Chapter 5
Marriage Between Two. Changing and Unchanging Concepts of Family: The Case of LGBTI Rights Litigation on Family Issues in Colombia

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Abstract The article tracks the paradigmatic cases of LGBTI rights litigation in Colombian Constitutional Court that impacted family law in the domestic legal system. Issues brought to Court, such as cohabitation rights, the concept of family and adoption of LGBTI couples, show the changing and unchanging characteristics that family issues have under the Colombian constitutional system. It also invites a critical appraisal of the LGBTI campaign for marriage equality.

Colombia's legal order underwent fundamental changes after the enactment of the Political Constitution of 1991. The Constitutional Assembly provided a space of confluence for liberals, conservatives, indigenous peoples, and ex members of the Movimiento 19 de abril (M-19) [9th of April Movement] and Ejército Popular de Liberación (EPL) [People's Liberation Army] popular fronts to discuss and reach agreements on the design of a new social pact. This diverse group of individuals embraced a wide array of political visions and political commitments, which translated into an ideologically inclusive democratic project. As a result, the new Constitution was meant to provide a new basis for a society fragmented by political violence, drug trafficking, armed conflict, poverty and profound social inequality. The end promise was social peace, achieved, in part, by the political inclusion of voices that had been silenced or marginalized in the past.[1]

[1]For Julieta Lemaitre: "The 1991 Constitution appeared at the time, and so entitled *Semana* magazine as the "magic wand," that powerful object whose influence would achieve the end of violence. Even for many who did not believe it was an immediate and magical end to violence, it was the beginning of the end, the foundation to build it, the right track to achieve it." Julieta

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Contrasting the Constitutional Chart of 1886, -which was for the most part a document of institutional design and ascription of legal duties for public servants and citizens, 1991s Constitutional Chart was designed to include a wide charter of rights ranging from first generation rights (i.e. rights of freedom and participation); second generation rights (i.e. equality rights and economic, social and cultural rights); and third generation rights (i.e. collective rights as well as rights to a safe environment). In particular, first and second generation rights serve individuals, activists and public interest law groups, to activate judicial proceedings in order to defend, promote and advance the LGBTI (lesbian, gay, bisexual, transexual and intersexed) rights agenda. As will be evident in the sections to come, a particular characteristic of the LGBTI rights movement in Colombia is its focus on high impact litigation as a vehicle for social change almost to the exclusion of the legislature due to the latter's majoritarian conservatism on social issues. In the judicial process that took place at the Constitutional Court, the rights of self-determination, free development of personality, and equality and non-discrimination, as well as the supremacy clause of the Constitution, have provided fertile ground to push the limits of interpretation to include those of LGBTI community members.[2]

This push through the judiciary, however, would not have been possible absent two central mechanisms of constitutional control included in the 1991 Charter. First, the "acción de tutela" a type of claim that obligates a judge to decide a case in a maximum period of 10 days calendar in order to protect the fundamental rights of citizens against actions or omissions of the state or, in some cases, private individuals. Second, the "acción pública de inconstitucionalidad," a type of claim that can be made by any individual who finds that a law issued by Congress violates the rights or duties established in the Constitution.[3] Because neither the Constitution, nor any law enacted by Congress thus far includes express provisions of rights to LGBTI community members, LGBTI activists and community members have progressively gained access to similar rights as heterosexual citizens and couples through the use of these two actions, as well as a creative use of legal interpretation and judicial precedent.

Lemaitre, *El derecho como conjuro. Fetichismo legal, violencia y movimientos sociales*, (Bogotá: Siglo del Hombre Editores, 2009).

[2]The constitutional supremacy clause included in article 4 of the Constitution states that "[t]he Constitution is the supreme law. In any case of incompatibility between the Constitution and any other law or legal norm, the constitutional provisions shall be applied."

[3]These two actions give way to two different kinds of decisions. An "acción de tutela" is decided by a type "T" decision in which the Constitutional Court decides whether or not there has been an infringement of the fundamental constitutional rights of the claimant and provides a resolution reinstating or not, the rights whose violation has been requested. The effect of these decisions is restricted to the case at hand, but the precedent set by the decision binds other judges and the Constitutional Court in later analogous cases. An "acción pública de inconstitucionalidad" is decided by a type "C" decision. In this case, the Court reviews whether a challenged law fits the constitutional mandates and if it can be harmoniously interpreted in accordance with the rights, values and principles of the Chart. Any citizen can present this challenge to the Court.

The early years of the Constitutional Court's decisions on LGBT issues focused on individuals who challenged legal rules and social practices that were discriminatory against the LGBTI community. The Court's decisions from that early stage (1994–2007)[4] start recognizing the individual rights of persons with alternative sexual orientations. In such decisions, the Court emphasized that "homosexuals cannot be subject to discrimination because of their condition [. . .] the fact that their sexual behavior is not the same as that of the majority of the population does not justify an unequal treatment [. . .] A fair treatment of homosexuals has to be based on respect, consideration and tolerance, since they are human beings who, in conditions of whole equality, are entitled to the same fundamental rights as other citizens, even if their mores are not exactly the same as those of everyone else."[5]

Consequently, the Court declared as unconstitutional a diverse set of practices and laws that established an unequal, and adverse treatment of gay and lesbian citizens. Among them the Court declared unconstitutional the State censorship of TV commercials featuring a gay couple kissing in public,[6] the discrimination of members of the military because of their sexual orientation,[7] the ban on homosexuals to be members of the Boy Scout society,[8] and the inclusion of homosexuality as a disciplinary contravention for notary public servants.[9] However, during this same period the Court dismissed other challenges that sought to provide same-sex couples with the same legal recognition given to *de facto* civil unions.[10] Additionally, the Court dismissed cases that involved granting equal access to same-sex couples seeking social security benefits for their partner's as granted in *de facto* civil unions,[11] and the right of same-sex couples to adopt.[12] The diverse outcomes of these cases show that the justices of the Constitutional Court were willing to recognize the rights of individuals with non-normative sexualities in so far as such entitlements only reached them as individuals, not as couples.

The second stage of Constitutional Court decisions (from 2007 and ongoing) started with the constitutional challenge of Law 54 of 1994, which established the legal recognition of *de facto* marital unions between heterosexual couples, the requisites for its legal recognition, and the derivative consequences for members of *de facto* unions during the relationship and after its dissolution. In this case,

[4]This periodization has been proposed by Daniel Bonilla "Parejas del mismo sexo en Colombia: tres modelos para su reconocimiento jurídico y político", *Anuario de Derechos Humanos* Universidad de Chile, (2010); as well as by Julieta Lemaitre, "El amor en los tiempos del cólera: Derechos LGBT en Colombia" *Sur: Revista Internacional de Derechos Humanos*, v. 6, n. 11 (2009).

[5]Colombia, Constitutional Court, Decision T-539/1994.

[6]*Ibid.,* Decision T-539/1994.

[7]*Ibid.,* Decision C-481/1998.

[8]*Ibid.,* Decision T-808/2003.

[9]*Ibid.,* Decision C-373/2002.

[10]*Ibid.,* Decision C-098/1996.

[11]*Ibid.,* Decisions T-999/2000 and SU-623/2001.

[12]*Ibid.,* Decision C-814/2001.

as well as in others that the Court has analyzed since, a change in the constitutional precedent took place regarding the rights of members of same-sex couples to include property rights, social security provisions and rights to alimony. This second stage is the most prolific in the recognition of legal entitlements and one in which the Court has re-conceptualized the notion of family that deserves legal protection and recognition in the Colombian legal system.

This text is divided in two parts. The first part, which is descriptive in nature, answers the question: What has changed in the Family Law regime in Colombia through the judicial recognition of rights for LGBTI couples? This part provides a general view of the litigation processes that have concluded in the recognition of same-sex couples' rights and how these decisions have reshaped family law in the Colombian legal and constitutional order in issues ranging from cohabitation rights to marriage and adoption rights. To accomplish that purpose, I will focus on the decisions that have been central in such effort. I will show, as well, that the evolution of this line of precedent has not been a pacific matter between Constitutional Court justices and that competing visions of morality and human dignity have played a central role in the constitutional interpretation of this issue. The detailed description I provide from the Court's arguments in each case is thought to allow a close track of the constitutional rationality in each of them, and to provide a meticulous map of the advancement of the LGBTI agenda through the judiciary.

The second part is analytic, and critical. I argue that one of the implications of the campaign for the rights of LGBTI community members, in particular the marriage equality campaign, engenders an entrenchment of the concept of family as embodied by a monogamous couple, and that such entrenchment limits the recognition, or at least defers the possibilities of other family formations to be recognized and covered by the legal system. Furthermore, I argue that the crisis that marriage is facing in Colombia, but also in the world at large, together with an understanding of the family's purpose as not centrally revolving around sex or procreation, may be used to trigger reconsideration of the kind of bonds that unite people and the possibility of furthering a distinction between relationships based on care, commitment, companionship and friendship, and others specialized on sex as different entities with different legal implications and possibly different legal regimes. While more in tune with current social practices, this ample understanding of social relations furthers a progressive sexual movement that enhances the rights of freedom of individuals by providing a wider array of social arrangements covered by the legal order.

5.1 Changing Conceptions of the Family. The Family Protected Under 1991 Constitution and Its Multiple Meanings

The Constitutional transit from the 1886 Chart to 1991s, and the latter's freedom and equality rights, provided a new forum of discussion and new testing standards of laws at the Colombian Constitutional Court. After 1991, the supremacy clause of the Constitution imposed an interpretation of law through the guise of the new

rights, principles and values included in the Charter. This proved to be an invaluable opportunity for strategic LGBTI activism, and in fact, rights regarding cohabiting same-sex couples as a family formation underwent the most substantive changes. Adoption rights by same sex couples has more recently turned into the hot topic of contention, and one facing rapid changes. Although the first attempts at judicial change of these issues through the Constitutional Court were unsuccessful, activists returned to the Court after failed initiatives in Congress. They fared better the second time around.

5.1.1 Step One: Cohabitation Rights. De facto Marital Unions

In the period 1994–2007, the Colombian Constitutional Court was open to the recognition of individual rights to LGBTI community members, but not their right to form legally covered unions. When confronted during that period with the first constitutional challenge of Law 54 of 1990 – a law that recognizes legal effects to *de facto* marital unions of heterosexual couples- under the charge that it infringed their constitutional rights because it discriminated against homosexual couples by excluding them from its coverage,[13] the Court declared that the law's sole recognition of legal entitlements to heterosexual couples and the exclusion of same sex ones was in agreement with the Constitution.

The Court based its decision on the constitutionality of the law in three main arguments. First, it used a teleological argument to indicate that with the enactment of Law 54 the legislature attempted to grant legal recognition to natural families. This meant families formed by a man and a woman who were not legally married but that had shared their lives for a period of 2 years or more. Furthermore, the legislature established the rights and duties that the parties were entitled to as a consequence of such family formation. As same-sex couples did not fall under the legal structure of heterosexual unions, same-sex couples' exclusion from the law's scope of protection was justified. Second, after arguing that from a constitutional point of view homosexual behaviors were valid and legitimate options of individuals which the State could not forbid or limit, the Court indicated that the exclusion of same-sex couples from this statute did not impinge on the exercise of their constitutional rights. If this was proven to be the case, then a more thorough examination of the constitutionality of the law should take place.[14] Third, the Court

[13]The constitutional challenge identified five fundamental rights that were allegedly violated by Ley 54 of 1990: the right to human dignity (art. 1); the right to equality (art. 13); the right of free development of personality (art. 16); the right to freedom of conscience (art. 18) and the right to have one's honor respected (art. 21). Colombia, Constitutional Court, Decision C-098/1996.

[14]As will be seen in the following paragraphs, this is one of the arguments used by the Court to revive the exam of the constitutionality of Law 54 in a later constitutional challenge to the same law. In the terms of the Court: "[t]he omission of the legislature [alleged in the constitutional challenge], could be subject to a more thorough and rigorous review of constitutionality if it should be found

claimed that the constitutional mandate that established the protection of natural families included in article 42 of the Chart[15] was linked to the heterosexual character of the union, a condition left unfulfilled by same-sex couples and further justified their exclusion of its scope of protection.[16]

Two of the nine constitutional justices took the opportunity to clarify their vote for the constitutionality of the law arguing that it would be "fair and appropriate that the law established a property regime to benefit same-sex couples (. . .) regardless of whether they are considered a family formation or not," but that such an endeavor should be carried out through Congress after a public deliberation on the matter.[17] Two more of the justices seized the opportunity to clarify that "homosexuality could hardly be accepted as a valid, lawful and constitutional source of the family, which, by its very nature is based on procreation, which is possible only between heterosexual couples."[18]

Despite the defeat that this as well as other decisions[19] meant to the gay and lesbian rights agenda, two important outcomes followed from them. First, the legal processes that led to these decisions and the public debate after them, generated mass media coverage. This visibility allowed gay and lesbians to voice publicly their concerns. Furthermore, the LGBTI community demonstrated the ways in which society discriminated against them. The news coverage may have created more tolerances in the public's perception perspective on sexual diversity.[20] Second, LGBTI rights activists started to organize, create new associations[21] and formulate

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that it purposively harms homosexuals or if its enforcement might create a negative impact against them. However, the purpose of the law was limited to protect heterosexual marital unions without undermining others and without [homosexual couples] suffering any detriment or grief, as indeed it has not happened." Colombia, Constitutional Court, Decision C-098/1996.

[15]In its relevant part, article 42 of the Constitution states: "The family is the fundamental unit of society. It is constituted by natural or legal ties, by the free decision of a man and a woman to marry or the responsible desire to form."

[16]In the terms used by the Court: "The *de facto* marital unions of heterosexual character, as long as they conform a family, are taken into account by the law in order to ensure "comprehensive protection" and in particular, that "women and men" have equal rights and duties, which [. . .] is absent in homosexual couples." Colombia, Constitutional Court, Decision C-098/1996.

[17]Concurring opinion to Decision C-098/1996.

[18]Dissenting opinion to decision C-098/1996, signed by Justices José Gregorio Hernández y Aclaración de voto Hernando Herrera Vergara.

[19]Other decisions that denied the rights of lesbian and gay couples were: T-999/00, T-1426/00 and SU-623/01 in which the Court denied the right of members of same-sex couples to be beneficiaries of social security and the obligatory health services plan; and C-814/01 in which the Court denied the right to adoption of children to same sex couples.

[20]Esteban Restrepo "Reforma Constitucional y progreso social: la constitucionalización de la vida cotidiana en Colombia" in: *El derecho como objeto e instrumento de transformación,* ed. Roberto Saba (Buenos Aires: Editores del Puerto, 2002) pp. 73–88.

[21]Lemaitre, "El amor en los tiempos del cólera", pp. 80–82.

new strategies or refurnish earlier ones (grassroots work with community members, legislative initiatives, and litigation) to accomplish the social and legal inclusion of homosexual community members.[22]

The task of resorting to the legislature, however proved futile. Sponsored by a member of the Liberal party and supported by the leftist party *Polo Democrático*, activists introduced a bill in 2001 to recognize the unions of same sex couples. Moreover, the bill recognized same sex couples' entitlements in terms of property regime and other rights and duties. The proposed bill faced criticism from the Catholic Church and from conservative leaders who warned that the bill would permit the acceptance of same-sex couples as a family formation and even possibly grant them adoption rights which, in their opinion, was unacceptable.[23] The same result occurred two more times with the same proposal. The defeats in the legislature and the lack of both political momentum and legislative majorities to turn the proposal into law forced LGBTI activists to turn again to the Constitutional Court.[24]

Colombia Diversa (an NGO working for the rights of the LGBTI community) and the Public Interest Law Group (G-DIP) formed an alliance in 2006 at Universidad de los Andes, with the purpose of trying a new constitutional challenge against Law 54 of 1990. In this opportunity, the task was to show to the Court that the law violated the rights to live with dignity, freedom of association, and equality of same-sex couples, and that a considerable detriment could effectively be shown as derived from their exclusion from the scope of protection of Law 54. Accordingly, the arguments presented in the case depicted several ways in which Law 54 curtailed the rights of same sex couples, in areas such as criminal law (a lack of protection in cases of domestic violence and the right not to incriminate the permanent partner), family law (lack of right to alimony), and labor law (lack to the right of social security benefits and the right to pension transfer when one of the members of the couple passed away).

In a strategic move, G-DIP and Colombia Diversa distinguished the concepts of "couple" and "family" from one another in the document delivered to the Court. The alliance argued that the concept of "couple" regardless of the sexual orientation of its members, refers to an associative form that is different from the "family," and that a life lived in a couple persists independently from the family. Therefore, the legislature may subject the concepts of "family" and "couples" to diverse legal regulation. The way in which the alliance framed the issue possibly relieved the Court from considering Law 54 under article 42 of the Chart which in the standing precedent defined the family as the union formed by "a man and a woman." The Court instead focused on the property regime applicable to heterosexual couples

[22]Mauricio García and Rodrigo Uprimny, "Corte Constitucional y Emancipación Social en Colombia" in: eds. Boaventura de Sousa Santos and Mauricio García *Emancipación social y Violencia en Colombia*, (Bogotá: Norma, 2004).

[23]Lemaitre, "El amor en los tiempos del cólera", p. 84.

[24]See footnote 16 in Daniel Bonilla and Natalia Ramírez, "National Report: Colombia", *American University Journal of Gender and Social Policy,*(2011), p. 19.

and its extension to same sex ones. Also, the thoughtful and well-crafted argument potentially persuaded the most conservative justices in the Court that this was not an issue that concerned or would imply a change in the concept of the heterosexual family protected by the Constitution.

The argument was successful. In this case (C-075/07), the Court declared the same property regime established for heterosexual couples was also applicable to homosexual ones.[25] In the words of the Court:

> [t]he legislative decision not to include homosexual couples in the property regime provided for *de facto* marital unions actually entails an unjustified restriction on the autonomy of the members of such couples and can have harmful effects, not only because it impedes the realization of their life project together, but because it does not offer an adequate response to conflictual situations that may arise when for any reason the cohabitation ceases.[26]

The Court explained that the change in the constitutional precedent resulted from the efficacy of the challenge in demonstrating the harmful effects suffered by members of same-sex couples due to the inapplicability of the property regime established under Law 54. Notably, however, the Court cautiously crafted the arguments that support the holding in terms of the rights to human dignity and autonomy of individuals with non-normative sexualities, and restricted the discussion of its decision's effect to the patrimonial rights of same sex couples. Any consideration about how this judgment could change the family regime in the legal or constitutional context is completely absent. In fact, in the whole decision there is not a single sentence in which the concept of family is related in any way to same sex couples. Henceforth, gay and lesbian couples whose members shared a continuous and monogamous cohabitation for a minimum period of 2 years were entitled, thereafter, to a regime of marital property[27] identical to the property regime for marriages. In all other areas, same-sex couples had no rights.

The decision, narrowly tailored to provide same-sex couples property rights but not their recognition as a form of family, allowed for eight of the nine justices to agree on its holding. As some scholars have pointed out, this decision is indicative of the change that has taken place in the popular perception of sexual diversity in Colombia, which reached even traditionally conservative justices whose morality and world view is closely intertwined with catholic religious beliefs.[28] The dissenting judge voted against the majority decision because he found that it fell short in the recognition of same sex couples' rights and that the decision to restrict its

[25] Colombia, Constitutional Court, Decision C-075/2007.

[26] *Ibid.,* Decision C-075/2007.

[27] In a regime of community or marital property most assets or debts acquired by any of the partners is owned jointly by both members of the couple. Under Colombian law, all marriages and *de facto* marital unions are covered by such regime. In the case of marriage, marital property exists from the day of the marriage; in the case of *de facto* marital unions, such regime only comes into existence after the 2 year period of cohabitation required by law.

[28] Daniel Bonilla, "Parejas del mismo sexo en Colombia: tres modelos para su reconocimiento jurídico y político", pp. 192–193.

effects to the patrimonial rights of *de facto* marital unions left out other civil effects, also derived from the harmonious interpretation of the law in the context of the complex family effects of Law 54. According to this dissenting justice, if the Court had analyzed these effects, its decision should have extended the rights to marriage, adoption and child custody regime to same sex couples.[29] In a separate document, three conservative justices clarified their vote for the conditional constitutionality of Law 54 arguing that they decided to support that decision only after making sure that it did not require or imply a change in the constitutional precedent with regards to the heterosexual family, which, in their understanding, was the only family protected by the Chart.[30]

Conservative justices seemed confident that their decision in this case solidified the Court's precedent against the recognition of other rights for same sex couples, in particular their right to be recognized as family. By doing so, the Court included gay and lesbian couples under a fragmentary regime of the civil and family rights to which heterosexual couples were entitled, but it seemed, out of the Court's consensus, that was as far as they would get.

Based on the precedent set by decision C-075/07, advocates brought before the Court legal rules and factual situations that involved same-sex couple's rights that the Court had previously denied. Advocates expected that the rulings under the new precedent would lead to grant other sets of rights. In the 2 years following the decision on *de facto* marital unions, the Court extended to members of same-sex couples the right to affiliate their partners to mandatory health programs,[31] the right to receive pension survivor annuities when one of the partners passed away,[32] and the right of the party in need to receive alimony after the cohabitation ceased under penalty of prison.[33]

C-029/2009 was the last important decision from this period regarding same sex couples. In this decision, the Court declared the conditional constitutionality of 26 laws that established rights and duties for heterosexual couples. Moreover, the Court declared that the clauses "family," "family group," "spouse," and "permanent partner" should be understood as also covering same sex couples. Five categories group the challenged rules in the case: (i) civil and political rights; (ii) sanctions and contingencies regarding crimes and misdemeanors; (iii) rights of victims of heinous crimes; (iv) access to and exercise of public office and eligibility for government contracts and (v) subsidies and social benefits.[34]

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[29] Colombia, Constitutional Court, Dissenting opinion to Decision C-075/2007, signed by Justice Jaime Araujo Rentería.

[30] *Ibid.*, Concurring opinion to Decision C-075/2007, signed by Justices Marco Gerardo Monroy Cabra, Rodrigo Escobar Gil and Nilson Pinilla Pinilla.

[31] *Ibid.*, Decision C-811/2007.

[32] *Ibid.*, Decision C-336/2008.

[33] *Ibid.*, Decision C-798/2008.

[34] For a complete list and explanation of all the challenged rules, see: Daniel Bonilla, Natalia Ramírez, "National Report: Colombia", pp. 105–109.

One of the rules challenged in this case broadened the fragmentary family regime that covered same sex couples. As a matter of family law, the decision provided that same-sex couples were also obligated to provide child support and alimony under the applicable rules of the Civil Code. The Court declared that other rules that have a material impact on family relations because they distribute power between family members but, that were not included in the traditional area of Family law because they did not pertain to the Civil Code also covered same sex couples. These new entitlements included the right to constitute marital property and housing as "family property," which implied that these assets were withdrawn from the market and they could not be attached or used as collateral. Moreover, the Court extended the protection to same-sex couples against embezzlement and squandering of family property.[35] Additionally, the Court extended the same protections heterosexual couples had against domestic violence to same sex couples, as well as the right to access family subsidies for social services and housing,[36] and the right to be beneficiaries of compensation under the Mandatory Driver Insurance (SOAT) for death due to traffic accidents.

Although in this case the Court's ruling extended the expression "family" to reach same-sex couples, the Court made clear that it did not change the concept of family protected under the Constitution, which was traditionally interpreted as monogamous and heterosexual. The Court, moreover, could not have changed the concept of family because the constitutional challenges did not include an argument asking to broaden the concept. Two years later, however, LGBTI activists asked the Court to examine the concept of family protected under the Constitution when they turned their focus to "the marriage issue."

5.1.2 Step Two: Marriage

LGBTI activists presented a new constitutional challenge to the Court regarding a group of laws that described the concepts of marriage and family as those constituted by a *man* and a *woman* who unite through legal or natural ties with the objective of *procreation*. The content of the challenged rules reproduced, at least partially, the text of article 42 of the Charter, which in the relevant part states: "The family is the fundamental unit of society. It is constituted by natural or legal ties, by the free decision of a man or a woman to marry, or by the conscious desire to create one."

[35]The rule "establishes a greater criminal penalty to those who squander or embezzle the assets they manage as legal guardians due to their status as the permanent partner of an individual who was declared incompetent." Daniel Bonilla, Natalia Ramírez, "National Report: Colombia", p. 107.

[36]"The challenged rules establish the right of a worker's permanent partner to access family subsidies paid in cash, in kind, or in services to middle and lower-income workers, as well as family housing subsidies granted to households that lack sufficient resources to acquire, repair, or obtain title to a home." Daniel Bonilla, Natalia Ramírez, "National Report: Colombia", pp. 108–109.

The issue presented to the Court had three subsections. First, activists asked the Court to interpret harmoniously the challenged laws with Colombian constitutional rights and principles. Second, activists requested a re-interpretation of article 42 of the Charter, which meant that the Court should rule on the constitutionality of marriage between same sex couples. Finally, if the court found that same sex marriage is constitutionally mandated, it should change the standing precedent that restricted the concept of family to heterosexual and monogamous relationships.

The impeached laws allegedly violated the rights to equality, free development of personality, to a life with dignity, recognition of the marital status, intimacy and reproductive autonomy of same sex couples. According to the arguments that supported the challenge, a harmonious interpretation of these constitutional rights recognized the right to marriage for same sex couples. Furthermore, the challenge stated that sexual orientation caused a deficit in protection, which, in essence, was a discriminatory treatment against gays and lesbians. Consequently, the Court identified five different issues that it had to evaluate regarding the constitutional definition of the family as stated in article 42: "(i) to determine the constitutional scope with regard to the family and marriage, (ii) to ascertain whether different types of families were included under the constitutional protection, (iii) to establish whether the union of same-sex couples was consistent with the notion of family, if so, (iv) to determine whether it is subject to constitutional protection, and, if so, (v) what was the scope of this protection and who was entitled to provide it."[37]

Thus far, the traditional understanding of the majority of the Court was that the literal interpretation of the constitutional provision yielded two forms of family: first, one united by legal ties and conformed by "the free decision of a man and a woman to marry;" and second, another one united by natural ties and formed by "the conscious desire to create one," that is, the *de facto* marital unions. The Court said that this interpretation seemed to mandate the constitutional protection as an exclusive prerogative to the family formed by a man and a woman.[38] However, dissenting justices in earlier cases had provided a competing interpretation of the wording in article 4.[39] For those justices, the two propositions considered in article 42 were alternatives, and although the institution of marriage was associated with the heterosexual couple, evidenced in the "man and a woman" clause, the "conscious desire to create one" was not equally determined. Instead, the justices argued that this last clause could work as recognition that both heterosexual and same-sex couples may unite through a conscious decision to do so, and, under this understanding this was an institution different from marriage. Moreover the

[37] *Ibid.*, Decision C-577/2011.

[38] *Ibid.*, Decision T-725/2004.

[39] The first examples of this broader understanding are the dissenting opinions of Justice Jaime Araujo Rentería in C-811/2007 in which the court extended the coverture of *de facto* marital unions to same-sex couples, and Justice Catalina Botero Mariño in C-811/2007 in which the Court extended to members of same-sex couples the right to affiliate their partners to mandatory health programs.

argument went, the framers did not have the intention to limit the concept of family to the heterosexual couple because the Charter did not contain a provision that banned same sex unions. This interpretation, as considered by the dissenting justices in those earlier cases, was more plausible and respectful of the rights and principles included in the Constitution, and was the outcome of a harmonious interpretation of its tenets. Despite the fact that these arguments had been debated in Court since 2007, and included in dissenting opinions since then, the majority decision in earlier cases had sided with a literal interpretation of the wording of article 42. However, this interpretation was about to change.

Using a realistic approach, the Court acknowledged that there was a paradox in the confrontation of the literal content of article 42 which seemed to determine once and for all the concept of family, and the fact that the concept was essentially variable and deeply sensitive to the influences of changing social mores. Using the precedents set in earlier decisions, the Court recognized that its own interpretation of what constituted a family was not mandated centrally or exclusively by the constitutional phrasing, but, instead, by the relationships that citizens naturally build between each other. Examples of this broader interpretation of the family included the recognition of single parents and their children as a family; the recognition of foster families as family; cases in which grandparents are in charge of their grandchildren, or elder brothers in charge of their siblings. The concept of family, then, encompassed not only the natural community formed by parents, siblings and close relatives, but it even incorporated persons that were not related to each other through ties of consanguinity.[40] The Court explained that the particular characteristics of a social, participatory and pluralistic state[41] which includes between its aims the protection of the liberties, beliefs and rights of citizens sustain the constitutional protection of these different formations of family. Moreover, the pluralistic nature of the Colombian state was clearly in tension with the imposition of a unique type of family to the exclusion of others that did not conform to the one that was recognized.

The implications of a broader understanding of situations that could be considered a family, that extend beyond the exact phrasing of article 42 led the Court to conclude that "heterosexuality is not a characteristic that is predicable of all kinds of families, neither is the existence of consanguinity ties as a foster family shows."[42] If neither heterosexuality nor consanguinity were essential characteristics of the family, What was essential to it? The Court held that the common denominator of the social formations known as family and whose realities distanced from the characterization of the family under article 42 were "love, respect and solidarity" as well as "a union of life or destiny that intimately links its members."[43] Out of this line of reasoning, the Court concluded:

[40] Colombia, Constitutional Court, Decision C-577/11.

[41] *Ibid.*, article 1.

[42] *Ibid.*, Decision C-577/11.

[43] *Ibid.*, Decision C-577/11.

> A couple who freely expresses its consent or joins with long-term expectations, is already a family, both in marriage and in *de facto* marital unions, which traditionally and for different purposes, has been accepted as a family even without descendants. Therefore, the situation cannot be different in the case of homosexuals that form a stable union.[44]

This understanding of the family focused on the particular kinds of relationships that were built between its members which translated into a long term commitment of love, care and solidarity, instead of the earlier focus on the biological sex of the parties. Finding that those conditions were present both between heterosexual and same sex couples, the Court reached the conclusion that same-sex couples were also covered by the family protected under article 42.

The Court explained the change of precedent through the concept of "living constitution," which implies thinking of constitutional rules as dynamic entities whose meaning is not set exclusively by the intention of its drafters or the meaning of its phrasing at the moment of enactment. Instead, according to this school of legal interpretation, the meanings of constitutional rules continue to change with the passage of time, the variation in people's perceptions and the evolving social, political or economic necessities and ideas. Finding that these changes had taken place in the Colombian social context the Court extended with its decision the scope of the rules that define the family.[45]

After concluding that same-sex couples are a form of family that deserves the constitutional protection established in article 42, the Court faced the issue of determining which protections and guarantees given to heterosexual couples had to be extended to same sex couples. Specifically, the Court focused on the right to marriage. According to the challenge, the deficit of protection that same-sex couples faced was due to their discriminatory exclusion from the possibility of entering into a committed and monogamous relationship that legally tied them (through rights and duties) at the time they gave their consent to start a life together. Instead, same-sex couples had to cohabit for 2 years before any legal effects took place between the partners. During the 2-year period of legally unbinding relationship, many situations may occur that leave one or both partners in a vulnerable situation.[46]

The Court answered this issue through a categorical statement: "the specific protection of the family and marriage of heterosexual couples is an unavoidable constitutional mandate."[47] Accordingly the only way to formalize a union between

[44] *Ibid.*, Decision C-577/11.

[45] *Ibid.*, Decision C-774/01 quoted in Decision C-577/2012.

[46] The risks the challenge enunciates and that are used by the Court in this section are: "in the absence of a mechanism to formalize the bond between members of the same sex couples, several issues are left pending for legal solution. Between them: the obligatory recognition of the reciprocal duties of cohabitation and mutual aid; other matters such as the maintenance obligation and its persistence on the party who is guilty of the separation; the property regime emerged at the time the link is formalized, the corresponding civil status and its effects, and the rights arising from the formalization of the link concerning the family property as well as the offense of failure to pay alimony, between many other aspects." *Ibid.*, Decision C-577/2012.

[47] *Ibid.*, Decision C-577/2012.

heterosexual partners was through marriage. At the same time, the Charter did not ban same sex marriage in any express way, so it could be concluded that some kind of legal institution that solemnizes the voluntary commitment of same-sex couples was a viable alternative. Moreover, the lack of such institution contravened the Constitutional right to free development of personality because it restricted same sex couple's right to freely decide on the formation of a family with all the legal formalities and protections heterosexual couples enjoyed. This did not mean, the Court argued, that whatever institution was designed for same-sex couples needed to be *the same* as that provided for heterosexual couples. The Court concluded, however, that the decision to include an institution to cover same-sex couples was a decision that pertained to the legislature. It ordered, therefore, that members of Congress undertake to draft and design an institution suitable for same-sex couples that allowed them to formally enter into a family arrangement at the moment in which the couple expressed consent. Moreover, the Court emphasized that the legislature is charged with the responsibility to establish the conditions under which such institution is created and establish its reach. Granting same-sex couples the right to enter a legally recognized family from the time of its formation is the starting point of such an institution. Additionally, legislative debate had to determine any other rights derived from such unions, such as rights of adoption. Due to the recognition that the current deficit of protection that same-sex couples face endangered and in fact hindered the exercise of their constitutional rights, the Court gave the legislature a term of 1 year to provide the legal terms of such institution. The Court stated that if the legislature failed to deliver a law for same-sex couples by the 20 of June 2013, "same-sex couples will be allowed to ask a notary public or a judge to formalize and solemnize a contractual bond that allows them to become a family."[48]

After the Court's decision, proponents presented four different draft bills to Congress for consideration. The "conservative" draft developed the rights and duties derived from a civil union for both different sex as well as same sex couples. The character of the union was a formal contract that bound the parties in a way similar to the way marriage bound a couple, but the bill was silent on the issue of adoption.[49] The "liberal" draft, extended the right to marriage to same-sex couples by rephrasing the wording of a group of rules and changing the clause "a man and a woman" by the clause "two people," and excluding procreation as the end of marriage. However, the bill lacked an express provision for adoption.[50] A third "multi partisan" draft

[48]The order given by the Court literally states: "If by June 20, 2013 the relevant legislation has not been enacted by Congress, same-sex couples may go before a notary or judge to formalize and solemnize a contractual tie that enable them to start a family, according to the scope that, by then, can legally be attributed to such unions". *Ibid.*, Decision C-577/2011.

[49]"Draft bill 29 of 2011", presented by Congressmen Miguel Gómez Martínez, Partido de la U. Accessed August 20, 2012, http://www.matrimonioigualitario.org/p/en-el-congreso.html

[50]Draft bill 37 of 2011, presented by Congressmen Guillermo Rivera, Partido Liberal. Accessed August 20, 2012, http://www.matrimonioigualitario.org/p/en-el-congreso.html

provided a regulation for "civil unions" for same sex couples, and extended the same rights, duties, and privileges of marriage to such unions. As in the liberal draft, no provision considered the issue of adoption.[51] Finally, the "leftist" draft proposed the recognition of the right to marriage and the right to adopt for same sex couples.[52] At the end all projects were rejected, and same sex couples are facing a diverse set of barriers to materialize their right to marry despite the fact that these unions were allowed by the Constitutional Court if by June 20th, 2013 no bill had been passed.[53]

5.1.3 Step Three: Adoption

In 2001, before most of the Constitutional Court decisions granting rights to same-sex couples that have been exposed thus far, the Court analyzed a constitutional challenge against two articles of Law 2737 of 1989, a law that developed children's rights and that included provisions on the process of adoption of minors. The two challenged articles established requirements that potential adopting parents had to fulfill prior to adopting. According to the constitutional challenges, the condition of "moral integrity" established for adopters as well as the law's restriction to benefit only couples formed by a man and a woman infringed constitutional rights of citizens seeking to adopt. First, for the challengers of the law, the "moral integrity" standard was not a requisite of biological parents and therefore included an illegitimate differentiation between biological and adoptive parents. Second, the standard allegedly required a particular moral stance which contravened the pluralistic tenets of the Colombian Charter. As for the heterosexual character of the

[51]Draft bill 47 presented by Congressmen Alfonso Prada and Carlos Amaya (Partido Verde); Gilma Jiménez, Jorge Londoño, Iván Name y Féliz Valera (Partido Verde) and Armando Benedetti (Partido de la U). Accessed August 20, 2012, http://www.matrimonioigualitario.org/p/en-el-congreso.html

[52]Draft bill 58, presented by Congressmen Iván Cepeda and Congresswoman Alba Luz Pinilla (Polo Democrático Alternativo). Accessed August 20, 2012, http://www.matrimonioigualitario.org/p/en-el-congreso.html

[53]After the Legislature failed to pass a law to govern same-sex couples unions, several couples reached notary publics and judges in order to formalize their unions in accordance with the decision of the Constitutional Court. Some couples have been "united" without the use of the noun "marriage" but some others have faced difficulties in finding a public officer who will conduct the union. Currently, the Constitutional Court is reviewing two "acciones de tutela" that aim to protect the right of same sex couples to have a formal union with the same rights and duties of marriages. See: "Carlos, y Gonzálo, la primera pareja gay "civil-menre casada" pero sin matrimonio" Accessed April 1st, 2014 http://www.rcnradio.com/node/79665 and "Corte Constitucional reabre el debate sobre matrimonio entre parejas del mismo sexo" Accessed April 1st, 2014 http://www.rcnradio.com/noticias/corte-constitucional-reabre-el-debate-de-la-union-de-parejas-del-mismo-sexo-118641

adopting couple, the challengers argued that excluding same-sex couples as eligible adoptive parents was discriminatory against them and illegitimately sanctioned their sexual orientation to disqualify them in the process of adoption.

In its analysis, the Court started by pointing out that the constitutional mandates included two references to the concept of "social morality" which the Court understood to be "the [morality] prevailing in each populace in their own circumstances."[54] In an earlier case regarding a homosexual man looking to adopt a child, the Court recalled that the standard of "moral fitness" was used to reject the adoption not because of the sexual orientation of the adopting parent but because of the adopting parent's living conditions and the likelihood that such an environment would prove detrimental to the minor's well-being. The decision to deny the adoption was, according to the Court, based on the best interest of the child.[55] In the following paragraphs of the ruling, the Court tried, unsatisfactorily, to establish the content of such standard of morality. The Court's difficulty in clarifying the concept may be due, in part, to the fact that it is defined, from the outset, as a category with a changing nature. However, in the paragraph cited below the Court described the content of the category by reference to its opposites, that is, the ways in which public morality may be infringed:

> The [adoption] rules aim, through these requirements [moral fitness], to achieve that the individual selected as an adoptive parent is able to offer the child the best guarantees to their harmonious development, (. . .) a person who has a history of consistent behavior in accordance with social morality ensures the State in an ideal way that the education of the child shall be conducted in accordance with these ethical criteria. (. . .) By contrast, the delivery of the child to someone who develops his life project in socially ostracized conditions, as is usual in environments where alcoholism, drug addiction, prostitution, crime or disrespect to human dignity in any way, puts the child in danger of not achieving the proper development of his personality and hinder his peaceful and harmonious coexistence within the socio-cultural environment in which he is embedded.[56]

As "social morality" is a changing concept, then general agreements can supplement the content by reference to the wellbeing of the adoptee. According to the Court, this precluded the judge or the administrative official from deciding an adoption case based on his own ethical or religious convictions. Also, this standard eliminated discriminatory intent against adoptive parents because biological parents must comply with this standard in order to maintain their rights to custody and guardianship. This moral integrity was in fact the only way in which the state

[54] Colombia, Constitutional Court, Decision C-224/1994.

[55] According to the proofs presented to the Court, the applicant adoptive parent lived in a "tolerance zone" prone to delinquency acts, and the room that he, his mother and the adoptive child inhabited was in poor living conditions. In addition, the adoptive parent's couple was allegedly an alcoholic. For these reasons, the state authority competent to grant adoptions (ICBF) rejected the adoption application. *Ibid.*, Decision T-280/1995.

[56] *Ibid.*, Decision C-814/2001.

could guarantee the prevalence of the principle of the best interest of the child. Finally, the Court emphasized that this standard was not explicitly focused on the sexual orientation of the applicant parent in the sense that a non-normative sexual orientation indicated lack of moral integrity. Instead, the reason why homosexual couples were not eligible for adoption was that they did not conform to the traditional constitutional understanding of family that the Court had elaborated. The Court in this case said that the family protected under the Constitutional Chart was monogamous and heterosexual[57] formed either by marriage or by the consent of the parties. Moreover, this entailed consequences in the structure of the possible legal and kinship relations that took place in adoptive families. Thus, the content of the law under challenge in the case at hand only reproduced the constitutional mandate that recognized the same rights of married couples and *de facto* marital unions to adopt, which was the social formation that the constitutional drafters aimed to protect as well as the most fit to protect the best interest of the child. The Court acknowledged that this case posed a tension between the right to equality and free development of personality of homosexual individuals or other persons looking to adopt who live in affective unions that under this understanding do not constitute a family, and the constitutional right of minors to be a part of a family. However, the Court concluded that such tension between rights was solved by the Charter, which in article 44 indicates peremptorily the prevalence of the rights of children over all other rights.[58] Consequently, the Court based its decision on the harmonic interpretation of article 42 that establishes the heterosexual character of the family, and article 44 which establishes the paramount prevalence of rights of children.

The Court showed to be divided on this issue, and four of the nine judges signed dissenting opinions. The dissenting judges argued that the family protected by the Charter was the heterosexual, monogamous family that the majority decision sustained, and that the general limitation for homosexual couples to adopt because it does not promote the best interest of the child was discriminatory against couples with a diverse sexual orientation and infringed upon their rights to personal autonomy, human dignity and pluralism.[59]

As I have shown in earlier sections, this understanding of the constitutionally protected family changed in decision C-577/11. It's implications on the change on the right of adoption for same-sex couples, however, is still incompletely addressed. Thus far the Court has decided three cases that have addressed issues around same sex couple's adoption rights but has dodged the question of equality in access with heterosexual couples. The first of this cases revolved around the adoption of two

[57] See supra §2.2.

[58] In it's relevant fragment, Article 44 of the Constitution states: "The rights of children take precedence over the rights of others."

[59] Dissenting opinion to Decision C-814/2001 signed by Justices Manuel José Cepeda, Eduardo Montealegre, Jaime Córdoba and Jaime Araujo.

children by a gay man, which took over media coverage both nationally and in the U.S.,[60] and brought this debate to the center stage.[61]

In 2012, the Court decided an "acción de tutela" presented by Chandler Burr, an American citizen who, after complying with the requisites and process of adoption of two Colombian minors aged 8 and 13, was denied permission to take the children out of the country. Subsequently the ICBF (Colombian Institute for Family Welfare) physically separated Burr and the children while it conducted a review of the adoption process, arguing that the adoptive parent may have misrepresented his parental qualifications.

According to Mr. Burr, after finalizing the legal and administrative procedures of the adoption process, and a family judge delivered the decision assigning the two children as adoptive sons to Mr. Burr, the only proceeding left was the issuance of the children's American visas in order to leave the country with their father. Before delivering the visas to Mr. Burr's adoptive children, he decided to pay a visit to ICBF's (Colombian Institute for Family Welfare) offices to say good bye to some of the officers involved in the adoption process. During that visit, Mr. Burr talked with the Deputy Director of Adoptions of ICBF. In their brief conversation, Mr. Burr "expressed his concern about the fear that exists in Colombia against adoption by homosexuals and hinted that he, being a gay man, was never considered not suitable for adopting."[62] After finishing the visit, Mr. Burr and the children went to the American Embassy in Bogotá where the Embassy notified them that although the visas had been initially granted, their visas had been "denied without prejudice" due to a recent communication from the ICBF denying permission to the kids to leave the country.

When asked the reason of the withdrawal of permission for the children to leave the country, ICBF officers argued that Mr. Burr omitted information in the administrative and judicial process of adoption by not disclosing his sexual orientation. This led the ICBF to take two actions. First, it accused Mr. Burr's for falseness in public proceedings and reported him to the authorities for his criminal prosecution. Second, regarding the children, ICFB ordered that the children be

[60] "Chandler Burr, American Journalist, Describes Colombian Fight For Gay Adoption Rights" *Hufftington Post*, May 27, 2012, http://www.huffingtonpost.com/2012/05/27/chandler-burr-Colombia-gay-adoption-rights-_n_1548477.html accessed July 19th, 2012 "Chandler Burr claims Colombia denied adoption because of his sexual orientation" *CNN* December 1st, 2011, http://am.blogs.cnn.com/2011/12/01/chandler-burrt-claims-Colombia-denied-adoption-because-of-his-sexual-orientation/ accessed July 19th, 2012; "Procuraduría impugnará adopción de niños al periodista Chandler Burr", *Semana*, December 13th, 2011, http://www.semana.com/nacion/procuraduria-impugnara-adopcion-ninos-periodista-chandler-burr/169111-3.aspx, accessed July 19th, 2012.

[61] "Fuertes declaraciones de iglesia sobre adopción al estadounidense gay" *El Tiempo*, December 13th, 2011 http://www.eltiempo.com/gente/ARTICULO-WEB-NEW_NOTA_INTERIOR-10913132.html accessed July 21st, 2012; "Iglesia y academia chocan sobre la adopción de parejas gay" *Semana*, April 26th, 2012 In: http://www.semana.com/nacion/iglesia-academia-chocan-sobre-adopcion-parejas-gay/176188-3.aspx, accessed July 21st, 2012.

[62] Colombia, Constitutional Court, Decision T-276/2012.

taken away from his custody and returned to a foster home, declared their rights endangered, and started a process of restitution of the children's rights which could result in the annulment of the adoption by Mr. Burr and return them to the situation of adoptability by another family. In response, Mr. Burr initiated an *acción de tutela* asking for the protection of his rights to equality, free development of personality and due process, as well as the children's rights to have a family, not being taken away from it, and not to be discriminated because of their family origin.

The Court found that the issue at stake was whether through its actions, the ICBF infringed the rights of Mr. Burr and his children. Additionally the Court divided its analysis in two fronts. First, on the mandated constitutional guarantees in processes of restitution of children's rights, and second, on the rights of children and adolescents to be heard and their opinions taken into consideration in administrative and judicial processes.

After evaluating the case, the Court found that ICBF could not show evidence to suggest a menace to the emotional health of the children when the protective measures were taken, and that even if it could be proven that such a menace existed, ICBF could not prove there was a relation of causality between the absence of notification of Mr. Burr's sexual orientation during the adoption proceedings and such menace. Therefore, the Court decided that the ICBF should stop all administrative and judicial proceedings and return the definitive custody of the children to Mr. Burr as their legitimate adoptive parent.

Despite the fact that national media widely publicized Mr. Burr's case as a case of discrimination against a gay man because of his sexual orientation,[63] the Court examined the issue in a less than a peripheral way. As it was proven by Mr. Burr, and accepted by the Court, he was not obligated to disclose his sexual orientation during the adoption proceedings because part of the process had been carried out through an adoption agency in the state of New York (U.S.) where it is illegal to ask an adoptive parent his or her sexual orientation. Moreover, as the court highlighted, ICBF was unable to provide conclusive proof that the absence of this information endangered the children's right, nor that Mr. Burr's sexual orientation showed a lack of capability to raise a child.

Although the case was as much about due process as it was about children's rights, it was fundamentally about a state agency discriminating against a man because of his sexual orientation, which was the motivating factor for ICBF's measures. Nevertheless, the Court decided not to address this issue. Indeed, the Court's press release that informed its decision stated that it "did not rule on the issue of equality and in any way states that ICBF has discriminated against the plaintiff. Nor does it resolve the controversy over whether same-sex couples can adopt."

[63] "Homosexual recupera a sus hijos adoptados" *El Tiempo,* December 13th, 2011, http://www.eltiempo.com/archivo/documento/MAM-5025080, last accessed 12 July, 2012. "ICBF revisa caso de padre gay" *El Tiempo,* December 9th, 2011, http://www.eltiempo.com/archivo/documento/MAM-5017443, "ICBF tendrá que devolver niños en adopción a estadounidense homosexual", *El Espectador,* December 12, 2011, http://www.elespectador.com/noticias/judicial/articulo-316255-icbf-tendra-devolver-ninos-adopcion-estadounidense-homosexual, last accessed July 12th, 2012.

While the LGBTI activists and mass media cheerfully received the decision,[64] its impact was narrow because it only ratified earlier precedents about due process in adoption procedures and the prevalence of the rights of children therein. The *ratio decidendi* of the decision revolved around due process and children's rights while references to sexual orientation as a possible danger to the children or as an illegitimate reason for excluding a person as a fit adoptive parent were, at the most, *obiter dicta*. Therefore, no fragment of this particular decision serves as future constitutional precedent against the discrimination of an adoptive parent because of his or her sexual orientation.

Trying to explain the reluctance of the Court to examine the charge of discrimination for sexual orientation is speculative. I will, however, try to flesh out what was at stake in this decision and the reasons that may have restrained the Court's analysis. First, this decision came only 9 months after the Court decided to extend the concept of family protected under the Constitution to same sex couples. Second, and most important, in that decision the Court argued that it was the legislature's responsibility to decide the form and extent that this newly recognized protection had, which meant that it deferred to that body the decision on the right to adopt for members of same sex couples. Therefore, if the Court had decided that Mr. Burr had been discriminated because of his sexual orientation, and that such discrimination was illegitimate because it infringed his constitutional rights, such a decision could be understood to concede the right to adopt to individuals regardless of their sexual orientation. Such a pronouncement would have, at least in part, conflicted with the reasoning that gave the legislator the power to decide on these issues. Moreover, it would have invited a clash of powers between the Constitutional Court and the Legislature if the latter had had an interest in denying such adoptions. However, remember that the Court had established a window for Congress to pass a bill until June 20th, 2013, time at which- if no bill had passed- same sex couples could ask notary publics and judges to perform formal unions. Well, by August 2014, the Court seemed ready to discuss the long time pending case of two mothers who challenged an administrative decision that denied the adoption of a child by his non biological mother.[65] In this case, the two women had shared their life together for several years and the non biological mother wanted to adopt the child bore by her

[64] "La Familia de Chandler Burr" *El Tiempo,* May 25th 2012 stating that despite the restrictive effect of the Court's decision "the very fact of recognizing a man his right to be a homosexual adoptive parent must be received as an unprecedented news that may well mean a definitive step towards a tolerant and inclusive society in which we can truthfully live amongst difference", http://www.eltiempo.com/opinion/editoriales/ARTICULO-WEB-NEW_NOTA_INTERIOR-11881961.html, accessed 18 July, 2012 "ICBF reconoce adopción de dos niños a estadounidense homosexual" *RCN* December 12, 2012, http://www.rcnradio.com/node/125287, accessed 18 July 2012; "Autorizan adopción de dos niños a estadounidense homosexual" *El País*, http://www.elpais.com.co/elpais/Colombia/noticias/autorizan-adopcion-dos-ninos-estadounidense-homosexual, accessed 18 July 2012.

[65] "Fighting to be a family" *Washington Post*, July 13, 2012, http://www.washingtonpost.com/world/the_americas/battling-for-equal-rights/2012/08/10/08c7b1d0-e279-11e1-98e7-89d659f9c106_gallery.html#photo=1 accessed July 25, 2012.

partner under their union. Also in this case, the Court strictly tailored the decision to fit very closely the particular facts that were presented. The Court affirmed that in cases of adoption by consent (those in which the biological father or mother of a minor assents to his or her adoption by their common law partner) the sexual orientation of the adoptive parent should not be used as a criteria to deny the adoption.[66] This was the standing law for same sex couple's adoption rights by February 2015, but changes may be on the way after the Court examines a new constitutional challenge on the same issue but in which the framing is the protection of "the best interest of the child". The new framing will allow a shift in analysis from the rights to non-discrimination of same sex couples to an emphasis on the right of minors to have a family.

5.2 Unchanging Conceptions of the Family. Marriage Between Two

Paradoxically, while the LGBTI agenda is devoted to pursuing the legal recognition of same sex "marriage" through the legislature, divorce rates are on the rise, and a certain public worry over its increase is building.[67] Indeed, marriage trajectories in Colombia declined from 62 % in 1982 to 35 % in 2006 and the divorce rate increased from 8 to 17 % in the same period. In the meantime, the percentage of cohabiting couples increased from 12 % in 1982 to 25 % in 2006.[68] Just in the first trimester of 2012, divorce rates escalated 26 % more than in the previous year, which, together with a decline in marriage, should invite us to consider seriously the warning that the institution of marriage is facing crisis, and evaluate whether we should be worried at all like social conservatives warn we should be.[69]

At the same time, Constitutional Court's decisions regarding the family veer towards the recognition of family formations not only based on grounds of

[66]Colombia, Constitutional Court, Press Release http://www.corteconstitucional.gov.co/comunicados/No.%2035%20comunicado%2028%20de%20agosto%20de%202014.pdf, accessed February 15th, 2015.

[67]José Manuel Otaolaurruchi, L.C. "Mejor el divorcio que convivir", *El Tiempo,* October 6, 2012, http://www.eltiempo.com/opinion/columnistas/josemanuelotaolaurruchi/mejor-el-divorcio-que-convivir-jose-manuel-otaolaurruchi-l-c-columnista-el-tiempo_12286778-4 last accessed October 6th, 2012, stating that due to the fear of divorce, young couples are increasing the rates of cohabitation.

[68]Diego Amador and Raquel Bernal, "Cohabitation vs Marriage: The effect in children's well-being", Documentos CEDE, (Bogotá: Universidad de los Andes) January 2012: http://economia.uniandes.edu.co/profesores/planta/Bernal_Raquel/documentos_de_trabajo accessed August 20, 2012.

[69]"Divorcios en Colombia crecieron 26,2 % en primer semestre de 2010", *El Espectador*, August 29, 2012 In: http://www.elespectador.com/noticias/politica/articulo-370915-divorcios-Colombia-crecieron-262-primer-semestre-de-2012, accessed August 20, 2012, "Atarofobia: el miedo de los jóvenes al altar" El Universal, Cartagena, September 29, 2012.

consanguinity but on a commitment between its members based on care, respect and tolerance regardless of procreation. This framework, it seems, allows for a more "organic" less stagnant understanding of the family and of personal ties that can become real family formations without the need of procreation as its main end. By "organic understanding" or "organic family" I try to highlight the contextual, changing character of the elements that constitute a family, and the way in which those can and are shaped by the way in which people actually live, who they share their commitments with, who they depend on, and who they want to associate with, regardless of the legal ties that bind them. It is this understanding which led the Court to recognize same-sex couples as family.

Despite the inclusion of same-sex couples as families, under the banner "the same rights with the same name" the LGBTI agenda is committed to the recognition of same sex *marriage* as the only satisfactory way to reach formal equality between same sex and different sex couples. Evidently, then, two forces are in tension. On the one hand the social reality of marriage under siege due to low rates of marriage and high divorce rates as well as a series of constitutional decisions backing a range of family formations that exceed the traditional nuclear family; on the other, a push for marriage in the terms of the traditional biparental unit for LGBTI couples. Another way of understanding this tension is by understanding each side's commitments. The first side is grounded in a pragmatic understanding of the family based on the actual practice of families. Conversely, the second side takes a traditional approach to the concept of family as a legally determined, legally enforced institution that finds its legitimacy in state sanctioned formalities. My interest in this last part is to question the implications of this veer to the traditional, biparental, state sanctioned family towards which the LGBTI agenda pushes current law reform. Specifically, I would like to question the effect of entrenchment of the traditional family that the LGBTI agenda accomplishes through the campaign for marriage equality and the way in which such entrenchment limits the possibilities of alternative family formations, and in the end, alternative understandings of sexuality and association. Rather than being for or against the LGBTI campaign for marriage, I would like to flesh out what is at stake in the debate and identify some of the costs of this line of political engagement.

Why is marriage so important for LGBTI activists? And, why are Colombian LGBTI activists focused not only in the recognition of the bundle of rights associated with legal marriage but, also in conquering the word *marriage* for same sex couples? There are several reasons that can explain this framing, but I will focus on two that are at the center of the current debate in Colombia as elsewhere. First, the enjoyment of the same benefits and burdens ascribed to heterosexual marriage. Second, the principled reason of formal equality and acquisition of legitimacy.

The first, most plain reason that LGBTI activists pursue the recognition of the right to marriage enunciates an interest in enjoying the same benefits that heterosexual marriages enjoy, which, in the current Colombian context, would guarantee their right to adopt. The second principled reason for pursuing marriage is that, for LGBTI activists and community members, the extension of this right for same-sex couples signifies a recognition of the legitimacy of their bonds in the

same terms and under the same conditions as heterosexual couples, that is, their equalization with the traditional monogamous heterosexual family under the guise of law. Similarly, couching their bond in the traditional parlance conveys a message of social acceptance and recognition of sexual diversity which is not accomplished by obtaining the same bundle of rights with a different denomination. LGBTI activists find that a different denomination for their unions is still discriminatory because it communicates the message that there is a fundamental difference between heterosexual and homosexual couples, which continues to undermine the genuineness of their bonds.[70] This line of argument is an instance of what Libby Adler identifies as the normalization of the gay family, through which gay rights advocates pursue the portrayal of homosexual unions as "morally indistinct" from the idealized version of the traditional heterosexual family, which is much more about love than about sex, and which seems to "naturally" allow for the extension of marriage from heterosexual to same sex couples.[71]

These are certainly good reasons to advocate for social change in the hope that we will once live in a pluralistic society where sexual orientation, but also every kind of discrimination is a thing of the past. However, the road that leads us in that direction is not necessarily served by entitling same-sex couples to get married. This is, no doubt, a sensitive issue. Because of the hardships that LGBTI community members suffered in the past and continue to suffer today, a critical appraisal of the campaign for marriage equality may seem insensitive to their grief and diminishing of their right to push for a more inclusive society. This is of course, not my interest. Quite on the contrary, taking advantage of this opportunity in the Colombian debate to rethink the bonds that tie us together would be both more inclusive and more sexually liberating for individuals, all individuals, regardless of their sexual orientation, than reducing the issue to marriage.

In the American debate, other scholars have stated reasons to question the emphasis of LGBTI activism around marriage equality and attempted to highlight its costs.[72] Particularly, Judith Butler has argued that the debate over marriage equality is polarized between legitimate and illegitimate unions. Legitimation, which is conferred by the state, has its own molds and establishes its own rules of entry to the exclusion of whatever is different. In terms of social arrangements, hetereosexual couples traditionally monopolize the legitimate field, whose legitimation is in part based on the establishment of formalities that exclude homosexual couples.

[70]Marcela Sánchez' intervention in the first debate on one of the marriage equality legislative drafts. October 1st, 2012, in: http://www.matrimonioigualitario.org/, accessed October 4th, 2012.

[71]Libby Adler, "The gay agenda", *Michigan Journal of Gender & Law* 16 (2009): 17, accessed August 18, 2012, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1268303

[72]See for example Janet Halley "Recognition, Rights, Regulation, Normalization: Rhetorics of Justification in the Same-Sex Marriage Debate" eds. Robert Wintemute & Mads Andenaes, *Legal Recognition of Same-Sex Partnerships: A Study of National, European, and International Law* (Hart Publishing: 2001); Judith Butler "Is kinship already heterosexual?" and Michael Warner, "Beyond Gay Marriage", both in eds. Wendy Brown and Janet Halley, *Left Legalism/Left Critique*, (Duke University Press: 2002).

Those who cannot comply with established formalities inhabit the illegitimate field. Legitimation, in turn poses the problem that its terms are set by the state, and that to acquire it, one must conform to the preexisting mold. Consequently, sexuality undergoes the same polarization: sexuality is thought in terms of marriage, and marriage is the way to acquire legitimacy, that is, legitimate sexuality is that which happens inside the boundaries of marriage. This dichotomic way of understanding legitimacy and sexuality, is built on the fundamental exclusion of other sexualities and other types of kinship, and forecloses the intelligibility of other kinds of social arrangements different from marriage. The naturalization of these dichotomic thinking bars our possibility of thinking about sexuality and kinship in terms that exceed the dyad legitimate-illegitimate when in fact reality is filled with *in betweens*, and marginal practices that cannot be completely, if at all, described by such limited universe. Because the LGBTI campaign for marriage equality is immerse in this dichotomic thinking, it naturalizes the terms of the debate and becomes unacceptably conservative.[73]

The current debate over marriage equality in Colombia is unnecessarily polarized in the terms described by Butler. The Constitutional Court's understanding of what constitutes a family and the nature of the ties that bind its members gives way to an understanding of kinship that already exceeds heterosexuality as its condition of possibility and procreation as its end. Such understanding, if taken advantage of, and strategically worked around, gives way to the recognition of a range of different social formations. In fact, if marriage, cohabitation, and divorce rates indicate something, it is that the marriage bond lost part of its social function of legitimizing unions and giving couples a certain social status and acceptability, though it is still a way of distributing costs of care and social entitlements such as social security and health care benefits. This way of social organization and of allocating costs is, however, not the only one possible. Other kinds of arrangements between friends, relatives, or lovers, who explicitly agree to form a "family," accomplish a distribution, similar to the French PACS (Pacts of Civil Solidarity) without its restriction on adoption rights, and maybe even without the restriction of encompassing only two individuals. Such unions could allow for some relations to be based on sex and love (lovers), friendship, companionship, and a long term life project (friends); companionship and solidarity (relatives), or different mixes of the above that lead people to conform long-lasting unions in which offspring may or may not be a manifestation of the parties commitment or life projects. Also, some of these unions would avoid the inconveniences of infidelity or romantic love running out as causes for separation because some of them would have other relationships specialized in sex and romantic love. Moreover, they allow some individuals to fulfill their interests of having offspring despite the fact that they have not found a love partner without having to carry all responsibility of childrearing on their own. The aforementioned simply exemplifies a few ways in which broadening the concept of family, without compromising the parties through marriage enhances people's

[73] Butler, J., "Is Kinship already heterosexual?", pp. 228–236.

life projects possibilities. So far, the exercise of deconstruction of the concept of family in the Colombian constitutional context has yielded its understanding as not necessarily heterosexual and not aimed at procreation as its unique end. How about furthering that exercise and initiate thinking of it also not *mainly* about sex and romantic love and not being a formality between two people but maybe three or more?

There is no certainty about which type of social organization serves best the interests of the parties, the child, and a national project, in part because all thinkable possibilities have not been implemented. Before getting married to the idea of "marriage equality," how about opening our minds and our political projects to a more diverse understanding of family, legitimacy, and even human commitment? The Colombian Constitutional Court has taken steps, though still conservative, towards a wider understanding of this issue. The opportunity should be taken to think about enhancing our rights to decide the kinds of commitments we want to be engaged through instead of relinquishing our possibilities to the state's desire of organizing society by coupling people through marriages of two.

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