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TRACING INCLUSIVITY: ASSESSING THE RECOGNITION OF WOMEN AND
LGBTIQ+ VOICES IN THE COLOMBIAN PEACE PROCESS

Author: Andrea Veronica Cruz Rojas

Supervisor: Lorena Sosa

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ABSTRACT

The inclusion of the voices of women and LGBTIQ+ victims has varied throughout the different stages of the Colombian peace process. This thesis studies how the moral claims of these groups have been acknowledged or disregarded in the negotiation, composition, and implementation of the Peace Agreement, and it determines the level of inclusivity achieved at each stage. To do so, it conducts a historical reconstruction of these claims, as they appeared in the negotiation phase of the Agreement, and traces them all the way to the first JEP's rulings regarding gender-based violence. A particular emphasis is placed on the peace plebiscite and the composition of a second version of the Peace Agreement. These turning points risked inclusion and recognition due to a conservative campaign against "gender ideology." Throughout this study, the thesis aims to demonstrate how the historical advocacy of LGBTIQ+ and women's organizations, along with the innovative judicial interpretations of the Special Jurisdiction for Peace, have expanded the scope of gender perspective and gender-based violence. These developments have led to the recognition of LGBTIQ+ and women victims and facilitated a more comprehensive analysis of systems of oppression.

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TABLE OF ABBREVIATIONS

| | |
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| CEDAW | Convention on the Elimination of Discrimination against Women |
| CEV | Truth, Coexistence and Non-Repetition Commission |
| ELN | Ejército de Liberación Nacional (National Liberation Army) |
| FARC-EP | Fuerzas Armadas Revolucionarias de Colombia – Ejército Popular (Revolutionary Armed Forces of Colombia – Popular Army) |
| IACHR | Inter-American Commission of Human Rights (CIDH, in Spanish) |
| IACtHR | Inter-American Court of Human Rights |
| ILGA World | International Lesbian, Gay, Bisexual, Trans and Intersex Association |
| JEP | Jurisdicción Especial para la Paz (Special Jurisdiction for Peace) |
| LGBT | Lesbian, Gay, Bisexual, Trans |
| LGBTI | Lesbian, Gay, Bisexual, Trans, and Intersex |
| LGBTIQ+ | Lesbian, Gay, Bisexual, Trans, Intersex, and Queer |
| NGO | Non-Governmental Organization |
| SIVJRNR | Comprehensive System of Truth, Justice, Reparation, and Non-Repetition |
| NSWP | National Summit of Women for Peace |
| SOGIE | Sexual Orientation, Gender Identity, and Gender Expressions |
| UBPD | Unit for Search for Persons Presumed Disappeared in the Context and by Reason of the Armed Conflict |
| UN Women | United Nations Entity for Gender Equality and the Empowerment of Women |
| WPS Agenda | Women Peace and Security Agenda |

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INTRODUCTION

Two failed attempts to negotiate peace and more than fifty years passed before reaching a peace agreement between the Colombian government and one of the oldest guerrillas in the Americas, the Revolutionary Armed Forces of Colombia (FARC). More than 9.492.472 victims/survivors¹ suffered from this armed conflict, of which 4.438 are LGBTI persons, 421 intersexual persons, 4.768.204 women, and 4.718.283 men (Unidad para las Víctimas, 2023); 450.664 persons were killed, 121.768 were forcibly disappeared, and more than 8.000.000 forcibly displaced (The Truth Commission of Colombia, 2022a, p. 206). Their lives were taken, their bodies destroyed or disappeared, their freedom restricted, and their lands ripped off their hands by force. Dreams were crushed and lives marked with the indelible ink of conflict. In this context, the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (Peace Agreement or Agreement or Accord) signed in November 2016 represented not only the end of more than half a century of violence but a seed of hope.

Current generations in Colombia have not lived a life free from armed conflict, they, including the author of this thesis, have only imagined the feeling of living in peace. As Bouvier said, armed conflict shapes ‘the most intimate aspects of (...) daily lives. It shapes where [people] reside, the way they dress, how they walk, where they travel, the crops they grow, the foods they eat, when and where they sleep, and how secure they feel’(Bouvier, 2016, p. 6). It has also shaped who they were allowed to love, how they live their sexuality, and how they should identify themselves. In this sense, being outside the binary division of sex/gender and sexuality or not complying with the roles, stereotypes, and norms linked to it meant a life threat or even a death sentence.

According to the Final Report of the Truth Commission of Colombia (Truth Commission), ‘all the armed groups of the conflict persecuted LGBTIQ+ persons because of their non-normative sexual orientation, gender identity and gender expressions (...) the combatants

¹ I will use victims/survivors to acknowledge the different ways persons who suffered from armed conflict want to call themselves.

selected these persons since for the combatants they were objectionable’ (The Truth Commission of Colombia, 2022a, p. 433). The structural impunity was one of the causes that the Truth Commission identified as an explanation of the persecution and violence suffered by LGBTIQ+ persons during the armed conflict; therefore it recommended to reinforce the implementation of the gender perspective in the procedures of the Special Jurisdiction for Peace (JEP) and to open a macro-case² to prioritize the investigation of sexual violence and other types of violence based on gender and sexuality (The Truth Commission of Colombia, 2022a, p. 571).

A. RESEARCH QUESTION, METODOLOGY, AND STRUCTURE

Given the creation of the new macro-case on gender-based violence and the structural impunity of this type of crimes, it is imperative to investigate if the transitional justice tribunal addresses the needs of the LGBTIQ+ and women victims of the armed conflict. To do so, it will be necessary to trace how the moral claims of these victims and the organizations representing them have been recognized and ignored at different stages of the peace process. Consequently, this thesis aims to answer the following research question: to what extent do the conceptualizations of gender-based violence and gender perspective within the Colombian transitional justice system address the claims of women and LGBTI victims who have experienced gender-based violence and align with the international and regional human rights standards?

The thesis is structured into four chapters that correspond to the phases of the peace process in Colombia: negotiation, renegotiation, and implementation. The examination of the recognition and inclusion of the moral claims throughout the thesis is guided by the three-level analysis proposed Strid, Walby, and Armstrong (three-level analysis) as well as Amartya Sen’s theory of moral claims as human rights. It is important to emphasize that this thesis employs a bottom-up analysis approach. In this sense, the international and regional standards will be mentioned wherever the moral claims of the women and LGBTI persons

² A macro-case is a line of investigation of JEP that analyzes a group of cases based on a specific thematic. For instance, there is a macro-case focused on extrajudicial killings and another one focused on forced recruitment of children during the armed conflict.

refer to them, or when the national legal instruments and the transitional justice tribunal mention them.

The first chapter will look into the participatory mechanisms of the peace negotiation to trace the voices of women and LGBTI persons. It will identify the moral claims of the LGBTI and women's organizations related to victims' rights to truth, justice, reparation and non-repetition, gender-based violence, and the inclusion of a gender perspective in the Peace Agreement. Afterward, based on the three-level analysis, this chapter will analyze the first version of the Peace Agreement to measure the level of inclusion and recognition of moral claims.

The second chapter will review the renegotiation phase of the peace process, especially the arguments of the political and religious groups that led the campaign against the first version of the Peace Agreement during the plebiscite and the arguments put forth by women and LGBTI organizations. This analysis will critically engage with the discussion surrounding the definitions of gender and sex, employing a feminist and queer theories approach. Additionally, this chapter will examine the revised version of the Peace Agreement to determine the level of inclusion and recognition of the LGBTI and women's organizations' claims, utilizing the three-level analysis. This section will reflect on the impacts the plebiscite had on the definition of gender perspective.

The third chapter will first examine the implementation phase of the Peace Agreement, specifically the adoption of the national legal framework of JEP. It will evaluate if the moral claims of LGBTI and women's organizations regarding the investigation of gender-based violence and the implementation of the gender perspective were included. The second section of the chapter will analyze the advisory concepts of the Gender Commission of the JEP to determine the level of recognition of moral claims. While Strid, Walby, and Armstrong's analysis is useful in assessing inclusivity, this chapter broadens their approach and highlights the importance of understanding the judges' interpretation of the law and the significance of naming within the legal framework.

The fourth chapter will analyze the outcome of the legal framework in the caselaw of the JEP. It will examine two cases: one case of a requirement of amnesty for a case of sexual violence against women and the first case where JEP recognized a gay man as a victim of the crime against humanity of persecution on the grounds of gender, under Article 7 (1) (h) of the Rome Statute. A study of these two cases allows a critical evaluation of the consequences of the definitions of gender perspective and gender-based violence of JEP's legal and conceptual framework. Furthermore, these cases enable an examination of the extent to which the judicial interpretation of these two notions aligns with the moral claims LGBTI and women's organizations made during the peace process. In the end, this chapter will explore the current difficulties faced by JEP in the opening of the new macro-case of gender-based violence, along with some of the forthcoming challenges that lie ahead. In the end, this thesis will present concluding remarks.

B. TERMINOLOGY: ACKNOWLEDGING DIVERSITY AND THE CHALLENGE OF NAMING IT

One of the significant findings of this thesis is the crucial role that naming plays concerning legal certainty and access to the rights of truth, justice, reparation, and non-repetition. To acknowledge and honor the voices of persons and organizations who have fought for the recognition of the rights of historically marginalized communities, this thesis adopts various acronyms and concepts that have been employed by them. It reproduces the way they self-identify or name diversity during the phases of the peace process. For this reason, the reader will come across terms such as LGBTI, LGBTIQ+, persons with diverse sexual orientation, gender identity, and gender expressions (SOGIE), and non-binary persons.

In the process of acknowledging diversity, organizations and State entities have faced challenges when it comes to naming diversity. As a result, the reader will notice changes in the terms and acronyms used in the chapters of the thesis. To make visible these changes have the intention to reflect on the different perspectives within the ongoing fight for recognition and inclusion of these historically marginalized communities. Therefore, the usage of each

of these terms and acronyms by the author of this thesis will correspond to the different ways they have changed over time:

- LGBT, LGBTI, LGBTIQ+, non-binary persons, and persons with diverse SOGIE are the acronyms and terms used by the Colombian organizations and activists referred to in this thesis.
- LGBTIQ+ is the acronym used by the Truth Commission of Colombia.
- LGBTI and persons with diverse SOGIE are the terms used by the Special Jurisdiction for Peace (JEP).
- The Peace Agreement and the national legal framework of JEP refer to LGBTI.

CHAPTER 1.

NEGOTIATING PEACE IN COLOMBIA: THE CLAIMS OF WOMEN AND LGBTI PERSONS AND THE INCLUSION OF A GENDER PERSPECTIVE

According to Strid, Walby, and Armstrong there are three levels of inclusion and recognition in policy making: (i) naming a minority, (ii) naming the intersecting inequalities a minority suffers, and (iii) including the voices of minoritized groups in the policy making process. (Strid et al., 2013, p. 565). The simple naming is the weakest form of visibility, while including the voice of minoritized groups is the strongest and 'requires that the minoritized group is not only made visible, but heard in the policy process; it requires voice' (Strid et al., 2013, p. 565). In order to assess the extent to which minoritized voices are acknowledged, these scholars suggest examining the demands of civil society organizations throughout the policy-making process and evaluating the resulting policy outcomes (Strid et al., 2013, p. 566).

Regarding civil society organization's demands, Amartya Sen has argued that human rights exceed the legislation and the judicial enforcement of the law. They are also 'ethical claims, social demands (...) [and] powerful moral claims' (Sen, 2006, p. 2917). In this sense, he explains that there are moral claims that are not yet legally recognized but are seen as human rights by different groups of persons. Sen states that legislation is just one means of acknowledging and enforcing moral claims (human rights)³, but there are alternative routes such as organized advocacy and the exertion of social pressure to ensure 'compliance with certain basic claims of all human beings that are seen as human rights' (Sen, 2006, p. 2920). In this context, he highlights the essential role played by NGOs and activists who promote human rights (moral claims) even when these lack a specific legal status (Sen, 2006, p. 2927). These social actors contribute to the advancement of human rights by advocating for their legal recognition, monitoring violations of legally recognized human rights, and exerting

³ Sen argues that there is 'a huge world of legitimate human rights beyond the limits of law' (Sen, 2006, p. 2927).

pressure to guarantee that States comply with their human rights obligations (Sen, 2006, p. 2920). Similarly, Strid, Walby, and Armstrong consider that -beyond being explicitly included in a policy's final text- another way to analyze the strength of inclusion and recognition of marginalized groups is by identifying the voices of coalitions and alliances between civil society organizations throughout the policy-making process (Strid et al., 2013, p. 560).

Following the three-level of analysis of inclusion and recognition, and Sen's theory regarding organized advocacy and its relationship with the recognition of moral claims, this chapter will first trace the voices and participation of women and LGBTI persons in the negotiation phase of the peace process and identify their moral claims. It will focus on the claims of the LGBTI and women's organizations related to victims' rights to truth, justice, reparation and non-repetition, gender-based violence, and the inclusion of a gender perspective in the Peace Agreement. Secondly, this chapter will examine the outcome of the negotiation phase, the first version of the Peace Agreement, to evaluate the strength of the recognition and inclusion of the claims made by women and LGBTI organizations; specifically, the adoption of a gender perspective and the investigation of gender-based violence.

1.1. WOMEN AND LGBTI STRUGGLES FOR INCLUSION IN THE PEACE NEGOTIATION PROCESS

According to the international legal framework, persons directly affected by a state's decision-making have the right to participate and be consulted. This right is stated in Article 21 of the Universal Declaration of Human Rights, Article 25 of the International Covenant on Civil and Political Rights, and at the regional level in Article 23 of the American Convention on Human Rights, among others. In the context of transitional justice, international human rights treaty bodies and special procedure mandate holders assert the importance of victims' and civil society's participation in transitional justice processes (de Greiff, 2016, paras. 31–34). Their participation has been understood as a measure of recognition of victims as rights holders, and an important contribution to the design, implementation, and monitoring of the transitional justice measures and mechanisms (de

Greiff, 2016, para. 28). Nonetheless, in practice, participation in transitional justice processes, especially in peace negotiations, has been historically restricted to men. Women have gained space in these scenarios thanks to their organized advocacy and activism; the landmark resolution 1325 (2000) of the Security Council of the United Nations and subsequent resolutions which conform to the Women, Peace and Security Agenda (WPS Agenda)⁴; and the recommendations made by the Committee on the Elimination of Discrimination against Women (CEDAW Committee) (de Greiff, 2016, para. 35). Despite these efforts, the achievement of parity participation, especially in decision-making positions, remains a challenge nowadays (Garrido Ortolá, 2021, p. 73).

The participation of LGBTI persons has been even more restricted and, in most cases, completely absent. Their voices have yet to be listened to in most transitional justice processes. In 2020, the Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence, Fabian Salvioli, issued a report to the United Nations General Assembly stating that the analysis of gender, sexual orientation, and gender identity was vastly ignored until recently by the transitional justice mechanisms (Salvoli, 2020, para. 6). In this sense, listening to the voices of non-binary persons is a historical debt in peace negotiations and transitional justice processes around the world.

Thanks to the advocacy and pressure of LGBTI and women's organizations, the Colombian peace process between the Government and the FARC guerilla was an unprecedented milestone in peacebuilding, not only for Colombia but also for the world. It marked the first peace negotiation in Colombia's history to involve the direct participation of LGBTI organizations and the first Peace Agreement to incorporate a gender perspective as a guiding principle. These achievements were the result of organized advocacy and pressure from social organizations.

⁴ The WPS Agenda established under the United Nations Security Council 1325 of 2000 is the most crucial and wide-reaching policy framework that bound the international community to protect women's rights in armed conflict and aftermath scenarios, with an emphasis on fighting sexual violence; promote increasing of women's participation in decision-making processes including peacekeeping, peace negotiation, and peacebuilding; and acknowledging and addressing the unique experiences and needs of women and girls in these contexts (Basu et al., 2020, pp. 1–3).

At first, the peace negotiations in Colombia counted only on male representation. In the exploratory phase (August 2010- August 2012), all the secret communications and preparatory meetings between the Colombian Government and FARC-EP were held exclusively by men representatives (Oficina del Alto Comisionado para la Paz, 2018d, pp. 64–69). During the exploratory meetings held in February-August 2012, only two non-plenipotentiary delegates (with no decision-making power) were women: Lucía Jaramillo on behalf of the Government and Sandra Ramírez on behalf of FARC (Oficina del Alto Comisionado para la Paz, 2018d, p. 70). In October 2012, the peace negotiation table started in Norway and only one woman was part of it, the Norwegian moderator (Bouvier, 2016, p. 19). Likewise, just one negotiator in Cuba was a woman: Farc member Tanja Nijmeijer, also known as “the Dutch guerrillera” because of her nationality (Bouvier, 2016, p. 19).

This situation improved in the second track of the peace talks (November 2013- August 2016). There, 33% of the negotiators were women: 20% of the government’s representatives and 40% of the FARC team (Council on Foreign Relations, 2019). The main reasons behind this change were the hard work of women’s organizations who formed political coalitions, such as the National Summit of Women and Peace (Cumbre Nacional de Mujeres y Paz), to demand the inclusion of their voices in the peace negotiations and the decision-making positions. Additionally, the international accompaniment of the United Nations, especially the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), was a key factor for the inclusion of women since they advocated for compliance with the WPS Agenda’s objectives. Nonetheless, until this point, none of the representatives of the LGBTI organizations were included.

1.1.1. National Summit of Women for Peace: the inclusion of women’s voices at the negotiation process as a bridge to the inclusion of LGBTI persons’ voices

Based on the objectives of the WPS Agenda, in October 2013, a coalition of nine women’s organizations⁵ called the National Summit of Women for Peace (NSWP) was created to

⁵ Asociación Nacional de Mujeres Campesinas, Negras e Indígenas de Colombia – ANMUCIC, Casa de la Mujer, Coalición 1325, Colectivo de Acción y Pensamiento – Mujeres, Paz y Seguridad, Conferencia Nacional

request the participation of the women's movement in the peace talks and the inclusion of a gender perspective in the peace process (Bouvier, 2016, pp. 92–95); UN Women and different embassies supported this political initiative (Bouvier, 2016, p. 20). The NSWP organized its first national meeting in Bogotá with '450 representatives of Colombian women's organizations from 30 of Colombia's 32 departments'⁶ (Bouvier, 2016, p. 20) to dialogue and discuss recommendations with a gender-perspective regarding the peace agenda's six thematic issues: (i) comprehensive rural reform; (ii) political participation; (iii) end of the conflict (including the ceasefire and disarmament), (iv) solutions to the problem of illicit drugs; (v) rights of the victims of the armed conflict; and (vi) ratification, implementation, and verification of the Peace Agreement (Banco de la República de Colombia, 2021). This section will highlight the moral claims regarding participation and the inclusion of a gender perspective in the thematic issue of victims' rights.

Regarding participation, the NSWP demanded: (i) the inclusion of women at the negotiation table (UN Women, 2014, p. 12); and (ii) parity in decision-making positions during the peace talks and in the organs that will implement the Peace Agreement, including in the ones that would conform the transitional justice system (UN Women, 2014, pp. 28, 30 and 63). Moreover, they claimed the inclusion of a gender perspective throughout the Peace Agreement. Regarding the rights of the victims to truth, justice, reparation and non-repetition, they demanded: (i) the creation of a Truth Commission that can achieve a comprehensive truth with a gender perspective and with the participation of the LGBTI population and women victims; (ii) public recognition of the seriousness of the different crimes committed against women; (iii) no amnesties for sexual violence crimes since these they must be categorized as crimes against humanity; (iv) access to justice with a gender perspective that guarantees the transformation of gender inequality, the participation of victims, and judges with expertise in gender issues; justice for gender-based crimes, especially sexual violence and feminicides, and victimization of LGBTI persons based on phobias; and (v) reparation measures with a gender perspective and an intersectional approach that considers the participation of the LGBTI community, women, ethnic communities, and victims in general

de Organizaciones Afrocolombianas – CNOA, Iniciativa de Mujeres Colombianas por la Paz – IMP, Mujeres por la Paz, Red Nacional de Mujeres, and Ruta Pacífica de las Mujeres.

⁶ All texts in Spanish have been translated from the original by the author of this thesis.

(UN Women, 2014, pp. 28, 30 and 63). Although LGBTI victims had not been included at this stage of the negotiation process, their nominal presence in the NSWP agenda demonstrates how temporary hierarchies of inequalities may be instrumental in achieving recognition (Strid et al., 2013, p. 560). In this case, the case for women's justice took a temporal preeminence that opened the way for further inclusion.

After the national meeting of the NSWP, three women were appointed as plenipotentiaries in the government's peace delegation⁷. Additionally, their specific demand of no amnesties for sexual violence crimes was taken into account by the working group of jurists of the peace negotiation, which was formed only by men (Bouvier, 2016, p. 23). These achievements demonstrate the effectiveness of the political pressure exerted by this political coalition of women's organizations since the peace table heard their voices. Moreover, as will be further explained, the advocacy of the NSWP led to the adoption of a technical committee called the Sub-commission of Gender as part of the peace delegation (Corporación Humanas, 2021). This Sub-commission played a crucial role in engaging the voices of other victims/survivors of the armed conflict, LGBTI organizations, and ethnic groups (Bouvier, 2016, p. 21).

1.2. PARTICIPATORY MECHANISMS OF THE PEACE PROCESS

The participation of victims/survivors in the peace process resulted from a longstanding demand for inclusion advocated by social movements, as well as victims' and human rights organizations in Colombia -including LGBTI and women's organizations, as shown in the last section-. In response to this claim, negotiators acknowledged the significance of incorporating the voices of Colombian civil society, armed conflict victims/survivors, and non-governmental organizations that have historically worked to ensure the recognition of the rights of the victims/survivors, their protection and respect. Therefore, they opened different participatory mechanisms: public consultations, opportunities to meet with the negotiators in Havana, and dialogues with the Sub-commission on Gender. This section will briefly present each participatory mechanism and highlight the moral claims of the participants, focusing on LGBTI and women's organizations' claims related to victims'

⁷ María Ángela Holguín, María Paulina Riveros, and Nigeria Rentería.

rights, gender-based violence, and the inclusion of a gender perspective in the Peace Agreement. Tracing their demands through these participatory mechanisms will be pivotal to assessing the strength and visibility of their voices both during the negotiation process and in the consolidation of the final version of the Peace Agreement.

1.2.1. National and regional public consultations

The negotiation table decided to hold public consultations at national and regional levels between 2013 and 2015. These forums were organized by the United Nations and the Public National University of Colombia (Universidad Nacional de Colombia). One of their objectives was to ensure parity participation, in response to the international policy framework of the WPS Agenda and the demands of women to be included in the peace negotiations (Brett, 2017, p. 36). As a result, 48% of the participants were women, 85% were victims of the armed-conflict, and 63 were victims of sexual and gender-based violence (Naciones Unidas & Universidad Nacional, 2014, p. 22).

The consultations collected more than 67.000 written proposals regarding the six thematic issues or items of the peace process agenda (Banco de la República de Colombia, 2021). Overall, 800 of 67.000 written proposals were related to guaranteeing the inclusion of a gender perspective in the overall content of the Peace Agreement (Barbabela & Villalba, 2022, p. 122).

A. Moral claims of the LGBTI organizations

17 LGBTI organizations participated in the public consultations and presented 225 claims regarding victims' rights to reparation, truth, and justice (Fundación Ideas para la Paz & ONU Mujeres, 2017b, p. 2). Regarding justice, they demanded the investigation of violence perpetrated by the State and illegal armed groups against LGBTI persons to fight historical impunity and prosecute the responsible individuals. They also asked for the adoption of criteria for identifying and classifying violence based on prejudice (Fundación Ideas para la Paz & ONU Mujeres, 2017b, p. 8). Their claims related to the right to truth were focused on

the reconstruction of how and why acts of violence against the LGBTI population occurred (Fundación Ideas para la Paz & ONU Mujeres, 2017b, p. 7). Their proposals of reparation were mainly focused on the public acknowledgement by FARC and the State's armed forces of their responsibility for violent actions against people based on their sexual orientation and gender identity (Fundación Ideas para la Paz & ONU Mujeres, 2017b, p. 7). Finally, the organizations insisted that peace must be inclusive and that the State's institutions and the society must change to end discrimination and violence based on sexual orientation and gender identity (Fundación Ideas para la Paz & ONU Mujeres, 2017b, p. 8).

Another set of claims were focused on measures to increase the participation of LGBTI persons in the peace process and the recognition of the voices of this historically excluded population. They demanded to be part of the decision-making positions and bodies (Fundación Ideas para la Paz & ONU Mujeres, 2017b, p. 2).

B. Moral claims of women's organizations

Furthermore, 301 women's organizations contributed 7.172 proposals to the negotiation table regarding the victims' rights to reparation, truth, and justice (Fundación Ideas para la Paz & ONU Mujeres, 2017a, p. 3). One of the central demands regarding reparation was the inclusion of comprehensive measures with gender and differential approaches (Barbabela & Villalba, 2022, p. 122). The key demands concerning truth were the recognition of the differential impacts of armed conflict on women's bodies (Barbabela & Villalba, 2022, p. 122), the upsurge in violence against women during the armed conflict, and the public recognition of the armed conflict actors' responsibility in perpetrating sexual violence against women (Fundación Ideas para la Paz & ONU Mujeres, 2017a, p. 8). The claims of justice were focused mainly on guaranteeing justice for the victims of sexual violence (Fundación Ideas para la Paz & ONU Mujeres, 2017, p. 7). Finally, there were demands for cultural transformations to prevent violence against women during the post-conflict phase, particularly in the fight against patriarchy (Fundación Ideas para la Paz & ONU Mujeres, 2017a, p. 4).

Another set of claims was related to women's political participation in the peace process and their recognition as relevant political actors that must be included in decision-making positions (1.186 proposals). There were also demands for guarantees of women's participation in the mechanisms that would constitute the transitional justice system, particularly for victims of sexual violence in the judicial procedures, and the truth and reparation processes (Fundación Ideas para la Paz & ONU Mujeres, 2017a, p. 3). Additionally, it is important to emphasize that 174 women's organizations presented claims that focused on ensuring the access of LGBTI individuals to the rights of truth, justice, reparation, and non-repetition (Fundación Ideas para la Paz & ONU Mujeres, 2017b, p. 5).

1.2.2. Peace Delegations Meetings in Havana

During the second semester of 2014, five delegations of victims/survivors were invited to travel to Havana and meet with the negotiating teams to discuss the fifth thematic issue of the peace agenda related to armed-conflict victims (Oficina del Alto Comisionado para la Paz, 2018a, pp. 181–186). The delegations comprised victims/survivors of violence perpetrated by FARC, the State, and paramilitary groups (Calderon, 2018, p. 77). Of the 60 victims/survivors who participated, 36 were women (Oettler, 2019, p. 20), 5 were victims of sexual violence, and 1 was part of the LGBTI community⁸ (Banco de la República de Colombia, n.d.).

The participation of victims/survivors –some of whom were members victims' organizations⁹– was key in bringing their historical demands and issues to the negotiation table. They advocated for the recognition of victims, increased participation, reconciliation, transitional justice mechanisms, and the fulfillment of victims' rights to truth, justice, reparation measures, and non-repetition. Most of their claims aligned with those presented in

⁸ Nora Elisa Vélez, a lesbian activist and human rights leader, whose sister was killed by armed groups because she was a trans woman (Banco de la República de Colombia, n.d.).

⁹ Gloria Gómez, director of the Association of Family Members of Victims of Forced Disappearance (ASFADDES); Yanette Bautista, director of an NGO, named with her sister, Nydia Érika Bautista, a victim of forced disappearance; Luz Marina Bernal, one of the Soacha mothers whose son was the victim of extrajudicial execution; among others (Banco de la República de Colombia, n.d.).

the public consultations¹⁰. They also included: (i) non-repetition measures to guarantee the end of armed conflict and its impacts; (ii) freedom of the kidnapped and forced disappeared persons; (iii) creation of a transitional justice system with a truth commission, and (iv) respect for the rights of the LGBTI population, specifically guarantee to access to their socioeconomic rights. Nora Vélez, a lesbian activist and human rights leader served as the sole delegate representing the LGBTI community. She stated, ‘We, the LGBTI community, are making ourselves more visible every day so the State and the armed groups realize that we are also human beings, that we are people who feel, that our rights should not be violated, that our lives should be respected’ (Brett, 2017, p. 77).

Moreover, their moral claims put the victims at the center of the peace process, thus influencing the negotiators to adopt a victim-centered approach as a guiding principle of the Peace Agreement. This guideline aims to recognize that victims and the fulfillment of their rights lie at the core of the Peace Agreement, and it has also been considered to align with international standards. Victims’ claims also helped to create a more victim-centered transitional justice system, to bring arguments to balance restorative and retributive justice, and had an impact on the transformation of the peace negotiators’ understanding of the dimension of violence and its effects (Brett, 2022, p. 485). One of the victims/survivors said that ‘one of the gravest aspects of the conflict has been denial from both sides that they caused suffering and harm to non-combatants. The fact that sixty people in flesh and bones directly attested to the atrocities represented a central mechanism to overcome this denial’ (Brett, 2022, p. 485). Consequently, FARC members were more open to admitting responsibility and asking publicly for the pardon of victims/survivors of human rights violations, and other negotiators changed their attitude towards the recognition and dignification of victims/survivors (Brett, 2022, p. 484).

Additionally, it is important to highlight that on February 2015, LGBTI organizations participated in a meeting with the peace delegations where they presented their moral claims. Caribe Afirmativo demanded that the Peace Agreement included the principles of equality and non-discrimination and a gender perspective. Also, they claimed the recognition and

¹⁰ See Chapter 1, Section 1.2.1.

guarantee of the rights of victims to truth, justice, reparation, and non-repetition. In this regard, they demanded: (i) to make visible the violence suffered by LGBTI persons; (ii) to include memory building and documentation regarding forms of victimization of people and organizations of the LGBT sectors; (iii) that the FARC guerrilla, and all the actors of the conflict, clarify the truth about violence based on sexual orientation and gender identity, and compromise to not perpetrate these crimes again; (iv) the dismantling of patriarchal and homophobic imaginaries that reproduce violence and the prevention of all kinds of violence or denial of rights towards LGBTI people (Caribe Afirmativo, 2015). Furthermore, they stated:

We have grown tired of the demands of LGBTI people being reduced, hidden, silenced. We constantly fight to “come out of the closet”, to be able to be, express and live our sexual orientation and gender identity. And we do not accept that the violence carried out by armed actors [FARC-EP, the State, and paramilitary groups] forces us to “go back to the closet”. (...) What these actors have in common is the contempt for sexual diversity, the use of prejudices and negative stereotypes, the idea that transgressing the roles of masculine and feminine are sufficient grounds to deny life, integrity, and freedom. Weapons and words erase our bodies and relativize our demands. For this reason, we are committed to this peace and post-conflict process since we see an invaluable opportunity for us to build a new conception of the country. A conception in which respect, protection, promotion and guarantee of diversity is an inviolable principle in an integral way (Caribe Afirmativo, 2015).

The organization Colombia Diversa shared most of the claims of Caribe Afirmativo, and added complementary demands, especially the ones regarding gender-based violence: (i) to recognize that gender-based violence includes violence perpetrated due to diverse sexual orientation and gender identity; (ii) to identify the types of discrimination and violence, in this sense, it is important to adopt criteria for the identification and classification of violence based on prejudice; (iii) to adopt measures to recognize and dignify victims of prejudice-based violence due to sexual orientation and gender identity in the context of armed conflict; (iv) to recognize the self-recognition of LGBT persons, especially in the procedures of the

transitional justice tribunal; (v) to update and disaggregate official data bases regarding LGBTI victims and gender-based crimes (Colombia Diversa, 2015, p. 15).

1.2.3. The Sub-commission on Gender: meetings with LGBTI and women's organizations on the implementation of the gender perspective in the first version of the Peace Agreement

The third and last participatory mechanism in the peace negotiations is the Sub-Commission on Gender, created in 2014 as the result of the advocacy of NSWP, women plenipotentiaries¹¹, and women's historical demands of inclusion and participation (Oficina del Alto Comisionado para la Paz, 2018c, pp. 139–143). It also responded to the international influence of the WPS Agenda and the General Recommendation 30/2013 of the Committee on the Elimination of Discrimination against Women. This Sub-commission - primarily composed of women- had the objective of providing advice to the negotiators on how to include a gender perspective in the Peace Agreement (Bouvier, 2016, p. 22). To do so, it held meetings with UN experts¹², LGBTI, and women's organizations to hear their recommendations (Oettler, 2019, p. 20).

Between December 2015 and February 2016, women's organizations¹³ and LGBTI organizations¹⁴ were invited to Havana to provide support to the Sub-commission on gender in implementing the gender perspective (Oficina del Alto Comisionado para la Paz, 2018c, p. 58). One of the main conclusions of this participatory dialogue was the importance of recognizing the pre-existence and persistence of a patriarchal system that creates relationships based on discrimination, exclusion, domination, injustice, and non-guarantee of LGBTI rights and women's rights; as well as the impact of patriarchy in the armed-conflict

¹¹ Government plenipotentiary María Paulina Riveros and the FARC delegate and former combatant Victoria Sandino Palmera (Corporación Humanas, 2021).

¹² Zainab Hawa Bangura, special representative of the United Nations General Assembly on sexual violence in armed conflict contexts.

¹³ Casa de la Mujer, Cumbre Nacional de Mujeres y Paz–Iniciativa de Mujeres por la Paz, ASODEMUC–Mujeres por la Paz, Red Mariposas de Alas Nuevas Construyendo Futuro, Asociación Alianza Departamental de Asociaciones de Mujeres del Putumayo, Red de Mujeres Excombatientes, ANMUCIC, AMART, ASCAMCAT.

¹⁴ Colombia Diversa, Corporación Caribe Afirmativo, and Organizaciones por la Defensa de los Derechos de la Población LGBTI.

(Oficina del Alto Comisionado para la Paz, 2018c, p. 294) and the exacerbation of violence against women and the LGBTI community during the armed conflict. Furthermore, the LGBTI organizations argued that ‘armed actors operated under social ideas of decency and morality in order to control communities and the bodies of individuals within the context of the conflict’ (Maier, 2020, p. 10) and that ‘peace is diversity, it is the recognition of one another, and articulated that one’s body is the first territory of peace’(Maier, 2020, p. 10).

Moreover, women’s organizations and LGBTI organizations proposed a gender perspective that (i) ‘recognizes the diversity of the identities of black, indigenous, peasants, young, rural, urban women, and LGBTI persons’(Oficina del Alto Comisionado para la Paz, 2018c, p. 336); (ii) recognizes the differential impacts the armed conflict had on women and the LGBTI persons; (iii) identifies the oppression systems behind the violence and discrimination against women and LGBTI persons, especially patriarchy; (iv) guarantees the rights of women and LGBTI persons with an approach that covers women, gender, and sexual diversity; (v) allows the State to comply with its obligations regarding non-discrimination and equality (Oficina del Alto Comisionado para la Paz, 2018c, pp. 366 and 344). In this sense, the understanding of the scope of gender perspective was broad including not only cis women but LGBTI persons.

Furthermore, they demanded the recognition of gender-based violence that is based on discrimination towards women and diverse sexual orientation and gender identity (Oficina del Alto Comisionado para la Paz, 2018c, p. 345). Consequently, they claimed the investigation and prosecution of crimes related to gender-based violence (Oficina del Alto Comisionado para la Paz, 2018c, p. 345), and the inclusion in the Peace Agreement of an inclusive language that does not reproduce sexism and homophobia.

Thanks to the participation of women and LGBTI organizations, the Sub-commission on gender achieved significant outcomes on the first version of the Peace Agreement: the inclusion of the gender perspective as a transversal principle of the Peace Agreement; the

integration of 130 gender-related provisions¹⁵ of a total of 578 (Medina, 2021, p. 39), of which 39 were identified as inclusive of the LGBT population (ILGA World & Colombia Diversa, 2022, p. 7); the implementation of an inclusive language (Calderon, 2018, p. 81); and the recognition of a more complex women's experience during war that made visible their agency and not only reproduced an 'image of women as passive victims, mothers, and caregivers' (Oettler, 2019, p. 20).

1.3. THE OUTCOME OF THE NEGOTIATION PHASE: RECOGNITION AND INCLUSION OF THE MORAL CLAIMS MADE BY WOMEN AND LGBTI ORGANIZATIONS

As mentioned in the introduction of this chapter, this section focuses on analyzing the strength of the inclusion and recognition of the moral claims of LGBTI and women's organizations in the Peace Agreement. This can be observed in the inclusion of a gender perspective in the Agreement, the investigation of gender-based violence, and the guarantees for victims' rights to truth, justice, reparation, and non-repetition.

Regarding the gender perspective, the peace negotiators publicly announced in 2016 that the Gender Sub-Commission finished including a gender perspective across all chapters of the first version of the Peace Agreement -130 gender-related provisions of a total of 578-. They said that 'it was a hard work that aimed to include the voices and demands of women and the LGBTI community in the 310 pages of the Peace Agreement' (Oficina del Alto Comisionado para la Paz, 2018c, p. 286). They reiterated the importance of the contributions of women's and LGBTI organizations in this task. In addition, this document stated that the gender perspective aimed 'to create conditions for women and people with diverse sexual identities to have equal access to the benefits of living in a post-conflict country (...) and to guarantee the inclusion and equal exercise of rights for all members of society, and specifically for women and the LGBTI population' (FARC-EP & Gobierno Nacional de Colombia, 2016).

¹⁵ To find all the gender-related provisions see (ONU Mujeres, 2018).

Moreover, they pointed out that the discussions related to the gender perspective sought to go further than the traditional conception of gender, ‘gender does not refer only to women, but to the differentiated impact of specific situations on men and women and LGBTI people. Gender is respect for difference and the condition of individuality; it is the possibility of living in harmony with difference. This is reflected in the Agreement’ (Oficina del Alto Comisionado para la Paz, 2018c, p. 394)

The provisions regarding the rights of victims to truth, justice, reparation, and non-repetition with a gender perspective included, among others, the following: (i) The creation of a transitional justice system composed of a Truth Commission, a Special Jurisdiction for Peace and a Unit for the search of the forced-disappeared persons. This system has the main objective to recognize and guarantee the victim’s rights, including their participation. (ii) The inclusion of the gender perspective as a guiding principle of the transitional justice system. (iii) The Truth Commission’s objective to implement a gender perspective to analyze the differential impacts the conflict had on women and LGBTI persons, and clarify their causes, including the causes of gender-based violence. (iv) The creation of a special investigation team in the Special Jurisdiction for the investigation of sexual violence cases that consider the rules of procedure and evidence of the Rome Statute regarding this type of crimes. (v) The prohibition of amnesties for sexual violence crimes (Oficina del Alto Comisionado para la Paz, 2018c, p. 399)

1.3.2. Three-level analysis of inclusion and recognition of the voices of women and LGBTI organizations

In this context, following the three-level analysis proposed by Strid, Walby, and Armstrong, the inclusion and recognition of LGBTI and women’s voices in the first version of the Peace Agreement is strong. This version not only named women and LGBTI persons, but also incorporated and acknowledged their demands in the text. These demands included the implementation of a gender perspective across all the chapters of the Peace Agreement, the recognition of victims’ rights to truth, justice, reparation and non-repetition, and the investigation of gender-based violence. Furthermore, as demonstrated throughout this

chapter, both women and LGBTI persons actively participated and had a voice during the negotiation process through the three examined participatory mechanisms. Following the analysis of Strid et al., this would be an example of the strongest form of recognition and inclusion (Strid et al., 2013, p.565). However, regarding gender-based violence, the focus in this version of the Agreement mainly referred to sexual violence, which overshadows other types of this gender-based violence.

1.4. PRELIMINARY CONCLUSIONS

Through the lens of Amartya Sen's theory and the three-level analysis proposed by Strid, Walby, and Armstrong, this chapter analyzed the negotiation phase of the Colombian peace process and its resulting outcome: the first version of the Peace Agreement. It identified the moral claims of LGBTI and women's organizations and assessed the level of recognition and inclusion of their demands both in the negotiation process and in the drafting of the Agreement. The chapter also focused on the moral claims related to the inclusion of a gender perspective; the recognition and guarantees of victims' rights to truth, justice, reparation, and non-repetition; and the investigation of gender-based violence.

Given the historically predominant participation of men in transitional justice processes, women and LGBTI persons were absent during the first track of the peace talks. Thanks to the pressure of the Colombian feminist movement and women's organizations, the Colombian Government complied with the axis of women participation of the WPS Agenda. Women's struggle for recognition also helped open participatory spaces for LGBTI organizations. In a subsequent phase of the negotiation process, peace negotiators introduced three important participatory mechanisms: public consultations, meetings with the peace negotiators in Havana, and a Sub-Commission on gender. Women and LGBTI organizations voiced their moral claims in these spaces, and, as a result, the Sub-commission included an inclusive gender perspective (encompassing both Women and LGBTI persons) in all the chapters of the first version of the Peace Agreement. Following Amartya Sen's theory, including this perspective was an achievement of NGOs' effective advocacy and pressure, which created a legitimizing force to recognize and include this moral claim in the Accord.

Finally, the level of inclusion and visibility of LGBTI and women's voices during the peace negotiation phase can be considered strong. Firstly, they were actively involved throughout the drafting process. Secondly, the first version of the Accord created a transitional justice system aiming to guarantee victims' rights to truth, justice, reparation, and non-repetition. Thirdly, the incorporated gender perspective had a broad scope, encompassing not only women but LGBTI persons. However, when it comes to the investigation of gender-based violence, the focus was primarily limited to sexual violence. This addressed the majority of women's claims but fell short in recognizing the differential impacts of this violence based on sexual orientation and gender identity, as advocated by LGBTI organizations. Furthermore, as it will be further explained, the definition of the gender perspective in the Peace Agreement underwent challenging debates concerning the definition of gender and sex which impacted its inclusiveness.

CHAPTER 2.

RENEGOTIATING PEACE: THE PLEBISCITE AND A BINARY CONCEPTION OF GENDER PERSPECTIVE

In “The Global Reach of Human Rights,” Amartya Sen argues that human rights are expressions of social ethics and ‘like other ethical tenets, human rights can, of course, be disputed but the claim of the generality of human rights is that they will survive open and informed scrutiny’(Sen, 2006, p. 2916). However, he does not provide a clear definition of what would constitute a properly “informed scrutiny,” nor does he address what happens when the claim of the generality of human rights faces *misinformed* scrutiny. Drawing on Sen’s theory, this chapter will argue that the campaign against the Peace Agreement represents a misinformed scrutiny that not only influenced the outcome of the plebiscite but also had an impact on the final version of the Agreement. Furthermore, it will analyze the arguments of the political and religious groups leading the campaign against the Peace Agreement and the arguments put forth by women and LGBTI organizations. This analysis will critically engage with the discussion surrounding the definitions of gender and sex, employing a feminist and queer theories approach. Additionally, this chapter will examine the revised version of the Peace Agreement to determine the level of inclusion and recognition of the LGBTI and women’s organizations’ claims, utilizing the three-level analysis proposed by Strid, Walby, and Armstrong. Ultimately, this chapter concludes that the renegotiation of the Agreement narrowed the scope of the gender perspective solely to women and that the outcome of the plebiscite highlights the enduring influence of the binary conception of gender within Colombian society.

2.1. THE PLEBISCITE

After the first version of the Peace Agreement was signed, then-president Juan Manuel Santos decided to legitimize it through a national referendum, or plebiscite, held on October 2, 2016. Contrary to most expectations, the majority of the Colombian electorate disapproved of the first version of the Agreement. A closer examination of the geographical distribution of the votes revealed that the Agreement was approved in the regions most affected by war, where

most victims/survivors lived (MOE, 2016, pp. 39–69). Conversely, urban areas less impacted by the war showed higher disapproval rates of the Peace Agreement (MOE, 2016, pp. 11–15). The message conveyed was clear: most victims/survivors wanted peace for their communities and lands, as they had experienced the hardships of living in fear and pain and did not wish to continue living under the shadow of war. However, the results, with a narrow margin of 50.2% versus 49.8%, revealed a divided country. After nearly four years of peace negotiations, it was unclear whether the Agreement would survive. Why did half of the country vote against the Peace Agreement?

Multiple factors may explain why the Agreement was rejected; among them are the fight against so-called “Castrochavismo”; the fear that the country would become like Venezuela; the idea of transitional justice as a path to impunity instead of justice; and the refusal to allow political participation of former guerrilla members in the post-conflict phase (Observatorio de la Democracia, 2017, p. 52). This chapter focuses on a prominent factor that helps explain the outcome of the plebiscite: the rejection of the presumed “gender ideology” allegedly promoted in the Peace Agreement. The campaign against this ideology established a public discussion that changed the scope of the gender perspective of the first version of the Peace Agreement to exclude LGBTIQ+ persons and focus only on cis women.

This opposition campaign was led by conservative political parties and religious groups - primarily Evangelical and Catholic conservatives- who believed that the gender perspective was an “ideology” that encouraged homosexuality and was a threat to the traditional concept of family (Oficina del Alto Comisionado para la Paz, 2018c, p. 269). Even though the first version of the Peace Agreement did not contain any references to same-sex marriage, abortion, reproductive rights, or adoption by same-sex couples, the campaign against the “gender ideology” disseminated misleading messages claiming that the peace agreement aimed to undermine the concept of family and to promote homosexuality and abortion in Colombia. Therefore, the scrutiny of the moral claims of LGBT and women’s organizations was not an informed one. Furthermore, just a couple of months before the plebiscite, the Colombian Constitutional Court reaffirmed the legality of same-sex marriage (*SU214/16*, 2016). The Court’s pronouncement provoked a mobilization against its judicial decision and

also against adoption by same-sex couples; more than 2 million Colombians signed against it (González, 2017, p. 123). Additionally, that same year, Evangelical and Catholic conservatives led another mobilization against the adoption of an anti-bullying manual that contained LGBTIQ+ inclusive sex education for public schools. This manual, created with UN support, was going to be implemented in the context of a judgment of the Constitutional Court in a case of suicide of a minor, Sergio Urrego, a victim of bullying at school due to his gender identity and sexual orientation (El Espectador, 2016). The then-president decided not to implement it after the plebiscite's results and stated that his government did not promote "gender ideology" (El Espectador, 2016).

In this context of mobilizations against LGBTI rights, many opinion polls showed that opposition to "gender ideology" was a significant factor for the voters who rejected the Peace Agreement (Macedo & Jacobucci, 2020, p. 112). According to the Monitoring Group for the Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the so-called concept of "gender ideology" was part of the propaganda directed to generate 'aversion and fear of progress in the rights of women (...) [and] had an important weight and accounts for an adverse context for the achievement of equality and non-discrimination against women and the LGBT population' (The Monitoring Group for the Implementation of CEDAW in Colombia, 2019, p. 4). This campaign and the political context previously explained are clear proofs of how the public scrutiny of the Agreement was affected by misinformation, the patriarchal character of Colombian society, the binary conception of sex/gender intrinsic in it, and the 'strength, structure, and socio-sexual expectations of gendered orders in the country' (Loken & Hagen, 2022, p. 13). The following section will explain this further.

2.2. GENDER PANIC: THE BINARY CONCEPTION OF SEX/GENDER

The result of the plebiscite was a significant setback for the peace process, and both sides of the armed conflict were forced to return to the negotiating table to adjust the first version of the Peace Agreement. In this renegotiation phase, the Colombian Government decided to convene a 'Great National Dialogue' where sectors in favor and against the Agreement could

present their written proposals for adjustments and clarifications. The peace delegations in Havana processed these proposals to build a reviewed version of the Peace Agreement. Additionally, the delegations held meetings to listen to the arguments of the representatives of political and religious groups who led the campaign against the first version of the Agreement and different social sectors which were in favor, including LGBT and women's organizations (Fundación Compaz, n.d.). This section will present their proposals regarding the concepts of gender perspective and gender-based violence and analyze them from a theoretical perspective grounded in feminist and queer theories. This analysis will elucidate why the concept of gender perspective of the first version of the Peace Agreement -drafted by the Sub-commission of Gender with the participation of LGBT and women's organizations- changed in the revised version of the Agreement excluding LGBTIQ+ persons from its scope and focusing only on women.

2.2.1. What were the proposals and arguments of the political and religious groups who led the campaign against the first version of the Peace Agreement?

The proposals presented against the gender perspective of the first version of the Peace Agreement could be summarized into four main changes: (i) clarify throughout the Agreement that the concept of gender perspective corresponds 'only to the restoration of the rights of women victims of the conflict' (Hoyos, 2016, as cited in Oficina del Alto Comisionado para la Paz, 2018b, p. 274); (ii) eliminate all references to sexual orientation, diverse gender identity, gender stereotypes; (iii) include the protection of the family as a comprehensive guideline of the Agreement and add in its preamble the following paragraph: '[e]mphasizing that the family is the fundamental nucleus of society. It is constituted by natural or judicial ties, by the free decision of a man and a woman to marry or by the responsible will to form it' (Hoyos, 2016, as cited in Oficina del Alto Comisionado para la Paz, 2018b, p. 276); (iv) include in the Agreement guarantees of the right of freedom of religion and recognize the ecclesiastic communities as victims of the conflict (Pacto Cristiano por la Paz, 2016, as cited in Oficina del Alto Comisionado para la Paz, 2018b, p. 277). To justify these proposals, they argued that the gender perspective of the first version of the

Peace Agreement went further than the achievement of equality between men and women since it promoted a “gender ideology” that they described in the following words:

An anthropology that does not recognize the sexual difference between women and men but centers on gender identity and sexual orientation. Based on this anthropology, essential institutions of society, such as marriage, family, adoption, filiation, and marital status, will have to be modified and no longer have constitutional recognition. These social institutions will be reinterpreted through “gender” (...) In this sense, the negotiating parties adopted a gender perspective that promotes the gender ideology, understood as a system of thought that pretends to reconstruct reality, law, the educational system, society (...) It restricts the rights of freedom of conscience and religious freedom (...) This ideology is promoted by the LGBTI community through the equal marriage, adoption, sex change, and the promotion of the theory that sex is not related to gender and that sexuality is not related to family but constructed by personal choices. These organizations and theories put the institution of the family at risk (Hoyos, 2016, as cited in Oficina del Alto Comisionado para la Paz, 2018b, pp. 274–275).

According to these arguments, the real problem of the definition of the gender perspective -constructed by the Sub-commission of Gender with the participation of LGBT and women’s organizations- was the inclusion of LGBT persons into the scope of the gender perspective as it entails a reexamination of the definitions of gender and sex. Hence, for them, this “gender ideology” poses a risk to the binary conception of sex and gender inherent in a conservative vision of society. This vision only recognizes the existence of two gender/sex categories: men/male and women/female -who must be cisgender- and one sexual orientation: heterosexuality. The concept of “gender ideology” used by Colombian political and religious groups is part of an anti-LGBT/anti-gender global movement that aims to undermine LGBT rights and women’s rights (Albarracín-Caballero, 2022). According to Serrano-Amaya, the origin of the “gender ideology” relies on the debates held at the Conference on Population and Development -Cairo, 1994- and the World Conference on Women -Beijing, 1995- (Serrano Amaya, 2019, p. 157). In these conferences, the Vatican

presented a counter-response to the feminist proposals of gender equality and women's rights. The Vatican's arguments were based on a biological view of gender that argues that there is a natural difference between women and men that is God-created; therefore, immutable and predetermined (Case, 2019, p. 639). According to this explanation, 'owing to their different biological make-up, men and women have distinct "essences" and thus are predisposed to differ mentally and behaviorally' (Saguy et al., 2021, p. 2). In this sense, the agenda of feminisms and LGBTI movements, as well as that of the United Nations, was considered to be part of a "cultural colonization" aimed at subverting the "natural" moral and sexual order, the concepts of family, gender hierarchies and heteronormativity (Faur & Viveros, 2020, p. 12).

Based on this context, this section will break through the arguments presented by Colombian political and religious groups and analyze them through a feminist and queer lens. First, they stated that "gender ideology" does not acknowledge the inherent sexual distinction between women and men. Instead, it promotes a "new anthropology" based on gender identity and sexual orientation. As said before, considering sex to be based on fixed biological characteristics is a crucial argument of the anti-gender movement; therefore, for them, sex and gender cannot be changed by "personal choices." This statement directly opposes the feminist and queer theories, which posit that sex and gender are not fixed categories but social constructs, as explained below.

One of the main achievements of the second wave of feminism was to recognize gender as a sociocultural construction (Hines, 2020, p. 702); as famously stated by Simone de Beauvoir, 'one is not born a woman, but rather becomes one' (de Beauvoir, 1973, p. 301). The separation of sex from gender played a crucial role in understanding that women's subordination was rooted in an imposed social category (gender) and was not pre-determined by biology. Feminists explained that gender is based on socially constructed roles and expected behaviors attributed to women and men in society, which are related to the sex assigned at birth (Gonzalez-Salzberg, 2018, p. 14). In this sense, if the roles and expectations of who a woman is are socially constructed, they can change. This fear of the political and religious sectors led the campaign against "gender ideology." They wanted to maintain

control over the definition of women and link it to their “role in society,” i.e., being mothers and forming a family composed of a heterosexual couple composed of a cisgender man and a cisgender woman.

Regarding sex, lesbian and materialist feminists contested its fixed nature and emphasized the crucial role that heterosexuality has in constructing the binary division of sex and gender. According to the biological approaches, which the representatives of the campaign against the Peace Agreement share, sex is part of nature and only has two categories: female or male. On the contrary, Monique Wittig argued that sex is a category that does not exist *a priori*, but is a political and cultural construction of the heterosexual society, which attributes a determined understanding to physical characteristics with the objective of keeping an unequal reality; therefore, sex is not natural but political (Wittig, 1992, p. 17). Wittig questioned heterosexuality understood as a system that reproduces doctrines regarding differences between the sexes to justify women’s oppression (Wittig, 1992, p. 15). This scholar stated that heterosexuality is also a political regime and a cultural construction, and its power is shown through language (Wittig, 1992, p. 15).

Similarly, Christine Delphy emphasized that gender was the reason behind the conceptualization of an anatomical difference between male and female bodies. She asserted that ‘gender precedes sex (...) masculinity and femininity are the cultural creations of a society based on a gender hierarchy’ (Delphy, 2002, p. 55). In other words, gender creates the binary notion of sex, and both are socially and culturally constructed. Judith Butler furthered these theories by stating that sex is socially constructed; it is subject to change and, therefore, is not fixed but fluid (Butler, 2015, p. 10). Thereby, ‘there is no reason to assume that genders ought to remain as two. (...) When the constructed status of gender is theorized as radically independent of sex, gender itself becomes a free-floating artifice’ (Butler, 2015, p. 9). In other words, sex/gender are not limited to the binary conception of female-woman/male-men, they can be changed. Under this logic, Butler developed the concept of gender performativity¹⁶: ‘[t]here is no gender identity behind the expression of gender; that identity is performatively

¹⁶ ‘Performativity is not a singular act, but a repetition and a ritual, which achieves its effects through its naturalization in the context of a body, understood, in part, as a culturally sustained temporal duration’ (Butler, 1990, p. 16).

constituted by the very “expressions” that are said to be its result’ (Butler, 2015, p. 25). Gender is constructed through behaviors and acts repeated over time. ‘We act as if being a woman or a man was an internal reality or something that is simply true about us, a fact. Actually, it is a phenomenon that is being produced all the time and reproduced. So, to say gender is performative is to say that nobody is a gender from the start’ (Judith, 2011). Furthermore, Butler considered that performativity is imposed onto us, a forced repetition of bodily acts and discourses that reproduce gender norms (Butler, 1993, p. 59). However, she argued that people could subvert and transform normative gender norms (gender subversion); therefore, as said before, new configurations of gender are possible and diverse gender identities can challenge the rigid norms of gender norms, gender/sex binarism, and compulsory heterosexuality (Butler, 2015, p. 198). Gender is not limited to a binary, it is ‘a changeable and revisable reality’ (Butler, 2015, p. 25).

Within this theoretical framework, the idea of changing the sex assigned at birth or identifying with a non-binary gender identity goes against traditional and conservative beliefs of the political and religious sectors that led the campaign against the “gender ideology” of the first version of the Peace Agreement. The feminist and queer theories explained above contested the compulsory order of sex/gender/desire or the heterosexual matrix¹⁷ that this conservative social project reinforces. In other words, their project of society only recognizes the existence of two gender/sex categories: men/male and women/female -who must be cisgender- and one sexual orientation: heterosexuality. Any person who does not respond to this expectation is “deviated.” Any theory that considers gender and sex as social constructions -rather than God-created biological categories- threatens the “moral” fabric of society, the patriarchal social order, and gender roles and institutions linked to it (such as marriage and family).

¹⁷ Butler refers to the term heterosexual matrix ‘to designate that grid of cultural intelligibility through which bodies, genders, and desires are naturalized. (...) to characterize a hegemonic discursive/epistemic model of gender intelligibility that assumes that for bodies to cohere and make sense there must be a stable sex expressed through a stable gender (masculine expresses male, feminine expresses female) that is oppositionally and hierarchically defined through the compulsory practice of heterosexuality’ (Butler, 2015, p. 208).

2.2.3. What were the proposals and arguments of LGBTI and women's organizations?

After the plebiscite, there was a notable increase in collaboration between LGBTI and women's organizations and movements. They joined forces within their own organizations, and other social sectors and citizens to publicly express the importance of preserving the Peace Agreement. At this moment, their main goal was maintaining the peace dialogues and achieving the Peace Agreement to end the armed conflict. Therefore, the proposals presented by the LGBTI and women's organizations invited to the meetings in Havana to renegotiate the Agreement advocated for maintaining the first version of the Peace Agreement. They especially wanted the negotiators to respect national and international standards regarding women's and LGBTI rights and maintain the gender perspective constructed through their dialogue with the Sub-commission of Gender (Fundación Ideas para la Paz, 2016, p. 23). They wanted peace with diversity.

The LGBTI for Peace Group (“Grupo LGBTI por la Paz”) -a political alliance of activists and organizations of lesbians, gays, bisexuals, trans and intersex persons created in 2016 during the plebiscite context¹⁸- presented their proposals in a public communication (Grupo LGBTI por la Paz, 2016b). They proposed the recognition of diversity in the Peace Agreement and the guarantee of the LGBTI community's rights to truth, justice, reparation, and non-repetition. They thanked the Sub-commission of Gender and the women's movement for their support in the inclusion of a provision to protect these rights in the Accord and affirmed that the mentions of the LGBTI persons in this Agreement did not intend to introduce a concept of family different from the one present in Colombian legal frameworks¹⁹. Furthermore, they asked peace negotiators to maintain a gender and differential perspective in the Agreement since it was one of the non-repetition guarantees and a way of repairing the differential effects of the armed conflict had on persons based on gender, gender identity, sexual orientation, and ethnicity, among others. Finally, they expressed their accord with the Agreement's provisions recognizing stigmatization and

¹⁸ This political platform includes the organizations that went to Havana before the plebiscite: Caribe Afirmativo and Colombia Diversa.

¹⁹ It is important to point out that by that time the Constitutional Court of Colombia already recognized different forms of conforming a family, including same-sex couples. To read more see Judgement T-292/2016.

discrimination based on religion or creed (Grupo LGBTI por la Paz, 2016a). Besides these proposals, they led a public campaign in social media against misinformation about the gender perspective and the inclusion of LGBTI persons in the Agreement. Its main goal was to inform that the Peace Agreement did not refer to same-sex marriage and adoption, gender education, or abortion.

On the other hand, 109 women's organizations presented a public communication to the peace table with their proposals. They defended maintaining the first version of the Peace Agreement because it had the victim's rights as its main goal and respected humanitarian law and national and international standards on human rights. They proposed maintaining a gender perspective that acknowledges the distinct impacts of the armed conflict on individuals in vulnerable situations, such as women and LGBTI communities. They also formulated measures to address rights violations and historical injustices and inequalities that women face solely due to being women. In this sense, they stated that the adjustments to the proposals of detractors of the Agreement based on false ideologies could not go against the rights of equality and non-discrimination (109 organizaciones de mujeres, 2016). Just like LGBTI organizations, they agreed to include religious organizations as victims of the armed conflict.

In conclusion, the proposals of the LGBTI and women's organizations are similar because they shared the political goal of maintaining the recognition of their rights in the Agreement and promoting an inclusive gender perspective. They were unwilling to forfeit any protection of their rights to truth, justice, reparation, and non-repetition. However, they made compromises in response to the proposals put forth by the religious groups, which sought to include guarantees of the right to freedom of religion in the Agreement and the acknowledgement of ecclesiastical communities as victims of the conflict.

2.3. DEFINITION OF GENDER PERSPECTIVE AND GENDER BASED VIOLENCE IN THE (REVISED) VERSION OF THE PEACE AGREEMENT

After several months of further negotiations, a revised Agreement was signed in November 2016 and approved by the Colombian Congress instead of holding another referendum. As this section will show, following the three-level analysis, the level of inclusion of the voices of LGBTI and women's organizations in this version of the Agreement is medium rather than not strong. On the one hand, the revised Agreement changed or erased references and provisions that were an important recognition of these voices. On the other hand, it incorporated LGBTI persons into the guiding principle of non-discrimination, and it did not delete all the provisions concerning their rights to truth, justice, reparation, and non-repetition. Furthermore, in some provisions, they were included in the concept of vulnerable populations.

Regarding the changes that reversed the inclusion of the moral claims of the LGBTI organizations, the revised version of the Accord removed inclusive language²⁰ and terms that were perceived to promote "gender ideology". As a result, the revised version deleted more than 59 out of 113 references to the word gender, and all mentions of sexual orientation, diverse gender identity, and sexual condition were erased (Corredor, 2021, p. 60); as a rebound effect, mentions of women increased. Thus, the limited scope of the gender perspective was a deliberate effort to associate the concept solely with women, effectively excluding LGBTI persons. Consequently, the revised version reinforced the binary conception of sex/gender. Furthermore, some references to LGBTI persons' rights were replaced with ambiguous terms like "vulnerable populations" (Corredor, 2021, p. 60). In this context, the final definition of gender perspective only focused on women:

'Gender perspective: in the current Accord gender perspective means recognition of equal rights for men and women and the special circumstances of each one, especially those of women regardless of their marital status, life cycle, and family and community relationship, as a subject of rights and special constitutional protection.

²⁰ This is particularly problematic since, as Monique Wittig stated, words, categories, and concepts have material effects that are inscribed on the bodies; '[l]anguage projects beams of reality onto the social body, violently marks and shapes it'(Wittig, 1972, p. 3), therefore it is crucial to reorganize the world with new concepts, to destroy the categories of sex in politics and philosophy, and gender in the language; it is important to create different pronouns.

In particular, it implies the need to guarantee affirmative measures to promote that equality, active participation by women and their organizations in peacebuilding, and recognition of the victimization of women as a result of the conflict.

To guarantee true equality, it is necessary to put forward affirmative measures which respond to the disproportionate impact the armed conflict has had on women, in particular sexual violence. Regarding the rights of victims, their protection includes differentiated treatment that recognizes the causes and disproportionate effects that the armed conflict has had, especially on women. Moreover, differential action must be taken to enable women to access the plans and programs contained in this Agreement on equal terms. Participation by women and their organizations and the equitable representation of women in the different areas of participation must be guaranteed. The gender-based approach must be understood and applied in a crosscutting manner in implementing the whole of the Agreement' (Gobierno Nacional de Colombia & FARC-EP, 2016, p. 193).

This definition clearly has women as the sole focal point of the gender perspective and reinforces the binary conception of gender/sex since it only mentions the categories of women and men. Consequently, any person who falls outside this fixed binary is not recognized under the scope of the gender perspective. The definition does not make any mention of LGBTI persons, not even in an abstract manner, as seen in provisions that use the term "vulnerable populations." Additionally, this understanding of the gender perspective has a comprehensive scope since it was adopted as a general guideline, thereby having a crosscutting impact on the overall implementation of the Agreement. Consequently, when other provisions of the Peace Agreement mentioning gender perspective without explicitly mention LGBTI persons, these provisions must be interpreted as recognizing equality between men and women and acknowledging the differential impacts suffered by women. Furthermore, affirmative measures and protection of rights should be understood as protecting only the rights of women.

Moreover, replacing the terms related to gender in the first version of the Peace Agreement reinforced the gender binary and directly linked gender to women. For instance, references to “gender equity” were replaced with “equal opportunities between men and women,” and provisions related to “gender perspective” were changed to “equal access for men and women.” This had the effect of decreasing the explicit protection of the rights of LGBTI persons, therefore denying some of their moral claims while recognizing the proposals of political and religious groups of the campaign against the “gender ideology.”

The Peace Agreement did not define gender-based violence and only mentioned it twice. The first time, it stated that the prospective Truth Commission aims to explain the complexity of the armed conflict, especially the less-known aspects of it, such as gender-based violence. The second time, the Peace Agreement referred to gender-based violence as part of the measures to reinforce justice in the context of peacebuilding. It stated that ‘these measures have to contribute to guarantee effective access to justice in cases of gender violence, free of stereotypes about LGBTI persons and proportional sanctions to the gravity of the crimes’ (Gobierno Nacional de Colombia & FARC-EP, 2016, p. 79). This explicit reference to LGBTI persons is important since it is included in the guiding principle of the Peace Agreement of reinforcing access to justice. Nonetheless, another effect of the renegotiation of the Agreement was the erasure of all mentions of the anti-discrimination grounds of sexual orientation and gender identity (Corredor, 2021, p. 60). Therefore, the moral claims of the LGBTI organizations regarding the recognition of victims of gender-based violence due to sexual orientation and gender identity were not considered in the final version of the Peace Agreement.

However, not all references to LGBTI persons and their rights were deleted. The final version of the Agreement added a non-discrimination clause in the general guidelines called “Respect for Equality and Non-discrimination” that explicitly refers to LGBTI people. Hence, they are not contemplated as part of the gender perspective but as one of the forbidden grounds of discrimination. The general guideline states that the interpretation of the chapters of the accord must respect equality and equal opportunities to access the plans and programs of the Peace Agreement without discrimination (Gobierno Nacional de Colombia & FARC-EP,

2016, p. 193). Additionally, it states that the interpretation of the Peace Agreement cannot ‘deny, restrict or undermine the rights of persons regardless their sex, age, religious believes, opinions, ethnic identity, belonging to the LGBTI community, or any other reason’ (Gobierno Nacional de Colombia & FARC-EP, 2016, p. 193). This demonstrates that the peace negotiators made efforts to strike a balance between the proposals put forth by the political and religious groups opposing the “gender ideology” and those presented by women and LGBTI organizations during the negotiation and renegotiation phases of the peace process. In this sense, the voices and political pressure of women and LGBTI organizations throughout the participatory mechanisms -explained in Chapter 1- and in the renegotiation phase were crucial to maintaining a medium recognition of their moral claims in the final version of the Agreement. As Strid, Walby, and Armstrong stated, including the voices of minoritized groups in the policy-making process is, in some cases, more important than explicitly naming all the anti-discrimination grounds (Strid et al., 2013, p. 575).

2.3.1. The definition of gender perspective and the WPS Agenda

The revised version of the Peace Agreement signed in 2016 represents a significant advancement in the implementation of the WPS Agenda as it stands as the world’s first Accord to explicitly adopt a gender perspective. It is considered ‘an international model for gender-sensitivity [which] embodies the vision and principles reflected in UN Security Council Resolution 1325 and subsequent resolutions’ (UN Verification Mission in Colombia, 2020, p. 9). Although the gender perspective adopted in the Peace Agreement did not challenge the binary conception of gender/sex or recognize it as a structural cause of discrimination and the disproportionate impacts faced by victims of armed conflict, particularly LGBTI individuals, its definition does align with the principles of the Women, Peace, and Security (WPS) Agenda. At that time, this international policy framework did not challenge the gender/sex binary and solely focused on cis heterosexual women (Hagen, 2016, p. 313). For these reasons, the definition of gender perspective of the Peace Agreement was not criticized by the international community; instead, it was celebrated as an achievement of the WPS Agenda’s goals in terms of participation, investigation of sexual violence, and affirmative actions (UN Verification Mission in Colombia, 2020, p. 9). The international

community highlighted the significance of women's involvement in the peace process and the references to equality between women and men in the definition of gender perspective. Additionally, the emphasis on investigating sexual violence received high recognition from the international community, as it was one of the main goals of the WPS Agenda. Nonetheless, scholars have criticized this focus of the WPS Agenda, arguing that it may overlook other forms of gender-based violence within the context of the armed conflict, and unprotect other victims of this type of violence, especially LGBTI persons (Hagen, 2016, p. 323).

2.4. PRELIMINARY CONCLUSIONS

This chapter focused on the renegotiation phase of the peace process. More specifically it examined the plebiscite and its impact on the definition of the gender perspective in the revised Peace Agreement. The negative outcome of the plebiscite divided the country, and the campaign against the Peace Agreement, led by conservative political and religious groups, targeted the gender perspective as promoting a “gender ideology” that threatened traditional concepts of family and sexuality. This campaign capitalized on existing opposition to LGBTI rights in a politically charged context. This chapter argued that the rejection of the gender perspective and the narrower focus on cisgender women in the revised agreement reflect the patriarchal and binary understanding of gender in Colombian society. The arguments presented against the gender perspective’s inclusive scope stem from an anti-LGBT and anti-gender global movement, rooted in a conservative view of the world that upholds a fixed and biological distinction between men and women. In contrast, feminist and queer theories challenge the binary understanding of gender and sex categories, emphasizing that sex and gender are social constructions, therefore, not fixed but subject to change.

Following Sen’s theory, this chapter concludes that the moral claims of LGBTI organizations regarding their inclusion in the gender perspective did not completely survive the public scrutiny of the plebiscite in 2016, because it was a misinformed public discussion. This historical event changed the scope of the gender perspective of the Peace Agreement to exclude LGBTI persons since it ended up focusing only on women and based on a cis-

heterosexual binary conception of gender/sex. However, women and LGBTI persons were included in the process of renegotiating the Peace Agreement, and the guiding principle of non-discrimination explicitly refers to LGBTI. Additionally, not all the provisions regarding their rights to truth, justice, reparation, and non-repetition were deleted; in some provisions, they were included in the concept of “vulnerable populations.” For these reasons, based on Strid, Walby, and Armstrong’s three-level analysis, the chapter concludes that the revised version of the Peace Agreement has a medium level of inclusion and recognition of the voices of the LGBTI and women’s organizations.

As Sen stated, there are legitimate human rights claims outside the legal framework. In this sense, the moral claims of LGBTI organizations were not fundamentally erased just because they were not completely recognized in the Peace Agreement. LGBTI and women organizations continued demanding consideration of their moral claims, particularly advocating for the inclusion of a gender perspective that guarantees the satisfaction of the rights of LGBTI persons to truth, justice, reparation, and non-repetition. The third chapter will demonstrate how the inclusion of the terms “vulnerable populations” and explicit references to LGBTI persons in the anti-discrimination clause opened an opportunity to adopt a broader gender perspective during the implementation phase of the Peace Agreement. The JEP has partially recognized and incorporated some of their claims through advisory opinions from the Gender Commission.

CHAPTER 3.

IMPLEMENTING THE PEACE AGREEMENT I: TRANSPOSING THE DEFINITIONS OF GENDER PERSPECTIVE AND GENDER-BASED VIOLENCE

After signing the revised Peace Agreement, the Colombian Government started its implementation through a legislative process. During this phase, LGBTI and women's organizations voiced their support for the Peace Agreement and emphasized its inclusivity (Caribe Afirmativo, 2016). Instead of criticizing the binary definition of gender perspective in the final version of the Agreement, these organizations strengthened their political alliances and coalitions, such as Five Keys Alliance (Alianza Cinco Claves)²¹ and Group of Gender in the Peace (Grupo de Género en la Paz -GPAZ)²². These coalitions issued reports analyzing the implementation of the perspective and provided recommendations for improvement. Some of their members became legal representatives of victims in JEP's procedures. The absence of a critical stance against the binary conception of sex/gender in the Agreement could be interpreted as a political strategy of these organizations. In the divided post-plebiscite context, these organizations prioritized the defense of the Agreement's legitimacy to guarantee its implementation (Suárez, 2019, p. 35). Despite the campaign against the "gender ideology," they reinforced the idea that the Agreement included both women and LGBTI persons.

The first section of this chapter examines the adoption of the national legal framework of JEP based on Strid, Walby, and Armstrong's three-level analysis. The aim is to determine the recognition and inclusion of the moral claims of LGBTI and women's organizations regarding the investigation of gender-based violence and the implementation of the gender perspective. This examination will reveal that the definitions of gender perspective within

²¹ Alianza Cinco Claves is a group of feminists and LGBTI organizations that work for the differential treatment of sexual violence against women in the Final Peace Agreement. It is conformed of Red Nacional de Mujeres, Women's Link Worldwide, Humanas, Sisma, and Colombia Diversa.

²² GPAZ is a group of feminists and LGBTI organizations that aims to ensure that the gender perspective of the Peace Agreement is included and implemented. The organizations that composed this coalition participated during the negotiation phase of the peace agreement and demanded the inclusion of a gender perspective in the Agreement. GPAZ is conformed of Dejusticia, Comisión Colombiana de Juristas, Sisma Mujer, Humanas, Women's link Worldwide, Red Nacional de Mujeres Defensoras, Colombia Diversa, and Red Nacional de Mujeres.

the framework are ambiguous, with some reinforcing the binary conception of gender while others hinting at a broader understanding of gender than the Peace Agreement.

The second section of this chapter analyzes the advisory concepts of the Gender Commission of the JEP to determine their recognition of the moral claims of LGBTI and women's organizations. While Strid, Walby, and Armstrong's analysis is useful in assessing inclusivity, this chapter broadens their approach and highlights the importance of understanding the judges' interpretation of the law and the significance of naming within the legal framework. Failing to name marginalized groups subjects their inclusion to many variables (such as the diversity of judicial interpretations, the willingness of officials implementing the law/policy, and the efforts and capabilities of these groups and NGOs to monitor and pressure for inclusivity). Additionally, this section demonstrates how the Gender Commission's definition of gender perspective centered solely on women at first but gradually developed more inclusive definitions. However, these definitions remained inconsistent and ambiguous. Overall, this chapter demonstrates that the demands of the organizations have survived the uninformed scrutiny of the plebiscite and the inconsistencies in regulatory definitions.

3.1. ADOPTION OF THE NATIONAL LEGAL FRAMEWORK OF JEP

JEP's national legal framework is composed of (i) the Legislative Act 01 adopted in 2017 (Acto Legislativo 01, 2017) that reformed the Political Constitution of Colombia to implement the revised version of the Peace Agreement and establish the transitional justice system, called the Comprehensive System of Truth, Justice, Reparation, and Non-Repetition (SIVJRNR); (ii) the Statutory Law 1957/2019 that regulates the functioning and scope of JEP's work; and (iii) the rules of procedure of the JEP, Law 1922/201. This section will review the different legal sources that refer to the concept of gender perspective and gender-based violence in this legal framework.

i) Legislative Act 01 of 2017

According to the Legislative Act 01 of 2017, the SIVJRNR comprised four mechanisms: the JEP, the Truth, Coexistence and Non-Repetition Commission (CEV), the Unit for Search for Persons Presumed Disappeared in the Context and by Reason of the Armed Conflict (UBPD), and the Special Measures for the Protection of the Guarantees of Non-Repetition. The purpose of the SIVJRNR is to satisfy and guarantee the victim's rights. It aims to achieve this by elucidating the truth, holding accountable those responsible for serious human rights violations and breaches of international humanitarian law, ensuring justice, providing legal security for participating actors, fostering collaboration from those who committed crimes, and promoting peaceful coexistence, reconciliation, and non-repetition (Acto Legislativo 01, 2017, art. 1).

Article 1 of the Legislative Act 01/2017 states that the SIVJRNR must have a gender perspective, a differential approach, and a territorial approach to address the specific characteristics of violence against each population and in each territory, with a special emphasis on the women and children who were victims of the armed conflict. Further, this Article states that '[t]he gender and the differential approach will be applied to all phases and procedures of the System, especially with respect to all women who have suffered or participated in the conflict' (Acto Legislativo 01, 2017, art. 1). Article 12 of the Legislative Act 01/2017 states that JEP's legal framework should guarantee the gender perspective and the differential approach. However, the Legislative Act does not define the differential approaches nor the concepts of gender and gender-based violence.

ii) Statutory Law 1957/2019

The Statutory Law 1957/2019 establishes in Article 18 the differential approach and states that JEP's functioning will have an emphasis on the necessities of women and children who suffered the effects of armed conflict violence in a disproportionated way. It also establishes that 'the reparations in the SIVJRNR respond to the United Nations call for peace agreements to adopt a gender perspective, recognizing reparation and restoration measures, the distinct suffering of women, and the importance of their active and equitable participation in the JEP' (Ley 1957, 2019, art. 18). However, the JEP's Statutory Law does not define the

concepts of gender, gender-based violence or gender perspective. While it mentions the gender perspective when characterizing the differential approach, the lack of a clear definition results in the inconsistent and confusing use of this concept: sometimes the differential approach includes the gender perspective, like in the Statutory Law, and sometimes they are mentioned separately like in the Legislative Act 01/2017. Also, it is important to highlight that JEP's Statutory Law focused the gender perspective on women, does not mention LGBTI persons, and only refers to sexual violence without stating that it is a type of gender-based violence. This law reflects the impacts of the Peace Agreement's narrow scope of the gender perspective and its binary conception of gender.

iii) Rules of procedure, Law 1922/2018

Furthermore, the rules of procedure of the JEP -Law 1922/2018- include the gender perspective as a guiding principle of all procedures and decisions of this special tribunal (Ley 1922, 2018, art. 1). This means that JEP must guarantee effective equality and avoid exclusion in all procedures. In addition, this provision recognizes that unequal gender relations preexist the armed conflict and were exacerbated during the war. Further, while this definition does not refer to LGBTI persons, it does not focus on women either. Only one of its paragraphs refers to JEP'S obligation to comply with and guarantee women's rights, especially to live a life free of violence, to have access to justice, and to participate in peacebuilding. Article 1 also states that the intersectional and territorial diversity approaches are guiding principles. This implies that JEP must identify the causes and consequences of conflict's differential impacts on women, girls, boys, LGBTI persons, people with disabilities, and ethnic groups, among others. It must take adequate and sufficient affirmative measures in favor of subjects of special constitutional protection (Ley 1922, 2018, art. 1). In this sense, LGBTI persons are included explicitly only in the intersectional and territorial approaches of the procedural rules of JEP, and not in the gender perspective. Additionally, this Law does not define sex/gender, which keeps legal uncertainty regarding the scope of the gender perspective and gender-based violence, and who are the persons protected or included in these concepts.

Article 19 of this Law refers to gender-based violence to state that victims of this type of violence, including sexual violence, have the right not to be confronted by their perpetrator. In this sense, even though there is no definition of gender-based violence, this Law explicitly recognizes that sexual violence is one type of gender-based violence. Further, JEP's procedural rules establish in Article 11 that one of the aims and objectives of investigations is to determine the reasons behind the criminal plan, especially those related to discrimination based on gender, sexual orientation, gender identity, race, ethnicity, religious or political beliefs, or similar reasons. Article 19 is the only article in JEP's legal framework that refers to gender identity; however, neither gender nor sexual orientation are defined here.

JEP's legal framework define gender perspective but inconsistently, proposing different definitions that mostly focus on women and ignore LGBTI persons. In practice, these unclear definitions of the gender perspective could create legal uncertainty and inadequate protection for victims of gender-based violence, especially LGBTI persons, as some LGBTI and women's organizations pointed out during the law-making process of this legal framework. Moreover, the regulatory gap regarding the definitions of gender/sex and gender-based violence aggravates the mentioned lack of protection.

Caribe Afirmativo rejected the exclusion of the acronym LGBTI from the definition of gender perspective of Law 1922/2018 and expressed its concern since it could risk the rights of the LGBTI victims of the armed conflict (Caribe Afirmativo, 2018). It stated that, since the beginning peace process, LGBTI organizations promoted the inclusion of a gender perspective that guarantees the satisfaction of the rights of LGBTI victims to truth, justice, reparation, and non-repetition (Caribe Afirmativo, 2018). They have also demanded a gender perspective that considers the differentiated forms of violence LGBTI persons have suffered based on diverse sexual orientation, gender identities, and gender expressions. In this sense, Caribe Afirmativo considered that omitting the LGBTI acronym from the definition of gender perspective could limit the application of a gender perspective in JEP's work, but, in any case, it stated that JEP should interpret the definition in favor of the rights of the LGBTI persons (Caribe Afirmativo, 2018).

Likewise, as mentioned before, organizations that follow the implementation of the gender perspective by JEP -Alianza Cinco Claves, GPAZ, Center for Reproductive Rights, ILGA World - have been informing in their reports the lack of implementation of this perspective into JEP's work, especially the absence of a methodology to investigate crimes against LGBTI persons in the context of armed conflict. In this sense, they stated that JEP's conceptual and methodological parameters are insufficient to analyze gender and sexuality in the context of armed conflict and to reflect on measures of non-repetition of gender-based violence, including prejudice-based violence (ILGA World & Colombia Diversa, 2022, p. 8). Consequently, these organizations started demanding that JEP prioritizes the investigation of gender-based violence by opening a new line of investigation -macro-case- to analyze this violence in a comprehensive way that allows understanding its magnitude, systematicity, and impact in the context of the armed conflict (Technical Secretariat of the International Verification Component of the Peace Agreement, 2022a, p. 98). Chapter 4 will explain this further.

3.1.1. Three-level analysis of inclusion and recognition of the voices of women and LGBTI organizations

Based on Strid, Walby, and Armstrong, the national legal framework of the JEP has a medium form of visibility since LGBTI persons are included explicitly in the intersectional and territorial approaches of the procedural rules of JEP, and its Article 11 mentions sexual orientation and gender identity as part of reasons that must be investigated when analyzing the criminal plan. However, this framework contains ambiguous definitions of gender perspective and lacks a definition of gender-based violence. Furthermore, most of the definitions or references to these notions reinforce a binary conception of gender. Only one definition does not refer to either women or LGBTI persons (this omission will prove to be crucial in the judicial practice of JEP, as shown in Chapter 4). Therefore, while LGBTI organizations participated in the adoption process of the law, their demands were not included in the outcome.

3.2. THE CONCEPTUAL FRAMEWORK CREATED BY JEP'S GENDER COMMISSION

To put the guiding principle of the gender perspective into practice, the JEP created a Gender Commission on March 2018 (Acuerdo 001, 2020, art. 104). This Commission is a permanent body of six judges that aims to 'promote equality between men and women, non-discrimination, and to avoid the exclusion of persons with diverse gender identity and sexual orientation in the judgments, the administration of justice, and in JEP's functioning' (Acuerdo 001, 2020, art. 105). One of its main functions is issuing advisory concepts in cases related with the gender perspective or violence against women, girls, and LGBTI persons, when required by the judges (Acuerdo 001, 2020, art. 105). JEP's Gender Commission has issued 14 advisory concepts regarding gender-based violence, forced recruitment, differential impacts of the armed conflict, intersectionality, among others.

Through these advisory concepts, the Gender Commission created a conceptual framework to fix the gaps and inconsistencies in the notions of gender perspective and gender-based violence within JEP's legal framework. In some of these advisory concepts, the definitions of the Gender Commission aligned with the moral claims that LGBTI and women's organizations presented during the negotiation phase of the peace process and even exceeded these demands. While in others, the Gender Commission reiterated a women-focused definition of gender perspective and gender-based violence that aligned with the Peace Agreement and JEP's national legal framework. The level of inclusiveness of the moral claims varies depending on: (A) the understanding of gender and sex; (B) the inclusion of the reports of LGBTI and women's organizations; and (C) the approximation to JEP's legal framework.

This section will demonstrate that the conceptual framework of the Gender Commission is inconsistent in the definitions it provides. However, this does not negate the fact that the Commission is actively working towards the inclusion of LGBTI persons into the scope of the notions of gender perspective and gender-based violence, even though LGBTI and

women's organizations do not have a mechanism to participate in the process of issuing of the advisory concepts, since this is a task of the judges.

3.2.1. Advisory concepts that do not include LGBTI persons in the scope of the definitions of gender perspective and gender-based violence

In the advisory opinions of June 2018 and September 2020, the Gender Commission defined gender perspective and gender-based violence solely with a women-focused approach. As the present analysis demonstrates, the reasons behind this limited approach are a binary understanding of gender and sex, the absence of references to the reports of LGBTI and women's organizations, and a more literal approximation of JEP's legal framework.

A. The understanding of gender and sex

As mentioned in Chapter 2, the definitions of gender and sex are at the heart of disputes not only in theoretical feminist discussions²³ but also in political and democratic debates, such as the plebiscite. The Gender Commission is no exception. Depending on the approximation this advisory body takes of these two notions, the definition of who counts as a victim of gender-based violence changes. In the same sense, the scope of the gender perspective changes to include LGBTI persons or to exclude them. In this context, the advisory concepts that adopted a women-focused approach of gender perspective and gender-based violence understood sex as a biological category and gender as a social construction. Therefore, sex was linked to the anatomical, physiological, and genetic differences between women and men; while gender was linked to the roles, norms, and stereotypes that produce the "feminine" and the "masculine" (Gender Commission, 2018, p. 7). In the words of the Commission, 'gender is a social and cultural construction, but sex is not since sex refers to the biological and natural characteristics with which we are born, female or male, and it has anything to do with sexual orientation' (Gender Commission, 2020b, p. 7). This definition shows that the Gender Commission adopted a position that aligns with the ideas of the second

²³ To read more about the debates inside the feminist movement, see (Hines, 2020).

wave of feminism²⁴ since it did not contest the sex/gender binary. On the contrary, the Commission reinforced it by stating that sex was immutable and emphasizing its biological basis.

By applying this binary conception of sex/gender, the Commission limited the scope of the gender perspective to women in both advisory opinions. The Commission defined this approach as ‘an analytical and methodological tool that makes visible how gendered differences interact and how this creates inequality between men and women’ (Gender Commission, 2018, p. 7). This definition acknowledges a central issue in the history of feminism, the ‘distinction between men and women, and the subordination of the latter group to the former’(Gonzalez-Salzberg, 2018, p. 14); but it does not consider the impacts that gender has on persons other than cis women —making invisible all other realities outside the sex/gender binary.

Furthermore, the Commission restricted the subject of gender-based violence to women. Its definition relied on Article 1 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará), which defines violence against women as ‘any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere’ (Convention of Belém Do Pará, 1979, art. 1). Following this definition, the Commission stated that for violence to be based on gender the reason behind it must be ‘being a woman’ (Gender Commission, 2018, p. 2). Therefore, apart from women, the Commission did not include others who could suffer from this type of violence, such as LGBTI persons. Thus, definitions of gender perspective and gender-based violence with a women-focused approach make invisible the violence, discrimination, and differential impacts suffered by LGBTI persons or anyone who does not comply with the roles, norms, and stereotypes originating from the sex/gender binary. Moreover, they do not identify nor analyze structural causes of violence, such as cisnormativity and heteronormativity.

²⁴ See Chapter 2, Section 2.2.1.

B. The inclusion of the reports of LGBTI and women's organizations

Another element that explains the level of inclusiveness of the moral claims of LGBTI and women's organizations is the absence of references to the LGBTI voices. In both advisory concepts, the Gender Commission did not refer to the reports that LGBTI organizations submitted to JEP as legal representatives of victims during the procedures. Even though the reports were not issued directly to the Gender Commission, since it is a consultative and technical body and not a tribunal or chamber, the Commission could access them.

Moreover, as explained in Chapter 2, the biological approach in the definition of gender and sex was used by the conservative political and religious groups during the renegotiation phase of the Agreement to oppose the inclusion of LGBTI persons in the gender perspective²⁵. In this sense, the women-focused definition of the Gender Commission does not align with the moral claims that the LGBTI and women's organizations presented during this phase. As Section 3.2.2. will explain, considering the reports of LGBTI organizations is an important factor in adopting a more inclusive definition of gender-based violence and gender perspective.

C. The approximation to JEP's legal framework

In both advisory concepts, the Gender Commission referred to national and international legal instruments of JEP's legal framework to define gender perspective and gender-based violence. Nonetheless, the Commission interpreted these legal instruments in a literal way replicating their women-focused approach. Consequently, it did not include LGBTI persons in the scope of these notions. In the advisory concept of June 2018, the Commission elaborated a section about the national legal framework of JEP where it referred to the Articles and provisions that define or mention the gender perspective; for instance, the Commission quoted the Peace Agreement's definition of gender perspective (p.16), the Legislative Act 01/2017, and JEP's Statutory Law. As mentioned in Chapter 2 and in Section 3.1. of this chapter, the Peace Agreement defined gender perspective solely focusing on

²⁵ See Chapter 2, Section 2.2.1.

women and reinforcing the gender binary. Legislative Act 01/2017 and the Statutory Law did not define gender perspective but established that its emphasis should be on women and children who disproportionately suffered the conflict's impacts. Thus, the Commission interpreted these provisions literally and replicated their women-focused approach.

When the Commission defined the concept of gender-based violence, as said before, it quoted the definition of violence against women of the Convention of Belém do Pará and further elaborated the definition based on the Judgement of the Supreme Court of Colombia (*Judgement March 4th*, 2015) and the General Recommendation no. 19/1992 of the CEDAW Committee. Again, the Commission's approach to these instruments was literal and the definition did not include LGBTI persons. It is important to note that if the Gender Commission had followed the Inter-American standards at the time, it could have interpreted these notions in a broader way.

In 2012, the IACtHR ruled that sexual orientation and gender identity are categories protected by the American Convention on Human Rights (*Atala Riffo and Daughters v. Chile*, 2012, para. 91). Furthermore, in the Advisory Opinion OC-24 of 2017, the IACtHR stated that gender identity is ‘the internal and individual experience of gender as each person feels it, which may or may not correspond to the sex assigned at birth (...) sex and gender should be perceived as being a part of the constructed identity that is the result of the free and autonomous decision of each person, and without this having to be subject to their genitalia’ (*Advisory Opinion OC-24*, 2017, para. 94). Consequently, the IACtHR considered that sex and gender are part of gender self-identification, the Gender Commission did not mention this when defining gender and sex.

The IACtHR also pointed out that hate crimes and transphobic violence ‘constitute a form of gender-based violence, driven by the desire to punish individuals whose appearance or behavior appears to challenge gender stereotypes’ (*Advisory Opinion OC-24*, 2017, para. 134). Moreover, the IACHR recommended interpreting Article 9 of the Convention of Belém

do Pará²⁶ to include sexual orientation and gender identity in the grounds the State must consider in cases of violence against women (Comisión Interamericana de Derechos Humanos, 2015, para. 52). Although the Advisory Opinion and the report do not have a mandatory character, the Gender Commission had the opportunity to interpret the scope of gender-based violence and gender perspective in a more inclusive manner, considering the caselaw and recommendation of the IACHR to include LGBTI persons.

3.2.2. Advisory concepts that include LGBTI persons in the scope of the definitions of gender perspective and gender-based violence and go beyond

Other advisory concepts issued in March 2019, December 2020, January 2022, and February 2022 by the Gender Commission significantly advanced in acknowledging the moral claims presented by LGBTI and women's organizations since the negotiation phase of the Peace Agreement. These advisory concepts addressed the inclusion of LGBTI persons into the scope of the gender perspective and recommended analyzing the differential impacts the armed conflict had on them. They also recognized that LGBTI persons have suffered from gender-based violence during the conflict. In this regard, the Gender Commission took up the LGBTI organizations' demand to include prejudice-based violence as a specific type of gender-based violence to investigate violence against LGBTI persons²⁷. In this sense, the Commission rescued the moral claims of LGBTI and women's organizations. Even some of these concepts went beyond and extended the scope of gender-based violence to any person, with a particular emphasis on women and LGBTI persons since they have suffered from this type of violence in a differentiated and disproportionated way.

The elements that could explain the difference in the interpretation of these advisory opinions, compared to the ones that adopted a women-focused approach that does not include

²⁶ In 2021, the IACtHR interpreted the Convention of Belém do Pará to expand its protection to trans women in the case of *Vicky Hernández and others v. Honduras*. The IACtHR recognized that 'violence against persons based on gender identity or expression, and specifically against trans women, is also gender-based violence' (*Vicky Hernández and Others v. Honduras.*, 2021, para. 128).

²⁷ See Chapter 1, Section 1.2.

LGBTI persons, are a non-binary understanding of gender, the recognition of the voices of LGBTI and women’s organizations, and a creative approximation to JEP’s legal framework.

A. The understanding of gender and sex

None of the advisory concepts issued in March 2019, December 2020, January 2022, and February 2022 explicitly defined gender and sex. However, the definitions of gender perspective and gender-based violence did not focus solely on cisgender women. This time the Gender Commission expanded their scope, and by doing so, a non-binary understanding of gender and sex can be inferred.

In March 2019, the Commission defined gender-based violence following the definition of the United Nations Population Fund: ‘[i]t encompasses any harmful act perpetrated against a person's will and based on differences in social attribution (gender) between men and women. GBV acts violate a certain number of universal human rights protected by international conventions and instruments’ (Gender Commission, 2019b, p. 3). Then, the Commission stated that ‘gender-based violence, in a broad sense, is suffered by people because of their condition as women or men, or for reasons of diverse sexual orientation or gender identity’ (Gender Commission, 2019b, p. 18). This conceptualization recognizes the moral claim that LGBTI organizations presented during the negotiation phase of the peace process since the Commission acknowledged that gender-based violence includes violence perpetrated due to sexual orientation and gender identity²⁸. Including these two notions in the definition of gender-based violence could be interpreted as understanding gender outside the binary. It recognized that persons could self-identify outside the rigid categories of men and women and be considered victims of gender-based violence.

Moreover, the Gender Commission went beyond the moral claims of LGBTI and women’s organizations regarding the recognition that women and LGBTI suffered from gender-based violence; since it recognized that anyone could suffer from gender-based violence. From a

²⁸ See Chapter 1, Section 1.2.

queer theory perspective²⁹, this definition could be interpreted as a queerer approach to gender-based violence. According to Meredith Loken and Jaime Hagen, queering gender-based violence means expanding its scope to include gender minority populations and men (Loken & Hagen, 2022, p. 2). It also means considering sexuality and gender identity in the analysis of this type of violence, since these concepts are ‘integral elements of gender and [help to explain] violence that punish gender deviance’ (Loken & Hagen, 2022, p. 16).

In December 2019, the Commission quoted the IACtHR’s judgment *Atala Riffo and Girls v. Chile*³⁰ to identify the oppression systems underlying gender-based violence. It stated that in armed conflicts, gender-based violence is a consequence of heteronormativity and patriarchy, which create gender norms and stereotypes (Gender Commission, 2019a, p. 2). Then, it stated that ‘gender-based violence, including sexual violence, is not only perpetrated against women and girls but also against any gender expression that questions patriarchy and heteronormativity’ (Gender Commission, 2019a, p. 3). Identifying the oppression systems underlying gender-based violence recognizes the moral claims of LGBTI and women’s organizations. They demanded the analysis and dismantling of the structural causes of patriarchal and homophobic imaginaries that reproduce violence against women and LGBTI persons³¹.

From a queer theory perspective³², it is groundbreaking that the Commission included the notion of heteronormativity. One of the distinguishing aims of queer theory is to question the naturalized character of identities and ‘the heteronormative understandings of genders and

²⁹ Teresa de Lauretis, the first scholar that use the term queer theory, in her article ‘Queer Theory: Lesbian and Gay Sexualities’ stated that one of queer theory’s emphasis is ‘to recast or reinvent the terms of our sexualities, to construct another discursive horizon, another way of thinking the sexual (...) [to deconstruct] our own discourses and their constructed silences (...)’ (de Lauretis, 1991, p. 4).

³⁰ See the references to the Inter-American standards on Chapter 3, Section 3.2.1.

³¹ See Chapter 1.

³² Based on Derrida’s concept of deconstruction³² and the works of Foucault, Rubin, and Butler, among other scholars, queer theory applies ‘a postmodern understanding of identities that contest their stability, challenging not only the fixity of categories such as sex/gender and sexuality but also the traditional construction of these characteristics as opposed binaries’ (Gonzalez-Salzberg, 2018, p. 28). It questions the ‘discourses that reinforce the system of two mandatory genders [men/women] and one normal sexuality [heterosexuality]’ (Gonzalez-Salzberg, 2018, p. 22).

sexualities’ (Gonzalez-Salzberg, 2018, p. 22) and to analyze the regulatory powers behind them. In this sense, heteronormativity is a crucial term for this critical wave of thought. Lauren Berlant and Michael Warner defined this notion as ‘the institutions, structures of understanding, and practical orientations that make heterosexuality seem not only coherent - that is, organized as a sexuality- but also privileged’ (Berlant & Warner, 1998, p. 548). Heteronormativity then is an oppressive system that considers heterosexuality as the “normal” and preferred sexuality and causes violence, discrimination, and exclusion against those who don’t fit into the heterosexual category (Rubin, 2012, p. 146). In this context, including heteronormativity in the definition of gender-based violence deepens the Commission’s analysis of the structural causes of gender-based violence, its impacts, ways of operation, and the heteronormative assumptions behind it.

In December 2020, the Gender Commission stated that prejudice-based violence is a type of gender-based violence (Gender Commission, 2020a, p. 11). Based on María Mercedes Gómez’s scholarship³³, the Commission explained that prejudice-based violence is an analytical tool that explains and makes visible ‘the foundation of the violence exerted on what is different’(Gender Commission, 2020a, p. 6). Therefore, violent acts seek the enforcement of what is considered “correct” in a determined society (Gender Commission, 2020a, p. 7). This analytical tool ‘makes it possible to understand the uses of the violence and how it maintains the status quo, in which women and LGBTI persons tend to be discriminated against and excluded’(Gender Commission, 2020a, p. 10).

When referring to the differentiated impacts of prejudice-based violence on women, the Commission referred to the lesbian feminist scholarship of Gayle Rubin and Jana Sawicki to explain how compulsory heterosexuality is one of the reasons behind women’s subordination, and the violence against them (Gender Commission, 2020a, p. 8). Rubin argued that sexual identities and behaviors are classified in systems of sexual judgment that establish a sexed hierarchy, which considers one of them more “valuable,” “normal,” and “natural” than others: marital, reproductive, heterosexual, monogamous, and noncommercial sex (Rubin, 2012, p. 151). Consequently, persons outside these parameters are stigmatized,

³³ To read more about this concept, see (Gómez, 2008).

oppressed, persecuted, and punished (Rubin, 2012, p. 180). Following her work, the Gender Commission concluded that having a ‘diverse sexual orientation is a transgression of an order based on an obligatory heterosexuality’ (Gender Commission, 2020a, pp. 8 and 29), and therefore prejudice-based violence aims to separate or eliminate “the different.”

In the advisory opinion of December 2020, the Commission also suggested analyzing the pertinence of using Butler’s concept of the ‘heterosexual matrix’³⁴ to understand its impact on socially established norms and how they could be the basis of prejudice-based violence (Gender Commission, 2020a, p. 8). Although the Commission did not include this concept in the definition of this violence, it is an important reference since it seems to be considering sex as social construction. It is significant that the Commission includes these concepts in the analysis of prejudice-based violence and gender-based violence in general. This approach acknowledges that the foundations of violence lie in the patriarchy and a gender/sex/desire system links sex assigned at birth (female/male), the binary conception of gender (woman/man), and the restriction of desire to heterosexuality (Butler, 1990, p. 82). The heterosexual matrix helps to understand why anyone who does not comply with fixed binaries, and the gender roles and norms related to them, disrupts the normative alignment of sex/gender/desire, and therefore must be corrected/punished/persecuted through gender-based violence to keep the status quo of the heterosexual matrix.

Finally, the Commission expanded the scope of the gender perspective to include LGBTI persons. Applying Crenshaw’s concept of intersectionality, in February 2022, the Commission stated that an analysis with a gender perspective, an intersectional approach, and a broad comprehension of gender considers sexual orientation, gender identity, and gender expression as factors that ‘give rise to a particular way of suffering the conflict on by gay, lesbian, bisexual people, trans, or other persons with diverse sexual orientations, gender identities, or expressions’ (Gender Commission, 2022b, p. 8). From this reference, it can be

³⁴ Butler uses the term heterosexual matrix ‘to designate that grid of cultural intelligibility through which bodies, genders, and desires are naturalized. (...) to characterize a hegemonic discursive/epistemic model of gender intelligibility that assumes that for bodies to cohere and make sense there must be a stable sex expressed through a stable gender (masculine expresses male, feminine expresses female) that is oppositionally and hierarchically defined through the compulsory practice of heterosexuality’ (Butler, 2015, p. 208).

inferred that the Commission comprehended gender outside the binary conception, including not only LGBTI persons but any person outside the sex/gender binary. And went further to include intersectionality as an analytical tool that helps to ‘identify the oppression systems and the systematicity of discrimination’ (Gender Commission, 2022b, p. 20).

B. The inclusion of the reports of LGBTI and women’s organizations

When quoting María Mercedes Gómez’s work, the Commission pointed out that the LGBTI organizations Caribe Afirmativo and Colombia Diversa used this author’s definition of prejudice-based violence in their reports (Gender Commission, 2020a, p. 6). The recognition of this type of violence has been a central demand of LGBTI organizations since the peace negotiation. Furthermore, the Commission used Colombia Diversa’s report ‘When Prejudice Kills’ (‘Cuando el prejuicio mata’) to explain the differentiated impacts of prejudice-based violence on women and LGBTI persons (Colombia Diversa, 2012, p. 9). Additionally, in its examination of the causes of this violence, the Commission quoted the report ‘To Become in Silence’ (Devenir en silencio) by Caribe Afirmativo stating that ‘prejudice-based violence is established and legitimated by a society that has heteronormativity and gender binarism as its dogma. (...) Violence due to hierarchical and exclusive prejudices is generated from behaviors framed in gender-based violence’ (Caribe Afirmativo, 2019, p. 39). The Commission also quoted a report from Alianza 5 Claves to underscore the significance of recognizing the diversity and plurality of victims, understanding the specificities of victimizations, its underlying causes, and the differentiated impacts experienced by women, LGBTI individuals, and ethnic groups (Gender Commission, 2022a, p. 8).

(C) The approximation to JEP’s legal framework

Unlike the women-focused advisory opinions, in these other concepts, the Gender Commission had a more creative approach to JEP’s legal framework. Its sources were mainly feminist scholars, and it did not quote the final version of the Peace Agreement. It also used the reports of LGBTI and women’s organizations. The only advisory concept -from the ones analyzed in this section- that quoted JEP’s national legal framework was the one issued in

February 2022. However, in this case the Commission's interpretation was not literal but creative. As the definitions of gender-based violence and gender perspective demonstrated, the Commission challenged the women-focused approach of this legal framework. It redefined gender perspective to include LGBTI persons, and gender-based violence to extend its scope to anyone who suffers from it.

When using the caselaw of the Inter-American Court of Human Rights (IACtHR), it referred to the case of *Atala Riffo v. Chile*, which, as said before, is the first judgment of this regional Court regarding the rights of LGBTI persons. Following the European Court of Human Rights and the United Nations System standards, the IACtHR included gender identity and sexual orientation in the list of anti-discrimination grounds of Article 1.1. of the American Convention on Human Rights. Therefore, it stated that 'any discriminatory norm, act, or practice based on the sexual orientation of persons is prohibited' (*Atala Riffo and Daughters v. Chile*, 2012, para. 91). Regarding prejudice-based violence, the Gender Commission did not refer to important judgments of the IACtHR³⁵, but used María Mercedes Gómez's scholarship, which has deeply influenced the construction of the concept of prejudice violence by the organs of the Inter-American System of Human Rights.

3.2.3. Three-level analysis of inclusion and recognition of the voices of women and LGBTI organizations

The advisory concepts of the Gender Commission demonstrated the importance of reviewing the judicial interpretation of the law/policies when analyzing the level of recognition and inclusion of the voices of LGBTI and women's organizations without a more creative interpretation of the Gender Commission, the moral claims of these groups would not have been considered since the national legal framework of JEP maintains a women-focused approach to the notions of gender-based violence and gender perspective. In this sense, merely examining the participation of these organizations in the law/policy-making process

³⁵ See (*Vicky Hernández and Others v. Honduras.*, 2021); (*Azul Rojas Marín and Another v. Perú*, 2020), and (*Olivera Fuentes v. Perú*, 2023).

or the adoption of demands in the law/policy and their practical implementation, as proposed by Strid, Walby, and Armstrong, is insufficient.

Naming minoritized groups is not a minor issue but holds significant importance because failing to do so subjects their recognition and inclusion to many variables, such as diverse judicial interpretations; the wiliness of those who implement the law/policy; and the efforts of marginalized groups and NGOs to monitor and pressure for the inclusive implementation, if their political and economic capital allows them to do so. Consequently, I propose broadening the three-level analysis elements to include the judges' interpretations of the law/policy. Tracing the voices and demands of LGBTI and women's organizations in the implementation phase of the law/policy is crucial to assessing their voices' visibility and the level of their inclusion. An analysis that includes this implementation phase proves that naming should be given greater weight because it can help prevent exclusion, lack of recognition, and legal uncertainty.

3.3. PRELIMINARY CONCLUSIONS

This chapter demonstrated the ambiguity of the definitions of gender perspective in JEP's national legal framework and the lack of definition of gender-based violence. It also highlighted that most of the definitions in this legal framework have a women-focused approach. Through its advisory opinions, the Gender Commission started to create a conceptual framework to fill these gaps and inconsistencies. In some of these advisory concepts, the definitions of the Gender Commission aligned with the moral claims that LGBTI and women's organizations presented during the negotiation phase of the peace process and even surpassed these demands. In others, the Gender Commission reiterated a women-focused definition of gender perspective and gender-based violence aligned with the Peace Agreement and JEP's national legal framework. The level of inclusiveness of the moral claims varied depending on the understanding of gender and sex, the inclusion of the reports of LGBTI and women's organizations, and the approximation of JEP's legal framework. The most inclusive definitions were the ones issued in advisory opinions that understood gender

and sex in a non-binary way, included references to LGBTI and women's organizations reports, and interpreted the legal framework creatively.

Although there are inconsistencies in the definitions of the conceptual framework, the Gender Commission has actively strived for greater inclusivity of LGBTI persons into the scope of the notions of gender perspective and gender-based violence. Even though LGBTI and women's organizations do not have a mechanism to participate directly in issuing the advisory concepts, the demands of these organizations have survived the misinformed scrutiny of the plebiscite and the inconsistencies in regulatory definitions. This chapter has also proved that naming, and the lack of it, has a significant impact on recognition and inclusion. Consequently, the three-level analysis of Strid, Walby, and Armstrong must be reassessed. Moreover, including the analysis of the judges' interpretations of the law/policy is crucial since it enables tracing the voices and demands of marginalized groups. The next chapter will stress on the significance of the judicial application of the law in assessing levels of inclusion of minoritized communities.

CHAPTER 4.

IMPLEMENTING THE PEACE AGREEMENT II: CASELAW OF THE SPECIAL JURISDICTION FOR PEACE

Following the three-level analysis of Strid, Walby, and Armstrong, this chapter aims to analyze the outcome of the legal framework in the caselaw of the JEP. It will examine two cases: one case of a requirement of amnesty for a case of sexual violence against one woman and two girls and the first case where JEP recognized a gay man as a victim of the crime against humanity of persecution on the grounds of gender, under Article 7 (1) (h) of the Rome Statute. A study of these two cases allows a critical evaluation of the consequences of the definitions of gender perspective and gender-based violence of JEP's legal and conceptual framework. Furthermore, these cases enable an examination of the extent to which the judicial interpretation of these two notions aligns with the moral claims LGBTI and women's organizations made during the peace process. At the end, this chapter will explore the current difficulties faced by JEP in the opening of the new macro-case of gender-based violence, along with some of the forthcoming challenges that lie ahead.

4.1.JUDGMENT OF THE TRIBUNAL FOR PEACE: GENDER PERSPECTIVE IN A CASE OF SEXUAL VIOLENCE AGAINST WOMEN

The Appeals Division of the Tribunal for Peace of JEP (Tribunal) issued a judgment on November 25th of 2021 to resolve an appeal filed by the attorney of Mr. Rojo Arenas -who is a former combatant of the guerrilla FARC- against a declaration of non-applicability of amnesty for rape and other forms of sexual violence. These crimes were committed against a woman and her two minor daughters -civilians- in the context of the armed conflict. The Chamber for Amnesty's judgment (Chamber) declared the non-applicability of amnesty for sexual violence crimes but extended the benefit of provisional release -that Mr. Rojo Arenas had regarding a rebellion crime- to also cover the sexual violence crimes. The Chamber did

this without increasing the level of strictness of the conditionality regime³⁶. Furthermore, the investigation of sexual violence crimes was not prioritized by the Chamber since there was none macro-case regarding gender-based violence.

The Tribunal applied a women-focused gender perspective to solve the appeal, which had different consequences regarding: (i) the strictness of the conditionality regime and (ii) the legal presumption of connection between the armed conflict and sexual violence. The application of the gender perspective strengthened the protection of the rights of women who suffered sexual violence in the armed conflict, as will be explained.

The Tribunal did not define the gender perspective; instead, it referred to the national legal framework of JEP. It cited the provision of the Peace Agreement that pertains the definition of the gender perspective, as well as Articles 1 and 12 of the Legislative Act 01/2017, which contain the obligation to incorporate the gender perspective in the Procedure Law of the Special Jurisdiction for Peace. Additionally, the Tribunal mentioned Articles 1 and 65 of JEP's Procedure Law that establish that all JEP's procedures must consider unequal gender relations and their instrumentalization and exacerbation during the armed conflict, as well as the rights of women. These provisions also state that the restorative component of the sanctions in cases of gender-based violence should consider victim participation and the promotion of activities that encourage the dismantling of prejudices and gender stereotypes (*Judgement TP-SA-AM n.º 273, 2021, para. 18*). Furthermore, the Tribunal directly quoted the definition of gender perspective of Article 18 of JEP's Statutory Law:

The operation of the JEP will emphasize the needs of the women, girls, and boys who suffer in a disproportionate and differentiated way the effects of the serious infractions and violations committed during the conflict. Reparations in the Comprehensive System for Peace must respond to the United Nations call that any peace agreement must adopt a gender perspective, recognizing reparation and restoration measures, the

³⁶ The conditionality regime is a document that contains the obligations to contribute to the guarantee of the rights of the victims to truth, justice, reparation, and non-repetition. Persons called to appear before JEP must comply with these obligations to maintain legal benefits.

special suffering of women and the importance of their active and equitable in the JEP (*Judgement TP-SA-AM n.º 273, 2021, para. 19*).

This definition of gender perspective reflects a binary conception of sex/gender. By exclusively mentioning women, girls, and boys, it excludes individuals who do not fit within this rigid binary framework. Consequently, the gender perspective is narrowed down to the analysis of issues specific to heterosexual cisgender women and children's rights within the compulsory order of sex/gender/desire. This definition clearly exemplifies the challenges explained in Chapter 3 regarding the binary conception of the gender perspective of JEP's legal framework, which includes the Peace Agreement. The limitations imposed by the plebiscite of 2016 on the scope of the gender perspective are evident in this legal framework, which restricts the interpretation of the Tribunal.

While the definition of gender perspective applied by the Tribunal is narrowed, it does protect the rights of cisgender women and girls. In this sense, the level of inclusion of their moral claims is strong since it recognized the differential impacts that the armed conflict had on women and the adoption of reparation measures with a gender perspective that respond to the particular suffering of women. Furthermore, the application of this gender perspective in the judgment strengthened the protection of the rights of women who suffered sexual violence in the armed conflict, as will be explained next.

4.1.1. The strictness of the conditionality regime

The Tribunal decided to revoke the conditionality regime since the Chamber did not increase its strictness level according to the seriousness of the crimes. It stated that sexual violence is a non-amnestible crime; therefore, the obligations of the conditionality regime to maintain the legal benefits must be strict, special, and respond to the application of a gender perspective (*Judgement TP-SA-AM n.º 273, 2021, para. 22*). In this sense, the Tribunal ordered the Chamber to adjust the conditionality regime guaranteeing the participation of the victims. The Tribunal listed two special obligations: to take a course for the awareness and sensitization regarding gender, which the Gender Commission must create, and to contribute

to the truth by answering specific questions about gender roles, the context of sexual violence in the region and the armed group, among others questions that the Gender Commission must suggest to the Chamber (*Judgement TP-SA-AM n.º 273 de 2021*, 2021, para. 22.1.).

Therefore, the role of the Gender Commission is crucial to guarantee the rights of the victims in this case and of all the victims of sexual violence who are participating in the procedures since the Tribunal is the highest judicial instance of JEP. The special obligations of the conditionality regime will start to apply, in general, to other cases of sexual violence. In this sense, the understanding of gender-based violence and gender perspective of the Gender Commission will impact the content of the gender-sensitive course and the identification of the structural causes of sexual violence through the questionnaire.

4.1.2. The legal presumption of connection between the armed conflict and sexual violence

Based on the caselaw of the Constitutional Court of Colombia, the tribunal stated that in the prosecution of sexual crimes against women the legal presumption of connection of sexual violence and the armed conflict must be applied, especially when the crimes were committed in territories with the highest level of escalation of the armed conflict. This means that women victims do not have to prove the connection for their cases to fall into the material competence of the JEP. The burden of proof does not rest on them. Furthermore, it is prohibited to infer women's consent in these cases. These procedural rules are strong protections for women victims of sexual violence since the lack of evidentiary capacity in this type of crime has been one of the historical causes of impunity.

The special protections afforded to women emanate from the strong legal and conceptual framework that develops a gender perspective and seriously considers violence against women. As argued in the previous chapters, this framework was achieved through the active participation and voices of women victims, women's organizations, and the feminist movement throughout the various stages of Colombia's peace process. It was also influenced by international and regional standards concerning women's rights, including the CEDAW Convention, the Belem do Pará Convention, the CEDAW Committee's General

Recommendations, the caselaw of the IACtHR, the reports of the IACHR, and the Women, Peace, and Security (WPS) Agenda.

However, the question remains whether these protections based on a women-focused gender perspective also apply to LGBTI persons who suffered sexual violence or other forms of gender-based violence. The existence of multiple definitions of gender perspective and gender-based violence with varying scopes of protection is problematic since this could restrict the access to differentiated or specific protections for LGBTI persons. It is noteworthy that the tribunal referenced the Gender Commission's definition of gender perspective in a footnote. The definition cited is from the Commission's management report for the year 2018:

[Gender perspective is] (i) the analytical lens that allows the recognition and transformation of unequal hierarchical power relations that subordinate women or diverse gender identities and sexual orientations, produce discrimination, violence and gender inequality and that condition the guarantee and effective enjoyment of rights and access to assets and resources; (ii) although unequal gender relations pre-exist the armed conflict, in the procedures before the JEP it will be considered that these relations were instrumentalized, exacerbated and accentuated during the conflict and deepened the damage, consequences and impacts of violence on the lives of women, girls, and the LGBTI population; in addition, (iii) the Approach aims to guarantee real and effective equality between men and women and avoid the exclusion of diverse gender identities (*Judgement TP-SA-AM n.º 273*, 2021, p. 27).

Despite this footnote, the content of the judgment did not change, and this definition did not have an impact on the Tribunal's interpretation of the provisions regarding the gender perspective of the legal framework. However, the definition referenced in the footnote recognizes gender perspective as an analytical tool that aims to identify, acknowledge, and transform unequal power relations that give rise to discrimination, violence, and inequality. This inclusive definition is broad enough to encompass oppressive systems such as the patriarchy, cisnormativity, and heteronormativity while also acknowledging that diverse gender identities and sexual orientations are subordinated to these unequal and hierarchical

power relations. In essence, the Gender Commission's definition, as quoted in the footnote, surpasses the definitions within JEP's legal framework. If the Tribunal had considered the advisory concepts of the Gender Commission and other sources, such as feminist and queer theory, it could have constructed a broader, more inclusive, and comprehensive definition of gender perspective, potentially leading to a different interpretation of the legal provisions.

4.2.DECISION OF THE RECOGNITION CHAMBER: GENDER PERSPECTIVE IN A CASE OF PERSECUTION ON THE GROUNDS OF GENDER

In the Decision of July 14th of 2022, the JEP's Recognition of Truth, Responsibility, and Determination of Facts and Conducts Chamber (Recognition Chamber or Chamber) analyzed 260 cases of extrajudicial executions, euphemistically known in Colombia as "false positives." Among the victims was José Rubiel Llanos Arias, a gay man killed by the Army Brigade XVI and whose body was presented as that of an enemy combatant. The Chamber determined that his sexual orientation motivated the crime (*Decision SUB D- n.º 055, 2022*, para. 634). Notably, this was the first time that a Chamber of the JEP charged a member of the Colombian Army³⁷ with the crime against humanity of persecution on the grounds of gender, under Article 7 (1) (h) of the Rome Statute.

4.2.1. Inclusive interpretation of gender perspective

In this Decision, the Chamber defined gender perspective in a more inclusive way. First, it relied on the international legal framework that protects women's rights³⁸; but surprisingly when citing the national legal framework, it only mentioned Article 1 of the rules of procedure of the JEP, Law 1922/2018, which states that the gender perspective is a guiding principle of all procedures and decisions of this special tribunal (Ley 1922, 2018, art. 1). This provision does not refer to LGBTI persons. However, it does not focus on women either.

³⁷ Wilfrido Domínguez Márquez.

³⁸ The Chamber stated that the International Law framework has recognized the differential impact that armed conflict has had on women and girls. It quoted the United Nations Security Council 1325 of 2000, Article 76 of the Additional Protocol I of the Ginebra Conventions of 1977, and norm 134 of the International Humanitarian Law (parr. 527).

Only in its final paragraph refers to the obligation of JEP to comply with and guarantee women's rights, especially to live a life free of violence, access justice, and participate in peacebuilding. The Recognition Chamber did not mention the last paragraph of the provision; it only quoted the following parts of the Article explicitly and added some transition phrases: 'the gender perspective has to be considered "[in] order to guarantee real and effective equality and avoid exclusion, in all actions and procedures", recognizing that "unequal gender relations pre-exist the armed conflict" and that these "were instrumentalized, exacerbated, and accentuated during the conflict, deepening the damage, consequences and impacts of violence on life"' (*Decision SUB D- n.º 055, 2022*, para. 527). In this sense, the Recognition Chamber reconstructed the definition of gender perspective by interpreting this provision of JEP's national legal framework and not referring to the Peace Agreement or the other laws that have a women-focused approach.

4.2.2. A more inclusive scope of gender-based violence and the recognition of prejudice-based violence

After interpreting the provision of gender perspective, the Recognition Chamber stated that gender-based violence, in the context of armed conflict, has affected not only women and girls but persons with diverse SOGIE³⁹. Moreover, the Recognition Chamber referenced the Gender Commission's advisory concept of September 2021 to state that the *continuum of violence*⁴⁰ has operated as 'a medium that seeks to eliminate from the territory everything that is perceived as different (...) that goes beyond the heteronormalized codes imposed by a society' (*Decision SUB D- n.º 055, 2022*, para. 528). According to the Recognition Chamber, persons with diverse SOGIE have suffered gender-based violence that manifests in their elimination based on their differences (*Decision SUB D- n.º 055, 2022*, para. 528); furthermore, this violence had also the 'purpose of sending a message to the community that whoever thought and acted in a similar way would suffer the same fate' (*Decision SUB D-*

³⁹ The Chamber used this term in its Decision to refer to persons with diverse sexual orientations, gender identities, and gender expressions. For this reason, this section will use this acronym.

⁴⁰ The Chamber used the term continuum of violence and quoted the Gender Commission's advisory concept of September 2020 that stated that this notion helps to 'understand that the specific violence of the armed conflict brings together and exacerbates the violence present in relations of economic, political and social domination between men and women' (Gender Commission, 2020b, p. 5).

n.º 055, 2022, para. 528). Additionally, the Recognition Chamber explained that these forms of violence have been called prejudice-based violence and referred to the Gender Commission's advisory concept of December 2020 to define it as an analytical category to comprehend the different forms of violence against persons who are considered different (Gender Commission, 2020a) and 'the social imaginaries behind the construction of certain visions' (*Decision SUB D- n.º 055, 2022, para. 529*).

4.2.3. The crime against humanity of persecution on the grounds of gender

After explaining these theoretical concepts, the Recognition Chamber stated that it would apply an intersectional and differential analysis in the case that implies recognizing how the 'existing gender differences constituted a special vulnerability factor for victims of the violent acts perpetrated by the army brigade XVI' (*Decision SUB D- n.º 055, 2022, para. 530*), including one person with diverse SOGIE, women, and girls. As a result, this judgment was the first time JEP charged a member of the Colombian Army⁴¹ with the crime against humanity of persecution on the grounds of gender under Article 7 (1) (h) of the Rome Statute.

To charge this crime, the Chamber first stated that the Colombian Criminal Code does not have a crime that typifies the facts of this specific case. Therefore, it explained that JEP's legal framework includes International Humanitarian Law, International Criminal Law, and International Human Rights Law. The Chamber then referred to international and regional standards regarding the prohibition of discrimination based on sexual orientation and gender identity. At the international level, it quoted the cases of *Nicholas Toonen (1994) v. Australia* and *Edward Young v. Australia (2003)* issued by the Human Rights Committee and the General Comment No. 20 of the Committee on Economic, Social, and Cultural Rights. In the decision and General Comment, these bodies stated that sexual orientation and gender identity cannot be motives of discrimination. At the regional level, it referred to the case of *Salgueiro da Silva Mouta v. Portugal* of the European Court of Human Rights; and *Atala Riffo and Children v. Chile* of the IACtHR. In both judgments, the tribunals included sexual orientation as an anti-discrimination ground in the regional Conventions.

⁴¹ Wilfrido Domínguez Márquez.

Regarding International Criminal Law, the Chamber explained that the Rome Statute is the first binding international instrument that recognized the crime of persecution based on gender; before the Rome Statute, this crime was limited to discrimination based on political, religious, or racial motives (*Decision SUB D- n.º 055, 2022, para. 628*). It stated that the persecution ‘impairs or violates the fundamental human rights of a person because of his or her membership, affiliation or identification with a group’ (*Decision SUB D- n.º 055, 2022, para. 630*). This was proved in the case of José Llanos. The Chamber stated that the objective of the members of the army was to “clean” the region from “undesirable” persons; they called persons with diverse SOGIE “obnoxious faggots” (*Decision SUB D- n.º 055, 2022, para. 638*). The Chamber found that there was a policy of suppression of social groups that were considered by the army members as “undesirable”. This policy was not directed only at persons with diverse SOGIE but also at persons who carried out activities that the army personnel considered deviant (women sex workers, young persons belonging to the punk culture, and persons with cognitive disabilities). In the case of the murder of José Llanos, the perpetrators insulted the victim with curse words related to his sexual orientation which proved a discriminatory motivation based on gender. ‘Persons were persecuted and sentenced to death by the army troops in Tauramena because of their sexual orientation (...) the troops murdered, tortured and violently told him that he was disgusting and a faggot’ (*Decision SUB D- n.º 055, 2022, para. 640*).

From a queer theory lens, the decision of JEP’s Recognition Chamber is crucial since it reconstructed the definition of gender perspective leaving behind a women-focused definition and giving it a broader scope. Consequently, the Recognition Chamber extended the scope of gender-based violence to cover the violence suffered by persons with diverse SOGIE, without ignoring the differential impacts this type of violence has on women and persons with diverse SOGIE. Further, the Recognition Chamber acknowledged that gender-based violence is a continuum of violence that has the objective of eliminating difference or diversity, and everyone who does not comply with the heteronormative norms imposed by society. Also, it responded to the political claims of the LGBTI organizations, like Caribe Afirmativo and Colombia Diversa, to include in the analysis of gender-based violence the

concept of prejudice-based violence and to interpret the concept of gender-based violence in an inclusive way that recognizes and protects persons with diverse SOGIE. Moreover, this decision recognized that the persecution of persons because of their sexual orientation or gender identity is considered a crime against humanity. It concluded that the army had a policy of eliminating the “different” and the “undesirable” from the community. For them, persons outside the gender binary had to be “eliminated.” This is a clear recognition of the differential impacts and structural causes of violence against LGBTI persons, which was one of the main moral claims of the LGBTI organizations since the peace talks. Additionally, it is important to highlight that this judgment demonstrates the impacts of the advisory concepts of the Gender Commission on the decisions that the Judges are taking in the different macro-cases.

4.3. NEW MACRO-CASE TO INVESTIGATE GENDER-BASED VIOLENCE

According to the Final Report of the Truth Commission of Colombia (Truth Commission), ‘all the armed groups of the conflict persecuted LGBTIQ+ persons because of their non-normative sexual orientation, gender identity and gender expressions (...) the combatants selected these persons since for the combatants they were objectionable’ (The Truth Commission of Colombia, 2022a, p. 433). To win the war and obtain military advantages, armed groups developed two strategies: (i) controlling the population through the imposition of a social and moral control and (ii) gaining social legitimacy in the territories (The Truth Commission of Colombia, 2022b, p. 560). Selecting persons -who did not comply with the roles, stereotypes, and norms of a binary and patriarchal system- to perpetrate violent acts against them was crucial for the armed groups to achieve both strategies; hence, they ‘imposed an heterosexual and cis-normative order and gained legitimacy from the Colombian society since its prejudices justified and promoted violence against LGBTIQ+ persons, who were considered undesired’ (The Truth Commission of Colombia, 2022a, p. 560). The structural impunity was one of the causes that the Truth Commission identified as a explication of the persecution and violence suffered by LGBTIQ+ persons during the armed conflict; therefore it recommended to reinforce the implementation of the gender perspective in the procedures of the JEP and to open a macro-case to prioritize the investigation of sexual

violence and other types of violence based on gender and sexuality (The Truth Commission of Colombia, 2022a, p. 571).

The Truth Commission's recommendation was elaborated based on the claims of the LGBTI and women's organizations. As mentioned in Chapter 1, they demanded during the negotiation phase of the peace process the investigation of violence based on gender and the inclusion of a gender perspective in the Peace Agreement and in JEP's work. Likewise, after the creation of JEP, LGBTI and women's organizations started to demand the opening an specific macro-case⁴² to investigate conflict related gender-based violence (Alianza Cinco Claves, 2021). As a respond from the pressure of these organizations, JEP announced on July 11th, 2022, the opening of a new line of investigation called "Macro-case 11: on sexual violence, reproductive violence, and other crimes committed because of prejudice, hate, and discrimination against diverse gender, sex, identity, and sexual orientation in the context of the armed conflict" (macro-case). With this macro-case, JEP aims to prioritize the investigation of these type of crimes, respond the claims of the victims/survivors, and implement the recommendation of the Truth Commission. According to the International Verification Component of the Peace Agreement, the macro-case 'is the result of the claim of thousands of women, LGBTI persons, and human rights organizations that over the years have compiled reports and collected the necessary data to identify sexual violence in the context of war due to strategy and social control' (Technical Secretariat of the International Verification Component of the Peace Agreement, 2022b, p. 155).

Almost a year has passed since JEP announced the creation of the macro-case, however, in practice, it has not start to function. For this reason, LGBTIQ+ and women's organizations and political coalitions have been actively advocating for JEP to materialize the opening of the macro-case. For them and for the victims these organizations legally represent in JEP's procedures, this macro-case is a guarantee of the right of women and LGBTIQ+ persons to access to justice (Alianza Cinco Claves, 2023). The Office of the Attorney-General (Procuraduría General de la Nación) and Yolanda Perea Mosquera -a victim/survivor of

⁴² A macro-case is a line of investigation of JEP that analyzes a group of cases based on a specific thematic. For instance, there is a macro-case focused on extrajudicial killings and another one focused on forced recruitment of children during the armed conflict.

armed-conflict related sexual violence and a member of the women's organization Ruta Pacífica de Mujeres⁴³-, submitted an action for protection (acción de tutela) to guarantee hers and the rights of victims of gender-based violence to due process and to access to justice within a reasonable time. On 16th of July 2023, JEP's Tribunal for Peace decided to protect the rights invoked and give a period of 30 working days to the Recognition Chamber to decide about the prioritization of the macro-case. The Tribunal considered that the plaintiffs were right regarding the urgency of prioritizing the investigation since JEP's Investigation and Prosecution Unit has a limit of 10 years to bring charges before the Tribunal, which expires in March 2028 (*Judgement SRT-ST-111*, 2023, para. 78). In this context, JEP faces important challenges to investigate gender-based violence cases. First, the time limit of the Investigation and Prosecution Unit and the number of cases. Additionally, there is a sub register of cases and of the data regarding the gender identity and sexual orientation of the victims/survivors (*Auto SRVR No. 103*, 2022, para. 34).

Second, as mentioned in Chapter 3, JEP does not have a unified definition or interpretation of the notions of gender perspective or gender-based violence. This creates legal uncertainty for the victims/survivors, who do not know how JEP will analyze their cases. In particular, LGBTIQ+ victims cannot know if JEP will include them into the scope of these notions. This is important since, as explained before⁴⁴, there are special procedural protections for women victims of sexual violence that could be extended to LGBTIQ+ victims if the interpretation of the scope of the gender perspective is more inclusive. Furthermore, the analysis of the systems of oppression behind gender-based violence changes depending on the broadening of the scope. Consequently, the identification of the differential impacts of this violence could be limited. Ultimately, the understanding of the gender perspective impacts the guarantee of the rights of victims to truth, justice, reparations, and non-repetition. In this regard, LGBTIQ+ and women's organizations have been expressing their concern about the absence of a cross-cutting application of the gender perspective in the analysis of some macro-cases. They stated that it is problematic for the comprehensive understanding of the criminal patterns, causes of the gender-based violence, and the identification of the responsibility of

⁴³ This organization has been participating since the negotiation phase of the peace process.

⁴⁴ See Chapter 4, Section 4.1.

the different armed actors and their repertoires of violence. They warned that JEP is separating the analysis of gender-based violence, including prejudice-based violence, from other crimes committed by the armed actors (Caribe Afirmativo et al., 2023). Therefore, the application of the gender perspective is being limited only to cases of gender-based violence, which results in a lack of a more complex analysis of the armed conflict that could guarantee the necessary conditions for non-repetition and the structural transformations the LGBTIQ+ and women's organizations have been demanding since the negotiation phase of the peace process.

Third, there is a legal gap in the caselaw of JEP regarding the definition of sex. The Gender Commission defined sex only once in the first advisory concept issued in 2018. As mentioned before⁴⁵, this definition is based on the binary and biological conceptualization of sex. The advancements of the Gender Commission and JEP's Recognition Chamber have been focused in a more inclusive definition of gender, but they have not redefined sex. These bodies recognize that gender is a social construction but have not state that sex is also a social construction. They started using the concept of persons with diverse SOGIE, which does not include sexual characteristics. In this context, an important challenge JEP could face is the analysis of the cases of intersex victims; who are more than 421 persons, according to the Victim Unit (Unidad para las Víctimas, 2023). Moreover, it could have also the challenge to analyze cases of non-binary persons and therefore, to rethink the binary conception of sex/gender. JEP will decide this type of cases in a context of jurisprudential development. In February 2022, the Constitutional Court of Colombia decided⁴⁶, for the first time, to recognize the fundamental right of gender identity of non-binary persons and ordered to add a third box in the national ID with the legal mark "non-binary". In this judgement, the Court recognized that persons with diverse gender identities have been historically discriminated based on social expectations of gender and that non-binary persons did not have a legal

⁴⁵ See Chapter 2.

⁴⁶ The plaintiff was a person who identify as non-binary. The plaintiff said that their physical appearance does not correspond to the binary since their body has characteristics of both binary categories. Therefore, the ID with the sex markers F/M does not identify persons who don't fall into these two rigid categories.

protection in the Colombian legal system. The Court stated that ‘the binary system sex/gender of a society does not obey a given “natural” order, but is a product of culture, therefore temporary and changing’ (*T-033/22*, 2022, para. 43) and consequently moved from a biological definition of gender/sex to state that ‘gender is not assigned, it is lived and constructed’(*T-033/22*, 2022, para. 28).

4.4.PRELIMINARY CONCLUSIONS

This chapter highlights the significance of analyzing the level of inclusion and recognition in jurisprudence, as it is where norms are applied to specific cases. Two cases were examined: one involving sexual violence against women and girls, and the other concerning persecution on the grounds of gender against a gay man. The analysis reveals a strong level of recognition of women's rights in the first case, with legal and jurisprudential tools providing enhanced protection. In addition, the court did not interpret the provisions of the normative framework of the SJP related to the gender approach, but applied them directly, as these have a focus on women. As argued in the previous chapters, this framework was achieved through the active participation and voices of women throughout the various stages of Colombia's peace process. It was also influenced by international and regional standards concerning women's rights.

In the second case, a strong level of recognition and inclusion was identified, because even though the normative framework of the SJP has a restrictive definition of gender perspective; in practice the Chamber interpreted it inclusively, thus recognizing the moral claims of LGBTI organizations. The case analyzed was the murder of a gay man by members of the national army. Applying this perspective and the concepts of the Gender Commission, the Chamber recognized that bias-based violence is a type of gender-based violence. It went further and recognized that the persecution of persons because of their sexual orientation or gender identity is considered a crime against humanity. It concluded that the army had a policy of eliminating the "different" and the "undesirable" from the community. For them, persons outside the gender binary had to be "eliminated." This is a clear recognition of the differential impacts and structural causes of violence against LGBTI persons, which was one

of the main moral claims of the LGBTI organizations since the peace talks. Additionally, it is important to highlight that this judgment demonstrates the impacts of the advisory concepts of the Gender Commission on the decisions that the Judges are taking in the different macro-cases.

A joint analysis of both cases demonstrates that it is crucial to analyze the case law when applying the three-level analysis of Strid, Walby, and Armstrong. Judges play a crucial role in the inclusion and recognition of the voices and claims of organizations. But at the same time, this chapter proved that legal uncertainty generated by not naming adequately leaves wide discretion for judges, who, as evidenced, may or may not inclusively interpret the rules. In this sense, the argument made in Chapter 3 on the importance of naming inclusively in the norms is reinforced.

Finally, the chapter explained the origin of the new macro-case of gender-based violence. The Truth Commission of Colombia recommended the investigation of gender-based violence during the armed conflict, particularly against LGBTIQ+ individuals. In response to pressure from women's and LGBTIQ+ organizations, the Tribunal for Peace of JEP announced the creation of "Macro-case 11" to prioritize the investigation of sexual violence and other crimes based on gender and sexuality. However, the macro-case has not yet started functioning despite its importance for accessing justice for victims. JEP faces challenges such as time limits and a lack of unified definitions for gender perspective and gender-based violence. The limited application of the gender perspective to certain cases hinders a comprehensive analysis of the conflict and structural transformations. There is also a legal gap in JEP's caselaw regarding the definition of sex, which could be a challenge when JEP analyzes cases of intersex and non-binary victims. JEP's analysis of these cases will occur in the context of ongoing jurisprudential development. The Constitutional Court's recognition of the fundamental right of gender identity for non-binary persons provides a basis for rethinking the binary conception of sex/gender. Overall, the macro-case itself proved the importance of the advocacy and participation of LGBTI and women's organization. Thanks to their continuous pressure, their demands have been constantly being saved from the misinformed scrutiny of the plebiscite.

CONCLUSIONS

At the national and international levels, the Peace Agreement in Colombia has been recognized as innovative and inclusive. Throughout this thesis, I have sought to show the scope, difficulties, and limitations of the inclusion of the moral claims of LGBTIQ+ and women's organizations. This journey began in 2010, with the negotiation phase of the peace process, and ended in 2022 with the first ruling in which JEP recognized a gay man as a victim of the crime against humanity of persecution on the grounds of gender. This was a long journey through which it was possible to appreciate the efforts of the communities, the victims, and their representatives as they fought for inclusion and recognition in the Agreement and before the law. Based on the theory of Amartya Sen, who asserted that human rights should be considered as extrajudicial moral claims with aspirations of universality, I identified the most important moral claims of women and LGBTIQ+ organizations. The aim was to trace whether these moral claims were reflected in the Agreement, in the laws, and in the judgments after the Agreement. However, it was not enough to establish whether or not the moral claims were reflected in the law; it was also necessary to determine the levels of inclusion achieved; to do so, I started with Strid et al.'s analysis of the three-levels of inclusion in the creation of laws. These two theoretical tools were used transversally throughout the analysis to identify the scope, difficulties, and limitations of the recognition and inclusion of the voices and demands of women and LGBTIQ+ people.

In the first chapter, I presented how the struggle for the recognition of women and LGBTIQ+ persons achieved their inclusion in the negotiation phase of the Peace Agreement. Initially, the negotiation table in Havana reproduced the logic of war: if the combat was mainly between men, the peace negotiation was thought of as a discussion only between men. However, both the international community and victims' organizations showed that the war differentially affected minority population groups that deserved a place at the table. This resulted in the first inclusive version of the Agreement, with 138 gender-related provisions, 39 of which included LGBTIQ+ demands. Following the analysis of Strid et al., it was possible to characterize this first version of the Agreement as strongly inclusive because it

included the voices of the communities in the drafting process, named them throughout the document, and considered the differential nature of the violence they suffered.

The second chapter showed how the plebiscite to ratify the Agreement affected the level of inclusion and put at risk the survival of the moral demands of the LGBTIQ+ population. Against all odds, the plebiscite that intended to ratify and provide legitimacy to the Peace Agreement resulted in the rejection of what was agreed in Havana. With a small margin at the polls, the "no" vote won. Therefore, the negotiating teams had to sit down again to work out a second version of the Agreement. At the center of the public discussions was the concept of gender perspective, which was deliberately misinterpreted and renamed as "gender ideology" by the most conservative sectors of Colombian society. Following Amartya Sen's theory, I called this process "uninformed public scrutiny" to differentiate it from the informed public scrutiny that Sen considers in his theory. According to Sen, moral claims claiming universality should survive informed public scrutiny; however, the campaign against the Agreement was characterized by disinformation. As a result of this campaign and the subsequent rejection, the second version of the Agreement restricted the recognition of LGBTIQ+ persons and narrowed the scope of the concepts of gender-based violence and gender perspective to include women only, while the moral claims of LGBTIQ+ victims were relegated to the principle of non-discrimination. According to the analysis of Strid et al., the level of inclusiveness of the revised version of the Agreement can be characterized as medium since, despite the substantial changes made after the plebiscite, it still recognizes the moral claims of women and names the LGBTIQ+ population.

Following Sen's perspective, even after uninformed scrutiny, the moral demands of communities still survived. The third chapter examines how these demands persisted in the implementation phase of the Agreement. To this end, the legal framework of the JEP and the work of the Gender Commission were analyzed. Although LGBTIQ+ persons were explicitly included in the intersectional and territorial approaches of the procedural rules of the JEP, their exclusion from key definitions of gender perspective and gender-based violence subjected them to legal insecurity and compromised a more comprehensive analysis of gender-based violence that would make visible its differential impacts and identify its

structural causes. In addition, the inconsistent definitions in JEP's legal framework and its reinforcement of binary concepts of sex and gender. In response to the exclusion and inconsistency of the JEP's legal framework, the Gender Commission -created to guarantee the implementation of the gender perspective- sought greater inclusion through the concepts it issued. However, this inclusion varied depending on the understanding of sex and gender present in these concepts (some more inclusive than others), the acknowledgment of the voices of LGBTIQ+ and women's organizations, and how the Commission approached the JEP's legal framework (with readings that were either literal or creative). While it is possible to see an active effort by the Gender Commission to achieve greater inclusion, inconsistencies in definitions and the restrictive legal framework of the JEP restricted the inclusion of the LGBTIQ+ persons.

The application and interpretation of the law have been crucial in the recognition of the rights of LGBTIQ+ persons in Colombia. Thus, it is crucial to study how the concepts discussed in the previous chapters are reflected in the decisions of the JEP. In this sense, the thesis raised the need to extend the Strid et al. analysis model to include judges' interpretations of the laws. The last chapter evaluated the level of inclusiveness of two rulings of JEP. For this purpose, I chose a judgment on sexual violence committed against a woman and her two daughters and another judgment on the extrajudicial killing of a gay man that was typified as a crime against humanity of persecution on the grounds of gender. The analysis showed that the existing legal framework offers sufficient tools to ensure the protection and implementation of a gender-sensitive approach to how women and girls have suffered the violence of the conflict. This achievement resulted from the struggle of women's organizations that sought to be included in the deliberation and law-making processes since the negotiation phase of the Agreement. However, when it comes to cases involving victims from the LGBTIQ+ community, the JEP's Tribunal must employ interpretive strategies that allow for an inclusive reading of the restrictive legal framework of the JEP. This need for strategic interpretations results from the exclusion of these communities from key concepts such as gender-based violence and gender perspective. However, the active role of LGBTIQ+ organizations in both the pre-Agreement and the Gender Commission (through reports that were taken into account

by this consultative body) has allowed their voices to survive and continue to be taken into account.

The study of the inclusion strategies employed by the Gender Commission and the JEP's case law is crucial in light of the opening of the new macro-case dedicated to investigating gender-based violence. Indeed, these strategies of inclusion can serve as a model to ensure that the moral claims of the LGBTIQ+ community continue to be taken into account even when the levels of inclusion in the legal framework of the JEP and the second version of the peace Agreement seem insufficient to guarantee their rights. The chronological journey outlined here opens up several avenues for future research. One of the most urgent is to evaluate whether the legal framework of the JEP offers sufficient tools to guarantee the rights of more than 400 intersex victims and possible non-binary victims. Also, the theoretical and conceptual apparatus employed in this thesis may serve as a tool for the study of future JEP's rulings.

The cross-cutting study of the moral claims of LGBTIQ+ and women's organizations, as well as the challenges and obstacles they have faced, demonstrates the importance of listening to their voices in the process of creating and negotiating new laws. While the level of inclusion of victims has been limited in the legal framework of the JEP, the creative interpretation of the Recognition Chamber and the inclusion of updated theoretical discussions in the concepts of the Gender Commission give rise to hope. In a context of polarization on a global scale, where the rights of minority communities are challenged daily, it is crucial to recognize the effects of the struggles for recognition on the creation of more inclusive policies. Studying and tracing these struggles in the context of the Colombian peace Agreement also demonstrates the impact of creative interpretations of restrictive laws, the strategic alliances of organizations representing minority communities, and the importance of courts willing to achieve inclusion despite political and social pressure from conservative sectors of society.

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