

# SOCIAL MOVEMENTS AND THE CONSTITUTIONAL COURT: LEGAL RECOGNITION OF THE RIGHTS OF SAME-SEX COUPLES IN COLOMBIA<sup>1</sup>

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## 1 Introduction

On December 23, 2009, the Colombian government declared a “social state of emergency” in order to confront the financial crisis in the health system. The decreed set of measures motivated patients, doctors, students, political parties, the media, and the general population to mobilize. All of these parties, including the national government, used the same terminology: “the right to health.” During the protests, two images grabbed my attention. The first was a banner held up by two patients, which read “*TUTELA*:<sup>2</sup> WE ARE ALIVE THANKS TO YOU.” The other was a poster, reproduced by the thousands on flyers distributed in downtown Bogota during the protests, which read: “Health is not a favor, it is a right.”<sup>3</sup> In both cases, citizens ascribed personal significance to a legal action or a constitutional right and used a common language to channel their discontent.

Using the language of rights is not unique to social movements in Colombia, nor to countries in the Global South. Such terminology has also been used in the Global North, such as in the civil rights movement in the United States, or in recent cases like the “Right to Work” campaign carried out by unions in the United Kingdom to protest budget cuts made by David Cameron’s administration.<sup>4</sup> The use of terminology around rights is also not exclusive to progressive movements. Conservative movements that oppose a woman’s freedom to have an abortion use language based on the “right to life,” and those who oppose the right of same-sex parents to adopt children formulate their arguments around “children’s right to have a father and a mother.”

During the last decade, many of the political demonstrations and social mobilizations in Colombia have been mediated by the language of rights. Furthermore,

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many of these debates have revolved around the Constitutional Court, currently the most prestigious and most visible judicial institution. This phenomenon can be attributed to the 1991 Constitution, which establishes an extensive set of fundamental social rights as well as concrete, expedient mechanisms for filing complaints in court.

Nevertheless, we know very little about this phenomenon, which could be called the *constitutionalization of social movements*,<sup>5</sup> drawing on Esteban Restrepo's use of the expression *constitutionalization of daily life* (RESTREPO, 2002). The constitutionalization of social movements is characterized by the growing, massive, and expansive use of rights-based language and the courts by citizens, human rights organizations, social movements, community organizations, etc. Organized and unorganized citizens "go to court full of hope"<sup>6</sup> that it will take care of their needs or address their concerns.

In fact, in the past two decades, the Colombian Constitutional Court has issued a large number of decisions, including ones that recognize most of the rights of same-sex couples. This article analyzes the process carried out by the organization Colombia Diversa, which sought to acquire legal recognition for the rights of these couples. This analysis is based on elements of social movement theory, including mobilization frameworks, political opportunity structures, and resource mobilization (TARROW, 2004; McADAM; McCARTHY; ZALD, 1999).

Throughout this article, I identify the factors that led to the recognition of same-sex couples' rights. The first factor is the reframing of the claims within a constitutional rights framework. An example of this is the phrase "equal rights for all couples," coined by activists. Given the context of mobilization, the activists also opted to present a modest claim, leaving the issues of marriage and adoption out of the debate. The second factor analyzed here is the existence of an activist organization – Colombia Diversa – that brought together significant resources and forged alliances with academics, progressive networks, elite activists, grassroots activists, etc. This article also highlights the use of a large repertoire of legal, political, and media actions, such as claims of unconstitutionality, public interventions, bills, economic studies, letters and other means of communicating with the authorities, television commercials, etc. The third factor is the existence of a structure of political opportunities created from various aspects of the national context. These include the existence of a progressive Constitutional Court, a highly inefficient and corrupt Congress, and favorable public opinion.

This analysis allows one to argue for two closely linked theses: the first is proof of the centrality of rights-based language within political activism, and the second is the prominence of political activism in the definition of constitutional rights within the Court. These two ideas demonstrate the impact of social mobilizations on the progressive decisions made by the Constitutional Court and reflect on the relationship between political action and legal reform.

This article is divided into four sections. The first section presents a justification for this kind of study and briefly describes the research methodology. The second section presents some of the theoretical elements used to understand the case study, particularly the application of social movement theories to explain legal changes and strategies. The third section describes the process that led to recognition of the rights

of same-sex couples and analyzes the elements of this process, namely the frameworks of mobilization, the resources used by the activists, and the structure of the political opportunities. Finally, the fourth section offers some conclusions.

## 2 Activism and the creation of knowledge

Normally, studies done on constitutional rights are legal in nature, attempting to explain their dogma, structure, legal basis, and other characteristics that are relevant for making decisions on judicial and legislative issues. These studies are fundamental in building a technical understanding of constitutional law and human rights. However, this kind of research only explains one part of the phenomenon. Such inquiries can only look at the constitutional issue as it is laid out on paper and they do not capture the social forces that precede, surround, and give meaning to a judge's words. A more comprehensive look at the legal phenomenon requires research into the rights movement, keeping in mind that rights are above all a social and political creation, not just a collection of rules, institutions, and procedures.

At the same time, this article seeks to draw attention to lesbian, gay, bisexual and transgender (LGBT) people, who have had limited participation in the development of social and legal knowledge. Thus, this study aims to give a voice to those who have not had one or who have only had a small one. In the words of Charles Ragin, "this approach to social research asserts that every group in society has a 'story to tell'" (RAGIN, 2007). In this article, those who have fought for legal and social change tell us in their own words what they saw and did. As an openly gay, "out of the closet" lawyer who participated as an activist and lawyer for Colombia Diversa in these struggles for legal recognition, I am in a unique position to access a lot of information and analyze the issue. No doubt this vantage point is no less problematic for a traditional look at the relationship between the subject and the production of knowledge.

As a matter of fact, writing an academic piece from within a social movement could be considered biased and slanted. Several of my colleagues have expressed serious concerns regarding my role in this research study given my ongoing participation in many of these processes. These concerns are fascinating because they propose a dichotomy between the research subject and object, and lead to questions about reflexivity and objectivity in social science research. They are also relevant because they are evidence of a discussion on activists' roles in the production of knowledge and academics' relationships to social change. This last point helps us see the changes and the positions of both activists and academics in political action and the production of knowledge.

Despite the criticism, it is imperative that activists and lawyers participating in processes of social change, share their points of view, and do collaborative research on processes that they have witnessed or participated in. This work has thus been done "from the inside," and seeks to build appreciation for this kind of perspective. Doing this type of work has major benefits both for the advancement of legal understanding and for the very individuals who participate in the task.

The first benefit is the ability to access a certain kind of information and viewpoints that would be hard to obtain through other means. Historian Eric

Hobsbawn has noted the benefits of writing as a participant observer, both for research and for building knowledge of history (HOBSBAWN, 2003). Meanwhile, Julieta Lemaitre recalls that there is a tradition of these kinds of studies, including in particular the work of Williams and Susan Estrich, and argues that “in addition to these, there is a whole generation of legal studies texts that use first person to critique the right and analyze its impact on daily lives, using their own lives as the starting point in many cases, and extending in other cases to the private lives of vulnerable individuals and communities” (LEMAITRE, 2009, p. 163).

The second benefit is authorship by the protagonists themselves and the participation of citizens in the creation of knowledge—in other words, democratizing the production of ideas to include the participation of activists and citizens themselves. This benefit is related to the preservation of collective memory of legal and social changes.

The approach that I have described was also accompanied by a more traditional social science research methodology. This study was carried out with Colombia Diversa between September 2009 and October 2010 using collaborative research methods and with funding from the Latin American Studies Association’s (LASA) “Other Americas” project. Information was collected through interviews with the protagonists of the events, reviewing press, radio and television coverage (2006-2010), and piecing together the judicial process in the Constitutional Court.

### 3 Social movement theory and mobilization around the right

In *The Politics of Rights*, Stuart Sheingold recognizes that even though the courts are generally conservative and limited in their ability to implement their legal decisions, rights can still be an important political tool. He believes that it is possible to capitalize on perceptions related to rights in order to achieve a variety of political benefits (SHEINGOLD, 1974). Thus, rights-based litigation has three positive effects on social change: rousing citizens, organizing them into effective groups, and realigning political forces. Connecting these kinds of outcomes with social action leads us to consider the analyses of scholars who are interested in social movements.

Therefore, to analyze the mobilization carried out by Colombia Diversa, this article will keep in mind Sidney Tarrow’s work on social movements, which includes the study of political opportunities, resources for mobilization, and frameworks of meaning (TARROW, 2004). This author develops what has been called the *synthesis theory of social movements*, which brings together the different perspectives in the literature on social movements.

According to Tarrow, social movements should have a common goal, as illustrated by Marxist analyses of capitalism, but this alone is not enough. Social movements use external resources to achieve their objectives. Even movements with minimal resources can be successful if they can take full advantage of different outside opportunities. Tarrow argues that the most important factor is the structure of political opportunities, characterized by resources that are external to the group and generated in the political environment: “Social movements form when ordinary citizens, sometimes encouraged by leaders, respond to changes in opportunities

that lower the costs of collective action, reveal potential allies and show where elites and authorities are vulnerable” (TARROW, 2004). The most important changes in political opportunities are increased access to power, changes in government, the availability of influential allies, and divisions between elites.

Another structural element of this theory relates to resource mobilization, which is comprised of two things: repertoires of contention and structures of mobilization. All societies have learned customs when it comes to social mobilization—what Tarrow calls a memory of collective action or repertoires of contention—which become habitual forms of interaction. These routine forms of mobilization may be actions like marches, strikes, petitions, etc. These repertoires are invented, adapted, and combined by movement leaders, and their relative usage depends on the context and on the tactical decisions made by each group of citizens. However, these repertoires should continue to be used over time in order to become movements in the strict sense; otherwise, they would be isolated campaigns that generate little social change. In general, movements are only successful when they are well organized and when they are maintained over time. The most well-known structures of mobilization are social networks, which may be networks of friends, interest groups, and organizations involved in the movement. Pre-existing social networks reduce the social costs of mobilization and help maintain the momentum of collective action even after the initial enthusiasm has worn off.

Finally, mobilization frames refer to shared ideological assumptions that drive people to collective action. Social movements must “frame” their demands based on their ideological backgrounds, cognitive frameworks, and cultural discourses. The media is then used to disseminate these framed demands and to mobilize followers (McADAM; McCARTHY; ZALD, 1999).

These elements will be kept in mind as we analyze the case at hand, the recognition of the rights of same-sex couples, because they are useful for obtaining a more detailed view of the different characteristics of Colombia Diversa’s legal and social actions. Meanwhile, for the purposes of this article, I will use a broad definition of social movements, as proposed by Colombian researcher Mauricio Archila: “permanent, collective social actions, aimed at addressing conditions of inequality, exclusion, or injustice, that tend to arise in certain spatiotemporal contexts” (ARCHILA, 2008).

Several studies have been conducted on the relationships between social movements and the Constitutional Court in Colombia. These include the book by Isabel Cristina Jaramillo and Tatiana Alfonso on the process to partially decriminalize abortion (JARAMILLO; ALFONSO, 2008), the study by César Rodríguez and Diana Rodríguez on decision T-025 from 2004 and the prosecution process related to forced displacement (RODRÍGUEZ; RODRÍGUEZ, 2010), the work of Julieta Lemaitre on violence, the law, and social movements (LEMAITRE, 2009), and the work of Rodrigo Uprimny and Mauricio García on the Constitutional Court and social emancipation (UPRIMNY; GARCÍA, 2004). Each of these has sought to analyze the participation and the significance of social actors and the Constitutional Court in the political definition of constitutional law.

Keeping in mind the aforementioned theoretical elements, I believe that social movements can have a leading role in the Constitutional Court’s body of law. The Court’s decisions are not made outside of cultural and political contexts.

On the contrary, external factors and circumstances shape and influence the formulation of progressive or conservative decisions. This study is particularly interested in showing how “progressive decisions” are made with the participation of social actors who apply a repertoire of legal actions in the context of particular political opportunities using the language of constitutional rights as a cognitive framework for mobilization. Shifting our gaze this way helps us to understand both a court’s thematic and temporal variations and exactly how judicial decisions are made. When it is said that a court is “progressive,” it sounds like society is not participating in its decisions but this is far from reality.

While progressive judges do indeed take part in these decisions, they are not the only actors involved with legal or social change. This study also tries to show that “progressive decisions,” made with the participation of social movements, lead to what Charles Tilly has called a cycle of protest—that is to say, a historic moment in which movements initiate broader struggles that involve various social demands and actors over a long period of time (TILLY, 2004). I believe that these legal decisions have created a cycle of legal protest in the LGBT movement for the full recognition of their rights. As I try to show, participation in constitutional litigation leads to the creation of new social networks and new political opportunities and transforms the mobilization framework used to strengthen and sustain political action.

## 4 Anatomy of a legal change: recognizing the rights of same-sex couples

### 4.1 *The protective Court*

On September 1, 1998 at 8:30 a.m., the Constitutional Court held a public hearing where experts, gay rights organizations, teachers’ unions, and public authorities spoke regarding the alleged unconstitutionality of a policy that punished a teacher’s “homosexuality” as a disciplinary offense.

The newspaper *El Tiempo* published an article entitled, “Gay teachers defend themselves in a public hearing.” Here is how the paper reported the event:

*Her face covered with a black mask, a lesbian professor spoke before the Constitutional Court yesterday to defend her right to teach and not to suffer retaliation due to her sexual preference. “I cover my face out of fear that I will be punished for my sexual orientation, and because of the discrimination I could face from the education community,” she said at the beginning of her speech. Likewise, a group of gay individuals spoke out yesterday against the norm of the Teachers Statute, which considers homosexuality to be a form of misconduct, using all kinds of psychological, legal, anthropological arguments and quotes from historical figures like Mahatma Gandhi and Winston Churchill. “Your Honors: I am sure that you would like to have people like Socrates, Oscar Wilde, Leonardo Da Vinci or Martina Navratilova teach your children subjects like philosophy, literature, art, or sports. Well, they were all homosexuals,” said a representative of one of the gay-rights organizations.*

(EL TIEMPO, 1998).

The hearing was significant because the Constitutional Court blazed a new trail by giving voice to those subjected to discrimination and violence. The Constitutional Court resolved this claim of unconstitutionality in decision C-481 of 1998, taking up the arguments of the plaintiff, and declaring that calling homosexuality a form of misconduct violated the rights to the free development of personality and sexual orientation. Further, it stated that “norms like the one contested here come from ... the existence of old, ingrained prejudices against homosexuality, which hinder the development of a pluralist, tolerant democracy in our country” (COLOMBIA, 1998b).

This statement is a roadmap for the defense of free sexual choice and the fight against discrimination based on sexual orientation. Several lines of argument support this approach. First, in this decision, the Court decided that sexual orientation should be constitutionally protected regardless of whether it is biological in nature, a learned behavior, or based on personal choice. The Court therefore considered that sexual orientation had two constitutional protections, one stemming from the right to equality and non-discrimination based on sex, and one from the right to a free development of one’s personality. In its decision, the Court pulled from the scientific literature on homosexuality in a comprehensive and illustrated way, implicitly drawing on an old idea of the Scientific Humanitarian Committee (*Wissenschaftlich-Humanitäre Comite*), led by 19<sup>th</sup> century German scientist Magnus Hirschfeld. This idea, *Per scientiam ad justitiam* (“Through science to justice”), suggested using scientific knowledge to work towards the decriminalization of homosexuality (HIRSCHFELD 2007). Second, the Court’s decision brought international law into the Colombian debate on the legal protections for sexual orientation, especially through the use of the Human Rights Committee’s decision in *Toonen v. Australia*. Third, the Court explicitly recognized that sexual orientation is a suspect classification and, therefore, any distinction made based on sexual orientation should be subjected to strict constitutional scrutiny.

This ruling also brought up the core themes of later debates that would take place in the Court regarding the rights of the LGBT population, particularly the discussion of the kinds of constitutional protection that should be given to people based on their sexual orientation and gender identity, as well as the type of scrutiny that should be applied when controversies arise regarding discrimination against this population.

In the last ten years, the Colombian LGBT movement has grown exponentially in various dimensions, territorial and thematic, and with increased specialization and capacity for advocacy. Regarding the territorial dimension, it should be mentioned that the capital cities of almost all departments in the country now have local groups that have formed roundtables and local networks that plan and carry out political advocacy activities at the local and national levels.

With regard to local advocacy processes, the cases of Cali, Medellín, and Bogotá stand out, along with many other local initiatives that emerge daily, particularly in intermediate cities. In addition to a greater degree of organization, there has also been more local action through advocacy or cultural and political activities like marches expressing pride or LGBT citizenship. The issues covered by the different organizations—which include independent activists, human rights groups, political groups, grassroots groups, and cultural associations—vary greatly (SERRANO, 2010).

Litigation that has been instrumental includes the work of Germán Humberto Rincón Perfetti, a lawyer who has led important cases heard by the Constitutional Court (Decisions C-481 from 1998, T-725 from 2004, T-152 from 2007, COLOMBIA, 1998b, 2004e, 2007b), and a decision made by the United Nations Human Rights Committee, among others. He has skillfully incorporated his work as a lawyer into his work as a leader of the LGBT movement. The activists who have presented *tutelas*—or writs for the protection of constitutional rights—also stand out, such as the case of Edgar Robles versus the Colombian Scout Association (Decision T-808 from 2003, COLOMBIA, 2003b) and Juan Pablo Noguera versus the Santa Marta police (Decision T-301 from 2004, COLOMBIA, 2004b).

In other cases, partnerships have been formed with lawyers from the feminist movement, who have helped with cases like that of Martha Lucía Álvarez, who demanded the right to have a conjugal visit with her partner in prison (Decision T-499 from 2003, COLOMBIA, 2003a). Local LGBT organizations like *El Otro* in Medellín and *Provida* in Cúcuta have also filed *tutelas* against police abuse suffered by transvestites.

The public institution that has been most engaged with this litigation is the Ombudsman's Office; its regional offices have advised and represented victims in various human rights cases. It bears reminding that cases filed by citizens whose rights have been violated, and who hope to find effective legal remedies, play a fundamental role in building precedent, even when these citizens are not affiliated with activist organizations. Their actions are courageous and very useful for efforts to claim rights.

This work by different activists, citizens, and institutions has created a tradition of defending rights and fighting against discrimination and homophobia, especially through public actions concerning the unconstitutionality of laws and the use of *tutelas* to demand the immediate protection of fundamental rights. In response to these claims, the Constitutional Court has produced a precedent that recognizes the right to free sexual choice and the right to equality and non-discrimination based on sexual orientation or gender identity. This has been applied in different arenas including the right to education—with regard to gay professors (COLOMBIA, 1998c) and students (COLOMBIA, 1998b, 2002c), the right to serve in the armed forces (COLOMBIA, 1994, 1999a), non-discrimination in holding public office (COLOMBIA, 2002b), non-discrimination by private actors in employment situations (COLOMBIA, 2007b), the right to receive a conjugal visit in prison from a same-sex partner (COLOMBIA, 2003a), sexual freedom of gay prisoners (COLOMBIA, 2004g), respect by prison authorities for sexual diversity and its public expression (COLOMBIA, 2005b, 2006d), and the right to the use of public space (COLOMBIA, 2004b).

According to this case law, homosexuals are a group that has been traditionally excluded and is socially vulnerable<sup>7</sup> and, consequently, sexual orientation has been deemed a suspect classification. Thus, whenever a law or behavior differentiates between sexual orientations, a strict test of equality should be applied. The Court has said that “*all differential treatment based on a person's homosexuality is presumed to be unconstitutional, and it shall be subjected to strict constitutional control*” (COLOMBIA, 1998c).

Despite this important protection for individuals, the Constitutional Court initially refused to recognize the rights of same-sex couples (Decisions C-098 from 1996, SU-623 from 2001 and C-814 from 2001, COLOMBIA, 1996a, 2001d, 2001f). At that time, the Constitutional Court ruled that homosexuals could not be discriminated against in any situation if they were requesting individual protection but that there was no legal protection for couples. Particularly surprising is the overlap between this legal discourse and that of the Catholic Church, which states that one should love homosexuals because they are children of God but hate the sin—that is, homosexual acts. This kind of language implies that there is a difference between “being” and “doing.” The “being” should be respected but the “doing” can be restricted or disallowed.

#### *4.2 The legislative vacuum and the founding of Colombia Diversa*

When the doors of the Court closed on the rights of same-sex couples, the LGBT movement turned to legislative battle. The full Senate debated a 2003 bill that sought recognition for the rights of same-sex couples. Senator Piedad Córdoba presented the bill, and former judge and Senator Carlos Gaviria Díaz spoke in support. From the beginning, conservative senators went on the offensive against homosexuals in Colombia. This strategy was led by José Galat, who, together with other organizations, paid for the placement of slanderous ads against the LGBT community in the country’s largest newspapers. The bill did not get enough support in Congress to pass.

As a result, the rights of same-sex couples were politically blocked at the same time that it was a closed legal issue due to the Court’s case law. The situation in the Constitutional Court appeared nearly hopeless, given that the constitutional precedent that failed to give protection to same-sex couples seemed increasingly solid, and the majority within the Court would not change until 2009 (CÉSPEDES, 2004; LEMAITRE, 2005; MONCADA, 2002; MOTTA, 1998; ESTRADA, 2003).

In this context, after the legislative defeat, a group of LGBT activists decided to establish a human rights organization that could rise to the challenges posed by such a difficult debate. After a series of discussions and consultations, Colombia Diversa was created, with the goal of changing the situation of same-sex couples. It proposed to frame the injustices committed against the LGBT population in terms of human rights (LEMAITRE, 2009).

Colombia Diversa was founded in March 2004, with the participation of a large group of activists who got to know each other in 2003 while advocating for the approval of a bill to recognize the rights of same-sex couples. The organization was created against the backdrop of the legislative defeat and it was at least an indirect consequence of the campaign waged by conservatives against the rights of same-sex couples. Colombia Diversa brought together activists who had a variety of experiences, including standouts like Germán Rincón Perffeti who had worked on legal issues for the gay community, activists like Marcela Sánchez who lobbied for sexual and reproductive rights, and academics like Carlos Iván García, María Mercedes Gómez, and others who were very familiar with LGBT activism in other countries such as the United States. This diverse group was able to recruit activists who had previously

worked on legal and academic issues, as well as people who had no experience with activism but who had cultural or financial capital that could be used to strengthen the organization. The organization was able to bring together resources and people who had many years of experience, as well as new people and resources, all of which was channeled through a single organization aimed at coherent, continuous action.

Colombia Diversa was heir to three previous manifestations of LGBT activism: Proyecto Agenda, the Planeta Paz initiative, and the committee that pushed for the bill on the rights of same-sex couples. Proyecto Agenda was an initiative led by Germán Rincón Perffetti in the 1990s, which organized the gay pride march and Bogotá's Sexual Diversity Week. Although Rincón was a lawyer who had filed various lawsuits to appeal for gay rights, he had not—at least consciously—made a clear link between the legal claim and social protest.<sup>8</sup> In 1999, Daniel García Peña got in touch with Germán Rincón to propose a project related to then-president Andrés Pastrana's peace process with the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia*, or FARC). García Peña was concerned that the national government was entering into negotiations with FARC without the participation of civil society or social movements. He decided to found Sectores Sociales y Populares por la Paz – Planeta Paz – an initiative that sought to get all sectors of society involved with the formulation of a comprehensive peace proposal.

Organizations and activists throughout the country got involved in this initiative, including Proyecto Agenda's contacts and organizations that worked in the fight against HIV/AIDS. This platform not only allowed for the creation of a space in which proposals directed at the state were articulated in terms of rights but it went even further than this. During the second national meeting of LGBT organizations, committees were formed around topics like health, politics and human rights, organizational processes, training, communication, and economic welfare.<sup>9</sup> Rights were one part of the effort but they were central. The slogan at the time was, "The body as the first territory for peace," a concept that denounced the violence in the country while also seeking recognition for the right to personal autonomy.<sup>10</sup>

Over time, rights became an increasingly important part of the discourse, especially when work began on the rights of same-sex couples. Planeta Paz helped build the capacity of activists on two fronts: making contacts in the political arena, especially in progressive and left-leaning sectors, and reaching out to the media. In this context, Senator Piedad Córdoba approached Germán Rincón with the idea of a new bill on the rights of same-sex couples. This new bill led to the founding of a Support Committee that followed the legislative effort. The committee was critical in building knowledge and skills for lobbying.

Some of the aforementioned resources and expertise were shifted to Colombia Diversa. Formal and informal networks of activists, particularly the Support Committee, were key to the creation of Colombia Diversa. The organization was built on previous mobilizing structures but it took steps to "adopt, adapt, and invent" those pre-existing resources. New resources from the elites and access to new networks of progressive lawyers were used to build on the pre-existing structures of mobilization. Elites' resources—especially social networks and strong cultural capital—were

accessed thanks to the participation of Virgilio Barco, son of former liberal president Virgilio Barco Vargas (1986-1990). There is no question that he was an important catalyst to accessing the resources of Colombian elites. He initially joined the Support Committee for the bill on same-sex couples and his participation was critical for the creation and continuity of a new organization that could keep up the activism permanently. In the meantime, Colombia Diversa was also making connections with legal scholars through its legal committee, which played an important role in building partnerships with law professors and progressive lawyers.

The organization started its activities in 2004. In 2005, it began to study the possibility of presenting a new bill to achieve recognition of the rights of same-sex couples. However, this time they would aim for a text that would recognize both economic rights and the right to social security as well as use stronger supporting arguments. The organization also launched an intensive communications and lobbying strategy targeting audiences that had shown themselves to be open to such appeals.

An important aspect of Colombia Diversa's strategy was that the text of the bill focused on assuring basic rights of same-sex couples in order to resolve their most urgent problems: a lack of economic protection in the case of death or separation, lack of access to health care, and the non-recognition of a same-sex partner's pension in case of death. It was believed that a minimalist text, with two basic demands, allowed for more solid arguments and had more potential to gain political support. The bill also had two important technical legs on which to stand. First, there was a strong constitutional argument to be made using the Court's case law on LGBT rights. Second, Colombia Diversa and a group of volunteers had done a high quality, technically sound economic impact study on the affiliation of same-sex couples to the social security system. The study was done in anticipation of an argument that was frequently used by those who opposed the previous bill. The ability to build strong arguments and anticipate counter-arguments strengthened the lobbying strategy around this bill.

These factors started to generate consensus among most political parties and institutions that same-sex couples deserved at least minimal constitutional protections. These actors included members of the government and opposition parties, institutions like the Attorney General's Office and the Ombudsman, and a number of opinion leaders and citizens.

As part of its communications strategy, Colombia Diversa monitors what happens in the press and it has stated, "in general, it appears that the media reflects the agenda developed by the LGBT movement." The organization has shown that in years which were particularly significant for constitutional jurisprudence on these topics, such as 2007, the media was to be commended for

*the journalistic coverage of the Constitutional Court's ruling on the economic rights of same-sex couples, and the different debates in Congress on these rights and on the possibility that a same-sex partner could be the beneficiary of social security, [which] put LGBT issues on the public agenda, not only in specialized contexts, but also in the political and academic arenas, and in society in general.*

(ALBARRACÍN; NOGUERA, 2008, p. 277).

Colombia Diversa also highlights the large number of columnists and cartoonists who have supported equality and non-discrimination against the LGBT population.

This increase in news coverage has been complemented by editorial positions taken by various publications in support of LGBT rights. These include *El Tiempo*, *El Espectador*, *Semana* magazine, and *Cambio* magazine. Just to illustrate the importance of these discussions in the Colombian press, it is enough to note that in June 2010, the Sunday edition of the *El Espectador* newspaper had the LGBT theme on the front page with the title “Proudly gay.” That same month, *Arcadia* magazine, a publication of *Semana* magazine dedicated to cultural issues, published a special edition on gay men in the arts and letters.

News station CM& holds a prominent place for running a commercial that Colombia Diversa organized to raise awareness about the consequences of a lack of legal protections for same-sex couples. The video shows a woman sitting alone in an empty house, looking at a photograph. The narrator says:

*They lived together for thirty years, they paid for the house, they paid for food every day, and they paid for cable, clothing, and the stereo. They paid for some books with cash and they paid for evenings out with credit. Now she is alone, and the only thing she inherited were some pending credit card bills for the evenings out. All this because her partner was another woman. The law does not give them any rights. There is no right. CM& Televisión for the rights of the people.<sup>11</sup>*

This is the context within which the Constitutional Court made its decisions in recent years. While it is difficult to establish a causal link between social pressure around a case and the Court’s decisions, it is clear that the opinions and information disseminated by the media must have had some influence on the judges.

### ***4.3 The dual strategy and return to the Court***

In parallel to these legislative efforts, in June 2005, Colombia Diversa and the Public Interest Law Group (*Grupo de Derecho de Interés Público*) began looking into the possibility of filing a complaint regarding the unconstitutionality of Law 54 from 1990, which regulates *de facto* marital unions and on which the Constitutional Court had also already ruled. The suit was presented one year later, on May 31, 2006, while a bill for the rights of same-sex couples was under consideration (BONILLA, 2008).

The suit was put together by a group of law students under the guidance of Professor Daniel Bonilla of the Universidad de los Andes law school. The students studied the constitutional question and the different legal opportunities and obstacles to reopening the debate in the Court. After intense study, the students drafted a complaint that they discussed with both other professors at the law school and the activists of Colombia Diversa. The complaint centered on the principle of human dignity and argued that the refusal to give legal recognition to same-sex couples affected multiple components of dignity, as defined by the Court’s case law: to live well, to live as one wants, and to live without humiliation.

Alongside this demand, an effort was made to seek citizen interventions that would strengthen the arguments made in the case, especially those that, for technical reasons, could not be presented directly (BONILLA, 2008).

Given that the bill in Congress was about to pass, some activists thought that it was not a good time to file the complaint before the Court. However, after several internal discussions, Colombia Diversa decided to carry out a “two-pronged strategy”: to initiate a minimalist bill in Congress and a more ambitious lawsuit in court.

The strategy planned by the activists and their allies ended up following another course. First of all, on June 19, 2007, Congress voted down the bill. This was a controversial move given that they had held the four debates required for the bill to become law; the bill was defeated in a very close vote—34 to 29—on the last day of a legislative session during the final reconciliation of the different texts. Thus, the political route was blocked and it remains so to this day, with no way of moving forward.

Meanwhile, the Constitutional Court started to make a series of quick decisions in favor of same-sex couples. The media pressure, the legal arguments put before the Court by the Public Interest Law Group (GDIP) and other allies, and the intense social debate led the judges to agree amongst themselves to move forward with the discussion and the protection same-sex couples’ rights. In a solution based on ideological balance, they decided that the rights of same-sex couples would be examined successively—in other words, each right would be studied as citizens raised it. On that basis, the Constitutional Court, with a statement by Judge Rodrigo Escobar Gil, issued decision C-075 on February 7, 2007 stating that same-sex couples would have economic rights if they complied with the requirements and conditions established in Law 54 from 1990 for the *de facto* marital unions of heterosexual couples. This decision opened the door for new constitutional litigation because it changed the existing legal precedent and recognized, for the first time, the existence of same-sex couples as well as the state’s responsibility to protect their rights. The activists, therefore, decided to choose a path that was less hostile and slow moving than that of Congress.

Just one month later, on March 5, 2007, two students from the Universidad Pedagógica y Tecnológica de Tunja filed a complaint against Article 163 from Law 100 of 1993, asking that the right to access health care under the social security system be broadened to include same-sex couples. On August 30, 2007, Colombia Diversa, the Public Interest Law Group at the Universidad de los Andes, and the Centro de Investigaciones Derecho, Justicia y Sociedad–Dejusticia<sup>12</sup> filed a new constitutional claim seeking recognition for the right to social security, both in terms of health care coverage and in terms of survivors’ pensions.

On May 14, 2007, something unexpected occurred that gave greater support to the activists and to the constitutional precedent. The Human Rights Committee issued its decision in the case of *X vs. Colombia* (COMITÉ DE DERECHOS HUMANOS, 2007) regarding discrimination against a citizen who lived with his partner and who was refused a survivor’s pension. The Committee determined that Colombia had violated the Covenant on Civil and Political Rights and ordered the state to restore the rights of the affected individual as well as resolve this situation of discrimination more generally.

The constitutional cases that were underway led to decisions C-811 in 2007 and C-336 in 2008 (COLOMBIA, 2007c, 2008a). These rulings recognized the rights of same-sex couples to social security coverage and survivors' pensions. Later, a woman filed suit regarding part of the penal code that excluded same-sex couples from requirements that domestic partners make maintenance payments. In decision C-798 from 2008 (COLOMBIA, 2008c), the Court ruled that this norm was discriminatory and that the obligation to pay maintenance should be extended to same-sex couples.

We can use the events recounted up to this point to analyze the political and ideological elements of this mobilization. Four events stand out that help show the change in the structure of political opportunities. The first is the defeat of the bill in Congress on same-sex couples. This bill had significant political and social support but Congress voted it through a procedural maneuver. While this was a defeat, it also contributed to the Constitutional Court's development of case law on the rights of same-sex couples.

A second political event occurred during the 2006 presidential elections, when then-president Álvaro Uribe, known for his conservative positions, decided to support the rights of same-sex couples during his campaign for reelection. The President's line was: "marriage, no; adoption, no; economic rights, yes; social security, yes." This action shook the entire political spectrum and garnered significant social support. In addition, this formulation also summarizes the doctrinal agreement reached by the Constitutional Court.

A third event occurred in May of 2007 when the aforementioned decision by the United Nations Human Rights Committee found that Colombia was violating the Covenant on Civil and Political Rights by not recognizing a person's right to the pension of his/her same-sex partner.

The structure of political opportunities that affected the Court's decisions can be explained by looking at the legislative failure, accompanying socio-political changes, and the new approach to the relevant legal sources used to resolve cases of same-sex couples. It was in this context that the legal mobilization developed.

Another set of factors that affected the structure of political opportunities relates to changes within the legal field, particularly in Colombian constitutional law. The Constitutional Court developed different theories, concepts, and tools that were essential to strengthening this precedent. In particular, these included the development of strong precedents in terms of human dignity, equality and non-discrimination, the duty to protect groups who are subject to discrimination and exclusion, the incorporation of international human rights law in constitutional debates, and a greater awareness and use of fundamental rights by all of the judges in the Court when they address the issues put before them. Important decisions regarding rights were also issued during this period, indicating that the decisions on LGBT rights were part of a trend in which the Court was taking rights and social conflicts in Colombia more seriously.

The Constitutional Court has played a lead role in recent years due to the combination of several regulatory, political, and institutional factors (UPRIMNY; GARCÍA, 2004; UPRIMNY, 2007). The factors that are frequently identified as contributing to this role include the relative judicial independence that exists in

Colombia; the broad set of rights recognized in the Constitution; the existence of legal mechanisms that help citizens access the courts; and the crisis of democratic representation in Colombia today.

Second, it is worth highlighting that the Court has also developed constitutional doctrine and methodologies to guarantee the right to equality<sup>13</sup> and the protection of historically marginalized communities.<sup>14</sup>

Third, it is notable that the Court has repeatedly used international human rights law to determine the meaning and scope of the basic rights recognized in the Constitution. The Court has frequently turned to international human rights law using reference clauses in the Constitution (Articles 44, 53, 93, 94 and 214). In some cases, it has stated that there are international treaties that have the same standing as the Constitution. In other cases, it has simply used the statements of international organizations to help interpret domestic legislation.<sup>15</sup>

All of these factors led to the Constitutional Court's recent adoption of important decisions on fundamental rights, both in the context of *tutelas* and in cases of constitutionality disputes. To illustrate this phenomenon, we can cite the following rulings: decision T-025 from 2004, on the rights of displaced persons (COLOMBIA, 2004a); T-760, from 2008, on the Colombian health system (COLOMBIA, 2008b); C-355, from 2006, on the decriminalization of abortion in three specific cases (COLOMBIA, 2006b); C-370, from 2006, on the rights to truth, justice, and reparations for the victims of serious human rights violations (COLOMBIA, 2006c); C-070, from 2009, on limitations to the authority to declare states of emergency (COLOMBIA, 2009b); C-175, from 2009, on the right to prior consultation (COLOMBIA, 2009d); and C-728, from 2009, on conscientious objectors' right to refuse to serve in the military (COLOMBIA, 2009f).

All of these factors directly or indirectly influenced the creation and strengthening of constitutional precedent on LGBT rights. Case law is not generated in a vacuum; it is always surrounded by collective action, the work of the media, and political and institutional contexts.

Now, with regard to the ideological factors, a number of scholars have referred to five elements of cultural framing. The first is the cultural background of the demonstrators; the second is the set of framing strategies that groups choose; the third is the fight to frame the issue; the fourth relates to the media as communicators of this fight; and the fifth is the cultural impact of the movement when it succeeds in changing the cultural context (McADAM; McCARTHY; ZALD, 1999, p. 44). For our purposes, we will look briefly at each element in turn.

In this case, the activists had significant cultural background in homosexuality and in the difficulties they had already encountered in trying to advance the recognition of equal rights for the LGBT population. Therefore, to increase their chances of success, the activists chose to frame their demands in the language of human rights and, in particular, to present their claims using constitutional law. In fact, as part of this strategy, they used the Constitutional Court's own statements to persuade their listeners.

A crucial element that can be observed in this period is the important role played by lawyers, law professors, and other professionals who acted as allies and participants in this strategy. The legal professionals acted as intermediaries, helping to translate

social demands into the language of constitutional law. Universities, research centers, and human rights organizations also participated in this process by bringing citizen interventions to bear on the movement's legal arguments. This is related to how the activists and their allies framed their claims: constitutional law was used to more effectively understand and communicate the injustices suffered by same-sex couples. The process of framing injustices in the context of constitutional rights was not only used for presenting legal claims before the Court; this same language was also incorporated into the speeches that activists gave to the press and at protests that they carried out in later years. This strategy of translating messages into constitutional language not only worked when directed towards the Court, but also as a way of educating the public.

The second strategy was the moderate approach taken to frame the claim and the exclusion of the right to have a family. "There is a tacit agreement between the Constitutional Court and the activist to avoid any talk of family," explained Esteban Restrepo. Elizabeth Castillo, of the Lesbian Mothers group, agreed with this decision because she thought it was strategic not to speak of that issue at the time though she said that there was an understanding that this was a temporary position being taken in the judicial debate.

The media provided important channels for presenting and disseminating the message. In fact, the groups that opposed this movement expressed their unhappiness with this information asymmetry. As has already been stated, the support from the media—particularly from newspapers and magazines—was key to building awareness of the problem and turning the discussion into one of fundamental rights.

#### *4.4 When the balance comes to an end: family, marriage, and adoption by same-sex couples*

Despite this important progress, the Court used a strategy that left the situation of same-sex couples uncertain and did not guarantee all of the rights of *de facto* marital unions. The Court argued that the issues should be considered one at a time, in each area of regulation. As a result, it was necessary to clarify what constitutional criteria would be used to define the rights and obligations of same-sex couples given that there were other rights and obligations that the Court had not yet addressed. Consequently, Colombia Diversa, Dejusticia, and the Public Interest Law Group (GDIP) filed suit against provisions in 26 laws that recognized the rights, benefits, and obligations of heterosexual couples while excluding same-sex couples. This suit resulted in decision C-029 (COLOMBIA, 2009a), which was issued on January 28, 2009.

This process was quite participatory and it generated important knowledge and opportunities for discussion on the rights of same sex couples. Seventy organizations participated in the last case filed before the Court; these included the three organizations that drafted the complaint, 32 plaintiffs, and 45 other organizations that were involved. In sum, it could be said that the LGBT movement, as a whole, was the plaintiff in this process, enabling the movement to have a collective and consistent voice.

This process also enjoyed strong support from opinion leaders and generated few conservative reactions. This phenomenon may be explained by the methodology used

by the Court, which led to decisions that had moderated stances and large majorities.

The recognition of rights was progressive. The Constitutional Court, prodded by activists, quickly issued eight decisions (C-075 from 2007,<sup>16</sup> T-856 from 2006,<sup>17</sup> C-811 from 2007,<sup>18</sup> C-336 from 2008,<sup>19</sup> C-798 from 2008,<sup>20</sup> T-1241 from 2008,<sup>21</sup> C-029 from 2009,<sup>22</sup> T-051 from 2011,<sup>23</sup> COLOMBIA, 2007a, 2006e, 2007c, 2008a, 2008c, 2008d, 2009a, 2011) that transformed the legal status of same-sex couples and recognized these rights and obligations. The methodology that the Court chose to use has made it necessary to present each situation for separate consideration by the Court, without having formulated a general rule on the equality of same-sex couples. Furthermore, there is a lack of clarity on the legal definition of *de facto* marital unions because the Constitutional Court has not expressed, clearly and unequivocally, that same-sex couples can have this status (ALBARRACÍN, 2010).

A few days after the issuance of decision C-029 of 2009, Professor Rodrigo Uprimny referred to it in his opinion column, writing, “these legal victories, as important as they are, are insufficient. It is possible that, despite these changes in the law, discrimination against homosexuals in daily life will continue or become more subtle. There may even be proposals aimed at annulling or blocking these legal advances” (UPRIMNY, 2009). This insightful warning should also be applied to the Constitutional Court’s more recent rulings on same-sex couples.

The legal precedent that recognized the rights of same-sex couples has been essential to granting these couples access to civil and social rights. It constituted a breakthrough in the guarantee of basic rights and it brought same-sex couples greater respect in society. Nevertheless, this precedent has major limitations, particularly because it fails to recognize the right to build a family, an exception that was made in order to achieve progress in the recognition of rights. In other words, the balance between the ideological positions was short-lived.

It was Judge (E) Catalina Botero who pinpointed this tension when she clarified her vote in decision C-811 of 2007:

*Although I agree with the Court’s decision (...), and I celebrate the extension of social security benefits (...) to same-sex couples, I have decided to clarify my vote in order to speak to an issue that seems to resist being taken up by the Court with the democratic openness that it deserves: the nature of family in Colombian constitutional law.” She goes on: “These decisions represent a decisive step in the guarantee and enforcement of the constitutional principles of human dignity, freedom, equality, and solidarity, and in the consolidation of a truly democratic, pluralist, and inclusive regime. However, they consistently avoid reference to the same-sex couple as a nuclear family that deserves respect and constitutional protection equal to that given to the heterosexual family. In this area, then, there is a lack of protection that the legal system will have to correct.*

(COLOMBIA, 2007c).<sup>24</sup>

The evasion of this issue was due to the framing used by both activists and the Constitutional Court. The constitutional case law was based on a doctrine that tried to find balance between different political positions within the Court. Thus, the precedent can have both conservative and progressive interpretations.

Although the Court made progress towards the protection of the rights of same-sex couples, the rulings have not all been progressive, nor have they eliminated all of the legal inequalities or the treatment of gay and lesbian individuals as second-class citizens. At the heart of the legal precedent, there is a growing and unsustainable tension that hinders the realization of equality and the full rights of these couples. The precedent protects the rights of same-sex couples to the extent that they are comparable to heterosexual couples; however, at the same time, it does not recognize that both types of couples deserve the same immediate protection and respect, especially regarding constitutional protection for the families of same-sex couples. The Constitutional Court has not stated clearly and convincingly that same-sex couples are equal to and have the same rights as heterosexual couples. On the contrary, it has created case law that protects same-sex couples but with an inferior protective status. These limitations are clear in recent cases looking at same-sex couples' right to marry (C-886 de 2010, COLOMBIA, 2010b) and adopt (C-802 de 2009, COLOMBIA, 2009g); in these cases, the Court decided not to issue rulings, arguing that there were technical deficiencies in the cases that citizens presented.

## 5 Conclusion

This article has recounted the process leading to the recognition of the rights of same-sex couples through actions carried out by Colombia Diversa. As has been argued throughout this article, this type of rights-based mobilization can be analyzed by considering three aspects of social movements. First, there are ideological elements of mobilization, related to the frames used to interpret and communicate the problem. Regarding this point, the moderate approach to demands of same-sex couples and the translation of situations of injustice into terms related to constitutional rights were key elements that help explain how this debate has evolved. Second, there are organizational elements that especially concern the availability of resources. In this regard, Colombia Diversa was able to bring together different pre-existing resources and build the capacity to create networks and access new resources. In particular, there was the combination of different forms of activism, partnerships with legal scholars, and access to elite resources. Third, the external political factors—or the structure of political opportunities—reveal the contingencies that influence the debate and can be cleverly exploited by activists. These include situations related to elections, institutions, international law, or even divisions within the Court, which make up the socio-political context in which social movement actions unfold.

Finally, I would like to raise two ideas that came out of this work, one related to methodology and the other to the relationship between the creation of law and its implementation. First, I want to highlight the importance of empirical work and disciplined, methodological dialogue in understanding the judges' work and society's demands for justice. We can't keep reading constitutional case law without considering people and power relations. In the same way, it is essential for actors who are directly involved with changing the law to also take part in academic work and reflect on social change. Without the involvement of the protagonists, research on legal and social change runs the risk of missing out on key parts of the story.

Second, regarding the creation of law and assurance of its implementation, I believe that these two phases are intimately connected. The courts are not an endpoint for political disputes; they usually represent one stage in a much longer discussion—sometimes even a stage that is repeated multiple times. Thus, in order to understand the implementation of a ruling, it is also necessary to understand how it was arrived at, as well as the opposing political forces and underlying political debates. In fact, if the political forces that helped generate legal change begin to weaken, it is possible that ground will be lost with respect to the legal change that was achieved.

Studying the relationship between social movements and the law helps us better understand the political aspects of the law, as well as its symbolism. At least three outcomes can be linked to the issuance of the rulings in this case: 1) it strengthened a movement that kept up its efforts of collective action; 2) it launched a cycle of protest (TILLY, 2004) for the rights of the LGBT population and for real equality in all rights; and 3) it created new political opportunities—both progressive and conservative.

This article has tried to describe the external factors and circumstances that shape and influence progressive decisions. Social actors set in motion a repertoire of legal actions, in the context of certain political opportunities, and they use the language of constitutional law as a cognitive framework of mobilization. Progressive judges participate in these decisions but they are not the only actors involved in legal change. The courts are actors in a much larger cast and they are often not even the leads. Social movements also play an important role in the creation of progressive legal decisions. Depending on the setting, social movements may play a leading role or a more minor part; therefore, it is crucial to understand these variations well in order to take more effective action to strengthen social movements and build an understanding of constitutional democracy. In the case of the LGBT movement, Colombia Diversa was a central actor. Without considering Colombia Diversa, it would be impossible to understand the legal changes or the progressive character of the Court when it considered the rights of same-sex couples.

## REFERENCES

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### Bibliography and Other Sources

- ALBARRACÍN, M. 2010. Igualdad versus protección: límites y alcances del precedente constitucional sobre derechos de parejas del mismo sexo en el 2009. En *Corporación Humanas, Observatorio de sentencias judiciales*. Bogotá: Corporación Humanas. p. 47-65.
- ALBARRACÍN, M.; NOGUERA, M. 2008. *Situación de los derechos humanos de Lesbianas, Gays, Bisexuales y Transgeneristas en Colombia 2006 – 2007*. Bogotá: Colombia Diversa.

- ARCHILA, M. 2008. **Idas y venidas, vueltas y revueltas**. Protestas sociales en Colombia 1958-1990. Bogotá: Instituto Colombiano de Antropología e Historia y CINEP.
- BONILLA, D. 2008. Igualdad, orientación sexual y derecho de interés público. La historia de la sentencia C-075/07. In: UNIVERSIDAD DE LOS ANDES; COLOMBIA DIVERSA. **Parejas del mismo sexo: el camino hacia la igualdad**, sentencia C-075/07. Bogotá. p. 11-39.
- CÉSPEDES, L. 2004. **¿El fin o la modificación del juego?** Las parejas homosexuales frente al derecho de afiliación a la seguridad social en salud. Tesis de grado maestría en género. Bogotá: Universidad Nacional de Colombia–Facultad de Ciencias Humanas.
- EL TIEMPO. **Maestros gay se defienden en audiencia pública**. Bogotá, 2 sept. 1998. Available at: <<http://www.eltiempo.com/archivo/documento/MAM-791613>>. Last accessed on: May 5, 2010.
- ESTRADA, A.J. 2003. La orientación sexual y el derecho a la igualdad en la jurisprudencia constitucional. En: **Memorias de las IV jornadas de derecho constitucional y administrativo**. Bogotá: Universidad Externado de Colombia. p. 177-216
- HIRSCHFIELD, M. 2007. La fundación del Comité científico-humanitario y sus primeros miembros. In: ULRICH, K.H.; KERTBENY, K.M.; HIRSCHFIELD, M.; ZUBIAUR, I. (Ed.). **Pioneros de lo homosexual**. Barcelona: Anthropos.
- HOBSBAWN, E. 2003. **Interesting Times**. A Twentieth-Century Life. London: Abacus.
- JARAMILLO, I.C.; ALFONSO, T. 2008. **Mujeres, cortes y medios: la reforma judicial del aborto**. Bogotá: Siglo del hombre editores y Universidad de los Andes.
- LEMAITRE, J. 2005. Los Derechos de los homosexuales y la Corte Constitucional: (casi) una narrativa de progreso. In: BONILLA MALDONADO, D.E.; ITURRALDE SANCHEZ, M.A. **Hacia un nuevo derecho constitucional**. 1 ed. Bogotá: Universidad de los Andes. v.1. p. 181-217.
- \_\_\_\_\_. 2009. **El derecho como conjuro: Fetichismo legal, violencia y movimientos sociales en Colombia**. Bogotá: Universidad de los Andes y Siglos del Hombre editores.
- McADAM, D.; McARTHUR, J.; ZALD, M. 1999. **Movimientos sociales: perspectivas comparadas**. Oportunidades Política, Estructuras de Movilización y Marcos Interpretativos culturales. Madrid: Ediciones Istmo.
- MONCADA, P. 2002. La huida de la Corte: el derecho al onanismo. **Revista Tutela**, Bogotá, v. 3, n. 25.
- MOTTA, C. 1998. La Corte Constitucional y los derechos de los homosexuales. En: **Observatorio de justicia constitucional: La Corte Constitucional – el año de la consolidación**. Bogotá: Universidad de los Andes y Siglo del Hombre Editores. p. 290-299.
- RAGIN, C. 2007. **La construcción de la investigación social**. Bogotá: Siglo del Hombre Editores y Universidad de los Andes.
- RESTREPO, E. 2002. **Reforma Constitucional y Progreso Social: La “Constitucionalización de la Vida Cotidiana” en Colombia**. Available at: <[http://digitalcommons.law.yale.edu/yls\\_sela/14/](http://digitalcommons.law.yale.edu/yls_sela/14/)>. Last accessed on: Feb. 28, 2011.
- RODRÍGUEZ, C.; RODRÍGUEZ, D. 2010. **Cortes y cambio social: cómo la corte constitucional transformó el desplazamiento forzado en Colombia**. Bogotá: Centro de Estudios Derecho, Justicia y Sociedad.

- SERRANO, J.F. 2010. Colombia. In: STEWART, C. (Ed.). **The Greenwood encyclopedia of LGBT issues worldwide**. Santa Barbara, California. p. 89-106.
- SHEINGOLD, S. 1974. **The Politics of Rights**. New Heaven: Yale University Press.
- TARROW, S. 2004. **El poder en movimiento**. Madrid: Alianza Editorial.
- TILLY, C. 2004. **Social Movements, 1768-2004**. Colorado: Paradigm Publishers.
- UPRIMNY, R.; GARCÍA, M. 2004. Corte Constitucional y emancipación social en Colombia. In: SANTOS, B.; GARCÍA VILLEGAS, M. **Emancipación social y violencia en Colombia**. Bogotá: Norma. p. 463-513.
- UPRIMNY, R. 2007. La judicialización de la política en Colombia: casos, potencialidades y riesgos. **Sur – Revista Internacional de Derechos Humanos**, São Paulo, Año 4, n. 6, p. 53-70.
- \_\_\_\_\_. 2009. Una jurisprudencia a favor de la igualdad y de la diversidad. **El Espectador**, Bogotá, 2 feb.

## Jurisprudence

- COLOMBIA. 1994. Corte Constitucional. **Sentencia T-097/94**. M.P. Eduardo Cifuentes Muñoz.
- \_\_\_\_\_. 1996a. Corte Constitucional. **Sentencia C-098/96**, MP: Eduardo Cifuentes Muñoz.
- \_\_\_\_\_. 1996b. Corte Constitucional. **Sentencia C-271/96**.
- \_\_\_\_\_. 1998a. Corte Constitucional. **Sentencia C-002/98**.
- \_\_\_\_\_. 1998b. Corte Constitucional. **Sentencia T-101/98**, M.P. Fabio Morón.
- \_\_\_\_\_. 1998c. Corte Constitucional. **Sentencia C-481/98**, M.P. Alejandro Martínez Caballero.
- \_\_\_\_\_. 1999a. Corte Constitucional. **Sentencia C-507/99**, M.P. Vladimiro Naranjo Mesa.
- \_\_\_\_\_. 1999b. Corte Constitucional. **Sentencia T-823/99**.
- \_\_\_\_\_. 2000a. Corte Constitucional. **Sentencia T-268/00**.
- \_\_\_\_\_. 2000b. Corte Constitucional. **Sentencia T-618/00**.
- \_\_\_\_\_. 2000c. Corte Constitucional. **Sentencias T-999/00**.
- \_\_\_\_\_. 2000d. Corte Constitucional. **Sentencia T-1210/00**.
- \_\_\_\_\_. 2000e. Corte Constitucional. **Sentencia T-1426/00**.
- \_\_\_\_\_. 2001a. Corte Constitucional. **Sentencia C-088/01**.
- \_\_\_\_\_. 2001b. Corte Constitucional. **Sentencia C-093/01**.
- \_\_\_\_\_. 2001c. Corte Constitucional. **Sentencia T-427/01**.
- \_\_\_\_\_. 2001d. Corte Constitucional. **Sentencia SU-623/01**.
- \_\_\_\_\_. 2001e. Corte Constitucional. **Sentencia C-673/01**.
- \_\_\_\_\_. 2001f. Corte Constitucional. **Sentencia C-814/01**.
- \_\_\_\_\_. 2001g. Corte Constitucional. **Sentencia C-921/01**.
- \_\_\_\_\_. 2002a. Corte Constitucional. **Sentencia C-064/02**.

- \_\_\_\_\_. 2002b. Corte Constitucional. **Sentencia C-373/02**, M.P. Jaime Córdoba Triviño.
- \_\_\_\_\_. 2002c. Corte Constitucional. **Sentencia T-435/02**, M.P. Álvaro Tafur Galvis.
- \_\_\_\_\_. 2002d. Corte Constitucional. **Sentencia T-610/02**.
- \_\_\_\_\_. 2003a. Corte Constitucional. **Sentencia T-499/03**, M.P. Álvaro Tafur Galvis.
- \_\_\_\_\_. 2003b. Corte Constitucional. **Sentencia T-808/03**.
- \_\_\_\_\_. 2004a. Corte Constitucional. **Sentencia T-025/04**.
- \_\_\_\_\_. 2004b. Corte Constitucional. **Sentencia T-301/04**, M.P. Eduardo Montealegre Lynnet.
- \_\_\_\_\_. 2004c. Corte Constitucional. **Sentencia C-431/04**.
- \_\_\_\_\_. 2004d. Corte Constitucional. **Sentencia C-576/04**.
- \_\_\_\_\_. 2004e. Corte Constitucional. **Sentencia T-725/04**.
- \_\_\_\_\_. 2004f. Corte Constitucional. **Sentencia C-1054/04**.
- \_\_\_\_\_. 2004g. Corte Constitucional. **Sentencia T-1096/04**, M.P. Manuel José Cepeda
- \_\_\_\_\_. 2005a. Corte Constitucional. **Sentencia C-194/05**.
- \_\_\_\_\_. 2005b. Corte Constitucional. **Sentencia T-848/05**, M.P. Manuel José Cepeda.
- \_\_\_\_\_. 2006a. Corte Constitucional. **Sentencia C-042/06**.
- \_\_\_\_\_. 2006b. Corte Constitucional. **Sentencia C-355/06**.
- \_\_\_\_\_. 2006c. Corte Constitucional. **Sentencia C-370/06**.
- \_\_\_\_\_. 2006d. Corte Constitucional. **Sentencia T-439/06**, M.P. Marco Gerardo Monroy Cabra.
- \_\_\_\_\_. 2006e. Corte Constitucional. **Sentencia T-856/06**.
- \_\_\_\_\_. 2007a. Corte Constitucional. **Sentencia C-075/07**.
- \_\_\_\_\_. 2007b. Corte Constitucional. **Sentencia T-152/07**, M.P. Rodrigo Escobar Gil.
- \_\_\_\_\_. 2007c. Corte Constitucional. **Sentencia C-811/07**, M.P. Marco Gerardo Monroy Cabra.
- \_\_\_\_\_. 2008a. Corte Constitucional. **Sentencia C-336/08**.
- \_\_\_\_\_. 2008b. Corte Constitucional. **Sentencia T-760/08**.
- \_\_\_\_\_. 2008c. Corte Constitucional. **Sentencia C-798/08**.
- \_\_\_\_\_. 2008d. Corte Constitucional. **Sentencia T-1241/08**.
- \_\_\_\_\_. 2009a. Corte Constitucional. **Sentencia C-029/09**.
- \_\_\_\_\_. 2009b. Corte Constitucional. **Sentencia C-070/09**.
- \_\_\_\_\_. 2009c. Corte Constitucional. **Sentencia T-140/09**.
- \_\_\_\_\_. 2009d. Corte Constitucional. **Sentencia C-175/09**.
- \_\_\_\_\_. 2009e. Corte Constitucional. **Sentencia C-242/09**.
- \_\_\_\_\_. 2009f. Corte Constitucional. **Sentencia C-728/09**.
- \_\_\_\_\_. 2009g. Corte Constitucional. **Sentencia C-802/09**.
- \_\_\_\_\_. 2009h. Corte Constitucional. **Sentencia T-911/09**.

- \_\_\_\_\_. 2010a. Corte Constitucional. **Sentencia C-252/10**. Available at: <<http://www.corteconstitucional.gov.co/RELATORIA/2010/C-252-10.htm>>. Last accessed on: Feb. 28, 2011.
- \_\_\_\_\_. 2010b. Corte Constitucional. **Sentencia C-886/10**.
- \_\_\_\_\_. 2011. Corte Constitucional. **Sentencia T-015/11**.
- COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS. 2001. **Sentencia T-1319/01**.
- \_\_\_\_\_. 2007. **Sentencia T-391/07**.
- COMITÉ DE DERECHOS CIVILES Y POLÍTICOS. 1992a. **Sentencia T-566/92**.
- \_\_\_\_\_. 1992b. **Sentencia T-567/92**.
- \_\_\_\_\_. 1992c. **Sentencia T-597/92**.
- \_\_\_\_\_. 2001. **Sentencia SU-1300/01**.
- \_\_\_\_\_. 2004. **Sentencia C-248/04**.
- \_\_\_\_\_. 2004. **Sentencia C-576/04**.
- \_\_\_\_\_. 2005. **Sentencia C-591/05**.
- \_\_\_\_\_. 2006. **Sentencia T-058/06**.
- \_\_\_\_\_. 2008. **Sentencia T-436/08**.
- COMITÉ DE DERECHOS ECONÓMICOS, SOCIALES Y CULTURALES. 2004. **Sentencia T-025/04**.
- COMITÉ DE DERECHOS HUMANOS. 2007. **X contra Colombia**. Comunicación N° 1361/2005: Colombia. 14 mayo 2007. CCPR/C/89/D/1361/2005.
- CORTE EUROPEA DE DERECHOS HUMANOS. 2001. **Sentencia C- 673/01**.
- \_\_\_\_\_. 2005. **Sentencia C-203/05**.
- \_\_\_\_\_. 2007. **Sentencia C-291/07**.
- CORTE INTERAMERICANA DE DERECHOS HUMANOS. 2000. **Sentencia C-010/00**.

## NOTES

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Americas II Project, particularly to the director of the initiative, Rachel Sieder, and to Professors Angelina Snodgrass Godoy and César Rodríguez Garavito, who provided very wise feedback on the methodology and relevance of this research.

2. The *tutela* is a writ for the protection of constitutional rights. These cases can be heard by any judge in Colombia, and they must be resolved within 10 days after filing (Colombian Constitution, Article 86).

3. The Constitutional Court later declared that

the exception in question was unconstitutional; see decision C-252 from 2010 (COLOMBIA, 2010a).

4. Information about the campaign can be found at <http://righttework.org.uk/>.

5. Interview with Juanita Durán, formerly in the office of Manuel José Cepeda, April 30, 2010.

6. Interview with Jack Smith, an official from the Constitutional Court's General Secretariat, May 12, 2010.

7. Regarding the classification of the gay community as a group that has been traditionally discriminated against, the Court has said: "So... most people socially condemn homosexual behavior (...) The prejudices and misconceptions that have historically been used to anathematize homosexuals do not legitimize the laws that turn them into an object of public humiliation" (COLOMBIA, 1996a).

8. Interview with Germán Rincón Perffetti, March 20, 2010.

9. Personal meeting notes, August 18, 2001.

10. Interviews with José Fernando Serrano, Marcela Sánchez, and Elizabeth Castillo, April 2010.

11. The commercial can be seen on YouTube at: <http://www.youtube.com/watch?v=qt6MOzBu1q0> and <http://www.youtube.com/watch?v=WdvNn5KcMuM>. Last accessed on: May 5, 2010.

12. The *Centro de Estudios Derecho, Justicia y Sociedad* (Dejusticia) intervened in the judicial process that led to decision C-075 in 2007 and was later a plaintiff in the lawsuits that led to decisions C-336 in 2008 and C-029 in 2009.

13. This doctrine generally asserts that four additional aspects must be evaluated in order to determine if differential treatment can be considered discriminatory. These include whether or not the measure seeks an end that is constitutionally admissible or imperative; whether the measure is adequate to achieve that end; whether it is necessary in order to achieve that end; and whether the means used are in proportion to the end that is sought. The constitutional judge may vary the degree of scrutiny given to each of these elements depending on the level of intensity (light, medium or strict) that he or she decides to apply.

14. The Constitutional Court has referred to this topic in numerous decisions. These include decision C-271 from 1996; C-002 from 1998; T-823 from 1999; T-1210 from 2000; C-088 from 2001; C-093 from 2001; T-427 from 2001; C-921 from 2001; C-673 from 2001; C-064 from 2002; T-610 from 2002; T-301 from 2004; C-1054 from 2004; C-194 from 2005; C-042 from 2006; C-029 from 2009; T-140 from 2009; C-242 from 2009 (COLOMBIA,

1996b, 1998a, 1999b, 2000d, 2001a, 2001b, 2001c, 2001g, 2001e, 2002a, 2002d, 2004b, 2004f, 2005a, 2006a, 2009a, 2009c, 2009e).

15. For instance, it has looked to rulings from the Inter-American Court of Human Rights (decision C-010 from 2000) and the Inter-American Commission on Human Rights (decisions T-1319 from 2001 and T-391 from 2007), from the European Court of Human Rights (decisions C-673 from 2001, C-291 from 2007, C-203 from 2005), from the Committee on Economic, Social, and Cultural Rights (decision T-025 from 2004), and from the Committee on Civil and Political Rights (decisions T-566 from 1992; T-567 from 1992; T-597 from 1992; SU-1300 from 2001; C-248 from 2004; C-576 from 2004; C-591 from 2005; T-058 from 2006; and T-436 from 2008). It has also looked to international human rights instruments that have traditionally been considered as "soft law." So, for example, it has turned to the Guiding Principles on Forced Displacement (Colombia, Constitutional Court decisions T-602 from 2003; C-278 from 2007, M.P.: Nilson Pinilla Pinilla; and T-821 from 2007), and the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (Colombia, Constitutional Court decision T-821 from 2007).

16. Recognition of economic rights.

17. Case on the right to health care coverage.

18. Recognition of the right to health care coverage.

19. Recognition of the right to a survivor's pension.

20. Recognition of the right to maintenance payments.

21. Case on the right to a survivor's pension.

22. Recognition of the following rights and obligations: indefeasible family property and the protection of property categorized as a family home; maintenance obligations; migratory rights for same-sex partners and the right to live in San Andrés and Providencia; a guarantee of non-discrimination in criminal cases; the ability to avoid a criminal sanction; aggravating circumstances; the rights to truth, justice, and reparations for the victims of heinous crimes; civil protection for the victims of heinous crimes; benefits from the police pension and health system; family allowances for services; family allowances for housing; the ability to own property; beneficiaries of SOAT compensation in cases of death in traffic accidents; and obligations related to being in the civil service and having state contracts.

23. Case on the implementation of the right to a survivor's pension.

24. Clarification of the vote of Judge (E) Catalina Botero.

## RESUMO

Neste artigo reconstrói-se o processo de mobilização conduzido pela organização Colombia Diversa, a fim de conseguir o reconhecimento dos direitos de casais do mesmo sexo na Corte Constitucional colombiana. Em particular, identificam-se três elementos que contribuíram para essa mudança jurídica. Em primeiro plano, a reformulação das demandas num marco de direitos constitucionais; em segundo plano, a existência de uma organização ativista que aglutinou um conjunto significativo de recursos e a utilização de um repertório particular de reivindicações; em terceiro plano, a criação de uma estrutura de oportunidades políticas gerada pela existência de uma Corte progressista, um Congresso pouco democrático, e a presença de uma opinião pública favorável às demandas dos ativistas. Estes três elementos permitiram que os ativistas pudessem canalizar suas demandas por direitos numa decisão judicial progressista. Em geral, argumenta-se a favor de duas teses que estão intimamente vinculadas: a primeira é a evidência da centralidade do discurso sobre os direitos no ativismo político colombiano; a segunda é o protagonismo do ativismo político na definição dos direitos constitucionais no interior da própria Corte.

## PALAVRAS-CHAVE

Colômbia – Corte Constitucional – Direitos de casais do mesmo sexo – Movimentos sociais – Mudança social – Homossexualidade

## RESUMEN

En este artículo se reconstruye el proceso de movilización llevado a cabo por la organización Colombia Diversa, con el fin de lograr el reconocimiento de los derechos de las parejas del mismo sexo en la Corte Constitucional de Colombia. En particular se identifican tres elementos que contribuyeron a este cambio legal. En primer término, la reformulación de las reclamaciones en un marco de derechos constitucionales; en segundo término, la existencia de una organización activista que aglutinó un número importante de recursos y el uso de un repertorio particular de protesta; en tercer término, la creación de una estructura de oportunidades políticas generada por la existencia de una Corte progresista, un Congreso poco democrático, y la presencia de una opinión pública favorable a las reclamaciones de los activistas. Estos tres elementos permitieron que los activistas pudieran canalizar sus reclamaciones de derechos en una decisión judicial progresista. En general, se argumenta a favor de dos tesis que están íntimamente vinculadas: la primera es la evidencia de la centralidad del discurso sobre los derechos en el activismo político colombiano; la segunda es el protagonismo del activismo político en la definición de los derechos constitucionales al interior de la Corte.

## PALABRAS CLAVE

Colombia – Corte Constitucional – Derechos parejas del mismo sexo – Movimientos sociales – Cambio social – Homossexualidad