

Rainbow revolution in Latin America: The battle for recognition



Foto: Felipe Longoni

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In a surprising turn of events, a “rainbow revolution” has blossomed in Latin America. In spite of the region’s long history of deep-rooted patriarchy, machismo, homophobia, and political and social marginalization of lesbian, gay, bisexual, and transsexual (LGBT) people, Latin America is currently home to twenty five percent of the world’s countries with same sex marriage laws. This CMI Brief examines the fight for legal equality in two Latin American countries, Costa Rica and Colombia, exploring the fissures, limits, and complexity of using readily available litigation strategies when popular opinion lags far behind judicial decisions.

Over the last two decades, despite a well-organized opposition, LGBT rights have made major advances in many Latin American countries. While these developments have been uneven across the region, tolerance for LGBT people and support for marriage equality has tended to increase, even if support remains low in many countries (see Table 1).

Here we examine a puzzle in two Latin American countries, Costa Rica and Colombia, that were among the earliest adopters of strong protections for LGBT people, but where full legal equality, including marriage equality, has not materialized. These cases illustrate the fissures, limits, and complexity of using readily available litigation strategies when popular opinion lags too far behind judicial decisions. This gap allows anti-LGBT rights groups and politicians to block or hinder the writing of marriage equality laws or is used to justify a legal strategy to impede judicial decisions advancing LGBT rights equality.

LEGAL OPPORTUNITIES STRUCTURES

Central to the successes of LGBT rights claims over the last 20 years in Costa Rica and Colombia, has been the opening of a legal opportunity structure that facilitated superior courts' favorable jurisprudence that was ahead of public opinion. The creation of the Colombian Constitutional Court in 1991 and the Costa Rican Constitutional Chamber of the Supreme Court, or Sala IV, in 1989, allowed LGBT (and other politically and socially marginalized) citizens to easily approach the courts to demand protection of their constitutional rights.

A key feature of these new judicial bodies was their accessibility. Both courts are open to any person in the country regardless of age, gender, nationality, or income level. Unlike their precursor courts, they employ few legal formalities, apply broad definitions of standing, and require no filing fees, lawyers, or legal training to file a rights claim. These institutional rules allowed everyone including poorly organized, socially and political marginalized groups and individuals to harness the power of the courts to recognize and protect their constitutional rights. As a result, individuals could file rights claims with the court without the need to coordinate or strategize with established LGBT rights organizations. Powerless LGBT collectives could present legal demands directly to the court without having to rely on support from strong political alliances or muster resources to pursue and implement their broad advocacy strategies.

INSTITUTIONAL DESIGN: STRENGTH AND POTENTIAL HARM FOR LGBT COLLECTIVE ACTION

In both countries, the LGBT rights litigation began with cases filed to defend individuals' rights from state and/or private agencies' actions such as police brutality and/or discrimination against their community. In these early cases the courts ruled in favor of LGBT people and against blatantly unfair and unconstitutional actions of discrimination

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based on sexual orientation or gender identity and maltreatment by the state. Because these claims were of little consequence to socially conservative organizations and others with long histories of animus toward LGBT people, they provoked little interest or objection. In Costa Rica, for example, early cases included legal recognition of LGBT organizations, an end to routine

police harassment, an end to discrimination by medical professionals, free access to antiretroviral medications, etc. Early cases in Colombia focused on resolving the urgent problems of same sex couples including the 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, and change of gender in the national identity documents. Although these cases were not part of a well-planned strategy designed by nascent LGBT organizations, they marked the successful start of the battle for LGBT rights recognition and protection in both countries. The low cost, open access legal structures and the litigation for less controversial rights, the judicial victories were possible without the existence of or need for well-funded, well-organized social movements to strategize the most effective rights litigation or to push compliance with the court's decisions. However, in both countries the ease of pursuing litigation also harmed LGBT organizational capacity building and their ability to augment their public perception and build political support or to strategize a path towards more controversial rights such as marriage equality. This organizational short coming was put into relief as a result of the first marriage equality cases. These cases were presented to the court by individuals acting in their own interests, not by LGBT organizations, at a time when popular opinion was strongly against their claim (see Table 1).

Unlike the earlier LGBT rights cases, the profundity of the marriage equality claim spurred well-organized groups hostile to

TABLE ONE: TOLERANCE OF HOMOSEXUALS, SUPPORT FOR MARRIAGE EQUALITY, 2010 AND 2012

Country	Tolerance of Homosexuals (%)		Support for Marriage Equality (%)		Same Sex Civil Unions/ Marriage Equality Legal (date)
	2010	2012	2010	2012	
Uruguay	62.1	77.6	50.5	67.1	Yes (2008/13)
Argentina	66.5	60.1	57.7	55.4	Yes (2010)
Brazil	44.4	66.4	39.8	49.8	Yes (2011/12)
Mexico*	37.8	47.9	37.8	45.4	Yes (2010/12)
Colombia	36.7	52.6	34.4	36.7	Yes (2009/13)
Costa Rica	39.4	46.9	20.7	22.3	No

*Marriage equality was legalized in the Federal District in 2010 and those marriages recognized nationally by a Supreme Court decision (2012). Marriage equality also became legal in the states of Quintana Roo (2011) and Chihuahua (2013) Source: LAPOP 2010, 2012

LGBT rights to react forcibly and to reframe the issue as an attack on the family, religion, and traditional values rather than as a rights equality issue. These organizations pursued legal and political strategies to block the legalization of marriage equality and forced LGBT organizations to react and develop advocacy and legal strategies not only to support the cases, but also to prevent the development of negative legal precedents and attempts to legislate against them.

BACKLASH OR NEW FIELD OF BATTLES? SELF-CENSORSHIP OF THE JUDICIARY

After many years of pro-LGBT rights legal decisions both the Colombian Constitutional Court (2011) and the Costa Rican Sala IV (2006) declined to rule on the constitutionality of Same Sex Marriage, and argued instead that the appropriate body to rectify the legal situation of same sex couples was the popularly-elected legislative assemblies, an arena not well suited to the underfunded, institutionally weak, socially and politically marginalized LGBT movements. These Courts' decisions might have been a strategy for the Courts to avoid being in the center of a polarized debate that could undermine their authority, but regardless of the actual motivation, it does reflect the sensitivity of the issue of the definition of "family" in Latin America and the success of the anti-marriage equality groups in reframing the issue. When

legal battles challenged the dominant definition of family, they also brought to light structural conditions, such as imbalanced gender relations, machismo culture, and the political power of religious leaders. The early LGBT rights cases in Colombia and Costa Rica did not challenge these social structures protected and defended by conservative groups. However, in Colombia and Costa Rica, the debate on same sex marriage was successfully framed by well-organized groups with animus toward the LGBT community as a major attack on the traditional concepts of family, morality, and religion rather than a "rights" issue.

The broader resistance created a new situation; legal struggles for marriage equality required a more organized response from LGBT rights groups to face the counter mobilization and to control the framing of the debate. In Costa Rica, immediately after the Sala IV decision, a bill was submitted to congress to legalize same sex civil unions (not marriage equality), but the SSM litigation had already set in motion a significant backlash that included a bill to ban adoptions by LGBT people, an attempt to amend the constitution via a popularly initiated referendum (over 150,000 signatures were collected), and constant attacks from the country's pulpits

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claiming marriage equality was against the family. Even with growing support in the congress, the fate of the same sex civil unions bill has been blocked for over eight years by deputies from small Christian political parties whose votes are necessary to pass the minority government's other legislation.

In the Colombian case, nascent LGBT organizations found themselves in a similar situation; they lacked popular and organizational support, but now had to work with politicians to push marriage equality in the congress where they had lost battles on similar bills in the early 2000s. While the struggle at the Congress was not abandoned, Colombian LGBT organizations continued with their strategy of pushing litigation in the courts to recognize the rights of same sex couples.

Unlike the Costa Rican court's decision, the Colombian Court gave legislators only two years to pass a marriage equality law. When Congress failed to pass the law before the June 2013 deadline, the Constitutional Court stepped in and allowed lower level courts to recognize individual same sex marriages. This, though, was not the end of the marriage equality battle. While it is now legally possible for same sex couples to get married, a new round of conservative lawfare has been unleashed by the Procuraduría General de Colombia (the Office of the Inspector General of Colombia) to prevent the superior court's same sex marriage decision from being implemented. The most visible leaders of the Procuraduría, Inspector General Alejandro Ordoñez and his delegate for women's rights, Ilva Myriam Hoyos, have used their offices to block the realization of same sex marriages by threatening to discipline lower level judges who perform the marriages and by presenting tutelas to annul existing same sex marriages.

The legal battle with the Procuraduría has been very difficult for the Colombian LGBT organizations to combat: it has required economic and human resources to protect the individuals affected by the actions of the Procuraduría, and also to repeatedly question the lawfulness of these actions, with legal

arguments. These legal and political battles are particularly burdensome activities, especially for organizations with limited resources. Besides, the barrier to same sex marriage is not the only rights violation faced by Colombian LGBTI organizations. They also have to respond to hate crimes, lack of access to justice (with authorities failing to investigate murders of LGBT, and judges giving lighter sentence in cases involving murder of LGBT)

CONCLUSIONS

The Costa Rican and Colombian cases show the complexity of the legal struggles for recognition of marriage equality. These two cases illustrate that successful litigation for some individual rights, such as property rights, do not necessarily prevent major resistance against marriage equality. Indeed, the reliance on a litigation strategy to push for LGBT rights precluded the need for these nascent LGBT rights organizations to build their capacity or the need to influence popular opinion. But on the larger, more transformative issue of full equality for LGBT people, as seen through the goal of marriage equality, stronger organizations and political allies are necessary to overcome well-funded, well-orchestrated anti-LGBT opposition.

Experiences of Costa Rica and Colombia reveal that the struggle for marriage equality requires a level of social mobilization, organization, and resources that were not necessary for less controversial LGBT rights claims. The openness of the legal opportunity structures helped LGBT people claim many rights, but the very openness also permitted individuals to present claims for marriage equality at a time when popular opinion was overwhelmingly against the idea and it helped create a hospitable climate for the development of "negative jurisprudence" that might jeopardize the whole battle for recognition of full LGBT equality. As these two cases show, the progressive battle of LGBT groups did not finish with a favorable judicial ruling. Conservative groups have also earned to launch legal and political strategies to challenge court decisions or block legislation that contradict their traditional interests and views.

* This brief is part of the research project. [Sexual and Reproductive Rights Lawfare: Global battles 2014-2018](#).

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