

“MACHISMO AT THE CROSSROADS - RECENT DEVELOPMENTS IN COSTA RICAN GAY¹ RIGHTS LAW”

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INTRODUCTION – GAY RIGHTS AND THE GLOBAL SCENE

Because of all the news coverage about New York State’s recent passage of a law making gay marriage legal² and the adoption of similar laws in

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1. I use the word “gay” here to refer to gay men, lesbians, bisexuals, and the transgendered, sometimes also referred to as the “LGBT” community.

2. Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 24, 2011, at A1, available at <http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html>.

Mexico City³ and Argentina,⁴ many people might not be aware that something perhaps even more momentous just occurred internationally, namely, the United Nations' (U.N.) passage of a resolution proclaiming that discrimination against gay people and the transgendered is a serious problem worldwide.⁵ The resolution calls for the first ever global U.N. study on the state of the problem.⁶ It has important implications for many countries, especially in the rest of Latin America, where attitudes about gay rights are still conservative.⁷

While some Latin American countries will no doubt be figuring out how to respond to the U.N. resolution, others have already passed laws offering some measure of protection to gays. One such country is Costa Rica, a Central American country that is a popular tourist destination for gay travelers.⁸ Costa Rica banned the criminal prosecution of adult gay sex in 1971,⁹ something the United States did not do until 2003.¹⁰ Costa Rica's

3. *Gay Marriage Law Comes into Effect in Mexico City*, BBC NEWS (Mar. 4, 2010), <http://news.bbc.co.uk/2/hi/8549400.stm>.

4. *Argentine Senate Backs Bill Legalising Gay Marriage*, BBC NEWS (July 5, 2010), <http://www.bbc.co.uk/news/10630683>.

5. Frank Jordans, *UN Group Backs Gay Rights for the 1st Time Ever*, Associated Press, June 17, 2011, available at <http://abcnews.go.com/International/wireStory?id=13865133#.TtZIGDBLWIk>.

6. *Id.*

7. See, e.g., *Gay Marriage in Argentina: A Queer Calculation*, ECONOMIST (July 15, 2010), http://www.economist.com/blogs/americasview/2010/07/gay_marriage_argentina. Also, a recent nationwide survey on attitudes about gay rights in Costa Rica showed that "[a]bout 70 percent of Costa Ricans disagreed (the majority strongly disagreeing) that gays should be permitted to marry in civil union or should have the right to adopt children." *Chinchilla Says She Would Not Oppose Legalization of Gay Marriage in Costa Rica*, TICO TIMES (Costa Rica), May 17, 2011, http://www.ticotimes.net/Current-Edition/News-Briefs/Chinchilla-says-she-would-not-oppose-legalization-of-gay-marriage-in-Costa-Rica_Tuesday-May-17-2011.

8. A Google search on the words "gay-travel-costa-rica," produced 1,780,000 results. A commentary for "about.com," the second hit on the Google search, has this to say about foreigners traveling to Costa Rica:

As for gay-owned or simply gay-friendly guest houses and accommodations, Costa Rica has plenty of them. It's a very comfortable place for gay travelers, and most of the foreigners who have moved there to open inns and accommodations (i.e., Americans, Canadians, Europeans, etc.) tend to be on the left-leaning, eco-conscious, and gay-friendly side. So in that sense, it's hard to go wrong.

Andrew Collins, *Planning a Summer Trip to Costa Rica - Advice on Gay Travel in Costa Rica*, About.com, http://gaytravel.about.com/od/readergaytravelquestions/qt/CR_letter.htm (last visited Jan. 11, 2012). *But see also infra* Part Three of this article which counters these views, especially in relation to the experiences of *local* gay Costa Rican citizens, as opposed to foreign tourists visiting the country.

9. EDDIE BRUCE-JONES & LUCAS PAOLI ITABORAHY, INT'L LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASS'N, STATE SPONSORED HOMOPHOBIA 9 (2011), available at http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2011.pdf.

constitution is also inspired by broad human rights principles that have and can be used in the future to protect its gay citizens. However, a strong culture of *machismo*, a phenomenon associated with what one law scholar has called a “harsh brand of gender subordination,”¹¹ and resistance on the part of conservative Christian groups have made expansion into the area of gay marriage and the actual implementation of current laws more challenging than gay activists might have hoped. Some of that resistance, both legal and cultural, has been successful, while some of it has not.

This article will explore the state of gay rights law in Costa Rica, particularly against this backdrop of conservatism, by looking at how the courts have interpreted and enforced the law and how certain cultural dynamics — particularly *machismo* and the role of the Church — have informed their development. Its findings can be used to examine whether or not Costa Rica’s experience can be used as a model for other Latin American countries.

Part One will provide a theoretical framework for various approaches to understanding how gay rights law in Costa Rican is situated within the larger legal framework of critical race, lat crit, feminist, and human rights law theory. Part Two will describe the international legal context within which Costa Rica operates, with a particular focus on United Nations and Latin American protocols to which Costa Rica is a party. Part Three will explore the large role that the Christian religion and the culture of *machismo* have played in shaping societal and legal debates about gay rights in Costa Rica. Part Four will cover relevant laws, policies, and gay rights court cases in Costa Rica that reflect and/or challenge some of these dynamics. Part Five will explore the lessons that can be learned from these developments.

10. *Lawrence v. Texas*, 539 U.S. 558 (2003).

11. Martha I. Morgan, *Taking Machismo to Court: The Gender Jurisprudence of the Colombian Constitutional Court*, 30 U. MIAMI INTER-AM. L. REV. 253, 267 (1999). *But see also* Morgan’s point that it is shortsighted to equate machismo with the resistance to pro gay rights laws in Latin America

[w]hile the machismo culture might be a driver behind violence against homosexuals, it is another question, to be addressed infra, whether politicians and judges creating law have machismo attitudes. Although Catholicism and machismo culture might be compatible with a system that does not grant same-sex couple rights, they are not necessarily drivers of the law. For example, Latin America’s high birth rate has been attributed to Catholicism and machismo, but studies have shown that it is the unemployment rate and illiteracy rate of women that drives birth rates. U.S. DEP’T OF JUSTICE, ATT’Y GENERAL’S COMM’N ON PORNOGRAPHY FINAL REPORT 197-223 (1986).

I. USING HUMAN RIGHTS THEORY TO FRAME THE UNDERSTANDING OF GAY RIGHTS LAW IN COSTA RICA

A. Feminism Theory – Homophobia as a Form of Sexism

A tremendous amount of gay rights law scholarship focuses on the extent to which laws guaranteeing civil rights protections to citizenry, particularly laws prohibiting sex discrimination, should be used to prohibit discrimination against gays.¹² This is due in part to the fact that countries like the United States were historically so resistant to appeals for protection for gays under basic constitutional protections guaranteeing equal treatment that activists looked to sex discrimination law as an analogous source of redress.¹³

One of the main arguments posed was that homophobia is the conscious or unconscious belief that gays are perverse because they do not conform to cultural ideas about how men and women should look and act.¹⁴ As such, the argument goes, gays are stepping outside the prescribed norms for their biological sex and should be penalized for doing so.¹⁵

In my own work I have argued that when such beliefs are used to target gay workers, this should be prohibited under sex discrimination law.¹⁶ This kind of analysis directly stems from traditional feminist thought, with its emphasis on critiquing the role that patriarchy plays in keeping women in limited and less powerful societal roles.¹⁷ By analogy, lesbians are unfairly penalized for daring to reject heterosexuality, and gay men, often typed by mainstream culture as being overly “feminine” and therefore not “natural”

12. See generally Toni Lester, *Protecting the Gender Nonconformist from the Gender Police — Why the Harassment of Gays and Other Gender Nonconformists As a Form of Sex Discrimination in Light of the Supreme Court’s Decision in Oncale v. Sundowner*, 29 N.M. L. REV. 90 (1999); See also Nicole Anzuoni, Note, *Gender Non-Conformists under Title VII: A Confusing Jurisprudence in Need of a Legislative Remedy*, 3 GEO. J. GENDER & L. 871 (2002); Sandi Farrell, *Reconsidering the Gender-Equality Perspective for Understanding LGBT Rights*, 13 LAW & SEXUALITY: REV. LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES 605 (2004); Meredith Render, *Misogyny, Androgyny and Sexual Harassment: Sex Discrimination in a Gender-Deconstructed World*, 29 HARV. J.L. & GENDER 99 (2006); Clare Diefenbach, *Same-Sex Sexual Harassment After Oncale: Meeting the “Because of . . . Sex” Requirement*, 22 BERKLEY J. GENDER L. & JUST. 42 (2007).

13. Lester, *supra* note 12 at 91, 92.

14. See generally SUZANNE PHARR, *HOMOPHOBIA: A WEAPON OF SEXISM* (1997), available at <http://suzannepharr.org/wp/wp-content/uploads/2008/01/homophobiaaweaponofsexismcondensed.pdf>.

15. Lester, *supra* note 12, at 98 n.52, 103.

16. See generally *id.*

17. For a good historical piece on this analysis, see Veronica Beechy, *On Patriarchy*, FEMINIST REV., Autumn 1979, at 66, 66 (citing KATE MILLETT, *SEXUAL POLITICS* (1969)), available at <http://www.palgrave-journals.com/fr/journal/v3/n1/full/fr197921a.html> (“At the most general level patriarchy has been used to refer to male domination and to the power relationships by which men dominate women.”).

men, are both subjected to different forms of patriarchy, all of which are just another kind of sexism at play.¹⁸ Some scholars of Latin American gender relations have even argued that in certain countries this vilification of the feminine leads to more active (sexually penetrating) males who engage in sex with other men in passive (sexually receptive) roles less socially stigmatized than their passive counterparts.¹⁹

B. Human Rights Theory

While some human rights law theorists continue to frame the argument about gay rights within the context of sex discrimination,²⁰ there is a growing body of law scholarship that places the question of gay rights into the larger context of human rights, with an emphasis on general rights that should be guaranteed to *all* people, as opposed to just women or any particular minority group. In a discussion of how this has played out in Latin America, scholar Omar G. Encarnación has said:

Promoting gay rights as human rights in Latin America predated the acceptance by the international community of the popular argument that “gay rights are human rights.” This view holds that gays are entitled to freedom from discrimination by virtue of being human; accordingly, what is being advanced with gay rights is humanity rather than a “gay agenda.”²¹

President Cristina Fernández de Kirchner of Argentina may have had this in mind when she proclaimed her support of gay marriage in 2010 by using the language of human rights, not gay rights *per se*. “We are a more *humane* and equitable society this week than last week,” she said, “thousands of Argentines have conquered rights I already had.”²² As a strategy, this approach may prove to be a more effective way of wooing voters than focusing on gays as a distinct minority group since it may appeal to peoples’ sense of the common humanity in all of us.

Human rights theory has a long and tested legacy with deep roots in the now famous 1948 United Nations Declaration of Human rights, passed just

18. Lester, *supra* note 12 at 104.

19. Martin Nesvig, *The Complicated Terrain of Latin American Homosexuality*, 81 HISP. AM. HIST. REV. 689, 692 (2001).

20. See Anthony R. Reeves, *Sexual Identity as a Fundamental Human Right*, 15 BUFF. HUM. RTS. L. REV. 215 (2009); James Wilets, *Conceptualizing Private Violence against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, 60 ALB. L. REV. 989 (1997).

21. Omar G. Encarnación, *Latin America’s Gay Rights Revolution*, J. DEMOCRACY, Apr. 2011, at 105, 106 (footnote omitted).

22. *Id.* at 109 (citing Gisele Sousa Dias, *Cristina Promulgo la ley de Matrimonio Homosexual en un Clima de Festejos*, CLARÍN, July 22, 2010, www.clarin.com/sociedad/titulo_0_303569767.html) (emphasis added).

after the end of World War II.²³ Key provisions of the Declaration include Article I, which states: “All human beings are born free and equal in dignity and rights,”²⁴ and Article II which provides that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²⁵ Further, Article VII provides: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”²⁶

Many “critical race”²⁷ and “lat crit”²⁸ scholars have argued that the U.S. legal system in particular tends to unfairly pigeonhole people into distinct identity categories based on their race, ethnicity, or gender, etc., which can produce the effect of not taking into account the varied and nuanced dimensions that are inherent in all identities and experiences. For instance, white judges applying a law like Title VII in the U.S., which prohibits employment discrimination based on race and sex, have generally been reluctant to recognize that African American female complainants subjected to both kinds of discrimination simultaneously should be entitled to redress for both.²⁹ As a counter to this legally myopic viewpoint, lat crit law scholar, Berta Esperanza Hernández-Truyol, has said: Human rights analysis can offer “the foundation for challenging the incoherent uni-dimensional construct of law that seeks to atomize a person into her/his component parts rather than engage the person as a whole.”³⁰ Such sentiments are echoed in the Values Statement of the Latin American gay rights group, Malabai, which says: “[s]exual rights are an inalienable part of *human rights*, and therefore, are universal, indivisible and interdependent.”³¹

23. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration].

24. *Id.* art. I.

25. *Id.* art. II.

26. *Id.* art. VII.

27. *See generally* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1996).

28. *See generally* Berta Esperanza Hernández-Truyol, *The Gender Bend: Culture, Sex, and Sexuality — A LatCritical Human Rights Map of Latina/o Border Crossings*, 83 IND. L.J. 1283, 1318 (2008).

29. *See generally* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex*, 1989 U. CHI. LEGAL F. 139 (1989). *See also* Toni Lester, *Race, Sexuality, and the Question of Multiple, Marginalized Identities in U.S. and European Discrimination Law, in GENDER NONCONFORMITY, RACE, AND SEXUALITY: CHARTING THE CONNECTIONS* 84 (Toni Lester ed., 1998).

30. Esperanza Hernández-Truyol, *supra* note 28, at 1318.

31. *Values*, MULABI – ESPACIO LATINOAMERICANO DE SEXUALIDADES Y DERECHOS, http://translate.googleusercontent.com/translate_c?hl=en&langpair=es%7Cen&rurl=translate

As the following discussion will show, this human rights approach to securing recognition for the struggles of Latin American gays has produced some significant results.

II. THE INTERNATIONAL CONTEXT FOR GAY RIGHTS IN COSTA RICA

In 2008, both Panama and Nicaragua struck down laws making homosexuality a crime, joining every other Spanish-speaking nation in Latin America that had already done the same.³² All of this was the result of long years of activism and advocacy by gay rights groups both domestically and globally. Starting in the 1990s, gay rights groups engaged in lobbying efforts before several international bodies, including the U.N., the Organization for American States (“OAS”), and the Southern Cone Common Market (the free trade association of Latin American, called “SCCM”) to get these organizations to take a stance on this issue.³³ The European Union had already taken up the question long before this in the 2000 Equal Treatment Directive,³⁴ which states that “any direct or indirect discrimination based on . . . sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community.”³⁵

By 2007, the SCCM adopted a statement condemning discrimination against gays in its member states and endorsing gay marriage.³⁶ And in 2008, the OAS adopted a resolution declaring that discrimination against gays was a human rights violation.³⁷ Further, in 2010, the OAS’s main judicial body, the Inter-American Court of Human Rights, rendered a judgment in a case brought to it by Karen Atala, a Chilean judge, who said she had been illegally separated from her children because she was involved with another woman.³⁸ The Court ruled in favor of Atala and said that Chile should develop policies designed to end all forms of state sanctioned sexual orientation discrimination.³⁹

Finally, as was mentioned at the beginning of this paper, the U.N. adopted a resolution condemning discrimination against gays in 2011, to which Costa Rica was a signatory. As of now, Mexico City and Argentina

.google.com&u=http://www.mulabi.org/&usg=ALkJrhjbFz4dkFfq0y1bRNeilzCISHTszA (last visited Jan. 11, 2012) (emphasis added).

32. Encarnación, *supra* note 21, at 104.

33. *Id.* at 107.

34. Council Directive 2000/78/EC, Establishing a General Framework for Equal Treatment in Employment and Occupation 2000 O.J. (L 303) 16, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:EN:NOT>.

35. *Id.* at 12.

36. Encarnación, *supra* note 21, at 107.

37. *Id.* at 107-08.

38. *Id.* at 108.

39. *Id.*

are the only places in Latin America where gay marriage is legal.⁴⁰ Same sex civil unions, however, have been allowed in Uruguay since 2008, Ecuador since 2008, Columbia since 2009, Brazil since 2004, and in some states in Mexico.⁴¹

Many of these global developments are the direct result of lobbying and testimony by gay rights groups about the extent of the violence and discrimination against gay people in these countries, including Costa Rica.⁴² The next section will explore some of those accounts and engage in a cultural analysis of their causes.

III. THE CULTURE OF MACHISMO, THE ROLE OF THE CHURCH AND DISCRIMINATION AGAINST GAYS IN LATIN AMERICAN AND COSTA RICA

A. Machismo and Homophobia

As one Latin American Studies scholar has explained, “[a] host of social factors account for Latin America’s traditional hostility toward homosexuality, including the hegemonic influence of Catholicism, the centrality of the family, and ‘the’ cult of masculinity that is called machismo.”⁴³ The popular chain of tour guide books for international travelers, Frommer’s, perhaps gives one of the most straightforward description of this state of affairs:

Costa Rica is a Catholic, conservative, macho country where public displays of same-sex affection are rare and considered somewhat shocking. Public figures, politicians, and religious leaders regularly denounce homosexuality.⁴⁴

As discussed in Part Two, *supra*, misogyny and homophobia are often interconnected. It should therefore come as no surprise that Frommer’s also tells women traveling to Costa Rica that “[f]or lack of better phrasing, Costa Rica is a typically ‘macho’ Latin American nation. Single women can

40. Germán Lodola & Margarita Corral, *Support for Same Sex Marriage in Latin America*, AMERICAS BAROMETER INSIGHTS (Latin Am. Public Op. Project, Vanderbilt Univ., Nashville, Tenn.), 2010, at 1& n.2, available at <http://www.vanderbilt.edu/lapop/insights/I0844.enrevised.pdf>.

41. *Id.*

42. NATASHA JIMÉNEZ & SOLEDAD DÍAZ PASTÉN, SITUATION OF LESBIAN, BISEXUAL, TRANSNATIONAL, TRANSGENDER AND INTERSEX WOMEN IN COSTA RICA IN REGARDS TO DISCRIMINATION 4, 5 (2011), available at http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/IGLHRC_for_the_session_en_Costa_Rica_CEDAW49.pdf.

43. Encarnación, *supra* note 21, at 117 n.4.

44. *Tips for Gay and Lesbian Travelers*, FROMMER’S, <http://www.frommers.com/destinations/costarica/0219028778.html> (last visited Jan. 12, 2012).

expect a nearly constant stream of catcalls, hisses, whistles, and car horns, especially in San José. Women should be careful walking alone at night throughout the country.”⁴⁵

Further, as one law scholar maintains, “until recently, it was traditional in much of Latin America to stigmatize only the so-called ‘passive’ partner in male same-sex sexual activity. The penetrator’s actions were not viewed as inconsistent with the power dynamics of *machismo*.”⁴⁶ Thus, the comingling of these two attributes — homophobia and the degradation of all things feminine, especially certain stereotypes associated with femaleness like passivity, comprise a big part of machismo culture in Latin American countries. Other writers, however, object to this perspective, asserting that *any* kind of same sex behavior is anathema in Latin American culture, regardless of whether someone is an active or passive participant.⁴⁷ Scholar Martin Nesvig adheres to this view.⁴⁸ He has said, “even a man who takes an active role would generally be expected to keep this information a secret and to condemn homosexuality even if he were personally engaged in it.”⁴⁹

Regardless of which view most accurately depicts gay life in Latin America and Costa Rica, the discussion later in this section will show that discrimination and violence against gay citizens is still prevalent, even as greater legal protections for gays are occurring throughout the region. In addition to a strong culture of *machismo*, the influence of conservative strands of the Christian Church in Costa Rica is another cause of this problem.

B. The Role of Religion

The Catholic Church has a long history of denouncing gay people. Just a few years ago it pronounced that “[m]arriage exists solely between a man and woman . . . while homosexual acts go against the natural moral law.”⁵⁰ As recently as 2010, the Vatican’s secretary of state, Cardinal Tarcisio Bertone, announced while on a visit to Latin America that homosexuals were to blame for the current global crisis regarding allegations of the

45. *Tips for Women Travelers*, FROMMER’S, <http://www.frommers.com/destinations/costarica/0219028784.html> (last visited Jan. 12, 2011).

46. Martha Morgan, *supra* note 11, at 294 (citing ROGER N. LANCASTER, *LIFE IS HARD: MACHISMO, DANGER AND THE INTIMACY OF POWER IN NICARAGUA* 235-78 (1992) and K.J. DOVER, *GREEK HOMOSEXUALITY* (1989)).

47. Nesvig, *supra* note 19, at 721.

48. *Id.*

49. *Id.*

50. *Vatican Fights Gay Marriages*, CNN (July 31, 2003), http://articles.cnn.com/2003-07-31/world/vatican.gay.marriages_1_gay-marriages-civil-unions-gay-couples?_s=PM:WORLD.

sexual abuse of children by priests.⁵¹ Pursuant to the Costa Rican Constitution, the Catholic Church is the country's official religion. Many Costa Rican Catholics hold similar views to the Church's official stance. In a recent study of over 3000 Costa Ricans on their attitudes about gay rights, "[a]bout 70 percent of Costa Ricans disagreed (the majority strongly disagreeing) that gays should be permitted to marry in civil unions or should have the right to adopt children."⁵² Catholics comprised two thirds of the study respondents.⁵³ The public stance of the conservative group, the Citizen Observatory, captures these sentiments. In a 2010 ad placed in the Costa Rican papers, it said: "Legally recognizing homosexual unions would turn them into a model for society. This is contrary to the fundamental values we Costa Ricans believe in . . . and that are enshrined in articles 51 and 52 of the Constitution."⁵⁴

Further, a 2010 survey of 42,238 respondents on general Latin America attitudes on gay marriage conducted by the American Public Opinion Project showed that "[e]vangelicals, compared to individuals who profess other religions, are significantly less likely to support same-sex marriage, while those who say that they are Atheists or agnostic about religion are more likely to support gay marriage."⁵⁵ Thus, some experts believe that there is a chance that overall antigay attitudes, at least with regard to marriage, will be difficult to eradicate in Costa Rica because non-Catholic Christians, like Protestants, Evangelicals, Mormons, and Jehovah's Witnesses, are becoming more prevalent in Costa Rica than Catholics, and these groups are even less tolerant towards gays than Catholics.⁵⁶ On the other hand, the Costa Rican study also shows that some conservative views about gay people might be changing in Costa Rica since 88 percent of the survey respondents also said they believed that homosexuals should be able to work wherever they want.⁵⁷ However, the study did not ask questions about levels of tolerance towards the transgendered, a group subjected to a great deal of discrimination in Costa Rica (see the next section for a discussion of this problem).

51. Rory Carroll & John Hooper, *Vatican Attacked Over Cardinal's Claim of Homosexuality and Paedophilia Link*, GUARDIAN (London), Apr. 13, 2010, at 22, available at <http://www.guardian.co.uk/world/2010/apr/13/vatican-homosexuality-paedophilia-claim-condemned>.

52. *Chinchilla Says She Would Not Oppose Legalization of Gay Marriage in Costa Rica*, *supra* note 7.

53. *Id.*

54. Alex Leff, *How Costa Rica is Battling for Gay Rights*, GLOBALPOST (Aug. 29, 2010), available at <http://www.globalpost.com/dispatch/costa-rica/100817/gay-marriage-same-sex-civil-unions> (last visited July 1, 2011) (footnotes omitted).

55. LODOLA & CORRAL, *supra* note 40 at 4.

56. Encarnación, *supra* note 21, at 115.

57. *Chinchilla Says She Would Not Oppose Legalization of Gay Marriage in Costa Rica*, *supra* note 7.

Despite some of the conservative attitudes towards gays described above, Costa Rica is often described as “the most gay friendly country in Central America.”⁵⁸ In an interesting case from Canada in which a gay Costa Rican was seeking political asylum on the grounds that his life was threatened because of virulent homophobia in the country, the hearing examiner disagreed with the applicant, observing that “the documentary evidence indicates that there is an abundant gay community thriving in Costa Rica and it is not the target of systemic persecution by the authorities or society in general.”⁵⁹

One thing the examiner failed to recognize, however, is that it can be quite different to be a tourist visiting a country on a temporary basis versus someone who is born and permanently resides there. Tourists are outsiders who do not have the same kind of ties to local culture and politics that are held by a country’s citizens. Further, as one researcher on gay tourism suggests, it is possible that gay tourists “feel an additional sense of freedom while holidaying because they go away from their everyday lives and, in this way, have a possibility for escaping constraints on their behaviour.”⁶⁰ This would not be the case for Costa Rica’s gay citizens, who may be subjected to harsher treatment than gay tourists for the very reason that they are seen as violating proscribed local cultural norms about how men and women in their culture should be and act in the traditional sense of what that means. Thus, the continued prevalence of *machismo* and religious conservatism in Costa Rica may explain why, even though the country has a recent history of taking some steps in favor of gay legal rights and is seen as a gay friendly tourist destination, there are still many instances of harassment and hate crimes committed against Costa Rica’s gay citizens.

C. Discrimination Against Gays in Costa Rica

According to political science scholars Bruce Wilson and Juan Carlos Rodríguez, gays in Costa Rica are still targeted by street gangs,⁶¹ and the police tend to equate gay crime victims with their perpetrators — “perverts who have chosen to embark on a life of crime, the same way that

58. Jennifer Meyer, *Gay Rights in Costa Rica: Pura Vida?*, COSTA RICA NEWS (Feb. 14, 2011), <http://thecostaricanews.com/gay-rights-in-costa-rica/5650>.

59. In Private Decision TA0-15870, [2003] Immigration and Refugee Bd. of Can., available at <http://www.irb-cisr.gc.ca/eng/brdcom/references/pol/juri/Pages/ta0-15870.aspx>.

60. Nina Ballegard & Jane Chor, *Gay and Lesbian Tourism: Travel Motivations, Destination Choices and Holiday Experiences of Gays and Lesbians* 16 (Nov. 7, 2009) (unpublished Master’s thesis, Copenhagen Business School & University of Southern Denmark), available at http://studenttheses.cbs.dk/bitstream/handle/10417/811/nina_ballegard_og_jane_chor.pdf?sequence=1.

61. Bruce Wilson & Juan Carlos Rodríguez Cordero, *Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics*, 39 COMP. POL. STUD. 325, 334 (2006).

burglars have learned to steal.”⁶² As one Costa Rican police officer stated, “‘Nobody is born with an inclination to steal. The same is true of drugs or homosexuality.’”⁶³ Further, there is a great deal of workplace harassment and discrimination is targeted against gay people, who are not inclined to file discrimination claims for fear of being outed.⁶⁴ One study showed that lesbians in particular are highly likely to stay closeted at work, fearing that their employers will discover their true orientation and be fired.⁶⁵

The transgendered are also especially vulnerable to violence and discrimination in Costa Rica. In a 2011 report for the United Nations on the state of discrimination against women in Costa Rica prepared by the International Gay and Lesbian Human Rights Commission, the study convener’s found that:

Police have been known to arrest transgender women by invoking laws prohibiting ‘public scandal,’ laws prohibiting ‘indecorous dress,’ complaints by neighbors and/or defiance of authority. These are ambiguous laws that define what are considered to be ‘good manners’ and can be applied at the discretion of the police. (Human rights advocates argue it is not discretion but arbitrary and discriminatory treatment). For instance, there is a misinterpretation of Article 385 of the Penal Code, which speaks of exhibitionism, drunkenness and touching others and are used as an excuse to arrest transgender women.⁶⁶

It is against this backdrop of discrimination that Costa Rican gay rights activists have forged a battle to get the legal system to be more responsive to their plight. Structural and procedural changes in the system adopted in the 1990s helped further their aims.

IV. THE COSTA RICAN CONSTITUTION AND OTHER LAWS EFFECTING GAY RIGHTS

A democratic republic, Costa Rica achieved independence from Spain in 1821 and adopted its current constitution in 1949.⁶⁷ The constitutional provisions most relevant to gay rights are Title IV, Article 20, which states that “all men are free within the Republic,”⁶⁸ and Title IV, Article 28, which

62. *Id.* (quoting JACOBO SCHIFTER, *PUBLIC SEX IN A LATIN SOCIETY* 152 (2000)).

63. *Id.* at 152.

64. *Id.* (citing Richard Stern, *Costa Rican AIDS Patient Coalition Wins Drug “Cocktail” in High Court Ruling*, 10 *PSYCHOL. INT’L* 3, 3-4 (1999)).

65. Ursula Rehaag Kopanke & Daria Gabriela Suárez R., *Final Remarks, JUSTICE FOR ALL WOMEN — DISCRIMINATION AGAINST LESBIANS IN COSTA RICA*.

66. JIMÉNEZ & DÍAZ PASTÉN, *supra* note 42, at 4.

67. U.S. Dep’t of State, *Background Notes: Costa Rica* (Sept. 14, 2011), <http://www.state.gov/r/pa/ei/bgn/2019.htm>.

68. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA art. 20, as amended by Ley No. 7880, May 27, 1999, *available at* <http://pdba.georgetown.edu/Constitutions/Costa/costa2.html>.

provides that “[a]ll persons are equal before the law and there shall be no discrimination against human dignity.”⁶⁹ With its references to freedom and human dignity, Costa Rica’s constitution evokes language found in the 1948 Universal Declaration, passed one year before the country adopted its constitution.⁷⁰ This is not surprising, since Costa Rica was a signatory to the Declaration.⁷¹ As I said earlier, some law scholars writing about the connections between Latin gay identity and individual rights and liberties in the U.S. have said that human rights theory is better suited for the kind of advocacy that is needed on behalf of gays of Latin descent. This approach has certainly been true in Costa Rica, where, as the discussion below will show, gay rights advocates have argued that the country’s gay citizens should be afforded equal rights based on this promise of freedom and human dignity for all.

In addition to the constitutional provisions just mentioned, Costa Rica also passed a law decriminalizing homosexual sexual acts in 1971.⁷² Well ahead of its time, this took place thirty-two years before the U.S. Supreme Court declared similar laws unconstitutional, and long before other Latin countries like Chile (1999), Colombia (1981), Cuba (1979), Ecuador (1997), Nicaragua (2008), and Panama (2008) did so.⁷³

Despite recent victories on the gay marriage front in Mexico City, Argentina, and Brazil, to date there is no recognition of same sex marriage in Costa Rica – a very Christian country where, as discussed earlier, recent public opinion polls show that marriage between a man and a woman is sacrosanct. As is the case with most debates about gay rights around the world, two of the most common arguments against their promotion are that they run counter to the tenets of Christianity and that gay marriage is against church doctrine. These views are strongly reflected in cultural attitudes and debates about gay rights in Costa Rica, evidenced as recently as the summer of 2011 when the Episcopal Church of Costa Rica announced that gay rights “[threaten] the strength of the family as the basic unit of society.”⁷⁴ The Church said it was aligning itself with the Catholic Church and called upon the government to refuse to approve gay marriage because to do so would

69. *Id.* art. 33.

70. Universal Declaration, *supra* note 23, arts. I, II.

71. 1948-49 U.N.Y.B. 535, U.N. Sales No. 1950.I.II.

72. BRUCE-JONES & PAOLI ITABORAHY, *supra* note 9, at 9.

73. *Id.* Dates for other Latin countries that have decriminalized gay sex are as follows: “Argentina (1887), Bahamas (1991), Bolivia, Brazil (1831), Costa Rica (1971), Chile (1999), Colombia (1981), Cuba (1979), Dominican Republic (1822), Ecuador (1997), El Salvador (1800’s), Guatemala (1800’s), Haiti (1800’s), Honduras (1899), Mexico (1872), Nicaragua (2008), Panama (2008), Paraguay (1880), Peru (1836-37), Suriname (1869), Uruguay (1934), Venezuela (1800’s).” *Id.*

74. *Bishops of Costa Rica Warn that ‘Rights’ to Same-sex Unions Undermine the Family*, ACIPRENDA (July 8, 2011), <http://translate.google.com/translate?hl=en&langpair=es%7Cen&u=http://www.aciprensa.com/noticia.php%3Fn%3D21902>.

constitute a failure “in its duty to promote and defend an institution essential to the common good, as is the marriage.”⁷⁵

Opponents of gay rights in Costa Rica have been able to rely with some success on those aspects of the constitution that relate to the role of religion in the country and the role of the family. Unlike the First Amendment to the U.S. Constitution, which overtly separates the role of the church and the federal government,⁷⁶ the Costa Rican constitution gives the Church great prominence within its legal structure. Title VI, Article 75 provides that the Roman Catholic Church is the religion of the State.⁷⁷ The State will support and maintain the Church, as long as it does not prevent the free exercise of the Republic or other forms of worship, as long as those other forms of worship are not opposed to universal morality and good customs.⁷⁸ Further, Title IV, Article 28, implicitly restricts so-called immoral behavior that some conservative groups might associate with gay sexuality by stating that “private actions which do not harm the morals or public order, or which do not cause any damages to third parties are outside the scope of the law.”⁷⁹

Finally, Article 51 of Title V states that “[t]he family, as a natural element and foundation of society, is entitled to State protection,” and Article 52 of Title V says that “[m]arriage is the essential basis of the family and rests on equality of the rights of spouses.”⁸⁰ These sentiments are further reflected in Paragraph 6 of Article 14 of the Costa Rican Family Code, which explicitly prohibits same sex marriage.⁸¹

Given the strong historical hold that the Church has had on the legal system, between 1971 and the early 1990s it was virtually impossible for gays to get any kind of legal respect or recognition in Costa Rica.⁸² Registro Nacional, the government’s registering body for new entities, would not even award gay rights organizations any kind of entity legal status during that time, which hindered their ability to mobilize into a movement,⁸³ and police raids on gay bars and harassment of attendees were common.⁸⁴ The

75. *Id.*

76. Cornell Univ. Law Sch. Legal Info. Inst., *Wex, First Amendment*, Aug. 19, 2010, http://www.law.cornell.edu/wex/First_amendment.

77. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA art. 75, *available at* <http://pdba.georgetown.edu/Constitutions/Costa/costa2.html>.

78. *Id.*

79. *Id.* art. 28.

80. *Id.* arts. 51, 52.

81. Cynthia Rothschild, WRITTEN OUT: HOW SEXUALITY IS USED TO ATTACH WOMEN’S ORGANIZING 129 (Scott Long & Susan T. Fried eds., 2005), *available at* http://www2.law.columbia.edu/faculty_franke/Gender_Devel/WrittenOut-FINAL.pdf (“The Family Code prohibits marriage between persons of the same sex, and the special law of de facto unions only recognizes unions between a man and a woman. This means that the right to inherit, to share property in common, or to have access to insurance or pension is reserved for heterosexual couples.”).

82. Wilson & Cordero, *supra* note 61, at 333.

83. It did not begin doing so until 1996. *Id.* (footnote omitted).

84. *Id.*

first gay activist organizations started to emerge in the 1980s and 1990s in response to this oppression and also because of the AIDS epidemic.⁸⁵ Then just as this activist momentum began to build, something fortuitous happened that would help support the work of gay rights proponents exponentially.

In 1989, the government restructured the court system in Costa Rica for the first time since 1949, adding a seven member team of judges tasked with addressing constitutional issues.⁸⁶ This new body, which is called “Sala Constitucional” or “Sala IV,” aggressively sought cases through major public education campaigns while simultaneously relaxing many of the previously rigid legal requirements to file a case.⁸⁷ As a result, gays, who had previously not had a voice in politics or in the courts, began to take advantage of their easier access to the legal system and bring a series of cases that called upon the courts to stand up and fairly apply the human rights language already present in the constitution to them.

Costa Rican gay rights legal claims generally fall into two categories – those that demand basic recognition for the right to be gay without fear of discrimination, retribution, or denigration in general, and those that seek constitutional protections for same sex marriage. The results have been mixed. For instance, a landmark claim that addressed the former was successfully brought under Sala IV in 1994 by the owner of a gay bar seeking to challenge police harassment and abuse. The Court decided against the police and ordered that they develop a training program on how to better treat gay people.⁸⁸ However, in another case in this category that took place in 1998, gay rights proponents were not as successful. In that case, the gay activist group, Asociación Triángulo Rosa, filed a claim against San Jose archbishop Román Arrieta Villalobos for making negative statements in the press about a gay and lesbian festival that was supposed to take place in the country.⁸⁹ The court concluded, however, that the archbishop was not guilty because “he had spoken in accordance with the Catholic Church’s doctrine on homosexuality.”⁹⁰

One of the most well known cases to address this issue of recognition of gay relationships and gay marriage involved a claim brought to the Costa Rican Supreme Court by gay rights activist, Yashin Castrillo Fernandez. Fernandez demanded that the Court recognize same sex marriage pursuant to international human rights protocols and the Costa Rican constitution.

85. *Id.*

86. *Id.* at 331.

87. *Id.*

88. Wilson & Cordero, *supra* note 61, at 336 (citing Corte Suprema de Justicia — Sala Constitucional, Ruling No. 4732-94).

89. *Id.* at 335-36 (citing Corte Suprema de Justicia — Sala Constitucional, Ruling No. 4732-94).

90. *Id.* (citing Corte Suprema de Justicia — Sala Constitucional, Ruling No. 3808-98).

The Court, which ruled in the negative, said: “the concept of marriage embraced by the Political Constitution stems historically from a context where it is understood to be between a man and a woman.”⁹¹ The family court ruled in the negative and the case was appealed to the Supreme Court in 2003, which took the unusual step of soliciting public opinion in a hearing on the issue before rendering its decision. It ruled that the plaintiff could not marry his partner because the law was never intended to apply to same sex marriage but instead only to traditional male-female marriages sanctioned by the Church.⁹²

In another unsuccessful bid at pushing the judicial envelope on gay relationships, a claim was brought before the Court in 2008 on behalf of a gay prisoner who was being denied conjugal visits that were allowed for his heterosexual counterparts.⁹³ The prison had originally approved the visits between the man and the male lover he met while in prison but then decided to end them. The Court gave little explanation for its ruling, save for its saying that the prison’s decision fell “within the scope of their rights, duties and powers.”⁹⁴

Most recently, in 2010 anti-gay rights groups successfully lobbied for a public referendum on same sex civil unions by obtaining the requisite 5 percent of the electorate’s vote.⁹⁵ Responding to a challenge to the referendum by gay rights groups, the Court halted the referendum but implied that history was on the side of the civil rights activists.⁹⁶ It said: “the rights of minorities borne out by struggles against majorities cannot be subjected to a referendum process where the majority rules People in same-sex relationships are a disadvantaged group and the object of discrimination who need support from public powers to recognize their constitutional . . . rights.”⁹⁷ Similar language was used in the 2003 U.S. Supreme Court case, *Lawrence v. Texas*,⁹⁸ when the Court declared the state

91. *Costa Rican Supreme Court Rejects Gay Marriage*, CATHOLIC NEWS AGENCY (May 28, 2006, 12:00 AM), http://www.catholicnewsagency.com/news/costa_ricas_supreme_court_rejects_homosexual_marriage/

92. David Brown, Note, *Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles*, 31 MICH. J. INT’L L. 821, 866 (2010) (citing Corte Constitucional, sent.1634-02, exp.02-001547-651-VD (Nov. 29, 2002)(Costa Rica)).

93. *Costa Rica Denies Gays Conjugal Prison Visits*, EDMONTON J., Aug. 10, 2008, at A7, available at [http://www.canada.com/edmontonjournal/news/story.html?id=b04ec27c-8b71-4abb-8e7a-31cdc6804a31&k=44327&utm_source=feedburner&utm_medium=%20feed&utm_campaign=Feed%3A+canwest%2FF264+\(Edmonton+Journal++News\)](http://www.canada.com/edmontonjournal/news/story.html?id=b04ec27c-8b71-4abb-8e7a-31cdc6804a31&k=44327&utm_source=feedburner&utm_medium=%20feed&utm_campaign=Feed%3A+canwest%2FF264+(Edmonton+Journal++News)).

94. *Id.*

95. Leff, *supra* note 54.

96. *Sala IV da Curso al Amparo Sobre Referéndum de Uniones del Mismo Sexo [Sala IV Gives Way Under Referendum on Same Sex Unions]*, EL PAÍS (Jan. 7, 2010), http://www.elpais.cr/frontend/noticia_detalle/1/27806.

97. Leff, *supra* note 54.

98. *Lawrence v. Texas*, 539 U.S. at 579 (2003).

of Texas' laws criminalizing gay sex unconstitutional. Former U.S. Supreme Court Justice Sandra Day O'Connor said in the ruling:

The State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law. The Texas sodomy statute subjects homosexuals to '[a] lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass . . . cannot be reconciled with' the Equal Protection Clause.⁹⁹

In addition to the constitutional reforms discussed with respect to Sala IV, Costa Rica also passed an employment discrimination law in 1998 making it illegal to discriminate against people who are HIV positive with the insertion of the words "sexual option," into the list of protected identity categories covered by the law.¹⁰⁰ The law provides:

Whoever applies, arranges or practices discriminatory measures because of race, nationality, gender, age, political, religious or *sexual option*, social position, economic situation, marital status or by *any suffering of health or disease*, will be sanctioned with penalty of twenty to sixty days fines. The judge will be able to impose, in addition, the disqualifying penalty that corresponds, of fifteen to sixty days.¹⁰¹

By way of comparison, the U.S. Congress has yet to pass a nationwide law prohibiting employment discrimination against gays such as this.

CONCLUSION – THE GIVE AND TAKE OF SOCIAL CHANGE MOVEMENTS

This article shows that, even after a Latin American country has adopted specific laws preventing discrimination against gays, the courts can be slow to interpret those laws in a light most favorable to gays, and the general populace can remain unwilling to honor those laws in day to day interactions with gay people. Thus, there is still much work that needs to be done. As the International Gay and Lesbian Human Rights Commission Report discussed earlier explains, Costa Rica "proclaims the equality of [minority] . . . rights. However, under the surface, it maintains an environment of condemnation, rejection and inequality. The myth of Costa Rica as a country that is completely respectful of human rights is belied by the large number of problems, both major and minor, that people who are different have to confront there every day."¹⁰²

99. *Id.* at 584 (O'Connor, J., concurring) (omission in original) (citing *Plyler v. Doe*, 457 U.S. 202, 239 (1982) (Powell, J., concurring)).

100. Law No. 7771, Apr. 29, 1998, art. 48 (Costa Rica), *available at* http://www.pasca.org/sites/default/files/ley_sida_cr.pdf.

101. *Id.* (emphasis added).

102. Kopanke & Suárez R., *supra* note 65, at 1.

This should come as no surprise, for as social change movements gain political traction, often there is a conservative backlash to return things to the status quo. For instance, in the United States, soon after the state Supreme Court of Massachusetts ruled that gays could marry in the state,¹⁰³ the U.S. Congress passed the Defense of Marriage Act,¹⁰⁴ and individual state legislatures around the country started passing amendments to their own constitutions banning gay marriage.¹⁰⁵ Similar reactionary developments are taking place in Latin America in such countries as Honduras, Ecuador and the Dominican Republic, which all passed laws defining marriage as an institution designed solely for a man and a woman over the last few years.¹⁰⁶ Sometimes violence against oppressed groups seems to rise in direct proportion to an increase in their rights. Grupo Gay da Bahia, an activist organization in Brazil, for instance, reports that “260 gays were murdered in 2010 in Brazil, up 113 percent from five years ago, including recent high-profile cases that made headlines,” all of this taking place just before the country’s Supreme Court declared that gay marriage was constitutionally protected.¹⁰⁷

All of the above is not to say that gay rights proponents in Costa Rica should be disheartened. As the discussion here also shows, with the adoption of the Sala IV reforms to the Costa Rican court system, tremendous inroads have taken place for gays in everything from increased protections at work and greater legal sensitivity to the plight of people with AIDS to the recent suggestion by the Constitutional Court that there should be a nationwide discussion about the pros and cons of gay marriage. At one time, such a suggestion would have been unheard of and viewed as bizarre and immoral. Even former Costa Rican President Oscar Arias admitted at the end of his term in 2010 that he believed that gay unions “[should have legal recognition . . . [and that o]ne doesn’t choose one’s sexual orientation. It’s given by nature or God.”¹⁰⁸ And his successor, President Laura Chinchilla, recently changed the anti-gay marriage stance that helped make her campaign a success and now maintains that while she is still personally against it, she would support any judicial decision in favor of it.¹⁰⁹

103. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

104. Pub. L. 104-199, 110 Stat. 2419 (1966) (codified as 28 U.S.C. § 1738C (2010)).

105. Brad Knickerbocker, *Tug of War Intensifies on Gay-Marriage Issue*, CHRISTIAN SCI. MONITOR, May 5, 2005, <http://www.csmonitor.com/2005/0505/p02s02-uspo.html>.

106. Encarnación, *supra* note 21, at 115-16.

107. Bradley Brooks, *Brazil Approves Same-Sex Civil Unions Despite Catholic Protests*, HUFFINGTON POST (May 6, 2011), http://www.huffingtonpost.com/2011/05/06/brazil-same-sex-civil-union_n_858515.html. For information on increased violence against gays in other parts of Latin America, see also Michael Jones, *The Coup in Honduras and the Rise in LGBT Violence*, CHANGE.ORG (July 23, 2009), <http://news.change.org/stories/the-coup-in-honduras-and-a-rise-in-lgbt-violence>.

108. Leff, *supra* note 54.

109. Chinchilla Says She Would Not Oppose Legalization of Gay Marriage in Costa Rica, *supra* note 7.

Clearly, gay people in Costa Rica live in a cultural and legal climate that is a complicated mixture of open mindedness and bigotry. In this respect, they are not unlike their counterparts in most of the western world. As the polls suggest, however, attitudes about many aspects of gay life, especially with respect to workplace rights, have softened over time. And while people still seem to hold fairly conservative views about the rights of gays to marry, one can only hope that, as has been the case with Mexico City, Argentina, and Brazil, Costa Rica's legislature and judiciary will continue to use the liberatory promise of international human rights protocols and their own Sala IV to help shape their country into a welcoming place for people from all walks of life.

