

NICARAGUA

@Article 204: legalizing the repression of homosexuality

A March 1994 ruling by the Nicaraguan Supreme Court has upheld legislation introduced in 1992 to penalize homosexuality. Amnesty International (AI) believes the law could result in the prosecution and imprisonment of prisoners of conscience.

On 11 June 1992 the Nicaraguan National Assembly approved a number of amendments to the Penal Code regarding sexual offences. Article 204 of the amended Penal Code now provides that **"anyone who induces, promotes, propagandizes or practices in scandalous form sexual intercourse between persons of the same sex commits the crime of sodomy and shall incur 1 to 3 years' imprisonment"**. It also states that if one of the people engaging in homosexual intercourse holds power or authority over the other, even if in private, s/he will be punishable with 2 to 4 years in prison for "unlawful seduction".

These amendments replace Article 205 of the former penal code, whose provisions appeared to be aimed at outlawing homosexual acts which are public, coercive or involve minors. The amendments delete these provisions and extend the crime of "sodomy" to include those who "induce, promote, propagandize or practice" homosexual sex "in scandalous form". Homosexual relations with a person under one's responsibility, regardless of age and whether in private, are criminalized by Article 204 as "unlawful seduction", which could thus be applied to consenting adults who have homosexual relations in private. "Unlawful seduction" between heterosexuals only applies when the person under the authority or dependence of the other is between 14 and 18 years of age (Article 197).

The terms used to formulate Article 204 are so broad and undefined that they could permit the prosecution of individuals for activities such as advocating lesbian and gay rights, imparting health information concerning sexuality, or having homosexual relations in circumstances which are not criminal if they involve heterosexuals. People prosecuted or imprisoned for these activities, or solely for their homosexuality, would be considered by AI to be prisoners of conscience.

Prisoners of conscience are defined by AI as people detained for their political, religious or other conscientiously held beliefs, or by reason of their ethnic origin, sex, colour or language. Individuals detained or imprisoned solely on the basis of their homosexuality are also considered by AI to be prisoners of conscience. AI includes in this category people who are arrested for having homosexual relations, when these are carried out between consenting adults in private.

Amnesty International made known its concerns about Article 204 to President Violeta Barrios de Chamorro in June 1992, before she was due to ratify the amendment. The organization asked her to clarify the intended scope and application of Article 204 and to ensure that the Nicaraguan penal code would never permit the imprisonment of prisoners of conscience. No response was received. The President ratified the bill containing the amendment in July and the law came into force in September 1992.

The Unconstitutionality Appeal

In November 1992 the lawyers' group **Centro de Derechos Constitucionales**, Centre for Constitutional Rights, together with Nicaraguan lesbian and gay activists and other Nicaraguan citizens, presented an appeal to the **Corte Suprema de Justicia**, Supreme Court of Justice, challenging the law as unconstitutional. The appeal presented detailed arguments that Article 204 of the revised penal code violated 12 articles of the Nicaraguan constitution, including the right to privacy, to freedom of expression and to non-discrimination before the law. It also argued that by violating these rights, Article 204 contravenes international human rights standards.

On 4 December 1992, the president of the National Assembly, Alfredo César, urged the Court to declare the appeal inadmissible on procedural grounds, claiming that the appellants had failed to substantiate why the law was injurious to them. The same recommendation was made by the **Procuraduría General de Justicia**, Attorney General's office, on 21 January 1993. The Supreme Court did not rule on the appeal until March 1994, a delay interpreted by Nicaraguan lesbian and gay activists as a stalling tactic aimed at averting domestic and international attention from this controversial issue. The ruling also came after the replacement in December 1993 of four Supreme Court judges appointed under the previous *Sandinista* government.

The March 1994 Supreme Court ruling

In its ruling, the Supreme Court rejected the appeal, concluding that Article 204 did not violate any of the rights guaranteed in the constitution. The ruling does not argue in detail against the points made in the appeal, but merely dismisses them by stating that none of the constitutional rights invoked by the appellants bore any relation to the case in hand. It then makes a series of observations which shed light on the intention behind the law and raise further grounds for concern that the law could result in the imprisonment of prisoners of conscience.

Instead of clarifying the vagueness and ambiguity of the terminology of Article 204, the ruling confuses and broadens the definitions of the terms "sodomy" and "scandalous form",

leaving them even more open to varying and contradictory judicial interpretation. The ruling defines "sodomy" as "a sexual inversion, that is, anal copulation between two persons of the male sex or between two women" and as "a deviation from normal life which subverts the foundations of a correct society, attached to ethical principles for the well-being of the family and the nation as a whole". This use and definition of the term "sodomy" extends the definition given in the text of Article 204 - the promotion and practice of homosexual sex in scandalous form - apparently broadening it to mean homosexual sex or identity in general.

The Article uses the term "scandalous form" as the legal standard to determine whether the "induction, promotion, propagandizing or practice" of homosexual sex is criminal. Rather than clarifying or defining this vague legal standard, the Supreme Court interprets it broadly to mean "disturbance, commotion, shamelessness, bad example". The scope of the article thus goes way beyond the criminalization of homosexual relations in public; it is applicable to any act, in public or in private, which is deemed to constitute a "bad example" by "promoting" homosexuality. The ruling also leaves the vague terms "induction, promotion and propagandizing" undefined. Nor does it clarify the provision outlawing homosexual relations with a person under one's responsibility, which explicitly covers freely consenting homosexual acts between adults in private. The Supreme Court's interpretation of Article 204 therefore offers no guarantees that the law will not be used to prosecute lesbians and gay men for sexual relations in private, nor individuals for publicly advocating lesbian and gay rights.

Far from allaying AI's concerns, the Supreme Court ruling increases fears that Article 204 could allow for the imprisonment of people solely on the basis of their homosexuality or for freely expressing conscientiously held beliefs - individuals who would be prisoners of conscience. The discursive and highly subjective arguments used to reject the appeal blur the distinction between "sodomy" and "homosexuality", suggesting that the law's intention is to effectively criminalize homosexuality by the backdoor. Moreover, the language of the ruling indicates the prejudice prevalent in official attitudes towards homosexuality. "Sodomy", it says, is "a threat to the holy institution of matrimony and procreation... To authorize its free practice would be a legal attack on the growth of the Nicaraguan population and a setback to its political, economic and social advancement."

Article 204 as a violation of international norms

By placing lesbian and gay rights defenders, health educators and others, at risk of prosecution for "induction, promotion and propagandization of homosexual sex in scandalous form", Article 204 permits arbitrary and excessive restrictions on the right to freedom of expression, in contravention of Article 19 of the International Covenant on Civil and Political Rights (ICCPR). This states that "everyone shall have the right to freedom of expression: this right shall include freedom to seek, receive and impart information and ideas

of all kinds." This right is also upheld in Article 13 of the American Convention on Human Rights (ACHR). By permitting the prosecution of adults for engaging in consensual homosexual sex in private, Article 204 also represents an arbitrary interference in the right to privacy, guaranteed in Article 17 of the ICCPR and Article 11 of the ACHR. In March 1994, the Human Rights Committee which monitors compliance with the ICCPR, held that similar provisions of the penal code of Tasmania, Australia, which criminalize various forms of sexual contact between men, including consensual acts between adult men in private, were in violation of Article 17 of the Covenant and recommended their repeal.

By imposing arbitrary and unjustified limitations on the development, expression and representation of homosexual identity - limitations which do not apply to heterosexual identity - Article 204 is also in violation of the non-discrimination principle provided in Article 2 of the ICCPR and in Article 1 (1) of the ACHR. This principle guarantees to all persons the free and full exercise of the rights and freedoms recognized in the Covenant and Convention, "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Considerable international jurisprudence supports the interpretation that discrimination on grounds of sexual orientation falls into the category of "other status" and is therefore prohibited.

The Nicaraguan government has stated that the international norms invoked by the appellants are "irrelevant because they are inspired by different moral concepts from those which predominate in our society" (statement by the President of the National Assembly to the Supreme Court). However, the requirements of domestic morality cannot justify the arbitrary, excessive and discriminatory interference by the state in individual rights which are universal in character. Moreover, these rights are guaranteed in international human rights standards - including the ICCPR and the ACHR - which are binding on Nicaragua and have precedence over domestic law. In its March 1994 decision on the Tasmanian legislation, the Human Rights Committee stated that "the Committee cannot accept that for the purposes of article 17 of the Covenant, moral issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy."

With the amendment to Article 204, Nicaragua has gone against the apparent international trend towards decriminalization. In Latin America, only Ecuador and Chile place criminal sanctions on homosexuality in their penal codes. The only other countries in the Americas which classify "sodomy" as a crime are those with an Anglo Saxon legal tradition, such as several states of the USA and several Caribbean countries. Legislation criminalizing or curtailing homosexuality in countries including Romania, United Kingdom, Ireland and Australia has been challenged by various inter-governmental bodies monitoring compliance with international or regional human rights standards.

To AI's knowledge no one has been prosecuted to date under Article 204. However, Nicaraguan lesbian and gay activists, together with human rights defenders such as the **Centro Nicaragüense de Derechos Humanos (CENIDH)**, Nicaraguan Centre for Human Rights, claim that the very existence of this legislation encourages other forms of discrimination and violations of the rights of lesbians and gay men - from physical attacks to the denial of employment rights. They interpret the law as a reaction by the conservative **Unión Nacional Opositora** government against the increased visibility of lesbian and gay rights activism since the late 1980s.

In the light of these concerns, AI will be monitoring closely the application of Article 204 and is calling on the Nicaraguan government to guarantee that it will never be used to prosecute prisoners of conscience, as defined by AI. It urges the government to give serious consideration at the earliest opportunity to the amendment or repeal of Article 204, so as to guarantee that the Nicaraguan Penal Code will no longer permit the illegitimate interference with fundamental rights guaranteed in international human rights instruments to which Nicaragua is party.

*"Sodomy goes against natural and Divine Law and its propagation in society would make us deserving of the biblical punishment which fell on the city of Sodom, which gave its name to this unnatural sexual practice, classified in many legislations as a crime.... Our country's legislation cannot be adapted to the whim and satisfaction of a small group of ideologues and practicants of sodomy."*National Assembly President, Alfredo César in 1992 statement to Supreme Court.

*"Safeguarding the family and public morality is not achieved by stigmatizing and persecuting one social group"*Dra. Vilma Núñez, president of CENIDH.