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There is much work to be done in the critical sectors of discrimination: the police, the security services permanently violate LGBT people's rights. The police is the State in the night; it is the State in the street; it is the State in vulnerable zones; and in spite of the fact that formal protection exists, this is an authoritarian State that mistreats people.

An Interview with Mauricio Albarracín

March 19, 2010

Mauricio Albarracín's house in Bogotá, Colombia

Mauricio Albarracín: My name is Mauricio Albarracín, I am from Bucaramanga, Santander and I have had a very legal life in the sense that when I began to study law I also started to practice became engaged in activism in favor of the rights of gay, lesbian, bisexual and transgender persons. With some feminist friends we founded a gender and sexuality group at university. When I finished my law studies, I came to Bogotá to pursue practical training at the Constitutional Court, under Judge Manuel José Cepeda, and I started to work in *Colombia Diversa*.

Colombia Diversa was born in 2004 as a result of the efforts of a committee that promoted a bill on same-sex couples. I worked for three years in the area of human rights and in the legal area, and simultaneously, I carried out research work at a research center, DeJusticia. I am currently working at the University of Los Andes, at the Socio-Legal Research Center and I am a professor at the Faculty of Law.

Carlos Motta: Can you tell me about the legal structure and the processes you have developed in *Colombia Diversa*?

MA: In 1991, Colombia promulgated a Constitution that introduced several important institutional changes, among them the creation of the Constitutional Court and the incorporation of a wide bill of rights. During the 1990s, a very progressive jurisprudence concerning the protection of gays and lesbians was established. As of 1999, different bills proposing the recognition of the rights of same sex couples –basically, property and social security rights – were developed. In that context, in 2003 there was a bill supported by a group of activists, but when this initiative was defeated, Marcela Sánchez, Virgilio Barco, Germán Alberto Rincón Perfetti and others decided that there should be an organization devoted to foster same-sex couples *de facto* recognition.

Colombia Diversa took up the challenge of analyzing previous bills and responding to critiques, which were basically of a constitutional, legal, economic, and religious nature. Arguments were devised for each of the objections, and new minimalist legislative initiatives, that is, those that did not request the right to marry, but merely the recognition of property and social security rights were promoted.

Besides, the project had technical support and an organization dealt with the work related to incidence. *Colombia Diversa* fostered the bill, and the University of Los Andes, which was filing a public interest lawsuit, carried out a study for a year and then filed suit to reopen the debate on the subject. It was a double process: one was a

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political one in Congress, and the other was a legal one in Court. What we did was to monopolize both discussion scenarios. Initially, *Colombia Diversa* was more interested and had more faith in the political debate, for various reasons; because more parties supported the initiative since, being much more moderate, it garnered support not only from the opposition parties, the Liberal and the Left-wing parties, but also from center-right sectors. That bill was approved after four debates. What happened was that during the process of conciliation of the different texts, the conservatives maneuvered and defeated it, based on a very formal aspect, but one that was necessary to approve the initiative. The country had entered into a very important debate on same sex couples; there was certain consensus about minimum rights for same sex couples due to the fact that a very important media campaign had been carried out to back the process, and that minimum consensus was sunk by the Conservative Party.

The consensus was expressed in President Uribe's famous phrase, which summarized this discussion: "marriage, no; adoption, no; property rights, yes; social security, yes."

Those were basically the items on which many sectors agreed. The Constitutional Court has had a counter-majority behavior; they have made decisions that have been opposed to those of the majority and the political majorities. As a result of the lawsuits filed by *Colombia Diversa* and the University of Los Andes, the Court recognized the property rights and the existence of the union of same sex couples. Once the Court opened that door, we abandoned the political arena; it is a difficult, not very legitimate terrain, with actors that have been severely called into question. It is difficult to build majorities in the Colombian Congress; politicians are interested in other types of matters, in addition to corruption, parapolitics, etc.

After this first lawsuit, we embarked on a litigation strategy through which we demanded laws on social security, pension and health. The first ruling involved property rights; then social security was approved and it was an extremely slow process. In 2009, we decided to introduce a lawsuit against 25 laws that recognized an important group of rights for unmarried heterosexual couples, and in this way we achieved the recognition of an important group of rights for unmarried couples. Now new challenges associated to adoption and marriage lie in store for us. But with respect to these issues, I believe it is too soon to take them to court. For several reasons. In the first place, because it is a new Court and there are divisions within it. Society is also divided, especially in relation to the issue of adoption. The Constitutional Court is under very strong political pressures, because it has had to decide on issues related to elections and parties; for example, it ruled that a referendum that allowed President Uribe's second reelection was unconstitutional, and this has placed it in the eye of political discussions. It must pronounce itself on other issues, for example, the reform of the health care system that the Government determined by decree. Then the question is if a new Court, which must solve great problems without democratic intermediation, can do so. In my opinion, it is too soon to file these lawsuits; as a matter of fact, *Colombia Diversa* has not filed them, although we are supporting them.

CM: What kind of arguments are proposed in the case of marriage rights?

MA: We have an old problem. Apparently, and I say apparently because that is the crux of the debate, our Constitution established that family is heterosexual. Article 42 states that marriage takes place between a man and a woman. There is a debate about this: some say that family is heterosexual and monogamous; these are the most conservative legal and social trends, but there is a progressive tendency that declares

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that this is only a description of a legal entity and not a prohibition to approve other forms of relationships and other forms of family. Politicians and judges are divided in their opinion and the Constitutional Court, in rulings from 1996 and 2001 that were quite polemic, stated that the Constitution protected the monogamous and heterosexual family. There is another argument in favor of marriage between same sex couples, not of a constitutional nature but of a factic one: the fact is that there are same sex couples living together as a family, and no matter what the Constitution says, the Court cannot deny that reality.

CM: Who are the great opponents to marriage?

MA: The real opponents are the Catholic Church, the Christian and Protestant churches, which have their own political expressions, certain political parties, certain representatives, and some judges. We have identified a very conservative judge who is aligned with the precepts of the Catholic Church, and the current Attorney General. These are two quite problematic actors. The rest are an enigma, but religious ideologies are mixed with male chauvinist ideologies. This Court is composed of eight men and one woman, and we don't know what their idea of family is, not only from the religious point of view, for we don't know if they adhere to a non-religious homophobic line of thought. But what I feel is that we have not had a serious debate on marriage in the public sphere, by comparison to the issue of the recognition and rights of couples.

CM: In terms of civil rights, what differences are there between the rights of same sex couples and marriage?

MA: Despite the fact that we have a regime of *de facto* marital unions that is very similar to marriage, because almost all the rights inherent in the heterosexual *de facto* marital unions are the same as those contemplated in heterosexual marriages, there are differences: in the first place, there is a situation of risk for the children living with same sex couples, whether they be biological children, or adopted children, or children living *de facto* with those families. This is apparently paradoxical; the rights of couples are protected, but they may have no legal bonds with their children. The second difference is that marriage has certain privileges as compared to the *de facto* marital union. The *de facto* marital union is a free association that people may put an end to at any moment and it has its differences with marriage, particularly in issues of inheritance. For instance, the husband or wife receive more in terms of inheritance than a permanent partner, or in issues of nationality, there are rights of precedence for the husbands and wives, but not for permanent partners. But the greatest difference resides in the protection of the family. There is a case of a couple of lesbian women who have declared their marital union, they are a couple, they have joint rights, one of them is the biological mother of a girl whom her partner is trying to adopt, mainly for the eventual case that the biological mother be absent. That is one of the debates the the Constitutional Court will have to face. If the Court denies protection to the homoparental family, who wins and who loses? The girl loses, because the couple's rights are guaranteed. This discussion concerning what family is protected will mainly affect children. It is paradoxical that the conservatives should say that they are protecting the children; their main argument is that same sex couples are not apt to raise children, but when they already have children, their solution is to deprive the child of their protection.

There is no consistency in the argument regarding child protection. If one really wants to protect the children, they should be left with their mother and in the company of their mother, and not be sent to foster care. The dispute is a symbolical one, and it concerns

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certain values associated to the family that the conservative sectors, especially the religious ones, do not want to lose.

CM: What would be the effect at the cultural level of an eventual approval of the law on marriage?

MA: It is difficult to tell without an empirical exploration, but I think that the core issue in this discussion is what kind of society the Colombian society is. I think this discussion is present in many areas, but there is a new time in Colombian society regarding issues of autonomy and sexuality. A former ELN guerrilla commented that recently he could finally be openly gay in his group. This is not representative, but I thought it was an indicator that something is happening, and what is happening is that issues addressed in public discussions are beginning to infiltrate non-traditional places, or places that were traditionally homophobic. I think public discussion is very important; I don't know how much it will contribute to people being more tolerant or less violent, but it does generate transformations and, at least, it brings a political project to light. In Colombia and in Latin America there is a political project that contemplates the recognition of gays, lesbians, bisexual and transgender persons. Legal decisions transform reality insofar as they destabilize an order. It is not as though they magically change reality, but they introduce an authoritative point of view and that point of view develops socially. I thought this has been the beneficial influence in the case of couples. Court decisions entail several benefits; a strictly speaking political one is that those legal proceedings create a network, an ensemble of stakeholders who meet through their involvement in the lawsuit and continue to participate in order to guarantee the rights obtained. Its effect also implies the existence of a group of people who have worked on the issue and this generates growing adhesion. That group will work to preserve the change in the long term. Additionally, this may give rise to a cycle of protest, that is, a cycle of mobilization; because some rights have been obtained, people begin to realize that there are other rights that have not, or that there are other types of discrimination and violence, and they begin to work in those areas. This action triggers other movements and other mobilizations in other spheres. Another benefit is that by recognizing they have rights, same sex couples gain empowerment when faced with the authorities. People over 35, 40 or 45 years of age, who have been in a relationship for 15 years, decide to proclaim their union after having lived inside the closet. At present law students read judgments that protect same sex couples and question themselves about the ruling on marriage, different questions to those posed five or ten years earlier, because the context is different. The debate has shifted to a different place, there is a political discussion going on; politicians promise things, there are politicians who are openly gay or lesbian, and there are public policies. There have been many changes.

CM: What is the debate with respect to adoption?

MA: There is a discussion in abstract terms as to whether the law would allow joint adoption by same sex couples; whether a couple could go to the State social services, to the Colombian Institute of Family Welfare and file for adoption. Another discussion involves the adoption of a partner's child. Once a couple's rights are recognized, what happens when one of the members already has a biological child? These are two different debates; in one we are talking about non-biological children; in the other, about biological ones, but independently of this nuance, what one is trying to demonstrate is the existence of a proportional protection that extends to all forms of family. There is a very beautiful phrase by a former Court judge, Ciro Angarita Barón,

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which says that family is the place where one's affections are, and that neither reproduction nor sexual differences are the defining characteristics of a family. Solidarity, affection, and mutual help define the notion of family. Another idea we must fight against is that gays and lesbians cannot have children. Yes, we can, we have all the means to do so. Our third argument relies on trying to prove through scientific studies that children living with same sex couples do not suffer any damage. The Court requested the Psychology departments of Colombian universities to submit their concepts of this issue; the concept submitted by the most important ones was that living with same sex couples implied no real or potential harm for children. Our fourth argument is that a negation of the existence of family would be detrimental for the children; same sex couples are already protected by the legal regime, and what is being sought is protection for the boys and girls who live with these couples.

CM: Would this project modify the way in which heterosexual couples adopt children, or the marriage rights of heterosexual couples?

MA: The conservatives affirm that granting rights to same sex couples will affect the traditional family. One of the ways in which we have structured our argument is to show that granting rights to homosexual couples does not affect the traditional family in the least; it does not improve it or detract from it. The heterosexual and monogamous family will continue to exist; these are two different paths for the formation of a family. What I do believe is that there is a significant number of children in Colombia that have not been adopted; for example, around 9000 children are included in a terrible category designated as non-adoptable or impossible to adopt, they live in precarious conditions, in foster homes provided by the Colombian Institute of Family Welfare. I think that a clear constitutional protection of family and the formation of families by same sex couples will make it possible for some of these children, for a significant number of these children, to have a family. Same sex and unmarried couples have a joint task to carry out: to obtain more rights that place their unions on a par with marriage. The fight should involve not only the recognition of marriage but also obtaining for *de facto* marital unions the same rights as those assigned to marriage.

CM: Certain sectors of the LGBT community are radically opposed to the implementation of marriage laws because they argue that these only affirm a heterosexual norm. What is your opinion?

MA: I have a pragmatic and a theoretical answer. The pragmatic one is that there are gay and lesbian persons who want to get married and think that that is the form of association they want for themselves. If people want to be equal in dignity and have equal rights, there should not be any legal discrimination for them to have access to that. A more theoretical answer: Judith Butler was challenged by US activists who were fighting for marriage and she wrote an essay whose title in Spanish is , "Es siempre el parentesco heterosexual". She wonders whether what is under discussion concerning marriage is not the meaning of the decision to marry but what occurs with relatives and family relationships. For what is ultimately under discussion is if the law protects in like manner my affection for one person or another depending on my sexual orientation. What I am particularly concerned about is, however, that the law, at least from a formal point of view, should offer an equal protection and that there be no odious discrimination.

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CM: The conversation has been geared towards gay and lesbian persons, but there are other types of entities that do not fall within this binary logic. How do you approach this problem as activists?

MA: It is difficult to find a particular or evident violation of rights related to bisexual persons. I don't know if this has to do with the absence of a visible bisexual community. In the case of transgender persons there has been more progress, in the sense of identifying their problems. We know that transvestites suffer more violence; there is documented evidence of the fact that the police maltreats them, that they do not receive adequate health care and that they have different problems related to their fundamental rights. One of the weaknesses involving organizations and theoreticians, judges and legislators, is that there are no coherent and clear legal responses in the case of transgender persons. An example: Germán Humberto Rincón represented a transsexual woman who applied for a job in which she had to plaster walls; she was the best in her trade, but at the moment of registering for health care, they realized that in one of those documents she appeared as a man and they refused to hire her. Germán Humberto Rincón lodged a writ of amparo, which was rejected in every instance. The Constitutional Court studied the case, and despite the fact that the lawyer insisted on the fact that his client was a transsexual and there is a scientific concept from another organization that explains what a transsexual is and the differences with a homosexual, the Court treated Magali (that was her name) throughout all its rulings as a homosexual, it didn't make any differences between transsexual and homosexual and in the end it denied him recourse to the writ of amparo, but explaining that there is a constitutional protection against discrimination at work due to sexual orientation, and this was clearly a case of gender identity. This reveals the lack of understanding of the phenomenon of sexual diversity. Institutions do not clearly understand to what kind of phenomenon we are referring to.

I think there is a very serious flaw in legal responses for transgender persons. The Constitutional Court has not pronounced sentence on the rights of transvestite persons. Additionally, I think there is a strong stigmatization of transvestites due to the practice of prostitution. The Court has been reluctant to select those cases for their study because it finds it complex to revise an issue of violence associated to prostitution.

CM: Are your future objectives as a movement those you have just enumerated – the law of marriage, the law of adoption?

MA: The objectives I perceive as an activist are, first of all, to try and make institutions comply with the rulings of the Court. Our first task as a group of activists is to see that the Court's rulings are obeyed, that people resort to them, that this tool that has been created have real social validity. The second is that a lot of work must be done in the critical sectors of discrimination: the police, the security services permanently violate LGBT people's rights. The police is the State in the night; it is the State in the street; it is the State in vulnerable zones; and in spite of the fact that formal protection exists, this is an authoritarian State that mistreats people. Schools are the second critical sector; the Constitutional Court has reiterated that gay, lesbian, bisexual and transgender students cannot be expelled, but in practice those decisions do not have an important social validity; teachers maintain significant homophobic stereotypes; school harassment, the forms of exclusion at school are very varied, and this is a critical sector in which a correct intervention has not been carried out. The third critical sphere is that of work. Today, in spite of the existing protection, people do not reveal

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their sexual orientation, they are afraid of their employers, there are many stereotypes associated to gay, lesbian, bisexual and transgender persons at work. These three sectors are vital for the real enforcement of rights.

CM: Is there an antidiscrimination law for issues of sexual orientation or gender identity in Colombia?

MA: Our Congress issues laws, but Colombia does not have a normative structure that is as strong as its jurisprudential structure, that is, the Constitutional Court interprets the laws, and that interpretation has the validity of a law. We have tried to build jurisprudence rather than laws, because Congress is not an apt place for democracy. These discussions cannot take place there. The Colombian political system is not a representative one; it is not democratic; the large number of frauds and denunciations prove that it is not a Congress freely elected by the people and this is also reflected in the way it makes its decisions. The legal work of *Colombia Diversa* involves propitiating the establishment of precedents, case laws and progressive decisions that we may use.

There is a discussion with activists who say that it is better to have a law because that provides greater protection and has a stronger impact. I am skeptical; there isn't much difference between a law and a judicial decision. The State fails to enforce both. What we have to do, our main mission is to try to make those constitutional rights and the Court's interpretations be respected. We have many problems because there are authorities, as for example, the current Attorney General, who are ultra-Catholic, ultra-conservative and this capture of the institutions by conservative actors or by traditional sectors leads to the law not being obeyed. Besides, the law is full of ambiguities, full of contradictions, and having a law will not always solve the problem.

Dichotomies are also beginning to appear in matters of public policies: the written word issued by public policies is one thing, and reality is a different thing. For instance, the national police issued a circular aimed at preventing police abuse and, simultaneously, that was the year with the greatest number of cases of police abuse. The cultural change is an important task; there are activists who devote themselves to exploring cultural stereotypes and to changing them through the media, through strictly cultural creations. I think most of the activist actions of the future should be focused on cultural change, on changing everyday, basic things, in places that are not Bogotá. That is what I envision as the greatest challenge for all of us.

CM: I guess the situation differs radically in major cities and in regions or small towns.

MA: Borrowing a phrase from a legal sociologist, this is a chameleon State. We may have a perfect comfort, but two hours away there are two or three hundred thousand displaced people. It is a very complex reality in which the territorial units are not the same, the situations of violence and the real actors are different, there are areas that are controlled by armed groups, areas in which the State is weak, where the civil society is weak, areas where the institutions have been coopted by private actors, by mafia actors. That chameleon-like condition of the Colombian society is also reflected in the rights of LGBT persons; being an upper middle-class gay person living in Chapinero is very different from being a gay person in a small town like Zapatoca, Santander, where there are no other gay persons, where your only ally may be a person working at the office of the Municipal Attorney. In Colombia, differences do not only involve phenomena of urban or rural sectors; there are also violent and non-

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violent sectors, civilized and non-civilized ones; there are very strong dichotomies. Besides, this is a country with a very centralist regime, and that has advantages and disadvantages. The advantages include that when a message is generated in Bogotá, the media – most mediums's headquarters are located in Bogotá – report the news from Bogotá as if they were national matters. In LGBT-related issues, coverage by the media has been very useful. I once visited a women's prison and I talked to one of the inmates; she was not a lesbian, she was the chair of the inmates' human rights committee, and I asked her if she knew about the LGBT movement, and she said: of course, I have seen it on the TV, it is often on TV. Television is a channel through which this message has reached many places, even places that are very distant from Bogotá. Besides, since Bogotá is a referent for intermediate cities, if Bogotá creates a mass transportation system, the intermediate cities will strive to do the same; by taking a step towards the implementation of a public policy, Bogotá has also generated a modernity referent in some intermediate cities, and that has led to activists and some intermediate cities marvelously appropriating that discourse. But this also creates an exaggerate "power" for activists in Bogotá. I have been an activist for a region, and I know that since everything goes through Bogotá, people do not feel they are participating in decision making and that this fractures the legitimacy of the movements.