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## INTERNATIONAL HUMAN RIGHTS COLLOQUIUM

● Interview with Rindai Chipfunde-Vava,

Director of the Zimbabwe Election Support Network (ZESN)

● Report on the IX International Human Rights Colloquium



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# PRESENTATION



This issue of the Sur Journal was developed in collaboration with the International Network for Economic, Social, and Cultural Rights (ESCR-Net). This network is a global initiative dedicated to promoting collective work between organizations and scholars around the world that strive to guarantee economic and social justice through human rights. To this end, the Network contributes to the development of a collective voice and joint activities among members, the exchange of information and mutual learning, the promotion of new tools and strategies, and the strengthening of links between different regions, languages, and disciplines.

Four of the articles published in this issue are revised versions of documents produced for the International Strategy Meeting on Economic, Social, and Cultural Rights and the ESCR-Net General Assembly held in Kenya, December 5-8, 2008, that grew out of the intense and valuable debates led by the participants in the event. The objective of these documents was to provide a critical evaluation of human rights work, placing a special focus on economic, social, and cultural rights – and, in particular, the collective work that the members and participants of the ESCR-Net have been developing in different thematic areas. At the same time, the articles sought to evaluate the future opportunities and challenges and discuss potential strategic interventions for ensuring effective human rights protection\*.

In this way, we are presenting a dossier in this issue that discusses which challenges and opportunities organizations and social movements fighting for global social rights are facing in certain areas, their main strategies, and a catalogue of recommendations for future action.

In the first article of the dossier, Ann Blyberg presents a brief history of civil society's use of budgetary analysis and explains in what working with a public budget as a tool for enforcing rights consists, in particular, in terms of economic, social, and cultural rights. She discusses different foci – transparency, gender, and right to food – of current work in this field and provides examples of experiences gained by civil society groups from different countries.

Aldo Caliori analyzes the manners in which increased international commerce and transnational financial flows, deregulation, privatization, and reduced State functions, have culminated in the debilitation of States' abilities to adopt active measures necessary for respecting, protecting, and satisfying human rights in their territorial jurisdiction. Based on a general description of tendencies posed by the intersection of commercial, financial, investment and human rights policies, Caliori presents a panorama of the strategies used by diverse organizations for protecting human rights in this context, including some success stories.

Patricia Feeney describes the ups and downs of the process for developing universal standards regarding corporate responsibility for human rights violations. She reflects on the reasons that lead to the disintegration of the Draft UN Norms on the Responsibilities of

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\* Other articles addressing the use of human rights strategies by social movements and base communities and work in the area of women's economic, social, and cultural rights were produced on this occasion and can be directly requested from the Network's secretary by email: [info@escr-net.org](mailto:info@escr-net.org).

Transnational Corporations and evaluates the strengths and weaknesses of 'Protect, Remedy and Respect Framework' adopted by the Human Rights Council in 2008, at the proposal of the UN Secretary-General's Special Representative for that subject, John Ruggie.

Finally, Malcolm Langford offers a socio-juridical panorama of the justiciability of economic and social rights in the national arena, formulating some questions regarding their origins, content, and strategies. He also includes the debate surrounding the impact of litigation and an evaluation of the main lessons learned. In conclusion, he offers some ideas about the future development of this field.

Completing this issue of the Journal are five articles, on diverse subjects, and an interview. In the first article, Víctor Abramovich presents a general panorama of some strategic discussions surrounding the role of the Inter-American Human Rights System (IAHRS) in the regional political scenery. The author suggests that, in the future, the IAHRS should expand its political role, setting its sight on the structural patterns that affect the effective exercise of rights by subordinate sectors of the population.

In their article, Viviana Bohórquez Monsalve and Javier Aguirre Román carry out a conceptual reconstruction of the three tensions existing in the concept of human dignity: i) the tension between one's natural and artificial character (or consensual or passive); ii) the tension between one's abstract and concrete character, and iii) the tension between one's universal and particular character.

In the third article, Débora Diniz, Lívia Barbosa, and Wederson Rufino dos Santos seek to demonstrate the way in which the field of disability studies has been consolidated into the concept of disabilities as constituting a social disadvantage. As a result of this new concept, as adopted by the 2006 UN Convention on the Rights of Persons with Disabilities, disabilities are not summarized as a catalogue of diseases listed by biomedical experts, but rather constitute a concept that denounces the inequality imposed by environments with barriers on bodies with impediments.

Building on a description of violence faced in Colombia by lesbian, gay, bisexual, transvestite, transsexual, and transgendered (LGBT) persons and on decisions passed down by the Constitutional Court regarding the protection of free sexuality options, Julieta Lamaitre Ripoll analyzes, in the fourth article, the law's symbolic role and argues that activists in her country have an ambivalent relationship with the law; at the same time as they distrust it, because of its ineffectiveness, they mobilize themselves for legal reform and celebrate the progressive jurisprudence of the Constitutional Court.

For the first time, and at the request of the event's participants, a brief account of the IX International Human Rights Colloquium will be included in the Sur Journal. Furthermore, during the IX Colloquium, an interview was conducted with Rindai Chipfunde-Vava, Director of the Zimbabwe Election Support Network (ZESN) that ends this issue of the Sur Journal. In it, Rindai emphasizes the importance of electoral observation in Africa and insists on the necessity for human rights defenders to see elections as a human rights issue.

We appreciate the support from the Ford Foundation, the ESCR-Net and the Observatório Interdisciplinar de Direitos Humanos of the Universidade Federal do Rio Grande do Sul (UFRGS) for the publication of the present issue of the Sur Journal.

Finally, we are extremely pleased to report that the Carlos Chagas Foundation will support the Sur Journal in 2010 and 2011. This new cooperation is exceptionally promising, because, in addition to financial support, this prestigious research institution will complement the Journal's editorial efforts.



JULIETA LEMAITRE RIPOLL

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ABSTRACT

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In a recent hearing before the Inter-American Commission for Human Rights, human rights activists denounced the violence in Colombia besetting lesbian, gay, bisexual, transvestite, transsexual and transgendered individuals (LGBT). Amongst the problems enumerated were abuse of police power, sexual violence in the prisons, murders fueled by hate, as well as several kinds of discrimination. This contrasts with the jurisprudence of the Constitutional Court, where there has been advancement in the protection of individuals' sexual rights. This article, which describes both the violence as well as the Court's sentencing, analyzes the symbolic role of the law and argues that these activists have an ambivalent relationship with the law: while wary of it, for its inefficacy, they mobilize for legal reform and benefit from the Court's progressive jurisprudence.

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KEYWORDS

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Gay rights – LGBT rights – Sexual rights – Same-sex equality – The Colombian Constitutional Court – Hate crimes.



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## LOVE IN THE TIME OF CHOLERA: LGBT RIGHTS IN COLOMBIA

Julieta Lemaitre Ripoll

On November 5, 2009 a group of Colombian organizations<sup>1</sup> held a special hearing before the Inter-American Commission on Human Rights (IACHR) on LGBT rights<sup>2</sup>. The fact that Colombia is one of the first nations in the region to have a hearing on this subject can be considered surprising since, without a doubt, in large part thanks to the Constitutional Court, LGBT rights are subject to special protection, which exceeds that of other countries and even that provided by international law. The jurisprudence not only considers laws that discriminate based on sexual orientation suspect, but has also explicitly prohibited discrimination on this ground in the military, schools, and the Boy Scouts. Moreover, same-sex couples enjoy many of the same rights as heterosexual couples, including the right to marital union, the right to an inheritance, the right to a pension, the right to be a health insurance beneficiary and the right to food.

What then could bring these organizations, including Colombia Diversa, a leader in the defense of LGBT rights, before the IACHR? On the one hand, its presence is undoubtedly a result of the success of the legal reform campaigns, which is reflected not only in the most recent jurisprudence, but also in the fact that a generation has been trained in human rights discourse, using it to pressure and shame the authorities. But its presence is also a manifestation of the Colombian paradox, so often mentioned, of a country that produces a luminous jurisprudence while at the same time being terrorized by bloodshed and violence.

In Colombia, as press reports and articles have repeatedly demonstrated, progressive norms co-exist daily with the impunity enjoyed by the state for human rights violations, territorial control by illegal armed groups and the terror engendered by the drug wars and the persistence of Marxist-Leninist guerrillas<sup>3</sup>. Neither regime has supremacy: judges, lawyers, and social organizations genuinely have this level of

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*Notes to this text start on page 88.*

creativity, intelligence, and commitment to a liberal-progressive vision of rights. At the same time, the armed groups, both legal and illegal, due to belief, convenience, or for profit, sow the fields and rivers with corpses and their limbs. In this article, I will discuss this paradox in the particular case of LGBT rights: both the violence that is denounced before the IACHR, as well as its exemplary constitutional jurisprudence, and I will speak about the unwavering faith in the law (and love for it) in the midst of violence (or cholera).

In her presentation to the Commission, Marcela Sánchez, director of Colombia Diversa, put forth a list of human rights violations; the abuses and deaths described were not unknown to the Commissioners, as they have the same format and content of claims made repeatedly in that venue, a limited repertory of the human capacity to inflict pain and humiliation. As many had done before her, she described a society plagued by discrimination, murder, torture, persecution, rape, and widespread fear. And of course, there are no national information systems; law enforcement officials, when they are not openly persecuting members of the LGBT community, are passive about investigating crimes against them. From 2006-2007, Colombia Diversa registered at least 67 hate murders in Colombia (ALBARRACÍN; NOGUERA; SÁNCHEZ, 2008).

In presenting this report, and this list of human rights defenders killed, Marcela Sánchez should also speak the names of those with tangible faces and voices, associates and acquaintances of Colombia Diversa, such as Álvaro Miguel Rivera, the Young activist who had helped draft the Colombia Diversa human rights report in 2005. He was found dead in his apartment in Cali on March 6, 2009, bound and gagged, with broken teeth and bruises on his body (ALBARRACÍN; NOGUERA; SÁNCHEZ, 2008; EL TIEMPO, 2009; YANED; VALENCIA, 2009). Similarly to the murderer of León Zuleta, a gay leader during the 1980's, Rivera's murder remains unpunished; no one seems to know who murdered him or why<sup>4</sup>. Except the obvious. That they were gay men visible as much for being out of the closet as for their activism, in a country that is virulently homophobic and where being a human rights defender carried an enormous risk<sup>5</sup>.

Listening to Marcela Sánchez discuss before the Commission not only the litany of human rights abuses but also the non-compliance of human rights norms, an inevitable question is why rely on the law as an engine of social change, both at the hearing and before the Constitutional Court<sup>6</sup>? Why would the Commission's pronouncement have any more effect than Colombia's progressive norms? It is not only because the law is breached for "lack of political will" embodied in some conservative officials who reject gay rights, and insist on the superiority of heterosexuals, as in the case of notaries who refuse to sanction same-sex marital unions (SARMIENTO, 2009). Nor is it a matter of a few local armed individuals bent on "social cleansing." It is a deeper problem of the law's inefficacy as an instrument of change, in particular judgments made without the support of the other branches, as we shall see in the case discussed. (ROSENBERG, 2008).

The weakness of the law, and of the rights defended by the Court, invites the question of the utility of constitutional jurisprudence, and even if useful, if it is worth expending so much effort and merits such enthusiasm. In other words, if we



subtract from the concrete benefits of a successful case the costs of litigation and legal mobilization (not only in terms of legitimizing power but in terms of money, work, and effort), it is possible that the difference between the costs and the benefits reflect an inexplicable excess of enthusiasm for and faith in the transformative potential of constitutional jurisprudence. The question that this article intends to answer is central to this discussion: why do so many intelligent and experienced individuals insist on using the law as an instrument of social change when they know of its limitations?

## 1 Fifteen years of luminous constitutional jurisprudence

It is probable that the main reason LGBT organizations place so much faith in the law is the Constitutional Court's jurisprudence. The Constitution of 1991, and especially its interpretation as provided by the Constitutional Court, have been central in mobilizing leadership, providing a vocabulary and a stage on which to make demands. While the Constitution itself makes no mention of gay rights, the Court, in a series of liberal decisions, extended the right to equality and human dignity to include protections against sexual orientation discrimination. These decisions served to change activist discourse, transforming what had previously been conceived as a question of culture and "lifestyle" into a question of fundamental rights.

Sexual orientation case law first emerged in the mid-1990's, when individuals, most of whom bore no relationship to one another, demanded protection and framed their suffering as a rights violation. During this time period, the lawyer Germán Rincón Perfetti stands out, as he began more or less systematically filing suit to protect individuals from sexual orientation discrimination. These first cases were rejected by the Court with sentences that perpetuated homophobic stereotypes by stating, for example, that homosexuality was abnormal and insisting that its expression was limited by "the rights of others," which seemed to include the right to be disgusted. (COLOMBIA, T-539, 1994b; T-037, 1995a)<sup>7</sup>.

One of the most widely recognized judgments from this time period was the case against the National Television Commission for censoring an AIDS prevention commercial that showed two men kissing at the Plaza de Bolívar in Bogotá (COLOMBIA, T-539, 1994b)<sup>8</sup>. In this case, the Court asserted that the Commission's decision was "technical," and that it fell within their jurisdiction; nonetheless, it added that gays had constitutional rights: "Homosexuals have legally protected interests when their conduct does not adversely affect the interests of others or become a stumbling block, especially during childhood and adolescence" (COLOMBIA, T-539, 1994b).

The Court's decisions began to change course in the mid-1990's. In 1995, the Court upheld the refusal of the Colombian Family Welfare Institute (ICBF, abbreviation in Spanish) to give a gay man custody of a girl in his care; the judgment made clear that this decision was grounded not in the man's sexual orientation, but his indigence and inability to provide materially for the girl (COLOMBIA, T-290, 1995b). Since that ruling, the Court began vigorously to adopt a discourse in favor of gay rights, based on the fundamental right to choose one's sexual orientation, and the right of individuals not to suffer discrimination for their choice of partner (COLOMBIA, C-098, 1996).

Ironically, this discourse was communicated more articulately in a 1997 judgment that denied equality for gays, upholding as constitutional a marital union law that denied its benefits to same-sex couples. Nevertheless, the Court affirmed in the judgment that it would reconsider its decision if it were proven harmful to norms of equality.

The cases that followed this ruling rejected discrimination against individuals on the basis of sexual orientation in several scenarios. In 1998, the Court linked the right to free development of personality and sexual choice in a case where it defended the right of gay teenagers to express their identity in school through their clothing, haircuts, attitudes, etc<sup>9</sup>. In two judgments rendered in the same year, the Court ruled that it was unconstitutional both for homosexuality to be grounds for disciplinary action for teachers in public schools and for it to be deemed a violation of military honor (COLOMBIA, C-481, 1998b; C-507, 1999).

In these judgments, particularly in the ruling on military honor, the Court gave more substance to what it called the right to self-determination based on two grounds of protection: on the one hand, the individual is protected by the right to equality and, on the other, by the right to the free development of his/her personality. This dual protection gives rise to a right to freely express one's personal identity, or to a right of self-determination, self-possession, and self-government. The Court spoke on this issue:

*“If sexual orientation is biologically determined, as asserted by some research, then the exclusion of homosexuals is discriminatory and in violation of equality, equivalent to segregation based on sex (CP art. 13). By contrast, other schools of thought argue that if the individual freely exercises his/her sexual preferences, that choice is protected as an essential element of his/her autonomy, intimacy and particularly his/her right to the free development of his/her personality (CP art. 16).*

*The core of the free development of one's personality refers to those decisions one makes over the course of time and that are critical to a life of autonomy and consistent with a vision of one's individual dignity. In a society that respects notions of autonomy and dignity, it is the person who defines, without outside interference, the meaning of his/her own existence, life, and the universe, since such determinations lie at the very foundation of what it means to be a human being.*

*(COLOMBIA, C-481, 1998b).*

Moreover, the Court stated that laws that discriminate on the basis of sexual orientation are suspect and that consequently any such rule or policy would require a strict application of the test for discrimination to determine its constitutionality. Any distinction based on sexual orientation, like race, ethnicity and sex, must meet certain conditions to pass constitutional muster, balancing the harm caused with the end result, while not infringing upon any fundamental right.

Despite this defense of gay rights, until 2006 the Court had not taken a progressive position on same-sex couples (LEMAITRE, 2005; MONCADA, 2002). In 2000, the Court slowed the pace at which it was expanding rights by claiming that it did not have jurisdiction over some matters (invoking the discretion of the legislative and executive branches), including cases in which a same-sex partner was

denied social security or compulsory health insurance (COLOMBIA, T-999, 2000a; T-1426, 2000b). That same year, the Court denied same-sex couples the right to adopt by asserting that it would not be in the best interests of the child. (COLOMBIA, T-999, 2000a; T-1426, 2000b). In both cases, the Court did not apply the strict test for discrimination that it had used previously, since the law did not use the word “homosexual” but instead limited the benefits outlined only to heterosexual couples. For this reason, the Court found no discrimination of a suspect class.

It became clear in the early years of the decade of 2000 that the Court protected sexual orientation vis-à-vis an individual’s rights, but not those of a same-sex couple. The protection of individual rights continued: the Court stated that notaries could not act on the basis of sexual orientation (COLOMBIA, C-373, 2002), and the Colombian Boy Scouts could not expel a member for being gay (COLOMBIA, T-808, 2003b). The Court held that conjugal visits in prison for same-sex couples were part of their right to the free development of their personalities ((COLOMBIA, T-499, 2003a), and that the police could not ban public gatherings simply because the individuals participating were gay (COLOMBIA, T-301, 2004).

It insisted that the homosexual couple conjugal visits in jail was part of the free development of personality (COLOMBIA, T-499, 2003a), and that police could not ban public gatherings of people for being gay (COLOMBIA, T - 301, 2004). But the Court also said the department of San Andres and Providencia could deny a person’s residence invoking as a justification the homosexuality of partners involved, the right of residence in the islands being reserved , for heterosexual couples ( COLOMBIA, C-336, 2008a). These judgments of the Court helped gay rights activists mobilize (GARCÍA; UPRIMNY, 2004), and perhaps even ushered in an era of more tolerant social attitudes towards sexual diversity (Restrepo, 2002). Mauricio García Villegas and Rodrigo Uprimny conducted a preliminary empirical study of the impact of Court decisions on gay rights activists, and concluded that the judgments encouraged mobilization and legal activism, and even strengthened the sense of identity and self-respect in the gay community. Not only was this true, but it stimulated the creation of organizations and their mobilization in Congress in search of greater protection of gay rights, for both individuals and couples.

## 2 From the Court to Congress and Back

After the issue reached this impasse in the early 2000s, some activists, motivated by the favorable rulings, went enthusiastically to Congress to lobby for legal reforms, in particular the adoption of a law permitting gay marriage. This course of action was suggested by the Court, which believed that the matter was in the purview of the legislator. The bill for same-sex rights, however, was repeatedly rejected<sup>10</sup>.

Since its introduction in 2001, the bill in support of same-sex rights has been attacked by conservatives, Catholics, and other Christians. It was introduced by Senator Piedad Cordoba; after being approved by the First Commission, it prompted several opponents to publish a full-page ad in *The Spectator*, with signatures of those who wished to kill the initiative, calling it immoral. The Catholic Church also opposed the initiative, warning that it might result in the acceptance of of homosexuality and

even the adoption of children by same-sex couples (El Tiempo, 2002). The initiative fell through, and this situation repeated itself in the years that followed: introduced by progressives, the initiative sank amid public opposition, from the Catholic Church, several other Christian churches, and prominent political conservatives. In all cases, the initiative enjoyed some support by activists; the difference over the years has been that the quality and quantity of support of the bills has been increasing.

The moment in which the bill had the best chance of becoming law was 2006-2007; it was approved, despite some difficulty, by the commission and plenary sessions of both houses of Congress, and was endorsed by government parties<sup>11</sup>. Several senators and representatives opposed the bill, including House Speaker Alfredo Cuello, and tried to delay the vote: they finally succeeded in having the Senate, in the conciliation commission, the last step before submission for presidential approval, vote against the bill without providing justification for the votes and in violation of party law which mandates voting along party lines. The project was also sunk by the Uribe government's disinterest in it, although it had been a campaign promise in 2006: the Minister of the Interior said that although the president supported the bill, he deemed it a project of no consequence and therefore had not bothered to follow up on it<sup>12</sup>.

Working in concert with a number of youth organizations, activists again looked to strategic litigation in 2006 as a real possibility of obtaining protection often denied them in Congress. Colombia Diversa and the Litigation Group for Public Interest Law at the University of the Andes filed a new lawsuit challenging the exclusion of same-sex partners from receiving an inheritance from their spouses<sup>13</sup>.

On 7 February 2007 the Constitutional Court announced a change in its previous position on the marital union of same-sex couples<sup>14</sup>. The Court said that it now considered that the exclusion of these couples from the economic benefits of the marital union was a fundamental human rights violation (COLOMBIA, C-075, 2007a; C-098, 2007b). It insisted that the law was unconstitutional because it imposed heterosexuality as a condition of access to those benefits. This ruling gave same-sex couples the same ability to build an estate as heterosexual couples. The Court also argued that the law that restricted marriage benefits to heterosexual couples imposed limitations contrary to "the constitutional principles of respect for human dignity, the state's duty to protect all persons equally and the fundamental right to freely develop one's personality."

From this ruling the Court has issued a number of other decisions that reinforce the equality of same-sex couples. In the years that followed, notions of equality extended to other situations in which the same-sex pair created rights and obligations: in 2007, the Court said that individuals were entitled to enroll their same-sex partner in a mandatory health insurance plan (COLOMBIA, C - 811, 2007c) and, in 2008, the Court stated that survivors had a right to their same-sex partner's pension (COLOMBIA, C-336, 2008a) and also that the offense of child neglect for failure to provide sufficient food also applied to them (COLOMBIA, C-798, 2008b).

In January 2009, following the "great demand" made by Colombia Diversa, the Court established that the terms "family", "familial", "family group", "permanent partner", "exclusive, permanent and continuous union" and "permanent union" in the context of various legal norms included same-sex couples (COLOMBIA, C-029,

2009). Some of the consequences of this “great demand” are that same-sex couples have the right to family reunification during armed conflict, build a family estate that cannot be garnished, live in subsidized housing as a same-sex couple, and have their living quarters be characterized as family housing. The same-sex foreign partner of a Colombian citizen has an equal opportunity to obtain citizenship as the member of a heterosexual couple, and can establish residence according to the same rules as same-sex couples in the archipelago of San Andrés. Same-sex equality also applies to the criminal realm: in same-sex couples, partners are not obligated to incriminate each other in a criminal case; the same circumstances that increase a criminal penalty apply to same-sex couples; the same principles guide same-sex domestic violence cases and disqualification on the basis of nepotism. Same-sex couples also enjoy the same protections in the event of a kidnapping or disappearance, or when one of the partners dies in a vehicular accident (SOAT insurance, abbreviation in Spanish).

### 3 The LGBT and legal fetishism

At the hearing before the Inter-American Commission, Commissioner Sergio Pinheiro acknowledged both the significant progress made by the Court, and what the IACHR must learn from this, including how to deal with the tension between standards and practice: “the general practice on the continent is akin to a hunting season that never ends”<sup>15</sup>. The difference between existing rights and the actual enjoyment of such rights is not the only paradox; the other is the contrast between reported violence and the weakness confronting such violence, both in terms of vindicated rights (e.g., the right to be an insurance beneficiary and to not be fired from one’s job) as well as the inflicted harms unprotected by the law (e.g., pre-contractual discrimination and the use of hazardous operations in transvestites) in the context of hate crimes.

Sometimes explicitly, but most often implicitly, the rights discourse can be understood as the denial of violence regardless of its severity. This discourse does not deny that violence exists, but rather denies the social meanings constructed from it. Thus, while the violence against homosexuals appears to serve as public and private punishment for their sexual orientation, the rights guaranteed them contradict this. And while fate decides who will be the victims of social cleansing in everyday life, especially when gays and transvestites are the victims, the rights discourse reclaims the humanity of each deceased person and their dignity embodied in small victories in areas such as insurance, pensions, and employment. This reference to violence, while present in other social movements that look to the law (Lemaitre, 2009), is particularly evident in the context of LGBT rights. Behind the bloody stories that reach the Commission are thousands of smaller stories, unrecognized under the law, about the aggressive and persistent refusal to recognize the full humanity of LGBT individuals. The human rights reports, however, do not recount the daily episodes of discrimination that probably produced the activists who write about them: the stares, the giggles, the loss of jobs and work, concerns and pressure from family and friends, their rejection, and the need to conceal and hide emotions. Nor do the reports shed light on how they should learn to live with the vicious current of hatred that permeates the seemingly innocent gestures, ostensibly playful comments, and

the graffiti that fade over time. They are subtle acts, whose existence is confirmed by a survey of high school students in Bogotá: six in ten admitted they had mocked children perceived as gay; three in ten admitted to having insulted them, 37.9% said they were afraid of homosexuals; and 17.6% said they were disgusted by gays<sup>16</sup>.

Quotidian violence, which may not amount to a human rights violation, or at least not the kind that can be reported to the Commission, is still overwhelming. The 2006-2007 report issued by Colombia Diversa (2007) documents the harassment by the police and citizens upon viewing public expressions of affection for same-sex couples, subsequent arbitrary detentions and discrimination in the workplace and at school.

But the most telling data come from the survey conducted in 2007 by CLAM, Profamilia and the National University (2008) with participants in the gay pride parade. These revealed that 77% have suffered some form of discrimination and 67.7% some form of aggression. Both are embedded in all areas of everyday life: 49.3% of those who reported discrimination said that such discrimination had taken place in schools and universities, by classmates and teachers; 43.8% in the street, by police; 42.8% in their homes, by neighbors; and 34.1% by their families. And while the most common form of assault was verbal (87.9%) followed by threats (36.2%), physical aggression still took place with alarming frequency: of the 67.7% who had suffered some type of aggression, in 31.6% of the cases such aggression was physical.

That the facts reported in the hearing before the Commission are more shocking than that which takes place on a daily basis is a matter of degree, and not one of motive, and it shows how deeply difficult it is to be LGBT in a deeply homophobic society. Gay individuals live with the constant threat of violence in all of the social spaces through which they move and with actual violence in response to their sexual orientation.

In the private sphere, many grow up in families in the midst of rejection and recriminations that quickly turn into insults and beatings. In the public sphere, they are subject to a mechanism of permanent social control, where any public display of affection or sexuality is met with aggressive hostility. This control seems to be more oppressive in rural areas and in areas controlled by illicit armed groups. Even in Bogotá, a same-sex couple seen hugging, holding hands or kissing can provoke the intervention of private security guards, the police and even bystanders who begin to assail it verbally and physically, to remove it from the premises and, in the case of the police, arrest it. Police often aggressively raid sites of commerce in pursuit of gay individuals. In prison, if their sexual orientation is revealed, they might be victims of sexual aggression and intimidation. And they are especially vulnerable to many kinds of violent crime, from serial killings in private homes to serial killings in public spaces known as “social cleansing,” extortion by blackmailers who threaten to reveal their identity to the public, and abuse from several officials, especially the police, who sometimes arrest them. Moreover, even for those who have never been the victims of violence, there is significant stress and anxiety associated with the possibility of suffering physical harm, and consequently those who would normally be affectionate in public in ways permissible to heterosexual couples end up repressing themselves.

Maria Mercedes Gómez (2006, 2008) explains this violence through the difference between discrimination and exclusion. Discriminatory violence is perpetrated against people who consider themselves part of society but in a subordinate

position, the purpose of this violence, both instrumental and symbolic, is to maintain this subordination. However, violence for the purposes of exclusion from society seeks to expel certain elements that are considered undesirable. This violence, moreover, is exacerbated when, as is the case of sexual orientation, the characteristic is perceived as relatively invisible and mutable: in this case the punishment is both a form of expulsion from the body, by rendering the difference visible, and at the same time constitutes an attempt to eradicate the difference (e.g., the idea that sexually violating a lesbian can change her sexual desires).

Without a doubt, the law has frequently been complicit in this violence, implicitly or explicitly excluding the LGBT community (for example, by granting rights only to heterosexual couples) or calling attention to them in ways that exclude them from society (for example, by punishing them with special criminal penalties). It is equally true, however, that the current trends in the law, as developed by the judgments of the Colombian Constitutional Court, have focused on normalizing homosexuality and the inclusion of the gay community.

To that extent, the law, or a certain area of the law, rises above the violence, and what it reveals about our society. The symbolic effect is reflected as a significant alternative, for example, in how the stories in the Colombia Diversa report for 2006-2007 are preceded by quotations from Constitutional Court judgments and the norms that prohibit the conduct described. As in so many human rights reports, the horror of the narrative contrasts with the formal nature of legal discourse, creating a strange tension between recognizing the reality of violations, which underscores the fragility of the law, and the intense desire to escape menacing hands, penises, knives and pistols to find refuge in the arms of the law.

The existence of rights, irrespective of their impact, means both equality between homosexuals and heterosexuals and the rejection of violence; these rights also fulfill the aspiration of normalization. By definition, rights are tied to that which is normal and included in the social body. The law prohibits that which is “abnormal,” or contrary to accepted standards, in two ways. First, because that which is prohibited is ostensibly conduct that takes place not on a daily basis, but occasionally, if not rarely; second, because that which is prohibited is that which is rejected morally, the abnormal. To that extent, the law is a powerful way to create significant social rights that are deeply moral, and the LGBT community’s use of the law is also marked by a desire for the moral acceptance of their identity; this desire stems from understanding the law as a symbol and object of desire.

#### 4 The law as fetish

The effects of legal reforms are not merely symbolic; undoubtedly the forementioned jurisprudence will bring real benefits beyond the creation of social meaning. There will be individuals who benefit from reduced discrimination, either because they win specific cases in the courts or by the elimination of certain rules, such as those that prohibited gay individuals from teaching in public schools. It is possible that the court’s rulings will lead some family members, employers and educational institutions to change their behavior and be more tolerant and respectful<sup>17</sup>.

Furthermore, we can assume that same-sex couples who request them will have access to a wide range of benefits that were previously limited to heterosexual couples. These benefits include survivors' pension rights, health insurance, etc.

At the same time the limits of these rules are relatively clear. First, having rights as an LGBT individual does not ensure greater protection against physical or sexual violence than the general rights to life and physical integrity. Second, the burden of proof for discrimination cases is so high that it is met only in the most egregious cases; in most cases, it is difficult to show that the conduct was motivated by discriminatory animus. Even in cases involving pre-contractual discrimination, lower wages and the glass ceiling, it is virtually impossible to prove causation. Third, for same-sex couples to have access to almost all rights, the individuals must fit a very specific profile that includes having a stable partner and both being out and *having the capacity* to be out of the closet. Being out of the closet, however, as we have seen, creates a permanent vulnerability that many individuals are not prepared to take on. Moreover, as has also been documented, officials show a cultural resistance to granting rights, which constitutes another barrier to same-sex equality. For these reasons, one can easily conclude that the enthusiasm elicited by this jurisprudence might be an excess of enthusiasm, a kind of optimistic fervor that does not correspond to the magnitude of the forementioned material benefits.

Still, the Court's judgments carry a weight greater than the result of a cost-benefit analysis, a weight arising from its symbolic value, including its impact on self-perception and social identity. Garcia and Uprimny classify this effect as "anticonformist" (GARCÍA; UPRIMNY, 2004, p. 493-495). This symbolic effect is a powerful antidote to the harsh effects of discrimination on one's sense of self and social life and, perhaps, is a kind of antidote or spell to combat the emotional scars from suffering violence -- an "anti" that is grounded in the possibility of using the symbolic force of the law to combat the interpretive power of violence.

The law confronts and denies the symbolism of violence and is not limited to the symbolic violence defined by Bourdieu, those negative social meanings with which discriminated and excluded groups are burdened, as part of their oppression<sup>18</sup>. Sheer physical violence also destroys and creates silent meanings about oneself and collective life, including the value of a human body, how to define human dignity, and what one can do with impunity to another body.

The threat of violence and violence itself penetrate the lives of homosexuals at all levels, constructing meaning about their identity and place in society. It might be more intensely felt by men, for the many ways in which violence is embedded in male socialization, but it is definitely present in the lives of women. It manifests itself not only as physical violence, but as the many forms of rejection, ridicule, insult and unrelenting hostility that can be observed even amongst those who would consider themselves tolerant.

How could one understand, for example, the practice in the 1980's of middle and upper-class teenage boys going to areas frequented by transvestites, such as the Avenue Carrera 15, with the sole purpose of attacking them in different ways?<sup>19</sup> How did the boy feel who could not understand his attraction to transvestites or to the boys with whom he went on these excursions? And how did it feel to be a transvestite?



Some of them began carrying knives to cut their own arms, as they discovered that sight of blood calmed the various assailants, including the police.

The positive symbolic effect of the Court's judgments should thus not be understood as a mere attempt to raise the self-esteem of the LGBT community, although this certainly happened. Or perhaps what is lacking is a more nuanced definition of what self-esteem is, one that is more closely tied to the possibility of articulating an identity and understanding of community life within a meaningful social network. What is at stake is not only the self-esteem notion of "feeling good about oneself," but rather the power to give social meaning to life itself, to denominate a partnership and its daily struggles, and to recognize the moral gravity of the violence they have suffered. The same-sex couple then becomes legitimate and normal, and the violence against it illegitimate and abnormal; in the language of the law, their partnership becomes a marital union, and the violence suffered is consequently understood as a human rights violation.

These definitions do not make complete sense if not understood as a response to years of being subjected to or fearing every type of aggression, and the necessity to appear twice, to hide, to exercise a permanent silence that distrusts the moral intelligibility of the social world. Violence, hate and contempt, both real and feared, impact community life even for those who do not experience it personally, and represent a profound challenge to the possibility of providing a moral foundation to a secular society.

The object, or potential object, of this kind of hatred can take three possible paths: two apolitical and one that leads to political participation in the collective life. The first is accepting the violence and what it symbolizes, and to justify the expression of violence while denying the validity of one's own story, one's own desires, etc. To a great extent, this characterizes life in the closet, accepted not as a strategic necessity but as a moral necessity.

The second option for those who are victims of homophobia is accepting the reality of violence, while rejecting the moral system that condones such violence. It is a "realist" position that leads to disenchantment with collective life, politics, and social life, and that finds refuge in the intimacy of the private sphere. Certainly, this has been a recurring solution amongst sexual minorities, as well as other minorities victimized by hate. In this way, for many experiencing violence, it only teaches that collective life is immoral, or amoral, or hypocritical, or simply hostile, and occasionally lethal. They thus find refuge in social ghettos that are rarely visible.

A third option is to reject not only the violence but also the notion that the morality of homophobia is "truly" the dominant one. It is the position of a crusader, an idealist and, of course, a social movement that refuses to accept the morality that rejects it, and that looks to other arguments to show that the morality of homophobia is above all a lie about social life. The law to a great extent is critical of this third option, as legal discourse rejects the morality of homophobia and its violence, and attempts to construct a separate societal morality.

In this process, the judgments of the Constitutional Court have played a decisive role. The Court's favorable decisions redefine collective life, by denying the symbolic effects of violence and insisting instead on a public discourse of dignity that produces tremendous satisfaction and mobilization without depending on the

enforcement of the law. By deeming homosexuality normal and violence abnormal, the Court recognizes homosexuals as fully human in a social world where violence would be by definition abnormal, or against the norm. Taking this redefinition seriously changes how one understands violence's relationship to personhood, and permits with this change the possibility of engaging again with a redefined social life, or at least provides a measure of value, or confidence. And it allows us to feel pleasure in seeing the law enshrined in the words of the Constitutional Court.

This is the law as fetish, but not with the negative connotation of being a "false" object of desire (LEMAITRE 2007; 2008; 2009). There is also the positive connotation of the sexual fetish metaphor (and not related to goods): it is inexhaustible pleasure, the rejection of certain conventions and antiquated ideas of morality, the denial of a "realism" that was burdensome, a wager on an alternate reality. And of course, it is deeply ambiguous: certainly individuals such as Marcela Sánchez have looked and continue to look to the court to vindicate rights; those who insist on the right to equality and dignity recognize the limitations of the law as an instrument of social transformation. They understand it in physical terms and perhaps better than those who theorize about it. At the same time, they celebrate the law, and each judgment that asserts their right to equality dignity, and treats them as equals and as part of the national community. This ambivalent relationship with the law is what leads them to the Commission; despite knowing its limits, they nevertheless look to it. They refuse to accept the violation of norms, but also enjoy the law's meaning-making capacity. It is a condition shared by hundreds of thousands, perhaps millions, of Colombians who, in the midst of the exhausting violence of the last thirty years, have decided, as we have decided, in the shadow of the 1991 Constitution, not to stop believing in (and loving) the law.

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## NOTES

1. The organizations present were: the Association for the Promotion of Social Alternatives MINGA, the "José Alvear Restrepo" Lawyers Group, the Commission for Justice and Peace, the Colombian Commission of Jurists, the Judicial Freedom Association, the Association for the Defense and Promotion of Human Rights RESET, the Committee for Solidarity with Political Prisoners Foundation, Interdisciplinary Group for Human Rights GIDH, Sisma Women and Colombia Diversa.
  2. The issue of LGBT rights is relatively new in international law, and is not mentioned in treaties and conventions. The United Nations Human Rights Committee has commented on this topic, highlighting for the first time the issue of failed pension substitution in a same-sex couple in the case *Young vs. Australia* (Communication N° 941/2000). The Inter-American Commission has not yet staked out a clear position but on July 23, 2008 accepted the case *Karen Atala e Hijas vs. Chile* (Petition 1271-04), about a lesbian mother who lost custody of her daughters. In the activist community, it is hoped that the Commission position itself firmly against discrimination based on sexual orientation when deciding this case.
  3. Additional information can be found in human rights reports of various organizations worldwide. Some of the latest entries of the Inter-American Commission on Human Rights (IACHR) are the report on women in armed conflict (IACHR, 2006) and the chapter on Colombia in the last annual report of the IACHR (2009b). Several reports by Human Rights Watch on Colombia are available at: <http://www.hrw.org/americas/colombia> and those by Amnesty International can be found at: <http://www.amnesty.org/en/region/colombia>
  4. León Zuleta, murdered in 1993, was a renowned human rights and gay activist in the city of Medellín. His murder was never solved. His biography was written by Manuel Velandia in 1999.
  5. In December 2008 a series of non-governmental organizations for human rights defenders asserted before the Universal Periodic Review of Colombia that between 2002 and 2007 75 human rights defenders were murdered, not including union members (HUMAN RIGHTS FIRST; FRONT LINE; FIDH; OMCT, 2008). The same Commissioner in her report on Colombia in 2008 reported that there had been a significant number of attacks against human rights defenders that year, including murders, property damage, thefts, burglaries and threats. He further stressed that it was "worrisom that some senior government officials have continued the practice of publicly stigmatizing human rights defenders and trade unionists, accusing them of being guerrilla sympathizers." (UN, 2008). The Inter-American Commission on Human Rights has ruled in the same direction recently in its annual reports of 2007 and 2008; it also has expressed concern about the spying and harassment by the government's security agency of recently revealed human rights advocates (IACHR, 2009b).
  6. It is interesting to note that the name of the march, which had been known as "gay pride," was changed to a "march for citizenship," showing the importance of the legal framework.
  7. In a 1994 decision, (COLOMBIA, T-097), the Court protected a student at the School of Carabineros de Villavicencio, who was expelled for engaging in homosexual conduct. In this case, however, the Court's decision was rooted not in prohibiting discrimination but in a violation of the student's procedural due process rights, as he was not allowed to present his defense.
  8. The rulings of the Constitutional Court are available at: <http://www.corteconstitucional.gov.co/relatoria>
- The judgments concerning the rights of LGBT individuals and couples are easily researched by topic on the website of the NGO Colombia Diversa, at the following link: [www.colombiadiversa.org](http://www.colombiadiversa.org).
9. This is the first decision in which the Court upheld the right of gay students to be free from discrimination, and ordered that the two students expelled on the basis of their sexual orientation be received back at the school. The Court protected their right to education and free development of personality. (COLOMBIA, T-101, 1998a).
  10. Bill 85 of 2001, Bill 43 of 2002, Bill 113 of 2004, Bill 130 2005.
  11. This bill includes marital union, coverage on a partner's health insurance, and survivor's pension .
  12. For a more detailed report of this legislative process, see (LEMAITRE, 2009). On July 20, 2007, they returned to the bill: this time, three bills similar in content were filed from three different political parties.
  13. Interview with Marcela Sanchez, director of Colombia Diversa, and conversation with Esteban Restrepo, November 2006. See also: [www.colombiadiversa.org](http://www.colombiadiversa.org).
  14. For a more detailed account of this jurisprudence, see: (ALBARRACÍN; AZUERO, 2009).
  15. Audio clips of Sergio Pinheiro's comments in that hearing can be found at: [http://www.colombiadiversa.org/index.php?option=com\\_content&task=view&id=738](http://www.colombiadiversa.org/index.php?option=com_content&task=view&id=738). Last accessed: November 2009.
  16. Survey conducted by the NGO Promote Citizenship (El Tiempo 2007a; 2007b).
  17. This kind of impact is documented by Munger and Engel (2003) regarding the disabled in the United States.

18. Bourdieu has explained his concept of symbolic violence in various texts. In one of his most didactic works, with Loic Waquant (1992, p. 167-168), he defines it as that element of domination that beings with the complicity of the dominated, as they accept as normal a social world of mechanisms of domination, and therefore do not recognize the violence of the cognitive structures of the social world. At the bottom of page 123, Waquant explained that the difference between this concept

and Gramscian hegemony is that for Bourdieu there is no process of convincing the dominated groups but rather that the cognitive structures exist in the social world. In the case of the negative social meanings associated with stigmatized identities, they are accepted as natural – not through persuasion, but rather because they are part of the cognitive structures of societies.

19. I do not know if this situation continues, as it has not appeared in human rights reports.

## RESUMOS

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Em uma audiência recente perante a Comissão Interamericana de Direitos Humanos, ativistas denunciaram a violência que as pessoas lésbicas, gays, bissexuais, travestis, transexuais e transgêneros (LGBT) enfrentam na Colômbia. Entre os fatos denunciados estavam o abuso policial, as violações sexuais nas prisões, os assassinatos motivados pelo ódio, bem como múltiplas formas de discriminação. Isso contrasta com a jurisprudência avançada da Corte Constitucional da qual decorre a proteção da livre opção sexual. A partir de uma descrição tanto da violência como das sentenças, este artigo analisa o papel simbólico do direito e argumenta que os ativistas têm uma relação ambivalente com o direito: ao mesmo tempo em que desconfiam dele, por sua ineficácia, se advogam pela reforma legal e se beneficiam da jurisprudência progressista da Corte.

### PALAVRAS-CHAVE

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Direitos dos homossexuais – Direitos LGBT – Direitos sexuais – Igualdade – Casais do mesmo sexo – Corte Constitucional Colombiana – Violência por preconceito.

## RESUMEN

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En una audiencia reciente ante la Comisión Interamericana de Derechos Humanos activistas denunciaron la violencia que enfrentan en Colombia las personas lesbianas, gays, bissexuales, travestis, transexuales y transgeneristas (LGBT). Entre los hechos denunciados estaban el abuso policial, las violaciones sexuales en las cárceles, los asesinatos motivados por el odio, así como múltiples formas de discriminación. Ello contrasta con la jurisprudencia de avanzada de la Corte Constitucional que ha desarrollado la protección de la libre opción sexual. Este artículo a partir de una descripción tanto de la violencia como de las sentencias la Corte Constitucional analiza el papel simbólico del derecho y argumenta que los activistas tienen una relación ambivalente con el derecho: al mismo tiempo que recelan de este, por su ineficacia, se movilizan por la reforma legal y gozan con la jurisprudencia progresista de la Corte.

### PALABRAS CLAVE

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Derechos de los homosexuales – Derechos LGBT - Derechos sexuales – Igualdad – Parejas del mismo sexo – Corte Constitucional Colombiana – Violencia por prejuicio.

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