

AZUL ROJAS MARIN

*Adjudicating LGBTI Rights in
the InterAmerican System of
Human Rights*

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The Case Study

The State of LGBTI RIGHTS in Latin America

Latin America has made immense progress in providing legal rights for LGBTI people. Some countries have not only legalized same sex marriage but provided increased protection against violence and discrimination for LGBTI people. For example, Argentina was the first country in Latin America to legalize same sex marriage in 2010, making it a global leader on LGBTI rights. However, LGBTI rights have spread unevenly throughout the region as many countries still do not have a comprehensive set of laws recognizing and protecting LGBTI people. In particular, Peru has not recognized same-sex marriage, but has decriminalized it. Furthermore, a high level of violence against LGBTI people remains an issue in the country.

The InterAmerican System of Human Rights

In Latin America, the Organization of American States provides the leading system to protect and promote human rights-- the InterAmerican System of Human Rights, which is comprised of the Commission (IACHR) and the Court (IACtHR). The IACHR is an autonomous body of the Organization of American States that was founded to uphold the values of human rights in the OAS, and accepts petitions on cases of human rights violations in the 35 member states of the OAS. The Commission can make a wide variety of recommendations to member states after hearing cases brought before it, and refer states to the court in instances where it feels there has been insufficient effort to fulfill the recommendations. The Court is similarly an autonomous body of the OAS that hears cases on human rights violations. Unlike the Commission, the decisions made by the Court are binding.

The Case: Azul Rojas Marin v Peru

First, it is important to note that Azul Rojas Marin is a citizen of Peru who, in 2008, the year of the alleged assault, identified as a gay man but now identifies as a woman. Thus, she will be referred to as a woman in recounting her case.

Azul Rojas Marin alleged that, on February 25, 2008, she was illegally detained by three Peruvian policemen. In turn, the police alleged that pursuant to Peruvian law she was held because she was unable to provide legal identification to the police officers. Marin further alleges that during her detainment, she was verbally berated, physically beaten and brutally raped with a police baton by the policemen due to her sexual orientation.

After her assault, Marin filed a criminal complaint against the police. Marin claims that she had various encounters with members of the judicial system who insinuated that her case would not be taken seriously because of her sexual orientation. Ultimately, her case was dismissed in 2009 and her claims of sexual assault were not further investigated or brought before a court. Thus, she brought her case before the IACHR in 2009. The Commission subsequently referred it to the Court in 2018 due to their assessment that the state had not sufficiently made an effort to comply with the Commission's recommendations.

The Peruvian state argued that Marin was not illegally held and deprived of her rights. Under Peruvian law, someone can be detained to ascertain that person's identification status. It further argued that the case was not dismissed by authorities on the basis of sexual discrimination. They carried out their duties, but ultimately decided that there was not enough conclusive forensic evidence to prosecute the case.

Furthermore, the state vehemently denied any allegations of torture against Marin. The state argued that the case could not be considered torture under Peruvian Law because it could not be proven that there was express intention for torture to obtain any information from Marin. They do not consider sexual discrimination to be a sufficient motive for torture.

Article 321 of Peru Criminal Code,

“The official or civil servant or any person with his consent or acquiescence, that inflicts on another severe pain or suffering, be it physical or mental, or submits him to conditions or methods that obliterate his personality or diminish his physical or mental capacity, even if they do not cause physical or mental pain, **for purposes of obtaining from the victim or a third person a confession or information, or of punishing him for any action he may have committed or is suspected of committing, or of intimidating or coercing him**, shall be punished with a jail sentence of not less than five nor more than ten years.

Marin argued it was not a legal detention, and that she was held by the police because of their subjective assessment of her sexuality, thus constituting a discriminatory and illegal attack. Furthermore, she alleges she was verbally attacked, raped, and otherwise suffered undue physical attacks. Marin's defense team was able to provide a medical report detailing an examination of Marin and forensic analysis of her clothes.

These alleged actions are constituent of torture as it is understood by the regional community of Latin America, since the OAS system defines torture as “cruel, inhuman or degrading treatment of punishment [that is] an offense against human dignity” from the Interamerican Convention to Prevent and Punish Torture. Importantly, the claimant argued that the behavior of the police officers and other members of the judicial system she interacted with are an indication of wider issues of discrimination against LGBTI members in the national judicial system. Finally, Marin argued that despite having sufficient evidence to prosecute her case, the Peruvian judicial system failed to properly investigate and prosecute her case

The Commission and the Court came to similar conclusions. In their view, the detention of Azul Rojas Marin was illegal and discriminatory since it was based on the police officer's assessment of Marin's status as a gay man. Despite the existence of a Peruvian Law that allows for detention for identification, the factors of Marin's LGBTI status nullified the legality of this law.

Further, they found that the grave and serious harm that Marin faced under detention constituted torture, since the sufficient conditions of severity and intention were fulfilled. Setting a precedent, the Court argued that intentionality can extend to conducting violence against LGBTI persons.

Finally, both the Commission and the Court determined that the Peruvian judicial system failed to investigate and prosecute Marin's allegations due to her status, at the time, as a gay man.

The Commission recommended that: monetary reparations be paid to Azul Rojas Marin and her mother Juana Rosa Tana; a public apology be issued whereby the state admits their mishandling of her case; Marin be provided with the appropriate medical and psychological treatment for her trauma, free of charge; the Peruvian state take the appropriate judicial actions to fully investigate and prosecute those responsible; the Peruvian state make changes to its judicial system to ensure non-repetition and justice for LGBTI peoples in the country, including LGBTI rights training for police officers.

The Court echoed and underlined the recommendations made by the Commission, and it further ordered Peru to create and adopt a domestic law that would prohibit members of the judicial system from applying stereotypes to victims and investigations of crimes. In addition, it determined Peru should create and implement, within one year, a data collection system on all cases of violence against LGBTI citizens in the country.

This case is important because this was the first time the Court heard a case about LGBTI persons in Latin America. Thus, it set a precedent for other countries and cases in Latin America. This was also the first time that sexual abuse was referred to as torture in the Inter-American System, setting clearer parameters for future cases of the prosecution of rape as torture.

Activity

Learning Objective: For students to understand the arguments and reasoning behind Azul Rojas Marin's case and the reasoning of the Peruvian state. In addition, for students to explore the role of Inter-American Human Rights System in adjudicating human rights cases and providing valuable recommendations to states.

Background:

Educators should play the [following video](#) released by the International Justice Resource Center detailing how the commission processes petitions and requests for precautionary measures. The [entire playlist](#) also provides a more complete overview of the Inter-American Human Rights System

Secondly, to gain a precursory understanding of the climate of LGBTI rights in Latin America, educators should show the [following video](#) by the Economist to the students.

Lastly, the case should be briefly explained to the students. Students should be provided with an explanation of Marin's testimony and the state's objections, but should not be privy to the final decision made by the Commission, in an effort to allow students to think critically about what kinds of arguments and decisions can be made by the various parties.

Instructions for the Activity

Students are going to enact a simulation of the proceedings before the InterAmerican Court of Human Rights. The objective of the Court is to hear cases of Human Rights in the Americas referred to it by the Commission and determine whether or not human rights violations have been made and if so, provide a set of policy initiatives to remedy the issue and prevent repetition.

Students will be divided into three groups and be given thirty minutes to collaborate with others to present a five-minute opening statement. One group will represent Azul Rojas Marin, another will represent the Peruvian state, and the third will represent the Court. The first two groups should pick one speaker to present the opening statement to the court. Students should endeavor to replicate the professional mannerisms of the court.

First, the court should announce that it is hearing the case brought before the it by Azul Rojas Marin against Peru. The speaker representing Marin's Defense should provide their name for the court. After their statement, the representative of the Peruvian State should similarly provide their name before the court before proceeding to their opening statement.

The Court is allowed to ask clarifying questions, and then given thirty minutes to deliberate amongst itself. In this time, similarly to preceding groups, the Court should prepare a brief on their decision. Their brief should answer the following questions: has a human rights violation occurred? If so, what are their recommendations to the Peruvian State?

The Peruvian State

- A group of students will represent the view and argument of the Peruvian State. They will build a defense against the claims of Rojas Marin.
- The state should pay special attention to Peruvian law as it applies to the case of Marin.

Marin's Defense

- A group of students will represent the charges that Azul Rojas Marin is making against the state.
- Students should rely not only on representing testimony of Marin, but endeavor to demonstrate the willful negligence of the state in their case.

The Court

- A group of students will take the position of the court outlining their decision on the case and explicating their reasoning.
- They will listen to the positions of the Peruvian State and Rojas Marin to make recommendations to the state. Students are encouraged to take notes during the other two presentations.
- Students will need to be creative in considering what kinds of recommendations they can make for change. While due to time constraints students do not need to provide a large number or detailed instructions, students should demonstrate thoughtfulness in their decision.

End: What Was the Actual Decision?

- At this point students should be informed of the decisions made by the Commission and the Court.

Debriefing: Discussion Questions

To promote further reflection on the experience, educators should facilitate a discussion about the following themes and answer any lingering questions from students.

- What kind of impact do you think that this case will have on Peru and other member states?
- One of the points of contention in this case is the IACHR's decision to label sexual assault as a case of torture. Do you think that sexual violence constitutes torture? More generally, how do you think torture should be defined?
- Do you think that it violates Peru's sovereignty rights to make recommendations to their judicial system?
- Do you think that this one case represents systemic failure of the Peruvian judicial system?

- Which definition of torture should be respected when prosecuting Marin? How should sovereignty impact considerations of human rights violations and torture?

Additional Resources

A video record of Marin's case being brought before the Commission:

https://www.youtube.com/watch?v=I_cfx0tE0ZI

This video previews the format for cases being brought before the commission, when it holds hearings for further information before making a decision on the merits of the case. Can be consulted to provide additional information prior to the simulation of the Court, since this procedures would have happened before hand.

The official guidelines for the decisions and recommendations made by the Commission

<https://www.oas.org/en/iachr/activities/follow-up/Directrices-en.pdf>

On pages 9-11, the OAS details the parameters for the types of recommendations that the Commission can make to states when adjudicating cases. This resource is especially important for students who are simulating the position of the Commission to clarify their powers as a part of the Commission.

The official decision and summary of the case published by the Commission

<https://www.oas.org/en/iachr/decisions/2014/PEAD446-09EN.pdf>

This document was officially published by the commission to provide their summary and judgment of the case. It can be consulted by students for research, prior to the simulation

The official decision and summary of the case published by the Court.

http://www.corteidh.or.cr/docs/casos/articulos/seriec_402_esp.pdf

This document was officially published by the Court to provide their summary and judgment of the case. It can be consulted by students for research, especially in learning about each party's arguments. If shared with students prior to the simulation, it should be edited by educators to remove the final decision.

*document is in Spanish

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