

The role of societal attitudes and activists' perceptions on effective judicial access for the LGBT movement in Chile

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Abstract

The frequent gap between de jure and de facto arrangements within South American judicial systems suggest that an institutional focus is not enough to understand effective access to justice. This article uses a constructivist approach to measure de facto judicial access for the LGBT (lesbian, gay, bisexual, and transsexual) social movement in Chile through examining the role of societal attitudes on social movement activists' perceptions of their access to justice. I find that while a lack of judicial receptivity can certainly affect the outcomes of cases, societal attitudes also influence activists' own perceptions about using the judicial system. The fear of societal repercussions limits the amount of judicial cases LGBT individuals bring forth, hence contracting their level of judicial access in practice. A constructivist evaluation of access to justice can enhance the legal opportunity and political opportunity literature, which tend to focus too heavily on de jure openings to legal institutions when defining access.

Introduction

There is an increasing amount of scholarly research examining lesbian, gay, bisexual, and transgendered (LGBT) rights and laws affecting those rights. Many of these legal studies focus specifically on countries where rights have been gained in the Western World over the past twenty years, such as the United States, Canada, and the European Union (for example see edited work by Barclay, Bernstein, and Marshall 2009; Mucciaroni 2008; Engel 2007; Anderson 2005). Still others focus predominantly on countries that have outwardly repressed homosexual rights, such as Namibia and Cameroon (see Currier 2009; Awondo 2010). While many note the importance of the "judicialization of politics" in South America (see Domingo 2004; Peruzzotti and Smulovitz 2006; Taylor 2008), few studies investigate the legal path of LGBT groups in South America, where social movement organizations (SMOs) tend to be in limbo between operating within states that are increasing political opportunities through opening political institutions and cultural norms that often categorize homosexual behavior as immoral. This study takes an in-depth look at judicial access for the LGBT movement in Chile through exploring this tension with a focus on societal attitudes and their impact upon LGBT movements decision to access the judicial system or not.

For decades, it has been noted that the consolidation of democracy is heavily tied to establishment of the rule of law (Dahl 1989, Mather 1990, Peruzzotti 1997, 2002). For Chile, liberal democratic judicial and political reforms occurred throughout the 1990s and 2000s – opening judicial institutions to many previously marginalized actors. At the same time of these institutional openings, however, the LGBT movement battled with conservative notions of sexuality, a variable often overlooked in many judicial access and legal opportunity studies (for notable exceptions see Hilson 2002, and Anderson 2005). Many judicial access scholars still focus on the impact of institutional variables on judicial access that are external to the social movements or individuals using the system, such as the provision of public defenders, legal aid, legal education, and so on. Yet the frequent gap between *de jure* and *de facto* arrangements within South American judicial systems suggest that an institutional focus is not enough to understand effective access. In a democracy, rights must be gained in practice and not just formally.

This work uses a constructivist approach and evaluates the effect of societal attitudes on the LGBT movement's perception of access to the judicial system. Societal attitudes and activists' perceptions of their judicial access are separate but linked processes. Societal attitudes of homosexuality represent perceptions outside of the social movement being studied, but may indirectly affect how social movement activists view themselves and their available legal opportunities. Activists' individual perceptions of their judicial access are internal to the LGBT social movement and allow me to evaluate the constructivist argument that activists' rights claims can be furthered through formal institutional openings but only if they perceive the institutions as open. Their own perceptions of access can directly affect which avenues they choose to pursue to gain rights and, in turn, can limit or enhance their access to the judicial system regardless of the judicial/political structure within which they operate.

I find that while federal judicial receptivity to homosexual rights claims in Chile was weak between 1990-2010, societal attitudes also influenced LGBT activists' decisions to not use the judicial system. Homophobic societal attitudes can dissuade LGBT activists from using public avenues to gain rights because many potential plaintiffs fear "coming out of the closet" in a hostile environment - hence contracting their level of *de facto* judicial access. Certainly the provision of institutional openings affect social movements' level of judicial access, but this work demonstrates that how activists perceive these institutional openings can explain more about social movement access in practice than simply relying on *de jure* measurements.

While one would expect the political institutions to be effectively more open and accessible to social movements that are more culturally accepted, my research documents this expectation and some of the specific mechanisms that create it. I frame my work within the larger debate concerning the role of culture in collective action theory and argue a constructivist approach to studying social movement strategies expands the explanatory power of the legal opportunity

model because it asks if activists' perceive formal openings to the judicial system as viable venues for rights recognition. Next, I give a brief overview of judicial reforms in Chile that increased *de jure* judicial access to all civil society actors over the past two decades. I then lay out my methodologies and indicators used to measure societal attitudes and activists' perceptions. This is followed by an explanation of the legal-historical context surrounding homosexual rights in Chile. Finally, I present my findings and conclude societal attitudes have an impact on activists' own perceptions of their access to the judicial system. In the case of the LGBT movement in Chile, activist fears of using the judicial system contracts their level of *de facto* judicial access, despite the institutional expansion of judicial access for civil society. Social movements world-wide are increasingly using the judicial system as an effective venue to gain rights recognition. However, for socially marginalized organizations where individual members fear personal consequences due to strong cultural opposition to his/her lifestyle, the judicial system becomes a less effective tactical option. This weakens the effectiveness of Chile's democracy by closing a major venue for rights recognition.

The culture debate and legal opportunity

One debate surrounding the role of culture in social movement theory is whether or not culture can be accounted for in the political process model (studying political opportunities, mobilizing structures, and framing either in conjunction with or separate from each other) or if the political process model is too "structural" to fully incorporate culture as a variable- creating a culture/structure split. Structuralists often look at social movements' relation to the state through their ability to mobilize support, garner necessary resources, and use available political opportunities to explain movement emergence, while culturalists focus on how groups interpret and perceive these materials (Smith and Febner 2007, 13-15). Further, there is much discussion on how well the political process model achieves its goal of melding both structure and culture through "framing". Jasper (2007, 92) argues that adding framing, an approach that focuses on social movement organizations' conscious decisions to frame grievances, to the political process model was just a "meek attempt" to add cultural variables to a failing theory based almost solely on structures and citizen groups' relationship to the state.

The political process model often explains judicial access as a political opportunity that is dependent on institutional provisions that expand or contract civil society's ability to gain entry to the courts. Over the past decade, however, some judicial and legal scholars abandoned the political opportunity model by arguing legal opportunity should be evaluated in its own right. Legal opportunity is a separate but similar approach that explores why social movement actors chose to use, or not use, *litigation strategies* when attempting to gain rights. Scholars differ slightly on the variables that constitute effective legal opportunities, but they agree that legal opportunity variables include both

structural and contingent factors. The structural variables, like political opportunities more generally, focus on institutional openings to the judicial system. Legal opportunities expand if laws give social movement organizations legal standing, access to formal institutions, and access to increased state legal funding (see Anderson 2005; Hilson 2002; and Wilson and Cordero 2006). Also, elite allies, often times judges, can help expand access to the legal system (see Anderson 2005; Hilson 2002). More contingent variables, such as receptivity of justices (Hilson 2002) and the inclusion of cultural and political frames (Anderson 2005), also affect legal opportunities. Rights groups must frame claims so they fall into categories already established by law, and justices must be receptive to these rights claims.

Recent scholars, focused on LGBT mobilization, who have convincingly added to the cultural debate include those who look at the impact on internal identity politics on movement success or failure (Brown-Saracino and Ghaziani 2009); the use of cultural repertoires, specifically the intentional use of contestation to challenge the status quo while simultaneously building a collective identity (Taylor et al. 2009); and the use of purposive framing to gain access to courts (Vanhala 2009). While these scholars argue that both structure and culture affect LGBT legal opportunities, they still tend to explain cultural variables as something social movement organizations internally “frame” in order to gain rights or create new opportunities. Few focus on the role of external societal attitudes on activists’ access to the courts. Anderson (2005, 209-211) acknowledges the influence of societal attitudes on LGBT litigation success when she argues social practices and public opinion can impact justices’ decisions, but she discusses societal attitudes affecting the process and outcome of the judicial process and not necessarily access to the system. I expand upon her conclusions by arguing accepted social practices and societal attitudes toward homosexuality not only affect justices’ opinions when making decisions but also *activists’* decisions to use the judicial system in the first place, many of whom mention fear of bringing a case to court because it forces plaintiffs to publically “out” themselves in an antagonistic environment.

While the idea of evaluating perceptions when looking at social movement success and emergence is nothing new, some claim it is an anthropological account of studying social movements (Salmon and Assies 2007, 206), it is a very understudied variable in the institutionally-focused political opportunities model and legal access studies more generally. Kurzman (2004, 117) argues for a new path of investigation that diverts from a structural framing to a constructivist framing of studying social movements, where opportunity should be viewed as “what people make of it”. Building on this debate, I evaluate perceptions within and surrounding the LGBT movement in Chile and find that LGBT perceptions of limited judicial access, partially due to a fear of outing themselves in a society with negative attitudes toward homosexuality, do in fact limit *de facto* judicial access for the social movement. I am reinterpreting a political opportunity/legal opportunity variable, the level of openness to an

institution, from a cultural perspective in the hope of strengthening its explanatory power for a constituency-specific movement.

De jure judicial access for civil society in Chile

Judicial access is the opening of the judicial system to all citizens to seek legal redress. While measurements of judicial accessibility differ slightly among access scholars, commonly agreed upon measurement are overall judicial spending, increased legal aid to citizens, the provision of alternative dispute resolution mechanisms, the increasing use of specialized courts, and public legal education (Londen and Viviano 2001; Di Paula et al. 2006, 3). Chile strengthened all of these variables throughout the 1990s and 2000s in a purposive effort to increase judicial access for all citizens. Spending on the legal system in Chile increased every year from 1997 to 2009 (see CEJA 2008-2009) and the percentage of the total fiscal budget dedicated to the judicial system also increased from .75% in the 1990s to about 1% by the mid-2000s (CEJA 2004-2005). Further, Chile increased its spending on legal assistance programs substantially since the early 1990s (CEJA 2008-2009). Most importantly, Chile created the Public Criminal Defender's Office in 2001 through the Criminal Procedure Reform Act, which provides free legal defense, and implements alternative dispute resolution (ADR) mechanisms, creating access to justice for citizens who are intimidated by or unable to participate in more formal judicial settings - such as those living in rural areas with little physical access to a court.

While Chile is a unitary system, the judicial reforms of the 1990s and 2000s made strides in attempting to decentralize/localize the judicial system, through advocating ADR and the use of specialized courts. However, in order for citizens to access the judicial system, they have to have some understanding that the system is available for use. Efforts to use mobile legal assistance teams in impoverished areas have made it one of the most successful nations with regards to access reform (Buchanan 2001). This provides greater access to the citizenry by cutting out travel time for the lower income citizens while at the same time easing the tensions associated with traveling to the city for legal advice. Wilson (2004, 34) claims, "these....public and private legal services programs make Chile a hemispheric, if not global leader in access to justice work".

Civil organizations and social movements historically acted as a catalyst for judicial change throughout South America, including Chile, yet many of the institutional reforms mentioned above focus more on criminal defendants than on human rights issues. For social movements, the writ of protection (*recurso de protección*), established in the 1980 Constitution (no. 20 article 19), allows citizens to seek relief from a court of appeals when constitutional rights are violated, thereby providing legal standing for all citizens. However, because of the emphasis on criminal cases, many of the measurements used to assess judicial access in Chile assume a certain amount of homogeneity among those who seek access to the system. Solely concentrating on these institutional

reforms does not give an accurate account of how negative cultural attitudes may affect certain social movements adversely.

Methods

The focus of my case study research and the majority of my fieldwork concentrate on Chilean societal attitudes toward homosexuality and Chilean LGBT activists' perception of their access to the judicial system. I begin by placing the Chilean LGBT movement in historical context through a review of Chilean legislation and laws affecting the LGBT community coupled with an examination of the only three LGBT court cases heard by the Chilean Supreme Court from 1990-2008. I then assess societal attitudes of homosexuality through an evaluation of Chilean public opinion polls over the past 15 years and compare them to public opinion polls in Argentina over the same time period.

Certainly cultural attitudes have some effect on how members in each social movement perceive themselves, but in order to delve deeper into activist perceptions, I employ a separate ethnographic method. I performed in-depth, open-ended interviews with leaders and members of social movement organizations as well as participant observation to complement my analysis of group newsletters/emails/and research conducted concerning each movement's use of the judicial system. In total, I conducted 21 interviews over a three month period from LGBT lawyers, LGBT plaintiffs, organization leaders, and organization members - including multiple interviews from the three largest and most active LGBT organizations in Chile. Interviews were recorded and lasted 45 minutes to two hours each. My interview structure was open-ended, but focused on three components: organizational and personal background, use of the judicial system, and perceptions of access to the judicial system. I transcribed and coded each interview around the categories of: resources, identity, institutional opportunities, framing, and "non-use" of the judicial system. Participant observations included sitting in on organization meetings, a protest march, and organization-sponsored speaker events. Before expanding upon my ethnographic findings on activist perceptions of judicial access, I first turn to a discussion of the legal and historical context within which the LGBT movement operates.

Legal and historical context

While LGBT SMOs did not appear in Chile until after the democratic transition, homosexuals were singled out in legislation well before the 1990s. In 1954, Chile passed a law (11.627) grouping homosexuals as social security threats (Jiménez 2005), which led to the arbitrary detention of sexual minorities until 1994 when the law was abolished. Since then, very little legislation mentions homosexuality specifically. However, for purposes of this study, Article 161 of the Chilean labor code, while not addressing homosexuality specifically, is important for the LGBT movement. Article 161 addresses the right of an

employer to fire employees for the “good of the company”, and while a non-discrimination bill recently passed through Congress, no legal protection existed for minority groups against firing during the time of my study. The Movimiento de Integración y Liberación Homosexual (MOVILH), the largest LGBT rights organization in Chile, states the fear of being fired, or not getting promoted due to intolerance, leaves many homosexuals in the closet (Jiménez 2005). This is backed by many studies and international reports claiming workplace security is one of the greatest inequalities for the homosexual community in Chile, and that the majority of LGBT harassment claims likely go unreported, especially to the Work Tribunal, for “fear of social stigma” (Acosta et al 2008, 5; Cardenas and Barrietos 2008).

The one successful policy change for the LGBT movement in Chile occurred in 1998. Social movement organizations successfully lobbied to amend their sodomy law (penal code 365) to legalize sexual practices between consenting male adults over the age of 18. However, penal code 365 still differentiates between homosexual and heterosexual sex with minors. For homosexuals, consenting age is 18, while for heterosexuals it is 15. According to international organizations, such as Amnesty International, this blatant difference in law between homosexuals and heterosexuals is a violation of human rights (MOVILH 2008a), and homosexuals have been arrested recently for violating the reformed sodomy law. In 2008, a foreign actor visiting Chile had sexual relations with his 17 year old partner and was charged with pedophilia and possession of pornography (EFE 2008). Further, many lesbian interviewees were quick to point out that the change in the sodomy law did absolutely nothing to further their rights.

Regardless of their limited success, most LGBT SMOS still put more faith in the Chilean legislative process than the judicial process. This is evidenced by MOVILH dedicating a substantial amount of resources on lobbying for a non-discrimination bill and civil union legislation beginning in the mid-2000s. After seven years of congressional debate on the comprehensive anti-discrimination law, due to major opposition based on the sexual orientation clause, it was finally realized when the Chilean Senate approved the bill on May 6, 2012 (Ring 2012). While an incredible legislative victory for the LGBT movement, and many other minority groups in Chile, its passage came only when the LGBT movement stepped up their demands after neo-Natzis brutally tortured and killed Daniel Zamudio in a public park, reportedly because he was gay. The passage of the long-awaited anti-discrimination law demonstrates public pressure can influence members of Congress, but also that the process was a long uphill battle that relied on a heinous act before realization.

This focus on the legislative branch for rights recognition is very similar to the strategy of LGBT activists in Argentina when civil unions passed in Buenos Aires in 2002 (and gay marriage legislation nation-wide in 2010). When asked in an interview about the Comunidad Homosexual Argentina’s (CHA), venue choice of the legislative branch for rights recognition, the director stated “on one hand the judicial system is very slow... on the other hand, the judicial

system is very politicized...it is very rare that a judge will recognize gay rights". He went on to state, "we cannot control advances in the judicial system...not here, not in Argentina...our greatest power is through the legislative branch at the local level" (Suntheim 2006). Unlike Argentina, however, Chile's highly centralized unitary system, and legislative branch purposively designed to maintain the status quo, makes gaining legislative victories a particularly slow process for social movements. Chile's unconventional binominal electoral system, established under the Pinochet regime in the 1980 Constitution, ensures the two dominant voting blocs receive close to the same amount of congressional seats even if one bloc receives a strong majority of the votes (Siavelas 2002, 420-21). This makes it difficult for many SMOs to gain a majority of legislative support. While the current Chilean president, Sebastián Piñera announced his support of a civil union bill in Chile (Frardino 2011), the binominal electoral system over-represents the center-right bloc who publically came out against Piñera's support.

As will be demonstrated in the following section, Chilean LGBT organizations steered clear of rights recognition through the courts. Only three LGBT cases received national attention since democratic transition, and none purposefully sought rights recognition in a proactive manner, a strategy often employed by LGBT SMOs in many Western democracies. Further, the LGBT movement's over reliance on a static legislative branch is a much weaker venue choice than the more localized legislatures in Argentina – severely limiting their democratic avenues for rights recognition.

Chilean court cases

The Divine Case

The first gay and lesbian judicial case that gained major national media attention was the Divine case, which began in 1993. The case refers to a fire at the gay discothèque, Club Divine, in Valparaiso, Chile. Many witnesses to the event stated that a group of men started the fire on purpose - sixteen people died and over thirty were injured. There were many reports that police officers, and the justice system as a whole, did not take appropriate steps to find evidence and never bothered to track down the murderers. Social movement organizations argued the judicial investigation never looked for the cause of the fire nor for any suspects before closing the case six months after the incident (MOVILH,2006). Even more offensive to those who were there or who knew someone killed or injured in the fire, was that the victims were treated like criminals and intimidated by the "homophobic judge" (Jiménez 2005, 10).

While originating as a criminal case, the Divine Case must be discussed in this analysis for two important reasons. First, it has become a very powerful symbolic reminder of institutional homophobia to the LGBT community. Many popular gay and lesbian themed poems, essays, short stories, and books discuss the event well over a decade later (Sutherland, 2007; Lemebel 2001). Second, this case is important because after a large amount of pressure from social

movement organizations, it was re-opened in 2003 based on “improper steps taken” by investigating officials (Jiménez 2005, 67). In 2008, the justices involved with the reopening of the case admitted that it was not handled properly by the first judge. Nevertheless, it is probably too late to find those responsible for the fire (MOVILH 2008b). Not only does MOVILH blame the initial “homophobic” Judge Gandara as the main reason the case was not properly investigated, but the recent judge in charge of the case, Patricia Montegro, claimed to “make sure that the courts have surpassed the homophobia” that was present during the initial investigation (MOVILH 2008b). The move to re-open Divine perhaps shows a changing judicial attitude toward homosexuality, but it also demonstrates that judicial biases, and lack of receptivity, most likely played a role in the investigation and outcome of the case – as many legal opportunity scholars would predict.

The Calvo Case

The second case involves Daniel Calvo, himself a judge in Chile. In 2003, Judge Calvo, then in charge of a major pedophilia investigation, was spotted at a gay sauna. Three days later he was removed from the pedophilia case by the Supreme Court and less than a year later he was suspended for four months. Visiting a gay sauna was enough for his removal from the high profile case, even though Calvo never committed a crime (Jiménez 2005). The Calvo case is symbolic of many similar occurrences in Chile, such as school expulsions or firings from positions for demonstrating homosexual activity. Likewise, the Calvo case is still often cited by international actors as a flagrant abuse of judicial power since the Supreme Court never said why his actions disqualified him from performing his job (Acosta et al., 2008: 11-12).

The Supreme Court maintained his suspension, citing: “the visit of a judge to a gay sauna constituted ‘explicit conduct’ that seriously jeopardized the ‘honor’ and ‘dignity’ necessary to exercise judicial power” (Jiménez quoting Supreme Court Statement 2005). Some claim that this “explicit Court-sanctioned equation of homosexuality to moral aberrance effectively transforms the judicial institution from a potentially powerful enforcer of equal rights into one of its greatest enemies” (Acosta et al 2007, 11-12). Similar to the Divine case, the Calvo case demonstrates that judicial actors’ attitudes toward homosexuality affected the outcome: the decision to suspend him was based solely on what they personally deemed to be “dishonorable” conduct.

The Atala Case

The third major homosexual case takes on a much larger role than the other two discussed above. Not only is it the most prominent judicial case involving LGBT rights in Chile, but it was also appealed beyond the Chilean Supreme Court to the international level of justice. This case involves a custody battle for the three daughters of lesbian judge Karen Atala Riffo. Judge Atala, who is herself part of

the judicial system in Chile, challenged the system for a decade, making this case an ongoing fight for homosexual parental rights.

Between 2001 and 2003, Judge Atala lived openly as a lesbian with custody of her three daughters; however, her ex-husband, Jaime Lopez Allendes, filed a suit when Judge Atala started living with her partner (Atala 2007; Vance Center 2006). In May of 2003, a Juvenile Court Judge in Villarica issued a provisional order removing custody of the girls from the home of their mother at the request of their father, even though no hearing had been held and no evidence collected. This ruling was most certainly anti-gay, considering that in Chile custody almost automatically goes to the mother unless she is proved to be a prostitute, drug addict, alcoholic, or mentally unstable (Byrne 2005). In October of 2003, the Court of First Instance of the City of Villarica rejected the lawsuit filed by Mr. López Allendes to gain full custody of their three daughters. After the lower court decision was upheld by the Appellate Court in the city of Temuco, Mr. López Allendes appealed to the Supreme Court of Chile. In May of 2004, the Supreme Court overturned the first two rulings in a 3-2 decision. Atala then brought the case to the Inter American Commission on Human Rights in 2006 (Vance Center 2006). In April 2010, the Commission ruled that Chile violated judge Atala's human right to live free of discrimination (MOVILH 2010).

While very rare, members of the Supreme Court became interested and active in the court case well before it reached the Supreme Court - supporting Mr. López Allendes' appeal from the outset, with the belief that the judges in the initial ruling hadn't considered the right of children to live in a "normal" family (Byrne 2005, A6). Mr. López Allendes, also a lawyer and insider in the judicial system, based his petition to the Supreme Court on the claim that the children had a right to be "furthered and protected" in an atmosphere of normality (Vance Center 2006). Interestingly, unlike the trial court, the Supreme Court did not even consider the children's opinions about their living situation.

Beyond the Court's proactive role, this was also the first instance in which child custody was granted to the father because the mother was a lesbian living with her partner. The Supreme Court decision was based on the beliefs of the justices that children living under the custody of a lesbian were subject to live a life full of ridicule. They argued the girls were in a "situation of risk" whose "pernicious consequences" would "damage their psychological development" (Chilean Supreme Court ruling 2004). The justices chose to ignore expert testimony stating that "the psychological tests on children have proved that living in a household with a lesbian couple does not put the children's development at risk" (Byrne 2005, A6). While the Supreme Court argued Atala's sexual identity did not dictate the ruling, in the same paragraph they stated the sexual identity of the mother could cause her daughters to become confused about sexual roles. The Supreme Court ignored scientific studies clearly showing otherwise and claimed the evidence presented was only "an element of the conviction that must form the judges' personal opinion" (Jiménez quoting Supreme Court Statement 2005, 13).

In all three cases, justices' lack of receptivity toward homosexuality seemed to affect either the process of attaining justice or even the particular outcome/ruling of the case, yet none of cases mentioned above point directly to limited access to the system. The fact that the re-opening of the Divine case was the only proactive attempt by an LGBT SMO to use the federal courts for rights issues implies litigation is not sought as a viable strategy for these organizations, but it is also true that the Supreme Court never "denied" access to justice since proactive cases were not brought before the Court. Certainly a lack of judicial receptivity impacts social movement actors' access to the judicial system, as many political and legal opportunity scholars argue, but this work asks if there are other variables that also affect the SMOs' decision to avoid the courts. Many SMOs use litigation as a strategy even when they know the judiciary is unreceptive and the likelihood of winning their case is bleak. Recently, in South America, actors have used the courts as a tool to "delay, disable, discredit [policy], and declare [opposition]" (Taylor 2008, 10; see Dupuis 2002, 9 for examples of movement's use of unreceptive courts). Ultimately, the decision to take a case to court depends on the decisions made by those within the LGBT movement. It is important to identify social attitudes and activists' perceptions as two linked variables that also limit the LGBT movement's access to *de facto* justice.

Societal attitudes

In the late 1990s and early 2000s, Fundación IDEAs, a non-profit civil society foundation aimed at ending social discrimination and spreading democratic values, launched multiple studies measuring discrimination against sexual minorities in Chile. The foundation reported that in 1997, 60.2% of the Chilean population thought homosexuality was a "very serious" problem (Fundación Ideas 1997). In 2001, they found that 45.2% of the Chilean population believed that homosexuality should be forbidden since it is "against human nature" (Fundación Ideas 2001), and a survey conducted in 2003 showed that 43% of the Chilean population believed homosexuals should not be school teachers (Fundación Ideas 2003). The most recent survey conducted by the Latin America Public Opinion Project (LAPOP) finds that public opinion in Chile is still divided on the topic. When asked their level of "approval" for homosexuals on a scale of 1 (completely disapprove) to 9 (completely approve), 34% of Chileans marked 1-4 and 30% of Chileans marked 6-9 with a mean score of 5.48. Further, 15 % of Chileans marked "1" while only 4% of Chileans marked "9" (AmericasBarometer, 2010). These results are comparable to acceptance levels in Uruguay and more supportive than results found in Colombia, with a 3.5 mean score.

In addition to the polls above, a couple of comparative studies based solely on the "Attitudes Toward Lesbian and Gay Men Scale" (ATLG), used to measure perceptions toward homosexuals throughout the world, tested the scale's reliability and validity in Chile. One of these studies demonstrated "particularly

strong social intolerance toward gays and lesbians” (Cardenas and Barrientos 2008, 141). In the other comparative study, the authors concluded that Chileans are much more prejudiced toward the LGBT community than the U.S. and that Chileans have much more “traditional” gender role values that have continuously added to negative perceptions concerning sexual minorities (Nierman et al. 2007, 65). While the surveys conducted in this ten year span ask different questions, they seem to back the argument that Chile is a traditionally conservative country with respect to homosexuality.

While similar to other South American attitudes, these findings are in stark contrast to public opinion polls conducted in Argentina. While not fully embraced by the entirety of Argentina, public support of civil unions and homosexuality increased significantly over the past 10 years. In 2002, 69% of Argentine’s believed homosexuality to be only sometimes to never justifiable. The same recent LAPOP survey that conducted Chilean public opinion on homosexuality shows a dramatic change in Argentine public opinion since the 2002 survey. The mean score on the 2010 survey was a 7.29 - with more than 70 percent of the population marking a 6-10 on the scale (AmericasBarometer 2010). Certainly there is more public support for the gay and lesbian movement in Argentina now than in Chile.¹

The evaluation of multiple public opinion surveys throughout the decade does not give an exact “measurement” of acceptance or hostility toward the gay and lesbian movement in Chile, but it does provide a general description of intolerance. The surveys conducted demonstrate opinions are slowly changing concerning sexual minorities, but societal attitudes of homosexuals still tend to be negative, especially when compared to neighboring Argentina. In fact, in late 2010, the Chilean government released a large-scale public service announcement against domestic abuse with the tagline: *Maricón, el que maltrata a una mujer (faggot: one who abuses a woman)*, much to the outrage of international LGBT organizations (Debord 2010). The arguments for causation of these negative attitudes vary and range from the role of the Catholic Church in Chile to perceptions of gender roles that are much more rigid in Spanish and Portuguese-speaking regions of the Americas (Redding 2003, 2; Nierman et al. 2007, 62-65). Further, international studies and shadow reports voice concern over Chile’s discrimination based on sexual orientation, specifically with court systems, access to health care, adoption and parenting rights, and access to jobs and public utility services (IGLHRC 2007, 1, 7-9; Acosta et al. 2008, 5-14). These international reports demonstrate that societal attitudes have created an atmosphere where open discrimination is common and fairly accepted. Certainly, there can be severe consequences for “coming out of the closet” by initiating a court case that will be made public.

¹ The City of Buenos Aires passed civil unions in the early 2000s during an economic and political crisis as a means of gaining political support. Attitudes on homosexuality changed dramatically throughout Argentina in the five years that followed the local decision (Suntheim 2006, see also King 2010, for the Argentine case study).

Activists' perceptions

While this section aims to measure certain perceptions regarding access to the judicial system for LGBT groups in Chile, it should be noted that it would be very misleading to say that there is a singular gay and lesbian voice. Rather, there are multiple perceptions amongst active members in the gay and lesbian SMOs studied. Similarly, there are diverse goals among the SMOs themselves. However, with regard to their opinions on using the judicial system to gain rights, there are many similarities. One of these is that sufficient legal and financial resources are essential. Interviewees also agree that a law specifically protecting sexual minorities would legally justify discrimination claims beyond the use of the more general *recurso de protección*. Neither of these statements is surprising. Clearly, resources are critical “mobilizing structures” in social movement theory and legal standing is a critical institutional access variable in the legal opportunity literature. However, some of the SMOs do have financial and legal resources, especially MOVILH, and the *recurso de protección* provides some standing for all minority groups in Chile. So why are there so few judicial cases involving gay and lesbian SMOs? My research finds that activists perceive seeking judicial redress as a fearsome, and even dangerous, route to gaining rights in Chile due to societal intolerance.

Toly Hernández, president of the Movimiento Unificado de Minorías Sexuales (MUMS), and currently the Chilean representative serving on the Board for the Latin American and Caribbean Region of the International Lesbian and Gay Association (ILGA), agrees that Chilean society is a little more open to gays and lesbians since 1990. However, she feels that members of the Chilean gay and lesbian community “are very afraid of speaking out about violations of their rights...because there may be problems with their families, their jobs, etc...” (Hernandez 2007). Further, she contends that the fight for rights is still in its infancy in Chile, despite the push from SMOs since the early 1990s. Juan Pablo Sutherland (2007), an author who writes on gay themes and an active member of the Communist movement in the 1980s, similarly claims things have not changed much since the 1980s. He points out, “on one hand there are more public allies now, but on the other hand there is still a lot of fear to identify publicly”. Almost all gay and lesbian interviewees mentioned fear as one variable that distances the community from using the judicial system; for some this was a large obstacle and for others it was one of many hindering factors to accessing the judicial system. One interviewee, Rolando Jiménez, stood out, however, due to his optimism on future use of the judicial system.

Jiménez is one of the most vocal gay and lesbian activists in all of Chile. As president of MOVILH, he and his organization have been involved in almost every gay and lesbian legal/judicial battle. He emphasized a positive shift from the old guard to a newer generation of Chileans who now have decision-making power. He explains that the justices and lawyers are much younger and there are more women involved in the judicial system now. Considering his large role in gaining legal rights over the last 15 years, his optimistic view of the Chilean legal environment should not be overlooked. There are signs of a society that is

slowly changing its perception concerning the gay and lesbian population. However, Jiménez's own published report to the first Inter-American Forum on Access to Justice, organized by the United Nation Development Program, states that the Chilean Supreme Court is the "most homophobic institution in the country" (Jiménez 2005, 9). He shows instances of judicial prejudice in all of the court cases evaluated in his research. Further, when speaking about Article 161 of the labor code, he states that there is a "fear of revealing one's sexual orientation because prejudices can affect one's access to future avenues in their profession" (Jiménez 2005, 6).

Jiménez roots the failures of all three court cases, mentioned above, in judicial homophobia, and past individual justices' homophobia has some effect on MOVILH's decision to steer clear of the courts. However, Jiménez also admits that the real danger is revealing one's sexual identity in Chilean society, and that this fear can affect one's decisions to use political structures in place (Jiménez 2007). The perceptions of members within, and represented by, the SMOs have some influence on their decision to not use the judicial system, even though there are structural openings for them. This perception of fear was mentioned many times by those interviewed, including active members of the LGBT community. One LGBT radio DJ and involved activist since the early 2000s, admitted that he may never come out of the closet to his parents or anyone in his small hometown because "it is not worth the hassle". Likewise, Judge Karen Atala explained that her decision to fight the Supreme Court ruling at the international level was based on her resources and knowledge of the judicial system, but that the process "singled her out" and made her personal life very difficult

Conclusion

The optimism of some LGBT activists may be warranted considering the slow, positive change in public opinion toward the LGBT community, the influx of younger justices in the judicial system, and the recent victory in anti-discrimination legislation. That being said, during the time of my investigation there was a fear to bringing cases to the courts. Evidence gathered from interviews demonstrates that fear can lead to a perception of being a "second-class citizen". Many publications produced by the SMOs, and almost all of the leaders interviewed, claim many cases have not been brought to court because victimized individuals are afraid of the consequences of "coming out". While some point to the less than successful outcomes of certain court cases involving gays and lesbians as a reason to use alternative avenues to gain rights, it is the repercussions of bringing a case to court in the first place, regardless of anticipated outcome, that can be the primary problem.

Unlike many other minority groups, gays and lesbians have an option of "staying in the closet". Historically, there have been many minority groups who feared using certain political avenues. What distinguishes the LGBT community from other rights groups is that the fear of bringing a case to court may be

devastating not only publicly but also within their private lives. One seemingly simple decision to fight for one's rights via the judicial system can lead to a loss of job, housing, education, and even one's family just for identifying as a homosexual. Being able to "hide" one's sexual identity is not an advantage for gaining rights, but rather an obstacle for LGBT rights organizations (Corrales and Pecheny, 2010 make a similar argument to explain why so few LGBT individuals join organizations to begin with in Latin America).

Moreover, a perception of limited access creates limited access in practice. Fear of bringing a case to court due to societal repercussions, as opposed to fear of losing a case, can lead to inaction. Most of those who study access to justice measure it by institutional provisions, such as the number of legal means provided for those who feel disenfranchised. This is for good reason, as a legal structure that provides avenues for access is crucial to any social movement who wishes to attain enforceable rights. However, the LGBT case study in Chile demonstrates that for certain rights groups, legal/structural access is not enough to achieve full *de facto* access to the judicial system. The recent passage of the Chilean anti-discrimination bill could become a powerful legal tool for the LGBT movement in the future when making rights claims, but limited judicial access may remain if activists are still afraid of being ostracized by bringing a case to court in the first place. My research suggests that a refocused, constructivist evaluation of access to justice can enhance the legal opportunity and political opportunity literature, which tend to focus too heavily on the amount of *de jure* openings to legal institutions when defining access.

Further, this work demonstrates that the study of identity politics should not solely focus on how activists craft their own perceptions or how they consciously frame their issues within a culturally and politically accepted framework to gain rights, but should also evaluate how societal opinions shape activists' decision-making strategies when venue shopping. Too often, collective action scholars point to the process and outcome of rights claims without focusing on access to the political system. In the Chilean LGBT case study, actors' non-use of the system was not strictly based on an evaluation of their past experiences with an unreceptive judicial system, but, rather, at least partially influenced by public opinion surrounding homosexuality in a traditionally socially conservative country – regardless of expected outcome or concern of a biased process.

Contrary to scholars studying social movements in the Global North, who argue that the judicial system can be a tool for marginalized groups to raise awareness, the LGBT movement in Chile is often afraid to use the courts exactly because it "raises awareness" of their personal sexual preferences. The publicity that many SMOs seek in the Global North via judicial cases work against gay and lesbian activists in Chile, which is why the judicial system is less open for them. Advancing Ashley Currier's (2009) conclusions on the gay and lesbian movement in Namibia, I argue that gay and lesbian social movements' *de facto* access to the judicial system is not only limited in countries where the state openly suppresses homosexuality, but also in states where societal attitudes are non-supportive – even if states are not openly suppressive. While my findings

are geographically and case study limited, LGBT SMOs face similar negative social attitudes in many countries, and must find a space between a hostile judiciary and negative public opinion. In Chile, the LGBT movement chose to pursue rights via the legislative branch, where organizations try to push agendas and individuals can remain anonymous. This reliance on a legislative branch, purposefully structured to maintain the status quo via a binominal electoral system, severely limits the democratic venues available for the movement, and demonstrates Chile's highly centralized system based on elite decision-making creates institutional obstacles to rights recognition.

While the Inter American Commission on Human Rights often rules in favor of plaintiffs in South America, as it did in the Atala case, a mere venue change to the international level of justice does not seem to be the solution to rights recognition. International courts do not have the power to implement their rulings; a judgment against a state may create slow changes at the domestic level due to public embarrassment, but it often does not lead to swift institutional change. This suggests that in Chile, and other regions of the world with similar negative societal attitudes toward homosexuality, the LGBT movement would strategically benefit by focusing first on changing public opinion through media campaigns and educational outreach and then on changing domestic law via the legislative branch. The judicial branch tends to be a conservative institution in many South American countries due to judicial tenure, and judicial decisions are not nearly as affected by shifts in public attitudes as legislative decisions. Even in a country like Chile, where the binominal electoral system creates obstacles for groups seeking rights recognition, the LGBT movement finally gained a legislative victory partially due to a shift toward more public acceptance of homosexuality (as evidenced by the public outrage over the murder of a gay man). This venue choice certainly also worked well for the LGBT movement in Argentina when gaining civil union and, later, marriage rights. Strategically, it makes more sense for LGBT social movements in conservative countries to focus on public engagement and educational outreach. This will not only reduce the stigma of coming out of the closet to potential plaintiffs, but, more importantly, could impact legislative decisions during the law-making process.

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