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REPORT No. 304/20

CASE 13.505

REPORT ON MERITS

CRISSTHIAN MANUEL OLIVERA FUENTES
PERU

Approved by the Commission on its session No. 2190 held on October 29, 2020.

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I. INTRODUCTION

1. On November 29, 2011 the Inter American Commission on Human Rights (hereinafter “the Inter American Commission”, “the Commission” or “the IACHR”) received a petition from the Study for the Defense of Women’s Rights Organization (DEMUS)¹(hereinafter “the petitioner”) which claims international responsibility of the Republic of Peru (hereinafter “the Peruvian State”, “the State” or “Peru”) for the violation of several rights enshrined in the American Convention on Human Rights (hereinafter “the Convention” o “the American Convention”) as a consequence of alleged acts of discrimination for the expression of sexual orientation to which the alleged victim, Crissthian Manuel Olivera Fuentes was subject.

2. The Commission approved admissibility report No. 172/17 on December 28, 2017². On July 19, 2010 the Commission notified such report to the parties and became available to them as to reach a friendly settlement, without conditions being given for such procedure. The parties had their due time to submit their additional observations on the merits. All information received was duly exchanged between the parties.

II. POSITIONS OF THE PARTIES

A. The Petitioner

3. The petitioner refers that on August 11, 2004 Crissthian Manuel Olivera Fuentes, who identifies himself as a gay man, and another man with whom at the time was involved in a sentimental relationship were in a coffee shop located inside a Santa Isabel Supermarket, property of Supermercados Peruanos S.A., in the city of Lima, reading poems in a romantic attitude, without having physical contact. He points out that the supermarket security staff requested them to cease their affective expressions, since a customer who was accompanied by his underage daughter had complained of their love scenes. He states that, afterward, the store supervisor approached them with four security agents, to insist they should modify their behavior, since their expressions of affection may affect the nearby children who were playing. He claims that the supervisor pointed out that they should leave if they were not to consume any product, but that if they purchased something in the coffee shop, they had to refrain from their affectionate behavior, in order not to disturb other customers, or else they should leave the establishment.

4. The petitioner adds that on August 17, 2004 the alleged victim attended, as part of a television report to the Santa Isabel Supermarket, another supermarket of the same company, along with a journalist and his girlfriend, and they deliberately performed affectionate conducts in order to prove the differentiated treatment given to persons with diverse sexual orientation. The petitioner says he was warned and expelled from the place, unlike what happened in this opportunity with the male journalist and his couple. He states that such report was broadcasted by TV on August 22, 2004.

5. The petitioner also holds that on October 1, 2004 the alleged victim filed a complaint for discrimination on sexual orientation against Supermercados Peruanos S.A. before the National Institute of Defense of Competition and Protection of Intellectual Property (hereinafter “INDECOPI”), however, on August 31, 2005 the complaint was dismissed by the Commission of Protection of the Consumer arguing that the alleged victim did not prove the discriminatory treatment and that the best interest of the child enabled companies to request any couple the cease of their manifestations and affectionate exchanges.

6. Petitioner affirms that against such sentence the alleged victim filed an appeal and the Defense of Competition Chamber of the Tribunal of INDECOPI, by means of decision dated May 17, 2006 confirmed the

¹ By means of a Communication dated March 26, 2014, it was informed that Heartland Alliance for Human Needs & Human Rights and Asociación Líderes en Acción would be co-petitioners. On its part by means of a communication dated February 21, 2018 it was informed that Heartland Alliance would further cease to act as co-petitioner, and Synergia-Iniciativas would incorporate for Human Rights.

² IACHR. Report No. 172/17. Petition 1718-11. Admissibility. Cristhian Manuel Olivera Fuentes. Perú. December 28, 2017. In such decision the Commission declared the Petition admissible concerning articles 8, 11, 13, 24 and 25 of the American Convention in accordance with articles 1.1 and 2 of the same instrument.

previous decision, arguing that the alleged victim had not submitted evidence on the facts occurred on August 11, 2004.

7. The same party adds that, versus such resolution, on September 13, 2006 the alleged victim requested partial nullity, before the 2nd Specialized Contentious Administrative Chamber of the Higher Court of Lima, which on June 10, 2008 declared the request unfounded, arguing that the evidence provided was not enough for being brought forth by the very claimant and that the video of the report was after the alleged facts. The petitioner points out that against such sentence filed an appeal, however on June 14, 2010 the Civil Chamber of the Supreme Court of Justice confirmed the first instance sentence, arguing that the burden of proof befalls upon who claims discrimination and that upon absence of enough evidence, the presumption of innocence of Supermercados Peruanos S.A. is to prevail. Finally, states that filed a cassation remedy and that on April 11, 2011 the Permanent Constitutional and Social Law Chamber of the Supreme Court of Justice declared the remedy inadmissible, stating it was not the competent instance to perform acts of new assessment of evidence.

8. As for law, argues the violation of the **principle of equality**. The petitioner claims that when jurisdictional authorities rejected the complaint filed by the alleged victim, they infringed such principle considering the burden of proof demanded, which they consider must be reverted when a person presents signs of unequal treatment. Petitioner adds that the decisions were based on stereotypes related to the expression of gender and homosexual orientation.

9. Likewise, claims the violation of the **right to privacy and freedom of thought and expression** because by arbitrarily using arguments related to public morals and the best interest of the child to justify the discriminatory treatment suffered by the alleged victim, the State affected the free development of his personality and the public expression of a specially protected speech.

10. Along the same lines, argues the violation of **fair trial and judicial protection**. In this regard claims that the 2nd Specialized Contentious Administrative Chamber employed in its decision as one of the arguments to motivate its sentence, the best interest of the child, although previously discarded during administrative proceedings, which is why acted against the prohibition of the figure of *reformatio in peius* which prevents a second instance judge from worsening the situation of a person who has challenged a first instance resolution. Adding that the aforesaid also affected the right to defense of the alleged victim since he had no chance to challenge whether the best interest of the child justified the unequal treatment to which he was subject. On the other hand, holds that the State breached the guarantee of **reasonable time** for the domestic duration of the proceeding which took over 7 years although it had no particular complexity.

B. The State

11. The State does not question the facts narrated by the petitioner, but considers that the case was decided domestically, and the fact of attaining unfavorable decisions does not imply a violation of a conventional right.

12. The State continues to present allegations related con lack of exhaustion of domestic remedies. It requests the IACHR to reconsider its admissibility report, upon absence of explanations referred to the exhaustion of domestic remedies, in particular on the alleged affectations on rights of protection of honor and dignity and freedom of thought and expression. It adds that INDECOPI cannot assess the affectation of these rights as the protection of honor and dignity and the right to freedom of thought and expression, since those not being specific rights recognized for consumers they cannot be analyzed in an administrative proceeding before such entity, since it exceeds the competencies recognized in the Peruvian constitution.

13. As for law, the State argues that it did not breach any conventional right. In particular concerning the **principle of equality**, holds that such right was not infringed and that it was the lack of proof which caused the complaint filed by the alleged victim to be declared unfounded. It adds that what the alleged victim actually objects is the burden of proof rule and the criteria of assessment implemented. The State expresses that in the complaint before the INDECOPI the alleged victim stressed that his rights were breached on August 11, 2004, however, presented a video as proof from August 17, 2004, which is why he did not prove

the alleged facts. The State adds that finally, the main argument to declare the complaint unfounded in the Second Chamber was the lack of proof that would unequivocally corroborate the act of discrimination and that, in any case, the Chamber did not carry out a distinction in virtue of the sexual orientation of couples who incur in excessive expressions of affection.

14. In regard to the **right to privacy and freedom of thought and expression**, points out that no such rights were breached. On this point, the State claims that the fact that its response by means of a resolution was not satisfactory for the petitioner does not suggest that the State fosters impunity nor discriminatory acts because of sexual orientation, but that as it has been previously addressed, the alleged facts were not duly proven.

15. Concerning law, the State argues it did not breach any conventional right. In particular regarding **fair trial and judicial protection** argues that, although the decision of the 2nd Specialized Contentious Administrative Chamber took into account the best interest of the child to justify its sentence, finally in the decision of the Permanent Civil Chamber of the Supreme Court of Justice did not adhere to such argument, but assessed whether the discriminatory act was corroborated. Likewise, concerning **reasonable time** it underscores that the duration of the proceeding obeyed the procedural activities by the parties.

III. FINDINGS OF FACT

A. Complaint before INDECOPI

16. On October 1st 2004 the alleged victim filed a complaint against Supermercados Peruanos Sociedad Anónima before the Commission for Protection of the National Institute for Defense of Competition and of Protection of Intellectual Property (INDECOPI). In this regard, claimed that:

On Wednesday August 11, during evening hours the administration and security personnel of the “Dulces y Chamberdos” coffee shop of the Santa Isabel supermarket of San Miguel (2155 La Marina Ave.) discriminated Crissthian Manuel Olivera Fuentes, member of the Assembly of Associates of the Homosexual Movement of Lima (MHOL), and his boyfriend for expressions of affection in public (just physical proximity and romantic looks) Crissthian and his partner had purchased products on the first floor of the supermarket, then sat very close to each other at one of the farthest tables from the view of the children playground section of the coffee shop on the second floor and initiated the reading of some poems. There were no kisses, embraces nor caresses, therefore what the Santa Isabel spokesman pointed out in the report made by Peru 21 newspaper is false (...)

The one responsible for the venue, Gabriela Madrid Paredes, along with four security staff members demanded Olivera and his partner to refrain from showing their affection since “that kind of behavior was not permitted”. Finally, upon protest by Olivera and his couple for the discriminatory treatment (heterosexual couples can publicly show in the coffee shop), they were asked to leave.

(...) At all times they affirmed they were not being discriminated and that if they wanted to stay in there they had to make purchases in the same shop, but made it clear that even consuming products acquired there, they could not continue in the same attitude nor with the same behavior, “you must be sane, understand you are being treated as people, you must seat correctly and separately” she said.

On another occasion (Tuesday August 17), Crissthian and his partner were discriminated by the Santa Isabel store of 2 de mayo Avenue in San Isidro by personnel of such institution. At that time both were talking, looking at a magazine and eventually kissing. Upon this situation, a worker pointed out that what they were doing was “disrespectful”, and then, a representative of Santa Isabel told them “out in the street, do all you want, but not here”. That time, the representative of the store accepted that this was Santa Isabel policy. This situation was registered by the “Reporte Semanal” television program of Frecuencia Latina, issued the morning of Sunday August 22. (...) the unequal treatment is evident when heterosexual couples can show signs of affection in their premises without being repressed, while homosexual couples cannot (...)³.

17. On October 20, 2004 Supermercados Peruanos, S.A issued its writ of reply to the complaint. It argued as follows:

³ Annex 1. Complaint by the petitioner before the INDECOPI. Annex to the writ by the petitioner of November 29, 2011.

(...) That, the claimant has manipulated the facts occurred on August 11 and 17 in our premises of San Miguel and 2 de Mayo, whereas, in the case of the San Miguel store, at no time were they asked to leave the store, neither by our attendance delegate nor by members of our security personnel. The claimant was contacted by our attendance delegate in order to convey a complaint from a customer, who was at the next table, close to the playground area, who was accompanied by his underage children, who witnessed the caresses, hugs and kisses that the claimant and his table partner were exchanging in a not discrete and openly explicit manner. (...) Upon the intervention of the attendance delegate on duty, Miss Gabriela Madrid Paredes, conveying the complaint of our customer, whom we regrettably have been unable to identify, the reaction of the claimant was extremely negative (...)

(...) The incident was reported the following day, August 12, 2004, by the chief of Prevention of Losses, Mr. Christian Quispe Dorador, who confirms that neither the claimant nor his companion were mistreated in any way, nor were they expelled from the place, merely being requested by company staff to cease their behavior due to the complaint of another customer, who was worried about his underage children (...) The claimant has not been able to prove in any way the existence of such discriminatory attitude from our company toward him, as set forth in Article 7B of the D.L 716, Consumer Protection Law, but on the contrary, the aforesaid article establishes the prohibition of this form of discrimination provided there are no reasons related to security of the place or the tranquility of its customers or other objective and justified reasons; which is the case, that the action by our company's staff located in San Miguel, originated from the complaint of one of our customers who felt disturbed and uncomfortable by the behavior of the claimant due to the presence of his children (...)

(...) We believe pertinent to have this Commission acknowledge that the claimant has been involved, in stores other than from our chain of supermarkets, in incidents that altered their normal functioning and that, however, unlike our way to proceed, the claimant was expelled from such facilities as stated in his press report (...) All he was asked to do is to respect the right of other customers to the quiet, peaceful, pleasant and to make proper use of our facilities, since we believe that the valuation of each conduct or behavior we show is in direct relation to the place and moment in which it is performed, is what we call respect to morals and good manners imposed by the community, with no other differentiation than being a righteous and respectful person for the rights of others, or not being. (...) We request the complaint filed against Supermercados Peruanos S.A be declared unfounded.⁴

18. In its reply, the entity provided a statement from Gabriela Madrid Paredes, who dealt with the alleged victim the day of the facts, on August 11, 2004 and referred that:

Finding myself on the second floor along with Mr. Julio Neyra, Chief of maintenance, I was required by a customer who manifested being uncomfortable and annoyed and by the attitude of two gentlemen, who were at the next table to the one used by him and his daughter, who returned from playing at the playground, who witnessed the scene of caresses, hugs and kisses, performed by the two gentlemen, upon which Mr. Julio Neyra courteously approached who after exchanging a few words with the two gentlemen allowed me to participate in order to convey the request of the customer and asking them to please, cease their romantic scenes for respect to other customers, since one of them complained that there were children circling toward the playground, which was done appealing to his good will. One of them angrily responded "Are there no homosexual children?", after which a calm exchange of own opinions, we ended the talk we had engaged in thanking for their comprehension and I walked away back to my duties. (...) I declare that what I previously stated adheres to the truth of what I know and that at no time were the gentlemen deprived of any service whatsoever, nor were they required to leave or anything of the sort (...)⁵.

19. Likewise, the reply included the report of the Chief of Prevention of Losses, who noted that "on Wednesday August 11 at 21:00 hrs. Approx.; once again we receive complaints from customers, for two male persons who were committing acts of homosexuality openly and in view of all public present on the 2nd floor of the store (restaurant area). This customer felt uncomfortable and annoyed and his underage children were using the playground (area of rides and games). At the time the children entered or left the games they witnessed how two people of equal sex were kissing and caressing. In that moment Srta. Gabriela Madrid (attendance) went upstairs and proceeds to explain and ask them to please avoid performing such acts due to which some customers felt uneasy in such a way that they understood and one of them in a defiant manner

⁴ Annex 2. Response to the complaint of Peruvian Supermarkets of October 20, 2004. Annex to the writ by the petitioner of November 29, 2011.

⁵ Annex 3. Court record of October 14, 2004 of Gabriela Madrid Paredes along with the Response to the complaint of Peruvian Supermarkets of October 20, 2004. Annex to the writ by the petitioner of November 29, 2011.

leaves her a card of the Homosexual Movement of Lima and comments her that they will have news from them (...)”⁶.

20. On August 31st 2005 the Commission of Protection declared the complaint unfounded due to lack of enough evidential material to corroborate the alleged unequal treatment. In this regard he considered that:

(...) Prior to the analysis of the existence of acts of discrimination, it is relevant and necessary to assess the conduct of the accused company under the perspective of the safeguard of the ultimate interest of the child, for it was raised and intensely discussed by the parties during the conduction of the Oral Report dated June 22, 2005. (...) we have then that the causes of homosexuality (biological or social, or even a mixture of both) find no peaceful and uniform position within the scientific community, but what can be assumed is that the surrounding is not neutral and that if it does not determine, it at least conditions psychosexual conducts of persons, with greater influenceability in children exposed to homosexual behavior (...) Therefore, the importance of this matter is worth highlighting, thus, the need to make a prudent decision, even when the parties submitted contradictory reports before the Commission on the possibility of the existence or inexistence of damage around conducts which are subject of the complaint; for if science has no defined or uniform and peaceful position on what this may mean in children’s health, a correct and prudent attitude of who is to judge any case which may imply damage to third parties, would demand refrainment from the conduct which generates the probability or risk of such damage, especially when it concerns a sensitive group which claims special protection from the State.

(...) The Commission has the opinion that, in pursuit of the protection of the minor, it is understandable the attitude of a parent to claim the supplier to demand a homosexual couple prudence in their manifestations of affection they profess in places where children attend, since what is legitimately invoked is the ultimate protection that any child deserves.

(...) the evidential difficulty rises when the claimant invokes unequal treatment based on insufficient signs that are not corroborated but denied by the defendant party, situation that in view of the Commission is observed in the present case. (...) In order to corroborate the alleged discriminatory policy a video was presented in which a heterosexual is seen kissing in one of the restaurants of Santa Isabel without being able to notice whether Santa Isabel staff interfered or not. Likewise, based on such video the claimant wanted to prove another discriminatory practice on August 17 in the store located in Dos de Mayo Ave. (San Isidro) upon being requested- by Santa Isabel staff- the cease of their expressions of affection (kisses) during the line to pay at the till. (...) it was clear that the recording was taken from a hidden camera and that the facts of the 17 had been caused by the claimant, which is why the analysis of the facts has been circumscribed to August 11, 2004 which strictly correspond to the complaint.

(...) The insufficient facts may lead us to think that there was a discriminatory attitude from Santa Isabel, but may also lead us to think that what existed was a scandalous attitude and expressly provoked by the homosexual couple based not only on what Santa Isabel stated, but also in the multiple contradictions with which the claimant narrates what happened (...) the Commission cannot sanction a supplier only with such elements attributing to it an offense as serious as discrimination, if there is no proof that directly corroborates that under the same circumstances and caused by the same conducts there have been an unequal treatment with neither objective nor reasonable justification.(...) In this order of ideas, the Commission considers that what proceeds is to declare unfounded the complaint for alleged infraction to the set forth in articles 5 literal c and d and 7/B of the Consumer Protection Law.

(...) as we have assessed the preceding points in conformity it is reasonable to demand couples in general a moderate conduct in zones destined to or often attended by children by grounding such demand in the best interest of the child, which is why requesting any couple the cease of their manifestations and affective exchanges (kisses, hugs and caresses), it is legitimate, and does not affect the suitability of the service, which is why the Commission considers it should declare unfounded the extent that assigns alleged infraction to the established in article 8 of the Consumer Protection Law⁷.

21. The Commission takes note that two members of INDECOPI voted in disagreement. On this point they held that:

⁶ Annex 4. Report No 056 of the Chief of Loss’ Prevention of August 12, 2004 along with the Response to the complaint of Peruvian Supermarkets of October 20, 2004. Annex to the writ by the petitioner of November 29, 2011.

⁷ Annex 5. Decision by INDECOPI of August 31, 2005. Annex to the writ by the petitioner of November 29, 2011.

The arguments held by the defendant and adopted in the decision with which we disagree, hold the validity of an unequal treatment upon homosexual expressions of affection, for alleged considerations of Protection to the rights of the child, which we do not accept as valid, even when such presence may have been possible. We consider that the right to nondiscrimination based on sexual orientation does not run counter to the Protection of the Rights of the Child. In our opinion, by juridically disregarding the right of persons for not being discriminated for their sexual orientation, an equal treatment is being given to heterosexual and homosexual persons, which makes it illegal and forbidden to approach differently the rights of freedom of expression of couples, due to the sexual orientation of their members.

(...) It is therefore not consequent, along with the right to not being discriminated for sexual orientation, to demand that expressions of affection in homosexual couples be made strictly in private or out of the possibility to be perceived by children. That is why, it is the parents' duty to educate children within limits established by society and concerning the legality of fundamental rights of persons. (...) In short, we consider that the complaint should have been declared founded keeping in mind that while the claimant was not deprived of access to the place of the defendant nor the access to the products and services sold therein, he was treated unequally by being called upon for performing a conduct that would be normal in a heterosexual couple, as are expressions of affection, without having corroborated that such conduct was excessive, had motivated complaints from other customers, had happened in the presence of children or may affect them, thereby conforming discrimination for subjective reasons⁸.

B. Appeal

22. On September 22, 2005 the alleged victim appealed such decision arguing that the unequal treatment was proven and that the same defendant entity accepted having reprehended him for exchanging expressions of affection with his couple⁹. On May 17, 2006 the Tribunal of Defense of Competition and Intellectual Property dismissed the appeal under the following arguments:

In this regard, neither the mere physical proximity nor the exchange of looks between two people may be considered as a conduct that disturbs the tranquility, security or proper use of the facilities of an establishment. These are conducts allowed by establishments from Supermercados Peruanos and, in most commercial premises, for heterosexual couples, which is why there is no justification for, the same conduct to be forbidden for homosexual couples. Equal treatment demands the same levels of tolerance with homosexual couples and, upon such kind of conducts, it is discriminatory to require any modification of behavior.

(...) In the present case, the facts matter of controversy (...) are exclusively grounded in the allegations by both parties. However, the one subject to study by this Chamber is the conduct of Supermercados Peruanos and, as aforesaid, it cannot be punished mainly by imputations from a party, since for that it is necessary to have full certainty on the infraction committed, either by means of proof or signs that yield a reasonable degree of conviction regarding the truthfulness of the reported facts (...) The claimant has not provided any means of proof whatsoever regarding the facts matter of this proceeding occurred on August 11, 2004. The evidential elements provided by the claimant in the proceeding- images from August 17, 2004, in Santa Isabel supermarket of Dos de Mayo Ave. in San Isidro-are rather referred to conducts developed on a later date, even in some case, had been recorded by mass media (...)

(...) In order to prove their statements Supermercados Peruanos has presented the reports form its store and security personnel which from pages 49 through 51 of the casefile, in which these employees narrate the incidents pointing out that the claimant and his partner "were kissing and caressing"; performing "unbecoming acts (caressing)"; and behaved in an "immoral manner". (...) the expressions contained therein are to be taken into account as the own expressions from employees of those levels of representation and formation who, merely credit the reasons why they approached the couple.

Additionally, the parties have agreed in that- at a certain moment- in the incident there was an agent of the National Police present. This fact is possible as long as it is not strange that upon the approach on a customer, for whatever reason, an incident takes place the result of which in most cases may be unforeseeable. Likewise, the

⁸ Annex 6. Disagreement vote by Adriana Giudice and Uriel García to the Decision of INDECOPI of August 31, 2005. Annex to the writ by the petitioner of November 29, 2011.

⁹ Annex 7. Decision of the Defense of the Competition and of Intellectual Property Tribunal de 17 de mayo de 2006. Annex to the writ by the petitioner of November 29, 2011.

very participation of a police agent cannot lead this Chamber to consider that it configures the discriminatory act against the claimant, for it is impossible to know for sure how the facts unfolded.

(...) Notwithstanding the prior reasoning, this Chamber wishes to underscore that the arguments of the defendant Supermercados Peruanos in the sense that the conduct of the claimant and his couple affected the presence of children in the coffee shop lacks pertinence to the extent that, as previously noted, if the conduct had been excessive the affectation would have been produced for all other customers, either adult or children. Consequently, all allegations invoking the best interest of the child do not fit the facts subject of the complaint. Therefore, what proceeds is to confirm the appealed decision which declared unfounded the complaint versus Supermercados Peruanos for alleged acts of discrimination in the consumption, modifying it on its foundations¹⁰.

23. The Commission notes that two members of such court voted in disagreement, under the following reasonings:

(...) It is proven in the casefile that Mr. Olivera was reprimanded performing caresses with his couple and that he was disturbed while staying in the restaurant of the defendant, after having consumed. Even, the presence of a National Police official of Peru was requested, which-in our concept- in itself configures unequal and exaggerated treatment. It does not pertain an establishment to reprimand anyone the fact of exchanging caresses, provided that, these do not surpass decency and disturb the tranquility of the public.

Likewise, us signatories don't believe that upon circumstances of this nature, where there is no evidence of facts of violence that put the security of the restaurant at risk, nor of other customers; justify the presence of the National Police of Peru to request them to cease their attitudes. Finally, if the aim was a change of behavior, that request could have been formulated by the store administrator. The police presence is obviously an excess and, essentially shows already unequal, unfair, inequitable and, above all, discriminatory treatment, which even attempts against the dignifying treatment every customer deserves.

(...) Instead it does create conviction in the signatories the fact that police personnel was resorted to request the claimant to cease his homosexual conduct, which is unsustainable, because as already proven in the oral report, it is not usual that the defendant requires the presence of personal of the National Police every time a heterosexual couple professes caresses inside its store, which leads to presume, with validity, that the tactics utilized by Supermercados Peruanos obviously was intended to disturb the claimant so he would leave the store and not allow his permanence in the store during night hours (between 9 and 10 pm) on a particular day (Tuesday) in which the presence of children and attendance of public which eventually resulted uncomfortable, was relative¹¹.

C. Nullity remedy

24. According to the information available the alleged victim filed a nullity remedy against the previous decision. On June 10, 2008 the 2nd Contentious Administrative Chamber of the Higher Court of Justice of Lima declared the remedy overruled based on the following reasons:

FOURTH: That, the evidence provided by the claimant is not enough as to conform proof made by the very claimant, which means of only part of it and the video provided dated after the occurrence of the questioned facts, not being able to perform its assessment since it was edited as mentioned in the writ forwarded by Frecuencia Latina on May sixteen of two thousand and five on pages one hundred and two of the administrative casefile.

FIFTH: That, as mentioned by Article 7-B of Legislative Decree No 716, Norm on Consumer Protection (...) the burden of proof as to the existence of unequal treatment pertains the affected consumer or, given the case, whomever represents him in the proceeding or the administration when it acts ex officio. Proving the existence of an objective and justified cause concerns the supplier of the product or service. Should the supplier prove the existence of an objective and justified cause, whomever claims such fact, has the duty to prove that this is actually a pretext or a simulation to incur in discriminatory practices. For all these effects it shall be valid to use signs or other surrogates of the evidential material", in the case subject of dispute were are upon a request from store employees in order for the claimant and his couple to leave the establishment, for performing an unbecoming conduct, allowing them to remain in the place provided that they consume a product and moderate their

¹⁰ Annex 8. Decision of the Defense of the Competition and of Intellectual Property Tribunal of May 17, 2006. Annex to the writ by the petitioner of November 29, 2011.

¹¹ Annex 9. Disagreement vote by Julio Baltazar Duran and José Alberto Oscátegui in the Decision of the Defense of the Competition and of Intellectual Property Tribunal of May 17, 2006. Annex to the writ by the petitioner of November 29, 2011.

behavior, being the objective cause the tranquility of the rest of the consumers, mainly since the claimant was on the second floor where also is the children playground area, as seen on pages forty-nine and fifty of the administrative casefile under Report No 056-J.P.P., and other one issued by Mr. William Silva respectively, which informs the misbehavior of the attendees at such establishment and these being acts concerning people's intimacy, allowing couples expressions of affection as long as they are not excessive both for homosexual or heterosexual couples, the requirement of the cease de such actions committed by the claimant is valid, added to the fact that after being asked to keep a proper conduct the claimant and his couple continued in the establishment in question without being expelled from such place.

(...) as verified from the evidence provided there is no certainty in the judge nor is his claim allowable, therefore the decision intended to declare null, does not seem product of an arbitrary act by the defendant entity, since it has abided by the norms in force on the matter, which is why this body considers that the defendant party has acted in conformity with the Law, therefore the present remedy is not allowable¹².

D. Appeal

25. The Commission underscores that the alleged victim filed an appeal against the previous decision. On June 14, 2010 the Permanent Civil Chamber of the Supreme Court of Justice declared the filed remedy inadmissible due to the following reasoning:

(...) in order to impose a sanction on the supplier, it must be corroborated that the establishment incurred in an infringing conduct, in this case discriminatory on account of sex, based on subjective elements; since otherwise what should prevail is the right constitutional of presumption of innocence of the establishment; in this sense it must be considered that the burden of proof of the existence of unequal treatment befalls upon the affected consumer, and to corroborate the existence of an objective and justified cause concerns the supplier of the good or service.

NINTH.- That, it is acknowledged from writs that while the claimant affirmed that the expressions of affection with his couple occurred at the coffee shop of the Santa Isabel Supermarket of San Miguel, consisted of physical proximity and romantic looks, with absence of kisses, embraces and caresses; the staff of the accused supermarket, on its reports of pages forty-seven through fifty-one of the accompanied, have pointed out that the claimant and his couple were kissing, embracing and caressing, which is why the intervention took place -at a customer's request- in order to request them to modify their conduct upon such acts of intimacy which they considered excessive to be done in public, after which, it has been credited that the claimant remained with his couple in the establishment, which corroborates that they were not deprived from continuing to use the facilities of the commercial establishment.

TENTH.- That, from what has been exposed we can conclude that it is not credited that the claimant was victim of a discriminatory treatment based on his sexual option, therefore, it is unfit to demand Supermercados Peruanos S.A to prove the existence of an objective and justified cause for the discriminatory attitude or treatment attributed to them, moreover if the evidence provided by the claimant and defendant, being parties, do not offer certainty of the occurred facts, which is why, the administrative authority imposed no sanction (...) That being said, we can see that the challenged administrative resolution has not incurred in causes for nullity foreseen in article 10 of Law No 27444, therefore the first instance sentence has been rendered in conformity with the law and respecting the rights of the parties¹³.

E. Cassation remedy

26. Finally, it is stated that the alleged victim filed a cassation remedy against the abovementioned decision. On April 11, 2011 the Permanent Constitutional and Social Law Chamber of the Supreme Court of Justice declared the remedy inadmissible, for considering that:

FOURTH: That, concerning the reported grievance, it is seen that the foundation of this remedy, points toward establishing the existence of a discriminatory treatment for his sexual option, upon the request of one of the customers of the commercial establishment for the to cease their acts of intimacy considered excessive, which cannot be heard but from a new assessment of the evidence provided, aspect which becomes incompatible with

¹² Annex 10. Decision by the Higher Court of Justice of Lima on June 10, 2008. Annex to the writ by the petitioner of November 29, 2011.

¹³ Annex 11. Decision of the Permanent Civil Chamber of the Supreme Court of Justice of the Republic of June 14, 2010. Annex to the writ by the petitioner of November 29, 2011.

purposes of the cassation remedy foreseen in article 384 of the Procedural Civil Code modified by Law No 29364. For the reasons exposed, by not satisfying the demand on merits referred to in article 388 of the Procedural Civil Code modified by Law No 29364, in exercise of the faculty granted by article 392 of the aforesaid Code, declared: the cassation remedy INADMISSIBLE (...) ¹⁴.

IV. ANALYSIS OF LAW

A. Previous matter

27. The Commission takes note of the request by the State to reconsider the report on admissibility, “upon the absence of explanations concerning the exhaustion of domestic remedies in particular on the alleged affectations to the rights of protection of honor and dignity and freedom of thought and expression”.

28. On the matter, the IACHR insists on its decision of admissibility and recalls that the alleged victim used the administrative and judicial channels to address his complaint regarding violations to rights of the consumer of unequal treatment resulted from the expression of his sexual orientation concluding with the denial of the cassation remedy by the Permanent Constitutional and Social Law Chamber of the Supreme Court of Justice on April 11, 2011. Likewise, the Commission recalls that “it is not a practice of Inter American system bodies, for not attending parameters of reasonability, to demand exhaustion of domestic remedies separately and autonomously before each one of the effects resulted from a principal violation” ¹⁵. In the case of *Duque vs. Colombia*, the Inter American Court referred to this aspect stating that:

54. The Court confirms that the violation of the right to health claimed in the action for protection by Mr. Duque, was closely connected to the claim of access to a specific regime of Protection of the right to health, contributive regime to which, initially, the alleged victim allegedly could only access with the recognition of his beneficiary condition of the pension of survivor. From this perspective, it is reasonable to infer that domestic remedies were exhausted with the filing of the action for protection, beside what the State has claimed, in the sense that Mr. Duque had specific judicial remedies available that were not exhausted concerning concrete violations of the right to health ¹⁶.

29. In virtue of the aforesaid, the Commission reiterates that in the present case the due exhaustion of domestic remedies regarding the formulated complaint by the alleged victim did operate, which makes the request by State inadmissible and what proceeds is to ratify the decision of admissibility granted by the IACHR.

¹⁴ Annex 12. Decision of the Constitutional Law and Social Permanent Chamber of de the Supreme Court of Justice of the Republic of April 11, 2011. Annex to the writ by the petitioner of November 29, 2011.

¹⁵ IHR Court. Case of *Duque vs. Colombia*. Preliminary Exceptions, Merits, Reparations and Costs. Sentence of February 26, 2016, Serie C no. 310, parr.47.

¹⁶ IHR Court. Case of *Duque vs. Colombia*. Preliminary Exceptions, Merits, Reparations and Costs. Sentence of February 26, 2016, Serie C no. 310, parr.54.

B. Fair trial and judicial protection in relation to right to equality before the law and right to privacy (articles 8¹⁷, 11¹⁸ 24¹⁹ and 25²⁰ of the American Convention, in relation to article 1.1 of the same instrument)

1. General standards on equality and nondiscrimination and privacy

30. The Inter American Court has held that the notion of equality stems directly from the nature of unity of mankind and it is inseparable of essential dignity of the person, in front of which it is incompatible any situation that, for considering a determined group superior, leads to treating it with privilege; or that, on the contrary, for considering it inferior, treats it with hostility or in any way discriminates of the benefit of rights recognized for those not considered to be in such situation. The jurisprudence of the Court has pointed out that, at the current stage of evolution of international law, the fundamental principle of equality and nondiscrimination has entered the area of *ius cogens*. Upon it relies the legal framework of national and international public order and permeates the whole legal regime²¹.

31. The Inter American system not only takes a formal notion of equality formal, limited to demand objective and reasonable criteria of distinction and, therefore, forbid unreasonable unequal, capricious or arbitrary, treatment, but moves forward to a concept of material or structural equality which starts from recognizing that certain sectors of the population require the adoption of affirmative measures of equalization. This implies the need of differentiated treatment when, due to circumstances that affect a disadvantaged group, the equality of treatment supposes suspending or limiting the access to a service, good or the exercise of a right²².

32. In regard to sexual orientation, as of the case of *Atala Riffo and girls versus Chile* and in subsequent cases, the Inter American Court clarified what is meant by the phrase “any other social condition” of article 1.1 of the Convention²³. According to the Court:

The Inter American Court has established that the sexual orientation and gender identity of persons are categories protected by the Convention. Therefore, it is outlawed by the Convention any discriminatory norm, act or practice based on the sexual orientation of the person. Consequently, no norm, decision or practice of domestic law, either by state authorities or by privates, may diminish or restrict, in any way, the rights of a person upon their sexual orientation²⁴.

In this sense, the Inter American instrument forbids discrimination, in general, including in it, categories such as sexual orientation which may not serve as grounds to deny or restrict any of the rights set forth in the Convention. The aforesaid would be opposite to the set forth in article 1.1 of the American Convention²⁵.

¹⁷ Article 8.1. 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

¹⁸ Article 11. 1. Every person has the right to his honor respected and his dignity recognized. 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home or his correspondence, or of unlawful attacks on his honor or reputation. 3. Everyone has the right to the protection of the law against such interference or attacks.

¹⁹ Article 24. All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

²⁰ Article 25.1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

²¹ IHR Court. *Case of Flor Freire Vs. Ecuador*. Preliminary Exception, Merits, Reparations and Costs. Sentence of August 31, 2016. Serie C No. 315. Para 109.

²² IACHR. Report on Poverty and Human Rights in the Americas, September 7, 2017, para 160

²³ IHR Court. *Case of Atala Riffo and girls vs. Chile*. Merits, Reparations and Costs. Sentence of February 24, 2012. Serie C No. 239, para 91 and 93.

²⁴ IHR Court. *Case of Duque vs. Colombia*. Preliminary Exceptions, Merits, Reparations and Costs. Sentence of February 26, 2016. Serie C No. 310, para 104.

²⁵ IHR Court. *Case of Duque vs. Colombia*. Preliminary Exceptions, Merits, Reparations and Costs. Sentence of February 26, 2016. Serie C No. 310, para 105.

33. Likewise, the Court has pointed out that the scope of the right to nondiscrimination on sexual orientation is not limited to sexual orientation, but also includes its expression and the consequences necessary in the life project of persons. The Protection against discrimination based on sexual orientation does not relate only with a less favorable treatment for being lesbian, bisexual or gay, but also covers discrimination because a person acts according to his or her sexual orientation, by choosing to participate in consented sexual activities in private or initiating a long run couple relationship with a person of the same gender²⁶.

34. The IACHR has recognized that the principle of equality and nondiscrimination along with accountability and effective access to reparation are part of the fundamental and transversal criteria that States must ensure in their responses to address and orient the treatment of the field of companies and human rights. On the first, claims that States must incorporate an intersectional and differential scope, including the perspective of gender, which considers the possible worsening and frequency of affectations to human rights concerning corporate activities and operations originated in discrimination on the base of protected categories such as sexual orientation or gender identity, among others. In regard to the second point, it underscores that the mechanisms, policies or legal frameworks implemented in the field of companies and human rights must aim to fight impunity through accountability from State authorities and companies, including the effective access to justice and proper reparation for the victims²⁷.

35. The Inter American Commission has also stressed that the States must protect the right of all persons to express their sexual orientation and gender identity, and set strategies to allow the integral development of their personality and personal capabilities pursuant to offering tools to confront the stigma, stereotypes and discrimination they often face at the time of expressing their personality and identity²⁸. In particular, exhorted the States to double their efforts to make sure companies comply with their responsibility to respect human rights of LGBTI persons. It has also recognized that companies play a major role in the change of stereotyped conceptions regarding LGBTI persons and may, by means of inclusion, foster principles of acceptance and nondiscrimination and generate a change in social perceptions against sexual diversity²⁹. In that context, the IACHR pointed out that States have the obligation to take measures, including domestic law dispositions, for the protection of human rights within corporate activities, which includes both substantial and procedural guarantees aiming to ensure respect of human rights at stake concerning corporate behavior involved³⁰. This way, it has recommended the States to demand companies to carry out the due diligence on human rights matters within its operations³¹. On this matter the United Nations has also indicated that States must use all instruments available in order to foster due diligence on human rights matters as part of habitual corporate policies³².

36. As for the right to intimacy and autonomy, the Court has pointed out that article 11 of the Convention forbids all arbitrary or abusive interference on the private life of persons and mentions several areas of it. In that sense, the Court has held that the area of privacy stands out for being exempt and immune to invasions or abusive or arbitrary aggressions by third parties or by public authority³³. The Court has likewise claimed that “private life is a broad concept not susceptible of exhaustive definitions and encompasses, among other protected areas, sexual life and the right to establish and develop relations with other human beings. In other

²⁶ IHR Court. *Case of Atala Riffo and girls vs. Chile*. Merits, Reparations and Costs. Sentence of February 24, 2012. Serie C No. 239, para 133 and 134.

²⁷ IACHR. Business and Human Rights: Inter American Standards. OEA/Ser.L/V/II IACHR/REDESCA/INF.1/19 November 1, 2019, para 44 and 51.

²⁸ IACHR. Recognition of rights of LGBTI persons. OAS/Ser.L/V/II.170 Doc. 184, December 7, 2018, para 81

²⁹ IACHR. Business and Human Rights: Inter American Standards. OEA/Ser.L/V/II IACHR/REDESCA/INF.1/19 November 1, 2019, para 385 and 386

³⁰ IACHR. Business and Human Rights: Inter American Standards. OEA/Ser.L/V/II IACHR/REDESCA/INF.1/19 November 1, 2019, para 80 – 146.

³¹ IACHR. Business and Human Rights: Inter American Standards. OEA/Ser.L/V/II IACHR/REDESCA/INF.1/19 November 1, 2019, para 414.3,

³² Work group on the matter of Human Rights and transnational companies and other companies. UN Doc. A/73/163, July 16, 2018, para 93.

³³ IHR Court. *Case of Atala Riffo and girls vs. Chile*. Merits, Reparations and Costs. Sentence of February 24, 2012. Serie C No. 239, para 161.

words, private life includes the form in which the individual sees himself or herself and how and when decides to project it to others"³⁴.

37. Based on the foregoing, the Inter American Court has noted that the sexual orientation forms part of the private life of persons. Therefore, it is a sphere where no arbitrary interference can exist³⁵. In the case of *Atala Riffo and niñas versus Chile*, the Court ruled that, as domestic tribunal "had the sexual orientation as reference" of Mrs. Atala, they exposed several aspects of her private life³⁶.

38. On the other hand, national and international courts have also referred to the prohibition of discrimination on sexual orientation in the access to public or private services. In the case of *Beizaras and Levickas versus Lithuania*, the European Court on Human Rights ruled on a situation in which two people were subject to comments and threats after publishing a photograph of them kissing, on the Facebook platform, which were not investigated. The court stressed that:

(...) 121. Therefore, the Court recalls that the Klaipėda District Court considered that the image of two men kissing did not contribute to social cohesion nor to the fostering of tolerance (see paragraph 21 above). This opinion was fully supported by the Regional Court of Klaipėda, which also considered that it would have been preferable that the claimants had only shared such images among "people with alike mentality", since Facebook allowed that possibility (see paragraph 23 above). Given these references expressed to sexual orientation of the claimants, it is clear that one of the reasons to refuse to open an inquiry was the disapproval from tribunals for the claimants showing their sexual orientation (compare and contrast *Bączkowski and others*, cited above, §§ 95 and 97).

29. Considering all the material available, the Court finds so established, first, that comments of hatred, including undisguised calls to violence from private individuals toward the claimants and the homosexual community in general, were instigated by an intolerant attitude toward that community and, secondly, that the very discriminatory mood was at the core of the noncompliance by pertinent public authorities to fulfill their positive obligation to investigate effectively whether those comments on the sexual orientation of the claimants conformed an encouragement to hatred and violence, which confirms that by reducing the danger of those comments, authorities at least tolerate such comments (see, *mutatis mutandis*, *Begheluri*, cited above, § 179). In light of these facts, the Court also considers given that the claimants suffered discrimination due to their sexual orientation. It also considers that the government provided no justification which proves that the reported distinction was compatible with the Convention's standards³⁷.

39. On the other hand, as an example, the Commission observes that the Colombian Constitutional Court determined in 2011 that a mall violated the prohibition to discriminate by requesting a couple of gay men who were kissing there to cease their conduct or to leave considering that in such several families with children were circulating. In this regard it reasoned that:

66. Finally and product of the condition of subject of special protection, as a usually discriminated group, when juridical norms are introduced or behaviors which suppose for them affectation or reduction of their rights, a *prima facie* presumption of discrimination operates, based on suspicious criteria its unequal treatment raises. In other words, to preserve the validity and force of such regulatory norms of the behavior or the execution of a faculty or competence or an attribution, it is necessary to undermine this discriminatory fact it is a part of.

105. As previously said, Mr. Jimmy Moreno and Mr. Robbie Pérez with their acts did not endanger the rights of others, they broke no rule of juridical order, they merely and in good faith, exerted their liberties. But also, what

³⁴ IHR Court. *Case of Atala Riffo and girls vs. Chile*. Merits, Reparations and Costs. Sentence of February 24, 2012. Serie C No. 239, para 162.

³⁵ IHR Court. *Case of Atala Riffo and girls vs. Chile*. Merits, Reparations and Costs. Sentence of February 24, 2012. Serie C No. 239, para 165.

³⁶ IHR Court. *Case of Atala Riffo and girls vs. Chile*. Merits, Reparations and Costs. Sentence of February 24, 2012. Serie C No. 239, para 166.

³⁷ European Court on Human Rights, *Case of Beizaras and Levickas vs. Lithuania*. Decision of February 14, 2020.

these young men did was to freely express their sexual orientation, as life option which in its components of sheer liberty, to kiss each other, is to be protected and respected by the State and private individuals. (...) This means that the treatment given by the security guard, aimed to annul, or dominate the homosexual young men, appealing to social and prejudice that their couple kisses in public, because they came from homosexual couples, are reprimandable for being more outrageous for public tranquility, security and morals, than kisses by heterosexual couples.

107. The two juridical persons linked as passive subjects of the action emphatically denied the intention to discriminate for reasons of the homosexuality of the couple that was kissing. However, there are several elements of proof such as physical evidence, arguments of part or subrules of the right to equality without discrimination, show the opposite to such affirmations. Since in both cases, the one of the shopping center and the one of the surveillance company, the aim to apply in general the norm that forbids any couple to exchange romantic kisses as a way to protect the rights of children, families and majoritarian groups who attend the shopping center, was before all an indirect discrimination which would only affect homosexual couples, as it occurred in the case of Jimmy Moreno and Robbie Pérez.

108. On one hand, is what can be appraised on the video records (pages 32-44, CD attached f. 44, original booklet), on what happens with other heterosexual couples in the mall. These, as can be clearly seen, are hugging and kissing in open spaces of the shopping center, in clear daylight, without being approached by its security staff so they won't "exceed" in their behavior. Such evidence shows, by contrast, that in the case of Mr. Jimmy and Mr. Robbie there was an unequal treatment and that the inequality did not respond to the expressions of affection, but because who were performing them were two men³⁸.

40. Likewise, in 2019 the same court declared because of an action for protection filed by a woman against a liquor store, who claims that the administrator of such establishment complained to her for holding hands and kissing her couple of the same sex in such venue. On this matter, the court emphasized:

47. The expressions of affection that the claimant and her couple manifested with a kiss and when they held hands, do not conform facts legally sanctioned by authorities, since not even the defendants qualified them as such, since they did not imply acts of a high intimate, sexual or obscene content, forbidden by the Legislator, which would have enabled the administrator of the place, to demand compliance of basic norms of behavior, by means of proportionate measures as a reprimand would be.

In this sense, kisses and other manifestations of affection such as holding hands, facial caresses and tender words, between couples who love each other, either heterosexual or of a diverse sexual orientation, or those given between parents and children, are the most genuine expression of the human nature, of the exteriorization of feelings which arise upon a specific life choice, supported by the exercise of their individual liberty, their dignity, their free development of personality and el right to not being disturbed in their most intimate spheres of existence, which allows the to perform them in public and not in a hidden or concealed manner.

There is no concrete legal restriction for the exercise of these individual liberties, which is why the administrator, in the subject matter, could not impose any kind of limitation, restriction or interference to the visitors of the establishment which provides services to the public in general, related to the exercise of their fundamental rights, either for heterosexual couples or of a diverse sexual orientation, since such manifestation did not imply disregarding any norm of Police, did not alter public order, nor did it affect juridical assets guarded by the administrator of the store.

52. The Chamber regards that in this case there is proof of the discrimination suffered by the claimant because of her diverse sexual orientation, since the action by the of the administrator was motivated by such condition, criterion that this Corporation has considered as suspicious, which also lacks all justification because through it the aim was not to reach a goal constitutionally urgent and, on the contrary, the reproach to the manifestations of affection of the diverse couple constituted a breach to fundamental rights of human dignity, to the free

³⁸ Constitutional Court of Colombia, Sentence T-909/11 of December 11, 2011.

development of the personality and intimacy, invoked by the party, produced an unequal treatment, since the analysis of the evidential material in the casefile, allows to conclude that the clerk did not perform the same reproach on other heterosexual couples and finally, configured a detriment, in the exercise of superior guarantees set forth in the action for protection, particularly, because they were censored because of their mutual expressions of affection, the above, generated their departure from the place, and also, the defendant conditioned their entry to both of them "(...) knowing how to behave"³⁹.

2. Standards related to the right to judicial protection

41. The Commission has held that according to dispositions set forth in articles 8 and 25 of the American Convention the States are obliged to provide effective judicial remedies to victims of human rights violations, which must be substantiated according to its rules⁴⁰. In the case of *Simone André Diniz versus Brasil*, the IACHR decided on the State's obligations upon a claim for racial discrimination to access a work position. In such matter the Commission highlighted the following:

All victim of human rights violations must be guaranteed a diligent, and impartial investigation and, existing signs of a crime constitution, the initiation of the pertinent action so that a competent judge, within a fair trial, determine whether there has been a crime or not, as it happens with every crime brought to public authority examination.

Should this not happen with the complaints for racial discrimination formulated by African descent persons in Brazil, the State flagrantly violates the principle of equality enshrined in the American Declaration and Convention, toward which it obliged itself to respect, and that determine that all persons are equal before the law and have a right, without discrimination, to equal protection of the law.

The Commission understands that excluding a person of the access to the employment market due to his race constitutes an act of racial discrimination⁴¹.

42. The Commission underscores that according to the obligation to guarantee human rights, both bodies of the Inter American system have stated that in determined circumstances the international responsibility of the State may also generate from acts of privates initially not directly assignable to the State; this due the lack of due diligence from the State to prevent, investigate and punish all violation of the rights recognized by the Convention or the absence of actions to restore, if possible, such right. Likewise, regarding this obligation, the IHR Court pointed out that it implies the duty of States Party to organize their whole governmental apparatus and, in general, all structures through which the exercise of public power is manifested, in such a way that they are able to juridically ensure the free and full exercise of human rights⁴². In order to determine the international responsibility of the State, it is crucial to clarify whether a determined violation of human rights recognized by the Convention has taken place with the support or tolerance of the public power or whether it has acted in a way in which the transgression has consummated in spite of all prevention or unpunished⁴³.

43. In regard to acts by companies that may imply abuses on human rights, the IACHR has stressed that States must take proper measures to guarantee that persons and communities affected by abuses and violation of their human rights produced under the jurisdiction of the State may access to effective mechanisms of reparation, which includes accountability by companies and the determination of their penal, criminal, civil or administrative responsibility. In that aim, the State mechanisms must be the base of a broad system of reparation in which the population must be informed on how to access them⁴⁴.

³⁹ Constitutional Court. Sentence T-335/19 of July 26, 2019.

⁴⁰ IACHR. Access to justice as guarantee of economic, social and cultural rights. September 7, 2007, para 177.

⁴¹ IACHR. Report No. 66/06. Case 12.001. Merits. Simone André Diniz. Brazil. October 21, 2006, para 97-99.

⁴² IHR Court. Case of Velásquez Rodríguez Vs. Honduras. Merits. Sentence of July 29, 1988. Serie C No. 4. Para 166.

⁴³ IHR Court. Case of Velásquez Rodríguez Vs. Honduras. Merits. Sentence of July 29, 1988. Serie C No. 4. Para 173.

⁴⁴ IACHR. Business and Human Rights: Inter American Standards. Report prepared by REDESCA. OEA/Ser.L/V/II IACHR/REDESCA/INF.1/19 November 1, 2019, para 121

44. The effectiveness of a remedy must be understood in relation to its possibility to determine the existence of fundamental rights violations, to repair the damage caused and to allow the punishment of those responsible⁴⁵. Along the same line of ideas, concerning the affectations on human rights within corporate activities, the DESC Committee has said that: “The States Party must provide proper means of reparation to affected groups or persons and ensure companies’ accountability”⁴⁶. A remedy is not effective, for instance, when practice has proven it useless, because lack of means to enforce its decisions or for any other situation which configures a situation of denegation of justice⁴⁷.

3. Analysis of the present case

45. In the present case it must be determined first whether the alleged victim was subject of interference of his private life, as well as unequal treatment based on his sexual orientation upon the facts occurred on August 11, 2004 and whether they had reasonable grounds. In a second moment the Commission shall analyze whether the State guaranteed the right to effective judicial protection before allegations of discrimination formulated domestically by the alleged victim. The IACHR notes that, since the facts refer to actuations of a private entity, determining the responsibility of the State shall be essential to assess the effectiveness of its response upon remedies filed by the alleged victim. In this sense, the Commission recalls that in virtue of international human rights law, it is the States who initially and directly assume the obligations set forth therein and such obligations may project effects on the behavior of such parties such as companies. This relation becomes evident when States formulate, supervise and assign explicit juridical and binding responsibilities aimed toward respect of human rights by companies at an inner level and are based on international human rights norms⁴⁸. In this sense, the Commission recognizes that in the present case ruling the responsibility of entities or private companies involved exceeds its scope of competence, being only necessary to examine the response by the State upon the alleged affectations to their rights, particularly, whether the alleged victim suffered an affectation of his rights which would require effective judicial protection.

3.1. Analysis of the unequal treatment imposed on the alleged victim by Santa Isabel Supermarket

46. Concerning the first aspect, the Commission notes that there is no controversy regarding the fact that on August 11, 2004 the alleged victim and his couple of the same sex were reprimanded by personnel of the Dulces and Chamberdos coffee shop of the Santa Isabel Supermarket of San Miguel, for publicly performing conducts of affection. Although there is controversy as to the nature of the conducts, since the alleged victim argues that his expressions limited to “physical proximity and romantic looks”, representatives of the supermarket argued that it included caresses, hugs and kisses, which would result in an affectionate manifestation of the alleged victim and his couple. The Commission observes that, according to evidence provided by the supermarket throughout the proceeding, the supervisor of the venue, the chief of maintenance, security guards and police interceded to make the alleged victim and his couple cease such conducts. The IACHR deems this as proof that the alleged victim was subject to an interference on his private life.

47. On the other hand, the IACHR remarks that, according to the report of the Chief of Prevention of Losses of the Shopping Center, the alleged victim was asked to cease his affectionate conducts considering that a customer had complained that two masculine people “were committing acts of homosexuality” since they were kissing and caressing, which disturbed him for being accompanied by his underage children. Likewise, the Supermarket pointed out in its reply to the complaint that the claimant had caused incidents in other

⁴⁵ IACHR. Access to justice as guarantee of economic, social and cultural rights. Study of the standards set forth by the Inter American Human Rights System. OEA/Ser.L/V/II.129. Doc. 4. September 7, 2007. para 248.

⁴⁶ Committee on Economic, Social and Cultural rights. General Observation No. 24. UN Doc. E/C.12/GC/24, August 10, para 39. Likewise recalls that the third pillar of the Ruling Principles on Business and Human Rights refers to the access to resources and effective reparations. See Report of the Special Representative of the Secretary General for Human Rights matters and transnational companies and other companies, UN Doc. A/HRC/17/31, March 21, 2011, principle 25.

⁴⁷ IHR Court. Case of Las Palmeras v. Colombia. Reparations and Costs. Sentence of November 26, 2002. Serie C No. 96, para 58.

⁴⁸ IACHR. Business and Human Rights: Inter American Standards. OEA/Ser.L/V/II IACHR/REDESCA/INF.1/19 November 1, 2019, para 181, 193, 194 and 196.

stores and that the categorization of each conduct corresponds to the place and moment in which it is performed and to morals and good manners imposed by the community. Finally, the Commission notes that on August 17, 2004 the alleged victim attended another commercial center of the same company, along with a heterosexual couple and again performed affectionate conducts, however, only the alleged victim and his couple were called upon for performing such conducts. The IACHR considers that this proves that the alleged victim was subject to a distinction of treatment based on expressions of his sexual orientation.

48. Taking the aforesaid into account, the Commission shall analyze next whether the interference in private life and distinction of treatment was carried out conventionally acceptable. In such aim, both the Commission and the Court have resorted to a gradual proportionality assessment which includes the following elements: i) the existence of a legitimate goal; ii) suitability, which means, determining whether there is a logic relation of causality form mean to goal between the distinction and the desired goal; (iii) the need, which is, determining whether there are less restrictive alternatives yet equally suitable; and (iv) proportionality in its strict sense, meaning, the balance of interests at stake and the degree of sacrifice of one in regard to the other⁴⁹.

49. The Commission shall implement such test under rigorous scrutiny, as it fits for cases where distinctions of treatment are claimed based on sexual orientation. On this matter, the Commission recalls that as stated by the Inter American Court, when it comes to prohibition of discrimination for sexual orientation, the eventual restriction of a right demands rigorous fundament and fairly powerful, which implies that the reasons used to carry out a differentiation of treatment must be particularly serious and be supported on exhaustive argumentation. Also, the burden of proof is reverted, which means it is the authority's duty to prove that its decision had no discriminatory purpose nor effect⁵⁰.

50. Along the same lines, as for the legitimate goal for the interference or unequal treatment, as raised in the casefile, Supermercados Peruanos argued that the warning on the alleged victim was justified to ensure "the tranquility of its customers" since one of them "felt disturbed and uncomfortable by the conduct of the claimant ante the presence of his children". The IACHR deems that guaranteeing "the tranquility of its customers" is not an imperative goal as it should correspond on a case of this nature in which it is indispensable to justify the limitation of a right with truly powerful reasons.

51. On the other hand, the Commission stresses that, in other similar cases after examining the suitability requirement, the Inter American Court has rejected generic allegations referred to the goal of guaranteeing the best interest of the child without proving why an unequal treatment based on sexual orientation contributes to such purpose. Specifically, in the case of *Atala Riffo vs Chile*, the Inter American Court underscored that:

In conclusion, the Inter American Court observes that being, in abstract form, "the best interest of the child" a legitimate purpose, the sole reference to it without concretely proving the risks or damages that the sexual orientation of the mother could cause the girls, a suitable measure cannot be the restriction of a protected right such as being able to exercise all human rights with no discrimination whatsoever due to the sexual orientation of the person. The best interest of the child cannot be used to defend discrimination against the mother or the father for the sexual orientation of either one of them. This way, the judge shall not take this social condition into consideration as element to decide on a tuition or custody.

(...) The Court considers that considerations based on stereotypes for sexual orientation are not admissible, which means, pre-conceptions of attributes, conducts or characteristics of homosexual persons or the impact these allegedly may have on girls and boys⁵¹.

⁴⁹ IHR Court. *Case of Artavia Murillo and others ("In vitro Fertilization") vs. Costa Rica*. Preliminary Exceptions, Merits, Reparations and Costs. Sentence November 28, 2012. Serie C No. 257, para 273; IHR Court. *Case of Atala Riffo and girls vs. Chile*. Merits, Reparations and Costs. Sentence of February 24, 2012. Serie C No. 239, para 146.

⁵⁰ IHR Court. *Case of Atala Riffo and girls vs. Chile*. Merits, Reparations and Costs. Sentence of February 24, 2012. Serie C no. 239, para124; IHR Court. *Caso Gonzales Lluy and others vs. Ecuador*. Preliminary Exceptions, Merits, Reparations and Costs. Sentence of September 1, 2015. Serie C no. 298, para257.

⁵¹ IHR Court. *Case of Atala Riffo and girls vs. Chile*. Merits, Reparations and Costs. Sentence of February 24, 2012. Serie C no. 239, para111.

52. Taking the above into consideration, the Commission deems that the invoked goal to ensure the tranquility of a customer who was with the presence of his children, who felt disturbed by the affectionate conduct of the alleged victim and his couple, it is not legitimate according to standards invoked previously. The Commission reiterates that the best interest of the child cannot be generically invoked without raising extremely weighty reasons, to limit expressions of affection found within basic norms of behavior and do not affect any juridically protected asset.

53. In light of the foregoing, the Commission considers that the warning on the alleged victim as a result of his expressions of affection, with no legitimate and justified base, conducted to an affectation to the rights to privacy, as for the principle of equality and nondiscrimination of the alleged victim, being necessary that the State have an appropriate response to punish the facts described above.

3.2. Analysis of the response from the State to remedies filed

54. The Commission recalls that the alleged victim filed a complaint for discrimination before INDECOPI on October 1, 2004 and received a final unfavorable decision by means of the cassation remedy, which was rejected on April 11, 2011.

55. As stemmed from the casefile, the main reason for authorities to reject the domestic remedies was the lack of evidential material to corroborate the alleged unequal treatment. On this point, in the decision on the appeal of September 22, 2005 the Tribunal of Defense of Competition and Intellectual Property noted that the facts subject to controversy are grounded only by allegations from both parties, however, the one subject on scrutiny is the conduct by Supermercados Peruanos, which cannot be punished only from allegations by a party. In return, on the decision of appeal of June 14, 2010 the Permanent Civil Chamber of the Supreme Court of Justice declared that “the burden of proof on the existence of unequal treatment befalls upon the affected consumer and to prove the existence of an objective and justified cause, on the supplier of the product or service”.

56. The IACHR regards that the domestic administrative and judicial bodies imposed an excessive argumentative and evidential load on the alleged victim, despite the aforesaid standards and that the very defendant entity recognized that its actions were motivated by the affectionate acts result of the own sexual orientation of the victim, admitting unequal treatment. On this matter, the Commission points out that in the casefile the following means of proof operated which corroborated at least one interference and unequal treatment for the alleged victim on August 11, 2011:

- The complaint filed by the alleged victim in which he indicated he was scolded on August 11, 2004 by personnel of Santa Isabel Supermarket in San Miguel, after expressions of affection with his couple.
- The video of a report provided by the alleged victim on another alleged discriminatory act against him occurred on August 17, 2004 in another supermarket of the same company.
- The reply to the complaint by Supermercados Peruanos in which it recognizes that personnel requested the alleged victim and his couple to cease their behavior due to the complaint of a customer, who “was concerned for his underage children”.
- The statement from Gabriela Madrid Paredes provided by Supermercados Peruanos in which she pointed out that the day of the facts she approached the alleged victim and her couple and requested them to “cease their love scenes for respect to other customers, since one of them was complaining because there were children circulating toward the playground area”.
- The report from the Chief of Prevention of Losses who confirmed having received the complaint from customers for two masculine persons who “were committing acts of homosexuality”, which required Gabriela Madrid to go ahead and explain to them to avoid performing acts which made some customers uncomfortable.
- The narration by both parties according to which in some moment the National Police intervened in the incident that took place in August 11, 2004.

57. The Commission considers that these evidential elements and signs were enough to prove *prima facie* the existence of an interference o unequal treatment, which is why what proceeded was to transfer the burden of argumentation to the defendant to prove that its interference on August 11, 2011 had no discriminatory

purpose nor effect. The IACHR notes domestic bodies imposed on the alleged victim the burden to prove the unequal treatment, and so, as it were discriminatory with an inadequate evidential standard for this kind of cases, based on its interpretation of article 7 B) of the Consumer Protection Law in force at the time of the facts⁵².

58. The Inter American Court pointed out in a case in which it was compulsory to unequivocally establish a discriminatory treatment that “in this kind of it is practically impossible for the claimant to prove “unequivocally” a discriminatory treatment⁵³. In this sense, the Commission observes, for example, that Directive 2006/54/CE of the European Parliament and of the Council establishes that:

The adoption of norms on the burden of proof has a great importance to guarantee the effective respect of the principle of equal treatment. Therefore, as held by the Court of Justice, dispositions are to be adopted to make sure that the burden of proof befalls upon the defendant party when at first sight there has been a case of discrimination, except concerning proceedings in which case the competent Tribunal or national body shall instruct the facts. However, it is necessary to specify that the appraisal of the facts from which the presumption of having committed direct or indirect discrimination still concerns the competent national body, in accordance with national law or national practices. Furthermore, the member States are enabled to introduce, in all phases of proceedings, an evidential regime which becomes more favorable for the plaintiff party⁵⁴.

59. Likewise, the European Court on Human Rights has stated “that once a claimant has shown a difference in treatment, it is the Government’s duty to prove that it was justified. As for the matter of what constitutes prima facie evidence able to pass the burden of proof to the defendant State, the Court declared in *Nachova and others c. Bulgaria* that in the proceeding before it there are no procedural barriers on the admissibility of the evidence nor on the predetermined formula for their valuation. In regard to whether statistics can conform proof, the Court, on cases related to discrimination in which the claimants argued a difference in the effect of a general measure or a factual situation, was based on statistics elaborated by the parties to establish an unequal treatment”⁵⁵.

60. The Commission considers that the high evidential standard imposed by domestic jurisdictional bodies, upon the presence of all proof and abovementioned signs made nugatory the right to effective judicial protection which the alleged victim had. Likewise, it deems that the lack of an analysis of reasonability and proportionality of the interference and distinction of treatment suffered by the alleged victim, conformed the violation to the right to privacy and the principle of equality and nondiscrimination.

3.3. Analysis of reasonable time

61. Finally, it is necessary to assess the allegation by the petitioner related to the extended delay of the proceeding. In this regard, the Commission recalls that article 8.1 of the American Convention sets forth as one of the elements of the due process that courts must decide on cases heard within a reasonable time. In this sense, an extended delay may conform, in itself, a fair trial violation⁵⁶. In order to determine the reasonability of the time, the jurisprudence of the Inter American system takes into account the following four elements: i) the complexity of the matter; ii) the procedural activity of the interested party; iii) the

⁵² Such article established that suppliers could not establish any discrimination whatsoever regarding requesters of products and services offered by the first in places open for public. It is forbidden to make a selection of customers, excluding persons or carrying out other similar practices, for reasons other than security of the venue or tranquility of its customers or other objective and justified reasons. The burden of proof on the existence of unequal treatment befalls on the affected consumer or, given the case, whomever represents him in the proceeding or the administration when it acts ex officio. Proving the existence of an objective and justified cause pertains the supplier of the good or service. Should the supplier prove the existence of an objective and justified cause, it is responsibility of whomever claims such fact, to prove that this is really a pretext or simulation to incur in discriminatory practices. For all these effects, it shall be valid to use leads and other substitutes of evidential means. See writ by the petitioner of November 29, 2011.

⁵³ IHR Court. Case of San Miguel Sosa and others vs. Venezuela. Merits, Reparations and Costs. Sentence of February 8, 2018. Serie C no. 348, para 192.

⁵⁴ Directive 2006/54/CE of the European Parliament and the Council July 5, 2006 concerning the application of the principle of equal opportunities and equal treatment between men and women on matters of employment and occupation.

⁵⁵ European Court on Human Rights, Case of Beizaras and Levickas vs. Lithuania. Decision of January 14, 2020.

⁵⁶ IHR Court. *Case of García Asto and Ramírez Rojas Vs. Peru*. Sentence of November 25, 2005. Serie C No. 137, para 166; *Case of Gómez Palomino Vs. Perú. Merits, Reparations and Costs. Sentence of November 22, 2005*. Serie C No. 136, para 85; and *Case of the Moiwana Community Vs. Surinam*. Sentence of June 15, 2005. Serie C No. 124, para 160.

conduct of judicial authorities; and iv) the affectation generated on the juridical situation of the person involved in the proceeding⁵⁷.

62. The IACHR takes note that in the present case the complaint was filed on October 1st, 2004 and the alleged victim received a definitive decision on the cassation remedy on April 11, 2011, which is more than 6 years after filing the initial complaint. As for the first element, the Commission underscores that the case did not entail any particular complexity and consisted essentially of determining whether Supermercados Peruanos breached the Consumer Protection Law. Regarding the second element, the Commission takes note that the alleged victim used all means available in the legislation to obtain a definitive decision regarding his complaint for discriminatory treatment filed before INDECOPI and there is no element to hold that his actions generated an excessive delay in the proceeding. On the contrary, as for the third element, the Commission notes that, the complaint filed on October 1st, 2004 was decided on first instance on August 31, 2005, which means 10 months later. Such decision was appealed and the appeal was decided on May 17, 2006. The alleged victim filed a nullity remedy, which was declared inadmissible on June 10, 2008, which is why he filed a further appeal, which was decided two years later, on June 14, 2010. Finally, the cassation remedy was decided on April 11, 2011. As it can be observed, the delay was caused by the time it took the authority to resolve the remedies filed, without the State having provided reasons to justify the time elapsed for the decision for each remedy. In light of the above, the Commission regards that the State breached the guarantee of reasonable time foreseen in article 8.1 of the American Convention.

63. In virtue of all the addressed in the present section, the Commission concludes that the State of Peru is responsible for the violation of the principle of equality and nondiscrimination, privacy, fair trial and judicial protection foreseen in articles 24, 11, 8 and 25 of the American Convention in relation to article 1.1 of the same instrument, in detriment of Crissthian Manuel Olivera Fuentes.

64. On the other hand, as for the claim for violation to freedom of thought and expression formulated by the alleged victim, the Commission deems that an autonomous determination does not proceed since its grounds are analyzed under the principle of equality and nondiscrimination and the right to privacy. Likewise, the Commission regards to have no elements to perform an analysis of the violation of the right to defense.

V. CONCLUSIONS AND RECOMMENDATIONS

65. The Commission concludes that the State of Peru is responsible for the violation of the rights set forth in articles 8.1 (fair trial), 11 (privacy), 24 (equality before the law) and 25.1 (judicial protection) of the American Convention on Human rights, in relation to the obligations set forth in el article 1.1 of the same instrument.

66. Based on the analysis and the conclusions of the present report,

THE INTER AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THE STATE OF PERU:

1. To integrally repair violations to human rights declared in the present report, including the payment of an indemnity on account of material and immaterial damages. In particular, adopting the payment of an indemnity for the lack of effective judicial protection regarding discrimination based on sexual orientation suffered by the victim of the case, as well as the excessive delay of the fostered proceeding.
2. To adopt the measures oriented to avoid the repetition of the facts of the present case. In particular:
 - i. To elaborate and implement a public policy to promote in the society regarding rights of LGBTI persons and their social acceptance, especially through education and general culture, and through the elaboration and implementation of informative and sensibilization and awareness

⁵⁷ IACHR, Report No. 28/16, Caso 11.550, Admissibility and Merits, Maurilia Coc Max and others (Massacre of Xamán), Guatemala, June 10, 2016, para 145. IHR Court. *Case of Massacre of Santo Domingo Vs. Colombia*. Preliminary Exceptions, Merits and Reparations. Sentence of November 30, 2012. Serie C No. 259, para 164.

- campaigns in public and private media on sexual orientation, gender identity, expression of gender, corporal diversity and gender approach, instilling equality and nondiscrimination, respect, acceptance and integral social inclusion of LGBTI persons ;
- ii. To create or strengthen specialized training mechanisms for all justice operators (including male and female judges, prosecutors, public defense counsels, male and female clerks at courts), and security forces of the State on equality and nondiscrimination, perspective on gender and human rights of LGBTI persons. Particularly, operators of justice must have guidelines which allow them to ensure that the rules of argumentation and burden of proof are compatible with Inter American standards on the matter and do not impose an excessive burden on subjects who claim discrimination.
 - iii. To adopt measures that demand, foster and orient companies to perform the due diligence on human rights matters within its processes and operations related to consumer protection regarding equality and nondiscrimination of LGBTI persons according to Inter American standards on the matter. Such measures must include training activities, and the development of indicators that allow the State to verify compliance of such measures by companies. Among those measures, the State is to require companies, including Supermercados Peruanos S.A., to make visible in its facilities open to public a message which promotes respect of the right to equality and nondiscrimination of LGBTI persons in its operations related to consumer protection in coordination with the victim and his representatives on the present case.
 - iv. Adopt the necessary measures to promote the ratification of the Inter-American Convention against all forms of Discrimination and Intolerance

Approved by the Inter-American Commission on Human Rights on the 29th day of the month of October, 2020. (Signed): Joel Hernández García, Chair; Antonia Urrejola Noguera, First Vice-Chair; Flávia Piovesan, Second Vice-Chair; Margarette May Macaulay, Esmeralda Arosemena de Troitiño and Edgar Stuardo Ralón Orellana (dissenting), Members of the Commission.