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The monogamous dynamics will turn against the gay community itself or against the LGBT community: before, they did not allow us to get married; now the ideal thing is to be married. What happens with all those who have made of promiscuity, of polygamy and of all those kinds of alternative forms of experiencing sexuality a way of living? Are they going to transform them into pariahs among the pariahs?

An Interview with Esteban Restrepo

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Esteban Restrepo's house, Bogotá, Colombia

Esteban Restrepo: My name is Esteban Restrepo, I am currently a professor at the Faculty of Law of the University of Los Andes. My interest in the subject was originally of an academic nature, and it arose ten years ago, in the United States, where I took a Master's course in Law at Yale University; under the influence of professors Reva Siegel and Kenji Yoshino, I decided to explore the issue. At a later stage I have been in contact with Harvard University professor Janet Halley, who is perhaps the most important representative of *queer* studies in the legal area in the United States.

When I returned to Colombia I started working at the Ombudsman's Office at a moment when the political development in Colombia, at least from the perspective of the law was crucial. The Constitutional Court had begun to make extremely important decisions in that matter; they were not always adequate, but they had opened a space for a public dialogue on the subject. At the Ombudsman's Office we started to work in an incipient way, but later, at the University of Los Andes, an absolutely liberal university in the classical sense of the term, where those who come to teach can have any academic project whatsoever, I found a group of professors aligned with feminism like Helena Alviar, Isabel Cristina Jaramillo and Julieta Lemaitre, with whom we have succeeded in opening a very important space for discussion. On the other hand, in the Department of Cultural Studies, in Anthropology, in Psychology and in Political Science, there are many people who have been trained in the United States, or who are Americans, such as professor Chloe Rutter-Jensen who works on *queer* theory, who have established the subject.

CM: What is the platform in that space?

ER: We do not have a formal space, but we have delivered courses jointly and individually. It is important to highlight that the university is a space where gay persons have no problems, there is no message of an institutional type against them. On the other hand, mention must be made of the fact that there has been a significant transformation within the Colombian society with regard to diverse sexualities, and this can be seen in the body of students. The students at the University of Los Andes are the children of a rising generation of educated middle-class persons for whom the fact that their children be gays or lesbians is no longer a family tragedy, many of them have been raised in environments of absolute tolerance. Besides, students have a very important space to explore that dimension in their lives at the university. As a matter of fact, under the rectorship of Carlos Angulo, an extraordinary liberal, the university encourages students to organize themselves in groups sharing the same interests,

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financed by the university, and one of those groups is the LGBT circle, which is about five years old. Although it is a relatively small group, it is extremely active, visible, and it has stirred up many things at the university.

CM: What kinds of activities do they carry out?

ER: They have an academic study group, they study, they implement cycles of *queer* films, they organize parties. I think it is an important space for socialization. The other reason why I became involved with this issue is the question of activism, a qualified activism, since I am not really an activist; my activism is restrained to being part of the Legal Committee of *Colombia Diversa*, which has played an important role within the mentioned organization, given that a large part of *Colombia Diversa's* strategy has been of a juridical nature. This has also been the case in many social movements since 1992 or 1993, due to the entry into force of the Colombian Constitution, of the discourse on rights, and the existence of the Constitutional Court, which is a luxury in Latin America.

CM: Could you share with me the philosophy behind *Colombia Diversa's* juridical strategy?

ER: The LGBT movement is marked by two great moments: the one prior to the 1991 Constitution, and the one that follows it. During the former, the movement was extremely precarious and invisible. With the enforcement of the new Constitution, and particularly with the creation of the Constitutional Court, people began to resort to the writ of amparo when they were going to be thrown out of school or dismissed from work on grounds of their being gay or lesbian. The Constitutional Court created a discourse on rights in which sexual orientation is considered a manifestation of the right to the free development of one's personality. It was in this context that organizations such as *Colombia Diversa* emerged. Hence that the legal strategy of *Colombia Diversa* should be present from the very outset. On the other hand, there have been transformations in the Faculty of Law of the University of Los Andes, which is starting to speak seriously for the first time of what is called public interest rights. A group called Public Interest Group, led by Daniel Bonilla, was created, and together with *Colombia Diversa*, it seeks recognition of rights of property for same sex couples. In 1996, the Constitutional Court had already denied this recognition, but the juridical challenge was to show them that between 1996 and 2006, many things had happened in the world; there had been decisions in the United States and in France. In Colombia, Mónica Roa had demanded the right to abortion through a juridical strategy that resorted to very peculiar means, as she mounted for the first time in Colombia what is called a high-impact lawsuit, which left us a very good learning process.

CM: Could you share Monica's case with me?

ER: Mónica is a Colombian lawyer, trained in the United States; she worked for a very important New York organization called *Center for Reproductive Rights*. Later she worked for an organization called *Women's World Wide Link*. There she decided it was time to obtain the decriminalization of abortion in cases when a woman had been raped, when carrying pregnancy to its full term can jeopardize the mother's health, and when the foetus is not viable, that is, cases when it is a certain fact that the foetus will die as soon as it is born. The Constitutional Court had already stated that abortion was not allowed even in these cases. Mónica's project did not include merely filing a lawsuit before the Court, but also generating an external political space that would exert

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pressure. This implied studying who the nine Court magistrates were, what messages might convince them, what kind of information they should receive, in what way could Mónica be shown as a moderate person, contrasting with feminists who had been activists for a longer time, like Jimena Castilla, and who had more extreme positions.

The strategy was successful and the Court decriminalized abortion in the cases proposed in the lawsuit. That experience could be important for *Colombia Diversa* because there were aspects that were similar to those in our strategy: In the first place, making the Court reconsider an issue with regard to which it had initially taken a negative stand. Secondly, there was the technification of the issue; the lawsuit is an extremely brilliant juridical document; it was very difficult for the Court to issue a negative ruling; and thirdly, showing the Court that Colombia couldn't lag behind in the presence of a situation which had radically changed worldwide. The Court understood this very well, so well that its decisions are practically unanimous. Indeed, Jaime Araujo Rentarí, who was a very extremist magistrate used to say: "but this is too little, the gay community needs a lot more, then I disagree." It is extremely interesting to note that even the most conservative voted in favor of the decision, making it clear that this under no circumstance did affect what they believed was the notion of family that the Colombian Constitution protects. That is to say, the heterosexual and monogamous family, which is another issue that is about to be decided in light of the lawsuit in favor of marriage which is still pending and which I believe will be resolved before the middle of this year.

CM: Could you tell me about the line of argument in that document and what the theoretical field that exerts an influence on the construction of these arguments is?

ER: Look, this was a juridical argument with an extremely high level of complexity for several reasons: in the first place, the first strong issue was to prevent the Court from saying that there was already a ruling regarding this issue. In Colombia, in 1990, a law approved the rights of property in the case of civil unions as a result of the fight of the women's movement, since it was women who tended to lose when these kinds of unions were dissolved. That law of 1990 was invoked for the first time in 1996, and in a very equivocal ruling, the Court declared that the fact that this law should not include same sex couples did not necessarily imply discrimination on grounds of sexual orientation. The argument referred to at that moment was that the different injustices that exist in the world are redressed little by little, and the 1990 law sought to redress the injustice against women. The gay community had to organize itself and fight for its rights. That decision had a final part, designated the open door, which stated: if in the future the fact that it is unfair not to allow rights of property in unions of same sex persons could be established as a sociologically empirical fact, the Court would be prepared to reconsider the issue. It was on that issue that *Colombia Diversa's* lawsuit was based. There was, therefore, a first obstacle to overcome: to show the Court, ten years later, that the situation had substantially varied by comparison to what had happened in 1996. Secondly, the Constitutional Court has always maintained that the family that is protected in Colombia is the heterosexual, monogamous family, which can be rightly formed through a heterosexual marriage or through the union of a man and a woman that are not necessarily married. This is the discussion that will take place this year in Latin America, because the Supreme Court of Mexico will be discussing this matter as a result of the Federal District law sanctioned in December 2009, and the issue will also be discussed in Argentina. What is interesting is that Argentina and Mexico do not face the problem we have in Colombia, because the Mexican or the Argentine constitutions do not define family, while the Colombian

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Constitution does define it as heterosexual. The question is that it has always been said that in Latin America the heterosexual, monogamous family is a minority, alternative families are a majority, they are families composed of women in charge of their children. Studies carried out in Mexico have demonstrated that in some regions the prevailing families are the ones composed of grandmothers and grandchildren.

There are sociological data that show the alternative character of families in Latin America; the heterosexual, monogamous family is truly a minority. But the family law is a political project; it has always been; therefore saying that the ideal family constitutionally protected is the heterosexual, monogamous family is a constitutional project. This has been the Constitutional Court's bet; the Court has betted on their being a formality in the case of a family which does not actually exist. Any LGBT movement active in this context must face the fact that any issue involving unions of same sex couples poses a threat to family. When the strategy for this lawsuit began to be planned, it was clear that it was important not to frighten the Court; the issue of family could not be brought up under any circumstance. It had to be stated that the acceptance of unions of same sex couples, providing them constitutional protection in matters of rights of property had nothing to do with the family. *Colombia Diversa* adopted that strategy. I have always interpreted that ruling as a tacit agreement between the LGBT movement and the conservative sector of the Constitutional Court.

Catalina Botero, who was the magistrate in charge at the moment of pronouncing judgment in one of the cases, the one involving social security in matters of health, made a beautiful reflection on what was at stake, asking everyone to talk about what they had to talk about, that the Court had to start talking about the issue of family, that people should stop being afraid to talk about the issue of family. In Comparative Law, in all LGBT issues – discrimination, couples, family, or any matter – there are always two traditional arguments: either the question is raised as discrimination, in terms of equality or in terms of what Eve Sedgwick, great *queer* theoretician, called *minoritizing*, that is, conceiving the homosexual issue as an issue involving special people who need special rights, or *majoritizing*, that is to say, in terms of universality: we are all more similar than we would like to be; sexual orientation is a sort of accident and for the rest we are human beings. Thus, the strategy many people consider the most powerful proposes: let us begin to raise issues in terms of universal rights; if all of us have a life project, part of that life project includes the free development of our sexual options. In that respect, everyone and not only homosexuals decides on the type of family or union. But for some this line of thought implies eliminating differences, eliminating sexual dissidence. Well, in any case, there is always a tension between the different principles to be used in a strategy.

CM: I understand that in Colombia there isn't an anti-discrimination law on grounds of sexual orientation or of gender identity.

ER: No, there isn't.

CM: Are there any ideas about creating a strategy to create such law or aren't there?

ER: This has also been a very much debated issue because it highlights the relationship between Congress and the Constitutional Court. In Colombia, the Constitutional Court is so activist and so generous in the recognition of the rights of minorities as a result of the legislative absence of protection in this regard. This is a very common topic in studies of political science on relations between courts and

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congresses. In Colombia, before the Court's rulings, there were several bills on the recognition of same sex couples. I think there were at least six bills that reached different stages in the legislative instance; these bills had very clear champions, such as Piedad Córdoba. The projects were sunk at various points in the legislative process, some at the very initial stages, but the last one was very scandalous because the four debates had been addressed, and in a last procedure, which is called conciliation procedure, a procedure through which the text issued by the House of Representatives and the text issued by the Senate are conciliated to produce a unified legal text, the bill was sunk. Many people who had originally voted repented. This was so scandalous that at *Colombia Diversa* we thought we would lodge a writ of amparo because we considered the procedure had not been a constitutional one. The Congress failed in protecting the rights of a social group and now it corresponds to the Constitutional Court to do what the Congress did not do.

CM: What is the Congress seeking to defend, what is its line of argument in moral and religious terms?

ER: The most recalcitrant sector of the Congress insists on the fact that the protection of family prevents granting amparo protection to the union of same sex couples. At Congress there are sectors that are absolutely reactionary. In political debates one still hears arguments regarding the natural order of things, in the years 2006, 2007, 2008, 2009, this is an untenable position, but it exists.

As for your question regarding an anti-discrimination law, since 2004 there has been a project initiated by the Office of the Ombudsman to produce a bill that would be a sort of anti-discrimination statute against all forms of discrimination. It was a space in which a number of groups which had always championed protection against discrimination got together for the first time to decide what we would bet on jointly. Given that each kind of discrimination is a practically incommensurable universe, the resulting bill was extremely complex. One of the great Colombian senators – who unfortunately is not with us any longer – Gina Parodi, took it seriously and decided that the only way to force the Ombudsman to present the bill it had not presented was to devise a new bill and present it. Congress has not shown an interest and we haven't had even a first debate. This bill presents a technical difficulty because it is a type of law that requires a special procedure: if it is not approved in a single legislature you have to start all over again. That is what has happened. Now I don't know what will happen, with the current Congress majorities being fundamentally Uribe supporters and conservatives, although Uribeism is a many-headed monster and it doesn't have a well-defined position with regard to this issue.

Neither do I perceive that there exist, among women's organizations or LGBT organizations, a particularly strong interest in that this be achieved, for in Colombia, with the existence of the writ of amparo, there is a very powerful, very conclusive and very swift action that can be taken in the case of people being discriminated. The writ of amparo has functioned very well in matters of race, protection of indigenous peoples, of sexual minorities, of women and of severely handicapped persons.

CM: I have heard certain critical opinions regarding the work of *Colombia Diversa*, due to its being focused on the Colombian middle class, from the middle class for the middle class, for the gay and the lesbian communities, and not so much for the other letters in the LGBT acronym. Could you give me your opinion in this respect? What is

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the relationship with minority ethnic groups, minority racial groups and identities that are not binary in the normative sense?

ER: I also ask myself when I assume the cause of same sex couple's marriage, adoption or the cause of same sex couples, if these are really the reasons why gay persons are discriminated in Colombia. I'm not so sure about that. In this sense, that would be an imperialist project; the LGBT communities of Latin America do the same

thing that the white, gay *mainstream* organizations in the United States do. Lamda Legal Defense Fund or the LCLU consider that the adequate thing is the pursuit of marriage. In this I tend to assume the absolute *queer* position when they say that it is like wading in deep water. But I believe in our country arguments get even more complex, and not only because one must try to conquer the spaces that belong to family. How does discrimination on grounds of sexual orientation work in a socio-economic context such as the Colombian one? I believe there are still no empirical studies that can tell us exactly the role sexual orientation plays according to the different socio-economic strata.

CM: Does a bill traditionally contemplate a universal individual with no class, no ethnicity?

ER: Not necessarily. There are differentiated bills, there are bills for women as the head of the family, etc. In the issue of sexual orientation it is not clear what being a colored, gay man in Colombia means, I have no idea, but I think it would be extremely important to know it. How many people have the resources to contribute to the social security? How many people are really included in the subsidized regime or within levels of poverty in which these decisions are completely unimportant? But there is an issue that is the symbolic, political issue that opens up spaces. Without these decisions, the issue would not be of public concern; those who criticize *Colombia Diversa* cannot ignore the fact that, thanks to these decisions, a space opens for other issues to be discussed in the public agenda, that is, there we are going to take care of lesbian women's rights and combine this with a class perspective.

I think that the acronym LGBT is, up to a certain point, a perverse one, which was invented in the USA within a very peculiar context of activism, with its own socio-cultural and economic context, which is not directly translatable to us. To speak of LGBT in Asia or in Africa is a contradiction, because those categories are not trans-historically or culturally stable. But sometimes strategy precedes theory and the everyday needs precede theory, and one has to be pragmatic. In the acronym LGBT, the G has taken it all; we see diverse sexualities through the optics of gay men, and of a certain type of gay men.

In that measure, I believe lesbians have been rendered invisible, as have the much more perverse ways in which they are being subdued, punished doubly due to the combination of sexism and homophobia. Bisexuals are invisible. What does being bisexual in contemporary societies mean? Like Kenji Yoshino remarks, bisexuals are included in a sort of contract of epistemic elimination between heterosexuals and homosexuals. For many homosexuals, bisexuals are confused heterosexuals or people who want to experiment, and the same goes for homosexuals. There is also the transgender problem; trying to make a judge understand what a transgender is, is already a practically impossible matter. We are not carrying out serious work with trans, but what does a small organization with scarce resources that must confront a society

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with this existential diversity do? It is these persons who really experience everyday violence in the hardest, most perverse way; who face the greatest barriers, who find themselves in situations of real impoverishment.

I believe, in sum, that these critiques you mention are partially accurate, but they may also be very unfair and blind people. Colombia is a country that requires remembering that there are many injustices that demand being discussed at the same time, and that is the task of the judges and the organizations that appeal to the judges for them to discuss these issues.

CM: In Norway I had the chance to talk with the activists who managed to promote legislation concerning couples who are very concerned because owing to the way in which this legislation was handled, it eliminated the differences and did not succeed in transforming homophobia. In Norway there is even adoption, the law is so complete that it doesn't even specify if you are marrying a man or a woman, but the indices of harassment at school, in the different universities are extremely high; people do not want to get out of the closet. What is your opinion?

ER: I am not surprised by what the Norwegians describe; to think that rules or legislation or a positive judicial ruling transform reality overnight is too innocent. The law does not work that way, the law is bound to produce social transformations in lengthy time-spaces and the law does not work on its own, that is, one must follow the juridical transformations, one must accompany them with strategies that transform culture, education, etc. On the other hand, there is a more theoretical question, repeated by the *queer*: Why consider that the core of LGBT movement has to be the family issue? That is a mistake, firstly because we want to colonize the most oppressive institution, the one in which people have been more oppressed, traditionally. How is it possible that if women have criticized for years the pattern of traditional family, we should wish to conquer marriage, that profoundly alienating and subordinating institution? Then comes the question of normalization. The sector of activism that has promoted the family issue is that liberal sector within the gay community, which says; we are equal, we are not a threat, the only thing that renders us different from you is that we like persons of the same sex, but that is restrained to the bedroom. As for the rest, we are like everyone else; we don't rape children or kill them. Might it not be that a long period of subordination creates a series of different cultures that are important to preserve, and that it would be an obvious mistake to lose? The monogamous dynamics will turn against the gay community itself or against the LGBT community: before, they did not allow us to get married; now the ideal thing is to be married. What happens with all those who have made of promiscuity, of polygamy and of all those kinds of alternative forms of experiencing sexuality a way of living? Are they going to transform them into pariahs among the pariahs? The other issue is that the fact that same sex couples are allowed to get married and may adopt children does not imply that homophobia is over, because homophobia exists in people's minds; homophobia is a prejudice, and prejudices are lodged in a very complex way in the minds of people, in educational processes, in processes of basic socialization, at school, at home. To transform this, the Law has a minimal potential; it may raise the issue, it may show a hidden social phenomenon, it may normalize it in the sense that it begins to refer to the situation of many persons as an issue of political concern, may lead to self-questionings, but transformations are always followed – and this has been shown in the context of the United States – by a homophobic *backlash*. The homophobic forces within society resist. This occurs in every sphere: when in 1954 the United States Supreme Court prohibited racial segregation in schools, George

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Wallace, the governor of the State – I can't remember if was Georgia or Alabama – said: "I won't comply, I simply won't comply; here our cultural life is based on the separation of white and black persons, the United States Supreme Court of Justice cannot come and tell me that I have to accept blacks in my children's school; I'm not going to do it." Why wouldn't the same thing happen in an issue that is linked to one of the greatest anxieties in Western culture?