

# TRANS RIGHTS: THE ONGOING DEBATE IN LATIN AMERICAN LEGAL AGENDAS\*

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**Abstract:** This article offers an overview of the Trans people's rights agenda in Latin America. It focuses on various Latin American countries to reveal how the route towards rights has been marked by a binary and medicalizing approach to non-normative identities, directly influenced by the traditional and conservative moral projects prevalent in the region. It also accounts for some recent normative and case-law developments, which however coexist with restrictive norms that criminalize the rights of gender-diverse people. It concludes that the recognition of Trans people's rights is often insufficient, that it contributes to rendering Trans diverse realities invisible, thus reinforcing discrimination.

**Keywords:** Latin America, human rights, gender identity, trans people, legislative agenda.

**Summary:** 1. INTRODUCTION. 2. THE LATIN AMERICAN CONTEXT AND THE RIGHTS OF TRANSGENDER PEOPLE. 3. THE RECOGNITION OF THE RIGHTS OF TRANSGENDER PEOPLE AND THE LEGISLATIVE AGENDA IN ARGENTINA, URUGUAY AND CHILE. 4. THE SITUATION IN COLOMBIA AND ECUADOR. 5. THE EXPERIENCE OF BOLIVIA AND PERU. 6. OVERALL CONCLUSIONS.

## 1. INTRODUCTION

Despite renewed constitutional agreements, many of which fall within the framework of the so-called new Latin American constitutionalism (Uprimny 2011; Viciano and Martínez 2010), the rights of transgender<sup>1</sup> people are subject to ongoing debates in South American legislative agendas, where their recognition faces considerable opposition. As the pro-rights sector has warned, the assault against them goes hand in hand with demands by more conservative social sectors to introduce statutory and legal reforms, with the aim of reinforcing traditional family and moral values which exclude diversity. This coincides with the erosion of constitutional rights, resulting from strategic litigation seeking to consolidate dominant, majority values. At a legislative level, this reactionary offensive has been accompanied by arguments and deliberative strategies by pro-life groups as well as staunch resistance to the advancement and protection of transgender people's rights.

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<sup>1</sup> In this article, Trans persons are defined as those whose gender identity is not consistent with the normative expectations and codes associated with the one legally assigned to them at birth.

The recognition of rights linked to the reality of transgender people has not followed a uniform pattern across Latin America. Countries such as Argentina, Uruguay and Chile have definitely made a certain amount of progress in adopting overall legislation on gender identity, whereas countries such as Ecuador have attempted to regulate a number of specific aspects, without having endorsed more far-reaching reforms. In countries such as Colombia, on the other hand, the protection of transgender rights has resulted from constitutional case-law, as well as certain administrative measures, although there is no specific ordinary legislation on the matter. In other countries, reluctance to recognise these rights still prevails.

Developments in the Inter-American system of human rights have led to the establishing of a minimum level of protection. A number of specific cases submitted to the Inter-American Court of Human Rights (IACtHR), as well as Advisory Opinions and special reports on the protection of the rights of transgender people, have paved the way to the development of a judicial framework in the different countries subject to the interpretative guidelines of the Inter-American system. Despite this, at a domestic level, developments have not been uniform. In some countries, significant levels of regulation and legislative recognition have been achieved, but these advances have not always been accompanied by judicial support. An example of this is the case of Bolivia, where the Constitutional Court has taken a step backwards with respect to legislation, the latter being more in accordance with the protection of rights.

In general, there have undoubtedly been clear attempts to move from a model involving the stigmatisation and pathologisation of Trans people, which is essentially conservative, to one of self-determination and recognition which incorporates broader social debates and reflection. However, these attempts tend to be half-hearted, and are often shown to be deficient and fragmentary, or at best only lead to a formal recognition of rights with few real advances. The result is a great disparity between regional experiences. Based on different national realities, this study of the rights of transgender people in Latin America aims to provide an overview of the legislative and judicial commitment to such rights in a range of the subcontinent's legal systems. At the same time, the experiences described will provide an analytical framework to assess either the evolution or the erosion of rights in different national legislations.

To this end, this paper is structured into four parts. The first section provides a brief description of the pathologising approach to the rights of Trans people and its conservative roots, whilst also offering a brief overview of a number of Latin American constitutional frameworks in which this approach shapes discussions on the issue. The second part examines the Argentinean, Uruguayan and Chilean models, the most progressive examples in the region, all three of which have enacted specific legislation to protect transgender people, despite the fact that their rights are not explicitly recognised in their national constitutions.

The third part focuses on the situation in Ecuador and Colombia, where legislative inertia has led to a situation whereby transgender people have had to rely on constitutional case-law to protect and guarantee their rights. Finally, we shall look at Bolivia and Peru

as examples of systems which are reluctant to recognise these rights altogether. While Bolivia provides an example of judicial regression in this area, the case of Peru highlights the strong influence of the international human rights system, which has had a clear effect on the future agenda of discussions about Trans people's rights in the region's different states. The paper concludes with a number of reflections on the progress and limitations of Latin American regulatory strategies in this area in the light of current case-law and legal texts, and with some questions on the role of legislators and courts in this field.

## 2. THE LATIN AMERICAN CONTEXT AND THE RIGHTS OF TRANSGENDER PEOPLE

The historic prevalence of a binary conception of gender identity, which conceives it as something objective and indisputable, has consolidated the existence of a system which excludes those who do not adapt to these binary premises and their rigid categories of classification, based on equally rigid (male/female) power relations. In fact, as Ruth Rubio Marín (2020: 47) has pointed out, "the definition of categories is an instrument frequently employed by legislators to determine the legal position of subjects in terms of the different general aims pursued by legislation and public policies", leading to apparently neutral and unquestionable classification and ordered criteria, through which subjects are either included or excluded (Butler 2009).

In terms of gender identity, discourses which pathologise Trans people are allied with a deterministic binary vision, imposed on the basis of what could be called a "medical model", or medical paradigm of classification or registration of people, which marginalises any diverse identity that does not adhere to the strict canons of binary assignment. This apparently neutral (binary) classification is in conflict with the realities of many people's experiences. In contrast, the exponents of a more positive approach see Trans identities from a less restrictive and exclusionary medical viewpoint. They demand instead a shift of understanding and comprehension, leading to the proper recognition of Trans people as democratic subjects with all corresponding rights.

In the Latin American context, this transition from a deterministic, essentialist, medicalised and exclusionary vision to one which strengthens the recognition of rights and subjective diversity has been uneven. Many South American constitutional states have not only failed to question, but have actually confirmed the mandatory enforcement of gender regulatory norms as a series of dichotomies and hierarchies which effectively exclude and marginalise many people. In fact, although the more recent Latin American "green constitutions" are associated with the protection of the rights of nature and the environment and are committed to pluralism and diversity, whilst giving an active voice to indigenous communities, peoples and nationalities, gender demands as such are largely absent. This is despite the insistence that this new constitutional approach is essentially aimed at including channels of political participation for social sectors historically excluded from the social contract.

This is not to say that the region is completely devoid of reforms aimed at offering a minimum of protection for gender-related rights. Thanks to the impetus of progressive movements and social awareness programmes, countries such as Colombia, Argentina,

Costa Rica, Brazil, Mexico, Uruguay and Ecuador have, for example, formally recognised same-sex marriage. Nevertheless, in other countries there is continued resistance and the issue is still under discussion. With regard to gender identity and the rights of transgender people, the debate has essentially focused on the sphere of international human rights, in particular on certain pronouncements by the IACtHR in 2018 on gender identity and the protection of same-sex couples (Advisory Opinion 24/17). At a constitutional and legal level however, a strategy of resistance or backlash is clearly evident,<sup>2</sup> with the traditional family order being emphasized in constitutional and legal texts, thereby undermining a more plural recognition of diversity.

There are therefore various different approaches to the issue in Latin American legislative agendas. In some cases, there is evidence of progress towards a greater commitment to the recognition of certain rights, whereas in others failure to make such a commitment threatens even the most straightforward constitutional guarantees. There are also countries which seem to suffer from legislative "idleness", often accompanied by conservative and regressive judicial practices, which complicate the whole issue of rights altogether. In all of these cases, a combination of factors tend (to a lesser or greater extent) to have a negative impact on the effective recognition of the rights of transgender people in the Americas. Behind the pathologising of identities that dissent from the modern gender binary, there is an ongoing conservative discourse which generates stigmatisation, subordination and exclusion from official norms. Significantly, there is also an underlying common religious element, which is part of Latin American countries' colonial inheritance and which informs the traditional principles and moral values continuing to influence their legislative agendas.

It is striking that despite their diverse realities Latin American states were founded on ideals of homogeneity (Tapia 2019), articulated through laws and public policies that aspired to impose themselves over those realities through the creation of an all-encompassing normativity. Notwithstanding its long colonial past, Latin America has resisted the imposition of a European-style hegemonic social model, yet at a normative level it has paradoxically reproduced Europeanised ideals of family and femininity typical of the "coloniality of power" (Quijano 2000; Mignolo 2011); ideals which, as decolonialist feminist theory points out, reinforce a "coloniality of gender" (Lugones 2010). It is only

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<sup>2</sup> In Ecuador, for example, following the Constitutional Court's rulings recognising equal marriage in the country (Ruling 11-18-CN and Ruling 10-18-CN), pro-life groups have insisted on the need to carry out a popular consultation, capable of reversing these historic rulings, seeking to disregard the Court's pronouncements and activating a mechanism for a regression in rights. Several members of the legislature have also insisted on bills aimed at openly disregarding another decision of the Court (a case concerning the decriminalisation of abortion for rape, Ruling 34-19-IN/21 and subsequent additions), in a form of contempt and open defiance of the decisions of the highest body of constitutional control in the country. To date, after an intense debate on the controversial presidential objection, the National Assembly has painstakingly approved a bill on the voluntary interruption of pregnancy in cases of rape, the official publication of which is still pending. Similarly, in Uruguay a group of conservative parliamentarians attempted to reject the approval of the Transgender Identities Law via a consultative referendum.

through the struggles of the feminist movement, and the parallel theoretical reflection of LGBTI people, that an essential contribution has been made to eroding this traditional model of gender and family. This has enabled the possibility of formally proposing new options in terms of ordinary legislation, whilst also giving rise to a wide range of theoretical positions which have a substantive impact on areas of discussion and the vindication of rights.

Currently, there are certain Latin American legal systems which explicitly recognise gender claims and others which do so implicitly, whilst some others fail to acknowledge the issue entirely. Among the more recent constitutions is that of Ecuador (2008). In its 444 articles it mentions gender equality and the prohibition of discrimination on at least 13 occasions in different passages concerning education, health, the family and the integration of various institutions. This shows constitutional concern about the subject at least at a formal level. Meanwhile, the Bolivian Constitution (2009), with 441 articles, refers to gender issues on at least 9 occasions. When outlining the values which inspire its state model and listing its catalogue of rights as well as the integration of certain bodies and institutions, this Andean country has at least identified the issue of diversity as an area for discussion. The Colombian Constitution (1991), on the other hand, does not mention the issue of gender at all in its 380 articles, or at least not directly, and although certain social policies have nonetheless been adopted at local or national levels in relation to questions of gender, it is not possible to perceive any real impact in terms of sexual diversity in the country. When it comes to Venezuela, its Constitution (1999) mentions gender equality on two occasions in its preamble. Thus, as can be seen, gender has found recognition in Latin America's most recent constitutionalism, which should set the tone for ordinary discussion, not only with regard to the eradication of discriminatory dynamics within a classic binary system, but also and principally in terms of the recognition and protection of (dissenting) gender identities.

However, due to a common history inherited from the conservative religious tradition referred to above, even the most "progressive" regional constitutions seem to have failed to include the issue of "gender" as a wide-reaching and inclusive vindication of sexual diversity; they rather generally include it as a formal response aimed essentially at reaffirming women's rights. At most, Latin American systems recognise the rights of homosexual people, in particular the right to same-sex marriage, yet they fail to articulate a comprehensive constitutionally protective framework for rights related to gender diversity. In fact, several aspects of Latin American constituent pacts, which in principle are presented as facilitators of inclusive dialogues, may be veiled by a reality which hides persistent exclusions and prejudices, even, or especially, in constituent moments, i.e., in extraordinary political (democratic) moments (Ackerman 1991), when a new normative order is being drafted. It is then that the dominant, conservative social, political and economic forces make every effort to guarantee their interests, thereby diluting the original intention of acknowledging diversity and articulating inclusion.

Be that as it may, the gender agenda in today's Latin American democracies cannot rely on a merely normative approach, one in which law is understood as the instrument which ultimately gives meaning and significance to different social relations. Legal

visions have economic, political and cultural roots, which shape power relations. This is why, in order to understand Latin American reality, the social dynamics of subordination and exclusion which define the rights agenda need to be explored. The aim of this paper is however far more modest. Its purpose is to explore how these dynamics have been introduced in the legislative agendas enacted by various different parliaments, and to highlight their deficiencies. Its ultimate aim is to illustrate the degree of legislative commitment in this area, or the denounce the lack of it.

### **3. THE RECOGNITION OF TRANSGENDER RIGHTS AND THE LEGISLATIVE AGENDA IN ARGENTINA, URUGUAY AND CHILE**

Although sometimes perceived as part of so-called new Latin American constitutionalism, the Argentinean Constitution of 1994 is essentially conservative. Nevertheless, after five bills were drafted with the aim of recognising the right to gender identity, the Gender Identity Law 26.743 was sanctioned on 9 May 2012 and enacted two weeks later on 23 May. The product of Trans activism and other sympathetic alliances, the aim of this Law was to legally recognise the rights of people whose gender identity had hindered their access to legal rights: people that had been historically discarded as legal subjects on the basis of a binary construction of the person as a subject of rights, an abstract and universal construction which excludes all diversity.

With the political and legal recognition of Trans identities, this law dismantled the psychological determinism and gender naturalism which had prevailed in Argentina, thus ushering in a new approach which favoured the acknowledgment of diversity. In substance, the law accepts the right to rectify identity data and allows for the recognition of social rights, guaranteeing access to health treatment for anyone who needs to modify their body in accordance with their self-perceived gender (Article 3). Importantly, this does not require a medical diagnosis or surgical intervention (Article 4, final paragraph). The consent and will of the person alone is sufficient, overriding any kind of regulatory or procedural requirement aimed at limiting, restricting, excluding or suppressing the exercise of the right to gender identity. Based on this logic of self-determination, the system must be interpreted in such terms that any normative requirement be always oriented in favour of allowing access to the chosen gender identity (Article 13). In line with this logic, the law also guarantees recognition of gender identity for minors (Article 12). In the current legal context, therefore, the consent of the person prevails and the right to bodily autonomy is valued over the naturalised notion of physical identity which has long been used as a mechanism to subjugate and suppress diversities.

Furthermore, in the province of Buenos Aires, legislation has been introduced in parallel with Law 26.743 to strengthen the rights of transgender people. An example of this is the Law on Employment Quotas, yet to be enacted.

In addition to the above, the Presidential Decree No 4676/21 (July 2021), concerning National Registration, marks a clear step forward in the recognition of non-binary identities. Article 2 of the Decree states:

"The terms to be used in National Identity Cards and Ordinary Passports for Argentinians in the field referring to 'sex' may be 'F' (Female), 'M' (Male) or 'X'. The latter shall be specified, as outlined in the provisions of Article 4 of this Decree, in the cases of nationals whose birth certificates have been rectified in accordance with Law No. 26.743, whenever the registered option for 'sex' differs from 'F' (Female) or 'M' (Male), or when no 'sex' option has been specified".

As specified in article 4, "For the purposes of this decree, the term 'X' as used in the field of 'sex' shall include the following meanings: non-binary, indeterminate, unspecified, undefined, unreported, self-perceived, or any other category with which the person who does not feel they fall within the male/female binomial may identify themselves".

Despite all of the above, we must not forget that Trans people in Argentina continue to be exposed to acts of violence and aggression as a result of discriminatory practices regarding gender identities, while obstacles to basic social rights such as health, education, work or decent housing still exist. In practice, if not in legal theory, the rule of conduct continues to be criminalisation, stigmatisation and pathologisation, based on the traditional heteronormative religious discourses which have permeated and prevailed in Latin American ideology.

## Argentina

No formal recognition at a constitutional level



Legislative progress

Own elaboration

Following intense debate, in October 2018 the Uruguayan Parliament adopted the Comprehensive Law for Trans Persons (Law 19.684). This had first been presented in Parliament in 2017, and was endorsed by the Senate. It recognises the right to a change of name and registered gender; urges the public sector to guarantee one percent of jobs to members of the Trans community (Articles 12 and 13); establishes a public policy of educational inclusion (Articles 15 and 17); and guarantees the right of Trans people not to be discriminated against or stigmatised, establishing measures for prevention, care, protection and reparation.

These legislative advances are the result of a democratising public agenda, a particular focus of which is the violation of the rights of people from social groups who have historically been discriminated against in terms of sexuality and gender (Sempol 2019). As such, this Law highlights the introduction of a reparation regime for transgender people born before 31 December 1975 who can prove that they were victims of institutional violence for reasons related to their gender identity, through deprivation of liberty or other types of moral or physical harm. This could have been carried out by agents of the state or by people acting

with the state's authorisation, support or acquiescence (Article 10). As indicated above, this is included within a regulatory framework for education, health and labour policies. The Law also proposes the need to create a legal watchdog based on a National Diversity Plan.

In 2019 there was an attempt by a group of conservative MPs to repeal the Trans Identity Law through a referendum. Members of the conservative opposition National Party submitted a number of signatures to the Electoral Court in order to be allowed to organise a referendum to repeal the Law. The referendum went ahead, but did not receive the expected support. Nevertheless, the fact that it could be set in motion not only shows that certain legislative advances need to be reinforced with more far-reaching public policies, but also highlights the constant risk of backlash faced by transgender people's rights, as well as the ongoing threat which conservative state institutions pose to progressive organisations and their claims.

## Uruguay

No formal recognition at a constitutional level



Legislative progress

Own elaboration

In the case of Chile, the post-dictatorship experience involved a period of intense democratic debates. During this transition period, however, opportunities for discussing the rights of the LGBTI population were almost non-existent and in the context of the HIV-AIDS crisis of the 1980s specific agendas included the social and institutional criminalisation of homosexuality. Partly due to the strong influence of conservative groups, the Chilean democratic transition reinforced the ideology of heteronormativity. As has been the case in Bolivia, Ecuador, Colombia and other countries in the region, in a form of Latin American "common practice", the recognition of the rights of transgender people has been severely hindered by the design of criminal laws which have served to reinforce the dominant legal discourse, thereby criminalising diversity and difference. In Chile, the Criminal Code, which punishes crimes against "morality and decency", has undoubtedly served to restrict the rights of Trans women.<sup>3</sup>

This is not to say that the country has witnessed no legislative progresses. Thanks to the mobilisation and social pressure of transgender groups, certain administrative and judicial advances have been attained. Indeed, thanks to social activism, various judicial decisions were handed down in 2007 which opened the way to vindicating the rights to change one's name and sex (gender) in registration documents without prior sex reassignment surgery.<sup>4</sup> In the administrative sphere, ministerial reports have also been issued which deal with the recognition of the rights of transgender people, especially in

<sup>3</sup>. Art. 373 of the Chilean Criminal Code

<sup>4</sup>. "Transsexuals make history by winning name and sex change lawsuit in court". 5 May 2007. Available at: <http://www.movilh.cl/transsexuales-hacen-historia-al-ganar-en-tribunales-demanda-por-cambio-de-nombre-y-sexo/>. [Accessed: 4 February 2022].



the field of health. Meanwhile, in terms of education, the Ministry of Education's Report No. 0768 of 2017, concerning the rights of transgender children and students, stands out as significant. These developments have all acted as instigators of the subsequent legislative agenda.

These advances and other emblematic precedents, such as the *Atala Riffo vs. Chile* case, decided by the IACtHR in 2012, and Law 20-609 of 2012 known as the "Zamudio" or anti-discrimination Law, all played their part in the eventual passing of Law 21120 in 2018. This recognises and protects the right to gender identity, regulating the procedures for permitting the rectification of a person's birth certificate in relation to their name and sex when the existing certificate is not congruent with their identity. The Law is based on guiding principles such as non-pathologisation; non-arbitrary discrimination; confidentiality; dignity of treatment; the best interest of minors; and the principle of progressive autonomy.

Law 21120 should be viewed in tandem with others, such as Law 20830, which came into force in 2015, thereby creating the Civil Union Agreement, and Law 21400, enacted on 9 December 2021, coming into force on 10 March 2022, and allowing same-sex marriage along with adoption and lesbian and gay parenting. It is hoped that all these pieces of legislation, when combined with the case-law referred to above, will serve as a basis for the development of public policies and norms, as well as playing a part in informing the agenda for the Constitutional Convention which is currently discussing a new Constitution in Chile, and will hopefully herald a significant constitutional shift.

It is worth bearing in mind, however, that despite the steps taken by Chilean society and its democratic order to recognise and protect the rights of transgender people, the rejection of these rights by more conservative social and political sectors has also intensified. Hence the importance of reinforcing Trans gender empowerment and continuing efforts to claim their place in civic spaces.

## Chile



Own elaboration

Despite having conservative constitutional models, Argentina, Uruguay and Chile have been pioneers in recognising and regulating the rights of transgender people in Latin America. Legislative and/or judicial avances have been fundamental in enhancing the rights of people belonging to historically victimised groups, creating conditions of equality and recognition of rights. We cannot forget, however, that this is just the tip of a large iceberg floating in a sea of exclusion and discrimination, the visible head which has emerged after a long history of demands and resistance led by Trans people in the region.

#### 4. THE SITUATION IN COLOMBIA AND ECUADOR

In Colombia, gender demands and demands for the recognition of transgender people's rights have not had the hoped for effect at a legal level. Unlike Argentina and Uruguay, there is no specific legislation in Colombia regulating and protecting these rights; at most there is a specific decree on their exercise.<sup>5</sup> Any development in this area has been achieved at the judicial level, based on a number of rulings of the Colombian Constitutional Court. In a system where the preponderance of fundamental rights plays a central role, Colombia's Constitutional Court has acted with special concern on issues of LGBTI rights, even recognising the right of same-sex couples to equal marriage in 2006. In other cases, local decrees or local public policies have also contributed to the protection of transgender people's rights.

In terms of legal gender reassignment, it was the Constitutional Court's ruling T-504/94 which marked the beginning of the legal debate. Subsequently, rulings such as T-771/12; T-918/12; T-552/13; and T-063/15 have similarly allowed the Court to rule on specific issues in relation to Trans people's rights, such as the right to health; gender reassignment; compulsory military service; all based mainly on the concept of human dignity and the right to the free development of personality. The rejection of a pathologising approach to gender transitions is thus made explicit and a step has been taken towards an elective construction of gender, making less invasive instruments available to applicants in order to preserve individual autonomy (Ruling T-063/15 of the Constitutional Court). Likewise, in September 2019, on the basis of Ruling T-447/19, the Court decided on the rights of a Trans child, who, through his mother, sued a notary's office which had not allowed him to change his name to reflect his gender identity. The Court concluded that the absence of an efficient administrative mechanism to change a child's gender identity constitutes a violation of his or her fundamental rights.

In a number of cases, this case-law momentum has been accompanied by appeals to the Congress of the Republic to enact a Comprehensive Gender Identity Law but the prevailing legislative inertia concerning the issue has unfortunately prevented them from being successful. Nevertheless, the work of certain non-governmental organisations (NGOs) has been crucial in promoting strategic litigation on the issue, making freedom and individual autonomy possible in the face of allegations of police abuse and constant harassment of various Trans activists and sex workers in Bogotá.<sup>6</sup>

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<sup>5</sup>. Decree 1227/2015 Sole Regulatory Decree of the Justice and Law Sector, related to the procedure to correct information on sex in the Civil Status Registry.

<sup>6</sup>. According to the third ILGA World Trans Legal Mapping Report, abuse of Trans activists and sex workers continues to occur at the hands of the police, who often invoke "exhibitionism" laws to fine them, or physically attack them for going beyond the "defined space" for sex work. One transgender sex workers' organisation reports recurrent police harassment, with insults, physical violence and fines for drug use in private spaces. They also report completely unjustified violence during identity checks. (Chiam et al 2020: 208).

## Colombia



Own elaboration

Ecuador, meanwhile, has as of 2008 a new Constitution of the Republic, which includes principles and values aimed at recognising diversity, non-discrimination and different types of families. Despite this constitutional framework, however, at a legislative level the response to the rights agenda demanded by trans people has been partial, fragmentary and essentially deficient. Nor does the Constitution properly settle the issue in favour of Trans people's rights. Rather, these appear to benefit from a merely formal or nominal recognition and often find themselves surrounded by ambiguities, or at the crossroads of the contradictions which often arise between different constitutional provisions (López 2018).

Indeed, although the Organic Law on Identity and Civil Data Management was passed in February 2016, thereby at least apparently articulating the protection of rights related to gender identity, there is no comprehensive legislation covering the issue. In fact, this Organic Law emphasizes a binary, patriarchal and heteronormative perspective, which tends to operate from suspicion. A prime example is the requirement for any person who transitions to another gender to provide two witnesses to prove the legitimacy of their choice.<sup>7</sup> Legislation thus casts a shadow of doubt over Trans people claiming to exercise their rights, thereby restricting the free development of their personality, discarding any proper recognition of diversity and accentuating discrimination.

Case-law, on the other hand, has been more positive. In a 2017 ruling, concerning case 0288-12-EP, the Ecuadorian Constitutional Court accepted the possibility of a change of legal gender based simply on the right to free development of personality. Similarly, in Constitutional Rulings 10-18-CN and 11-18-CN of 2019, the same court paved the way for another contentious issue: the recognition via case-law of so-called egalitarian marriage. From that point onwards, constitutional jurisdiction has become an agent for LGTBI rights, thus making up for legislative inertia. Specifically, in a 2017 ruling, in case 0288-12-EP, the Court urged the National Assembly to regulate the change of the 'sex' marker on identity cards of Trans persons, granting the legislator a period of one year to generate the necessary regulation in this regard. To date, however, the National Assembly

<sup>7</sup> Article 94, final paragraph, of the Organic Law on Identity and Civil Data (2016) states:

"...Voluntarily, upon reaching the age of majority and once only, a person may replace the field of sex for a field of gender, which may be: male or female. The act shall be carried out in the presence of two witnesses who confirm there has been self-determination contrary to the sex of the applicant for a period of at least two years, in accordance with the requirements determined for this purpose in this Law and its regulations. This change shall not affect the data in the person's single personal register relating to sex. Should this situation arise, the petitioner may request a change of names based on the substitution of sex for gender..."

has not complied with the Constitutional Court's resolution and its mandate to adapt the infra-constitutional legislative system, which is indicative of negligence in this area.

Within these various contexts the fight for the rights of transgender people has intensified, generating a whole network of activism and preventative legal advice in order to provide intervention in cases of police violence and discrimination.<sup>8</sup>

## Ecuador



Own elaboration

## 5. THE EXPERIENCE OF BOLIVIA AND PERU

In the case of Bolivia, as well as formal constitutional recognition of gender identity, the country's Legislative Assembly passed a Gender Identity Law (Law 807) for transgender and transsexual people in 2016, thereby establishing a procedure for changing a person's name and gender marker on identity documents. Its enactment was clearly perceived as a step forward for the rights of transgender people. However, despite the expectation that, combined with the 2010 Law against racism and all forms of discrimination, this would lead to regulation of the situation of Trans people, things have not turned out as was hoped.

While the Bolivian legislature consolidated certain minimum thresholds of protection, a conservative case-law reversal took place when the Plurinational Constitutional Court of Bolivia declared, in November 2017, that the aforementioned law was partly unconstitutional. The decision responded to a suit filed against the Law five months after its approval, based on legal and moral arguments. As Pascale Absi (2020, p. 38) points out, the lawsuit was filed

"by the self-styled Platform for Life and Family (a Catholic and evangelist anti-abortion and anti-"gender ideology" coalition), with the support of six opposition assembly members (deputies and senators from the Christian Democratic Party, among others). In the meantime, the first marriages of transgender people -some of them highly mediatised- resulted in reactivating the campaign against the law".

<sup>8</sup>. Since 2002, the Transgender Project in Ecuador has been working on legal activism in the streets using what they have called itinerant legal patrols to prevent arbitrary arrests and violent and abusive interventions by police officers against sex workers. Likewise, the PAKTA Foundation is an organisation created by activists for the promotion and defence of the human rights of the LGBTI population.

Conservative groups have portrayed this as a "victory for the traditional family". Meanwhile, Trans groups in Bolivia have continued to appeal to the National Assembly, arguing that the void produced by the declaration of unconstitutionality completely undermines the original intent of the Trans Identity Law as successfully approved by Parliament.

In this context, a municipal law was approved in La Paz in 2018, which regulates spaces where self-managed sex work takes place and which benefits a significant proportion of transgender women. According to the local government, it came about as a result of a civil society initiative supported by several different organisations and based on consultations with various state institutions. The Law states that the municipality must grant authorisation for sex work in order to prevent trafficking, sexual exploitation and procuring. However, the Trans Legal Mapping Report 2019 (2020: 200) has pointed out that:

"civil organisations working for the rights of transgender people in Bolivia have reported that drug possession is used as an excuse (sometimes involving false accusations or fabrications) to harass sex workers and their clients, and in some cases, imprison both".

In Bolivia, therefore, everyday experience and struggle for the recognition of transgender people's rights still have to contend with harassment, discrimination, lack of recognition and reactionary forces.

### Bolivia



Own elaboration

In Peru, meanwhile, the Women and Family Congress Commission approved a legal opinion in March 2021, proposing a Gender Identity Law for the country which appeared to create a window of opportunity for the LGTBI community. Unfortunately, Parliament has failed as yet to pass any legislation on the matter. Nevertheless, since the case of *Azul Rojas Marín vs. Peru*, decided by the IACtHR in 2020, the vulnerable situation of the LGBTI population has become more apparent, thereby increasing the opportunities for discussing the discrimination and violence suffered by transgender people and the urgent need to address it.

### Perú



Own elaboration

## 6. OVERALL CONCLUSIONS

The above discussion shows that the recognition of the rights of Trans people throughout Latin America is still fragmentary, inconsistent and often deficient. In some cases, Trans people are criminalised based on criminal norms which represent the conservative stance prevalent in the region. In this situation, the constitutional and legislative orders, as well as case-law, all have a role to play, often as a result of strategic litigation, but there is a distinct lack of uniformity and consistency at any of these levels. Even where recognition of rights has been possible, it has only been partial: social rights such as health, education, social security and inclusion remain unfulfilled for significant minorities. Moreover, the implementation of certain policies using conformist legal approaches of control and surveillance, criminal law and repressive administrative procedures has often enabled the continuation of hegemonic conservative legal epistemologies in the region.

Where achieved, the partial recognition of rights has been made possible thanks to the impetus, mobilisation and strength of purpose of activist groups and associations which embody this historical struggle, fighting their way as they have through the complex relationship between judges, legislators, public bodies and pressure groups which strive to maintain the conservative approach which largely embodies Latin American "legal orders". To their credit, the voices championing more progressive rights have refused to be silenced in the face of democratic attrition, reversals and restrictiveness.

In those Latin American countries where a degree of regulation has been achieved, it has not always been accompanied by jurisdictional support. In the Bolivian case, for example, constitutional case-law even led to a dismantling of existing legislative advances. In contrast, in countries such as Ecuador and Colombia, their respective Constitutional Courts have been far more pro-active and forward-looking in the face of lack of specific and comprehensive regulation, playing a vital role in the protection of rights as mediators in the complex relationship between the legislators, public authorities and jurisdictional bodies. What definitely does seem to have played a significant role in recent times is the influence of the International Human Rights system, which has permeated national states and successfully broadened protective frameworks thanks to persistent social mobilisation, thus increasing the visibility of hitherto stigmatised groups.

There could be several factors that account for the generalised absence of legislation granting adequate protection to the rights of Trans people: the marked conservatism of the members of national legislative bodies, who reflect heteronormativity as a remnant of traditional, immovable, hierarchical gender roles; the conservative backlash which threatens to disregard the more progressive constitutional covenants through regressive reforms of the content of rights; a legislative rhetoric aimed at "civilising" and "ordering" bodies and behaviours on the basis of supposed moral superiority; and the understanding of law as a tool of power, social control and surveillance which encourages orthodox and "civilising" behaviour (Tapia 2019). These are just some of the many causes which merit further discussion and analysis with a view to understanding the limited legal protection available to transgender people.

In view of this, even the most progressive constitutions in the region, such as those of Ecuador (2008) and Bolivia (2009), with their updated agendas concerning human rights,

have not proved sufficient to instigate a coherent legislative approach to the rights of Trans people. Meanwhile, at a constitutional level, the understanding of "gender" seems to ignore any comprehensive protection of gender-diversity as such. By way of contrast, as the Argentinean case indicates, more conservative constitutions in terms of fundamental rights, which fail to give explicit recognition to demands concerning gender, have not necessarily prevented legislators from taking a more progressive approach to the protection of rights for gender-diverse people.

What seems clear is that a paradigm shift in the recognition and protection of rights seems to be taking place in the region, brought about by new constitutional pacts, by the mobilisation of organised pressure groups and/or by the acceptance of international human rights instruments. It is equally clear, however, that formal recognition, whether based on the constitution, legislation or case-law, is still inadequate and fragile (Chiam et al 2020). It also has to contend with the actions of "agencies" linked to more conservative sectors, which have proved to be a key obstacle to the effective realisation of the rights of Trans people at a general level. Even where the rights of transgender people are recognised by law, there is still a long way to go to eradicate discriminatory and violent behaviour, be it physical or institutional.

As such, beyond some specific cases where there has been a legislative shift from a model of stigmatisation to one of recognition and self-determination, the limited attention paid to issues related to the rights agenda has tended to prevail, with no real concern, meaning or significance given to the proposals of Trans movements which are attempting to create a space for discussion within the dominant hegemonic discourse.

Also pending is the task of increasing awareness about the limitations of legal strategies which are often resorted to in order to ensure a threshold of state protection, but which in fact often simply make the daily experience of oppressed bodies invisible. Discourses which properly contemplate non-binary realities are scarce, and in many cases cover up strategies of criminalisation and state persecution by implementing laws which are apparently protective, but ultimately ineffective.<sup>9</sup> This has necessarily led to the development of new concepts and strategies for the consolidation and defence of rights in the Latin American context, a good example being the network for LGBT litigation.

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<sup>9</sup> Anti-narcotics laws are often used to criminalise transgender people in Bolivia, the Dominican Republic, Colombia and Ecuador. As the *Informe de Mapeo Legal Trans 2019: Reconocimiento ante la ley Trans* (Trans Legal Mapping Report 2019: Recognition before the Law) (2020: 190) reveals: "In Bolivia, drug possession is frequently used as a reason, often with allegedly false accusations, to harass and even imprison Trans sex workers and their clients. In Colombia, 40% of LGBTI people and 30% of transgender people who are imprisoned are convicted for drug offences. Ecuador also reports high rates of Trans persons being imprisoned for drug-related offences...". The same report, in relation to the Ecuadorian situation, states: "...According to civil society, the 2014 Ordinance regulating the urban regeneration zone in downtown Guayaquil is used to profile transgender sex workers. When Trans people are in public spaces or engage in sex work discreetly, paragraph (c) of the Ordinance applies, while when they engage in sex work openly, paragraph (f) applies. Municipal, metropolitan and national police use ordinances such as these to justify recurrent violence against Trans sex workers. In addition, they report that many transgender people are in prison for drug-related offences..." (Chiam et al 2020: 1; 215). Similarly, in Chile and Peru, identity control laws are frequently used against transgender people.

This journey through various Latin American legislative agendas and advances in case-law invites a deeper reflection about the role of legislative bodies, the judiciary and public authorities in general in plural contexts of exclusion and discrimination against social groups which have not been able to achieve proper state protection. Questioning the role of the law and how exactly its narrative is constructed around the protection of rights is a necessary process for underpinning greater and enhanced recognition in an area where the region's more conservative forces are fighting to uphold a fragmented and limited protection of such rights, leaving anyone who is considered "different" out of the social contract. As Blanca Rodríguez has stated, "greater legislative activity is not necessarily synonymous with a better regulatory framework" (Rodríguez Ruiz 2010).

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