129), Tlaxcala (articles 220 and 221), and Veracruz (articles 153 and 158).
440 This is the case of the criminal code of the state of México (articles 270 and 273).
441 This is the case of the criminal code of the state of San Luis Potosí (article 148-I, only for sexual abuse).
442 This age-range appears in the criminal codes of the states of Aguascalientes (article 122), Coahuila (article 394), Michoacán (article 243), San Luis Potosí (article 149), and Yucatán (article 311).
443 This age-range appears in the criminal codes of the states of Querétaro (article 179) and Tabasco (article 153).
444 This age-range appears in the criminal codes of the states of Campeche (article 230), Chiapas (article 239), Guerrero (article 145), Hidalgo (article 185), Jalisco (article 142-I), Morelos (article 159), Nayarit (article 258), Oaxaca (article 243), Puebla (article 264), Tamaulipas (article 270), and Zacatecas (article 234).
445 This age-range appears in the criminal code of the state of Nuevo León (article 262).
446 This age-range appears in the criminal code of the state of Veracruz (article 156).
447 This age-range appears in the criminal codes of the states of Baja California (article 182), Chihuahua (article 243), Colima (article 211), Durango (article 293), and Quintana Roo (article 130).
448 This age-range appears in the criminal code of the state of México (article 271).
449 This age-range appears in the criminal code of the state of Sinaloa (article 184).
450 This age-range appears in the criminal codes of the states of Baja California Sur (article 193) and Guanajuato (article 185).
451 This age-range appears in the criminal code of the state of Sonora (article 215).
states’ regulations on “estupro” are aimed at protecting both boys and girls, some of them only protect girls, girls that are “chaste,” girls that are “honest,” and girls that have an “honest way of living.”

Finally, some of the states of Mexico also regulate the crime of “abduction” (“rapto”). This offence has generally been defined as the abduction of a child or an adolescent, using violence or deception, in order to satisfy erotic desires of the perpetrator or for purposes of marriage. The states that have included this crime in their criminal codes have differently set the age-range of the victim: under fourteen, sixteen, and eighteen years of age. In addition, in some states the offence of “abduction” only protects girls.

3.2.3. Criminalization of HIV/STI Transmission

The criminalization of HIV and other STIs in the LAC region adopts two modalities, which, in turn, adopt two forms. The first modality is the specific criminalization of HIV/STI transmission. The first form that this modality adopts is the inclusion of specific crimes that penalize the transmission or propagation of HIV and other STIs—intentional and sometimes reckless. The second form adopted by the specific criminalization of HIV/STI transmission appears as a ground for the aggravation of sentences meted out for sexual crimes such as rape, statutory rape, and other forms of sexual abuse. If the victim of these crimes is infected with HIV and/or other STI, the sentence imposed to the perpetrator is increased. The second modality is the non-specific criminalization of HIV/STI transmission, which also adopts two forms. First, criminalization of transmission of HIV/STIs may be channeled through generic crimes that punish the propagation of diseases or epidemics. In this case, these crimes might have been included in criminal codes by legislatures that did not have exactly in mind HIV or STIs. Second, most criminal codes in the LAC region include a set of crimes called “personal injuries” (“lesiones personales”) whereby a person may be punished if he or she injures another person, causing him or her any bodily harm, including a transitory or permanent disease.

An interesting feature of the criminal codes of many countries in the LAC region, and a source for concern from the perspective of human rights standards, is that they include both forms of criminalization of the transmission of HIV and other STIs. In some cases, a criminal code not only includes a specific crime (or specific crimes) punishing the transmission of HIV and other STIs, but it also includes crimes against public health that criminalize the propagation of diseases and epidemics, the offence of “personal injuries,” and a provision that aggravates sentences for rape and other forms of sexual abuse when the victim is infected with HIV and/or other STI. Such an ample spectrum of crimes may be used to support a strategy of prosecution and punishment of the transmission of HIV and other STIs if public authorities in a certain country at some historical juncture decided to do so. Even without specific crimes directly punishing the transmission of HIV/STIs, crimes against public health and the

452 This limitation appears in the criminal codes of the states of Campeche (article 230), México (article 271), Nuevo León (article 262), Querétaro (article 179), Tabasco (article 153), and Zacatecas (article 234).
453 This limitation appears in the criminal code of the state of Aguascalientes (article 122).
454 This limitation appears in the criminal code of the state of Baja California Sur (article 193).
455 This limitation appears in the criminal codes of the states of Baja California (article 182), Durango (article 293), Nayarit (article 258), and Sinaloa (article 184).
456 This limitation appears in the criminal codes of the states of Sonora (article 215) and Veracruz (article 156).
457 This age-range appears in the criminal code of the state of Chihuahua (article 250-I).
458 This age-range appears in the criminal codes of the states of Campeche (article 237), Chiapas (article 244), and Sonora (article 222).
459 This age-range appears in the criminal codes of the states of Coahuila (article 389) and Puebla (article 273).
460 This is the case of the criminal codes of the states of Chihuahua (article 250-I), Puebla (article 273), and Sonora (article 222).
461 For an overview of the manyfold problems posed to a liberal conception of the criminal law by the criminalization of the transmission of HIV/STIs see, e.g., Diego Manuel Luzón Peña, Problemas de la transmisión y prevención del SIDA en el derecho penal español, in PROBLEMAS JURÍDICO-PENALES DEL SIDA 11-23 (Santiago Mir Puig ed., 1993); Bernd Schünemann, Problemas jurídico-penales relacionados con el SIDA, in PROBLEMAS JURÍDICO-PENALES DEL SIDA 25-99 (Santiago Mir Puig ed., 1993).
offence of “personal injuries” may be construed so as to include that transmission. Additionally, when analyzing criminal legislations on this topic from a human rights perspective, it is also important to bear in mind if the transmission of HIV/STIs was drafted as a “danger crime” (“delito de peligro”) or it requires actual infection. While in the former case the mere fact of endangering the health of the victim is penalized, in the latter case the perpetrator must actually infect the victim in order to be criminally liable.

The most illustrative examples of specific criminalization of HIV transmission are the criminal codes of Colombia, Costa Rica, and the states of Durango, Guerrero, and Tamaulipas in Mexico. In all these cases, the criminal offence specifically penalizes the transmission of HIV under certain circumstances. It is worth noting, however, that whereas the Costa Rican legislation requires that the victim is actually infected, the Colombian and Mexican legislations penalize the transmission of HIV/STIs as “danger crimes.”

Article 370 of the Colombian Criminal Code establishes a crime called “propagation of the virus of human immunodeficiency or hepatitis B” (propagación del virus de inmunodeficiencia humana o de la hepatitis B). A person is liable for this crime, and may be sentenced to imprisonment from six to twelve years, if he or she engages in practices that may infect another person with HIV or hepatitis B or donates blood, sperm, organs or other anatomic components after being informed of being infected with HIV or hepatitis B.

Article 195-A of the Criminal Code of the Mexican state of Guerrero, also explicitly criminalizes the transmission of HIV along with other “sexually transmitted diseases in infecting period.” In this case, a person is liable, and may be sentenced to imprisonment from three months to five years, if (1) he or she knows that he or she is infected with HIV or a STI, (2) has sexual intercourse with a person who does not know about the infection, and (3) sexual intercourse takes place in conditions that create a risk for the health of the victim. Article 203 of the Criminal Code of the Mexican state of Tamaulipas is very similar to Guerrero’s regulation. The only differences are that it stills refers —as many Mexican state legislations do— to “venereal disease” instead of “sexually transmitted disease” and the sentence is imprisonment from six months to five years and a fine from fifteen to fifty daily salaries. In the case of the State of Durango, the transmission of HIV is criminalized by the same article of the criminal code that penalizes the transmission of any “serious disease in infecting period.” Indeed, article 273 of the Criminal Code of the State of Durango punishes with imprisonment from three days to three years anyone who knows that he or she has a serious disease in infecting period and puts another person in danger of being infected. However, if the “diseases” at stake are HIV, syphilis, or any other “venereal disease” and the risk of infection occurs through “sexual contact” sentence is imprisonment from two to six years.

Although article 264 of the Criminal Code of Costa Rica does not explicitly refer to the transmission of HIV, and generically criminalizes the transmission of “infecting-contagious diseases,” its current wording is the product of an amendment introduced by Costa Rica’s General Act on HIV/AIDS (Law 7.771 of 1997). The fact that, on the one hand, this provision was amended by a HIV/AIDS law and, on the other hand, article 130 of the Costa Rican Criminal Code separately penalizes the transmission of “venereal diseases” allows the conclusion that article 264 is specifically geared towards the criminalization of the transmission of HIV and not other STIs. According to this provision, any person is liable for this offence if (1) he or she infects another person with an “infecting-contagious” disease that presents a serious risk to his or her life, health, or bodily integrity, (2) knows that he or she is infected with such a disease, and (3) infects the victim in the following circumstances: (a) he or she donates blood, sperm, maternal milk, tissues or organs, (b) he or she engages in sexual intercourse without informing his or her partner about his or her infection, and (c) he or she uses an invasive, cutting or puncturing object that he or she has previously used. Sentence for this crime is imprisonment from three to sixteen years. In addition, articles

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462 This provision also establishes that the perpetrator may be confined to “a medically appropriate facility until the infecting period has ceased.”
463 This provision does not include as part of the sentence the confinement in a medical facility.
41 and 42 of the General Act on HIV/AIDS of Costa Rica (Law 7,771 of 1997) specifically penalize public and private health workers who transmit HIV/AIDS through transfusions, transplants, or the use of infected devices. Article 41 sets forth this offence in its intentional modality punishing it with imprisonment from three to eight years. In this case, the agent must be aware of the risks and “admits that infection is a probable result.” If the victim becomes infected, the sentence is increased to imprisonment from twelve to twenty years. Article 42 regulates the offence in its reckless modality and punishes it with imprisonment from one to three years. If the victim becomes infected, the sentence is increased to imprisonment from four to ten years.

Other criminal codes in the LAC region specifically criminalize the transmission of HIV/STIs through a general reference to the transmission of “sexually transmitted diseases” or “venereal diseases.” Illustrative examples of this modality of criminalization of HIV/STIs may be found in the criminal codes of Brazil, Costa Rica, Guatemala, and an important number of the states of Mexico. With the exception of the regulations of Costa Rica and the Mexican state of Nayarit, all the other legislations penalize the transmission of HIV/STIs as a “danger crime.”

Article 130 of the Criminal Code of Brazil sets forth the crime of “danger of venereal infection” (perigo de contágio venéreo), which imposes criminal liability on anyone who knows or should have known that he or she is infected with a “venereal disease” and exposes another person, by means of sexual intercourse or “any other libidinous act,” to be infected with that disease. The regular sentence for this offence is imprisonment from three months to one year, but if the perpetrator acted with the intention of infecting the victim imprisonment is increased to one to four years and a fine. In the case of Guatemala, article 151 of the Criminal Code punishes with a fine from fifty to five hundred Quetzals any person who, knowing that he or she is infected with a “venereal disease,” exposes any other person to being infected. If infection actually occurs, punishment is imprisonment from two months to one year plus the already mentioned fine. As previously mentioned, the Criminal Code of Costa Rica, in addition to criminalizing the “propagation of infecting-contagious diseases” (see supra), includes a special provision that penalizes the transmission of “venereal diseases.” Article 130 of the Costa Rican Criminal Code punishes with imprisonment from one to three years anyone who, knowing that he or she is infected with a venereal disease, infects another person.

The regulations on the transmission of sexually transmitted diseases of the states of Mexico have important differences that are worth highlighting. At the federal level, article 199-bis of the Criminal Code of the Federal District establishes the most common form of criminalization of STI transmission. The offence, called “danger of infection,” punishes with imprisonment from three days to three years and a fine of up to forty daily salaries anyone who (1) knows that he or she is infected with a “venereal disease” or any “other serious disease in infecting period,” and (2) puts in danger the health of another person through sexual intercourse or any other “means of transmission.” Interestingly, this provision increases the sentence to imprisonment from six months to five years if the transmitted disease is “incurable.”

The criminal codes of several states include this basic form of the crime of “danger of infection” (peligro de contagio), but add different elements or conditions that modulate the extent or the stringency of the crime: (1) the perpetrator must act deliberately or with the intention to transmit the STI, (2) the victim

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464 This basic form of the crime may also be found in the criminal codes of the states of Campeche (article 173), Guerrero (article 195-A; specifically refers to “sexually transmitted diseases in infecting period, including HIV”), Michoacán (article 298), and Tamaulipas (article 203; specifically refers to a “sexually transmitted disease in infecting period or HIV”).

465 This element appears in the criminal codes of the states of Chiapas (article 444) and Yucatán (article 189). In the case of Chiapas, article 444 of the Criminal Code provides that the action of the perpetrator is not intentional or deliberate if he or she does not know that he or she is infected with a contagious disease, if he or she ignores the forms of transmission of the disease, he or she has disclosed the risk of the disease he or she is infected with, or he or she took the necessary precautions to avoid the infection.
must not have any knowledge about the infection of the perpetrator, (3) some provisions establish presumptions on the knowledge of the existence of the infection, (4) some regulations include the violation of a duty of care as one of the relevant circumstances of the transmission, (5) some regulations are specific in mentioning “syphilis or a venereal disease in infecting period”, “syphilis or any venereal disease in infecting period or any other easily transmissible disease,” “a venereal disease or any other chronic or serious disease that may be sexually transmissible,” (6) the provision generically talks about a “serious disease in infecting period” but later makes explicit that the danger for the health of the victim stems from “sexual intercourse or any other means of transmission,” and (7) in some cases the wording of the provision stresses upon the danger nature of the crime by establishing that the perpetrator will be liable if he or she has “sexual intercourse [with the victim] and even if he or she simply puts in danger the health [of the victim]” (emphasis added).

As mentioned before, Nayarit is the only Mexican state where the transmission of HIV/STIs is only criminalized when the victim is effectively infected with an “incurable venereal disease.” Indeed, article 192-bis of the Criminal Code of Nayarit punishes with imprisonment from ten to fifteen years anyone who knows that he or she is infected with an “incurable venereal disease” and infects another person through sexual intercourse or any other means. Other states criminalize HIV/STI transmission as a “danger crime,” but make the sentence harsher if infection actually occurs. In most of the cases, if the victim is infected it is provided that the perpetrator will have a cumulative sentence composed by the sentence for the transmission of HIV/STI and the sentence for the crime resulting from the infection. Although none of these regulations is explicit in mentioning which crimes may result from actual infection, article 251 of the Criminal Code of the State of Sonora clearly sets forth that in case the perpetrator infects the victim he or she will be liable for personal injuries or homicide.

The second modality of specific criminalization of HIV/STI transmission is the aggravation of sentences meted out for sexual crimes such as rape, statutory rape, and other forms of sexual abuse if the victim of these offences is infected with HIV or another STI by the perpetrator. This form of penalization may be illustrated by provisions of the criminal codes of Argentina, Colombia, and Peru.

Article 119-c of the Criminal Code of Argentina aggravates the sentence for the crimes of rape, statutory rape, and sexual abuse if the perpetrator knows that he or she is infected with a “serious sexually transmitted disease and there was a risk of infection.” If this circumstance occurs, sentence is imprisonment from eight to twenty years. Similarly, article 211-3 of the Criminal Code of Colombia establishes that sentences for the crimes of rape, statutory rape, sexual abuse, and sexual harassment will be increased between a third and a half if the victim is infected by the perpetrator with a STI. Finally, article 170-4 of the Criminal Code of Peru aggravates the sentence for rape (imprisonment from twelve

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466 This element appears in the criminal codes of the states of Chiapas (article 444), Colima (article 195-bis), Guerrero (article 195-A), and Querétaro (article 130).
467 This is the case of the criminal codes of the states of Chiapas (article 444; knowledge of the disease is presumed if the perpetrator presents easily perceptible external lesions or manifestations provoked by the disease or when she or she knows about his or her condition and is undergoing medical treatment), Puebla (article 214-I; knowledge of the disease is presumed if the perpetrator presents easily perceptible external lesions or manifestations provoked by the disease), Tlaxcala (article 158; knowledge of the disease is presumed if the perpetrator presents easily perceptible external lesions or manifestations provoked by the disease).
468 This circumstance is included in the criminal code of the state of Baja California (article 160) along with sexual intercourse and “any other means of transmission.”
469 This is the case of the criminal codes of the states of Baja California (article 160), Nayarit (article 190), Oaxaca (article 192), Puebla (article 213), and Zacatecas (article 173).
470 This wording appears in the criminal codes of the states of Baja California (article 160), Chiapas (article 444), Colima (article 195-bis), and Querétaro (article 130).
471 This phrasing appears in the criminal codes of the states of Nayarit (article 190), Tlaxcala (article 156), and Zacatecas (article 173).
472 This is the case of the criminal codes of the states of Campeche (article 173), Chiapas (article 444), Nayarit (article 192), Oaxaca (article 192), Puebla (article 214-III), Tamaulipas (article 203), Tlaxcala (article 158), and Zacatecas (article 175).
to eighteen years) if the perpetrator knows that he or she is infected with a “serious sexually transmitted disease.” Note that while in the cases of Argentina and Peru the mere knowledge of the infection, independently from actual infection of the victim, is the aggravating circumstance, in the Colombian case actual infection of the victim is required for the aggravating circumstance to apply.

As mentioned before, non-specific criminalization of HIV/STI transmission may adopt the form of generic crimes that punish the propagation of diseases or epidemics. Offences of this sort appear in the criminal codes of Argentina, Chile, Colombia, Costa Rica, Guatemala, and some states of Mexico. Whereas in some of these cases (Colombia, Chile, Guatemala, Peru, and some Mexican states) the crimes punish the propagation of diseases or epidemics per se, in other cases (Argentina, Colombia, Chile, Costa Rica, and Peru) the offence punishes the violation of sanitary measures aimed at avoiding the propagation of contagious or infecting diseases or epidemics.

Article 369 of the Criminal Code of Colombia establishes the crime of “propagation of epidemic” (propagación de epidemia) and punishes with imprisonment from four to ten years anyone who “propagates an epidemic.” In a similar vein, article 316 of the Chilean Criminal Code penalizes the dissemination “of pathogen germs with the purpose of producing a disease” with imprisonment from five to ten years and a fine. In Guatemala, article 301 of the Criminal Code imposes a sentence of imprisonment from one to six years on anyone who “intently propagates a dangerous or contagious disease for persons.” A very similar provision is established by article 289 of the Criminal Code of Peru, which punishes with imprisonment from three to ten years anyone who “intently propagates a contagious or dangerous disease for the health of persons.”

The criminal codes of some Mexican states include the crime of “danger of infection” (peligro de contagio). Most commonly, these codes punish anyone who knows that he or she is infected with “any serious and transmissible disease” and puts in danger of being infected any other person through any means, without being specific on the nature of the disease or the circumstances where it is transmitted. Provisions of this sort may be found in the criminal codes of the states of Chihuahua (article 224), Coahuila (article 365), Guanajuato (article 168), México (article 252), Morelos (article 136), Quintana Roo (article 113), Sinaloa (article 149), Tabasco (article 120), and Veracruz (article 138). It is worth noting that in some of these states the crime of “danger of infection” includes the violation of a duty of care as a relevant circumstance. Article 169 of the criminal code of the state of Baja California Sur punishes a person who is infected with a “serious and transmissible disease” and puts in danger of being infected any other person through any means, without being specific on the nature of the disease or the circumstances where it is transmitted. Provisions of this sort may be found in the criminal codes of the states of Chihuahua (article 224), Coahuila (article 365), Guanajuato (article 168), México (article 252), Morelos (article 136), Quintana Roo (article 113), Sinaloa (article 149), Tabasco (article 120), and Veracruz (article 138). It is worth noting that in some of these states the crime of “danger of infection” includes the violation of a duty of care as a relevant circumstance. 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authority in order to avoid the introduction or the propagation of an epidemic. Finally, article 292 of the Peruvian Criminal Code establishes a sentence of imprisonment from six months to three years and a fine of 90 to 180 daily salaries for anyone who violates sanitary measures imposed by law or by the competent authority in order to avoid the introduction into the country or the propagation of a disease, an epidemic, an epizootic, or a plague.

The second modality of non-specific criminalization of HIV/STI transmission adopts the form of the crime of “personal injuries” (lesiones personales). Generally, this offence punishes anyone who injures another person, causing him or her any bodily harm, including, in some cases, a transitory or permanent disease. Criminal regulations of this sort may be found in the criminal codes of Argentina, Brazil, Chile, Colombia, Costa Rica, Guatemala, Peru, and some states of Mexico.

In Argentina, articles 90, 91, and 94 of the Criminal Code impose criminal liability on anyone who injures another person causing her a disease. While article 90 punishes the perpetrator with imprisonment from one to six years if the injury causes a “permanent weakness of the health [of the victim],” article 91 increases the sentence to imprisonment from three to ten years if the injury produced a “certain or probably incurable mental or bodily disease.” Article 94 refers to injuries leading to harms “in the body or health” of the victim by anyone who acts recklessly, with negligence, with lack of skills in his or her “art or profession,” or ignoring the regulations or the duties he or she is subjected to. In this case, sentence is imprisonment from one month to three years or a fine from 1.000 to 15.000 Pesos. In the case of Costa Rica, article 124 of the Criminal Code makes criminally liable anyone who injures another person and causes him or her “persistent weakness of [his or her] health” and punishes the perpetrator with imprisonment from one to six years.

Article 129 of the Criminal Code of Brazil establishes two modalities of personal injuries. The first modality, called “personal injury” (lesão corporal), punishes with imprisonment from three months to one year anyone who “harms the bodily integrity or the health of another person.” The second modality, dubbed “personal injury of a serious nature” (lesão corporal de natureza grave), imposes a sentence of imprisonment from two to eight years on anyone who injures another person and causes him or her “an incurable disease.” Similarly, article 146 of the Criminal Code of Guatemala defines the crime of “very serious personal injury” (lesión personal gravísima) and punishes it with imprisonment from three to ten years. According to article 146-1, one of the modalities of “very serious personal injury” is an “incurable or probably incurable mental or bodily disease.” In Mexico, the criminal codes of the states of Aguascalientes and Tabasco also punish personal injuries leading to an incurable disease. Article 105-VI of the Criminal Code of the state of Aguascalientes defines “personal injuries” as “any alteration of health or the causation of any other harm that leaves a material trace on the human body provoked by any external agent.” If the injuries do not endanger the life of the victim, but cause him or her an incurable disease the perpetrator will be punished with imprisonment from two to eight years and a fine. If the injuries caused an incurable disease and posed a danger to the life of the victim, sentence for the perpetrator will be increased by a half. In quite similar terms, article 116-VI of the Criminal Code of the state of Tabasco punishes anyone who causes harm to the health of any other person. If the harm is an incurable disease, the perpetrator will be sentenced to imprisonment from five to ten years.

The regulations on personal injuries of Chile, Colombia, and Peru are quite similar. Article 397-2 of the Chilean Criminal Code punishes with imprisonment from 541 days to three years anyone who “injures, beats or mistreats” another person causing him or her a disease that lasts more than thirty days. In a similar way, articles 111 and 112 of the Criminal Code of Colombia set forth different imprisonment terms according to the duration of a disease caused by an injury. Article 111 establishes that anyone who causes harm to another person “in the body or health” will be punished to the following sentences (article 112): (1) if the injury causes a disease that lasts less than thirty days sentence is imprisonment from sixteen to thirty six months, (2) if the injury leads to a disease that lasts between thirty and ninety days sentence is imprisonment from sixteen to fifty four months and a fine, and (3) if the injury causes a disease that lasts longer than ninety days sentence is imprisonment from thirty two to ninety days and a
In Peru, article 121 of the Criminal Code establishes the offence of “serious injuries” (lesiones graves). According to this provision, a person who causes another a “serious harm in the body or health” will be punished with imprisonment from three to eight years. One such harm is harm to bodily or mental health that “demands thirty or more days of assistance or rest” (article 121-3).

Another form of regulation of personal injuries causing a disease to the victim appears in the criminal codes of the Mexican states of Jalisco and Nuevo León. Both article 219-VII of the Criminal Code of the state of Jalisco and article 316-III of the Criminal Code of the state of Nuevo León establish that the crimes of personal injuries and homicide are “qualified” if committed, among other circumstances, through “intentional infection” (Jalisco) or “infection with any disease” (Nuevo León). In addition, article 140-III of the Criminal Code of the state of Nuevo León sets forth that statutes of limitations do not apply to intentional crimes committed through “infection with an incurable disease,” among other circumstances.

3.3. State Regulation of Marriage and Family

International human rights standards note the fundamental right to “marry and found a family” and reiterate the centrality of the family as a core unit of society. Marriage is an important institution in many societies, although in practice its structure is diverse. While marriage can be the basis of family, it is increasingly recognized that marriage is not the only basis of family; moreover, families can take many forms. And while both marriage and family are important institutions, persons wishing not to marry or found a family must be acknowledged as full participants in society and entitled to full rights, including sexual rights.

While marriage and family are often treated as linked institutions in both law and in many social and religious systems, they also need to be considered separately to assess fully their impacts on the sexual health and rights of all affected persons, including parent(s), children, and guardians. Marriage and family law play a major role in promoting or restricting the health and rights, including sexual health, of many people, both married and unmarried, and their children and other dependents. In addition, marriage regulations may promote or be detrimental to physical, emotional or social well-being of the spouses. In contemporary rights terms, marriage can be generally understood as a voluntary union which creates specific bonds of legal rights and responsibilities, and which, as a consensual union, can also be dissolved by decision of either partner with due process and respect for the rights of the partners. Importantly, under rights principles, the legal bonds of marriage are created through contracts made by persons endowed by law with equal powers of “free and full consent” to enter marriage.

In human rights, the focus on equal, free and full consent for all persons, female and male, to decide if, when, and with whom to enter into, or dissolve marriage as an aspect of their dignity and rights, has important consequences for sexual health. Marriage partners have equal rights to determine their sexual conduct in marriage, and should have the means to act on their decisions, including through access to services and with the support of the law, for voluntary sexual conduct. Equality of rights in marriage is an especially important aspect of rights for the sexual health of women, and it is important to note that equality between men and women in marriage may require affirmative actions by the state. The equal right of women and men to control their fertility, therefore underscores the importance of laws that promote access to sexual and reproductive health information and services; women’s and men’s right to

473 “Qualified” injuries or homicide are graver modalities of these crimes carrying higher sentences. According to article 213 of the Criminal Code of the state of Jalisco, qualified homicide is punished with imprisonment from twenty to forty years. Article 210 of the same code sets forth that in the case of qualified injuries the minimum sentence applicable to “simple injuries” is increased by a third and the higher sentence applicable to “simple injuries” is increased by two thirds. In the case of the state of Nuevo León, article 318 of the Criminal Code provides that qualified homicide will be punished with imprisonment from twenty five to fifty years. According to article 305, sentence for qualified injuries will be the sentence applicable to simple injuries increased by a half.

474 See, e.g., UDHR (article 16), ICESCR (article 10), ICCPR (article 23), CRC (Preamble), and CRPD (article 23).
access and use family planning, and rights to legal and other remedies for any abuses that may occur within marriage and on its dissolution.

A health and rights approach has implications for state practices (de jure or de facto) that exclude adults from marriage or conversely allow persons to be coerced into marriage. Mandatory, pre-marital health tests (to determine HIV status, for example) or other tests of physical characteristics (virginity tests, which may be privately administered but tolerated by the state) are unjustified interferences with privacy and impede core rights to bodily integrity. Categorical exclusion from marriage on these or other grounds linked to health and physical characteristics (disability, for example) violates principles of non-discrimination. Other laws which allow persons to be coerced into marriage by abuse or disadvantage, such as when an accused or convicted rapist is absolved by marriage to his victim, should be seen to violate non-discrimination rights as well as being harmful to the personal well-being of the coerced person.

The focus on legally meaningful consent of adults as the basis of marriage has important implications for the rights and health of adolescents and young women in particular, as eighteen years is now the internationally agreed upon minimum age for marriage. Early marriage has been linked to early childbearing, with increased rates of morbidity and maternal death for young women and girls. In addition, married young women lose access to resources, including education, health services, and mobility. Using law as a tool for rights and health, states are working toward the elimination of child marriage, with best practices coupling law reform, registration of births and other administrative changes with outreach and strong legal, social and health supports for young married girls and women.

Moreover, while marriage is a key site for sexual activity for many people, rights and health protections must extend to consensual sexual conduct before or outside of marriage. In addition, procreative sex and reproduction are not limited to married couples, with implications for the rights and health of both parents and children born outside of marriage. Increasingly, it is clear that a rights and health approach to marriage invalidates constructions of marriage requiring sexual activity between spouses as a matter of proprietary right. Obligatory or coerced sex in marriage has many negative health consequences including unprotected and unsafe sex, unwanted pregnancy and HIV transmission, with implications for mental as well as physical health. Rights and health-based approaches support the trend toward laws supporting consensual sexual activity within marriage, which is linked with each partner’s ability to negotiate for and use condoms; have access to and the means to use comprehensive family planning, and access to comprehensive and accurate sexual health information.

A wide range of laws may regulate marriage in any given country: family, personal status, and criminal laws, as well as health regulations and customary laws. In addition, an extensive set of legal rights may depend on marital status, such as rights to immigration, social security, healthcare, insurance rights, and access to confidential medical records, as well as inheritance, property disposition, custody and control of children, visitation rights, and decision-making for incompetent patients. These various regimes have grave impacts on the rights and sexual health of marriage partners, and are often gender-specific in their discriminatory effect. Many legal regimes governing entry and exit from marriage operate so that often women are not only denied bodily autonomy but also face conditions which undermine their sexual health: when they are coerced into marriage, or are compelled by custom or law when widowed to re-marry, or conversely when law or custom allows them to be shunned or otherwise socially ostracized after divorce or widowhood. In places where sexual activity outside of marriage is strongly stigmatized, widowed or divorced women who are constrained from marriage may in effect be excluded from the ability to enjoy sexual relations in the future.

475 Advocacy of mandatory premarital HIV-testing as a way of protecting women’s health and rights in marriage is misplaced; interventions are better directed to supporting women’s full and free decision to marry, or when and under what conditions to have sex within marriage.

476 These include laws such as marital rape laws, equality between women and men and laws providing for services for married women seeking to exercise their rights to speech, association, property, etc.
Of particular importance to health are marriage regimes which treat married women as legal minors or dissolve their rights into the rights and privileges of the male spouse, particularly those regimes which disallow women access to healthcare services (through requiring male or spousal consent); which bar in law or in practice prosecution or other intervention against an abusive spouse, including for coercive sex, or which restrict widows or divorced women from equal powers over property, inheritance, or control or decisions over children, and so forth.

On a different note, constitutional or family law provisions that recognize or deny access to marriage to same sex couples not only heavily condition the way the state regulates sexuality and sexual life, but also may either deny or grant specific health-related benefits based on marital status. In many countries, marriage defines the entitlement to a wide range of social rights and benefits; excluding same-sex partners from health benefits or other legal entitlements deprives them of services and conditions essential to the highest attainable standards of health because of relationship status or sexual orientation.477

Moreover, health and rights analyses increasingly highlight the need for recognition of alternative forms of family, as these varied forms of family provide important economic resources and social support to many people. States must ensure that access to appropriate services, as well as conditions of equality, security and freedom necessary for health for all members of the family, are available to all kinds of families. Families formed outside of marital or other intimate partner relationships, such as when a grandparent or other kin cares for children of their extended family, need recognition and support, including appropriate authority to make decisions in the child’s best interest, and access to the means to ensure their sexual health and freedom from abuse.

Because single women are often in this caregiver role in alternative families, sex-based discrimination against the caregiver has negative effects on the well-being of children. Same-sex couples who are raising children and whose relationship is not recognized as a marriage also fall into this concern for alternative families. Conversely, persons in alternative families who face domestic violence or sexual exploitation (as when members of extended families work as domestics, for example) also need to be recognized as persons deserving of legal interventions and safeguards such as protection or other orders intervening in the family. Such provisions are essential to promoting basic health and rights, as well as specific sexual health concerns.

It is clear, however, that children have full rights regardless of the marital status of their parents. In many circumstances, the health, of the child (including her or his sexual health and protection from abuse) requires respect and equal protection for parents’ ability and right, irrespective of marital status, or different or same-sex partnership, to make decisions for and with the child, in his or her best interest, including on access to services, treatment and information.

Criminal laws proscribing incest are found in many jurisdictions, but they reflect extremely diverse conceptions of kinship, social appropriateness, and risk. Prohibitions against incest vary greatly regarding the type of kin one must avoid having sexual relations with, reflecting important social principles of proximity and distance rather than degrees of biological relatedness. Indeed, some incest laws prohibit sexual relations between individuals who have no biological relationship whatsoever, although they are legal relatives (like step-parents or in-laws). Some incest laws prohibit sexual contact between adults and young people under the age of consent (in which case the sexual contact could not be seen as consensual), and the law serves as protection against abuse. Other laws more expansively forbid

477 Notably, some state regimes allocating social benefits conditional to marriage may also deny unmarried, cohabiting heterosexual partners access to benefits; others accept unmarried cohabiting heterosexual partners as akin to spouses (if meeting other conditions such as duration of cohabitation) for the purpose of benefits. Such disparate treatment—particularly in regard to pensions, access to housing and other conditions for health—have been determined to be discriminatory.
sexual conduct between persons in specified kinship relationships, even if they are all adults and without evidence of abuse.

Law in LAC has paid a great deal of attention to the regulation of the family. Given the socio-economic and political dynamics of the region, where the coverage of social services and social security in many countries is still limited, families have played a key role of social support and protection of their members from traumatic events (economic crises, unemployment, sickness, death, etc.). At the legal level, civil codes have historically been the centerpiece of the regulation of the family in LAC. The codification of private law was one of the many consequences of the independence struggles of countries in LAC in the 19th Century: it fulfilled the need to have simple and straightforward legal rules that reflected the basic and radical equality of all citizens. Many civil codes in the region took an inspiration in the *Code civil des français* (1804) —also known as *Code Napoléon*—, which began to exert its regional influence by the mid-19th Century.

In recent times, however, the importance of codification in LAC and the influence of the *Code Napoléon* have lost some of its force due to phenomena such as the emergence of new private law issues, globalization, the influence of the United States in the region, the development of indigenous legal doctrines, the emergence of new constitutions and the subsequent constitutionalization of domestic legal systems. In spite of this, as M.C. Mirow has recently argued, the *Code Napoléon* —or, more generally, the codification ideology— “still rules from its grave,” in the sense that it “represents a paradigm of law, a *mentalité*, and a talisman.” Codification still works to provide a “legal grammar,” that is, a “taxonomic function as the intellectual superstructure upon which all legal thought is built.” One of the most important effects of the ideology of codification is that it has established, organized, and shaped certain legal institutions in the region.

One of these institutions is the family. Codification ideology originally imposed in the LAC region a patriarchal view of family relationships, where the *pater familias* exerted total authority over the life of the members of the family. Under this conception of the family, women where subordinated to the authority of their fathers or their husbands. Marriage —conceived of as an indissoluble bond— was seen as the natural foundation of the family and the only space for the legitimate exercise of sexuality. Although the codification vision of family relationships has been slowly transforming in a more

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480 See Mirow, Buried, supra note 479 at 182-85 (“From the mid-nineteenth century to the mid-twentieth century, the French Code and its commentary sources provided many of the core concepts and methodologies of private law in Latin America… Thus, the Code and its method of structuring the law were a primary influence on the development of Latin American private law”).
481 See id. at 185-90.
482 Id. at 191.
483 Id.
484 Id.
485 Id.
486 Id. at 191-92.
democratic direction, its ideological force still operates to imposing reified visions of the “normal” or “natural” family that have operated as the main obstacle in the implementation of family law reforms based on more egalitarian human rights standards. Although there has been an important evolution in the direction of more egalitarian family institutions, there are still important reforms to be pursued in such matters as the domestic work of women, sexual orientation and gender identity equality, family violence, and sexual and reproductive rights, among others.

Not only civil codes devote an important part of their provisions to shaping the family institution (through the regulation of institutions such as marriage, adoption, custody, kinship relations, obligations between members of the family, and so forth), but constitutions in the LAC region tend to include a number of protections for the family and its social role. Law in LAC, through civil and criminal codes and constitutions, has therefore shaped and protected a monogamous, exogamic, and heterosexual family where marriage has occupied a preeminent place as its foundation and origin. In its original versions, civil codes in LAC conceived of marriage as the only possible foundation of the family, so that the two terms of the equation were synonymous. For example, a classic civil law treatise, which commented on Chile’s Civil Code of 1855 —considered to be the closest to the Code Napoléon— observed that “marriage, basis of the family, is the foundation upon which all human societies are built.”

Although more recent commentaries, updated to reflect some sociological realities and transformations regarding the formation of families, reject that family can only originate in marriage, still define this institution in its monogamous, exogamic, and heterosexual modality. Another important structural feature of family law in LAC is that it is generally considered to be “public order” legislation. This means that even though citizens have a fundamental right to found a family whenever they deem it appropriate, once the family is formed its members are not free to dispose of or renounce to the rights, obligations, and duties established by family law regulations.

The social centrality of the family institution in LAC is also reflected by the fact that its legal regulation also falls within the realm of the criminal law. Criminal codes mirror civil codes in the regulation of

489 The patriarchal nature of the original vision of the family has been greatly superseded by a more egalitarian notion of the family, where human rights standards tend to play an increasing role in shaping family institutions. For example, in most countries in LAC women’s social movements were able to push for legislative reforms of family law in the direction of greater equality between men and women in marriage. Children human rights and sexual reproductive rights have also been influential in the implementation of family law reforms in several countries in LAC. See, e.g., Jelin, Familias latinoamericanas, supra note 487 at 97-101; Acosta, Cambios legislativos, supra note 487 at 202-203; Villanueva & Lacerda, Brasil, supra note 317 at 87-88.


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492 1-1 Luis Claro Solar, EXPLICACIONES DE DERECHO CIVIL CHILENO Y COMPARADO: DE LAS PERSONAS 281 (1935). See also Luis Fernández Clerigo, EL DERECHO DE FAMILIA EN LA LEGISLACIÓN COMPARADA 7 (1947) ("Marriage is the essential foundation of the family. There is not really any legislation that does not make such recognition... But for reasons related to ethics, to the organic meaning of our society, to tradition, to political orientation, and even to public interest it is indispensable to consider marriage as the normal and legal foundation of the family. This institution must be studied carefully with an eye in its paramount social function and transcendence that neither the most revolutionary doctrines nor the most profound historical upheavals have been able to disturb").

493 See 5 Arturo Valencia Zia & Alvaro Ortiz Monsalve, DERECHO CIVIL: DERECHO DE FAMILIA 15-60 (1995) [hereinafter Valencia & Ortiz, Derecho Civil] (the increase of the number of households where women are the breadwinners, the increase in birth rates, the decrease of marriage vis-à-vis de facto unions, the increase of single mothers, the reconstitution of families, the development of assisted reproduction technologies, the liberalization of abortion, the struggles of the women’s rights movement for equality, among others).

494 See id. at 4 (“For many commentators, family should always be referred to an institution that has its origin in marriage. Out-of-wedlock children therefore lack a family and de facto unions between a man and a woman, even if they are stable, are not considered to be a family. However, this view is rejected by the most modern doctrine and has no room in our positive legislation").

495 See id. at 3.

496See id. at 8-9.

497 Francesco Carrara, the founder of the classic school of criminal law, and one of the most influential legal scholars of all times in the continental/civil law tradition, offered the rationale for the protection of the family through the criminal law in the
the family, so that both sorts of codes work in tandem to legally shape this institution. Most of the
criminal codes in the region have traditionally included a chapter on “crimes against the family” that
criminalizes conducts that violate the basic features of this institution. Which elements and features of
the family should be protected through the criminal law in LAC has been a matter of important
theoretical discussion. While some commentators think that only the most basic features of the family
should be protected by the criminal law and only the gravest conducts against these features should be
turned into criminal offences, others argue for a more encompassing criminal law regulation of the
family that would protect a wider spectrum of its characteristics.\textsuperscript{498} Apart from this discussion, a cursory
examination of the regional legislations allows concluding that, most generally, one of their basic
features is that they do not protect particular family members but the institutions that conform the family
such as marriage, custody of children, marital status, civil registry of family relations, alimony, and the
patrimonial rights and duties between members of the family.\textsuperscript{500} For example, most criminal codes in
LAC protect monogamy and fidelity in marriage by means of the criminalization of bigamy and adultery,
they preserve the exogamic family through the penalization of incest, and they enforce patrimonial
obligations and duties between family members through offences such as breach of alimony obligations.

This heavy legal regulation of the family in LAC still operates in spite of a sociological reality that
shows, with more and more clarity, that the nuclear, monogamous and heterosexual family based on
marriage tends to become more and more exceptional in the region. Even though the gap between the
sociological reality of families and family legislation in LAC is not a recent one,\textsuperscript{500} it has become more
prominent since the 1990s.\textsuperscript{501} Irma Arriagada has shown that the most conspicuous transformations in the
structure of the family in LAC in the period 1990-2005 are the (1) decrease of nuclear families, (2)
increase of female single-parent households, and (3) increase of households formed by one person who
lives alone.\textsuperscript{502} With regards to these transformations, Arriagada strikingly concludes: “For a long time,
the nuclear family formed by a father, a housewife and their children, was considered —and still is— the
paradigm of the ideal family and the family model upon which public policies were planned. By 2005,
this model of the traditional nuclear family was not majoritarian in the LAC region. Only 34% of nuclear
families, a 24.6\% of total families and a 20.9\% of total households, follow this traditional model… In
conclusion, in the LAC region only one out of five families follows the model of the traditional nuclear
family.”\textsuperscript{503} Other commentators have also observed that the crisis of the “traditional family” in LAC is a
result of factors such as decreasing marriage rates, raising numbers of de facto unions, an increase in the
age when people marry for the first time, and the rise of divorce rates.\textsuperscript{504} Sociological research thus shows
that family relationships in the region seem to be transforming towards more freedom of choice,
more possibilities to leave unsatisfying marriages, and the expansion of new family forms.\textsuperscript{505}

The gap existing between the reality of Latin American families and the legal regulation of family
institutions should be carefully taken into account in any analysis of the family in LAC. As noted before,

\textsuperscript{498} See, e.g., Diego, Delitos contra la familia, supra note 497 at 49-69; Pabón Parra, Delitos contra la familia, supra
note 497 at 62-64.

\textsuperscript{499} See, e.g., Diego, Delitos contra la familia, supra note 497 at 55-63.

\textsuperscript{500} See Jelin, Familias latinoamericanas, supra note 487 at 97.

\textsuperscript{501} See, e.g., Arriagada, Estructuras familiares, supra note 478 at 4-5; Arriagada, Transformaciones familiares, supra note 490 at
126-28.

\textsuperscript{502} See Arriagada, Transformaciones familiares, supra note 490 at 127-28.

\textsuperscript{503} Id. at 129-30.

\textsuperscript{504} See Jelin, Familias latinoamericanas, supra note 487 at 101-102.

\textsuperscript{505} Id. at 102.
although family legislation in the region has evolved in a more democratic and egalitarian direction it is still based on the nuclear, monogamous, and heterosexual model of the family. In this sense, most family legislations and public policies are still based on a notion of the family formed by “a father and a mother who married in order to assume a lifetime commitment to live together with their children, and where gender roles are perfectly defined: women are in charge of domestic chores and men are the breadwinners… [T]his model of the family presupposes a set of tacitly defined rights and duties and a constant interaction between the members of the family based on asymmetrical responsibilities and undemocratic relationships.”

The gap between a legislation that reflects a model of the family that is being replaced by new forms of family relationships generates many instances of discrimination in the application of family legislation in LAC. The reality of the family in the region therefore demands legislation that establishes more egalitarian forms of ascription and distribution of rights and duties between family members and that makes visible and legitimate emerging family forms.

This section examines the legal regulation of marriage and family in the LAC region in relation to four topics: (1) legal conditions placed on marriage, (2) adultery, (3) polygamy, and (4) incest. These legal developments —mostly of a statutory nature— should be jointly read with the subsection on constitutional regulation of family and marriage included in the chapter on sexuality equality and non-discrimination. This constitutional regulation operates as the general framework and background upon which the following topics have operated.

3.3.1. Conditions Placed on Marriage

This subsection examines some legal conditions imposed on people’s ability to marry with respect to age, ability to procreate, and health status.

At the Inter-American level, article 17 of the ACHR establishes some conditions to the formation of family and the institution of marriage. Indeed, while article 17-2 guarantees the “right of men and women of marriageable age to marry and to raise a family,” which could be exercised if “they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention,” article 17-3 sets forth that “[n]o marriage shall be entered into without the free and full consent of the intending spouses.” Additionally, article 17-4 obligates States Parties to “take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution.” Similarly, article 15-2 of the Protocol of San Salvador establishes that “[e]veryone has the right to form a family, which shall be exercised in accordance with the provisions of the pertinent domestic legislation.”

With regards to age, in the LAC region the capacity to marry is generally regulated by civil codes. In Argentina, the legal capacity to marry is fixed at eighteen years of age by article 166-5 of the Civil Code. Below this age, both men and women can marry if judicially authorized (article 167). Articles 106 and 107 of the Chilean Civil Code and articles 116 and 117 of the Civil Code of Colombia set the age of legal capacity for marriage at eighteen years of age and provide that parental authorization is required to marry below this age. Both in Chile (article 114 of the Civil Code) and Colombia (article 124 of the Civil Code), the person below the age of eighteen who marries without parental authorization may be disinherited by his or her parents. In Costa Rica, article 16-1 of the Family Code prohibits marriages of...
persons below the age of eighteen without the authorization of whoever has custody over the minor. While article 241 of the Peruvian Civil Code sets forth that marriages of persons above the age of sixteen are valid with judicial authorization, article 244 indicates that marriages of individuals below the age of eighteen require parental authorization. In Brazil, article 1517 of the Civil Code indicates that persons above the age of sixteen and below the age of eighteen are allowed to marry with parental authorization. Finally, the Marriage Act of Jamaica sets forth in section 3-2 that “[a] marriage solemnized between persons either of whom is under the age of sixteen years shall be void.”

Some countries in the region —like the Dominican Republic, Guatemala, and Mexico— establish different ages for men and women in the legal capacity to marry. In article 144, the Dominican Civil Code sets forth that men cannot marry before they have reached the age of eighteen and women the age of fifteen. Yet, article 148 indicates that men below the age of twenty five and women below the age of twenty one need parental authorization to marry. In Guatemala, article 81 of the Civil Code establishes that men older than sixteen years of age and women older than fourteen years of age can marry with parental authorization. Finally, article 148 of the Civil Code of the Federal District of Mexico (Federal Civil Code) indicates that in order to marry men need to have reached the age of sixteen and women the age of fourteen. However, article 149 of the same code establishes that any person below the age of eighteen needs parental authorization to marry.

The establishment by law of a minimum age to marry is not irrelevant from the perspective of human rights standards. In particular, this age must respect standards relating to sex equality, the rights of children (especially girls) to a free, harmonious, and comprehensive development, and the right to freely form a family. An illustrative good practice of the adjustment of a minimum age to marry to these human rights standards is the decision whereby the Constitutional Court of Colombia equalized at fourteen years of age the minimum age to marry for both boys and girls.511

In its original drafting, article 140-2 of Colombia’s 1873 Civil Code established that the minimum age for marriage for girls was twelve years and for boys fourteen years. In its decision, the Colombian Constitutional Court explained that this rule had its origin in Roman law and was later adopted by many countries in the civil law tradition, including those in LAC via the different local transplants of the Code Napoléon. The Court explained that the establishment of a legal minimum age for marriage was basically aimed at guaranteeing the reproductive function of marriage. Setting forth a minimum age for marriage at fourteen years of age for boys and at twelve years of age for girls thus reflected the average age at which the capacity for reproduction had developed.512 The original rationale of this rule was not therefore aimed at protecting girls; on the contrary, it arose and developed in a context of profound gender inequality.513 For the Constitutional Court, the establishment of a lower minimum age for marriage for girls “was not aimed at promoting the autonomy or freedom [of the marrying woman], but at facilitating that she could comply with the social functions related to procreation that, at the time, were attributed to her in a situation of dependence to the husband and in conditions of sex inequality that operated in her detriment.”514

The Court then reflected on the implications of modern human rights standards on sex equality and children rights for a legal rule establishing different minimum ages for marriage for boys and girls. In the Constitutional Court’s view, such a rule highly affected the fundamental right of girls to a free, harmonious, and comprehensive development guaranteed by article 44 of the Constitution of Colombia and the right to sex equality of girls protected by articles 13 and 44 of the Colombian Constitution. With regards to the first right, the Court observed that early marriages —particularly when they are followed by pregnancy— generally put girls in a situation where they have to assume a set of burdens and responsibilities that radically transform their lives, for their educational, social, and economic

512 Id. ¶ 4.
513 Id.
514 Id. ¶ 4.2.6.
development is truncated. Drawing on reports of the Special Rapporteur on Violence against Women and the WHO and general comments of the Committee on Economic, Social, and Cultural Rights and the Committee on the Rights of the Child, the Constitutional Court explained that early marriages and subsequent early pregnancies imposed an undue burden on the rights of girls to education and health.

Finally, in its sex equality rationale, the Court stressed out that early marriages have a discriminatory dynamics because they tend to impose on girls stereotyped gender roles. The Constitutional Court observed: “For a girl, an early marriage usually implies an important restriction on the possibility to choose a life project. Traditional images that discriminate against women — those that confine them to the domestic realm, for example — tend to be imposed upon married girls or tend to propagate and stick when the role of mother at an early age makes difficult for a woman to identify, construct, and follow complementary, different, or alternative life options.” For the Court, such a consequence was in violation of articles 2-f and 5-a of the CEDAW, obligating states’ parties to repeal legal provisions reflecting stereotyped gender roles, and articles 13 and 44 of the Constitution of Colombia protecting the right to sex equality of girls.

The obligation that children above the minimum age for marriage and below eighteen years of age request parental authorization has also human rights standards implications from the perspective of the rights to marry and freely form a family. Again, the doctrine of the Constitutional Court of Colombia offers an interesting example on this topic. In 1993, the Court found that the legal obligation of children between the ages of fourteen and eighteen — at the time between twelve and eighteen years of age in the case of girls — to request parental authorization to marry was compatible with their fundamental rights to the free development of personality and to freely form a family. The Court also found that the disinheritance of a child who had married without parental authorization was constitutional.

The Constitutional Court explained that the requirement of parental authorization was aimed at protecting children against their own inexperience, for “marriage is a complex relationship that demands an emotional maturity that is generally only attained with the passage of time.” In the Court’s view, the protection of freedom by the Colombian Constitution does not overrule the authority of parents over their children. Yet, this authority is “a rational authority that must be exercised in the benefit of its subjects.” The Constitutional Court also observed that disinheriting a child who had married without the authorization of his or her parents was not unreasonable since it was the only way to make effective the obligation of children to secure this authorization. It pointed out as well that, according to the disinheritance regime established by the Colombian Civil Code, this sanction does not operate automatically and the possibilities that it actually happens are remote because it requires that the cause for disinheritance be explicitly established in the parents’ testament and be judicially declared.

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515 Id. ¶ 9.2.1.
516 Id. ¶¶ 9.2.1.1 and 9.2.1.2.
517 Id. ¶ 9.2.2.1.
518 See Const. Ct. Col., Decision C-344/93 (Aug. 26, 1993). In spite of its problems, in 2000 the Constitutional Court of Colombia reaffirmed its doctrine on the constitutionality of the obligation of adolescents to request parental authorization in order to marry. The Court opined that “the state cannot equally treat the decision to getting married that is the product of the maturity of persons who can freely exercise their legal personality and the decision to getting married of persons who, in spite of having reached the legal age for marriage, do not however have the inner maturity allowing them to fully understand the responsibility stemming from the decision to form a family.” Const. Ct. Col., Decision C-1264/00 (Sept. 20, 2000), ¶ 4.5.
520 Id.
521 Id. ¶ II.C.
522 Id. In 2000, the Constitutional Court examined the constitutionality of another consequence of the marriage of an adolescent without parental consent. Article 125 of the Colombian Civil Code establishes that the parent of an adolescent who had married without authorization is entitled to revoke any donation he or she has made in favor of his or her adolescent son or daughter. For the Court, this sanction “puts in the hands of parents a useful tool to force their adolescent children to make a reflexive decision and, in case marriage is celebrated without parental authorization, to mitigate, at least from a patrimonial point of view, the consequences of their children’s decision.” Const. Ct. Col., Decision C-1264/00 (Sept. 20, 2000), ¶ 4.7.
It is worth noting that two justices dissented and argued that the majority’s decision was based on an archaic and authoritarian model of the family and parental authority. They thus presented another view of parental authority founded on the right to the free development of personality of all family members.\textsuperscript{523} In their view, the notion of the family protected by the Constitution of Colombia of 1991 “is not compatible with an arbitrary exercise of powers that puts children in the painful dilemma of denying themselves and modifying their personality or submitting to the irrational and unfounded authority of their parents.”\textsuperscript{524} For the dissenting justices, the majority’s view on parental authority would legitimize any restriction on the right to the free development of personality of children.\textsuperscript{525} They also observed that “in the case of adolescents, the decision to marry not only depends on their free and autonomous personal decision, but the legal order grants full validity to their acts ascribing to them rights and duties. The authorization of the parents does not add or replace the capacity of adolescents who are considered by the law as fully capable.”\textsuperscript{526} The justices finally added that the disinheritance sanction for the adolescent who had married without parental authorization was unreasonable and disproportionate for it had an extortive nature.\textsuperscript{527}

As previously mentioned, marriage in LAC has an important history of being conceived as an institution strongly tied to the possibility of human reproduction. In this sense, some civil codes in the region still define marriage as a contract entered into by the spouses in order to procreate, live together, and help and assist each other. This is the case of the civil codes of Chile (article 102),\textsuperscript{528} Colombia (article 113), and Guatemala (article 78). For some commentators, from the inclusion of procreation in the definition of marriage stems the obligation of the spouses to have sex with each other (obligación de débito conyugal).\textsuperscript{529} In direct opposition to the inclusion of procreation in the definition of marriage, article 1565-2 of the Civil Code of Brazil establishes the right of the spouses to freely decide on all matters related to family planning, the obligation of the state to provide educational and financial resources for the appropriate exercise of this right, and prohibits any form of impingement on this right by public or private institutions.

Other civil codes in LAC, without including procreation in the definition of marriage, set forth that impotence or, more generally, the inability to procreate are impediments to marriage, a cause for the nullity of marriage, or a cause for divorce. Article 156-VIII of the Civil Code of Mexico’s Federal District (Federal Civil Code) establishes that “incurable impotence for copulation” is an impediment for marriage. Yet, in most cases, impotence is a cause for the nullity of marriage. For example, article 220-3 of the Argentine Civil Code sets forth that “the impotence that absolutely prevents sexual intercourse” is a cause for the nullity of marriage. In Costa Rica, article 15-4 of the Family Code establishes that the marriage of a person who is “absolutely impotent” is null and void provided that the impotence is incurable and previous to marriage. In similar terms, article 145-2 of the Guatemalan Civil Code provides that “relative or absolute impotence” is a cause for the nullity of marriage if it is “perpetual, incurable, and previous to marriage.” Although article 227-7 of the Civil Code of Peru also sets forth that “absolute impotence” of one of the spouses at the moment of the celebration of marriage is a cause for its nullity, it clarifies that if both spouses are unable to “perform sexual intercourse” the cause for nullity


\textsuperscript{525} Id. ¶ 5.

\textsuperscript{526} Id.

\textsuperscript{527} Id.

\textsuperscript{528} Article 1 of the Chilean Civil Marriage Act of 2004 did not modify the definition of marriage established by article 102 of the Civil Code of Chile.

\textsuperscript{529} One of these commentators observed that “when marrying, every spouse grants the other the right that his or her body be sexually possessed by his or her partner. It is a reciprocal right and a duty that is performed in terms of equality and within the consideration that husband and wife owe to each other.” VALENCIA & ORTIZ, DERECHO CIVIL, supra note 493 at 157.
disappears. Finally, article 155-13 of the Civil Code of Guatemala and article 267-VI of the Civil Code of Mexico’s Federal District (Federal Civil Code) regulate impotence as a cause for divorce.

Health status as a condition for marriage has been regulated by some countries in the LAC region where the disease of any of the persons seeking to get married or of any of the spouses has been alternatively or cumulatively considered as an impediment for marriage, as a cause for the nullity of marriage, and as a cause for divorce or separation.\footnote{Argentina is a special case of this sort of regulation. Article 169-3 of the Argentine Civil Code establishes that parents are authorized to deny their consent to the marriage of their children or adolescent sons or daughters if the person they are marrying has a “contagious disease” or a “serious mental or physical deficiency.”} In Mexico and Peru, the disease of any of the future spouses is an impediment for marriage. According to article 156-VIII of the Civil Code of Mexico’s Federal District (Federal Civil Code) any chronic and incurable disease that is also contagious or hereditary is an impediment for marriage. Similarly, article 241-2 and 3 of the Civil Code of Peru sets forth that any “chronic, contagious, and transmissible hereditary disease” that represents “a danger for the offspring” or any “chronic mental disease” are absolute impediments for marriage.

As a cause for the nullity of marriage, the disease of any of the spouses has been regulated by the civil codes of Brazil and Peru. In Brazil, article 1556 of the Civil Code provides that a marriage is null and void if there was an “essential error” on the person of any of the spouses. According to article 1557-III of that code, one of the hypotheses of this sort of error is the ignorance, previous to marriage, of the existence of an “irremediable physical defect” or a “serious and transmissible disease that is contagious or hereditary and endangers the health of the other spouse or his or her progeny.” A similar regulation appears in article 277-5 of the Civil Code of Peru, which establishes, on the one hand, that the error on the person of the other spouse when he or she has an “essential defect” is a cause for the nullity of marriage and, on the other, that any “serious chronic disease” is one of these essential defects.

The disease of any of the spouses as a cause for divorce or separation is regulated by the legislations of Colombia, Costa Rica, Guatemala, Mexico, and Peru. Article 154-6 of the Colombian Civil Code establishes that “any serious and incurable physical or mental disease or abnormality of any of the spouses that endangers the physical or mental health of the other and makes impossible matrimonial community” is a cause for divorce.\footnote{In 2002, the Constitutional Court of Colombia found that this provision was constitutional provided that the divorced spouse pays him or her alimony. For the Court, “the obligation of mutual support between the spouses arises from the reciprocal rights and duties of the married couple [to which article 42 of the Colombian Constitution makes reference] as well as the principle of human dignity. This principle prevents the transformation of any of the spouses into the instrument of the other by abandoning him or her when he or she has health problems or when he or she is not ‘useful’ anymore for the purposes of the other spouse.” Const. Ct. Col., Decision C-246/02 (Apr. 9, 2002), ¶ 4. The Constitutional Court observed that even though a spouse is not constitutionally obligated to become a “hero” or a “martyr” by having to remain married with a person who has a serious disease, the possibility of divorcing this person should be balanced with the demands of the duty of mutual help between the spouses stemming from the constitutional principle of solidarity. If a spouse is authorized to divorce when the other is seriously ill, he or she ought to act with solidarity and pay the other alimony in case he or she does not have the material means to lead a life with autonomy and dignity. See id. ¶ 5-7.} In similar terms, article 58-5 of the Family Code of Costa Rica provides that a mental disease of any of the spouses that lasts for more than one year or another disease or serious behavior disorder that makes impossible or dangerous life in common are causes for judicial separation. According to article 155-12 of the Civil Code of Guatemala, any “serious, incurable, and contagious disease” that endangers the other spouse or the progeny is a cause for divorce. The Mexican and Guatemalan regulations on this issue particularly stress out the possibility to divorce when any of the spouses is infected with a STI. In Mexico, article 267-VI and VII of the Civil Code of the Federal District (Mexican Federal Civil Code) establishes that a spouse has a cause for divorce if the other has an “incurable mental disease” or “syphilis, tuberculosis, or any other chronic or incurable disease that is also contagious or hereditary.” Similarly, article 333-8 of the Civil Code of Peru provides that any “serious venereal disease contracted after the celebration of marriage” is a cause for its dissolution.
Finally, Argentina and Guatemala require that medical certificates on the health status of the spouses be issued before marriage is celebrated. In Argentina, article 13 of Law 12.331 (1936) established the obligation of every man wanting to get married to obtain a prenuptial medical certificate and prohibited the marriage of any person having a “venereal disease in its contagious period.” Later, Law 16.668 (1965) extended this obligation to every woman seeking to get married. In similar terms, article 97 of the Civil Code of Guatemala makes obligatory that a physician or public health authorities issue a certificate establishing that the husband does not have a “serious, contagious, and incurable disease that may be harmful to the wife or the progeny” or a “serious physical defect” that makes procreation impossible. A certificate on the health status of the wife should be issued if the husband or his parents —in case he is a child or an adolescent— request it.

3.3.2. Adultery

In LAC, adultery has been traditionally considered to be a criminal offence regulated by criminal codes and/or an impediment for marriage, a cause for separation of bodies, and a ground for divorce established by civil codes as part of their regulation of marriage. With the exception of several states of Mexico, including the Mexican Federal Criminal Code, adultery has disappeared from the criminal codes of the countries selected for this research project. In the LAC region, the criminalization of adultery was historically a matter of heated debate. In the first place, commentators and policymakers never reached an agreement on which were the family values protected through the criminalization of adultery: conjugal fidelity, “sexual morality,” the “honor” of the “offended” spouse, the “legal and moral order of marriage,” and the institution of marriage as such, among others. Second, the “moralizing” nature of adultery was, in most countries in LAC where it was criminalized, the main reason to repeal it from criminal codes.

In some cases, however, the offence of adultery existed until very recently. In some countries, the crime of adultery was repealed by new criminal codes or by laws expressly enacted to suppress adultery as an offence. This is the case of Peru where the new criminal code of 1991 excluded adultery from its provisions, Argentina where it was repealed by Law 24.453 in 1995, and Brazil where it was suppressed from the criminal code by Law 11.106 in 2005. In other countries, high courts adopted judicial decisions against the criminalization of adultery. An illustrative case is Guatemala, where in 1996 the Court of Constitutionality struck down article 232 of the Criminal Code that penalized any married woman who had sexual intercourse with a man other than her husband and the man who had sexual intercourse with her knowing that she was married. According to the Court, the regulation of adultery by the Criminal Code of Guatemala was a form of sex discrimination and therefore was in violation of article 4 of the Guatemalan Constitution. For the Court, “[the provisions of article 232 of the Code entail] a form of discrimination against married women based on their sex. Indeed, if a married man behaves in the same way and in similar circumstances he will not commit the crime of adultery. Gender has therefore a direct and clear relationship to this crime: it is the unfaithful conduct of the married woman that is penalized and not the conduct of the unfaithful husband. Identical acts are thus treated differently by the criminal law. This difference is not reasonable because if what the criminal law

532 For a general overview of the reasons that historically supported the penalization of adultery as a crime against the family see generally DIEGO, DELITOS CONTRA LA FAMILIA, supra note 497 at 180-233.
533 See id. at 189-90.
534 For the reasons leading to the repealing of adultery in 1995, which work as a good example of why the crime of adultery has almost disappeared in the region, see generally 1 CARLOS CREUS & JORGE EDUARDO BUOMPADRE, DERECHO PENAL: PARTE ESPECIAL 181 (2007); 1 EDGARDO ALBERTO DONNA, DERECHO PENAL: PARTE ESPECIAL 509 (2007). Carlos Fontán Balestra, a renowned Argentine criminal law commentator, explained that criminalization of adultery was a “bad habit” (“resabio”) stemming from “the confusion between moral law and crime, which should be eradicated from the legislation of civilized countries.” 5 CARLOS FONTÁN BALESTRA, TRATADO DE DERECHO PENAL 44 (2007).
535 The basic reason leading the Brazilian Congress to repeal the crime of adultery was its sexist nature. See VIANNA & LACERDA, BRASIL, supra note 317 at 91-92.
seeks to protect through the criminalization of adultery are either the legal order of the family or marital status, then the infidelity of both spouses should had been punished in equal terms.”

As previously mentioned, Mexico is the only country of the research project where adultery is still criminalized by several states. Article 273 of the Federal Criminal Code punishes with imprisonment to up to two years the adultery of any of the spouses committed “in the marital domicile” or “with scandal.” In addition, while article 274 clarifies that prosecution of adultery can only be requested by the “offended spouse,” article 275 establishes that only “consummated adultery” may be prosecuted. Similar provisions are established by the criminal codes of the states of Aguascalientes (article 135), Chihuahua (articles 186-189), Coahuila (articles 327-328), Durango (articles 239-241), Hidalgo (article 243), Jalisco (article 182), México (articles 222-223), San Luis Potosí (articles 174-176), Tabasco (article 222), and Zacatecas (articles 247-250).

As an impediment for marriage and a cause for separation of bodies or divorce, adultery is regulated by civil codes of a number of countries in the LAC region. In Argentina, articles 202-1 and 214-1 of the Civil Code set forth that adultery is a cause for personal separation of the spouses and divorce. Similarly, article 1572 of the Civil Code of Brazil establishes that any of the spouses may initiate the action for judicial separation whenever the other spouse has seriously violated marriage duties in a way “that makes unbearable life in common.” Accordingly, article 1573-1 of the Brazilian Civil Code sets forth that adultery is one of the grounds that make impossible marital common life. In Chile, article 132 of the Civil Code defines adultery as a serious violation of the duty of fidelity in marriage that allows for the imposition of the sanctions established by law. The Civil Marriage Act (Law 19.947 of 2004) refers to adultery both as a cause for judicial separation and divorce. In the first case, article 26 of the Act provides that judicial separation may be initiated against the spouse who has seriously violated the rights and duties imposed by marriage. In the second case, article 54-2 of the Act establishes that any “serious and repeated violation of the duties of coexistence, mutual help, and fidelity stemming from marriage” is a ground for divorce. In a similar vein, articles 333-1 and 349 of the Civil Code of Peru provide that adultery is simultaneously a cause for separation of bodies and divorce. Finally, in Mexico, article 156-V of the Federal Civil Code (Civil Code of the Federal District) establishes that judicially declared adultery is an impediment for marriage. In addition, article 267-I of the Mexican Federal Civil Code establishes that “the duly proven adultery of any of the spouses” is a cause for divorce.

In other countries in the region, like Costa Rica and Guatemala, adultery is only a cause for divorce. Indeed, while article 48-1 of the Family Code of Costa Rica explicitly refers to adultery as a cause for divorce, article 155-1 of the Guatemalan Civil Code establishes that the “infidelity” of a spouse is a ground for divorce.

The Colombian regulation of adultery as part of the legal regime of marriage presents an interesting case of its historical evolution and progressive adaptation to human rights standards. In its original drafting, article 154-1 of Colombia’s 1873 Civil Code provided that adultery was a ground for divorce only if committed by the wife. In 1976, the Civil Code was thoroughly amended by Law 1 of 1976, which, among other provisions, established that “extra-marital sexual relations” were a cause for divorce only if the spouse requesting the divorce did not “consent, facilitate, or forgive” these relations. Additionally, article 140-7 of the original version of the Civil Code of Colombia established that the marriage between an “adulterous woman and her accomplice” was null and void on the condition that adultery had been judicially declared before the new marriage. After the entry into force of Colombia’s 1991 Constitution, the Constitutional Court has handed down three decisions on the compatibility of the two above-mentioned provisions of the Civil Code with basic human rights standards.

In its first ruling, the Court overturned article 140-7 of the Civil Code of Colombia after finding that it violated the prohibition to discriminate on grounds of sex set forth in article 13 of the Colombian

537 Id. ¶ II.
Constitution and the right to marry understood as an expression of the fundamental right to the free development of personality guaranteed by article 16 of the Constitution of Colombia.\footnote{See Const. Ct. Col., Decision C-082/99 (Feb. 17, 1999).} With regards to the violation of sex equality, the Constitutional Court reaffirmed its previous doctrine that family relations are constitutionally based “on the equality of rights and duties between the spouses; that is to say, on the equality of rights between men and women.”\footnote{Id. ¶ 4.1.} For the Court, “it is unreasonable to impose a burden on only one of the spouses for the only reason she belongs to a certain sex… Far from pursuing a constitutionally acceptable purpose, [article 140-7 of the Civil Code of Colombia] perpetuates the historical discrimination to which women have been subjected to, for it reproduces a patriarchal scheme in which men should be the bearers of higher prerogatives and recognition.”\footnote{Id.} In its right to marry holding, the Constitutional Court observed that “the decision to remarry is a personal one, so that any intromission aimed at its limitation is arbitrary.”\footnote{Id. ¶ 4.2.b.} It also added that “[article 140-7 of the Civil Code] undoubtedly establishes an undue burden on freedom. Maybe when adultery was a crime it was conceivable that, in function of this crime, the free development of personality could be limited. Today, however, in light of the new Constitution, it is unreasonable to limit the individual’s right to marry and, even less, to do it on grounds of her sex.”\footnote{Id.}

More recently, the Court examined the compatibility of article 154-1 of the Colombian Civil Code with the Constitution and struck down the condition that the spouse who requested a divorce based on the “extra-marital sexual relations” of the other did not “consent, facilitate, or forgive” these relations.\footnote{See Const. Ct. Col., Decision C-660/00 (Jun. 8, 2000).} The Constitutional Court began by framing the issue as a problem concerning the very notion of the family established by article 42 of the Constitution of Colombia.\footnote{See supra Section 3.1.2.4.} According to the Court, the fact that the constitutional notion of the family presupposes “its natural tendency to unity, affinity, coherence, and stability” prohibits “the use of any mechanism forcing a couple of spouses to remain together.”\footnote{Const. Ct. Col., Decision C-660/00 (Jun. 8, 2000), ¶ 3.} In the Constitutional Court’s view, the principles and rights enshrined in the Constitution privilege “the stability of the family and not the duration of marriage… The principle of human dignity and the right to the free development of personality forbid to force a couple to maintain their matrimonial bond against their will and interests for the very same reasons they forbid coercing individuals into marriage.”\footnote{Id. ¶¶ 3, 4.}

The Court also considered that the condition imposed on a spouse to request divorce when the other had had extra-marital sexual relations violated the fundamental right to privacy and freedom of conscience. For the Constitutional Court, the consent or forgiveness given by a spouse to the extra-marital sexual relations of the other is a private matter that the law is forbidden to regulate. In the Court’s view, such a regulation is an unconstitutional legal interference “in the intimate life of the spouses, in the evolution of their emotions and affections, and in their effort to adjust, at some point in their life, to the conduct of the other spouse.”\footnote{Id. ¶ 5.} In addition, the Constitutional Court considered that forgiveness or consent of the extra-marital sexual relations of the other spouse were forms of personal beliefs or convictions protected by freedom of conscience.\footnote{Id.}

Finally, the Court decided that article 154-1 of the Civil Code did not violate the Colombian Constitution when it established the “extra-marital sexual relations” of any of the spouses as a cause for divorce.\footnote{See Const. Ct. Col., Decision C-821/05 (Aug. 9, 2005).} The Constitutional Court’s basic argument was that this ground for divorce did not unconstitutionally impinge on the spouses’ sexual freedom. For the Court, “the union stemming from both spouses’ consent
in the act of marriage imposes on them a set of obligations. Fidelity is one of the most relevant of these obligations. It is considered a fundamental pillar of marriage’s structure because it preserves the bond of mutual consideration, appreciation, and trust indispensable in matrimonial life. The violation of the legal duty of spousal fidelity is incompatible with the consent that legitimates the marriage bond. The law cannot therefore restrict the right of the offended spouse to request the dissolution of marriage… When article 113 of the Civil Code provides that marriage establishes a union between a man and a woman in order for them to live together and procreate it establishes that marriage is a monogamous relation where both spouses are obligated to direct their affections towards one another.\footnote{Id. ¶ 8.3.}

In the Constitutional Court’s view, the violation of the duty of fidelity by any of the spouses endangers the harmony and stability of the family, which, according to the Court’s settled doctrine, are the core values protected by the Constitution with regards to family matters.\footnote{Id.} The Court observed that restricting the sexual freedom of the spouses by establishing extra-marital relations as a cause for divorce was a legislative measure proportionally tailored to the constitutional protection of the family. The Constitutional Court added: “In accordance with the legal nature of marriage, infidelity deteriorates the affective relationship between the spouses and causes instability in the family… Establishing infidelity as a ground for divorce thus protects these constitutional interests [harmony and stability]… [The limitation to the free development of personality and sexual freedom] is constitutionally legitimate because it aims at protecting the free and willing commitment that the spouses assume when they marry as well as the interests of the affected spouse.”\footnote{Id. ¶¶ 8.7, 8.8.}

3.3.3. Polygamy

The regulation of polygamy in the LAC region has historically taken the form of the prohibition of bigamy. As with other legal regulations of aspects of marriage and family, bigamy is simultaneously prohibited by criminal and civil codes. The latter generally consider that a previous marriage that has not been legally terminated operates as an impediment for a new marriage. If a person previously married who has not terminated this bond marries again, the new marriage will be null and void. In addition, many criminal codes in LAC criminalize the violation of this impediment through the crime of “bigamy.” Some of these codes have gone even further and have criminalized the violation of any impediment for marriage —established in the Civil Code— through the crime of “illegal marriage.” With regards to the crime of bigamy —as in the case of other criminal offences tending to protect the family— there has been an important discussion as to which are the social values that this offence aims at guarding. Most criminal law commentators in the region tend to agree that bigamy protects monogamy in marriage as the foundation of the family. They have thus argued that the crime of bigamy operates as “a guarantee and protection of the monogamous and legal construction of the family, which has its primary and elementary foundation in marriage.”\footnote{DIEGO, DELITOS CONTRA LA FAMILIA, supra note 497 at 238.}

With the exception of Colombia, all the countries selected for this research project have penalized bigamy. The regulation of this offence has adopted two modalities. In the first case, bigamy is criminalized through a more encompassing crime generally called “illegal marriage,” which penalizes the violation of the impediments for marriage established in the civil code. The existence of a non-dissolved previous marriage is generally included as an impediment for a new marriage. This modality of criminalizing bigamy exemplifies the way in which in the LAC region civil and criminal regulations of the prohibition of bigamy work in tandem to preserve the monogamous nature of marriage. The regulations on illegal marriage of Argentina, Costa Rica, and Guatemala illustrate this modality of penalizing bigamy.
In Argentina, article 134 of the Criminal Code establishes that if a couple marries in violation of an impediment that causes the “absolute nullity” (nullidad absoluta) of marriage and both spouses knew about the impediment, they will be punished with imprisonment from one to four years. A different hypothesis is regulated by article 135-1 of the Argentine Criminal Code, which imposes a sentence of imprisonment from two to six years on any person who marries knowing the existence of an impediment that causes the absolute nullity of marriage and hides the existence of the impediment to the person he or she is marrying. The Costa Rican regulation on illegal marriage is very similar to the Argentine one. While article 176 of the Criminal Code of Costa Rica punishes with imprisonment from six months to three years the couple that marries knowing the existence of an impediment that causes the absolute nullity of marriage, article 177 of the Costa Rican Criminal Code establishes that whoever marries knowing the existence of an impediment that causes the absolute nullity of marriage and hides the existence of the impediment to the person he or she is marrying will be sentenced to imprisonment from two to six years. In the case of Guatemala, article 227 of the Criminal Code penalizes with imprisonment from two to five years the couple that marries knowing the existence of an impediment carrying the absolute nullity of marriage and hides it to the person he or she is marrying.

The second modality of the regulation of bigamy in the LAC region is through a crime explicitly called “bigamy.” This offence appears in the criminal codes of Brazil, Chile, Guatemala, Jamaica, Mexico, Peru, and the Dominican Republic. In Brazil, article 235 of the Criminal Code establishes that a married person who marries again will be sentenced to imprisonment from two to six years. In addition, this article sets forth that the person the single person who marries a married person knowing that he or she is married will be punished with imprisonment from one to three years. Similarly, article 382 of the Criminal Code of Chile simply states that whoever being married marries again will be punished with imprisonment from three to five years. In addition to including the crime of illegal marriage, article 226 of the Guatemalan Criminal Code sets forth the crime of bigamy. According to this provision, a person commits bigamy and could be sentenced to imprisonment from one to three years if he or she “marries a second time without having terminated its previous marriage” or if, being single, he or she marries a married person knowing that he or she is married. In Jamaica, section 71-1 of the Offences against the Person Act provides that “whosoever, being married, shall marry any other person during the life of the former husband or wife” will be guilty of a felony punished with a term of imprisonment to up to four years, with or without hard labour. Bigamy is widely regulated in Mexico both at the federal and state levels. Article 279 of Federal Criminal Code of Mexico establishes that a validly married person who marries again with all legal formalities commits bigamy and could be sentenced to imprisonment to up to five years and a fine from 180 to 360 daily salaries. In Peru, articles 139 and 140 of the Criminal Code regulate the consequences of bigamy for the married person who remarries and the single person who marries a married person knowing that he or she is married. In the first case, article 139 punishes any married person who marries again with imprisonment from one to four years, but if he or she additionally leads the person he or she is marrying into an error about his or her marital status sentence will be imprisonment from two to five years. In the second case, article 140 sets forth a sentence of imprisonment from one to three years for the single person who marries a married person knowing that

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554 In order to understand these criminal prohibitions it is necessary to resort to the Civil Code of Argentina, which, in articles 166 and 219, establish that the existence of a non-dissolved previous marriage is an impediment for marrying that, in case of being violated, carries the absolute nullity of marriage.

555 According to article 14-1 of the Family Code of Costa Rica the marriage of a person who has a previous marriage is “legally impossible.” Article 64 of the same code establishes that if such a married is carried out it is absolutely null and void.

556 Article 88-3 of the Civil Code of Guatemala sets forth that “married persons” have an “absolute impediment” to marrying.

557 Bigamy is also a crime included in the criminal codes of the states of Aguascalientes (article 130), Baja California (article 241), Baja California Sur (articles 248-249), Campeche (article 244), Chiapas (articles 268-269), Chihuahua (article 184), Coahuila (article 322), Colima (article 166), Durango (articles 232-235), Guanajuato (article 217), Guerrero (article 193), Hidalgo (article 240), Jalisco (article 180), México (articles 214-216), Michoacán (article 217), Morelos (article 207), Nayarit (articles 266-267), Nuevo León (articles 274-276), Oaxaca (article 260), Puebla (articles 280-282), Querétaro (article 221), Quintana Roo (article 174), San Luis Potosí (article 170), Sinaloa (articles 245-247), Sonora (article 231), Tabasco (article 219), Tamaulipas (articles 282-284), Tlaxcala (article 235), Veracruz (article 208), Yucatán (article 226), and Zacatecas (articles 244-245).
he or she is married. Finally, *article 340 of the Criminal Code of the Dominican Republic* also establishes a simple regulation of bigamy by stating that a validly married person who remarries will be punished with “minor imprisonment” (*reclusión menor*).

The evolution of the crime of bigamy in Colombia is illustrative of how both its inclusion in and exclusion from a criminal code might be compatible with human rights standards. Articles 260 and 261 of Colombia’s 1980 Criminal Code penalized bigamy and illegal marriage in very similar terms to other countries in the LAC region. While bigamy was defined as the new marriage of a validly married person or the marriage of a single person with a validly married one and carried a sentence of imprisonment from one to four years, illegal marriage was defined as the marriage of a person who married having an impediment or the marriage of a person who married another who had an impediment and carried a sentence of imprisonment from six months to three years. In 1997, the Constitutional Court decided that these two articles of the Criminal Code of Colombia were compatible with the Constitution. The Court observed that the crimes of bigamy and illegal marriage were aimed at the protection of the family for they penalized a set of conducts “contrary to the loyalty upon which the marriage bond is based.” For the Constitutional Court, bigamy and illegal marriage were wrongful acts “harmful to the stability and transparence of the family institution that also endanger the interests of the social collective and violate legal security.”

In 2000, the Congress of Colombia enacted a new Criminal Code that did not include the crimes of bigamy and illegal marriage. In 2002, the Constitutional Court had to decide a constitutional challenge against the repeal of these two crimes by the new Criminal Code. The plaintiff argued that the exclusion of bigamy and illegal marriage from the new code endangered the constitutional notion of the family, which, in his view, made imperative that these two conducts were criminalized. In the Court’s view, Congress has a great leeway in deciding which social harms have to be penalized. It is thus legitimate for Congress to decide that criminalization may not be the best means to pursuing certain constitutional purposes. The Constitutional Court considered that, in order to protect the family, Congress was not obligated to criminalize bigamy and illegal marriage and could afford protection to this institution through means that were not as invasive of personal freedom as the criminal law. For the Court, “the fact that the Constitution protects the family does not entail that this institution ought to be protected through the criminalization of all conducts that affect it… The law may resort to other forms of protection of the matrimonial family such as the nullity of illegal marriages and other civil sanctions.”

As previously mentioned, the prohibition of bigamy also appears in civil codes regulated as an impediment for marriage. With different phrasings, civil codes in the LAC region establish, on the one hand, that a validly married person is forbidden to marry anew and, on the other hand, that a marriage against this impediment is null and void. The civil codes of Argentina (*article 166*), Brazil (*article 1521-VI*), Guatemala (*article 88-3*), Peru (*article 241-5*), and the Dominican Republic (*article 147*), the Civil Marriage Act (*Law 19.947 of 2004*) of Chile (*article 5-1*), the Family Code of Costa Rica (*article 14-1*), and the Mexican Federal Civil Code (*article 156-X*), all establish that a non-dissolved previous marriage is an impediment for a new marriage. The nullity of a marriage celebrated against this impediment is established by the civil codes of Argentina (*article 219*), Brazil (*article 1548-II*), Colombia (*article 140-12*), Guatemala (*article 144*), Peru (*article 274-3*), and the Dominican Republic (*article 184*), the Civil Marriage Act (*Law 19.947 of 2004*) of Chile (*article 44-a*), the Family Code of Costa Rica (*article 64*), and the Federal Civil Code of Mexico (*article 235-II*).

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559 Id. ¶ 2.
560 Id.
562 Id. ¶ 6.
563 Id. ¶ 7.
564 Id.
In the LAC region, the prohibition of incest has historically been regulated as a crime included in national and state criminal codes. The rationale for the criminalization of this conduct has been threefold. The first rationale—which might have lost some of its explanatory power in light of new constitutions that strongly protect human rights standards and establish a clear separation between the state and religion656—justified the penalization of incest on the need to protect “family morality.”566 According to some commentators, any conduct against “the dignity, honor, prosperity, and good customs of the family” was harmful to family morality.567

The second rationale is related to the violation incest entails of a more general notion of “public morality” or a “positive morality” unrelated to any particular or individual moral worldview. This was, for example, the notion of morality the Constitutional Court of Colombia relied upon in part of its decision upholding the constitutionality of the crime of incest.568 For the Court, “the public morality that may operate as a limit to freedom is the one that is rationally necessary to attune individual life plans that, in spite of being absolutely contradictory, are compatible with a constitutional democracy.”569 Using this analytical framework, the Colombian Constitutional Court asserted that the criminalization of incest “reiterates the social prohibition of a cultural order firmly grounded in public morality.”570 It also added that the crime of incest seeks to “influence human sexual behavior in order to deter members of the community from engaging in a set of conducts that have been proved to be harmful to community itself... [These conducts entail] an important number of dangers, threats, and harms, more or less probable and plausible, that the prohibition of incest has historically tried to eradicate.”571

Finally, the third rationale intends to ground the penalization of incest on liberal premises of state intervention on individual freedom. According to this view, the actions of a free agent may be limited by the criminal law only if they cause an objective social harm.572 Certain sexual conducts may be therefore criminalized if they produce a social harm that could be objectively proven. The Constitutional Court of Colombia also justified the penalization of incest by the Colombian Criminal Code based on this rationale.573 In the Court’s view, “beyond any scientific dispute, the prohibition of endogamous sexual relations appears as a social constant since remote times in the most diverse cultures.”574 Drawing on classic literature in anthropology and psychoanalysis on the prohibition of incest as foundational of culture,575 as well as expert testimony from Colombian physicians, geneticists, anthropologists, and psychologists, all agreeing that incest produces a serious social harm,576 the Constitutional Court considered that the freedom to engage in sexual intercourse or other erotic act —stemming from the fundamental right to the free development of personality— could be legitimately limited by the criminal

565 See supra Section 3.1.2.5.
566 See DlEGO, DILITOS CONTRA LA FAMILIA, supra note 497 at 346-47, 350-51.
567 Id. at 346.
569 Id. ¶ 10.8.
570 Id. ¶ 10.10.
571 Id. ¶ 10.11.
572 See supra note 405 and accompanying text.
574 See supra Section 3.1.2.5.
law if the intercourse was incestuous. For the Court, incest is the act of a free agent that causes harm to the family of a gravity that warrants its criminalization. The Constitutional Court observed: “The limits of the [individual] private sphere within the family are more labile because the behavior or attitude of any of its members that implicates another member fatally affects the basic core of society.” $^577$

In the LAC region, incest has been widely criminalized. While most of the countries penalize any kind of sexual intercourse (consensual or violent) between family members related by different degrees of kinship (incest \textit{per se}), other countries only penalize incest as an aggravating circumstance in the commission of crimes such as rape, statutory rape, and other forms of sexual abuse.

Incest \textit{per se} has been penalized by the criminal codes of Chile, Colombia, Guatemala, Jamaica, and Mexico. Article 375 of the Chilean Criminal Code punishes with imprisonment from sixty one days to three years anyone who has sexual intercourse with an ascendant or descendant or a brother or a sister. This provision operates under two conditions: (1) the agent must know that his or her sexual partner is his or her ascendant, descendant, brother or sister; and (2) only blood kinship is covered by the provision (kinship by adoption is therefore excluded). In Colombia, incest is criminalized by article 237 of the Criminal Code. This provision imposes a sentence of imprisonment from sixteen to seventy two months to any person who has sexual intercourse or engages in any other sexual act with a descendant or an ascendant or a brother or sister. In the Colombian case, the prohibition of sexual activity between family members covers both blood kinship and kinship by adoption. Similarly, article 236 of the Criminal Code of Guatemala punishes with imprisonment from two to four years whoever has sexual intercourse with his or her ascendant, descendant, brother or sister. Insofar as this provision does not explicitly establishes which forms of kinship are covered, it could be understood to cover both blood and adoption kinship. Additionally, article 237 of the Guatemalan Criminal Code establishes an aggravated modality of incest when it is committed with a descendant of an age below eighteen years. In this case, sentence is imprisonment from three to six years. In Mexico, incest is similarly punished by the Federal Criminal Code and the criminal codes of most of the states. Article 272 of the Federal Criminal Code punishes with imprisonment from one to six years the ascendant that has sexual intercourse with his or her descendant, who, in turn, is punished with imprisonment from six months to three years. This last sentence is also applicable to incest between siblings.$^578$

In Jamaica, incest is thoroughly regulated by the Incest (Punishment) Act of 1948. Interestingly, the Act makes a difference if incest is committed by a male or a female. Section 2-1 of the Act establishes male incest as the sexual intercourse of a male of any age with his grand-daughter, daughter, sister, or mother. This offence is a misdemeanour punished with hard labor and imprisonment not exceeding five years. Yet, if the female is below the age of twelve years the crime is punished with hard labor and imprisonment not exceeding sixteen years. Section 3 of the Act defines female incest as the sexual intercourse of a female person of or above the age of sixteen years with her grand-father, father, brother, or son. Again, this offence is a misdemeanour punished with hard labour and imprisonment not exceeding five years.

Argentina, Brazil, Costa Rica, and Peru do not criminalize incest \textit{per se}, but aggravate offences such as rape, statutory rape, and sexual abuse when they are committed by the perpetrator over a member of his or her family. In the case of Argentina, Costa Rica, and Peru each offence provides for its special aggravating circumstances, which include kinship relations, and specifies which degrees of kinship

\textit{Id.} ¶ 7. $^577$

$^578$ Incest is also penalized by the criminal codes of the states of Aguascalientes (article 129), Baja California (article 242), Baja California Sur (article 250), Campeche (article 241), Chiapas (article 246), Chihuahua (article 185), Coahuila (article 326), Colima (article 167), Durango (article 238), Guanajuato (articles 218-219), Guerrero (article 194), Hidalgo (article 242), Jalisco (article 181), México (article 221), Michoacán (article 220), Morelos (article 208), Nayarit (article 268), Nuevo León (article 277), Oaxaca (article 255), Querétaro (article 223), Quintana Roo (article 176), San Luis Potosí (article 168), Sinaloa (article 248), Sonora (article 226), Tabasco (article 221), Tamaulipas (articles 285-286), Veracruz (article 210), Yucatán (article 227), and Zacatecas (articles 246).
aggravate the offence. In Brazil, the Criminal Code establishes a general aggravating provision setting forth that most sexual crimes are aggravated if the perpetrator has a kinship relation with the victim.

According to article 119 of the Criminal Code of Argentina, one of the modalities of sexual abuse — punished with imprisonment from six months to four years — is when it is committed by taking advantage of a relationship of authority or dependency. In addition, article 119-b of the Argentine Criminal Code establishes that if (1) the duration or the circumstances of sexual abuse implicate for the victim a seriously offensive form of sexual submission or abuse, (2) was perpetrated through sexual intercourse, and (3) the perpetrator was an ascendant, a descendant or a brother or sister, sexual abuse is aggravated and punished with imprisonment from eight to twenty years. Similarly, article 125 of the Criminal Code of Argentina sets forth an aggravated form of the crime of corruption of children — punished with imprisonment from ten to fifteen years — if the perpetrator is an ascendant or a brother or sister.

Article 157-2 and 3 of the Costa Rican Criminal Code aggravates the crime of rape if it is committed by the grandfather, grandmother, father, mother, son, daughter, brother, sister, uncle, aunt, niece, nephew or cousin of the victim or the victim’s spouse. In this case, sentence is increased from imprisonment between ten to sixteen years to imprisonment from twelve to eighteen years. In the case of the crime of sexual abuse (non-consented sexual acts different to sexual intercourse), article 162-2, 3 and 4 of the Criminal Code of Costa Rica aggravates the offence — from imprisonment from two to four years to imprisonment from three to six years — if committed by an ascendant, descendant, brother, sister, uncle, aunt, niece, nephew, cousin, stepfather, stepmother, stepbrother or stepsister of the victim. Similar aggravating circumstances apply to statutory rape, sexual abuse of children, and corruption of children. Indeed, articles 159, 161-3, 4 and 5, and 168-4, 5 and 6 of the Costa Rican Criminal Code impose graver sentences if these crimes are perpetrated by an ascendant, descendant, brother, sister, uncle, aunt, niece, nephew, cousin, stepfather, stepmother, stepbrother or stepsister of the victim. In the case of statutory rape the imprisonment sentence is increased from two to six years to four to ten years. For sexual abuse the imprisonment sentence is increased from three to eight years to four to ten years. And, finally, in the case of corruption the imprisonment sentence is increased from three to eight years to four to ten years.

In Peru, the crimes of rape, statutory rape, acts against modesty (actos contra el pudor), and acts against modesty with children are aggravated if the agent has a kinship relation with the victim. According to articles 170-2 and 176-1 of the Peruvian Criminal Code, the offences of rape and acts against modesty (non-consented sexual acts other than sexual intercourse with an adult) are aggravated if committed by an ascendant, descendant, spouse, or blood or adoptive brother or sister of the victim. In the case of rape, the imprisonment sentence is increased from six to eight years to twelve to eighteen years; and, in the case of acts against modesty, the imprisonment sentence is increased from three to five years to five to seven years. Articles 173 and 176-A of the Criminal Code of Peru also aggravate the crimes of statutory rape and acts against modesty with children when the perpetrator has a relation of authority over the victim stemming from a kinship bond or uses this bond to make the victim trust him or her. In the case of aggravated statutory rape sentence is life in prison; and, in the case of aggravated sexual acts with children, sentence is imprisonment from ten to twelve years.

According to article 226-II of the Criminal Code of Brazil the different modalities of the crimes of rape, statutory rape, sexual harassment, and sexual abuse will be aggravated if committed by an ascendant, a stepfather or stepmother, an uncle or a sister or brother. In these cases, the sentence applicable to each crime will be increased by a half.

3.4. Sexuality and Violence: The Inter-American Standards

Violence committed against persons violates and diminishes the fundamental human rights recognized in all international conventions, most notably the right to life and bodily integrity. Persons may be deprived
of life or liberty only in accordance with the law. All nations have made formal commitments to protect persons against violence through their national laws and international obligations. All treaty bodies have agreed that states are required to prevent violence by state and non-state actors.

Forms of sexual violence include rape, coerced sex, child sexual abuse, sexualized forms of domestic and intimate partner violence, FGM, so-called honor crimes, and trafficking into forced prostitution. It is important to recognize that sexual violence can be and is directed at women, men, girls and boys, and at any group in a position of vulnerability, though available data suggest higher incidence of sexual violence directed against women and girls. Sexual violence in its diverse forms impairs sexual health through physical injury, psychological trauma, transmission of disease through unprotected sex, particularly HIV and STIs, unwanted pregnancy and subsequent unsafe abortion or maternal mortality. Victims of sexual violence are often held responsible, in part or in whole, for the violence, feeling shame, dishonor, spoiled identity, and guilt that make it difficult to report incidents of violence and seek treatment and care for related physical and psychological injuries. Sexual violence is thus responsible for a significant disease burden from the national and global perspective, some portion of which becomes chronic. The extensive social and health system costs stemming from sexual violence, however, may be significantly reduced through prevention and earlier, more effective state intervention.

A comprehensive review of sexual health must also consider violence committed against persons because of their real or imagined sexual characteristics, even though delivered through non-sexual means (non-sexual assault or injury, for example). These real or imagined sexual characteristics or attributes might include sexual behavior or practices, same-gender sexual partner, lack of virginity, extramarital sex, sexual contact with social “inferiors” or members of “enemy” groups, “bad reputation,” “dishonor” to the kin group, and sexual “disobedience.” Although the delivery of violence may not utilize rape or sexual injury as its medium, the physical and psychological effects are otherwise similar: injury, reduced ability to access health care for these injuries, and increased disease burden.

In addition to representing an assault on fundamental rights to life and bodily integrity, violence may be both a sign and consequence of gender discrimination. Sexual violence against women and girls reduces freedom of movement, association, and speech, as well as reducing their access to education, work, and the public sphere and political participation. Sexual violence, however, is directed not just at women and girls, but also at men, boys, and transgender persons, who are thought to transgress social norms of appropriate masculine or feminine behavior (in dress, manner, speech, or work). Sexual violence reinforces and stems from other forms of inequality as well, serving to reinforce hierarchies of power based on class, race, ethnicity, caste, or other important social divisions. Sexual violence thus serves as an extra-legal form of punishment and control, which may be administered informally by state agents or by non-state actors (family members, neighbors, or workmates). It is a draconian form of legal punishment, intended to induce shame and diminish the reputation of the victim of violence, resulting in social exclusion, damaged reputation, and diminished life prospects.

In addition, sexual and non-sexual violence directed at sexually stigmatized persons reduce the capacity of persons to access and utilize other rights (right to health and health services, freedom of movement, expression, political participation, livelihood, and free and unforced marriage). Sexual and non-sexual violence directed at sexually stigmatized persons promotes fear and terror, especially in conditions of conflict and ethnic cleansing, erodes personal agency, and serves as a marker of stigma and subordination. National and international law must provide for effect prevention, investigation, and forms of response. The bodies of law that address violence more directly include human rights, humanitarian, refugee, and international criminal law.


580 See supra note 37 and accompanying text.
This section exclusively describes legal developments in LAC aimed at the eradication, prevention, and punishment of sexual violence related to the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Pará) (CBP). With the entry into force of this convention, much of the issues related to sexual violence in the region have revolved around its implementation and the adaptation of domestic legislations to fulfill the obligations it imposes upon States. The section will therefore describe the CBP and the doctrine of the IACHR and the IACtHR on the interpretation of the most important concepts and provisions of this Convention.

The CBP has been considered to be a milestone in the global advancement of women’s substantive equality. Catharine MacKinnon, a leading feminist scholar and a champion of women’s substantive equality, has recently remarked that the CBP, along with the African Protocol on the Rights of Women, are the only two pieces of modern international human rights law that view women’s equality in truly substantive terms and conceive of gender violence as a form of sex discrimination.

The preamble to the CBP—entered into force on March 5, 1996—includes several important principles that explain the scope of application of the Convention. To begin with, the Preamble affirms that “violence against women constitutes a violation of their human rights and fundamental freedoms, and impairs or nullifies the observance, enjoyment and exercise of such rights and freedoms,” and strikingly observes—based on a very substantive notion of sex equality—that “violence against women is an offense against human dignity and a manifestation of the historically unequal power relations between women and men.” In addition, the Preamble expresses the conviction of the State Parties that “the elimination of violence against women is essential for their individual and social development and their full and equal participation in all walks of life.”

Because the CBP conceives of violence against women as a form of sex discrimination, the definition it provides on the different forms of violence is broad. Article 2 of the Convention understands that violence against women has physical, sexual, and psychological dimensions and may occur: (1) in family, domestic or interpersonal relationship contexts, “whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse, (2) in community contexts where the agent could be any person, and includes “among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place, and (3) it “is perpetrated or condoned by the state or its agents regardless of where it occurs.” The relationship between violence and discrimination is also made evident by the rights protected by the CBP. According to articles 4, 5, and 6 women have all “classic” civil and political rights (life, physical, mental, and moral integrity, personal liberty, equal protection, right to a simple and prompt recourse, and freedom of religion, among others), social, economic, and cultural rights, and special substantive equality rights (right to be free from discrimination and right “to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination”).

Article 12 of the CBP establishes that it may be jurisdictionally enforced before the ACHR through petitions lodged by “any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization,” for violations of article 7. In this sense, this latter provision becomes the centerpiece of the Convention for the advancement of the right of women to be free from violence. Article 7 of the CBP reads as follows.

Article 7

581 Other forms of sexual violence—particularly sexual violence against children and adolescents—are dealt with in the section of this report on criminalization of sexual activities. See supra Section 3.2.2.
The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to:

a) refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation;
b) apply due diligence to prevent, investigate and impose penalties for violence against women;
c) include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary;
d) adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property;
e) take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women;
f) establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures;
g) establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies; and
h) adopt such legislative or other measures as may be necessary to give effect to this Convention.

As it will explained later in this section, article 7 of the CBP has been enforced on a few occasions by the IACHR and, interestingly, by the IACtHR. It must not be forgotten, however, that this provision, as interpreted by the Commission and the Court, works in tandem with the American Convention of Human Rights, and particularly with articles 8 (fair trial), 24 (equal protection), and 25 (judicial protection) of this Convention. Women are therefore protected against violence by both conventions. If a country has not ratified the CBP or acts occurred before its entry into force or the date of ratification by a country, against violence women could then be confronted through the ACHR. The section now turns to examining some illustrative decisions of the IACHR and the IACtHR on the obligations of the states in the prevention, eradication, and punishment of violence against women stemming from the CBP and, when appropriate, in light of the ACHR.

3.4.1. The CBP and the Doctrine of the IACHR

The IACHR has rendered several decisions on violence against women that may be classified in two groups. The first group refers to cases that have been decided under the provisions of the ACHR either because the facts of the case occurred before the entry into force of the CBP, the facts took place before the ratification of the CBP by the defendant state, or the defendant state was not part of the CBP. The second group includes the cases were the CBP has been directly invoked by the defendants. Up to this date, just one case of the Commission has thoroughly enforced and interpreted the CBP, hence providing an important guidance to states in the LAC region on its implementation at the domestic level. This subsection will examine both sorts of cases.

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The most important decision of the IACHR on the CBP up to this date is the opinion rendered in the case of Maria da Penha Maia Fernandes v. Brazil.\(^{587}\) The importance of this case is threefold: (1) it applies for the first time article 7 of the CBP, (2) it applies, in forceful combination, the CBP and the ACHR, and (3) it shows that, even in the absence of the CBP, the gendered dimensions of violence against women could be captured through articles 5, 11, and 24 of the ACHR and the American Convention to Prevent and Punish Torture.

The Fernandes Case arose after a petition was lodged before the Commission arguing that Brazil had violated article 7 of the CBP and articles 8 (fair trial), 24 (equal protection), and 25 (judicial protection) of the ACHR, when it condoned, for years, the violence to which the petitioner was subjected by her husband. In particular, during the months of May and June, 1983, the husband committed against Mrs. Fernandes several acts of aggression, including a murder attempt, that left her in state of paraplegia and suffering from a number of other permanent ailments. The IACHR concluded that Brazil had violated articles 8 and 25 of ACHR and article 7 of the CBP. In addition it observed that these violations were part of “a pattern of discrimination evidenced by the condoning of domestic violence against women in Brazil through ineffective judicial action.”\(^{588}\)

The Commission began its decision by analyzing the extent of the obligations imposed upon States Parties by the rights to fair trial and justice guaranteed by articles 8 and 25 of the ACHR in conjunction with article 7 of the CBP. According to the IACHR, these rights “stipulate that all persons are entitled to access to judicial remedies and to be heard by a competent authority or court when they think that their rights have been violated.”\(^{589}\) For the Commission, Brazil violated these rights because “[m]ore than 17 years have elapsed since the launching of the investigation into the attack on the victim Maria da Penha Maia Fernandes and to date, based on the information received, the case against the accused remains open, a final ruling has not been handed down, and remedies have not been provided for the consequences of the attempted murderer of Mrs. Fernandes.”

The IACHR applied this test to the case and found that the rights to judicial protection and fair trial of Mrs. Fernandes had been violated by Brazil. The Commission analyzed the “specific facts surrounding” the case and concluded that “the police investigation completed in 1984 provided clear and decisive evidence for concluding the trial and that the proceedings were delayed time and time again by long waits for decisions, acceptance of appeals that were time-barred, and unwarranted delays.”\(^{591}\) With regards to the second prong of the test, the IACHR added that “the victim/petitioner... has fulfilled the requirement related to procedural activity with respect to the Brazilian courts, which is being handled by the Office of the Public Prosecutor and the pertinent courts, with which the victim/complainant has cooperated at all times.”\(^{592}\) It finally concluded that “the characteristics of the case, the personal situation of persons involved in the proceedings, the level of complexity, and the procedural action of the interested party cannot explain the unwarranted delay in the administration of justice in this case.”\(^{593}\)

588 Id. ¶ 3.
589 Id. ¶ 37.
590 Id.
591 Id. ¶ 39.
592 Id.
593 Id.
At a more abstract level, the Commission observed that the right to judicial protection and fair trial established by articles 8 and 25 of the ACHR are violated when state authorities allow acts of violence to go unpunished therefore producing a situation of impunity. Recalling the basic doctrine of the IACtHR on the duties of states to combat impunity established in the Velásquez Rodríguez and Godínez Cruz cases, the IACHR indicated that the key aspect to be established in cases where the rights to judicial protection and fair trial are at stake is (1) whether the State acquiesced to the violation, or (2) the State allowed the act of violence to take place without adopting measures to prevent it or without punishing the perpetrators. To make such a finding, it is necessary to take into account the basic obligation of the state “to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.”

The Commission then turned to establishing how the right to equality before the law guaranteed by article 24 of the ACHR had been violated by Brazil. To begin with, the IACHR noted that it had received important information documenting that, in Brazil, domestic violence seemed to disproportionately affect women. The Commission strikingly observed: “Compared to men, women are the victims of domestic violence in disproportionate numbers. A study done by the National Movement for Human Rights in Brazil compares the incidence of domestic violence against women and men and shows that in terms of murders, women are 30 times more likely to be killed by their husbands than husbands by their wives. In its special report on Brazil in 1997, the Commission found that there was clear discrimination against women who were attacked, resulting from the inefficiency of the Brazilian judicial system and inadequate application of national and international rules, including those arising from the case law of the Brazilian Supreme Court.” The IACHR also indicated that positive legislative, administrative, and judicial initiatives adopted in Brazil in order to counteract violence against women had “been implemented on a limited basis in relation to the scope and urgency of the problem” and had not affected the case of Mrs. Fernandes in any significant way.

Finally, the IACHR analyzed the violation of articles 2 and 7 of the CBP. It clarified that, in this case, which implied “an ongoing violation of the right to effective legal procedures” (the violation began before the ratification of the CBP by Brazil, but kept on occurring after it was ratified), it only had ratione materiae and ratione temporis competence with respect to acts occurred after the ratification of the CBP by Brazil (November 27, 1995). The Commission then qualified the Convention as an “essential instrument that reflects the great effort made to identify specific measures to protect the right of women to a life free of aggression and violence, both outside and within the family circle.” In light of this general assertion on the thrust of the CBP, the IACHR found that Brazil had violated article 7 of the Convention BP when (1) it allowed the acts of Mrs. Fernandes’ husband to go unpunished and therefore created a situation of impunity, and (2) it condoned a general pattern of discriminatory impunity of acts of violence against women, extending well beyond the case of Mrs. Fernandes, which was only “the tip of the iceberg.”

With regards to the first cause of violation, the Commission stated: “The failure to prosecute and convict the perpetrator under these circumstances is an indication that the State condones the violence suffered

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596 Id. 43, citing Godínez Cruz, ¶ 175.
597 See id. ¶¶ 46-49.
598 Id. ¶ 47.
599 See id. ¶ 50.
600 See id. ¶ 52.
601 Id. ¶ 53.
by Maria da Penha, and this failure by the Brazilian courts to take action is exacerbating the direct consequences of the aggression by her ex-husband.\textsuperscript{602} On the other hand, the existence of an extended pattern of discriminatory impunity of acts of violence against women was not only a violation of the duties to prosecute and convict these acts, but also an infringement of the obligation to prevent them. For the IACHR, “[g]iven the fact that the violence suffered by Maria da Penha is part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors, it is the view of the Commission that this case involves not only failure to fulfill the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices. That general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.”\textsuperscript{603} To sum up, the Commission observed that the combination of “ineffective judicial action, impunity, and the inability of victims to obtain compensation” was a clear evidence “of the lack of commitment [of the Brazilian state] to take appropriate action to address domestic violence.”\textsuperscript{604}

As forms of reparations, the IACHR recommended Brazil to (1) conduct a serious, impartial, and exhaustive investigation on the criminal liability of Mrs. Fernandes’ husband, (2) investigate what were the actions of state authorities that prevented the prompt and effective prosecution of the acts of violence that affected Mrs. Fernandes, (3) provide Mrs. Fernandes with rapid and effective compensation, and (4) adopt national measures aimed at eliminating toleration of violence against women.

As mentioned before, the IACHR has decided a number of cases on violence against women in light of the ACHR. An illustrative recent example of this group of decisions is the opinion handed down in the case of \textit{Ana, Beatriz, and Celia González Pérez v. Mexico}.\textsuperscript{605} This decision, however, should be jointly read with the opinion of the Commission in the case of \textit{Raquel Martín de Mejía v. Peru}.\textsuperscript{606} Both cases are strikingly similar because (1) they deal with rapes committed against women detained by military forces after being accused of belonging to insurgent or terrorist groups (Raquel Martín to \textit{Sendero Luminoso} and the González Pérez sisters to the \textit{Ejército Zapatista de Liberación Nacional}), and (2) the cases were exclusively decided in light of the ACHR (in the \textit{Martín de Mejía Case}, the CBP had not yet entered into force, and in the \textit{González Sisters Case}, the facts occurred before Mexico had ratified the CBP), and (3) the Commission stated that rape was a form of torture prohibited by the ACHR and the American Convention to Prevent and Punish the Crime of Torture. An importance difference between the two cases is their sensitivity towards the gendered dimensions of rape of women in the midst of armed conflicts. While the \textit{Martín de Mejía Case} does not emphasize the fact that sexual violence in war generally affects women in a disproportionate way, the \textit{González Pérez Sisters Case} —drawing on the breakthrough decisions of the International Criminal Tribunal for the Former Yugoslavia on rape as torture— is specific and emphatic in ascertaining the disproportionate impact of war on women’s sexual freedom. This subsection presents the standards on impunity of sexual violence established by the IACHR in the \textit{González Pérez Sisters Case}, which reasserts and broadens the doctrine previously set forth in the \textit{Martín de Mejía Case}.

The \textit{González Pérez Sisters Case} arose after a petition was brought before the IACHR arguing that Mexico had infringed articles 5 (humane treatment), 7 (personal freedom), 8 (fair trial), 11 (privacy), 19 (rights of the child), and 25 (judicial protection) of the ACHR, when the Mexican Army illegally detained, raped, and tortured Ana, Beatriz, and Celia González Pérez, and, later, failed to duly investigate these acts, punish their perpetrators, and compensate the victims. The facts proved before the

\begin{itemize}
\item \textsuperscript{602} \textit{Id.} ¶ 55.
\item \textsuperscript{603} \textit{Id.} ¶ 56.
\item \textsuperscript{604} \textit{Id.} ¶ 57.
\end{itemize}
Commission document that on June 4, 1994, the González Pérez sisters and their mother were detained by the Mexican Army in order to make them confess their membership to the *Ejército Zapatista de Liberación Nacional*. During their captivity, “the three sisters were separated from their mother, beaten, and raped several times by military personnel.” Although a petition was filed before the Federal Public Prosecutor’s Office (*Procuraduría General de la República*), the case was transferred to the Office of the Prosecutor for Military Justice, which decided to close the case “for failure of the sisters to come forward to testify again and to undergo an expert gynecological examination.”

The IACHR analyzed the rape of the González Pérez by military personnel while they were in detention in light of the rights to humane treatment and privacy guaranteed by articles 5-1 (“every person has the right to have his physical, mental, and moral integrity respected”) and 2 (prohibition of torture and duty to respect human dignity of persons deprived of their freedom) and 11 (“no one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation”) of the ACHR and the American Convention to Prevent and Punish Torture.

Drawing on these conventional provisions, the doctrine of the ICTY in the appeals decisions in the *Çelibić* and *Furundžija* cases, the doctrine of the European Court of Human Rights, and the reports of the United Nations Special Rapporteur on Violence against Women, the IACHR observed that the rapes of the González Pérez by the Mexican Army were a form of torture. For the Commission, “sexual violence committed by members of the security forces of a State against the civilian population constitutes, in any situation, a serious violation of the human rights protected under Articles 5 and 11 of the American Convention, as well as the guidelines of international humanitarian law.”

Drawing on these international law standards, the Commission considered that the rape of detained women was a form of torture when used to punish, humiliate, intimidate, or coerce the victim in order to obtain her confession or that of a third party. To conclude, the IACHR stated: “Ana, Beatriz, and Celia González Pérez were sexually assaulted as part of an illegal interrogation conducted by military officers in a zone of armed conflict and were accused of collaborating with the EZLN. The Inter-American Commission, within the context of this case and the pertinent analysis, also lends credence to the reports of death threats and additional acts of torture reported by the aggressors when they released them, since

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608 Id.
610 See Aydin v. Turkey, Case No. 57/1996/676/866, ECtHR (Sept. 25, 1997).
614 Id. ¶ 48, citing the European Court of Human Rights in the case of *Aydin v. Turkey*, ¶ 83.
615 Id. ¶ 46 and note 21.
these acts were reported and never investigated in accordance with due process in Mexico. Given the manner in which they were assaulted, the accusations made against them, and the serious threats, it is reasonable to believe that the military officers wanted to humiliate and punish the women for their alleged links with the rebels... In the view of the Inter-American Commission, abuses targeting the physical, mental, and moral integrity of the three sisters committed by agents of the Mexican State constitute torture.\(^{617}\)

The IACHR also concluded that Mexico had violated the rights of the González Pérez sisters to a fair trial and judicial protection guaranteed by articles 8 and 25 of the ACHR. To start its analysis, the Commission invoked the doctrine of the IACtHR stating that “pursuant to articles 8 and 25 of the American Convention, the States parties have an obligation to provide effective judicial remedies to victims of human rights violations and to support them in accordance with the rules of due process.”\(^{618}\) The Commission then indicated that, in cases of rape, state authorities cannot request the victim to undergo additional medical examinations aimed at confirming adequate medical examination conducted just after the sexual assault had occurred. For the IACHR, “[r]ape is an aberrant act, which, because of its very nature, requires evidence that is different from other crimes. Subjecting the victim to another episode of humiliation or one that causes that person to relive the events involving the most private parts of the person’s body in the form of review proceedings should be avoided. Consequently, the Commission holds the view that the investigating authorities should analyze the circumstances surrounding the case and all available elements such as statements, circumstantial evidence, presumption, and other legal elements. In the absence of evidence, the medical examination must provide all the guarantees for fully respecting the dignity of the person and for considering that individual’s mental and psychological condition.”\(^{619}\) In sum, when the Office of the Prosecutor for Military Justice decided to close the case of the rapes of the González Pérez sisters because they did not want to go through an additional expert gynecological examination, their rights to a fair trial and access to justice were infringed by Mexico.

In the Commission’s opinion, Mexican authorities failed to comply with its duty to investigate, punish, and compensate acts of torture—established in articles 8 and 25 of the ACHR and articles 6 and 8 of the American Convention to Prevent and Punish Torture—when it transferred the case of the González Pérez sisters from ordinary to military courts. The IACHR began this part of its decision by recalling its previous doctrine on the lack of impartiality of military courts to rule on matters falling without the realm of the military life.\(^{620}\)

Applying this doctrine to the case, it concluded: “The acts of abuse committed by the members of the Armed Forces that deprived the four victims of their liberty and the rape of the González Pérez sisters, one of whom was a minor at the time of the incident, cannot in any way be considered acts that affect the legal assets of the military, nor does this case pertain to offenses committed while military officers were discharging legitimate functions entrusted to them under Mexican legislation, since, as has been noted, this was a chain of acts of violation that began with the arbitrary detention of the four women. In other words, even if there was no evidence of common offenses that constitute human rights violations (and this is not the case here), there is no link to an activity by the Armed Forces that can justify the involvement of the military courts. The Inter-American Convention stresses that torture in all its forms is categorically prohibited by international law, and, for this reason, the investigation into the facts related to this case by the military courts are completely inappropriate.”\(^{621}\)

The IACHR wrapped up its decision by asserting that “[t]his case is characterized by complete impunity.”\(^{622}\) It therefore recommended Mexico to (1) conduct a complete, impartial, and effective

\(^{617}\) Id. ¶ 51-52.  
\(^{618}\) Id. ¶ 74.  
\(^{619}\) Id. ¶ 75.  
\(^{620}\) See id. ¶ 81.  
\(^{621}\) Id. ¶ 82.  
\(^{622}\) Id. ¶ 88.
investigation in ordinary courts aimed at establishing the criminal liability of all the persons involved in
the illegal detention, rape, and torture of the González Pérez sisters, and (2) adequately compensate the
victims for their illegal detention, rape, and torture.\textsuperscript{623}

3.4.2. The CBP and the Doctrine of the IACtHR

The IACtHR has applied and interpreted article 7 of the CBP on two occasions. The first decision of the
Court to address violence against women in light of the CBP was the opinion handed down in the case of
Miguel Castro Castro Prison v. Peru.\textsuperscript{624} As some commentators have noted, although this was not the
first case in which the IACtHR dealt with the violation of human rights of women, it was the first to
address these violations from an explicit and detailed gender-based perspective.\textsuperscript{625} The Miguel Castro
Castro Prison Case is one of the cases against Peru arising from the human rights violations occurred
during the war against terrorism undertook by the Peruvian government during the 1980s and 1990s.

On May 6, 1992, Peruvian military forces attacked, by surprise, Lima’s Miguel Castro Castro Prison
where many persons accused of terrorism and high treason were detained. The operation was initially
justified on the decision of penitentiary authorities to transfer the female prisoners to another high
security prison. It was later proved, however, that the transfer of the women detainees was just an excuse
to attack and exterminate the prisoners accused of membership to Sendero Luminoso lodged in two aisles
of the prison. The prison was attacked between May 6 and 9, 1992, with heavy weaponry, snipers, gases,
and explosives.\textsuperscript{626} The attack was indiscriminately targeted at male and female inmates, many of whom
were pregnant. By the end of May 9, 41 prisoners had died and 185 had been injured.\textsuperscript{627} After May 9, the
inmates who survived were subjected to several forms of inhumane treatment: enforced nudity, beatings,
insults, confinement of several prisoners in minuscule cells, some women had to undergo rough vaginal
inspections, and some pregnant prisoners gave birth without any health assistance, among other
violations.

The IACtHR found that Peru was internationally liable for the violation of articles 4 (right to life), 5
(personal integrity), 8 (fair trial), and 25 (judicial protection) of the ACHR, articles 1, 6, and 8 of the
American Convention to Prevent and Punish Torture, and article 7-b of the Convention of Belém do Pará
when it attacked in disproportionate and unjustified fashion the Miguel Castro Castro Prison, killing and
wounding several inmates, and, later, failed to duly judicially investigate these facts and punish those
who were criminally liable.

For the Court, several of the violations to the right to personal integrity (ACHR, article 5) had a gendered
dimension and therefore affected more intensely women who suffered them. In finding these violations, the
IACtHR combined article 5 of the ACHR with article 7 of the CBP. To begin with, the Court dealt
with the attack to inmates who were pregnant. In the Court’s view, “pregnant women who were attacked
experienced an additional psychological suffering. In addition to the violation of their own personal
integrity, they suffered from the anguish, desperation, and fear stemming from the danger posed to the
life of their unborn children.”\textsuperscript{628} In legally qualifying this violation, the IACtHR observed: “In addition to
the protection afforded by article 5 of the American Convention, it is worth pointing out that article 7 of
the Convention of Belém do Pará specifically indicates that States have the duty to guarantee that their
authorities and agents abstain from any action or practice of violence against women.”\textsuperscript{629}

\textsuperscript{623} See id. ¶ 96.

25, 2006).

\textsuperscript{625} See Palacios Zalouga, Path, supra note 14 at 240.

\textsuperscript{626} See id.

\textsuperscript{627} See id.

\textsuperscript{628} Caso del Penal Miguel Castro Castro v. Perú (Fondo, reparaciones y costas), Inter-Am. Ct. H.R. (ser. C) No. 160 (Nov. 25,
2006), ¶ 292.

\textsuperscript{629} Id.
The Court then found that, in general, enforced nudity—affecting both male and female inmates—was also a violation of article 5 of the ACHR. However, the IACtHR deemed that, in the case of women prisoners, this violation had “especially serious characteristics.” It considered that the female inmates who were subjected to enforced nudity and who had to use the sanitary services while an armed guard watched them were victims not only of an infringement to their personal dignity, but also of sexual violence. Drawing on the International Criminal Tribunal for Rwanda’s trial decision in Prosecutor v. Jean-Paul Akayesu and article 2 of the CBP, the Court considered that sexual violence “makes up from actions of a sexual nature that are committed on a person without his or her consent that, in addition to implying the physical invasion of the human body, may include acts that do not involve penetration or even no physical contact whatsoever.” The IACtHR noted as well that the context in which the violations occurred is crucial to establishing if sexual violence had occurred. In the case at hand, the female inmates were under the “absolute control of state agents,” they were “absolutely defenseless,” and they were “wounded.”

With regards to the rough vaginal inspections that some prisoners had to undergo, the Court deemed them to be a form of rape as torture prohibited by international law. For the IACtHR, “rape does not necessarily imply vaginal sexual intercourse without consent, as it is traditionally considered. Rape also comprises acts of vaginal or anal penetration by other parts of the body of the aggressor or by objects without the consent of the victim, as well as the penetration of the mouth by the penis.” In line with other sources of international law, the Court observed that rape is a form of torture when used to humiliate the victim. In its view, “rape of a woman detained by an agent of the state is an especially serious and reprehensible act, taking into account the vulnerability of the victim and the fact that the agent is abusing his power. Rape is also a highly traumatizing experience that may have severe consequences and causes great physical and psychological harm that leaves the victim ‘physically and emotionally humiliated.’ Different to other traumatic experiences, it is difficult that the trauma of rape is overcome with the passage of time.” For the IACtHR, forcible vaginal inspections are thus a form of rape, which, in turn, is a modality of torture prohibited by article 5-2 of the ACHR and articles 1, 6, and 8 of the American Convention to Prevent and Punish Torture.

The Court analyzed two additional violations against the personal integrity of the female inmates of the Miguel Castro Castro Prison. First, the IACtHR considered that the severe isolation to which the inmates were subjected had particular serious effects on the prisoners who were mothers. In its opinion, “several international organs have emphasized the obligation of the states to take into account the special attention that should be afforded to women for reasons of their maternity, which implies, among other measures, that appropriate visits between mothers and their children are guaranteed. The impossibility of the inmates who were mothers to communicate with their children caused them an additional suffering.” Second, the lack of special attention to the female inmates’ “physiological needs” (access to toilets, showers, clean clothes, special arrangements for women in their menstrual period, pregnant, or in the company of their children, among others) also caused them “special and additional suffering.”

Finally, the IACtHR turned to studying the situation of impunity surrounding the case. To start with, the Court recalled that violations to the right to personal integrity entail the obligation of states to fully
investigate and punish them (duty of due diligence) in order to guarantee the rights to fair trial (ACHR, article 8) and access to justice (ACHR, article 25) of the victims. The IACtHR indicated as well that, when the right to personal integrity has been violated, the duty of due diligence also stems from the American Convention to Prevent and Punish Torture and, interestingly and controversially, if the victims have been women, from article 7-b of the Convention of Belém do Pará. It must be recalled, however, that article 12 of the CBP exclusively entrusts the Inter-American Commission on Human Rights to hear individual petitions on the violation of article 7. In principle, therefore, the Court did not have competence to judicially enforce this Convention. The reasons of the IACtHR to assume competence over violations to article 7 of the Convention of Belém do Pará in the Miguel Castro Castro Prison Case remain unclear, to say the least. With regards to this issue it only cursorily stated: “[The provisions of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women] are applicable to this case because they specify and complement the obligations of the State with respect to the fulfillment of the rights guaranteed by the American Convention.”

Applying this framework to the case, the Court concluded that Peru never seriously undertook any serious judicial investigation aimed at clarifying the attack to the Miguel Castro Castro Prison and the death and wounding of several of the inmates. In the end, the Peruvian state generated a situation of total impunity where the perpetrators of the human rights violations committed during the attack to the prison remained at large. For the IACtHR, “the internal procedures that were initiated in the instant case have not been an effective recourse to guarantee a true access to justice to the victims, within a reasonable period, that comprises the clarification of the facts, the investigation, the punishment of those liable, and the reparation of the violations to the rights to life and personal integrity.”

The most important case to date on violence against women to have been decided by the IACtHR arose from the systematic disappearance and murder of women in Ciudad Juárez, Mexico, since 1993. In its decision in the case of Claudia Ivette González, Esmeralda Herrera Monreal, and Laura Berenice Ramos Monárrez v. Mexico, also known as the Cotton Field (“Campo algodonero”) Case, the Court produced crucial doctrine on the application of the Convention of Belém do Pará.

Ciudad Juárez, State of Chihuahua, is an industrial city located in northern Mexico, on the border with the US. It is characterized by the activities of sweatshops (“maquilas”) and a heavy presence of organized crime networks devoted to drug trafficking, human trafficking, arm trafficking, and money laundering. Since 1993, a disproportionate increase in the disappearance and murder of women was identified. Although the exact figures remain unclear and are disputed, around 380 women were found death between 1993 and 2005. The disappearance and murder of the victims seems to reflect a pattern: (1) they have predominantly been young working women, (2) they have been kidnapped and held in captivity, (3) their families reported the disappearance before Mexican authorities, and (4) after several days or months the bodies were found with signs of sexual violence, torture, and mutilations.

The representatives of the victims, several organizations, and even the Mexican state, argued that the disappearance and murder of women in Juárez were part of “a culture of discrimination against women.” The representatives also argued that women and girls have been murdered because they are women, and

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640 See Palacios Zuloaga, Path, supra note 14 at 242.
641 The Court itself later recognized this fact in the Cotton Field Case, where it asserted: “Although it is true that in the case of Miguel Castro Castro Prison v. Peru we did not carry out an exhaustive analysis of the competence of the Court over violations to article 7 of the Convention of Belém do Pará, at the time that analysis was deemed unnecessary because the Convention was not expressly invoked by any of the parties to the case.” Caso González y otras (“Campo algodonero”) v. México (Excepción preliminar, fondo, reparaciones y costas), Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009), ¶ 76.
643 Id. ¶ 113.
644 See id. ¶ 122-127.
therefore the murders could be defined as “feminicides”—the utmost manifestation of society’s misogyny. Finally, Mexican authorities offered inefficient and indifferent responses to the families of the victims so most of the crimes were not investigated. As of 2005 most of the murders remained unsolved.

Claudia Ivette González, Esmeralda Herrera Monreal, and Laura Berenice Ramos Monárrez, a worker of a maquila, a domestic worker, and a high school student, disappeared in September and October of 2001. On November 6, 2001, the bodies of the three women were found in a cotton field near Ciudad Juárez with signs that they had been raped and abused with extreme cruelty. As in other cases of disappearance and murder of women in Juárez, Mexican authorities conducted superficial, inefficient, and indifferent investigations leading to a situation of complete impunity. In the Cotton Field Case, the IACtHR found that Mexico was internationally liable for the violation of articles 4 (right to life), 5 (personal integrity), 7 (personal freedom), 8 (fair trial), 19 (rights of the child), and 25 (access to justice) of the ACHR, and article 7 of the Convention of Belém do Pará.

In rejecting a preliminary exception raised by Mexico, the Court reasserted its competence to decide over violations of article 7 of the Convention of Belém do Pará. This time, the IACtHR thoroughly elaborated the reasons to support its competence. To begin with, the Court argued that the analysis of the preliminary exception had to be carried out within the framework provided by the provisions on the interpretation of treaties of the Vienna Convention on the Law of Treaties (articles 31 and 32). Using the criteria of literal, systematic, and teleological interpretation, and invoking the object and purpose of the Convention, as well as its travaux préparatoires, the IACtHR concluded that it had competence over violations of article 7 of the CBP. With regards to the precedent established in the Miguel Castro Castro Prison Case, the Court observed that in, this case, “it declared the violation of the Convention of Belém do Pará, which is equivalent to having established its competence over it.” It also clarified that two additional cases had reasserted that competence. In these cases, however, the IACtHR did not found that the CBP had been violated because it was not proven that some of the violations discussed in the cases had been aimed at women because they were women. For the Court, such a finding was only possible through an analysis of the CBP.

With regards to the nature and the appropriate way to designate the murders of women in Ciudad Juárez and the murders of the three victims in the specific case, the Court made some interesting observations. The IACtHR indicated that the evidence in the case allowed talking about the “murder of a woman for gender reasons, also known as feminicide.” In spite of this observation, the Court was careful to point out that the same evidence did not permit to qualify every murder of a woman in Juárez as the “murder of a woman for gender reasons.” Addressing this issue, the IACtHR observed: “For this reason, [the Court] will refer to the Ciudad Juárez’s cases as murders of women, even if it understands that some or many of them may have been committed for gender reasons and the majority of them have occurred within a context of violence against women.”

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648 See id. ¶ 128-145.
649 See id. ¶¶ 147-163.
650 See id. ¶ 32-33.
651 See id. ¶ 35-73.
652 Id. ¶ 75.
655 See id.
656 Id. ¶ 143.
657 Id. ¶ 144.
The first substantive issue the IACtHR decided in this case was whether the murders of Claudia González, Laura Ramos, and Esmeralda Herrera were a form of violence against women in light of the Convention of Belém do Pará. The Court clarified that such a finding should be made in light of the “international corpus juris on the protection of women’s personal integrity,” which is composed by article 5 of the ACHR, the CBP, and the CEDAW. The IACtHR first recalled article 1 of the CBP, which defines violence against women as “any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere,” and then pointed out that not every violation of the human rights of a woman entails the violation of the Convention of Belém do Pará. For the Court, the recognition of Mexico that the Ciudad Juárez’s crimes were part of “a culture of discrimination against women,” as well as similar information included in the reports of international human rights NGOs and organizations, provided sufficient evidence to believe that the murders of González, Herrera, and Ramos “were murders of women based on gender reasons.”

The IACtHR considered that evidence was inconclusive —due to the situation of impunity surrounding the case— as to whether state authorities had directly participated in the murders of the three victims. The Court therefore refused to declare that Mexico had infringed its duty to respect the rights to life, personal integrity, and personal freedom of the murdered women. However, the IACtHR found that the situation was completely different with regards to the duty to prevent the violation of these rights. The Court recalled that “the duty to prevent comprises all legal, political, administrative, and cultural measures that promote the safeguard of human rights and that secure that possible violations to these rights are effectively considered and addressed as an illegal act that, as such, is susceptible of entailing sanctions for those liable, as well as the obligation to repair the victim for its harmful consequences.”

In addition, in cases of violence against women, the duty of due diligence established in article 7-b of the Convention of Belém do Pará also entails the obligation to prevent the violation of women’s human rights to life and personal integrity. The IACtHR then observed that “domestic and international reports are coincident in that the prevention of the murders of women in Ciudad Juárez, as well as the reaction in their regard, has been inefficient and insufficient.”

The Court, however, clarified —based on previous doctrine— that the duty of states to prevent violations of human rights committed by private parties is not absolute. For the IACtHR, “the conventional obligations of the states to guarantee human rights do not imply an unlimited liability of the states with regards to any act or fact of private parties. This is so because the duties of the states to adopt measures of prevention and protection between private parties are conditioned by the knowledge of a situation of real and immediate risk for a specific individual or group of individuals and to the reasonable possibilities of preventing or avoiding the risk. That is to say, even if an act or omission of a private party has as a consequence the violation of certain human rights of another private party, this violation is not immediately attributable to the State. It is first necessary to look at the particular circumstances of the case and the specification of the obligations to guarantee in that case.”

According to the IACtHR, in the case at hand the obligations of the Mexican state to prevent the violations of the rights to life and personal integrity of the victims had to be established in two different moments: (1) before the disappearance of the three women, and (2) before the location of their dead bodies.

With regards to the first moment, the Court did not find that Mexico had infringed its duty to prevent the disappearance and murder of Claudia González, Laura Ramos, and Esmeralda Herrera. In the
IACtHR’s view, although Mexican authorities were aware of the situation of insecurity for women in Ciudad Juárez, it was not proven that they did have knowledge that the three specific victims were in a situation of real and immediate risk. With regards to the second moment, the Court observed that, given the context provided by the situation in Ciudad Juárez, Mexican authorities were clearly aware that the victims were in immediate and real risk of being sexually attacked, abused, and murdered. In this situation, the State has a duty of strict due diligence imposing upon police and judicial authorities the obligation to initiate a rapid, immediate, and exhaustive search of the whereabouts of the victims. The IACtHR found that Mexico had not provided any evidence showing that such measures were adopted when the families of González, Ramos, and Herrera alerted the authorities about their disappearance. For the Court, “this violation of the duty to guarantee is particularly serious, given the context known by the State—which put women in a situation of special vulnerability—and the reinforced obligations imposed in cases of violence against women by article 7-b of the Convention of Belém do Pará.”

The IACtHR also considered that Mexico had infringed its duty to prevent the violations of the rights to life, personal integrity, and personal freedom of the women of Ciudad Juárez (ACHR, article 2; CBP, article 7-c) when it failed to adopt measures that would have allowed (1) state authorities to act in immediate and efficient fashion when the disappearance of a woman was reported, and (2) public officials responsible of answering the reports of disappearance to have the capacity and the sensitivity to understand the gravity of the phenomenon of violence against women and the will to act immediately.

With respect to the duty to investigate the disappearance and murder of Claudia González, Laura Ramos, and Esmeralda Herrera—stemming from articles 8 and 25 of the ACHR and 7-b and 7-c of the CBP—, the Court found that Mexico had violated it when it did not initiate a serious and adequate investigation of the facts. On many occasions, the IACtHR has observed that “the obligation to investigate is a legal duty that states must assume as their own obligation and not as a mere formality condemned beforehand to being fruitless. This obligation has to be fulfilled with due diligence in order to avoid impunity and the repetition of violations of human rights.” The Court pointed out that, in the case of acts of aggression against women within a general context of violence against them, the duty to investigate “has a further reach.” Drawing on the doctrine of the European Court of Human Rights, the IACtHR specified that the investigation of acts of violence against women must be carried out “with vigor and impartiality,” “taking into account the permanent need to reiterate the condemnation of [sexism],” and with a view to “maintaining the trust of minorities on the ability of authorities to protect them from the threat of [gender-based violence].” In the Court’s view, Mexico failed to discharge its duty to investigate in the case of the disappearance and murder of González, Herrera, and Ramos when state authorities committed several mistakes in the handling of reports, evidence, crimes scenes, and autopsies, when they fabricated culprits, and delayed the investigations.

A very important point made by the IACtHR on the duty to investigate acts of violence against women has to do with the systematic character of these acts. Drawing on previous doctrine, the Court observed that, in order to duly and efficiently discharge their duty to investigate violations of human rights, police and judicial authorities have the obligation to take into account “systematic patterns that operate as a framework within which certain human rights violations occur.” Although in a context of systematic

667 See id. ¶ 282.
668 See id. ¶ 283.
669 Id. ¶ 284.
670 See id. ¶ 285.
671 Id. ¶ 289.
672 Id. ¶ 293.
673 Id.
674 See id. ¶ 296-389.
violations to the human rights of women state authorities may individualize investigations in order to promote efficiency, they are in any case obligated to establish how every individual act of violence is tied to that context.\textsuperscript{677} In this sense, the duty of due diligence demands that every specific murder of a woman be tied to the other murders and a relationship between them is established.\textsuperscript{678} In addition, this is a duty the state has to discharge by its own initiative and not as a response to the demands of the victims or their families.\textsuperscript{679}

Finally, the IACtHR examined the violation of the obligation of non-discrimination established in article 1-1 of the ACHR. Based on the provisions of the Convention of Belém do Pará that establish that violence against women is a form of sex discrimination, the \textit{Miguel Castro Castro Prison Case}, and domestic and international reports —and even the recognition of the Mexican state in the same sense— indicating that disappearances and murders of women in Ciudad Juárez were part of a “culture of discrimination against women,” the Court found that the murders of the three victims were a form of violence against women and, therefore, a modality of sex discrimination.\textsuperscript{680} In addition, the IACtHR pointed out that the indifference and inefficiency of Mexican authorities in the investigation of the facts of the case were in part based on stereotypes about women.\textsuperscript{681} Impunity was discriminatory because “it sends the message that violence against women is tolerated. This, in turn, favors the perpetuation of that violence, its social acceptance, the feelings of insecurity of women, as well as a persistent distrust of women towards the justice system.”\textsuperscript{682}

### 3.5. Sexuality and Access to Health Services

Health services, as well as health systems which organize and ensure the appropriate delivery of health services and goods, are essential for the promotion of sexual health. The structure and delivery of health care must be seen as contributing the experience of being a full member of one’s society, a valued person. A health and human rights-based approach to health services focuses not only on the technical and clinical quality of services, but also on the design, delivery and use of these services. In addition to evaluating the impact of health services on the rights to health and life of all persons without discrimination, a rights-based analysis examines how the structure and delivery of sexual health services follows other key values of human rights. Moreover, a rights-based framework recognizes that untreated or inadequately treated sexual health conditions are themselves often a source of stigma for affected persons and groups.

In addition to evaluating health services in regard to customary public health criteria, it is necessary to assess the legal and policy framework of health services with attention to values of equality, dignity, freedom and autonomy for all. Such evaluations would address the laws and policies determining the distribution, content, accessibility, delivery, and accountability for inadequate services. While the state is ultimately responsible for insuring the availability, accessibility, acceptability, and quality of health services, the state itself is not the only provider of these services.\textsuperscript{683} However, the state remains responsible to ensure that non-state actors do not discriminate and that non-state actors providing services to marginalized populations are not themselves discriminated against nor face restrictions on their rights to association and expression.

\textsuperscript{677} See id. ¶ 368.
\textsuperscript{678} See id.
\textsuperscript{679} See id.
\textsuperscript{680} See id. ¶¶ 390-399.
\textsuperscript{681} See id. ¶ 401.
\textsuperscript{682} See id. ¶ 400.
Four key aspects of accessibility for health services have been spelled out in international human rights law and are applicable to services necessary for sexual health: (1) non-discrimination, by which is meant in the sexual health context that health services must be accessible without discrimination, including on the basis of sex, gender, sexual conduct, marital status or sexual orientation, (2) physical accessibility, which requires health services to be within safe physical reach of all persons, including persons in detention, refugees, and women facing restrictions on movement, (3) economic accessibility, by which is meant that health services are affordable to all, including marginalized populations, and (4) information accessibility, meaning the right to seek, receive and impart information and ideas concerning sexual health, including the availability of relevant services, even services challenging dominant sexual mores.\(^{684}\)

Each of these four aspects must be considered in regard to the wide array of health services important to sexual health. The scope of these services includes the prevention and treatment of STIs and HIV/AIDS (including voluntary testing, and post-exposure prophylaxis, and access to anti-retroviral therapies); contraception, including condoms and emergency contraception; and abortion services. Laws that erect barriers to accessing contraception or safe abortion services have the effect of reducing the sexual wellbeing of girls and women, in that they are denied the fundamental right to determine if and when sexual activity will become reproductive. Other laws fail to provide adequate access to goods and services in the context of sexual assault (such as forensic tests as well as treatment of injuries and STIs).

Discriminatory exclusion of certain categories of persons (married women, men, adolescents, those assaulted in conflict situations, in detention, refugee or displacement settings) and thereby result in preventable ill health, compounding the initial abuse and falling disproportionately on marginalized populations. Other laws regulate access to assisted reproductive technologies and other infertility services on the grounds of individuals’ marital status or perceived or actual sexual orientation. Excluding unmarried women and lesbians from access to infertility services violates non-discrimination standards and the rights to health.

In general, the analysis of health service laws must consider not only the necessary scope of the laws, but the barriers that specific populations and marginalized sub-groups may face: does the law on its face or in practice exclude unmarried women, from accessing contraception, for example? Does the law provide for information and distribution in ways that will reach young married women or men who have sex with men? Is the privacy of persons seeking information and services protected explicitly, or does the law subordinate their rights to police registration of HIV status of people in sex work? Are there other laws penalizing behavior, such that a person seeking care would be reluctant to disclose his or her actual sexual practices? Do the services reach populations in prison and non-nationals, including both migrants and refugees? Are the insurance or social welfare schemes supporting access to health services non-discriminatory, and adequately held accountable to meeting health and rights protections?

HIV status (actual or imputed) can also function as a major barrier to accessing general health services, or conversely, HIV-positive status can result in coercive services (for example, mandatory testing). Groups such as persons in sex work or men having sex with men can also be singled out for coercive health services (mandatory health checks and tests) which are often rationalized as public health measures but which in fact fail both on effectiveness and ethical grounds.\(^{685}\)

Persons under 18 years of age face particular barriers in accessing sexual health services, care, and information. The necessity of consent for health services and procedures is fundamental. While in regard to minors, parents or guardians may retain formal powers to consent, respect for the principles of the

\(^{684}\) See id.

\(^{685}\) Systems which impose mandatory testing on certain groups, on the grounds of their alleged or real higher risk, often drive persons further from care and services. These mandatory tests also violate medical norms in that testing is not provided for the health benefit of those tested, but for the good of others (most clearly shown in laws which mandate tests without providing for treatment of tested individuals).
evolving capacity of the child and his or her best interest can result in under-18s accessing appropriate and necessary services without recourse to parental involvement or consent. The principle of evolving capacity suggests that older adolescents should be able to access services without consent of parents or guardians. In addition, the right to enjoy confidentiality in regard to sexual health services and care should be respected. Persons under 18 years of age have the right to accurate, comprehensive, and age-appropriate sexual health information, regardless of the nature of the provider (state or non-state actor). Sexual health information may not be restricted on discriminatory grounds (for example, sex, gender, or sexual orientation). Young persons’ rights to information include information about sexual health services.

State obligation for non-discriminatory access to health services includes the obligation to eliminate both formal and substantive discrimination. Formal discrimination consists of codified differential access and treatment (both exclusion from treatment or services, or mandated and non-consensual treatment). Substantive discrimination includes practices, such as derogatory, humiliating, and inferior treatment in health facilities and programs, which are legally mandated but to which the law does not provide adequate redress. Both formal and informal discrimination excludes or reduces the access of persons from care, treatment, and information necessary for sexual health, increasing mortality and morbidity.

This section presents illustrative developments in LAC with regards to (1) abortion, (2) contraception, and (3) access to health care services related to HIV.

3.5.1. Abortion

In LAC, abortion has perhaps been one of the most politically contentious areas in the access to health services related to sexuality in the region. First, it will describe the ways in which the Inter-American System of Human Rights has dealt with issues of abortion. Second, it will present the status of access to abortion in the domestic legislations of several countries in LAC.

3.5.1.1. Inter-American Law and Abortion

In LAC, abortion has historically been a matter regulated by domestic criminal law. No country in the region has yet completely liberalized abortion, which continues to be a serious crime with very few exceptions. Generally, when these exceptions do exist they only allow the termination of a pregnancy when the woman has been raped or when the pregnancy entails a danger for the health or the life of the pregnant woman. Before describing the different forms of criminal law regulations of abortion in the LAC region, this subsection presents how this issue has been dealt with by the Inter-American System of Human Rights.

At the Inter-American level, abortion has been discussed in the context of the guarantee of the right to life. The protection of this right by regional conventional instruments is twofold. While article 1 of the American Declaration of the Rights and Duties of Man (ADRDM) sets forth that “[e]very human being has the right to life, liberty and the security of his person,” article 4-1 of the American Convention on Human Rights (ACHR) establishes that “[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life” (emphasis added).

Although neither the Inter-American Commission on Human Rights (IACHR) nor the Inter-American Court of Human Rights have yet produced a decisive ruling on the status of abortion at the Inter-American level, some decisions have partially touched on some aspects of this issue. The first case on
abortion to have reached the IACHR is known as the *Case of Baby Boy*, which was decided in light of article I of the ADRDM. In this case, the IACHR famously decided that the US Supreme Court decisions in *Roe v. Wade* and *Doe v. Bolton*, which decriminalized abortion before the first trimester of pregnancy and established a regime of state regulation of abortion in the second and third trimesters, did not violate article I of the ADRDM.

At issue in this case was the abortion of “Baby Boy” by Dr. Kenneth Edelin in a Hospital in Boston, Massachusetts, in October, 1973. After the performance of the abortion, Dr. Edelin was initially convicted for manslaughter. According to the trial court, the abortion was supposedly carried out at a time when the fetus was already viable and therefore the procedure was not covered by the US Supreme Court rulings in *Roe* and *Doe*. The Supreme Judicial Court of Massachusetts reversed the conviction after finding there was insufficient evidence about the viability of the fetus.

The plaintiffs argued before the IACHR that the reversal of the conviction of Dr. Edelin violated article I of the ADRDM, but, more generally, they argued that this violation was allowed by the US Supreme Court decisions in *Roe v. Wade* and *Doe v. Bolton*, which, therefore, also violated the same conventional provision. The complainants interpreted article I of the ADRDM as protecting life from the moment of conception. They based this interpretation on two arguments: (1) the *travaux préparatoires* of the ADRDM indicated the intention of the IX International Conference of American States at Bogotá in 1948 —where the ADRDM was approved—to protect the right to life from the moment of conception. (2) article 4-1 of the ACHR, “promulgated to advance the [ADRDM’s] high purposes and to be read as a corollary document,” protects the right to life since conception.

The IACHR rejected both arguments. With regards to the first argument, the Commission carefully examined the legislative history of the ADRDM and concluded that although the draft of the Declaration initially presented at the Conference of Bogotá in 1948 protected the right to life from the moment of conception, it was later abandoned because it was incompatible with the domestic legislations on abortion of many states in the region. For the IACHR, “the acceptance of this absolute concept—the right to life from the moment of conception—would imply the obligation to derogate the articles of the penal codes in force in 1948 in many countries because such articles excluded the penal sanction for the crime of abortion if performed in one or more of the following cases: (a) when necessary to save the life of the mother, (b) to interrupt the pregnancy of the victim of a rape, (c) to protect the honor of an honest woman, (d) to prevent the transmission to the fetus of a hereditary or contagious disease, (e) for economic reasons (*angustia económica*)”. In conclusion, “the conference [of Bogotá of 1948] faced [the question of the protection of life since conception] but chose not to adopt language which would clearly have stated that principle.”

In order to reject the second argument advanced by the complainants, the Commission also examined the discussions of the draft of the ACHR at the Inter-American Specialized Conference on Human Rights in San José, Costa Rica, in 1969. The IACHR concluded that article 4-1 of the ACHR, which protects the right to life “in general, from the moment of conception” was the result of a compromise between “the views that insisted on the concept ‘from the moment of conception,’ with the objection raised, since the...
Bogotá conference, based on the legislation of American States that permitted abortion, *inter alia*, to save the mother’s life, and in case of rape. According to the Commission, article 4-1 of the ACHR therefore generally protects life from the moment of conception, but permits domestic legislation that exempts from criminal liability the performance of abortions aimed at saving the life of the pregnant woman or when pregnancy is the outcome of rape. In the words of the IACHR: “In light of this history, it is clear that the petitioners’ interpretation of the definition given by the American Convention on the right of life is incorrect. The addition of the phrase ‘in general, from the moment of conception’ does not mean that the drafters of the Convention intended to modify the concept of the right to life that prevailed in Bogotá, when they approved the American Declaration. The legal implications of the clause ‘in general, from the moment of conception’ are substantially different from the shorter clause ‘from the moment of conception’ as appears repeatedly in the petitioners’ briefs.”

More recently, in the case of *Paulina del Carmen Ramírez Jacinto v. Mexico*, the Commission approved a friendly settlement reached between the parties. In July, 1999, Paulina Ramírez, then fourteen years old, was raped in her home. Although the rape was immediately reported to the public prosecutor’s office of the State of Baja California, she was not informed about the possibility of using emergency oral contraception. The petitioner became pregnant as a result of the rape. The public prosecutor’s office, in accordance with article 136 of the Criminal Code of the State of Baja California (which allows abortion in the case of rape), authorized the performance of an abortion at Mexicali’s General Hospital. However, the hospital’s personnel gave a number of excuses to the complainant and her family in order not to perform the procedure. Finally, a physician convinced Paulina’s mother that the abortion should not be performed because of the supposed risks of the procedure for her health. In the petitioner’s view, “Paulina del Carmen Ramírez Jacinto’s case is indicative of those of a countless number of girls and women forced into motherhood after being raped and after being prevented by state authorities from exercising a legitimate right enshrined in Mexican law. In addition, since the nation’s laws lack regulations that allow rape victims to exercise their right to an abortion, they are compelled to carry to term pregnancies imposed on them by force that, among underage mothers, are characterized by high levels of risk.” The complainants argued that these facts entailed the violation of articles 1, 5, 7, 8, 11, 19, and 25 of the American Convention of Human Rights, articles 1, 2, 4, 7, and 9 of the Convention of Belém do Pará, and article 10 of the Protocol of San Salvador, among other international conventional provisions.

The parties reached a friendly settlement whereby Mexico agreed to (1) pay consequential and moral damages to the petitioner, (2) pay maintenance, assistance, housing, and school supplies expenses to the complainant, (3) enroll the petitioner and her son to a state social institution that will provide them with health services until the boy reaches adulthood, (3) provide psychological care to the complainant and her son, (4) provide the petitioner’s son with enrollment fees, school supplies, and text books until he finishes his high school education, and (5) hand over a sum of money to the complainant in order for her to start her own microenterprise with the technical assistance of the state. In addition, (1) the State of Baja California agreed to publicly acknowledge its responsibility, (2) Mexico’s Federal Health Secretariat agreed, among other measures to (a) conduct a national survey on medical assistance to victims of domestic violence, and (b) draft a circular addressed to state health services aimed at “strengthening their commitment toward ending violations of the right of women to the legal termination of pregnancy.”

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695 Id. ¶ 25.
696 See id.
697 Id. ¶ 30.
699 Id. ¶ 14.
700 Id. ¶ 16.
In addition to these cases, the IACHR has defended therapeutic abortion and abortion when the pregnancy is the outcome of a rape through letters of concern and precautionary measures. In December, 2006, after the Congress of Nicaragua completely banned abortion, the Commission addressed a letter of concern to the Nicaraguan Minister of Foreign Relations and observed that “therapeutic abortion has been internationally recognized as a specialized and necessary health service for women,” and that “[d]enial of this service endangers women’s lives as well as their physical and psychological integrity.”

According to article 25-1 of its Rules of Procedure, the IACHR, “on its own initiative or at the request of a party,” may request to a State that, “[i]n serious and urgent cases, and whenever necessary according to the information available,” it adopts “precautionary measures to prevent irreparable harm to persons.” In recent years, the Commission has granted precautionary measures on two occasions to protect the rights of women endangered by the denial of state authorities to perform legal abortions.

On September 21, 2009, the IACHR granted precautionary measures (PM 270/09) for two Colombian women, a mother and her teenage daughter. After being raped in 2006, the teenager became pregnant and contracted an STI. Although the rapist was convicted, the victim and her mother were subjected to stalking, physical assaults, and a kidnapping attempt by the family of the perpetrator. Although the teenager requested an abortion, it was denied on seven occasions by health providers. In addition, a judicial injunction against the health providers was dismissed. In the meantime, the teenager tried to commit suicide on several occasions as her physical and mental health deteriorated. In the end, the teenager had to undergo a high-risk delivery and gave birth to a boy who she gave up for adoption. The precautionary measures granted by the Commission in this case aimed at protecting the rights to life and personal integrity of the teenager and her mother. The IACHR particularly requested Colombian authorities to guarantee that the teenager “receives adequate medical treatment to address the effects of the sexual abuse and of having had to continue an unwanted pregnancy under high risk circumstances.”

The Commission also granted precautionary measures (PM 43/10) in the case of “Amalia,” a Nicaraguan pregnant woman with metastatic cancer. Even though Amalia’s doctors recommended that she urgently initiated chemotherapy and radiotherapy, these treatments were denied because health providers argued that there was a high risk that they will produce an abortion. On February 26, 2010, the IACHR granted precautionary measures aimed at protecting Amalia’s rights and requested Nicaragua to adopt all measures necessary to make sure that the petitioner has access to the medical procedures needed to treat her cancer. Within the deadline established by the Commission to receive an answer, Nicaragua informed it that the requested treatment has been initiated.

3.5.1.2. Domestic Law and Abortion in LAC

As previously mentioned, abortion has been a matter that has generally fallen within the ambit of regulation of domestic criminal law. The abortion legislations of countries in LAC may be organized along four axes: (1) extremely restrictive legislations that criminalize abortion in every case without

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701 Nicaragua’s former Criminal Code authorized therapeutic abortion until 2006. Article 165 established that “therapeutic abortion will be scientifically prescribed with the intervention of at least three physicians and the consent of the spouse or the closer relative of the woman.” In 2006, Law 603 repealed this article. Articles 143 to 145 of the new Nicaraguan Criminal Code, enacted in 2007, do not establish any exemption to criminal liability in cases of abortion.


704 Since 2006, after a ruling of the Constitutional Court, abortions in the case of pregnancies that are the outcome of a rape are legal in Colombia. See infra Section 3.5.1.2.


706 Id.


708 Id.
allowing any sort of exception (Chile, Jamaica, and Dominican Republic) (2) less restrictive legislations that generally criminalize abortion but allow some exceptions (Argentina, Brazil, Costa Rica, Guatemala, and Peru), (3) restrictive legislations that, on their face, do not allow any exception but have been the object of judicial decisions permitting abortion in some cases (Colombia), and (4) legislations completely liberalizing abortion during the first trimester of pregnancy (Cuba, Guyana, and Mexico’s Federal District).

The legislations of Chile, Jamaica, and the Dominican Republic illustrate the first modality of criminal law regulation of abortion. In Chile, article 19-1 of the Constitution guarantees the right to life and physical and psychic integrity of every person and adds that legislation “protects the life of the unborn.”

As a development of this constitutional provision, article 342 of the Chilean Criminal Code establishes that anyone who “maliciously causes an abortion” will be punished with imprisonment (1) from five to ten years if the agent acts with violence on the pregnant woman, (2) from three to five years if the agent acts without the consent of the pregnant woman, even he or she does not exert violence, and (3) from 541 days to three years if the pregnant woman consents to the performance of abortion. In addition, article 343 of the Criminal Code of Chile regulates unpremeditated abortion (aborto preterintencional) and sets forth that any person who “using violence causes an abortion, even if he or she did not have the intention of causing it,” will be sentenced to imprisonment from 61 days to three years provided that the condition of pregnancy of the victim is evident or the agent is aware of it. Finally, article 344 of the Chilean Criminal Code punishes with imprisonment from three to five years the woman who causes her own abortion or allows another person to cause it. Interestingly, this provision imposes a less severe sentence (imprisonment from 541 days to three years) if the woman caused her abortion to “hide her dishonor (deshonra).”

In Jamaica abortion is harshly criminalized. Section 72 of the Offences against the Person Act establishes the basic provision on abortion. It penalizes both the woman who causes herself an abortion (“[e]very woman, being with child, who with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent”) and any other person who causes an abortion to a pregnant woman (“whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her, or cause to be taken by her, any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent”) with a sentence to life in prison. Additionally, section 73 of the Offences against the Person Act of Jamaica criminalizes the supply of any abortive substance, object, or instrument and punishes it with imprisonment for a term not exceeding three years. In this case, the agent must act with the knowledge that the supplied substance, object, or instrument will be used to cause an abortion.

As in the Chilean case, article 37 of the Constitution of the Dominican Republic of 2010 protects the right to life from the moment of conception until death. In criminal law, different hypotheses of abortion are regulated by article 317 of the Dominican Criminal Code. The first two hypotheses refer to (1) any person who causes or directly cooperates in causing an abortion to a pregnant woman using food, medications, potions, treatments, or any other means even with the consent of the woman, and (2) the

709 Until 1989, article 119 of Chile’s Sanitary Code (Decree 725 of 1967) allowed the performance of abortions in cases where pregnancy entailed a danger for the life of the pregnant woman and two physicians had authorized the procedure. This provision was repealed in 1989 and now establishes that “no action could be performed which aims at causing an abortion.” For a presentation of the different problems entailed by the absolute prohibition of abortion in Chile see DIDES, MÁRQUEZ, GUJARDO & CASAS, CHILE, supra note 416 at 293-303.

710 Some Chilean commentators have argued that the distinction made by this constitutional provision between a general protection of the right to life of every person and the protection of the life of the unborn through legislation may allow passing laws permitting abortion for therapeutic purposes or other indications. See Lidia Casas, Women Prosecuted and Imprisoned for Abortion in Chile, 5 REPRODUCTIVE HEALTH MATTERS 29 (1997); CUERPO Y DERECHO, supra note 1 at 179.

711 Until 1989, article 119 of the Sanitary Code of Chile (Decree 725 of 1967) allowed therapeutic abortions when pregnancy entailed a threat to the life of the woman and two physicians had approved the performance of the procedure. After its amendment, article 119 establishes that “no action could be performed whose aim is to provoke an abortion.”
woman who effectively causes herself an abortion, consents in using abortive substances, or submits herself to abortion procedures. In both cases, sentence is imprisonment from two to five years. The third hypothesis punishes whoever has contacted a pregnant woman with another person who will perform an abortion and the abortion was effectively carried out. In this case, sentence in imprisonment from six months to two years. Finally, the fourth hypothesis refers to physicians, surgeons, nurses, midwives, pharmacists, or any other medical practitioner who, “abusing his or her profession,” causes or cooperates in effectively causing an abortion. This modality of the crime entails a sentence of imprisonment from five to twenty years.

The legislations of Argentina, Brazil, Costa Rica, Guatemala, and Peru are illustrative of the second form of criminal law regulation of abortion in LAC. The Criminal Code of Argentina devotes several of its provisions to regulating abortion. Article 85 of the Argentine Criminal Code generally punishes anyone who causes an abortion. Sentence varies if the pregnant woman consented or not to the performance of the abortion. If she did not consent, sentence is imprisonment from three to ten years. If the woman consented, sentence is imprisonment from one to four years. In both cases, however, sentence is aggravated if the woman dies as a result of the abortion procedure. This provision is mirrored by article 88 of the Criminal Code of Argentina, which punishes with imprisonment from one to four years any woman who causes herself an abortion or allows another person to cause it. Unpremeditated abortion (aborto preterintencional), defined as violently causing an abortion without the intent to producing this outcome, is punished by article 87 of the Argentine Criminal Code with imprisonment from six months to two years.

The most interesting feature of the Argentine regulation on this matter is the regime of exceptions it establishes. Article 86 of the Criminal Code of Argentina—in the context of the criminal liability of medical practitioners who carry out abortions—sets forth a general rule and a set of exceptions. The general rule indicates that any physician, surgeon, midwife, or pharmacist who, “abusing his or her science or art,” causes or cooperates in causing an abortion will be punished with the sentences established in article 85 of the Criminal Code in addition to being forbidden to practice during the double of the time of the prison sentence. This provision, however, exempts licensed physicians from criminal liability if abortion was carried out (1) in order to avoid a danger for the life or health of the pregnant woman that could not be avoided by other means (article 86-1), and (2) if pregnancy was the outcome of the rape or sexual abuse of a mentally disabled woman and her custodian has agreed to the performance of the abortion (article 86-2).

It is worth noting that, in 2003, the city of Buenos Aires passed the Pregnancy Incompatible with Life Act (Law 1.044 of 2003), which seeks to regulate the procedures to be performed in public hospitals of...


713 In the case of non-consented abortion sentence may be increased to up to fifteen years of imprisonment. In the case of consented abortion sentence may be increased to up to six years of imprisonment.

714 According to Paola Bergallo, after the constitutional amendments of 1994 to the Argentine Constitution judges have produced a confusing doctrine on abortion. On the one hand, there are positive signs of liberal, more expansive interpretations on the possibility of women to interrupt their pregnancies. For example, the comparison of figures documenting the number of women who are hospitalized for post-abortion complications, the number of these women who are effectively reported by doctors for having committed abortion, and the number of these women who are effectively judicially prosecuted seem to show important signs of the unwillingness of doctors to report abortions or judicial authorities to prosecute women who have aborted. Another positive sign is an almost generalized trend of appeal provincial and federal courts of interpreting article 86 of the Argentine Criminal Code in generous fashion by removing obstacles interposed by hospitals, medical practitioners, or trial judges to the practice of non-criminal abortions. Yet, these positive signals are mixed with more conservative interpretations of the legal regime on abortion. For example, certain political actors, health professionals, prosecutors, and even judges have argued that, in light of article 4-1 of the American Convention on Human Rights, which protects life from the moment of conception, article 86 of the Criminal Code of Argentina is unconstitutional because the constitutional amendments of 1994 incorporated human rights treaties to the Argentine Constitution. See Bergallo, Caso formoseño, supra note 712 at 21-32.
Buenos Aires with regards “to every pregnant woman with a fetus with anencephaly or other analogous pathology incompatible with life” (article 1).\textsuperscript{715} Article 2 establishes that a fetus has a “pathology incompatible with life” when it has “very serious malformations, irreversible and incurable, that will produce its intra-uterus death or its death after few hours following birth.” Interestingly, the bill (articles 4 and 6) \textit{does not refer to the abortion of the unviable fetus, but to the inducement of its birth.}\textsuperscript{716} According to article 6, the inducement procedure may be performed (1) after the pathology of the fetus has been duly certified with two obstetric ultrasounds (articles 3 and 6-a), (2) the pregnant woman has been clearly informed about the existence of the pathology, the possibility to induce the birth, and the consequences of the decision she might make (articles 4 and 6-b), and (3) the fetus has reached 24 weeks of gestational age or the minimum gestational age of “viability in intrinsically or potentially healthy fetuses” (article 6-c). Finally, the bill (article 8) allows for conscientious objections raised by staff of the obstetrics and gynecology departments of the public hospitals where the inducement procedures will be performed. These hospitals, however, are obligated to immediately provide the necessary replacements or substitutions of personnel.

In Brazil, abortion is generally criminalized.\textsuperscript{717} The basic regime on this crime contemplates three different hypotheses. The first hypothesis, regulated by \textit{article 124 of the Brazilian Criminal Code}, refers to the criminal liability of the pregnant woman who causes herself an abortion or consents that another person causes it. Sentence for this modality of the offence is imprisonment from one to three years. The second and third hypotheses apply to any person who causes an abortion to a pregnant woman. While the second hypothesis —established by \textit{article 125 of the Criminal Code of Brazil}— refers to the performance of an abortion without the consent of the woman, the third hypothesis —set forth by \textit{article 126 of the Brazilian Criminal Code}— applies to anyone who carries out an abortion with the consent of the woman.\textsuperscript{718} In the first case, sentence is imprisonment from three to ten years, and, in the second case, from one to four years. According to article 127 of the Brazilian Criminal Code, if a woman is seriously injured or dies as a consequence of the performance of an abortion the sentences for this crime established in articles 124 to 126 will be increased by a third (injury) and a half (death). Finally, \textit{article 128 of the Criminal Code of Brazil} establishes two cases in which the abortion carried out by a physician is not criminal. First, abortion does not carry criminal liability for the physician who performs it \textit{as the only means to save the life of the pregnant woman}. And, second, abortion is not criminal if a physician performs it with the consent of the pregnant woman or her custodian (in case she is incapable) \textit{when pregnancy was the result of rape.}\textsuperscript{719}

\textsuperscript{715} This bill was enacted as a development of a decision of the Supreme Court of Argentina that authorized the induction of birth of a fetus with anencephaly of a woman in the eighth month of her pregnancy. \textit{See Sup. Ct. Arg., TS v. Gobierno de la Ciudad de Buenos Aires (Jan. 11, 2001), 324 FALLOS 5 (2001), cited by Bergallo, Caso formoseño, supra note 712 at 24-25.}

\textsuperscript{716} This distinction was originally made by the Argentine Supreme Court in the \textit{TS Case} as a response to the gestational age of the fetus of the petitioner at the moment of the decision. When the case reached the Court, the petitioner was in her twenty-first week of pregnancy, at a moment when article 86-1 of the Criminal Code of Argentina could have been applied (abortion may be performed to avoid a danger for the life or health of the pregnant woman that could not be avoided by other means). However, the case was decided two months later, after the viability threshold of 24 weeks of gestational age had been reached and the interruption of the pregnancy would have therefore been a criminal abortion. The Court then decided to argue that inducing birth after the twenty-fourth week of pregnancy was not a form of abortion because the death of the fetus after birth was an inevitable consequence of its pathology and not the result of human action. \textit{See Bergallo, Caso formoseño, supra note 712 at 24-25; Cuerpo y Derecho, supra note 1 at 94.}

\textsuperscript{717} For a general overview of the situation of abortion in Brazil \textit{see Vianna & Lacerda, Brasil, supra note 317 at 101-104.}

\textsuperscript{718} This third hypothesis only applies if the pregnant woman is above the age of fourteen, she is not mentally disabled, or her consent was not obtained through fraud, violence, or serious threat.

\textsuperscript{719} The constitutions of nine states of Brazil have provisions establishing the duty of the public health system to provide health care and assistance for the performance of abortions in the cases authorized by law. Such provisions may be found in the constitutions of the states of Amazonas (article 186 § 1), establishes that the public health system must provide health care and psychological, social, and judicial assistance to women who have interrupted their pregnancy in the cases authorized by law), Bahia (article 282-III, sets forth that the state must regulate the procedures for the interruption of pregnancy in the cases authorized by law, guarantee the access of women to information, and facilitate the operational mechanisms for a comprehensive health care of women), Goiás (article 153-XIV, establishes that the public health system must guarantee medical assistance to women victims of rape or whose life is endangered by a high risk pregnancy to carry out abortions in the form prescribed by law), Minas Gerais (article 190-X, sets forth that the public health system must guarantee priority care in cases of legal interruption of pregnancy), Pará (article 270-XIV, establishes that the public health system will provide medical care for the
As in other regulations of abortion in the LAC region, articles 118 and 119 of the Criminal Code of Costa Rica criminalize three basic modalities of abortion. The first modality (article 118-1) punishes with imprisonment from three to ten years anyone who “causes the death of a fetus” without the consent of the pregnant woman or when the pregnant woman is below the age of fifteen. However, if the fetus had not reached “six months of intra-uterine life” sentence is imprisonment from two to eight years. In the second case (article 118-2), abortion is punished with imprisonment from one to three years if performed with the consent of the pregnant woman. Again, if the fetus had not reached six months of intra-uterine life sentence is imprisonment from six months to two years. The third hypothesis (article 119) punishes with imprisonment from one to three years the woman who causes herself an abortion or allows a third party to cause it. If the fetus had not reached six months of intra-uterine life, sentence is imprisonment from six months to two years. In addition, article 122 of the Costa Rican Criminal Code imposes a fine on whoever recklessly causes an abortion.

With regards to non-criminal abortion, article 121 of the Criminal Code of Costa Rica only exempts from criminal liability the physician or the midwife (only if a physician was not available) who perform an abortion with the consent of the pregnant woman as the only means to avoid a danger for her life or health. Interestingly, however, articles 93-4, 93-5, and 120 of the Costa Rican Criminal Code establish a set of cases where judicial pardon may be granted or a lower sentence may be imposed if abortion was committed under certain circumstances. According to article 93-4 of the Criminal Code of Costa Rica a judge may grant judicial pardon to a person who had been sentenced for abortion if the crime was committed to save his or her honor or the honor of his or her sister or blood descendant or ascendant. In addition, judicial pardon only proceeds after the Institute of Criminology has evaluated the personality of the agent. Similarly, article 93-5 of the Costa Rican Criminal Code allows for granting judicial pardon to the woman who had been sentenced for abortion and the pregnancy was the result of rape. Finally, article 120 of the Criminal Code of Costa Rica establishes a modality of abortion called “honoris causa abortion,” which punishes with imprisonment from three months to two years (a lower sentence to the ones imposed in the cases of abortion regulated by articles 118 and 119 of the Criminal Code) anyone (including the pregnant woman) who, with the consent of the pregnant woman, caused an abortion in order “to hide the dishonor of the woman.”

Article 3 of the Constitution of Guatemala guarantees and protects “human life from the moment of its conception.” Abortion is thus defined by article 133 of the Guatemalan Criminal Code as “the death of the product of conception at any moment of pregnancy.” The basic regime of abortion is regulated by articles 134 and 135 of the Criminal Code of Guatemala. As in other countries, this regime includes three cases of abortion: (1) if a woman causes herself an abortion or permits anyone to cause it she will be sentenced to imprisonment from one to three years (article 134), (2) any person who causes a woman an abortion with her consent will be sentenced to imprisonment from one to three years (article 135-1), and (3) anyone who causes a woman an abortion without her consent will be sentenced to imprisonment from three to six years, and to imprisonment from four to eight years if violence, threats, or fraud were used (article 135-2). Additionally, the Guatemalan regulation on abortion includes unpremeditated (aborto preterintencional) and reckless abortion. The first offence is established by article 138 of the Criminal Code of Guatemala, which provides that anyone who causes an abortion through acts of violence without the intent to cause it, but knows that the victim is pregnant, will be

performance of abortion in the cases authorized by federal law), Rio de Janeiro (article 294-IV, sets forth that the state has the obligation to assist women in case of legally provoked or spontaneous abortion), São Paulo (article 224, establishes that the public health system, through its specialized clinical body, must provide medical assistance for the performance of abortions authorized by criminal legislation), and Tocantins (article 148-II § 3, sets forth the obligation of the public health system to provide medical care for the practice of abortions authorized by law).

This sentence is lowered to imprisonment from six months to two years if the woman acted in a state of mind, “intimately linked to her [pregnancy],” of “clear psychic alteration.”

According to article 136 of the Criminal Code of Guatemala, if the woman dies as a consequence of the abortion described by articles 134 and 135-1 sentence is imprisonment from three to eight years. If the woman dies as a result of an abortion caused in the conditions set forth by article 135-2, sentence is imprisonment from four to twelve years.
sentenced to imprisonment from one to three years. Reckless abortion and attempt to commit abortion are set forth by article 139 of the Guatemalan Criminal Code. According to this provision, while there is no criminal punishment for the pregnant woman who attempts to commit or recklessly causes herself an abortion, the third party who causes an abortion with negligence knowing that the victim was pregnant will be sentenced to imprisonment from one to three years.

In Guatemala, the only exemption from criminal liability in the case of abortion is therapeutic abortion. Article 137 of the Guatemalan Criminal Code exempts from criminal punishment the physician who performs a therapeutic abortion (1) if the pregnant woman consented, (2) with a previous positive diagnosis of at least another physician, (3) if it was performed “without the intention to directly cause the death of the product of conception,” (4) with the exclusive purpose of avoiding a duly established danger for the life of the pregnant woman, and (5) after having exhausted all available scientific and technical means.

In article 2, the Peruvian Constitution, within the guarantee to the right to life, establishes that “the product of conception has legal entitlements in all what favors it.” As in other countries in LAC, the basic regime of abortion —established by articles 114, 115, and 116 of the Criminal Code of Peru— also refers to three cases: (1) if a woman causes herself an abortion or permits anyone to cause it she will be sentenced to imprisonment up to two years or of community service from 52 to 104 days (article 114), (2) any person who causes a woman an abortion with her consent will be sentenced to imprisonment from one to four years and from two to five years if the woman dies as a consequence of the abortion and the agent could have foreseen this result (article 115), and (3) anyone who causes a woman an abortion without her consent will be sentenced to imprisonment from three to five years and from five to ten years if the woman dies as a consequence of the abortion and the agent could have foreseen this result (article 116). Unpremeditated abortion (aborto preterintencional) is established by article 118 of the Peruvian Criminal Code, which punishes it with imprisonment up to two years or community service from 52 to 104 days. Similarly to other countries in the LAC region, this modality of abortion applies to anyone who causes an abortion through acts of violence without the intent to cause it, but knows that the victim is pregnant.

Articles 119 and 120 of the Criminal Code of Peru regulate therapeutic, “sentimental,” and eugenic abortion. Therapeutic abortion (article 119) can only be performed by a physician with the consent of the pregnant woman and proceeds when it is the only means to save her life or to avoid a serious and permanent harm to her health. This modality of abortion does not carry any criminal liability. According to article 120-1 of the Criminal Code, “sentimental abortion” is the abortion performed when pregnancy is the outcome of rape or non-consented artificial insemination outside of marriage and these facts have at least been reported or investigated by the police. Article 120-2 refers to eugenic abortion as the abortion carried out when, at birth, the fetus has medically diagnosed physical or psychic defects. Both of these cases of abortion entail criminal liability with a reduced sentence of imprisonment to up to three months.

Until 2006, Colombia had one of the most restrictive criminal legislations on abortion in the LAC region. On their face, articles 122 and 123 of the Colombian Criminal Code of 2000 regulate the basic hypotheses of abortion caused with and without the consent of the pregnant woman. Article 122 of the Criminal Code of Colombia punishes with imprisonment from 16 to 54 months the woman who causes herself an abortion or allows any other person to cause it and the person who performs the abortion with the consent of the pregnant woman. If the abortion is caused without the consent of the pregnant woman, article 123 of the Colombian Criminal Code sets forth that the agent will be sentenced to imprisonment from 64 to 180 months.

However, on May 10, 2006, the Constitutional Court of Colombia ruled that article 122 of the Colombian Criminal Code was constitutional under the condition that it is interpreted to include three exemptions to the criminal liability entailed by the performance of an abortion. These exemptions are: (1) when
pregnancy entails a danger to the life or the health of the pregnant woman certified by a physician, (2) when the fetus has a serious malformation—certified by a physician—that makes its life unviable, and (3) when pregnancy is the outcome of rape, non-consented artificial insemination or ovule transference, or incest that have been duly reported to police or judicial authorities.\(^{722}\)

In this decision, the Court began its analysis by recognizing that the life of the unborn is constitutionally protected and therefore Congress is obligated to adopt measures aimed at its protection. For the Constitutional Court, in Colombia, “termination of pregnancy is not exclusively a private matter of the pregnant woman that is circumscribed to the exercise of her fundamental right to the free development of personality.”\(^{723}\) The Court argued that this conclusion was supported by several constitutional and international human rights law provisions that protect life in its different stages, including life in gestation. Criminalization of abortion is not therefore a perfectionist measure that imposes a “specific model of virtue or human excellence under the threat of criminal punishment.”\(^{724}\) However, the Constitutional Court pointed out that, when Congress chooses to protect the life of the unborn through the criminalization of abortion, other constitutionally protected values should be considered when assessing the constitutionality of that criminalization. A balance has therefore to be reached between the protection the Constitution affords to the life of the unborn and the rights of women to dignity, the free development of personality, health, life, and physical integrity. According to this premise, the Court considered that criminally banning abortion in all circumstances was unconstitutional. For the Constitutional Court, “the criminalization of abortion in every instance means the total preeminence of the life of the unborn—just one of the constitutional values at stake in this case—and a consequent complete sacrifice of all fundamental rights of the pregnant woman. This situation is clearly unconstitutional.”\(^{725}\) The Court also considered that, as a general rule, it is for Congress to set forth the cases where criminalizing abortion is incompatible with the fundamental rights of women. Yet, if Congress does not establish these cases the Constitutional Court has to signal the instances in which the criminalization of abortion disproportionately affects the rights of women in clear fashion.\(^{726}\)

The first of these instances is when pregnancy is the result of rape. The Constitutional Court observed that establishing a less severe sentence for abortion in this case was an insufficient form of reaching a balance between the protection of the life of the unborn and women’s fundamental rights. In the Court’s view, “in this case [penalizing abortion with a less severe sentence when pregnancy is the outcome of rape] the absolute prevalence of the protection of the life of the unborn supposes a total disregard of the

\(^{722}\) See Const. Ct. Col., Decision C-355/06 (May 10, 2006). In this decision, the Constitutional Court of Colombia dramatically changed its view on abortion. On two previous occasions, the Court ruled that the criminalization of abortion by the Colombian Criminal Code of 1980 was compatible with the Constitution of Colombia. See Const. Ct. Col., Decisions C-133/94 (Mar. 14, 1994) and C-013/97 (Jan. 23, 1997). In the first decision, the Court basically considered that even if article 11 of the Constitution did not explicitly establish it so, this constitutional provision protected life from the moment of conception. It was therefore reasonable to protect the life of the unborn through the penalization of abortion. The second decision went even further. In that ruling, the Constitutional Court decided that criminalizing abortion even when pregnancy was the result of rape was compatible with the Constitution (the 1980 Criminal Code just established a less severe sentence in this case). In an exceedingly sexist decision, the Court remarked that “the woman is not the owner of the living fruit of conception, which is, in and of itself, a different being who has a human life in formation, but that is autonomous.” Const. Ct. Col., Decision C-013/97 (Jan. 23, 1997), ¶ 4.6. The Constitutional Court added: “The being conceived by the violent act [the rape] is just another victim—the most innocent and harmless of all—... If one resorts to the balance stemming from true justice, it is necessary to conclude that—understanding the reaction of the mother with regards to the crime that has been committed against her—it is legally unacceptable that the fruit of conception, also a human being, pays with his life for a crime he has not committed... The Court also rejects the argument that [the criminalization of abortion when pregnancy is the result of rape] affects or degrades the dignity of the woman. Such an argument confuses the act of rape with maternity. While the former causes great harm in the future life of the victim and truly damages female dignity, the latter, insofar as it represents the transmission of life to a human being, dignifies and ennobles the mother. No one can say that a woman who, after being raped, becomes pregnant and decides to give birth to her child lacks dignity. The dignity of a woman does not reside in the recognition of a right she does not naturally possess.” Id., ¶ 4.8.


\(^{724}\) Id.

\(^{725}\) Id.

\(^{726}\) See id.
human dignity and the free development of personality of the pregnant woman, whose pregnancy is not the result of a free and consented decision but the outcome of arbitrary conducts that fail to recognize her as an autonomous subject of rights... The dignity of the woman excludes that she could be considered as a mere receptacle. Her consent is thus essential to assume any commitment or obligation with regards to such an important fact as giving life to a new being.\textsuperscript{727} The Constitutional Court extended this hypothesis of non-criminal abortion to cases when pregnancy is the result of incest or non-consented artificial insemination or ovule transference. In all these cases, the crime that resulted in the pregnancy of the woman must have been reported to judicial or police authorities in order for the abortion to be performed. With regards to this requirement, the Court remarked that Congress has the power to regulate the conditions of the report, but such regulations cannot amount to a disproportionate burden on the rights of women. For example, in the case of rape, Congress is forbidden to “require forensic evidence of sexual penetration or evidence proving that sexual intercourse was involuntary or abusive, request that the rape is confirmed according to standards established by the judge, request that a police officer be convinced that the woman was raped, or request that the women, before the performance of the abortion, secures a permission or authorization from her husband or parents.”\textsuperscript{728}

The second case where the criminalization of abortion breaks the balance that should be achieved between the protection of the life of the unborn and the fundamental rights of women is when the pregnancy threatens the life or health of the pregnant woman. For the Constitutional Court, “it is clearly excessive to demand the sacrifice of a fully formed life for the protection of a life in formation.”\textsuperscript{729} The Court recalled its doctrine that the state is forbidden to demand heroic sacrifices from its citizens. In the case of a pregnancy that entails a danger for the life or the health of the pregnant woman, it would be unconstitutional to ask the woman to sacrifice her own rights for “the benefit of a third party or the general interest.”\textsuperscript{730} In the Constitutional Court’s opinion, state authorities are constitutionally and internationally obligated to adopt measures to guarantee the rights to life and health of women. Criminalizing abortion when pregnancy threatens the life or the health of the pregnant woman would therefore violate articles 6 of the ICCPR, 12-1 of the CEDAW, and 12 of the ICESCR. The Court finally clarified that this hypothesis of non-criminal abortion covers not only the threat a pregnancy may entail for the physical health of the pregnant woman, but also extends to her mental health. In the Constitutional Court’s view, “the right to health, in light of article 12 of the ICESCR, protects the right to the highest attainable level of physical and mental health, and pregnancy may cause a situation of severe distress, or even serious psychic alterations that justify the interruption of pregnancy under medical prescription.”\textsuperscript{731}

The last case when abortion should not be subject to criminal sanction is when the fetus has malformations that make its life unviable according to medical criteria. For the Court, “in these cases the duty of the state to protect the life of the unborn loses weight precisely because its life is unviable. The rights of the woman therefore have to prevail and Congress is forbidden to force her, by means of the criminal law, to carry on the pregnancy of a fetus that, according to a medical certificate, is unviable.”\textsuperscript{732} The Constitutional Court additionally considered that criminalizing the abortion of an unviable fetus would infringe the dignity of the pregnant woman because the use of criminal sanctions to force her to continue with the pregnancy would be a form of cruel, inhuman, and degrading treatment.\textsuperscript{733}

The Court pointed out that the only requirement for the performance of an abortion in the second and third hypotheses is a certificate issued by a duly licensed physician about the danger the pregnancy entails for the life or health of the pregnant woman or the non-viability of the fetus.\textsuperscript{734} In addition, the

\textsuperscript{727} Id.
\textsuperscript{728} Id.
\textsuperscript{729} Id.
\textsuperscript{730} Id.
\textsuperscript{731} Id.
\textsuperscript{732} Id.
\textsuperscript{733} See id.
\textsuperscript{734} See id.
Constitutional Court clarified that conscientious objection to the practice of abortions in the three cases where it is non-criminal is a right of individual persons and not of organizations or the state. Hospitals or health providers are thus prohibited to interpose institutional conscientious objections to the performance of legal abortions. In the case of conscientious objections raised by individuals, the Court ruled that they “should be based on a duly founded religious belief.”735 In such an instance, the physician objecting to the practice of a legal abortion for religious reasons is obligated to immediately refer the woman to another doctor who is willing to carry out the procedure. In these cases, through procedures of medical ethics, it could afterwards be established if a conscientious objection to the performance of a legal abortion raised by a physician was rightly founded.736

In its original drafting, article 123 of the Criminal Code of Colombia criminalized the abortion performed without the consent of the pregnant woman or on a girl under the age of fourteen. This provision therefore presumed that girls less than fourteen years of age could never consent to the practice of an abortion. In the decision just being described, the Constitutional Court struck down this presumption.737 The Court considered that although the Colombian Constitution authorizes the adoption of measures aimed at the special protection of children and adolescents, these measures cannot disproportionately impinge on the exercise of their fundamental rights. In particular, the Constitutional Court recalled its doctrine that children and adolescents have the right to freely give their informed consent to the practice of medical procedures even if they are highly invasive.738 The Court “discarded that merely objective criteria, like age, are the only relevant to establishing the reach of the consent freely given by children to authorize treatments and interventions on their bodies… A protective measure that deprives of any legal relevance the consent given by a child, like the one established in article 123 of the Criminal Code, is unconstitutional because it completely ignores the free development of personality, the autonomy, and the dignity of children.”739 In the particular case of abortion, such a measure completely loses its protective character if the abortion is aimed at guaranteeing the life or the health of a pregnant adolescent.

After this decision, the Constitutional Court has decided a number of constitutional injunctions in cases where women who had the right to a legal abortion were denied the practice of the procedure by health providers.740 In these rulings, the Court has refined and extended its doctrine on legal abortion in Colombia. In the first case of this kind, a mentally disabled woman was raped and became pregnant.741 When her mother requested that a legal abortion be performed, the health provider refused to carry out

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735 Id.
736 See id. The decisions adopted by the Constitutional Court in this ruling were implemented by the Colombian government in Decree 4444 of 2006. This piece of administrative legislation is addressed to all health providers and regulates the provision of “voluntary termination of pregnancy” services. Article 2 of the decree explicitly establishes that “the provision of safe services of voluntary termination of pregnancy… will be available in all the degrees of complexity required by the pregnant woman.” It also obligates health providers to guarantee “sufficient availability aimed at guaranteeing real access and timely care for pregnant women who require voluntary termination of pregnancy services in all degrees of complexity.” Finally, article 2 forbids health providers to erect administrative barriers that would unnecessarily delay the provision of voluntary termination of pregnancy services, “such as the authorization by several physicians, the authorization by auditors, waiting periods and lists, or any other procedure that may represent an excessive burden for the pregnant woman.” Article 3 of this decree sets forth that voluntary termination of pregnancy services should be carried out according to administrative and technical norms issued by the Ministry of Social Protection. The provision also clarifies that while the technical norms are enacted, the performance of the services should be carried out according to the standards established in WHO’s Safe Abortion: Technical and Policy Guidance for Health Systems (2003). With regards to conscientious objection, article 5 of the decree reaffirms that it is an individual and not an institutional right that could only be exercised by the personnel who would directly participate in the abortion procedure. Finally, article 6 establishes that women who have legally terminated their pregnancy and medical personnel who has or not raised conscientious objections to the practice of legal abortions cannot be discriminated against in the access to education, employment, and health services, among others.
738 Id.
739 See id.
the procedure because the mother did not provide, in addition to the report to police authorities that her
daughter was “violently raped,” a copy of the judicial proceedings whereby she was designated as her
mentally disabled daughter’s custodian, and a psychological assessment proving that the pregnant woman
was indeed incapable of expressing her will. On the same day the mother requested the health provider
the performance of the abortion, she had reported to the police that another of her sons had committed
against her daughter the crime of “abusive sexual intercourse in a person incapable of resisting.” In its
decision, the Constitutional Court recalled that, in the case of a pregnancy that is the result of a rape, the
only requirement for the performance of an abortion is that the rape had been reported to police or
judicial authorities. For the Court, the additional requirements of the health provider to perform the
abortion of the petitioner’s daughter were in violation of the Court’s main decision on legal abortion
and represented a disproportionate burden on the exercise of her rights. The Constitutional Court remarked
that the actions of the health provider in delaying the abortion of the petitioner’s daughter also violated
the constitutional and international duty of special protection of citizens with disabilities.

In another case, the mother of an adolescent who had been raped and became pregnant brought an
injunction against two health providers that were unable to perform a legal abortion because all their
physicians raised conscientious objections. The Constitutional Court’s decision in this case made
important clarifications on the issue of conscientious objections interposed by the health personnel in
charge of carrying out legal abortions. To begin with, the Court reaffirmed its doctrine that conscientious
objection is a right of physicians and other health personnel who might be directly involved in the
performance of a legal abortion. However, it is not an absolute right for its exercise may not impinge
on the right of women to terminate a pregnancy in the cases authorized by the Constitution. Drawing
on its main decision on legal abortion, but also on such international documents as the World Medical
Association Declaration on Therapeutic Abortion (1970, 1983, 2006) and WHO’s Safe Abortion:
Technical and Policy Guidance for Health Systems (2003), the Constitutional Court particularly
emphasized that a physician who objects for reasons of conscience to the practice of a legal abortion has
the constitutional duty to immediately refer the pregnant woman to a colleague who would be willing to
perform the procedure. This obligation of physicians is coextensive with the duty of the state “to
guarantee an adequate number of health care providers able to provide services of voluntary termination
of pregnancy.” To fulfill this obligation, health providers must draw a list of the physicians who are
willing to perform legal abortions so that in case of conscientious objections pregnant women can
immediately be referred to a doctor who could carry out the procedure. Finally, the Court established
that in cases where the right of a woman to legally terminate a pregnancy has been violated by health
providers and/or physicians, damages should be awarded to the victim. In setting forth the amount of
the damages, judges have to take into account the following factors: (1) whether the affected woman was
a child or an adolescent, (2) that rape, in addition to being a violent act, is an act of aggression,
humiliation, and submission that has a short- and long-term emotional, existential, and psychological
impact, and (3) the harms caused to the health of the woman by the pregnancy and any STI that might
have been transmitted by the rape.

In a third case, the partner of a woman who was diagnosed with the pregnancy of a fetus with a
malformation that made its life unviable requested a health provider that a legal abortion be performed.

743 See id. ¶ 21.
744 See id. ¶ 31.
746 See id. ¶¶ 4.1-4.3.
747 See id. ¶¶ 4.4-4.9.
748 See id. ¶¶ 4.10-4.11.
749 Id. ¶ 12.
750 See id. ¶ 4.17.
751 See id. ¶ 5.24-5.29.
752 See id. ¶ 5.27.
Although a board of physicians recommended the abortion, the gynecologist who was supposed to carry out the procedure requested a court order to proceed. The partner of the pregnant woman brought a constitutional injunction against the health provider. The trial judge first argued that because of reasons of conscience he had an impediment to decide the case. When an appeals judge ordered him to decide because conscientious objection was not a cause of judicial impediment, the trial judge decided not to grant the injunction and argued that the right to object to abortion for reasons of conscience supported his decision of not ordering the health provider to perform an abortion to the petitioner’s partner. The appeals judge reversed, granted the injunction, and ordered the health provider to carry out the abortion.

In its decision, the Constitutional Court observed that the constitutional regime of legal abortion in Colombia could be summarized in eight basic rules:

1. Any woman in any of the three hypotheses of legal abortion has “the right to decide free from coercion, pressure, manipulation, and in general, any sort of inadmissible intervention, on the voluntary termination of her pregnancy. This is a right of women who, even if they are in any of the three cases [of legal abortion], may also decide to continue with their pregnancy.”

2. Every woman has the right to access sufficient, comprehensive, and adequate information that allows her to duly exercise her sexual and reproductive rights, including the content of the decision of the Constitutional Court on legal abortion (Decision C-355 of 2006) and its development by administrative legislation (Decree 4444 of 2006).

3. Services of voluntary interruption of pregnancy should be available to all women, in all their levels of complexity, in all Colombian territory.

4. Health professionals in charge of services of voluntary termination of pregnancy have a duty of confidentiality and are therefore obligated to respect the fundamental rights to dignity and privacy of women who want to legally terminate a pregnancy.

5. Women who decide to legally terminate a pregnancy and health professionals who perform or participate in a legal abortion cannot be discriminated against in their access to education, employment, or health services.

6. Departments, districts, and towns have the obligation to secure a sufficient availability of public health services aimed at guaranteeing the effective access of women to quality services of voluntary termination of pregnancy.

7. Health providers (public, private, with a religious affiliation, or secular) are forbidden to deny the service of voluntary termination to any woman who is in one of the three hypotheses of legal abortion, whatever the modality of affiliation of the woman to social security and independently of her payment capacity, age, economic or social condition, ethnic origin, or sexual orientation.

8. Health providers are forbidden to raise obstacles, erect barriers, or make requirements additional to those established by the Constitutional Court in its main decision on legal abortion such as, among others: (a) require the meeting of medical boards to approve a legal abortion, (b) prevent girls under the age of fourteen to express their free consent to the performance of a legal abortion when their parents or guardians are in disagreement, (c) make additional requirements such as forensic medical concepts, court orders, or authorizations from family members, doctors, legal counselors, etc., (d) raise collective or institutional conscientious objections, and (e) draw collective or individual agreements to refuse to perform legal abortions.

The Court recalled that although conscientious objection is a fundamental right it is not an absolute one. For the Constitutional Court, the conflict between the freedom of conscience of a physician who objects to the practice of a legal abortion and the right of a pregnant woman to legally terminate her pregnancy has to be solved on a case-by-case basis. However, the Court observed that some few general rules could be devised. If a doctor refuses to perform a legal abortion and there are other physicians to whom the pregnant woman could be immediately and easily referred, then the doctor who objects should be freely allowed to raise the conscientious objection. Yet, if the physician who interposes the conscientious objection is the only one available, then he or she is obligated to perform the legal abortion because, constitutionally, the rights to life and health of the pregnant woman take precedence over the freedom of conscience of the objecting physician. For the Constitutional Court, “in principle, in the case of

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754 See id. ¶ 4.4.
755 See id. ¶ 5.1.
756 See id.
757 See id.
758 See id.
pregnant women who are [in one of the three hypotheses of legal abortion], health professionals may exempt themselves from the performance of a termination of pregnancy for reasons of conscience only, and only if, the provision of this service, in conditions of quality and security for the health and life of the pregnant woman, is guaranteed to the woman requesting it, without imposing her any additional burden or requesting her procedures that would difficult her access to health services in detriment of her rights to life, sexual and reproductive health, personal integrity, and human dignity. The Court also recalled that conscientious objection may only be raised by the health personnel who directly participate in the abortion procedure. Administrative personnel and the personnel in charge of medical activities to be performed before and after the abortion therefore do not have the right to interpose conscientious objections. In addition, any physician who wishes to raise a conscientious objection has to do it in writing with (1) an explicit explanation of the reasons of conscience leading him or her to object to the performance of a legal abortion, and (2) the name or names of his or her colleagues to whom the pregnant woman could be referred for the practice of the abortion. Finally, the Constitutional Court observed that conscientious objections could not be raised by judicial authorities who have the constitutional duty to enforce the fundamental rights guaranteed by the Constitution.

In its latest decision on legal abortion, the Court had to decide on the case of a woman with a pregnancy that entailed a threat for her life and health and to whom the performance of a legal abortion had been denied by her health provider. In this opinion, the Constitutional Court strikingly affirmed that, since its 2006 decision, women in Colombia who are in one of the three hypotheses of legal abortion have a fundamental reproductive right to legally terminate their pregnancies. Based on previous doctrine, the Court recalled that reproductive rights protect (1) reproductive self-determination, and (2) access to reproductive health services. In this sense, the voluntary termination of a pregnancy is a reproductive right that has facets of both reproductive self-determination and access to health services. As a fundamental right, the right to the voluntary termination of a pregnancy imposes upon the state and health providers a number of obligations to respect and guarantee that could be summarized in the eight basic rules established in a previous decision of the Court on legal abortion. In addition to these obligations, health providers have the duty to guarantee the existence of protocols of quick diagnosis in the case of pregnancies that entail a danger for the life or health of the pregnant woman in order to verify, as soon as possible, if the woman is indeed in such a situation and therefore an abortion could be performed.

In LAC, only Cuba, Guyana, and Mexico’s Federal District have completely liberalized abortion during the first trimester of pregnancy. In Cuba, abortion is available upon request during the first ten weeks of pregnancy through the National Health System. In the first years of the Revolution abortion was prohibited, although without much enforcement. In post revolutionary Cuba, particularly beginning around 1959, highly increasing fertility rates (basically due to the rise in real incomes and changes in marriage patterns) led Cuban authorities to liberalize abortion in 1965. The 1965 health regulations that authorized abortion by request establish that, if pregnancy is less than five weeks, abortion (1) is performed through menstrual regulation, (2) no confirmation of pregnancy is needed, and (3) girls do not require parental consent. If pregnancy is between ten and twelve weeks (1) pregnancy needs to be
confirmed, (2) the pregnant woman must undergo an exam by a gynecologist and must receive counseling from a social worker, and (3) women under the age of eighteen must secure parental consent and women below sixteen years of age must have authorization from a medical committee. If the abortion is to be performed during the second trimester, in addition to the conditions imposed for carrying out an abortion during the first trimester, the procedure must be authorized by a committee of obstetricians, psychologists, and social workers.

Article 267 of the Criminal Code of Cuba defines the crime of illegal abortion as causing an abortion, with the consent of the pregnant woman, outside the health regulations established for the termination of pregnancy. This offence carries a sentence of imprisonment from three months to one year, but may be increased to imprisonment from two to five years if the abortion (1) was caused to obtain economic profit, (2) was performed outside official institutions, or (3) was carried out by a person who is not a physician. As in other countries in LAC, article 268 of the Cuban Criminal Code punishes with imprisonment from two to five years the agent who causes an abortion without the consent of the pregnant woman. If violence is used, this sentence is increased to imprisonment from three to eight years. Unpremeditated abortion is defined by article 270 of the Criminal Code of Cuba as the abortion caused by an agent who, using violence or force, causes an abortion without having the intention to produce this result but knowing that the victim is pregnant. This modality of the offence is punished with imprisonment from one to three years. Finally, article 271 of the Cuban Criminal Code penalizes with imprisonment from three months to a year or a fine any person who sells or provides, without a medical prescription, any abortive substance.

In Guyana, abortion was liberalized by the Medical Termination of Pregnancy Bill, which was passed by the Guyanese Parliament in May of 1995. In its preamble, the bill strikingly declares that it was enacted “to enhance the dignity and sanctity of life by reducing the incidence of induced abortion” and “to enhance the attainment of safe motherhood by eliminating deaths and complications due to unsafe abortion.” In section 4, the bill provides that pregnant women—and, when appropriate, their partners—who wish to terminate their pregnancies should receive pre- and post-abortion counseling. This provision also clarifies that “to facilitate such counseling [the regulations the Guyanese government has to enact] shall provide for a waiting period of forty-eight hours after the woman has made a request for such medical termination of pregnancy.” Section 5 of the act refers to the termination of pregnancies of not more than eight weeks. In this case, abortion may be performed “by any lawful and appropriate method other than a surgical procedure” administered “by a medical practitioner.” In addition, in this case the abortion may not be carried out in an “approved institution” (hospital, clinic, nursing or maternity home, among others) and is not subjected to the requirements necessary to terminate a pregnancy that is between eight and twelve weeks.

Termination of pregnancies between eight and twelve weeks is regulated by section 6 of the bill. In this case, the conditions to perform the abortion are: (1) the procedure must be carried out in an approved institution, “having regard to the medical procedure involved and the duration of the pregnancy,” (2) when, in the opinion of an authorized medical practitioner, (a) the pregnancy “involves a risk to the life of the pregnant woman or grave injury to her physical or mental health,” (b) the fetus “would suffer such physical or mental abnormalities as to be seriously handicapped,” (c) the pregnant woman “on account of being a person of unsound mind… is not capable of taking care of the infant,” (3) the pregnant woman “reasonably believes that her pregnancy was caused by an act of rape or incest and submits a
statement to that effect.” (4) the pregnant woman is HIV positive, and (5) there is “clear evidence that the pregnancy resulted in spite of the use in good faith of a recognized contraceptive method by the pregnant woman or her partner.” In addition, the termination of pregnancies between twelve and sixteen weeks “may be administered by an authorized medical practitioner in an approved institution, if two medical practitioners are of the opinion, formed in good faith, of the matters specified in [the conditions (2), (3), (4), and (5)].” Section 7 of the act regulates the termination of pregnancies of more than sixteen weeks. In this case, abortion only proceeds if three physicians deem it necessary “to save the life of the pregnant woman or to prevent grave permanent injury to the physical or mental health of the woman or her unborn child.” It is worth noting, however, that, in cases where the abortion “is immediately necessary to save the life of the pregnant woman or to prevent grave permanent injury to her physical or mental health,” the counseling and multiple-physician opinion requirements are not applicable (section 10).

With regards to issues of consent (section 8), the bill establishes that the physician performing the abortion “may require the written or oral consent of the pregnant woman before administering treatment for the termination of her pregnancy.” While the consent of a guardian is required to terminate the pregnancy of a woman of “unsound mind,” in the case of girls of any age, although the doctor may encourage the girl to inform her parents, “he is not required to obtain the consent of her parents or guardian or to notify them.” Finally, the pregnant woman’s partner consent is not require to perform an abortion, even though physicians may encourage that the partner be informed about the termination of the pregnancy.

Matters relating to conscientious objection are regulated by section 11 of the bill. Except in cases where an abortion “is immediately necessary to save the life of a pregnant woman or to prevent grave permanent injury to her physical or mental health,” the right to conscientious objection is recognized to any person. Indeed, section 11-1 establishes that “no person shall be under any legal duty to participate in any treatment of a patient for the termination of a pregnancy to which he has a conscientious objection.” The objector has the burden of proof, which must be discharged “by a statement on oath of affirmation to the effect that he has a conscientious objection to participate in any [termination of pregnancy].”

The Mexican regulation on abortion is one of the most interesting in the LAC region. While abortion by request remains illegal at the federal legal and all states, the Federal District completely liberalized

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777 The Federal Criminal Code of Mexico punishes anyone who causes an abortion with and without the consent of the pregnant woman (article 330) and the woman who causes herself an abortion (article 332), and exempts from criminal liability the performance of abortions recklessly caused by the pregnant woman (article 333), when pregnancy is the result of rape (article 333), and when pregnancy entails a threat to the life of the pregnant woman (article 334). At the state level, the abortion regulations are quite varied. It is worth noting, however, that most states exempt from criminal liability the performance of an abortion when pregnancy is the result of rape (Aguascalientes, Baja California, Baja California Sur, Campeche, Chiapas, Chihuahua, Coahuila, Colima, Durango, Federal District [after the first trimester], México, Guanajuato, Guerrero, Hidalgo, Jalisco, Michoacán, Morelos, Nayarit, Nuevo León, Oaxaca, Puebla, Querétaro, Quintana Roo, San Luis Potosí, Sinaloa, Sonora, Tabasco, Tamaulipas, Veracruz, Zacatecas, and Yucatán), when abortion is caused by reckless conduct (Aguascalientes, Baja California, Baja California Sur, Campeche, Chihuahua, Coahuila, Colima, Durango, Federal District [after the first trimester], México, Guanajuato, Guerrero, Hidalgo, Jalisco, Michoacán, Morelos, Nayarit, Oaxaca, Puebla, Querétaro, Quintana Roo, San Luis Potosí, Sinaloa, Sonora, Tamaulipas, Veracruz, Zacatecas, and Yucatán), when pregnancy is in dire economic need and she already has three living children (Yucatán). In some states sentences for abortion may be
abortion in the first trimester of pregnancy in 2007. The most interesting dynamics of modern Mexico’s abortion law is, of course, how the Federal District, beginning in 2000, progressively amended its criminal law until complete decriminalization of abortion in the first trimester of pregnancy was established in 2007. In addition, both the 2000 and 2007 amendments to Mexico City’s Criminal Code were followed by interesting opinions of the Mexican Supreme Court that upheld the constitutionality of the reforms.

The first set of reforms was passed by the legislature of the Federal District in 2000. On this occasion, the Criminal Code was reformed in order to extend the cases where abortion was not to be punished. The amendment established that abortions performed when pregnancy was the result of non-consented artificial insemination, when pregnancy entailed a grave threat for the health of the pregnant woman, and when the fetus has congenital or genetic alterations that make its life unviable were exempted from the imposition of a criminal sentence. The reform reduced the sentences applicable to criminal abortions, removed the reduction of sentences for abortions carried out for reasons of “honor,” and repealed the criminalization of attempted abortion. Several members of Mexico City’s legislature challenged before the Supreme Court the constitutionality of the exemption from the imposition of a criminal sentence to the performance of an abortion when the fetus has congenital or genetic alterations that make its life unviable. In January, 2002, the Court upheld the validity of the exemption in light of the Mexican Federal Constitution. In this decision, the Court made two basic points. The first issue the Supreme Court discussed had to do with the protection to life afforded by the Federal Constitution of Mexico. Although the Mexican Constitution does not have a provision that explicitly guarantees the right to life, the Court considered that the protection to this right stemmed from article 14, which established that no person could be deprived from his or her life, freedom, or property without the due process of law, and article 22 that specified in which cases death penalty may be imposed. In addition, the Supreme Court found that the right to life of the unborn was constitutionally protected at every stage of its development through the right to health (article 4) and the constitutional protection to pregnant women (article 123).

This interpretation of the Federal Constitution was reinforced by an interpretation of the Convention on the Rights of the Child, which, according to the Court, obligated Mexico to protect life since the moment of conception. Using this constitutional framework, the Supreme Court then delved into establishing whether exempting from the imposition of sentence the abortion of a fetus that has a congenital or genetic alteration that make its life unviable violated the Constitution. The Court answered in the negative. In its view, the exemption under review was just an exemption to the imposition of a criminal sentence in a very specific situation and not an exception to criminal liability. To the extent that the
In 2004, a new amendment was introduced to the Criminal Code of Mexico’s Federal District. This time, the legislature transformed the exemptions to the imposition of a criminal sentence in some cases of abortion into true exemptions to criminal liability. In addition, in December, 2005, articles 14 and 22 of the Federal Constitution were amended. While life was removed from the hypotheses in which persons could be deprived of certain rights with the due process of law, death penalty entered into the list of prohibited sentences. The crucial reform to the Federal District’s Criminal Code was passed in 2007. The amendment defined abortion exclusively as “the termination of pregnancy after its twelfth week” and therefore allowed abortion by request during the first trimester of a pregnancy. Additionally, the reform drastically reduced sentences for criminal abortion after the twelfth week.

The 2007 amendment was challenged before the Supreme Court of Mexico by the Attorney General and the President of the National Human Rights Commission. The plaintiffs basically argued that the 2007 reform violated the right to life of the unborn and the Court’s 2002 precedent. On August 28, 2008, the Supreme Court upheld the constitutional validity of the amendment. In its decision the Court did not follow its precedent with regards to the constitutional protection of the right to life. This time, the Supreme Court ruled that the right to life and its protection were not included in the Federal Constitution of Mexico. For the Court, even if that right had been constitutionally protected, it would not have been an absolute right and therefore the need to balance it with other rights would have arisen. The Supreme Court also observed that although conventional instruments of international human rights law strongly protect life they do not establish that it is an absolute right or set forth the moment at which the protection of life should begin. Particularly, the Court interpreted article 4 of the American Convention on Human Rights in a similar way as the Inter-American Commission on Human Rights did in the Case of Baby Boy. For the Court, even though Mexico’s Federal Constitution does not establish a right to life, it obligates the state to adopt measures to guarantee other rights that make life possible (health, housing, protection of the environment, rights of children, etc.).

In the Supreme Court’s view, the state is not obligated to protect rights exclusively through criminal law regulations. The key issue in cases such as the one at stake is whether the Mexican Constitution or international human rights law treaties impose an obligation to criminalize conducts affecting a right. If such an obligation does not exist, then public authorities have leeway to determine if it is appropriate to protect the right through criminal law prohibitions. For the Court, if public authorities end up deciding to resort to criminal law sanctions to protect a right the only limits imposed by the Constitution to this use of criminal law are that the criminalization of conducts cannot be discriminatory, must be done in general fashion, and must follow the appropriate legislative procedures. Insofar as Mexico’s Federal Constitution does not establish a duty to protect life through the criminal law, then the Federal District’s legislature had the power to decide when it was appropriate to use criminal law prohibitions in the protection of the right to life. For the Court, the 2007 amendment to Mexico City’s Criminal Code

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785 See Pou, Aborto en México, supra note 776 at 140.
786 See id. at 142-43; VELA, CURRENT ABORTION REGULATION, supra note 776 at 5-9.
787 See id.
788 See id.
789 See Sup. Ct. Mex., Decisions AI 146/2007 (Aug. 28, 2008) and AI 147/2007 (Aug. 28, 2008). After this decision, several states amended their constitutions in order to explicitly establish that the right to life was protected since the moment of conception. As of November, 2010, the states of Baja California, Campeche, Chiapas, Colima, Durango, Guanajuato, Jalisco, Morelos, Nayarit, Oaxaca, Puebla, Querétaro, Quintana Roo, San Luis Potosí, Sonora, and Yucatán had amended their constitutions. See VELA, CURRENT ABORTION REGULATION, supra note 776 at 9-10.
790 See Pou, Aborto en México, supra note 776 at 147; VELA, CURRENT ABORTION REGULATION, supra note 776 at 5-9.
791 See id.
792 See supra Section 3.5.1.
793 See Pou, Aborto en México, supra note 776 at 148; VELA, CURRENT ABORTION REGULATION, supra note 776 at 5-9.
794 See id.
795 See Pou, Aborto en México, supra note 776 at 148.
reflected a careful balance between the protection of life and women right’s. In particular, the Supreme Court highlighted that the Federal District’s Legislature took into account such factors as the impact of the legalization of early abortion in public health through the decrease of clandestine abortions, the will to improve access to reproductive health services for poor women, the impact of early abortion in the equal enjoyment of sexual and reproductive rights, among others. For the Court, such factors were not prohibited by the Federal Constitution and represented an appropriate measure “to safeguarding women’s freedom to decide over their own bodies, their physical and mental health, and even with respect to their lives.”

3.5.2. Contraception

This subsection describes illustrative developments in the LAC region related to access to regular contraception and to emergency contraception. The legislation of most of the countries selected for this research project guarantee the access of all persons to regular contraception in the context of family planning laws, laws regulating fertility, laws on sexual and reproductive health, or in the context of general health laws.

In Argentina, article 6-b of the National Program of Sexual Health and Responsible Procreation Act (Law 25.673 of 2003) provides that health services, on demand by the beneficiaries, may “prescribe and supply contraceptive methods and elements, of a non-abortive and transitory nature, respecting the criteria or convictions of the beneficiaries, absent a specific medical contraindication, and after information on the advantages and disadvantages of natural methods has been provided.” Article 7 of this bill establishes that contraceptives (among other sexual and reproductive health procedures and benefits) will be included in the Medical Obligatory Program (Programa Médico Obligatorio) and in the health services of the public system, in health social security, and private health plans. In addition, the Surgical Contraception Act (Law 26.130 of 2006) sets forth that “every adult has the right to access the performance of the practices known as ‘Fallopian tubes ligation’ and ‘ligation of deferent conducts or vasectomy’ through the services of the health system.” Article 5 of this act provides that these surgical procedures will be provided free of charge by the public health system, social security institutions, and private health plans.

Article 226-7 of the Brazilian Constitution, among a set of protections for the family, establishes that family planning is a free decision of every couple and that it should be based upon the principles of human dignity and responsible parenthood. In addition, it imposes upon state authorities the duty to provide the necessary educational and scientific resources for its exercise and prohibits any form of coercion from the state or private parties. This constitutional article was developed by the Family Planning Act (Law 9.263 of 1996), which defines family planning as “the set of actions aimed at the regulation of fecundity that guarantees equal rights of constitution, limitation, or increase of the offspring to every woman, man, and couple” (article 2). In article 3, this bill clarifies that family planning is part of a more encompassing set of actions inscribed within a global and integral notion of health care including, among others, assistance in conception and contraception. An important aspect of this law has to do with the regulation of surgical sterilizations. By means of criminal sanctions, the bill punishes the physician who does not notify health authorities the performance of surgical sterilizations (article 16), it criminalizes the induction or instigation to the performance of surgical sterilizations (article 17), and it punishes any request of certificates attesting the performance of a sterilization for any purpose (article 18).

796 See id.; VELA, CURRENT ABORTION REGULATION, supra note 776 at 5-9.
797 See Pou, Aborto en México, supra note 776 at 148.
798 Id. at 149.
799 For a general overview of contraception legislation and public policies in Argentina see PETRACCI & PECHENY, ARGENTINA, supra note 267 at 109-152.
800 For an explanation of the reasons leading to the adoption of these criminal measures see VIANNA & LACERDA, BRASIL, supra note 317 at 97-100.
In Chile, the National Norms on the Regulation of Fertility, approved by Supreme Decree 48 of 2007, are a public policy directive that contains the Technical Norms and the Clinical Guidelines for the regulation of fertility. These norms aim at (1) reducing reproductive inequity generated by gender inequalities and the higher vulnerability of some groups of the population (the poor, indigenous people, adolescents, and young adults) in order to make possible that every person, without discrimination, reaches the fecundity he or she desires, (2) reducing the incidence of unsafe provoked abortions through the improvement of the offer and quality of the services of sexual and reproductive health, and (3) reducing unwanted teenage pregnancies. The Norms thus refer to the use of several forms of contraceptive technology (hormonal contraception and non-hormonal contraception). In addition, these norms also establish standards of quality for the delivery of the services and refer to forms of contraception for some special populations. With regards to voluntary sterilization,Resolution 2.326 of 2000, issued by the Ministry of Health of Chile, establishes that voluntary female sterilization and vasectomies will be provided, free of charge, by the public health system.

As in Chile, Colombia included the provision of contraceptives as part of a wider national public policy on sexual and reproductive health. Indeed, the National Policy on Sexual and Reproductive Health, approved in 2003, includes family planning as one of its main lines of action and aims at “providing access to the population to diverse, safe, accessible, acceptable, and reliable methods of family planning through quality counseling, timely provision of the method of choice, and the guarantee of monitoring of the use of that method by means of all the necessary check-ups for the optimal use and adaptation to every user.’ The most up to date legal regulation of this topic of the National Policy is Agreement 380 of 2007 of the National Council on Health Social Security, which included the provision of a number of hormonal contraceptives and condoms in the Obligatory Health Plan (Plan Obligatorio de Salud) to which every Colombian has access to through the Health Social Security System.

Article 6 of the Constitution of Peru establishes that the “national population policy aims at disseminating and promoting responsible fatherhood and motherhood. It recognizes the right of families and persons to decide. The state therefore guarantees adequate programs of education and information and the access to the means that do not affect life or health.” In turn, article 6 of the General Health Act (Law 26.842 of 1997) states that “every person has the right to freely chose the contraceptive method of his or preference, including natural contraceptives, and to receive, previously to the prescription or the application of any contraceptive method, adequate information on the available methods, their risks, contraindications, precautions, warnings, and physical, physiological, and psychological effects that its use or application may cause. Previous consent of the patient is required for the application of any contraceptive method. In the case of definitive methods, consent must be given in writing.”

As in Brazil and Peru, family planning in enshrined in the Mexican Constitution. Article 4 of the Federal Constitution of Mexico sets forth that “every person has the right to decide in free, responsible, and informed fashion the number and time-spacing of his or her children.” The General Health Act of 1984 develops this constitutional provision. According to this bill, family planning is a public health issue

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801 For a general overview of the regulation of fertility and contraception in Chile see Dides, Márquez, Guajardo & Casas, Chile, supra note 416 at 307-329.
803 In their original drafting, the Norms included emergency contraception (administration of levonorgestrel and etinilestradiol). However, in April, 2008, the Constitutional Tribunal of Chile overturned this portion of the Norms because of the potentially abortive nature of certain active components of emergency contraception. See infra in this subsection for the “saga” of emergency contraception in Chile.
805 For a description of the Peruvian family planning public policy see Cuerpo y Derecho, supra note 1 at 445-47.
(article 3-VII) and a basic health service (article 27-V). Article 67 the Act establishes that family planning is a top priority, which, among the activities it entails should include educational information and orientation for adolescents and, in order to reducing reproductive risks, should inform women and men—through appropriate, timely, efficient, and complete contraceptive information—on the inconvenience of pregnancies before the age of twenty or after thirty five years of age as well as the convenience of spacing pregnancies and reducing their number. In addition, article 9-VI of the Federal Act to Prevent and Eliminate Discrimination of 2003 provides that denying or limiting information on reproductive rights or preventing the free exercise of the right to freely establish the number and time-spacing of children is a discriminatory conduct. This article should be jointly read with article 10 of the bill, which, among the different affirmative action measures that should be undertaken to promote women’s equality, obligates Mexican public authorities to (1) offer complete and updated information, as well as personal counseling, on reproductive health and contraceptive methods (article 10-II), (2) guarantee the right to decide on the number and time-spacing of children through the creation of the conditions for the obligatory care of women who request it in health and social security institutions (article 10-III). Finally, article 28-H of the Federal Act for the Protection of the Rights of Girls, Boys, and Adolescents of 2000 sets forth that the guarantee of the right to health of Mexican boys, girls, and adolescents imposes upon public authorities the obligation to establish measures aimed at preventing early pregnancies.

In Costa Rica, Decree 27,913-S of 1999 created the Inter-institutional Commission on Reproductive and Sexual Rights and Health. This decree mandates the creation of a Counseling Office in Reproductive and Sexual Rights and Health in every health institution in the country. These counseling offices, among their tasks, have to (1) design and execute campaigns of education and dissemination on rights related to sexual and reproductive health, methods for the control of fertility, and on the offer of services on these matters (article 5-a), and (2) provide individual and group information on the advantages, limitations, and contraindications of the different methods of fertility control and support the choice of the most convenient method in every case with due respect and recognition of the values of the patient (article 5-c). In the case of surgical sterilization, the decree specifies that written informed consent of the patient is required (article 5-d).

Access to contraception in Guatemala is regulated by the Universal and Equitable Access to Services of Family Planning and their Integration in the National Program of Sexual and Reproductive Health Act (Decree 87 of 2005). According to articles 4, 7, and 20 of this bill, the Ministry of Health and the Institute of Social Security of Guatemala have the obligation to guarantee the availability of all “modern methods of pregnancy spacing” in all public and private health institutions in a way that duly responds to the demands of the population and guarantees universal access to these methods. In addition, article 17 of the Act creates the National Commission for the Availability of Contraceptives, which has to guarantee the access of the population to the services of family planning.

With regards to emergency contraception, a number of high courts in the LAC region have decided on the constitutional viability of the distribution and provision of certain forms of emergency contraception (basically those whose active ingredient is levonorgestrel). In these cases, the basic issue at stake was whether emergency contraception had abortive properties and therefore violated the protection of the right to life afforded by domestic constitutional provisions. Illustrative decisions of this sort have been handed down by courts in Argentina, Chile, Colombia, Peru, and Mexico with different results. While high courts in Argentina and Chile have prohibited emergency contraception based on levonorgestrel, courts in Colombia, Peru, and Mexico have allowed it.

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806 For more information on Mexico’s population and family planning legislation and public policies see CUERPO Y DERECHO, supra note 1 at 379-80.
In 2002, the Supreme Court of Argentina ruled against the distribution of an emergency contraceptive called “Imediat” (levonorgestrel). In the Court’s view, insofar as this contraceptive prevents the implantation of the egg in the uterus it had abortive properties. The Supreme Court therefore considered that its distribution violated the protection afforded to life since conception by article 4-1 of the American Convention on Human Rights.

Similarly, in Chile, emergency contraception based on such active ingredients as levonorgestrel and etinilestradiol was prohibited in April, 2008, by a decision of the Constitutional Tribunal. This, however, was the last step of a true judicial and political “saga.” In March, 2001, a number of judicial actions were initiated before the Court of Appeals of Santiago seeking to stop the distribution of a product called “Postinal” (levonorgestrel). Although the Court dismissed the complaints, the Supreme Court of Chile, in August, 2001, on appeal, reversed and deemed unconstitutional the authorization to distribute Postinal. For the Supreme Court, the active ingredient of this product had to be considered abortive—and therefore unconstitutional—if it affected the normal implantation of the egg in the uterus. Later, in December, 2002, another judicial action was initiated against the administrative resolution that registered another emergency contraceptive called “Postinor-2” (also levonorgestrel). The trial judge considered that even though no evidence supported the argument that this product had abortive properties the life of the unborn had to be protected as a measure of precaution. The judge thus ordered the Public Health Institute to cancel the sanitary registry. On appeal, the Court of Appeals of Santiago reversed the trial decision. The petitioners, however, raised a cassation action against this decision before the Supreme Court of Chile. In November, 2005, the Court, in a decision that radically differed from the August, 2001, opinion, confirmed the decision of the Court of Appeals of Santiago. This time, the Supreme Court found that no evidence was offered as to whether Postinor-2 had abortive properties and therefore no violation to the constitutional protection of the life of the unborn could be declared.

The last round of the saga occurred when the National Norms on the Regulation of Fertility (which, as discussed above, included the distribution of emergency contraception based on levonorgestrel) were enacted in 2006. A number of judicial actions were initiated against these norms before Chilean courts, but, most importantly, before the Constitutional Tribunal by a group of members of the Congress of Chile. On April 18, 2008, the Tribunal ruled against the distribution of emergency contraception based on levonorgestrel. The Constitutional Tribunal made two basic doctrinal points in order to reach its decision: (1) the Constitution of Chile not only imposes on state authorities the duty to address actual violations of fundamental rights, but also obligates these authorities to adopt measures aimed at preventing any threat or imminent danger on the integrity of rights, and (2) the Chilean Constitution protects the right to life from the moment of conception. Based on these two premises the Tribunal concluded that as long as emergency contraception could adversely affect the implantation of the egg in the uterus and, therefore, could have abortive effects, it had to be prohibited as a measure of precaution in defense of the right to life.

After the ruling of the Constitutional Tribunal, the Chilean Congress passed the Information, Orientation, and Delivery of Services in Matters of Regulation of Fertility Act (Law 20.418 of 2010). In addition to
establishing the right to receiving sexual education and mandating the inclusion of programs of sexual education in institutions of middle education (article 1), the Act guarantees the right to “freely chose and access, without any sort of coercion, in accordance with every person’s formation and beliefs, authorized methods for the regulation of male and female fertility” (article 2). With regards to emergency contraception, the bill sets forth that it could be distributed and provided on the condition that it does not have abortive effects (article 4). In the case of girls under the age of fourteen, emergency contraception may be prescribed by physicians who, in any case and after the prescription, have the duty to inform her parents or the adult person she indicates (article 2).

As previously mentioned, high courts in Peru, Colombia, and Mexico have allowed the distribution of emergency contraception. In Peru, the Ministry of Health ordered health institutions to distribute, free of charge, oral emergency contraception (Resolutions 465-99-SA/DM and 399-2001-SA/DM). In 2002, two petitioners brought a constitutional injunction against the Ministry of Health for not having implemented the resolutions. In the petitioner’s view, the lack of implementation was discriminatory against poor women who could not access free oral emergency contraception. In November, 2006, the Constitutional Tribunal of Peru granted the injunction and ordered the Ministry of Health to implement the resolutions.815 Although the Tribunal did not directly address the issue of the potential abortive effects of emergency contraception (which were put forward in the judicial discussion by some amici arguing against the implementation of the resolutions), it asserted, in passing, that evidence showed that “in the current state of medicine the effects of oral emergency contraception are shown to be merely contraceptive.”816 In 2008, the Council of State of Colombia (Consejo de Estado), the highest administrative court in the country, found that sanitary authorities did not violate the Colombian Constitution when they registered and allowed the distribution of an emergency contraception product called “Postinor-2” (levonorgestrel).817 In this case, the petitioner argued that Postinor-2 prevented the implantation of the egg in the uterus and therefore had abortive effects that were prohibited by the protection afforded to life by the Constitution. After assessing an important amount of scientific evidence, the Council of State concluded that levonorgestrel had only contraceptive effects for it acts through preventing ovulation and is innocuous once the egg has been implanted in the uterus. For the Council, “abortion presupposes conception or the pregnancy of the woman. Insofar as Postinor-2 does not act after conception or pregnancy but before any of them, it is not possible that it has abortive properties. Moreover, no evidence has been provided that it acts on the embryo or the fertilized egg.”818 Finally, in May, 2010, the Supreme Court of Mexico dismissed a constitutional challenge brought by the Governor of the state of Jalisco against a set of federal norms that modified the protocols for the care and attention of victims of sexual violence.819 Among other features, these norms imposed the obligation to provide emergency contraception to victims of sexual crimes. Although the decision basically deals with issues of federalism —the Federation did not invade the powers of the Mexican states— it mentioned that mandating emergency contraception was not equivalent to requiring an abortion. For the Court, “[what the challenged provisions mandate] is just a form of contraception, which will only be prescribed with the informed consent of the patient, and not a procedure for the interruption of pregnancy that would amount to a criminal abortion.”820

3.5.3. Access to Health Care Services Related to HIV/AIDS

In LAC, access to health care services related to HIV/AIDS has been generally regulated by special HIV/AIDS statutes or general health laws. In some countries, high courts have handed down decisions ordering health institutions to provide access to health care to HIV/AIDS patients.

816 Id. ¶ 22.
818 Id. ¶ 2.2.2.
820 Id. ¶ IV.
In Argentina, article 1 of the National AIDS Act (Law 23.798 of 1990) establishes that the fight against HIV/AIDS is an activity of “national interest” that includes “the detection and research of its causal agents, the diagnosis and treatment of the disease, its prevention, assistance and rehabilitation, including its associated pathologies, as well as all measures aimed at avoiding its propagation, especially the education of the population.” At the level of the delivery of health services, article 1-a of the Health Institutions Act (Law. 24.455 of 1995) (Ley de obras sociales) sets forth that all health institutions are obligated to provide medical, psychological, and pharmacological treatments to persons infected by “some of the human retroviruses” and those who have developed AIDS and its associated diseases. This obligation was extended to companies providing prepaid medical services by article 1 of the Prepaid Medicine Act (Law 24.754 of 1997). Finally, as a development of Law 24.455 of 1995, Resolution 625 of 1997 of the Ministry of Health of Argentina established the Program of Services and Prevention of HIV/AIDS that every health institution must offer to its beneficiaries.821

Without explicitly referring to HIV/AIDS, the Organic Act of the Unified Health System of Brazil (Law 8.080 of 1990) provides that the Unified Health System has to carry out actions of “epidemiological control” (article 6-I-b) and of “comprehensive therapeutic care, including pharmaceutical care” (article 6-I-d). Within the general framework provided by this bill, Law 9.313 of 1996 mandated the free provision of all necessary medications to HIV/AIDS patients through the Unified Health System.822 In addition, Law 9.656 of 1998 obligated private health care institutions and insurance companies to offer comprehensive access to health care to HIV/AIDS patients. Finally, according to Law 7.670 of 1988 HIV/AIDS allows access to such social benefits as leaves for medical treatment, pensions, and military leave, among others.

In Chile, the prevention, diagnosis, and control of HIV/AIDS are regulated by Law 19.779 of 2001. While article 1 of this bill sets forth that “the prevention, diagnosis, and control of the infection provoked by HIV, as well as the care of the persons with HIV/AIDS and the free and egalitarian exercise of their rights, without any discrimination, are a sanitary, cultural, and social purpose of national interest,” article 6 imposes upon the state the obligation to guarantee the access to health care to HIV/AIDS patients.823

Access to health care services for HIV/AIDS patients in Colombia is regulated by Law 972 of 2005. As in other countries in the region, article 1 of this bill provides that the “comprehensive state commitment to the fight against HIV/AIDS is a national interest and priority for the Republic of Colombia” and adds that “the state and the General System of Social Security will guarantee the provision of drugs, reactants, and medical devices authorized for the diagnosis and treatment of ruinous or catastrophic diseases.” Article 3 of the act establishes a prohibition to deny medical and pharmaceutical assistance to HIV/AIDS patients and a set of administrative sanctions (fines) to the institutions that infringe this prohibition. In addition, articles 4 and 5 of the bill impose upon the Colombian government the obligation to design a “set of clear and precise strategies” aimed at reducing the costs of the drugs, reactants, and medical

821 On several occasions, persons with HIV/AIDS have resorted to Argentine federal courts requesting judicial orders aimed at obligating public and private health institutions to provide access to medical and pharmaceutical treatment to which they had legal right. As reported by the Center of Legal and Social Studies (CELS), “in most of the cases, judges have developed a committed activism leading them to demand the discharge of legal obligations, issue precautionary measures aimed at immediately satisfying the infringed rights, and impose severe fines in cases of failure to comply with legal obligations.” CENTRO DE ESTUDIOS LEGALES Y SOCIALES (CELS), LA LUCHA POR EL DERECHO 75-76 (2008). The most important legal decision on this matter was handed down by the Supreme Court of Argentina in 2000 ordering the Argentine government to comply with Law 23.798. See Sup. Ct. Arg., Asociación Benghalensis y otros v. Ministerio de Salud y Acción Social (Jun. 1, 2000), 323 FALLOS 1339 (2002).

822 In 2000 and 2007, the Supreme Federal Tribunal of Brazil ruled in favor of the constitutional validity of programs of free distribution of HIV/AIDS drugs. In the tribunal’s view, these programs developed the constitutional fundamental rights to life and health through guaranteeing “universal and egalitarian access to pharmaceutical, medical, and hospital assistance.” See Sup. Fed. Trib. Brazil, Decisions RE 271.286-AgR (Sept. 9, 2000) and RE 393.175-AgR (Feb. 2, 2007).

823 As in other countries in the LAC region, several Chilean courts, including the Supreme Court, have decided cases dealing with HIV/AIDS patients to whom health providers had denied access to medical and pharmaceutical treatment. Although some of these courts have indeed protected the petitioners, invoking the fundamental constitutional rights to life and health, the general trend has been to dismiss their claims. See DIDES, MÁRQUEZ, GUAIJARDO & CASAS, CHILE, supra note 416 at 221-28.
devices for the treatment of HIV/AIDS. Before the enactment of this statute, the Constitutional Court of Colombia had initiated an important activism allowing HIV/AIDS patients to access medical and pharmaceutical treatment. On several occasions, the Court has protected the rights to life and health of HIV/AIDS patients and has enjoined health institutions ordering them to provide comprehensive diagnostic, medical, and pharmaceutical treatment to these patients.823

In Peru, the HIV/AIDS Act (Law 26.626 of 1996, as amended by Law 28.243 of 2004) establishes that “the fight against HIV/AIDS infection and STIs is a goal of national necessity and public interest” (article 1). With regards to access to health services, article 7 of the bill states that “the care of persons living with HIV/AIDS must be responsive, in a comprehensive fashion, to their biological, psychological, and spiritual components, implicating their families and society in this process.” This same provision imposes upon the state the obligation to guarantee to HIV/AIDS patients permanent and comprehensive access to health care services. These services comprise (1) actions of prevention, diagnosis, treatment, monitoring, pre- and post-counseling, and social rehabilitation and reinsertion, (2) ambulatory, hospital, in-house and/or community care, (3) the provision of drugs for an adequate and comprehensive of HIV/AIDS infection and the adoption of actions aimed at a progressive provision of free antiretroviral treatment, and (4) the provision of human, infrastructure, and logistical resources required to maintain, recuperate, and rehabilitate the health status of HIV/AIDS patients. This legislation was developed by the Supreme Decree 006-2007-SA, which approved the Strategic Multisectorial Plan 2007-2011 for the Prevention and Control of STIs and HIV/AIDS in Peru. One of the strategic goals of this plan is to reach a 90% access to quality and comprehensive health care for adult and children HIV/AIDS patients.

Mexico has not enacted a special HIV/AIDS statute. Access to health care is generally guaranteed by article 4 of the Mexican Federal Constitution, which establishes that “every person has the right to the protection of his or her health” and defers to statutory legislation the regulation of the access to health services. This constitutional provision was developed by the General Health Act of 1984. Article 2 of this bill specifies that the right to the protection of health includes the following goals: (1) the physical and mental wellbeing of persons aimed at contributing to the full exercise of their capabilities, (2) the prolongation and improvement of human life, (3) the protection and extension of the values that contribute to the creation, conservation, and enjoyment of the health conditions that foster social development, (4) the extension of attitudes of solidarity and responsibility among the population in the preservation, improvement, and restoration of health, (5) the enjoyment of the health and social assistance services that satisfy the needs of the population in efficient and timely fashion, and (6) the dissemination of knowledge for an adequate enjoyment and use of health services, and (7) the development of education and scientific and technological research for health. Access to health care in the case of HIV/AIDS is only mentioned by article 3-XVII Bis of the Act when it establishes that the National Program for the Prevention, Care, and Control of HIV/AIDS and STIs is a public health matter. More recently, article 28-G of the Federal Act for the Protection of the Rights of Girls, Boys, and Adolescents of 2000 has set forth that Mexican public authorities are obligated to (1) guarantee the care of endemic and epidemic diseases and of STIs and HIV/AIDS, and (2) promote programs of prevention and information on these diseases.

In 2007 and 2008 the Supreme Court of Mexico ruled on a number constitutional injunctions (amparos) brought by several members of the Mexican Armed Forces who had been discharged from service because of their HIV-positive status. In addition, most of the petitioners were discharged with less than 20 years of service and therefore were denied the access to medical and pharmaceutical care for their HIV condition.825 Although the Supreme Court found that it was discriminatory and therefore unconstitutional to discharge members of the military on grounds of their health status, it did not find that denying access to health services to the petitioners infringed any constitutional right or guarantee such as the rights to health and social security. For the Court, establishing a threshold of 20 years of

military service to access medical and pharmaceutical care for HIV/AIDS did not violate these rights because the petitioners could resort to private health providers or the regular System of Health Protection (not the special system of social security for members of the military). In these cases, the Supreme Court followed a traditional jurisprudential trend that deems that economic, social, and cultural rights—and, more precisely, the rights to health and social security—are not justiciable. According to the Court, these rights should be progressively realized taking into account the availability of public resources and the restrictions imposed by complex questions of public policy.\textsuperscript{826}

In Costa Rica, articles 7, 27, and 28 of the General AIDS Act (Law 7.771 of 1998) protect the right of every HIV/AIDS patient to comprehensive medical, psychological, and counseling assistance and to “every treatment that reduces his or her suffering and relieves, as much as possible, the complications arising from the disease.” These provisions add that (1) the national social security institution has to import, buy, keep in stock, and directly provide to patients the antiretroviral drugs specific for the treatment of HIV/AIDS, (2) public and private health workers are obligated to provide support and care to HIV/AIDS patients, and (3) the state may create special shelters for HIV/AIDS patients and support private shelters with public funds. Article 44 of this Act punishes with imprisonment from one to three years the public or private health worker or the person in charge of a health institution who refuses, omits, or delays access to health care to a HIV/AIDS patient. If the refusal, omission, or delay damages the health of the patient the sentence is increased to imprisonment from three to eight years. This bill was thoroughly developed by Decree 27.894-S of 1999. While articles 6 to 8 of the Decree regulate the right of HIV/AIDS patients to comprehensive health care, specially emphasizing care provided by health institutions, articles 9 to 13 refer to the right of these patients to access antiretroviral drugs.

Access to health care services for HIV/AIDS patients in Guatemala is guaranteed by the General Act for the Fight against HIV/AIDS and the Promotion, Protection, and Defense of Human Rights in Cases of HIV/AIDS (Decree 27 of 2000). According to article 1 of the Act, the HIV/AIDS infection is “a social problem of national urgency.” Access to health care is more precisely regulated by article 35 of the bill, which establishes that “every person diagnosed with HIV/AIDS must receive comprehensive and immediate health care, in equality of conditions with other persons, with due respect for his or her will, dignity, individuality, and confidentiality. No health worker can refuse to provide the care required by a person who lives with HIV/AIDS.” This provision is complemented by article 48 that imposes upon the Guatemalan Ministry of Health and Social Assistance the obligation to provide care services to HIV/AIDS patients that guarantee counseling, support, and updated medical treatment. In addition, article 49 that HIV/AIDS patients who are beneficiaries of the Guatemalan Institute of Social Security will receive health social security benefits and services for life.\textsuperscript{827}

The AIDS Act (Law 55 of 1993) of the Dominican Republic regulates all matters regarding the prevention, control, and treatment of the HIV/AIDS infection. Article 4 of this bill guarantees the right of HIV/AIDS patients to receive medical care in health institutions in accordance with their needs. Additionally, article 5 establishes that these institutions are also obligated to provide HIV/AIDS patients with services of counseling and emotional support by qualified and trained staff. Finally, article 20 of the

\textsuperscript{826} See Pou, Militares con VIH, supra note 156 at 9-10, 16-17.  
\textsuperscript{827} In 2003, the Center for Justice and International Law (CEJIL) brought a petition before the Inter-American Commission on Human Rights on behalf of two persons who had died from AIDS because the Guatemalan government had not provided them with antiretroviral treatment. In addition, precautionary measures were requested to protect the rights of 39 HIV/AIDS patients who were not being provided with antiretroviral drugs. According to CEJIL, Guatemala was in breach of articles 4 (right to life), 5 (right to personal integrity), 24 (right to equal protection), and 26 (right to the progressive development of economic, social, and cultural rights) of the American Convention on Human Rights, among others. Even though in 2004 precautionary measures were issued by the Commission, the Guatemalan state still did not provide the drugs requested by the petitioners. On March 7, 2005, the IACHR admitted the petition. It observed that it “is competent to examine the claims presented by the petitioners regarding the right to life and effective judicial protection, in relation with the general obligation to respect all rights. The Commission found that in the circumstances of the present petition, the right of physical integrity, along with the economic, social and cultural rights are contained in the alleged violation of the right of life.” Luis Rolando Cuscul Piraval y otras personas afectadas por el VIH/SIDA v. Guatemala, Case 642/03, Report No. 32/05 (Admissibility), Inter-Am. C.H.R., OEA/Ser.L/V/II.124 Doc. 5 (2005) (Mar. 7, 2005), ¶ 46.
Act sets forth that “public and private health institutions are obligated to provide comprehensive care to persons infected with HIV and patients with AIDS respecting their dignity, without any discrimination, and in full compliance with ethical, administrative, technical, and legal norms.”

3.6. Sexuality Education, Information, and Expression

Rights to education, information and expression are interdependent, and the impact of each on sexual health must be addressed with an eye to their interrelation. Nonetheless, because education (both formal and informal) constitutes a specific right, a distinct field of law, specific state institutions, and a distinct field of practice (characterized by mutual exchange between teachers and students), sexuality education is addressed in a separate section from information and expression.

A rights approach to sexuality education is derived from the rights to health, education, to information and expression, as well as the right to participate in, and benefit fully from, scientific progress, combined with fundamental guarantees to equality, dignity and the right to participate in the cultural and political life of one’s community and nation. Sexuality education, as a component of education, is understood to be essential to the full development of the human personality, in addition to being an essential means to protect oneself from sexual ill-health, whether from sexually transmitted infections, unwanted pregnancies, or sexual violence and abuse.

Many different sectors of law are essential to ensure adequate education in general and adequate sexuality education in particular. These sectors include administrative regulations regarding educational curricula, and constitutional provisions on rights to education; equality and non-discrimination law (regarding sex, gender, sexual orientation, race, religion, disability, health status, and national status, among other grounds). Other important laws engaged to support effective sexuality education include those protecting freedoms of speech and expression, and laws guaranteeing both teachers and students safe and non-discriminatory environments.

Sexuality education is understood to include not only accurate, age appropriate, scientifically supported information on health, sexual health and sexuality as an aspect of human conduct, but also ideals on non-discrimination and equality, tolerance, safety and respect for the rights of others, which are delivered through trained agents using age- and context-appropriate pedagogical methods. In particular, a rights-based approach to sexuality education requires the participation and contributions of young people, particularly adolescents and older teens. Sexuality education, coupled with comprehensive access to information, contributes to health through promoting individuals’ ability to have preferences for, and act on decisions that protect their health, as well as determine the number and spacing of children. Sexuality education is also essential to each person’s ability to develop themselves and their sense of self-worth particularly in regard to any decision regarding their sexual and gender identity, and sexual behavior as an aspect of their personhood. Sexuality education is aimed at prevention, as well as creating understanding of when and how to seek treatment or other forms of assistance for ill health, abuse, or other sexuality-related concerns.

As a key component of effective prevention of sexual ill health, sexuality education recognizes that a significant amount of health promotion occurs outside of health care services and health systems per se. As such, it is both less expensive than much health care, in importantly highlights self-care through support for the conditions of empowerment. Sex education, like all health education, promotes the values of well-being and autonomy.

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828 Education must of course be paired with access to services and resources necessary to act on the knowledge gained, which includes links to other preventive systems, as relevant, such as HPV vaccine and cervical cancer screening.
Failures to develop and deliver accurate and comprehensive sexuality information, therefore, not only contribute to ill health, unwanted pregnancies, exposure and transmission of STIs, and increased rates of HIV infection, but also contributes to reduced use of services and treatment for STIs and HIV as well as reduced access to appropriate contraception and family planning services and services responding to pregnancy and complications of unsafe abortion.

Accessible and good quality sexuality education can contribute to breaking silences over sexual violence, sexual exploitation and abuse, and inspire those who suffer from sexual dysfunction to seek assistance. Furthermore, sexuality education can serve as an important tool for equality and dignity in society — when presented in a non-discriminatory and non-judgmental manner— it can challenge gender stereotypes and fearful or negative attitudes towards sexuality in general and towards those who engage in non-conforming, consensual sexual practices in particular.

Barriers in law or practice of the state to implementing comprehensive sexuality education, therefore, contribute to inequality, violence and exclusion as well as to higher incidence of otherwise preventable STIs, unwanted pregnancies, abortion and unsafe abortion in particular and other complications. Often state law or policy exclude specific topics or persons from sexuality education as part of a larger policy of sex or gender stereotyping, or imposition of particular religious or cultural beliefs about the intrinsic need of sexual activity to be legitimized by reproduction, and the specific obligation of girls or women to submit to husbands in regard to sexual decision-making, or the “sinfulness” of same-sex behaviour or sex outside of marriage. These exclusions run counter to evidence-based evaluations of effective sexuality education as well as conflict with basic rights protections for education. Moreover, sexuality education should not replicate gender stereotyped understandings of sexual behaviour in the name of promoting respectful behaviours, such that girls are taught that their duty is to be chaste in the face of the “natural” lust of boys.

Comprehensive sexuality education may include information and ideas regarding the effective use of contraception, protection against HIV, protection against sexual violence, understanding of sexual orientation and information on the diversity of sexual practices in society. This form of education is associated with better health outcomes for girls and women, as well as sexual minority populations. Comprehensive sexuality education requires strong protections in the law for freedoms of expression, education and the right to education as well as non-discrimination, as it relies on the dissemination of information that may challenge religious leaders and dominant but gender stereotyped beliefs in society around the roles of women and men, for example. For example, educational curricula that limit sexual education to a content promoting abstinence before marriage fail to provide the information that sexually active youth need, even if they delay sexual activity: evidence shows that while some delay may occur, when sexual activity follows that delay, condoms are used less often. Under international human rights standards it is clear that states must refrain from arbitrarily censoring scientifically accurate sexual health information or dispensing misinformation in sexuality education programs.

Sexuality education can be conveyed by both state and non-state actors, in both formal and non-formal, educational settings. While the state has the primary duty to ensure sexuality education in its system of primary and secondary education, to reach the widest range of people, voluntary organizations must be involved and protected from intimidation and censorship. For example, reaching people in sex work, or men who have sex with men with sexuality education is often done most effectively by voluntary organizations rather than the state, which is associated with police abuse and exclusionary policies. National laws, such as those for expression, association and non-discrimination, as well as laws ensuring the ability to participate in the benefits of scientific progress and to participate in cultural and political life are essential to protecting voluntary groups who provide important sexuality education to marginalized groups.

Sexuality education must be flexible in its formats, so that it reaches both school going and non-school going youth (especially street youth) and must be available to adults throughout their lives. Women in
particular often face de facto bars to accessing comprehensive sexuality education; and special steps, supported by law, must often be taken by the state to reach young married adolescents (who often leave school early). Sexuality education must also be understood to be required throughout life, as older people should not be excluded from the benefits of new information and understanding of sexuality in their lives.

It is important to distinguish rights-based, necessary and affirmative measures that must be taken to reach targeted populations and the rights-denying and less effective tactics that assume categories of information are relevant to specific populations and deny comprehensive sexuality education. For example, assuming that only “gay-identified” populations need information about anal sex (in the face of evidence that heterosexual youth are engaging in anal sex to avoid pregnancy) and condom use is to fail to provide effective sexual health education. To assume laws on education for women are all that is needed to ensure population-wide use of contraception and the rights of women (as if men in heterosexual relationships do not need to understand family planning) or to assume that MSM only need education on condom use with men (as if they did not also have sex with women) is to provide insufficient sexuality education, and thus to fail to protect the health and rights of the general populations as well as the rights of women and girls.

Children have specific rights to age-appropriate and comprehensive sexuality education, which is made accessible to them regardless of gender, disability, or national status. International rights standards elaborate the importance of sexuality education, especially for adolescents, to support them in determining their lives and identities, and to live free of abuse and preventable illness and unwanted pregnancy. Sexuality education, understood to be an obligation of the state which is often in constructive tension with the rights of parents and families. While families have the right to raise their children consistent with their religious and cultural beliefs, the rights of the child to objective and scientifically supported information (commensurate with their evolving capacity) is coupled with the duty of the state to present information and education in an objective and pluralistic manner to that child. This set of rights and duties means that parents cannot bar their children from receiving such critical information.

It is important to note that education’s impact on sexual health is not limited to sexual health education. Education in general is a vehicle for realizing other rights, and to contributing to all persons’ ability to live lives of equality, dignity and freedom. The importance of non-discriminatory access to education for all is critical to supporting the rights and sexual health of persons who might otherwise be stigmatized and excluded from formal and informal opportunities for education, such as unmarried pregnant girls and women, men or women failing to conform to gender norms or persons in sex work, etc. Laws that mandate or permit discrimination against students or teachers on the grounds of sexual orientation, gender expression or marital status, therefore are violations of the right to education but also contribute to the stigmatization of persons excluded on these grounds, and thus ultimately erect barriers to their health.

829 The Committee on Social, Economic, and Cultural Rights has observed: “Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.” General Comment N° 13: The Right to Education (Art. 13), U.N. CESCR, 21st Sess., U.N. Doc. E/C.12/1999/10 (1999), ¶ 1. According to the Committee, “education in all its forms and at all levels shall exhibit the following interrelated and essential features: a) availability; b) accessibility; c) acceptability; and d) adaptability.” Id. at ¶ 6. See also General Comment N° 11: Plans of Action for Primary Education (Art. 14), U.N. CESCR, 20th Sess., U.N. Doc. E/C.12/1999/4 (1999).

830 See UDHR, article 26.
This section describes illustrative developments in the LAC region with regards to sexual health and freedom of speech. It will first present the regional general framework on freedom of speech and the right to education. Second, it will describe developments related to sexuality education and information. Finally, the section will explain how forms of sexual speech such as obscenity and pornography have been dealt with in LAC.

3.6.1. The Inter-American and Constitutional Framework on Freedom of Speech and the Right to Education

Freedom of speech is a thoroughly protected right in LAC both by Inter-American law and by domestic constitutions and legislations. With a couple of exceptions that will be elaborated in the next subsection, neither Inter-American nor domestic constitutional law explicitly refers to sexuality education, information, and sexual speech. Yet, most of the rules developed in both areas with regards to freedom of speech, the right of access to information, and the right to education provide a strong framework for the advancement and support of programs and public policies aimed at imparting sexuality education, providing information on sexual issues, and the circulation of sexual speech.

At the Inter-American level, freedom of speech is protected by article IV of the American Declaration of the Rights and Duties of Man (ADRDM) and article 13 of the American Convention on Human Rights (ACHR). While the first instrument cursory states that “[e]very person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever,” the second instrument establishes a more complex regulation of freedom of speech.

Indeed, article 13-1 of the ACHR protects “the right to freedom of thought and expression,” which includes “freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.” In addition, article 13-2 of the Convention prohibits previous censorship and provides that the exercise of freedom of speech “shall be subject to subsequent imposition of liability, which shall be expressly established by law” in order to guarantee “respect for the rights or reputations of others” or “the protection of national security, public order, or public health or morals.” This provision is complemented by article 13-5 of the ACHR, which sets forth that “public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.” Additionally to forbidding previous censorship, the Convention, in article 13-3, also prohibits indirect methods or means of restricting freedom of speech (abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, among others). Finally, article 13-5 of the ACHR states that “[a]ny propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.”

According to the Special Rapporteur on Freedom of Speech of the Inter-American Commission on Human Rights, the Inter-American conventional framework on freedom of speech provides the most thorough and extensive protection of this right currently existing in international human rights law. The thoroughness of the guarantee to freedom of speech at the Inter-American level makes clear the intention of the drafters of the ACHR to accord a special importance to this right in the region. The Special Rapporteur has explained that “the jurisprudence of the [Inter-American] system has stated that the Inter-American legal framework affords the highest value to freedom of speech because it is based in a generous concept of personal autonomy and dignity, and also for it takes into account both the

instrumental value of this right for the exercise of other fundamental rights and the essential role it plays in democratic regimes.\footnote{Id. Chapter III, ¶ 5.}

Both the possibility to impart appropriate sexuality education and the circulation of discourses with a sexual content depend on the preservation of a democratic polity afforded by freedom of speech and the instrumental nature of this right for the exercise of other rights. With regards to the role of freedom of speech in promoting democracy, the IACtHR has observed that “[f]reedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a conditio sine qua non for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.’\footnote{Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights). Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5 (Nov. 13, 1985), ¶ 70.} Such a statement means that the relationship between democracy and freedom of speech is “structural,” “close,” “indissoluble,” and “fundamental.”\footnote{See Special Rapporteur IACHR, Report 2009, supra note 831 at Chapter III, ¶ 8.} In the end, freedom of speech operates as a safeguard against authoritarianism by facilitating personal and collective self-determination.\footnote{See id.} In the forceful words of the IACtHR, “without a truly operating freedom of speech… democracy vanishes, pluralism and tolerance begin to break, citizen means of control and denunciation stop operating and, ultimately, the field for the advent of authoritarian systems is created.”\footnote{Caso Herrera Ulloa v. Costa Rica (Excepciones preliminares, fondo, reparaciones y costas), Inter-Am. Ct. H.R. (ser. C) No. 107 (Jul. 2, 2004), ¶ 116.}

As mentioned above, freedom of speech has an instrumental character, in the sense that it permits the exercise of other human rights. As the IACHR has indicated, “the lack of freedom of speech is a cause ‘contributing to the violation of other human rights’.”\footnote{Hugo Bustíos Saavedra v. Peru, Case 10.548, Report No. 38/97 (Merits), Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 753 (1997) (Oct. 16, 1997) ¶ 72.} In the Special Rapporteur’s view, this means that freedom of speech is a key factor for the exercise of other rights such as political participation, religious freedom, education, ethnic and cultural identity, non-discrimination, and basic social and economic rights.\footnote{See Special Rapporteur IACHR, Report 2009, supra note 831 at Chapter III, ¶ 9.}

This double functional nature of freedom of speech in the Inter-American system has a number of important consequences when considering sexual discourses. In the first place, freedom of speech protects a number of discourses according to their form. Secondly, discourses are also protected by this right in function of their content. Although conventional Inter-American law and the jurisprudence of the IACHR and the IACtHR have not yet explicitly referred to sexual speech, there are a number of extant rules that might be used to protect it both by the form and the content it may adopt.

With regards to the protection of the discourses according to their form, there are at least two Inter-American legal rules that are of importance when dealing with the protection of sexual speeches. On the one hand, and according to the Special Rapporteur, \textit{Inter-American law protects the right to symbolic or artistic freedom, the right to spreading artistic expression, and the right of access to art in all its forms.} This rule has been drawn from the decision of the IACtHR in the Case of the \textit{The Last Temptation of Christ},\footnote{See id. Chapter III, ¶ 27.} where Chile was found in breach of article 13 of the ACHR after its judicial authorities censored the screening of Martin Scorsese’s movie \textit{The Last Temptation of Christ} in order to protect the good name and the honor of the Catholic Church and Jesus Christ.\footnote{See THE LAST TEMPTATION OF CHRIST (Cineplex-Odeon Films & Universal Pictures, 1988).} On the other hand, the
Special Rapporteur has also indicated that another modality of Inter-American protection of the form adopted by speeches is through the right to seek, receive, and access expressions, ideas, opinions, and information of all kinds. 842 Because of its importance for the issues dealt with in this section of the report, this right will be developed more fully later in this sub-section.

Among the Inter-American legal rules protecting the content of speeches, two are of relevance for the topics of this section. First, Inter-American law protects, in principle, all sorts of expressions even if they are offensive, shocking, or distressing for certain audiences, including governments. 843 According to the IACtHR, this rule is a necessary correlate of the relationship between freedom of speech, democracy, and pluralism. For the Court, “freedom of speech must not only be guaranteed with respect to information and ideas that are favorably received or are considered to be harmless or indifferent. It must also be protected with regards to ideas that are unpleasant for the state or any sector of the population. These are the demands of pluralism, which implies the tolerance and the spirit of openness required by a democratic society.” 844

It is important to note, however, that Inter-American law explicitly prohibits a number of discourses because of their potential to destroy democracy and pluralism. 845 To begin with, article 13-5 of the ACHR states that “[a]ny propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.” Second, the Special Rapporteur has indicated that Inter-American law incorporates the prohibition to directly and publicly incite to commit genocide established in article III-c of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. 846 Finally, Inter-American law prohibits child pornography. According to the Special Rapporteur, this prohibition stems from the incorporation into Inter-American law —through article 19 of the ACHR on the rights of children— of article 34-c of the Convention of the Rights of the Child, which forbids “[t]he exploitative use of children in pornographic performances and materials,” and article 3-b of ILO Convention No. 182 on the worst forms of child labor, which, among the prohibited forms of work, includes “the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances.” 847

The second form of protection of the content of speeches offered by Inter-American law is through the protection of speech expressing essential features of personal identity or dignity. 848 Although this protection has been drawn from cases dealing with the identity of ethnic groups, 849 it could be extended to other aspects of personal identity such as sexuality. Indeed, the Special Rapporteur has observed that “other discursive forms that should especially protected because they express an essential feature of personal identity and dignity are religious speech and those expressing one’s sexual orientation and gender identity,” 850 and added that “[b]ecause of its close relationship with dignity, freedom, and equality of all human beings, discourses that express one’s sexual orientation and gender identity are included in the category of especially protected speeches. With respect to this issue it must be recalled that

843 See id. Chapter III, ¶¶ 31-32.
846 See id. ¶ 60.
847 See id. ¶ 61.
850 Special Rapporteur IACHR, Report 2009, supra note 831 at Chapter III, ¶ 57.
Resolution 2435 (XXXVIII-O/08) of the OAS General Assembly represented an international landmark on the matter.

As mentioned above, because of its importance for the possibility to teach appropriate sexuality education and provide information on sexuality issues, the Inter-American legal regime on the right of access to information deserves special attention. This right has been granted paramount importance by the different organs of the Inter-American system because of its particular importance “for the consolidation, the appropriate operation, and the preservation of democratic systems.”

The right of access to information —protected by article 13 of the ACHR— thus basically guarantees the possibility of every person to access the information under the control of the state and imposes on public authorities a corollary obligation to allow citizens to access the information under their custody, administration, or possession and the information they produce or are obligated to produce.

Both the IACHR and the IACtHR have indicated that the right of access to information is a key factor in the preservation of the transparency of the public sphere, the control of corruption, and the appropriate and informed exercise of other human rights. Referring to this last role of the right of access to information, the Special Rapporteur has observed that “only an appropriate implementation of this right allows citizens to exactly know which their rights are and what the mechanisms are to protect them. In particular, the appropriate implementation of the right of access to information, in all its dimensions, is an essential condition for the recognition of the social rights of marginalized or excluded sectors of the population.”

The Special Rapporteur, drawing on the jurisprudence of the IACtHR, has also indicated that the right of access to information is (1) based on a number of guiding principles, and (2) imposes on states a set of obligations aimed at securing its protection and fulfillment. For purposes of the topics discussed in this section of the report, the guiding principle of “maximum disclosure” is of particular relevance. This principle basically means that access to information is the rule and secrecy the exception. According to the IACtHR, the principle of “maximum disclosure” “establishes the presumption that all information is accessible and therefore subject to a restricted system of exceptions.” The exceptionality of the restrictions that may be imposed upon the access to information means that they must (1) have been previously established by a law, (2) pursue a purpose allowed by the ACHR, and (3) be “necessary in a democratic society; that is, they must be oriented towards the satisfaction of a compelling public interest.”

Among the obligations imposed by the right of access to information on states, the obligation of “active transparence” should be highlighted. This obligation demands from public authorities that they provide the maximum amount possible of information on, at least, the following topics: (1) the structure, powers, and budget of the state, (2) the information required by the exercise of other rights, including basic social and economic rights, (3) the offer of state services and benefits, and (4) the procedures to

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851 See supra Section 3.1.1.2.
852 Special Rapporteur IACHR, Report 2009, supra note 831 at Chapter III, ¶ 57.
853 Id. Chapter IV, ¶ 1.
856 Id. Chapter IV, ¶ 5.
859 Id. ¶¶ 89-91.
860 See Special Rapporteur IACHR, Report 2009, supra note 831 at Chapter IV, ¶ 32.
initiate claims and request information. In addition, this obligation requires that the information provided by the state be complete, comprehensible, drafted in accessible language, and updated.\textsuperscript{861}

Finally, as mentioned before, article 13-2 of the ACHR authorizes that the exercise of freedom of speech be subject to “subsequent imposition of liability,” on the condition that it is “expressly established by law” in order to guarantee “respect for the rights or reputations of others” or “the protection of national security, public order, or public health or morals.” In addition, article 13-5 of the Convention provides that “public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.” Previously in this paper, it was explained in detail how the IACtHR and several national courts in the LAC region have produced important doctrine on the possibility to limit human rights in order to protect public interests such as “public order,” “public morality,” and “public health.”\textsuperscript{862}

Freedom of speech and the right of access to information in LAC are also thoroughly protected by domestic constitutions. Freedom of speech is guaranteed by the national constitutions of Argentina (article 14), Brazil (article 5-IX), Chile (article 19-12), Colombia (article 20), Costa Rica (article 29), Guatemala (article 35), Jamaica (section 22-1), Mexico (articles 6 and 7), Peru (article 2-4), and the Dominican Republic (article 49). The right of access to information is protected by the constitutions of Brazil (articles 5-XIV and XXXIII), Colombia (article 20), Costa Rica (article 30), Guatemala (article 35), Jamaica (section 22-1), Mexico (articles 6 and 7), Peru (article 2-5), and the Dominican Republic (article 49). In the case of the constitutions of Argentina (article 42) and Costa Rica (article 45) the right of access to information is also protected in the context of consumer rights.

Inter-American law and domestic constitutional law of countries in LAC extensively guarantee the right to education. The oldest Inter-American provision to protect this right is article XII of the ADRDM, which states that “[e]very person has the right to an education, which should be based on the principles of liberty, morality and human solidarity” and that “will prepare him to attain a decent life, to raise his standard of living, and to be a useful member of society.” It also expresses that “[t]he right to an education includes the right to equality of opportunity in every case, in accordance with natural talents, merit and the desire to utilize the resources that the state or the community is in a position to provide.” Finally, article XII of the ADRDM protects the right of every person “to receive, free, at least a primary education.”

The relative silence of the ACHR on the protection of the right to education, only indirectly guaranteed through the general and cursory reference of article 26 to the duty of states to pursue the progressive realization of economic, social, and cultural rights, is filled by article 13 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, also known as Protocol of San Salvador (PSS). After stating in article 13-1 that “[e]veryone has the right to education,” the PSS, in article 13-2, establishes that education “should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace,” that it “ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence,” and, finally, that it “should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace.” Article 13-4 of the Protocol importantly notes that parents have the right to chose “the type of education to be given to their children,” provided that it respects the general principles set forth by article 13-2. Whereas the PSS is explicit in mandating free and compulsory primary education (article 13-3-a), with regards to secondary and higher education it only imposes on states the obligation to make them “generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education” (article 13-3-b and c). Finally, article 13-5 of the Protocol protects “the freedom of

\textsuperscript{861} Id.
\textsuperscript{862} See supra Section 3.1.2.5.
individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties."

Even though Inter-American law does not yet include a rule directly imposing upon states the obligation to impart sexuality education or to implement programs aimed at disseminating information on sexual health or sexuality issues, article 8 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Pará) (CBP) obligates states to progressively implement a set of programs generally oriented towards the prevention of violence against women. Three of these programs have an educational character and therefore fit within a broad notion of sexuality education. First, article 8-b of the CBP indicates that states have the obligation to “modify social and cultural patterns of conduct of men and women” through, among other means, “the development of formal and informal educational programs appropriate to every level of the educational process” aimed at countering “prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women.” Second, article 8-c of the Convention imposes on states the obligation to progressively “promote the education and training of all those involved in the administration of justice, police and other law enforcement officers as well as other personnel responsible for implementing policies for the prevention, punishment and eradication of violence against women” (emphasis added). And, third, article 8-e of the CBP obligates states “to promote and support governmental and private sector education designed to raise the awareness of the public with respect to the problems of and remedies for violence against women” (emphasis added).

Although the right to education—and, generally, economic, social, and cultural rights—does not occupy a particularly important place in the jurisprudence of the IACHR and the IACtHR, some decisions of both organs illustrate its importance for the construction of a truly democratic, pluralist, and just polity.863

The IACHR has referred to the right to education on several occasions. In the case of Jehovah’s Witnesses v. Argentina, the Commission found that Argentina had violated “equality of opportunities in education”—and, therefore, article XII of the ADRDM—after the government passed in 1976 a decree prohibiting all the activities of the Jehovah’s Witnesses.864 As part of these measures, children belonging to this religious creed were forbidden to enroll in public schools, expelled from them, or prevented from taking final exams. Even though the decision of the IACHR in this case makes clear the importance of the right to education in upholding the values upon which the Inter-American system is based, it did not elaborate a substantial interpretation on the meaning of this right. In the case of Mónica Carabantes Galleguillos v. Chile, the Commission protected the right to education in the context of the friendly settlement reached by the parties.865 The settlement aimed at redressing the rights to be free from arbitrary or abusive interference with the private life and equal protection of the law of the petitioner that had been violated when she was expelled from the private school where she was pursuing her studies “for the sole reason that she had become pregnant.”866 The compensatory measures approved by the IACHR included, among others, the commitment of the Chilean government “to disseminate Law N° 19.688, amending the Education Act, which contains provisions on the rights of pregnant students or nursing mothers to have access to educational establishments.”867 Finally, the Commission has admitted the case of Adolescents in the custody of Febem v. Brazil.868 The petitioner alleges that the conditions in which the adolescents

863 For references to the jurisprudence of the IACHR and the IACtHR on the right to education I draw on Melish, Inter-American Commission, supra note 11 at 354-55, 363, 367; Melish, Inter-American Court, supra note 11 at 388-92.
866 Id. ¶ 14.
867 Id.
incarcerated in the São Paulo prison system are kept violate articles 4 (right to life), 5 (right to humane treatment), 8 (right to a fair trial), 19 (right to special protection for children), and 25 (right to judicial protection) of the ACHR and article 13 of the PSS (right to education). According to the petitioner, adolescent detainees are tortured, mistreated, and beaten, “they are forced to remain sitting in the cells, unable to get up or move about,” and “they do not have any medical care, education, psychological care, or leisure time.”

The importance of this case lies in the fact that it will be the first where the Commission may directly interpret article 13 of the PSS.

The right to education has been considered by the IACtHR as part of the more encompassing “right to a dignified life,” “right to life,” or “right to harbor a project of life.” For the Court, the full guarantee of the individual’s rights to life and to humane treatment protected by articles 4 and 5 of the ACHR includes “essential aspects of the rights to health, education, food, recreation, sanitation, and adequate housing, all of which are necessary for the development of a dignified life.” The first tenets of this doctrine were developed by the IACtHR in a couple of cases dealing with children’s rights, where articles 4 and 5 of the Convention were interpreted in conjunction with article 19 (children’s rights). In the Street Children Case, the Court observed that “the fundamental right to life not only includes the right of every human being not to be arbitrarily deprived of his or her life, but also the right not to be prevented from accessing the conditions that would guarantee a dignified existence.” This view was further developed in the advisory opinion Legal Status and Human Rights of the Child, where the IACtHR reaffirmed that “the right to life protected by article 4 of the American Convention not only entails the prohibitions established in that provision, but also the obligation to provide the measures necessary to lead a life in dignified conditions.” With respect to the right to education of children, the Court said: “It is necessary to highlight that among the special protection measures of children and the rights recognized to them by article 19 of the American Convention the right to education holds a special place. This right lies at the foundation of the possibility to lead a life in dignity and contributes to preventing unfavorable situations for the child and society itself.”

The decisive step in the consolidation of the Court’s doctrine on the “right to a dignified life” took place in the Case of Children’s Rehabilitation also known as the Panchito López Case. This case dealt with the inadequate life conditions of detainees (overcrowding, lack of education and health services, and poor nutrition, among others) in a detention facility in Paraguay. After stating that “one of the obligations the state must assume… to protect and guarantee the rights to life and personal integrity of detainees is to provide them with the minimum conditions compatible with their dignity while they are detained,” the Court clarified that the obligations of the state with respect to the right to life of every person include an additional obligation in the case of children. For the Court, “[in the case of children], on the one hand, [the state] must discharge its obligations to guarantee with more care and responsibility and must adopt special measures based on the principle of the best interests of the child. On the other hand, the protection of the life of the child requires that the state takes special care of the life circumstances the

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869 Id. ¶ 2, 7.
870 See Melish, Inter-American Commission, supra note 11 at 355.
871 See Melish, Inter-American Court, supra note 11 at 388.
872 Id.
873 See id. at 389.
874 Caso de los "niños de la calle" (Villagrán Morales y otros) v. Guatemala (Fondo), Inter-Am. Ct. H.R. (ser. C) No. 63 (Nov. 19, 1999), ¶ 144.
875 See Melish, Inter-American Court, supra note 11 at 389.
877 Id. ¶ 84.
878 Id. ¶ 88.
879 See Melish, Inter-American Court, supra note 11 at 389-90.
Based on this premise, the IACtHR added: “With respect to detained children under its custody, the state thus has the obligation to, *inter alia*, provide them with health care and education, making sure that detention does not destroy their life projects.”

On the right to education of detained children, the Court considered that a combined reading of articles 4, 5, and 19 of the ACHR and 13 of PSS imposed on the state the obligation to implement educational programs in detention facilities. In the IACtHR’s view, these programs were of vital importance because “children are in a crucial stage of their physical, mental, spiritual, moral, psychological, and social development that will impact, in one way or the other, their life project.” Finally, after finding that Paraguay had violated article 13 of the PSS when it did not fulfill its obligation to provide adequately funded and staffed educational programs at the detention facilities, the Court observed that this sort of violation “causes even more serious consequences when the detained children belong to marginal sectors of society... because it limits their possibilities of effective reinsertion in society and the development of their life projects.”

At the domestic level, most constitutions in LAC protect the right to education. With different phrasings, this right is protected by the constitutions of Argentina (articles 5 and 75-19), Brazil (article 205), Colombia (article 67), Costa Rica (articles 77 and 78, which do not explicitly refer to the right to education but state that preschool and general basic education are free, compulsory, and provided by the state), Chile (article 19-10), Guatemala (article 71), Mexico (article 3), Peru (article 13), and the Dominican Republic (article 63).

### 3.6.2. Sexuality Education and Information

Although the general legal framework on freedom of speech and the right to education elaborated in the previous subsection —with the exception of article 8 of the CBP— does not explicitly refer to sexuality education, most countries selected for this research project have enacted legislation and/or their courts have ruled on this matter.

To begin with, at least three countries in the LAC region have constitutions imposing on the state the obligation to impart sexuality education or implement programs oriented towards the dissemination of information on sexual matters. The Federal Constitution of Brazil and the constitutions of several Brazilian states are perhaps the most illustrative and positive examples of constitutionally mandated sexuality education. At the federal level, sexuality education is regulated in the context of the right of every couple to family planning. After guaranteeing this right, and establishing that it should be based on the principles of human dignity and responsible parenthood, *article 226 § 7 of Brazil’s Federal Constitution* imposes on public authorities the obligation to provide educational and scientific resources for the free exercise of this right. A number of Brazilian state constitutions include a similar mandate and follow the same or a similar wording to the Federal Constitution.

Other constitutions of the states of Brazil explicitly mandate that sexuality education be included in the curricula of different levels of the public education system. While some of these constitutions make a general reference to the obligation of

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881 *Id.* ¶ 160.
882 *Id.* ¶ 161.
883 *Id.* ¶ 172.
884 *Id.* ¶ 174.
885 This is the case of the constitutions of the states of Bahia (article 279-I), Ceará (articles 248-XV and 286, referring to the duty of the health system to guarantee the access to education, information and methods of family planning that respect the rights to health and personal option), Espírito Santo (article 204), Federal District (Lei Orgânica, article 207-XVII), Goiás (article 153-XIII), Mato Grosso do Sul (article 205, which, in the context of the obligation of the state to assist the family, sets forth that public authorities have to guarantee the access to information on adequate methods of family planning respecting the ethical and religious convictions of couples), Pernambuco (article 166-XII), Rio Grande do Norte (article 155 § 3), Santa Catarina (article 186-I), and Tocantins (article 152-XV).
teaching sexuality education in public (and sometimes private) schools, others indicate more specific public policy directives on how to implement programs of sexuality education.

The constitutions of Mexico and Peru also mandate the implementation of programs of sexuality education and information in the context of their regulation of the national population public policy and the individual right to define the number and time-spacing of children. Article 4 of Mexico’s Federal Constitution establishes that “every person has the right to decide in a free, responsible, and informed fashion the number and time-spacing of his or her children” (emphasis added). In Peru, article 6 of the Constitution sets forth that the national population public policy (1) has as its aim “the dissemination and promotion of responsible paternity and maternity,” (2) recognizes the right of families and persons to decide, and (3) imposes on the state the obligation to implement appropriate programs of education and information and to facilitate the access to methods of family planning that do not affect life or health.

Most countries in the LAC region have enacted legislation establishing programs of sexuality education and information. This legislation may be classified in three groups. The first set of legislations directly regulates sexuality education and mandates the implementation of sexuality educational programs. The second group of legislations deals with sexuality education in the context of the prevention of STIs and HIV/AIDS. Finally, the third set of legislations implements sexuality education and information within a more general context of guaranteeing sexual and reproductive rights.

The first group of legislations may be illustrated by bills and administrative legislation enacted in Argentina, Colombia, and Peru. In 2006, the Congress of Argentina passed the National Program of Comprehensive Sexuality Education Act (Law 26.150). Article 1 of this bill establishes that “all students have the right to receive comprehensive sexuality education” in public and private schools and defines “comprehensive sexuality education” as one that “articulates biological, psychological, social, affective, and ethical aspects.” This provision is complemented by article 3, which sets forth the aims of the National Program of Comprehensive Sexuality Education. These aims are: (1) including comprehensive sexuality education in educational programs oriented towards the harmonious, balanced, and permanent formation of persons, (2) guaranteeing the transmission of pertinent, reliable, and updated knowledge on the different aspects of comprehensive sexuality education, (3) promoting responsible attitudes towards sexuality, and (4) securing equality of treatment and opportunity between men and women.

In Colombia, the General Education Act (Law 115 of 1994) thoroughly inserted sexuality education in the Colombian educational system. To begin with, article 13-d of this statute provides that the most important purpose of each and every educational level is the comprehensive development of students through structural actions aimed at —among others— “developing a healthy sexuality that promotes self-knowledge and self-esteem, the construction of sexual identity in a context that respects equality between the sexes, affectivity, mutual respect, and the preparation for a harmonious and responsible family life.” Article 14-e establishes that “sexuality education, imparted in every case according to the psychic,

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886 This is the case of the constitutions of the states of Amapá (article 286-II-b), Ceará (article 215 § 1-f, referring to the obligation that curricula of public and private schools include notions of “sexology”), Distrito Federal (Lei Orgânica, article 35), Pernambuco (article 196), and Piauí (article 226 § 1, talking about the promotion of sexuality education in public and private schools within the “appropriate area of knowledge”).

887 This is the case of the constitutions of the states of Goiás (article 153-XVI, referring to the obligation of the public health system to implement programs of sexuality education in the first and second degrees of public schools), Rondônia (article 258-II, establishing the sexuality education should be offered as an optional course in fundamental and middle education), Roraima (article 149-III, setting forth that minimum contents of the curricula of fundamental and middle education should include sexuality education), Santa Catarina (article 164-IV, establishing that minimum contents of the curricula of fundamental and middle education should include scientific and technical programs on the protection of sexual orientation), São Paulo (article 278-VIII, mandating that the state promotes the supply of orientation and information on human sexuality in the curricula of fundamental and middle education provided it is possible), and Tocantins (article 152-XIX, indicating that the public health system should implement the program of sexuality education in the first and second degrees of public schools).
physical, and affective needs of the students,” is a compulsory course that should be included in the preschool, basic, and middle levels of all public and private schools offering formal education.

Finally, the President of Peru enacted the Supreme Decree N° 006-2006-ED, which sets forth the organization and functions of the Peruvian Ministry of Education. Article 47 of this Decree establishes that the Ministry has the duty of planning, directing, coordinating, executing, monitoring, evaluating, and disseminating a number of educational policies, strategies, and actions in such fields as sexuality education. As a development of this duty, in 2008, the Ministry of Education of Peru issued Resolution 0180-2008-ED, which adopts the Educational Directives and Pedagogical Orientations for Comprehensive Sexuality Education. This resolution operates as a framework for the implementation of a national public policy on comprehensive sexuality education. The most important feature of this policy is perhaps the fact that all its definitions and actions are based on a human rights perspective. For example, “comprehensive sexuality education” is defined as: “A formative action that should be present along the whole educational process and that contributes to the development of knowledge, capabilities, and attitudes that help students value and assume their sexuality within the framework of the exercise of their rights and the rights of others. Comprehensive sexuality education has as its most important aim that students achieve significant learning on the exercise of a healthy, pleasurable, and responsible sexuality in the context of interpersonal, democratic, egalitarian, and respectful relationships.”

As mentioned above, the second set of legislations in the LAC region on sexuality education regulate this topic as part of bills aimed at the prevention of STIs and HIV/AIDS. This group of legislations may be illustrated by statutes enacted in Argentina, Chile, Costa Rica, and Guatemala. In Argentina, article 1 of the National AIDS Act (Law 23.798 of 1990) declares that the fight against AIDS is of national interest and includes, among other actions, “measures aimed at preventing its propagation, first of all the education of the population.” This statute was developed by Decree 1.244 of 1991, which, in article 1, includes the prevention of AIDS in the curricula of primary, secondary, and tertiary levels of education.

Similarly, in the General Act on HIV/AIDS of Costa Rica (Law 7.771 of 1998) sexuality education and information appears as an important component. Article 1 of this statute operates as a general framework on this issue when it states that education on HIV/AIDS is one of its main purposes. It is developed by articles 24 (strengthening of education campaigns on the convenience of the use of condom), 30 (the Ministry of Health has the duty to adequately and timely inform the population, and especially its most vulnerable sectors, about HIV/AIDS with scientific updated data on the forms of preventing the infection), 31 (the Superior Council of education has the obligation to include in educational programs topics related to the risks, consequences, and means of transmission of HIV, the forms of preventing its transmission, and the respect for human rights), and 34 (the Ministry of Justice has the duty to implement educational campaigns in prisons aimed at reducing the risk of transmission of HIV).

Similar provisions may be found in the General Act on the Fight against HIV/AIDS and the Promotion, Protection, and Defense of Human Rights in the HIV/AIDS Field of Guatemala (Decree 27-2000 of 2000). As in the Costa Rican case, article 2 of this statute has as its main purpose “the creation of a legal framework allowing the implementation of the necessary means for the education, prevention, epidemiological supervision, research, attention, and follow-up of STIs, HIV, and AIDS, as well as guaranteeing the respect, promotion, protection, and defense of the human rights of the people affected by these diseases” (emphasis added). This provision is developed by a full chapter (articles 8 to 18) dealing with education and information actions. Among the provisions in this chapter, articles 9 (the ministries of education and public health should include in the curricula of public and private primary education a unit on the prevention of STIs and HIV/AIDS), 11 (the Ministry of Public Health has the

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889 Id. at 23.
duty to disseminate messages in the languages prevailing in each region of the country on the prevention of STIs and HIV/AIDS through newspapers and radio and television programs), 12 (programs of education, information, and communication on the prevention of STIs and HIV/AIDS should be implemented for vulnerable and risk groups), and 17 (education actions on the prevention of STIs and HIV/AIDS should be implemented in institutions such as penitentiaries and prisons, mental health institutions, and military institutions) should be highlighted.

Chile presents a more complex regulation of sexuality education, insofar as it appears in a number of statutes dealing with STIs and HIV/AIDS dating from different periods and reflecting diverging views on these matters. The first Chilean regulation on the issue are articles 38 and 39 of the Sanitary Code (Decree Law 725 of 1967), which provide that (1) the National Health Service has the duty to fight “venereal diseases” and will endeavor to avoid their propagation “by educational, preventive, and any other means it deems necessary,” and (2) appropriate legislation will establish the forms and conditions in which sexuality and “anti-venereal” education will be imparted in schools, military institutions, ships, factories, workshops, and penitentiaries, among others. Later, article 19 of the Regulation on STIs (Decree 362 of 1983) established that “sexuality and anti-venereal education comprises educational activities oriented towards preparing children, adolescents, and adults of both sexes for the attainment of their maturity and development as men and women, for a behavior as parents responsible for the health of their family and community, and for the prevention of STIs.” Interestingly, article 21 of this Regulation indicates that the basic purposes of sexuality education are the (1) description of the anatomical and physiological aspects of the reproductive system of both sexes, and (2) “conceptualization of human sexuality as a form of heterosexual relationship, affectively motivated that purports to organize the family in coordination with the existing legal system.” More recently, the AIDS Act (Law 19.779 of 2001) included sexuality education and information as part of the actions aimed at the prevention of HIV/AIDS. Article 3 of this statute provides that public authorities have the obligation to implement the “actions necessary to inform the population on HIV, the ways it is transmitted, its consequences, the most effective measures for its prevention and treatment, and the public programs existing for these purposes, especially emphasizing prevention campaigns.”

The third group of legislations regulates sexuality education and information within a more general context of guaranteeing sexual and reproductive rights. It may be illustrated by statutes enacted in Argentina, Costa Rica, Mexico, and Peru. In Argentina, article 2-b the National Program on Sexual Health and Responsible Procreation Act (Law 25.673 of 2003) guarantees as one of its main goals the access of the entire population to information, orientation, methods, and services related to sexual health and responsible procreation. As a development of this general goal, article 9 of this bill provides that religious and non-religious public and private schools have the duty to disseminate its content “within the framework of their convictions.” In similar terms, Executive Decree 27.913-S of 1999, issued by the President of Costa Rica, created the Inter-Institutional Commission on Health and Reproductive and Sexual Rights. According to article 2-b, one of the duties of the Commission is the production of general directives on the content and means of implementation of programs aimed at the attention, education, training, promotion, and dissemination of sexual and reproductive rights.

In Mexico, the General Health Act of 1984 includes important actions on sexuality education and information in the context of its regulation of family planning. Article 68-I of this statute establishes that

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890 For a history of sexuality education in Chile and the downsides of current initiatives on the matter see Lidia Casas & Claudia Ahumada, Teenage Sexuality and Rights in Chile: From Denial to Punishment, 17 REPRODUCTIVE HEALTH MATTERS 88 (2009).
891 An interesting regulation on sexuality education in Mexico appears in the Federal Criminal Code and the criminal codes of several states. Article 200 of the Federal Criminal Code penalizes the commerce, distribution, circulation, and offer to persons under the age of eighteen of books, writings, recordings, movies, photographs, printed publicity, images, or objects of a pornographic character. This provision, however, clarifies that these materials are not considered to be harmful or pornographic when their purpose is the dissemination of scientific, artistic, or technical ideas, sexuality education, education on the human reproductive function, and the prevention of STIs and adolescent pregnancy, provided they have been approved by the competent authority. Similar provisions appear in the criminal codes of the states of Baja California (article 261-bis), Coahuila
family planning services include “the promotion of the development of programs of educational communication related to family planning and sexuality education based on the contents and strategies set by the National Council on Population.” More generally, article 112-III of the bill provides that one of the goals of “education for health” is the orientation and training of the population in issues such as sexuality education and family planning, among others. Analogous regulations are included in the General Health Act of Peru (Law 26.842 of 1997). Article 5 of this bill establishes the individual right to receive and demand from the state adequate and timely information on reproductive health, among other topics. This general provision is later developed by articles 117 to 121, which regulate all matters related to health information and its dissemination.

In the LAC region, one of the most positive and illustrative examples on the importance accorded to sexuality education and information is the jurisprudence of the Constitutional Court of Colombia on this matter. Since the Court began to operate in February of 1992, it has forcefully guaranteed and promoted sexuality education for all Colombians. Interestingly, most of the cases in which the Constitutional Court has decided issues related to sexuality education have arisen in the context of cases brought by students or their parents against schools that did not have appropriate programs of sexuality education. The lack of such programs led to misunderstandings of school authorities about the appropriate sex behavior of students that, in turn, produced the violation of their rights to privacy, the free development of personality, and education.

In its first case on sexuality education, the Constitutional Court of Colombia observed that “sexuality education is a conscious effort of communication and transparency between different generations that allows children and adolescents —without, of course, limiting social dialogue to these groups—, in accordance with their emotional conditions and their cognitive capacities, to assume, confront, and go through every stage of their personal evolution in a happy and enriching fashion. In the end, this will allow them to reach a full and harmonious development.” The Court justified sexuality education on the need to counteract (1) “certain types of interferences, misunderstandings, falsifications, and repressions coming from society and many of the places where individuals socialize (parents, schools, peers, the media, etc.) that create dysfunctions and disturb a healthy development of personality,” and (2) “wrong and subjugating social representations of sexuality” that lead individuals to deny their own subjectivity.

On the role of sexuality education, the Constitutional Court stated that “it is not a simple recount of anatomy and physiology and the methods of family planning, but a true process that begins with the birth of the individual and that has in his or her parents the most influential instance.” The Court added that sexuality education seeks to “provide elements and purposes to contribute to a deeper reflection on sexuality and to a clearer and more rational and natural assumption of the person’s body and subjectivity.” In the end, sexuality education is a key instrument in the guarantee of the fundamental rights to privacy and the free development of personality through helping individuals make and adopt conscious and responsible choices and attitudes.

(article 301), Colima (article 161-bis 3), Chiapas (article 329), Guerrero (article 216-bis 1), México (article 204-III), Michoacán (article 162), Morelos (article 211-ter), Nayarit (article 200), Nuevo León (article 201-bis), Oaxaca (article 194), Querétaro (article 258), Quintana Roo (article 192-bis), San Luis Potosí (article 179-bis), Sonora (article 169-bis), Yucatán (article 208), and Zacatecas (article 181-bis).

893 Id.
894 Id., ¶ 3.
895 Id., ¶ 2.
896 See id.
897 See id.
898 See id.
The Court then clarified that although sexuality education is, primarily, a responsibility of parents, the educational system has the duty to include it in the curricula of schools. For the Constitutional Court, this duty seeks to complement the educational process in the hands of parents, but it also arises because “sexual behavior is an essential part of general human conduct that supports a harmonious development of personality and, thus, a peaceful and happy coexistence of society.”\footnote{Id. ¶ 4.} In the Court’s view, the fact that sexuality education is a shared responsibility of parents and schools demands a permanent cooperation and communication between the two instances. According to the Court, “parents have the right to periodically request information on the content and methods employed in sexuality education courses so they can make sure the curricula are in accordance with their own ideas and convictions. Yet, the duty to cooperate demands from parents understanding and tolerance for the teachings imparted by the school, particularly if they are adequate for the age and cultural conditions of the child. Introducing sexuality education in school curricula is not unreasonable, for it may prevent unwanted pregnancies, STIs, and irresponsible paternity or maternity.”\footnote{Id. ¶ 6.}

In further developments of this doctrine, the Colombian Constitutional Court has, for example, clarified that academic freedom and the freedoms of teaching, researching, and learning, guaranteed by article 27 of the Constitution of Colombia, do not grant schools an absolute leeway to ignore the inclusion of sexuality education into their curricula. For the Court, the tight relationship existing between sexuality education and the guarantee of the fundamental rights to privacy and the free development of personality imposes on schools the obligation to offer a compulsory course on this issue.\footnote{See Const. Ct. Col., Decision T-368/03 (May 8, 2003), ¶ II.4.}

In another very interesting extension of the doctrine on sexuality education, the Constitutional Court was keen to approving the terms in which the sexuality education public policy devised by the Colombian Ministry of Education was designed.\footnote{See Const. Ct. Col., Decision T-220/04 (Mar. 8, 2003).} For the Court, “[the documents supporting the Colombian sexuality education public policy] allow us to talk about a true policy of sexuality education. For example, these documents indicate that the conception of sexuality has evolved from a being a ‘simple biological fact’ to ‘an integral dimension of human existence;’ from being a value ‘exclusive of marriage’ to being understood as ‘an autonomous value.’ The documents also put forward the idea that sexuality education ‘should bring about the education of the person in self-esteem, autonomy, social coexistence, and health’.”\footnote{Id. ¶ 21.} In this decision, the Constitutional Court also summarized the four basic constitutional conditions under which sexuality education should be offered: (1) it should be imparted in basic education public and private schools so that students may access it as an “asset of culture,” (2) its contents should be based on the principle of autonomy of the student and the respect for human dignity and the fundamental rights to privacy and freedom of conscience, (3) its contents should be sufficient, in the sense that they should allow students to develop skills of interpersonal communication and respect to difference and the rights of others, to learn about sexual and reproductive health, particularly about the transmission of STIs, and to raise consciousness about the right and duty of responsible parenthood, and (4) it should be taught through special pedagogical tools that guarantee the respect for the rights of the students and by qualified and well trained instructors.\footnote{Id. ¶ 22.}

The importance of sexuality education and information has also been highlighted by the Court in contexts different from schools and the classroom. For example, in a case where an exhibit of erotic pictures had been censored by the public authorities of a Colombian town because they deemed it to be obscene and therefore harmful for the rights of children, the Constitutional Court ruled that the state is forbidden to censor artistic expression on such grounds. For the Court, even though public authorities have the obligation to guarantee the right of children who attend such exhibits to a “harmonious and integral development,” the compliance with this duty “is not incompatible —and it could never be either legally
or pedagogically— with the possibility of showing an exhibit of erotic art. On the contrary, such an exhibit may be a powerful tool for the education in sexuality that the state, along with the parents of children, has the duty to impart."\(^\text{905}\) The Constitutional Court therefore ordered the organizers of the exhibit to “provide children with sufficient information and guidance so that artistic appreciation becomes a truly educational experience."\(^\text{906}\)

In a second case, the Court decided on the exercise of sexual and reproductive autonomy by a woman with a slight mental disability—who, on several occasions, had expressed that she wanted to become a mother—whose mother had requested that a tubectomy be performed on her daughter in order to avoid unwanted pregnancies.\(^\text{907}\) The case arose when the mother enjoined the health care provider that had refused to perform the sterilization procedure. Although psychiatric expert testimony expressed that the petitioner’s daughter lacked the capacity to fully understand the responsibilities stemming from motherhood, the Constitutional Court considered that the testimony also mentioned the possibility that this capacity could be enhanced with appropriate information and support. Instead of ordering the performance of the tubectomy, the Court ordered the health care provider to include the daughter of the petitioner in a special comprehensive educational program that, in accordance with her capacities and needs, provided her with appropriate education for people in her mental condition aimed at the autonomous and responsible exercise of her sexuality and maternity.\(^\text{908}\)

The third and final case arose after the Constitutional Court of Colombia decriminalized abortion in three circumstances (pregnancy is the product of rape, the fetus is unviable, or the pregnancy entails a danger for the life or health of the pregnant woman).\(^\text{909}\) After this decision, the Court has had to explain its meaning in a number of injunctions initiated by pregnant women who requested abortions that were denied by hospitals or other health care providers. In the latest of such opinions, the Constitutional Court recalled that, after its main decision on the decriminalization of abortion in certain cases, Colombian women have a true fundamental right to interrupt a pregnancy if they are in one of the three cases authorized by the Court. This fundamental right includes a subset of rights including the right “of all women to access sufficient, broad, and adequate information that allows them to freely and fully exercise their sexual and reproductive rights, including the right to be fully informed on the decision [of the Constitutional Court decriminalizing abortion in three cases].”\(^\text{910}\) In order to make this right effective, the Court ordered the Ministry of Social Protection, the Ministry of Education, the Attorney General’s Office, and the Ombudsman Office to devise, design, and implement “massive campaigns of promotion of sexual and reproductive rights aimed at securing their free and effective exercise by all women living in Colombia. These campaigns should include the dissemination of Decision C-355 of 2006 as well as the decisions adopted in the instant case. The campaigns should also include a component oriented towards assessing its level of impact and efficacy and should disseminate complete information on these issues in simple, clear, and illustrative terms.”\(^\text{911}\)

### 3.6.3. Sexual Speech

This subsection describes legal developments in countries in the LAC region on speech of a sexual nature, emphasizing how they have dealt with obscene and pornographic forms of expression.

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\(^{906}\) Id.


\(^{908}\) See id. ¶ 2.2.6.

\(^{909}\) See Const. Ct. Col., Decision C-355/06 (May 10, 2006). See also supra Section 3.5.2.


\(^{911}\) Id. ¶ II.7.
At the criminal law level, it seems that countries in LAC less and less penalize obscenity and, with regards to pornography, criminalization is more and more exclusively confined to child pornography. Yet, there are still some exceptions. Criminal law in Argentina, Brazil, Chile, Guatemala, Peru, and the Dominican Republic penalizes obscene acts or acts against “morality and goods customs.” None of these regulations define what should be understood by “obscenity” or “acts against morality and good customs.”

In Argentina, article 129 of the Criminal Code punishes with a fine from 1000 to 15.000 Pesos anyone who “performs or forces another person to perform obscene exhibitions that may be involuntarily watched by third parties.” Articles 233 and 234 of the Brazilian Federal Criminal Code criminalize obscene acts, writings, and objects. While article 233 cursorily states that the performance of an “obscene act” in a public place or in a place exposed or open to the public carries a sentence of imprisonment from three months to one year or a fine, article 234 penalizes with imprisonment from six months to two years or a fine the manufacture, import, export, purchase, sale, or keeping of writings, designs, paintings, images, or any other obscene object for commercial purposes or for their public distribution or exhibition. This latter provision also punishes obscene public or accessible to the public theatre performances, movie screenings, radio shows, or any other sort of performance or speech. Obscenity is criminally regulated in very similar terms in Guatemala and Peru. Article 195 of the Criminal Code of Guatemala establishes an offence called “obscene exhibitions” that punishes with a fine from 200 to 2000 Quetzals anyone who performs or forces another to perform obscene acts in a public or open to the public place. In Peru, obscene publications and exhibitions are also criminalized by article 183 of the Criminal Code. The general modality of this crime imposes a sentence of imprisonment of no less than two years on whoever performs exhibitions, gestures, touchings, or any other obscene act in a public place.

The criminal law of Chile and the Dominican Republic does not penalize obscenity but acts against “morality and good customs.” Article 373 of the Chilean Criminal Code punishes with imprisonment from 61 days to three years anyone who offends “modesty” (“pudor”) or “good customs” with acts of grave scandal or significance. More akin to other regional criminal prohibitions of obscenity, article 374 of the Criminal Code of Chile penalizes the sale, distribution, or exhibition of songs, printed or not leaflets or other writings, figures, or images offensive to “good customs” with the imposition of a sentence of imprisonment from 61 to 540 days. In addition, this provision clarifies that the author of the writing, the drawing, or the image or the person who reproduced them will be subject to the same sentence. In the Dominican Republic, article 287 of the Criminal Code criminalizes the exhibition or distribution of songs, leaflets, figures, or images “contrary to morality and good customs” and imposes on the perpetrator a sentence of imprisonment from one month to one year and a fine from 16 to 100 Pesos.

In other countries in the LAC region obscenity is penalized only when children and adolescents are involved through the crime of “corruption of minors.” This modality of criminalization of obscenity may be illustrated by regulations adopted in Costa Rica and Mexico. According to article 167 of the Costa Rican Criminal Code, one of the modalities of the crime of “corruption” is the use of persons below the age of eighteen in public or private performances or exhibitions for erotic, obscene or pornographic purposes even if the victim consented. Sentence for this offence is imprisonment from three to eight years. In Mexico, article 201-f of the Federal Criminal Code sets forth that one of the modalities of the

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912 This provision aggravates the offence (imprisonment from six months to four years) (1) if the victim is below the age of eighteen, or (2) if the victim is below the age of thirteen independently if he or she consented to watch the exhibition.

913 This article imposes an aggravated sentence (imprisonment from three to six years) on anyone who (1) shows, sells, or gives to a child below the age of fourteen objects, books, writings, or images that, because of their obscene nature, may affect his or her modesty (“pudor”) or “prematurely arouse or pervert his or her sexual instinct,” and (2) incites a child below the age of fourteen to perform an obscene act. The provision also imposes the same aggravated sentence to the manager or the person in charge of a movie house or a theatre who allows a child below the age of fourteen to watch obscene movies or any other sort of obscene performance.
offence of “corruption” is forcing or inducing a person below the age of eighteen to perform “true or simulated sexual or body exhibitionism acts for a lewd or sexual purpose.” This crime is punished with imprisonment from seven to twelve years and a fine.  

As mentioned before, Inter-American law forbids child pornography. Most countries in LAC have enacted criminal legislation in order to enforce this prohibition at the domestic level. These regulations vary in their complexity and regulate several hypotheses. For purposes of this section, a broad notion of child pornography includes (1) the use of children or adolescents in the production of pornography, (2) the distribution, sale, or possession of pornographic material depicting children or adolescents, and (3) the provision of pornographic materials to children and adolescents. While some countries regulate all three cases, other countries only regulate one or two of them.

Perhaps the most encompassing regulations in the region are those of Argentina, Colombia, Chile, Costa Rica, and Peru. While the regulations of Argentina, Colombia, and Peru are quite simple, in the sense that they include most hypotheses of child pornography in just one provision of the criminal code, the Chilean and Costa Rican regulations are more complex and devote several articles of the criminal code to prohibiting child pornography.

**Article 128 of the Criminal Code of Argentina** punishes with imprisonment from six months to four years anyone who produces, finances, offers, trades, publishes, facilitates, disseminates, or distributes, by any means, child pornography. This provision defines as child pornography any representation of a person under the age of eighteen performing “explicit sexual activities,” any “representation of [a person’s under the age of eighteen] genitalia mainly with sexual purposes,” and the organization of the live performance of explicit sexual representations where persons below the age of eighteen are participating. The mere possession for “unequivocal purposes of distribution or sale” of child pornography materials carries a sentence of imprisonment from four months to two years. Finally, the same provision punishes with imprisonment from one month to three years anyone who allows the access of children below the age of fourteen to pornographic performances or provides them with pornographic materials. Colombia also regulates child pornography in quite simple terms. **Article 218 of the Colombian Criminal Code** sets forth that anyone who “photographs, films, records, produces, disseminates, offers, sells, buys, possesses, carries, stores, transmits, or exhibits, by any means, for personal use or for exchange, real representations of sexual activity involving a person below the age of eighteen” will be punished with imprisonment from ten to twenty years and a fine from 150 to 1,500 monthly salaries. The same sentence is applicable to anyone who feeds Internet databases with child pornography. Similarly, **article 183-A of the Peruvian Criminal Code** punishes with imprisonment from four to six years and a fine anyone who possesses, manufactures, distributes, exhibits, offers, trades or publishes, imports, or exports objects, books, writings, visual or sound images, or organizes live performances of a pornographic nature in which persons between the ages of fourteen and eighteen are used. If the victim is under the age of fourteen, sentence is imprisonment from four to eight years and a fine.

Chilean criminal law regulates the three hypotheses in three different articles of the Criminal Code. **Article 366-quater of the Criminal Code of Chile** imposes a sentence of imprisonment from 541 days to five years to make a person below the age fourteen hear or watch pornographic materials or performances. The same conduct is punishable when committed with adolescents between the ages of fourteen and eighteen if force or intimidation are used or the perpetrator takes advantage of a mental disability, a situation of dependency, or the sexual inexperience and ignorance of the victim. **Article 366-quinquies of the Chilean Criminal Code** regulates the production of child pornography. According to this

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914 It is worth noting that this provision specifies that preventive or educational programs devised by social, public, and private institutions aimed at imparting sexuality education, education on the reproductive function, the prevention of STIs and adolescent pregnancy are not considered to be “corruption.” The same exception applies to pictures, videos, recordings, or images that are family memories.

915 See supra Section 3.6.1.
provision, whoever participates in the production of pornographic materials in which persons below the age of eighteen have been used will be punished with imprisonment from three to five years. Child pornography is defined as “any representation of persons less than eighteen years of age performing real or simulated explicit sexual activities, or any representation of their genitalia with primordially sexual purposes.” Finally, article 374-bis of the Criminal Code of Chile prohibits, on the one hand, the trade, import, export, distribution, dissemination, or exhibition of child pornography, and on the other hand, the “malicious acquisition or storage” of child pornography. In the first case, sentence is imprisonment from 541 days to five years, and, in the second case, imprisonment from 541 days to three years.

The criminal regulation on child pornography of Costa Rica is quite similar to the Chilean one. To begin with, article 173 of the Costa Rican Criminal Code forbids the manufacture, production, and reproduction of pornographic materials that use persons under the age of eighteen, their image, and/or their voice, punishing it with imprisonment from three to eight years. The same provision imposes a sentence of imprisonment from one to four years on whoever transports or imports child pornography. According to article 173-bis of the Criminal Code of Costa Rica, the mere possession of child pornography carries a sentence of imprisonment from six months to two years. Finally, article 174 of the Costa Rican Criminal Code regulates two modalities of dissemination of child pornography. First, it criminalizes selling, dissemination, or exhibition of pornographic materials to persons below the age of eighteen. Second, it penalizes the exhibition, dissemination, distribution, or trade, by any means and under any title, of child pornography. In both cases, sentence is imprisonment from one to four years.

The Mexican regulation on child pornography is less encompassing for it only refers to one of the hypotheses of this crime pointed out above. Article 200 of the Federal Criminal Code of Mexico punishes with imprisonment from six months to five years and a fine any person who trades, distributes, exposes, circulates, or offers to persons under the age of eighteen books, writings, recordings, movies, pictures, printed announcements, images, or objects of a pornographic nature through any means.

The constitutional protection of obscene and pornographic speeches has also been discussed by some domestic courts in the LAC region. A number of decisions adopted by the Court of Constitutionality of Guatemala and the Constitutional Court of Colombia are useful to illustrate this issue.

In 2003, the Court of Constitutionality of Guatemala struck down article 196 of the Criminal Code that penalized the publication, manufacture, or reproduction of obscene materials and the performance of obscene shows.916 For the Court, article 35 of the Guatemalan Constitution establishes that every aspect of freedom of speech—including criminal offences related to its exercise—ought to be exclusively regulated by the Constitutional Act for the Dissemination of Thought (Ley constitucional de emisión del pensamiento) and not by ordinary legislation such as the criminal code.917 However, the Court of Constitutionality recalled—as obiter dictum—that any limitation imposed on freedom of speech by means of criminal sanctions has to be reasonable and must not amount to an “excess that nullifies the guarantee of freedom of speech.”918 Drawing on scholarly literature, the Court observed that obscene publications are generally criminalized as a means to affecting freedom of speech and artistic creativity. It also pointed that, according to that literature, judges who enforce such criminal prohibitions are “perceived by the general opinion as enacting a moralism that is foreign to any modern society.”919 The Court of Constitutionality finally indicated that if such a crime is established, it should be restrictively enforced and interpreted so it does not encompass expressions that have as their aim artistic creation, information, or even the critique of social or cultural standards.920

917 See id. ¶¶ II-IV.
918 Id. ¶ V.
919 Id.
920 Id.
The Constitutional Court of Colombia has also decided a number of cases on obscenity useful to illustrate the dynamics of this form of sexual speech in light of freedom of expression. One of the first and most important cases on these matters that reached the Court arose when a public exhibition of male nudes was censored by the public authorities of a town in the Colombian Caribbean region who deemed it to be “pornographic, contrary to the prevailing regional morality, and without artistic value.” The Constitutional Court protected the right to artistic expression of the photographer and considered that, in a state based on the principle of pluralism, public officials are forbidden to censor works of art based on their particular religious, moral, or ideological worldviews. For the Court, public authorities may restrict the right to artistic expression only when its exercise could entail an objective social harm or a grave harm to the rights of others.

In another case, the Constitutional Court had to decide on the constitutional validity of the decision adopted by the National Television Commission to suspend the broadcasting of a TV talk show with some sexual contents that was aired at a time of the day when children were potential watchers. The Commission suspended the program because it dealt with sexuality in “morbid and obscene fashion” and therefore offended “public order.” For the Court, although the Commission had a general power granted by statute to suspend TV programs “in cases of extreme gravity,” the program at stake did not fall within that category of cases. In the Court’s view, this was an act of censorship that violated article 20 of the Colombian Constitution. The Constitutional Court finally observed that, instead of censoring the program, the Commission could have ordered the TV channel to change the timeframe in which the show was aired in order to protect children from inappropriate sexual contents.

Finally, in its most important case to date on sexual speech, the Colombian Constitutional Court had to decide on the constitutional compatibility of the ruling of an administrative court ordering the Ministry of Communications (1) to impose sanctions on a radio station that broadcasted a radio show where explicit sexual and salacious language was often used, and (2) to order the radio station to modify the contents of the radio show and make them compatible with the rights of children and adolescents. In the core of this decision, the Court examined the constitutional status of sexually explicit, indecent, shocking, or socially offensive expressions. As a basic principle, it stated: “In principle, sexually explicit language is protected by freedom of speech, by the presumption of unconstitutionality of any state limitation to its dissemination, and by a presumption of its primacy in case of a conflict with other rights.”

For the Constitutional Court, this basic principle does not mean that sexually explicit speech could not be limited in order to protect other rights and, particularly, the rights of children and adolescents. However, in order to be constitutionally valid a limitation to this form of expression must comply with six conditions:

1. it must be imposed by a law passed by the legislature where the limitation has to be tailored in precise and specific fashion,
2. it must pursue a compelling public interest (protection of the rights of others, protection of public order and security, protection of public health, or protection of public morality),
3. it must be necessary to reach the compelling public interest it seeks to fulfill,
4. it must be subsequent and not previous to the dissemination of the expression at hand,
5. it must not amount to censorship and therefore it must be neutral with regards to the content of the expression that is being limited, and
6. it must not impose an undue burden on the exercise of freedom of speech.

The Court then clarified that sexually explicit discourse “is subjected to a broader regulatory leeway, for its exercise may conflict with other rights protected by the Constitution, particularly the rights of children.

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922 See id. ¶ 3.
923 See id. ¶ 4.
925 See id. ¶ III.2.
926 See id.
928 Id. ¶ 4.7.2.1.
929 See id. ¶ 4.5.3.
and adolescents... [The limitation, however, must comply with all] the conditions for a limitation to freedom of speech to be constitutionally legitimate." In particular, the Constitutional Court was keen to clarifying that limitations on sexually explicit speech based on reasons of public morality must be defined in precise and specific terms and would be subjected to judicial strict scrutiny.

One of the most interesting aspects of this decision is the classification drawn by the Court between forms of what it generically dubbed “sexually explicit expressions;” a category that includes forms of discourse going from “the innocent joke” to “pornography with violence.” For the Constitutional Court, the criteria to distinguish between forms of sexually explicit expression are the characteristics of the specific form of expression, the language employed, and the context of the speaker and the audience. In the Court’s view, this means, for example, that “the criteria on pornography are not automatically applicable to every form of sexually explicit expression.” With regards to the possibility of limiting or regulating these discursive forms in order to protect the rights of children and adolescents, the Constitutional Court observed: “Insofar as children and adolescents are possible consumers of sexually explicit materials, they do need legal protection because such materials may produce specific negative effects on their formation and development process that may harm the autonomous exercise of their freedom, wellbeing, and best interest. [The limitation may also be oriented towards the safeguard] of the rights of the parents to guide the formation process of their children according to the rules they deem to be the most appropriate.” For the Court, however, limitations to the access of children and adolescents to sexually explicit materials have to be drawn so that they “do not end up measuring or valuing the type of expressions to which adults have access.”

The Constitutional Court finally clarified that when sexually explicit discourse is disseminated through the media it admits a broader margin of regulation than other forms of speech, given the sort of constitutionally protected interests that, in such a case, conflict with freedom of expression. According to the Court, the extension of the regulatory margin depends on (1) the impact of the specific media (if it is intrusive, if it allows the audience to reflect on the messages, the sort of public or private spaces reached by the media, the possibility of the audience to opt out and chose other messages), and (2) the nature of the audience (basically if it includes children and adolescents or adults who are not willing to hear the message and are unable to opt out).

Based on these principles, the Constitutional Court of Colombia considered that the order of the administrative court to the Ministry of Communications was a prohibited form of censorship and therefore left it without any effects. The Court then ordered the radio station to initiate a process of self-regulation of the contents of the talk show —particularly with regards to the interests of children and adolescents — that would be an expression of its autonomy and social responsibility.

3.7. Sex Work

This section examines how laws governing the exchange of sexual services for money or goods (often called “sex work” or “prostitution”) influence the sexual health of persons in sex work, as well as facilitate or prevent discrimination, abuse and violence against them. Analysis of the law’s influence on the health and rights of people in sex work requires careful attention to legal words and language: terms and their meanings have changed historically, and in addition do not have uniform meaning across nations and legal systems.

930 Id. ¶ 4.7.
931 See id.
932 See id. ¶ 4.7.1.
933 Id.
934 Id. ¶ 4.7.2.1.
935 Id.
936 See id. ¶ 4.8.1.
This paper mirrors the original terminology when referring to the text or discussing the text of national and regional laws which regulate prostitution (often formally called prostitution laws, as well as debauchery or morals offense codes). Confusingly, some national laws prohibiting prostitution are called anti-trafficking laws (i.e., using the same expression as the contemporary international law term “trafficking,” which today has a different meaning entirely. The terms “sex work” and “sex workers” may be used to describe the practices of, and the people engaged in, exchanging sexual services for money or goods, either regularly or occasionally.

States vary in how they approach prostitution or sex work in the law. Some use criminal law to prohibit various aspects of prostitution. Other states permit buying and selling of sexual services, subject to administrative regulations that govern work and labor practices generally. Others have developed regulatory schemes directed specifically at the people, conditions, and venues involved in the exchange of sexual services for money or goods, with strong penalties for violating these rules. Prostitution laws may be gender-specific, punishing only women for selling sex. Nevertheless, men who sell sex in legal systems with sex-specific criminal prostitution codes may face penalties under other criminal laws prohibiting indecent conduct, same-sex sexual behavior or vagrancy, for example.

Criminalization in particular marginalizes people in sex work: to avoid arrest, detention, or conviction, as well as general harassment and surveillance, people may distance themselves or hide from authorities in law, health and education, as well as from family; migrate to other towns or countries; or otherwise organize their lives outside formal social structures. Criminal convictions for prostitution have lasting social consequences, in addition to their direct effects through fines or detention. Criminal records may bar individuals from gainful employment, public housing, or other social benefits. Even in states that do not criminalize prostitution (and more so in states that do), people in sex work face significant social stigma. This stigma is variously linked to disapproval of sex for non-reproductive purposes or sex outside or before marriage, particularly for women, as well as the short-term exchange of sexual services for money outside domestic or “private” locations. This stigma constrains sex workers from seeking support and operates through the condemnation of authorities in key institutions, enabling abuse with impunity at the hands of both state and non-state actors and generally erecting barriers to sex workers taking steps individually or through organizing to claiming their rights, including rights to health.

Research on “sex work” finds that it takes protean forms. Most exchanges of sex for money, food, or resources occur in informal labor sectors, often in combination with other work, as a livelihood strategy. Sex work is found at all socio-economic levels, with corresponding differences in income, danger, and vulnerability. The selling and buying of sexual services takes place in a range of physical environments, including brothels, bars, clubs, homes, hotels, cars, streets, and outdoor settings. The context of sex work ranges from highly organized, with multiple participants, social differentiation, and inequality of power to individual workers operating independently in the informal sector. Sex work may be arranged through direct personal contact (involving the sex worker or a go-between) or via telephone, the Internet, or other modes of solicitation or advertisement. The persons involved in sex work can be male, female or transgender and may range in age.

This extensive variation in the people, places and practices which constitute “sex work” has tremendous implications for health and rights-based policy interventions. Unequal and vastly different vulnerabilities and capacities of people in sex work defy any single characterization. Moreover, a health and rights-based evaluation also reveals that the participation of people in sex work is essential to devising the interventions needed to respond to their needs. However, the dominance of criminalization as the legal response to sex work impedes cooperative and participatory measures.

While persons under 18 years of age may be involved in sex work, under international standards their involvement is deemed abuse or exploitation (according, for example to the UN Palermo Protocol). Persons less than 18 years involved in sex work should thus—under no circumstances—be treated as criminal offenders.
Under conditions of criminalization, many people in sex work face steep barriers to realizing their fundamental rights, such as rights to health, equality, privacy, association, family life, housing and education, and participation in the cultural life of the community. Under regimes in which some forms of prostitution are legal, sex workers may continue to face social and practical exclusions because of the continued weight of stigma, or because the laws differentiating what is legal and what is criminal in regard to selling sex maintain surveillance over sex workers which render even legal sex workers vulnerable to both state and non-state abuse. Persons in systems that permit some forms of sex work, however, may have better opportunities to organize, share information, and to seek public redress for abuse and discrimination.

In many cases, the state and its agents are the primary abusers of persons in sex work. Arbitrary detention, irregular deportation, forced evictions and removal of children without due process are often committed under the claimed authority of law, but without formal warrant, arrest or other due process protection. Transgender sex workers, migrant sex workers and sex workers of minority racial or ethnic groups can be particularly vulnerable to abuse by law enforcement operating under the cover of the law. They face compounded barriers in seeking redress for these abuses. They also face additional hurdles in accessing health services and information.

The use of raids, and exemptions from the need for independent review of warrants for entering premises or arrest, are common in legal regimes regarding prostitution, demonstrating high levels of state disregard for people in sex work. Extralegal abuses by state agents, including rape, assault, murder, theft, and extortion, are committed with impunity. Revolving door arrests and mass arrests coupled with a high degree of state-generated sensational publicity reveal the extent to which the spectacle of “punishing the prostitute” continues to serve an interest of the state in controlling sexual behavior through the production of the “prostitute” as moral scapegoat. Often, these public arrests are tied to claims of state action on behalf of public health or national morality.

Health services, provided by both state and non-state actors, have historically not been a site of rights promotion for people in sex work. State health controls, through measures purportedly serving a public health purpose, are a frequent source of violations of sex workers’ rights: mandatory testing for STIs and HIV; routine infringements of confidentiality regarding HIV test results and other medical information; and mandatory health identity cards, which must be displayed to authorities on demand, thus violating the right to privacy. Moreover, the orthodox understanding of sex workers as a discrete and “findable” sub-population of women (as opposed to an often diffuse and diverse population of women, men and transgendered persons as described earlier) has led to interventions tailored in ways that miss many people in sex work. Finally, the tendency of health programs designed for people in sex work to focus exclusively or disproportionately on STI and HIV prevention is a constraint on the right to health, and violates rights to equal treatment, as people in sex work need comprehensive health services for everything from contraception, pre-and post natal care, to dental care and overall care for physical and mental health.

The state tolerates abuses by non-state actors, such as violence by clients, abuse from neighbors and family members, or abuse as well as substandard care or humiliating treatment by health professionals. Discrimination gains justification by the imputation of “prostitution status,” real or imagined, reducing the ability of persons in sex work to function as full members of society. The inability of sex workers to access bank accounts, decent housing, social security schemes, or education for their children, because of discrimination and prejudice, contributes to their precarious livelihood and increases social exclusion.

The health status of many people in sex work can be quite variable: it is often relatively low, in part related to insecurity of income, food and housing for the most vulnerable persons in sex work, and

938 Interventions also often presume that condom use with casual clients is always the greatest concern in sexual health, whereas some studies show that condom use is less frequent with intimate partners, posing a greater risk for STI and HIV transmission.
because of the difficulty of accessing appropriate and respectful health services for prevention or treatment. The barriers to care and accurate information are proportionate to socially discriminatory attitudes and legal barriers. That said, people in sex work with higher socio-economic status may enjoy relatively good health status, especially if they also have access to adequate services (although they remain in jeopardy through police abuse and risk of incarceration.)

Having multiple sex partners under conditions of unsafe sex increases the risk of sexually transmitted infections, yet prevention efforts directed at sex workers for STIs and HIV are often demeaning, discriminatory, substandard, and ineffective. Effective prevention programs are often stymied by police practices under criminalization regimes: for example, while condom promotion is essential to HIV prevention efforts, in many settings possession of condoms is used as evidence of criminal activity (engaging in prostitution). In many states, ARV treatment is denied to sex workers entirely de facto, or persons deemed more “innocent” are prioritized for treatment as a matter of policy.

Many people in sex work have little recourse to law to vindicate their rights, whether to custody of their children, rights to their wages, or prosecutions of perpetrators of violence. Often, police and other authorities will not register their complaints, and many sex workers come to believe that they do not enjoy the same status as other members of their community. Few legal defenses are mounted to challenge the arbitrary detentions or deportations of (alleged) sex workers or to investigate crimes committed against sex workers by law enforcement.

Much of what is termed “prostitution law” (law directly prohibiting prostitution) is criminal law. However, many other laws (loitering, vagrancy, “riotous behavior” laws, zoning and housing laws, health codes, bar or cabaret licensing laws, public indecency laws, etc.) also have a direct effect on the practice of sex work. The criminal laws on prostitution vary widely: in order to analyze the specific effects of law, it is critical to identify with great specificity what particular acts are prohibited. Inquiry into law must ask: is the actual exchange of sex for money or goods a crime? Are other activities (by the sex workers themselves or others) criminalized, for example, solicitation (the public attempt to seek clients or make an offer for a sex/money exchange), pandering (to act as a go-between in facilitating the sexual exchange), living off the earnings of a prostitute, managing or renting premises for the purposes of prostitution, etc. Many systems do not criminalize the exchange of money for sexual services, but rather the penumbra of conduct surrounding it.

939 The English language literature of the last two decades about prostitution law often characterizes legal approaches to prostitution with a set of terms claiming to delineate essential categories: abolitionist, prohibitionist, regulationist, as well as using the terms to decriminalize, to legalize, and to regulate. Despite their ubiquity, these categories do not enable careful analysis. First, the categories suggest that there are clear boundaries between “types” of legal approaches, such that one can assign any national or local law to one category. These assignments are in fact very problematic: for example, does one consider systems that decriminalize the seller and criminalize the buyer “prohibitionist” or partial decriminalization? Further analysis grounded in empirical research reveals that it is mistaken to call this decriminalization, even of the seller, because in practice the person selling sex is not free of criminal surveillance. For example, sex workers may be taken into custody in order to be questioned or to ensure their evidence in any prosecution of the buyer. Furthermore, this taxonomy attends exclusively to laws governing the exchange of sexual services, ignoring the many overlapping laws (found in other parts of the criminal code, such as statutes punishing vagrancy or indecent conduct, as well as health codes, zoning and other administrative laws) that effectively penalize sex work over and above the offences listed in the criminal code. Finally, even more confusion has been engendered over the meaning and distinctions between “legalized” and “regulated” prostitution, as some use the term ‘regulation’ to refer to prostitution-specific registration and surveillance schemes, while others use the term to refer to any system in which the government plays a role in setting the conditions of work (which may be comparable to state regulation of safety and health in restaurants or other service sectors.) As noted in the discussion in the text, different legalization schemes can be vary greatly in their promotion of equality, autonomy and health, as well as in their impact on sexual health.

940 Many legal systems that are understood to “criminalize prostitution” do not, in fact, criminalize the specific acts of exchange—in part because the proof is so difficult to obtain, absent police surveillance in the private space where the sexual behavior occurs, or direct police participation in the sexual acts themselves. A key reason given for law reform decriminalizing prostitution is corruption by law enforcement agents and abusive or rights-violating methods of surveillance. Confusion arises about terminology, when sexual exchange per se is not criminalized, but the penumbral conduct is: some observers describe this as a legal environment in which “sex work is not a crime;” while others deem the penalization of acts supporting the exchange of sex for money as “criminalization.”
Systems which permit sex work under regulatory codes vary widely in their impact on sexual health and rights. Some systems are rights and health violating, such as those which mandate health cards (as described above, for example), or which restrict the abilities of people registered as sex workers to choose their own housing or live with their families, or which condition limited health care services on registration. These systems transgress norms of equal protection of the law, as well as constraining the underlying rights of privacy, family life, and rights to housing and health. Many legal regimes also severely constrict freedom of movement (through regimes of zoning and registration, or provisions barring working from living together or assigning sex work to isolated areas, rendering persons in sex work more vulnerable to violence and other forms of abuse.

Other legal regimes are more rights and health promoting, particularly as they move toward greater integration with general labor regimes, so that the system ensures access to insurance and other social benefits, and ensures health and safety conditions akin to those found in other service sectors. Other key aspects of health and rights-promoting legal regimes for sex work are: ensuring access to health services for a full range of mental and physical health concerns (and not solely for sexually transmitted diseases), and guaranteeing rights to organize and access to the courts to vindicate a full range of rights.

Even legal systems which administer the conditions of sex work (i.e., permit it as labor) have not succeeded in disentangling sex work from criminal law. Some legal systems define only some forms of sex work as legal (brothel-based, or escort services, for example); street-based or independent sellers of sex may still face criminal sanctions. Some systems permit only nationals of their country (or from a limited number of other countries) to work in the sex sector: persons who fall outside the legally permissible status commit criminal offenses in selling sex. These complicated inter-relationships between legal and criminalized forms of sex work suggest that even systems often characterized as “legalized” can put sex workers at risk of law enforcement monitoring (and concomitant harassment) to a very high degree, suggesting the need for close review of all regulatory and administrative systems regarding sex work from a health and rights perspective.

The historical usage of the word “trafficking” to mean all prostitution has produced a great deal of confusion in the analysis of the relationship between law, human rights, health, and sex work. The 1949 UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others equated all movement into prostitution with the international crime of trafficking. As noted, however, this Convention has been supplanted in practice by the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons which focuses on trafficking as a crime defined by its use of force, fraud and coercion into a range of labor sectors, including but not limited to prostitution. (For persons under 18, however, movement into prostitution is deemed “trafficking” even absent any force, fraud or coercion.) Trafficking as defined in the Protocol is a serious human rights violation, and it has serious effects on. When the circumstances of persons in sex work fit the crime described in the Protocol, it is critical that authorities respond as they would to any other trafficked person: with full regard for their rights and with concern for the abuses they have suffered, including health consequences. Trafficked persons, including persons trafficked into prostitution, may face extreme abuse in their working conditions, lack of pay, inability to leave, and threats to selves and family members. Trafficked persons in sex work, therefore, are rarely able to organize, employ health promotion and disease prevention measures, and make decisions about clients, which lie at the core of successful sex worker-led health and rights based efforts.

From a health and rights perspective, both under-prosecution and over-prosecution in regard to persons in sex work constitute failures to respect rights, especially in creating the conditions for redress and restitution. On the one hand, many national laws and policies often fail to respond to abuses against sex

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941 This is distinct from many labor regimes, where the irregular immigrant commits an administrative violation in working out of status, but not a criminal offense.
942 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, article 3.
workers, applying gender-stereotyped presumptions about sex workers’ credibility and dismissing their accounts of abuse. On the other hand, campaigns against trafficking into forced prostitution often mistakenly assume all people in sex work, particularly women, are victims of trafficking, and have no capacity to consent to exchange sexual services for money. During criminal investigations, people in sex work may be detained against their will or treated as accomplices in the trafficking of others. The equation of all prostitution with trafficking elides two very different conditions and circumstances. This confusion produces ineffective legal and health interventions such as “raid and rescue” of un-trafficked sex workers, whose livelihoods, associations, and safety nets are torn apart by the raids.

As noted, there is agreement that persons under 18 should not engage in sex work. More difficult to formulate, however, are the legal and policy responses that constructively engage with teenagers engaged in survival sex or other forms of regular or irregular sex work, not infrequently occasioned by ejection from their natal homes or attempts to escape abuse. At minimum, they need access to services to help them protect their health, as well as education, housing, and support that allows for rapid exit from sex work. Many health programs which target young persons aged 14-24 fail to offer services to address the needs and contexts of the diversity of young people in sex work. Transgender or homosexual youth, who are escaping violence in their homes or communities, find both resources and abuse when they leave home and move to larger urban areas, where many engage in survival sex. Services should be designed for them that meet their particular needs and barriers to exiting sex work, and integrating into safer community settings.

Moreover, young persons in sex work should not be prosecuted as criminal offenders. Few legal regimes have incorporated this approach, especially in light of their reliance on punitive and non-rehabilitative juvenile justice systems. Rescues and raids on behalf of minor sex workers often place them in abusive conditions of detention in “rescue or remand homes.” Girls face particular problems when rescued from sex work, as they may be returned to communities in which they are culturally stereotyped as no longer “good” women, assumed to be HIV positive unable to re-integrate. Moreover, the raid and rescue strategy has not proved sustainable in many sites, as debt structures that facilitated the minors’ entry into sex work motivates indebted families to send still-younger children in their place. Alternative livelihood strategies and education must be created.

It could be argued that, historically, in the LAC region sex work appears as a phenomenon mostly regulated by the criminal law. Most countries in the region pride themselves of having decriminalized prostitution (both sides of the transaction of sex for money) and only punishing the crime of pimping (“proxenetismo,” “lenocinio,” and, in certain countries “rafiandería” or “rafianism”) or offences similar or related to it. Although this may be true as a very general descriptive assertion, a closer examination of criminal legislations reveals a more complex landscape, particularly since the end of the 1990s. The current status of sex work in the criminal law of countries in LAC may be described as a combination of the following factors: (1) prostitution as such is indeed not a crime, 943 (2) in most cases

943 Even this assertion should be taken with a grain of salt. Although prostitution is not a crime as such, meaning that it is not an offence included in the criminal code, this does not mean that, in certain countries, it may be an administrative contravention — subject to arrest by police authorities— regulated by administrative law. Quite often, administrative legislation sanctioning the exercise of prostitution is enacted at the local level and therefore it is quite ubiquitous and difficult to find. Examples of this sort of regulation are the codes of contraventions (códigos de faltas or códigos contravencionales) of some Argentine provinces. Provisions imposing administrative sanctions on the exercise of prostitution and aiming at protecting “morality and good customs,” “public morality,” or “decency” may be found in the codes of contraventions of the provinces of Buenos Aires (articles 68 and 92), Formosa (article 98), La Rioja (article 60), Mendoza (article 54), Neuquén (articles 58 and 61), and San Juan (article 96). Another modality of keeping prostitution within the orbit of the criminal law is through what has been called “security measures.” In civil/continental criminal law, “security measures” are a form of preventive punishment. Taking into account the personal conditions of the agent of a specific crime, they are imposed in order to prevent him or her from committing a new offence. Security measures thus generally proceed when (1) the agent is incapable to fully understanding the meaning of his or her actions because he or she is underage or has a mental disability, and (2) certain traits of the perpetrator’s
pimping remains a criminal offence, (3) a trend seems to be developing to penalize pimping only when the pimped sex worker is below the age of eighteen or, if the sex worker is above this age, only when there is coercion, violence, or force, (4) the criminalization of new forms of sex work of children and adolescents such as sex tourism, and (5) the criminalization of trafficking for purposes of sexual exploitation or prostitution.

The complexity of this regulation operates against a regional backdrop of inexistent or very inchoate and precarious regulation of sex work. With this combination of factors (complex criminal law and absence of regulation), it is possible to raise a number of serious questions regarding the true legal status of sex work in the LAC region. Referring to the case of Spain, where the lack of legal definition of prostitution seems to be quite similar to the situation in LAC, Manuel Cancio Meliá,944 a leading criminal law commentator, recently argued that when all criminal offences punishing prostitution were removed from the Spanish Criminal Code of 1995 (where only the crime of enforced prostitution was left), it seemed “that sex work was on its due way to being normalized, leaving to the criminal law only the cases where consent was lacking.”945 However, this situation changed in 2003 when a new offence was introduced to punish the conduct of “whoever profits from the exploitation of the prostitution of another person even with his or her consent.” For Cancio, the use of the word “exploitation” is too broad for the offence may apply to any person who participates and obtains any benefit from prostitution. In addition to this, and similarly to LAC, Spain lacks any serious administrative regulation of sex work. In Cancio’s view, the combination of the current criminal law and the absence of administrative regulation produces “a general lack of legal definition of sex work: prostitution, in the strict sense of the word, free from coercion, is in a limbo; it is neither licit nor illicit.”946 In his view, “the most striking feature of the Spanish criminal system with regards to prostitution is hypocrisy: it allows that sex work develops with almost no control, but keeps criminal provisions that seem to disapprove of it.”947

Given the current legal situation of sex work in LAC, Cancio’s ideas work as an eye-opener admonition: the combination of an absence of administrative regulation of prostitution that gives a clear signal that it is a form of legal work and the existence of criminal legal provisions that, without criminalizing sex work as such, still express society’s moral disapproval will make the idea that most countries in LAC have decriminalized prostitution a libertarian mirage. Against this backdrop, this section examines the legal status of sex work in the LAC region. It will first describe the place of prostitution in regional criminal law and then present some inchoate forms of regulation of sex work in LAC.

### 3.7.1. Sex Work in the Criminal Law of LAC

The description of criminal legislation on prostitution in LAC may be organized along three axes: (1) the criminal regulation of pimping and similar conducts, (2) the criminal regulation of forms of sex work of children and adolescents, and (3) the regulation of trafficking for purposes of sexual exploitation and prostitution.

Pimping has perhaps been the most constant form of criminal prohibition related to prostitution in the LAC region. Its regulation, however, may adopt different modalities. The first modality is pimping in its...
“classic” form. Regionally, this crime adopts different phrasings. It could be argued that the most salient feature of this crime is its semantic volatility: it encompasses a broad range of conducts surrounding the activity of the sex worker. Sometimes pimping just refers to obtaining any economic profit from the prostitution of any person of any age. Other times, the offence makes explicit the forms through which economic profit is obtained and criminalizes anyone who favors, promotes, facilitates, or induces the prostitution of other persons of any age in order to obtain any sort of economic profit. Criminal provisions of this sort still exist in Brazil, Costa Rica, Guatemala, Mexico, Peru, and the Dominican Republic.

The Brazilian regulation on pimping is complex and dense: it uses a broad array of verbs (induce, attract, facilitate, prevent, make difficult, maintain, profit, participate, and so on) to describe the conducts of people around the work of the prostitute. Although the sex worker as such is not punished, a caveat arises as to whether such a dense criminal regulation of the activities of people surrounding him or her may have perverse effects of criminal prosecution on the prostitute. Article 227 of the Criminal Code of Brazil establishes the crime of “mediation to satisfy the lewd desires of a third party,” which punishes with imprisonment from one to three years anyone who “induces another person to satisfy the lewdness of a third party.” The provision also regulates graver forms of commission of the crime: (1) if the victim is between the ages of fourteen and eighteen or if the agent is his or her ascendant, descendant, spouse, brother, sister, or guardian sentence is imprisonment from two to five years, (2) if the offence is committed with violence, the use or threats, or fraud sentence is imprisonment from two to eight years in addition to the sentence that may be imposed to the use of violence, and (3) if the crime is committed with the aim of obtaining any economic profit sentence will include a fine in addition to imprisonment. Similarly, article 228 of the Brazilian Criminal Code regulates the offence of “favoring prostitution or any other form of sexual exploitation.” This crime imposes a sentence of imprisonment from two to five years and a fine on whoever “induces or attracts anyone to prostitution or other form of sexual exploitation” or “facilitates, prevents, or makes difficult that a person leaves prostitution or other form of sexual exploitation.” The offence imposes graver sentences when committed by an ascendant, stepfather, stepmother, stepbrother, stepsister, brother, sister, or guardian of the victim (imprisonment from three to eight years), with violence, the use of threats, or fraud (imprisonment from four to ten years), and with the purpose of obtaining economic profit (fine is added to imprisonment).

Two additional provisions complete the picture of the Brazilian regulation of pimping. Article 229 of the Criminal Code of Brazil punishes with imprisonment from two to five years any person who “maintains, on his or her own behalf or on behalf of a third party, an establishment where sexual exploitation occurs.” This crime does not require that the agent aims at obtaining economic profit. Finally, article 230 of the Brazilian Criminal Code regulates the crime of “rufianismo,” which might be considered to be the “classic” form of pimping. It penalizes with imprisonment from one to four years and a fine whoever participates, in any form, in the profits of prostitution or allows him or herself to be supported by a prostitute. As in other offences related to pimping, this crime is aggravated when committed by an ascendant, stepfather, stepmother, stepbrother, stepsister, or guardian of the victim (imprisonment from three to six years), and with violence, the use of serious threats, fraud, or any other means that prevents the victim from freely exercising his or her consent (imprisonment from two to eight years).

Although less complex than the Brazilian regulation of pimping, Costa Rica also deals with this phenomenon in several provisions of its criminal code. The basic provision on pimping

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948 For an overview of the situation of prostitution, sexual tourism, and sexual exploitation of children and adolescents in Brazil see generally VIANNA & LACERDA, BRASIL, supra note 317 at 63-74.
949 “Rufianismo” or “rufianería” come from the Portuguese word “rufião” and the Spanish word “rufián.” Both Portuguese dictionaries and the Dictionary of the Royal Academy of the Spanish Language define “rufião” or “rufián” as a man who lives from the work of a prostitute and therefore “rufianismo” is sometimes presented as a synonym of pimping. Dictionaries also indicate that these words refer, more generally, to any man who is “perversion,” “despicable,” or “without honor.” Although the English language has the word “ruffian” it is defined as a synonym of “bully.” Better English words to designate the Portuguese “rufião” or the Spanish “rufián” would be “scoundrel” or “rogue.”
"proxenetismo") is article 169 of the Costa Rican Criminal Code, which states that “whoever promotes the prostitution of persons of any sex or induces them to exercise it, or maintains or recruits them to exercise prostitution” will be sentenced to imprisonment from two to five years. The same sentence applies to anyone who maintains another person in “sexual servitude.” The aggravated modalities of pimping —carrying a sentence of imprisonment from four to ten years—are regulated by article 170 of the Criminal Code of Costa Rica. The aggravating circumstances are: (1) the victim is below eighteen years of age, (2) the agent uses deception, violence, or any other means of intimidation or coercion, or abuses from his or her authority over the victim, takes advantage from a situation of need of the victim, or takes advantage from a relationship of trust with the victim or his or her family, (3) the agent is an ascendant, descendant, sister, brother, uncle, aunt, nephew, niece, cousin, stepfather, stepmother, stepbrother, stepsister, or guardian of the victim, and (4) the agent performs the conduct on an ascendant, descendant, sister, brother, uncle, aunt, nephew, niece, cousin, stepfather, stepmother, stepbrother, stepsister, or guardian of his or her spouse. Lastly, article 171 of the Costa Rican Criminal Code defines the crime of “rufianería” as the conduct of anyone who, in a coercive way, forces a prostitute to support himself or herself, even partially, through the exploitation of the profits generated by the sex worker. Sentence for this crime is imprisonment from two to eight years. However, sentence is imprisonment from four to ten years if the victim is under the age of thirteen and imprisonment from three to nine years if the victim is between thirteen and eighteen years of age.

In Guatemala, the criminal code distinguishes “classic” pimping from pimping affecting children and adolescents. The hyper-regulation of this phenomenon is, again, a source for concern. As in the case of Brazil, the proliferation of criminal offences punishing a number of activities that surround the prostitute as such leaves one to wonder if sex work has been truly decriminalized. “Classic” pimping is regulated by article 191 of the Guatemalan Criminal Code, which sets forth that “whoever promotes, facilitates, or favors the prostitution of persons of any sex for purposes of profit or for the satisfaction of the desires of a third party” will be sentenced to a fine from 500 to 2,000 Quetzals. Article 192 aggravates this offence (the fine is increased by a third) if the victim is a minor, the agent is a family member or a guardian, or the agent uses violence, deception, or abuses from his or her authority. As in Costa Rica, article 193 of the Criminal Code of Guatemala establishes the crime of “rufianería,” which punishes with a fine from 500 to 3,000 Quetzals any person who lives totally or partially at the expense of a prostitute or prostitutes or from the profits generated by prostitution.

The Guatemalan Criminal Code also regulates pimping that affects children and adolescents. The basic provision regulating this hypothesis is article 188 of the Criminal Code of Guatemala, which imposes a sentence of imprisonment from two to six years on the person who “in any way promotes, facilitates, or favors the prostitution or the sexual corruption of a minor, even if the victim consents in participating in sexual acts or in watching their performance.” The sentence is higher (imprisonment is increased by a third) if (1) the victim is below the age of twelve, (2) the agent acts with purposes of economic profit or to satisfy the desires of a third party, (3) the agent uses deception, violence, or abuses from his or her authority, (4) the agent is an ascendant, brother, sister, or guardian, and (5) if the criminal conduct is performed regularly. Another modality of pimping affecting children and adolescents is established by article 190 of the Guatemalan Criminal Code. This time, the offence punishes with imprisonment from one to three years anyone who uses a promise or a pact (even if they are apparently legal) to inducing or leading into prostitution or corruption a child or an adolescent. The provision also establishes that the same sentence applies to any person who, under any motive or pretext, maintains or helps maintaining a child or an adolescent in a situation of prostitution or sexual corruption.

As in Guatemala, the Federal Criminal Code of Mexico regulates “classic” pimping (“lenocinio”) and pimping that affects children and adolescents. According to article 206-bis of the Mexican Federal Criminal Code, the offence of pimping adopts three forms: (1) exploiting the body of a person through “carnal commerce,” maintaining a person in that commerce, or obtaining any sort of profit from it, (2) requesting a person or inducing him or her to sexually commerce with his or her body or facilitating the means for the prostitution of a person, and (3) directly or indirectly administering, managing, or
maintaining a brothel or any place expressly devoted to exploitation of prostitution or profiting from its revenues. Any of these modalities of pimping carries a sentence of imprisonment from two to nine years and a fine. Pimping affecting children and adolescents is regulated by article 204 of the Federal Criminal Code of Mexico, which punishes with imprisonment from eight to fifteen years and a fine anyone who commits the same pimping conduct described in article 206-bis, but the victim is below the age of eighteen, does not have the capacity to understand the meaning of the conduct, or does not have the capacity to resist the conduct. In article 205-bis, the Federal Mexican Criminal Code establishes the circumstances aggravating pimping of children and adolescents (imprisonment and fine are increased by a half). In general terms, these circumstances have to do with the abuse of family or authority relationships by the agent that subordinates the victim and the use of physical or psychological violence by the agent against the victim.

In Peru, pimping is also regulated with a high degree of complexity and normative density. Although article 181 of the Peruvian Criminal Code penalizes pimping, the conducts it regulates refer to a quite peculiar form of the crime. Indeed, the provision imposes a sentence of imprisonment from two to five years on anyone who “promises, seduces, or abducts a person to hand him or her to another person to have sexual intercourse.” However, if the victim is below the age of eighteen; the agent uses violence, threats, abuses a position of authority, or uses another means of coercion; the victim is the agent’s spouse, descendant, adoptive son or daughter, son or daughter of his or her spouse, or in under his or her care; or the victim is handed to a pimp, the commission of the crime carries a sentence of imprisonment from five to twelve years. As in other countries in LAC, article 180 of the Criminal Code of Peru criminalizes “rufianismo” and defines it as the conduct of whoever “exploits the dishonest profit obtained by a prostitute.” Sentence for this offence is imprisonment from three to eight years. Finally, article 179 of the Peruvian Criminal Code regulates another modality of pimping that it calls “favoring prostitution” consisting in “promoting or favoring the prostitution of another person.” The regular sentence for this offence is imprisonment from two to five years, but it is increased to imprisonment from four to twelve years if the victim in under the age of fourteen; the agent uses violence, threats, abuses from his or her authority, or uses any means of intimidation; the agent is a family member of the victim within the fourth degree of blood kinship or the second degree of affinity kinship or is his or her spouse, adopting parent, or guardian; the victim has been abandoned or is in a situation of dire need; or the agent lives from pimping.

As a summary of the criminal law regulation of “classic” pimping in the LAC region, article 334 of the Criminal Code of the Dominican Republic may function as a recap of the myriad conducts that could be criminalized as pimping. According to this provision, a pimp —punished with imprisonment from six months to three years and a fine— is anyone who: (1) in any way, helps, assists, or covers up persons for prostitution or the recruitment of persons for prostitution, (2) obtains profits from prostitution, (3) being related to prostitution, is unable to justify his or her income, (4) allows the prostitution of his or her couple and obtains benefits from this activity, (5) hires, trains, or maintains a person for prostitution, debauchery, or the “relaxation of customs” even if him or her is an adult and has consented to these activities, (6) operates as an intermediary, under any title, between the prostitute and the person or persons exploiting prostitution, and (7) using threats, pressure, manipulation, or any other means disrupts actions of prevention, assistance, or reeducation directed at persons exercising prostitution or in risk of being prostituted. As in other countries in LAC, article 334-1 of the Dominican Criminal Code establishes similar aggravated forms of the crime of pimping (the victim is a child or an adolescent, the agent uses any form of force or violence, the agent is a family member of the victim, the agent holds a position of authority over the victim, and so on), entailing a sentence of imprisonment from two to ten years and a fine.

A number of countries in the region still criminalize pimping, but only when the victim is a child or an adolescent or, in the case of adults, when coercion, violence, or threats have been used. The legislations of Argentina and Colombia (to a certain extent) illustrate this trend. The Argentine regulation on pimping
is perhaps the less intrusive in the region in terms of freedom. Pimping affecting children and adolescents is criminalized by article 125-bis of the Criminal Code of Argentina, which establishes that “anyone who favors or facilitates the prostitution of persons under the age of eighteen will be sentenced to prison from four to ten years.” If the victim is below thirteen years of age, the conduct carries a sentence of imprisonment from six to fifteen years. Note how this provision criminalizes the mere facts of favoring or facilitating prostitution, without requiring that the agent acts with the intention of obtaining some sort of economic profit. Interestingly, this crime also punishes favoring or facilitating the prostitution of adults (without requiring that the agent acts to obtain economic gains), but only if the agent used deception, threats, abuses from his or her authority, or uses any other means of intimidation or coercion, or the agent is an ascendant, the spouse, a brother or sister, or a guardian of the victim.

Pimping as such (involving adults and requiring that the agent acts with the purpose to obtain an economic profit) is regulated by article 126 of the Argentine Criminal Code. This provision could perhaps operate as a model of what pimping should look like in light of human rights standards protecting personal freedom. It punishes with imprisonment from four to ten years the person who “promotes or facilitates the prostitution of persons above the age of eighteen using deception, abuse of a relationship of dependency or power, violence, threats, or any other means of intimidation or coercion, with the purpose of obtaining economic profit or satisfying the desires of a third party.” Article 127 of the Criminal Code of Argentina criminalizes an alternative form of pimping exclusively centered on the economic exploitation of the exercise of the prostitution of others. According to this provision, “whoever exploits for an economic purpose the exercise of the prostitution of a person using deception, coercive abuse of a relationship of authority, dependency, or power, violence, threats, or any other means of intimidation or coercion” will be sentenced to prison from three to six years.

Colombia regulates pimping in a similar way to Argentina. On the hand, the criminal code only refers to pimping (“proxenetismo”) when children and adolescents are involved. Article 213-A of the Colombian Criminal Code punishes with imprisonment from fourteen to twenty five years and a fine “whoever organizes, facilitates, or participates in any way in the carnal commerce or sexual exploitation of a person below the age of eighteen for the purpose of obtaining any economic profit for him or her or a third party or the satisfaction of the sexual desires of a third party.” Another form of pimping affecting children and adolescents is regulated by article 217 of the Criminal of Colombia, which sets forth the crime of “encouragement to the prostitution of minors.” This offence imposes a sentence of imprisonment from ten to fourteen years and a fine on any person who “uses, rents, maintains, manages, or finances a house or a premise for the practice of sexual acts with the participation of minors.”

Pimping with adults is regulated by two provisions of the Criminal Code of Colombia. First, article 214 of the Colombian Criminal Code establishes the offence of “coercive prostitution,” but, interestingly, does not use the word “pimping.” According to this provision, the coercion of a person of any age into “carnal commerce or prostitution” with the purpose of obtaining economic profits or satisfying the desires of a third party” carries a sentence of imprisonment from nine to thirteen years and a fine. Second, article 213 of the Colombian Criminal Code regulates a crime called “induction into prostitution,” which, without using the word “pimping,” penalizes conducts that, in other countries in the LAC region, have been criminalized as pimping. This article sets forth that any person who “induces another person [of any age] to carnal commerce or prostitution with the purpose of obtaining economic profits or satisfying the desires of a third party” will be sentenced to prison from ten to twenty two years and a fine.  

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950 For an overview of the situation of prostitution, sexual tourism, and human trafficking in Argentina see generally PETRACCI & PECHENY, ARGENTINA, supra note 267 at 227–48.
951 In 2009, the Constitutional Court of Colombia found that article 213 of the Colombian Criminal Code was not in violation of the Constitution. See Const. Ct. Col., Decision C-636/09 (Sept. 16, 2009). In this case, the plaintiff had argued that punishing a person who simply induces another into prostitution is a disproportionate use of the criminal law because the person who is induced is left with his or her power to freely decide if he or she becomes a prostitute. The Court began its opinion by recalling
As in other countries in LAC, article 216 of the Criminal Code of Colombia aggravates all these offences (sentences are increased by a third to a half) when (1) the victim is under the age of fourteen, (2) the conduct is performed in order to send the victim abroad, (3) the victim is a family member of the agent up to the fourth degree of blood and affinity kinship and first of civil kinship, the victim is the spouse of the agent or is part of his or her domestic unit, or the agent takes advantage of the trust the victim deposited in him or her, and (4) the victim is in a situation of vulnerability because of his or her age, ethnic origin, physical or mental disability, or job.

As mentioned at the beginning of this subsection, beginning in the late 1990s some countries in LAC began criminalizing a number of conducts related to the sex work of children and adolescents different from the “classic” notion of pimping. In Colombia, the Criminal Code devotes three provisions to penalizing forms of sex work involving children and adolescents different from “classic” pimping. To begin with, article 217-A of the Colombian Criminal Code establishes a crime called “request of commercial sexual exploitation of a person under eighteen years of age,” which punishes with imprisonment from fourteen to twenty-five years anyone who “requests or demands, directly or through a third party, the performance of sexual acts or sexual intercourse with a person below the age of eighteen through payment of money or the promise of payment of money, goods, or any other form of retribution.” This provision clarifies, on the one hand, that the consent of the victim does not exonerate the agent from criminal liability, and, on the other hand, aggravates the crime (sentence is increased by a third to a half) when (1) the conduct is performed by a tourist or a national or international traveler, (2) the conduct leads to servile or enforced marriage or union, (3) the agent is a member of an illegal armed group, (4) the victim is below fourteen years of age, and (5) the agent is a family member of the victim. Article 219 of the Criminal Code of Colombia regulates the offence of “sexual tourism” and defines it as the direction, organization, or promotion of touristic activities that include the sexual use of persons under the age of eighteen. This crime carries a sentence of imprisonment from four to eight years, which is increased by a half if the victim is less than twelve years of age. Finally, article 219-A of the
Colombian Criminal Code sets forth an offence dubbed “use or facilitation of means of communication to offer sexual activities with persons below the age of eighteen.” This provision punishes with imprisonment from ten to fourteen years and a fine any person who “uses or facilitates traditional mail, global networks of information, telephone services, or any other means of communication to obtain, solicit, offer, or facilitate any contact or activity with sexual purposes with persons less than eighteen years of age.”

Mexico also regulates the crime of “sexual tourism” both at the federal and state levels. Article 203 of the Mexican Federal Criminal Code defines this offence as promoting, making publicity, inviting, facilitating, or managing through any means the international or domestic travel of any person with the purpose of performing real or simulated sexual acts with persons below the age of eighteen, who are unable to understand the meaning of the conduct, or who cannot resist it. This crime carries a sentence of imprisonment from seven to twelve years and fine.

Lastly, several countries in the LAC region have included the crime of human trafficking within their criminal law regulations on pimping and other forms of sex work—human trafficking is included in the chapter of the criminal code dealing with pimping and other modalities of sex work. While some countries consider human trafficking to be an independent crime, other countries regulate it as a form of pimping. These forms of regulation of trafficking may be found in the legislations of Brazil, Chile, Colombia, and the Dominican Republic.

Brazil and Chile criminalize human trafficking for prostitution within the chapters of their criminal codes on pimping. Brazilian criminal law legislation distinguishes between international and domestic trafficking of persons for purposes of sexual exploitation. Article 231 of the Criminal Code of Brazil refers to international trafficking either as the promotion or facilitation of the entrance of any person into Brazilian national territory for the exercise of prostitution or other form of sexual exploitation, or the promotion or facilitation of the departure of any person from Brazilian national territory for the exercise abroad of prostitution or other form of sexual exploitation. The crime is also applicable to the person who represents, provides accommodation, buys, or attracts the trafficked victim as well as the person who transports or transfers the victim knowing that trafficking is being committed. In both hypotheses, sentence is imprisonment from three to eight years. In addition, the crime is aggravated (sentence is increased by a half) when the victim is less than eighteen years of age, the agent is a family member of the victim, or the perpetrator uses violence, threats, or fraud. Domestic trafficking is regulated by article 231-A of the Brazilian Criminal Code. This crime punishes with imprisonment from two to six years anyone who “promotes or facilitates the displacement of any person within Brazilian national territory for the exercise of prostitution or other form of sexual exploitation.” As in the case of international trafficking, the offence also covers the person who represents, provides accommodation, buys, or attracts the trafficked victim as well as the person who transports or transfers the victim knowing that trafficking is being committed.

The criminal law of Chile also penalizes human trafficking for purposes of prostitution within the chapter of the criminal code dealing with pimping. Article 367-bis of the Chilean Criminal Code imposes a sentence of imprisonment from three to five years and a fine to whoever “promotes or facilitates the entrance or departure [from Chile] for purposes of the exercise of prostitution in national territory or abroad.” The offence is aggravated (sentence of imprisonment from if the victim is below the age of eighteen, if the agents uses violence, intimidation, or abuses from a relationship of authority or trust, if

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952 The crime of sexual tourism is also included in the criminal codes of the states of Baja California (article 262-ter), Colima (articles 157-bis 6 and 157-bis 7), Michoacán (article 165), Quintana Roo (article 192-quater), San Luis Potosí (article 183), and Sinaloa (article 274-bis E).

953 For an overview of the situation of sexual commerce in Chile see generally Dides, Marquez, Guajardo & Casas, Chile, supra note 416 at 87-113.
the agent is a family member of the victim, or if the perpetrator takes advantage of the economic destitution of the victim.

Colombia represents an interesting case on the criminal regulation of trafficking. In its original drafting of 2000, the Colombian Criminal Code (1) included human trafficking in the chapter on pimping, which, in turn, was part of the title on crimes against sexual freedom, integrity, and formation, and (2) related it exclusively to prostitution. Article 215 of the Criminal Code of Colombia therefore defined human trafficking as the promotion, coercion, or facilitation of the entrance or departure from the country of a person for the exercise of prostitution, and punished it with imprisonment from four to six years and a fine. Later, Law 747 of 2002 entirely repealed this crime. It was not until 2005 that human trafficking was included again in the Colombian Criminal Code by Law 985 of 2005, as a form of complying with the obligations imposed by the Palermo Protocol, ratified by Colombia in August, 2004. This time the offence was introduced as part of the chapter of the criminal code on crimes against personal autonomy—which, in turn was part of the title on crimes against personal freedom and other guarantees—along such offences as torture, forced displacement, and traffic of migrants, among others.

The current regime on human trafficking is regulated by article 188-A of the Criminal Code of Colombia, which imposes a sentence of imprisonment from thirteen to twenty three years and a fine on whoever “recruits, transfers, receives, or accepts a person with purposes of exploitation within national territory or to be send abroad.” This provision defines exploitation as obtaining economic profit or any other sort of benefit for oneself or for a third party through (1) the exploitation of the prostitution of another person or other forms of sexual exploitation, (2) enforced work or services, (3) slavery and analogous practices, (4) servitude, (5) the exploitation of another’s mendicancy, (6) servile marriage, (7) organ extraction, and (8) sexual tourism. It is worth noting that the article makes explicit that the consent of the victim does not exonerate the agent from criminal liability. Interestingly, however, in spite of having conceptually reconsidered the meaning of human trafficking as an offence against personal freedom, not tied, by definition, to an abusive exploitation of another person’s sexuality, article 216-2 of the Colombian Criminal Code still includes a form of trafficking as a modality of aggravated pimping. According to this provision, the crimes of “induction into prostitution,” “pimping of minors,” and “coercion into prostitution,” will be aggravated if they are committed with the purpose of “sending the victim abroad.”

Finally, article 334-1 of the Criminal Code of the Dominican Republic includes human trafficking for prostitution as an aggravated form of pimping that entails a sentence of imprisonment from two to ten years and a fine. While article 334-1-7 of the Dominican Criminal Code sets forth that pimping will be aggravated if the “victims have been handed in or incited to exercise prostitution outside [Dominican Republic’s] national territory,” article 334-1-8 of that code establishes a similar aggravated form of pimping if the “victims have been handed in or incited to exercise prostitution at their arrival abroad or shortly before that arrival.”

3.7.2. Inchoate Forms of Regulation of Sex Work in LAC

This subsection describes two illustrative examples of comprehensive and national regulation of sex work in the LAC region. While the first example shows a form of statutory regulation of sex work, the second example is a judicial decision prompting state authorities to seriously take sex work as a form of work and regulate it accordingly.

An example of national statutory regulation of sex work in LAC is the Regulation of the Exercise of Sex Work Act of Uruguay (Law 17.515 of 2002). Although this bill represents an important step towards the regulation of sex work outside the criminal law, and indeed adopts positive measures in matters such as access to health care by sex workers, some of its provisions still reflect forms of moral disapproval to the exercise of prostitution. To begin with the positive aspects of this statute, article 1 clearly states that “sexual work is a licit activity provided it is performed according to the conditions set forth in this Act.” Similarly, article 3 sets forth that persons in sex work cannot be arrested by police authorities “for the
sole fact of their activity” if its exercise is within the limits established by the statute. At the institutional level, the Act creates the National Honorary Commission for the Protection of Sex Work (article 5) integrated, among other members, by two delegates of NGOs representing sex workers. This commission has as one of its most interesting and important tasks that of advising sexual workers on their rights and duties and supporting them in any legal action aimed at their protection from sexual exploitation (article 6-c).

The more specific measures of regulation of sex work adopted by this statute revolve around three axes: (1) the creation of the National Registry of Sex Work, (2) access to health measures, and (3) zoning measures. The National Registry of Sex Work (articles 7 to 13) aims at collecting information on the exercise of sex work in Uruguay through the data included in a card that should be issued to every sex worker who wants to legally perform this activity. The card includes basic personal information (name, pseudonym, and date of birth) and proof that the sex worker obtained a certification on his or her health status issued by the Ministry of Public Health (article 17). Article 13 explicitly states that the information included in the National Registry of Sex Work is private and can only be requested by the registered sex worker, judicial authorities, or the Ministry of Public Health for sanitary or police purposes related to the enforcement of the Act. Measures related to health (articles 14 to 17) include both obligations and rights of sex workers. On the one hand, every sex worker has the obligation to undergo “sanitary controls,” including “clinical and paraclinical exams” (article 14). On the other hand, sex workers have the right of access to health education and promotion, emphasizing “prophylaxis of sexually transmitted diseases” (article 15). Additionally, the Act mandates that in, every city, sex workers must have access to an “interdisciplinary team formed by a physician, a nurse, and a social assistant” (article 16). Finally, the bill has a number of zoning provisions, which are the less progressive inasmuch as they are based, to a great extent, on stereotypes of prostitution as “scandalous” and morally repellent. Article 19 of the Act establishes that “perfectly delimited zones in terms of geographical location and hours of operation” should be established for the exercise of sex work. With regard to these zones, the bill specifies that they must not be close to schools (article 20) and that their regulation must “specifically include the working hours, the attire, and the behavior of the sex workers so it does not affect the sensitivity of the families living in close neighborhoods or harms children and adolescents” (article 21).

The Constitutional Court of Colombia recently handed down an opinion that could be considered a major regional breakthrough in the regulation of sex work according to human rights standards.954 The case was initiated by a prostitute who worked at a bar and was dismissed by the owner after she got pregnant. The Court granted constitutional relief, enjoined the owner of the bar, and —based on the Constitution of Colombia and ordinary labor law— ordered him to pay the sex worker damages for having illegally dismissed her and the sum corresponding to her maternity leave.

To adopt these decisions, the Constitutional Court made several important conceptual moves leading to consider sex work as a constitutionally protected form of labor and commercial activity. To begin with, the Court observed that, in Colombia, the legal regulation of sex work —a compound of criminal and administrative law— responds to a model that is, at the same time, prohibitionist, abolitionist, and regulationist.955 For the Constitutional Court, this fact produces confusions and tensions for “it is an uneven regime… [that superimposes] prohibitionist, abolitionist, and regulationist measures that are not always in mutual dialogue and that are not assessed according to their consequences in terms of the level of protection they afford to rights and values (of the sexual workers, their families, of citizens, public space, and the owners of businesses devoted to sex work)... A tension therefore arises between the tendency to eradicate [sex work] through prohibition measures and the criminalization of conducts, the recognition of the rights of the individuals who exercise sex work, and the legalization of this activity.”956

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955 See id. ¶¶ 43-67.
956 Id. ¶ 67.
The Court then delved into establishing if, according to Colombian constitutional and ordinary law, prostitution could be considered a legal activity. The Constitutional Court was interested in pursuing this issue because the trial and appeal judges had refused to protect the petitioner arguing that she could not be considered a regular worker to whom ordinary law protections should be applied insofar as the object of the supposed contract existing between her and the owner of the bar was illegal. In its answer to this issue, the Court concluded that, in light of the constitutional principles of personal freedom and human dignity, prostitution was a legal activity under the condition that the sex worker is able to consent to the exercise of the activity in a “persistent and comprehensive fashion.”957 The Constitutional Court made explicit the fact that its view on prostitution as compatible with human freedom and dignity was “in contrast with Modernity’s prejudice against [this phenomenon], which is considered to be an activity unworthy of legal protection. This conception has deemed sexual relationships devoid of affective commitment, without a procreative purpose, and where only the satisfaction of the senses is pursued in exchange for money to be reprehensible and therefore the object of social stigma.”958 Based on this premise, the Court concluded: “Prostitution is an economic activity that belongs to existing markets of services, that responds to its own rules of supply and demand, and that provides a space for several actors to obtain economic profits, to gain their livelihood, to work, or to commercially develop. Insofar as several economic freedoms are pursued through prostitution —whether society like it or not— law has to ascribe to this exercise the same legal consequences that it assigns to other forms of legal economic activity.”959 For the sex worker, this latter assertion means that the performance of prostitution is the exercise of his or her rights to freedom, work, and to chose a profession or a trade, from which he or she can legitimately expect to obtain an economic profit.960

The Constitutional Court then turned to examining if the relationship between the owner of a brothel or a bar where prostitution is exercised and the sex worker implies a labor contract generating for the prostitute all the rights ordinary labor law legislation affords to any worker (payment of a salary and social security benefits, protection from unfair termination, pregnancy protections for female workers, and so forth). For the Court, an affirmative answer to this question was “inexorable” in light of the constitutional principles of human dignity, freedom, and equality. In its view, if a prostitute was employed by the owner of a brothel or a bar “there will always be a labor contract if the sex worker has acted with full capacity and will, he or she was not induced into prostitution, when the activities stemming from her or his work where performed under conditions of freedom and dignity, and, of course, when orders from the employer were followed and a previously agreed upon salary was paid.”961 Additionally, the Constitutional Court observed that extending labor law protections to sex workers was an expression of the constitutional principle of substantive equality because it represented a form of favorable treatment for a traditionally discriminated against minority in a situation of social vulnerability.962 The Court, however, clarified that sexual workers did not have the right to being reinstated if they had been unfairly dismissed by their employer. In its estimation, establishing such a right would be contrary to the duty of public authorities to adopt every possible measure to prevent prostitution, to rehabilitate sex workers, and broaden their options for the improvement of their economic situation.963 For the Constitutional Court, in sum, granting full labor rights to sexual workers without the right to being reinstated in case of unfair dismissal was a form of balancing their freedom and dignity with the obligation of the state not to promote the “exercise of a trade that, according to the values of constitutional culture, should not be lauded or promoted.”964

957 Id. ¶ 95.
958 Id. ¶ 96.
959 Id. ¶ 101.
960 See id. ¶ 102.
961 Id. ¶ 150.
962 See id. ¶ 151.
963 See id. ¶ 155.
964 Id. ¶ 156.
Finally, the Constitutional Court urged Colombian public authorities to adopt a comprehensive legal regime of regulation of prostitution aimed at effectively protecting the rights of sex workers to health, rehabilitation, equality, and work.  

4. Sexual Health, Sexuality, and Human Rights in LAC: Some Very Provisional Conclusions

Latin America and the Caribbean is a region of stark contrasts. While in the last couple of decades important progresses have been made in protecting manifold dimensions of human sexuality and sexual health through human rights standards, many obstacles remain in the path to the construction of full sexual freedom, equality, and health. It is an undeniable fact that countries in the region have been willing to incorporate generous bills of rights into their domestic constitutions and to comply with the most important obligations imposed by international human rights law. Laws have been enacted in support of sexual freedom, equality, and health and, using domestic constitutional fundamental rights and international human rights standards, courts in the region have produced important doctrinal rules advancing these same values. Yet, true social change is never exclusively the result of legal reform. Although law plays an important part in transforming injustice and enhancing human freedom and equality, it never causally produces these transformations. Law should be always combined with other political instruments that would produce structural and durable social change. In LAC, society and culture, despite important legal transformations, still retain deeply unjust structures in matters of sexuality. There will always be a paradoxical relationship between progressive legal advances towards more sexual freedom and equality and cultures and societies that do no transform at the same pace of legal reform.

This paper has exclusively described legal sources (international law, constitutions, statutes, administrative regulations, and judicial opinions), which, on their face, may look, in many cases, as impressive developments sustaining hopeful avenues for the expansion of generous notions of sexual freedom, equality, and health. The fact that the paper does not delve into the day-to-day implementation of these legal sources —the “law in action” as opposed to the “law in the books”— may lead to a more careful evaluation of all the legal advances in the LAC region. In spite of this call for caution, some conclusions and lessons may be drawn from the texts of the legal sources this paper has described.

An important issue for further research demanding special attention is the distinctive use of criminal law in the LAC region. The legal regulation of each and every topic in this paper includes an important section on criminal law. Much of the encounter of law and sexuality in LAC has thus occurred in the domain of the criminal law. The intensive use of criminal law to regulate sexuality in the region adopts two problematic modalities. The first modality uses criminal law in a protective fashion, usually as a tool to debunk discrimination against certain social groups. In certain countries, criminal codes have been amended in order to introduce the crime of discrimination (on grounds of sex, sexual orientation, or health status, among others). In other countries, specific discriminatory conduct has been criminalized. Sexual harassment is the most conspicuous example of this trend. Although criminalizing forms of discrimination may seem an impressive way to counteract this social phenomenon, a caveat arises as to whether it is the appropriate state response to structural forms of social subordination. A criminal procedure is about establishing the individual liability of a perpetrator. Have such a procedure and an eventual conviction the potential to transform unjust social structures? In addition, it must not be forgotten that criminal proceedings demand that a perpetrator of a criminal offence be convicted if, and only if, he or she is found guilty beyond a reasonable doubt. How easy is it for a victim of sexual harassment, in the conditions in which this conduct usually occurs (in private, in a context of

965 See id. ¶¶ 220-224.
966 See supra Sections 3.1.3.1.1 and 3.1.3.2.1.
967 See supra Section 3.1.3.1.1.
subordination between the perpetrator and the victim, among others), to prove that she was harassed? Will, under these conditions, a conviction ever happen?

The second modality of the use of criminal law in matters of sexuality in the LAC region takes the forms of what could be called “regimes of hypocrisy.” Although, as it was explained earlier in this paper, it may be generally asserted that criminal law in LAC has gained freedom from moralistic and religiously embedded conceptions of sexuality, criminal law regulations—in several domains—still reflect moral condemnation of certain sexual activities, options, or human sexual statuses. This condemnation, however, is not performed through a direct criminalization of a sexual activity, a sexual option, or a sexual human status, but through a very rich criminal regulation that, without directly penalizing them, ends up “encircling” the activity, the option, or the status at stake in a way amounting to its actual criminalization. Regimes of hypocrisy may be illustrated through two examples this paper has previously tackled. Even though in LAC it could generally be observed that the non-intentional transmission of HIV or other STI’s has not been criminalized, the propagation or causation of diseases (in general) is criminalized through other crimes that, at the moment of its judicial enforcement, may be reasonably interpreted to include HIV/STIs. Under this regime, a state may perfectly argue that, on its face, its law is compatible with human rights standards advocating for the decriminalization of HIV/STI transmission. However, at the level of criminal prosecution the same state, if willing to prosecute the transmission of these diseases, still has a criminal law arsenal allowing it to pursue that policy. The second example has to do with the rich criminal law regulation of pimping and related conducts in LAC. Although prostitution has not historically been criminalized in the region, pimping and other related conducts (like “induction” into prostitution and sexual tourism, among others) have been the object of dense criminal law regulations. In addition, in recent years, many countries in the region have criminalized human trafficking in ways that, in many instances, confuse this criminal conduct with prostitution. The combination of a strong criminal law on pimping and confusing criminal law regulations on human trafficking leads to wondering if avenues have been set up to criminally prosecuting prostitution per se. Again, the legal system does not expressly condemn prostitution, but, in practice, it has a number of criminal law instruments to indirectly express this condemnation.

Even though in the LAC region international human rights law has deeply permeated domestic legal systems, this has not meant that it is automatically used in ways that advance equality and freedom in sexual matters. On the contrary, many times international human rights law is strategically used to support legal and political agendas quite restrictive of true sexual rights. A couple of examples drawn from this paper may serve again to illustrate this point. The first example is related to the use of the best interest of children human rights law standard to deprive homosexual citizens from the custody of their children or to bar the access of homosexual couples to the adoption of children. In Chile, the Supreme Court considered that Karen Atala’s homosexuality and the fact that she lived with her same-sex partner could affect the best interest of her three daughters in a way that led the Court to deprive her from the custody of the girls. In Mexico, the Federal Attorney General partly based its challenge to the Federal District law that allowed same-sex marriage and adoption on the argument that the best interest of children could be affected if adopted by same-sex couples. Fortunately, the Inter-American Commission on Human Rights and the Supreme Court of Mexico rejected these uses of international human rights law frameworks on human trafficking to condemn prostitution. For instance, in 2009 the Constitutional Court of Colombia upheld the constitutional validity of the crime of “induction into prostitution.” The Court rejected the argument that the “induced” person had freely consented to become a prostitute because human rights

968 See supra Section 3.2.
969 See supra Section 3.2.3.
970 See supra Section 3.7.1.
971 See supra Section 3.1.1.3.2.2.
972 See supra Section 3.1.3.2.2.
law instruments were clear to signal a tight relationship between becoming a prostitute and entering international criminal law networks of human trafficking. Under this bizarre interpretation of international law, a step into prostitution was equivalent to becoming a victim of human trafficking. For the Colombian Court, this business, because of its nature, deprives its victims from all autonomy and free will.\footnote{See supra Section 3.7.1.}

Finally, in the LAC region the use of certain human rights law standards to debunk forms of sexuality inequality and discrimination may have the unintended and paradoxical consequence of entrenching the very form of injustice they sought to combat in the first place. The most important example of this phenomenon may be the fight against sex discrimination through human rights law standards aimed at the eradication of violence against women. In the LAC region, this dynamics was prompted by the enactment of the Convention of Belém do Pará.\footnote{See supra Section 3.4.} Although conceiving violence against women as a form of sex discrimination is indeed a remarkably important step towards the construction of true substantive sex equality,\footnote{See supra Section 3.1.1.1.} the use of eradication of violence against women legal standards has the tendency to construct women’s “identity” exclusively in terms of victimization: women are just seen as victims of violence, devoid of any agency.\footnote{For “classic” statements of this critique see WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 52-76, 96-134 (1995); Lauren Berlant, The Subject of True Feeling: Pain, Privacy, and Politics, in CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW 42-62 (Austin Sarat ed., 1999). This critique has also been voiced in the field of international criminal law related to the prosecution of sexual violence in armed conflicts. See, e.g., Karen Engle, Feminism and its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina, 99 AM. J. INT’L L. 778 (2005); Janet Halley, Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict, 9 MELB. J. INT’L L. 78 (2008); Janet Halley, Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law, 30 MICH. J. INT’L L. 1 (2008).} Even though international and domestic legal standards aimed at eradicating violence against women seek to counter a form of sex subordination (and they hence contribute to strengthen women’s equality), their application may reconstruct women’s “identity” in terms that end up contributing to consolidating a vision of women as second-class victimized human beings.