

## Introduction

Overturning an appellate-court decision, on May 31, 2004, Chile's Supreme Court stripped Karen Atala of the custody of her daughters. The Court argued that the daughters were in a "situation of risk" by living with their lesbian mother because it exposed them to potential social discrimination and ostracism, placing them in a "vulnerable position" in their social environment. According to the majority ruling, such a situation would affect the children's personal development. Atala, a respected jurist, availed herself of *amicus curiae* briefs, obtained support from national and international human rights organizations, and took her case to the Inter-American Human Rights Commission. In 2008 the Commission decided that the case was admissible to the Inter-American Court of Human Rights. In a historic 2010 ruling, the Court stated that the Chilean state had violated Atala's right to live free of discrimination as stipulated in the American Convention of Human Rights. It also urged the Chilean state to adopt legislation, policies, and programs to prohibit and eradicate discrimination based on sexual orientation. The ruling was a significant personal triumph for Atala's seven-year legal battle to regain custody of her daughters. It was also historic because it was the first time discrimination based on sexual orientation was considered to be a suspect classification and hence to contravene basic human rights enshrined in Inter-American treaties. But, more broadly, the recommendation amounted to an indictment of Chile's record in establishing a legal framework to prevent and eradicate discrimination based on sexual orientation. A country often used by many as the socioeconomic model of development that Latin Americans should emulate found itself exposed internationally for its failure, twenty years after the end of a

brutal dictatorship that had committed gross human rights atrocities, to extend basic rights protections to one of the most vulnerable sectors of its society.

Across the Andes another important struggle for sexual rights came to an end in the same year. Following the submission of a judicial appeal by Alex Freyre and José María di Bello to the denial of their marriage license application, in November 2009 a Buenos Aires judge handed down a historic ruling arguing that the definition of marriage in Argentina's civil code was unconstitutional and ordered the city's administrators to issue the couple a marriage license. Despite the surprising decision by the city's right-wing mayor not to appeal the ruling, on the eve of their wedding scheduled for December 1, another judge issued an injunction ordering the city's administration not to issue the marriage certificate on grounds that the previous judge did not have competency to rule in that area. Their marriage was thus annulled. Flanked by gay and lesbian activists and numerous prominent politicians, the couple gave a highly emotional news conference as their right to marry had been taken away hours before the ceremony. Freyre and di Bello vowed to fight on and were seemingly destined to make history: the socially progressive governor of Tierra del Fuego Province decided to intervene and ordered her province's Civil Registry's Office to honor the first ruling. On December 28, 2009, the couple finally wed in the Western Hemisphere's southernmost city, Ushuaia, making them the first same-sex couple in Latin America to have contracted marriage. This legal victory was part of a larger struggle waged by gay and lesbian activists in Argentina to expand the traditional definition of marriage. Their struggle culminated with reforms to the civil code approved by the Argentine Congress in 2010 and promulgated into law by President Cristina Fernández de Kirchner that expanded the right to marriage nationally to same-sex couples. Argentina thus became the first country in Latin America, second in the Global South, and tenth in the world, in which this right was extended to its entire citizenry.

Mexico also witnessed a significant culmination in the struggle for the expansion of sexual minority rights in 2010. After intense collaboration between gay and lesbian activists and socially liberal city councilors, and despite stern public opposition from the Catholic Church and other conservative actors, Mexico City's Assembly approved, on December 21, 2009, reforms to the city's civil code allowing for same-sex marriage. The city's socially progressive mayor, Marcelo Ebrard, had been an open advocate of sexual minority rights and supported the reforms. He promulgated them into law and the new civil code came into effect

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on March 2, 2010. Gay and lesbian activists' elation for having won this battle was tempered, however: the federal government, headed by conservative president Felipe Calderón (2006–12), decided to challenge the constitutionality of the reforms before the Supreme Court. Calderón's decision was not surprising as he had taken the same course of action when legislation decriminalizing abortion was passed by the city three years earlier. The Supreme Court did not agree with Calderón's challenge and upheld the constitutionality of Mexico City's marriage laws. It subsequently ruled that marriages performed in the city are valid throughout the country. Indirectly, gay marriage was extended to all Mexicans provided that they contract marriage in the capital city.

The three developments elicit intriguing policy puzzles. Why did Argentina and Mexico adopt marriage when they did? Why did Argentina do so at the national level while Mexico first expanded such a right at the subnational level? Why does Chile appear to be a laggard in the expansion of rights to sexual minorities? The country has not adopted gay marriage, and it enacted its first antidiscrimination legislation only in 2012, pushed largely by the popular outrage caused by the death of a gay teen who was attacked and tortured by extremists in central Santiago. Why, in more general terms, do there appear to be different trajectories and outcomes in the expansion of rights to sexual minorities in the three countries? While not representative of the entire region, the three cases capture some of the variance that exists in the expansion of sexual minority rights across Latin America. Indeed, a characteristic of the region's recent "gay-rights revolution" (Encarnación 2011) is wide cross-national variance: while some countries have extended gay and lesbian rights, others have not, and yet others have in fact retrenched them.<sup>1</sup> The main objective of this book is to account for such variation by focusing on one policy area: gay marriage. The pursuit of this explanation fills an

<sup>1</sup> In terms of same-sex relationship recognition, by mid-2014 Argentina, Uruguay, and, in Mexico, Mexico City and Quintana Roo, were the only jurisdictions to allow gay marriage, and, through judicial rulings (detailed in Chapter 5), couples in the states of Oaxaca, Chihuahua, Guanajuato, Nayarit, and Jalisco were granted the right to marry. A ruling by a Brazilian high court in 2012 extended all the rights accorded to traditional marriages to same-sex couples, thereby allowing for gay-marriage benefits through an administrative route. In Colombia, a legal vacuum was created by the failure of Congress to abide by a Constitutional-Court ruling that challenged the definition of marriage and urged Members of Congress to legislate on the matter. Same-sex unions have been legalized in Uruguay, Colombia, and Ecuador, and in several Argentinean, Mexican, and Brazilian subnational jurisdictions, while Honduras, El Salvador, and the Dominican Republic have constitutionally banned same-sex marriage.

important gap in our knowledge of the politics of sexual minority rights in Latin America in general and of gay marriage in particular. Important work has recently been produced on this understudied topic (de la Dehesa 2010; Encarnación 2011; Marsiaj 2006; Pecheny, Figari, and Jones 2008; Torres-Ruiz 2011). Some scholars have sought to explain policy outcomes in gay rights<sup>2</sup> (Marsiaj 2012; Pierceson, Piatti-Crocker, and Schulenberg 2010) while others have specifically analyzed the recognition of gay marriage in Mexico and Argentina (Andía 2013; Ballina 2013; Clerico and Aldao 2010; Corrales and Pecheny 2010; Friedman 2012; Lozano 2013; Maffre 2014; Schulenberg 2012). Yet, no work has been produced that explains cross-national policy variation in gay marriage recognition in Latin America.<sup>3</sup> It also contributes to the debate on current explanations for the variation in same-sex marriage outside the region. Since the first country (The Netherlands) approved gay marriage (in 2001), several political scientists have attempted to identify the factors that are behind its enactment. Most of this work, however, is based on case studies (Calvo 2007; Larocque 2006; Matthews 2005; Mucciaroni 2008; Pettinicchio 2010). While they provide important insights into the legalization of gay marriage, they have limitations for they are unable to generalize beyond single cases. Some political scientists have taken an explicitly comparative approach (Kollman 2013; Paternotte 2011; Rayside 2008; Smith 2008). This work has made important contributions to the debate because they allow us to reach midrange generalizations. However, their findings can be enriched with research on countries in the Global South given that, until now, these studies have been limited to industrialized democracies.

In order to explain cross-national policy variance I have selected three cases that show variation in gay marriage recognition: Argentina, Mexico, and Chile. Gay marriage has been approved in Argentina and Mexico but not in Chile. Chile is therefore the noncase in my comparison. Using John Stuart Mill's "method of difference,"<sup>4</sup> the three cases allow me to explore and identify the factors that explain policy variance across countries that

<sup>2</sup> In this book I use the terms *gay* and *gay and lesbian* rights interchangeably for, among most activists and academics who work on the issue of gay marriage (the policy under study in this book), the term *gay* encompasses all homosexuals regardless of gender.

<sup>3</sup> Pierceson, Piatti-Crocker, and Schulenberg's edited volume includes two essays on gay marriage in Argentina and Mexico, but it is not a comparative study (2012).

<sup>4</sup> The method consists of comparing one or more "positive" cases in which the phenomenon under study is present with another case or cases in which it is not, among cases that share important general similarities (Mill 1974).

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share several important characteristics, such as levels of urbanization, education, and industrialization. I therefore control for several variables. I have selected gay marriage not only because it is understudied by political scientists, but also because it is an area of moral policy<sup>5</sup> reform in Latin America that has become one of the most dynamic in recent years, given the significant changes that have taken place in a very short period of time. The selection is also influenced by Theda Skocpol's view that the aim of social science research is to understand and explain real-world puzzles (2003). It is at the same time inspired by some theoretical discussions on the nature of democracy that the expansion of gay rights has inevitably ignited (Bell and Binnie 2000; Cossman 2007; Eribon 1999; Kaplan 1997; Plummer 2003). For some of these theorists, gays and lesbians attain full democratic citizenship when they are able to secure not only negative rights – such as the decriminalization of homosexual activities between consenting adults and the prohibition of discrimination based on sexual orientation – but also when they are able to wrest from the state the legal and social recognition of the ethical status of gay and lesbian relationships (Kaplan 1997). As discussions on the quality of democracy in Latin America continue, questions regarding the limits of citizenship are of increased relevance (Hagopian 2007; Yashar 2005). While there is, of course, no agreement over what democracy entails, demands for the recognition of same-sex relationships by the state, as Éric Fassin argues (2008), inevitably force a debate on what democracy and citizenship entail. The Latin American gay activists at the center of these struggles, and their allies, are pushing the boundaries of democracy and citizenship. That, on its own, warrants scholarly attention.

### Explaining Policy Variance: The Argument

What accounts for policy variance in the expansion of gay marriage in the three countries? In this book I answer this question by presenting

<sup>5</sup> I use the terms *moral politics/policy* to refer to the political science literature that explores, broadly, sexual and reproductive rights and family law. Some scholars have argued that moral policy (gay marriage, abortion, capital punishment, prostitution, pornography, etc.) constitutes a distinctive policy type because it entails the regulation of conflicts among social values (Meier 1994, 1999; Mooney 1999). However, most of this work was theorized based on the U.S. experience where the “culture wars” have indelibly marked politics over the last three decades. Recent research suggests that such a clear distinction does not apply elsewhere. In some countries (e.g., Denmark and the United Kingdom) they are often considered nonpolitical, “ethical” issues given the composition of their party systems (Engeli, Green-Pedersen, and Larsen 2012).

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research data gathered over a period of five years.<sup>6</sup> The research I present in this book suggests that policy variance is largely explained by a combination of three variables: 1) the ability and willingness of activists to form coalitions and networks with a variety of state and nonstate actors; 2) the type of access to the policy-making process that is conditioned by a country's institutional features; and 3) the framing of demands in a manner that resonates with larger social debates. I argue that policy change is the result of decades-long struggles to expand citizenship rights waged by numerous activists *and* allies. In the two cases in which we have seen policy change, Argentina and Mexico, activism has been characterized by higher degrees of organization, coalition building, and the development of more effective framing strategies in the pursuit of policy reform. This is then a story about the perseverance and acumen of individuals to create more equal societies by expanding rights to marginalized sectors of their societies. But agency is not enough to explain policy variance. Structures matter, and activism must be placed within its structural context. I argue that the institutional framework of each country has conditioned the type of access to the policy process that proponents and opponents of gay and lesbian rights have had. Institutions are therefore a central part of the story. Policy change has occurred in the countries in which political institutions allow meaningful access to proponents of gay and lesbian rights and over which opponents do not have formal or informal veto power to block activists' demands. However, equally important are the broader political environments in which activism has evolved and institutions have been established, and access to the policy process is not enough to explain policy variance. Policy change has been induced when gay and lesbian activists and allies craft their demands in a manner that resonates with society at large and that convinces decision makers of the justness of their cause. Larger processes of democratization are crucial in these developments. The *type* of transition to democracy a country has undergone has conditioned the degree of political contestation that allows for

<sup>6</sup> The research data were obtained through 246 in-depth personal interviews with activists and government officials in the three countries, carried out over a period of nineteen nonconsecutive months between May 2007 and August 2012. It also comprised archival research and numerous formal and informal meetings with activists and government officials in the three countries. Funding for this research was provided by Canada's Social Sciences and Humanities Research Council. In accordance with ethics guidelines mandated by the Government of Canada, informants were given the option to remain anonymous. Accordingly, the names of participants appear only in those cases in which they formally agreed to have their names published. Descriptive, nonidentifying terms are otherwise used.

a renegotiation of the terms of citizenship rights. In the following sections I detail how these three variables – gay and lesbian mobilization, access to the policy process, and the framing of demands – play out in accounting for policy variance among the three cases.

### *Public Policy, Social Movements, and Networks*

The vast literature on public policy offers numerous explanations for policy change. Scholars have argued that policy processes are rather complex and that policy change can come from a variety of sources (Stone 2001). One of those sources is social mobilization. Policy scholars have traditionally ignored the relationship between social movements and the policy-making process (Meyer 2005, 6–7). However, recent literature has looked at the interaction between social movements and the state (Banaszak, Beckwith, and Rucht 2003; Franceschet 2005) as well as how they are able to influence the shaping of policy beyond placing issues on public agendas (Díez 2006, 2013; Johnson, Agnone, and McCarthy 2010; Lupien 2011; Weldon 2012). In terms of moral policy reform, recent scholarship shows, rather conclusively, that social movements do indeed influence policy change. In the most comprehensive cross-national study of moral policy reform, Mala Htun and Laurel Weldon (2012) demonstrate – looking at seventy countries over a period of thirty years – that feminist mobilization in civil society accounts for variation in policy development in the area of violence against women. In the case of Latin America, scholars have become increasingly interested in the impact nonstate actors have on policy. As the posttransitional politics began to stabilize in many countries of the region – and questions of military reversals faded – some scholars began to look at the interaction between nonstate actors and governments and especially at the extent to which social mobilization was influencing policy making in the new democracies. This question assumed particular importance at the turn of the century given the highly exclusionary styles that characterized many policy-making processes during the 1990s (Centeno and Silva 1998; Teichman 2001). Because of the negative effects this was having on the vibrancy of the new democracies, such as widespread public cynicism, calls for more open and participatory policy-making practices were made in what was termed “second-generation reforms” (Molyneux 2008). There has been, as a result, increased scholarly interest in the extent to which civil society actors and organizations have been able to influence public policy within the new democratic context (Boesten 2006; Díez 2006; Garay 2007).



Results from this research point to a rather sketchy picture (Franceschet and Díez 2012). Some work suggests that there has been an increased ability of various sectors of society to gain access to decision and policy making. However, the stark socioeconomic inequalities for which the region is notorious pose veritable challenges to the ability of excluded sectors to organize and influence policy. Moreover, in many countries in the region, the close links created between the political and economic élites have continued to allow for the direct access into the policy process by the most powerful groups, access that in certain cases has become institutionalized. There has therefore been an unequal access to the process by society with an inordinate influence by economic élites. However, despite these challenges, scholarship on Latin America has also underlined the critical role social movements play in bringing about policy change in areas that tend not to be priorities for governments. Whether it is indigenous people's or women's rights, or environmental protection, political scientists have demonstrated that social movements have gone beyond the placement of demands on national agendas and that they have been able to shape policy (Díez 2006; Franceschet 2005; Lupien 2011). In the area of gay and lesbian rights, recent scholarly work has produced similar findings: gay and lesbian mobilization has been critical in bringing about policy change (Díez 2010, 2013; Encarnación 2013; Marsiaj 2012; Schulenberg 2012).

Nevertheless, the impact social movements have on policy is often difficult to determine. In Latin America, individuals who belong to social movements or nongovernmental organizations (NGOs) have increasingly been recruited into government while maintaining strong relationships with civil society organizations. This is especially the case with the region's recent shift to the left. Many of the social democratic parties that have been elected into government emerged from grassroots mobilization and have strong links with civil society actors (Díez 2010). Because in many cases they have recruited civil society individuals to government positions, the line between state and nonstate actors has consequently become blurred. Moreover, while activists belonging to social movements play pivotal roles in pursuing, and attaining, policy objectives, their efforts are very often accompanied by individuals, or "allies," who do not form part of these movements but who nonetheless play critical roles in bringing about policy change. The employment of "social movement" as a concept that refers to nonstate actors is consequently rendered of limited use. As a result, concepts used by political scientists interested in the study of public policy in Latin America such as "policy networks"



(Kubal 2012), “issue networks” (Htun 2003b), or quite simply individuals’ “networks” (Hochstetler and Keck 2007) in explanations of policy outcomes seem more useful, which is demonstrated by their increased use in analyses of policy making (Torres-Ruiz 2011; Vargas Paredes 2010).

In this book, I use the broad concept of networks to account for policy change. My use of the term *network* derives from the concept of “issue network” first developed by Hugh Heclo to describe specialized subcultures of highly knowledgeable policy watchers (1978). It refers to a multiplicity of state and nonstate actors, NGOs, and professional associations that collectively pursue shared policy objectives. But my use of the term *networks* differs from Heclo’s conceptualization, and its use by some scholars, in the role activists play in building, sustaining, and relying on these networks in their struggles to bring about policy change. In her groundbreaking work on gender policy reform in Latin America, Htun uses Heclo’s idea of issue networks in her analysis to capture “the range of actors and interests who have contributed to gender-related reform in Latin America” (2003b, 15). However, for Htun, social movements do not play a central role in forming these networks: she argues that social movements may or may not influence them and that what links issue networks is an interest in a particular policy area and not traits such as ideological orientation or identity (2003b, 15). Such networks are decidedly different from the ones I identify in this book and that are largely behind policy change in the area of gay and lesbian rights. As we shall see, gay and lesbian mobilization has been central in the formation and sustainability of networks, and identity and ideological compatibility appear to play a central role in linking myriad state and nonstate actors. As I argue, the formation of networks is the result of the efforts made by gay and lesbian activists. They have been created over periods of time by members of gay and lesbian movements who have formed alliances with a variety of individuals with whom they share identity traits or ideological values and are characterized by a certain degree of volatility. These networks are key in explaining the expansion of rights in the countries analyzed here. Indeed, the central argument in this volume is that *policy change is induced by gay and lesbian activists who form extensive and influential networks of like-minded state and non-state actors, which in turn develop strategies and policy frames that convince policy makers and important sectors of society of their cause*. In the two countries in which there has been policy change, Argentina and Mexico, networks were determinant. The ability of gay and lesbian activists to weave alliances of state and nonstate actors to pressure governments to adopt their policy

objectives has been key. The same has not taken place in Chile. Even though networks have been formed, they are weak, and their weakness is largely a function of the weakness the gay and lesbian movement in Chile has exhibited since the return of democratic rule in 1990. Indeed, the strength of networks is largely conditioned by its embeddedness within the larger gay and lesbian movement from which it is sustained, and such strength explains policy variance.

In this study I take a historical approach to the study of policy and show the importance of looking at the policy reform trajectories of each country. Because policy change in gay marriage recognition has been prompted by networks, it is important to look at their formation and evolution over periods of time. Work on gay rights points to perceived trends in their expansion, or “policy histories,” where countries generally begin by decriminalizing homosexuality, followed by the adoption of human rights policy in the form of antidiscrimination provisions and culminating in gay marriage (Adam 2003). The idea of a policy history has been criticized for it is argued that policy reform in gay rights is not linear (Paternotte 2011). While that may be the case, there is no question that, as I show in the pages that follow, early experiences in policy reform influence the formation and evolution of networks that have been at the center of gay marriage recognition. The adoption of a historical approach is therefore indispensable.

### *State Institutions*

Scholarship on Latin American politics has traditionally had an ambivalent position on the role institutions play in sociopolitical processes given their perceived weakness. Scholars have therefore tended to look at broader political processes, such as regime types and class configurations, to explain political outcomes.<sup>7</sup> As the politics of posttransition Latin America stabilized after military rule, however, an increasing number of political scientists have devoted their attention to the study of institutions. There is now widespread consensus that institutions matter. Indeed, scholars have increasingly debated the effect that presidentialism, constitutions, decentralization, and more recently, the judicialization of politics, have on the policy-making process (Díez and Franceschet 2012, 17–20). Institutions matter because their design delineates the distribution

<sup>7</sup> Early work on institutions was mostly preoccupied with the relationship between systems of government (presidential vs. parliamentary) and their propensity for democratic breakdown (Linz 1990).