

# LGBTI public

# policies in

# Latin America



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# **Text on the advancement of LGBTI policies in Latin America focusing on the actions public authorities can take and on the approval of legislation to guarantee rights<sup>1</sup>**

In the last years, advancements were obtained in the recognition of Lesbian, Gay, Bisexual, Transvestite, Transsexual and Intersex (LGBTI) rights in the Americas. Northern countries had initiated this trajectory much before the Southern countries, but in the last decade much progress has helped to guide and boost the strategies for global advocacy in favor of LGBTI rights. Further on we will see, for example, that the public policies in Argentina and Uruguay became a reference to many nations, including the US and Canada.

Public policies – whatever they might be: principles, action plans, specific programs and/or regulations – have been developed at national, state, regional or municipal level due to the pressure exerted by the organized movement, which directly influences government plans. This has created responses, in order to ensure a certain level of economic, social and cultural wellbeing for all parts of the population, including those who identify as LGBTI.

Setting up LGBTI policies, especially if it is about transvestites and transsexuals, can only be successful if it is based on full recognition of the inequalities faced by trans people derived, among others, from their exclusion merely because of their gender identity. It is necessary to exert the principle of equity, in order to perceive how much this population has their rights violated and how much transphobia<sup>2</sup> prevents travestites and transexuals from having access to the labor world.

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<sup>1</sup> This text was produced with the collaboration of LGBTI groups from the Latin America through answering a brief questionnaire. Unfortunately, we had some difficulty to access the English-speaking Caribbean nations and other countries that did not return the questionnaire.

<sup>2</sup> Transphobia is aversion, discrimination and violence practiced against transvestites and transsexuals due to their gender identity. Generally it is manifest in the most socially recognised form against adult transvestites and transsexuals, either through negative opinions, exclusion, lack of access to public policies, or through physical and verbal aggression. Many times it is manifest in an indirect form, through an excessive concern to guarantee that these people play the social role associated to their biological sex. In “Promoção dos Direitos Humanos de Pessoas LGBT no Mundo do Trabalho” – OIT, PNUD and UNAIDS, 2014.

Public policies emerge from the identification of social problems by the organized social sectors, turning them visible to the whole society. Proposals are elaborated as well as political incidence actions, so that public authorities respond to such needs and incorporate them through their policies.

There are many successful examples of public policies in the Americas and they all emerge from the analysis of those needs and from the effective participation of the organized social movements.

Public authorities play a leading role in the design, elaboration, and implementation of public policies, but control and social participation are fundamental, to point out the needs, and, consequently, to implement and evaluate those policies. Thus, it is important to observe the complementary forces that struggle for the well-being of LGBTIs: the trade unions and the LGBTI movement should organize their agendas towards the enhancement of life improvements for this population.

In some cases, the advancement of public policies is delayed or even blocked, not only by the indifference of the authorities, but also by the resistance from conservative organized sectors that continuously attack LGBTI citizens.

According to the International Association of Lesbians, Gays, Bisexuals, Trans and Intersex People (ILGA)<sup>3</sup>, 78 countries in the world criminalize it, among which 11 countries are located in the Americas (Antigua and Barbuda, Barbados, Belize, Dominica, Granada, Guyana, Jamaica, Saint Christopher & Nevis, Santa Lucia, Saint Vincent & Grenadines, Trinidad & Tobago). There are even 4 countries in which legislation sets a death penalty for homosexual relations, even between adults with their own consent (Brunei Darussalam, Iraq, Pakistan and Qatar).

Same-sex marriage is recognized in 16 countries in the world. In the Americas, it is allowed in Canada, some regions of Mexico, in the majority of the states of the USA, Argentina, Uruguay and Brazil. As for the joint legal adoption, by same-sex couples, it is legal in 15 countries.

In addition to its large territory, the region of the Americas has a very diverse pattern of social, legal and cultural settings. Multiple cultures and histories of colonization had direct influence on LGBTI rights, and legislation differs notoriously among its countries. We may

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<sup>3</sup> [www.ilga.org](http://www.ilga.org)

say that the Latin American countries stand out among those that hold the worldwide leadership in the promotion of LGBTI equality, thanks to legislation, public policies or judicial decisions emerged in Argentina, Brazil, Bolivia, Chile, Ecuador, Mexico, Colombia, Costa Rica and Uruguay<sup>4</sup>

Nevertheless, we still need hard work and struggle: (i) to eradicate stigmatization and prejudices based on sexual orientation<sup>5</sup> and gender identity<sup>6</sup>; (ii) to fight against homophobia<sup>7</sup>, lesbophobia<sup>8</sup>, and transphobia, at state level and societal level; (iii) to combat the so-called “traditional cultural values”; (iv) to stand up against all forms of religious fundamentalism that want to impose their dogmas upon the state; (v) to prevent political fundamentalism and combat it where it has risen. All these factors can create a terrible climate in which hate crimes and the criminalization of homosexuality can occur.

Let’s see what happens in **Brazil**: as has been mentioned, marriage between same-sex people is recognized by the State, as well as, the adoption of children by homosexual couples, both rights are guaranteed by the Judiciary. However, the bill of law that was drafted to criminalize homophobia was continuously delayed and attacked by

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<sup>4</sup> [http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2013\\_portuguese.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2013_portuguese.pdf)

<sup>5</sup> “We understand sexual orientation as a reference to the ability of each person to have a deep emotional attraction, either affectionate or sexual, for individuals of a different gender, of the same gender or more than one gender, and to have intimate and sexual relations with these people.” Yogyakarta Principles– Indonesia – November, 2006.

<sup>6</sup> “We understand gender identity as the deep experience felt internally and individually of the gender of each person, which may or may not correspond to the sex attributed at birth, including the personal sense of the body (which may involve, by free choice, modification of the appearance or body function by medical means, surgery and other) and other gender expressions, including dressing, way of speaking, and mannerisms” *Idem*.

<sup>7</sup> According to Daniel Borrillo, homophobia is the intolerance, rejection, fear, prejudice or persecution towards people who do not comply with the norms of the dominant male gender, with the role culturally established by the male power for men and women. BORRILLO, Daniel. *Homofobia: história e crítica de um preconceito*. Belo Horizonte: Autêntica, 2010.

<sup>8</sup> Lesbophobia is the intolerance, rejection, fear, prejudice, or persecution towards women who do not comply with the norms of gender culturally established by the male power. It is aggravated by unequal relations that disqualify women in general. In “Promoção dos Direitos Humanos de Pessoas LGBT no Mundo do Trabalho” – OIT, PNUD and UNAIDS, 2014.

congressmen and senators from the group of religious fundamentalists, who tried to prevent at any cost the advancements of LGBTI citizenship.

Meanwhile, homophobia in Brazil is still at an alarmingly high level. Records show that 312 murders of gays, transvestites, and lesbians occurred, in 2013, an average of one death every 28 hours. This number is only 7.7% lower than that of the same category of crimes in 2012 (when 388 lesbians, gays or trans people were assassinated)<sup>9</sup>.

A positive development took place with the constitution of the National Forum of Managers of State and Municipal Public Policies for Lesbian, Gay, Bisexual, Transvestites and Transsexual Populations – FONGES LGBT<sup>10</sup>, an entity constituted by all the agencies responsible for the coordination and implementation of public policies for LGBTI in its territory. Altogether they represent 65 agencies that promote the citizenship and the human rights of this community around the whole country.

Also it was sanctioned, in June of 2014, the Law number 12.984 which considers crime the discrimination against people living with HIV/AIDS – a good step but still far from what the Recommendation 200 from the ILO suggests on the rights of seropositive workers, which, instead of punishing such workers, sets out their promotion, even suggesting function redeployment, among other actions – something extremely important since UNAIDS itself says that the vast majority of people living with HIV/AIDS in the world are inserted into the labour market.

In 2010, **Argentina** became the first country in Latin America to legalize marriage between same sex people. By so doing, it provided these couples access to the rights and benefits of heterosexual couples, including adoption. It is important to mention that in four provinces of the country (including Buenos Aires) those same rights are extended to foreigners. It is worth saying that after its sanction, the Executive took the Decree of Necessity and Urgency (DNU) 1006 of equal recognition to children born before egalitarian marriage, which allowed issuing new birth certificates completing the data from both mothers and the double surname, and doing so guarantee access to social provisions, the continuity of the link in case of separation or death of one of their mothers, circulation and joint medical and educational decisions,

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<sup>9</sup> Data from Grupo Gay da Bahia – GGB in <http://atarde.uol.com.br/brasil/noticias/1568348-ggb-registra-312-assassinatos-de-gays-em-2013>

<sup>10</sup> <http://www.fongeslgbt.com.br/o-fonges-lgbt>

inheritance rights, labor licenses for both mothers due to their children disease and legal recognition of the link related to their extended family: grandmothers and grandfathers, uncles, aunts, cousins, etc.

In addition to the law which guarantees marriage between two people of the same sex, Argentina has since 2012 the most modern Identity Gender Law of the world. It allows people whose self-perceived gender identity does not match the sex assigned at birth to change their name and gender on all documents proving identity for free, administratively and without any kind of diagnosis and/or medical or psychological treatment as a precondition. In turn, guarantees the right of access to comprehensive health services and, based on the informed consent of the person concerned, includes the right to request access to full and/or partial surgery and/or comprehensive hormonal treatments to adjust his/her body, including genitals to gender identity. These achievements have been incorporated into the Civil and Commercial Code, recently renovated which, in turn, expands rights especially in regard to family diversity, with the inclusion of “procreational will” as a principle of affiliation for practical assisted human reproduction cases – previously legislated by the law 26.862.

In Argentina it was also formed a group of organisms within the National Government for the protection and promotion of the LGBTI people’s rights, in which take part 24 national government agencies that implement an anti-discrimination perspective in the implementation of public policies for LGBTI. It was formed in July 2012 with the aim of mainstreaming sexual and gender diversity in public policy and legislative developments translate into effective social inclusion and equal opportunities. It was formed in July 2012 with the aim to incorporate the perspective of sexual and gender diversity in public policies and to translate legislative developments into social inclusion and effective equality of opportunities.

**Uruguay** offers a lot of protection to LGBTI people. After legalizing same-sex marriage, same-sex couples got equal rights and all the benefits (health, pension, inheritance, etc.) attached to marriage were also applied to them, including to the right to adoption. The country also allows gay people to serve in the armed forces. In 2004, the Uruguayan Congress approved an anti-discrimination Act which forbids prejudice based on race, religion, sexual orientation and gender identity. In 2009, a Gender Identity Act was approved, allowing the change of name and gender without undergoing surgery.

The Uruguayan government has seriously complied with its public

policies for LGBTI people, to the extent that, in 2013, when the Ministry of Social Development needed to fulfill seven job openings, they prepared a public exam in order to find men/women candidates, but with the restriction that only transvestites and/or transsexuals could apply for the job<sup>11</sup>. The same Ministry has guaranteed that transvestites and transsexual people qualify as beneficiaries of the Uruguay Social Card, which allows the access to a wide range of social welfare benefits, as well as assistance, labor, and educational programs, in order to avoid their usual social exclusion.

In **Peru**, despite the protection that imposes limits to the LGBTI community, the struggle carried out by women/men activists and allies is intense. In 2004, the Constitutional Process Code was promulgated, as the first official document in the history of the country to establish a protection mechanism to face discrimination by sexual orientation. In 2005, the National Plan for Human Rights 2006-2010 was approved, establishing the strategic goal of promoting a culture of respect to diversity, in order to avoid a degrading or violent treatment based on sexual orientation, in the realm of policies and laws. The most significant advancements in policies are in the local laws that forbid discrimination on the basis of sexual orientation and gender identity, but this represents only a small part of the country.

In **Cuba**, some measures are promoting improvements in the LGBTI rights. The Cuban Communist Party (PCC) defines the conception of public policies and, the current agenda – approved in 2012 after a broad debate with the grassroots – involves the dimension of confronting discrimination based on sexual orientation. Guidelines 57 and 69 on the defense of diversity explicitly deal with sexual orientation. Two legal documents recognize the specific needs of the LGBTI community: Resolution 126, by the Ministry of Public Health (2008), which foresees the creation of a health center for transsexuals, with integral assistance, and the Labor Code, Law No. 116 (2014).

The National Center of Sexual Education (CENESEX)<sup>12</sup> is specifically in charge of the public policies for the LGBTI community. The work is based upon a total health approach – physical, psychological and social – and they seek to provide the tools for people to achieve that.

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<sup>11</sup> [http://www.larazon.com.ar/interesa/Ministerio-uruguayo-buscara-empleados-trans\\_o\\_516900208.html](http://www.larazon.com.ar/interesa/Ministerio-uruguayo-buscara-empleados-trans_o_516900208.html)

<sup>12</sup> <http://www.cenesex.org/>

In 1992, **Nicaragua** altered the Penal Code in order to criminalize sex between same-sex people, establishing punishment through imprisonment. Article 204 of the code specifies: “A crime of sodomy is committed when someone induces, promotes, advertises, or practices in a scandalous way sexual relations between same-sex people, with punishment of one to three years in prison. When one of participants, even in private, has power or disciplinary control over the other, as ascendant, tutor, teacher, chief, or any other title involving influence of authority or moral orientation, the punishment applied for illegal seduction will consider this person as the only one responsible.”<sup>13</sup> In 2008, a new penal code decriminalized homosexual sexual relations. Moreover, it also criminalizes the discrimination on the grounds of sexual orientation, for which punishment involves prison or fines, although the effectiveness of the legislation is debated in LGBTI communities. Advancements occurred in some resolutions, such as the one from the Ministry of Health<sup>14</sup>, which has helped different organizations working with sexual orientation and gender identity issues and campaigning for changes to guarantee the rights and the citizenship of LGBTI people. In 2009, the government established an ombudsman to defend LGBTI rights.

In **Mexico**, much progress was obtained in the last decade. In the federal realm two breakthroughs were achieved, guaranteeing the rights of LGBTI people: (i) the Federal Act to Prevent and Eliminate Discrimination, in which they mention that “sexual preference”<sup>15</sup> should not be a reason for discrimination; (ii) a presidential decree, establishing the 17th of May as “the National Day against Homophobia”.

At the local level, at least three bills of law were approved, aiming at guaranteeing the rights of LGBTI people: (i) Reforms that allow marriage between same-sex people, with all the rights included in marriage: adoption, inheritance and social security for the partner; (ii) the Decree that guarantees changes in the birth certificate of transsexual people, so that adjustments can be made regarding their name and

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<sup>13</sup> [http://www.oas.org/juridico/mla/sp/nic/sp\\_nic-int-text-cp.html](http://www.oas.org/juridico/mla/sp/nic/sp_nic-int-text-cp.html)

<sup>14</sup> <http://andisexnicaragua.blogspot.com.br/2014/01/contribuyendo-al-conocimiento-de-la.html>

<sup>15</sup> In Mexico, by political decision of women/men activists, they do not use the expression. “sexual orientation”. They prefer to use “sexual preferences”, meaning that people may choose whatever sexual partner they might prefer.



gender, respecting the new social reality of these people, and (iii) the Act to Prevent and Eliminate Discrimination in the Federal District, including homophobia, biphobia<sup>16</sup> and lesbophobia as root causes of crimes.

In **Colombia**, similarly to what is happening in Brazil, LGBTI rights have been conquered mostly through the Judiciary System of the country. In 2009, the Constitutional Court of Colombia decided that cohabiting same-sex couples should be entitled to all the rights enjoyed by heterosexual couples, including property rights, inheritance and social security benefits. In 2011, the Congress approved an anti-discrimination Law, establishing sexual orientation as a protected category. For those who infringe this anti-discrimination clause, it establishes punishment with prison and fines. In 2011, the Court decided that the legislation of the country should approve marriage for same-sex couples. Although the Colombian Congress voted against a bill of law to legalize these marriages in 2013, the Supreme Court decision (2011) is still in force.

These are just some experiences in the vast continent where we live. In face of this situation, it is important to emphasize that as far as LGBTI public policies are concerned, in the Americas, the trade unions and social movements play a decisive role, and that this role may even be more prominent when they play it together and with concerted agendas.

There are many challenges ahead, and one of them is now set at the center of the political agendas: the discussion on the lay nature of the state. A great barrier to the advancement of public policies for the LGBTI community is represented by churches of different denominations and by fundamentalist-extremists who – based upon the conservative understanding of the world by their leaders – are in complete opposition to any progress in terms of human rights related to sexual and reproductive rights. They represent a threat to the State as well as an intrusion on its public policies. Nowadays, the most important preachers of homophobic and hatred are the religious fundamentalists. Their speeches and stances are intervening in the conception and implementation of public policies for sexual diversity and anti-discrimination.

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<sup>16</sup> Biphobia is the intolerance, rejection, fear, prejudice or persecution towards bisexual people, for not complying with the gender norms culturally established by the masculine power.

Trade unions and LGBTI organizations also need to realize that they are stronger when they represent more people. They must not be afraid to communicate with their membership and grassroots LGBTI people; for instance, to discuss with them the issue of combating *moral harassment* faced by LGBTI people at work. We need to know how to communicate and involve public opinion in favor of the necessary advancements, in order to guarantee the citizenship for lesbians, gay men, bisexuals, transvestites, transsexuals and intersex people. We should not create obstacles in the agenda due to conflicts of interest or protagonist competition.

As Luiz Mello<sup>17</sup> recalls: “In spite of everything, in all places where homosexuality was decriminalized and rights were guaranteed for LGBTI people, the world continued its same ancestral routine: the sun rises and sets, as usual, the days still have 24 hours, the plants grow and the birds sing. But, surely, in those societies, a deep change took place: people are free to live their desire and the love between adults, of any gender, knowing that our sexual, amorous and marriage links will be increasingly respected”.

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***We hope that in a forthcoming publication, we will be able to include more detailed information regarding the situation of LGBTI people in the United States, Canada and the Caribbean, once we will already count on the full integration of names indicated by these regions to the PSI Inter-Americas LGBTI Regional Committee***