

# CHAPTER III

## THE LEGAL STATUS OF LESBIAN WOMEN IN COSTA RICA

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### **INTRODUCTION**

We analyzed 28 legal documents, the principal general and specific laws of the country and some additional regulations, which indicated to us the actual conditions before the law of the Costa Rican lesbian community.

The life conditions of lesbians, as we have observed, are dominated by the curious conjunction of virtual invisibility with severe prejudice and stigma.

The legal condition of lesbians shows the same paradoxical combination. Lesbians are nowhere mentioned in the law; indeed, (almost) any express mention of sexual orientation--or any phrase that might be equivalent to it--is conspicuous by its absence. Yet certain aspects of the law--particularly those relating to the definition of the family, and the manifold ramifications of family status in deciding access to benefits and the capacity to make rights claims--are weighted against lesbian identity and lesbian relationships with an almost malign intensity. Utter silence about lesbians is coupled with a vivid determination to write their existence out of the protection of the law.

We will first examine the adequacy of general definitions of discrimination in Costa Rican law. We will then move to analyze how laws in fact confirm and incarnate discrimination, implicitly yet willfully, hypocritically professing their intent to advance equality while quietly institutionalizing its opposite. We will also look for signs of hope, places where the law has broken through the encasing crust of legally codified and reified heterosexuality to experiment with new adaptations to the diverse and changing modes of human life.

### **ANALYSIS OF COSTA RICAN LEGISLATION**

#### ***A. Definitions of Discrimination***

What constitutes discrimination in Costa Rican law? Several attempts at definition exist, with several different implications.

*Political Constitution of the Republic.*

The Constitution, unlike some comparable national and international instruments, does not contain a list of grounds or statuses upon which discrimination is barred. However, it embodies the general principle of equality in its Article 33, which states, "All persons are equal before the law and there shall be no discrimination against human dignity."

Moreover, the Constitutional Tribunal of the Supreme Court of Justice has repeatedly held that any form of discrimination based on race, sex, creed or other analogous condition violates these constitutional principles. Yet the principles are not absolute. Existing precedents--particularly the interpretation of the Corte Plena, or "Full Court," in 1963 --establish that the Constitution does not affirm an individual's right to be put on the same level as any individual without regard to circumstances, but rather requires the law not to make distinctions between two or more persons who are in the same legal situation.

*Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*

Costa Rica ratified this Convention in 1986 and it has been incorporated to the country's legislation. Article 7 of the Costa Rican Constitution establishes that "Public treaties and international agreements duly approved by the Legislative Assembly, will have... an authority that is superior to that of (national and local) laws".

Thus, the way discrimination is defined in CEDAW must work as a guiding criteria to define "discrimination against women" in Costa Rican law.

Article 1 of the Convention states: "... the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality with of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field".

*Penal Code.*

Article 373 of the Penal Code bars discrimination "on the basis of race or considerations of sex, age, religion, marital status, public opinion, social origin or socioeconomic status" as "crimes against human rights". It applies to individuals, managers of official or private institutions --including industries and commercial establishments that "apply any discriminatory measures against others" based on the above mentioned status. Penalties go from 20 to 60-days-fines. In case of reincidence on the part of public officers, the Judge could suspension from 15 to 60 days.

Sexual orientation is not a protected category under this provision. And there is no mention to “other status” either – a formulation that sometimes leaves a window open for claims based on sexual orientation (that could be also included in the category of “sex”, following the understanding of the United Nations’ Human Rights Committee on the landmark case “Toonen v/Australia”)<sup>27</sup>.

In cases of workplace discrimination (see Chapter 4), this provision can not help lesbians, as the real reasons behind the firing are seldom made explicit by the employers. Usual pretexts are staff restructuring, downsizing, etcetera.

Law # 7600 (1976) Act regarding equality of opportunity for persons with disabilities.

This Act defines "equality of opportunity" in its Article 2 in a way both apparently more sweeping but possibly also more problematic than the Constitution's language. Such equality is “the principle which recognizes the importance of the various needs of the individual, which should constitute the basis for the planning of society, with the end of assuring the use of resources so that people will enjoy equal opportunities for access and participation in identical circumstances.”

The definition again grounds equality in similarity of circumstance or legal situation. It also refers to “needs” rather than "rights," implying that equality is predicated on the contingent requirements of individuals, not on a generalized capacity to make absolute claims. "Needs" are not specified, and we do not find clearly established in the law such needs of the individual as:

- ✓ health (mental and physical),
- ✓ liberty,
- ✓ education,
- ✓ security,
- ✓ means of subsistence (food, clothing, shelter),
- ✓ freedom of expression and association,
- ✓ information,
- ✓ entertainment/leisure.

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<sup>27</sup> *The United Nations Human Rights Committee, in the 1994 case of Nicholas Toonen vs Australia, upheld a challenge to two provisions of the Tasmanian Criminal Code (Sections 122 a and c, and 123) which criminalized various forms of sexual contact between men. The Committee held these provisions to be violations of Article 2 paragraph 1 (non-discrimination) and Article 26 (equality before the law) of the International Covenant on Civil and Political Rights, as well as of that Covenant's protection of the right to privacy. Upon examining the assertions made by both parties, the UN Human Rights Committee concluded specifically that "sexual orientation" was included under protections against sex-based discrimination, holding that "reference to 'sex' in articles 2, paragraph 1, and 26, is to be taken as including sexual orientation." Tasmanian laws were modified accordingly some time later.*

On the other hand, the law, like the Constitution, ties equality to dignity: Article 6, regarding the "raising of awareness" about disability, points out that "when, for whatever reason or purpose, the subject of disability is considered or mentioned, it shall be presented in such a way as to reinforce the dignity and equality of human beings."

The language also suggests (in imposing these obligations on media) that State and other institutions have a positive obligation to prevent discrimination, and to change the climates which contribute to it, not merely a negative one to refrain from or punish it.

In its Article 24, "Discriminatory acts," the law finds the following to be discriminatory: "Using in the selection of personnel mechanisms that are *not adapted to the conditions of the applicants*, requiring prerequisites in addition to those established for any applicant, and not employing a suitable worker due to his or her disability." It is also considered a discriminatory act to "deny a person access, due to his or her disability, to the use of productive assets".

In this language, unlike its general definition of equality, the law thus does recognize the principle that discrimination can consist not only in *unequal* treatment of those inherently *equal*, but in *equal* treatment of those deserving recognition of their *difference*.

## **B. Sodomy Law**

### Penal Code

Article 380 of the Costa Rica Penal Code (Contraventions against good customs) penalizes with 30 days fine "those who practice sodomy in a scandalous way". There is no definition of what constitutes an act of sodomy, or what defines the "scandalous way" to indulge in such act.

In his yet unpublished work "More than a Name: State-Sponsored Homophobia and its Consequences," a publication of Human Rights Watch and IGLHRC, Scott Long writes:

*"So-called "sodomy" laws—laws which criminalize consensual, adult homosexual conduct—have been held by the United Nations to violate basic rights to privacy and non-discrimination.<sup>28</sup> Nonetheless, they persist in many jurisdictions around the globe. Their language rarely mentions homosexuality per se: they usually far antedate the coinage of that term. The words with which they describe what they punish are various and*

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<sup>28</sup> *Nicholas Toonen v Australia, UN GAOR, Hum. Rts. Comm., 15<sup>th</sup> Sess., Case no. 488/1992, UN Doc. CCPR/c/50/D/488/1992.*

*often vague. These laws are only part of a confusing welter of provisions by which States may try to regulate people's sexual behavior.*

*On paper, sodomy laws simply punish certain sexual acts (however vaguely defined). In practice, such laws encourage authorities---and, ultimately, the curious public—to take a different tack: to identify and single out the kinds of people presumed to be prone to, or proselytizers for, the criminalized behaviors.*

*Instead of searching out the conduct itself, State and society look for signs. "Sodomy laws" help create "sodomites." They impute to people not just the commission of an act, but the propensity to commit it. They invite authorities to assume that a single lapse points to a habitual condition.*

*That condition in turn ultimately justifies judgment on a person's nature: a nature which must then be legible in mannerism, appearance, dress. The laws collude with other forces—social prejudice and stereotype, folklore and religious teaching—to create an atmosphere of stigma, in which certain outward marks signal the presence of a certain kind of person, and certain identities and groups become automatic targets of the law.*

*The effect of sodomy laws is thus twofold—and their victims are more manifold than they might seem. On the one hand, they are used to arrest and punish people who are believed to have committed certain acts. Yet on the other, they are themselves a powerful form of State rhetoric: one which separates out people—variously called "sodomites," "gays and lesbians," "homosexuals", or other names—and paints them as unwanted; one which enforces division, dislike, and fear. It sends a message that gays and lesbians, or those who feel homosexual desire, must keep their acts and feelings secret, shrouded in a privacy which is nonetheless permeable and threatened. And it helps create a public culture of prurience".*

In this particular case, the provision adds the element of "scandal", an ambiguous and problematic term that allows for discriminatory enforcement. The mere perception of difference might constitute "scandal" for some. It is worth noticing that this provision does not punish sodomy practiced in "public places" –a formulation that is more explicit and less prone to discretionary enforcement- but opts instead for the vague "scandalous way".

### **C. Provisions Discriminating on the Basis of Family Status**

The provisions in Costa Rican law which are most likely to maintain the legal and social inequality of lesbians make no mention of sexuality or sexual orientation, much less lesbian identity. They affirm the State's exclusive protection of an exclusionary, narrow definition of the family--thereby eliminating other relationships of care from recognition, support, or access to benefits and services.

The multiple effects of this discriminatory definition stretch across Costa Rican law, but are grounded in the delineation of the family in the Constitution and the Family Code.

*Constitution of the Republic, and Law # 5476 and its revisions (Family Code).*

The Constitution addresses the family in five articles in the section on "Social Guarantees." These provisions together flout the general affirmation of equality in the document's section on "Individual Rights." They do so by setting up, implicitly but clearly, a particular vision of the two-generation, heterosexual, radically nuclear family as inviolable and indisputable--in contrast to the actual family structures and lives of thousands of Costa Ricans:

- **ARTICLE 51.** The family, as a natural element and foundation of society, is entitled to State protection. Mothers, children, the elderly and the destitute infirm are also entitled to such protection.
- **ARTICLE 52.** Marriage is the essential basis of the family and rests on equality of the rights of spouses.
- **ARTICLE 53.** Parents have the same obligations toward children born out of wedlock that they have toward those born within it. Everyone is entitled to know who his parents are, in accordance with the law.
- **ARTICLE 54.** Any personal qualification based on the nature of filiation is prohibited.
- **ARTICLE 55.** The special protection of mothers and minors shall be entrusted to an autonomous institution named Patronato Nacional de la Infancia (National Infancy Foundation), with the collaboration of other State institutions.

The positive aspects here, of protecting gender equality and ensuring the social welfare of mothers and children--as well as the putative insulation of civil society from kinship relations--cannot override the overwhelming attempt at institutionalizing nuclear family relationships. And this in fact means the return of highly reified kinship relations to dominate both civil society and the State: for some relationships will as a result become the basis for access to goods and services, while some other relationships will be ruthlessly excluded.

Referring to the Constitution's stipulations on marriage, Dr. Ruben Hernandez (a Costa Rican lawyer specialized in Constitutional Law) points out: "It should be clearly stated that constitutionally protected marriage in Costa Rica is of heterosexual couples, which excludes any possibility of legalizing unions between homosexuals, and granting to them the respective rights and responsibilities contained in the Family Code." (Dr. Ruben Hernandez, 1998)<sup>29</sup>

The Family Code is comparably restrictive. The Code regulates all subjects related to civil marriage, marital separation and divorce, parenthood and filiation, obligation of parents to children, and adoption. "Family" in its terms means a group consisting of father, mother, and children. Broader kinship relations are also excluded. The Capitant Dictionary of Legal Terms<sup>30</sup> defines "family" as "*a group of people united by matrimony, blood or affinity, and among whom exist sanctioned legal rights and responsibilities... A second, narrower meaning, indicates that the family is 'the grouping formed by the father, the mother and their offspring'.*" This last is the meaning adopted by our Family Code, even no explicit definition of "family" can be found in the text. Art. 11 establishes "marriage" as the basis of the family"; "*husband and wife share the responsibility and governance of the family*" (Art. 34); transference of property among the marital (or cohabiting) couple and their children is tax exempted (Articles 43 and 44); alimony obligations affect only the marital couple, parents in relation to children and viceversa, siblings and grandparents in relation to grandsons/daughters (and viceversa) but only when those "of immediate kin" are unable to provide for them.

The Family Code expressly prohibits marriage between two people of the same sex. Its Article 14, amended by Article 1 of Law 5895 (March 23, 1976) states that marriage is legally impossible under the Family Code if "*a) one of the parties is not legally divorced; b) the marriage is between blood relatives; c) the marriage is between siblings related by blood; d) the marriage is between the one who adopts and the adopted; the adopted and the children of the one who adopts; the adopted and the excouple of the one who adopts; e) an individual is charge with the murder of his or her spouse, then that individual can not marry the surviving spouse of the murdered victim; f) between persons of the same sex*" (underlining ours)."

One searches in vain for an opening in the various provisions of the Family Code which would allow for a more expansive or inclusive definition of "family." Costa Rican law recognizes so-called "de facto unions," giving rights to partners in relationships which have demonstrated

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<sup>29</sup> *Jurisprudencia Constitucional en Constitución Política de la República de Costa Rica*, comentated and annotated by Rubén Hernández Valle, 1 Edición, SJ, CR, Juricentro, 1998, pag. 192.

<sup>30</sup> *Vocabulario Jurídico*, Henri Capitant. Ediciones Depalma, Buenos Aires. 1973.

their stability over time but have not received the State sanction of civil matrimony. The category was added to the Family Code by Article 1, Law 7532 (August 8, 1995). In other societies, such as France, such unions have become a model for extending recognition to same-sex couples. The term “Cohabitant in a *de facto* union” appears in the Family Code (Articles 242 to 246). Article 242 grants those who enter a de-facto union “all patrimonial effects associated with legal marriage in the case the union ceases”. Article 245 grants the right to mutually ask for alimony once the union is recognized as such.

But we again run into a definition which shuts the door to any non-discriminatory interpretation, as Article 242 of the Code indicates:

*“The de facto, public, known union, exclusive and stable, for more than three years, between a man and a woman who are legally competent to enter into marriage, will cause all of the inheritance laws proper to a legally formalized marriage to be in effect, if it should end for any reason.”*

Law # 7532 was added to the Family Code to regulate the *de facto* union, broadening the legislation in matters of family and establishing more clearly the civil effects of such unions. The Family Code only mentioned marriage and only applied to legal marriage. Given the fact that de facto unions were very common in Costa Rica, there was a need to include them somehow in the legislation and thus the 1995 amendment came to play. However *de facto* unions are defined as exclusively heterosexual in a way identical to how marriage was defined by Article 14 of the same Code.

The Constitutional Tribunal has pronounced as follows: *“For the constituent legislator the so-called ‘de facto families’ and marriage are simultaneously two moral and legal sources of family (one has to take into account that there exists no legal impediment to creating a de facto family); both guarantee the necessary stability for a permanent family life, because they have their origins at a common source: the love that binds man and woman, the desire to share, to mutually help and support one another, and to have descendants.”*

Law # 2/43 and its revisions (the Costa Rican Labor Code).

The Labor Code denies basic equality to lesbian and gay partners of workers, restricting their economic rights by adhering to the Constitutional and Family Code understandings that the State protects only certain relationships and rejects others.

The rights of partners and of workers themselves are circumscribed by such restrictive definitions. The Labor Code uses the terms "Relatives," "Family," "Consort" and "Assignee" to describe what relationships enable one to make a rights claim. For example, we can cite Articles 39, 41, 42, 43.c, 71, 83.g, 85.1, 95, 159, 166,171, 206, 427.f, 544.f, among others, for the terms "Family" and "Consort", and 206, 544, 550, 553 among others, for the term "Trustee". "Relatives" is found in Articles 36, 42, 43, 75, 83, 427 and 544 (as "familiares") and in Articles 85 and 222 (as "parientes"). "Consort" in Article 85 ("consorte") and in Articles 194, 243 and 408 (as "cónyuge/s").Both "familiares" / "parientes" and "consorte / cónyuge" are synonymous in Spanish

We shall transcribe only a few of these articles:

**Article 39:** "If the worker is employed for service or performance of work at a location different from that of his/her normal residence at the time of the closing of the contract, and said worker finds him/herself compelled to live at the location where the work shall be performed, the employer shall fulfill his/her duty by merely covering the reasonable costs for a trip to [the work location] and back before and after the period of the contract, as long as there are ten or more kilometers separating both points ... It shall be understood that the costs of the family living with him/her are included in the relocation costs of the worker . . ."

**Article 194.** "Without dismissing the possibility that, upon the request of the interested party, insurance against workplace risks may be issued, the following shall be excluded from the provisions of this heading:

- a) Family work activity of natural persons: this is understood as that which is done between spouses or those who live as such, or between these and their ancestors and descendants, toward the common good, when undoubtedly there is no work relationship.
- b) Workers who carry out activities on their own, understood as those who work alone or in association with others, in an independent fashion, and who earn no salary."

Every Costa Rican employer is mandated by law to insure his/her workers against labor related health risks. However, in the two cases above mentioned, there is no obligation to get insurance, even though it can be done if the workers so desire

**Article 234.** "When and if the worker does not receive the benefits indicated in Article 218, he/she shall be able to sue for the provision or the stop of these, the applicable legal interest, plus the legal and personal

costs involved in his/her suit before the labor judge. The assignees of the worker shall follow the same procedure in their case in order to obtain the benefits to which Articles 219 and 243 refer, or the reimbursement applicable to these, if the worker dies as a consequence of a workplace risk.”

"Family" is obviously defined by the terms of the Family Code. "Spouse" requires no comment. "Assignee" is a legal term which indicates a person who has acquired a right or obligation of another person, for example, the rightful heir or universal legatee.

**Article 572** of the Costa Rican Civil Code lists the "legitimate/rightful heirs" as the following

1. Children, parents and consort, or de facto cohabitant, with the following exceptions:
  - a. The guilty spouse in legal separation. Any of the consorts in de-facto separation, on the assets acquired during the time of separation.
  - b. In the case of children born out of wedlock, the father can only inherit them if he had legally recognized them or at least paid alimony to them for two consecutive years.
  - c. De facto partners have a right to inheritance only if their union has been constituted between a man and a woman who are legally capable of marrying, and have maintained a public, singular and stable union during at least three years. Their right extends only to assets acquired during the time the couple has been together (Amendment to the Code by Law 7142, March 8 1990).
2. Grandparents and other legitimate ancestors. Mother and grandmother on the mother's side are considered legitimate even in the case of children born out of wedlock
3. Legitimate siblings and siblings born out of wedlock on the mother's side
4. Children of legitimate siblings or siblings born out of wedlock on the mother's side, children of a legitimate sister or of one born out of wedlock on the mother's side  
Legitimate brothers of the deceased's legitimate parents and uterine non legitimate brothers of the legitimate mother or father,

The legatee is the testamentary heir of the property belonging to the deceased worker.

It is tempting, of course, to suppose that many of these problems can simply be solved by making wills. Yet many homosexuals, like many

heterosexuals, do not do so; the very requirement that their relationships be ratified by a contractual exercise, instead of the mere standard of durability and stability applied to *de facto* unions, places an undue legal burden on them. Moreover, testaments can be challenged: and when "blood family" face homosexual partners in a contest over inheritance, in a legal system mandated by Constitution and code to favor the former, even the strongest will may waver and give way to a biased jurisprudence.

Lesbian and gay relationships are thus placed under a shadow of inferiority, and often excluded from a range of benefits. Most painfully, they are denied the right to make effective claims in the wake of a working partner's injury or death. Article 85 of the Labor Code states:

"The causes which end the employment contract that do not stem from the worker's responsibility and without ending the rights of said worker, or of his/her assignees, to claim and obtain payment of the benefits and compensation for which they could be entitled by virtue of the mandates of this Code or of special provisions:

- a) the death of the worker;
- b) the need of the worker to satisfy legal obligations such as that of military service or other similar ones, which according to common law are the equivalent of the absolute impossibility of fulfillment;
- c) act of God or accident, insolvency, bankruptcy or liquidation...and
- d) the employer's own wishes.

The benefits to which paragraph a) of this article refers shall be claimable by any of the interested relatives indicated below, before the appropriate judicial authority for labor. Those benefits shall be delivered by that authority to those with a right to them, without the need for a sucesory trial for that effect, and without the payment of taxes. Those benefits shall correspond to the relatives of the worker, in the following order:

- 1) the consort and the minor children or those unfit for work;
- 2) the adult children and the parents; and
- 3) any other persons who according to civil law have the nature of heirs."

"Consort" is a synonym of "spouse," "husband" or " wife." (See, for example, Article 572 of the Civil Code quoted above. Throughout the Code, "consort" and "spouse" are used in different articles, with equivalent meanings). On the other hand, the Family Code cited above expressly prohibits the marriage of two people of the same sex. "Relative," the core

component of legal kinship, is thus understood to include only heterosexual or blood relationships.

Faced with a question brought before it by CIPAC, the Costa Rican Social Security Office (CCSS) pointed out:

*“It is clear to (the undersigned) that our legal code openly and firmly protects the family, be it de jure or de facto. This by virtue of the necessary adjustment to fundamental rights guaranteed to the inhabitants of this country. Having thus stated matters with regard to the de facto union which is protected, it is that union which is constituted between heterosexual couples, from which follows that this excludes, on the one hand, any possibility of legalizing the unions of homosexuals and lesbians,... and consequently, the possibility of recognizing the family beneficiary nature of the partners of gay and lesbian persons by way of regulation for social security purposes also would be excluded.”<sup>31</sup>*

It is clear, then, that the partner of the worker does not acquire any rights to the property acquired during the shared life of both, or to the property derived from a work relationship upon the death of the worker. Only the imperfect promises of testamentary succession can provide a substitute for the lacunae of the law.

Law # 30-85 and its revisions, No. 63/87. Civil Code.

**Article 29** of the Civil Code reads: “Marriage entered into by foreigners outside of Costa Rica in accordance with the laws of the country in which it occurs, shall have all the civil effects of legitimate marriage, as long as it is not included among those marriages which are not legally possible.” This refers us to the Family Code, which stipulates that marriages between persons of the same sex are legally impossible: as a result, if a lesbian (or gay) couple entered into a union legally recognized in Denmark or Hungary, it would not enjoy such recognition in Costa Rica.

Still more significantly, **Article 572** establishes lawful succession, or the law of inheritance. Lawful heirs are defined as children, parents and the spouse or consort of the cohabitant in a *de facto* union. (See the full text of the Article above) The Article also stipulates that the cohabitant in a *de facto* union shall only have such rights when “said union has been constituted by a man and a women legally competent to enter into marriage.” We have already addressed this discriminatory aspect above.

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<sup>31</sup> (Licda. Gloria Martina Monge Fonseca, Litigation Division Coordinator, CCSS, in Official Letter DSI-076-00, 22 March, 2000)

## Penal Code

Several provisions of the Penal Code use discriminatory access to marriage or discriminatory definitions of the family to establish unequal rights before the criminal law.

**Article 81** restricts the right of appeal or accusation to the legitimate heirs of an aggrieved deceased party. These legitimate heirs, as defined above in the Civil Code, implicitly exclude same-sex partners. Article 93, clauses 2 and 3 are discriminatory in the same sense. Article 93.2 terminates the punishment of those who blame themselves for a crime that they had not committed, to “save their ascendant, descendant, spouse, brother, benefactor or de facto partner with whom they had lived in marital state for at least two continuous years immediately before the crime has been committed”. And Article 93.3 extends the same benefit to those who have incurred in “concealment, theft, robbery implying the use of force upon objects, fraud, slight injuries or harm, when requested by the aggravated person having with the defendant the same kinship or relationship ties mentioned above”.

**Article 92** requires halting any penal action or punishment (in cases of "crimes against decency," including rape) if there is a marriage between the defendant or the convict with the offended party, as long as this marriage is legally possible. The discriminatory impact should not blind us to the regressive character of the provision itself, which implicitly defines rape as a crime against a family's honor--to be remedied by marriage--rather than a crime against the woman herself, to be remedied by criminal punishment. It encourages forced marriages between women and their rapists, arranged under family pressure. At the same time, though, it colludes in a restrictive definition of that very "family."

**Article 112.1.** This article refers to aggravated homicide, compared to simple homicide, which calls for a lesser punishment than the former. The crime is aggravated when the victim is “an ancestor, a descendant, a spouse, a blood sibling, one’s live-in lover if [perpetrator and victim] have one or more children in common and have lived as common-law spouses for at least the two years preceding the perpetration of the act”. Again we find that if the crime is committed against one’s partner in a lesbian relationship, it does not qualify as aggravated.

**Article 148:** Once again the right of appeal or accusation is limited to the members of the victim’s family, “family” understood in the terms of the Family Code, such as in Article 81.

**Article 176:** Under "crimes against the family," this provision criminalizes an illegal marriage, with prison sentences for those persons who contract

marriage while knowing that an impediment exists causing the marriage to be null and void. "Illegal marriages" are those defined as such by Article 14 of the Family Code, among them "those between persons of the same sex" (see full text above).

**Article 187:** This criminalizes failure to assist and support but limits the duty to assist to parents and those responsible for a minor, as well as to the "spouse" who fails to protect and relegates the other "spouse" to a condition of material abandonment. The Article reads: "He who should fail to fulfill or neglect the duties of protection, care and education incumbent upon him in regard to a minor under 18 in such a way that the minor falls in a situation or material or moral abandonment will be punished with six months to a year of imprisonment, 20 to 60 days' fine and six months to to year inhabilitation to enjoy his/her parental rights".

Law # 7594 (Penal Procedural Code).

**Article 37** establishes that a civil action "to restore the real object of a punishable act, as well as reparation for the damage and harm caused, can be undertaken by the injured party, his or her heirs, legatees, successors or by the beneficiary in the case of personal claims against the perpetrators of the punishable act..." The terms "family members" or "cohabitant" do not appear; rather there is a reference to heirs, who can be testamentary or rightful.

**Article 205** deals with the right to refuse to give testimony against a defendant in a criminal trial. This right is restricted to a "spouse" or to a "cohabitant" who has lived with the defendant for two years or more, and to relatives by blood or marriage. These terms restrict the right to those connected by heterosexual relationships; like the rest of Costa Rican legislation, the rule does not recognize permanent and stable relationships between two people of the same sex.

Law # 7654/ 97. Act concerning nutritional pensions.

**Article 1** recognizes the right to receive foodstuffs only for members of the family group: "This law regulates everything concerning support payment derived from family relations, as well as the procedures to apply and interpret the law". It needs to be read in the light of Article 169 Family Code, according to which:

"Mutual alimony is mandatory between:

1. Spouses
2. Parents to children underage or disabled and children to parents.

3. Siblings to underage siblings or those who show a disability that impedes them to provide for themselves; grandparents to grandchildren underage and those who, due to disability, can not provide for themselves, whenever the closest of kin can not provide for food or for as long as they can not do it; and grandchildren and grand-grandchildren to grandparents and grand-grandparents under the same conditions indicated in this paragraph.

(Amended by Article 3, Law 4760 October 14, 1996)

Law # 7033. Act concerning immigration and aliens.

The law creates two statuses for people who can settle in Costa Rica: heterosexual "spouses" and relatives, who can follow a family member's lead with ease, and homosexuals and other members of non-families, who are excluded. Article 7 of this law, in clause 1 of the second paragraph, indicates that the General Directorate should hear and resolve the following cases: "Application for identity card for [reasons of] unification of family, in accordance with the immigration categories established in this act." Immigration categories are specified in Articles 33-37 and include: permanent residents, temporary settlers and non-residents. Article 35.ch defines "relatives of a Costa Rican citizen, understanding as such the consort/spouse, children, parents and single siblings" as permanent residents.

If there is no legal possibility that a lesbian couple be considered a "family", the female applicant cannot be heard, and cannot claim the right to an identity card for reasons of family unification.

Article 36 e) is discriminatory as well in stating: "Any foreigner who, without the intention of staying in the country indefinitely, enters as a member of one of the following subcategories: spouse and minor children of the persons.... shall be considered temporarily settled." Article 40 is discriminatory in the same sense. It deals with embassy and international bodies' personnel –who will be exempted from the provisions contained in Law 7033, as long as they remain in office. Their "spouses/consorts and relatives" enjoy the same status.

Law # 7142. Act concerning the promotion of the social equality of women.

**Article 8** again entails the exclusion of lesbian or gay couples, this time in access to insurance: this provision affirms that those directly insured through the Sickness and Maternity System, man or woman, can extend the benefits of that system to the "family" group.

Health insurance regulations (Caja Costarricense del Seguro Social). 1997.

**Article 2** contains another sweeping anti-discrimination promise and protection: “Every insured person is equal before the law and before these regulations. There shall be no discrimination for economic, ethnic, religious or ideological reasons, nor for those of any other nature which violates human dignity. The only distinctions made shall be with regard to the type of affliction or sickness.”

Yet further reading dispels the illusion that such words will live up to their apparent scope. Article 10 contains terminological definitions, and we find:

“Directly insured: Insured who by virtue of the payment of premiums, has as a result rights to health insurance both for him/herself and for the members of his family...”

“Family insured: Person, male or female, who acquires the condition of insured due to the fact that he/she meets, with respect to the directly insured, certain requirements with regard to kinship, economic dependence, age and...”

“Partner: Person, male or female, who cohabits in a common-law partnership, in a stable manner and under the same roof, with another of a different sex.”

Once again rights are granted by virtue of kinship, by a condition of family membership; and once again the prevailing Family Code definitions intervene to exclude lesbian and gay partners from protection. The definition of “partner” here expressly encodes the exclusion of same-sex cohabitants.

Similarly, Article 12 defines “family insured” as “consort/spouse, de facto partner, children, siblings, father, mother and other minors who are not paid workers... and in relation of economic dependency to the directly insured person”; Article 14 states that family insured beneficiaries are entitled to integral health care, benefits in the form of money or social services and Article 52 -dealing with reimbursements of funeral expenses- restricts them to “relatives or persons who can prove they have incurred on such expenses, in the case of death of a beneficiary, its spouse/consort or de facto partner”. In this last case, a lesbian or gay partner might claim reimburse as “a person who can prove (she/he) has incurred on such expenses”.

Disability, old age and death regulations. Caja Costarricense del Seguro Social, 1999

**Articles 9.2 and 15** take up the meaning of the Health Insurance regulations with regard to the term “partner” and insofar as the rights are granted only to members of the family, to relatives.

Law # 7142. Act concerning the promotion of the social equality of women.

**Article 7** states: “All real property distributed through social development programs shall be registered in the names of both spouses in case of marriage, in the name of the woman in the case of a *de facto* union, and in the name of the beneficiary in all other cases, whether man or woman.” Thus if there is no recognized union (as in the case of lesbian couples), the beneficiary *cannot* have the property registered in the partner's name.

Law # 7739/98 (Childhood and Adolescence Code).

**Article 33** states the right of minors to stay with their families; a minor person may not be separated from her/his family, except in special circumstances established by law. Yet this leaves the children of lesbian couples subject to State intervention which may remove them arbitrarily from their homes.

Regulations on adoption

Provisions discriminating against lesbians and gays are similarly “masked” in the form of prioritizing married couples and discriminating against single people, in Costa Rica's regulations on adoption. There are no express prohibitions or stipulations regarding the adoption of minors by lesbians (or gays); however, in practice, once the application for adoption has been made, the person has to meet a range of requirements, including a psychological and social study. It is within the authority of the National Council on Adoptions to determine if the person is suitable to take on the care of a particular boy or girl, and it is the Family Judge who in the final instance ratifies the Council's judgment or not.

**Article 106** of the Family Code (revised by Law # 7538/95) contains the general requirements to be met by any adoptive parent:

- I. Possession of the full capacity to exercise his/her civil rights (this implies not being in a state of restraint or being a minor, for example);
- II. Age of more than twenty-five years in the case of individual adoptions; for joint adoptions it shall suffice that one of the adoptive parents has reached that age;
- III. An age of at least 15 years greater than that of the adoptee. For a joint adoption this difference shall be with respect to the younger of the adoptive parents. For an adoption by only one spouse, this difference shall also exist with respect to the consort of the adoptive parent.
- IV. Good conduct and reputation. These qualities shall be confirmed by means of a suitable test, documentary or testimonial, which shall be noted and evaluated by the presiding Judge.
- V. Possession of family, moral, psychological, social, economic and health conditions which demonstrate the aptitude and disposition to assume parental responsibility.

However, the following may not adopt:

- a) The spouse without the consent of his/her consort, except in the cases mentioned in Article 108 of the cited code.
- b) Those who have exercised the guardianship of the minor or the legally incompetent person while the competent judicial authority has not yet approved the last items of the administration.
- c) Persons over the age of sixty years, unless the tribunal, in justified resolution, holds that, despite the age of the adoptive parent, the adoption is in the interests of the minor.
- d) Those who have been denied or suspended from the exercise of *patria potestas* [parental authority], without the express consent of the Tribunal.

In examining the Integrated Adoption System (PANI) (self-defined in Article 1. of its Organic Law # 7648 as “an autonomous institution with decentralized administration and a budget of its own. Its central aim is to protect specially and wholly underage persons and their families, as society’s natural element and fundamental pillar”) one sees, as usual, no explicit discrimination against lesbians, or for that matter against gay men. Nonetheless one notes the preference for heterosexual couples: and given the possibility of choosing between the first couple and the second, the latter will almost inevitably be chosen as adoptive parents for a boy or a girl.

The psycho-social evaluation which is part of the adoption process ostensibly allows evaluating the possibility of an individual adoption as well as a joint or direct delivery adoption of a minor, but we see that the

questionnaire is more directed at couples, at adoptive parents (the term “*padres*”<sup>32</sup> is used for the plural of “mother” and “father”). Among the issues evaluated are: “the feelings and mechanisms used on the degree of working-out of loss, anguish, and depressive anxieties; the motives and previous circumstances that brought about the decision to adopt,” for example, increasing the size of the family with other members, bettering family relations, reasons of social or religious conscience, etc.

PANI officials have stated to CIPAC that “[regarding] the rights of single persons, eventually gays or lesbians, to have custody of male or female children, the institutional position, based on the legal framework, is that, as long as no risk factors of whatever nature are established which put into question the guarantee of the rights of minors and their best interests, there is no reason whatever for the intervention of this institution.”<sup>33</sup>

Yet the criterion “risk factors of whatever nature” conceals vast scope for discretion, arbitrariness, and bias. Its invitation to prejudice only adds to the armament in the hands of the bureaucrats of a biased State.

#### ***D. Provisions permitting or encouraging other forms of discrimination***

*Law # 218. Act regarding associations and regulation of same, DE 12670-J.*

**Article 23** reads: “Associations may have their own venue or open one for their meetings or for the fulfillment of their ends. However, if in that location there occur illicit acts, immoral or indecent behavior, or disorderly conduct<sup>34</sup>, the authorities shall be able to order the closing of the venue.”

The ambiguity of this article lends itself to abuse on the part of the authorities. It interferes in a basic way with the freedoms of association and assembly, allowing the State to shut down gatherings on the basis of vague and sweeping invocations of moral disapproval. It can not only shut down the gatherings, it can exact fines from those responsible: Article 33, clause 2 establishes such fines which can be imposed on members of the governing Board of an association, if they permit association funds to be allocated for, “or permit acts to take place which are prohibited in article 23.”

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<sup>32</sup> *Translator’s note: this noun cannot refer to two women, and is normally understood to mean male and female “parents”.*

<sup>33</sup> *Dr. Jorge Sanabria León, Technical Manager of PANI, in a note responding to a written consultation on the subject.*

<sup>34</sup> *Underlining is our own*

Penal Code.

**Article 98.6 and 102** state the obligation of the judge to impose a security measure consisting in “prohibition to visit certain places” when “prostitution, homosexuality, drug addiction or alcoholism are habitual and have caused the criminal conduct of the accused.” Consensual sexual behaviors appear in the same class as what are generally understood as compulsive diseases--a clearly discriminatory and offensive provision in the law.

***E. Provisions tending to prevent discrimination***

Penal Procedural Code. Law # 7594.

**Article 2** contains principles for interpreting the provisions of the Penal Procedural Code. It states: “The legal provisions that restrict personal liberty or limit the exercise of a power or right conferred upon the subjects of a trial shall be interpreted in a restrictive manner. In this respect, broad interpretation or analogy are prohibited if they do not operate in favor of the liberty of the accused, or of the exercise of a power conferred upon those who are parties to the proceedings.” The rule establishes that neither analogy nor broad interpretation of provisions shall be used against the accused. It moves toward establishing the principle that sweeping provisions (such as the ban on "immoral or indecent behavior, or disorderly conduct" in the Law on Associations, above) should in fact be interpreted as narrowly as possible: that when a particular relationship or act is not expressly prohibited, it should not be subject to judgment in the criminal justice system on “moral” grounds, for example.

General Public Administration Law, No. 6227/78.

This law regulates the administration of State functions in all its aspects.

**Article 113.3** declares: “In evaluating the public interest, the values of legal security and justice for the community and the individual shall be taken into account first, and in no instance shall mere convenience be placed before them.”

**Article 16** of the law declares: “In no case shall laws be made contrary to the univocal laws of science or technology, or to elementary principles of justice, logic or convenience”. These two provisions potentially provide a defense against the abuses of broad interpretation of vague provisions.

Regulations for Law # 7319- Ombudsman Office (Defensoría de los Habitantes).

**Article 2** defines the term “rights” as the whole of the “faculties (can be also translated as ‘abilities, capabilities, rights, permissions’) and institutions (can also be translated as ‘areas or branches of the law’) recognized in legal instruments both national and international, which clearly state the requirements for the dignity, the liberty and the equality of human beings”. For the Office of the Defender, then, the concept of rights is bound by Costa Rican and foreign or international law, including its interpretations and jurisprudence.

**Article 35** permits access to the Office of the Defender to “all persons, natural or legal, with no exception whatsoever”.

**Article 40** establishes that in cases where the “person who files a report (or a complaint)” is a woman, she shall be offered the possibility to be assisted by the institution’s (that is, the Ombudsman Office’s) female personnel. No analogous rule offers the same possibility to men. The law thus represents the principle that equal treatment can involve the acknowledgement of differential power or differential situations.

Law # 7586. Act against domestic violence.

**Article 21.4** states that the National Women’s Institute (Instituto Nacional de las Mujeres) “...shall promote the modification of sociocultural patterns of behavior of men and women, including the design of educational programs, both formal and informal, appropriate to all the levels of the educational process, with the aim of combating prejudices, customs and all kinds of practices that are based on the premise of the inferiority of either of the two sexes, as well as the stereotypes of men and women, which legitimate or exacerbate violence against people.”

The article recognizes the power of sociocultural patterns and "prejudices" in creating not only discriminatory but violent behavior. Yet in not specifying either prejudices or their victims, it perpetuates that pattern of imprecise promises which has vitiated other initiatives against discrimination in Costa Rican law.

Law # 7771/98. General Act concerning HIV-AIDS and its regulations DE (decree) 27894-S

**Article 10** bars any workplace discrimination against any worker with HIV-AIDS, and establishes that no employee is under obligation to inform his/her employer or colleagues of his/her serostatus.

**Article 38** prohibits the isolation, segregation or restriction of work, sports, recreational or other activities to the detriment of persons deprived of liberty and infected with HIV; Article 40 establishes the right to claim injuries if Article 38 or of the rest of the law are not obeyed.

**Article 48** makes discrimination a misdemeanor, with a penalty of “20 to 60 days' fine for anyone who applies, orders or practices discriminatory measures for reasons of race, nationality, gender, age, political, religious or sexual option, social position, economic situation, marital status or any health impediment or sickness...”. The article is the only place in Costa Rican law where sexual choice is expressly recognized as a right of the human person.

Law # 7410/94. General Act concerning Policing.

**Article 42** establishes which public servants are covered by the police statute, and declares: "With no discrimination, the only persons who shall be members of police force bodies, as referred to in this Statute, shall be the persons appointed in accordance with the rules prescribed in the present Act and its Regulations." What we find interesting is the beginning of this rule, for although it states “With no discrimination,” it does not elaborate on nor clarify the concept. But it seems to indicate that, once a person has followed the required procedures, he/she must be granted the status of “police personnel”, regardless of his/her personal features that might otherwise position him/her as a target for discrimination.

**Article 109.c.** Service and organization regulations, DE 23880-SP. It contains the rights of the members of the institution, and clause c) which reads: “The respect of his/her dignity, religious or ideological convictions, as long as these are not in conflict with the subject matter on order and discipline, or with that of the courses.” Although it is true that we cannot say that this is openly discriminatory, it ends up being so by omission, by not acknowledging other liberties.

No expressly discriminatory articles were found. It is necessary to discuss with police authorities how they interpret the general prohibitions against discrimination which the law contains.

Penal Code

**Article 156** is of interest given the subject being analyzed, given that it mentions that it is a crime to have carnal knowledge of a person of either sex when said person is either under the age of 12 years, is incapable of or not in a condition to resist, or when violence or intimidation are used.

Rape is defined in a non-gender specific way (“a person of either sex”), and quite broadly in terms of body parts (“oral, anal or vaginal access”) and instruments used (“same punishment will apply if the action consist in introducing one or several fingers or objects via the victim’s vagina or anus).

## ***F. Provisions defining family relations in a non-discriminatory way***

### *Penal Code*

**Article 162**, clause 2 defines the sexual abuse of those of legal age. Such abuse is aggravated when the perpetrator is (among others) an ancestor, a descendant, a sibling by reason of blood or marriage, a stepfather or stepmother, a spouse or a person who finds him or herself in an analogous relationship of cohabitation." The phrase “or a person who finds him or herself in an analogous relationship of cohabitation” draws our attention, since according to the letter of the law the aggravated charge is applicable to one of the parties in a relationship of cohabitation between persons of the same sex.

### *Law # 7771/98. General Act concerning HIV-AIDS, and its regulations, DE 27894-S.*

**Article 2:** Of great interest is the term “Close Associate”, defined in this article: “Person with whom the patient frequently associates.” This term was not found in any other legal instrument. Of course we note that gender is not mentioned in the wording of this law, and we shall need to analyze whether the Close Associate has some kind of right or obligation: the law in question only establishes that the person infected with HIV is required to inform his/her sexual contacts of his/her situation, a requirement which will be made known to him or her by the health authorities, as will be his/her penal and civil liabilities in case of contagion.

**Article 4** forbids all discrimination against “those infected with HIV/AIDS, its relatives and close associates”. Article 11 forbids discrimination, exclusion or dismissal of “students who are infected with HIV or suffering from AIDS, neither when one of their relatives or close associates is infected”.

Thus, the concept of “Close Associate” can perfectly be applied to a HIV+ woman’s lesbian partner. This law is unique in the Costa Rican context as it recognizes a non-necessarily-heterosexual intimate relationship and allows those who live in those relationships to submit complaints in case of discrimination against them (Articles 4 and 11).

Law # 3284 and its revisions. Commerce Code.

**Article 23.** Refers to de facto associations, such as those that arise due to a lack of a charter. This is important for those cases in which a homosexual couple lives together and works jointly in a business or commercial activity, without the existence of documents establishing the business association, in case of the need arising for one of the parties to defend his/her rights vis-a-vis the other party, or the family of the other party.

The Article allows “interested third parties” to prove the existence of the de-facto association and the conditions under which it operated, through all “ordinary means of evidence”. The same right is granted to the partners in the association.