DISSERTATION

# THE ROLE OF PERCEPTIONS ON EFFECTIVE JUDICIAL ACCESS FOR THE GAY AND LESBIAN AND ENVIRONMENTAL SOCIAL MOVEMENTS IN CHILE AND ARGENTINA

Submitted by

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WE HEREBY RECOMMEND THAT THE DISSERTATION PREPARED UNDER OUR SUPERVISION BY MARIAH DAWN KING ENTITTLED THE ROLE OF PERCEPTIONS ON EFFECTIVE JUDICIAL ACCESS FOR THE GAY AND LESBIAN AND ENVIRONMENTAL SOCIAL MOVEMENTS IN CHILE AND ARGENTINA BE ACCEPTED AS FULFILLING IN PART REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY.

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ABSTRACT OF DISSERTATION

# THE ROLE OF PERCEPTIONS ON EFFECTIVE JUDICIAL ACCESS FOR THE GAY AND LESBIAN AND ENVIRONMENTAL SOCIAL MOVEMENTS IN CHILE AND ARGENTINA

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. This dissertation uses a constructivist approach to measure judicial access for the environmental and gay and lesbian social movements in Chile and Argentina through examining the effect of societal, individual justices' and social movement activists' perceptions on the social movements' level of *de facto* judicial access. I find that while individual justices' perceptions of the social movement seeking rights can certainly affect the outcomes of cases, it is the external cultural variable of societal perceptions that more directly influences activists' own perceptions about using the judicial system. Societal perceptions (public opinion) can affect activists' decisions when choosing which political avenues, if any, they should use to gain rights - hence expanding or contracting their level of *de jure* judicial access

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# CHAPTER 1

# INTRODUCTION

## INTRODUCTION

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). However, this aspect of democracy was often overlooked well into the 1990s by scholars who were more interested in the role of the legislature and the executive within transitional South American countries that traditionally had relatively weak judicial systems. Recently, there has been a surge of South American judicial studies attempting to fill this gap (see Taylor 2008, Kapiszewski and Taylor 2008, Hilbink 2009, McAllister 2008, Prillaman 2000). Some scholars argue the judicial systems in South America are still corrupt and dominated by the executive (Buscaglia 1998, Acuna and Smulovitz 1997, Faivovich 2003), making them less important than the other two branches when studying democratic consolidation. The role of the judiciary in these, now consolidated, countries should be studied more, however, not less. Not only does judicial transition affect the rule of law directly, it also affects the

other branches' operations, making it an instrumental piece in the study of consolidation.

Due to the later entrance of judicial reforms specifically meant to deal with civil liberties, there are still many areas of judicial reform that must be improved, including access to the system. In a 2002 World Resources Center Report on information, participation, and justice in decision-making, the authors recommend that governments devote more time and energy to the practice of access, rather than focusing primarily on the law (Lash 2002, x). Prillaman (2000) argues that the defining variables that dictate real judicial "justice" in South America are independence, efficiency, and access. Further, he states that comparative legal scholars have argued that "one essential – possibly *the* essential – feature of a really modern system of administration of justice must be its effective, and not merely theoretical, accessibility to all" (Cappelletti 1993, as cited in Prillaman 2000, 18). Additionally, if there is to be a lasting consolidation of liberal democracy, "the notion of democratic rights (both civil and political rights) should come to be assumed and take root socially" (Buscaglia 1998, 15). This dissertation evaluates the role of perceptions and how these perceptions affect the level of *de facto* judicial access for social movements seeking these civil and political rights in Chile and Argentina.

While many studies have been conducted on judicial access for individuals or movements attempting to gain rights, most access scholars focus on the impact of institutional variables on judicial access that are external to the social movements or

individuals using the system[1]. The legal structure should not be overlooked as a driving force behind whether or not actors choose to participate in the political system. This holds especially true for organized social movements since they are often the tools of individuals seeking rights, and may have more resources to utilize the legal system (Foweraker and Landman 2000). 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. Rights must be gained in practice and not just formally.

This work evaluates the effect of two additional external independent variables that are not traditionally defined as "institutional" - societal perceptions and individual justices' perceptions of the social movements' attempting to gain access to the judicial system[2]. Further, this dissertation focuses on a third non-institutional variable that is internal to social movements – activists' own perceptions of their access to justice. I find that while individual justices' perceptions of the social movement seeking rights can certainly affect the outcomes of cases, it is the external cultural variable of societal perceptions that more directly influences activists' own perceptions about using the judicial system. Societal perceptions (public opinion) can affect activists' decisions when choosing which political avenues, if any, they should

[1] Such as the provision of public defenders, provision of legal aid, provision of legal education, and so on.

[2] It should be noted that justices' decision-making strategies are not always considered "non-institutional". Behavioralists study judicial attitudes through the attitudinal model of judicial decision-making – where they are seen as rational actors influenced by their own political preferences and goals (see Clayton and Gillman 1999; Sagel and Spaeth 2002: 343-349). Neo-institutionalists argue judicial decisions are also influenced by their institutional surroundings (see Maltzman et. al. 1999). However, these studies focus on judicial decisions, interactions, and outcomes more so than access to the judicial system. Further, with the emergence of constructivist institutionalism (see Hay 2008: 56-57) some scholar argue that an inherent flaw in neo-institutional methods is their insistence on assuming material interests are the key determinants of their behavior – rather than perceptions of those interests (Hay 2008: 68). This study views judicial attitudes through a comparative, constructivist lens.

use to gain rights - hence expanding or contracting their level of *de facto* judicial access.

Through comparing and contrasting the environmental and gay and lesbian social movements' use of the judicial system and perceptions of the judicial system in Chile, I find that while both movements operate under the same institutional judicial structure, perceptual variables create very different patterns of effective access. Gay and lesbian activists feel that using the judicial system can be risky since they fear bringing their homosexuality into the public realm. In contrast, the environmental movement perceives public opinion as supportive and therefore feels empowered by the will of the public to bring cases to court. I reach similar conclusions when evaluating the movements within Argentina.

Cultural values and how they affect access to institutions like the judiciary are rarely studied (see Cappelletti 1993 and Prillaman 2000). If "cultural politics fundamentally determine the meaning of social practices and, moreover, which groups and individuals have the power to define these meanings" (Jordan and Weedon 1995, 5-6) it should be relevant when studying access to the courts. Societal perceptions and cultural values play a role in who is accepted as an actor within the system, so attention must be paid to the external variables of cultural attitudes toward the social movements in addition to the constitutional structure of the system when measuring access.

The societal perceptions variable I discuss is along the lines of "social mentalities" (Tarrow 1992: 177), which is popularly held values and practices about

private life and behavior, not political culture which is how these societal values affect or determine politics and political systems. This variable of societal perceptions differs significantly between the two issue-areas being studied, which is the primary reason I chose these two particular social movements for my study. Given the tremendous societal and cultural pressures that have worked to limit the advancement of gay and lesbian movements in the developing world (Brown 1999), there is more cultural support for the environmental movement than the gay and lesbian movement (see Wilson and Cordero 2006). This is not to say that there is complete cultural acceptance of the environmental movement, only that there is more acceptance of it than of the gay and lesbian movement.

Arguably, regardless of constitutionality, one would expect the political system to be effectively more open and accessible to social movements that are more culturally accepted (Eckstein 1988, Inglehart 1995, Currier 2009). My research documents this expectation and some of the specific mechanisms that create it. Through utilizing an in depth study of the two social movements within Chile, operating under the same judicial system with very different levels of public support, I am able to draw conclusions about the impact of activists' perceptions on their level of *de facto* access to the judicial system. Further, a comparison of my Chilean findings to the same two social movements in Argentina finds that while Argentina's federalist system and provision of a defensoría del pueblo (public ombudsman) offer structural/institutional variables that can increase access for both social movements, social and judicial perceptions still affect activists' perceptions on the "safety" of

using the judicial system – and environmentalists make freer use of similar institutional opportunities.

Given the array of actors involved in this study, I pull from numerous sets of literature - including South American judicial literature, access literature, and the cross disciplinary debate over the role of culture in the social movement literature. This chapter frames my study with respect to these dialogues and explains where it fits in each. I begin by briefly describing the study of judicial systems in South America and why my study fills some of the gaps in this broader sense. Second, I explain why I choose judicial access as my dependent variable. Third, I explore the contemporary debate on the role of cultural, or non-institutional, variables when studying social movements. Finally, I clarify the methodology used to measure my independent "perception" variables. Chapter two expands on my discussion of social movements by explaining where my study fits within the literatures on environmental and gay and lesbian movements as well as social movement literature more generally.

## THE EMERGENCE OF THE STUDY OF JUDICIAL SYSTEMS IN SOUTH AMERICA

Many South American countries made a transition to more open markets and political systems in the 1980s. Numerous scholars have focused attention on these post-transition regimes to evaluate both the positive and negative consequences of democratization and liberalization. The first studies focused heavily on executive and legislative politics, and for good reason since these hyper-presidentialist governments

revolved heavily around the executive and his relationship with the legislature. Beginning in the mid-1990s, when the initial phases of democratic consolidation were nearing an end, more focus began shifting to the judicial systems in many South American countries. Both internal and external forces began putting pressure on governments to legitimize or strengthen their judicial systems. Internal pressures such as economic collapses leading to constituent disapproval of most, if not all, politicians led to a focus on reducing nepotism and strengthening checks on executive and legislative institutions. Perhaps more importantly, external pressures such as the demands placed on these newly consolidated governments by international actors, both for economic and humanitarian reasons, began shifting the emphasis of studies from consolidating the legislative and executive branches to focusing on the rule of law (see Carrillo-Florez 2007 and CEJA 2004-2005). While much of the original international insistence on stable and legitimate legal systems was economic in nature, such as the need for lasting and durable contracts for trade and commerce, humanitarian pressures from NGOs soon followed.

Since the mid-1990s, there has been more research focused on the judicial systems in newly consolidated South American countries, but there are still fewer studies of this branch than the other two. While many scholars argue that the judicial system is a crucial, or even the most important, part of true democratic consolidation (Dahl 1989; Mather 1990; Linz and Stepan 1996), its role is fairly understudied in South America, including in both Chile and Argentina. Certainly there have been publications focused on comparing judicial effectiveness and efficiency in South America (Hilbink 2007, Taylor 2008, Prillaman 2000; Jarquin and Carillo 1998;

Martinez 1998), but most of these are fairly recent compared to studies evaluating the role of the other two branches of government. Further, there are gaps in both comparative and attitudinal studies of the South American judiciaries.

**Gaps in the Latin American Judicial Literature**

In a recent article by Diana Kapiszewski and Matthew Taylor (2008), in which they examine a wide range of scholarly and academic works focusing on judicial politics in Latin America from 1980-2006, they make several suggestions concerning the major gaps in the literature. This study aims to narrow two of the gaps they address. First they make an argument that "little comparative work is conducted – either cross-nationally, or within country cases" - which can include studying across areas of law or policy arenas (Kapiszewski and Taylor 2008: 742). My study largely focuses on the latter of these two comparative methods by closely evaluating two distinct social movements within Chile to gauge similarities or differences between the two issue areas with regards to levels of judicial access. I also address the former comparative method with a small study of the judiciary and these same social movements within Argentina.

Another argument made by Kapiszewski and Taylor is that little has been done to test hypotheses that have advanced in other parts of the world. One of these hypotheses is the attitudinal model from the U.S. literature (see Spagel and Spaeth 2002). They argue "since we cannot assume that Latin American judges and justices' ideologies are not important to their decision-making, further analysis of judicial attitudes , especially in countries where there is greater institutional stability, seems

warranted" (Kapiszewski and Taylor 2008: 746). While my intention of studying activist, public, and judicial perceptions is to build upon studies of judicial access, my focus on judicial perceptions will also add to attitudinal studies in the South American judicial literature. Similarly, and most important for this study, there are gaps in judicial access studies - this especially holds true when it comes to the lack of studies evaluating access as a dependent variable.

## WHY THE JUDCICIARY?

In order to provide this thick description of social movement perceptions toward access, it is crucial to focus on a single "institutional" route that social movement organizations utilize to gain access to the system. Social movement organizations utilize multiple avenues for access, including: using the legislative branch to push through policy, pressuring the executive to support social movement goals, and gaining access to the media to try to change societal attitudes toward movement goals, to name a few. I choose to study why social movement organizations choose to use, or not use, the judicial system.

There are multiple reasons I decided to study the judicial system instead of other political opportunity avenues for access. First, more and more social movements are using the judicial branch to gain rights, this is particularly true with social movements looking to gain "non-citizen rights" in the Global North, such as the environmental and gay and lesbian movement (Bernstein et. al 2009: 6; Daum 2009; Pedriana 2009). With respect to the gay and lesbian movement, some have

gone as far as claiming that all gay and lesbian rights in the U.S. have been gained through using the legal system (Pierceson 2005). Even when the legal process proves "unsuccessful" for social movements, rights-based strategies "challenge hegemonic social relations", "support ongoing resistance by mobilizing and empowering people to reimagine their lives" (Bernstein 2009: 6), and act as a constraint on government (Smith 2002). Similar arguments are echoed by those who study legal mobilization strategies for the environmental movement in the Global North. The courts have been an instrumental tool in challenging not only policies but also agency interpretation and implementation of environmental law - or lack thereof (O'Leary 2009).

Certainly, one of the best avenues to policy change is through the legislative branch – where groups may be able to help change policy directly. In order to keep this study focused, it will not attempt to explain legislative access – although specific laws impacting either social movement will be explained as affecting the overall environment within which each movement operates and are used as a measure of societal perceptions (see chapters four and five). This being said, it should also be noted that there is a shift in judicial politics toward the "judicialization of politics" where "once courts are activated, they can wield considerable policy influence" (Taylor 2008, 5; also see Gloppen et al 2004). Many contemporary U.S. social movements have specialized in legal strategies because using the courts can be a valuable tool to constrain the government (Smith 2002, McCarthy 1996: 145). If it is true that "the judiciary does not act as one, but has internal competing motivations, [and] competing interest groups" (Taylor 2008: 154), then justices' personal perceptions of issues may have a significant impact on how they interpret policies,

laws, and constitutions with regard to each social movement, and, in turn, have an impact on policy. While Taylor is speaking to the different pieces of the legal system, some scholars have made a more direct link between public opinion and its influence on judicial decisions in the U.S. (see Flemming and Wood 1997, 486; Stimson et al 1995, 555; Mishler and Sheehan 1993, 90).

Studying the different impacts of the judicialization of politics is often embraced by judicial scholars who view the judicial system, and its relations to actors using the system, through a constitutive perspective. While structuralists in the judicial literature argue that litigation is too expensive and time consuming for social movements to use them and neo-realists argue that the "expectation gap" between judicial decisions and actual change is minimal (Rosenberg 1991), this study (and many studies on cultural change movements) argues along the lines of a constitutive perspective where one "adopts an interactive, culturally-based view of laws and social norms and analyzes how legal norms and appeals to claims of rights are invoked as a form of political activity (Dupuis 2002: 5-6). Further, the constitutive approach tends to focus on non-judicial actors as legal agents and argues that "judicial proclamations have more impact on reshaping *perceptions* of when and how particular values are realistically actionable as claims of legal right" (McCann 1992: 731). This study takes a constitutive approach to viewing the judicial system and evaluates the political role of the courts in South America both directly (through individual justices' perceptions) and indirectly (through the perceptions of those outside of the judicial system).

Finally, evaluating the accessibility of the judicial system will allow me to focus on components of access more specifically. In order to investigate *de jure* versus *de facto* judicial accessibility, I evaluate access as a dependent variable that may be affected by more than institutional provisions. Many scholars address the gap between policy and reality in Latin America - ranging from implementation gaps stemming from trade agreements (Malamud and Castro 2007: 124) to indigenous rights promises (Godoy 2007). It is important to understand the disconnect between judicial access as legal provisions, included in reforms throughout the 1990s and 2000s, and the actual level of judicial access for those seeking rights. For both country studies, I evaluate the traditional institutional variables used to explain *de jure* judicial access, and then evaluate the role of perceptions to explain their differing levels of *de facto* judicial access.

## THE ROLE OF PERCEPTIONS IN JUDICIAL ACCESS

Many scholars point to judicial access as either a critical measurement of overall judicial effectiveness (Prillaman 2002) or as a critical component of access to the political system as a whole (as in most political opportunity literature). Judicial access needs to be studied in a "thicker" analysis as a dependent variable. This especially holds true into the 2000s when more and more scholars are asking if the judicial system is a rational and "neutral" opportunity to gain access to the system (as discussed by Friedman 2005: 2, 81) or if there is a more of a tendency into the 2000s toward the "judicialization of politics" (Gloppen et.al. 2004).

Mathew Taylor (2008) evaluates the role of the judicial system in Brazil and concludes that, indeed, there is a judicialization of politics that cannot be overlooked in Brazil (and perhaps the rest of the democratically consolidated countries of South America). He argues that the judicial system plays a crucial role in gaining rights as actors may use the courts to "delay, disable, discredit [policy], and declare [opposition]" (Taylor 2008: 10). This sentiment is shared by Martin Dupuis (2002) in his in depth, historical account of same sex marriage, legal mobilization, and the politics of rights (Dupuis 2002: 9). If there are multiple reasons why social movements should use the legal system, even if they do not "win" their case, one would expect the courts to be used more often by social movements - even if it is simply to delay legislation or to declare opposition symbolically. Access to the judicial system, and evaluating what creates access to the judicial system, then becomes a critical variable to evaluate when studying differing social movements, yet few have studied it as a dependent variable and even fewer have studied the role of cultural values as affecting *de facto* judicial access as a dependent variable. Hilson (2002) introduces the idea of "legal opportunity", and is one of very few who addresses it, but he does not look at judicial and social perceptions as measurements of access to the system. Instead, he views access to the judicial system as one of many independent variables, along with legal funding and standing, that dictate legal opportunity (Hilson 2002: 242-243).

Further, when political opportunity scholars study social movement access to a system, they also often focus on different institutional variables that may have an impact on social movements attempting to gain rights, and a large part of this is

addressing the relatively openness or closure of a system (access). Political opportunity scholars claim the level of openness of any given political system can help explain social movement actions or predict movement behavior (see McAdam et.al 2002:10). Access is a critical variable in the political opportunity approach to studying social movements, yet the focus on measuring variables external to the social movements leaves an important access variable understudied – activists' perceptions of their level of judicial access. While political opportunity scholars have attempted to incorporate cultural variables into their approach, there is still a focus on measuring *de jure* levels of access for social movements and variables that are external to the social movements being studied. Additionally, there are criticisms from some that political opportunity scholars' attempt to incorporate cultural variables is only a half-hearted attempt to appease culturalists (Jasper 2007: 92).

Besides the lack of studies focusing on access as a dependent variable that may be shaped, or even created, by cultural variables such as perceptions and the lack of political opportunity studies that explore the role of variables internal to social movements which may affect *de facto* political access, another understudied aspect of judicial access is the role of culture in shaping judicial access. This line of research has picked up momentum in the 2000s; just recently there have been publications on gender and attitudes toward justice systems in Central America (Walker 2008: 80-103), on the impacts of how cultural attitudes surrounding race affects justice and the law (Dzidzienyo and Oboler 2008: 20-23), and on the impact of fear on the GLBT movement's decision-making (Currier 2009: 21). The idea that culture and justice can be connected is nothing new, but most access scholars still skirt around making a

direct link between the two. Even "legal culture" is defined in more general terms, external to specific social movements, where it is "the clusters of attitudes, ideas, expectations, and values that people hold with regard to their legal system, legal institutions, and legal rules" (Friedman and Perez-Perdomo 2003: 34), not the values people hold about their accessibility to the system.

Most studies on judicial "culture" or legal "culture" are based more broadly on cultural attitudes *about* the judicial system or how culture may affect ideas such as "justice". There is very limited information about how cultural attitudes about certain peoples or social movements may limit or enhance groups' effective access to the judicial system, and hence the system as a whole. My study intends to evaluate a much more specific type of culture surrounding the judicial system: the role of judicial, societal, and activist perceptions. Instead of solely focusing on societal views of the legal system, or how those external to the system view it, I am also focusing on how those using the system specifically perceive their access to it.

In the social movement literature, political scientists often use a combination of approaches to explain social movement behavior and predict when social movements may be the most successful. The political opportunity approach often examines institutional variables external to the social movements being studied, such as the level of openness of the political system, while the resource mobilization and framing approaches evaluate variables internal to the social movements being studied, such as their access to resources and how they choose to "frame" an issue. All three of these approaches attempt to include culture as an independent variable affecting social movements' decisions, yet there is a debate as to whether these three

approaches to studying social movements – known collectively as the political process model - adequately incorporate cultural variables. This debate is important for my research since I argue that the three perception variables I study are cultural variables that can be used to better explain *de facto* social movement access to the judicial system – adding to the literature that often focuses on *de jure* judicial access.

The following section begins by discussing the definition of "culture" and its role in political studies more generally. Then, it lays out the debate between those who feel culture is inadequately incorporated into the political process model of studying social movements and those who believe culture can be fully accounted for in the political process model. Into the 2000s, the "cultural" effect on social movements is highly debated between those who insist framing is only a "meek attempt to add" cultural variables into the political process model (Jasper 2007: 92) and those who insist the political process model is a fluid model that has had the flexibility to be molded over time to include "culture" (Tilly 2004: 34; Meyer 2004: 50). I argue that the political process model still tends to focus on *de jure* measurements of access, and, because of this, can be complemented by studies taking a more constructivist approach to better explain effective/ *de facto* judicial access.

## THE CULTURE DEBATE

> Cultural dynamics never stand alone – we need to see the carriers of culture in action… we need a better culture-structure link (Jasper 2007: 72).

One of the most difficult tasks in undertaking a "cultural" study is in defining exactly what one means by culture. Some early definitions of culture focused on sets

of shared attitudes, values, goals, and practices that characterize an institution, organization group, or nation. Language, religion, customs, traditions, and symbols can all fall under this all-encompassing definition. Similarly, there is much debate concerning the roots of culture – be it sociological, anthropological, biological, historical, or religious (see edited work Kuper 1999). In fact, after explaining ways in which culture has been explained and used, both within and outside of the discipline of political science, I will argue the word "culture" is still too general when examining particular cultural variables – which is why I focus on "perceptions".

In political science, the concept of political culture took root as a "particular pattern of orientations to political actions" embedded in the political system (Almond 1956: 369). In *The Civic Culture*, Almond and Verba (1965) incorporated attitudinal studies and focused on orientations held by individuals in relation to their political system in an attempt to generalize specific political culture types, such as level of political activeness/awareness. While many critiqued studies of political culture as reductionist, descriptive, or too biased toward a Western preconception of ideal-types, Thompson, Ellis, and Wildavsky (1990) refer to a revival of political culture studies with the works of those such as Inglehart (1981) and Putman and others (1988). These scholars presented a more pluralistic conception that accounted for factors such as hierarchy, egalitarianism, individualism, and autonomy in cultural life – steering away from the *Civic Culture's* focus on attitudes associated with civic culture that explain democratic "types" of government.

Further, political culture scholars into the 1990s and 2000s, began focusing attention on the shifting cultural values in contemporary prosperous societies.

Whereas civic culture may have emerged with the rise of capitalism, more post-materialist values, such as valuing quality of life over basic security, emerged from post-industrial societies (Inglehart 1981, 1993). Inglehart (1995) argues it is these changing values in post-industrial societies that have aided in the success of rights movements since the 1960s. Regardless of focus, studies of political culture look at the relationship between cultural norms and types of governments, politics, regimes, demands, or development paths. Certainly my work incorporates aspects of political culture, since it analyzes the effect of a cultural variable on the use of a political institution, but studies of political culture tend to be asking much broader questions or searching for generalized or universal "types". While generalizations can be useful when evaluating broad concepts, such as why some states tend to be democratic while others tend to be authoritarian, a broad definition of "culture" will not suffice when trying to answer focused questions about how specific actors/organizations make decisions within and outside of their state institutions.

Marc Steinberg (2004) defines culture as the "semiotic attributes of social practices, commonly recognized through shared cognitions… easily replicable and generally difficult to alter because of their strong relations to (1) larger systems of signs and their meanings within which they are used and (2) patterns of action themselves" (Steinberg 2004: 124). This is a much more social and constructivist understanding of culture than that of the political culture scholars – who often focus on individual, aggregated attitudes. James Jasper defines culture as "consist[ing] of shared mental worlds and their perceived embodiments…culture is located within individuals [as Inglehart would argue] and outside of them". It also "comprises

cognitive understandings of how the world is, moral principles and intuitions about how the world should be, and emotions concerning both of these" (Jasper 2007, 60). What both scholars allude to is that "culture" is not just a subjective title that can be placed on anything that is non-institutional. In fact, some scholars insist that culture should be studied as an objective variable that can be measured through observable institutional laws, rules, and social rituals (Polletta 2004: 99-100). Culture can be stable or it can shift fairly regularly depending on the cultural dimension one is studying.

When looking for a thicker description of what constitutes "culture", concepts such as identity, carriers of meaning, and morality become important. Carriers of meaning can be symbols, the media, the written word, and so on, while identity can be either an individual feeling of self or a collective identity that creates a collective consciousness (a very important element in "framing"). For my investigation, the concept of morality plays a large role in both identity and meaning. Often, moral studies are associated with the study of religious movements (Jasper 2007: 86) where "morality" is seen as a driving force for someone to be helpful (ie. it is one's moral duty to help), while very little is said about the role of one's moral duty to hinder (Jasper 2007:86). All three of these additional elements of culture will be examined when studying the environmental and gay and lesbian social movements, but particular attention will be paid to the concept of "morality" as it may impact perceptions and prove to be a hindering factor for social movement success rather than an obligation to extend a helping hand. Accusations if immorality can be disempowering for social movements or any actor seeking rights. In other words, I

argue along the same lines as Jasper; however, I will focus not only on citizens' obligation to support a cause (as seen with the environmental movement) but also citizens' obligation to stop a cause (as seen with the GLBT movement).

When investigating the role of "culture" in the study of these specific social movements, I agree with Adam Kuper who argues that using the word culture becomes a moot point for any serious type of investigation (Kuper 1999). There is no explanatory power in using a term that can include everything, including institutional and structural formation, to explain. The explanatory power in "culture" comes when investigators are much more specific in their usage of the word (Kuper 1999: x-xi). Furthering Jasper's (2007) definition that culture comes both from within individuals and outside of them and Kuper's insistence that "culture" is too general, this study will not look at "culture", but rather individual and societal elements that often fit under the umbrella of culture. Tom Salmon and Willem Assies (2007) agree that one must be careful when using culture to explain causation. It is only when "we separate out the various processes that are lumped together under the heading of culture, and then look beyond the field of culture to other processes" that we will come to understand any of it (Salmon and Assies 2007: 209-210).

In an attempt to "separate out" perceptions, I choose not to look at "culture" in general but rather to examine a few cultural variables. The first cultural variable I will look at is public perception of each social movement. How does the public perceive each issue being studied and does that effect social movements' decisions when choosing an avenue to achieve rights? This analysis, while using public opinion studies, focuses less on individual opinions and, rather, tries to capture underlying

societal discourses that may pre-shape people's particular orientations on movement activities. Second, I will also be investigating judges' perception of the social movements. The role of the individual justice in the judicial system may have significant weight on what is considered and what is simply thrown out (see Taylor 2008: 6). Finally, activists' perceptions must be investigated. I use the terms "activist perception" as a way to describe how individuals within social movement organizations (since often an individual is needed to bring something to court) view their options for access to the system. Do they "feel" that the institutional avenues for access are open to them and does this help determine the avenues they choose to pursue when seeking their goals? Can a mere perception that an "open" structural avenue for access, such as the judicial system, is less meaningfully open for some more than others affect the level of *de facto* openness of that avenue?

Exploring culture that is both external and internal to the social movement of interest will not only add non-institutional variables to my study of access in general, but focusing on activists' internal perceptions of access will add a constructivist interpretation of movements' *de facto* level of judicial access – adding another piece to the political opportunities approach to studying social movements. One of the largest debates surrounding the role of culture in social movements into the 2000s is whether or not culture can be accounted for in the political process model (usually through the framing approach) or if the political process model is too "structural" to fully incorporate culture as a variable. Even within sociology, there is a split between the structuralists and the culturalists. Structuralists look at social movements' relation to the state through mobilizing structures, resources and opportunities to explain

movement emergence and culturalists focus on how groups interpret and perceive these materials (Roggeband and Klanderman 2007: 4, Smith and Febner 2007:13-15). There is still a debate on how well the political process model achieves its goal of melding both structure and culture for explaining social movement emergence and success.

Even political process theorists admit that "opportunity cannot invite mobilization unless it is: a) visible to potential challengers, and b) *perceived* as an opportunity (McAdam, Tarrow, and Tilly 2001: 43 emphasis added). However, it is argued that while an agreement on a more constructivist interpretation of social movements is needed, methods have not followed this notion. Opportunity is still often viewed as a formal opening rather than a flexible opening which may affect social movement decisions differently. A more constructivist approach to studying movements would delve further into what is meant by "opportunity". "Constructivism turns structural factors into distributions of perceptions: perceptions of the political environment and what can feasibly be accomplished, of social ties and what can be expected of them, and of cultural norms and their application to a given movement" (Kurzman 2004: 119). If opportunity is "operationalized primarily as perceived opportunity" (Kurzman 2004: 119), then the political process theory label becomes much less important than the shift from a structural to a more constructivist study of social movements.

There is some agreement that political opportunity variables can be strengthened by reinterpreting them from a cultural perspective (Jasper 2007: 72, 89) or that looking at culture is critical when political and structural factors do not fully

explain movement decisions (Alvarez, Dagnino, and Escobar 1998, Meyer 2004: 53, Koopmans 2004: 66). I evaluate perceptions within and surrounding social movements in an attempt to determine if viewing cultural variables as affecting levels of *de facto* access can strengthen the entire political process model – including the political opportunity approach that often measure variables that are external to the movements seeking rights. I am reinterpreting variables from a cultural perspective in hopes of strengthening the explanatory power of these structural variables for constituency-specific movements.

I argue that access literature often overlooks cultural variables and political opportunity scholars often overlook cultural variables internal to the social movement being studied due to their focus on explaining *de jure* access. However, there is an emerging argument within the gay and lesbian literature that calls for methods concentrating on measuring *de facto* judicial access for marginalized groups. Due to gays and lesbians' unique ability to choose to "stay in the closet", studying the role of cultural attitudes on social movements' decisions, specifically when choosing which avenues they choose to pursue when gaining rights, largely emerges from those who study the GLBT movement. Since gays and lesbians can choose to "hide" from the public eye, they may be less likely to use any state institution. Michael Brown (2000) was one of the first to argue that the "anxiety" gays and lesbians experience due to state-social movement organization interactions can affect their decision-making.

More recently, Ashley Currier (2009) concluded in her study of The Rainbow Project in Namibia, a gay rights social movement organization, that fear of state repression led them to defer legal tactics (Currier 2009: 26-32). Her study is much

like my own in that she is studying the social movement activists' perceptions of their tactical options for gaining rights. Currier argues that "tactical choices that may be logical for GLBT social movement organizations in older democracies may not be so simple for GLBT social movement organizations in younger democracies in which the state is openly hostile to GLBT rights and organizing" (Currier 2009: 21). State-social movement relations, especially when the state is openly in opposition to a specific social movement, can certainly affect which avenues, if any, social movements choose to pursue when gaining rights. Currier's study offers me possible hypotheses for confirmation in very different cases. I expand upon her conclusion by arguing that even when states are not openly hostile to social movements, activists' perceptions of judicial access are influenced by societal perceptions.

While my conclusions will be as geographically limited as Currier's, GLBT movement scholars often focus on the "success" cases in the Global North – such as Canada, the U.S., and a handful of European countries (see Dupuis 2002; Engel 2001, Hilson 2002, Anderson 2005) or, like Currier's work, focus on states that are openly suppressive. Since the 2000s, there have been a number of scholars who study the gay and lesbian movement, and gay and lesbian culture more generally, in South America (see Brown 1999; Acosta et. al. 2008; Nierman et. al 2007), but no specific studies have been conducted on the role of perceptions on levels of judicial access for GLBT movements in South America. This study evaluates the role of perceptions in both access and social movement literature by using the GLBT and environmental movements as case studies, but also complements the emerging literature that

focuses, more specifically, on the role of perceptions on the GLBT social movement's decision-making strategies.

While looking at the role of "perceptions" on social movement 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 conception of culture in the political process model. As stated earlier, many political scientists studying access/openness of a political system focus on variables external to the social movements being studied. Kurzman (2004) argues for a new path of investigation that breaks from a structural framing to a more constructivist framing of studying social movements, where opportunity should be viewed as "what people make of it" (117). This study is an investigation on the effect of perceptions on levels of access, or the effect of "what they make of it". Therefore, it is important to expand on the measurements used to explore my variables of public perceptions, justices' perceptions, and activists' perceptions.

## METHODS OF ASSESSING PERCEPTIONS

The focus of my case study research and the majority of my fieldwork concentrate on the cultural attitudes of society and justices with regards to the two social movements being studied and on how social movement activists' view their access to the judicial system in Chile. I call these cultural attitudes and mind-sets "perceptions". It is important to note that societal perceptions (or cultural attitudes), justices' perceptions and activists' perceptions are separate but linked processes. Both

cultural attitudes and judicial perceptions represent perceptions external to the social movement being studied.

In the case of cultural attitudes, there may be an indirect effect on access to the judicial system – this measurement best represents the cultural environment in which these social movement organizations operate. If cultural attitudes are favorable to a specific social movement, they could indirectly affect the movement's access to the judicial system by either creating a perception that the judicial system will be favorable to their pleas or, if societal perceptions are negative, perhaps hostile to their claims.

Individual justices' perceptions of each social movement also operates outside of the social movement organizations, yet these perceptions can have a more direct effect on social movements' access to the judicial system. If justices use their personal opinions on what is "right" or "moral" to make a decision, this could not only affect the outcome of a specific case, but could also directly affect whether or not social movement organizations feel comfortable bringing other cases to the courts. Finally, there is the more constructivist notion that social movements may respond not only to structural opening but also be directly responsive to openings they can *see*. This internal variable of activist perceptions of access can directly affect which avenues they choose to pursue to gain rights and, in turn, can limit or enhance their *de facto* access to the judicial system, perhaps regardless of the *de jure* judicial/political structure within which they operate.

**Societal Perceptions**

The majority of my research concentrates on two new social movements fighting for citizen and cultural change rights within the same country. The gay and lesbian and environmental movements in Chile have similar histories of suppression under the Pinochet regime and emerged in the late 1980s as offshoots of the opposition, Communist, party. Both social movements have been fighting for rights against an established status quo, view themselves as cultural change social movements, and feel limited in their ability to use the judicial system. They differ, however, on my variable of interest – public perceptions of the social movements. Activists within the environmental movement still complain about judicial pro-industry prejudices, yet they feel a certain amount of empowerment by the high levels of public acceptance of the environmental movement (Dougnac 2007). In Contrast to environmentalists' sense of empowerment to speak "for the people", the gay and lesbian movement is not strongly supported by societal attitudes in Chile (Cardenas and Barrientos 2008). It is the effect of these external perceptions that are at the heart of my research. While I do not "measure" societal attitudes of each social movement, due to the difficulties in measuring culture (mentioned above), I use a number of indicators to gauge societal acceptance levels for each social movement.

Societal perceptions of the social movements are measured in a number of ways. First, basic public opinion surveys that have been conducted in Chile concerning views on gay and lesbians and environmental issues will act as an initial indicator for how society perceives each movement. Second, I evaluate laws put into place that directly affect each social movement. Laws initiated by the legislative

branch often represent the cultural values of that society. Since the legislative branch represents "the people", this branch of government, more than the other two, must be responsive to the demands and changing attitudes of the public and therefore can act as a general measurement of culture and cultural change over time (Dupuis 2002, Bernstein 2003: 360-362, Currier 2009: 26-27). Dupuis (2002) claims that laws help describe culture and laws addressing specific "groups" of people can help predict the success of rights litigation in his multiple state study on same sex marriage outcomes.

Finally, I evaluate shadow reports and international reports concerning environmental and GLBT judicial cases in Chile. Using these three measurements of societal perceptions will allow me to make some general assumptions about the "culture" within which these two movements operate. It provides a good starting point to look more deeply into the perceptions of activists within social movements who may decide to use, or not use, the judicial system. Societal perceptions in Chile may, at least indirectly, influence which avenues social movements choose to use when attempting to gain rights. Likewise, cultural attitudes may influence how individual justices, those who may have a more direct effect on social movements' perceptions of judicial access, perceive each social movement.

**Judicial Perceptions**

Exploring the effect of judicial perceptions on whether or not social movement organizations decide to bring cases and rights claims to court presents the most difficult methodological challenge. In a recent study on attitudes toward lesbian and gay men in Chile, the authors concluded that it was best to avoid explaining their

study to judges to avoid negative reactions (Cardenas and Barrientos 2008: 142). This creates a methodological challenge in that few, if any, pointed questions can be asked to justices concerning specific social movements and decisions made to accept cases. This holds especially true when measuring judicial perceptions of highly controversial social movements – certainly for the gay and lesbian movement and to a lesser extent, the environmental movement. This leaves surveys and interviews out of the methodological toolbox. Fortunately, justices in the Supreme Court usually explain why they choose to accept each case brought before them and must explain their ruling if the case is accepted – even those who dissent from the majority ruling often state the reason for their dissention. Therefore, I will evaluate the specific rulings of justices and judicial statements made to the media regarding three judicial cases that will be studied for each social movement.

In order to study the complexity of individual justices' perceptions, I chose to look at three "watershed" judicial cases for each social movement studied. The basis for a small-N study is three-fold. First, a small-N study helps provide thick description when tracing these cases through time while simultaneously allowing me to investigate the role, if any, judicial perceptions play in influencing each case. Specifically, I will ask: 1) does the decision make logical sense based on the evidence presented? 2) Do any justices purposefully interject their personal opinion, either positively or negatively, for each case? and 3) how and why did the justices choose to accept each specific case? Second, there are only a handful of gay and lesbian cases that have reached the Supreme Court level in Chile. Given Chile's unitary system and a purposive effort to narrow my judicial cases studied to those deemed as "important"

to those within the environmental and gay and lesbian social movement organizations, I evaluate only cases that have been heard by the Chilean Supreme Court. Focusing on only three cases important to the environmental movement will allow me to parallel my discussion with the gay and lesbian cases. Finally, Chile does not have an aggregate database of court cases – making it difficult to compare judicial cases between the two social movements in a large-N study.

**Activists' Perceptions**

While investigating the role of societal and judicial perceptions is crucial when explaining the external environment within which social movement operate, the most important facet of my study is the perceptions of people within each social movement and how that may affect their access to the judicial system. Certainly cultural attitudes will have some effect on how members in each social movement perceive themselves, but in order to delve deeper into activist perceptions, a separate measurement must be employed. Measuring activists' perceptions requires more qualitative research than when measuring cultural attitudes. Ethnography is an important methodological tool when looking at culture within movements (Meyer 2004, 53, Currier 2009: 25). In-depth, open-ended interviews with leaders and members of social movement organizations as well as participant observation complement my analysis of group newsletters/emails/and research conducted concerning each movements use of the judicial system.

Individuals making the decision to bring a case to court may be highly influenced by both societal perceptions and by how they view justices. If society

presents social ramifications for bringing a case to court - such as someone losing his job if he is found out to be gay or if he is speaking up against his own company for environmental infractions - those within the social movement may be less inclined to make their cases "public" through the judicial system. Similarly, if justices demonstrate that their own personal perceptions directly influence the outcome of cases, it certainly may inhibit social movement organizations from using the judicial system at all. It is these activists' perceptions, the cultural variable internal to social movements, which may affect their level of access to the judicial system most directly. I find that activists' perceptions of fear or empowerment when bringing cases to court are not only affected by societal perceptions but also affect their meaningful level of access to the judicial system. I explore the same two social movements in Argentina as a check on these findings.

**Argentina**

While the majority of my conclusions address the differences between the gay and lesbian and environmental social movements in Chile, I explore my same perception variables in a second country - Argentina. Argentina and Chile offer a mixture of similarities and differences that are conducive to studying both social movements and judicial systems. In general, both countries are similar in size, degree of modernization, demographics, and their focus on judicial reform in the 1990s. Both countries share a history of authoritarian rule that has led to a transitional democracy and have experienced a wave of social movement demands since the 1980s. Further, their attitudes towards gay and lesbian and environmental social

movements are fairly similar. When evaluating the openness of each country's judicial systems, however, there are few significant differences between the two.

Since transition, Chile has made large strides to opening up judicial "justice" in all three areas of independence, access, and efficiency. Chile has been touted as a model case of judicial reform (Prillaman 2000), yet most of these reforms concentrated on streamlining criminal law with little attention paid to civil rights. Argentina, while implementing similar judicial reforms to Chile in the 1990s, has focused a bit more on civil rights through the provision of a defensoría del pueblo (public ombudsman). Further, many access scholars point to a decentralized political system as an important variable that impacts the level of judicial access. Therefore, when evaluating the effect of the perception variables in Argentina, I pay particular attention to the role of the defensoría del pueblo and decentralized system – two institutional provisions of access which Chile lacks. I find that the provision of a defensoría del pueblo does not seem to influence activists' perceptions in Argentina. Further, while a highly decentralized system, especially in the case of a fairly autonomous Buenos Aires, certainly provides more access for both movements in Argentina, it only further reinforces my Chilean findings on the gay and lesbian movement – activists feel more comfortable bringing cases to court in Buenos Aires where societal perceptions are more accepting of the gay and lesbian community. Similarly I find that the environmental movement in Argentina feels a similar sense of empowerment from civil society as the environmental movement in Chile.

## THE STRUCTURE OF THE DISSERTATION

This chapter lays out my study of perceptions as it adds to the access literature, the South American judicial literature, and the debate over the role of culture in social movement studies – including those specifically addressing GLBT movements. Judicial access scholars, while sometimes viewing access as a dependent variable, do not focus on the role of perceptions as an independent variable that may impact levels of judicial access. My study adds to the South American judicial literature by studying two movements within one country and also by evaluating the much lacking role of judicial attitudes/perceptions and their influence on cultural change social movements. Further I argue that "culture" can be accounted for in political science social movement studies if a more constructivist approach – which measures cultural variables both external and internal to the social movements being studied – is employed. While I frame my research as an "access" study, I also use two cultural change social movements as case studies – making it imperative to discuss not only where my work fits within the social movement literature but also where the environmental and gay and lesbian movements fit within the social movement and South American judicial literature more generally.

The next chapter focuses on the environmental and gay and lesbian movements as understudied "cultural change rights" social movements and addresses the varying approaches employed by social movement scholars to incorporate cultural variables. Since the political opportunity approach to studying social movements often addresses the role of political access for social movements, special attention is paid to how this approach, which almost always measures variables external to the

social movement seeking rights, could be enhanced by also focusing on perception variables internal to the social movements – which are predominantly only discussed by resource mobilization and framing scholars. Further, adding a constructivist analysis of social movement activists' perceptions helps explain the implementation gap between *de jure* and *de facto* judicial access.

Before measuring the effect of perceptions on *de facto* judicial access, it is necessary to establish what level of *de jure* judicial access is provided by the state.

Chapter three evaluates Chile's provision of *de jure* judicial access to citizens since democratic transition in the late 1980s. I give a brief historical account of the judiciary since democratic transition and then break-down judicial reforms throughout the 1990s and 2000s to specifically determine where Chile has improved judicial access for its citizens. I find that while Chile's judicial reforms concentrated on increasing judicial access for criminal cases, they also increased *de jure* access for social movements making rights claims.

Chapters four and five are social movement case studies in which I try to measure the level of *de facto* judicial access through my analysis of societal, individual justices', and activists' perceptions. In chapter four, I find that those within the gay and lesbian movement are often afraid to bring a case to court due to society's negative attitude toward homosexuality – hence limiting their *de facto* level of access. In contrast to the gay and lesbian movement, environmental activists in Chile often feel empowered by strong societal support – which expands their level of *de facto* access to the judicial system.

Chapter six acts as a check on my Chilean findings through evaluating *de jure* and *de facto* judicial access for the same two social movements in Argentina. Like Chile, Argentina has aggressively sought to increase citizens' access to the judicial system via judicial reforms throughout the 1990s and 2000s. I find that activists within the environmental movements likewise feel empowered by societal support of their cause to bring cases to court. Societal support for the gay and lesbian movement in Argentina has changed dramatically in the past ten years. At the beginning of the twenty-first century, public disapproval of the gay and lesbian movement was near the same percentage of Chileans disapproving of the gay and lesbian movement. Over the past five years, the Argentine public has grown much more accepting of the gay and lesbian movement, yet here is still very little use of the judicial system by the activists in the gay and lesbian movement due to their regional legislative successes. I argue that the federal system in Argentina provides an added formal avenue of judicial access for social movement seeking rights. However, I also argue that the gay and lesbian social movement's decisions to gain these regional rights, where the public was more accepting of their cause, strengthens my argument that activists' *de facto* level of access is affected by their perceptions of that access.

I conclude by re-stating my findings and arguing that a constructivist approach to studying social movements' judicial access can better explain *de facto* judicial access than using the traditional approaches employed by access and social movement scholars. I also discuss some secondary findings in my study that deserve further research – specifically the role of international courts and the effect of younger domestic justices in expanding social movements' level of access. While my

study is geographically limited, I confirm some hypothesis posed by scholars studying the gay and lesbian movement in other regions. Further, I advocate the use of more constructivist approaches to studying social movements' judicial access since rights must be gained in practice and not just formally.

# CHAPTER 2

# SOCIAL MOVEMENTS AND JUDICIAL ACCESS

## INTRODUCTION

This dissertation focuses on the ways social movements try to expand and defend rights through access to the judicial system. In this chapter, I place that struggle into the context of social movement literature. Most political science studies of social movements gaining rights draws much more from the social movement literature – where access is one of many measurements used to describe differing levels of political opportunities. I argue that access, although an important variable in the political opportunity approach to studying social movements, can be better explained when one focuses not only on the more traditional formal openings to the system, but also on how the level of cultural acceptance for social movements affects their perception of access to the system. The environmental and gay and lesbian movements in South America provide ideal social movement case studies due to their differing levels of cultural acceptance in Chile.

I begin this chapter by discussing social movements and briefly explaining the study of new social movements. Since my study focuses on two new social movements, it is important to describe basic concepts/approaches surrounding the

study of these movements. While the debate between New Social Movement Theory and Resource Mobilization Theory has been put aside since the late 1980s, some of these same arguments are beginning to re-surface in the debate between the "structuralists" and "culturalists". Second, I proceed by discussing which approaches have traditionally been used to study new social movements and determine where culture fits within the political opportunity structure/political opportunities approach, the resource mobilization/mobilizing structures approach, and the framing approach to studying social movements.

All three approaches incorporate a cultural element to a certain extent. The question then becomes: Do these three approaches, used independently or in conjunction with one another, adequately explain movement decisions, success, emergence, and, most importantly for my study, their use of the judicial system? Cultural variables fit well into the framing approach and fit somewhat into the mobilizing structures approach to studying social movements. I argue that the political opportunity framework does little to incorporate cultural variables internal to social movements due to its reliance on variables external to the social movement organizations – such as the political structure of the system within which they operate. Political opportunity approaches certainly explain a great deal of *de jure* access for social movements to the judicial system. However, incorporating activist and social perceptions as variables that affect access to the judicial system can better explain access for specific groups than institutional, formal or "external" measurements of access alone. My focus on *de facto* judicial access for social

movements utilizes a more constructivist approach to studying social movements without watering-down the original intentions of studying political opportunity.

The discussion of these political process approaches leads into the third section of this chapter – I review the literature on social movements and access to the judicial system and explain why judicial access is not only an important dimension when studying social movements, but also that it is a highly under-studied dimension of social movement theory. Focusing on one subset of political opportunities will allow me to not only investigate the understudied role of the judiciary, but to also narrow my investigation, allowing me to provide an in-depth analysis of the role of culture/perceptions for political opportunities more broadly. Fourth, I give a brief overview of the environmental and gay and lesbian social movements since the 1960s to demonstrate that while the two movements are fairly similar at a very basic level, they differ from each other significantly enough to provide for a rich comparative study of historically understudied "cultural change" movements. Finally, I conclude by reviewing the theoretical implications of my work for the fields of social movement theory.

## THE STUDY OF NEW SOCIAL MOVEMENTS AND NEW SOCIAL MOVEMENT THEORY

Throughout the past few decades there have been many competing definitions of what exactly constitutes a social movement: these range from the broadest interpretation of "an association or set of associations organized around a common

interest that seeks to influence collective outcomes without obtaining authoritative offices in government" (Dryzek et.al. 2003: 2) to a more narrowed definition of "formal organizations that focus on movement" (McCarthy 1996: 144-145). Hanspeter Kriesi lays out two key elements that separate social movement organizations from other types of formal organizations and social movements more broadly. He states that social movement organizations (SMOs), "1) mobilize their constituency for collective action, and 2) they do so with a political goal, that is to obtain some form of collective good or avoid some collective ill from authorities" (Kriesi 1996: 152).

Kriesi's definition is close to what I use to define what constitutes a social movement organization, since these larger organizations will be the focus of my study. However, it is important to note that social movements, in general, usually encompass a vast spectrum of actors/organizations and can have goals that do not include gaining a collective good from authorities, but may rather choose to focus their energy toward more identity based goals, such as changing public or private "cultural codes" (Goodwin and Jasper 2004: 10). Since the social movement organizations I choose to investigate have multiple goals that are both politically (institutional change) and culturally (identity) based, I define social movement organizations as organizations that mobilize constituencies for collective action for purposes of obtaining political or cultural goals.

Using the definitions above, social movements are often formed to challenge some aspect of the status quo or the system in general. Their actions can range from huge lobbying campaigns and litigation for the more formal social movements

organizations, to small, local meetings encouraging people to change small behaviors at the more grassroots level. Social movements can be very professional and hierarchical as organizations or they may have a more horizontal organizational structure. They often use the political system to try to attain their goals, but are better known for some of their non-conventional tactics, such as boycotts and protests. The popularity of these tactics in the 2000s even makes it hard for some scholars to consider boycotting, protests, and so on as "un-conventional" (Plotke 1995: 115-117). Indeed, into the 21st century, most focus is on these "non-conventional" social movements, or what scholars began calling "new social movements" in the 1980s.

Certainly the study of social movements is nothing new in the disciplines of political science and sociology. One can easily see the significance of social movements in Tocqueville's (1835) comparative study of the U.S. and France or in Marx's (1998, org. 1848) emphasis on class differences within a society that can lead to fragmentation and divide, or even revolution. Until the 1960s, most research on social movements was largely class-based (for example, see Blumer 1951; Heberle 1951) and used primarily in the study of labor rights organizations. By the 1960s, scholars noticed a new type of social movement that, instead of focusing on class divides, concentrated on identity and post-modern values while drawing largely from the middle classes for support (see Dalton 1994).

New Social Movement Theory arose in the 1980s, largely out of Europe, as a means to study these new types of movements that were much more identity focused than class-focused. During the same time, resource mobilization theory gained ground in the U.S. as an approach to studying social movements' success, decisions,

and emergence through their use of available resources (to be discussed in more detail in a later section). While the two theories seemed to be at odds with each other, both theories developed throughout the 1980s to encompass important aspects of the other. Resource Mobilization continued to stress the importance of resources but acknowledged the important role of culture and identity through its incorporation of mobilizing structures, and later by linking mobilizing structures with framing and political opportunities. New Social Movement Theory is now widely accepted as a "label" for the analysis of types of social movements that mainly emerged in the 1960s.

A once lively debate between two distinct approaches has now almost wholly been set aside. However, I still feel it is necessary to expand a bit on the idea of new social movements for two specific reasons: First, both social movements I study fall into the category of "new social movements", as defined earlier, and at least a brief description of the term is necessary. This will allow me to introduce the terminology that is often applied to the two social movements I am studying. Second, while the debate seemed to have died out with the evolution of the political process model (to be discussed in the following section), which claimed to incorporate both internal, external, and cultural variables in its approach, a new literature has emerged that is questioning the incorporation of culture into what some call a more structurally-focused approach that only half-heartedly acknowledges the importance of culture (Jasper 2007, Goodwin and Jasper 2004).

New social movements distinguish themselves from the more traditional set of social movement actors in that they often use self-limiting radicalism, concentrate on

the importance of identity concerns, tend to have a fluid/discursive organizational style, and employ unconventional tactics, such as protests and boycotts (Dryzek et al 2003: 11-12). These social movements - including civil rights, women's, environmental, peace, and gay and lesbian movements - were deemed "new social movements" due to their distinctness from the traditional labor social movements. Similarly, new approaches to studying social movements emerged with the rise of new social movements. Instead of focusing primarily on a resource-based/rational actor approach, scholars began focusing more on actors, context, and sociopolitical culture (see Dalton 1994; McClurg Mueller 1992: 6). It was difficult to study more identity-based, communal movements, such as women's movements and disadvantaged racial/ethnic groups, without looking beyond their resources – hence the need to incorporate culture.

Social movements are, by the definitions given above, meant to challenge an established regime, ideology, or social norm. Indeed, at one end of the spectrum, social movement organizations can turn revolutionary and have a very significant impact on an entire regime. On the other end of the spectrum, social movements can be very small and have minimal, if any, impact on society at large, depending on a multitude of factors such as ambition, structural conditions, timing, resources, support from allies, and how the social movement frames their issues to the public. However, many new social movements fit somewhere between these two poles and concentrate on challenging specific facets of a political or social structure.

Regardless of size, studying social movements and the issues they make salient enables scholars to have at least a minimal understanding of major grievances

or divides within a country and the cultural norms or societal perceptions that drive governance. It is for this reason that focusing on two new social movements that are both active and prevalent in the 2000s is important. Even though the new social movement debate has been set aside, it is important to continue studying those that are still emerging or that have been highly understudied or pushed aside as "spin off " movements - such as the gay and lesbian movement (Goodwin and Jasper 2004: 10).

Focusing on these lesser studied social movements will allow me to fill in some of the gaps in social movement theory by concentrating on how movements aiming to change cultural rights may differ from more traditional "citizen rights" social movements. It allows me to address the current debate between scholars who ague that the political process model adequately incorporates cultural variables and those scholars who believe the melding of approaches in the political process model is a minimal and inadequate attempt to incorporate cultural variables. In order to address the role of culture in social movement theory, it is important to briefly discuss how the political process model has attempted to integrate culture as a variable that affects social movements and to discuss whether this is an adequate integration.

**The Political Process Model**

While New Social Movements Theory was emerging, predominantly, in Europe, scholars in the U.S. developed what was originally deemed a "competing" approach to New Social Movement Theory in the 1970s and 80s: resource mobilization theory and its offshoots. By the 1990s, scholars had worked to synthesize these two theories by incorporating external, internal, and identity variables into one model. While the "political process theory" label has been around

since the early 1980s when scholars argued that many variables affect social movement behavior (i.e. they do not operate in a vacuum) (see McAdam 1982: 2), many break down the political process theory into the political opportunity thesis and the political process model – referring to the later merging of opportunities, mobilizing structures, and, framing approaches in the late 80s (see Engel 2001: 15; Goodwin and Jasper 2004: 4, 18-19; Jasper 2007).

The political process approach to studying social movements was an attempt to link political scientists and sociologists by agreeing that both external variables, like state structures, and internal variables, such as group organizational dynamics, affect social movements' emergence, decisions, and success, and, in turn, social movements may have an effect on political structures (Meyer and Lupo 2007: 111). Engel (2001: 15) argues that the political process model is an offshoot of the political opportunities structure approach to studying movements, while Salmon and Assies (2007: 227) insist that it is breaking down three aspects of resource mobilization theory. For purposes of clarity, I disregard the exact "origins" of the political process model and will refer to the term "political process model" as the melding of three separate approaches used to describe social movement emergence and actions. This is much along the lines of McAdam et. al (1996) when they state the political process model claims " social movements result when expanding political opportunities are seized by people who are formally or informally organized, aggrieved, and optimistic that they can successfully redress their concerns" (8).

In order to demonstrate where my research adds to social movement literature, it is important to look, first, at the three separate approaches of which the political

process model is comprised. These separate approaches have themselves transformed over the last two decades to encompass a wide range of variables, including what many consider to be cultural variables. Through carefully looking at the separate approaches that make up the political process model, I will argue that while they attempt to incorporate "culture", both independently and when used together, these revisions are still not sufficient to fully capture specific cultural variables that may affect certain social movements' decisions to use the political system. This, however, does not mean the political process approach should be dropped entirely as some critics may argue (e.g. Roggeband and Klandermans 2007); it should simply be enhanced.

## THE THREE APPROACHES OF THE POLITICAL PROCESS MODEL

Beginning in the 1960s and 70s, scholars embarked on trying to explain which conditions contribute to movement emergence or success/failure. Later, many more questions were asked, including what impact social movements have on the political structure and questions aimed at the internal dynamics of any social movement and/or organization. Usually, the approach used to study social movements dictates what types of questions are asked and which ones can be answered. The three most common approaches to studying social movements are looking at political opportunities, mobilizing structures, and the framing process.

Political opportunity theorists look at which formal political characteristics/structures affect movements – often variables that are external to the

social movement organizations. Resource mobilization (or mobilizing structures) theorists ask what internal organizational factors affect social movements, and framing scholars ask how language, meaning, and symbolism can affect movements internally. While investigated separately in many studies, it should be noted that these approaches are not mutually exclusive and can be used in conjunction with one another for answering multiple or complex questions (see McAdam et. al 1996). The next three sub-sections break down the three approaches of the political process model and investigate how each one incorporates culture as a variable. I conclude that the political opportunities framework does a poor job at incorporating cultural variables internal to social movements into its approach and often depends on the other two approaches to address the influence of culture. While my research draws on the political opportunities approach more than the other two approaches, since I will be looking at judicial access (which is often studied in political opportunity approaches since it is highly dependent on the structure/openness of the system), I argue that the entire political process model can be enhanced by studying social movement perceptions. Too often framing scholars assume that cultural variables are either conscious or internal to social movement organizations, or how they choose to "frame" an issue. It is crucial to look at external cultural elements, such as the level of cultural acceptance for the social movement, that may also affect social movement organizations' decisions.

**Political Opportunity Structure/Political Opportunities**

Scholars who focus on how political opportunities (POs) affect social movement behavior usually identify factors outside of the social movement itself as instrumental in social movements' timing of collective action and the outcomes of movement activity. External factors such as the degree of openness or closure of the political system within which a particular social movement, or grouping of social movements, operates can affect what avenues they choose to pursue in achieving their goals. Doug McAdam and his collaborators (2002) state that the four most relevant dimensions of the political opportunity structure, especially in relation to predicting movement emergence, include: 1) "the relative openness or closure of the institutionalized political system" (the dimension of interest for this study) , 2) "the stability of the broad set of elite alignments that typically undergird a polity, 3) "the presence of elite allies", and 4) "the state's capacity for repression" (McAdam et.al. 2002: 10). Further, these dimensions, along with institutional dimensions - such as type of electoral system - that may dictate the importance of party alliance, may explain movement development.

While the above dimensions are often used by scholars studying the degree of political opportunity, either separately or in conjunction with one another, there is still debate as to exactly what variables should be included when defining political opportunities. Some argue that it should not become a sponge that soaks up every variable (i.e. it is better to try to agree on a "set" of dimensions) for the sake of building on PO as a theory. Others argue that perhaps the PO model shouldn't be stretched further, but, rather, maybe there should be agreement that there just isn't an

all-encompassing theory (Engel 2001: 185) or that perhaps there should be a move away from trying to find a theory altogether (Goodwin and Jasper 2004: 5).

Indeed, there is some disagreement among those who study the PO model (for PO scholars who list slightly different dimensions see Rucht 1996; Obershall 1996: 94-95), and even more disagreement between PO scholars and those who argue for a more culturalist approach to studying social movements. Despite these disagreements, there is agreement that factors external to the social movement largely affect its likelihood for success/emergence and decision-making processes – including deciding which, if any, political avenue a movement should take in order to best achieve its goals.

Political opportunity structures can be studied in either a single case study, with hopes of understanding " the emergence of a particular social movement on the basis of changes in the institutional structure or informal power relations of a given national system" (McAdam et.al. 1996: 3), or more comparatively where scholars try to "account for cross national differences in the structure, extent, and success of comparable movements on the basis of differences in the political characteristics of the nation states in which they are embedded" (McAdam et.al. 1996: 3). The first kind of studies typically derive from the United States (for examples see Tilly 1978 and McAdam 1982), and the second set of studies typically emerged out of European studies (for examples see Kriesi 1989; Kitschelt 1986; and Dryzek et. al. 2003). My study attempts to take on parts of both approaches through comparing two case studies within one country and then briefly comparing my findings with the same two cases in another country.

Into the 1990s and the 2000s, both single-case and multi-case studies continue to examine political opportunity structures throughout the world. Regardless of methodology, most opportunity oriented structural theorists are asking the "why"questions (Meyer 1995: 169), such as: why do social movements emerge and why is a social movement successful or unsuccessful in achieving goals? Further, PO scholars are also concerned with the "when" – when do social movements emerge and decide to act. The types of questions PO scholars ask differ slightly from resource mobilization and framing theorists who focus more on the "how". Culture tends to fit more in the other two "how" approaches rather than into the PO approach to studying social movements. When asking questions such as, "How does a social movement emerge?" or "how is a movement successful?" many conclude that culture can play a role in how social movements develop. Knowing this, it becomes important to evaluate the other two most commonly accepted approaches, in political science, to studying the role of culture in social movements before expanding on why my particular cultural question deals more specifically with questions asked by political opportunity scholars.

**Resource Mobilization Theory/Mobilizing Structures**

As mentioned earlier, resource mobilization theory emerged in the U.S. around the same time as new social movement theory was gaining momentum in Europe. Initially drawing from the "old" social movement literature, focused primarily on labor groups and class-division issues, resource mobilization theory concentrates on the amount and kinds of resources available to a given social movement and how that movement uses those resources to further its goal. Based

more in a rational-choice context (Engel 2001, 167), resource mobilization theory delves into internal attributes of social movements, and most simply states that those movements with the most accessible resources - including money, capital, membership numbers, and number of experienced and specialized staff - will fare better than their resource-poor counterparts.

Resource mobilization was heavily criticized as a theory that was outdated and not adequate to explain and describe new social movement actions, organization, and goals on its own. This led resource mobilization scholars to look at cultural variables by the early 1990s (see Gamson 1992: 59-61). Even though cultural targets can be harder to identify than political or economic targets, a push to evaluate collective identity as a social movement resource made sense when studying movements more reliant on identity values (Gamson 1992: 60). Certainly physical resources are an important factor when looking at movement success; however, the inability for resource mobilization to account for identity and social ties quickly led these theorists to consider a more encompassing look at internal group resources – mobilizing structures.

Studying mobilizing structures is an attempt to look at movement activity over time that incorporates both the formal social movement organizations and the more informal networks in which social movements are comprised. It looks at internal governance, participation, leadership, and so on (McAdam et.al 1996). Additionally, "the choices movements make in how to more or less formally pursue change, have consequences for their ability to raise material resources and mobilize dissident efforts, as well as society-wide legitimacy" (McCarthy 1996: 141). In this context,

scholarship on mobilizing structures includes many differing studies focusing on the internal dynamics of any given social movement ranging from studying and classifying internal organizational dynamics (Kriesi 1996: 158) to evaluating internal goals and tactics.

While not a focal point of my research, it is important to mention mobilizing structures as an approach to the study of social movements because it is still part of the structural/cultural debate. While the framing approach is the part of the political process model that focuses the most on identity, symbols, and other aspects of culture, it is often used in conjunction with political opportunities and mobilizing structures to explain the "why, when and how" (Engel 2001, 168). Therefore, it is important to outline the approach to the political process model that attempts to address the cultural question most directly – framing.

**Framing**

Exploring the framing approach is crucial for any social movement study that focuses on cultural variables. Cultural studies of social movements are quite numerous and often fit within the framing approach, addressing how cultural framing affects social movements' choices and, sometimes, success or failure of a given movement. Movements often attempt to frame their grievances in a manner that allows them to act cohesively, appeal to new members, impact policy, and so on. While in-depth studies of culture long precede social movement theory, the study of framing and its importance for social movements began gaining momentum in the 1980s. The "social psychology of collective action" tried to account for those

variables that resource mobilization theory could not, primarily the significance of collective identity (Gamson 1992: 53-76). David Snow (1986) originally defined framing as the "conscious strategic efforts by groups of people to fashion shared understandings of the world and of themselves that legitimate and motivate collective action" (Snow 1986, cited in McAdam et. al 1996: 6). Scholars such as Snow and Benford (1988, 1992) discuss framing as a significant dimension in studying social movement emergence, constraints, and decisions to act.

Following the earlier work of the 1980s, it became fairly clear that in order for social movements to take full advantage of an open political structure and its resources, that people still needed to be "aggrieved about some aspect of their lives and optimistic that, acting collectively, they can redress the problem" (McAdam et.al. 1996: 5). The trifecta of an open political system, adequate resources, and the ability to frame grievances seemingly become the best way for social movements to succeed, whether it be through legislative, judicial, or less traditional means (such as boycotts/protests). Framing most simply states that frames are the " specific metaphors, symbolic representation, and cognitive cues used to render or cast behavior and events in an evaluative role" (Zald 1996: 262) and, by nature, this is heavily tied to culture: " the shared beliefs and understandings, mediated by and constituted by symbols and language of a group or society" (Zald 1996: 262).

Building on the idea that framing works in conjunction with the two other approaches in the political process model, many scholars point out that frames require resources for their dissemination, and thus structure must account for culture (McAdam 2003; Tarrow 2003). While all three approaches in the political process

model rely on each other, framing, more than the other two approaches, requires the availability of both political opportunities and mobilizing structures in order for social movements to have success. Many scholars point out, however, that this is one of the main problems with the political process model - its reliance on structural variables to explain movement success, emergence, and decisions. This is even a problem with the approach that is supposed to incorporate culture the most - framing.

The definitions mentioned above account for framing in terms of "conscious strategic efforts" (Snow 1986) and "cognitive cues" (Zald 1996). While framing largely focuses on cultural variables, it often makes the assumption that culture is something that is calculated, and, therefore, is actively "framed" in a certain way to achieve social movement goals. Some cultural theorists argue that since cognitive liberation, i.e. when actors believe they have a chance to succeed, is a crucial variable for framing scholars (see Jasper 2007: 92), there is an automatic bias toward viewing culture as something that is constructed and internal to the social movement organization. Much like the political opportunities approach, which I argue focuses too heavily on variables external to social movement organizations, framing focuses too heavily on variables internal to social movements. What about external cultural variables, such as public and judicial perceptions, which social movements may not be able to "frame", that may affect social movements' decisions? Framing scholars effectively incorporate cultural variables into their explanation of social movements' level of success, but culture has a much broader role than simply explaining how movements choose to "frame" their grievances.

## WHY I FOCUS ON POLITICAL OPPORTUNITIES WITHOUT ABANDONING THE IMPORTANCE OF FRAMING

There is no doubt that using the framing method to evaluate social movements brings cultural importance into the study of social movements. This study, however, is not focused on how social movements try to use culture to frame their causes, instead, it concentrates on evaluating the perceptions surrounding movements and asks if that can affect their political opportunities, specifically access to the judiciary, regardless of how they frame their grievances. The aim of this study is not to take away from the cultural variables studied by scholars who use the framing method, but, rather, to determine if these understudied internal cultural variables may also affect political opportunities. While I argue that the PO approach still does not incorporate an adequate amount of cultural variables, its response to cultural critic - such as dropping the "structure" label altogether and talking of "political opportunities" to avoid the "stable structural trap" (Goodwin and Jasper 2004: 16) - demonstrates that the political opportunity approach, and the political process model in general, is a model that is rather flexible and can change with time to incorporate cultural variables. I argue that not only do open structural avenues affect social movements' level of access, but also how activists within the social movement organizations perceive these avenues of access. While this criticism of the political opportunity approach has been made efforts to evaluate the impact of these internal perceptions have not followed. Cultural variables internal to social movements can be more easily included when using the framing approach, but they should not be

abandoned when evaluating the influence of "external" political opportunities. This does not mean that more variables need to be incorporated into the political opportunities approach, it simply means that a constructivist approach can explain more about social movement access in practice than simply relying on measurements of *de jure* access.

Similar to using PO as an approach to studying social movements, where it is critical not to use an "opportunity structure" as a sponge that soaks up any variable within the system, framing scholars also run the risk of making the framing approach an over-generalized method that can soak up any cultural dimensions (see McAdam et.al 1996: 6). Therefore, it becomes important to identify exactly what dimensions of culture are being evaluated and to justify why it fits into the PO approach. I argue that since I am studying the relative openness or closure of the political system, a variable that is almost always studied through the PO approach, it is important to look at how evaluating political opportunities from a different approach can enhance what is meant by "degrees of openness". The level of *de facto* political opportunity for differing social movements depends on a broader set of cultural values and activists' perceptions of those values.

I chose to look at one political avenue social movements use when seeking change, the judicial system, to facilitate a more focused and thick description that is necessary when investigating any cultural variables (Meyer and Lupo 2007 125-126). Further, I concentrate on very specific cultural variables - social, individual justice, and activist perceptions - to aid in defining the complex variable of "culture". Using very narrowed and selective components of culture should allow me to investigate the

importance of these cultural variables for constituency-specific movements, when evaluating the relative openness of the judicial system. Certain dimensions of culture should not be automatically thrown into the framing approach without also evaluating their explanatory power on political opportunities.

Political opportunity scholars focus on dimensions that coincide with the dimensions I am looking at for judicial access. In fact, it has been argued that political opportunity structure theorists should pay a great deal of attention to "changes in the *legal* or institutional structure that grant more formal political access to challenging groups" ( McAdam 1996: 29, emphasis added) and that a strong judiciary may be crucial in providing an alternative access point in the political system (Kitschelt 1986: 64, Taylor 2008). It should be noted that this study is not one that evaluates "political opportunities" as a whole, but rather one dimension within political opportunities – judicial access. I argue that effective judicial access, like political opportunities and political access, is affected not only by variables external to the social movements studied, but also by each social movement's perception of those openings.

Can social perceptions about a specific social movement, or even the perceptions of one judge making a decision that affects a social movement, affect the overall avenues of political opportunity available to a social movement? Perceptions help create political opportunities, and I argue, in line with many political opportunity scholars (see chapter one), that formal and institutional political opportunities should be looked at in a more fluid manner. My study sets itself apart in that it is an attempt to look at access more fluidly through a specific cultural variable - perceptions. A

severe inequality in this dimension could lead to very different levels of *de facto* political opportunities for differing social movements - especially those seeking cultural change, which may well challenge societal consensus.

Scholars do admit that "national opportunity structures may be the basic grids within which movements operate, but the grid is seldom neutral between social actors" (Tarrow 1996: 51). With this in mind, it is surprising that there are not more studies that investigate the role of differences between movements in their access to the system. Historically, the PO approach, and degree of access/openness more specifically, was viewed as something that was more institutional by nature, but this stable/structural idea has been dropped almost entirely. While scholars argue that there are very stable, structural foundations of political opportunities, there is much agreement that not all facets of the opportunity structure are stable – or even structural (see Tarrow 2004: 39-40, Meyer 2004: 53, Kruzman 2004: 117-120), yet there is still little focus on these more contingent factors related to political opportunity (see edited work arguing for a shift in focus-Klandermans and Roggeband 2007). Very little research focuses on activists' perceptions of accessibility, and none that specifically compares two social movements within a system through thick description of their perceptions of access.

Since most cultural studies do indeed fit within a framing approach (or a combination of multiple approaches), there is a very real possibility of stretching the political opportunity approach too broadly where it becomes a "sponge that soaks up virtually every aspect of the social movement environment" (Gamson and Meyer 1996: 275), limiting its explanatory power by including culture. Doug McAdam

(1996) makes an argument that while there are "expanding cultural opportunities", such as contradictions between social practice and traditional social values concerning that practice or a sudden imposed grievance, these cultural opportunities should not be blurred with political opportunities because they are collective processes that use framing to achieve their goals (McAdam 1996: 25-26). Instead, I argue that evaluating cultural elements, both internal and external to the social movements, directly affect *de facto* political opportunities, i.e. the "openness" of the system. This constructivist interpretation of opportunities can be used in conjunction with the PO approach to strengthen its explanatory power instead of stretching it too thin – this especially holds true when studying social movements seeking both cultural change and political rights.

## CULTURAL CHANGE RIGHTS AND THE JUDICIAL SYSTEM

It has already been argued that social movements seeking to gain cultural change rights are understudied in social movement literature. One way to fill the knowledge gap concerning these groups is to focus on one avenue they use to gain these rights. More cultural change social movements have been looking to the judicial system to achieve their goals. Some cultural change social movement organizations have been most successful in liberal democracies, such as in the United States and Europe, by using the judicial system as an alternative path to gaining access to the system or as a tool to interpret existing policy to their favor (Dupuis 2002: 2). This dissertation, while having its own geographical limits when discussing

empirical conclusions, attempts to further U.S. and European studies by investigating cultural change movements' use of the judicial system in South America's Southern Cone.

Though cultural change movements differ from the more classic "citizen rights movements" in their attempt to realize advancements not solely based on political changes, this does not mean that cultural change movements do not make citizen rights claims to advance their goals. In fact, cultural change movements often use rights-based litigation strategies to obtain goals, especially when they view themselves as a "minority" that is protected under law (Smith 2005, Dupuis 2002: 2-9). Most notably, many gay and lesbian groups have used the judicial system to challenge existing policies or to simply positively interpret ambiguous existing policy, like human rights charters or constitutional amendments guaranteeing human rights, to benefit the social movements' cause (Smith 2005, Dupuis 2002). Similarities are found in environmental cases, where social movement organizations try to use the judicial branch to interpret vague elements of the constitution, such as the right to a healthy environment, to further their cause.

While the larger structural/cultural debate is in full force both within and amongst disciplines, there is less debate over criticism that the political process model is too focused on political structures and, hence, too focused on "citizen rights" social movements. Ruud Koopmans (2004) and David S. Meyer (2004) both admit that while they deem many of the criticisms of "structural" theories - such as that they are too trivial or simply tautological - unfounded, critics do make a valuable argument in that there is not enough focus on cultural or apolitical social movements with goals of

seeking cultural change (Meyer 2004,:53, Koopmans 2004: 60). Both the gay and lesbian (GLBT) and environmental social movements move beyond the idea of just claiming "citizen rights". Both movements, in their own way, seek to change cultural values and perceptions. In fact, Goodwin and Jasper (2004: 10) point to the ecology and GLBT movements as two movements with goals of cultural change over citizen rights that are still understudied.

## ENVIRONMENTAL AND GAY AND LESBIAN MOVEMENTS IN PRACTICE AND WITHIN THE LITERATURE

Due to a more general consensus that social movements can include less formal organizations (McCarthy 1996: 144) but are often much more formalized and goal oriented than support organizations, service organizations, and voluntary associations and much more dependent on constituency participation than parties and interest groups (Kriesi 1996: 152-153), it is not surprising that most scholars who study social movements focus on the larger, more formal organizations when studying social movements as a whole. There is just more information available on the more formal organizations (Rucht 1996: 185-203; Kriesi 1996:152-184; Della Porta and Diani 2006). Even researchers who interpret social movements as a broader set of actors tend to focus on larger organizations within the movement to make comparisons (Dryzek et.al. 2003). Indeed, there may be incomplete data when scholars "overemphasize the most visible or most accessible parts, which are usually the largest and more formally organized components", but it is almost a necessary

bias when trying to grasp social movements on an aggregate level (Rucht 1996: 187-188).

My research will take a similar narrower view of social movements in that most information is only available via the more formalized environmental and gay and lesbian organizations in Chile and Argentina. However, interviewing members of many diverse and smaller, although somewhat formalized, organizations adds a more inclusive element to my study. While the specific social movements studied will be analyzed in much further detail for Chile and Argentina in following chapters, it is important to see where these two movements fit, more generally, into the social movement literature. First, exactly how similar or dissimilar are these two movements for a comparative study? Certainly, both movements are categorized as new social movements given the fact that both emerged on domestic and international levels beginning in the 1960s and both often focus on identity, to differing degrees, and non-traditional tactics to reach their goals. Both are also focused on the dual goals of political and cultural change and have grievances about prejudiced perceptions hindering them from achieving their goals. In the most general sense, these two movements are fairly similar. However, most of the similarities between the two movements stop there. They have very distinct foci, differing levels of resources and membership, much different levels of societal support, and some scholars classify them as very different "types" of new social movements that need to be examined as their own distinct entities.

Worldwide, environmental social movements arose with other new social movements of the 1960s and 70s. Overpopulation, new scientific research outlining

degradation, and even seeing the first picture of the earth from space were all catalysts in the push to make environmental concerns, and environmental rights, worthy of international and domestic attention, through legislative, judicial, and less traditional means, such as boycotts and protests. In many parts of the world, although still facing many obstacles, environmental movements were seen as the least radical of the counter-culture groups of the 60s and 70s. This can be seen through their admittance as political parties in Eastern Europe before the collapse of the USSR or through governments' inclusion of these groups (see Dryzek et.al. 2003: 57-59).

Into the 2000s, environmental social movements, anchored by many highly organized and institutional social movement organizations (SMOs), have become a large and powerful force, both internationally and domestically for almost every country in the Global North and many parts of Latin America. Continuing research linking environmental degradation to dramatic global changes, research into alternative forms of energy for economic security, and the popularity of powerful environmental documentaries, such as *An Inconvenient Truth* (Gore 2006) have catapulted environmental concerns into the forefront of policy debates and have allowed them to gain public support both in terms of saliency and intensity in most developed countries (Kamieniecki 1991: 340; Inglehart 1995). While global attitudes concerning environmental issues such as global warming has declined slightly with the economic recession of the late 2000s ( see Climate change 2009), some environmentalists still view 2007 as an environmental tipping point for public awareness (Guber and Bosso 2009). This "success" in becoming a force in global politics does not mean that environmental social movements are always, or even

mostly, successful in achieving their various goals – it simply suggests that there is some public support/acceptance.

Facing challenges every day over pollution abatement, environmental rights for minority and indigenous groups, population growth, and many other environmental contestations almost always rest in a much larger conflict between creating a healthy environment and a healthy economy. Perhaps more so than any other new social movement, the environmental movement is entrenched in a ongoing battle against a very strong neo-liberal, capitalistic world economic order; many studies point to the dichotomy between economic growth and bettering environmental conditions (Kamieniecki 1991: 358; Van Der Heijden 1991; Gamson 1992; Kamieniecki et. al 1995; Van Der Heijden 1999; Dryzek et. al 2003). Although not pitted against a neo-liberal economic world order, the gay and lesbian movement has faced many of its own challenges in the past decades.

The gay and lesbian rights movement predates the Stonewall Riots of 1969, but most scholars and activists point to this event in New York as the catalyst for gay and lesbian social movements. For the most part, research on gay and lesbian social movements has been highly understudied, and really only becomes prevalent in the mainstream political science and sociological literature well into the 1990s (for examples see Haider-Markel and Meier 1996; Hilson 2002; Wilson et. al 2004). It has also been argued that the gay and lesbian movement had been all but ignored for decades in the study of social movements (Haider-Markel and Meier1996: 332). Fortunately, the study of gay and lesbian movements has picked up a lot of momentum in the new millennium due to the fact that it had been understudied and it

provides a new dimension to the study of new social movements due to its often conflicting relationship with cultural attitudes (see Hilson 2002; Wilson and Cordero 2006).

Before expanding on the gay and lesbian rights movements, it is important to clarify the terminology used in this work. Certainly "GLBT" scholars are often critical of the lack of inclusion of the transsexual and bisexual individuals involved in and represented by many of these movements (see Bernstein 1997, 2000). I use the terms gay and lesbian movement (or gay rights movement) due to my focus on gay and lesbian rights in civil cases – ranging from rights to organize in the early 1990s to same sex civil union and parenting rights into the 2000s. However, this is not to discount the rights struggles faced by bisexuals and transsexuals in Latin America. Transsexuals, in particular, still face a great deal of discrimination and are often the targets of violent acts, resulting in many criminal court cases but no specific civil court cases at the national level.[3] When I am referring to my own case study work, I use the term gay and lesbian movement. However, when I refer to the works of others, or the movement in general, I use the term GLBT.

Gay and lesbian social movements are usually, although not always, viewed as having an identity as a goal, rather than identity as a strategy or identity for empowerment (see for example Bernstein 2002: 86; Whittier 2002: 291). While the environmental movement is studied at length through all three approaches to the study of social movements, research that focuses on gay and lesbian movements has a

[3] I will, however, discuss a case study in Argentina that granted a transsexual organization the right to organize.

tendency to fit primarily into the framing approach. Like women's movements, gay movements often look to construct a new identity while environmental movements "construct new identities as a means of promoting mobilization rather than as a goal in themselves" (Whittier 2002: 291). Unlike the environmental movement, which is heavily pitted against economic development, gay and lesbian movements are often pitted against an equally salient "morality" group in societies that is often religiously based.

Similar to the environmental movement, the gay and lesbian movement is highly fragmented and the SMOs range from well-organized, professional organizations to much more locally based organizations focusing on one specific policy or cultural goal. Within the gay and lesbian community, goals can range from full assimilation into society to maintaining a distinct identity where non-assimilation is the goal (Hilson 2002: 241). Most studies focus on the more well-organized SMOs, and while this leaves certain sectors of the social movement out of comparative studies, it is useful for ease of comparison with other social movements. Scholars such as Hilson (2002) and Kriesi (1996) specifically look at comparative studies that include both the environmental and gay and lesbian movements within and between countries. Most evaluate the gay and lesbian movement for its newness and for the unique/different dimensions it brings to a comparative study. I also view the gay and lesbian movement as somewhat unique due not only to their conflicting relationship with many societal norms but also for their ability to "hide" their identity. For this reason, I view the environmental movement and the GLBT movement as most different social movements, especially when analyzing the role of broad societal

perceptions surrounding the two, even when they operate in the same country under similar structural conditions.

It is argued here that the gay and lesbian and environmental social movements, while both similar in that they are new social movements and have similar grievances at their most basic level, are different types of new social movements. Schwartz and Paul (1992) argue that there are consensus movements and conflict movements. Environmental movements tend to be consensus movements, or "movements that have the broad support of 80-90% of the population and enjoy little to no opposition" as opposed to the GLBT movements that are much more conflict movement, which can be defined as "those social mobilizations that confront organized opposition in attempting to change the social structure, prevailing fundamental policies and/or the balance of power among groups" (Schwartz and Paul 1992: 205-206). Consensus movements, while enjoying a broad base of support and usually a wider range of resources (government, industry, etc…), often are less successful when producing the massive mobilization of conflict movements that are often identity-based.

Kriesi (1996) and Hilson (2002) point out that, when compared, environmental movements have a much larger resource-base than the GLBT movements which can lead to different tactics. Similarly, while both social movements try to gain political opportunities through access to the system and through utilizing the receptivity of elites, the GLBT social movement often has problems with both points of access. In his study on legal opportunity, Hilson (2002) concludes that political opportunity, ie. access to parliament, is the best avenue for the

environmental social movements in the European Union due to their lack of standing within some of the countries' legal opportunity structures. He then concludes that the GLBT movements will be more likely to use the legal opportunity structure than other new social movements because policy on GLBT issues is not universal in all EU states and the issue is very controversial (Hilson 2002: 249). In his view, the unfavorable receptivity of political opportunities opened the door for more advancement within legal opportunities.

While Hilson's work is regionally focused on Western Europe, his conclusions could be tested elsewhere. Certainly, GLBT social movements in the U.S. have focused on both the legislative and judicial avenues for access within states – many finding success via the judicial branch (Dupuis 2002: 49-71; Daum 2009, Pedriana 2009: 52). Similarly, in the U.S., environmental social movements seemingly have had more success than the GLBT movement via the legislative branch (Dupuis 2002: 1-4). One of many questions I am trying to answer through my research is: does this idea transfer to South America, where cultural perceptions of each movement may be quite different than perceptions in the Global North? Do GLBT movements use the judicial system more than environmental groups and do they perceive it as a viable/accessible avenue for access in Chile and Argentina?

All new social movements differ from each other, and goals and tactics even within one social movement can vary substantially across regions. The differences between the environmental and GLBT social movements in Chile and Argentina, however, tend to differ significantly on the variables of interest to my study: the social and judicial perceptions of each social movement and, in turn, the movements'

perception of accessibility of the judicial systems. While my findings will have the same geographical limitations as those mentioned above, this dissertation adds another dimension to the study of "legal opportunity".

## CONCLUSION

This chapter describes where my work fits within the social movement literature. While social movement scholars incorporate numerous cultural variables to describe social movement behavior, I argue that those who use the political opportunities approach to studying movements, who often measure access to the system, focus too heavily on variables external to the social movements being studied. Constructivist arguments, claiming openings to the system are affected by how people perceive these openings, lack empirical studies testing their hypotheses. Through a thorough evaluation of the effects of societal, judicial, and activist perceptions on their level of access to the judicial system in Chile and Argentina, my study takes a constructivist approach to measuring access that adds to both South American judicial access literature and social movement literature.

I aim to bridge the gap between culturalists and structuralists in the social movement literature by evaluating political opportunity through a more constructivist approach. Many criticisms of the political opportunities approach to studying social movements, and the political process model in general, is that the approach does not account for enough cultural variables affecting access to the system. I argue that the political opportunities approach to studying movements does incorporate cultural

variables, but does not focus enough on variables internal to social movements – such as their perception of their level of access. Further, political opportunity scholars are so focused on not using the concept of political opportunity as a "sponge" that can soak up any variable related to the political opportunity structure (literally anything), that there has been an overwhelming push to place culture into the "framing" approach. For example, the Civil Rights movement used the contradiction between U.S. political culture rhetoric of equality with their unequal rights post WWII as a driving force to push for changes in legislation. Most literature focuses on how the movement used this contradiction to help them gain equal rights under the law, i.e. how they "framed" the issue. Certainly, evaluating the role of "framing" is critical in the study of social movements, but something gets lost from the explanatory power of the PO approach if cultural variables internal to social movements are taken out of the equation completely.

David Meyer (1996) argues that "political opportunity structure is too broad to be useful by itself in helping us to understand what conditions or circumstances produce more or less space for movement action [and] any explanatory power comes from the specific variables that come from it" (Meyer 1996: 283). Assuming that the explanatory power of the political opportunity approach rests on the specific variables that come from it, cultural variables, including variables that may be "internal" to social movements, should be studied in addition to the *de jure* measurements often employed by PO scholars. This holds especially true if they *directly* impact levels of access to the system. Arguably, the variables of perceptions will differ between every movement and may also differ regionally – making it difficult to make any sort of

universal claim when studying the role of perceptions. Nonetheless, by looking at two different social movements operating under the same institutional openings to the system, this study aims to make some suggestions that can enhance the explanatory power of the political opportunities approach.

Both access and social movement studies concentrate on explaining *de jure* levels of access – perhaps leaving out some important perception variables when looking more closely at judicial access. Who are the judges making decisions? How much influence does each justice have on decisions? Do their personal beliefs (regardless of the broader political culture) affect access to the judicial system? Do activists' perceptions affect decisions to use or not use the judicial system? Are any of the above perceptions influenced by societal perceptions? By asking these questions, I not only evaluate cultural variables that are often not accounted for as independent variables in access literature but also look at how activists' internal perceptions affect their level of *de facto* access – adding to political opportunities literature. A more constructivist/cultural approach to studying openness of the system will view "openness of the system" as being affected by internal and external cultural variables.

With regard to the two social movements chosen for this study, most existing literature comparing the GLBT social movement with others, and much of the literature that focuses on comparing social movements within and between countries, comes from Western European, Eastern European, and U.S. studies. These regions have different political and cultural histories from South America, and therefore, I hypothesize that some assumptions and beliefs surrounding social movement access

to political systems may not transfer over to South American social movements. For example, in U.S. and European studies, it is argued that GLBT movements will often use the judicial system to gain rights as a minority group whose grievances are not well received by those in the legislative branch (see Dupuis 2002, Hilson 2002). Due to the taboo of speaking of homosexuality in many countries in South America, I argue that GLBT groups may be less likely to use the judicial system to bring cases to court. Gays and lesbians who wish to remain in the closet may be more likely to support social movement organizations fighting for policy change or street-level cultural change since they can remain anonymous or only "come out" to other gays and lesbians.

Before expanding on the importance of perceptions to explain *de facto* judicial access, I first evaluate what Chile has done over the past two decades to increase *de jure* judicial access. The following chapter begins with a description of judicial reforms in Chile, from the mid-1990s to the mid-2000s, and a breakdown of the reform variables that focus on judicial access specifically. I conclude that these judicial reforms have increased d*e jure* judicial access for many citizens but that this little about *de facto* judicial access for social movements seeking rights.

# CHAPTER 3

# JUDICIAL REFORM AND CHILE'S STRIDES IN INCREASING DE JURE ACCESS

## INTRODUCTION

The last chapter argued that studies of social movements gaining rights focus heavily on access to the political/judicial system as part of the overall political opportunities provided to rights groups in their given country, which could severely aid or limit those seeking rights. However, political opportunity approaches to studying social movements rely heavily on measuring *de jure* judicial access and independent variables external to the social movements studied – limiting its explanatory power when accounting for judicial access in practice. Scholars focusing particularly on access to the judicial system often use access as an independent variable that affects judicial effectiveness overall or break access into structural or institutional variables, such as provision of public defenders, legal aid, and legal training. Similar to the political opportunities approach, there is an emphasis on measuring variables external to social movements (or those using the system). In addition, access scholars tend to focus heavily on institutional variables – leaving little room for constructivist explanations of differing "levels" of judicial access.

However, the institutional variables most often measured by access scholars are certainly important when explaining different levels of judicial access between countries. This research is an extension of access and political opportunity studies by evaluating *de facto* judicial access as a dependent variable that may be affected by more than just judicial reforms that aim to formally increase judicial access. First, however, it is important to evaluate the traditional institutional variables used by scholars to explain judicial access in order to determine if these two social movements in Chile have an adequate level of *de jure* judicial access.

This chapter evaluates the judicial institutional reforms in Chile that strive to increase all citizens' access – the institutional variables often measured by access scholars. It details Chile's judicial reforms from the early 1990s into the mid-2000s[4] and then specifically looks at how these reforms have tried to influence access by improvements on the variables most often used to measure judicial access, specifically improvements in judicial spending, the availability of legal aid, the provision of alternative dispute resolutions, spending on judicial training, the provision of public defenders, the reduction in trial lengths, the availability of legal education to the public, and the provision of constitutional rights.

Steering clear of the more contentious cultural variable of perceptions evaluated in the two case study chapters, this chapter focuses on the institutional elements of judicial reform targeted at increasing judicial access for citizens. First, this chapter describes the Chilean judicial system and reforms the Chilean judiciary

[4] This is the time period in which most judicial reforms occurred and also covers the time span of all judicial cases evaluated in the case studies sections to follow.

has made since its democratic transition. Second, I analyze the reforms specifically aimed at improving access to the Chilean Judicial system, and, finally I look at access and provision of standing for rights movements in the Constitution. I find that Chile has made significant strides in increasing *de jure* access by boosting all of the variables mentioned above. Despite Chile's unitary system and its lack of a Defensor del Pueblo (Public Ombudsman), both of which can negatively affect access to the judicial system for those bringing forth rights cases, formal access for rights groups has increased in Chile due to judicial reforms in the 1990s and 2000s. While the two rights movements I study differ in many ways, this chapter demonstrates that both the gay and lesbian and environmental movements have institutional access to the judicial system, and it has improved for both over the past two decades.

## CHILE'S JUDICIAL SYSTEM

### History

Chile, compared to most other countries in South America, has a long-standing tradition of democratic institutions with the one blemish arising from the Pinochet regime (1973-1990). This rooted history of democracy, however, did not include a strong, independent judiciary. While the Chilean courts were often championed as impartial and independent, and sometimes touted as one of the best judiciaries on the South American continent (Country Studies 2004), the judiciary was tightly linked to the executive and was neither vigilant nor neutral prior to 1973 (Hilbink 2003). Prior to the Pinochet regime, the Courts were criticized for their

insistence on a literal definition of laws designed to protect such things as private property, and, indeed, their positivist position on separating politics from law prevented them from being a flexible institution in times of political change.

The Chilean Courts are still known for their positivist-inspired approach to laws, yet it is worth noting that during the Pinochet regime, the Courts were criticized for the exact opposite. While the military regime left the courts intact, the "judiciary worked diligently to adjudicate matters in conformity with the new military decree laws, even when these decrees violated the spirit of the constitution" (County Studies 2004). The Courts went from modest "defenders of liberties" to ignoring the numerous human rights violations under the military regime. This blind eye to human rights violations even extended to prosecuting human rights groups into the 1980s (Hilbink 2003, 78). While not much more than an extension of the executive under the Pinochet regime, it should be noted that the mere fact the judicial branch was left intact due to Pinochet's insistence on rule of law to legitimize his authoritarian rule and to protect the neo-liberal economy (see Hilbink 2009), is indicative of Chile's democratic past.

While a history rich in inclusiveness and stability indeed aided in the democratic transition of Chile, the judicial branch, created to act as a branch of the executive, was in much need of reforms throughout the 1990s. The following two sections will describe Chile's judicial structure and the judicial reforms adopted by Chile in the past two decades in an attempt to consolidate democracy and establish a more legitimate rule of law. It is on the basis of these reforms that I then evaluate their impact on formal judicial access for Chilean citizens.

**Judicial Structure and Powers**

As established by the 1980 Constitution, Chile's judiciary consists of the Supreme Court, the appellate courts (cortes de apelación), major claims courts, and various local courts (juzgados de letras). There are also a series of special courts, such as juvenile and labor courts. Chile has sixteen appellate courts, each with jurisdiction over one or more provinces, the members on these courts range from four to twenty-five. The Supreme Court Consists of twenty members, who select a president from within to a three year term (CIA Factbook 2006).

Members of the Supreme Court are appointed by the president of the republic, who selects them from a list of candidates provided by the Supreme Court itself. At least two of these candidates must be senior judges on an appellate court. The judges in appellate courts are also appointed by the president from a list provided by the Supreme Court. At the local level, judges are appointed by the president from a list of candidates provided by the court of appeals (Chilean Constitution article 75). These are provisions that give the current Supreme Court and other Courts remarkable control over these successions – making the process fairly conservative.[5] All appointments must be ratified by the Senate and judges serve for life, barring dismissal for inappropriate behavior (Chilean Constitution article 77).

[5] While not the focus of this research, I find that concern of "conservatism" within the courts and a hope for "younger" judges is a common theme for both the environmental and GLBT movements in both countries (see chapter seven).

Although Chile's governmental institutions are largely designed to be similar to the those in the United States, the legal system borrows more heavily from Roman law and Spanish and French traditions, making the legal tradition one steeped in civil law, although Chile is quickly progressing into a mixed system of both civil and common law. The civil law system is highly structured and relies on declarations of broad, general principles, often ignoring the details. In essence, this legal tradition is set up to protect overarching principles such as freedom and equality without being bound as heavily by previous "past prejudices" or judicial precedent as in common law (Tetley 2000, 7-9). In civil law, the court's role is to apply laws established by the legislators; there is much more of a separation of powers in this system than the judge-made precedents at the core of much law in a common law legal tradition.

Jurisprudence and style of drafting laws are affected by the civil law system. Civil law decisions first identify the legal principles that might be relevant then verify if the facts support their claims, unlike common law traditions that try to compare facts to previous decisions in order to find the specific legal rule relevant to the facts. Further, civil law statutes provide no definitions and state principles in broad terms, whereas common law statutes are precise (Tetley 2000, 17). Affecting many court decisions into the 2000s, the civil law system focuses heavily on substantive law, which means less emphasis is placed on law that concentrates on rules of procedure and evidence. In terms of litigation for human rights cases that will be investigated in this work, civil law tradition allows the judges the role of the prosecutor based on written arguments in an inquisitory style. The judges often speak to parties at different times, not allowing the defendant parties to argue against the prosecutor in

the same room, as opposed to a more oral and accusatory style based on evidence and arguments.

The consequence of the civil law tradition is that the principles are rigid and imposed on courts, however, civil law traditions also tend to be less timid about statute reform than the common law tradition. Further, the written and inquisitory style of prosecution leaves more room for corruption within the system since many activities take place behind closed doors (Couso 2004). This legal tradition, however, is starting to become more mixed in Chile as the Frei government in 1997 started changing the judicial role to one that is more oral and accusatory and began removing the prosecutor function from judges (Hilbink 2003, 84). The slowly changing legal tradition opens more doors for human rights social movements seeking redress since all sides of the arguments must be heard simultaneously, although there are still complaints that civil law cases have not transitioned to the mixed system as quickly as criminal law cases.

**Post Transition Reforms**

After the Pinochet military regime ended in 1990, subsequent democratic governments made a systematic effort at improving the infrastructure of the legal system, raising the percentage of the national budget earmarked for the judiciary. Expenses for judicial modernization and technology grew to more than double the initial budget designed by the Patricio Aylwin government between 1990 and 1992. Then they doubled again between 1997 and 1998 during the presidency of Edwardo Frei Ruiz-Tagle (Correa 1999). Most of the focus on judicial reforms in the 1990s

were aided and supported by the U.S. and U.S. controlled multilateral organizations. Organizations such as the United States Agency for International Development (USAID), the World Bank, the Inter-American Development Bank (IBD), and the Organization of American States (OAS) through its Justice Studies Center (Fensom 2004: 60-68) all Invested in Chile's judicial reforms as an attempt to consolidate democracy and stabilize the rule of law to secure economic interests.

Initial post-transition judicial reforms happened fairly gradually under the multi-party concertación throughout the 1990s. Beyond increasing spending on the judiciary, few structural reforms occurred prior to the mid 1990s. In 1996, the Judicial Academy was established with great support from politicians, academics, and judges alike. The Academy became a type of public corporation that reflected the desire of the judicial branch to create an institution dedicated to training its members, with an emphasis on broadening knowledge, abilities, and skills of justices. The Academy also set criteria for judicial promotion (Pereira 2003; Report of Justice 2005, Hilbink 2002). In 1997, Frei supported the passed legislation that stipulates justices' appointments must be approved by the Senate, stripping the executive of complete control over appointments. While these initial reforms did little to aid those seeking rights, they did give rise to a broader package of judicial reforms in the late 1990s and early 2000s.

Perhaps the largest reform to the judicial system began in 2000 when Congress passed a new penal code, known as the Criminal Procedure Reform. This reform separated the prosecutorial and adjudicating functions of judges in criminal cases, and, in turn, created a public prosecutor's office by 2001. With plans for this

reform being carried out in 2005, it required an investment of 320 million dollars to help with the gradual hiring of 809 new judges and construction of new buildings to support investigative courts and oral criminal trial courts. Beyond the Criminal Procedure Reforms, judicial reforms have focused on extending specialized courts such as juvenile courts in 2004 and family courts in 2005 (Report of Justice 2005).

Generally, most scholars praise judicial reform in Chile as being one of the most successful, if not the most successful, in South America. Prillaman (2000) argues that Chile has had the most successful judicial reform in South America due to Patricio Aylwin (1990-1994) and Eduardo Frei's (1994-2000) simultaneous focus on independence, efficiency, and access. Buchanan (2002) specifically looks at Chile's emphasis on access and claims efforts to use mobile legal assistance teams in impoverished areas and requiring law students to complete internships in clinical legal education programs have made it one of the most successful nations with regards to access reform.

Pereira (2003) takes a more path dependent approach to explaining the success of judicial reform in Chile in his study of reforms in Brazil, Argentina, and Chile. He claims that Chile had more successful reforms than the other two countries due to its repressive and legalistic military regime. Repressive regimes are necessary to get civil society concerned about the judiciary post-transition. The legalistic regime under Pinochet, the civilian/military judiciary under a constitutional and legal framework (even though it was often times not followed), led to the military being involved with the judiciary post transition which, in turn, put the judicial focus on reforms rather than retroactive justice concerned with the past regime.

While there are multiple arguments for why or how Chile has had successful judicial reforms, there is consensus that the reforms have been successful. However, these reforms are heavily focused on institutional change and opening access for criminal defendants – leaving those seeking civil rights in Chile understudied. The focus of this study is to look specifically at access to the judicial system and not merely general reforms. It then becomes important to look closely at the reforms specifically aimed toward access to the judicial system and to then evaluate if the institutional provisions do indeed allow for increased access for all citizens – including those seeking civil rights.

## INSTITUTIONAL ACCESS TO THE JUDICIAL SYSTEM IN CHILE

The judicial reforms of the 1990s and 2000s were an attempt to increase overall judicial effectiveness in Chile, and increased access for citizens was a crucial part of the reforms. The general definition of access to justice is universally accepted as the opening of the judicial system to all citizens, rich or poor, to seek legal redress (Wilson et al 2004, Moye 2003, Londen and Viviano 2001, Mendez 1999, Buchanan 2001, Domingo and Sieder 2001). Further, some scholars define judicial access as "the equal opportunity by all citizens to use and receive remedies from mechanisms of conflict and grievance resolution" (Unger 2002, 190). Whether based on income or simply on general rights, there is an agreement that there should be equality for all citizens to seek legal redress.

Scholars agree that access is an integral part of judicial reform in Latin America (Wilson et. al. 2004; Mendez 1999; Dakolias 1996, 2001; Buchanan 2001; Prillaman 2000; Unger 2002). Prillaman's (2000) formation of three critical reform areas - independence, access, and efficiency – has been especially influential among recent Latin American scholars, including government officials (Gershanik 2002, Unger 2002, Finkel 2004). For him, barriers to access include direct and indirect costs. Direct costs such as attorney fees, filing charges, and other legal expenses prevent poor populations from participating in the system. Indirect costs such as bribes to the judiciary also create barriers to entry. Invisible costs such as time needed to travel to courts also contribute to access, or lack thereof. Further, Prillaman approaches access systematically where one measures "inputs" such as reformed laws, new institutions, judicial training, an increase in the number of cases filed and accepted, and changes in the number of cases handled by alternative dispute resolution or judges from specialized courts as well as "outputs", such as rulings against the government; speedier trials; and, above all, the public's perception of the accessibility of the judicial system[6] (Prillaman 2000).

In a five year study in Argentina, conducted by the Fundación Ambiente y Recursos Naturales (FARN- Environmental and Natural Resource Foundation) and two smaller environmental NGOs, scholars assessed indicators on justice and the environment in Argentina (see Nápoli 2006 and Di Paula 2006). They found two sets of indicators that dictate levels of judicial access. First, are management indicators such as staff, budget, provision of reduced cost or pro bono legal services, provision

[6] It should be noted that Prillaman used only general public opinion surveys to measure the public's perception of accessibility to the judicial system.

of a public defender, provision of a Ministerio Público, provision of a Defensoría del Pueblo, and an adequate system of registers and statistics. The second set, what they refer to as input indicators, evaluates legal proceedings, including: standing to sue, fees and costs of the process, intervening bodies (NGOs), time, and use of ADR mechanisms (Di Paula et. al. 2006: 3-4).[7] This study evaluates these "indicators" as institutional variables affecting judicial access.

While the variables used to measure accessibility of the system differ slightly, one commonly agreed upon measurement is the level of legal aid to citizens (Moye 2003, Londen and Viviano 2001, Hilson 2002, Di Paula et. al. 2006: 3). Similarly, many define the use of alternative dispute resolutions (ADRs) as a measure of access within a system. Beyond the agreed upon measurements of legal aid and provision of ADRs, some scholars argue that legal education of the public and judicial training for those involved in the judicial system are crucial for accessibility to the system (Buchanan 2001, Prillaman 2000) as well as an increase in the number of public defenders and public defense spending (Prillaman 2000, Wilson et. al. 2004, Nápoli 2006), and educated pubic prosecutors (Hilbink 2009). Unger (2002) breaks judicial access reforms into four categories: free legal aid for criminal defendants, open centers for legal aid and information on criminal and civil cases, government sponsored mechanisms for ADR, and allowing individual communities to set up parallel judicial structures (Unger 2002, 196-201).

[7] The Argentine Access Initiative, whose research methodology was largely based on those employed by the World Research Institute (Petrova 2002), measured similar judicial access variables a few years before the 2006 study on environmental judicial access.

While there are slight differences in the measurements for judicial access, the commonly agreed upon measures include: availability of legal aid, provision of ADR mechanisms, judicial training, an increase in specialized courts, speedier trials, increased spending on the legal system in general, availability of legal education for citizens, an increase in the number of judges and public defenders, and the public's perception of improved access and overall confidence in the judicial system. I will use these reform variables to evaluate judicial access reform in Chile. Prillaman also stresses the importance of inputs such as number of cases filed and number of cases settled, both of which have increased in Chile quite substantially over the last decade (see Justice Studies Center 2005), but these inputs are slightly more contentious since some argue they say little about access for marginalized sectors (see Hilbink 2002, 172).

Chile has attempted to address many of these judicial reforms in the realm of access for citizens, and some of these reforms occurred after Prillaman's (2000) study of judicial reform, where he claims Chile has had the most successful judicial reform in South America. The following break-down of reforms aimed at increasing access to the judicial system will demonstrate that Chile has made large strides in increasing institutional access to citizens through increased judicial spending and judicial reform. These gains in judicial access, however, say very little about specific access for marginalized groups.

**Availability of Legal Aid**

To scholars who view limited access to the judicial system as primarily a class issue that allows for discrimination against those who are financially underprivileged, the availability of legal aid is of utmost importance for equal access. Legal aid allows citizens, who otherwise would not be able to afford legal counsel, the ability to become not only more involved with the judicial system but also more educated in their judicial rights. Chile has increased its spending on legal assistance programs to the point that the number of low income clients served increased by nearly 20 percent in four years toward the end of the 1990s, and has increased the number of judges and public defenders substantially since the early 1990s (Prillaman 2000, Chilean Administrative Corporation of the Judiciary 2000, Buchanan 2002). There is no doubt that there has been substantial focus on improving legal situations for those citizens in lower income brackets, although the amount of success this has had for that population is still debated and "provision of legal aid" is difficult to pinpoint as one type of reform.

Providing legal aid to citizens is much more than spending money on legal assistance programs. Crucial reform efforts; such as the provision of public defenders, overall judicial spending (including providing more locations/buildings citizens can physically access), and the provision of public education for legal services are also necessary to increase legal aid for citizens. Therefore, discussion of the provision of legal aid will be carried out in the sections to follow as well.

**Spending on the Legal System**

Almost all scholars agree that effective judicial reforms rely on increased judicial spending. Beginning right after the transition, Chile significantly increased money earmarked for the judiciary, in fact, expenses for judicial modernization quadrupled between 1992-1998. Moreover, since the transitional period, Chile has emphasized increasing judicial spending to enhance the rule of law for democratic consolidation. Since 1997, there has been an increase in the amount of money allocated to the Judicial Branch, not only in raw numbers alone but also in the percentage of the total fiscal budget from each year (see Table 3.1 for judicial branch funding, as a percentage of the total fiscal budget, from 1997-2004). Over an eight year span, Chile increased the percentage of the total fiscal budget devoted to the judiciary from .79 percent to .95 percent. While the numbers may indicate that this percentage of the budget may be decreasing due to the drop from 2003 to 2004, much of the increased spending in 2002 and 2003 was a direct result of the Criminal Procedure Act, where a large portion of money was pumped into the system to start common law reforms.

One actor that has increasingly become important in access to justice is the Ministry of Justice. The Ministry of Justice represents the executive branch in the area of justice and acts as a liaison between the Executive and Judicial Branches. The law assigns the Ministry numerous functions such as formulating policies and analyzing legislation in order to propose reforms that it deems necessary (Justice Studies Center 2005). Beyond these duties, the Ministry is also in charge of ensuring access to citizens, including ensuring the provision of free legal aid as legally

stipulated and directly overseeing the Public Defender's Office. The budget for the Ministry of Justice has increased every year since 1997 (see Table 3.2). While the Ministry does oversee some laws and institutions dealing with access, it should be noted that the majority of the increase in spending after 2001 is directly related to the Criminal Procedure Reform. This reform likewise addresses access to the system, but it concentrates on criminal access much more so than civil access to the judicial system.

It is also worth noting that the budget allocated to the entire justice system (including ministry of justice budget and so on) has increased in recent years (see Table 3.1). The entire sector received approximately 366 billion pesos (US $523, 161, 428) in 2003, approximately 394 billion pesos (US$ 668,413,559) in 2004, and approximately 500 billion pesos (US$892,671,428) in 2005. The justice sector budget represented 4.5% of total public expenditures in 2004; this increased to 5.3 percent in 2005 (Justice Studies Center 2004-2005). The overall increase in judicial spending, with an emphasis on increasing spending to aid citizens, demonstrates that Chile has made a dedicated effort at reforming its judicial sector on the variable that many scholars deem as the most important for measuring effective judicial reform. When addressing access specifically, judicial spending must also concentrate on providing an adequate number of public defenders and justices to serve those seeking legal aid - attention must be paid to how the money is spent.

**Provision of a Public Defender and Increases in Number of Defenders and Judges**

The Public Criminal Defender's Office is relatively new in Chile. It was created in 2001 under the Criminal Procedure Reform. The aim of their service is to provide criminal defense within an oral criminal trial or other courts (Embassy of Chile 2005). There is a National Public Defender's Office (located in Santiago), Regional Public Defender's Offices (fourteen throughout Chile), and eighty Local Public Defender's Offices. The implementation of laws creating the Defender's Office represented an investment of over $53,000,000 to ensure the proper functioning of regional and local offices.

The Public Defender's office aids in access to justice not just because it provides free legal defense and advice to citizens, it also represents a "professionalization" of the judicial system. First, the new programs are institutions, not "ad hoc lists of counsel appointed in their individual capacity under patriarchal and often crony-ridden judicial appointment system" (Wilson 2004, 32). In the old system, fees were very few to nonexistent, allowing the state to justify the lack of competency for pro-bono lawyers. Second, the new public defender programs provide "unlimited eligibility for services", meaning anyone is eligible for representation, regardless of income level (Wilson 2004, 32). Finally, the new program provides an expanded scope of representation. Often, legal representation lasts well beyond the trial date into appeals and representation during the incarceration period in criminal cases.

There are still many problems with backlogged cases in the Public Defender's Office, and often victims do not feel adequately represented (Hirsch 2004, 36). However, there is no denying the old system, operating on a shoe-string budget and often heavily influenced by corruption, has been much improved by the new reforms. An old system providing no victim support with poorly trained clerical staff has transformed into a system that better focuses on victims' needs. This new focus allows for better access in criminal cases by improving the quality of support for those who cannot afford legal counsel, and while there are no guarantees that the assistance is going to be helpful, there is no denying the "increased care and personal attention victims receive from representatives of the state" (Hirsch 2004, 37).

For criminal cases, many countries in South America have Ministério Públicos, or a body of autonomous magistrates composed of public prosecutors. In some countries, such as Brazil, the Ministério Público acts as a national human rights ombudsman charged with guaranteeing citizens' rights, and some argue professional public prosecutors working under a Ministério Público are integral in aiding rights claims (McAlister 2008).

Brazilian prosecutors are among those authorized by the Brazilian Constitution to bring action against private individuals, commercial enterprises and the federal, state and municipal governments, in the defense of minorities, the environment, consumers and the civil society in general. Chile also has a Public Defenders Office and, much like the increase in public defense spending, spending and staff for the Public Prosecutors increased throughout the 2000s (see Justice Studies 2006-2007). However, Chile's Ministério Público differs from Brazil's in that the public

prosecutors' purpose is to "exclusively direct the investigation of criminal acts, carry out criminal prosecution in accordance with the law, and offer protection to crime victims and witnesses" (Justice Report 2009).

Whereas a handful of Ministério Públicos in the region have the authority to try civil cases that involve human rights issues, the public prosecutors in Chile, and in many other South American countries, are not assigned this role. Most countries in Latin America set up institutions known as Defensorías del Pueblo to act as prosecutors/ombudsmen for human rights cases. Chile is one of only a handful of countries in South America that does not provide its citizenry with a Defensoría, so while a foundation has been laid for criminal public defenders, Chile is lagging behind many other South American countries in this provision of institutional access for civil/ human rights cases. The lack of a Defensoría del Pueblo may prove to be an obstacle for environmental and gay and lesbian rights, and it will be addressed in further detail when discussing similarities and differences between access for rights movements in Chile and Argentina.

Increased spending on the judicial system provides avenues for increased access in the formal sector, but access reforms are not limited to money nor are they limited to major "institutional" reforms. Many scholars point to the provision of less-formal institutions as equally important to aiding access for citizens. Often, formal institutions can be perceived as intimidating for those without legal training or for those who have little to no experience using the judicial system. It is because of this, and the increased physical accessibility for many citizens, that the provision of

alternative dispute resolution mechanisms and specialized courts are included as independent variables that increase judicial access.

**Provision of Alternative Dispute Resolution Mechanisms and Specialized Courts**

Alternative dispute resolution (ADR) is "an exercise through which community-based disputes are resolved by facilitated negotiation, conciliation/mediation, and arbitration. These mechanisms often precede or replace formal court proceedings and may include processes designed to manage community tension" (USAID ADR, 1). ADR is important for access to the judicial system because it involves flexibility and informality within the judicial system, in turn, creating access 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. Likewise, due to the informality of ADR, fees and costs to access ADR are much lower than those associated with more formal legal proceedings.

Beyond the reduced costs and flexibility of ADR, some argue it is also based more on equity than the rule of law. Decisions are made on a case by case basis where the ultimate goal is to reach an agreement that is agreeable for all parties involved. This is particularly related to access in societies in which citizens do not receive fair justice under the formal legal system, often related to: a lack of education, a lack of finances, geographical distance from major cities, or general intimidation of the legal system (USAID ADR 2004).

Chile has introduced an ADR program. While behind other Latin American states which require ADR mechanisms, Chile, with international aid, trained ADR

professionals as early as the mid-1990s. Chile opened two mediation centers in 1996, which continue to settle a high percentage of cases. A current reform underway in Chile "strongly encourages" the use of ADR mechanisms in order to "reduce the costs of disputes, curtail congestion in the courts, and expand access to justice" (Embassy of Chile 2005, 5). These mechanisms have been included as a legitimate form of conflict negotiation in the new juvenile criminal system, the new family court system (in some instances, such as divorce cases, mediation must be sought), in international commercial law, and the Criminal Procedure Reform Act (Embassy of Chile 2005, 5; Justice Studies Center 2005).

While ADR is not mandatory in Chile, the processes associated with ADR have been encouraged throughout a wide range of legal cases. Further, ADR mechanisms are included as a legitimate means of conflict resolution, and are encouraged, under many of the new judicial reform laws, and an increasing number of ADR cases are finding their way into the legal arena with many successful settled cases (USAID ADR 2005). The Access to Justice Program, which encourages alternative forms of resolution, served 12,000 people in its first year, resolving 60 percent of the cases. By 1997, officials in the Justice Ministry estimated nearly 100,000 cases were provided with out-of-court resolutions (Chilean Administrative Corporation of the Judiciary 2000). These figures demonstrate significant improvement in providing ADR mechanisms even within the first few years of reforms.

Specialized courts increase access to the judicial system in that they reduce trial lengths and take pressure away from the already bogged down courts. Similarly,

specialized courts are more likely to use alternative dispute resolutions, which reduce overall costs of the trials. In the last few years, many Chilean judicial reforms have concentrated on creating new, specialized courts. New courts include family courts, created in 2005, that embrace the new oral procedures. The previous 51 juvenile court judges are being incorporated into 258 new family courts, where the proceedings will be faster with improved access to justice (Embassy of Chile 2005). In addition, Congress passed legislation that created new labor justice courts – implementation began in 2008 (see CEJA 2008-2009).

While Chile is a unitary system, the judicial reforms of the 1990s and 2000s have made many strides in attempting to decentralize/localize the judicial system, through advocating ADR and the use of specialized courts, in an effort to increase access for all citizens. However, in order for citizens to use the judicial system, they have to have some understanding that the system is available for use. Further, it is also important to provide new legal training for those working within a newly reformed system. Judicial reforms must focus on judicial and citizen legal education to further citizens' access.

**Judicial Training**

Many scholars agree that in order to effectively provide judicial access to citizens in many of these newly transitioned states, it becomes imperative to train lawyers and justices in order to "broaden knowledge, abilities, skills and basic criteria to ensure the proper exercise of the judicial function" (Justice Studies 2005, 1 see also Hilbink 2009). The Judicial Academy is a public corporation that was founded

in 1994 with widespread support from government officials and from within the judiciary itself (Hilbink 2002, 172). In meeting its objectives, the Judicial Academy focuses on multiple training programs. The first program is the training program, which was put in place to help attorneys wishing to become justices. The second program focuses on continuing education for novice judges, and the third program concentrates on capacity-building for justices who want to move up to ministry positions (Justice Studies 2005; Academia Judicial 2006, programas). Beyond the continuing educational programs, the Judicial Academy has likewise worked on projects such as setting criteria for judicial promotions (Pereira 2003).

This widely embraced institution sets itself apart from many other judicial training institutions in South America in that all of these programs, including many conferences and workshops addressing judicial issues, are open to all members of the judicial branch, such as general employees and support staff. These open training programs become crucial to judicial branches that face many structural/legal changes, such as the many past reforms and those currently underway in Chile.

While judicial/legal training programs do not guarantee justices will embrace reform efforts in Chile, they do guarantee that a larger number of persons involved in the judicial system have a much more thorough and consistent knowledge of the system. Indeed, the training efforts, workshops, conferences, internships, and mentoring programs established by the Judicial Academy, if nothing else, create a steady, dependable, and reliable education for justices. In regards to access, this training is crucial to incorporate disenfranchised groups under the military regime, who often benefit from post-transition reforms. Additionally, judicial training should,

in theory, create more uniform decisions, reducing certain amounts of bribery and corruption that may likewise disenfranchise certain groups. Beyond educating judicial employees, effective judicial reforms aiming to increase access must also address the legal education of the public in order for disenfranchised groups to understand their legal rights and their right to use publicly provided services

**Availability of Legal Education to the Public**

Buchanan (2002) specifically looks at Chile's emphasis on access and claims efforts to use mobile legal assistance teams in impoverished areas and requiring law students to complete internships in clinical legal education programs have made it one of the most successful nations with regards to access reform. The six month apprenticeship traces back to Pinochet under his regional Corporations for Judicial Assistance (Wilson 2004, 32). Clinical legal education is not unusual in Latin America, however, the "long historic commitment and sophisticated structure of the Chilean clinics make them unique to the region" (Wilson 2004, 33). Further, the clinical legal assistance teams in Chile set themselves apart by placing heavy emphasis on the mobile teams. This provides greater access to the citizenry by cutting out travel time for the lower income citizens while at the same time eases the tensions associated with traveling to the city for legal advice. Often, the large, crowded, noisy judicial buildings are intimidating to those who are not well-educated in law (Hirsch 2004, 35). The mobile teams reduce the intimidation factor by offering rural citizens legal advice where they are comfortable.

Chile also has a wide range of private and public institutions that have made extensive efforts to document and map the problems of the poor. For example, private corporations have surveyed the legal problems of poor people across a wide range of issues, while government programs, such as the Programa de Asistencia Jurídica (PAJ) and the Legal Assistance Program (FORJA), provide additional service functions, such as linking poor people to social services (Wilson 2004, 33). Adding to Buchanan's (2002) praise of the access reform in Chile, Wilson (2004) claims, "these….public and private legal services programs make Chile a hemispheric, if not global leader in access to justice work" (Wilson 2004, 34).

Chile's effort to increase judicial access for rural and/or poor sectors of the citizenry deserves the acclamation it receives. However, the praises for Chile's legal mobile teams and outreach to the public make a generalizing assumption: increased access for disenfranchised groups equates to increased access for the poor or less-educated population. Certainly, increased access for the poor is critical in increasing overall access to the judicial system, but this study looks at "disenfranchised groups" more broadly to also include those who may be culturally disenfranchised, seeking cultural change along with increased citizen rights, not just economically or educationally disenfranchised[8]. The following two measurements of access, trial length and public confidence in the judicial system, look at access to all citizens, not just those who feel disenfranchised.

[8] The next chapter returns to the discussion of culturally disenfranchised "groups" through the analysis of the GLBT movement in Chile

**Trial Length**

Trial length is important for access to justice in that delayed trials often intimidate and/or dissuade citizens from using the courts. Additionally, long trials create an atmosphere where it is normal for the cost of resolving a dispute to be very high, which, in turn, could limit access to a wide array of citizens. Beyond intimidation and high court costs, lengthy duration of trials is indicative of the demand for trials outstripping the supply of judicial services (Martinez 1998, 8). While lengthened trials could represent positive aspects of civil society, such as greater public awareness and the development of actions to protect collective rights, it still leads to an inefficient judiciary where access is limited.

Before the extensive trial reforms, Chile ranked below many other South American countries in this arena. In 1995, the average duration of a civil proceeding in Chile lasted 2 years and 9 months, compared to 8 months in Uruguay, 2 years in Argentina and Paraguay, and 2 years and nine months in Colombia. One of the only South American countries with a longer trial length was Peru, where the average trial took 4 years and 6 months (Martinez 1998, 9). The Chilean judicial system did not set itself apart from many of the less-developed countries' judicial systems in the region with regards to civil proceedings.

With the advent of judicial reforms in the late 1990s and early 2000s, trial lengths in Chile diminished significantly. While most of these reforms addressed criminal proceedings, the increased revenue dedicated to the judicial system, the addition of infrastructure, the increase in judges, the changing role of judges, and the

increased training of both lawyers and justices aided in many civil trials as well. The duration of the average civil proceeding dropped from 1000 days (Vargas 1995) to 509 days between 1995 and 2002 (CEJA 2005). Recently, the length of average civil proceedings in Chile has increased slightly, but there is optimism that civil procedure reform is inevitable in the coming years to further quicken the process (CEJA 2008-2009, civil proceedings).

A reduction in trial length aids almost all citizens' access to justice since there become many fewer people who feel intimidated to expend time, money, and energy for trials that could take years (see Rowat et. al. 1995: vii). In addition, a decrease in trial length makes the judicial system more "transparent, efficient, and participatory" for all citizens (USAID 2009:5) Regardless of socioeconomic background, reduced trial lengths can decrease a certain amount of disincentive to bring cases to court – and is a good measure of the overall efficiency of the judicial system. Another measure of effectiveness/efficiency is the public's confidence in the judicial system. Beyond a decrease in trial length, which may make citizens less "intimidated" to use the judicial system", a citizenry that is confident in its judiciary is more likely to feel confident in using the judicial system.

**Public Confidence**

As noted by many scholars, one measure of a strengthened judicial system is public confidence in that system (Rowat et. al. 1995: vii; USAID 2009: 10). Arguably, one would expect public confidence to increase with a reformed judicial system. In Chile, as with other Latin American countries, we see quite the opposite.

According to the Latinobarómetro, an annual public opinion survey that has been carried out since 1995, public confidence in the judicial system went down in Chile from 1996-2003 (See Figure 3.1). Public confidence numbers in Chile represent a much different picture than the many reforms would lead one to believe.

I place Chile in the figure amongst other South American countries to demonstrate that this negative perception of the judicial system is not unique to Chile. By late 2009, these confidence numbers in Chile had returned to the 1996 level (Latinobarómetro 2009). This increase in confidence between 2003 and 2009 is encouraging for democracy in the regions, but it is still a fairly low confidence level, as about 35% of those surveyed had confidence in the judiciary. A lack of confidence in judicial systems systematically arises as one of the widespread weaknesses in democratic consolidation throughout the continent. However, as will be evident when citizens are polled on their confidence in judicial institutions (see Figure 3.2), Chileans, and South Americans in general, view judicial institutions separately than the judicial system as a whole[9]. Therefore, the question must be asked, "Why do citizens have a negative perception of their judicial systems?" The common answer to this question is the corruption and nepotism that has historically, and continues to be, linked to the judicial system and politics more generally (see latinobarómetro 2009). However, there may be more to the low confidence levels than just the simplified explanation of corruption.

[9] Methodologically, this is a common problem with most polls on public confidence in the judicial "system". Many polls do not define what they mean by "judicial system" often confusing the public on differences between civil and criminal law and the judicial branch vs. judicial institutions (see report by Stratton and Lowe 2000: 2-4)

While many judicial reforms have been made in Chile, and most argue that these reforms are much better than the old judicial system (Hirsch 2004, 36; Wilson 2004, 34; Jiménez 2007), there are still problems with backlogged cases due to the growing need for even more judges, lawyers, and trained specialists (Sotolongo 2006). The tremendous backlogging of cases has led to an upset citizenry that does not always reap the benefits of the reforms. While they may appreciate the new buildings and the increased care from representatives of the state (what they often view as judicial institutions), there are no guarantees that this assistance will be helpful to the victim – hence lowering their confidence in the "judicial system" as a whole (Hirsch 2004, 37).

When one looks at the confidence Chileans have in their judicial institutions, as opposed to the confidence in the justice system, there is a slightly different picture. Public confidence increased, by about one percent, among Chileans between 2001-2005 (See Figure 3.2). The difference in public opinion between view of the overall justice system and view of judicial institutions, over the same time period, suggests the public views the institutions quite separately from the system. While many Chileans are still disenchanted with the manner in which the justice system operates, there is more optimism when it comes to the judicial institutions themselves, which have been strengthened in the last ten years through various judicial reforms[10]. While confidence in Chile has increased quite significantly since the beginning of the democratic transition, levels of confidence in the legal system in 1989 were often in

[10] While data on confidence levels in judicial institutions is not available for 2009, many of those interviewed spoke highly of the judicial reforms and their strengthening of judicial institutions (see Jiménez 2007, Dougnac 2007).

the single digits (Prillaman 2002: 138), more emphasis must be placed on making this system more accountable and accessible to the citizenry.

As an indicator for a successful judiciary, the public confidence numbers in Chile are a discouraging measure of the efficiency of the judicial reforms throughout the 1990s and 2000s. Regardless of institutional changes made to the judicial system, there is something more that needs to be done to truly transform the judicial system, something beyond institutional changes. While most indicators demonstrate that Chile is strengthening its judicial system, the public confidence measure, which Prillaman (2000) argues is one of the most important, lacks. There are many variables that may affect this perception, including problems with inefficiency and corruption within the system that will only decrease over a much longer period of time than a couple of decades. However, this also demonstrates that institutional improvements to the system do not always equate into actual improvements, at least immediately, to the system as a whole and how the citizens are affected by it. One argument this dissertation makes is that variables other than institutional indicators should be used to measure judicial success within a system, especially with regards to access. One access variable that is important for social movement organizations trying to gain rights, besides the institutional ones mentioned above that were enhanced through judicial reform, are the legal provisions provided to rights groups in the Constitution.

**Access for Human Rights in Chile**

Beyond changes in the judicial system, the government must also provide an institutional path for citizens who believe their human rights have been violated; this path is created by allowing citizens to seek redress through the judicial system when they feel their human rights have been violated. Human rights in Chile are guaranteed under article 19 of the Chilean Constitution. Among these rights and liberties are the right to life (no. 1), the right to legal defense and equal protection under the law (no. 3), freedom of religion (no. 6), the right to a lawful arrest (no. 6), the right to protection of health (no. 9), the right to education (no. 10), freedom of expression (no. 12), and the right to assemble (no. 13). Among multiple other rights listed in article 19, this section of the Chilean Constitution is largely based on the U.S. Bill of Rights. Indeed, many of the same rights are protected, and in the case of Chile, article 19 is more comprehensive than the Bill of Rights, guaranteeing such rights as freedom of education and freedom to work.

With reference to the two particular social movements being studied, article 19 of the Constitution is of particular interest. The writ of protection (recurso de protección), guarantees fundamental rights for all citizens. Established in the 1980 Constitution, the writ of protection allows individuals to seek relief from a court of appeals when their constitutional rights are violated (no. 20 article 19 Chilean Constitution), in essence, this article provides legal standing for all citizens[11]. While the specific use of these articles by each social movement for rights litigation will be

[11] I evaluate the use of this provision in the following chapters for each social movement

addressed in the proceeding chapters, both social movements have grounds for rights claims under the Chilean Constitution.

**Conclusion**

This chapter has aimed to not only address the structural changes to judicial access in Chile, and in some cases judicial reform more generally, but to also open the door to ask questions about access problems that may not be resolved through institutional reforms alone. As indicated, Chile has gone through wide ranging reform efforts to boost the strength and legitimacy of its judicial system, and many of these reforms have been highly successful in their attempts to incorporate more citizens into the system, a major goal of access reforms. However, the fact that citizens still feel removed from, and lack confidence in, the system may affect their perception of having access to the system. Explaining their feelings of disenfranchisement could be as simple as reform efforts not quite diffusing to the general public, or there could be a deeper explanation that cannot be explained by institutional change alone. If citizens do not "feel" they have access to the system and, in turn, choose not to use the system, then they are still lacking effective access - regardless of the numerous access reforms. Another factor that may affect the capacity of these access reform efforts to be applicable to the general public may be found in the reforms' emphasis on criminal cases, without focusing on civil/social cases. Indeed, civil organizations and social movements historically acted as a catalyst for judicial change throughout South America (Pereira 2003; Chavez 2004, 134-35), yet many reforms focus more on criminal defendants than claims being filed by social organizations that often emphasize human rights issues. While a thief or

troubled adolescent may experience increased access to the system through the provision of an educated public defender, this says little about the access an environmental social movement fighting for environmental clean-up or forest restoration may have. One question that will be asked in this work is: "do the judicial reforms stressing increased access carry over to increased access for all citizens". This question is of particular importance to consolidating countries who must address civil/social rights to gain public confidence.

Another important focus of this paper is expanding the measurement variables that affect access to the judicial system. While many scholars note that a positive public perception of institutions is crucial to consolidate democracy, there has been relatively little research on *how* citizens' perceptions can specifically affect their use of the political system. Further, most studies of public perceptions focus on perceptions of the judicial system as a whole, not perceptions of access to the judicial system more specifically. Because of this, many of the measurements used to measure access by access scholars assume a certain amount of homogeneity among those who seek access to the system. I argue that solely concentrating on *de jure* institutional reforms that assume a certain amount of homogeneity of actors does not render an accurate account of how perceptions may differ amongst sectors of society. Certain social groups that do not have a high level of cultural support within a given country may be averse to bringing issues to trial due to cultural prejudices. While this variable may seem insignificant in the large scheme of judicial access reforms, public opinion and socio-cultural norms have indeed affected effective access to many social movements, including movements as significant as the U.S. civil rights movement.

Overlooking this crucial cultural variable, creates a gap in the judicial access literature that this dissertation will fill.

The following two chapters will take an in depth look at two social movements in Chile that have used the judicial system in attempting to gain rights. Through an analysis of cultural perceptions surrounding each movement, individual justices' perceptions of each movement, and the perceptions of those within each social movement, I will determine if any of the above perceptions affect levels of judicial access. Studies of judicial access centering on institutional reforms have determined a solid set of variables that affect judicial access for citizens. However, this more focused study of judicial access, which concentrates on the role of perceptions, argues that these institutional variables are not enough when trying to explain why different rights movements choose to use, or not use, the system. The level of judicial access varies amongst social movements in Chile, even though they have very similar institutional accessibility to the system. Socio-cultural norms and public perceptions of each social movement should be added as a variable to measuring judicial access for any scholars who wish to study specific actors attempting to gain rights.

TABLES AND FIGURES

Table 3.1 : Judicial Branch Funding 1997-2004

| Year | Total Fiscal Budget (in millions of pesos from each year) | Judicial Branch Budget (in millions of pesos from each year) | Judicial Branch Budget (in thousands of US dollars) | Percentage of the Total Fiscal Budget |
|---|---|---|---|---|
| 1997 | 6,902,157 | 54,697 | 109,394 | .79% |
| 1998 | 7,775,181 | 60,731 | 121,462 | .78% |
| 1999 | 8,412,396 | 68,465 | 134,227 | .81% |
| 2000 | 9,058,095 | 77,915 | 147,009 | .86% |
| 2001 | 9,908,155 | 90,262 | 158,354 | .91% |
| 2002 | 10,493,058 | 97,895 | 148,325 | .93% |
| 2003 | 11,144,384 | 121,191 | 173,130 | 1.08% |
| 2004 | 12,989,415 | 124,595 | 211,178 | .95 |

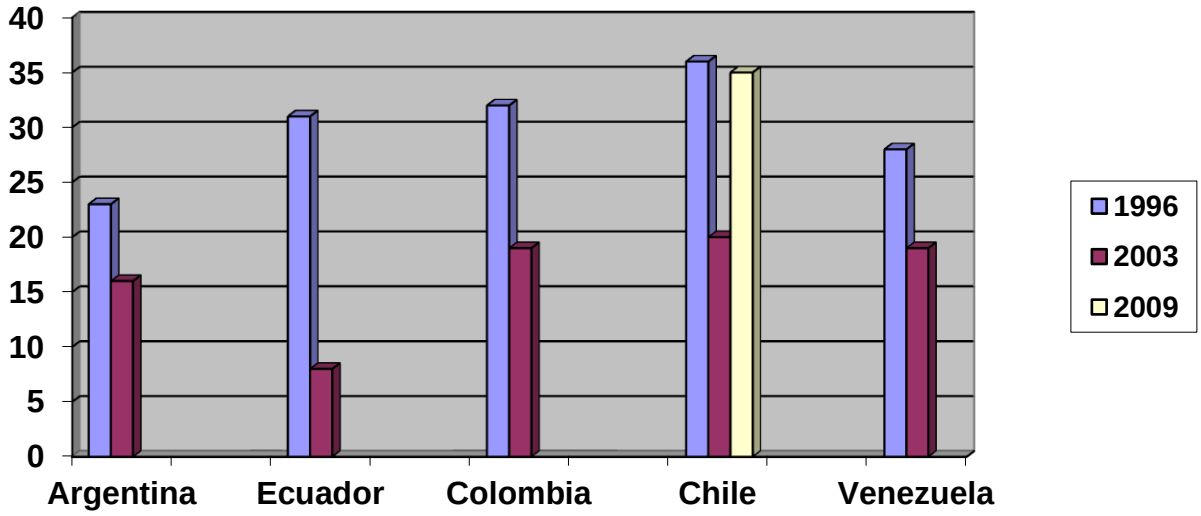
Source: Justice Studies Center of the Americas: Report of Justice 2004-2005.

Table 3.2: Ministry of Justice Budget 1997-2005

| Year | Budget (in millions of pesos per year) | Budget (in dollars per year) |
|---|---|---|
| 1997 | 84, 977 | 169,954,000 |
| 1998 | 94,122 | 188,244,000 |
| 1999 | 97,055 | 190,303,921 |
| 2000 | 106, 012 | 200,022,641 |
| 2001 | 130,864 | 299,585,964 |
| 2002 | 155,887 | 236,192,424 |
| 2003 | 205,484 | 293,548,571 |
| 2004 | 222,116 | 376,467,796 |
| 2005 | 254,060 | 453,678,571 |

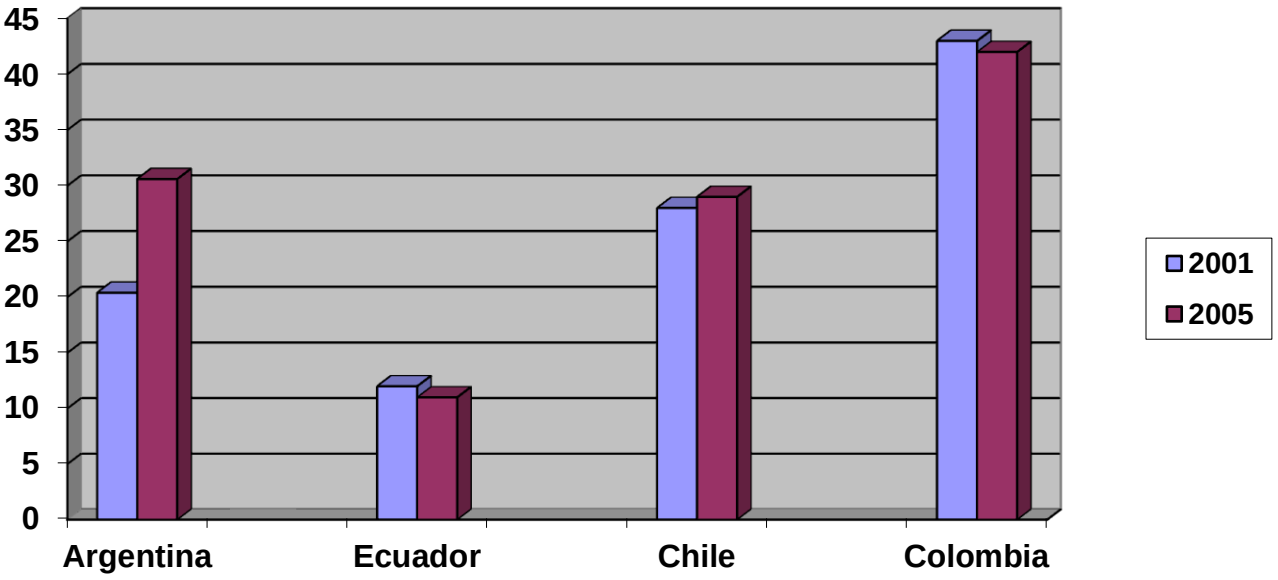
Source: The Justice Studies Center of the Americas Report of Justice 2004-2005. Information obtained from the Ministry of Finance Budget Office.

Figure 3.1 Index of Confidence in Justice System in Latinobarómetro Poll (percentage of public who have confidence)




Source: Justice Studies Center of the Americas (CEJA 2004-2005) and Latinobarómetro 2009.

Figure 3.2: Confidence in Judicial Institutions – Ibero-American Governance poll (percentage of public who have confidence)




Source: Justice Studies Center of the Americas 2004-2005

# CHAPTER 4

# THE GAY AND LESBIAN MOVEMENT IN CHILE

## INTRODUCTION

This study evaluates an element of the political opportunity approach to studying social movements, access to the judicial system, through a more culturalist/constructivist lens by examining the role of perceptions about access to the system. The gay and lesbian (GLBT) social movement in Chile serves as an ideal case study when considering the impact of perceptions on judicial access due to the persistence of negative societal attitudes toward the GLBT community. The GLBT movement is also an understudied "cultural change" movement due to its dual goals of political and cultural change. This chapter examines societal perceptions of the GLBT movement in Chile, individual justices' perceptions when making judicial decisions, and group perceptions of their access to the judicial system in order to determine if perceptions act as an aide or an obstacle in achieving access to the system.

I begin this chapter by briefly describing the GLBT social movement organizations in Chile. Second, I use multiple measurements to determine some general societal perceptions surrounding the movement in Chile. Third, I review

three major judicial cases in the GLBT movement. I look at judicial decisions and judicial abnormalities within them as a means to measure individual justices' perceptions of the social movement. Finally, I evaluate the perceptions of members within the GLBT social movement. I use interview data to see if those within the GLBT movement perceive their access to the judiciary as limited and, if so, why? I conclude by arguing that while individual justices' interpretations and involvement in the court cases can affect judicial process and outcome, this appears to be just a reflection of broader societal perceptions in Chile. The perception of limited access within social movement organizations in response to these larger societal perceptions, however, creates a real obstacle when seeking judicial access. There is an inherent fear within organizations of bringing cases to court, or to "come out of the closet" in general, in a society where these actions can have severe personal and professional consequences.

Throughout the Pinochet years, the gay, lesbian, bisexual, and transsexual movement in Chile was most notably tied to the Concertación – the opposition that was actively part of removing Pinochet from power. Many contemporary gay activists felt closer ties to the more left sect of the Concertación in the 1980s – the Communist movement. Many, including gay and lesbian theorist Juan Pablo Sutherland and the "Che of the Gays" Victor Hugo Robles (Sutherland 2007, Robles 2007), were active members and leaders in the Communist party during the end of the Pinochet years. Although many gay and lesbians were politically active in attempting to oust Pinochet from power, very few demanded sexual minority rights during this

time and there were only a handful of more radical GLBT organizations – most of which opted to stay out of the political debate (Hernández 2007).

It wasn't until the early 1990s that organizations such as the Movimiento de Integración y Liberación Homosexual (MOVILH) began advocating for the GLBT community itself. This was largely due to the fact that the Communist Party did not want homosexual rights as part of its agenda.[12] MOVILH is well known throughout South America as a very political organization that concentrates heavily on legal advancements for the community. However, in the mid-1990s MOVILH split into two organizations over a conflict in both goals and means to achieving rights. MOVILH remained the more legally focused branch. They argued that fighting within the political system was the best means to achieving rights and also argued for breaking away from international gay and lesbian organizations that did not reflect the needs of the GLBT community in Chile (Jimenez 2007).

Those who argued to remain part of the International Lesbian and Gay Association (ILGA) and to equally focus on changing cultural attitudes in Chile as a tool to achieving political rights, formed the Movimiento de Minorias Sexuales (MUMS). MUMS also believed that MOVILH did not focus on important issues such as HIV/AIDS and transsexual rights in Chile (Hernández 2007). To date, these two organizations still remain the largest and most influential GLBT social movement organizations in the country. Many of their ideological differences have since faded, yet there is still a more legal push from MOVILH, while there is a more focused

[12] It should be noted that women and environmental groups also broke away from the Communist Party at this time – a general pattern across Latin America.

cultural push from MUMS. MOVILH went as far as rejoining the international community in 2006, yet there still remain stronger ties between MUMS and the ILGA.[13]

Besides these two organizations, there are a few more radical or more issue-based social movement organizations within Chile. TransChile represents the transsexual community and has strong ties to MUMS, and Las Otras Familias was specifically formed to support parental rights for gays and lesbians and focuses on the Atala case, one in which a mother was denied custody of her children due to her "outward gay lifestyle of living with a partner" (De Ramon 2007). Due to the concentration of all of these organizations in Santiago (and the concentration of most open gays and lesbians in the Santiago area), there remains dialogue between the organizations and many work together to support the GLBT community.

In order to better understand the progression of the GLBT movement in Chile since the early 1990s, it is important to examine the environment within which they operate and the laws which affect the movements' level of success. The following section measures societal perceptions of the GLBT movement by grouping public opinion polls and laws surrounding the GLBT movement in Chile. This evaluation acts not only as a background for social movement action over the past decades, but also as a foundation to gauge the cultural environment surrounding the movement.

[13] Toly Hernández, president of MUMS, was appointed in 2008 as the Chilean representative on the ILGA board that represents South America.

## SOCIETAL PERCEPTIONS

The purpose of evaluating societal perceptions is to view it as a cultural base within which the social movement and the judiciary operate. While political opportunity scholars admit that looking at cultural variables is critical when political and structural factors do not fully explain movement decisions (Alvarez, Dagnino, and Escobar 1998, Meyer 2004: 53), I have argued that access scholars rarely measure societal attitudes as an independent variable affecting access. As stated in the introduction to this work, public opinion on issues may have an effect on individual justices' judicial decisions, both the decisions to accept cases and outcome decisions. I argue that social perceptions of social movements, especially those trying to gain cultural rights, will also impact social movements, and individuals within those social movements, when they are choosing which avenues to pursue when attempting to gain rights. If social movements and individual justices are swayed by their own perceptions, some of these perceptions are born out of a more general Chilean culture.

Measuring societal perceptions involves both general public opinion surveys conducted in Chile as well as more focused surveys conducted based solely on attitudes toward gays and lesbians. I also use international reports and shadow reports written to international bodies, such as the International Gay and Lesbian Human Rights Commission and the Inter-American Commission on Human Rights, which report on the state of minority rights in Chile. Finally, I look into laws that affect sexual minorities in Chile, since the legislative branch is the most representative branch of the government and reacts and responds to societal demands.

In the general World Values Survey conducted in 2000, 72% of the population surveyed in Chile found homosexuality to be only sometimes justifiable to never justifiable (Inglehart et.al. 2000). This measure of homosexuality is the only question in the World Values Survey asked in all country case studies included that related to views on homosexuality. This general perception of homosexuality in Chile in the early 2000s led to many other, more focused, studies on societal perceptions surrounding homosexuality in the latter part of the decade.

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. The foundation found that in 1997, 60.2% of the Chilean population thought homosexuality was a "very serious" problem (Fundacion Ideas 1997). In 2001, the foundation found that 45.2% of the Chilean population believed that homosexuality should be forbidden since it is "against human nature" (Fundacion Ideas 2001), and a survey conducted in 2003 showed that 43% of the Chilean population believed homosexuals should not be school teachers (Fundacion 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. Further, 15 % of Chileans marked "1" while only 4% of Chileans marked "9" (AmericasBarometer 2010). 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 (Nierman et.al. 2007).

Following the mid-2000s, there were a couple of studies based solely on the "Attitudes Toward Lesbian and Gay Men Scale" (ATLG) and its reliability and validity in Chile. This scale has been used to measure perceptions toward homosexuals throughout the world. Both studies agreed that homosexuals receive unequal treatment compared to heterosexuals in Chile. This statistic is not surprising since this is the case in most of the world, however, the data in one study 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 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 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, it does provide a general description of intolerance in the country. Although the arguments for causation 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), one can conclude that there are at least some prejudices against gays and lesbians in Chile. Further, these prejudices may act as a rationale for why gays and lesbians may be "afraid" to take a rights claim to court.

Many international studies and shadow reports to multiple United Nations and Inter-American commissions 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 (International Gay and Lesbian Human Rights Commission 2007: 1, 7-9; Cardenas and Barrientos 2008: 141; Acosta et. al. 2008: 5-14). These international reports demonstrate that not only are there many Chileans who disapprove of homosexulity, but also that these societal attitudes have created an atmosphere where open discrimination is common. Certainly there can be severe "consequences" for "coming out of the closet" by initiating a court case that will be made public.

Another measure of societal perceptions, besides relying on public opinion polls, can be found in the laws (see Bernstein 2003: 360-362 and Dupuis 2001 for this law-culture link) that concern gays and lesbians in Chile. Before expanding on laws specifically aimed at sexual minorities, it is important to look at how the Chilean Constitution addresses human rights. One constitutional provision has been of particular interest to the gay and lesbian movement, and will also be discussed as critical to the environmental movement in the next chapter, - article 19. The writ of protection (recurso de protección), guarantees fundamental rights for all citizens. This article provides standing for all citizens and is certainly representative of Chile's political culture – one that is shaped by a long history of liberal democracy. Gay and lesbian social movement organizations and sexual minority rights advocates have tried to use this article of the constitution to justify sexual minority rights in Chile, both in judicial cases and when trying to push through anti-discriminatory legislation.

While it is part of the law, article 19 is a general law concerning human rights and not one that is focused on gays and lesbian specifically. Therefore, I will not use this law as a measure of societal perceptions toward the gay and lesbian community, but instead focus on the judicial interpretation of this article in the "judicial perceptions" section.

In Chile, there have been a few laws affecting sexual minorities. In 1954, Chile passed a law (Law 11.627) grouping homosexuals as social security threats, along with drug users, vagrants, and other "socially dangerous groups" (Jimenez 2005). While not often used, the movement links this law to the arbitrary detention of sexual minorities until 1994 when the law was abolished. Similarly, a vague penal code (373) written in 1874, states that imprisonment could be an option for anyone who is seen as violating virtuous and moral customs. While not specifically addressing homosexuality, authorities have used this law as recently as 2004 to arrest sexual minorities for as little as a kiss on the cheek in public. Choosing to interpret this dated law as one against homosexuality likewise reflects the cultural norms in the Chilean judicial system. While the judicial branch has recognized the concerns of movements such as the MOVILH, they have also argued that very few are arbitrarily arrested under this penal code and that these movements should seek a legislative change in the law.

There is one article in the Chilean Labor Code that, while vague, has been used to not only discriminate against sexual minorities, but also threatens their financial security. Article 161 addresses the right of an employer to fire employees for the "good of the company". MOVILH states the fear of not getting promoted

leaves many homosexuals in the closet and while article 19 of the Constitution guarantees equal rights before the law, it has done little in terms of stopping discriminatory acts toward homosexuals. Further, many studies and international reports point toward workplace security as one of the greatest inequalities for the homosexual community (Cardenas et al 2008: 141; Acosta et al 2008:5). A shadow report from Global Rights to the International Gay and Lesbian Human Rights Commission goes as far as saying that the majority of cases likely go unreported, especially to the Work Tribunal, for "fear of social stigma" (Acosta et al 2008:5).

Perhaps the most progressive steps these organizations have made were through their lobbying efforts in modifying penal code 365 of the Chilean Constitution. The code that made sodomy illegal was changed to legalize sexual practices between consenting male adults over the age of 18. However, this legal project was first introduced in 1993 and didn't pass until 1999, demonstrating that the lobbying effort for the modification was a slow process (Law 19.617). Further, Chile was one of the last countries in Latin America to decriminalize sodomy (Brown 2002, Miles 2004: 16-17), again reflecting cultural values in a socially conservative country. Most disturbing about the passage of penal code 365, is that it still differentiates between homosexual and heterosexual sex with minors. For homosexuals, the age is 18, while for heterosexuals the age is over 14. Ironically, the law that was originally viewed as a success for the gay and lesbian movement has become a tool to use against them. 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, and, while those charges were dropped, he was charged with

violating penal code 365. International organizations such as Amnesty International say that this blatant difference in law between homosexuals and heterosexuals is a violation of human rights (MOVILH Suspenden…2008).

In Chile there were laws specifically addressing homosexuality as an immoral act until the late 1990s that were sometimes used to detain sexual minorities; no such laws after transition were in place that specifically isolated other minority groups. Paired with the information gathered from public opinion surveys, one can hypothesize that sexual minorities are not well tolerated or accepted, by society at large, as a minority group who deserves rights. Further, research on the history of repealing sodomy laws points out that most sodomy laws were repealed based on a right to privacy and have very little to do with homosexual rights (Bernstein 2003: 362, Haider-Merkel 2000). Therefore, the one progressive legal step made that affects gays and lesbians may not be such a good measure of societies' perceptions. While the surveys conducted do demonstrate that opinions are slowly changing concerning sexual minorities, societal perceptions of homosexuals still tend to be negative.

In the next section, I measure individual justices' perceptions by examining the role of justices in the three most important judicial decisions to date concerning gay and lesbian rights (these also happen to be the only major cases that involve the Chilean Supreme Court). While societal perceptions toward the GLBT movement tend to be negative, it is important to determine if these perceptions carry over to those justices who are directly involved in decision-making, and if these justices' perceptions affect the GLBT movement's access to the judicial system.

## INDIVIDUAL JUSTICES' PERCEPTIONS IN THE COURT CASES

In Chile, there have been very few civil cases regarding homosexuality that have involved the national judicial branch. While a number of criminal cases are brought before smaller courts; such as harassment, beatings, rape, and homicide; there are only three cases that have reached the national level of the judiciary on grounds of civil rights – and one of the three began as a criminal investigation (Jimenez 2007). This serves as both a hindrance and a facilitator for research on the subject. There are not enough court cases to develop a large N quantitative study, however, having such a small number of cases to study allows for a deep analysis of each.

Perhaps the most influential individuals associated with human rights cases are the high level justices that are making these decisions. How individual justices choose to interpret vague laws, what cases they choose to accept at the national level, and how justices choose what evidence upon which to base their opinions all indicate their personal perceptions – toward law in general and the specific social movements seeking rights. Differing judicial opinions are quite frequent – this is evident by dissenting opinions in most judicial rulings. Dissention alone, however, is not what I will be investigating. Rather, I will look at court transcripts and judicial statements to determine *why* certain individual justices make their decisions, regardless of if they agree or dissent with the final court ruling.

The three specific judicial cases chosen are still included in international reports as the most important judicial decisions for homosexual rights in Chile, and

all demonstrate that there has been very little legal success for gay rights in Chile.[14] Further, all three of these cases involve judicial irregularities and seemingly biased justices (or biased administrative officials within the judicial system). I will briefly describe each court case and the judicial involvement in each before concluding that there are negative judicial perceptions which have led to injustices in GLBT court cases. However, an evaluation of social movements' perceptions is needed before determining the effect this may have on the GLBT movement's access to the system.

**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 Divine Case refers to a fire at the gay discoteca, Club Divine, in Valparaiso, Chile (about an hour west of Santiago). Many witnesses to the event stated that a group of men started the fire on purpose - sixteen people died and over thirty were wounded. 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 (Nunoz - Gonzaléz 2007, Robles 2007). Social movement organizations argued the judicial investigation never looked for the cause of the fire nor looked for any suspects before closing the case six months after the fire (MOVILH 2006: 67). Even more offensive to those who were there or who know someone who was killed or injured in the fire, was that the victims were treated like criminals and intimidated by the "homophobic judge" (Jimenez 2005: 10).

[14] See shadow reports Acosta et.al. 2008: 10-14, IGLHRC 2007: 13-24. Both claim that the Atala and Calvo cases are still the benchmark cases for GLBT rights in Chile.

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 to many individuals and members of sexual minority social movement organizations. Many popular gay and lesbian themed poems, essays, short stories, and books discuss the event well over a decade later (Sutherland 2007, for an example see Lemebel 2001: 119-123). The second reason the Divine Case is important to my research is that after a large amount of pressure from social movement organizations, the case was re-opened in 2003 based on the "improper steps taken" by investigating officials, and there continue to be struggles in appellate courts to keep the case open (Jiménez 2005: 67). Most recently, the justices involved with the reopening of the case admit that the case was not handled properly by the first judge, but also admit that it is probably too late to find those responsible in 1993 (MOVILH Afinan detalles… 2008). Not only does MOVILH blame the initial "homophobic" Judge Gandara as the main reason the case was not properly investigated, but the current 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 Afinan Detalles… 2008). While the move to re-open the case is mostly symbolic, it does demonstrate that judicial biases most likely played a role in the investigation and outcome of the case.

**The Calvo Case**

The second case of judicial importance involves Daniel Calvo, himself a judge in Chile. In 2003, Judge Daniel Calvo, then in charge of a pedophilia investigation, was spotted at a gay sauna. Three days later he was removed from the case and less

than a year later he was suspended for four months. The diffusion of a video obtained by a Chilean media outlet, that demonstrated Calvo was in fact visiting a gay sauna, was enough for his suspension, even though Calvo never committed a crime (Jiménez 2005: 58).

Currently, Calvo is attempting to win a civil court case against the judicial system that he claims unlawfully suspended him and caused emotional damage to him, his wife, and their children. However, the judge in charge of the case for Santiago's Second Court of Appeals recently claimed Calvo's case is out of his jurisdiction (D.U. 2008). While still ongoing in civil courts, this case is important beyond the appellate ruling. The Calvo case is also symbolic for many similar occurrences in Chile, such as school expulsions or firings from positions based on the fact that one demonstrates homosexual activity. Likewise, the Calvo case is still often cited by international actors as a flagrant abuse of judicial power (Acosta et. al. 2008: 11-12).

The decision to suspend Judge Daniel Calvo based on his visit to a gay spa was largely based on personal perceptions of the justices. The Supreme Court maintained this 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" (Jimenez 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 Devine case, the Calvo case demonstrates that judicial actors'

perceptions of homosexuality affected the outcome – the decision to suspend him based on "dishonorable" conduct.

**The Atala Case**

The third major homosexual case takes on a much larger role than the other two cases discussed. Not only is it the most prominent judicial case involving gay and lesbian rights in Chile, and perhaps South America in general, but also in that it has been 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 a part of the judicial system in Chile, has challenged the system over the past six years, making this case an ongoing fight for homosexual parental rights at the international level.

The case began in 2003 when the Court of First Instance of the City of Villarrica rejected the lawsuit filed by Mr. Ricardo Jaimie López Allendes to gain custody of their three daughters after he and Judge Atala separated in 2001. This is not surprising, considering that in Chile custody almost automatically goes to the mother (99% of the time) – unless she is proved to be a prostitute, drug addict, alcoholic, or mentally unstable (Rother 2006, 6; Hernandez 2007; Byrne 2005). During the period of time between 2001-2003, Judge Atala had lived openly as a lesbian with custody of her three daughters; however, Mr. Lopez Allendes filed a suit when Judge Atala started living with her partner, Emma de Ramón (Atala 2007; Vance Center Amicus 2006). The lower court decision was then upheld by the Appelate Court in the city of Temuco; this is when Mr. López Allendes appealed

before the Supreme Court of Chile. In May of 2004, the Supreme Court overturned the first two rulings in a 6-2 decision. It was after this Supreme Court ruling that Atala brought the case to the Inter American Commission on Human Rights in 2006 (Vance Center Amicus 2006; Rother 2006, 6; Reel 2006, A14). In April 2010, the Commission ruled that Chile violated judge Atala's human right to live free of discrimination (MOVILH 2010).

The most evident case of individual justices' perceptions and how those perceptions influence court rulings is found in the Karen Atala case. While very rare, members of the Supreme Court became interested and active in the court case well before it reached the Supreme Court. Four Supreme Court Justices had supported Mr. Lopez'Allendes, the father of the children, appeal from the outset, believing 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, himself a lawyer and insider in the judicial system, based his petition to the Supreme Court on the claim that, according to the Political Constitution of Chile and the United Nations Convention on Children Rights, the children had a right to be "furthered and protected" in an atmosphere of normality (Vance Center 2006). The Supreme Court took up the case in 2004, improperly according to some legal analysts due to their proactive interest in the case (Rother 2006, 6), and overturned the first two rulings in a split decision on May 31. Ironically, unlike the trial court, the Supreme Court did not even consider the children's opinions about their living situation (MOVILH, 2004).

The Supreme Court Decision, a six to two ruling, was precedent setting in that not only did the Supreme Court take a proactive role, but this was also the first

instance in which child custody was granted to the father not because of the mother being an addict or prostitute, but because the mother was a lesbian. Dated laws in the Chilean system had linked homosexuality to questionable morals in the past, but penal code 373 had been viewed by most in 2004 to be outdated and unusable (Hernandez 2007, Jimenez 2007, Nunoz- Gonzalez 2007).[15] Interestingly enough, those who thought penal code 373 was outdated were correct. The Supreme Court decision was not based on penal code 373; which would have at least been based on existing, albeit outdated, law; but rather the personal beliefs of the justices that children living under the custody of a lesbian were subject to live a life full of ridicule and that the girls were in a "situation of risk" whose "pernicious consequences" would "damage their psychological development" (Transcript of Chilean Supreme Court ruling 2004).

The assumption that the justices made their decision based on personal beliefs rather than legality derives from the accusation that 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 her sexual identity did not dictate the ruling, in the same paragraph they stated that the sexual identity of the mother could cause the daughters to become confused about sexual roles. The Supreme Court ignored scientific studies stating otherwise and claimed that the evidence presented was only " 'an element of the conviction that must form the judges' personal opinion'" (Jimenez quoting Supreme Court Statement 2005, 13).

[15] A more detailed description of these laws to follow

With regards to justices' opinion, the results tend to be very similar to the public opinion findings. A presentation (2005) at the Latin American Forum on Access to Justice presented by the Movimiento de Integracion y Liberacion Homosexual (MOVILH), specifically points to judicial prejudices as one of the most important factors hindering judicial access for the Chilean GLBT movement (Jimenez 2005, 1). The movement furthered this argument by designating the Supreme Court as the most homophobic institution in the nation (Jimenez 2005, 9), and, more recently, MOVILH has stated that the judicial system is still the most homophobic institution in Chile, placing it above conservative senators (MOVILH…Denuncias 2009).

In all three cases, justices' personal opinions on homosexuality seemed to affect either the process of attaining justice or even the particular outcome/ruling of the case, yet none of these particular cases point directly to limited *access* to the system. Further, there seems to be hopeful optimism, from some, that changing societal values could perhaps lead to judicial successes for the GLBT movement in the future. Interestingly, this sense of optimism relies on changing societal values, not the changing values of individual justices – even though most of the heavy criticism from those within the GLBT community on case outcome is focused on the role of the individual justices.

It is these perceptions from within the movement that may provide the most information when trying to measure their access to the system. Societal and individual justices' perceptions of the GLBT movement may indirectly affect the movement's access to the system, but the decision to take a case to court lies with the

decisions made by those within the GLBT movement. It is through interviews with those that have decided to use (or not use) the judicial system that it becomes evident that perceptions of fear can lead to effectively limited access to the judicial system.

**Activists' Perceptions**

As noted in the introduction, neither political opportunity nor access scholars study activists' perceptions of their level of access to the judicial system. I argue that a more constructivist approach to studying levels of judicial access for social movements, by incorporating these activist perceptions, will enhance the political opportunity approach's explanatory power and add a needed cultural/attitudinal variable to judicial access studies. While social movement scholars argue that political opportunities can be "what people make of them" (Kurzman 2004: 117) - methods, and studies, have done very little to explore the connections between levels of judicial access and social movements' perceptions.

Activist perceptions were measured by interviews of leaders and members of the largest gay and lesbian organizations, as well as participant observation at many lectures, demonstrations, gatherings, and events. While this section aims to measure certain perceptions regarding access to the judicial system for gay and lesbian 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 social movement organizations studied. Similarly, there are diverse goals between the social movement organizations themselves. After interviewing the presidents of the three largest and most visible gay and lesbian

organizations in Chile, it was quite apparent that these organizations have very differing views of how the fight for rights should proceed. MOVILH is a political organization that fights for political rights and equality, while MUMS focuses less on political strategies and more on cultural change strategies. Las Otras Familias has gained visibility due to their focus on, predominantly, lesbian adoption rights and their support of the Atala case. Furthermore, there are rifts even within each of these organizations. There was such a large rift within MOVILH that it split into two organizations in 1994 – creating MUMS.

The rewriting of penal code 365, which removed most of the sodomy law, was seen as a large victory by many gay and lesbian social movement organizations; however, it was a direct victory for gay men, not lesbians or transsexuals. Transexuals, although not a focus of my investigation due to an attempt to narrow the court cases studied, are the most criminally discriminated against sect of the GLBT movement. They are often harassed, arrested, and ridiculed, not just by other citizens but also by the police force and those who are supposed to carry out the laws. For MUMS, this is a huge problem that should be addressed through cultural change and utilizing the media to make the GLBT movement more visible in a positive manner (Hernadez 2007, Sutherland 2007). For MOVILH, using the courts and trying to change laws in order to help "normalize" the GLBT movement is their primary goal (Jimenez 2007), and for Las Otras Familias the primary objective is to focus on the importance of private lives and adoption/family rights.

Regardless of their differences, there is a sense that these organizations work together in attempting to change the Chilean environment within which these

organizations operate. All organizations support the Anti-Discrimination Act which has been floating in the legislative branch since 2006 – a very progressive act that includes sexual minorities as a minority who deserves protection under the law (along with gender, age, ethnic background, and class), and all organizations agree that the passage of this law will aid in their judicial battles. The purpose of my study is to see if there is a common sentiment amongst these organizations, and individuals within these organizations, as to the obstacles or facilitating factors to judicial access in Chile – and in this regard, there are many similarities.

The first two similarities amongst the social movement organizations' perceptions of using the judicial system are that resources and a basic law protecting sexual minorities are crucial to judicial success. Many agree that Karen Atala's case made it to the Supreme Court and continued to move to international courts because Atala is a judge and has both the financial resources necessary to fight her judicial battle and the knowledge to use her financial resources (Hernandez 2007, Jimenez 2007, Atala 2007). Legal knowledge and money for lawyers are crucial for judicial success, especially in a country that does not have a Defensor del Pueblo (Hernandez 2007). Beyond financial and legal resources,[16] organizations agree that a firm law protecting sexual minorities would legally justify discrimination claims – which may not only affect judicial success but also access to the system. Neither of these social movement organizations' (SMOs) criticisms is surprising, in fact, resources are critical as "mobilizing structures" in social movement theory and legal standing is a critical variable for "political opportunity". However, some of the SMOs do have

[16] These would often be included as variables in "mobilizing structures".

financial and legal resources, especially MOVILH, and there is the "recurso de proteción" that provides some standing for all minority groups in Chile. If this is the case, why are there so few judicial cases involving gay and lesbian social movement organization? My research finds that these groups also perceive seeking judicial redress as a fearsome, and even dangerous, route to gaining rights in Chile.

Through open-ended interviews with leading actors within the gay and lesbian social movement organizations, it became apparent that cultural factors affect their perception of using the judicial system – hence limiting their level of access to the system. It should be noted that the questions were pointedly open-ended to allow the interviewees to give their opinions and perceptions without being pushed in any direction. I never asked if they were afraid or fearful – to the point that the words "culture" and "perception" were not used by the interviewer at all. However, the perceptions of fear came up quite regularly.

Toly Hernandéz, president of 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. However, she feels that there has been no significant gain in rights and that there probably will not be as long as "heterosexuality is the dominant cultural construction"(Hernandez 2007). Further, 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…". While she agrees that the Atala case has modified these issues slightly, she contends that the fight for rights is still in its infancy in Chile, despite the

push from social movement organizations since the early 1990s. Interestingly, she focuses on the social stigma associated with being gay or lesbian as an obstacle to bringing rights cases to court. Even a large number of gay and lesbian Chileans who are actively involved in social movement organizations often choose to stay in the closet when it comes to their family life (Nunoz – Gonzalez 2007). While she advocates the passage of the anti-discrimination bill as a mechanism in which the GLBT movement can better defend their constitutional rights, she also focuses significantly on the indirect role societies' opinions/cultural attitudes toward gays and lesbians have on many gays and lesbians who choose not to bring rights cases to court.

Juan Pablo Sutherland, an author who writes on gay themes and an active member of the Communist movement in the 1980s, describes his involvement as a leader within the movement as bitter-sweet. Although the Communist movement was supported by many gays and lesbians, they could not identify themselves publicly since "you couldn't distract from the movement when the fight is against the dictator" (Sutherland 2007). He claims things have not changed much since – "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 activists who were interviewed 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 stood out, however, on his opinion of obstacles to judicial access – Rolando Jimenez.

Rolando Jimenez is one of the most vocal gay and lesbian activists in all of Chile, and perhaps even all of South America. As president of MOVILH, he and his organization have been involved in almost every gay and lesbian legal/judicial battle. He points to MOVILH's recognition from the United Nations Development Program as one of the top four civil society organizations with political power in Chile and the organization's huge push to re-open the Devine case as evidence of their presence in Chilean society. He believes changes have happened in Chile quite quickly and dramatically – even more quickly than Argentina, where civil unions are legal in certain areas (Jimenez 2007). "It took Argentina 25 years to get to a point where civil unions are accepted in a few areas, it has been 15 years in Chile and there may be a civil union law for the entire country soon [perhaps as soon as 2009 in his opinion]" (Jimenez 2007). Jimenez certainly has a much more optimistic/idealistic viewpoint of the current Chilean environment in which gay and lesbian organizations maneuver in order to achieve their rights claims.

He points to the penal reforms of the 2000s as the turning point in judicial behavior. Before the reforms, he claims that most cases were not investigated, many criminals were never punished, and there was "absolute indifference for victim rights". Ironically, besides his discussion on the importance of the provision of a Public Defender, he spends the majority of his time talking very little about structural changes with the penal reforms and more about a shift from the old guard to a newer generation of Chileans who now have decision-making power. He goes on to explain that the justices and lawyers are much younger (many under the age of 50) and there are more women involved in the judicial system now. His optimism is backed by the

fact that he never once mentioned fear or intimidation, in his interview, as an obstacle to gaining judicial access in Chile. Considering his large role in gaining legal rights over the last 15 years, his positive 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 movement. However, Jimenez's own published report concerning gay and lesbian usage of the legal system is less optimistic about the role of the judicial branch, and he points to judicial prejudices as a hindering factor for any gay or lesbian to bring a case to court (Jimenez 2005, 9).

In MOVILH's report to the first Inter-American Forum on Access to Justice, organized by the United Nation Development Program, Jimenez states that the Chilean Supreme Court is the "most homophobic institution in the country" (Jimenez 2005: 9). He explains instances of judicial prejudice in each of the three court cases evaluated in this research. First, he blames homophobic justices for not exhausting all investigative routes in the Devine Case, and argues that the ten year battle to re-open the case was blocked due to homophobia. Second, he argues that while the justices on the Supreme Court who ruled against Daniel Calvo claimed their decision was not based on homophobia, their statements to the media prove their personal prejudices (Jimenez 2005: 11). Finally, with regard to the Atala Case, Jimenez argues that the Supreme Court's decision to remove custody was based on personal opinions of the justices over scientific facts (Jimenez 2005: 13). 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" (Jimenez 2005: 6).

He finishes his report with an essence of optimism in that he believes things are slowly changing, but he roots the failures of all three court cases in judicial homophobia. This judicial homophobia certainly has a more direct impact on the process and outcome of judicial cases than general societal perceptions, however individual justices' homophobia seems to have a minimal effect on access to the system. Jimenez 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. It is the perceptions of members within, and represented by, the social movement organizations that seems to directly affect their access to the system – even though there are structural openings for them.

There is an agreement within the larger Chilean gay and lesbian social movement that things are becoming better for sexual minorities: penal code 373 is rarely used anymore to detain sexual minorities, there is an entire gay district in the center of Santiago, and there is even a popular soap opera character who is homosexual (Nunez-González 2007). Perceptions of the degree to which things are changing, however, differ between social movement organizations and individuals within those organizations. Some within MOVILH are optimistic about gaining more legal rights for homosexuals, while many within MUMS are less optimistic about legislative changes anytime soon – yet point to slow societal attitude changes which are more accepting of gay and lesbian lifestyles as a step toward less prejudice. While they do not agree on the future of the Chilean gay and lesbian social movement, there is vast agreement among movement leaders, activists, and scholars

that a perception of "fear" limits gay and lesbian individuals' and gay and lesbian social movement organizations' levels of access to the judicial system.

If a fear of using an institutional avenue to gain rights discourages those who might otherwise use it, then this perception goes beyond a mere mental attitude, it becomes a direct obstacle in achieving rights. Certainly, societal perceptions of specific groups seeking rights can indirectly affect some individuals' attitudes about using the political system to gain those rights. However, it is the perception variable internal to social movements, activists' fear to bring cases to court, that directly limits their level of *de facto* judicial access and strengthens my argument that a more constructivist approach to studying judicial access is needed to better explain judicial access in practice.

## CONCLUSION

Despite the optimism of some within the Chilean gay and lesbian movement, it is obvious that there is still an element of fear to bringing cases to the courts. A fear of being "outed" and perhaps losing a job, a fear of being kicked out of certain communities, and a fear of being isolated from loved ones, plays a role in individuals' decision to use the judicial system. Since my work is based on a constructivist argument that the perceptions of those who choose to use, or not use, the judicial system can actually construct a reality of limited access, it becomes important to discuss if the evidence suggests that perceptions of limited access to the judicial

system do indeed lead to limited access – despite having open structural access to the system.

Certainly, fear can limit one from doing a number of things, but the case study of the Chilean judicial system demonstrates that fear can lead to a perception of being a "second-class citizen". Almost all of the publications produced by the social movement organizations and almost all of those interviewed suggest not only that there is a certain amount of fear, but that many cases have not been brought to court for fear of making things worse for those who felt victimized in the first place. While some point to the less than successful outcomes of certain court cases involving gays and lesbians as an excuse to use alternative avenues to gain rights (ie. the prejudices of justices), most of the arguments made concerning fear of using the judicial system for gays and lesbians involves the repercussions of bringing a case to court in the first place, regardless of anticipated outcome.

Unlike many other minority groups, gays and lesbians have an option of "staying in the closet". Certainly, there have been many minority groups who have feared using a certain political avenue. Even within the U.S., the Civil Rights Movement faced an enormous quantity of obstacles to the system based on prejudices and perceptions of others – especially the perceptions of those making direct decisions such as justices and politicians. However, one cannot hide being black, indigenous, elderly, or female (to name a few minorities). One can hide being gay or lesbian if one so chooses. To some this may sound like an advantage for the gay and lesbian social movement, but I argue that it actually makes the fear of bringing a case to court even greater.

For many human rights organizations representing minority groups, there may be fear of using the political system for many reasons – for example, one may think it is a waste of resources if former decisions indicate that success is unlikely or one may be individually chastised and threatened if he/she stands out as a "leader" or "trouble-maker" by bringing a case to court. What distinguishes the gay and lesbian community from other minority 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 a loss of one's family just for identifying as a minority group. Being able to "hide" one's sexual identity is not an advantage for gaining rights, but rather it magnifies the risks one must take in order to try to gain rights or prove he/she has been wronged.

A perception of limited access creates limited access in practice. Fearing the worst about bringing a case to court - whether it stems from the idea that a favorable ruling is unlikely or because one fears losing one's private life - can lead to inaction, both in civil and criminal courts. Most of those who study access to political systems 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 rights movements who wish to attain enforceable rights. However, the GLBT case study in Chile demonstrates that for certain rights groups, legal/structural access is not enough to achieve full access to the judicial system. A refocused evaluation based on a more constructivist role of perceptions as a variable demonstrates that the judicial access literature may focus too

heavily on legal norms. Despite the argument that negative perceptions can create access barriers for the gay and lesbian movement in Chile, the seemingly optimistic attitude of some within the movements should also be discussed.

To differing extents, many within the gay and lesbian community in Chile have a somewhat positive attitude about the future of gaining rights both through the legislative, executive, and judicial system. With regard to the legislative branch, there is optimism that if the non-discrimination act passes that it will become a major legal doctrine to aid in all different types of civil rights cases. Similarly, many activists and scholars point to changing societal attitudes, albeit a slow change, as an indicator that perhaps there will be less fear in the future when using the political system to gain rights. Michelle Bachelet, the former president of Chile, supported passage of the Non-Discrimination Act, yet many in gay and lesbian social movement feel she made idle promises (Herrera 2006). Regardless, the fact that her platform did include the advancement of sexual minority rights is at least a symbolic step in the right direction. Similarly, even the popular right-wing candidate who won the 2010 Chilean presidential elections – Sebastían Pinera – supported pension and inheritance rights for unmarried couples during his campaign, including gay and lesbian couples (Pinera… 2010: 59). With respect to the judicial branch, there is also optimism that things are slowly starting to change. This optimism, however, has very little to do with most of the current justices on the Supreme Court and everything to do with cases in the future and the changing demographics of those moving up in the judicial branch – the youth.

Regardless of some optimistic perception within social movement organizations that societal perceptions are slowly starting to change, access to the judicial system for GLBT rights seekers could be hindered until there are dramatic perceptual changes within society. Certainly, GLBT organizations, and those within the GLBT organizations who do not feel intimidated by societal pressures, can seek legal changes through all branches of the government. However, cases brought to the judicial branch, and cases brought to GLBT organizations for representation/support with the judicial process, are highly dependent on individual actors in society bringing these cases to court. Even when those within GLBT organizations do not fear bringing cases to court, judicial access may still be limited by those victims who choose to "stay in the closet".

The GLBT case study is just one rights movement in Chile out of many seeking legal changes. The next chapter evaluates another rights movement - the environmental movement. Similar to the GLBT movement, the environmental movement in Chile attempts to navigate through the judicial system with vague laws protecting the environment that can easily be interpreted by individual justices. There are also many criticisms within the environmental movement that cases often seem to be affected by judicial "abnormalities". Both the GLBT and environmental movement are seeking rights that are often at odds with the status quo, yet the environmental movement differs from the GLBT movement when it comes to societal support.

# CHAPTER 5:

# THE ENVIRONMENTAL MOVEMENT IN CHILE

## INTRODUCTION

The environmental social movement in Chile presents itself as an interesting case when evaluating the impact of perceptions on judicial access. Like the gay and lesbian (GLBT) movement, the environmental movement largely emerged in the late 1980s after the end of the Pinochet Regime. Further, members from within environmental social movement organizations echo many of the same complaints as members from within the GLBT movement: laws are too narrowly or broadly interpretable, justices use their own personal opinions to affect case process/outcome, and, in general, many argue that the environmental social movement organizations are constantly fighting against a societal norm that values economic growth over environmental protection. However, despite the movements' concern that neo-liberal growth strategies will trump environmental action, the environmental movement, unlike the GLBT movement, benefits from supportive societal perceptions.

This chapter begins by introducing the history of the environmental movement in Chile and early judicial cases. This is followed by an evaluation of societal perceptions concerning the environment in Chile, individual justices' perceptions

concerning the environment and environmental law through an analysis of their decisions on major environmental cases, and then activists' own perceptions of their access to the judicial system. This study finds that while justices' personal perceptions surrounding the environment do hinder the success rate of environmental cases and a lack of resources is an obstacle for environmental social movement organizations using the judicial system, the environmental movements' access to the judicial system is not limited by judicial or societal perceptions. Instead of a feeling/perception of having limited access, the environmental movement builds on societal perceptions that a clean and healthy environment is important to bring cases to court. In some instances, public support for environmental efforts increases the environmental movements' access to justice in Chile.

**The Environmental Social Movement in Chile**

The environmental movement in Chile has benefited from new environmental laws and some court victories since the late 1980s, but, like many of its South American neighbors, many of these laws do not translate into implementation. The end of the Pinochet era left a door open that encouraged wide-spread grass-roots demands that had been pent up during the 1980s, but this rise in civil society action soon faded due to the importance placed on neo-liberal economic reforms in a state with continuing vertical and central control (Carruthers 2001; Champarino et al 2008: 362). While many Latin American countries placed restrictions on natural resource exports throughout the 1990s, Chile was the exception (Clapp 1998: 19). Further, Chile has lagged behind some of its neighbors with respect to environmental regulations. Major border development projects between Chile and Argentina operate

under Chilean law due to Chile's more lax environmental laws (Luna et.al. 2004). Further, Chile lacks a Ministerio Público and public prosecutors who focus on environmental law – both have aided Brazilians in using the courts to gain environmental rights (see McAlister 2008). It had been an uphill battle for the environmental rights movement since well before 1990, but the economic success of the neo-liberal model well into the 1990s seemed to close some avenues for the environmental rights movement, even though the country transitioned to a democracy (Dougnac 2007, Pinochet 2007).

This is not to say, however, that the environmental movement in Chile is inactive or has not had major successes over the past twenty years. Organizations such as The National Defense of Flora and Fauna (CODEF), founded in 1964; the Fiscalia de Medioambiente (FIMA), founded in 1997; and Fundación Terram, founded in 1997, are all national leaders in the environmental movement. Together, with the establishment of the National Environmental Commission (CONAMA) in 1994 to assess environmental impact statements (EISs) and numerous small-scale and localized/regional environmental organizations, these organizations have made strides in the executive, judicial and legislative branches. While constantly battling those who benefit economically from lax environmental legislation, the environmental movement in Chile has benefited from increasing public support as environmental conditions have worsened (Pinochet 2007). In a recent public opinion poll, 67.28% of the Chilean population perceived the environmental situation as worsening in the last 5 years and 59.2% of the population believed it is necessary to create a Ministry of the Environment (CONAMA Public Opinion Study 2008).

The dichotomy of interests posed by a population that has benefited over the last 35 years from unrestricted natural resource exports and a population that has seen the environmental damage unrestricted growth has caused makes the environmental movement in Chile an interesting case study when investigating the importance of perceptions. Unlike some of the other social movement organizations trying to gain rights who may have limited access to the judicial system based on negative societal and group perceptions, such as the gay and lesbian movement, the environmental movement has prided itself on garnering wide-spread public support over the last ten years (Pizarro 2007). While this study finds that the public support for the environmental movement in Chile does not have the positive effects for which activists might hope, a growing number of Chileans support environmental improvement and this support may aid in judicial access. On the other hand, unlike many other new social movements in Chile, the environmental movement, and the environmental organizations within the movement, are constantly pitted against large corporations with sizeable amounts of financial resources – perhaps limiting their judicial access as much as social movements that lack public support[17]. This research finds that while environmental social movements who work within the judicial system face many obstacles in winning judicial cases, their ability to bring cases to court, i.e. access to the system, is not as limited as the GLBT movement - which lacks public support.

In order to more fully understand the obstacles and facilitating factors that affect judicial access for the environmental movement, it is important to briefly

[17] It should also be noted that, unlike the GLBT movement, there may be an institutional fix for the environmental movement's lack of access

describe the history of the movement and judicial cases in the past two decades. Once the major historical cases are introduced as a background to the environmental social movements' judicial activity, this study will evaluate the environmental laws and social attitudes surrounding the environmental social movement to act as further background information and to gauge general societal perceptions within which the environmental movement operates.

**Judicial Cases through the 1990s**

As stated above, many environmental judicial cases in Chile base their standing on the constitutional right to a healthy environment. While this "recurso de protección" will be discussed in greater detail when discussing legislation affecting judicial access for environmental organizations, it is important to mention since most of the historical cases impacting environmental rights, and most contemporary cases, have used this constitutional article in court for environmental rights claims. The first use of the writ of protection occurred in 1988 in Martín v. CODELCO-Chile.[18] Mr. Martín and others claimed that the company had pumped minerals, arsenic, and chemicals into the Pacific Ocean, destroying the beach and the ocean's ecosystem. Using sections of article 19 of the Constitution, the victims' lawyers convinced the Supreme Court that CODELCO must be held responsible for their environmental degradation. Similar cases such as Molina and others v. Pacific Mineral Company in 1992, and Silva and others v. Prague Electric Company in 1993 likewise were successful claiming their right to live in a sound environment (Martínez 2001, 40-46).

[18] It should be noted that this first case occurred only 8 years after the 1980 Constitution under the Pinochet Regime. This is not all that surprising considering that the Pinochet Regime was dedicated to establishing the rule of law in order to reinforce its legitimacy and restructure the Chilean political system on more rational and unitary grounds (see Hilbink 2009: 782, 788-789)

By 1997, in Horvath Kiss and others v. the National Environmental Commission, a new "precedent" was set by using the writ of protection. Along with the Movement for the Defense of the Environment, Horvath argued that the Commission passed a resolution that violated the right to a sound environment, claiming that there were many holes in the environmental impact statement that did not address the exploitation of forest lands. The Supreme Court agreed with the plaintiffs, addressing the issue that the plaintiffs did indeed have legal standing under the writ of protection, even if they could not prove direct personal injury (Martínez 2001, 13). The analysis of the United Nations Environmental Program's (UNEP) "Judicial Symposium on Environmental Rights and Sustainable Development: Access to Justice in Latin America" (2000) demonstrates that strides in judicial access had been made by environmental movements in the 1990s due to their use of and the judicial interpretation of the writ of protection. This is not to say, however, that all environmental cases brought to court have won their claims. In fact, the following section, and the section on the three case studies, demonstrates that the struggle for improving environmental laws in Chile is a very lengthy and expensive process that by no means guarantees success for the environmental organizations and citizens bringing these cases to court.

## SOCIETAL PERCEPTIONS OF THE ENVIRONMENT IN CHILE

In order to evaluate the general public's perception of the environmental movement, it is again necessary to investigate not only public opinion surveys

conducted to gauge environmental perceptions, but to also take a more in depth look at environmental laws - since the legislative branch is the most "representative" branch of the government. In addition to using public surveys and evaluating laws affecting the environmental movement, I use international reports on the environment in Chile to garner a basic measurement of public perceptions of both environmental social movements and environmental issues in general. After reviewing a number of public opinion surveys, reading multiple international reports on the environment in Chile, and conducting several interviews, there seems to be a general consensus regarding public perceptions of environmental issues in Chile. While certainly not one of the most salient issues in the eyes of the public, there is a large percentage of the population that supports improving environmental conditions and many have faith in the environmental movement.

In the 2000 World Values survey, 65% of the population surveyed in Chile had confidence in the environmental protection movement (Inglehart et.al. 2000). The responses from the environmental question differ dramatically from the 72% of the population surveyed in Chile who found homosexuality to be only sometimes to never justifiable in the same year (Inglehart et al. 2000). Although the survey is a bit dated and only asks one question concerning the environmental movement, it has been followed by more in-depth public opinion surveys conducted based solely on perceptions toward the environment and the environmental movement.

In a Chilean national public opinion survey conducted in 2003, the population responded that the three problems whose solutions should garner more effort from the government were 1) crime, 2) employment, and 3) health – including environmental

health (National Public Opinion Survey 2003). Many organizations, both public and private, used the results from this national survey to further explore opinions toward the environment. The most notable of these environmental surveys was conducted in 2008 by CONAMA (Comisión Nacional de Medio Ambiente), the government agency set up to monitor environmental impact assessments. In this survey, the most dramatic result was the percentage of citizens who believe that Chile should create an Environmental Ministry (59.7 percent). The demographic that believes this the most was found in the 18-29 year old range (65.6 percent) (Study of Public Opinion, 2008). When asked who was responsible for solving the problem, 32.7 percent responded government, 26.5 percent responded the general public, 15.2 percent responded business, and 6.6 percent responded environmental organizations and NGOs. Further, 67.28 percent of the Chilean population surveyed perceived environmental conditions worsening in the last five years.

Interviews with leaders in prominent Chilean social movement organizations reiterate the public opinion survey results. Rodrigo Pizzaro, president of Fundación Terram**,** claims that due to increasing pollution in Chile, that environment is "at least on the public agenda" and that "increased pollution makes Chilean public opinion more supportive of environmental rights than other Latin American countries" (Pizzaro 2007). Somewhat less optimistically, lawyers for FIMA ( Fiscales del Medio Ambiente )**,** the only legal environmental NGO in Chile, claimed "public opinion has changed in the last decade, but mostly in appearance only" (Pinochet 2007), and "public opinion has changed, but it is not a priority" (Dougnac 2007). The environmental movement has at least some public support, as demonstrated by

increasingly favorable responses on public opinion surveys and the increased public demand for a Ministry of the Environment. However, public support does not always lead to strong environmental action. Most leaders in the environmental movement agree that the environmental movement has slowly been gaining momentum in Chile, but this slow progress is somewhat indicative of Chile's continual emphasis on neo-liberal economic growth over environmental impact. While environmental social movement organizations have aided in and benefited from environmentally-friendly legislation in the past decade, these too have come after lengthy, slow-paced, and highly debated processes.

The gap between the public's concern over environmental improvement and actual environmental action is also reflected in Chilean environmental laws. Even the legalistic Pinochet regime felt forced to respond to public demands for environmental protection, after years of an export based economic system led to obvious environmental destruction, but these early legal steps were not much more than symbolic. In 1980, the regime incorporated environmental legal protection into the constitution and by 1984, went so far as to create a National Commission for Ecology to help create environmental policy (Champarino et. al. 2008: 362-365). Very little environmental protection came out of the 1980 Constitution and the National Commission for Ecology soon faded, yet these two legal steps by the Pinochet regime came earlier than most of South America and marked the beginning of Chilean environmental legislation - providing a starting point for the post-Pinochet government to pass a new set of environmental policies.

Perhaps the most important, and still most highly used law to protect the environment in court, is the continuance of citizens' legal standing on environmental issues into the 1990 Constitution. The writ of protection, (recurso de protección), guarantees fundamental rights for all citizens and provides standing for all citizens to defend these rights. Section 8 of article 19 explicitly states that everyone has the right to live in sound environmental conditions free of contamination - seemingly giving environmental organizations, and all those fighting for healthy environmental conditions, a solid legal standing in court. To date, violation of the writ of protection is still the most frequently used law for defense in court – all of those interviewed from environmental organizations point to section 8 of article 19 as crucial, and many viewed it as the most important Chilean law protecting environmental health (Pinochet 2007, Dougnac 2007, Pizzaro 2007). While a very important constitutional protection, the right to live in a sound environment free of contamination is still a very general means of protecting the environment – broad enough to be easily interpreted to fit each side's argument. Beginning in the early 1990s and continuing today, more detailed environmental laws have been enacted, although there are still few and those that are in place took years upon years before enactment.

Like many other social movements in Chile trying to put their post-industrial concerns on the policy agenda after the Pinochet regime, concerned citizens and organizations started pushing for a national environmental law. This law was realized in 1994 with the passage as the Chilean Environmental Framework Law (law no. 19.3000) also referred to as "the Law" (Ortúzar and Vial 1997). The Law established basic criteria for forming environmental policy, set procedures for national quality

and emission standards, created a "polluter pays" stance on liability, established a 60 day period within which citizens or organizations can discuss a project under the supervision of government, and created regional Consultative Councils to provide members of society a chance to aid in forming environmental policy – two seats are reserved on each Council for environmental social movement organization representatives (Chiamparino et.al. 2008: 365-372). The most important facet of the Law, however, was the establishment of the National Environmental Commission (CONAMA) as a coordinating body with a mandate to guide and coordinate public sector administration of environmental issues (Environmental Management - Chile 1996).

Amongst many educational drives to further environmental awareness, CONAMA was responsible for establishing the environmental impact assessment system, enacted in 1997. The role of CONAMA and the effectiveness of environmental impact assessments (EIAs) have been at the heart of many environmental court cases in the last decade. Environmental impact assessments are the "procedure used to determine whether the environmental impact of a given activity or project is consistent with the applicable legislation" (Ortúzar and Vial 1997) and also require 60 days of public discussion, under the supervision of CONAMA, when the assessment is released (Chiamparino et.al. 2008: 371). The National Environmental Commission is *required* to perform an EIA only for those projects which pose risk to human health, relocation of human communities, significant adverse effect on quantity and quality of renewable resources, and projects with a close proximity to protected areas or resources. All other projects only require

an environmental impact declaration (EID). Environmental impact declarations are much different in that they must set forth only the "type of project and a description of the same, [and] background information indicating that the project complies with environmental laws" (Ortúzar and Vial 1997). Due to the general description of projects requiring a formal EIA, much discretion is left to CONAMA.

While the creation of the Environmental Framework Law addressed many issues that were of concern to the environmental movement, its effectiveness in solving Chile's environmental problems is still highly debated. First, into the mid to late 2000's, eighty percent of projects are passed as declarations in order to side-step public involvement (Chiamparino et.al. 2008: 371). Second, if a project with an EIA is rejected, it can be submitted to CONAMA for a final judgment as an "emergency exit" and also as a means to reassure central control over projects (Chiamparino et.al. 2008: 365). Finally, the Law is very vague when it comes to specific environmental concerns such as forest management and biodiversity (Chiamparino et.al. 2008: 377; Ortúzar and Vial 1997). The loopholes found within the Law once again reflect a legislative branch wanting to appease public opinion while simultaneously keeping central government at the heart of environmental decision-making in order to perpetuate and control a neo-liberal economic model.

Following this model of economic advancement over environmental improvement, the legislature has been active in the economically important mining debate by side-stepping the Chilean Constitution, which states there is to be no mining in border zones important to national security, by ratifying the Mining Integration and Complementation Treaty in 2000. The Mining Integration and

Complementation treaty, which allows investors to explore and exploit mining resources between Chile and Argentina and gives the Chilean courts, with more lenient environmental laws, power to approve border mining activities in Argentina (Luna et.al. 2004) had been challenged in an appeal to the Chilean Constitutional Court to no avail (Estrada 2006). The economic importance of the potential mining income generated from the border region seems to be of the highest priority for the Chilean government – much higher than environmental or even security concerns. Environmental organizations find themselves constantly fighting with a government whose top priority is economic growth, yet despite setbacks such as the Mining Integration Treaty, the environmental movement has pushed through a fairly detailed forestry law.

Perhaps the largest environmental policy success over the last two decades is found in the 15 year fight for a forestry law. The first version of the Native Forest Law was first proposed to Congress in 1992 and was finally passed as legislation in December of 2007 (Rubilar 2008). Largely supported by the Committee for the Defense of Flora and Fauna (CODEFF), the first and longest lasting environmental organization in Chile, the Forest Law (law no. 20.283) supports forest conservation and places the value of trees above mere wood production. The law also grants more public access to management plans, legal protection for regulation, and the creation of the Consejo Consultivo – which will start to address the theme of citizen participation in forestry decisions. Chile has been plagued for decades by decreasing native forests, which are exported for wood products **(**Nef 2008: 253; Clapp 1998: 3**).** A Yale University Index in 2002 highlighted biodiversity protection as the most troubling

deficiency of Chilean environmental management; marking the passage of the Forest Law as at least symbolic of a "fundamental advancement, even though [it is] not a complete solution" (Rubilar 2008). Still in its infancy, it is difficult to determine the effectiveness the Forestry Law will have on actual management practices; however, it does represent the growing public insistence that management plans incorporate more environmental concerns.

While international organizations have not taken a strong proactive role in impacting Chilean environmental policy, many social movement organizations have used international reports (for example see Greenpeace Chile 2005, Yale Center for Environmental Law 2002) to demonstrate the need for policy change. Similarly, lobbyists and concerned citizens alike pointed to the fact that Chile has signed all major international agreements on the environment since the Stockholm Conference in 1972 (Chiamparino et.al. 2008: 372) as an aid in pushing for strong environmental policies. The impact of the newest environmental policy (the Forest Law) is still yet to be determined. Despite this lack of knowledge on policy impact, the results from public opinion polls, the slow change toward environmentally-focused legislation, and the symbolic signing of international environmental agreements all support the claim that the public is concerned about environmental conditions and that the government is responding to these concerns. These opinions and laws do not necessarily point to environmental improvement nor do they address the role of the court in environmental decision-making. Departing from the general argument that the public does view environmental improvement as an important issue in Chile, the next two sections will explore the perceptions of social movement organizations and

the perceptions of justices involved with environmental cases in order to gauge whether or not these perceptions influence judicial access for environmental organizations.

## INDIVIDUAL JUSTICES' PERCPETIONS THROUGH THE ANALYSIS OF THREE MAJOR COURT CASES

While the section on societal perceptions explores a more generalized conception of the environmental movement, the section on judicial perceptions will specifically concentrate on the Pascua Lama, Alerce, and Trillium cases. Due to the somewhat controversial nature of environmental judicial cases in Chile – considering these cases are often pitting the environment against development - court decisions and judicial statements surrounding three major court cases are evaluated, instead of interview evidence from justices, to determine if judicial decisions are driven by personal perceptions more than their "neutral" position within the government would suggest. The decisions made by individual justices certainly impact all judicial cases. In many instances, an individual justice or a small group of justices declare whether or not a case is admissible to court, they decide when cases will be heard and what evidence can be presented, and many of those interviewed from social movement organizations believe that justices rely on their own perceptions of a case when interpreting laws.

The three case studies discussed here were chosen for multiple reasons. First, all three cases were mentioned by multiple interviewees as being some of the most

important judicial decisions for the environmental movement (Espejo 2007, Pizarro 2007, Pinochet 2007, Dougnac 2007). Second, all three of these cases address what many consider to be the most critical environmental problems needing to be solved in Chile – forestry and mining policy. Third, the three cases chosen are representative of many of the judicial arguments used in environmental cases – such as battles over EIS statements and constitutional rights. It should be noted that the analysis of the three "cases" is an analysis of the process surrounding major cases, and in some instances I will discuss multiple judicial decisions over time surrounding one case.

Most environmental judicial cases in Chile rest on the constitutional right to a safe and healthy environment – found in both the 1980 and 1990 Constitutions. As will be seen with the three case studies, however, environmental legal battles in Chile do not rest solely on a constitutional right to a healthy environment; often, environmental cases rest on the role of government organizations in environmental decision-making and on other Constitutional rights violations such as freedom of information, freedom of expression, and the right to judicial protection (Justice Initiative 2006, Order of the Inter-American Court, 2006: 1). This case study analysis finds that judicial perceptions certainly affect the process and outcome of environmental cases, and many international court hearings have agreed that judicial decisions in Chile are suspect (Justice Initiative 2006; Order of the Inter-American Court 2006: 27, 38-39; Carlos Barona Bray v. Chile 2007). Even though justices may affect the case outcome, which could indirectly "intimidate" organizations from using the judicial system again, this study finds, through investigating judicial statements on three environmental case studies and using interview data collected from members

of environmental social movement organizations, little evidence to support the claim that judicial perceptions affect the environmental movements' access to justice.

**Pascua Lama – Mining, Environmental Impact Statements, and Recurso de Protección**

The judicial case that was most frequently brought up by those interviewed is the judicial process that has stalled the Pascua Lama project. Pascua Lama is an open-pit mining project of gold, silver, copper, and other minerals that straddles the Chile/Argentina border – owned by Toronto-based Barrick Gold. A detailed legal investigation of Barrick Gold in Chile claims that Barrick sailed through many hoops, thanks to legislation under Pinochet, in order to continue their environmentally damaging mining practices (Luna et.al 2004). When Barrick Gold wanted to explore mining deposits at the Chilean/Argentine border in the mid to late 1990s, they were faced with a dilemma – the Chilean Constitutional Court had ruled previously that there would be no mining in border zones since it poses a risk to national security (Luna et.al 2004). This obstacle was soon bypassed with the adoption of the Mining Integration and Complementation Treaty by both Chile and Argentina in 2000 (Luna et.al 2004, Estrada 2006, www.cochilco.cl). In 2000, an appeal was filed with the Chilean Constitutional Court to rule the treaty unconstitutional, but nothing came of the lawsuit and the National Environmental Commission (CONAMA) issued the final approval of the project in June of 2006 (Wolfe 2006:3).

The judicial fight over the constitutionality of the Pascua Lama project, however, is only half of the legal battle surrounding the controversial project. The

mining treaty between Chile and Argentina neatly side-stepped the environmental issue by stating it is up to each to decide which environmental laws to follow in issuing an approval on the project. Since Chilean environmental laws are more lax than the Argentine environmental laws, the project is managed based on Chilean law. Further, the treaty also gives the Chilean Courts power to approve mining activities in that border region of Argentina (Luna et.al. 2004). This is problematic for social movement organizations since Chile is more centrally controlled and the public voice is often superseded by the government when dealing with EISs (Chiamparino et.al. 2008: 364-365).

In the Pascua Lama case, the original EIS conducted by Barrick Gold never mentioned an important part of their initial plan - transplanting three glaciers in order to gain access to a vast amount of mineral deposits beneath them (Luna et.al. 2004, Estrada 2005). It wasn't until farmers in the Huasco Valley warned CONAMA of the plan that Barrick was forced to scrap their initial plans of moving the glaciers due to the public pressure (Estrada 2005). Although the project has been approved by both Chile and Argentina, the construction has been slowed by those protesting that the plan still includes moving 20 hectares of ice while simultaneously releasing cyanide, sulfuric acid and mercury into the water supply (Estrada 2005). Barrick Gold contends that the project is environmentally friendly and will create 5,500 jobs and directly invest $60 million in local infrastructure. In May of 2009, Barrick Gold finally announced that they "received key construction permits [and had] satisfactorily resolved outstanding fiscal matters with the governments of Chile and Argentina" (barrack.com/global operations 2009). While those bringing cases to

court certainly proved to be an obstacle for Barrick Gold and may have forced the company to remove one of the environmentally damaging plans, the construction of the project is currently under way – bypassing almost all cries of recurso de protección violations.

The only major criticism involved with the Pascua Lama cases was the judicial decision to not question the Constitutionality of the Chile and Argentina Mining Integration and Complementation Treaty, which was ratified in 2000. An appeal was filed with the Chilean Constitutional Court stating that the signature of the treaty, which allowed for investors to explore and exploit mineral deposits between the two countries, violated sovereignty laws. A detailed legal investigation in "The Exile of the Condor" concludes that "The Constitution clearly states that absolutely no mining concessions shall be granted for any deposit situated in border zones considered important to national security". Similarly the researchers emphasize that "no non-Chilean person or company can be granted mining rights within a 10-km buffer zone along the entire Chilean border, and that includes Argentineans, Canadians, U.S. citizens or Australians." (Luna et. al. 2004 as cited by Gonzalez 2006: 2).

The investigation's main criticism was Congress' decision to ratify the treaty as basic law (requiring a simple majority) instead of a constitutional law (requiring two-thirds of both houses of Congress). In the case of Pascua Lama, many blame Congress more so than the judiciary, but there is still heavy criticism over the judicial branches' decision of non-intervention (Estrada 2006). Certainly, the judicial branch's decision of non-intervention could be seen as suspect, but it was not legally

required of the judicial branch and therefore not deemed by this study as being unduly influenced by individual justices personal perceptions. In fact, the Pascua Lama case study investigation does not find judicial perceptions to be at the heart of decisions made in this particular case, nor does it find that individual justices' perceptions affected the environmental movements' access.

However, the most controversial environmental judicial cases in Chile certainly revolve around those which accuse the government of being part of the problem – usually involving access to information or EIS statements. As will be seen with the two forestry cases, there are many more instances of judicial perceptions affecting judicial processes and procedures than found in the Pascua Lama case, such as individual justices' placement on cases and the Supreme Court making judicial decisions that affect lower courts' decisions in one of the cases. The next two case studies not only demonstrate the significant role of the judiciary in environmental rights but also demonstrate that the judiciary and justices' perceptions of environmental rights can act as an obstacle for environmental organizations using the judicial system.

**Alerce Case – Forestry and Freedom of Expression**

Perhaps the most well-known environmental judicial struggle in Chile is over the Alerce forests. Often compared to the majestic redwoods of California, the alerce tree reaches more than 150 feet in length and 13 feet in diameter. This native Chilean tree can live to be 3600 years or more and contains resin, which resists decomposition – making it ideal for exterior construction (Ancient Forest Intl. 2009). While only an

estimated 15% of original alerce forests remain in Chile, it is also the most protected tree species in the country. In 1976, the Chilean government designated the alerce as a national monument and outlawed the cutting of live trees (Clapp 1998, Ancient Forest Intl. 2009). Later that year, the International Convention on International Trade and Endangered Species (CITES, Appendix 1) prohibited the International sale of alerce products. Given its special designation and majestic beauty, protection of the alerce forests have become the focus of major environmental organizations such as Fundación Terram, Greenpeace, and the Southern Environmental Center (Castelli 2004, Barona Bray v. Chile 2007: 46). While the alerce is a protected species, estimates claim that illegal poaching of the trees from the mid-1990s to mid-2000s garnered about $150 million (Atwool 2004). Even worse, there have been many allegations that the Chilean state's National Forestry Corporation (CONAF), responsible for implementing forestry policy, may be aiding poaching "gangs" (Atwool 2004).

The first major legal battle over the protection of the alerce tree was not based on the constitutional right to a healthy environment, rather, the case involves the role of CONAF. In January of 2004, a Santiago appeals court sided with the plaintiff, landowner Jose Comandary, after he accused CONAF of "withholding information on their activity in Region X" (where most alerce forests are located). The ruling stated CONAF's silence indicated that CONAF "has not carried out any resolution to construct an investigation into illegal cutting of alerce" (Attwool 2004). While the ruling was favorable to those protecting the alerce and the plaintiff viewed the ruling

as a moral victory (Attwool 2004), no immediate implementation change occurred within CONAF.

Further, even this small victory for the land owner, who wanted CONAF to remove up to 40 illegal squatters from his land, was almost tarnished by suspect judicial activity. Halfway through the hearings, the investigating judge was replaced by the father of a CONAF attorney. Massive protests eventually led to his removal, but the very unusual decision to place the judge on the case in the first place left many environmental organizations suspicious of "judicial interests" (Pinochet 2007; Atwooll 2004). Later that same year, CONAF was involved in another judicial case involving the alerce in which CONAF benefited from the decision.

The second major legal battle over alerce protection involved citizens' rights to freedom of expression. In 2004, Carlos Barona Bray, a lawyer, publicly accused Senator Sergio Paez of facilitating illegal trafficking of the alerce by teaming up with illegal poachers and CONAF to re-label the trees to ship internationally. Worth an estimated tens-of-thousands per tree on the market (Castelli 2004), he accused Paez of using this black market money to fund his campaign. After these allegations, Judge Rosa Munoz ordered the arrest of CONAF director Carlos Weber for his alleged involvement. Weber was later released due to lack of evidence and pressure from government officials, and Justice Munoz dropped the case due to death threats (Castelli 2004).

The scandal was further escalated when Senator Paez took Barona Bray to court – and the "whistle blower [was] cited with slander" (Castelli 2004). On March

4 2005, the Inter-American Commission of Human Rights (IACHR) received a petition against the state of Chile, filed by public interest and the Human Rights Clinic at the University of Diego Portales on behalf of Mr. Barona. The petition stated that the criminal prosecution of the statement made by Mr. Barona denied him his freedom of expression - violating Articles 1(1), 13, and 24 of the American Convention of Human Rights. The Chilean state argued the petition was inadmissible because it was filed after the 6 month period allowed[19], the international Commission disagreed with the state and admitted the petition (Barona Bray v. Chile 2007).

Domestically, Borona Bray tried to have the decision nullified in an appeal, but the Chilean Supreme Court denied the appeal in September of 2004 stating that the conviction "cannot be appealed and domestic remedies [had] been exhausted" (decision of court of Santiago 2004: 36). Currently, the case is still pending at the international level, but domestically the conviction stands since "greater seriousness was required" of Mr. Barona Bray since he is a lawyer (decision of the court of guarantee, Puerto Montt). As with the Pascua Lama case, the alerce cases demonstrate that the fight to preserve the alerce is somewhat bitter-sweet. Although rulings have sided with the plaintiffs when accusing CONAF of purposefully ignoring its requirements to protect the alerce, no change occurred within CONAF. Further, while technically a slander conviction, it appears that the judicial branch has more recently sided with government officials over environmentalists.

It is this later judicial case involving the Alerce forests which involves many judicial irregularities – and one of these irregularities affecting case process and

[19] By a few days

outcome is a result of judicial percpetions . After Barona's initial accusation of illegal activity, Judge Rosa Munoz ordered the arrest of Carlos Weber, CONAF director of region X, but Weber was later released due to a lack of evidence and pressure from the Chilean Minister of Agriculture, Jaime Campos, and the Minister of the Interior, Jose Miguel Insulza. Certainly, a case cannot continue if there is a lack of evidence against the accused, however, the fact that death threats eventually led Judge Munoz to drop the case altogether is yet another "irregularity" in the judicial process (Castelli 2004).

In the decision *against* Barona, Judge Patricio Rondura declared "Barona's accusations were the fruit of his personal opinion and were not based on documents" and since Barona is a lawyer his comments are "taken more seriously by the media" (Castelli 2004). In an interview with La Tercera (a widely-read Chilean newspaper), Rondura stated "one cannot sacrifice a person's honor on simple rumors, because that is neither reliable nor responsible" (Castelli 2004). This rationale is also found in the decision of the Court of Gaurantee, Puerto Montt , stating that " it appears disproportionate to this court to sacrifice someone's right to honor to another's freedom of expression when the assertions do not have the support claimed ( Decision of Court 2004, ID #0410008047-3: 46). When Barona tried to nullify the decision through the Chilean Supreme Court, the appeal was denied because "domestic remedies [had] been exhausted" (Carlos Barona Bray v. Chile 2007: 36).While the Chilean Constitution does guarantee freedom of expression, it does not guarantee the right to "honor" within the Articles. In this specific instance, it does appear that judicial perceptions affected the case process and outcome. The Inter-American

Commission on Human Rights agreed that the ruling was suspect and agreed to receive the international petition filed by Mr. Barona and the Human Rights clinic at Diego Portales University in late 2007 – an international decision has yet to be made. While the Barona case is still in limbo at the international level, the Inter-American Court of Human Rights has ruled on the similar freedom of expression case presented to them in the Trillium case.

**Trillium – Freedom of Information and Right to Judicial Protection**

The case against Trillium Ltd. (a forestry company based in the U.S.) somewhat resembles the alerce case in that it began as a request for information. The executive director of a large environmental organization, Claude Reyes of Fundación Terram, requested the environmental record of Trillium from the Chilean Foreign Investment Committee and was denied this information (Justice Initiative 2006). Trillium was in the process of planning the massive Condor River logging project in Southern Chile, and Reyes believed he and Fundación Terram had a constitutional right to gather information about the U.S. company.

Once Reyes was denied access to information, he filed an application for protection (of his constitutional rights) before the Santiago Court of Appeals on July 27, 1998 – stating that the government's denial of the information was a violation of Article 19 (12) of the Chilean Constitution (Order of the Inter-American Court 2006: 26). Article 20 of the Chilean Constitution regulates the application for protection of rights, which can be filed by any individual to a court of appeal when "owning to arbitrary or illegal acts or omissions he suffers denial of, interference with, or threat

to the legitimate exercise of his rights". On July 29, 1998 the Santiago Court of Appeals delivered their ruling and deemed the application of protection inadmissible because they viewed the application to be "clearly without grounds" (Order of the Inter-American Court 2006: 27). On August 18, 1998 the Supreme Court also declared his remedy of complaint (asking the appeals court to reconsider) inadmissible as well.

Reyes took his case to the Inter-American Commission and the Court of Human Rights, which found Chile in violation of Article 13 ( freedom of thought and expression) and Article 25 (right to judicial protection) because Mr. Reyes "was refused information and [was] not granted an effective judicial remedy" (Order of the Inter-American Court 2006: 2). Due to public protests over the case, Trillium finally abandoned their plans. The outcome of the judicial process was positive for Mr Reyes and Terram, but only because public outcry blocked the forestry project[20]. The role of the Chilean judicial system in the process was highly criticized internationally for their role in the case - or lack of role in the case. It is this violation of judicial protection that questions the motives of the justices involved with the case.

According to the Inter-American Court ruling, when Reyes was refused his right to public information he filed an application for protection (of his constitutional rights) before the Santiago Court of Appeals - which is allowed under Article 19(12) of the Chilean Constitution. On July 29, 1998, the Santiago Court delivered the ruling that the application for protection was inadmissible because "from the facts

[20] It should be noted that these protests are viewed by many in environmental social movement organizations as "public support" and is addressed in the following section on activists' perceptions.

described, and from the background information attached to the application…it is clearly without grounds" (Order of the Inter-American Court 2007: 27). The ruling did not contain any other justifications beside the one indicated above and the mention of a unanimous Supreme Court decision published only one month prior on June 9, 1998. This Supreme Court decision states "if the presentation is time-barred or suffers from a *clear lack of justification* it shall declare it inadmissible by a summary decision which shall not be susceptible to any type of appeal (Decision of the Supreme Court of Chile 1998: 1049). On August 18, 1998 the Supreme Court ruled the remedy of complaint, filed to force the appeals court to reconsider, also inadmissible.

The decision of the Appeals Court to deny Mr. Reyes (representing Fundación Terram) of his constitutional right to public information, the timing of the Supreme Court decision and the use of this decision by the Appeals Court to deny Mr. Reyes of his rights one month later are all suspect actions that led to the international decision declaring Chile in violation of international (as well as their own domestic) laws. While the Alerce case outcome brought little change to the structuring of CONAF, the Trillium case did spark public outrage and an international decision – forcing the project to stop. Regardless of the difference in outcome, both forestry cases evaluated demonstrate that judicial irregularities and suspect judicial rationales for decisions affected the cases negatively. The role of judicial perceptions in the cases involved with Pascua Lama seem to be less evident than the forestry cases – although one can still find questionable judicial decisions in the mining case.

It is these judicial irregularities that have proven to be an obstacle for those seeking environmental rights, and one of the judicial decisions in the Barona case was directly affected by individual justices' perceptions that the right to "honor" was more important than the constitutional right to freedom of expression . The evidence presented by tracing the three cases and individual justices' perceptions and opinions on the case studies demonstrates that individual justices can affect both the process and, at times, the outcome of environmental decisions. The effect of individual justices' perceptions cannot be fully evaluated until there is an understanding of the social movements' perceptions about their access to justice. The next section evaluates the perceptions of those within environmental social movement organizations to determine if they feel that their access is limited due to negative judicial or societal perceptions.

## ACTIVISTS' PERCEPTIONS WITHIN THE SOCIAL MOVEMENT ORGANIZATIONS

Public concern in Chile, more often than not, sides with the environmental movement. Societal and individual justices' perceptions may aid or hinder social movements' access to the judicial system, but a much more in depth analysis of environmental judicial access can be gained by exploring the perceptions of those who work on environmental issues and fight for environmental rights on a daily basis. Through many interviews and, where available, Chilean social movement organizations' publications, this section aims to answer two questions. First, do the

perceptions of activists involved with environmental rights match the perceptions of the Chilean public? Second, do those working within social movement organizations perceive judicial access as limited? If those within the movement feel limited due to governmental pressure, fear, or a feeling of hopelessness, a somewhat favorable public opinion of the environment may not influence the degree of judicial access for environmental organizations. I find that while almost all those interviewed see a disconnect between public opinion and actual environmental change, none of those interviewed feel "afraid" to bring a case to court. Most complaints concerning the use of the judiciary for environmental groups involve the amount of resources it takes to fight large corporations - although many cite the fuzziness of environmental laws, conservative justices' influence on environmental impact statement (EIS) cases, and the lack of an Environmental Ministry as barriers to gaining legal environmental rights as well.

In Chile, there is only one legally-focused environmental NGO, the Fiscalia del Medioambiente (FIMA). The Fiscalia de Medioambiente was established in 1998 and is headed by Fernando Dougnac, who some proclaim as the "best environmental lawyer in Chile" (Pinochet 2007). Jose Pinochet, one of just a few lawyers working for FIMA, states that most of the legal battles involve challenging EISs that are approved by CONAMA since "most EISs are focused more for complying with international commercial standards - not for environmental protection" (Pinochet 2007). For him, the largest obstacle standing in the way of using the judicial system is the money that is needed for fighting large corporations who benefit from the lax EIS standards. Beyond financial resources, however, he cites the fact that less than

10% of judges have any environmental experience – those who do become environmental lawyers work for corporations, not for environmental groups. Finally, he perceives the environment as a "generational issue". Justices serving long terms inhibit fair usage for environmental groups due to their "conservative nature" (Pinochet 2007).

Fernando Dougnac, the president of FIMA and an active environmental lawyer since 1984, agrees with Pinochet that a lack of financial resources limits judicial use for environmental social movement organizations. In addition, Dougnac believes that access for environmental social movement organizations "fundamentally lies in the recurso de protección because it is constitutional" (Dougnac 2007). He extends Pinochets' perception that the environment is a generational issue by stating "disgracefully, the Supreme Court ….has made unconstitutional decisions…by allowing tribunals to use their opinion without knowing [about the environment], making their decisions completely arbitrary" (Dougnac 2007). To him, "the biggest judicial crisis lies within tribunals and individual justices who interpret the recurso however they want, and somehow they are ignoring the importance of the environment in Chile…Chile needs newer justices" (Dougnac 2007). He certainly sees administration problems (such as the environment being "pushed off" onto non-environmental agencies) and civil code problems (such as administrative justices not having any environmental law experience) as hindering use of the judicial system as well, but points mostly toward financial resources and the fact that most justices are conservative and more sympathetic to economic growth then they are to protecting

the environment as the largest obstacles to environmental social movements' judicial success.

Dougnac claims that there is a much improved "environmental consciousness" within the last twenty years and that the "environment's biggest force, like the rest of the world, is sympathy from citizens". While the environment "does not have much political or economic power, it has the power of the people" (Dougnac 2007). He claims that people think that environmental groups and fiscales are a public service… "once *their* river is contaminated , they become upset that no environmental groups are acting". He wants to see legal changes that give money to environmental groups who are always going up against corporations, especially since environmental groups in the U.S. give a majority of their financial support to less-developed countries.

While the lawyers of FIMA dedicate their time and energy to environmental law cases, they are not the only organization that works within the judicial system to gain environmental rights. However, many of the environmental social movement organizations often opt to leave the judicial cases to the fiscales, while instead focusing on issues such as public access rights and public awareness. Two of the largest, and most influential, environmental social movement organizations are Fundación Terram and CODEFF (the Chilean National Defense for Flora and Fauna). Rodrigo Pizarro, president of Terram, explains that Terram used to have an entire judicial department, but the organization cut the department entirely since it was inefficient and took away too much time and financial resources from the organization – choosing to focus more heavily on the theme of increasing public access to environmental information (Pizarro 2007). Similarly, CODEFF has spent

most of its resources on the legislative side of politics, particularly with their involvement in shaping the Forest Law (Rubilar 2008 CODEFF). This creates an unspoken division of labor between and amongst some environmental organizations in Chile.

Pizarro does admit that "many recurso de protección cases were judicialized in the in the 1990s, so there is an impetus for the government and private organizations to go there [the judicial branch], especially for EIS cases" (Pizarro 2007). However, he also admits that this strategy can be counter-productive because Chileans "should not assume the judiciary is meant to be involved with EIS cases" (Pizarro 2007). The problem, to him, is that "many legislative members interpreted the recurso liberally, but justices are much more conservative…even today" (Pizarro 2007). The removal of the judicial department from such a large environmental organization is certainly indicative of the difficulty in bringing cases to court. According to Pizarro, these obstacles are "too much legal and scientific costs and too much time" (Pizarro 2007) – resources can be better directed elsewhere. Further, there are no precedent-setting cases, so social movement organizations have to spend time and money for each individual case, instead of relying on one important case that may dictate other decisions down the road.[21] For him, time, money, a lack of precedent in civil law, and conservative justices all act as major barriers for Terram to use the judicial system, but he points to FIMA and states that they use the judicial branch quite regularly with some success – such as protecting native forests.

[21] While there have been some "precedent-setting" cases in Chile, such as the provision of environmental legal standing to citizens even if they cannot prove personal environmental damage (established in Hovarth), there is still a sense that since there are no "Erin Brokovich" (Dougnac 2007; Pinochet 2007) cases, the judicial system is too inefficient to use on a regular basis.

Nicolás Espejo, an environmental law professor at University Diego Portales and currently the head of the Diego Portales Center for Human Rights, once again points primarily to the recurso de protección as the major tool used by environmental organizations to defend court cases. He also agrees with almost all of those interviewed that the government "has tended to error on the side of development – they do not have a precautionary attitude toward the environment" (Espejo 2007). Legislatively, the "government needs to revise the EIS process by CONAMA [and] … needs to create a Ministry of the Environment to handle some of these environmental decisions" (Espejo 2007). These changes could dramatically better provide for environmental social movement organizations' access to the judicial system, but Espejo lists examples – such as the Alerce forest case won by FIMA and a few current cases that he feels may have a chance of winning judicial cases using the recurso. For him, the main factors limiting judicial use are financial resources and the fact that the government has established an EIS system that strongly favors development over the environment. "There is always doubt in any scientific study…and it is often hard to prove that, first, development has an environmental effect, and, second, that the environmental effect is affecting people" (Espejo 2007). Espejo, and other environmental activists, argue there are many obstacles to overcome when using the judicial system in Chile, but access to the judicial system is not one of those obstacles.

This section aimed to answer two questions. First, is there a disconnect between societal perceptions of the environmental movement and perceptions from within these movements. Second, do these societal perceptions seem to inhibit

judicial access to environmental movements? All of those interviewed did perceive a large gap between the public's acceptance of the environmental movement and environmental laws; "there is a change in public opinion, but not a change in the law" (Espejo 2007). Also, all those interviewed explain this phenomenon by stating the saliency of economic growth almost always trumps the issue of environmental improvement. Does this disconnect affect judicial access by these environmental organizations? While more public support may certainly aid the environmental social movement in gaining resources to use the judicial system, not one interviewee mentioned the lack of public support as an inhibiting factor to gaining judicial access. In fact, despite the large obstacles of increasing revenue and fighting conservative justices and pro-development environmental legislation, almost all those interviews still view public support as an aid in gaining judicial access. Espejo remarks that "right now, our discussion should be focused on incorporating the environmental minority in Chile and by focusing on the pressure of international influences" (Espejo 2007), and Rodrigo Pizarro points to the fact that the public support for an improved environment has "forced the environment on all political platforms for all serious presidential candidates". Further, many of those interviewed point to the protests and outcries that have ceased development projects over the past decade as evidence that public support "strengthens" the environmental movement and encourages them to bring more cases to court (Espejo 2007, Dougnac 2007, Pinochet 2007).

While members of the movement mentioned the difficult struggle in gaining more environmental rights in Chile, most concentrated their responses to the limits in *using* the judicial system, not *access* to the system. While financial resources, time,

conservative justices, and a lack of transparency in environmental laws may certainly affect access to the system, those interviewed never talked about limits to simply bringing a case to court. They responded to the process of the judicial system, not the initial access to the system. Not a single interviewee mentioned fear, uneasiness, or skepticism about the process of bringing a case to court. In fact, Fernando Dougnac admits that there is a much improved "environmental consciousness" within the last twenty years and that the "environment's biggest force, like the rest of the world, is sympathy from citizens". While the environment "does not have much political or economic power, it has the power of the people" (Dougnac 2007). Certainly, achieving environmental rights in Chile has been an uphill battle, but one that has seen a handful of judicial victories and an increase in public support- which appears to aid in environmental organizations' success when bringing issues public through the judicial system.

## CONCLUSION

In the previous case study on gay and lesbian social movement organizations, I argued that societal perceptions negatively affect activist perceptions concerning their *de facto* access to the judicial system. The negative public attitude toward gays and lesbians led to gay and lesbian individuals and organizations being fearful to bring cases to court. This perception of fear directly limited their access to the judicial system. In the case of the environmental social movement, public opinion strongly supported environmental improvement; and improved environmental legislation,

although it has been a slow and lengthy process, supports this. All of those interviewed thought access to the judicial system was difficult for their organizations and most agreed that using the judicial system, in general, is costly, risky, and sometimes "inefficient"- causing some environmental organizations to drop their legal departments altogether (Pizarro 2007). Given that international court rulings have sided with environmental plaintiffs against the Chilean government for restricting judicial rights, the social movement organizations concerns over using the judicial system are warranted. However, this research not only looks at "if" social movements feel limited access, but also, more importantly, "why" and "to what extent" do social movements feel they have limited access to the judicial system.

This study finds that environmental organizations are not "afraid" to use the judicial system. All of those interviewed pointed to costs, time, uncertainty, a legal system that does not lean on precedence, and "bought" justices as obstacles affecting judicial cases – yet most of those interviewed did not link this directly to limiting their *access*. Those who spoke specifically about access to the judicial system focused on costs and time (resources) as the inhibiting factors.[22] Those interviewed who focused on the importance of judicial perceptions focused much more on negative judicial perceptions affecting outcome, not access. In fact, social movement organizations touted public support as a reason to be proud of bringing environmental cases to court.

To repeat Fernando Dougnac, one of the most influential environmental lawyers in Chile, "the biggest judicial crisis lies within tribunals and individual

[22] Not surprising since money and time limitations are often referred to in "access" literature

justices who interpret the recurso however they want, and somehow they are ignoring the importance of the environment in Chile…Chile needs newer justices" (Dougnac 2007). The biggest obstacle to Mr Dougnac, and almost all other social movement organization leaders and environmental lawyers interviewed, is how the judicial system *interprets* laws already in place. Those involved in environmental judicial cases feel limited by how the *process* and *outcome* are affected by individual justices' perceptions (or justices' personal interpretations of laws). This feeling of being limited by justices' perceptions does not seem to carry over to negatively affecting access to the system. Even though one of the most well-known environmental cases in Chile, Trillium, involved limiting access to the judicial system when the Supreme Court denied protection of Mr. Reyes' constitutional rights to information, it wasn't a focus of concern for those interviewed.

Many things affect the environmental social movements' access to the judicial system in Chile – primarily inadequate resources limit these organizations to choose only a few cases to bring to court. This study finds, however, that the activists perceive only the perceptions of individual justices as affecting their use of the judicial system negatively. Unlike the GLBT case study, societal perceptions aided *de facto* access to the judicial system for these environmental organizations instead of limiting their access. In the Trillium case, public outcry led to the withdrawal of development plans. In a sense, the power of public perceptions was enough to supersede the judicial system. The skepticism in using the judicial system does not mean that environmental social movement organizations lack access to the system, it

just demonstrates their preference to use the legislative branch and public outcry as more efficient means of gaining rights.

The environmental social movement in Chile has gained public support both due to a changing demographic and the realization that 40 years of unrestricted mining, development, and forestry policies has caused a large amount of environmental damage to the country. According to most of those interviewed, a large part of environmental movement's successes in the past 20 years rests on the foundation of public support. In the case of the environmental movement in Chile, public support actually increases their motivation to bring cases to trial – which aids in their *de facto* access to the judicial system. At the same time, inadequate resources and a judicial system that many in the movement perceive to be "biased" limit social movement's use of the judicial system. Perceptions toward the environmental movement in Chile affect access to the judicial system in two ways. First, judicial perceptions and interpretations of laws seem to limit use of the judicial system. Second, social support affects *de facto* judicial access in a positive manner. Based on the evidence provided – it is certain that perceptions have at least some effect on *de facto* judicial access. In the case of Chile, however, there are certain economic and political factors that distinguish it from the rest of Latin America – primarily their pro neo-liberal development stance since the 1970s and their centralized political system.

The next chapter looks at two social movements within Argentina as a means to check my Chilean findings. Argentina is similar to Chile in that it has focused a large amount of time and money in the past decade into judicial reforms, many attempting to increase judicial access, and post-industrial attitudes concerning the

environment and gay and lesbian movements have been increasing over the last two decades. Unlike Chile, Argentina has a decentralized system – and provides more avenues for judicial accessibility. An analysis of these two social movements will explore any similarities or differences amongst perceptions of judicial access between countries, and will help to strengthen and generalize some of the arguments made concerning the importance of studying perceptions when measuring *de facto* judicial access in Chile.

# CHAPTER 6:

# ARGENTINA'S JUDICIAL SYSTEM AND LEVEL OF ACCESS TO IT FOR THE GAY AND LESBIAN AND ENVIRONMENTAL MOVEMENTS

## INTRODUCTION

While the focus of my study on judicial access lies within the comparative study of two social movements within the Chilean judicial system, Chile has a unitary government and a Defensoría del Pueblo that has little jurisdiction in rights cases – both important institutional variables affecting judicial access. Argentina is comparable to Chile in that it has enacted many similar judicial reforms in the name of democratic consolidation over the past decades. Both countries have increased judicial spending dramatically and have made constitutional provisions for strong public ministries and increasing access for marginalized citizens. Further, social perceptions concerning both the environmental and gay and lesbian social movements in Argentina are very similar to results found in Chile[23]. However, with a decentralized government and Defensoría del Pueblo that has constitutional authority to defend and protect human rights, Argentina serves as an appropriate comparative case to not only evaluate the importance of the

[23] This is especially true in the 1990s and early 2000s, although cultural attitudes in Argentina have changed significantly over the past four years concerning the gay and lesbian movement

institutional/*de jure* variables Chile lacks but to also evaluate the Chilean findings concerning activists' perceptions of judicial access.

The methodology in this chapter differs slightly from the methodology used in the Chilean case. Similar to the Chilean case study, I will look at public opinion polls and laws affecting both social movements to establish a sense of societal perceptions of both social movements. I will also use interviews with members of social movement organization to gauge their perceptions of access to the system. Further, since the number of interviewees is less than those in Chile, I will rely more heavily on social movement organizations' literature to measure their perceptions of access as well as review aggregate Supreme Court cases for each movement – since the data is available for Argentina and not Chile. Although the two country case studies differ slightly methodologically, the focus on aggregate cases brought forth by the Defensoría del Pueblo and cases brought forth to the Supreme Court through localities will help determine the importance of these institutional variables on judicial access for the two social movements. In addition, the focus on activist and social perceptions allows me to draw parallels between the Argentine and Chilean case studies.

I begin this chapter by describing the Argentine judicial system and its major judicial reforms affecting access and human rights since the military regime ended its rule in 1983. Second, I look at public opinion studies and laws specifically affecting each social movement to gauge the societal perceptions surrounding each. Next, I evaluate social movement organization literature and interview data to determine if activists within the social movement organizations perceive their access to the judicial system. I conclude by stating that, similar to Chile, perceptions of each group can affect their

access to the judicial system. Access to a decentralized political system seems to enhance judicial access for the environmental movement and legislative access for the gay and lesbian movement. However, this study finds that the Argentine Defensoría del Pueblo does relatively little for the environmental movement in Argentina when it comes to litigation and close to nothing for the gay and lesbian movement

While I will look into the effect of provincial/local laws and attitudes, particularly the city of Buenos Aires, this investigation focuses on court cases brought to the Supreme Court. I chose to only evaluate the federal level of judicial access for a couple of reasons. First, a federal analysis will facilitate comparing variables with Chile's federal system. Second, since the records of Supreme Court decisions are readily available, an analysis of these cases will allow me to look at all of the cases brought forth in a five year period instead of conducting a semi-random study of certain provinces. I collected my cases from multiple data bases, including the database listed by FARN, LexisNexis Argentina, EcoJurist, the Argentine Supreme Court online register, and Patagónic@ Legal and limited my search to cases brought forward between 2002 and 2007. Focusing on this time period allows me to bypass most of the Argentine economic crisis of 2001-2002, which could have interrupted common patterns of judicial access.

## ARGENTINA'S JUDICIAL SYSTEM

Faced with many of the same challenges as the rest of Latin America, Argentines have attempted many judicial reforms to counteract the weak judicial systems controlled by the military government from 1976-1983. After the emergence of a democratic

government in 1983, Argentina looked to be the regional country with the most emphasis on judicial reform. The Raúl Alfonsín government in Argentina made judicial independence its top priority and began democratic rule by promising to prosecute military leaders who had records of human rights violations during military rule. While this proved difficult for the administration due to political instability and inflation, the independence of the judiciary was established (Prillaman 2000, 117-118). However, Alfonsín's neglect of efficiency and access undermined the progress made with judicial independence, and by the end of his term in 1989, public confidence in and approval of the judicial system was much lower than in 1983. Trial delays and court backlogs increased more dramatically than under military rule, and investors noted the lack of "juridic security", a theme that candidate Carlos Menem emphasized throughout his successful campaign to follow Alfonsín as president (Prillaman 2000, 119).

Unlike Alfonsín, Menem prioritized judicial efficiency and access to the system in the early 1990s while undoing many of the progressive steps taken toward judicial independence. Many of the reforms in the early 1990s were a direct result of economic policies calling for a more effective judiciary to enhance investor confidence in the state. The access reforms included increasing the number of public defenders and adding alternative dispute resolution (ADR) and mediation as a means to allow low income families access to the system. Further, constitutional amendments in 1994 recognized new rights and bases of action with regards to legal standing. These amendments not only created the Ministerio Público de la Defensa (public defender) and Defensoría del Pueblo (public ombudsman's office), established to protect and defend public rights, but

also included articles 41, 42[24], and 43, which specifically refer to the environment, consumer protection, and the extension of the amparo (a constitutional remedy to guarantee the inviolability of the rights and guarantees set forth in the constitution) to protect those rights under a freedom of information amendment. These new constitutional provisions resulted in the filing of many lawsuits by citizens acting as "private ombudsmen." In addition to the increase in caseloads, judges and court officials were not well prepared to handle these cases. Despite these drawbacks, the amendments have resulted in a substantial increase in access to the courts for rights groups. Many of these cases have involved filing on behalf of the environment, the rights of the physically challenged to access buildings, and for gay rights (Dakolias et. al. 2002, Legal and Judicial Sector Assessment 2002).

Despite many steps in advancing legal standing, lowering legal costs, and implementing alternative dispute resolution mechanisms, public opinion of the courts remained low in Argentina. Much of this is attributed to Menem's politicization of the courts, stripping independence away from the justices that was granted to them in the 1980s. By 1999, 70% of the public thought that the Argentine judicial system was corrupt and everyone from politicians to the director of the International Monetary Fund agreed that the courts were the weakest link in Argentina's democracy, this figure dropped to an even lower approval rate after the economic collapse in 2001 (Prillaman 2000, 112; Inglehart 2004, E085; Suntheim 2006).

[24] Article 42 and 86 of the Constitution specifically establish the authority of the public ombudsman's office (Defensoría del Pueblo)

Realizing steps must be taken to improve the judicial system in Argentina, a 2001/2002 report by the Ministry of Justice and Human Rights contended that numerous projects were being developed that attempted to strengthen and modernize it, with access to the system being a top priority. In the forward of the report, the authors claim that, "…the focus here is on improving the relationship between the citizenship and the judiciary." The specific activities that began in 2002 were: Access to Justice and Legal Education Manuals, a registry of centers that provide free legal assistance and counseling and Legal Orientation Centers to be established in strategic locations with high levels of public attendance (Gershanik 2002, 6). Similarly, the Judicial Reform Program, which functions within the jurisdiction of the Secretary of Justice and Legislative Affairs, listed access to justice as a top reform priority, ranked above court management, judicial training and education, administrative reforms, legislative reforms, infrastructure, and creation of consensus (Gershanik 2002, 10). Specific reforms currently underway include the further development of mediation as an alternative dispute resolution method, improvement in access to justice for the underprivileged through criminal procedure law reforms, institutional and technical development of the Public Defender's Office, and a focus on increasing the judicial budget (CEJA 2008-2009).

While public confidence in the judicial system was low in Argentina until the mid-2000s, much of the criticism was attributed to the justices' lack of independence and the nepotism that soon followed, as evidenced by a lack in confidence in almost all political institutions post 2001[25]. Argentina has made great strides in the 1990s and 2000s with regards to access to the system. By 2008, when Argentines where asked "to

[25] See the latinobarómetro polls at www.economist.com for large dip in public opinion concerning trust in institutions in 2001 and 2002.

what extent do you believe the courts in Argentina guarantee rights?" and "to what extent do you respect the political institutions in Argentina?", the mean scores for each were 3.67 and 4.22 respectively with 1 being "not at all" and 8 being "a lot" (AmericasBarometer 2008). While still less than half have faith in their judicial system and a little more than half respect their political institutions, this is a vast improvement since the mid-1990s. With the passage of judicial reforms over the past two decades, public confidence in the judicial system is strengthening. This says little, however, about judicial access reforms and the impact of these reforms on levels of judicial access for social movements seeking rights. The next section explores the specific reforms and advancements made at increasing formal access to the judicial system over the past two decades in Argentina.

## PROVISION OF *DE JURE* ACCESS TO JUSTICE

As addressed in chapter three, there are many variables used to measure judicial access, and many South American countries in the 1990s and 2000s paid particular attention to enhancing and expanding these institutional variables through judicial reforms in order to increase access for citizens. I evaluate the same institutional judicial access variables in Argentina as I did in Chile. Specifically I will look at the availability of legal aid, provision of ADR mechanisms, judicial training, an increase in specialized courts, speedier trials, standing to sue, increased spending on the legal system in general, availability of legal education for citizens, the provision of a public defender's office and a public ombudsman, an increase in the number of judges and public defenders, and the

public's perception of improved access and overall confidence in the judicial system. These institutional variables are widely cited as those that affect levels of judicial access the most (see Prillaman 2000, Buchanon 2001, Unger 2002: 196-201, DiPaula 2006: 3-4, Nápoli 2006), making it important to first evaluate Argentina's institutional attempts to increase access to citizens before expanding on my argument that activists' perceptions should also be included when explaining *de facto* judicial access for social movements.

I find that, similar to Chile, Argentina focused on increasing judicial spending, building infrastructure, creating public offices that aid those seeking judicial access, and increasing available funds for public aid. Although I argue that the environmental movement may have more institutional avenues than the gay and lesbian movement, as was also the case in Chile, the overall focus on judicial access reforms in Argentina has certainly opened the judicial system to many citizens. Since most scholars often see resource limitations as one of the largest obstacles in obtaining judicial access – whether it be due to direct costs, such as paying for attorney fees (Prillaman 2000, Moye 2003, Hilson 2002, Di Paula 2006: 3-4) or indirect costs, such as bribes to the judiciary (Prillaman 2000) – I will first evaluate Argentina's court costs and fees and attempts to increase legal aid for citizens to combat these costs before expanding on the other institutional access variables.

**Availability of Legal Aid and Court Costs**

While much of the evaluation on availability of legal aid will be discussed in following sections since it is often "packaged" with other access reform variables, it is important to note that the Argentine legal system involves costs that are often times

higher than similar cases in other countries. Following the English system[26], the losing party is responsible for both sides' attorney fees, court fees, and expert witness testimonies. This, in and of itself, could dissuade some litigants from pursuing cases. While Argentina does have a pro bono system in place that allows a party to litigate without having to pay legal and/or attorney fees, according to a 2002 Legal and Judicial Sector Assessment, this system was in need of major reform (Legal and Judicial Sector Assessment 2002, 59-60). Further, a study conducted by the Fundacíon Ambiental y Recursos Naturales (FARN), claims most state pro bono aid is only for criminal defendants (Di Paola 2006). While judicial fees may be waived, the party is still required to pay for expert testimony in trial and attorneys are not required to provide any type of free legal services, often times resulting in only inexperienced attorneys representing those in financial need. Further, the same report conducted by the FARN in 2006 (Di Paola 2006) consistently found that in both their provincial and federal cases, the variables of court costs and fees negatively affected access to the system.

This being said, with the aid of many NGOs and some governmental services, court costs can be passed on to a larger organization. This is one of the reasons both environmental and GLBT cases rely on social movement organizations to bring cases forward. Since the laws regulating court fees are the same for all plaintiffs, this institutional variable should be equal for both social movements being studied. However, upon evaluating the environmental court cases brought to the Supreme Court over a five year span, there were a startling number of cases (10 of 15) that were brought to the Supreme Court from administration and tax courts. These cases ranged from noise

[26] Although there are currently reform efforts aiming to switch to a mixed or common law system (see CEJA 2008-2009)

pollution and waste removal to access to information and the preservation of public spaces. While a somewhat "strange" pattern for most environmental cases, further research showed that according to most provincial (and the city of Buenos Aires) constitutions, use of these courts is free. Therefore, any case seeking "preventative measures" can use the administration and tax courts, courts that have historically included environmental principles in their resolutions (Di Paula 2006). Therefore, the environmental social movement may have an institutional edge over the GLBT social movement, which primarily uses civil courts, with respect to court fees and using "alternative" courts.

While the environmental movement may have increased access when attempting to avoid court costs, this study finds that this institutional avenue for increased access does not seem to be as "dividing" as it sounds. It takes a large amount of financial resources for both social movements to bring a case to court, making court fees comparatively nominal. Further, the following institutional access variables demonstrate that most access reform efforts in Argentina have attempted to increase judicial access for all citizens – such as the overall spending on the judicial system, the provision of public ombudsmen and defenders, and efforts to increase citizens' legal standing with regards to rights issues.

**Spending on the Legal System**

Judicial spending has increased over the last decade in Argentina (Table 6.1), with emphasis placed on the public ministry. While the spending dropped (in dollars) from 2000 to 2005 in Argentina, this decline in spending is a direct result of the Argentine

economic crisis, and, as part of the restructuring process, the devaluing of the peso from the dollar. Neo-liberal policies curbed hyperinflation and stabilized the Argentine economy in the 1990s, but the system collapsed in the early 2000s as a result of a large debt incurred by Argentina over past decades. This trend in an overall decrease in judicial spending in the early 2000s is found in all of the budgetary allotments for the national and provincial judicial branches. Despite this instable economy in the early 2000s, overall spending on the national budget has been steadily increasing since 2003 (Table 6.1). In fact, total judicial spending increased by 160 percent from 2004-2008 (CEJA 2008-2009).

Argentina operates under a federal system of government, where the city of Buenos Aires operates quite independently from the national and other provincial governments, so it is important to include Buenos Aires' budgets in the analysis (see Table 6.2 for a listing of the city of Buenos Aires' judicial budget and the percentage of the total fiscal budget). One statistic that coincides with a similar country that has made significant strides in judicial reform, Chile, is that the budgetary allotment in 2004[27] for both the city of Buenos Aires and the nation represents .95% of the percentage of the total fiscal budget. These findings are very similar to the findings in Chile, where .95% of the total fiscal budget was spent on the judicial system in 2004 (CEJA – JSCA 2004-2005). This demonstrates that the Argentine government at least places importance on the judicial system when allocating budgets. Despite a decrease in overall judicial spending in Argentina from 2001-2004, the budget per capita allocated to the judicial branch in

[27] The year Argentina started to climb out of recession and also in the middle of 2000-2007 (the time frame in which I evaluate judicial cases)

current dollars from 2004-2005 was $26.40 while the spending per capita in Chile was $14 (see Table 6.3).

This comparison demonstrates that Argentina is at least on par with its neighbor Chile in total judicial spending, which is often praised for its judicial reforms in the last decade when it comes to overall spending allocation. Argentina has the edge in per capita spending, but the most important indicator for access to the judicial system will be better represented by the spending on public ministries and public defenders. The Ministry of Justice and Human Rights has become an increasingly important actor in Argentina with regards to access to justice. The Ministry acts as a liaison between the different branches of government and often helps to update national legislation. Many of the Ministry's tasks include the following:

> -"To cooperate with the judicial branch with regard to comprehensive justice reform;
>
> -To maintain records of property and holdings and criminal background information;
>
> -To participate in the organization, operation, and supervision of prison establishments;
>
> -To set policy, formulate plans and programs, and represent the State before international organizations in matters of human rights and non-discrimination against specific individuals or groups;
>
> -To take part in requests for extradition;
>
> -To take charge of designing laws to promote alternative dispute resolution methods and actions aimed at organizing, registering, and overseeing bodies that provide such service
>
> -To be responsible for the Federal Penitentiary Service" (CEJA Argentina 2005).

Most of the roles given to the Ministry of Justice and Human Rights involve policy formation, international disputes, and prison/correctional institution oversight. With the exception of the 2001-2002 period, the budget for the Ministry has steadily increased (see Table 6.4). In pesos, there is a 74.7 percent increase from 2001-2005, but this number is offset by the 41 percent decrease in spending based on dollar value. However, since 2005, spending on the Ministry has increased in both dollars and pesos (CEJA 2008-2009). Overall, Argentina spends an adequate amount of money on the judicial system and therefore, according to most access scholars, should be able to provide services to its citizens, including improved access. However, while the Ministry has the role to represent the state in international issues concerning human rights, most domestic human rights cases are handled by the Ministerio Público and Defensoría del Pueblo.

**Provision of a Public Defender and Number of Defenders and Judges**

Governed by National Law 24.946, the Argentine Ministerio Público was established in 1994 as part of the Constitutional Reform process. This institution is composed of the Public Prosecutors Office and the Public Defender's Office (JSCA 2005, Argentina). The Attorney General's Office oversees the actions of the Prosecutors Office while the National Defender General holds a similar position that oversees Defenders. The total budgets for the Federal Public Ministry and the Ministry of the Province of Buenos Aires represent prosecutor spending and defense spending (for a list of spending per year from 2001-2005 see Tables 6.5 and 6.6). Similar to other Argentine government spending over the last five years, there is a decrease in spending from 2002-2003, but the numbers increase steadily to date (CEJA 2008-2009).

The total spending for the Public Ministry in 2004 was well over $100,000,000. In comparison, the amount spent to jump start the Defenders Office in Chile was roughly $53,000,000 and the annual spending in Chile for public defense in the 2003 fiscal year was roughly $20,000,000. These numbers are somewhat comparable when measuring per capita spending considering that the population of Chile is less than half that of Argentina. Also worth noting is that the judicial reforms toward a more mixed/oral system may have a significant impact on access to justice and affects the roles of public defenders/prosecutors. This trend seems to be popular in many countries around the world as an attempt to open up access to judicial systems. Oral systems include all actors in the trial whereas a civil law system places heavy emphasis on the role of the judge and investigators. While Argentina has less of a mixed system than other countries transitioning to common law systems, there have been reforms aimed at introducing more oral procedures. The National Criminal Procedure Code (law 23.984), passed in 1992, opened the door for a mixed civil/common law system. However, the Code was more symbolic than reform oriented, and the role of the Public Prosecutors Office remained somewhat formal and less active in actual proceedings, especially in comparison to "activist" prosecutors in countries like Brazil (see McAllister 2008), unless the judge delegated the investigation to the Office (JSCA 2005, Argentina). In 2007, the Advisory Commission for the Reform of Criminal Procedure Law was founded in an effort to push through more civil law reforms. To date, Argentina is strengthening this push and new reform laws seem inevitable – although this applies specifically to criminal law (CEJA 2008-2009).

Beyond spending on public defenders, the number of judges available to the public will also affect access to justice by making more justices "available" to take cases – this, in turn, speeds up the judicial process. According to the 2005 report from the Justice Studies Center of the Americas (CEJA) Argentina had roughly 11.4 judges per 100,000 people while Chile had approximately 5 judges per 100,000 in 2004. These numbers demonstrate a large differential in population-adjusted numbers of judges, where Argentina ranks among this highest in Latin America, third to Costa Rica and Uruguay, and Chile ranks at the bottom of the eighteen country study, below Ecuador and Nicaragua (see Table 6.7 in the appendix for total number of judicial staff by year).

With regard to judicial spending, and the provision of public defenders, prosecutors and judges, Argentina appears to be making yearly progress toward advancing its judicial reforms. However, an actor with an increasingly large role in speaking on behalf of marginalized groups is the Defensoría del Pueblo, a branch of the Ministerio Público (MP). When evaluating the defense of human rights, the provision of a Defensoría del Pueblo may be the most important reform measure when evaluating overall judicial access reforms.

**Defensoría del Pueblo**

The Defensoría del Pueblo (DP) is an independent national ombudsman mandated to investigate human rights abuses, field complaints from citizens and formulate policy (Ungar 2002, 36). Most DPs were established in certain countries in Latin America[28] to supplement the MPs with a more focused agency for human rights, since MPs tended to

[28] List of countries with Defensorías del Pueblo: Argentina, Bolivia, Brazil, Colombia, Ecuador, Guatemala, Mexico, Panama, Paraguay, Peru, Venezuela (Ungar 2002, 38)

be not only overburdened but also too heavily tied to past political obligations. Established under Article 86 of the National Constitution in 1994, most of the DP's actions concentrate on motions of "amparo", which is a general recourse against illegal state or administration action in the name of rights. Further, under Law 24.284 (and modified by Law 24.379) the DP is given the mission of the defense and protection of human rights and guarantees set by the Constitution and laws as well as the role of investigator for abuses made by police, prisons, and the judiciary (Defensor 2008). It is a national organ of the state; however, some provinces have also adopted local DPs as well. In fact, the passage of the national DP gained popularity due to the popularity of some already established DPs at the provincial level (Ungar 2002, 39).

According to the annual reports posted by the Argentine DP (Defensor 2010), from 1994 to 2009, the composition of their complaints were: 14 percent for human rights and justice administration; 13.1 percent for culture; 0.5 percent for the environment; 38.3percent for consumers, public services, economy, finance, and taxes; 33.9 percent for welfare and employment; and 0.20 percent for legal and advisory matters. A further evaluation of the DPs seemingly lack of concentration on environmental and GLBT issues will be addressed in the discussion section of this paper. Regardless of its focus on certain cases over others, it is important to note that Argentina does have an established DP, an institution that many scholars, and international institutions such as the World Bank and International Development Bank, deem to be one of the most vital to strong institutional reforms in the area of rights protection (Ungar 2002, 31; Carrillo-Florez 2007, Payne et.al. 2007). In order for those who are seeking

rights to use these institutions, however, they first must be grated standing to use the courts.

**Standing to Sue**

Perhaps one of the greatest obstacles to accessing the judicial system for both social movements being studied is the provision of a standing to sue on behalf of a group or "the public interest". In Argentina, this provision was granted in the Constitutional amendments of 1994, particularly articles 41, 42, and 43, which specifically refer to the environment, consumer protection, and the extension of the amparo (a constitutional remedy to guarantee the inviolability of the rights and guarantees set forth in the constitution) to protect those rights under a freedom of information amendment. Many of these cases have involved filing on behalf of the environment, the rights of the physically challenged to access buildings, and for gay rights (Dakolias et.al. 2002).

These constitutional provisions have been praised by NGOs, since there were no real collective rights in Argentina until the Constitutional Amendments of 1994 (Sabsay 2003). Almost all instances of environmental rights, even if brought forward by an individual, are inherently collective (Di Paola 2006, Sabsay 2003). Similarly, most of the cases brought by GLBT organizations are communal as well since almost all argue for a group right as opposed to individual rights. So while the environmental movements has direct and explicit standing to sue on behalf of the "environment", GLBT groups have an indirect standing to sue based on their constitutional right to be protected equally under the law – similar to Chile. Providing rights groups judicial standing, increasing total judicial spending, and an adequate provision of public defenders and ombudsmen are all

important when increasing *de jure* judicial access, but just as important are provisions for more "informal" methods to seek legal redress. Among these are the provision of alternative dispute resolution mechanisms, increased legal education and provision of pro bono services.

**Provision of Alternative Dispute Resolution**

Alternative dispute resolution (ADR) mechanisms can be used as an alternative to the court system or in conjunction with the court system. Generally, these mechanisms include the provision of negotiation, which is a voluntary action taken on by and limited to the parties in the case; arbitration, which involves a third party making a binding decision; and mediation, which involves a framework tailored to each specific case. All three mechanisms can be used to reduce legal costs and time spent in court. While many countries in the world are still in the process of experimenting with a nascent ADR program for resolving civil conflicts, Argentina has become one of the leaders in ADR reforms in the developing world. Many forms of ADR are found world-wide, yet most of these are developed to aid in international disputes or small-scale, local disputes (Messick 2005, 1-3). Few countries focus on ADR as a mandatory step in domestic-level civil cases, as Argentina does.

In Argentina, it is mandatory to seek mediation at the beginning of a lawsuit. According to Argentine law (Law No. 24573), all matters are included with the exception of criminal cases, labor cases, cases where the Federal Government is involved, writs of habeas corpus, bankruptcy cases and voluntary trials (Legal and Judicial Sector Assessment 2002, 65; Gershanik 2002, 29; Padilla 2002, 1). Established in 1995, this

mandatory program has its roots in a pilot program developed by the Ministry of Justice in 1994. The program was so successful at settling cases in a respectable amount of time that the Ministry of Justice sent a bill to Congress that passed later that year (Law No. 24573). By 1996, mandatory conciliation was expanded to all labor cases as well (Law No. 24635). Each case designates a judge to oversee the mediation, and if a decision is not made during mediation, that judge will conduct the case should it be litigated (Legal and Judicial Sector Assessment 2002, 65). All mediation must be overseen and registered with the Ministry of Justice. Incorporating mediation into the legal system solves the short-comings of community-level ADR mechanisms which are not always legally binding or may operate outside of the national legal system (Messick 2005, 1-3).

The Argentine ADR program is not without criticism however. First, the mediators' honoraria are often very small, discouraging mediators from getting involved in the system. Second, there are discrepancies in the training of mediators due to the diversity of training centers nation-wide. Finally, there are questions as to the constitutionality of requiring ADR since it does not guarantee due process before the law (Legal and Judicial Sector Assessment 2002, 66-67; Ungar 2002, 199). Despite these problems, by 2002 the "mediation in Argentina has achieved remarkable results" (Legal and Judicial Sector Assessment 2002, 66). Legal scholars look at the ADR program as a success, mostly due to the fact that mediation processes accept some cases that otherwise would have been deemed unsuitable for the formal legal process and because it represents a large number of settled cases that did not weigh down the national court system (Legal and Judicial Sector Assessment 2002, 66-67).

The incorporation of cases that otherwise may not have been heard broadened access to justice through ADR mechanisms for some. While there is debate about how "useful" Argentina's ADR program is, it is important to explore Argentina's use of ADR mechanisms since creating more avenues to the judicial system not only makes the judicial process less expensive but also more accessible to rural citizens. Another informal approach to increasing *de jure* judicial access for poor or "isolated" citizens is the availability of legal education for citizens – and the pro bono legal services which often accompany free/reduced cost legal education.

**Legal Education and Provision of Pro Bono Services**

An educated public that understands its rights and a legal community that is well educated in human rights issues are key variables affecting levels of access. It is important to evaluate the effectiveness of Argentina's judicial reforms aimed at assuring the public understands its legal rights and that lawyers are adequately trained in human rights issues. As stated earlier, the Argentine government has acknowledged that many more steps need to be taken in order to reform all types of access to justice in the system. One hole in the reform efforts lies in Argentina's lack of legal education for citizens. A 2002 study by the University of Palermo law school found that there is a general aversion to clinical education throughout Argentina due to inflexible and highly regulated curricula, lack of capacity for practical legal training, and political conservatism (Bohmer 2002). A more recent study likewise argues that Argentina's provision of legal education trails well behind Chile and Brazil (Tribelcock and Daniels 2008: 292), but also that there has been some improvement in the past few years.

One group of scholars at the University of Palermo Law School have tackled this reform flaw by stating too much emphasis is placed on "top down" approaches to legal education, such as changes within institutions, without incorporating "bottom-up" approaches that would reinforce Argentina's legal culture, such as educating the public on legal issues and incorporating more public interest law into law courses (Bohmer 2002, 29-32). The Palermo Group founded the first university legal clinic that actively seeks out precedent-setting civil rights cases in the mid-1990s. Since then, the group has supported increasing the supply of "free" legal services and clinics while also encouraging private law firms to donate pro bono services. As of 2002, the group had convinced 15 law firms to accept pro bono cases for NGOs (Bohmer 2002, 31). Additionally, between 2004 and 2007, the Colegio de Abogados de la Ciudad de Buenos Aires Pro Bono sector has accepted twenty pro bono public interest cases, separated amongst multiple law firms, concerning issues such as disability, labor, and health rights ( Colegio de Abogados 2007). Further, the Universidad de Buenos Aires (UBA) Law School Free Legal Clinic, the Universidad de Belgrano Legal Aid and Clinic, and the Free Legal Clinic of the Bar Association of the Federal Capital (Colegio Público de Abogados de la Capital Federal) have been established to provide pro bono work throughout the 2000s (CEJA 2007).

Unlike Chile, which made tremendous strides in both citizen and law student education throughout the 1990s and 2000s, Argentina did not place a high priority on judicial reforms seeking to expand legal education. While this certainly may hinder access for the poor and less educated, both the environmental and gay and lesbian social movements in Argentina have social movement organizations with the financial means

and the expertise to navigate the judicial system - making them critical actors when bringing cases to court in the name of rights.

In an evaluation of environmental court cases since 2002, 13 of 15 cases have direct involvement of social movement organizations (SMOs) and many more use SMOs to provide resources and amicus curiae briefs. The most notable SMO that acts as a judicial "intervening body" (Di Paula 2006: 3-4) for the environmental movement is the Programa Control Ciudadano del Medio Ambiente, a well-known pro bono branch of FARN – the largest and most powerful environmental SMO in Argentina. A second notable intervening body is the Center for Legal and Social Studies (CELS). Established in 1979 to defend human rights, its primary role is to litigate judicial cases with respect to violations of human rights. While a leader in intervening in human rights cases, CELS predominantly works with "questions of impunity, institutional violence, judicial independence, immigrants' rights, access to information, and the observance of economic, social, and cultural rights" (CEJA Argentina 2007). Other actors present in environmental cases include Greenpeace Argentina, Fundación Vida Silvestre Argentina (FVSA), and multiple neighborhood associations.

For the gay and lesbian cases, there are far fewer intervening bodies; however, their role is no less than the organizations involved with environmental cases. One of the reasons there are fewer organizations involved with GLBT groups is that there are far fewer court cases brought forward by GLBT groups and far fewer people affected by GLBT rulings than environmental rulings. The organizations most involved with court cases include the Comunidad Homosexual Argentina (CHA), the Argentine Federation of Lesbians, Gays, Bisexuals, and Transsexuals (FALGBT), and the Association for the

Struggle of the Transvesti and Transsexual Identity (ALITT). Both the gay and lesbian and environmental social movements in Argentina benefit from well-organized and professionalized social movement organizations aiding in their legal battles for rights. For these battles to have any chance at success, each social movement must have formal access to the judicial system.

**Do Social Movements have Formal Access in Argentina?**

Much like the expansion of judicial access in Chile, the "opening" of the Argentina judicial system in the 1990s and 2000s was much more of an opening for criminal law than civil law. The addition of ADR, the expansion of the Public Defender's office, and their reform efforts to change to a more "mixed" legal system mostly opened access for criminal defendants. However, Argentina's constitutional reforms of the 1990s aided both environmental and GLBT movements in the realm of access. While the level of institutional access in Argentina is still highly dependent on financial resources (Suntheim 2006; Martin 2006), social movements, given at least adequate resources, should have similar access to the system since institutional access is fairly equal. While the environmental movement may have "more" institutional judicial access than the gay and lesbian movement, based on their ability to bypass some court fees and to defend their rights based on wording specifically addressing environmental rights in the Constitution, both movements should have institutional access for their rights claims.

The next section acts as a check on my Chilean findings. Given both social movements have institutional access to the judicial system in Argentina, it is important to

examine how they view their access to the system. I begin by discussing the emergence of the gay and lesbian movement in Argentina, laws affecting gays and lesbians in Argentina, and public opinion on the gay and lesbian movement to gauge societal perceptions of the movements. I then examine the same variables to gauge the level of public support for the environmental movement in Chile. I find that while the societal perceptions of the gay and lesbian movement were similar to Chile's in the 1990s and early 2000s, this perception has changed dramatically in the past five years. Further, there is more societal acceptance for the gay and lesbian movement in Buenos Aires – which has the power to act autonomously of the federal government. I find very similar patterns concerning societal perceptions of the environmental movement as I do in the Chilean country study. I then examine activists' perceptions of their access to justice through interview data and, in the case of the environmental movement, examining Supreme Court cases brought forward with help from SMOs, from 2002-2007. Some argue (see Di Paula 2006) that a history of positive court case decisions can affect activists' perceptions of their "chances" to win a case. This, in turn, leads them to use the judicial system more when attempting to gain more rights. I find that, much like the Chilean findings, environmental groups are optimistic about using the judicial system while those in gay and lesbian movements are much more hesitant to use the judicial system – even given their legislative successes over the past two decades.

## THE GAY AND LESBIAN MOVEMENT IN ARGENTINA AND SOCIETAL PERCEPTIONS

The timing of the emergence of gay activism owes much to events that marked a high point in an international protest cycle, including the 1969 Stonewall riots and mass student demonstrations in France and Mexico in 1968 (Brown 2002). Argentina's gay and lesbian activism is a spin-off movement, at least in the case of the Argentine gay and lesbian movements of the early 1970s. These "owe less to expanding political opportunities than to complex diffusion processes by which the ideational, tactical, and organizational lessons of the early risers are made available to subsequent challengers" (McAdam, McCarthy, and Zald 1996:33). In other words, it was not so much the change in domestic conditions that led to the birth of gay activism; activism arose instead as part of a national and international movement of contesting established social relations (inspired by and learned from other actors) and adapting to local conditions (presumably inspiring others in turn).

While diffusion of international activism may have led to the rise of such movements in Argentina, no action was taken internally until there were political opportunity structures that allowed them to work within the system. During the 1980s, gay and lesbian activists capitalized on certain new political opportunities – principally the return to democracy, the rise in human rights discourse, and some international support – to build a movement (Brown 1999,110). Organizations such as the Comunidad Homosexual Argentina (CHA), one of the first GLBT groups in South America (Reding World Policy Report 2003, 19) began pushing for homosexual rights in the 1980s. CHA began the 1990s fighting for the most basic political right of being legitimately

recognized by the state as an organization. In 1991, their right to organize was refused by a negative Supreme Court ruling, but President Carlos Menem reversed the decision with a presidential decree under intense international scrutiny.

Throughout the 1990s, the GLBT community fought multiple anti-gay laws, such as police edicts not allowing "two men to dance" or for men to "dress like the opposite gender". Such discriminatory edicts were upheld by the Supreme Court into the 1990s (Reding 2003, 19). Beginning in 1996, the city of Buenos Aires elected a mayor and drafted a Statute of Autonomy, and, this same year, the city banned discrimination based on sexual orientation. Despite the historical discriminatory practices surrounding gay and lesbian groups, a legislative opening of the system gave gay rights advocates something concrete to use in judicial cases. Taking advantage of the city of Buenos Aires' judicial and legislative autonomy, the gay and lesbian movement had one of its most striking victories in Latin America with the recognition of same-sex unions in the city in 2002 through the Civil Union Law 1.004 (Bazan 2004, 450). Similar gay and lesbian rulings, at the lower courts, in Argentina include lesbian mothers retaining custody of their children to more economic based rights of common law partners and inheritance entitlements in some regions (Miles 2004); the whole province of Rio Negro has likewise passed civil union legislation (Reding 2003, 18).

According to Marcelo Suntheim (2006), Secretary of the largest GLBT organization in Argentina (CHA) and half of the first couple to have a civil union in South America, the passage of civil unions in Buenos Aires was a huge step for the movement. He argues, however, that the passage may have been more closely attributable to a window of opportunity for all human rights movements, post 2001, than

a true change in opinion by politicians (Suntheim 2006). Facing an ever growing conception in Argentina that all politicians were corrupt, many politicians in Buenos Aires were convinced to pass the bill as a gesture toward embracing human rights organizations and civil society as a whole, especially given the heightened media coverage of the bill. Suntheim stressed the importance of CHA's identity as a highly principled group in an unprincipled political context – five politicians cycled through the presidency in two weeks' time in 2001-2002, facing mass protest movements' demands to "Throw them all out!"

While not fully embraced by the entirety of Argentina, public support of civil unions and homosexuality after the bill passage increased significantly in the years to follow. In 2002, 69% of Argentine's believed homosexuality to be only sometimes to never justifiable (see Table 6.8). Recent survey data from the Latin America Public Opinion Project (LAPOP) asking Argentine's how much they approve or disapprove of homosexuals based on a 1 (strongly disapprove) to 10 (strongly approve) scale shows a dramatic change since the 2002 survey was conducted. The mean score on the 2008 survey was a 7.29 - with more than 70 percent of the population marking a 6-10 on the scale. (AmericasBarometer 2008). When cross-tabulating the responses to "regions", 46 percent of the respondents lived in Buenos Aires – arguably this could account for such a high approval; however, when excluding the city of Buenos Aires, roughly 68 percent of Argentine's still marked a 6-10. Certainly there is more public support for the gay and lesbian movement in Argentina now than in Chile[29].

[29] The mean score from Chilean respondents was a 5.48

The gay and lesbian movement in Argentina has made significant strides in gaining legislative rights throughout the 2000s. Concurrently, public opinion surveys show that there has been an increasing acceptance of the gay and lesbian movement. This being said, it is also important to note that anti-homosexual laws were upheld by the Supreme Court well into the 1990s (Reding 2003: 19), and that close to 70 percent of Argentine's in 2002 thought homosexuality was only sometimes to never justifiable. My analysis of case studies examines court cases from 2002-2007 and no statistical data is available for Argentine perspectives on the gay and lesbian movement from this time period. Therefore, the public opinion variable used to measure societal perceptions is not clearly identifiable for my time period of interest – only that it significantly changed from approximately a 30 percent to a 70 percent approval rating. If Marcelo Suntheim is correct in that public opinion did not start to change dramatically until after 2006, then public opinion on homosexuality for my time frame is probably closer to the 2002 public opinion responses than the 2008 responses.

While the Comunidad Homosexual Argentina lacks the resources and the member numbers that the environmental movement possesses, they do have a legal department that is well educated about the system and have enough donations to support the organization (Suntheim 2006). Their ability to organize a movement supporting civil unions while many other smaller gay and lesbian SMOs doubted one could be passed, also attests to their strength as an organization. One would expect the gay and lesbian movement, especially CHA, to have quite a bit of institutional access to the judicial system. Further, unlike the gay and lesbian movement in Chile, societal perceptions of the gay and lesbian movement and laws aimed at gays and lesbians changed dramatically

over the last decade – sending a somewhat mixed signal concerning societal perceptions of the movement. Unlike the gay and lesbian movement, societal perceptions of the environmental movement are much more consistently supportive in Argentina over the past decade.

**Environmental Movement**

With regards to the environmental movement in Argentina, there are prominent organizations that date back to at least 1978 when Greenpeace started working on projects. The FARN and the Fundacion para la defensa del ambiente (Environment Defense Foundation) were both established in the mid-1980s to work on environmental legal services (Country Profile 2002, Fundacion 2002). These groups have led the environmental movement by training civil society, advocacy, taking legal actions, providing technical expertise, and communicating with the media on issues such as forestry preservation, hazardous material transportation, GMO production, large-scale development projects, and nuclear plant development and upkeep to name a few (Fundación 2002).

One of the major environmental political issues these organizations have advanced is the passage of the Environmental Preservation Law in some provinces that requires annual reporting on environmental management and makes environmental impact assessments (EIAs) mandatory. Similarly, the city of Buenos Aires has its own Secretary of the Environment and Public Space. At the national level, the Secretary of Environment and Sustainable Development has authority over many environmental

projects/disputes.[30] The Foundation of Natural Resources (FARN) is one of the strongest organizations defending the environment in Argentina. Unlike CHA, which is one of the only SMOs in Argentina that fights for gay and lesbian political rights, FARN has reached out to many other NGOs to join its fight in cleaning up the environment. Among the networks in the social movement include the Centro de Estudios Legales y Sociales (CELS), Poder Ciudadano, the Union of Consumers and Users, and is a founding member of the Argentine Network of Lawyers for the Defense of the Environment (FARN 2005, 9-10).

Like the GLBT movement, the environmental movement has also shared in legislative success over the last fifteen years. Constitutional amendments in 1994 set a minimal national standard for environmental degradation and also state that provinces must adhere to the minimal requirements yet also may expand upon them (Art. 41). A similar reform allows NGOs and interest groups to take up cases of collective or public interest (Art. 43), in turn, giving citizens environmental judicial standing (Martin 2006). Given these institutional provisions, as well as the access reforms evaluated in the beginning of the chapter, the environmental movement should have *de jure* access to the judicial system. Further, the public in Argentina has supported the environmental movement much more consistently than the gay and lesbian movement.

In 2002, 67 percent of the population surveyed in Chile had confidence in the environmental protection movement (see Table 6.9). There was much more support for the environmental movement than the gay and lesbian movement at the beginning of the

[30] The GLBT movement does not have specific secretariats

decade, and public support for the environment has continued throughout the 2000s (see FARN 2005). Juan Martin (2006), a lawyer for FARN contends that while the public cares about the environment, it is rarely, if ever, top on the priority list for both the public and the politicians – a sentiment also expressed by many environmental lawyers and organizations in Chile (Pinochet 2007; Pizarro 2007; Espejo 2007). Regardless of saliency, the consistency of public support for a clean environment in Argentina, and a lack of prejudice laws "targeting" the movement, demonstrates there has been more public support for the environmental movement than the GLBT movement over the past decade. Again, this is not to say that there is complete cultural acceptance of the environmental movement, only that there is more acceptance of it than of the gay and lesbian movement.

This section is a means to gauge societal perceptions of both movements, and while the environmental movement has experienced more public support over the past decade than the gay and lesbian movement, it should be noted that there is more public support for the gay and lesbian movement in Argentina than Chile – perhaps affecting gay and lesbian activists' perceptions of their access to the system. The next section briefly explores these activist perceptions by first evaluating recent judicial activities for each movement and then interpreting interview data and SMO publications to determine if, like the Chilean case, activist perceptions of their access to the judicial system affect their *de facto* level of judicial access.

## JUDICIAL ACTION AND ACTIVIST PERCEPTIONS FOR EACH MOVEMENT

While no comprehensive categorized database exists for all judicial cases in Argentina, there are many more judicial databases than in Chile. For this reason, I have combined cases found in LexisNexis, the Supreme Court online data base (Argentina Supreme Court 2007), ECOJURIST, and leading judicial NGOs' websites to compile a list of both environmental and gay and lesbian court cases taken to the Supreme Court for a general overview of SMO judicial activity through most of the 2000s. I review the major cases brought forward by SMOs, or with significant help from SMOs, from 2002-2007[31]. It should also be noted that only one Supreme Court case can be found involving gay and lesbian rights, and this case deals more with the legality of group association rights than gay and lesbian rights.

### The Environmental Movement

As mentioned earlier, the environmental movement has founded many legal action networks to deal with judicial cases. This, in and of itself, demonstrates that the environmental movement is active in legal issue and pursues its aims through the judicial system. According to FARNs 2005 Annual Report, over 150 claims and consultations were received from individuals and groups in the calendar year, many of which resulted in administrative and legal action in Federal or Provincial Courts (FARN 2005, 8). Juan Martin Vezzulla (2006) with FARN states that the organization will bring cases to trial, but sees its most significant contribution as filing amicus curiae briefs on behalf of the environmental fights of other groups, multiplying its impact.

[31] Under the listing "ambiental" and "medio ambiente" in my database search of the Supreme Court, there are roughly 48 hearings/decisions from the Supreme Court since 2002, but not all of these were actual cases brought to the Supreme Court. The final number of cases is 14.

Of the fourteen Supreme Court environmental cases evaluated over the five year span, seven have reached a conclusion while the other half are still ongoing. Three of the concluded cases were access to information cases which concluded quickly, all siding in favor of the plaintiff. One concluded by demanding a corporation obtain a legitimate environmental impact statement (EIS) (2005); another concluded quickly as it was a local noise ordinance against a local bar, and yet another concluded by insisting the city of Buenos Aires decentralize oversight organizations for public works as stated in the City's constitution. The only major case that has concluded since 2002 is a lawsuit against a waste company and the city of Buenos Aires for illegal pathogenic waste incineration; the city of Buenos Aires terminated the contract with the company.

The major cases on public space preservation, major noise pollution caused by development, biodiversity, and collective environmental damages are still in the Court system. Any thought of a quick trial seems inconceivable unless it is an environmental case related to access to information or it involves small parties in the dispute. Worth noting, however, is that all of these cases that concluded sided with those trying to protect the environment. Also, those cases that are still in trial have gone through multiple hearings allowing for witness testimony. Most cases show the willingness of justices to accept that there are instances of unconstitutional environmental damage. The difficulty lies in resolving the issues with either major corporations or state institutions, as evidenced by multiple hearings stating environmental damage has occurred (see Figure 6.1 for listings of major hearings within each case).

The overall number of cases is less significant; however, than whether or not each environmental social movement organization believes it can use and has access to the

judicial system. Legal successes inspire environmental social movement organizations to use the judicial system more. These successes have come in the form of some Supreme Court rulings in their favor in the 2000s, and even more by the cases the Supreme Court rejected to hear based on earlier decisions or upholding provincial rights to tighten environmental regulations and require environmental impact statements (EIS). This was the case in the fight against Minera El Desquite mining company.

Minera El Desquite projected an open cast gold mine using cyanide in the Chubut province. The concession was awarded by the provincial government, but citizens took legal action to stop the mining since cyanide mining is prohibited in the province due to its threat to human health in the air and water (Valente 2007). Four years after protests began, an appellate court ruled in favor of the Chubut citizens, who were supported by the Chubut Antinuclear Movement and the Center for Human Rights and the Environment (CEDHA) (Valente 2007). The Supreme Court refused to hear the case, declaring there was no case since "the state sets minimum environmental laws… which the provinces have a right to expand if they want" (Valente 2007, 1). This victory in 2007 represents numerous other provincial victories in environmental rights. Daniel Taillant, head of the CEDHA stated "there [is] a rising trend in social protests over environmental problems in Argentina in the last five years….the justice system 'reflects' that trend in its verdicts". He concludes by stating, "public opinion is playing an increasingly important role in setting public policies on the environment" (Taillant from Valente 2007, 2b).

Regardless of positive or negative court decisions on the environment in the last fifteen years, there is an overall view from members of the environmental movement that

not only is using the judicial system an option, but it is increasingly becoming a successful option. Argentina has witnessed an increase in support from the judicial system for environmental issues, proving to be a champion of defending provincial control over environmental policy. This proves the judicial branch has not taken a back seat when dealing with upholding law into the 2000s. For the Argentine environmental movement, there are very few, if any, apparent cultural limitations on their ability to access the judicial system.

**The Gay and Lesbian Movement**

Perhaps one of the greatest gay and lesbian success stories arose in Argentina in 2002/2003 with the passage and implementation of civil unions in Buenos Aires, the first in all of South America. With such legislative success, even if it is only at the city-level, Argentina poses itself as a great case study to test *de facto* judicial access. While legislative politics is separate from judicial politics, the question arises: with a background of basic civil union rights in Buenos Aires, and Argentina more generally, and a fairly dramatic change in public opinion concerning the issue, does this carry over into a more accessible judicial system?

Like the environmental movement, the gay and lesbian movement has also succeeded in winning a prominent judicial Supreme Court case fairly recently. In 2006, the Argentine Supreme court overruled a civil court ruling and decision by the General Inspectorate of Justice that banned the Association for the Struggle of the Transvesti and Transsexual Identity (ALITT) from being a legal association, claiming the group was "going against the common good" (Alizadah 2006). Paula Ettelbrick, Executive Director

of ALITT, proclaimed, "the legal recognition of the right to associate is a critical step of having a full voice in society" (Ettelbrick from Alizadah 2006). While seemingly similar to the environmental cases in that it is a judicial victory, the ALITT case is less of a success for GLBT rights and more of a rudimentary victory over the constitutional right to assemble. In fact, the idea that the government resisted legally recognizing an organized, non-violent association demonstrates that individuals' values concerning "right vs. wrong" do affect the GLBT community. Additionally, this is the only case any GLBT group has brought to the Supreme Court.

Unlike the environmental cases, where heads of environmental organizations express optimism about the use of the judicial system and have sent thousands of cases through both federal and local courts, very few judicial cases have been brought forward by the gay and lesbian movement. When asked if CHA uses the judicial system, Marcelo Suntheim (2006) states, "no no, 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 goes 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). This statement represents the general feeling of the gay and lesbian community in Argentina: that entrenched political and cultural attitudes of individual justices deems it ineffective to work through the judicial system.

While CHA looks at close to 1500 cases a year, many of which have a juridical basis, very few of these are even considered by CHA to take to trial (Suntheim 2006; CHA 2005), often citing justices who have been in office for a long time as a reason. Maria Rashid, president of the Argentine Federation of Lesbians, Gays, Bisexuals, and

Transsexuals (FALGBT), stated that "there are very conservative judges, some of them have participated in the dictatorship (of the 1970s), and their thinking is very homophobic" (Rashid from Hoffman 2007). While many activists are inspired to change local legislation, very few view the judicial system as an effective means to gaining rights. For the gay and lesbian movement in Argentina, however, there seems to be much more resistance to using the judicial system because they perceive justices to be "biased", not due to a fear of "outing" themselves

Further, there is an overall "feeling" by environmental movements that the judicial system is a legitimate outlet to question illegal actions carried out by individuals, corporations, or the state. Much of this is due to their relative success in using the judicial system. Although actual implementation of such rulings may never be realized, they unquestionably feel they have open access to the judicial system. While the GLBT movement operates under similar institutional access to the judicial system as the environmental movement, there is much less use of the judicial system, even in cases that could challenge rights in court. My findings suggest that this is due to an activist perception that the Argentine culture and, more importantly, the personal beliefs of justices, affect the ruling before a case is even brought to the courts. The mentality of "why bother?" seems to prevail.

## CONCLUSION

The findings in this chapter parallel my findings in the Chilean chapter. First, environmental groups perceive their access to the judicial system as very open and

acknowledge that public support strengthens their case – making them feel "empowered" more than "intimidated" to pursue rights via the judicial branch, in turn expanding their *de facto* judicial access. Further, the gay and lesbian movement was much less likely to use the judicial branch. Their *de facto* judicial access, however, is not as limited as the gay and lesbian movement's access in Chile. Unlike the Chilean case, the leaders of Argentine social movement organizations seemed less concerned about societal perceptions and much more concerned about justices' perceptions of the movement in affecting the decision outcome. This finding makes sense considering the public opinion has become much more supportive of the gay and lesbian movement over the past 5 years, but older justices in the system often represent a more "traditional" value sets.

If my findings in the Chilean country study are correct, the perceptions of justices do not limit *access* for social movements nearly as much as societal perceptions of the social movements and the activists' own perceptions of access to the judicial system. Judges certainly have the ability to impede the judicial process and outcome – hence why gay and lesbian social movements choose not to use the system if they feel justices are prejudiced against their cause. In Chile, activists were often times "afraid" to use the judicial system – directly limiting their *de facto* access. In Argentina, activists seemed more "annoyed" at using the judicial system, where interviewees simply explained it was much more effective to use the legislative branch. This difference in activists' perceptions of access between the two country studies could certainly be explained by Argentina's growing cultural acceptance of the gay and lesbian movement and the social movement's strategy to focus on localized legislative battles. When CHA was pushing to get civil unions legalized in Buenos Aires, where a plurality supported the legislation,

they were fighting for rights in a city that was much more open to homosexuality than the rest of Argentina (Shulenberg 2006: 7). In other words, while it was a legislative battle for the gay and lesbian movement, they still chose to "go public" where it was most culturally accepted to do so.

**Decentralization**

While this legislative victory for the gay and lesbian movement in Argentina is not the focus of my investigation, it does demonstrate that Argentina's federal system (with an autonomous Buenos Aires) aided in CHA's rights struggle. First, CHA chose a political venue, Buenos Aires, which was much more culturally accepting of their plight. Second, the director of CHA claims that it is the passage of civil union rights that changed most public attitudes on civil unions - suggesting that legislative victories at the local/regional level where societal perceptions are more tolerant could be a more effective alternative to using the judicial system and a solid strategy for changing cultural attitudes. While I argue that state laws are one way of gauging societal values, the case of gay and lesbian rights in Argentina demonstrates that the legislative process can also shape perceptions. However, the political landscape in Argentina in the early 2000s was chaotic and the former president of CHA claims that the passage of civil unions in Buenos Aires was very much reactionary to the public's outcry to "throw them all out" (Suntheim 2006). The legislature was under an incredible amount of pressure to pass anything that made them appear to be unified and responsive to the public. The gay and lesbian movement's success in pushing through a civil union law benefited from a political crisis and a supportive local constituency in Buenos Aires. This legislative example parallels the thought that judicial access should also begin at a local level where

courts that have a certain amount of autonomy with national minimum standards (Ungar 2002 31-34). However, while decentralization of courts and legislative bodies can aid rights movements in certain localities, it could severely cripple them in more rural areas where the cultural split is much more pronounced (Reding 2003, 2-3).

The environmental movement also seemed to benefit from a federal system. The Argentine federal government, much like the U.S. federal government, allows discretion to individual states when choosing to strengthen environmental laws. In the Supreme Court cases evaluated from 2002-2007, many of the cases were never heard since the Supreme Court defers to state governments. Again, this is very similar to the U.S. system where states also have this type of authority (O' Leary 2009). I argued at the beginning of this chapter that a decentralized political system and the provision of a defensoría del pueblo, that is mandated to handle human rights cases, are two institutional access provisions that may increase *de jure* access for rights movements in Argentina. Argentina's decentralized system has given social movements not only executive and legislative outlets for voicing their concerns but also more chances/openings to appeal to the judicial branch. The City of Buenos Aires' special provincial powers have proved especially important. The role of the Defensoría in Argentina, however, is much less helpful to both movements.

As mentioned previously, the provision of an ombudsman has been heralded as perhaps the most effective judicial reform with regards to rights recognition. Upon investigation of the Supreme Court cases, however, there was only one case which involved the Defensoría and environmental issues, and this case was just a general hearing that resulted in the Supreme Court rejecting the case due to jurisdiction issues

(court case # C2131.XXXVII). While it is not surprising that the Defensoría did not handle any cases with the gay and lesbian community, given the low level of court proceedings in general and its lack of saliency, it is somewhat surprising to see its lack of involvement with environmental issues. Upon viewing cases heralded by the Defensoría del Pueblo, their own statistics demonstrate that only 0.5% of their complaints since 1994 (and hence proceedings) dealt with environmental issues (Defensor del Pueblo, report on proceedings 2009).

The Defensoría has spent the majority of its time and energy on consumer issues, finance, taxes, welfare and employment, and health and education - all important human rights issues in Argentina. However, its lack of involvement in environmental cases raises an interesting question in regards to its role in environmental rights that should be studied further. While only .5% of their proceedings dealt with environmental issues, roughly 50% of the reports and data publicized on their webpage addresses environmental concerns. The Defensoría funds many environmental research projects and studies as well as provides the public with information, but is not involved in many environmental court cases due to its focus on issues of welfare, unemployment, education, and so on.

Some scholarly findings would suggest that judicial decisions often reflect public opinion, yet tend to lag behind the shift in opinion (Mishler and Sheehan 1993, 19). If this is indeed true, one would expect more gay and lesbian judicial cases being brought to the courts along with more judicial successes perhaps five to ten years from now. It also raises the question: Is it problematic that justices operating under a system, where they are supposed to be neutral, allow their personal values to interfere with outcomes?

Indeed, this tendency is only natural and happens with justices throughout the world, but it may have more of an impact in countries that have only recently gone through democratic consolidation and are dealing with many new actors, movements, and rights claims in the political arena. The concluding chapter further expands upon this notion and also re-evaluates the arguments I make at the beginning of this study concerning the role of measuring perceptions in both access and social movement literature.

## TABLES AND FIGURES

### Table 6.1: National Judicial Branch Budget 2001-2005

| Year | Pesos | US Dollars |
|---|---|---|
| 2008 | 1,161,716,648 | |
| 2005 | 884, 290, 933 | 302, 839, 360 |
| 2004 | 726, 072, 905 | 248, 655, 104 |
| 2003 | 693,583, 327 | 207,039,799 |
| 2002 | 658,627,208 | 470,448,005 |
| 2001 | 662,440,390 | 662,440,390 |
| 2000 | 794, 227, 880 | 794,227,880 |

Source: Justice Studies of Americas Report of Justice (CEJA) 2004-2005, Argentina Judicial Reform Program Report 2001-2002, and CEJA 2008-2009

**Table 6.2: Buenos Aires Province Judicial Branch Budget 2002-2004**

| Year | Buenos Aires Judicial Budget Pesos | Buenos Aires Judicial Budget US Dollars | Total Judicial Budget National and Buenos Aires: Pesos | Total Judicial Budget National and Buenos Aires: Dollars | Percentage of the Total Fiscal Budget[32] (National and Buenos Aires) |
|---|---|---|---|---|---|
| 2004 | 441.531.000 | 151.209.246 | 1,167,603,905 | 399,864,350 | .95% |
| 2003 | 418.916.000 | 125.049.552 | 1,112,499,327 | 332,089,351 | |
| 2002 | 407.969.000 | 291.406.428 | 1,066,596,208 | 761,854,433 | |

Source: Justice Studies Center of the Americas, 2005 Report of Justice

**Table 6.3: Budget per Capita Allocated to the Judicial Branch in Current Dollars (includes all judicial spending for ministries)**

| **Country** | **2004-2005** | **2003-2002** |
|---|---|---|
| Argentina | $26.4 | $25.3 |
| Chile | $14.0 | $9.8 |

Source: Justice Studies Center of the Americas, 2005 Comparative Report of Justice

[32] Based off of the 2005 CIA Factbook estimate of national expenditures of $39.98 billion (122.34 billion pesos).

**Table 6.4: Ministry of Justice and Human Rights Budgets, 2001-2005**

| Year | Budget in Pesos | Budget in Dollars |
|---|---|---|
| 2008 | 549,741,343 | 180,243,063 |
| 2005 | 403,897,711 | 136,451,929 |
| 2004 | 317,474,621 | 108,724,185 |
| 2003 | 231,597,326 | 69,133,530 |
| 2002 | 221,508,343 | 158,220,245 |
| 2001 | 231,508,343 | 231,095,513 |

Source: Justice Studies Center of the Americas (CEJA), 2005 Report of Justice, also available at www.mecon.gov.ar , and CEJA 2008-2009

**Table 6.5: Public Ministry Budget, 2001-2005**

| Year | Pesos | Current Dollars |
|---|---|---|
| 2005 | 194,086,000 | 65,569,594 |
| 2004 | 162,410,000 | 55,619,863 |
| 2003 | 154,711,739 | 46,182,608 |
| 2002 | 146,923,783 | 104,945,559 |
| 2001 | 148,146,004 | 148,146,004 |

Source: Justice Studies Center of the Americas (CEJA): Argentina. Compiled from National Budgetary Laws.

## Table 6.6: Public Ministry of the Province of Buenos Aires, 2002-2004

| Year | **Current Pesos** | **Current Dollars** |
|---|---|---|
| 2004 | 156,814,000 | 53,703,424 |
| 2003 | 147,806,000 | 44,121,194 |
| 2002 | 137,651,000 | 98,322,141 |

Source: Justice Studies Center of the Americas: Argentina. Compiled from National Budgetary Laws.

## Table 6.7: National Judicial Branch Staff 2000-2003

| **Year** | **Number of Total Judges (including provinces)** | **Number of National Judges** | **Number of National Public Defenders** | **Number per 100,000 (national and provincial)** |
|---|---|---|---|---|
| 2006 | | | 209 | |
| 2005 | | 883 | 206 | |
| 2004 | | 834 | 206 | |
| 2003 | 4409 | 820 | 201 | 11.4 |
| 2002 | | 826 | 201 | |
| 2001 | | 806 | 201 | |
| 2000 | | 810 | | |

Source for nacional judges: Anuario Estadístico del Poder Judicial. See http://www.pjn.gov.ar/estadisticas/index/htm. Source for total justices: (JSCA) Justice Studies Center of the Americas

**Table 6.8: Do you think homosexuality is justifiable?**

**JUSTIFIABLE: HOMOSEXUALITY**

| COUNTRY/REGION | | | Frequency | Percent | Valid Percent | Cumulative Percent |
|---|---|---|---|---|---|---|
| Argentina | Valid | Never justifiable | 460 | 36.0 | 39.9 | 39.9 |
| | | 2 | 30 | 2.4 | 2.6 | 42.5 |
| | | 3 | 33 | 2.6 | 2.8 | 45.4 |
| | | 4 | 36 | 2.8 | 3.1 | 48.5 |
| | | 5 | 236 | 18.4 | 20.4 | 68.9 |
| | | 6 | 66 | 5.2 | 5.7 | 74.6 |
| | | 7 | 46 | 3.6 | 4.0 | 78.6 |
| | | 8 | 55 | 4.3 | 4.8 | 83.4 |
| | | 9 | 22 | 1.7 | 1.9 | 85.3 |
| | | Always justifiable | 169 | 13.2 | 14.7 | 100.0 |
| | | Total | 1154 | 90.1 | 100.0 | |
| | Missing | Don´t know | 126 | 9.9 | | |
| | Total | | 1280 | 100.0 | | |
| Chile | Valid | Never justifiable | 421 | 35.1 | 37.0 | 37.0 |
| | | 2 | 71 | 5.9 | 6.3 | 43.3 |
| | | 3 | 72 | 6.0 | 6.3 | 49.6 |
| | | 4 | 63 | 5.3 | 5.6 | 55.2 |
| | | 5 | 191 | 15.9 | 16.7 | 71.9 |
| | | 6 | 92 | 7.7 | 8.1 | 80.0 |
| | | 7 | 50 | 4.2 | 4.4 | 84.4 |
| | | 8 | 61 | 5.1 | 5.4 | 89.8 |
| | | 9 | 16 | 1.3 | 1.4 | 91.2 |
| | | Always justifiable | 101 | 8.4 | 8.8 | 100.0 |
| | | Total | 1139 | 94.9 | 100.0 | |
| | Missing | Don´t know | 61 | 5.1 | | |
| | Total | | 1200 | 100.0 | | |

Source: Human Beliefs and Values Survey: 2004. Inglehart et.al.

**Table 6.9: How much confidence do you have in the environmental protection movement?**

**CONFIDENCE: THE ENVIRONMENTAL PROTECTION MOVEMENT**

| COUNTRY/REGION | | | Frequency | Percent | Valid Percent | Cumulative Percent |
|---|---|---|---|---|---|---|
| Argentina | Valid | A great deal | 198 | 15.5 | 18.0 | 18.0 |
| | | Quite a lot | 540 | 42.2 | 49.0 | 67.0 |
| | | Not very much | 239 | 18.7 | 21.7 | 88.7 |
| | | None at all | 124 | 9.7 | 11.3 | 100.0 |
| | | Total | 1101 | 86.0 | 100.0 | |
| | Missing | Don´t know | 179 | 14.0 | | |
| | Total | | 1280 | 100.0 | | |
| Chile | Valid | A great deal | 252 | 21.0 | 22.3 | 22.3 |
| | | Quite a lot | 485 | 40.4 | 43.0 | 65.3 |
| | | Not very much | 279 | 23.3 | 24.8 | 90.1 |
| | | None at all | 111 | 9.3 | 9.9 | 100.0 |
| | | Total | 1127 | 93.9 | 100.0 | |
| | Missing | Don´t know | 73 | 6.1 | | |
| | Total | | 1200 | 100.0 | | |

Source: Human Beliefs and Values Survey: 2004. Inglehart et.al

# CHAPTER 7:

# CONCLUSION

## INTRODUCTION

The gay and lesbian and environmental social movements in Chile and Argentina are both trying to concurrently expand their political rights and change cultural norms in society. Since the early 1990s, both social movements have made strides toward these goals. However, the levels of success and tactics chosen to achieve these goals differ between countries and amongst social movements studied. The environmental movement, with consistent public support over the last two decades in both countries, feels empowered to use the courts – even if the process is "irregular" and the outcome involves rulings in favor of their opposition. Conversely, the gay and lesbian movement in Chile feels too intimidated to "go public" by using the judicial system, and in Argentina, they rarely choose the judicial system as an access point to achieving rights. While successful judicial reforms in both countries opened the judicial system to many citizens and marginalized groups, the frequent gap between *de jure* and *de facto* arrangements within South American judicial systems suggests that an institutional focus is not enough to understand effective access. Social movements' decisions on which

avenues to pursue when gaining rights are not only affected by the formal openings provided to them, but are also affected by how they perceive these openings.

### *DE JURE VARIABLES AFFECTING ACCESS*

This dissertation finds that when incorporated into judicial reforms, the *de jure* advances measured by access scholars certainly increase access for most citizens – including the two social movements I study. This is evident in my findings that both social movements stressed the importance of resources when explaining obstacles to judicial access. The provision of resources (whether in the form of provision of direct aid, public defenders, legal training or assistance, or simply the provision of more physical locations of court houses) is an institutional focus for access scholars and many judicial reforms were successful in expanding citizen access via expanding these critical institutional variables. Further, my cross-country comparison of the two social movements also highlights the importance of Argentina's decentralized political system for both rights movements. As mentioned before, many scholars argue that a decentralized system allows many more institutional avenues for those seeking rights. In the case of Argentina, the environmental movement benefitted from the Supreme Court often deferring to more stringent local environmental laws and the gay and lesbian movement certainly benefited by appealing to change laws within the city of Buenos Aires where public opinions were more supportive of their pleas.

Another institutional factor affecting social movements' decisions to use the judicial branch in both countries is their civil law traditions. While both countries are in

the process of changing their criminal cases over to common law, the civil courts remain entrenched in the civil law system. Even for the environmental movement organizations that won judicial cases, the civil law's lack of precedence affected their decision to use the judicial system (Pinochet 2007, Dougnac 2007, Pizzaro 2007). Their insistence that there are no "Erin Brokovich" cases demonstrated their acknowledgement that justices have little power to legislate via the bench in a civil law system. For both the gay and lesbian and environmental social movement, then, the legislative branch is viewed as a more effective means of gaining rights (Hernandez 2007, Pizzaro 2007, Jimenez 2007, Suntheim 2006). Both countries recognize that their judicial systems are in need of an overhaul to better address rights claims – and both countries are addressing this issue by slowly changing to a common law system through judicial reforms. The social movement activists' insistence that increased resources, a decentralized system, and a common law tradition are all factors that increase their level of access to the judiciary supports access scholars' claims that the provision of de jure judicial access does increase judicial access for rights movements.

## *DE FACTO* ACCESS FOR SOCIAL MOVEMENTS

Access scholars' focus on institutional variables, however, does little to explain the continuing differences in levels of access for citizens from differing social movements within the same country. Political opportunity scholars, who generally study marginalized groups, put a heavier emphasis on cultural factors as affecting movements' access to the political system. However, political opportunity scholars still tend to focus

on variables external to the social movements studied – leaving out activists' perceptions of their judicial access. A more constructivist interpretation of judicial access can be used in conjunction with the formal and institutional access variables, measured by both access and political opportunity scholars, to better explain levels of *de facto* judicial access. If opportunity is "operationalized primarily as perceived opportunity" (Kurzman 2004: 119), then there should be also be a focus on judicial access in practice.

When the variables of societal and individual justices' perceptions about the social movement studied and activists' perceptions of their access to the system are explored from a more constructivist approach, I find that societal attitudes do affect movements' perceptions of their access to the judicial system – hence expanding or contracting the extent to which they take advantage of *de jure* judicial access. The environmental movement in both countries perceived their access to the judicial system as very high, often times feeling empowered by citizen support for their cause. Activists within the gay and lesbian movement in Chile were often "afraid" (their term) to use the judicial system due to society's negative perceptions while in Argentina, the gay and lesbian movement opted to fight for rights locally – in regions and cities where public opinion was much more supportive of their grievances. These findings address the observation that while there are many examples about one's moral duty to help, very little is said about the role of morality in hindering the development of social movements (Jasper 2007:86). Accusations of immorality can be disempowering for social movements or any actor seeking rights. Positive societal perceptions empowered the environmental movement while negative societal perceptions had the opposite effect on the gay and lesbian social movement.

Cultural variables internal to social movements are often measured when using the framing approach in the political process model, but they should not be abandoned when evaluating the influence of "external" political opportunities (PO). Some argue that the political opportunity approach should not become a sponge that soaks up every variable, for the sake of building on PO as a theory and I agree. More variables do not need to be incorporated into the political opportunities approach. I argue that a constructivist interpretation of opportunities can be used in conjunction with the PO approach to strengthen its explanatory power when evaluating judicial access in practice - instead of stretching it too thin. Societal perceptions can affect how those in social movements view their access to the system. These activist perceptions, in turn, can directly affect social movements' level of *de facto* judicial access. While my dissertation focuses on this implementation gap between *de facto* and *de jure* levels of access, I also add to South American judicial literature and studies evaluating judicial access for environmental and gay and lesbian social movements

My research on *de facto* judicial access for environmental and gay and lesbian social movements allows me to expand upon previous studies aimed at explaining judicial access or social movements' tactical decisions made when gaining rights. Using the judicial system can be a time-consuming and expensive avenue for social movements seeking to gain rights, yet many scholars who study the environmental and gay and lesbian movements in Western Europe, Canada, and the United States insist that courts can be a valuable tool not only in gaining rights but also in delaying policy, making symbolic statements, and creating a stronger common identity within the social movement (Dupuis 2002, Hilson 2002, Taylor 2008, Bernstein 2009: 6). While these

sentiments are echoed by some in the Chilean and Argentine environmental movements, the judicial system is a less viable option for the gay and lesbian movement in both countries.

My study adds to the contemporary literature on gay and lesbian social movement's decision-making strategies when choosing political avenues to gain rights. Gay and lesbian movement scholars often focus on the "success" cases in the Global North where public opinion is often comparatively supportive – such as Canada, the U.S., and a handful of European countries (see Dupuis 2002; Engel 2001, Hilson 2002, Anderson 2005) or focus on states that are openly suppressive (Currier 2009). Even so, in his study of the GLBT and environmental movements in the E.U., Hilson (2002) argues that GLBT movements will be more likely to use the legal opportunity structure than the environmental movement because policy on GLBT issues is not universal in all EU states and the issue is very controversial amongst members (Hilson 2002: 249). Certainly, GLBT social movements in the U.S. have focused on both the legislative and judicial avenues for access to rights within states – many finding success via the judicial branch (Dupuis 2002: 49-71; Daum 2009, Pedriana 2009: 52). Similarly, in the U.S., environmental social movements seemingly have had more success than the GLBT movement via the legislative branch (Dupuis 2002: 1-4). I find that many of their assumptions and conclusions do not transfer easily to the Chilean and Argentine movements.

Chile and Argentina present two case studies in which public attitudes toward the movement were not supportive of GLBT rights, yet the state was not openly suppressive of the movement. Contrary to scholars studying social movements in the Global North -

who argue that the judicial system is an often used tool for marginalized groups to raise awareness - the gay and lesbian movement in Chile is often afraid to use the courts exactly because it "raises awareness" of their personal sexual preferences. The publicity that many social movement organizations seek in the Global North - via judicial cases, work against gay and lesbian activists in Chile, and is exactly 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. This holds especially true for those in the gay and lesbian movement who can choose to "stay in the closet" (unlike, say racial and ethnic minorities), but could also affect judicial access for other marginalized sectors not supported by a majority of society.

Similar to Chile, the gay and lesbian movement in Argentina rarely uses the judicial system. While societal perceptions of the GLBT movement in Argentina have changed dramatically over the past five years, in the early 2000s, social movement organizations opted to stay away from the judicial system. Instead, gay and lesbian social movements chose to take the local legislative avenue to gain rights in regions where public opinion supported their cause. In both cases, negative public perceptions of the movement led to the activists perceiving their access to the judicial system as limited. In the Argentine case, the gay and lesbian activists' perceptions that individual justices were too "traditional" led some activists to completely write off the judicial system as a point of access to gain rights.

The third set of perceptions evaluated in this dissertation addresses the effect of these individual justices' perceptions of social movements on levels of *de facto* access to the judicial system for these movements. In their study of Latin American judicial systems, Kapiszewski and Taylor (2008) argue that "since we cannot assume that Latin American judges and justices' ideologies are not important to their decision-making, further analysis of judicial attitudes , especially in countries where there is greater institutional stability, seems warranted" (746). In Chile, both movements believed that "prejudiced" judges hindered their ability to gain rights. My analysis of court documents and international reports concerning three Chilean judicial decisions for each movement supports their concerns. In both environmental and gay and lesbian court cases, I found many "irregularities" – ranging from justices on the Supreme Court taking a "proactive" interest in a court case to justices serving on cases in which they were a relative of the defendant. Certainly the perceptions of individual justices affected trial process and outcome for both social movements, but neither movement viewed these "prejudiced" justices as limiting their access to the judicial system. I reach a similar conclusion in Argentina where the GLBT activists have a "why bother" attitude about using the judicial system. Maria Rashid; president of the Argentine Federation of Lesbians, Gays, Bisexuals, and Transsexuals (FALGBT); states that "there are very conservative judges….and their thinking is very homophobic" (Rashid from Hoffman 2007). Certainly, the activist perceptions that justices can affect process and outcome can limit their *de facto* access to the system. After all, a feeling of "hopelessness" due to individual justices' perceptions could be similar to a "fear" of societal perceptions (see Di Paula 2006), but most of those interviewed did not make any specific link between

justices' perceptions and *access*. In Argentina, this is likely due to the gay and lesbian movement's focus on gaining local legislative rights – often "ignoring" the judicial system altogether. In Chile, I argue this could be due to activists in both movements pointing to the "new guard" of justices as a reason for optimism.

## ROLE OF YOUNGER JUSTICES/LAWYERS

When asked about access to the law and judicial systems, Rolando Jiménez, involved in Chilean gay and lesbian politics since the early 1990s, states:

> "The new procedural system is filled with men and women who are young and between the ages of 39 and 45. In the old system, the median age of justices was fifty years. In other words, culturally there has been more attention focused to our themes. Today, lawyers in the new system have a lot more sensibility and are part of the cultural change that has occurred in Chile…there has been an improvement to judicial access" (Jiménez 2007).

Certainly this is evidenced by a younger female justice re-opening the Devine Case (discussed in chapter four) and citing judicial homophobia and inadequate police work in the original investigation as her rationale for doing so. This link between age and cultural attitudes toward gays and lesbians is also backed by statistical data.

In a study about gender role beliefs and attitudes toward gays and lesbians in Chile and the U.S., researchers found a couple of broad findings beyond gender role beliefs. First, Chileans were more prejudiced than Americans, and, second, men were more prejudiced than women (Nierman et. al. 2007: 61; also see Lingiardi et. al. 2005). Second, research has shown that age is also an important variable when investigating prejudices against gays and lesbians – the older the subject, the more negative the attitude

(Herek 1994; Cárdenas and Barrientos 2008: 141). In Chile, the older, male-dominated "old guard" in the judiciary is slowly being replaced. This variable alone seems to be having an effect on individual and social movement organizations' perceptions of justices' attitudes toward their cause and their access to the judicial system more generally.

Similar to the GLBT case study, environmental social movement organizations also feel that their use of the judicial system is negatively affected by the "old guard" of justices who do not rank environmental improvement as an important issue and who have long-standing ties with those in the government who may be defendants. Jose Pinochet, an environmental lawyer for FIMA, states that "ninety percent of justices do not have any environmental law experience" and one of the problems for environmental social movements is that "the judiciary serves long terms and the environment is generational" (Pinochet 2007). This is echoed by the president of FIMA, who sees justices as making many arbitrary "unconstitutional" decisions (Dougnac 2007) and also by the president of TERRAM who feels that "legislative members interpreted the *recurso de protección* as a liberal document, but justices are much more conservative" (Pizarro 2007). This link between the younger generations and an increased commitment to bettering environmental conditions is backed by many studies. In a recent article in The Ecologist, Joss Garmin claims that the "youth are driving the environmental movement" world-wide (Garmin 2009). Similarly, the Chilean government's poll on the environment found that the younger generation tends to support environmental improvement and environmental policy more than their older counterparts (Study of Public Opinion 2008).

One of the most striking parallels between the two social movements studied is a strong feeling that individual justices are biased enough to affect judicial process and case outcome. Traditional thought concerning the importance of judicial independence centers on the necessity of judicial tenure. In the case of Chile, like many Western democracies, it is very difficult to remove a Supreme Court Justice from office. Once a Supreme Court justice is appointed, he or she is entitled to remain on the court until the retirement age of 75; he can only be removed if he is found to be involved with criminal activity - and the process for removal must not only go through the courts but must also be approved by the president (Chile Constitution articles 77,78). It is this judicial independence that may have limited *de facto* access for marginalized rights movements due to individual justices' perceptions – however, now twenty years after democratic transition, activists in both social movements tend to focus on making a direct link between optimism and the "new guard" instead of a link between limited access and the "old guard".

## ROLE OF THE INTERNATIONAL COURTS

While a rising "new guard" in the judicial system does give reason for optimism for human rights organizations in Chile, there have still been very few gains for the gay and lesbian social movement. One alternative avenue available for these organizations, and individuals represented by these organizations, is the use of the international system. The best known example is the case brought forward to the Inter-American Commission on Human Rights (a branch of the Organization of American States) by Karen Atala,

after she lost her domestic custody battle at the Supreme Court level. Chile ratified the American Convention on Human Rights in 1990, which requires the nation to ensure equal protection under the law without discrimination (American Convention 1969, Article 1). While the agreement does not specifically refer to sexual orientation, the Commission decided to review the case. In August of 2008, the Inter American Commission of Human Rights unanimously agreed to investigate the Atala case and the Chilean government defended the Supreme Court ruling in its declaration to the Commission. In April 2010, the Commission ruled in favor of Atala and declared Chile violated Atala's "human right to live free of discrimination" (MOVILH 2010). This ruling could have a dramatic effect on sexual minority rights throughout South America since "all eyes [were] on the Commission" - with many countries placing a ruling at the Inter-American level above their own courts, this court case could affect many outside the Chilean system (Rother 2006, A6). Arguably, the opposite could also occur – Chile can decide to ignore the IACHR ruling that Chile must take "holistic" steps to right the situation.

However, the Inter-American Commission on Human rights is not the only international organization that is making strides towards including sexual minorities in the definition of human rights. Recently, in late 2008, the United Nations began looking at expanding the definition of human rights to include sexual minorities. This is evident by the fact that 66 countries, including Chile and Argentina, signed on to a statement declaring violations against anyone based on his sexual identity is a violation of his human rights. France introduced the statement to the U.N., basing its argument on article 1 of the Universal Declaration of Human rights which claims all humans are born free

with equal rights (Herrera 2008). Regardless of the effect the international ruling in the Atala case may have on rights in practice, it symbolizes the continuing struggle for human rights amongst the gay and lesbian community and could be a step toward more demands for other rights in South America, such as civil unions. Among the Unified Movement for Sexual Minorities (MUMS), the Homosexual Movement for Integration and Liberation (MOVILH), Las Otras Familias (The Other Families), the Diego Portales Center for Human Rights, and many other organizations, the growing sentiment is that the fight for sexual minority rights in Chile may be best accomplished at the international level of governance. Many in the environmental movement agree – in fact, two of the environmental cases I researched reached the international level.

In a court case involving the alerce trees, Carlos Barona Bray was cited with slander for publicly accusing a senator of illegal trafficking of the tree, and the Supreme Court upheld the decision. On March 4 2005, the Inter-American Commission of Human Rights (IACHR) received a petition against the state of Chile, filed by public interest groups and the Human Rights Clinic at the University of Diego Portales on behalf of Mr. Barona. The petition stated that the criminal prosecution of the statement made by Mr. Barona denied him his freedom of expression - violating Articles 1(1), 13, and 24 of the American Convention of Human Rights. The Inter-American Commission on Human Rights agreed that the ruling was suspect and agreed to receive the international petition filed by Mr. Barona and the Human Rights clinic at Diego Portales University in late 2007 – an international decision has yet to be made. While the Barona case is still in limbo at the international level, the Inter-American Court of Human Rights has ruled on the similar freedom of expression case presented to them in the Trillium case.

In the Trillium case, Claude Reyes was denied access to information concerning the forestry company's environmental record. On August 18, 1998 the Supreme Court declared his remedy of complaint (asking the appeals court to reconsider) inadmissible as well. Reyes took his case to the Inter-American Commission and the Court of Human Rights, which found Chile in violation of Article 13 (freedom of thought and expression) and Article 25 (right to judicial protection) because Mr. Reyes "was refused information and [was] not granted an effective judicial remedy" (Order of the Inter-American Court 2006: 2). Due to public protests over the case, Trillium finally abandoned their plans – in large part due to the case being investigated at the international level.

The role of international courts and the impact their rulings will have on Chilean domestic policy is still unknown, but social movement activists in Chile have used these courts as a check on their own judicial system. The role of younger justices domestically and the role of the international community on *de facto* judicial access for social movements is not the focus of my investigation, but both deserve further research as they could affect social movements' decision-making when choosing which political avenues to use when attempting to gain rights. Further, my hypothesis that societal perceptions can affect social movement activists' perceptions of their access to the judicial system, in turn expanding or contracting their level of *de facto* judicial access, is geographically and case study limited. More constructivist studies on marginalized social movements' perceptions are needed to confirm my hypothesis that understanding activists' perceptions of their "open" avenues for gaining rights can better explain their level of access in practice.

REFERENCES


Academia Judicial. 2006. Website for the Chilean Judicial Academy. www.academiajudicial.cl. Accessed on July 30, 2006.

Acosta, Tabatha, Elizabeth Carter, David Koenig, and J. Brody Mcmurthy. 2008. Shadow Report on lesbian, gay, bisexual, transgender, and intersex rights in Chile. Global Rights. Presented to the International Gay and Lesbian Human Rights Commission.

Acuna, Carlos and Catalina Smulovitz. 1997. Guarding the Guardians in Argentina: Some Lessons about the Risks and Benefits of Empowering the Courts. In, *Transitional Justice and the Rule of Law in New Democracies*. A. James McAdams, ed. Notre Dame, In.: University of Notre Dame Press, 93-113.

Alizadeh, Hossein. 2006. The Argentine Court Recognizes Transgender Group. *International Gay and Lesbian Human Rights Commission* Press Release, Nov. 22. Accessed at: www.asylumlaw.org/docs/showDocument.cfm?documentID=4865 May 1, 2007.

Almond, Gabriel and Sidney Verba. 1965. *The Civic Culture: Political Attitudes and Democracy in Five Nations*. Boston: Little, Brown.

Alvarez, Sonia, Evalina Dagnino and Arturo Escobar (eds). 1998. *Culture of Politics, Politics of Culture*. Boulder: Westview.

American Convention on Human Rights. 1969. Organization of American States. Signed in San Jose, Costa Rica, November 22. http://www.oas.org/juridico/english/treaties/b-32.html. Accessed on February 23, 2009

AmericasBarometer. 2008. By the Latin American Public Opinion Project (LAPOP), www.lapopsurveys.org. Accessed March 8, 2010.

Ancient Forest International: Forest Types Central to AFI's Efforts. Accessed at www.ancientforests.org/forest_types.html on August 23, 2008.

Anderson, Ellen Ann. 2005. *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation*. Ann Arbor: The University of Michigan Press.

Anuario Estadístuco del Poder Judicial. 2005. Accessed at http://www.pjn.gov.ar/estadisticas/index/htm. June 17, 2007.

Argentina Supreme Court Website and database of cases. Accessed at: http://www.csjn.gov.ar/documentos/cfal3/cons_fallos.jsp. Sept-Nov 2007.

Arjona, Flavio. 1996. La administracion de justicia: Una comparacion interprovincial. *Novedades Economicas* 18 (186): 26-76.

Atala, Karen. 2007. Interview, Chilean judge and human rights activist. Santago, Chile. March 28.

Atwool, Jolyon. 2004. Environmentalists Scare Legal Victory out of CONAF. *The Santiago Times.* February 12.

Barnum, David G. 1985. The Supreme Court and Public opinion: Judicial Decision Making in the Post- New Deal Period. *The Journal of Politics* 47 (2): 652-666.

Bazan, Osvaldo. 2004. *Historia de la monosexualidad en la Argentina: De la Conquista de América al Siglo XXI.* Buenos Aires: Editorial Marea.

Bergoglio, Maria Ines. 2003. Argentina: The Effects of Democratic Institutionalization. In, *Legal Culture in the Age of Globalization*. Lawrence M. Friedman and Rogelio Perez-Perdomo (eds). Stanford University Press. Stanford, CA. 20-63.

Bernstein, Mary. 1997. Celebration and Suppression: The Strategic Uses of Identity by the Lesbian and Gay Movement. *American Journal of Sociology*, 103(3): 531-65.

Bernstein, Mary. 2002. New Social Movement Theory and the Limits of Essentialism. In, *Social Movements: Identity, Culture, and the State*. David S. Meyer, Nancy Whittier, and Belinda Robnett Eds. 2002. New York: Oxford University Press, 85-104.

Bernstein, Mary. 2003. Nothing Ventured, Nothing Gained? Conceptualizing Social Movements "Success" in the Lesbian and Gay Movement. *Sociological Perspectives,* 46(3): 353-379.

Bernstein, Mary; Anna-Maria Marshall; and Scott Barclay. 2009. The Challenge of Law: Sexual Orientation , Gender Identity, and Social Movements. In Barclay, Scott; Mary Bernstein; and Anna-Maria Marshall (eds). *Queer Mobilizations: LGBT Activists Confront the Law*. New York: New York University Press 1-17.

Blumer, Herbert. 1951. Social Movements. Taken from (1995) Stanford M. Lyman (ed) *Social Movements: Critiques, Concepts, and Case-Studies*. New York: New York University Press: 60-83.

Bohmer, Martin. 2002. Access to Justice and Judicial Reform in Argentina. Paper presented at the Fifth Annual Colloquium on Clinical Legal Education. Warsaw, Poland. Nov. 15-16.

Borland, Elizabeth. 2004. Cultural Opportunities and Tactical Choices in the Argentine and Chilean Reproductive Rights Movement. *Mobilization: An International Journal* 9(3): 327-339.

Brand, Karl-Werner. 1990. Cyclical Aspects of New Social Movements: Waves of Cultural Criticism and Mobilization Cycles of New Middle-Class Radicalism. In Russell J. Dalton and Manfred Kuechler (eds.), *Challenging the Political Order*. New York: Oxford University Press.

Brown, Michael. 2000. *Closet Space: Geographies of Metaphor from the Body to the Globe.* New York: Routledge.

Brown, Steven. 1999. Democracy and Sexual Difference: The Lesbian and Gay Movement in Argentina. In *The Global Emergence of Gay and Lesbian Politics: National Imprints of a Worldwide Movement*. Adams, Barry; Jan Willem Duyvendak and Andre Krouwel eds. Temple University Press: Philadelphia, 110-134.

Buchanan, James. 2001. Judicial Reform in the Americas. Executive summary for the Canadian Foundation of the Americas. Publication Mail Agreement: 40012931. Ottawa, Onterio, accessed via www.focal.ca February 2005.

Buscaglia, Edgardo. 1998. Obstacles to Judicial Reform in Latin America. In, *Justice Delayed: Judicial Reform in Latin America*. Edmundo Jarquin and Fernando Carrillo (eds). Inter-American Development Bank. Washington D.C.: John Hopkins University Press, 15-29.

Buscaglia, Edgardo, Maria Dakolias, and William Ratliff. 1995. *Judicial Reform In Latin America: A Framework for National Development*. Hoover Institution Press: Stanford.

Buscaglia, Edgardo and Maria Dokolias. 1996. *Judicial Reform in Latin America*. Washington D.C.: The World Bank: 9, 15.

Byrne, Emily. 2005. Chile's Supreme Court Accused of Infringing Human Rights – Judiciary Under Scrutiny for Homophobic Rulings. Santiago Times, May 13. www.santiagotimes.cl

Byrne, Paul. 1997. *Social Movements in Britain*, London: Routledge.

Cappelletti, Mauro. 1993. Alternative Dispute Resolution Proccesses within the Framework of the World-wide Access-to-Justice Movement. *Modern Law Review*, 56 (May): 282-85.

Cardenas, Manuel and Jaime Edwardo Barrietos. 2008. The Attitudes Toward Lesbian and Gay Men Scale: Adoption and Testing the Reliability and Validity in Chile. *Journal of Sex Research*, 45 (2): 140-149.

Carlos Borona Bray vs. Chile. 2007. Case 232-05, Report No. 50/07. InterAmerican Commission on Human Rights; OEA/Ser.L/V/II.130 Doc. 22, rev. 1.

Carrillo-Florez, Fernando. 2007. Institutions and Democratic Accountability in Latin America: Legal Design vs. Actual Performance. In Payne, Mark J, Daniel G. Zavatto, and Mercedes Mateo Díaz (eds). *Democracies in Development: Politics and Reform in Latin America*. Inter-American Development Bank: Washington, D.C., 117-148. Also found at http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=970762 .

Carruthers, David. 2001. Environmental Politics in Chile: legacies of dictatorship and democracy. *Third World Quarterly*, 22 (3): 343-358.

Castelli, Irene. 2004. Death Threats Force Judge to Drop Alerce Case. The Santiago Times. Tuesday May 18. Accessed at http://www.santiagotimes.cl/index.php?option=com_content&view=article&id=4287:DEATH-THREATS-FORCE-JUDGE-TO-DROP-ALERCE-CASE&catid=1:other&Itemid=38 on July 5, 2007.

CEJA – JSCA (Justice Studies Center of the Americas) Accessed Report of Justice. 2004-2005. online at www.cejamericas.org, June 29, 2006.

CEJA – JSCA (Justice Studies Center of the Americas) Accessed Report of Justice. 2006-2007 (3rd Edition). online at www.cejamericas.org, September 2008.

CEJA – JSCA (Justice Studies Center of the Americas) Accessed Report of Justice. 2008-2009 (4th Edition). online at www.cejamericas.org, January 2010.

Center for Legal and Social Studies (CELS). www.cels.org.ar Accessed on September 23, 2007.

CHA (Comunidad Homosexual Argentina). 2005. Annual Report. Buenos Aires, Argentina. www.cha.org.ar.

Chavez, Rebecca Bill. 2004. *The rule of Law in Nascent Democracies: Judicial Politics in Argentina*. Stanford: Stanford University Press.

Chiamparino, Tomaso; Laura Piazza; and Irene Venturello. 2008. Chile: The Development-Sustainability Dilemma. In, Albert Brenton, Giorgio Brosio, Silvana Dalnozzone, and Gioviann Garrone (eds.) *Environmental Governance and Decentralisation*. London: Edward Elgar Publishing: 359-381.

Chilean Administrative Corporation of the Judiciary. 2000. Chilean Legal and Judicial Sector Assessment for the World Bank. Accessed at http://www4.worldbank.org/legal/database/Justice/Pages/jsBrief.asp?Country=2240 November 2004.

CIA World Fact Book: Chile. Accessed at http://www.cia.gov/cia/publications/factbook/geos/ci.html June 12, 2006.

CIA World Fact Book: Argentina. Accessed at, https://www.cia.gov/cia/publications/factbook/geos/ar.html December 12, 2006.

Clapp, Roger Alex. 1998. Working for the Forest Law: Resource-Led Development and Environmental Politics in Chile. *Latin American Research Review* 33(2): 3-36.

Climate Change and Public Opinión. 2009. *The Economist*. Accessed at www.economist.com (print edition November 5).

Colegio de Abogados de Buenos Aires. 2007. Listing of Judicial cases. Accessed at: www.probono.org.ar/casos.php, July 3, 2007.

Collier, David and Steven Levitsky. Democracy with Adjectives: Conceptual Innovation in Comparative Research. *World Politics* (49): 430-451.

CONAMA (Chilean National Environmental Commission). 2008. Public Opinion Poll on Environment. March 15. Accessed at www.conama.cl on April 8, 2009.

Costain, Anne N. and Steven Majstorovic. 1994. Congress, Social Movements and Public Opinion: Multiple Origins of Women's Rights Legislation. *Political Research Quarterly* 47(1): 111-135.

Country Profile on environment: Argentina. 2002. Planning and Evaluation Department: Japan International Cooperation Agency report. February.

Courso, Javier. 2004. The Politics of Judicial review in Chile in the Era of Democratic Transition, 1990-2001. In Siri Gloppen, Roberto Garganella, and Elin Skaar (eds), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies*. Frank Cass Publishing: Portland, Oregon: 70-88.

Correa-Sutil, Jorge. 1999. Judicial reforms in Latin America: Good News for the Underpriveleged? In Mendez, Juan; Guillermo O'Donnell and Paulo Sergio Pinheiro (eds), *The (Un) Rule of Law and the Underprivileged in Latin America*. University of Notre Dame Press: Notre Dame, Indiana: 255-277.

Currier, Ashley. 2009. Deferral of Legal Tactics: A Global LGBT Social Movement Organization's Perspective. In Barclay, Scott; Mary Bernstein; and Anna-Maria Marshall (eds). *Queer Mobilizations: LGBT Activists Confront the Law*. New York: New York University Press: 21-37.

Dahl, Robert. 1971. *Polyarchy: Participation and Opposition*. New Haven: Yale University Press.

Dahl, Robert. 1989. *Democracy and its Critics*. New Haven, Conn.: Yale University Press.

Dakolias, Maria. 1996. The Judicial Sector in Latin America and the Caribbean: Elements of Reform. World Bank Technical Paper, no 350, Washington D.C.: xi.

Dakolias, Maria. 2001. Legal and Judicial Reform: The Role of Civil Society in the Reform Process. In Pilar Domingo and Rachel Sieder (eds), *Rule of Law in Latin America: The International Promotion of Judicial Reform*, London: Institute of Latin American Studies: 80-98.

Dakolias, Maria; Sprovieri, Luis;De Michele, Roberto; Rodriguez, Marcela; Saba, Roberto; Sabsay, Daniel; Dabak, Beth; Motta, Cristina. 2002. *Argentina Legal and Judicial Sector Assessment*. Working Paper for the World Bank; report no. 25081. Vol 1 of 1.

Dalton, Russell J. 1994. *The Green Rainbow: Environmental Groups in Western Europe*. New Haven: Yale University Press.

Daum, Courtenay. 2009. Deciding Under the Influence? The "One Hit Wonders" and Organized-Interest Participation in U.S. Supreme Court Gay Rights Litigation. In Barclay, Scott; Mary Bernstein; and Anna-Maria Marshall (eds). *Queer Mobilizations: LGBT Activists Confront the Law*. New York: New York University Press: 76-102.

Defensor del Pueblo: Argentina. 2008 and 2010. Statistical reports. Accessed at www.defensor.gov.ar/informes/estad01-en.htm. Oct 2008, and April 3, 2010.

Defensor del Pueblo: Argentina. 2008. www.defensor.gov. Accessed December 2008, and April 4, 2010.

Della Porta, Donatella and Mario Diani. 2006. *Social Movements: An Introduction (2nd ed)*. Oxford: Blackwell Publishing.

Decision of the Court of Gaurantee Puerto Montt. 2004. Tax No. 0410008047-3, Sept 9: pg. 36.

Diamond, Larry. 1996. Democracy in Latin America: Degrees, Illusions, and Directions for Consolidation. In Tom Farer (ed), *Beyond Sovereignty: Collectively Defending Democracy in the Americas*. Baltimore: John Hopkins University Press

Diamond, Larry. 1999. *Developing Democracy: Toward Consolidation*. John Hopkins University Press: Baltimore.

Di Paola, Maria E., Doloraes Maria Duverges, and Jose Alberto Esain. 2006. *Indicators on Justice and the Environment*. Publication of Fundación Ambiente y Recursos Naturales. Accessed at www.farn.org.ar/docs/libros.html.

Drucker, Peter. 1996. In the Tropics There Is No Sin: Sexuality and Gay-Lesbian Movements in the Third World. *New Left Review* 218 (July-August): 75-101.

Doherty, Brian. 1999. Paving the Way: The Rise of Direct Action Against Road Building and the Changing Character of British Environmentalism. *Political Studies*. Vol 47 (June): 275-291.

Domingo, Pilar and Rachel Sieder. 2001. Conclusions: Promoting the Rule of Law in Latin America. In Pilar Domingo and Rachel Sieder (eds), *Rule of Law in Latin America: The International Promotion of Judicial Reform*, London: Institute of Latin American Studies: 142-164.

Dougnac, Fernando. 2007. Interview: Executive of FIMA (Fiscalia del Medioambiente). Santiago, Chile. February 27.

"D.U.". 2008. Declaron Incompetente a Juzgado Civil para Tratar Caso Calvo. Publication of OPUSGAY, Nov. 25. Accessed at www.opusgay.cl on Sept 8, 2009.

Dupuis, Martin. 2002. *Same Sex Marriage: Legal Mobilization, and the Politics of Rights*. Peter Lang Publishing: New York.

Dzidzienyo, Anani and Suzanne Oboler. 2008. Race, Social Justice, and the Law in the Americas: Redefining the Terms of the Debate. *Latin American Studies Association Forum*. Vol. 39 (1): 20-23.

Eckstein, Harry. 1988. A Culturalist Theory of Political Change. *American Political Science Review*, vol.82 (September): 789-904.

Embassy of Chile, Washington DC. 2005. Ministry of Justice Reforms Underway: "A New System of Justice by the Bicentennial. Accessed at www.chile-usa.org/minjustice.htm. Accessed July 18, 2006.

Engel, Stephen M. 2001. *The Unfinished Revolution: Social Movement Theory and the Gay and Lesbian Movement.* Cambridge: Cambridge University Press.

Espejo, Nicolas. 2007. Interview: Environmental law professor, University Diego Portales. Santiago, Chile. March 19.

Estrada, Daniela. 2005. Conflict Over Andean Glaciers Heats Up. Inter Press Service News Agency. November 11. Acessed at www.ipsnews.net/news.asp?idnews=30994 on April 29, 2009.

Estrada, Daniela. 2006. "Yes" to Gold Mine, but don't Touch the Glaciers. Inter Press Service News Agency. February 15. Accessed at www.ipsnews.net/news.asp?idnews=32174 on April 29, 2009.

Faivovich, Edmundo Fuenzalida. 2003. Law and Legal Culture in Chile. In, *Legal Culture in the Age of Globalization*. Lawrence M. Friedman and Rogelio Perez-Perdomo (eds). Stanford University Press. Stanford, CA (108-133).

FARN (Fundación Ambiente y Recursos Naturales). 2005. Annual Report. Buenos Aires, Argentina. www.farn.org.ar.

Finkel, Jodi. 2004. Judicial reform in Argentina in the 1990s: How Electoral Incentives Shape Insitutional Change. *Latin American Research Review* (39) 3: 56-80.

Flemming, Roy B. and Dan Wood. 1997. The Public and the Supreme Court: Individual Responsiveness to American Policy Moods. *American Journal of Political Science*, 41 (2): 468-498.

Foweraker, Joe and Todd Landman. 1997. *Citizenship rights and Social Movements: A Comparative and Statistical Analysis*. Oxford University Press.

Friedman, Lawrence M. and Rogelio Perez-Perdomo (eds). 2003. *Legal Culture in the Age of Globalization*. Stanford University Press. Stanford, CA.

Friedman, Lawrence. 2005. *A History of American Law 3rd Ed*. New York: Simon and Schuster.

Fundación Ideas. 1997, 2001, 2003. Investigations on discrimination against sexual minorities. Accessed at http://www.ideas.cl/documentos/documentos.php?id=6. February 23, 2009.

Fundacion IDEAS. 1997. Primera encuesta de tolerancia y no discriminacion [First discrimination survey]. Santiago de Chile.

Fundacion IDEAS. 2001. Segunda encuesta de tolerancia y no discriminacion [Second discrimination survey]. Santiago de Chile.

Fundacion IDEAS. 2003. Tercera encuesta de tolerancia y no discriminacion [Third discrimination survey]. Santiago de Chile.

Fundacíon para la Defensa del Ambiente (FUNAM – Environmental Defense Foundation: Argentina). 2002. List of Achievements. www.funam.org.ar/achiveme.htm Accessed March 14, 2005.

Galanter, Marc and Jayanth K. Krishnan. 2004. Bread for the Poor: Access to Justice and the Rights of the Needy in India. *Hastings Law Journal* 55 (4): 789-834.

Gamson, William, A. 1992. The Social Psychology of Collective Action. In Aldon D. Morris and Carol McClurg (eds.) *Frontiers in Social Movement Theory*. New Haven: Yale University Press, 53-76.

Gamson, William and Davis S. Meyer. 1996. Framing Political Opportunity. In *Comparative Perspectives on Social Movements*, Doug McAdam, John D. McCarthy, and Mayer N. Zald (eds.). Cambridge: Cambridge University Press.

George, Alexander. 1979. Case Studies and Theory Development: The Method of Structured, Focused Comparison. In, *Diplomacy: New Approaches in History, Theory, and Policy*, Paul Gordon Lauren (ed). NY: The Free Press, 43-68.

Gershanik, Martin. 2002. *Judicial Reform program Report*. Argentine Ministry of Justice and Human Rights. Accessed at www.jus.gov.ar on Sept 8 2006.

Giugni, Marco. 2004. Social *Protest and Policy Change: Ecology, Antinuclear, and Peace Movements in Comparative Perspective*. Rowman and Littlefield Publishers Inc.: Boulder.

Gloppen, Siri, Roberto Gargarella, and Elin Skaar, eds. 2004. *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies*. London: Frank Cass Publishers.

Godoy, Julio. 2007. Rights: Indigenous People's Rights Ignored Again. *IPS News.* April 10. Accessed at www.ipsnews.net/news.asp?idnews=37285 on April 7, 2010.

Golub, Stephen. 1993. Evaluation of Asia Foundation Legal Services/Human Rights Programming in Bangladesh. Accessed at [http://www1.worldbank.org/publicsector/legal/BangladeshADRreview.pdf].

Goodwin, Jeff and James Jasper (eds.) 2004. *Rethinking Social Movements: Structure, Meaning, and Emotion*. Boulder: Rowman and Littlefield Publishers Inc.

Goodwin, Jeff and James Jasper. 2004 (orig 1999). Caught in a Winding, Snarling Vine: The Structural Bias of the Political Process Theory. In Goodwin, Jeff and James Jasper (eds.) *Rethinking Social Movements: Structure, Meaning, and Emotion*. Boulder: Rowman and Littlefield Publishers Inc., pp. 3-30.

Gonzalez, Gustavo. 2006. Pascua Lama Gold Mine a Threat to Sustainability. *Inter Press News Service Agency*. June 5. Accessed at www.ipsnews.net/print.asp?idnews=33501 on July 3, 2009.

Gore, Al. 2006. *An Inconvenient Truth* (documentary). David Guggenheim (director). Lawrence Bender Productions.

Greenpeace Chile. 2005. For a Native Forest Law: Greenpeace position on the draft law of native forests. Accessed at www.greeenpeace.org/chile on May 30 2008.

Guber, Deborah Lynn and Christopher Bosso. 2009. Past the Tipping Point? Public Discourse and the Role of the Environmental Movement in a Post-Bush Era. In Vig, Norman and Michael Kraft (eds.) *Environmental Policy: New Directions for the Twenty-First Century, 7th Edition*. Wahington, D.C: CQ Press: 51-74

Haider-Markel, Donald P. 2000. Lesbian and Gay Politics in the States: Interest Groups, Electoral Politics, and Policy. In, C.A. Rimmerman, K.D. Wald, and C. Wilcox (eds) *The Politics of Gay Rights*. Chicago: University of Chicago Press: 290-346.

Hall, Kevin G. 2004. Calvo Case 2003. Accessed at globalgays.com/chile-news.html.

Hall, Melinda and Paul Brace. 1999. State Supreme Courts and their Environments: Avenues to General Theories of Judicial Choice. In, Cornell, Clayton and Howard Gillman (eds) *Supreme Court Decision-Making: New Institutionalist Approaches*. The University of Chicago Press: Chicago: 281-300.

Hay, Colin. 2008. Constructivist Institutionalism. In, Rhodes, R.A.W., Sarah A. Binder and Bert A. Rockman (eds) The Oxford Handbook of Political Institutions. Oxford: Oxford University Press: 56-74. Printed from Oxford Handbooks Online at www.oxfordhandbooks.com.

Heberle, Rudolf. 1951 (org.). Taken from (1995) Stanford M. Lyman (ed) *Social Movements: Critiques, Concepts, and Case-Studies*. New York: New York University Press: 49-59.

Herek, Gregory M. 1994. Assessing Attitudes Toward Lesbian and Gay Men: A review of Empirical research with the ATGL Scale. In B. Green and G.M Herek (eds), *Lesbian and Gay Psychology: Theory Research, and Clinical Application*. Thousand Oaks, CA: Sage Publications: 206-228.

Hernandez, Anatolia. 2007. Interview: President of MUMS (Moviemiento Unificado de Minorías Sexuales). Santiago, Chile. March 7.

Herrera, Catalina. 2006. Golpe Cultural Contra la Discriminación: Bachelet Se Convierte en al Primera Presidenta de Chile. OPUSGAY Report. Accessed at: http://www.opusgay.cl/1315/article-71922.html.

Hilbink, Elisabeth. 2002. Review of William C. Prillaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law*. In *Latin American Politics and Society*, 44 (1): 169-174.

Hilbink, Lisa. 2003. An Exception to Chilean Exceptionalism? The Historical Role of Chile's Judiciary. In Susan Eva Eckstein and Timothy P. Wickham-Crowley (eds.) *Whose Justice? What Justice? Fighting for Fairness in Latin America*. Los Angeles: University of California Press: 64-97.

Hilbink, Lisa. 2007. *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile*. Cambridge, MA.: Cambridge University Press.

Hilbink, Lisa. 2009. The Constituted Nature of Constituents' Interest: Historical and Ideational Factors in Judicial Empowerment. *Political Research Quarterly* 62 (4): 781-97.

Hilson, Chris. 2002. New Social Movements: the role of legal opportunity. *Journal of European Public Policy*, 9 (2): 238-255.

Hirsch, Joe. 2004. Access to Justice for Victims and Defendants in Chile. *Justice Initiatives Open Society Newsletter*, February: 34-38.

Hochstetler, Kathryn. 1997. The Evolution of the Brazilian Environmental Movement and its Political Roles, in *The New Politics of Inequality in Latin America: Rethinking Participation and Representation*. D.A. Chalmers et. Al., eds. New York: Oxford University Press, 192-216.

Hoffman, Matthew. 2007. Argentine Appeals Court Rules Against "Gay Marriage". *Lifesitenews*, Nov 2. Accessed at www.lifesite.net/ldn/2007/nov/07110202.html

Hommes, Rudolf. 1998. Institutional Reliability and Development. In, *Justice Delayed: Judicial Reform in Latin America*. Edmundo Jarquin and Fernando Carrillo (eds). Inter-American Development Bank. Washington D.C.: John Hopkins University Press: 47-52.

INECE (International Network of Environmental Compliance and Enforcement) A branch of the World Bank. 2006. List of indicators arising out of access initiative. Accessed at http://www.inece.org/indicators/brochure.pdf Oct 20, 2007.

Inglehart, Ronald. 1981. Post-Materialism in an Environment of Insecurity. A*merican Political Science Review*. Vol 75: 880-900.

Inglehart, Ronald. 1995. Public Support For Environmental Protection: Objective Problems and Subjective Values in 43 Societies. PS, Vol. 28 (1): 57-71.

Inglehart, Ronald, Miguel Basanex, Jaime Diez-Medrano, Loek Halman, and Ruud Luijkx. 2004. *Human Beliefs and Values: a cross-cultural sourcebook based on the 1999-2002 values survey*. Mexico City: Siglo XXI Editores.

International Human Rights Commission (IGLHRC). 2007. Shadow Report on Status of Lesbian, Gay, Bisexual, and Transgender (LGBT) individuals in Chile. Presented March 12. http://www.iglhrc.org. last accessed September 2008.

Jacobs, Lawrence. 1993. The *Health of Nations: Public Opinion and the Making of American and British Health Policy*. Ithica, N.Y.: Cornell University Press.

Jacobs, Lawrence and Robert Y. Shapiro. 1994. Studying Substantive Democracy. *Political Science and Politics* (27) 1: 9-17.

Jarquin, Edmundo and Fernando Carrillo (eds). 1998. *Justice Delayed: Judicial Reform In Latin America*. Washington, D.C.: Inter-American Development Bank/ John Hopkins Press.

Jasper, James. 2007. Cultural Approaches in the Sociology of Social Movements. In Klandermans, Bert and Conny Roggeband (eds.). *Handbook of Social Movements Across Disciplines*. New York: Springer Publications, pp. 59-110.

Jiménez, Rolando. 2007. Interview: President MOVILH (Movement for the Integration and Liberation of Homosexuals). Santiago, Chile. February 21

Jiménez, Rolando. 2005. Minorias Sexulaes Y Acceso a la Justicia. Paper presented at the first Inter-American Access to Justice Conference. United Nations Program for Development. Santiago Chile, October 26.

Jordan, Glenn and Chris Weedon. 1995. *Cultural Politics: Class, Gender, Race, and the Post-ModernWorld*. Oxford: Blackwell.

Kamieniecki, Sheldon. 1991. Political Mobilization, Agenda Building, and International Environmental Policy. *Journal of International Affairs* 44(2): 339-358.

Kamieniecki, S., S.D. Coleman, and R.O. Voss. 1995. The Effectiveness of Radical Environmentalists. In, B.R. Taylor (ed), *Ecological Resistance Movements*. Albany: SUNY Press.

Kapiszewski, Diana and Matthew Taylor. 2008. Doing Courts Justice? Studying Judicial Politics in Latin America. *Perspectives on Politics* (6) 4: 741-767.

Keck, Margaret E. and Kathryn Sikkink. 1998. *Activists Beyond Borders: Advocacy Networks in International Politics*. Ithaca: Cornell University Press.

Kitschelt, Herbert. 1986. Political Opportunity Structures and Political Protest: anti nuclear movements in four democracies. *British Journal of Political Science* 16: 57-85.

Klandermans, Bert and Conny Roggeband (eds.). 2007. *Handbook of Social Movements Across Disciplines*. New York: Springer Publications.

Klesner, Joseph L. 2007. Social Capital and Political Participation in Latin America: Evidence from Argentina, Chile, Mexico, and Peru. *Latin American Research Review* 42 (2): 1-32.

Koopmans, Ruud. 2004. Political Opportunity Structure: Some splitting to balance and lumping. In Goodwin, Jeff and James Jasper (eds.) *Rethinking Social Movements: Structure, Meaning, and Emotion*. Boulder: Rowman and Littlefield Publishers Inc., pp 61-74.

Kornblit, Ana Lia, Mario Pecheny, and Jorge Vujosevich. 1998. *Gays and Lesbianas:Formacion de la Identidad y Derechos Humanos*. Editorial La Colmena: Buenos Aires, Argentina.

Kriesi, Hanspieter. 1989. New Social Movements and the New Class in the Netherlands. *American Journal of Sociology* 94 (5): 1078-1116.

Kriesi, Hanspieter, Ruud Koopmans, Jan Willem Duyvendak, and Marco Giugni. 1992. New Social Movements and Political Opportunities in Western Europe. *European Journal of Political Research*, 22: 219-44.

Kriesi, H. 1996. The Organizational Structure of New Social Movements in a Political Context. In McAdam, Doug; John D. McCarthy, and Mayer N. Zald Eds. 1996. *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*. Cambridge University Press.

Kuper, Adam. 1999. Culture: An Anthropologists' Account. Harvard University Press: Cambridge, Mass.

Kurzman, Charles K. 2004. The Poststructuralist Consensus in Social Movement Theory. In Goodwin, Jeff and James Jasper (eds.) *Rethinking Social Movements: Structure, Meaning, and Emotion*. Boulder: Rowman and Littlefield Publishers Inc., pp. 114-120.

Lash, Jonathan (president of the World research Institute). 2002. Forward in *Closing the Gap: Information, Participation, and Justice in Decision-Making for the Environment*. Bob Livernash (ed.). Washington D.C.: World Research Institute.

Latinobarómetro Poll 2009. *The Economist*. Dec 10. Accessed at Economist.com

Lemebel, Pedro. 2001. *La esquina es mi corazón*. Santiago: Biblioteca Breve.

Lingiardi, Vittorio,Simona Falange, and Anthony R. D'Augelli. 2005. *The Evolution of Homophobia in an Italian Sample. Archives of Sexual Behavior,* 34(1): 81-93.

Link, Michael W. 1995. Tracking Public Mood in the Supreme Court: Cross Time Analysis of Criminal Procedure and Civil Rights Cases. *Political Research Quarterly*, 48: 61-78.

Linz, Juan and Alfred Stepan. 1996. Towards Consolidated Democracies. *Journal of Democracies*, 7 (April): 14-33.

Londen, Jack W. and Mary C. Viviano. 2001. California Commission on Access to Justice. Annual Report.

Luna, Diego; Cesár Padilla and Julián Alcayaga. 2004. *The Exile of the Condor: Transnacional Hegemony on the Border*. Detailed legal Investigation. Santiago, Chile.

Mainwaring, Scott and Edwardo Viola. 1994. New Social Movements. Political Culture, and Democracy: Brazil and Argentina in the 1980s. In, *Essays on Mexico, Central and South America*. Jorge Dominguez (ed). New York: Garland Publishing, 205-240.

Malamud, Andrés and Pablo Castro. 2007. Are Regional Blocs Leading from National States to Global Governance? A Skeptical View from Latin America. *Iberoamericana Nordic Journal of Latin American and Caribbean Studies*. XXXVII:1, 111-130.

Maltzman, Forrest, James F. Spriggs II., and Paul J. Wahlbeck. 1999. Strategy and Judicial Choice: New Institutionalist Approaches to Supreme Court Decision-Making. In, Cornell, Clayton and Howard Gillman (eds) *Supreme Court Decision-Making: New Institutionalist Approaches*. The University of Chicago Press: Chicago: 43-64.

Marshall, Thomas. 1989. *Public Opinion and the Supreme Court*. Boston: Unwin Hyman.

Mason, Paul E. 1996. The Benefits of Arbitration and Mediation for North-South Business Transactions, *Latin American Law and Business Report* 5, (May): 4.

Martin, Juan; lawyer and legal assessor for Fundacion Ambiente y Recursos Naturales (FARN). 2006. Interview conducted by Kathryn Hochstetler. July 12.

Martínez, Isabel. 2001. El Acceso a la Justicia Ambiental en Argentina, Brasil, Chile, Colombia, México y Venezuela Durante la Década de 1990. United Nations paper anlayzing the Judicial Symposium for Environmental Rights and Sustainable Development: Access to Environmental Justice in Latin America. United Nations Environmental Program. Mexico City, Mexico. January 26-28, 2000.

Martinez, Nestor Humberto. 1998. Rule of Law and Economic Efficiency. In, *Justice Delayed: Judicial Reform in Latin America*. Edmundo Jarquin and Fernando Carrillo (eds). Inter-American Development Bank. Washington D.C.: John Hopkins University Press, 3-15.

Marx, Karl and Friedrich Engles. 1998. Communist Manifesto (reprint from 1848). NewYork: Penguin Books

Mather, Lynn. 1990. Dispute processing and a longitudinal approach to courts. *Law and Society Review* 24 (2): 357-71.

Mayer, Margit. 1995 (org pub. 1991). Social Movement Research in the United States: A European Perspective. Taken from, Stanford M. Lyman (ed) *Social Movements: Critiques, Concepts, and Case-Studies*. New York: New York University Press: 168-195.

McAdam, Doug. 1982. *Political Process and the Development of Black Insurgency*, 1930-1970. Chicago: University of Chicago Press.

McAdam, Doug. 1996. Conceptual Origins, Current Problems, Future Directions. In *Comparative Perspectives on Social Movements*, Doug McAdam, John D. McCarthy, and Mayer N. Zald (eds.). Cambridge: Cambridge University Press.

McAdam, Doug; John D. McCarthy, and Mayer N. Zald Eds. 1996. *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*. Cambridge University Press.

McAdam, Doug, Sidney Tarow and Charles Tilly. 2001.. The Dynamics of Contention. New York and London: Cambridge University:.

McAdam, Doug. 2003. Beyond Structural Analysis: Toward a more Dynamic Understanding of Social Movements. In Diani Mario and McAdam Doug (eds), *Social Movemetns and Networks: relational approaches to collective action.* Oxford: Oxford University Press, 281-298.

McAllister, Lesley. 2008. *Making Law Matter: Environmental Protection and Legal Institutions in Brazil.* Stanford: Stanford LawBooks.

McCann, Michael. 1992. Reform and Litigation on Trial. *Law and Social Inquiry* 17: 715-743.

McCarthy, John and Mayer Zald. 1977. Resource Mobilization and Social Movements: a partial theory. *American Journal of Sociology* 82: 1212-41.

McCarthy, John D. 1996. Opportunities in adopting, adapting, and inventing. John D. McCarthy. In McAdam, Doug; John D. McCarthy, and Mayer N. Zald Eds. 1996. Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings. Cambridge University Press: 141-151.

McClurg-Mueller, Carol. 1992. Building Social Movement Theory. In Aldon D. Morris and Carol McClurg (eds.) *Frontiers in Social Movement Theory*. New Haven: Yale University Press, 3-25.

McCarthy, John D. 1996. Opportunities in adopting, adapting, and inventing. John D. McCarthy. In McAdam, Doug; John D. McCarthy, and Mayer N. Zald Eds. 1996. *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*. Cambridge University Press: 141-151.

Mendez, Juan E. 1999. Institutional Reform, Including Access to Justice: Introduction. In Juan E. Mendez, Guillermo O'Donnell, and Paulo Sergio Pinheiro (eds), *The (Un) Rule of Law and the Underprivileged in Latin America*. University of Notre Dame Press: Notre Dame, IN.: 221-226.

Mendez, Juan; Guillermo O'Donnell and Paulo Sergio Pinheiro (eds). 1999. *The (Un) Rule of Law and the Underprivileged in Latin America*. University of Notre Dame Press: Notre Dame, Indiana.

Messick, Richard E. 2005. Alternative Dispute Resolution – when it works, when it doesn't. The World Bank Poverty Reduction and Economic Management (PREM) network: PREMnotes Public Sector, No. 99: 1-4.

Meyer, David S. 2002. Opportunities and Identities: Bridge-Building in the Study of Social Movements. In, *Social Movements: Identity, Culture, and the State*. David S. Meyer, Nancy Whittier, and Belinda Robnett Eds. New York: Oxford University Press, 3-24.

Meyer, David S. 2004 (orig. 1999). Treading the Vinyard: Cultivating Political Process Research. In Goodwin, Jeff and James Jasper (eds.) *Rethinking Social Movements: Structure, Meaning, and Emotion*. Boulder: Rowman and Littlefield Publishers Inc., pp. 50-60.

Meyer, David S. and Lindsey Lupo. 2007. Assessing the Politics of Protest: Political Science and the Study of Social Movments. In Klandermans, Bert and Conny Roggeband (eds.). *Handbook of Social Movements Across Disciplines*. New York: Springer Publications, pp. 111-156.

Miles, Penny. 2004. Searching for Citizenship the Legal Way: Gay Communities in Argentina and Chile. Dissertation for MSc Latin American Politics, Institute of Latin American Studies: University of London. Aug., 27.

Mishler, William and Reginald Sheehan. 1993. The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions. *The American Political Science Review*, 87 (1): 87-101.

MOVILH (Movement for Homosexual Integration and Liberation). 2009. Denuncias por homofobia y transfobia en Chile aumentaron en un 14 por ceinto durante el 2008. February. Accessed February 2009 at: http://www.movilh.cl/index.php?option=com_content&task=view&id=700&Itemid=1

MOVILH (Movement for Homosexual Integration and Liberation). 2008. Afinan detalles para anunciar públicamente verdad del Caso Divine. Accessed January 2009 at: www.movihl.cl/index.php?option=com_content&task=view&id=645&Itemid=1

MOVILH (Movement for Homosexual Integration and Liberation). 2004. Informe Anual Sobre Derechos Humanos de las Minorias Sexuales Chilenas. www.movilh.org/documetos/informeddhh2004.doc.

MOVILH (Movement for Homosexual Integration and Liberation). 2008. Suspendan Juicio Contra Actor Extranjero que fue Detinido por ley Homofobica en Chile. Aug. 15. Accessible at http://www.movilh.cl/index.php?option=com_content&task=view&id=633&Itemid=1

MOVILH (Movement for Homosexual Integration and Liberation). 2010. Comisión Interamericana resuelve que Chile violó derechos humanos de jueza Atala y de sus tres hijas. April 5. Accessed at http://www.movilh.cl/index.php?option=com_content&task=view&id=871&Itemid=1 on April 5, 2010.

Moye, John E. 2003. Access to Justice and Funding for the Courts. The Colorado Lawyer (32) 1: 25.

Nápoli, Andres (ed). 2006. Acceso a la información y participación pública en materia ambiental: actualidad del principio 10 en la Argentina. Buenos Aires: FARN. accessed at www.farn.org.ar.

Nef, Jorge. 2008. Environmental Policy and Politics in Chile Revisited: The Limits of Reformism. In Diez, Jordi and O.P. Dwivedi (Eds.) *Global Environmental Challenges: Perspectives from the South*. Toronto: Broadview Press: 248-274.

Nierman, Angela J, Suzanne C. Thompson, Angela Bryan, and Amanda L Mahoffy. 2007. Gender role Beliefs and Attitudes towards Lesbian and Gay Men in Chile and the U.S. *Sex Roles*, May (57): 61-67.

Núnez-González, Héctor. 2007. Interview. Chilean GLBT activist and former GLBT radio host. February 13.

O'Donnell, Guillermo. 1992. Transitions, Continuities, and Paradoxes. In Scott Mainwaring, Guillermo O'Donnel, and J. Samuel Venenzuela (eds.), *Issues in Democratic Consolidation: The New South American Democracies in Comparative Perspective*. Notre Dame: University of Notre Dame Press.

Open Society Justice Initiative. 2006. Justice Initiative and Four Other Groups Join Landmark Access to Information Case. March 30. Accessed at www.justiceinitiative.org on August 4, 2008.

Order of the InterAmerican Court of Human Rights Case of Claude-Reyes et. al. v. Chile. September 19, 2006. Accessed at www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc on September 9, 2008.

Ortúzar, Antonio Sr. and Pedro Filipe Vial. 1997. Latin American Legal Developments Movement, 5(3). National Law Center for Inter-American Free Trade. Accessed at http://www.natlaw.com/interam/ch/en/sp/spchen1.htm on July 13, 2009.

Padilla, Roberto E. 2002. Alternative Dispute Resolution (ADR) in Argentina. Article published on LexUniversal: Global Virtual Law Connection. http://www.lexuniversal.com/en/articles/901 Accessed Nov 21, 2006.

Payne, Mark J, Daniel G. Zavatto, and Mercedes Mateo Díaz. 2007. *Democracies in Development: Politics and Reform in Latin America*. Inter-American Development Bank: Washington, D.C. Also found at http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=970762 .

Pedriana, Nicholas. 2009. Intimate Equality: The Lesbian, Gay, Bisexual, and Transgender Movement's Legal Framing of Sodomy Laws in the Lawrence v. Texas Case. In Barclay, Scott; Mary Bernstein; and Anna-Maria Marshall (eds). *Queer Mobilizations: LGBT Activists Confront the Law*. New York: New York University Press: 52-75.

Pereira, Anthony. 2003. Explaining Judicial reform Outcomes in New Democracies: The Importance of Authoritarian Legalism in Argentina, Brazil, and Chile. *Human Rights Review*, 4 (3): 3-16.

Pereira, Anthony. 2005. *Political (In)justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina*. Pittsburgh: University of Pittsburgh Press.

Peruzzotti, Enrique. 2002. Towards a New Politics: Citizenship Rights in Contemporary Argentina. *Citizenship Studies*., Vol. 6, No. 1: 77-92.

Peruzzotti, Enrique. 1997. Civil Society and the Modern Constitutional Complex: The Argentine Experience. *Constellations*, Vol. 4, No. 1: 94-103.

Petrova, Elena, Crescencia Maurer, Norbert Henninger and Francis Irwin. 2002. *Closing the Gap: Information, Participation, and Justice in Decision-Making for the Environment*. World Resources Institute. Washington D.C.

Pierceson, Jason. 2005. *Courts, Liberalism, and Rights*. Philadelphia: Temple University Press.

Pinera flies the flag. 2009/10. *The Economist*. Dec 19th-Jan. 1: 59.

Pinochet, Jose. 2007. Interview: Lawyer for FIMA (Fiscalia del Medioambiente). Santiago, Chile. March 5.

Pizarro, Rodrigo. 2007. Interview: Executive Director, Fundación Terram. Santiago, Chile. March 8.

Plotke, David. 1990. What's so New About New Social Movements. Taken from (1995) Stanford M. Lyman (ed) *Social Movements: Critiques, Concepts, and Case-Studies*. New York: New York University Press: 113-136.

Polletta, Francesca. 2004. Culture is Not Just in Your Head. In Goodwin, Jeff and James Jasper (eds.) *Rethinking Social Movements: Structure, Meaning, and Emotion*. Boulder: Rowman and Littlefield Publishers Inc., pp. 99-113.

Prillaman, William C. 2000. The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law. Praeger Publishers: Westport, CT.

Reding, Andrew. 2003. Sexual Orientation and Human Rights in the Americas. A Report for the Project for Global Democracy and Human Rights: World Policy Institute.

Report of Justice. 2004-2005. Justice Studies Center of the Americas (CEJA – JSCA). Accessed online at www.cejamericas.org/reporte/muestra_pais.php?idioma=ingles&pais=Chile, June 29, 2006.

Renteln, Alison Dundes. 2004. *The Cultural Defense*. Oxford University Press: Oxford.

Risse-Kappan, Thomas. 1991. Public Opinion, Domestic Structure, and Foreign Policy in Liberal Democracies. *World Politics* 43: 479-412.

Roggeband, Conny and Bert Klandermans. 2007. Introduction. In Klandermans, Bert and Conny Roggeband (eds.). *Handbook of Social Movements Across Disciplines*. New York: Springer Publications.

Rohter, Larry. 2006. With a New Leader, Chile Seems to Shuck Its Strait Laces. *New York Times*, March 8: A4.

Rootes, Chris. 1997. Shaping Collective Action: structure, and knowledge, in Ricca Edmondson (ed), *The Political Context of Political Action: Power Argumentation and Democracy*, London: Routledge.

Rootes, Chris. 1999. The Transformation of Environmental Activism: activists organizations, and policy-making. *Innovation: The European Journal of Social Sciences* 12: 153-73.

Rosenberg, Gerald. 1991. The Hollow Hope: Can Courts Bring about Social Change? Chicago: University of Chicago Press.

Rowat, Malclm; Maria Dakolias, and Malik H. Waleed (eds.). 1995. *Judicial Reform in Latin America and the Caribbean: Proceedings from the World Bank Conference*. Washington, D.C.: World Bank Publications.

Rubilar, Edwardo. 2008. Ley Bosque Nativo! Por Fin! Boletín ESCODEFF, No. 23. Accessed at www.webcodeff.cl on August 22, 2008.

Sabsay, Daniel. 2003. Constitución y ambiente en el marco del desarrollo sustentable. Symposium of Judges and Prosecutors of Latin America. Buenos Aires, FARN.

Salmon, Ton and Willem Assies. 2007. Anthropology and the Study of Social Movements. In Klandermans, Bert and Conny Roggeband (eds.). *Handbook of Social Movements Across Disciplines*. New York: Springer Publications, pp. 205-267.

Schedler, Andreas. 1998. What is Democratic Consolidation? Journal of *Democracy* 9 (2): 91-107.

Schepple, Kim Lane. 1988. *Legal Secrets: Equality and Efficiency in the Common Law*. Chicago: University of Chicago Press.

Schwartz, Michael and Shuva Paul. 1992. Resource Mobilization versus the Mobilization of the People: Why Consensus Movements Cannot be Instruments of Social Change. In Aldon D. Morris and Carol McClurg (eds.) *Frontiers in Social Movement Theory*. New Haven: Yale University Press, 205-223.

Segal, Jeffrey and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge: Cambridge University Press.

Sherwood, Robert. 1998. Judicial Systems and National Economic Performance. In *Justice Delayed: Judicial Reform in Latin America*. Edmundo Jarquin and Fernando Carrillo (eds). Inter-American Development Bank. Washington D.C.: John Hopkins University Press: 31-38.

Shulenberg, Shawn. 2006. Policy Success Despite Declining Opportunities: Civil Unions in Buenos Aires in the Wake of the 2001 Economic Crisis. Paper prepared for the 2006 meeting of the Midwest Political Science Association, Chicago, Illinois. Accessed at http://www.allacademic.com//meta/p_mla_apa_research_citation/1/3/8/5/1/pages138513/p138513-1.php

Siavelis, Peter M. 2002. Exaggerated Presidentialism and Moderate Presidents, Executive-Legislative Relations in Chile, in Scott Morgenstern and Benito Nacif (eds) *Legislating Institutions in Latin America.* Cambridge: Cambridge University Press: 79-113.

Sims, Calvin. 1997. Eyes on Argentina, Judges Often Biggest Law Breakers. *New York Times*, August 18

Slater, David. 1991. New Social Movements and Old Political Questions: Rethinking State-Society Relations in Latin American Development. *International Journal of Political Economy* 15 (Spring): 32-65.

Smith, Jackie and Tina Febner. 2007. Structural Approaches in the Sociology of Social Movments. In Klandermans, Bert and Conny Roggeband (eds.). *Handbook of Social Movements Across Disciplines*. New York: Springer Publications, pp 13-57.

Smulovitz, Catalina and Enrique Peruzzotti. 2003. Societal and Horizontal Controls: Two Cases of a Fruitful Relationship. In, *Democratic Accountability In Latin America*, Scott Mainwaring and Christopher Welna (eds). NY: Oxford University Press: 309-331.

Sotolongo, Jen. 2006. New Legal Systems Still Lacking Qualified Judges. *The Santiago Times*, April 4. Accessed at www.tcgnews.com/santiagotimes.

Snow, David A., E. Burke Rochford, Steven K. Worden, and Robert D. Benford. 1986. Frame Alignment Processes, Micromobilization, and Movement Participation. *American Sociological Review* 51: 464-481.

Snow, David A. and Robert D. Benford. 1988. Ideology, Frame resonance, and Participant Mobilization. *International Social Movement Research* 1:197-217.

Snow, David A. and Robert D Benford. 1992. Master Frames and Cycles of Protest. In Morris D. Aldon and Carol McClurg Mueller (eds.) *Frontiers in Social Movement Theory*. New Haven: Yale University Press: 133-155.

Steinberg, Marc W. 2004. The Intellectual Challenges of Toiling in the Vinyard. In Goodwin, Jeff and James Jasper (eds.) *Rethinking Social Movements: Structure, Meaning, and Emotion*. Boulder: Rowman and Littlefield Publishers Inc., pp. 121-127.

Stimson, James A., Michael B. MacKuen, and Robert S. Erikson. 1995. Dynamic Representation. American Political Science Review, 89: 543-65.

Stratton, Mary and Diana Lowe. 2000. *Public Confidence and the Civil Justice System: What do we know about the Issues*? Paper prepared for Justice Policy Advisory Subcommitee on Public Confidence. Alberta Canada: Canadian Forum on Civil Justice. Accessed at http://cfcj-fcjc.org/docs/2006/cjsp-confidence-en.pdf

Suntheim, Marcelo; Secretary of Comunidad Homosexual Argentina (CHA). 2006. Interview conducted by Elisabeth Friedman, July.

Tarrow, Sidney. 1989. Democracy and Disorder: Protests and Politics in Italy, 1965-1975. Oxford: Clarendon.

Tarrow, Sidney. 1992. Mentalities, Political Cultures, ad Collective Action Frames: Constructing Meaning through Action. In Morris D. Aldon and Carol McClurg Mueller (eds.) *Frontiers in Social Movement Theory*. New Haven: Yale University Press: 174-202.

Tarrow, Sidney. 1994. Power *in Movement: Social Movements, Collective Action, and Politics.* Cambridge: Cambridge University Press.

Tarrow, Sidney. 2006. Confessions of a Recovering Structuralist. *European Political Sceince*. 5 (1): 7-20.

Tarrow, Sidey. 2004 (orig. 1999). Paradigm Warriors: Regress and Progress in the Study of Contentious Politics. In Goodwin, Jeff and James Jasper (eds.) *Rethinking Social Movements: Structure, Meaning, and Emotion*. Boulder: Rowman and Littlefield Publishers Inc.. pp. 39-40.

Taylor, Matthew M. 2008. *Judging Policy: Courts and Policy Reform in Democratic Brazil*. Stanford: Stanford University Press.

Tetley, William. 2000. Mixed Jurisdictions: common law vs. civil law (codified and uncodified). Uniform Law Review: 591-619. Accessed at http://www.unidroit.org/english/publications/review/articles/articles-main.htm March 8, 2005.

Tilly, Charles. 1978. *From Mobilization to Revolution*. Reading, MA.:Addison-Wesley.

Tilly, Charles. 2004 (orig. 1999). Wise Quacks. In Goodwin, Jeff and James Jasper (eds.) *Rethinking Social Movements: Structure, Meaning, and Emotion*. Boulder: Rowman and Littlefield Publishers Inc., pp. 31-38.

Tjernstrom, E. and T. Tietenberg. 2008. Do differences in attitudes explain differences in national climate change policies? Ecological Economics 65: 315-324.

Tocqueville, Alexis . 1835 (org.) Reprinted 2002. *Democracy in America*. Chicago: University of Chicago Press.

Tribelcock, M.J. and Ronald Joel Daniels. 2008. *Rule of Law Reform and Development: Chartering the Fragile Path of Progress*. Northhampton, MA.: Edward Elgar Publishing Limited.

Tyler, E. 1871. *Primitive Culture*. London: John Murray.

Unger, Mark. 2002. *Elusive Reform: Democracy and the Rule of Law in Latin America*. Boulder, Co.: Lynne Rienner.

USAID Supports Alternative Dispute Resolution In Latin America and the Caribbean. 2004. http://www.usaid.gov/locations/latin_america_caribbean/pdf/dg_conflict.pdf. Accessed June 26, 2006.

USAID Promotes the Rule of Law in Latin America and Carribean Democracies. http://www.usaid.gov/locations/latin_america_caribbean/pdf/dg_ruleoflaw.pdf Accessed February 13, 2010.

Valente, Marcela. 2007. Supreme Court Precedent Against Dangerous Mines. *Inter Press Service News Agency*: Environment Argentina. April 20. Accessed at: www.ipsnews.net/news.asp?idnews=37425.

Vance Center for Internacional Justice Initiatives. 2006. Global Clearinghouse: Amicus Network. Accessed at www.abcny.org/VanceCenter/PDF/Amicus - (Carlos Barona Bray vs. State of Chile) on September 8, 2008.

Van der Heijden, Hein-Anton. 1999. Environmental Movements, Ecological Modernization, and Political Opportunity Structures. *Environmental Politics*, Vol. 8, No. 1: 13-34.

Vargas-Viancos, Juan Enrique. 1995. Diagnóstico del sistema judicial chileno. Ministry of Justice.

Walker, Ignacio. 2003. The Future of Chilean Christian Democracy, in Scott Mainwaring and Timothy R. Scully (eds) *Christian Democracy in Latin America: Electoral Competition and regime Change*. Stanford: Stanford University Press: 162-195.

Walker, Lee Demetrius. 2008. Gender and Attitudes Toward Justice System Bias in Central America. *Latin American Research Review*. Vol. 43 (2): 80-106.

Whittier, Nancy. 1995. *Feminist Generations: The Persistence of the Radical Women's Movement*. Philadelphia: Temple University Press

Whittier, Nancy. 2002. Conclusion. In, *Social Movements: Identity, Culture, and the State*. David S. Meyer, Nancy Whittier, and Belinda Robnett Eds. 2002. New York: Oxford University Press, 289-308.

Wilson, Bruce M., Juan Carlos Rodriguez Cordero and Roger Handberg. 2004. The Best Laid Schemes…Gang Aft A-gley: Judicial Reform in Latin America – Evidence from Costa Rica. *Journal of Latin American Studies* (36) 3: 507-531.

Wilson, Richard J. 2004. Growth of the Access to Justice Movement in Latin America: The Chilean Example. *Justice Initiatives Open Society Newsletter*, February: 31-34.

Williams, Rhys H. 2004. The Cultural Contexts of Collective Action: Constraints, Opportunities, and the Symbolic Life of Social Movements. In *The Blackwell Companion to Social Movements, Blackwell Companions to Sociology*, David Snow, Sarah Soule, and Hanspeter Kriesi (eds). London: Blackwell Publishing: 91-115.

Wolfe, Pamela. 2006. Water Conflicts Threaten Violence on Local Level: Chile's National Environmental Commission (CONAMA) issued its final Approval. *Water and Waste Water International*, 21(3): 3.

Yale Center for Environmental Law and Policy. 2002. *Pilot Environmental Performance Index*. New Haven: Yale University Press.