

Global progress recognising the human rights of lesbian, gay, bisexual and transgender (LGBT) persons has been matched by intense contestation about these developments.¹ Polarised positions, both supporting and opposing human rights protection, are now closely associated with collective and national identity.² As a result, issues related to sexual orientation and gender identity (SOGI) have become contentious not just within nation-states but also regional and international organisations.³ ‘Transnational culture wars’⁴ about norms related to sexual orientation and gender identity (SOGI) are also grip the Americas. Within the 35 Member States of the Organization of American States (OAS)⁵ in Latin America, North America and the Caribbean, some states are global frontrunners in the recognition of the rights of LGBT persons and others have introduced very little by way of legal and policy reforms that recognise the dignity and equality of LGBT persons. Even the more progressive OAS States face pockets of strong opposition to these human rights developments, especially in their legislatures and executives. Moreover, the OAS is divided

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¹ See Jonathan Symons and Dennis Altman, ‘International Norm Polarization: Sexuality as a Subject of Human Rights Protection’ (2015) 7 *International Theory* 61; Dominic McGoldrick, ‘The Development and Status of Sexual Orientation Discrimination under International Human Rights Law’ (2016) 16 *Human Rights LR* 613. The human rights concerns about bodily diversity facing intersex persons are far less visible and acknowledged.

² Jonathan Symons and Dennis Altman, ‘International Norm Polarization: Sexuality as a Subject of Human Rights Protection’ (2015) 7 *International Theory* 61, 65, 83.

³ See Elizabeth Baisley, ‘Reaching the Tipping Point?: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity’ (2016) *Human Rights Quarterly* 134.

⁴ Christopher McCrudden, ‘Transnational Culture Wars’ (2015) 13 *ICON* 434.

⁵ 21 countries signed the OAS Charter in 1948 and became Member States:

Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, United States of America, Uruguay, and Venezuela. 14 states later joined, mainly from the Caribbean: Barbados, Trinidad and Tobago (1967); Jamaica (1969); Grenada (1975); Suriname (1977); Dominica (Commonwealth of), Saint Lucia (1979); Antigua and Barbuda, Saint Vincent and the Grenadines (1981); The Bahamas (Commonwealth of) (1982); St. Kitts & Nevis (1984); Canada (1990); Belize and Guyana (1991).

by language, political ideology, legal heritage and history, economic power and sub-region. Both the OAS and the inter-American human rights system (IAHRS) are besieged by ongoing crises shaped by these divisions and contestation over the place of the human rights system with the transition in Latin America from dictatorships and repressive governments to democracies.

This paper explores the political, juridical and institutional developments at the OAS and in the IAHRS in relation to norms related to sexual, gender and bodily diversity taking place, notwithstanding sharp regional and intra-country contrasts, the backlash against the IAHRS and ongoing crises at the OAS. These developments could easily be missed since the hard legalising of these norms in the system is slim. Kenneth Abbott and Duncan Snidal define hard legalisation in terms of the establishment of ‘legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.’⁶

Treaties epitomise hard legalisation. The Americas is the only region to have adopted two regional treaties naming and proscribing discrimination based on sexual orientation and gender identity, one of which has entered in force.⁷ Nonetheless the significance of these treaties is undercut by the slow ratification process that is anticipated and the Anglo-Latin divide that is already evident in the signatures. With a paucity of LGBTI related cases decided by the IAHRS, one scholar concludes that that the ‘OAS has seen minimal development’ in the recognition of sexual orientation discrimination.⁸ Ironically, few cases at the early stage of norm development

⁶ Kenneth Abbott, Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 *International Organization* 421, 421.

⁷ Inter-American Convention on Protecting the Human Rights of Older Persons (A-70) Adopted June 15, 2017, Entered into force January 11, 2017; Inter-American Convention Against All Forms Of Discrimination And Intolerance (A-69) (adopted 5 June 2013).

⁸ Dominic McGoldrick, ‘The Development and Status of Sexual Orientation Discrimination under International Human Rights Law’ (2016) 16 *Human Rights LR* 613, 659.

has not been a disadvantage, it may have minimised the threats of norm polarisation. At the same time, a strong affirmative first ruling can make a difference. Criticised by some for its uncompromising and expansive read of equality and non-discrimination,⁹ the first ruling of the Inter-American Court of Human Rights (IACtHR) in *Karen Atala Riffo and daughters v Chile*¹⁰ has so far proved to be mostly a boon for the development of norms in the IAHRs. Moreover, cases like *Atala* are situated within a varied body of *soft legalising* related to the sexual, gender and bodily diversity in the IAHRs that is not without influence and should not be discounted. Soft law develops when one or more of the elements of obligation, precision, or delegation is weakened.¹¹

The hard and soft law developments in the IAHRs are idiosyncratic. Consent-based soft law created by the OAS General Assembly has been a legitimating frontrunner in legalisation in the regional human rights system. The General Assembly adopted resolutions titled ‘Human Rights, Sexual Orientation, and Gender Identity’ from 2008 that incrementally recognised the human rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons and the human rights violations they face, and called on states to take action. The consensus decision-making practices of the OAS General Assembly are less demanding in terms of opinion convergence than voting systems and, at least initially, they enabled decisions on polarising issues with little ostensible division.¹² On the other side, the Inter-American Commission on Human Rights

⁹ See e.g. Álvaro Paul, ‘Examining Atala-Riffo and Daughters v Chile, The First Inter-American Case on Sexual Orientation, and Some of its Implications’ (2014) 7 *Inter-American and European Human Rights Journal* (Protection of Human Rights in the Americas: Selected Essays for the Inter-American Court of Human Rights’ Anniversary) 54.

¹⁰ *Atala Riffo and daughters v Chile* Merits, Reparations and Costs IACtHR (ser C) No 239 (24 February 2012).

¹¹ *Ibid* 422.

¹² Philippe Urfalino, ‘Apparent Consensus and Voting: Two Modes of Collective Decision-Making’. Paper presented at the workshop on “The mechanisms of collective decision-making” Adriano Olivetti Foundation, Rome, April 29, 2006. Translated by Amy Jacobs (accessed at [file:///C:/Users/10032291/Downloads/Apparent Consensus and Vote.pdf](file:///C:/Users/10032291/Downloads/Apparent%20Consensus%20and%20Vote.pdf)) 20. Philippe Urfalino, ‘The Rule of Non-Opposition. Opening Up Decision-Making by Consensus’ (2014) 22 *Journal of Political Philosophy*, Wiley, 2014, 3320.

(IACHR), an autonomous organ of the OAS with delegated power to protect and promote human rights, and largely non-consensual modes of working, is responsible for a more amorphous body of soft-legalising of norms related the sexual, gender and bodily diversity. In 2011, the IACHR institutionalised its thematic work on sexual orientation and gender identity (SOGI) and bodily diversity with the creation of a specialised Unit on the Rights of LGBTI Persons. With little controversy, the Commission upgraded that Unit to a full-fledged rapporteurship in 2013. In a polarised context, the Commission's tools, which include public hearings, press releases, country and thematic reports, precautionary measures, requests for information from States, have proved to be flexible and advantageous, even if imperfect, ones for understanding the issues, identifying regional concerns, articulating standards, influencing states and enabling human rights defenders.¹³

It is early days, but I am intrigued that the development of norms related to sexual, gender and bodily diversity in the IAHRs has not been derailed for all the reasons one would predict, since they inhere in the critiques of system, such as the argument that the IACtHR's limited deference to OAS States threatens its effectiveness and legitimacy¹⁴ or that the Commission has remained too 'consistently and institutionally pro-victim and anti-state orientation'.¹⁵ The crisis-narratives of the IAHRs can obscure how the battered and idiosyncratic inter-American system *survives* and, to this point, has demonstrated resilience in advancing human rights on some polarising, morally embattled concerns.

¹³ See Andrew Guzman, 'Against Consent' (2011) 52 Va J Int'l L 747; Elizabeth Baisley, 'Reaching the Tipping Point?: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity' (2016) 38 Human Rights Quarterly 134, 143.

¹⁴ Gerald Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 European Journal of International Law 101.

¹⁵ Paolo Carozza, 'The Anglo-Latin Divide and the Future of the Inter-American System of Human Rights' (2015) 5 Notre Dame J. Int'l Comp. L. 153, 168.

The Political

From 2008 the OAS General Assembly passed annual resolutions calling for respect for and the protection of human rights of LBGT and later intersex persons. These annual General Assembly resolutions have been adopted by consensus and have incrementally advanced recognition of the human rights of LGBTI persons in the OAS. Even though the resolutions by 2013 hit a crossroads and have not since then been a very useful tool, the first five years laid an influential consensus-driven foundation for the later work of the human rights organs of the OAS. This was realised in part due to the way the OAS makes General Assembly resolutions and its accommodation of civil society participation in its general assemblies, on the one hand. On the other, the diversity in the composition of the coalition of LGBTI activists working on the issue and their strategic decision to focus first on the political, not human rights, organs of the OAS also made a difference.

The OAS General Assembly tends to adopt resolutions by consensus rather than a vote. Philippe Urfalino describes consensus decision-making as adopting a rule of non-opposition, meaning, there is the absence of any overt opposition to the position at hand.¹⁶ The consensus is achieved as some states agree not to oppose the proposal and when those who disapprove, or do not approve entirely, keep quiet.¹⁷ It facilitates decision without division.¹⁸ Although in principle there is equality of participation, there is rarely equal participation in the decision and often inequalities in influence.¹⁹ The 2008 OAS General Assembly Resolution on ‘Human Rights,

¹⁶ Philippe Urfalino. ‘The Rule of Non-Opposition. Opening Up Decision-Making by Consensus’ (2014) 22 *Journal of Political Philosophy* 320.

¹⁷ Philippe Urfalino, ‘Apparent Consensus and Voting: Two Modes of Collective Decision-Making’. Paper presented at the workshop on “The mechanisms of collective decision-making” Adriano Olivetti Foundation, Rome, April 29, 2006. Translated by Amy Jacobs) (accessed at [file:///C:/Users/10032291/Downloads/Apparent Consensus and Vote.pdf](file:///C:/Users/10032291/Downloads/Apparent%20Consensus%20and%20Vote.pdf)) 20, 23.

¹⁸ Urfalino, ‘The Rule of Non-Opposition’.

¹⁹ Urfalino, ‘Apparent Consensus and Voting’, 23.

Sexual Orientation, and Gender Identity’ was led by Brazil.²⁰ In its preamble it recites the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man and the OAS Charter which ‘proclaims that the historic mission of America is to offer to man a land of liberty and a favorable environment for the development of his personality and the realization of his just aspirations’.²¹ This resolution’s modest goal was to have states express concern about ‘acts of violence and related human rights violations perpetrated against individuals because of their sexual orientation and gender identity’.²²

In 2009, the Resolution moved from expressing concern to condemning the violence and human rights violations related to sexual orientation and gender identity (SOGI) to urging that these acts be investigated and perpetrators be brought to justice.²³ The Resolution also called for adequate protection for human rights defenders and asked the IACHR to pay attention to the issue. In 2010 the Resolution made a broader call to states to secure equal access to justice SOGI related violence and discrimination and encouraged them to find ways to combat discrimination based on sexual orientation and gender identity.²⁴ By 2011 states were encouraged to introduce public policies against SOGI-based discrimination.²⁵ 2012 represented another shift, with a call to states to eliminate barriers in access to political participation and to other areas of public life and to

²⁰ Brazil initiated the earlier ill-fated attempt to introduce a resolution before the then UN Human Rights Commission in 2003 expressing concern about violations of human rights based on sexual orientation. See Elizabeth Baisley, ‘Reaching the Tipping Point?: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity’ (2016) 38 Human Rights Quarterly 134, 149.

²¹ AG/RES. 2435 (XXXVIII-O/08) Human Rights, Sexual Orientation, and Gender Identity (Adopted at the fourth plenary session, held on June 3, 2008)

²² Ibid.

²³ AG/RES. 2504 (XXXIX-O/09), Human Rights, Sexual Orientation, And Gender Identity, (Adopted at the fourth plenary session, held on June 4, 2009).

²⁴ AG/RES. 2600 (XL-O/10) Human Rights, Sexual Orientation, And Gender Identity (Adopted at the fourth plenary session, held on June 8, 2010).

²⁵ AG/RES. 2653 (XLI-O/11), Human Rights, Sexual Orientation, And Gender Identity, (Adopted at the fourth plenary session, held on June 7, 2011).

prevent interference in their private life.²⁶ The IACHR having been asked the year before to prepare a hemispheric report on the rights of LGBTI persons was asked in 2012 to prepare a study on laws restricting the human rights of individuals because of SOGI and ‘guidelines aimed at promoting decriminalization of homosexuality.’²⁷

The Coalition of Lesbian, Gay, Bisexual, Travesti, Transgender, Transsexual and Intersex Organizations from Latin America and the Caribbean (LGBTTTI Coalition) includes organisations from over 20 OAS member states which from 2006 took advantage of more liberalised OAS rules for the participation of civil society in its general assemblies.²⁸ The Coalition capitalised on the relative openness of OAS organs to accrediting civil society organisations and providing spaces for dialogue with civil society.²⁹ The Coalition’s work can be traced to the 2006 Americas Regional Conference against Racism organised in Brasilia as a follow up to the Durban and Santiago +5 processes. LGBTI activists made a decision to devote their attention to the Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance proposed by Brazil. They met in a parallel event at the OAS General Assembly in Panama in 2007. More than half of the activists at the 2007 General Assembly were trans and intersex, and the Coalition succeeded in getting the OAS to recognise the gender identity of trans activists in the accreditation

²⁶ AG/RES. 2721 (XLII-O/12) Human Rights, Sexual Orientation, And Gender Identity (Adopted at the second plenary session, held on June 4, 2012).

²⁷ Ibid.

²⁸ See Jorge Contesse, ‘Contestation and Deference in the Inter-American Human Rights System (2016) 79 Law & Contemporary Problems 123, 132, citing OAS, Permanent Council Res. 759, Guidelines for the Participation of Civil Society Organizations in OAS Activities (Dec. 15, 1999).

²⁹ In both the UN and African human rights systems, LGBT activists have faced impediments in gaining access to processes where norms are developed. See Elizabeth Baisley, ‘Reaching the Tipping Point?: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity’ (2016) Human Rights Quarterly 134, 144-45; Annika Rudman ‘The protection against discrimination based on sexual orientation under the African human rights system’ (2015) 15 African Human Rights LJ 1, 23.

process for the General Assembly, regardless of the gender markers on their identity documents.³⁰ The Coalition made a strategic decision to focus their initial energies on the OAS political organs—as distinct from the IACHR and IACtHR, the system’s autonomous human rights organs—even though the latter had become a bulwark against systemic human rights violations arising from decades of repressive governments in Latin America, and were the focal point in the OAS for Latin American human rights defenders.

Notoriously, 11 of the 12 English speaking Caribbean States are outliers in the OAS, averse to decriminalising consensual same-sex sex. Their relative silence during the adoption of the resolutions between 2008 and 2012, and their decision to keep any disapproval they may have had to themselves, was tacit consent in a consensus decision-making process.³¹ The Coalition gave unprecedented prominence to Caribbean civil society at the OAS, a departure from the overwhelmingly Latin American focus of the OAS and the IAHRs.³² English speaking Caribbean states representatives were confronted by activists from their countries at the General Assembly and obliged to provide responses, however modest. For example, in the Civil Society and Heads of Delegations Dialogue in 2012 in Cochabamba Bolivia, the Coalition drew attention to the situation of LGBTTTTI persons in the English speaking Caribbean, ‘mentioning each member of the Coalition in attendance from that region, who stood up calling attention to the Heads of Delegation and the audience’. Consequently, the state representations of St. Kitts and Nevis,

³⁰ Stefano Fabeni, Marcelo Ferreyra, ‘The Coalition of Lesbian, Gay, Bisexual, Transgender, Transsexuals, Travesti, Intersex (LGBTTTTI) Organizations of Latin America and the Caribbean working within the Organizations of American States (OAS): A Short History (2016)

³¹ Philippe Urfalino, ‘Apparent Consensus and Voting: Two Modes of Collective Decision-Making’. Paper presented at the workshop on “The mechanisms of collective decision-making” Adriano Olivetti Foundation, Rome, April 29, 2006. Translated by Amy Jacobs) accessed at [file:///C:/Users/10032291/Downloads/Apparent Consensus and Vote.pdf](file:///C:/Users/10032291/Downloads/Apparent%20Consensus%20and%20Vote.pdf) 23.

³² See Auro Fraser, ‘From Forgotten Through Friction to the Future: the Evolving Relationship of the Anglophone Caribbean and the Inter-American System of Human Rights’ (2006) 43 *Revista IIDH* 207.

Guyana and Trinidad and Tobago expressed their concerns about the information shared and committed to raising these concerns with their governments.³³

The OAS General Assembly resolutions on sexual orientation and gender identity faltered after 2012 as they pushed the boundaries of norm recognition forward and as the resolutions became more *au courant*.³⁴ In 2013, for the first time, the Resolution spoke not only of sexual orientation and gender identity, but also *gender expression*. All three terms were included in the Convention on Discrimination and Intolerance adopted by the OAS General Assembly in 2013. The Resolution also encouraged states to produce data on homophobic and transphobic violence. Also for the first time, States were urged to afford appropriate protection to intersex people and to implement policies and procedures, as appropriate, to ensure medical practices that are consistent with applicable human rights standards along the lines, drawing on recommendations made by the Special Rapporteur for Torture to the UN Human Rights Council that very year. 2014 was the first year that there were no increments to the resolution, yet the number of footnotes in 2014 doubled from the year before, from seven to 14 between 2013 and 2014; two-fifths of the OAS member states.³⁵ No resolutions were considered in 2015 and in 2016 and omnibus resolution echoing elements of earlier resolutions was adopted with footnotes from Jamaica, Honduras, Nicaragua, Guatemala, Paraguay, Trinidad and Tobago and Barbados.³⁶

English speaking Caribbean States were the first to the break from the consensus by adding footnotes to the resolution in 2013. Caribbean countries objected to the drift in terminology to

³³ Coalition of LGBTTTTI Organisations Working in the OAS, 'Celebrate the Approval of the Fifth Resolution on Human Rights, Sexual Orientation and Gender Identity' 5 June 2012.

³⁴ OAS G/RES. 2807 (XLIII-O/13) Human Rights, Sexual Orientation, And Gender Identity And Expression 1/ 2/ 3/ 4/ 5/6/ 7/ (Adopted at the fourth plenary session, held on June 6, 2013).

³⁵ AG/RES. 2863 (XLIV-O/14) Human Rights, Sexual Orientation, And Gender Identity And Expression (Adopted at the fourth plenary session, held on June 5, 2014).

³⁶ OAS AG/RES. 2887 (XLVI-O/16) Promotion and Protection of Human Rights (Adopted at the Second Plenary Session, Held on June 14, 2016).

include gender identity, which it said was vague and had no consensus in international law, and some said that there was a lack of consensus on these issues in their countries and still strong support for buggery/sodomy laws.³⁷ Though eight of the fourteen footnoters in 2014 were Caribbean states, the list included five Latin American states and the United States. The advocacy against the resolution by Latin American religious CSOs who raised the spectre of same sex marriage as either implied by the resolutions or their next step likely contributed to the breakdown in the Latin American consensus on the resolution.³⁸ Perhaps partly in response to the *Atala* ruling, from 2013 onwards religious conservative groups used the same spaces in the OAS General Assembly for civil society that had been mined productively by the LGBTI activists to press their opposition to the development of sexual and gender rights.³⁹ Over the course of a few years, the General Assemblies became a battleground for culture wars about abortion and same sex marriage.⁴⁰ The United States took an entirely different tack saying that while it supported the resolution in principle, it objected to the negotiation of new conventions dealing with racism, discrimination and intolerance.

³⁷ Jamaica, St. Lucia and St. Vincent and the Grenadines objected to the drift to include the terminology "gender expression" on grounds that it is ambiguous and had no consensus in international law. Both Suriname and St. Vincent and the Grenadines said that they would only be guided by principles and norms accepted at the UN. Caribbean countries who has been silent when the 2012 pointedly asked the Commission to prepare recommendations for decriminalization of homosexuality now made reference to their laws criminalizing same sex sex. Barbados said it could not join the consensus because the matters in the resolution were still the subject of national discussions and Guyana said these matters were being considered by a committee of the National Assembly. Trinidad and Tobago said it was maintaining its sodomy laws and Belize said that it there was ongoing litigation whose outcome it had to await.

³⁸ Guatemala and Ecuador expressed their concern that their countries did not recognize same sex marriage and that this lack of recognition was not deemed to be discrimination in their countries. Honduras offered a caveat that it was not bound by anything in the resolution that was inconsistent with its national laws or international commitments. Panama said it would implement the resolution in accordance with its Constitution.

³⁹ See Christopher McCrudden, 'Transnational Culture Wars' (2015) 13 *ICON* 434.

⁴⁰ LGBTTTTI Coalition of Organizations working at the OAS Celebrates the Approval of the Sixth Resolution on the Human Rights, Sexual Orientation and Gender Identity and Expression at the OAS 6 June 2013. LGBTTTTI Coalition of Organizations working at the OAS Celebrates the Approval of the Seventh Resolution on the Human Rights, Sexual Orientation and Gender Identity and Expression at the OAS 14 June 2014.

The backlash by OAS States against the expansion of norms in the 2013 resolution was not particularly principled. Most states were objecting to threats not found in the Resolution or raising concerns that would have applied to the earlier 2008-12 Resolutions. Nevertheless, the 2013 Resolution tapped into solidified dissensus at the OAS by borrowing language from the draft Inter-American Convention against All Forms of Discrimination and Intolerance. Once the non-binding soft law resolution drew upon contested hard law—a new convention that nearly half the states openly did not support—it faltered. OAS Member States could not agree on a single draft convention against racism and all forms of discrimination and intolerance as proposed by Brazil. Some Caribbean states objected to a single convention that would also address discrimination based on sexual orientation because of the absence of national consensus on this issue.⁴¹ As a result, two conventions were negotiated and adopted at the 2013 OAS General Assembly—one against racism and the other against all (other) forms of discrimination and intolerance.

One can only wonder about the likely trajectory of the resolutions had there been ownership of them by a larger and more diverse group of states.⁴² This may have tempered the expansion of norms in the Resolution to the more widely accepted condemnation of violence and broad principles of non-discrimination, and access to justice—the core principles of the early resolutions. Elizabeth Baisley argues that UN political bodies like the Human Rights Council are more effective norm entrepreneurs than UN expert bodies on SOGI precisely because they are conservative and tend to frame these norms within existing normative frameworks, as adjacent

⁴¹ Awaz Raof, 'The Inter-American Anti-Discrimination Conventions and the Concealed Challenges Ahead' Oxford Human Rights Hub 3 July 2013.

⁴² The first resolutions were sponsored by Brazil, and in 2010 the SOGI resolution had the co-sponsorship of Bolivia. In 2011 the United States, Argentina, El Salvador and Costa Rica co-sponsored and in 2012 just Brazil. In 2013 Argentina, Columbia, the United States and Uruguay all co-sponsored with Brazil the ill-fated resolution. A co-sponsor of the 2013 Resolution, the United States provided a footnote to the same text in the 2014 Resolution.

claims to ones well-established related to violence and discrimination.⁴³ In 2016, on the margins on the General Assembly, Argentina, Brazil, Canada, Chile, Colombia, Mexico, the United States, and Uruguay, established themselves as members of the OAS LGBTI Core Group. In articulating its aims, the Core Group went back to basics, focusing on the least contested norms of supporting ‘regional and OAS efforts aimed at ensuring that all human beings are able to live free from violence and discrimination on the grounds of sexual orientation or gender identity or expression, acknowledging the importance of addressing multiple and overlapping forms of discrimination’.⁴⁴ It is yet to be seen if the LBGTI Core Group can invigorate the consensual soft legalising in the OAS political organs.

Juridification

Litigation before the IAHRS is inefficient and slow, favours experienced actors and operates as a ‘lottery’ accessible to a tiny number of victims.⁴⁵ Very few petitions before the system deal with LGBTI persons. By 2014, the IACHR had processed approximately fifty petitions related to LGBTI persons brought against 16 States.⁴⁶ Only a few of these have generated published merits reports by the IACHR or rulings by the IACtHR. One of the earliest cases in the system is the

⁴³ Elizabeth Baisley, ‘Reaching the Tipping Point?: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity’ (2016) 38 Human Rights Quarterly 134, 149.

⁴⁴ OAS LGBTI Core Group, ‘Joint Statement by the Founding Members of the OAS LGBTI Core Group’, Santo Domingo, 15 June 2016 <http://www.oas.org/es/cidh/lgtbi/docs/JointDeclaration-FoundingMembers-OAS-LGBTI-CoreGroup.pdf>. Virtually all OAS States, including in the Caribbean, had acknowledged these principles, even if only rhetorically.

⁴⁵ James Cavallaro, Stephanie Erin Brewer, ‘Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court’ (2008) 102 American Journal of International Law 768, 770. The Inter-American Commission receives petitions alleging human rights violations in all 35 OAS States. The IACHR determines their admissibility and, if admissible, issues a report on the merits of the petition with recommendations. In only a handful of cases involving the Latin American and few Caribbean States that have ratified the American Convention on Human Rights and accepted its contentious jurisdiction, the Commission submits the case to the Inter-American Court.

⁴⁶ IACHR, ‘The Rights of Lesbians, Gay, Bisexual, Trans and Intersex Persons in the Americas’ (Brochure 2014), accessed at <http://www.oas.org/es/cidh/lgtbi/docs/Brochure-Rapporteurship-2014.pdf>.

Columbian case of *Marta Lucía Álvarez Giraldo*⁴⁷ which the IACHR admitted in 1999. Her petition alleged that the state violated the American Convention in denying her access to intimate conjugal visits as a lesbian. Between 2012 and 2016, the IACtHR gave rulings in three cases involving lesbian and gay persons. *Karen Atala Riffo and daughters v Chile*⁴⁸ was initiated by a Chilean judge who lost custody of her daughters because of her sexual orientation. The Inter-American Court in 2012 interpreted the American Convention on Human Rights as prohibiting discrimination on the basis of sexual orientation and gender identity. *Duque v Columbia*⁴⁹ dealt with the rights of same sex couples and the Court found Columbia in violation of Mr. Duque's right to equality and non-discrimination by denying him the right to a survivor's pension due to his sexual orientation. In *Flor Freire v Ecuador*,⁵⁰ the Inter-American Court determined that Ecuador's military disciplinary rules which distinguished between sanctions for homosexual sex and non-homosexual sex to be discriminatory. Mr. Flor Freire insisted he was not gay but perceived to be so, and was dismissed from the army for breaching its rules on sex between persons of the same sex.

Many of the early petitions came from jurisdictions like Chile and Columbia where lawyers and organisations were actively pursuing domestic litigation to vindicate the human rights of lesbians and gay persons.⁵¹ The exhaustion of domestic remedies is a precondition for the admissibility of petitions before the IACHR. All three cases decided by the IACtHR involved persons who were denied justice by their local courts but who were nevertheless cognisable to the

⁴⁷ *Marta Lucía Álvarez Giraldo v Columbia* IACHR Report No 71/99, Admissibility, Case 11.656, May 4, 1999.

⁴⁸ *Atala Riffo and daughters v Chile* Merits, Reparations and Costs IACtHR, Ser C No 239 (24 February 2012).

⁴⁹ *Duque v Columbia* Preliminary Objections, Merits, Reparations and Costs, IACtHR, Series C No 310 (26 February 2016).

⁵⁰ *Flor Freire v Ecuador* Preliminary Objections, Merits, Reparations and Costs, IACtHR, Series C No 315 (31 August 2016).

⁵¹ See Penny Miles, 'Brokering Sexual Orientation and Gender Identity: Chilean Lawyers and Public Interest Litigation Strategies' (2015) 34 *Bulletin of Latin American Research* 435.

domestic courts, and had the means to approach them. The *Atala* case took 8 years from the date the petition was filed to the Court's ruling; *Duque* and *Flor Freire* took longer, 11 and 14 years respectively, to be resolved. Indeed, by the time the 2016 cases were decided, there had been important reforms to the discriminatory legal frameworks in both countries. Notably, these early cases give little indication of the violations most often denounced to the IACHR through its various mechanisms—complaints about violence, lack of access to justice in the context of violence and non-recognition of gender identity.⁵²

That said, the IACHR's recent attention to petitions related to the rights of LGBTI persons is beginning to bear fruit with a wider cross-section of petitions related to LGBTI being declared admissible.⁵³ In November 2014, the IACHR admitted its first case focussed on violence, that of *Luis Alberto Rojas Marín*⁵⁴ who alleges that he was subject to illegal and arbitrary detention and to acts of sexual violence and torture while in police custody because of his sexual orientation, and that the State failed to investigate these acts. In 2015, the IACHR declared admissible the case of *Sandra Cecilia Pavez Pavez v Argentina*,⁵⁵ a religious teacher whose certificate to teach Catholicism in schools was revoked because she was a lesbian. Four petitions were declared admissible in 2016, all related to transgender persons. One involves the refusal of Brazil to perform a gender affirmation surgery through the public health system or to pay for the surgery in a private hospital.⁵⁶ Another deals with the alleged unwarranted delay in the investigation of the murder of a Honduran trans woman and discrimination in the administration of justice based on sexual

⁵² See e.g. 'Hearings-Rights of LGBTI Persons' <http://www.oas.org/es/cidh/audiencias/topicslist.aspx?lang=en&topic=32>.

⁵³ See IACHR, 'Rapporteurship on the Rights of LGBTI Persons: Mandate and Functions' <http://www.oas.org/en/iachr/lgtbi/mandate/mandate.asp>.

⁵⁴ *Luis Alberto Rojas Marín v Peru* IACHR Report No 99/14, Petition 446-09, Admissibility, November 6, 2014.

⁵⁵ *Sandra Cecilia Pavez Pavez v Argentina* IACHR Report No 30/15, Petition 1263-08, Admissibility, 21 July 2015.

⁵⁶ *Luiza Melinho v Brazil* IACHR Report No 11/16, Petition 362-09, Admissibility, April 14, 2016.

orientation.⁵⁷ The other admitted is a petition filed by noted Venezuelan trans academic and politician, Tamara Adrián, who alleges that the Venezuela legal system failed to provide a suitable and effective remedy for changing a person's gender identity in the registry documentation system.⁵⁸ The final one addresses the alleged violence against an El Salvadoran trans woman because of her gender identity and expression by persons who included state officials and the failure of the State to give her access to justice in a non-discriminatory way.⁵⁹

In *Atala*, the Inter-American Court interpreted the American Convention on Human Rights as a living instrument 'whose interpretation must go hand in hand with evolving times and current living conditions'.⁶⁰ The Court said that the Convention should be interpreted 'in the context of the most favourable option for the human being and in light of the evolution of fundamental rights in contemporary international law'.⁶¹ It concluded that the Convention prohibited discrimination on the basis of sexual orientation and gender identity. These fell within the words 'any other social condition' in Article 1.1 which guarantees all persons to the full exercise of all Convention rights and freedoms without discrimination. The Court took account developments in the region but these were not given decisive weight.⁶² Although the Court saw differences in how states respect the rights of LGBTI persons, it identified in the resolutions of the OAS General Assembly between 2008 and 2011 growing consensus that discrimination on the basis of sexual orientation was prohibited.⁶³ The Court also recognised progressive rulings of courts in Columbia and Mexico on

⁵⁷ *Vicky Hernández and family v Honduras* IACHR Report No 64/16, Petition 2332-12, Admissibility Report 6 December 2016.

⁵⁸ *Tamara Adrián Hernández v Venezuela* IACHR Report No 66/16, Petition 824-12, December 6, 2016.

⁵⁹ *Alexa Rodríguez v El Salvador* IACHR Report No 73/16 Petition 2191-12.

⁶⁰ *Atala Riffo and daughters v Chile* Merits, Reparations and Costs IACtHR, Ser C No 239 (24 February 2012), para 83.

⁶¹ *Ibid* para 85.

⁶² Nino Tsereteli, 'Emerging Doctrine of Deference of the Inter-American Court of Human Rights' (2016) 20 *Int'l J of Human Rights* 1097, 1106.

⁶³ *Atala* para 86. See also the separate opinion of Judge Perez Perez para 20.

sexual orientation discrimination. The Inter-American Court explained that

The alleged lack of consensus in some countries regarding full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to perpetuate and reproduce the historical and structural discrimination that these minorities have suffered. The fact that this is a controversial issue in some sectors and countries, and that it is not necessarily a matter of consensus, cannot lead this Court to abstain from issuing a decision, since in doing so it must refer solely and exclusively to the stipulations of the international obligations arising from a sovereign decision by the States to adhere to the American Convention.⁶⁴

The question is whether the Court should maintain its limited deference to state consent in general and especially in such contested terrain, given the risks of backlash by states.⁶⁵ The lack of universality of ratification of the American Convention is already a serious concern. No one wants to risk further denunciations or further discourage ratifications by Caribbean states. Writing before *Atala*, Gerald Neuman argues that greater attention to regional consent in the evolutive interpretation of the American Convention could improve acceptance and effectiveness of the IAHRs.⁶⁶ Even though the treaty invokes a supra-positive moral authority, he says it cannot afford to neglect its consensual dimension if it wishes to maintain its legitimacy.⁶⁷ Without some deference to states, it is argued that human rights systems risk losing support and undermining their effectiveness.⁶⁸ Along the same lines, there is a criticism that the IAHRs gives too little scope

⁶⁴ *Atala* para 92. Also in *Duque*, the Inter-American Court affirmed again it would not refuse to decide a case because of a lack of consensus among Member States on the rights of LGBT persons (*Duque v Columbia* Preliminary Objections, Merits, Reparations and Costs, IACtHR, Series C No 310 (26 February 2016), para 123).

⁶⁵ Álvaro Paul, 'Examining *Atala-Riffo and Daughters v Chile*, The First Inter-American Case on Sexual Orientation, and Some of its Implications' (2014) 7 *Inter-American and European Human Rights Journal* (Protection of Human Rights in the Americas: Selected Essays for the Inter-American Court of Human Rights' Anniversary) 54, 74. See also Candia, Gonzalo. "Comparing Diverse Approaches to the Margin of Appreciation: The Case of the European and the Inter-American Court of Human Rights." Available at SSRN 2406705 (2014) I. See more generally, Gerald Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 *European Journal of International Law* 101.

⁶⁶ Gerald Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 *European Journal of International Law* 101.

⁶⁷ *Ibid.*

⁶⁸ Dominic McGoldrick, 'A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee' (2016) 65 *ICLQ* 21, 44.

for the operation of the European doctrine of margin of appreciation, as a form of judicial self-restraint applicable to the scope of obligations and limitations on rights.⁶⁹ Dominic McGoldrick says that ‘when properly understood the MoA is a complex, sophisticated and defensible intellectual instrument for international bodies supervising polycentric rights claims.’⁷⁰ Another concern is the identity of the IACtHR as an Inter-American Constitutional Court for Latin America, as Ariel Dulitzky terms it.⁷¹ The doctrine of conventionality control—which asks domestic judges to guard the supremacy of the Convention as it is interpreted by the Inter-American Court—contributes to the sense that the court functions as a supranational constitutional court.⁷² This doctrine, increasingly described as an invention of the Court,⁷³ is unfathomable in the legal systems of Anglo-America, and especially the Caribbean, where the doctrine of constitutional supremacy is an important symbol of decolonisation and national independence.

There is now growing recognition that the IAHRs has developed practices, albeit not coherently, of judicial deference and consideration of the regional and national situations.⁷⁴ At least in equal protection cases that go to the heart of vulnerabilities endemic to the region, the inference is that deference will be slim.⁷⁵ This ensures that the system challenges prevailing and

⁶⁹ See Gonzalo Candia, ‘Comparing Diverse Approaches to the Margin of Appreciation: The Case of the European and the Inter-American Court of Human Rights’ (March 9, 2014). Available at SSRN: <https://ssrn.com/abstract=2406705> or <http://dx.doi.org/10.2139/ssrn.2406705>; Dominic McGoldrick, ‘A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee’ (2016) 65 ICLQ 21.

⁷⁰ McGoldrick *ibid*, 58.

⁷¹ Ariel Dulitzky, ‘An Inter-American Constitutional Court: The Invention of the Conventionality Control by the Inter-American Court of Human Rights’ (2015) 50 *Tex. Int’l LJ* 45, 47.

⁷² *Ibid*. See also Gonzalo Candia, *Comparing Diverse Approaches to the Margin of Appreciation: The Case of the European and the Inter-American Court of Human Rights* (March 9, 2014). Available at SSRN: <https://ssrn.com/abstract=2406705> or <http://dx.doi.org/10.2139/ssrn.2406705> 1; Jorge Contesse, ‘The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights’ (2017) 15 *ICON **.

⁷³ *Ibid*.

⁷⁴ See Nino Tsereteli, ‘Emerging Doctrine of Deference of the Inter-American Court of Human Rights’ (2016) 20 *Int’l J of Human Rights* 1097; Jorge Contesse, ‘Contestation and Deference in the Inter-American Human Rights System (2016) 79 *Law & Contemporary Problems* 123, 141-42.

⁷⁵ Contesse, *ibid* 142.

longstanding inequalities rather than affirming them.⁷⁶ By the time the Court heard *Atala*, the main tension posed in the case was between the rights of the mother and the best interests of her children. Though the latter were a legitimate state aim that could justify the restriction of the right to equality and non-discrimination, the Court signalled that a standard of strict scrutiny applied where sexual orientation was a ground for distinction or exclusion. The State had to provide weighty and substantial justification under the headings of legitimate aim, suitability, necessity and proportionality. The Court rejected the argument that a child who grows up with same sex parents would be damaged as ‘speculative or imaginary’.⁷⁷ Arguably, the proportionality test used in *Atala* gives the state an opportunity to provide reasons—weighty and convincing ones why the right can be limited—and incorporates a narrow margin of appreciation.⁷⁸ One middle ground, would be for the Court to give states some scope in deciding how to implement the right.⁷⁹

Without greater attention to regional consensus, is the IAHRs risking an overlegalisation of human rights, especially as more contentious claims related to marriage equality come before it? Larry Helfer has looked at the crises in the Inter-American and universal systems as Caribbean countries denounced treaty obligations that provided access for death row inmates to international tribunals.⁸⁰ He has posited that there was an overlegalisation of international human rights norms that threatened state sovereignty, ‘precipitating a backlash’.⁸¹ Helfer’s analysis done in 2002, the centre of the storm, is now incomplete. While the Caribbean states who denounced various conventions have not re-acceded to them, their courts, including the indigenous Caribbean Court

⁷⁶ Nino Tsereteli, ‘Emerging Doctrine of Deference of the Inter-American Court of Human Rights’ (2016) 20 *Int’l J of Human Rights* 1097, 1105.

⁷⁷ *Ibid* para 109.

⁷⁸ Silvia Serrano, Staff Attorney, IACHR, email correspondence 8 March 2017.

⁷⁹ *Ibid*, 1107.

⁸⁰ Laurence Helfer, ‘Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes’ (2002) 102 *Colum. L. Rev* 1832.

⁸¹ 1834.

of Justice, have largely accepted the reasoning of the international tribunals and given their work more significance in the domestic courts.⁸² No one has been executed in the English speaking Caribbean since 2008 and death rows have dramatically shrunk, in some cases to nothing, with the abolition of the mandatory form of the punishment in 10 of the 12 independent English speaking countries.⁸³ Though public support for the death penalty in the Caribbean endures, the strong backlash against its restriction does not. Chile's response to a 2012 petition with regard to lack of access of same sex couples to marriage also tests the overlegalisation thesis. The Court's decision in *Atala* looks like a precursor to Chile's 2016 friendly settlement of in respect of this petition.⁸⁴ In January 2017, President Michelle Bachelet presided over a public ceremony to sign the agreement and make a commitment to securing marriage equality in Chile.⁸⁵

There is a strong case for what Jorge Contesse describes as a more bottom-up approach by the Court, deepening the transnational dialogue between the Inter-American Court and national courts, and taking greater account of and rooting its analysis in local developments.⁸⁶ Nino Tsereteli argues that the Court should take national opinion into account even if it ultimately rejects it, as it might, adopting a narrow margin of appreciation.⁸⁷ I would go in a different direction and suggest that the entire inter-American system should become a more *curious* one, deepening its

⁸² See Tracy Robinson, Arif Bulkan, Adrian Saunders, *Fundamentals of Caribbean Constitutional Law* (Sweet and Maxwell 2015).

⁸³ Only Trinidad and Tobago recorded death sentences in 2015, and no one is on death row in Belize, Dominica, Jamaica and St. Lucia Amnesty International, *Amnesty International Global Report, Death Sentences and Executions 2015* (2016).

⁸⁴ IACHR, 'Friendly Settlement before the IACHR Furthers Progress on Marriage Equality in Chile' Press Release No 009/17, 2 February 2017.

⁸⁵ *Ibid.* Chile is also a member of the recently established OAS LGBTI Core Group in 2016.

⁸⁶ Jorge Contesse, 'The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights' (2017) 15 *ICON **. See also Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 *Cornell International LJ* 494, 523.

⁸⁷ Nino Tsereteli, 'Emerging Doctrine of Deference of the Inter-American Court of Human Rights' (2016) 20 *Int'l J of Human Rights* 1097. 1107.

interest in the region's diversity and its legal and cultural pluralism; seeking to better understand what, who and where it does not know yet in the region.⁸⁸

Especially in the realm of sexual, gender and bodily diversity, we must ask ourselves whether the questions that preoccupy us are still 'questions worth having answers to'.⁸⁹ The conventional question and answer about SOGI reproduces a dichotomy of pathologically homophobic states and suspect democracies, on the one hand, and nations which by virtue of their LGBT acceptance are exemplary and entitled to global and regional leadership on the other.⁹⁰ In this frame, *Atala's* expansiveness is entirely at odds with Anglo-Caribbean's resistance to decriminalising same-sex sex. Imagined differently, the Inter-American Court in *Atala* generates new questions worth having answers to about the concept of family diversity in the entire region. In considering Karen Atala's right to family life under Article 17 of the American Convention, the Inter-American Court asserted that the American Convention does not advance a singular notion or closed conception of family or something called a 'normal' or 'traditional' family or one based on marriage in article 17. The Supreme Court of Chile had told Judge Atala, that her daughters needed to grow up in a 'normally structured family that is appreciated in its social environment' and not in an 'exceptional' one. The Inter-American Court dismissed this, saying that it reflected 'a limited, stereotyped perception of the concept of the family, which has no basis in the American Convention'.⁹¹

⁸⁸ Tracy Robinson, 'Universality, the Caribbean and the Inter-American Human Rights System', 1^{er} Encuentro Internacional de Especialistas y Redes del SIDH "Retos del Sistema Interamericano de Derechos Humanos", Instituto de Investigaciones Jurídicas de la UNAM, 19 August 2016, Mexico City, 5.

⁸⁹ David Scott, *Refashioning Futures: Criticism after Postcoloniality* (Princeton University Press 1999) 7.

⁹⁰ See Jasbir Puar, 'Homonationalism as assemblage: Viral travels, affective sexualities' (2013) 4 *Jindal Global L. Rev.* 23.

⁹¹ *Ibid* para 145.

Prof. Rhoda Reddock, a prominent Trinidadian feminist scholar, told a group of OAS Ambassadors in 2014 that there was ‘a long-term and widespread presence of sexual diversity in the Caribbean’ that belied the stereotype of islands of homophobia.⁹² She also reasoned that sexual diversity like *mati-work* in Suriname,⁹³ a form of homoerotic and homosocial bonding between women, is often rendered invisible using traditional Western identity categories like LGBT since the sexual expression and practices are understood as what women *do* as distinct from who they *are*, an identity.⁹⁴ She explained that Afro-Caribbean family forms were deemed deviant by colonial authorities because they did not follow European norms of marriage and a nuclear family and that a century and a half of efforts after the end of slavery to reform black families left a strong ‘negative impact’.⁹⁵ Introducing reforms to the narrow conception of family became one of the earliest projects of post-independence Anglophone Caribbean states.⁹⁶

It is not simply that the IAHRS should take note of national and regional practices, even if it ultimately rejects them, it must *ask the right questions* about the Americas. In the case of same sex marriage, those questions should generate analysis of family diversity across the Americas for Afro-descendants and indigenous peoples, among others, as well as an inquiry into the value placed on marriage as the ‘gateway to family formation’.⁹⁷ The strong polarisation presumed to follow if IACtHR ultimately rules that the American Convention guarantees marriage equality

⁹² Rhoda Reddock, ‘Gender, Sexuality and Caribbean Diversity’ (Presentation to the Inter-American Commission on Human Rights, Meeting of Ambassadors and Representatives of State, Washington DC, 22 April 2014, on file with author).

⁹³ See Gloria Wekker, “It?": Rethinking Identity in Light of the *Mati Work* in Suriname." *Feminist Anthropology: A Reader* (2009) 435; Gloria Wekker, *The politics of passion: Women's sexual culture in the Afro-Surinamese diaspora*. (Columbia University Press, 2006).

⁹⁴ Reddock *supra*.

⁹⁵ *Ibid.*

⁹⁶ See Tracy Robinson, ‘The Properties of Citizens: A Caribbean Grammar of Conjugal Categories’, (2013) 10(2) *Dubois Review: Social Science Research on Race* 425.

⁹⁷ Macarena Saez, ‘Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families around the World: Why ‘Same’ is so Different?’ (2011) 19 *American University Journal of Gender, Social Policy & the Law*, 126, 129.

need not be fatal or fixed new practices and social norms are being established, as the death penalty case study suggests, and if the IAHRs gives stronger attention to new questions and, through that process, introducing wider understandings of the Americas.

Admittedly because of my past close involvement in issues related to LGBTI persons in the IAHRs, I take a generous read of *Atala's* expansiveness and the abstract norms it articulates about structural discrimination and inequality and diversity in the Americas. I see the case as inviting questions worth having answers in the Americas. The IAHRs's methods of soft legalisation through the IACHR allow a range of actors to consider *Atala's* significance and implications in a range of settings that are not invariably heavily contested.⁹⁸ Soft law can 'initiate[] a process and discourse that may involve learning and other changes over time.'⁹⁹ Some human rights tribunals have struggled to be effective norm entrepreneurs on questions of sexual and gender diversity because their decisions have been mixed and inconsistent.¹⁰⁰ The vagaries of international human rights litigation and an inefficient case system have produced few cases before the IACtHR. Yet its weighty early ruling can normatively moor work in a system with varied soft-law mechanisms, without unnerving all states because the ACHR and acceptance of the Court's jurisdiction are not universal. At least in the early phase of norm development, these peculiarities of the IAHRs appear to have given the system an edge in responding to the complex contested

⁹⁸ Brian Sheppard, 'Norm Supercompliance and the Status of Soft Law' (2014) 62 *Buff. L. Rev.* 787.

⁹⁹ Kenneth Abbott, Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organization* 421, 423.

¹⁰⁰ Elizabeth Baisley, 'Reaching the Tipping Point?: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity' (2016) *Human Rights Quarterly* 134, 140. The UN Human Rights Committee's lack of clarity on why discrimination on the basis of sexual orientation violates the International Covenant on Civil and Political Rights (ICCPR)—is sexual orientation discrimination merely a form of *sex* discrimination as suggested in *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) or is it 'other status'?—haunts the recent decision of the Belize Supreme Court that holds that the criminalisation of same-sex sex is a form of sex discrimination in *Orozco v AG Belize* Supreme Court, 10 August 2016.

terrain of SOGI and human rights.

Institutionalisation

At the end of 2013, the IACHR converted the Unit it set up in 2011 on the Rights of LGBTI Persons into its ninth thematic rapporteurship. The latter's mandate is to monitor and make visible the human rights situation of LGBTI persons in the Americas; to support the processing of petitions and cases and provide advice on requests for precautionary measures, to prepare reports with recommendations aimed at OAS States and offer technical assistance to OAS States and political organs.¹⁰¹ The institutionalisation of work in the IAHRs through the establishment of a rapporteurship has provided space for norm development in the system that is not limited to reacting to cases brought before it, the earliest of which were not representative of the most pervasive grievances in the region.¹⁰²

By 2016, the Commission had issued over 50 press releases and held over 40 public hearings during its sessions in which it received information of alleged violations of the human rights of LGBTI persons by OAS States. The IACHR has also granted 11 precautionary measures to protect physical integrity of LGBTI human rights defenders and a few LGBTI persons in Cuba, Honduras, Belize, Jamaica, Mexico and Guatemala facing violence and threats to their safety. Through requests for information from States, the Commission is in dialogue with States about general and specific matters related to LGBTI persons in their countries.¹⁰³ With the

¹⁰¹ IACHR, 'Mandate and Functions of the Rapporteurship for the Rights of LGBTI Persons', accessed at <http://www.oas.org/en/iachr/lgtbi/mandate/mandate.asp>.

¹⁰² See Elizabeth Baisley, 'Reaching the Tipping Point?: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity' (2016) 38 Human Rights Quarterly 134, 143.

¹⁰³ In 2015, seven of the 53 requests made by the IACHR to OAS States for information asked for specific information related to LGBTI persons. The requests for information ranged from queries about the situation of specific LGBT human rights defenders in El Salvador, to the situation of homeless LGBT youth in Jamaica and the situation of LGBT persons more generally in the Dominican Republic. Four of the requests concerned trans persons with a strong focus on violence and conditions of detention. Among these was a request for information from the United States on the situation of Ashley Diamond, a trans inmate who had been denied

institutionalisation of work in the IACHR on the rights of LGBTI persons, the Commission began to solicit and receive information during onsite and country visits that had hitherto not been collected. For example, in its 2014 report following its onsite visit to Columbia, the Commission explored how the conflict in Columbia exacerbated the situation of discrimination and violence faced by LGBTI persons.¹⁰⁴

Since these mechanisms do not generate legally binding obligations, they are decidedly forms of soft legalisation. One of the most effective ways of making early arguments about the human rights of LGBTI persons is to locate these adjacent to the settled human rights norms.¹⁰⁵ The earliest soft law norms developed by the IACHR respond to the information it received through hearings, country visits, requests for information and precautionary measures. They link the normative claims of LGBT persons to the very established inter-American jurisprudence on violence and the failure of states to exercise due diligence to prevent, investigate, prosecute and punish perpetrators and restore victims.¹⁰⁶ The IACHR was faced with mounting complaints of violence against LGBT persons received through public hearings and requests for precautionary measures, but limited region wide data. To help it understand the phenomenon it was consistently receiving information on, the Unit/Rapporteurship established a Registry to collect data on

access to hormone treatment she was taking prior to incarceration and who alleged repeated violence in prison due to her gender identity. IACHR, 'IACHR Annual Report 2015', Chap IV paras 11, 12. Accessed at <http://www.oas.org/en/iachr/docs/annual/2015/TOC.asp>.

¹⁰⁴ IACHR, *Truth, Justice and Reparation - Report on the Situation of Human Rights in Colombia* (2014). See also IACHR, *Report on the Situation of Human Rights in Jamaica* (OEA/Ser.L/V/II.144, Doc 12, 10 August 2012) <http://www.oas.org/en/iachr/docs/pdf/jamaica2012eng.pdf>. The 2012 IACHR Report following its 2008 visit to onsite Jamaica devotes a chapter to discrimination against LGBT persons. The follow up to the recommendations in that report fell within the remit of the Rapporteurship and included public hearings and a further report found in Chapter IV of the 2014 Annual Report in which the Commission recognized 'some promising steps in fostering greater social inclusion and protection of LGBT persons' but concluded that there had no progress in developing a comprehensive legal framework to ensure non-discrimination based on SOGI IACHR, *Annual Report 2014*, Chapter V, <http://www.oas.org/en/iachr/docs/annual/2014/TOC.asp>, para 210.

¹⁰⁵ Elizabeth Baisley, 'Reaching the Tipping Point?: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity' (2016) *Human Rights Quarterly* 134, 138.

¹⁰⁶ See *Velásquez Rodríguez v Honduras*, IACtHR. (Ser. C) No. 4 (1988), 29 July 1988.

violence.¹⁰⁷ For fifteen months between January 2013 and March 2014 it collected data from media reports, state documentation and civil society, with accounts of violence against 594 persons who were LGBT or perceived to be, in 25 OAS Member States. This rudimentary methodology, offered the Commission insight into the high levels of cruelty associated with some acts of violence against LGBT persons, how young the most victimised trans women are, and the routineness of violence to punish those who challenge gender norms and the invisibility of harms faced by lesbians.¹⁰⁸ In 2015, four years after it set up the specialised Unit, and a year after it ended the collection of data through the Registry, the IACHR published its first thematic report on the rights of LGBTI Persons. This report looks at violence and was prepared with the input of two thirds of the OAS States and 35 NGOs.¹⁰⁹

The IACHR has a somewhat ‘schizophrenic nature as both advocate and adjudicator, both prosecutor and judge, promoter-educator and litigator’.¹¹⁰ Former President of the IACHR, Prof. Paola Carozza, argues that the Commission’s multiplicity of roles and its pro-victim orientation undermine the Commission’s credibility as an impartial arbiter of the rule of law.¹¹¹ But the Janus-faced quality of the IACHR also gives it flexibility in responding to allegations of human rights violations and rearranging its relationship with states, civil society and victims. Nowhere is this more evident than in engagement with States on LGBTI issues. Within two years of the establishment of the specialised rapporteurship, the Commission had developed a practice of

¹⁰⁷IACHR, ‘An Overview of Violence Against LGBTI Persons: A Registry Documenting Acts of Violence Between January 1, 2013 and March 31, 2014’, annex to IACHR, ‘IACHR Expresses Concern over Pervasiveness of Violence against LGBTI Persons and Lack of Data Collection by OAS Member States’ Press release 153/14, 17 December 2014.

¹⁰⁸ Ibid.

¹⁰⁹ IACHR, *Violence against LGBTI Persons*’ OAS/Ser.L/V/II.rev.1 Doc. 36 12 November 2015.

¹¹⁰ Paolo Carozza, ‘The Anglo-Latin Divide and the Future of the Inter-American System of Human Rights’ (2015) 5 *Notre Dame J. Int’l Comp. L.* 153, 168.

¹¹¹ Ibid 168.

publicly acknowledging the progress being made by States. The Commission, for example, issued press releases congratulating Mexico and Columbia for measures recognising the identity of trans persons;¹¹² commended the Mexican Supreme Court for its new protocol on sexual orientation and gender identity;¹¹³ valued the establishment of special prosecutors in Honduras and some Brazilian states; commended the decision of Uruguay to ensure equal access to health care facilities regardless of sexual orientation and gender identity and Ecuador's efforts to shut down clandestine reparative clinics¹¹⁴ and to establish a special health care facility for LGBTI persons in Ecuador;¹¹⁵ and welcomed recognition of adoption by same sex couples in Argentina,¹¹⁶ and marriage equality in Uruguay.¹¹⁷ The press releases also recognised the growing list of high level officials in the Anglophone Caribbean who publicly affirmed norms of non-violence and non-discrimination against LGBT persons. Placing these accounts of different types and depth of change beside each other in press releases, and not in contention with each other, present more dynamic images of political, social and cultural life in the Americas as 'open to contestation' and in 'a process of continually creating new meanings and practices'.¹¹⁸

Some states and their ombudspersons seek out the Rapporteurship both for cooperation in activities and technical advice. The LGBTI Rapporteurship provided technical advice to the

¹¹² IACHR Congratulates Mexico and Colombia for Measures Recognizing Identity of Trans Persons July 1, 2015, http://www.oas.org/en/iachr/media_center/PReleases/2015/075.asp

¹¹³ IACHR, 'IACHR Congratulates Mexican Supreme Court for Adoption of Protocol Involving Sexual Orientation and Gender Identity', Press Release 2014/095, August 29, 2014 http://www.oas.org/en/iachr/media_center/PReleases/2014/095.asp.

¹¹⁴ IACHR, 'The IACHR Welcomes Recent Developments in OAS Member States to Protect and Promote the Rights of Lesbian, Gay, Bisexual, Trans and Intersex Persons (LGBTI)', May 20 2014 http://www.oas.org/en/iachr/media_center/PReleases/2014/060.asp.

¹¹⁵ IACHR, 'IACHR acknowledges recent steps taken by several OAS Member States to further equality for LGBTI persons' November 21, 2013 http://www.oas.org/en/iachr/media_center/PReleases/2013/089.asp

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Sally Engle Merry, 'Constructing a global law-violence against women and the human rights system' (2003) 28 Law & Social Inquiry 941, 947.

Mexican Supreme Court, at the latter's request, in the development of its pioneering protocol for the judiciary on cases involving SOGI.¹¹⁹ In other cases, the Rapporteurship has reached out. In the wake of the resistance to the 2013 General Assembly LGBT Resolution, in April 2014 the Rapporteurship organised a closed door discussion with states titled 'Gender, Sexuality and Diversity: A Conversation with Professor Rhoda Reddock' which was attended by 18 States.¹²⁰ Extracts from video recorded IACHR public hearings were translated into short videos to explain terminology and the main human rights issues facing LGBTI persons.¹²¹ Even though the effectiveness of these varied approaches of engagement with states is far from clear, they tend to open up space for dialogue and reflection and illustrate how institutionalisation has allowed the IACHR to know the Caribbean better.¹²²

Given the range of concerns that can come before the system, it is vital that the IACHR has options for listening and reflecting before pronouncing. Soft legalisation opens up beneficial

¹¹⁹ Suprema Corte de Justicia de la Nación, *Protocolo De Actuación Para Quienes Imparten Justicia En Casos Que Involucren La Orientación Sexual O La Identidad De Género* (Segunda Edición 2015) accessed at https://www.sitios.scjn.gob.mx/codhap/sites/default/files/archivos/paginas/Protocolo_orientaci%C3%B3n_%20sexual-REVDIC2015.pdf. See also IACHR, 'IACHR Congratulates Mexican Supreme Court for Adoption of Protocol Involving Sexual Orientation and Gender Identity' (Press Release, 29 August 2015).

¹²⁰ Rhoda Reddock, 'Gender, Sexuality and Caribbean Diversity' (Presentation to the Inter-American Commission on Human Rights, Meeting of Ambassadors and Representatives of State, Washington DC, 22 April 2014, on file with author).

¹²¹ See Lucas Ramón Mendos, 'IACHR Hearings on LGBTI Persons' (21 April 2014); <https://www.youtube.com/watch?v=kOV3yp3NIqs>; 'IACHR, The Situation of the Human Rights of Trans Persons; Clips from the Hearings' (7 January 2017) <https://www.youtube.com/watch?v=9hHtR88-XvM>; IACHR, 'The Situation of the Human Rights of Intersex Persons: Clips from the Hearings' (7 January 2015) <https://www.youtube.com/watch?v=59RwM0koP-M>; IACHR, 'The Situation of the Human Rights of Lesbian, Gay and Bisexual Persons: Excerpts from the Hearings' (7 January 2015) <https://www.youtube.com/watch?v=xnH6NVMiYAI>; Following the meeting the Rapporteurship also produced a brochure titled 'Diversity: Orientation, Identities, Expressions' for Caribbean states, many of whom had complained about the terminology-creep in the General Assembly resolutions. The brochure explained the developments at the OAS on the rights of LGBTI persons through the adoption of resolutions of the OAS General Assembly, it identified statements by Caribbean leaders affirming equal protection of the law and non-discrimination and it provided definitions of key terminology.

¹²² The Commission has received information on the situation of LGBT persons in the Caribbean in an unprecedented number of hearings on Belize, Grenada, Guyana, Jamaica and Trinidad and Tobago in a short period of time.

spaces for thoughtfulness, learning and review.¹²³ As an early initiative, the Unit on the Rights of LGBTI Persons held six expert meetings between 2011 and 2013, a form of soundings on themes related to health, violence and impunity, employment, political participation, education and culture and families.¹²⁴ Public hearings held during sessions of the IACHR gave visibility to specific human rights issue and introduced new topics of concern for the Commission. They have a didactic quality, with civil society translating human rights norms up to the experts on the Commission. A few have been ex officio hearings requested by the LGBTI Unit/Rapporteurship to improve the Commission's and wider public's understanding of an issue, such as the hearing on the human rights of intersex persons in the Americas and indigenous LGBTI persons in the Americas.¹²⁵ Both hearings raised concerns not well represented in the petitions presented to the IACHR or through other mechanisms of the system.

Andrew Guzman acknowledges the central role of consent in international law to 'protect the interests of states and support notions of sovereign equality' but also views it as 'a barrier to effective cooperation in a world of vastly divergent priorities and concerns.'¹²⁶ He argues for a 'better balancing of the valuable protections provided by consent and the desperate need for non-consensual solutions to our problems.'¹²⁷ The delegation by the OAS Charter of the mandate to protect and promote human rights to the IACHR, an autonomous body of independent experts, allows the Commission to establish new lines of thematic work and rapporteurships without state

¹²³ Brian Sheppard, 'Norm Supercompliance and the Status of Soft Law' (2014) 62 *Buff. L. Rev.* 787, 792.

¹²⁴ See IACHR, 'Expert Meetings LGBTI' <http://www.oas.org/en/iachr/lgtbi/activities/meetings.asp>.

¹²⁵ IACHR, Public Hearing, 'Situation of Human Rights of Intersex Persons in the Americas', 147 Period of Sessions, March 15, 2013; IACHR, Public Hearing, 'Situation of Human Rights of LGBTI Indigenous Persons in the Americas' 147 Period of Sessions; Date: Saturday, March 16, 2013.

¹²⁶ Andrew Guzman, 'Against Consent' (2011) 52 *Va J Int'l L* 747, 749.

¹²⁷ *Ibid* 789.

consent.¹²⁸ At the same time, these mechanisms provide opportunities for significant state and civil society participation. The non-consensual soft law methodologies of the IACHR have given it flexibility in dealing with uncertain and contested issues like same sex marriage. Through press releases it welcomed judicial and legislative developments in the region that recognise diversity of families without pronouncing on whether the exclusion of same sex marriage is compatible with the American Convention. By 2016, it had brokered a friendly settlement with Chile in respect of a 2012 petition that directly raised this question. And while not speaking as an entire Commission, a bolder approach is evident in the statement of the LGBTI Rapporteur to celebrate the agreement. He said the friendly settlement represents steps taken by Chile ‘in order to respect and guarantee the human rights of all people, including the rights to family, without any discrimination based on sexual orientation or gender identity’,¹²⁹ a plausible way of interpreting both *Atala* and *Duque*.¹³⁰ Press releases on the friendly settlement agreement and the legal recognition of same sex marriage in certain OAS States, a very squishy/soft law methodology, inched forward with norm innovation, and notably on the coattails of state sovereignty—initiatives states have themselves undertaken.

The IACHR’s non-consensual method of institutionalising work related to LGBTI persons has risks. The Commission is not guaranteed effective and able leadership for the work in the form of a rapporteur, since all seven members of the IACHR must assume a thematic portfolio which may not correspond to her or his interests or abilities. Moreover, the rapporteur has limited time to devote to the thematic area since his or her primary responsibility is as a member of the IACHR with wide-ranging functions that are performed on a part time basis. Institutionalisation, which

¹²⁸ At the UN, new special procedures must be created by the Human Rights Council, a body comprised of states, which made the establishment of a SOGI related mandate an arduous road that begun well before 2016.

¹²⁹ Ibid.

¹³⁰ On 17 May 2016, Costa Rica asked the Inter-American Court for an advisory opinion on marriage equality, among other things.

creates incentives to organise to be seen and heard, can also entrench rigidities that sexual, gender and bodily diversity come in specific shapes, with precise ideologies and issues and named identities. It can easily imagine those who do not ‘come out’ according to conventional scripts into non-existence.¹³¹ It can neglect the least visibly concerns, such as bodily diversity. To combat these the institutionalised work of the IACHR must involve ongoing reflection and innovation to maintain its legitimacy and deepen its impact.

Conclusion

Democratisation in Latin America has brought with it a ‘repoliticisation of inequality’ in the larger Americas.¹³² This gives the beleaguered inter-American system a new(ish) impetus as a site for the cultural production of norms.¹³³ There has been a growth in the middle class and a decline in social and economic inequality throughout Latin America that appears to be plateauing or stagnating.¹³⁴ The World Bank describes Latin America and the Caribbean as hitting a turning point as economic growth declines with recent region-wide recessions and ‘increased social expectations from an emerging middle class that is more connected, more involved, and demanding more.’¹³⁵ The cultural milieu of this regional institutional space, with its imbalance of power between States, an Anglo-Latin divide, state resistance to human rights oversight, chronic delays, beleaguered institutions, a multiplicity of actors and mechanisms and a range of hard and soft legalisation mechanisms naturally registers as dysfunctional. Yet it also expresses resilience.

¹³¹ Luke Boso, ‘Urban Bias, Rural Sexual Minorities and Courts’ Role in Addressing Discrimination’ (2012) 60 *UCLA L. Rev.* 562.

¹³² Kenneth Roberts, ‘The Politics of Inequality and Redistribution in Latin America’s Post-Adjustment Era’ (WIDER Working Paper, No. 2012/08, 2012).

¹³³ Sally Engle Merry, ‘Constructing a global law: Violence against women and the human rights system’ (2003) *Law & Social Inquiry* 941, 943, 974.

¹³⁴ Tsounta, Evridiki, and Anayochukwu Osueke. “What is behind Latin America's declining income inequality?.” (IMF Working Paper WP/14/124, July 2014).

¹³⁵ World Bank, ‘Overview: Latin America and the Caribbean’ (updated Oct 6 2016) <http://www.worldbank.org/en/region/lac/overview#1>.

And the latter curiously has made the inter-American system a noteworthy locus for legalising norms related to sexual, gender and bodily diversity in today's polarised world. How the IAHRs negotiates the balance between hard and soft legalising as more cases emerge, and in the midst of its many other challenges, is to be seen.