A dissertation presented by

María Gracia Andía

to

The Law and Public Policy Program

in partial fulfillment of the requirements for the degree of

Doctor of Philosophy

in the field of

Law and Public Policy

Northeastern University
Boston, Massachusetts
May 2011
DISADVANTAGED GROUPS, THE USE OF COURTS AND THEIR IMPACT: A CASE STUDY OF LEGAL MOBILIZATION IN ARGENTINA

by

María Gracia Andía

ABSTRACT OF DISSERTATION

Submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy in Law and Public Policy in the Graduate School of Arts and Sciences of Northeastern University, May 2011
Abstract

In the context of rising judicialization of politics, Argentina presents a case that is relevant and is worth our attention for the insights it provides to the phenomenon of legal mobilization. This dissertation describes and analyzes how two disadvantaged groups in this country—LGBT and indigenous—used law and courts to achieve their policy ends.

I suggest some answers about what factors make the groups choose the courts, the impact of using the courts, whether social mobilization -support structure- makes any difference on the impact, and what “new” roles are thrust upon courts in the policy making process. Through an interdisciplinary appraisal and the use of empirical analysis, this dissertation fills the gap, adds to the existing literature, and sheds new light on the phenomenon of judicialization of politics.

I began by surveying the literature on legal mobilization and the judicialization of politics and then examined how these two groups built their “social structures for legal mobilization” and mounted their legal campaigns for social change. Although there are some important similarities and differences between these groups, both have used the courts to advance their rights. The impact of the recent efforts of legal mobilization on behalf of LGBT individuals and indigenous peoples on the national Congress and the media turned out to be different. The case studies developed here indicate that when cases are being advanced in court by groups that enjoy considerable social mobilization, what the literature calls the “support structures for legal mobilization,” they are likely to achieve the objectives that are sought.

The findings support Charles Epp’s "support structure" explanation, suggest a classification of the cases using Marc Galanter’s theory about the nature of the parties as oneshotters or repeat players, and provide a fuller understanding of the extent to which courts play a new role in Argentine politics.
Acknowledgements

This was an unforgettable and wonderful experience, both personally and professionally. I am grateful to the ones who guided and helped me in this process, making this journey easier and more delightful. I want to thank the chair of my committee, Professor Michael Tolley, who was always available, and whose comments were precise and constantly encouraging. His help made this dissertation become as fluid, readable, and interesting as it is. Also, I would like to thank the readers of my committee, Professor Tom Koenig and Professor Rhonda Evan-Case, for their support and inputs. I want to thank the Director of the Law and Public Policy Program at Northeastern University, Professor Joan Fitzgerald, for her generous support and for giving the opportunity to teach. I am grateful to my “Intro to Law, Policy, and Society” students, for all of what I learned from them. I am also grateful to Len, Suzy, and Christina; they were very important for me at the beginning of this process.

I want to thank Professor Alejandro Garro, from Columbia Law School, whose generosity was extremely important once I arrived to New York. Also, I am thankful to Professor Ellen Chapnick for her support during my period as Visiting Researcher at Columbia Law School. My time there was critical for the development of this dissertation. I am grateful to Dr. Linn Hammergren, who contributed to make my experience at World Bank in Washington D.C. extremely interesting, and gave insightful comments to the first drafts of this work. I am thankful both to Northeastern University and Columbia Law School for their financial support throughout my doctoral studies. That support allowed me to focus solely on my research during my years in Boston and New York. Moreover, I would like to thank to those who helped me financially in Mendoza to start with this project several years ago.
I want to thank Congressman Adrian Perez, the University of Palermo, and the Institute of Social Sciences Methods at the National Academy of Social and Moral Sciences for helping me to find time and space to continue working on my dissertation in Buenos Aires.

My friends made this process enjoyable and sometimes “bearable,” motivating me and allowing me to learn from them. Corey, Kuheli, Neenah, and Gram made LPS a special place for me. Sole, Pancho, Ana, Javi, Karen, Tito, Carmen, Analia, Paula, Vicky, and Agus made Cambridge and New York my home. Gabi, Ali, Seba, and Santi were supporting me no matter what and no matter where.

Marga, thank you for your time and dedication as an adorable “abuela.” The only way to efficiently work was to know that my daughter was safe, loved, and having a great time with you. Chango, you have been very important for me in the whole process. From the beginning encouraging me to embark in this PhD; then discussing topics and theories; and until the final moment being there. Thank you for your support, generosity, and confidence in me.

Dad and mom, thank you for raising me with freedom, love, and sewing the seeds of curiosity into me. Thank you for always encourage my personal and professional development, and challenge myself to do my best without forgetting my roots. Thank you for educating me in an environment in which the principles of equality, fairness, love, and tolerance always ruled. Thank you for having taught me to be kind and generous, combining joy and responsibility. I truly hope that my personality reflects those values, and that I could bring them to my own family. Thank you for being so humble and unselfish, with both of you I never feel alone.

Jime and Seba, you are my closest friends, my witnesses who see me at my worst and my best and love me anyway. Jime, thank you for being a marvelous “big sister.” Knowing that you were in the other side of the phone whenever I needed you, made the difference for me. Thank
you and Rodrigo for giving me the joy of being the “tia” of such lovely nieces. Seba, my pal, thank you for your constant support, I will treasure in my heart all what we lived those years in New York; I love you.

Juan Cruz, without your love, help, encouragement, and patience this work would not have been possible. In all these years of this incredible journey together, you never stopped being my best friend and beloved adventurer partner who makes me happy. You are the one who knows me better, and knows how to bring the best out of me. Your love is my home, but also is what makes me aim higher and look for further challenges. Thank you for reading every single draft and discussing all my crazy ideas, always trying to have the best sense of humor. Thank you for being the tolerant editor who improved the quality of my work. Thank you for being a loving and great father who is always ready to act.

To my daughter, Abril, who changed my life. You are the joy, fun, innocence, and love embodied in one little beautiful person who makes me want to be every day a better person. You complete me.
# TABLE OF CONTENTS

Abstract 2

Acknowledgments 4

Table of Contents 7

List of Abbreviations and Acronyms 10

**Chapter 1: Introduction** 13

A. Problem Statement 13

B. Background and Literature Review: United States, Latin America, and Argentina 17

   1. The U.S. and the World Context 17
   2. Latin America and Argentina 24

**Chapter 2: Social Movements and the Law** 40

A. Background and Theory 40

B. Methodology 57

**Chapter 3: Law and Politics in Argentina** 60

A. An Overview 60

B. The Form of Government and Political System 69

C. The Legal System 73

   1. Marriage Law 77
   2. Property Law 77

D. The Legal Profession 77

E. The Use of Courts by Rights-Based Advocacy Groups 80

**Chapter 4: Legal Background of the LGBT and the Indigenous Peoples Movements** 86
### Legal Background of the LGBT Movement Strategy

86

### Legal Background on Indigenous Rights

89

### Governmental Institutions Relevant to the LGBT and Indigenous Movements

103

1. National Institute against Discrimination, Xenophobia, and Racism (INADI)  
   104

2. National Indigenous Affairs Institute (INAI)  
   107

### Chapter 5: The Use of Courts by the LGBT Movement

113

#### A. Organization and Mobilization Background of LGBT People in Argentina  
113

1. Argentine Homosexual Community (CHA)  
   114

   a. History, Location, and Structure of the Organization  
   114

   b. Funding  
   115

   c. Members and Human Resources  
   115

   d. Goals Achieved and Strategies Followed  
   115

2. LGBT Federation  
   119

   a. History, Location, and Structure of the Organization  
   119

   b. Funding  
   122

   c. Members and Human Resources  
   122

   d. Goals Achieved and Strategies Followed  
   122

#### B. Common Features of the LGBT Mobilization  
124

#### C. The Conflicts and Differences within the Social Movement  
125

#### D. The Strategy: “the Same Names, the Same Rights,” a Superior and Common Objective Prevailed  
127

#### E. The LGBT Movement beyond the Courts. The Time for a Legislative Agenda: Egalitarian Marriage Reform  
145
Chapter 6: The Use of Courts by Indigenous Peoples

A. Organization and Mobilization Background

B. Common Features of the Indigenous Mobilization to Point out

C. The Conflicts and Differences within the Indigenous Movement

D. The High Profile Legal Cases: the Common Strategy or the Absence of it
   1. National Supreme Court Cases
      b. Association Aborigine Community v. The Province of Salta
   2. Provincial Court Cases:
      a. Neuquén
         i. The Kaxipayiñ Community
         ii. The Paichil Antreao Community
         iii. The Huenctru Trawel Leufu Community
         iv. Criminalization
      b. Mendoza
         i. Huarpes

E. The Indigenous Movement beyond the Courts. Is there a Legislative Agenda?

Chapter 7: Conclusion

A. Final Thoughts about LGBT Mobilization

B. Final Thoughts on the Indigenous Mobilization

C. Summary of Principal Conclusions

Bibliography
List of Abbreviations and Acronyms

AADI: Asociación de Abogado/as de Derecho Indígena (Indigenous Law Lawyers Association)

ACLU: American Civil Union Liberties

ADC: Asociación por los Derechos Civiles (Civil Rights Association)

ADPRA: Asociación Defensores del Pueblo de la República Argentina (Association of the Ombudsman of the Argentine Republic)

ALITT: Asociación Lucha por la Identidad Travesti (Association of Struggle for the Liberation of Travesty Identity)

ANDHES: Abogados y Abogadas del Noroeste Argentino en Derechos Humanos y Estudios Sociales (Lawyers from the Argentine Northeast in Human Rights and Social Studies)

ANSES: Administración Nacional de Seguridad Social (National Social Security Agency).

APAC: Asociación para Apoyo de Comunidades (Association for Community Support).

A.R.I.: Afirmación para una República Igualitaria (Affirmation for Egalitarian Republic)

ATTA: Asociación Argentina de Travestis y Transexuales de Argentina (Argentine Association of Transvestites and Transsexuals)

CEDHA: Centro de Derechos Humanos y Ambiente (Center for Human Rights and Environment)

CEDOSEX: Centro de Documentación en Sexología (Sexuality Documentary Centre)

CELS: Centro de Estudios Legales y Sociales (Center for Legal and Social Studies)

CEPPAS: Centro de Políticas Públicas para el Socialismo (Center for Public Policies of the Socialist Party).

CHA: Comunidad Homosexual Argentina (Argentine Homosexual Community)

CiCRED: Committee for International Cooperation in National Research in Demography

CMN: Confederación Mapuche Neuquina Mapuche (Mapuche Neuquén Confederation)

CODECI: Comité de Defensa Ciudadana y Asistencia a Comunidades Rurales (Committee for Citizen Defense and Assistance to Rural Communities)

CSJN: Corte Suprema de Justicia de la Nación Argentina (Argentine National Supreme Court)

ECPI: Encuesta Complementaria de Pueblos Indígenas (Complementary Survey of Indigenous People)
EDIPAM: Equipo Diocesano de Pastoral Aborigen de Mendoza (Mendoza Work Team of Aboriginal Pastoral).

EMIPA: Equipo Misiones de Pastoral Aborigen (Misiones Work Team of Aboriginal Pastoral).

ENDEPA: Equipo Nacional de Pastoral Aborigen (National Indigenous Pastoral Team).

FEIM: Foundation For Studies And Research On Women

FLGBT: Federación Lesbianas, Gays, Bisexuales y Trans (Lesbians, Gays, Bisexuals and Transsexuals Federation)

FLH: Frente de Liberación Homosexual (Homosexual Liberation Front)

FPV: Frente para la Victoria (Front for Victory)

FTAA: Free Trade Agreement of the Americas.

GAJAT: Grupo de Acceso Jurídico a la Tierra (Legal Advisor to Have Access to the Land).

GaysDC: Gays por los derechos civiles (Gays for Civil Rights).

IDACH: Instituto del Aborígen Chaqueño (Chaco Institute for Indigenous Affairs).

IGLHRC: International Gay and Lesbian Human Rights Commission

ILGA: International Lesbian and Gay Association

ILO: International Labor Organization

INADI: Instituto Nacional contra la Discriminación, la Xenofobia y el Racismo (National Institute against Discrimination, Xenophobia, and Racism)

INAI: Instituto Nacional de Asuntos Indígenas (National Institute of Indigenous Affairs)

INDEC: Instituto Nacional de Estadísticas y Censos (National Institute of Statistics and Census)

IMC: Independent Media Center


Mercosur: Mercado Común del Sur (Southern Common Market)

MPP: Movimiento de Profesionales para los Pueblos (Movement of Professionals for the People).

NAACP: The National Association for the Advancement of Colored People

OAS: Organization of American States.

ODPHI: Observatorio de Derechos Humanos de Pueblos Indígenas (Observatory of Human Rights of Indigenous People)
OIT: Organización Internacional del Trabajo (International Labour Organization)

RELAJU: Red Latinoamericana de Antropología Jurídica (Latin American Network of Legal Anthropology)

Re.Na.C.I: Registro Nacional de Comunidades Indígenas (National Registry of Indigenous Communities)

SIGLA: Sociedad de Integración Gay Lésbica Argentina (Argentine Society for Gay and Lesbian Integration)

UCR: Unión Cívica Radical (Radical Civic Union)

UN: United Nations

UNDP: United Nations Development Programme

WTO: World Trade Organization

YPF: Yacimientos Petrolíferos Fiscales (Fiscal Oil Fields)
Chapter 1: Introduction

A. Problem Statement

The purpose of my research is to understand the impact of the use of courts by certain groups\textsuperscript{1} of the Argentine civil society. Since the recovery of democracy in 1983, Argentina has experienced an increase in the number of groups turning to courts to achieve various policy objectives, a phenomenon referred to in the literature as ‘the judicialization of politics.’ This phenomenon has been defined\textsuperscript{2} as the ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies. The instrumental use of courts by different individuals and groups to achieve or redefine policy goals has started since then and increased in the last 20 years. The role of courts in Argentine politics has started to change and can be demonstrated by some high profile cases at both the national and state levels.

This dissertation is about the instrumental use of courts by various disadvantaged groups in Argentine society in an attempt to achieve policy change. By instrumental use of courts I mean the lawsuits/cases brought to the courts by individuals and those groups which result in court decisions -successful or not- that seek to achieve social change by judicial means. The interest groups that I examine are the so-called disadvantaged groups. These groups are constituted by those individuals who suffer unfavorable social, political, economic, and cultural circumstances.\textsuperscript{3} People see themselves as disadvantaged to the extent that they are denied access

\textsuperscript{1} The political science literature about interest groups is vast: Matthew Cahn, “The Players:


to, and use of, the same tools found useful by the majority of society, including self-respect, autonomy, health, education, employment, and information. Likewise, the concept of oppression defined by Iris Young captures with sufficient precision what the expression disadvantaged groups means. She explains that to be discriminated against is a form of oppression, not necessarily politically (i.e., by a tyrant), and not necessarily intentionally. Discriminated people suffer when they are inhibited to a greater or lesser extent in their capacity to develop and exercise their faculties and express their needs. This is necessarily related to a model that does not acknowledge difference and that legitimizes the fiction that equality predates the law.

The disadvantaged groups may vary from one country to another, according to the historical, economic, institutional, social and cultural context. In Argentina several groups have experienced unfavorable circumstances that make them disadvantaged in many respects: socially, culturally, politically, physically and economically. Some of these groups are the indigenous, immigrants, LGBT (lesbians, gays, bisexuals, and transsexuals), the obese, the disabled, the elderly, women, and prisoners. Not all of them have lived the same hostile experiences and perhaps not all are disadvantaged in all respects. Discrimination against these groups is dissimilar and sometimes happens in different scenarios: employment, education, transportation, housing, health and politics. As examples, a number of their claims reflect the distinct experiences that they have gone through. For instance, the disabled, the obese, the LGBT

---

and women have made claims based on health rights and the elderly and indigenous have made allegations of violations of their property rights.

In this dissertation I analyze cases brought to the courts by two disadvantaged groups (LGBT people and indigenous communities), where there is social mobilization behind them. Typically, these cases involve only one plaintiff, although the impact of these lawsuit cases may go well beyond the particular parties. By social mobilization I mean what Charles Epp calls “the support structure for legal mobilization.” Epp holds that the sources of support consist of rights advocacy lawyers, rights advocacy organizations, source of financing of various types and governmental rights-enforcement agencies. He explains that legal mobilization depends on these factors, called support structure, which permit a widespread, sustained, and successful rights-litigation.

Although my concept of social mobilization relies upon Epp's definition of support structure for legal mobilization, it is different. The social mobilization that I analyze takes place in a different context (serious economic disruptions, periods of political and social instability). Moreover, in this work, following Marc Galanter’s seminal article “Why the ‘haves’ come out ahead?” I also examine if the disadvantaged groups under study are one-shotters or repeat players and how the basic architecture of the legal system creates obstacles or possibilities to use the courts.

The impact of the use of the courts in this dissertation is circumscribed to the reactions/actions of the legislatures, both national and state, as well as the media coverage. I explore these phenomena by addressing the following questions:

1) What are the factors that make disadvantaged groups choose the courts instead of other institutional channels to achieve their policy goals?

2) Who are those groups? Are they really representatives of their interests? Do these groups include the people actually affected? Do these people have the capability to organize themselves? Do they really have access to the courts?

3) What is the level of impact, if any, of the use of courts on the National Congress, as well as the media coverage?

4) To what extent does social mobilization contribute to the degree of impact of the policy change resulting from the instrumental use of courts?

5) What is the role of the courts in the policy making process?

Firstly, I examine the factors that encourage these litigants to use courts instead of other channels of the political system. By observing some relevant cases from Argentina, not only those brought to the national courts of Argentina but especially by some provincial courts, the necessary conditions for such litigants to gain access to courts are also be addressed. There have been some federal and provincial high profile cases that demonstrate that this initial phenomenon has been happening at both national and local level. The analysis of cases from the national and provincial level allows us to get a more complete picture of the instrumental use of courts by disadvantaged groups in Argentina and, thus, to gain a deeper understanding of the phenomenon.

---

9 In this study I use provincial and local courts for the same purpose and with the same meaning.
In addition, this approach helps to explain the extent to which local jurisdictions are likely to be sympathetic in comparison to the national arena on some specific issues.

Mainly, I assess what impact, if any, the use of courts has on the national Congress as well as on media coverage. My aim is to account for the new role of courts in the political process in Argentina. By focusing on those groups that have considerable support, that is, social mobilization behind them, I try to understand whether the social mobilization factor contributes to the level of impact of the use of courts.\textsuperscript{10}

This is a topic that touches several important debates such as the relationship between law, disadvantaged groups, courts, politics, and policymaking. The existent Argentinean academic literature, particularly in the legal field, concerning these issues is almost all normative.\textsuperscript{11} For this reason, my work does not take a normative approach, nor does it evaluate the decisions to turn to courts rather than legislatures for redress. Instead, this study tries to understand, through an interdisciplinary appraisal and the use of empirical analysis, how these relationships work in the real world.

B. Background and Literature Review: United States, Latin America, and Argentina

1. The U.S. and the World Context

In 1954, all the efforts channeled through litigation along the history of segregation in the United States achieved a historical momentum with \textit{Brown v. Board of Education}.\textsuperscript{12} Brown

\textsuperscript{10} Epp considers this factor fundamental for legal mobilization as well as for successful cases.
\textsuperscript{11} Alfonso Santiago (Jr.), \textit{La Corte Suprema y el Control Político: Función política y posibles modelos constitucionales} (Buenos Aires, Argentina: Ábaco de Rodolfo Depalma, 1999).
allowed revisiting\textsuperscript{13} the meaning of the Fourteenth Amendment of the United States (U.S.) Constitution and the expectations about the judiciary in giving meaning to substantive equality. The U.S. ideals were rediscovered in the fundamental law giving them a concrete meaning and crafting the rights needed to implement them. The expectations about the judiciary, previously thought merely as an instrument of the ruling elite, were revisited and a new role of courts in the political system rose.\textsuperscript{14} A new understanding of the purpose of law and the functions of courts\textsuperscript{15} was developed at that time. Following this example, other disadvantaged groups\textsuperscript{16} such as racial and religious minorities started to use litigation to achieve certain policy ends. They began to use courts as one of the possible strategies besides lobbying and political participation, understanding the role of courts as policy makers.

Judicial review, of course, was established by Chief Justice John Marshall in \textit{Marbury v. Madison} (1803).\textsuperscript{17} Nonetheless, its use on behalf of fundamental rights, including the right to

\begin{footnotes}
\item[16] The first time the term, disadvantaged groups, was implied was in United States v. Carolene Products Company, 304 U.S. 144 (1938), by the U.S. Supreme Court that held some discrete and insular minorities were so marginalized in the political process that the courts had the duty to scrutinize allegations of their rights violations more closely. The Supreme Court stated the idea that the courts should have a special responsibility to protect the disadvantaged groups. But was in the 1950s and 1960s, when the Warren Court followed this suggestion and began delivering important victories for African-American and religious minorities.
\item[17] \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137 (1803).
\end{footnotes}
equality in the *Brown* decision in 1954, was for the most part a mid-20th century development (and put equality at the center of the reform). In this way, the disadvantaged groups started to look for victories in courts when they could not win in politics. However, the power of these groups pushing their agendas through the courts should not be overstated. Indeed, several courts’ major interventions were initiated by individual client/lawyers.

The Warren Court’s decisions, including *Brown* and others, enhanced both the Court’s reputation and the importance of the practice of judicial review, inside and outside the United

---


19 Fiss, *The Law as It Could Be*; Hammergren, *The Politics of Justice and Justice Reform in Latin America: The Peruvian Case in Comparative Perspective*; Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. It should be said that the trend of changing the target from property rights to civil rights started in 1937 with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) as well as the reformulation of the Court’s role with *Carolene Products*.

20 Shapiro, “The United States: American Legal Culture.” Other authors consider that even those individual cases were part of a bigger group strategy. See Jack Greenberg, *Crusaders in the Courts* (New York NY: Basic Books, 1994).

21 Significant decisions during the Warren Court years included decisions holding segregation in public schools unconstitutional (*Brown v. Board of Education*); holding anti-miscegenation laws unconstitutional (*Loving v. Virginia*); that schools cannot have official prayer (*Engel v. Vitale*) or mandatory Bible readings (*Abington School District v. Schempp*); dramatically increasing the scope of the doctrine of incorporation (*Mapp v. Ohio*; *Miranda v. Arizona*). Martin Shapiro considers: “that the U.S. courts and their judicial review are actually most obscure than the appearance, and the U.S. experience does not justify the enthusiasm of being emulated. It would be hard to conclude that the U.S. experience ought to inspire successful pro-rights interventions by the new constitutional courts in new democracies. On the other hand, American experience is historical, and history changes. “Never before, we’ve experienced the contemporary global enthusiasm for rights.” In Chapter II: “Judicial Review in Developed Democracies” in Siri Gloppen, Roberto Gargarella, Elin Skaar, *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (London: Frank Cass, 2004), 11-12.
In the case of Argentina, the influence of the U.S. Supreme Court and its experience with judicial review is particularly strong. Argentina’s 1853 Constitution -still in force today but with several and central amendments- was modeled after the U.S. Constitution. Thus, Argentina’s constitutional law has traditionally followed closely the U.S. Constitution and its interpretation by the U. S. Supreme Court.\footnote{Pilar Domingo, “Introduction,” in Roberto Gargarella, Pilar Domingo, Theunis Roux, \textit{Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?} (Aldershot, Hampshire, England; Burlington, VT: Ashgate, 2006), 1-13.}

In the last 20 years many countries around the world have looked to the \textit{Brown} decision as an example to follow.\footnote{Pablo Riberi, “On Constitutionalism and Identity: Assessing legitimacy Through Legal Transplants in Argentina”, VI World Congress on Constitutional Law, Santiago de Chile, January 2004.} Despite differences among judicial review systems, and variations on rights’ discourse, the expansion of judicial power and the rights’ discourse has become a dominant form of political action in many countries,\footnote{Examples: In \textit{Sojo} (Fallos 32:125 - 1887), the Supreme Court struck down article 20 of the 48 Act, which granted original jurisdiction to our Supreme Court on Habeas Corpus cases. Citing US case-law, like Marshall in Marbury, Argentine Highest Court reasoned that the constitution prevented such expansion of its original powers. Later on, some decisions related on “welfarism” or what we call “social constitutionalism,” were inspired by U.S. precedents as well. For example: \textit{Ercolano} (Fallos 136:170) or \textit{Avico v. De la Pesa} (Fallos 172:29), on lowering interest rates and a moratorium on the foreclosure of existing mortgages contracts, were cases where the Court duplicated U.S. Supreme Court criteria. Particularly, to bring some tokens of the “Great-Society and Welfare State paradigm,” Argentine Supreme Court was heavily influenced by cases like \textit{Home Building & Loan Assn. v. Blaisdell} (290 US 398 (1934) and \textit{Nebbia v. New York} (291 US 502 (1937).} including New Zealand (1990), South Africa (1996), Israel (1992: judicial review, and new law protecting civil liberties) and Canada

\footnote{Rhonda Evans Case, \textit{Enforcing New Zealand Anti-Discrimination Laws: The State as Public Interests Litigator in New Zealand} (Lexis Nexis, New Zealand, 2006), 3.}
(1982), and India among others. Most of these countries have adopted new constitutions or have amended their old ones, and now contain bills of rights and judicial review. These new systems of constitutional review and the right discourse, in turn, began to affect domestic politics and the role of courts in these countries. This international tendency has been labeled with diverse names from the different disciplines such as the judicialization of politics, expansion of judicial power, constitutional politics, judicial activism, rights revolution, public law litigation, juristocracy and the legalization process. These concepts, although neither well

26 Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge Mass.: Harvard University Press, 2004), 1. For example: New Zealand does not have a judicial review system. Canada has a weak form of judicial review – at least from the theoretical perspective – because of the possibility of the judicial decision’s override. South Africa has a strong judicial review. India has its own history of crisis, conflicts and majorities regarding judicial review. Israel has a weak judicial review; it was introduced by Aharon Barak in the 1990s, and currently it is being discussed.

27 It is important to make a difference between judicial review and rights discourse since not all the countries have both. New Zealand does not have judicial review but has a discourse on rights. Canada, after the adoption of the Constitution Act 1982, revolutionized the status of judicial review. The impact of the Charter on judicial activism has been nothing short of revolutionary.


29 Shapiro and Stone Sweet, *On Law, Politics, and Judicialization*


defined nor homogenous, have a core feature in common: the gradual emergence of courts as relevant actors in political and constitutional processes as well as the relevance of the rights’ discourse.

In this sense, the discussion about the factors that have contributed to the growing role of the judiciary in the policy game is not specific and findings depend on the different cases of study. For instance, certain scholars mention the breakdown of the authoritarian governments — spreading democratization and a global commitment to the establishment of the rule of law—and the mounting influence of the jurisprudence of the U.S. among others. Other researchers explain this phenomenon as a top-down event driven by elites that understood the necessity to legitimize the political system in order to preserve their economic and/or political power. For a slightly different version of this explanation, the top-down phenomenon is drawn by elites in the transitional periods, following the international tendencies, in order to legitimize the “new” governments at the international level. In contrast, various other analyses examine this global trend as a bottom-up process. The rights’ demands emanate from the bottom, coming from powerless people who organize themselves and bring the cases to courts, instead of using other

---

institutional channels that are sometimes blocked for them. As Keck and Sikkink explain, the major changes in national and international policies often result from concerted efforts by actors other than states to promote shared principles, such as legal equality opportunity.\textsuperscript{38}

Besides, there is a growing acceptance and enforcement of the idea that democracy is not the same thing as majority rule. In a constitutional democracy, minorities enjoy legal protection -the bill of rights is part of the fundamental law- what American constitutional scholars usually call the “constitutional democracy.” As Dworkin and others maintain, democracy must protect itself against the tyranny of majority rule through constitutionalization and judicial review.\textsuperscript{39} In this way Charles Epp mentions in his book the key factors that the conventional interpretation of the “rights revolution” identifies as essential ones and how the theories of constitutional democracy give a venerable place to them. They are constitutional guarantees, judicial leadership and popular rights consciousness. However, the lawsuits and legal mobilization are not a direct response of those factors -constitutional guarantees, either judicial leadership or popular rights consciousness. Indeed, what he considers essential for the “rights revolution” (or whatever name we may give to this phenomenon) is what he calls “support structure for legal mobilization” which includes resources for litigation, rights advocacy lawyers, rights advocacy organizations and sources of funding.

Besides the factors that have sparked the phenomenon and the conditions that have contributed to the atmosphere of the judicialization of politics, many authors claim that this global trend towards juristocracy is arguably one of the most significant developments in late

\textsuperscript{38} Margaret E. Keck and Kathryn Sikkink, \textit{Activists Beyond Borders: Advocacy Networks in International Politics} (Ithaca: Cornell University Press, 1998).

\textsuperscript{39} Ronald Dworkin, \textit{A bill of rights for Britain} (London: Chatto and Windus, 1990).
20th century and 21st century government. However, as Brown did in the U.S., this phenomenon is raising both supporters and critics among scholars and practitioners around the world. If for no other reason, we could say, following Tate, that for better or for worse this significant trend deserves careful description, analysis and evaluation.

2. Latin America and Argentina

This global trend has emerged at its own pace in Latin America, given the subcontinent’s own social, political, economic, and legal systems. As other developing regions, Latin America has been strongly influenced by global tendencies, serving as a laboratory for several types of institutional, political, and economic reforms. Since the 1980s, several countries of the region have gone through a transition from authoritarian regimes to more democratic systems. This trend was part of what Samuel Huntington called the third wave of democratization.

---

40 Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism.
43 Tate and Vallinder, The Global Expansion of Judicial Power.
45 “… A wave of democratization is a group of transitions from non-democratic to democratic regimes that occur within a specified period of time and that significantly outnumber transitions in the opposite direction.” Moreover, according to Huntington, the case of Latin America in this
After somewhat similar processes, Latin American countries eventually transformed themselves and finally recovered democracy. Nonetheless, some countries may be classified as more democratic than others. It has been recognized that some countries can be deemed less democratic than others, but, according to a minimalist concept of democracy, competitive elections have taken place in all countries (with the exception of Cuba) and some of those elections have been monitored by the Organization of American States (OAS). Today, if a minimalist concept of democracy is applied, one may conclude that the entire region is democratic and supports democratic institutions and democratic processes more generally. There is a large academic discussion about the consolidation and the quality of democracy in Latin America but this is beyond the scope of this dissertation.

The third wave of democratization presented different types of transitions such as 1) transformations like the ones in Brazil where the elites in power took the lead in bringing about democracy; 2) replacements as in Argentina where opposition groups took the lead in bringing about democracy; 3) transplacements as in Bolivia, and Nicaragua where democratization occurred from joint action by government and opposition groups; and 4) interventions as in Panama where democratic institutions were imposed by an outside power. In Samuel, Huntington, The Third Wave: Democratization in the Late Twentieth Century (Norman OK: University of Oklahoma Press, 1991), 15.


O’Donnell, “Illusions about Consolidation.” In fact, the bulk of contemporary scholarly literature analyzes these “incomplete” democracies that are failing to become “consolidated.” However, the meaning of “democracy consolidation” is complex, arguable, and unspecified.

Over this period, there were some normative developments. Several countries of the region amended their constitutions or enacted new ones including a catalogue\(^{50}\) of new rights, called positive or second-generation rights, and rights with collective impact including protection to the environment, social-economic rights, right to health care, rights related to vulnerable/disadvantaged groups/minorities (women, children, indigenous). This was the case of Colombia (1991), Paraguay (1992), Peru (1993), Argentina (1994), Brazil (1988), Ecuador (1998), Venezuela (1999) and Bolivia (2002).\(^{51}\) These reforms were significant advancements. In the case of Argentina, the previous Constitutions neglected the economic, social and cultural rights as well as the special rights to indigenous as native peoples. With regard to this disadvantaged group the dominant concept was to “civilize” them, that is, convert them, to Catholicism and occidental values. Only in the failed reform of 1949 were some of the economic, social and cultural rights introduced. The reform of 1957, implemented by a military government, just left one article, the 14 bis, from the 1949 modification. That article is the unique antecedent that recognized labor rights, social security rights, the rights to retirement and pensions, the comprehensive protection of the family, the defense of the homestead, family allowances, and access to decent housing. The reform of 1994 was complete and integral including all those types of rights and the tools to make them effective.

In this fashion, some of these countries have introduced new and special procedural tools for vindicating those rights. For instance, the Colombian Constitution introduced the “acción de


\(^{51}\) Courtis, “El desarrollo del derecho de interés público en la Argentina avances, obstáculos y desafíos.”
“tutela” and “acción popular”; Brazil’s provided for the “acao direta de inconstitucionalidade” and Argentina’s the “acción de amparo.” The amparo has created the possibility of bringing legal actions -summary action- when either an act or omission injures, restricts, alters, or threatens rights and guarantees recognized by the Constitution, a treaty or a law, and also to defend new rights with collective impact. In fact, the individual and collective amparo has been a novel procedural tool that has been used by the diverse groups of civil society to bring their claims to the courts. This action can be brought by the “affected party, the Ombudsman, and by associations that defend such rights and that are registered in accordance with the law.” The judges have recognized standing to any organizations with the only requisite of being registered as a legal entity.

Many countries have gone even further, granting some human rights international instruments a privileged legal status and sometimes higher or equivalent to domestic laws. For example, Argentina, Bolivia, Colombia, Ecuador, Paraguay, Peru, and Venezuela have made constitutional law more amenable to international human rights. Such institutional arrangements have helped to bring about both the procedural and political legitimacy essential to democracy, and have played a role in conditioning the kind of attitude and the level of constitutional adherence to democratic ideas that is believed to be essential to democratic consolidation. As a result, there were some societal developments especially during the transition period:

---

52 Accion de Tutela allows any citizen to demand the immediate protection of fundamental rights and without a mandatory legal assistance.
53 It expands the number of actors authorized to initiate constitutional control of rights.
international and domestic NGOs used human rights litigation successfully to achieve their goals. Moreover, there are several cases of transnational activism in Latin America that include not only human rights but also causes such as environmental preservation, curbing the violence against women, labor activism, and indigenous rights, showing continuity and change in the nature of transnational advocacy mobilization.⁵⁶

LGBT groups were one prominent example of groups in Latin America that attained some significant political achievements over the past decade or so. The normative developments and the societal developments as well as other variables⁵⁷ have contributed to LGBT activist groups in Latin America to accomplish several political achievements in the 2000s. Examples of such policy changes include decriminalization of homosexuality (now complete in all Spanish-speaking countries and Brazil); laws against sexual-orientation discrimination (Brazil 2000, Mexico 2003, Peru in 2004); extending the same rights and obligations to same-sex couples as heterosexual couples (e.g., Buenos Aires 2002, Colombia in 2009); granting access to health benefits, inheritance, parenting and pension rights to all couples who have cohabited for at least five years (Uruguay); constitutional bans against discrimination on the basis of gender, sexual identity or HIV-AIDS status (Ecuador 2008); and the Mexico City law recognizing gay marriage and adoption rights.⁵⁸ Those legal changes have happened rapidly, and also have shown the effectiveness of social mobilization of LGBT groups in Latin America. Finally, the equal

marriage law passed in 2010 in Argentina (and discussed in detail in Chapter 5) is a development that is also part of this trend.

In the same way, the indigenous movements in Latin America, as Deborah J. Yashar explains, have resurfaced and once again become political actors in the democratic dialogue.\textsuperscript{59} Indigenous movements have discussed and even called for constitutional reforms (Ecuador, Bolivia, Peru, Colombia, Mexico, Venezuela, and Argentina, among others) demanding democratic institutions that fit better with a multi-ethnic and pluralistic view of the State. The normative developments, along with the emergence and raising mobilization, and other variables have set the stage for the indigenous agenda. However, the mobilization along Latin America has not been even in all the countries with indigenous presence. As Yashar explains, in this contemporary period, the movements in Ecuador and Bolivia have become stronger but in Peru they have not achieved a widespread mobilization.\textsuperscript{60} Their agenda may also be considered revolutionary and viewed as a threat to the power and homogeneity of the traditional nation-state. Indeed, in countries such as Bolivia, demands for local autonomy and institutional pluralism may further encourage secessionist tendencies.

The indigenous presence in Argentina is only 1.6\% of the population. Therefore, it is not as important as in other countries like as Bolivia (60\%-70\%), Guatemala (45\%-60\%), Peru (38\%-40\%), Ecuador (30\%-38\%) and Mexico (12\%-14\%), and as a result it has not often been studied. In the case of Argentina, its vibrant and well-organized civil society demonstrated that even during dictatorships- it could not be silenced by fear. This is the case, for example, of both

\textsuperscript{60} Yashar, \textit{Contesting citizenship in Latin America: the rise of indigenous movements and the post liberal challenge}. 
Mothers of Plaza de Mayo\textsuperscript{61} and Grandmothers of Plaza de Mayo.\textsuperscript{62} After the so-called “dirty war” and the democratic restoration in 1983, there was a desire for justice, democracy, and freedom. In this atmosphere, the discourse and language of rights found fertile ground in which to grow, as did the groups of civil society pressuring for an effective justice. The courts started to play a new role, a role that included venturing into the realm of politics.\textsuperscript{63}

The recovery of democracy also gave more opportunities to several groups of people, representing different interests, to organize on behalf of rights. In fact, various groups made their claims heard in the constitutional convention in 1994 to have their rights recognized in the new constitution and became more active after the reform was instituted (indigenous, environment, consumers, anti-discrimination of women, disabled people and children, etc.). Other organizations have since decided to use the same tool in order to make the new, so called second-generation rights effective and, in some other cases, to call for obedience to the international standards of human rights. Along with this, some national and transnational NGOs have started to develop a strategy of rights-based litigation.\textsuperscript{64} These new techniques and strategies were

\textsuperscript{61} The Mothers of the Plaza de Mayo is a unique organization of Argentine women who have become human rights activists in order to achieve a common goal. For over three decades, the Mothers have fought for the right to re-unite with their abducted children. The Mothers' association was formed by women who had met each other in the course of trying to find their missing sons and daughters, who were abducted by agents of the Argentine government during the years known as the Dirty War (1976-83), many of whom were then tortured and killed.

\textsuperscript{62} The Asociación Civil Abuelas de Plaza de Mayo (Civil Association of Grandmothers of the Plaza de Mayo) is a non-governmental organization whose purpose is to locate the children kidnapped during the era of political repression in Argentina (1976-1983), to restore these children to their legitimate families, to prosecute those responsible for their disappearance, and to prevent similar human rights violations from happening in the future.


borrowed and employed by other groups. Keck and Sikkink explain how the women’s suffrage movements borrowed from the abolitionists and human rights advocates, who had already learned what kind of strategies and legal frames limited their possibilities of success.\textsuperscript{65}

In Argentina, there have been several prominent examples of civil society using the courts at all levels (provincial, national, international) as a new strategy.\textsuperscript{66} For instance some cases were based on health rights such as Viceconte, Mariela Cecilia c/Estado Nacional – Ministerio de Salud y Acción Social- s/ amparo ley 16. 986 (Viceconte) and CSJN, Asociación Benghalensis y otros c/ Ministerio de Salud y Acción Social -Estado Nacional s/ amparo ley 16.986 (Asociación Benghalensis). The first case was about the illness called “argentine hemorrhagic fever” that is typical of the “pampas” region (Buenos Aires, Cordoba, Santa Fe and La Pampa). The importance of this case is the recognition of health care as a positive right with collective impact. This precedent has been followed by other courts in high profiles cases.

The second case was brought to the courts by people affected by HIV-AIDS. This group was represented by eight NGOs that work against the HIV-AIDS.\textsuperscript{67} This case is important because the Court’s decision states that the National State is the guarantor of the country’s population health. Also, the Court held that the State should take the positive actions to protect the public health, independently from the responsibilities of the provinces and town councils as well as that of any private institution. Another significant point to stress in both cases is how the organized and coordinated legal mobilization of neighbors (in Viceconte) and disadvantaged

\textsuperscript{65}Keck and Sikkink, \textit{Activists Beyond Borders: Advocacy Networks in International Politics}. \\
\textsuperscript{66}Part of the information of the following cases was obtained in CELS, \textit{Litigio estratégico y derechos humanos: la lucha por el derecho} (Buenos Aires: Siglo XXI Editores Argentina, 2008; and www.csjn.gov.ar/documentos/cfal3/cons_fallos.jsp (accessed October 18 2008). \\
\textsuperscript{67}Those groups are Benghalensis Association, Descida Foundation, FEIM Foundation, Intilla Civil Association, RED Foundation, CEDOSEX Foundation, Pro-Help to the Child with HIV Argentine Foundation, SIGLA Civil Association.
groups (in Asociación Benghalensis) played a significant role in bringing the case to the courts and reaching a successful outcome.

Other cases have referred to the right to have access to a decent home, given the precarious housing situation that there is in the city of Buenos Aires. There are two interesting cases in this vein: Agüero, Aurelio E. C/ GCBA s/ Amparo” (Vecinos de La Dulce) and Vecinos de la Cava. In the first case, 180 families had occupied, peacefully, a piece of land, which had been abandoned for 10 years. A judge ordered them to vacate the land, giving rise to the beginning of negotiations between the community and the municipality. After several meetings, the government committed to building 86 homes. However, the deadline set in the agreement expired and the homes were not built. Consequently, the neighbors of “La Dulce” mobilized and articulated their claims with the legal representation of CELS (Centro de Estudios Legales y Sociales). Something remarkable to take into account in this case is that the lawsuit became a negotiation ground between the different parties (the neighbors, the ombudsman, the CELS, the government of the city and the Catholic Church representatives). Thanks to this process, the parties reached a consensus, endorsed by the court, in which the government agreed to build the houses according to encoded standards. In this way, the court established the standards and the principles that must guide the public policy in the housing arena. Moreover, the complexity and length of this kind of process revealed the weight that a group’s level of organization has in the legal mobilization process.

The second case was about a settlement of numerous families in an area called “La Cava” and the decision of the state to design a program of housing with six stages. However, the state

---

68 This is an organization, under the legal form of “civil association,” which defends claims and protects human/constitutional rights using the courts in Argentina. They either present their own cases or are counselors of others groups that don’t have the legal support structure.
only finished the first stage and then reached an agreement with two “traditional associations” by virtue of which the government enacted a decree giving those associations permission to possess the land and cancelled the housing program. Immediately, one of the members of the neighborhood and the association of “Comisión de Tierra y Vivienda de la Cava” along with the “Asociación para Apoyo de Comunidades” (APAC), with the legal representation of CELS, filed an injunction

69 to stop any possibility of suspending the housing program. The legal mobilization of the organizations APAC, “Comisión Tierra y Vivienda de la Cava” and the CELS and, how they worked together, accomplished successful outcomes. Their approach pushed the government to negotiate concluding in a successful compromise for the organizations. The government has committed itself to carry out the required infrastructure works.

Other important cases, *Lavado* and *Verbitsky,*

70 relate to inmate or prisoner rights in which the Supreme Court, given the serious institutional and human conditions, decided to take action although it did not solve and decide about its jurisdiction. In both cases the Court established and promoted the conditions for the dialogue between the different governmental branches and the parties of the cases. At the same time, the Court stated some guidelines for public policies playing an important role as a political actor. While, in all the cases, the Court insisted with being respectful to the functions of the other political branches.

In both cases the problem was the inhuman conditions and overcrowded prisons in the province of Mendoza and Buenos Aires. In *Verbitsky,* the Supreme Court maintained that it represented a structural situation of inhuman treatment, cruel and demeaning. In this way the

---

69 Medida de no innovar
70 CSJN; “Lavado, Diego Jorge y otros c/ Mendoza, Provincia de y otro s/ acción declarativa de certeza” (Fallos: 330:111) and “Recurso de Hecho Verbitsky, Horacio s/ habeas corpus,” V. 856. XXXVIII, Argentina: CSJN, February 9, 2004.
Supreme Court decision established precise orders to the different players. There are some interesting examples of the Court directives to the other institutions. It ordered the Local Supreme Court of Buenos Aires to end the imprisonment of young and ill people at police stations within 60 days. It exhorted the State Executive Power to send a detailed report to the judges about the conditions of the imprisonment in 30 days and within five days notify possible solutions; and to inform every 60 days about the improvements done at the prisons. Moreover, it ordered the state to start a dialogue between the parties and the organizations that presented *amicus curiae* and inform the Court every 60 days about the improvements.

A group of inmates of the Mendoza Prison filed a claim in the Inter-American System complaining about overcrowding and the lack of provision of the basic elements (food, security, medical attention and hygiene) in that prison. The Inter-American Court of Human Rights ordered the national government to improve the conditions in the prison and to provide the inmates with elements to satisfy all the basic necessities. Later, a group of lawyers from Mendoza representing the inmates filed a lawsuit in the Supreme Court requesting that the prison authorities comply with the Inter-American Court’s orders. The Court, in a provisional measure and without deciding about its jurisdiction, requested the national government and the province of Mendoza to inform about what measures, if any, they had taken to comply with the Inter-American Court’s ruling.

These cases reveal something that is novel in Argentina and should attract our attention. Civil society groups –disadvantaged and human rights associations- organized themselves and planned strategies that included the use of the courts to achieve their public policy objectives. All this is a radical shift from the times when courts were considered irrelevant as political actors,
supporters of the status quo, and a place only for powerful and privileged people. In this fashion, there also has been a change in the civil law tradition. In this legal system, the courts’ activity has traditionally been seen as a routine administrative task. Judges are considered as mere operators of the legal machine and their functions are uncreative, limited to “just applying the law.” Indeed, the great legal names are not judges but legislators and scholars.

Most of the studies of political institutions have concentrated on the Executive Power and its relations with other branches. The separation of powers has been long regarded as unbalanced and dominated by the Executive Power. In fact, in Latin America the conventional approach to courts, as well as to legislatures, has been that they are either politically isolated or dominated by the Executive, making them extraneous to the political game. In the case of

71 Javier A. Couso, “The Changing Role of Law and Court in Latin America: From an Obstacle to a Social Change to a Tool of Social Equity” in Gargarella, Domingo, and Roux, Courts and Social Transformation in New Democracies: An Institutional Voice for The Poor?
76 Chritopher Larkins, “Delegative Democracy and the Judiciary in Argentina,” Comparative Politics 30, no. 4 (Jul., 1998): 423-442; Spiller, Stein and Tommasi, Political Institutions,
courts, there are only a few works that have examined their political role, but these works have largely focused on the analysis of court-executive relations.⁷⁷ Some of these studies use the strategic approach; they argue that although strategic action is not the only factor when explaining why judges decide to defy the president or not, it certainly is a very important one. Helmke has analyzed the tendency of Argentine Supreme Court judges to adjust their interpretation of law in light of the values and preferences of the incoming government when the current government loses power.⁷⁸ Additionally, Scribner has demonstrated that the strategic reaction of the judges is due to their political and institutional environment. In this way, when the justices of the supreme courts of Argentina and Chile—despite the different executive-supreme court experiences—do not share the policy preferences of the presidents, they will find themselves less constrained and will decide against the executive when it does not have control over a majority in Congress and, thus, lacks significant political resources. All this is independent from the judges’ diverse motivations, incentives, and/or sanctions in each country. Moreover, this trend increases in both countries at the end of presidential terms.⁷⁹ Yet, the courts as political institutions have been understudied.⁸⁰

---

⁷⁸ Helmke, Courts Under Constraints: Judges, Generals, and Presidents in Argentina.
⁷⁹ Scribner, Limiting presidential power: supreme court-executive relations in Argentina and Chile.
Regarding the law and development field, most scholarly works dealing with courts in Latin America have focused on the independence, transparency and efficiency of the judiciary, and possible reforms to achieve such traits as an important aspect of the rule of law. In fact, in the last twenty years, the rule of law, including the independence of courts, has been considered a significant component of democracy and market economy and a way to consolidate both democracy and development. \(^8^1\) Likewise, in the last 20 years, international organizations whose main goals include development have initiated comprehensive judicial reform programs nearly in all countries of Latin America. \(^8^2\) Such studies and some of these judicial reform programs have considered courts as neutral and apolitical actors. Moreover, none of them has taken into account the local environment –civil society and legal culture- focusing straightly on importing formal institutions. They have paid attention to the enforcement of contracts and property rights, as well as their stability and security, elements often considered essential to development. \(^8^3\) In this way, 


Messick cites analogies between the Bank’s reform program and the so-called ‘law and development movement’ in the 1960s. That program, led by USAID and the Ford Foundation, sought to use law as a tool for development and social change mainly in Latin America but academics criticized it for its lack of coherence. Practitioners had no way to prioritize, predict or measure the effect of reforms, which were created and implemented without public participation. Foreign legal consultants dictated the content and pace of reform that focused exclusively on formal legal systems. See: Richard Messick, “Judicial Reform and Economic Development,” *Bank’s Research Observer* 14.

\(^8^3\) Hammergren, *The Politics of Justice and Justice Reform in Latin America: The Peruvian Case in Comparative Perspective*. 

37
these studies consider law from a formalistic and technical point of view without taking into account that law affects, and is affected by, the social, political, and economic context where it is ingrained.  

Additionally, from other legal scholars’ works, it is possible to infer the significance and the necessity of studying the construction of “the law” from the bottom, that is, from the cases, understanding the local demands and how highly fundamental is the context in order to make laws effective and enforceable. In this way, it is vital that legal theory produce more less-formalistic research and more empirical studies, taking into account how institutions work in a given context, and how, the different key institutional and non-institutional players have a role in the construction of the rule of law.

In Latin America generally, and particularly in Argentina, studies that have examined the role of the groups of the civil society in the use of the courts are scarce. Two Argentine scholars, Smulovitz and Peruzzotti, have done a lot of research on social movements, social accountability and democratic consolidation. In some of their works they sketch and touch the issues of rights’ discourse and social mobilization. Its relevance to this dissertation is that they demonstrate how social mobilization by groups of the civil society may be a means of democratic accountability. In fact, one of the strategies of social accountability Smulovitz and Peruzzotti mention centers on

---


the judiciary. They explain how resorting to the new provisions in the constitutions, networks of NGOs have used law/litigation to advance the protection of constitutional rights.86

---

Chapter 2: Social Movements and the Law

A. Background and Theory

Scholars have shown that courts in the United States have influenced the course of public policy. The courts play an important role in governance deciding which policy alternatives are legally legitimated and which are not, thus constraining government in the generation and implementation of public policy. Likewise, civil society groups are key players in advancing and setting the public policy agenda. Indeed, there have been many notable examples of advocacy groups pressing for change in the civil rights of African-Americans, women, and LGBT individuals.¹

It is indeed novel to claim that in Argentina civil society groups have used courts to advance public policy aims. For that reason, there have been few works focusing on Argentine courts and legal mobilization.² Thus, I present theoretical and empirical works about the United States and other countries that are relevant to this study, and explain how they form the theoretical basis of my approach.

² Some authors have showed skepticism on the potential of the judicial power to have an active role in new democracies. For instance, G. O’Donnell framed in several articles a theory called “horizontal accountability” – an innovative version of separation of power. He calls particularism to the preeminence of particularistic rules versus universal rules and the gap between formal rules and informal ones. He considers that these new democracies are majoritarian, plesbicitarian and delegative. They lack of the horizontal accountability and have weak republican institutions. Thus, although separation of powers is granted on the constitution the functional separation of powers is concentrated heavily in the executive branch being the courts ineffective actors alienated from the political system. In Guillermo O Donnell, “Illusions about consolidation,” Journal of Democracy 7, no. 2 (April 1996): 34-51 and, Guillermo O Donnell, “Horizontal accountability in New Democracies,” Journal of Democracy 9, no. 3 (July 1998): 112-126.
Some important studies about courts have focused on the impact of courts’ decisions, prioritizing empirical findings over any normative theory, and focusing on the factors that affect the impact of court decisions. Gerald Rosenberg’s book, *The Hollow Hope*,[^3] is one of the classics in the literature of empirical analysis of the courts’ impact. Rosenberg argues that lawyers have focused on how the Courts ought to act. For that reason, among others, his book is about whether the courts can or did produce social-political change through an empirical analysis.

He suggests that there is an activist and a constrained view of courts. The activist view portrays the courts as a powerful source for change. This dynamic view is nurtured by several factors. First, the bar views itself as an influential actor; the law school inculcates in their students such powerful and influential beliefs, all these factors along with the normative belief that courts are the guardians of the fundamental rights fuels -according to Rosenberg- that appreciation.

Courts normally do not overrule legislation and do not issue decisions that go beyond the will of the legislatures. Nevertheless, there are some important cases –for instance Brown and Roe- in which courts did precisely that and those are the subjects of the *Hollow Hope* book. These are policy-oriented cases where the decisions would affect a large number of people or advance a major law reform objective. Then, to what degree and under what conditions can judicial processes be used to produce political and social change? What are the constraints that operate on them? What factors are important and why? These are the questions that Rosenberg tries to answer. In order to determine whether and under what conditions courts can produce change he looks in his last edition at the Supreme Court cases in the following areas: civil rights,

abortion rights, women rights, environment reapportionment, criminal rights and gay rights. He concludes that US courts are seldom-effective producers of significant social reform. The U.S. courts are not as activists as they are generally portrayed. At best, they follow the reforms fueled by other branches of government, and they rarely solve problems that are irresolvable elsewhere.

Michael McCann, Charles Epp, Malcolm Feeley, Edward Rubin, Austin Sarat, and Stuart Scheingold, among others, are part of a group of socio-legal scholars who have begun to dispute Rosenberg’s conclusion that U.S. courts are not as activist as many had assumed. McCann illustrates this point in his study of comparable worth litigation and activism. He found that a court’s judgment was very effective in labor negotiations and recruiting supporters. He maintains that the pay-equity movement derived substantial benefits from using legal tactics despite its limited success in the courts. This is an intriguing statement because using the legal system is costly and some types of interest groups have low resources and are marginalized from politics. Thus, to say that legal battles are cost-effective for social groups is a statement that is counterintuitive.

McCann’s argument is based on his study of the pay equity movement and its legal tactics. He states that the legal tactics must be used as instrumental tools. The objectives should be broader than winning a case or a series of cases. Legal action, contrary to what a superficial analysis might indicate, helps to define the group’s complaints, raises the issue, and provides a vehicle for collective action. Moreover, “legal resources” are not fungible (activist lawyers).

---

Thus, legal tactics should be one among many employed by groups in an effort to affect policy change.

Charles Epp’s views are similar to McCann’s. Epp\(^5\) takes some of Rosenberg’s questions and presents his own inquiries going further in his analysis about non-legal factors and impact. The result is another challenge to the Rosenberg thesis. In his comparative study of women’s rights, the rights of criminal defendants, and prisoners in the United States, Britain, India and Canada, Epp demonstrates that the success of the rights revolution depended not solely on constitutional guarantees of rights, or even on judicial leadership, but most critically on the public support structure for such rights. He uses the term, “support structure”, throughout the book to mean litigation-oriented lawyers organized to pursue rights, and grassroots organizations prepared to work with them. He emphasizes this factor and contends that previous scholarship tends to leave it out or take it for granted. He explains that without such support, even a country with a bill of rights and a strong tradition of judicial independence, was unlikely to achieve a strong rights revolution. Epp explains that not only the judges uphold the rights but also the lawyers, activists, and resource providers who allow that the potential claims proceed to the final judgments. Indeed, dead precedents come alive when civil society groups pursue and pressure to make them effective. One of the examples he cites was the 1880 case of *Strauder v. West Virginia* that banned discrimination in jury selection. However, only when the civil rights movement demanded the necessary reforms to make the precedent effective did the dead rule become real. The rights revolution in the United States and elsewhere developed out of the


43
growth of a broad support structure in civil society. Epp teaches us that we must pay attention to non-legal factors in the evolution of rights.

Both McCann and Epp suggest that Rosenberg looked too narrowly at the impact of certain judicial decisions. Like McCann, who focuses on the broader legal action that gives content and definition to the groups’ claims and empowers the disadvantaged group, I analyze how groups in Argentina mobilized on behalf of indigenous peoples and LGBT individuals. I also build on the insights of Epp by examining the “support structures” for legal mobilization for these two groups.

I also rely on Marc Galanter’s much-cited work “Why the “haves” Come out Ahead?” Basically, he divides the litigant parties into “one-shotters” and “repeat players,” and identifies an apparently predictive variable (litigant experience). Repeat players appear in court often and usually have low stakes in the outcome of the case and the resources to pursue long-term interests. They also can anticipate legal problems, develop expertise, and have access to specialists. As a result, they enjoy economies of scale and encounter low start up cost for any particular case. One-shotters do not enjoy the same advantages. By comparing the outcome of the cases based upon these different typologies of litigation, Galanter concludes that “the basic architectural of legal system creates and limits the possibilities of using the system for redistributive changes” and that certain groups have advantages in litigation. In this dissertation, I hope to show how some traditionally disadvantaged groups in Argentine society, the ‘have nots’ to use Galanter’s terminology, may obtain the advantages of repeat-players by appearing frequently in court.

---

I also rely on the Canon and Johnson model of judicial impact. What happens after a judicial decision is made? Canon and Johnson identify four groups concerned with the process of implementation. They include the interpreters (judges, lawyers, attorneys in general); the implementers (those who apply the rules to persons subject to their authority); the consumers (those who receive benefits or suffer directly); and the secondary population (those indirectly affected by the decision but who nevertheless react to it). Despite the Hollow Hope’s conclusion that the Supreme Court may not be as powerful as many have suggested, Canon and Johnson found that Supreme Court decisions have a resonating effect which tends to increase the Court’s influence as a policymaker.

In the last few years, there have been several studies of countries outside of the U.S., which belong to diverse legal traditions regarding to the expansion of the judiciary, the rights revolution and the legal mobilization. One recent example is Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World which took the questions raised by some of the works surveyed in this chapter and some of the previous one (Tate and Vallinder, Rosenberg, Epp, Hirschl, McCann and Galanter). This works brought together by Gauri and Brinks in this edited volume shed light on those questions in a five-country empirical study (Brazil, India, Indonesia, Nigeria, and South Africa) about the causes and consequences of the courts involvement in the policy-making process particularly about social and economic rights litigation focusing in education and health rights. This research focuses on social and economic rights litigation in both civil law and common law countries, what the authors call the

---

“legalization process.” According to them, it has four key moments: the placing of the cases; the judicial decision; the response of state or private party; and follow up litigation. These scholars explain the “demand-side factors” for each country which account for the turn to courts drawing especially on Epp’s “support structure for legal mobilization” thesis. As for the “supply-side factors” they consider what Epp takes for granted, namely the institutional characteristics of the judicial system. Thus they analyze the institutional features of each system, the nature of the legal framework, and the attitudinal and strategic models of judicial behavior. The scholars on “response-side factors” draw on Rosenberg. In this way, they distinguish two types of claims according to the state institutional strength. Then, they conclude that in a weak state the litigants’ claims will demand for more state regulations and private provisions while in a stronger state the litigation will demand direct state action. They consider that the “follow up” of the decision does not always include the initial claimants or even the same demands; in this way the book measures the aggregate impact of litigation in each country, and assesses the weight of the empirical findings for legal theory. Finally, the authors’ findings suggest that courts may become important actors in the policy decision making process while benefiting, or at least without making matters worse for, the disadvantaged groups. Likewise, they maintain that the judiciary can advance social and economic rights under the right conditions precisely because they are never fully independent of political pressures. My research begins with the approach of Epp and, like Courting Social Justice; it then takes into account the particularities of the Argentine judicial system for the demand and supply side factors. For instance, the courts themselves in

9 The demand for judicial services.
10 The supply for judicial services.
11 The response side refers to the target of the demand.
which the indigenous groups would bring their cases are usually located a long distance away, which is an obvious physical barrier. Another factor to consider is how difficult it is to have access to a well-qualified and competent lawyer on indigenous law. Such would be an economic barrier and the lack of lawyers specialized on those issues. Moreover, I take the follow up approach to analyze the court cases that involve indigenous and LGBT people.

In Affirmative Advocacy, Dara Strolovitch, begins with the assumptions that social organizations -support structures- are relevant and that they provide valuable legal representation for marginalized groups -disadvantaged- in American politics, and then analyzes the conflicts and contradictions in the practices of those advocacy organizations. Like other scholars, she considers that these civil groups are the key component of a healthy democracy. Moreover, these advocacy or social movement groups historically have been the only voice of these disadvantaged groups. Those organizations have mobilized, lobbied, and litigated achieving important social changes for those groups. However, as these organizations seek social change by looking to end the inequalities that women, racial minorities, and the poor suffer, these inequalities are replicated within the population itself that those organizations represent. Therefore, her work looks for answering several questions related to the idea that formal organizations become focused on maintaining the organization and pursuing more tangible and speedy objectives rather than substantive goals as well as how genuine the representation is regarding the whole constituency. Strolovitch’s research suggests several questions that inform this dissertation: How do advocacy organizations pick and prioritize their battles? How far-

---

reaching is the impact of the policy issues those organizations pursue? How effectively do the organizations empower those members of marginalized group?

Strolovitch finds that the interests of “intersectionally disadvantaged subgroups” are not as well represented as those of other subgroups. She demonstrates that the advocacy groups do not promote the interests of disadvantaged subgroups, such as low-income black women or gay Latino men, as often and extensively as they do for other relatively advantaged subgroups, such as middle-class white women or gay white men. She concludes that those advocacy groups unintentionally further the marginalization of the disadvantaged subgroups. She also finds that several organizations seek to remedy this situation. Indeed, many of the organization officers expressed their genuine commitment and concern about the representation of the “intersectionally disadvantaged subgroups”. She concludes with a set of principles that she calls “affirmative advocacy”: “a form of representation that aspires to overcome the understated but deep-rooted prejudices against people at the intersection of more than one disadvantaged group.”

Another significant study for this project is Rhonda Evans Case’s work. She explains, referring to antidiscrimination laws of New Zealand, that although the country has not experienced a rights revolution in Epp’s terms, the rate of litigation has increased and its nature changed. Using Epp’s support structure approach, in this case characterized by state agencies, she examines the conditions under which antidiscrimination enforcement institutions link up to the courts. She explains that in New Zealand, where one does not find a rights-claiming legal culture, public interest litigation is very embryonic and the “traditional” groups who mobilized

14 Strolovich, Affirmative Advocacy: Race, Class, and Gender in Interest Group Politics.
around antidiscrimination statutes protecting women and racial minorities have not done so there. Under these conditions the enforcement agencies have increased importance; moreover, the lawyers who work on those agencies understand their role as essential in the processes of promoting social change. In addition to this, they are equipped with multiple antidiscrimination legal tools that are linked to the courts. Therefore, the important factors are the power of agencies, the funding, and the ambition and disposition of their staff. They truly believed that through litigation they may achieve structural change as well as serve for educational purposes. In this context the activists have experienced a favorable change through rights-based strategy.\textsuperscript{16}

In \textit{The Cultures of Legality},\textsuperscript{17} Couso and others explore how the law has become a core focus of social movements and policy-making in Latin America. The authors seek to understand the relationship between legal culture and the judicialization of politics. The concept of judicialization in this region, they argue, differs from that in the U.S. and Europe where this phenomenon was first observed and studied. In general, the authors’ approach their topic with the assumptions of historical institutionalism and extend to that the idea that the agents may change and re-build the institutions since they are not just ruled by them. The result of this new institutionalism, so called constructive or discursive institutionalism, is that the judicialization of politics is a culture phenomenon.

There are two particular chapters relevant for my research. Turning to the south of Chile, Anne Skjaevestad shows how the judiciary’s conservatism hinders the defense and advance of Mapuche indigenous claims through the courts. Nevertheless, the process of legal mobilization

\textsuperscript{16} Evans Case, \textit{Enforcing New Zealand Anti-Discrimination Laws: The State as Public Interests Litigator in New Zealand}.

\textsuperscript{17} Javier Couso, Alexandra Huneeus, and Rachel Sieder, eds, \textit{Cultures of Legality: Judicialization and Political Activism in Latin America} (New York: Cambridge University Press, 2010).
and the experience of the use of courts have served to judicialize the Mapuche’s own legal consciousness and to understand their political battle given their movement further momentum. In this dissertation, I focus on the broader effects of the use of courts by the Argentine indigenous, like Anne Skjaevestad.

In this same work, Catalina Smulovitz analyzes the case of Argentina. She argues that the citizens’ idea about the law does not explain the increase in the use of courts by people in the last few years. Indeed, the polls show that perceptions of the judiciary and judges performance are negative. She finds that the increase of the judicialization of politics may not be related to how people evaluate the judiciary, but to the opportunity structure for making claims combined with the support structure of existing lawyers (in this case specialized in labor rights) and a new structure of advocacy organizations (NGOs) that led to the greater use of courts. Smulovitz concludes that they are not the citizens’ ideas about the “law,” but rather the “existing resources” of particular lawyers’ cultural capital that provoke the judicialization phenomena. In this dissertation, I focus on those available “resources.” Cultures of Legality encourages thinking about a new theory of judicialization for Latin America according to its own institutional and cultural features.

From the legal theory perspective and focusing more on the litigation itself, Walker Anders explains in his work about constitutional law and social movements that the role of culture in American constitutional law remains one of the most under-theorized topics in legal studies. In his article, he examines the civil rights, gun rights, and gay rights movements and the

---

18 Couso Huneeus and Sieder, Cultures of Legality: Judicialization and Political Activism in Latin America.
constitutional cases brought by those groups to the courts. He demonstrates how those movements have aligned their legal claims with cultural trends. He shows that to be successful, social movements need to build their own frames that diagnosed the problems, identify a clear prognosis of them, and then mobilize target audiences to find a solution. In this way, these “collective action frames” worked best when aligned with the ideas, assumptions, and beliefs (what he calls “cultural frames”) already held by target audiences, what has been labeled a “frame alignment.”20 His theory is that when the frame alignment is the most strategic, that is, when one is paying attention to how the Court framed its civil rights decisions, it allows maximizing cultural synergy and minimizing popular backlash. For instance, Anders examines how in Brown v. Board of Education and New York Times v. Sullivan the lead attorneys, Thurgood Marshall and Herbert Wechsler, both tried to align their legal claims with prevailing cultural norms. In Marshall’s case, this meant aligning civil rights with national concern about youth while in Wechsler’s it meant aligning press rights with national support for the First Amendment. Both succeeded at the Supreme Court level, yet Brown met significant opposition. By contrast New York Times v. Sullivan by aligning civil rights with free speech maintained the media apparatus through which the civil rights movement would win national support and eventually helped the movement obtain strategic changes in federal legislation. The lawyers, like social movement, should frame their agendas in terms that most people are able to support and understand.

Regarding the gay rights movement, Anders examines the work of Eskridge\textsuperscript{21} and Andersen\textsuperscript{22} going through the different cases from the challenge to state anti-sodomy laws to the official recognition of same sex marriage. Both authors analyze the alignment of legal and cultural frames under privacy rights. Eskridge, writing more from the legal perspective, considers the influence of prior Supreme Court rulings based on privacy rights brought by such groups as the American Civil Liberties Union (ACLU). By contrast, Andersen shows how the decision to pursue privacy litigation was not a simple factor, but a strategic choice. The strategic decision was to attack laws that applied to both heterosexual and homosexual and limit what couples could do in the privacy of their own homes and thoughtfully avoided lawsuits that claimed child custody rights for gay parents. According to Anderson, the strategic decision to emphasize and focus on privacy reflected a smart alignment of the legal frame of gay rights with the cultural frame of heterosexual, middle class privacy interests. In the same way, she takes into account such contextual variables as the potential winner of the presidential election, the potential Supreme Court nominations, and the better jurisdiction to bring the cases. However, Anders shows that while some cultural progress in the direction of gay rights had been achieved under the privacy rights framework, more substantive initiatives on behalf of LGBT interests were unlikely to succeed. After more than twenty years, the first “gay lawsuits” cultural frames may have evolved, but not as far as LGBT activists might have liked. Indeed, by 2011,\textsuperscript{23} 29 states have constitutional amendments restricting marriage to one man and one woman, and 14

\textsuperscript{22}Ellen Ann Andersen, \emph{Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation} (United States: The University of Michigan Press, 2005).
states have statutes banning same-sex marriage. Finally, she encourages law scholars to cross interdisciplinary boundaries engaging in a fuller understanding of social movements and their constitutional cases.  

The book by Barclay and others titled *Queer Mobilization* analyzes the relationships among LGBT mobilizations, social change and the law in the United States. It examines the movement’s engagement with law to reshape the most basic social institutions: family, marriage and work. The book reflects the complex relationship between law and social change. Since the NAACP’s legal successes in the 1950s, many other social movements have turned to the courts in hopes of achieving greater substantive equality. Still, the use of courts to obtain more structural change has met with mixed results. The more pessimistic view in the literature considers the following: a) favorable judicial decisions do not automatically take effect, b) rights-based strategies recreate the relationship of power and domination, c) some victories lead to severe backlash, and d) law normalizes some lifestyle and identities obscuring the fluidity of sexuality. The more positive view in the literature maintains that: a) even with unsuccessful litigation the rights-based strategies further important social movement goals, b) the use of courts allows to gain leverage generates media attention and educates people, c) rights-based strategies challenge hegemonic social arrangements, and d) even losing in court promotes ongoing resistance by mobilizing and empowering people to re-imagine their lives.

26 NAACP: The National Association for the Advancement of Colored People, founded in 1909, is the oldest and largest civil rights organization in the U.S.
Queer Mobilization shows how social movements continue channeling their claims for reform through the legal processes. As the authors state, judicial decisions in the United States set precedents but also sent the symbolic message of what is and is not acceptable for society. The struggle of the LGBT movement for same-sex marriage has exposed the animosity and the intensity of the opposing positions of the debate revealing the significance of legal recognition of equal marriage rights. The continued participation of social movements in legal processes provides a constant challenge to make law more responsive to marginalized communities. Since the Supreme Court declared unconstitutional the sodomy laws on the basis of the right of privacy,27 many gay rights groups have been using the privacy rights frame. Nevertheless, other LGBT movements doubt the efficacy of the privacy framework, fearing that it may be used to exclude them from some aspects of public life. In short, privacy is a troublesome concept that may both advance and restrict the rights of lesbian and gays. The authors maintain that concepts like “privacy” and “marriage” among others allow claiming the legitimacy associated with law and advancing social change.28

With respect to the rights of indigenous peoples, Engle’s book titled *The Elusive Promise of Indigenous Development*29 tries to put the social movement in a historical and international context tracing the strategies they have been choosing and showing the constant dilemma emerging of each approach. Indigenous peoples have used international law to make claims for their heritage, their territory, and their culture. She considers over time how the cultural rights framework prevails over self-determination and she evaluates the costs and benefits of such a

28 Barclay, Bernstein and Marshall, *Queer Mobilizations LGBT Activists Confront the Law*.
framework for indigenous groups. Under the umbrella of the cultural rights, culture has been understood in different ways: culture as heritage, culture as land, and culture as development. According to Engle, advocates using the general or “umbrella” concept indigenous rights have often made concessions and limited indigenous economic, political, and territorial autonomy.\(^{30}\)

Deborah Yashar’s *Contesting Citizenship in Latin America*\(^ {31}\) is a rich case study that explains the uneven emergence, timing and location of indigenous mobilization in Ecuador, Bolivia and Peru. She addresses two questions: why have indigenous identities become politically relevant in the contemporary period, and why have they translated into significant political organizations in some places, but not others. Since the recovery of democracy in Latin America the ethnic movements have reappeared. In this way, indigenous movements have mobilized in unprecedented ways. They shut down roads, occupied churches, cut off commerce, organized and coordinated international meetings, as well as fielded political candidacies in local and national elections -Ecuador, Bolivia and Guatemala-, and pursued their rights in legislative assemblies. Different from the past, this rising mobilization promotes an explicit indigenous agenda. Along with the old set of demands –equal inclusion and access— there are new and increasing claims for recognition of group rights and ethnic self-determination, what she calls "special rights as native peoples."\(^ {32}\) Yashar’s book is ultimately about identity and rights. She argues that identity politics may best be explained through a comparative historical approach that analyzes three factors: changing citizenship regimes to explain the temporal question, social networks and political associational space to speak about spatial inquiry. She concludes that the

\(^{30}\) Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy*.


mobilization of indigenous groups has "solidiffed indigenous peoples as political actors whose interests are now part of the national dialogue."  

In this dissertation I employ Yashar’s theoretical approach that combines both culture (that is, the popular identity politics approach) and structural/institutional analysis. In this fashion, ethnic political identities are institutionally and historically constrained. Therefore, the relevant institutional changes, such as constitutional reforms in the Argentine case, may contribute to politicize identities, often in novel and unplanned ways, providing a motive for mobilization.

There are very few works in Argentina that study LGBT and indigenous affairs from an interdisciplinary approach. For that reason, most of the key works are based on the U.S. case and comparative cases from Latin America. My analysis combines aspects of the theoretical approaches used by the authors whose works I briefly examined in the section above. Though I borrow from Charles Epp’s “support structure for legal mobilization” concept, I employ it to understand different specific cases within Argentina. In this way, there are some characteristics in the Argentine judicial system for the “demand and supply side factors,” especially for the indigenous people who are excluded from the system (physical, economic, cultural and educational barriers, among others). With respect to the “supply side,” I examine the factor

35 The few relevant works in Argentina are Bruno Bimbi, Matrimonio Igualitario (Buenos Aires: Planeta, 2010) and Marisa Herrera, Maria Victoria Fama and Andres Gil Domínguez, Matrimonio Igualitario y Derecho Constitucional de Familia (Buenos Aires, Argentina: Editorial Ediar, 2010).
pointed out by Evans Case about lawyers’ ambition and disposition in the legal mobilizations under study. Taking the McCann’s argument that the legal action gives content to the groups’ claims and empower them although the high costs and unsuccessful court cases, I look particularly at the “effects” of legal actions on indigenous and LGBT mobilizations. Also, I employ Gauri and Brink’s “follow up” side approach. Moreover, Galanter’s thesis and the other explanations built on it provide theoretical support to examine if these players are “repeat” or “one-shotters” as well as “haves” or “not-haves.” Furthermore, I am concerned about how the basic architecture of the legal system, such as the institutions and rules of the Argentine legal and political system, creates and limits the possibilities of using the system for changes that have an impact on the other branches. I also rely on the Canon and Johnson model of judicial the impact, which analyzes what happens in terms of policy development after any judicial decision is made. In short, this dissertation combines these theoretical approaches and insights in an effort to assess how and when the LGBT and indigenous peoples movements have used the courts, and how the support structures for social mobilization worked to bring the cases to courts, and with what effects, that is, the impact of the use of courts in the legislatures as well as in the media coverage.

B. Methodology

37 There are two theses. The first is that the “haves”/upper middle class–wealthy and educated–change its composition and have a new agenda. The greatest challenges to the socio-political status quo now come from the “haves” classes. Now the agenda of social justice and quality of life issues enjoys the sympathy of wealthier and more educated professional people. Those are the cases of the feminist and the homosexual rights’ movement in Canada. Different to Galanter’s article in 1974, today the “haves” have a different agenda. Thesis presented by Ian Brodie et al, in: “Do the “Haves” Still Come out Ahead in Canada? The second is that the “have-nots” by organizing themselves, having legal strategies and representation, may ameliorate the gap with the “haves” in the legal system being either “repeat” or “one-shotter” players. Charles Epp, “The two motifs of “why the Haves” come out ahead and its heirs,” Law & Society Review 33 (1999): 1089-97.
The term “disadvantaged groups” used in the title of this dissertation might be too broad. For this study, I look specifically at those disadvantaged groups which have used significant litigation to achieve their policy goals successful or not. Then, in order, to select the groups for this study I took into account the level of activism of those groups. In this project I consider a group as activist when it seeks to use litigation as part of its overall strategy to effect social change. Although there are no studies measuring the activism, it is possible to infer from the research that I have done which groups often use litigation as one of their strategies.

This study focuses on indigenous peoples and LGBT individuals, two disadvantaged groups whose advocates and supporting organizations exhibited significant levels of political activism. Although these two groups are not the only ones in Argentine society that have been politically active, I have selected them because they have been understudied with this interdisciplinary approach. The reasons for not having a significant amount of research of indigenous and LGBT people are numerous. With respect to indigenous peoples, it may be due to their “invisibility” in Argentine society – they are not a big group in Argentina and they do not have the resources to make their problems noticeable. In the case of LGBT, the use of courts by their supporting organization is a new phenomenon.

This dissertation focuses on the series of cases brought by LGBT groups in the quest for official recognition of same sex marriage. The LGBT Federation, one of the most important organizations of the gay movement in Argentina, has either presented or accompanied all the lawsuits of same sex marriage. Even though the Argentine Homosexual Community (CHA), one of the first organizations of the gay movement, has brought a lawsuit about the recognition of a

---

38 Significant in this project is not related to the quantity of the lawsuits but with the impact and relevance of them.
Spaniard marriage in Argentinean law, the case is not relevant for the purpose of this study. The other organized gays groups have not pursued litigation, and thus are beyond the scope of this study.

I focus my analysis on the first unsuccessful amparo (Rachid, María), and the first successful one (Freyre, Alejandro). I just outline the other two unsuccessful amparos because they followed the same strategy as the first. The other successful court cases employed the same approach and achieved the same results as the cases analyzed in this research. There were many new court cases following the successful outcome of Freyre, Alejandro. I have picked those representative court cases, some successful and some not, in order to describe a fuller, more complete picture of the LGBT social movement and their use of courts.

It is important to clarify that the indigenous social movement includes indigenous communities, organizations, and leaders. In general, the lawsuits in which the indigenous people are involved, either as plaintiffs or defendants, involve claims of property rights. Property rights, or more specifically ancestral lands, are central to indigenous peoples’ worldview, culture, and way of life. First, I mention two of the most landmark Supreme Court cases. Those cases are the examples of the two approaches adopted by the Supreme Court in its decisions. Next, I describe how the indigenous people sought to use courts to achieve their policy ends. The communities and the court cases that implicated them are the Mapuches, located in Neuquén, and Huarpes, situated in Mendoza. These communities present different features, procedures and outcomes. In the same way, they show diverse type of activism. The experts in the field helped me to choose those national and provincial cases. 39

---

39 Silvina Ramírez (Scholar -University of Buenos Aires-, Lawyer), Personal Interview, January 28, 2011.
Reformulating Galanter’s thesis slightly, I classify the selected groups according to some important features. The classifications are based on several criteria: location in the periphery or center; having or not having resources; level of organization, and “outsourcing their litigation” or not. The indigenous communities are located in the periphery. They may be classified as lower class taking into account their wealth, income, and education. Literacy is really quite low. Not being an empowered community, they fit what one thinks of as “have-nots.” These communities have organized themselves and have a clear agenda of activism fighting for their rights. However, being the “have-nots” without tools and resources and no expertise in litigation, they outsource the strategic litigation to others. From that perspective the indigenous communities themselves are “one-shotters” although they are the parties of a number of cases. NGOs that work on indigenous and human rights have brought the cases to the courts and developed an expertise in the field of indigenous litigation.

The LGBT “activist” community is predominantly located in the center (Buenos Aires) and in the largest cities of the country (Rosario y Córdoba). I highlight activist gay community because it is common to stereotype the gay community as an educated, wealthy, middle-class. Sexual orientation does not belong to a socio-economic class, nor does it belong to an ideological group or a geographical location. However, it is clear that gays who participate vigorously in the movement belong to an educated middle class which lives in the urban areas. Additionally, the LGBT community has developed an expertise in litigation. For this reason, they might be considered “repeat players.”

Fernando Kosovsky. (Activist, Member of GAJAT, Lawyer), Personal interview, January 20, 2011.
Chapter 3: Law and Politics in Argentina

A. An Overview

Argentine democratic institutions evolved in a highly unstable environment. During the 20th century Argentina went through six military coups with dreadful violence1 and severe economic crises. Since the democratic system was reestablished in 1983, Argentina experienced two great social, economic and political crises, one in 1989 and the other in 2001.2 Those crises3 generated new and drastic changes in governmental policies, which provoked changes in social mobility. However, since that time, the Argentine economic recovery has been rapid and impressive. In the last years, the country has been growing at stable rates (between 5 and 7

---

3 After the last crisis in 2001, the international debt and the public deficit were unsustainable. The default was declared and the crisis left more than half of Argentineans living in poverty and one out of four was indigent. Three million people remained unemployed, while half of million children under 14 worked in the worst conditions. A third of senior citizens had no income of their own. Eighteen million people lacked medical insurance. Facing all these problems the policy measures were drastic and most of the cuts were in social spending.
percent annually). This improvement has allowed the government to implement new social policies to attack inequality and poverty.\(^4\) Still, a lot remains to be done.

Given those circumstances, only two Argentine presidents (Carlos Menem 1989-1994 and 1995-1999; and Nestor Kirchner 2003-2007) finished their terms in office and orderly transferred the power to another elected president. Presidents Raúl Alfonsín and Fernando de la Rúa left their positions early due to the hyperinflation and financial crises respectively. In fact, during the 2001 crisis and prior to Nestor Kirchner’s election, Argentina had five presidents within one week. Then, the National Assembly designated Eduardo Duhalde as interim President for the 2002-2003 period following the institutional procedures.\(^5\)

It is clear that Argentine institutional development is still weak. Indeed, the degree of the strength and stability of the Argentine institutions is often discussed by political scientists and pundits.\(^6\) However, and in spite of these challenging economic and political conditions, it must be emphasized that since the recovery of democracy the country, including both its elites and the general population, has expressed its support and commitment to the democratic system.

As for Argentina’s society, the country has the largest middle class\(^7\) of the region as well as the highest levels of schooling and urbanization. Buenos Aires, the capital, and the other big urban cities, are known for their high levels of openness and acceptance of the gay community.


\(^5\) Ley de Acefalia (No 20.972). This law covers presidential succession when a president dies or resigns.


Labor unions are very strong and well organized.\(^8\) They have been historically associated with Peronism. At the moment, Peronism is the ruling party and sees itself as a left of center political force with a strong progressive agenda based on the defense of human rights.\(^9\)

The level of religiosity in Argentina also presents some distinctive peculiarities. Although the majority of the population recognizes itself as Catholic, Argentines do not go to church regularly. Church attendance is very low with only 22 percent of the population attending church services weekly. Moreover, the evangelical population is still insignificant, barely two percent of the population. Those figures reveal the extent of societal secularism as well as the weakness of the churches’ mobilization. Furthermore, the constitutionally mandated separation of church and state has been expanded to mean the separation between the Church and the political parties. For nearly 100 years, the country has not had a strong confessional party. There is not a relevant Christian Democratic party, nor is there a party with a strong relationship with Opus Dei or with the Evangelical groups.\(^10\) Indeed, the most important, traditional and historical political parties - Radical Civic Union and Peronism- have had confrontations with the Catholic Church.

Argentina is also a country of immigrants. For example, Argentina’s population is composed of immigrants from Europe, predominantly Italians and Spaniards, followed by the French, Germans, Poles, Russians and Ukrainians. There are also many immigrants from the Middle East (Lebanese, Armenians) and from other South American countries: Bolivians,

---


Chileans, Paraguayans, and Peruvians. Also, there is a presence of Africans and Indigenous in Argentina, and in the case of Jewish\textsuperscript{11} is the biggest community in Latin America.

I pay special attention to the indigenous demographic background as well as the socio-economic and political features of this particular ethnic group since they are part of this case study. Argentina, unlike other countries in Latin America in which the majority of the population is native, does not have a significant number of indigenous people. Nevertheless, this does not mean that there are no indigenous communities in Argentina. Indeed, the denial of their existence has allowed the violation of their rights, making them a disadvantaged group which suffers unfavorable social, political, economic, and cultural circumstances.

In 1998, the inclusion of the “issue” of indigenous population into the National Census was ordered by law.\textsuperscript{12} Thus in 2001, the National Institute of Statistics and Census (Instituto Nacional de Estadísticas y Censos, INDEC) included the indigenous as a category in the count. Building on that information, the Complementary Survey of Indigenous People (Encuesta


\textsuperscript{12}Law 24,956
Complementaria de Pueblos Indígenas - (ECPI) 2004-2005\textsuperscript{13} - was carried out. This was a turning point in the National Statistics.\textsuperscript{14}

The survey - ECPI - showed that there were 600,329 indigenous people in Argentina.\textsuperscript{15} They represent between three and five percent of the population, belonging to diverse groups of indigenous communities settled throughout the country. In the northeast region (Chaco, Formosa, Misiones, and Santa Fe) the communities include the Mbya-Guarani, Pilaga, Toba, Wichi and Vilela. In the northwest (Jujuy, La Rioja, Salta, San Juan, Santiago del Estero, y Tucuman) the communities are the Atacama, Ava-Guarani, Chane, Chorote, Chulupi, Diaguita-Calchaqui, Kolla, Omaguaca, Tapiete, Toba, Tupi-Guarani and Wichi. In the south (Chubut, Neuquén, Santa Cruz, and Tierra del Fuego) the communities are the Mapuche, Ona, Tehuelche, and Yamana. In the center (Buenos Aires, La Pampa, and Mendoza) the communities are the Atacama, Ava-Guarani, Diaguita-Calchaqui, Huarpe, Kolla, Mapuche, Rankulche, Toba, and Tupi-Guarani.\textsuperscript{16} The Mapuches are the largest population (113,000) and they have the best level of

\textsuperscript{13} The sample was the homes that in the National Census (Censo Nacional de Población, Hogares y Viviendas 2001) registered at least one person who either belongs or descend from the Indigenous People.

\textsuperscript{14} There have been eight national censuses. In the first three censuses the indigenous matter was partially analyzed and it was not taken into account in the last ones. Also, there is a powerful precedent, the national indigenous census, in 1966-68. Regrettably, it was inconclusive. Moreover, there is good information taken from local surveys (Formosa y Salta). Antecedents http://www.indec.gov.ar/webcenso/ECPI/index_ecpi.asp (accessed November 23 2009).

\textsuperscript{15} The criteria used by the survey were either being a first generation descendent or self-identification. 457, 363 people recognized themselves as indigenous. 93.4\% of this group is also a first generation descendent. 142, 966 are a first generation descendent but they do not recognize themselves as indigenous. 50\% of this population belongs to the communities of Mapuche, Kolla, Toba and Wichí http://www.indec.mecon.gov.ar/webcenso/ECPI/index_ecpi.asp (accessed November 16 2009).

organization. In 2007, there were 212 indigenous communities registered at the Registry of Indigenous Community (RE.NA.CI) and 746 were registered at a local level. The major communities are Mapuche, Kolla, Guarani, Huarpe, Toba, and Wichi.

In this dissertation, I examine the specific cases of the Mapuches and Huarpes, studying their communities, their efforts at legal and political mobilization, and the cases that brought their claims into courts. The Mapuches are located in two areas of the argentine Patagonia, in the north (Río Negro and Neuquén) and in the south (Chubut, Santa Cruz, and Tierra del Fuego). The majority of the Mapuche population is situated in Neuquén. Half of the Neuquén population lives in the city, while only a few Mapuches live there. The number of Mapuches increases towards the west and in rural areas. The majority of them are located in the Andes where most of the Mapuches communities have been established. In that province, there are approximately 70,000 Mapuches distributed in 52 communities.

The principal economic activity of the Mapuches is the raising of sheep and goats. This activity is migratory in the winter and summer. Male members of the family are in charge of cattle breeding. In the past, the female members of the family also migrated with the men; today, generally stay at home and cultivate the garden. Others are engaged in forestry. Provincial

---

18 The law 23,302 instituted the Registry of Indigenous Community (RE.NA.CI). And the Resolution 4811/1996 adjusts the criteria of registration to the constitutional requirements (declarative effect).
20 Silvina Ramírez, La Guerra Silenciosa: despojo y resistencia de los pueblos indígenas (Buenos Aires: Capital Intelectual, 2006)
21 The information about Mapuches in this item is based on the 2008 Annual Report of the Human Rights of Mapuche People in the Neuquén Province made by the Observatory of Human Rights of Indigenous People.
tourism helps to diversify the indigenous communities’ fragile economies. In all of these cases, their economy is precarious and the Mapuches do not have the resources to invest and improve their productivity. The result is that 60 percent of the Mapuches live below the poverty line.

Poverty is a calamity that repeats itself throughout the indigenous people living in the country, especially affecting the youngest. Malnourishment and disease are the leading causes of death. In 2006, fifteen Misiones children from three months to eight years of age died in a population of 4,083. The same situation was repeated in 2007 in Chaco, where twenty-one people of the Toba community died. Another case of malnutrition took place in 2009 in Salta where a two-year-old child passed away.22

The level of schooling of Mapuches is relatively low and children usually join their parents in rural, agricultural work. In general, their young people between 14 and 24 and particularly women between 17 and 30 migrate to the city. In the urban areas, they often live in slums, get jobs in the black market and depend on the welfare of the state. In fact, in 2009 the INDEC reported that eight out of ten indigenous children do not finish high school and only 30 percent finish primary school. The illiteracy rate of children older than ten is 2.6 percent, three times higher than the national average rate.23

There are some features that differentiate the Mapuches and the Huarpes. The Huarpes were a pacifist nation and the Mapuches were a nation of warriors. Their presence in Argentina and Chile has always been acknowledged to be different from the Huarpes whose ethnicity has been denied for decades. The Mapuches consider themselves to be a nation living in the Argentine State, unlike the Huarpes, who see themselves as indigenous Argentines.

The government and people of Mendoza believed that the Huarpe people disappeared for many years. First, the “Indians” were Spanish tributaries. Their men were taken to Chile for “encomienda”\textsuperscript{24} leaving behind the women and children. At the moment when the “encomienda” ended it was thought that they were no longer “Indians.” Moreover, it was understood that the new generation was mixed blood, not taking into account that there was a group of indigenous people hidden in the Huanacache’s lagoons. Second, in 1889 with the “campaign of the desert,” a military campaign for exterminating hostile indigenous settlements, the official extinction of the Huarpes was declared for the second time. Nevertheless, the indigenous people had survived taking shelters at the Huanacahes’ lagoons. Thirdly, the Huarpes lost their native language, which was the reason why some scholars believed they had disappeared.

Today, they are still located in the Lavalle desert, called the Huanacahe’s Lagoons, which comprises the district of Asunción, San José, Laguna de Rosario, and San Miguel. The Huanacache’s lagoons and its immediate surroundings were declared "Ramsar site" in 1999.\textsuperscript{25} This is an extension of around 1,433,200 acres. The statement was obtained at the request of the province of Mendoza and accompanied by the national State. Huanacache has a migrating population of approximately 4,000 people. They live on fishing, hunting, and agriculture. For that reason, they made irrigation canals. They also work with reeds and reed making of ponchos and blankets, among other things. They are very hardworking and industrious. However, poverty, lack of health and education is part of their daily reality.

\textsuperscript{24}“Encomienda” was a colonial system that gave Spaniards a restricted set of property rights over Indian labor.

Argentine society presents some very positive characteristics and indicators in terms of literacy, urbanization, economic growth, among others. However, social and cultural exclusion is a reality for a considerable part of its population. Indigenous populations are facing many problems that the Government has not fully addressed. For them, the institutions have not delivered on their promises.

B. The Form of Government and Political System

In 1853 Argentina enacted its first Constitution. It was heavily drawn from the U.S. Constitution establishing a federal republic with a presidential political system. Although the 1853 Constitution is still in force, it experienced several amendments. The 1994 reform was the most extensive revising several parts of the Constitution. However, the provisions for strong executive branch, bicameral congress, and independent judiciary were maintained.26

As a federal republic there are 23 provinces and the Autonomous City of Buenos Aires. Like the states in the U.S., each province has its own Constitution and the authority to establish and organize the local executive, legislature and judiciary. The City of Buenos Aires needs to be mentioned because of the cases brought to the courts by LGBT individuals. Before the 1994 constitutional reform, the Mayor of the city was designated by the national executive power, not by people’s vote. After the reform, the Mayor of the city is selected by popular vote. Moreover, there were some attributes that the city did not have. The reform gave the City of Buenos Aires the status of an Autonomous City. According to this legal status, the city has its own government and administration within the jurisdiction. There is a debate among scholars whether the city of

Buenos Aires has the same legal status of a province or not. Although it is inferred from the documents of the reform that the constitutional conventioneers did not give the city of Buenos Aires the legal status of a province, courts have ruled otherwise, giving the city some attributions that parallel those of a province.

The nature of Argentina’s federalism is subject of considerable debate. There are several characteristics that mitigate the country’s federalism. For instance, substantive law (codes/private law) is a prerogative of the National Congress and not of the provincial legislatures. The civil, commercial, criminal, mining, labor and social security codes are all national law. In this way, private and criminal laws are of national scope, while administrative and procedure law may be either national or provincial.

Like the U.S. Constitution, the Argentine Constitution divides power at the national level between the three branches of government. This arrangement of separation of powers also includes a system of checks and balances. Executive Power is vested in one person who is elected by popular vote. The Constitution bestowed upon the President formal powers both in the legislative and non-legislative realms. The office possesses a number of important prerogatives like declaring state of siege, federal intervention of provincial governments, veto powers, and legislative initiative. These faculties are technically shared with the Congress whose approval is required. However, the Argentine presidential system has become a hyper-presidentialist system\(^27\) and this often impedes and dominates the normal function of the Congress. Moreover, executive power has become personalized with little transparency.

The Argentine national Congress, like in the U.S., has two chambers: the Senate and the House. This division of chambers embodies the different levels of the government: federal and provincial. The House represents the population and the Senate the provinces. The House has 257 members, elected for a four-year term in each electoral district (23 Provinces and the Autonomous City of Buenos Aires) by proportional representation using the D’Hont method, with half of the seats renewed every two years in all districts. The Senate has 72 members, elected for a six-year term in three-seat constituencies (23 provinces and the Autonomous City of Buenos Aires) for a six-year term, with two seats awarded to the largest party or coalition and one seat to the second largest party or coalition. A third of its members are renewed every two years.

The Congress has been characterized as an ineffective check on the Executive and a comparatively unimportant political actor. The ineffectiveness of majoritarian institutions and sometimes their willful delegation of controversial issues are features that contribute to institutional weakness. However, some scholars concede that the Congress has a role in national politics, albeit one that is described as “reactive” or a “veto player.”

---


For a critique of this view, see Vicente Palermo and Marcos Novaro, Politica y poder en el gobierno de Menem (Buenos Aires: Grupo Editorial Norma Ensayo, 1996), 477-505.


work I explain how the Congress on LGBT rights differs from most of the issues, and has played a role more substantial than merely a “reactive” or “veto” player.

As a consequence of Argentine federalism (art. 1, C.N.), the Judicial Power is organized in two levels: federal courts (arts. 108 y ss. C.N.) and provincial courts, including the City of Buenos Aires courts (art. 5 y 129, C.N.). It should be clarified that there are also national courts. In the past, when the city of Buenos Aires was not an autonomous city, there were national tribunals located there. Those tribunals had civil jurisdiction on the cases situated at national territories (the capital city and other national territories that today are provinces). Today, there are still national courts located at the city of Buenos Aires that have jurisdiction over civil and commercial issues. Although the City claims some of this jurisdiction, the City now only has tribunals hearing cases dealing with disputes of an administrative nature. There are some proposals at the National Congress to transfer jurisdiction, but nothing has been done yet.

Judicial federalism is a characteristic of the Argentine judiciary. The national or federal system is headed by a Federal Supreme Court, which applies both state and national laws and follows a federal procedural code. Also, there are the provincial judiciaries, headed by the respective provincial Supreme Courts, that apply national laws and follow provincial procedural codes. Private and criminal laws are of national scope, while administrative and procedural laws may be either national or provincial.

The Constitution specifies that the national Supreme Court may exercise original jurisdiction in cases affecting ambassadors and other diplomats, and in cases in which the state is a party. In all other cases, however, the Court has only appellate jurisdiction. Like the U.S. Supreme Court, it very rarely considers cases based on its original jurisdiction; almost all cases
are brought to the Supreme Court on appeal. In practice, the only original jurisdiction cases heard by the Court are disputes between two or more states.

C. The Legal System

Argentina’s legal system has a unique combination of American and European law influences. The country inherited the continental law tradition from Europe, but the U.S. Constitution deeply influenced Argentina’s constitutional law. The outcome is the “strange marriage”\(^30\) between a judicial power with the institutional prerogatives akin to the U.S. system but with a civil law culture and codification transplanted from Europe.

From the point of view of private law, Argentina is a civil law system. The private law in general was strongly influenced by the French, Germany, Spaniard, Brazilian and Chilean codes. Like the other Latin American legal systems, Argentina embraced the continental tradition. This tradition grants to the legislature the major law making role. As a result, judicial tribunals are expected to recognize the sovereign law making power of the legislature and thus often construe such laws in a technical and neutral manner free of any personal judgment. This, of course, is the theory, but in reality there have been examples of judicial decision making which recognize valid sources of law other than the laws passed by the representatives of the people.\(^31\)

Argentine constitutionalism has been heavily influenced by the U.S. constitutional experience. The sections on judicial power in the Argentine Constitution, enacted in 1853-1860


and reformed both in 1957 and in 1994, are almost a literal translation from the U.S. Constitution, but there is one notable exception introduced by the 1994 reform. Judicial review of the constitutionality of laws and of the constitutionality and legality of the Executive action is provided for in the Argentine Constitution in its article 43. Furthermore, in the North American tradition judicial precedent is binding and confers *stare decisis* to the Supreme Court’s decisions with *erga omnes* effect. In the U.S. tradition, adherence to precedent gives stability its constitutional system. However, the Argentine constitutional system does not recognize binding legal precedents in the same way. Although Supreme Court decisions are often “taken into consideration” by lower tribunals, the highest court’s decisions are only really binding on the parties to the case.

These features make the Argentinean case unique since the national and local courts, following the civil law system, do not apply the principle of *stare decisis*. In the common law system, precedents are understood to narrow the judges’ range of discretion. In the civil law system, the judges are understood to be merely applying the law using methods of logic. Since they are not “allowed” to interpret the law, their work is understood to be mechanical and uncreative. Under this conception, precedents are not necessary. A rule that is supposed to

---

32 It is important to clarify that Argentine constitution was also reformed in 1949 during the Juan D. Peron’s presidency. However, the *coup d’état* in 1955 made the reform null and void. After that, the government reformed the constitution in 1957.

33 Before that reform the Constitution did not say explicitly that there was judicial review. There were just “hints” as in the era of *Marbury* that may indicate the existence of such practice. However, the judicial review did exist in Argentine law established by the law 27 in its article 3 enacted in 1862. And soon after, the law 48 regulated the access to the Supreme Court explicitly, addressing the interpretation of constitutional provisions and the contradiction to lower statutes. Later, the leading case that is pointed it out as the jurisprudential creation of the judicial review is *Sojo*.

34 Saldivia, “The Argentine Supreme Court and Constitutional Protection of Sexual Minorities.”

35 Saba, “Constitutions and Codes: A Difficult Marriage.”
reduce the discretion of judges is not needed in a system where the judges just apply the letter of the law. However, experience has shown that in nearly every court decision there is a margin of interpretation and discretion, and in those instances judges cannot help but to make law.

Since the 1853 Constitution was based on the U.S. Constitution, Argentine courts tend to rely on U.S. Supreme Court’s decisions. The U.S. Court’s decisions have been cited as a “non-authoritative” source, but never as a direct precedent. There are many examples.\textsuperscript{36} In \textit{Sojo} (1887), the Argentine Supreme Court struck down article 20 of the 48 Act which granted original jurisdiction to the Supreme Court on Habeas Corpus cases.\textsuperscript{37} Quoting Chief Justice John Marshall in \textit{Marbury v. Madison}, the Argentine Court reasoned that the Constitution prevented such expansion of its original powers. Later, in some decisions related to “welfarism” or “social constitutionalism,” Argentina was inspired on U.S. precedents as well. \textit{Ercolano}\textsuperscript{38} and \textit{Avico v. De la Pesa}\textsuperscript{39} are good examples. They deal with regulating interest rates and a moratorium on the foreclosing of existing mortgages contracts, and the outcome of these cases resembled those in the United States. The Argentine Supreme Court has been particularly influenced by cases like “Home-building”\textsuperscript{40} and “Nebbia,”\textsuperscript{41} both landmark cases at the time of the New Deal and the rise of the welfare state in the United States. These legal borrowings or transplants have been

\textsuperscript{37} CSJN-Fallos 32:125 (1887)
\textsuperscript{38} CSJN-Fallos 136:170
\textsuperscript{39} CSJN-Fallos 172:29
\textsuperscript{40} 290 US 398 (1934)
\textsuperscript{41} 291 US 502 (1937)
criticized\textsuperscript{42} by some academics, but others understand that the use of foreign precedent is difficult to avoid today.

The 1994 Argentine constitutional reform incorporated into its original bill of rights new, so-called third generation rights. These were enumerated not only in articles 41 providing the right to a healthy environment and 42 granting to consumers and users the right to the protection of their health, safety and economic interests, but also in the international treaties incorporated to the Constitution. These international treaties were expressly recognized to have the same status as constitutional law. These newly incorporated rights provide a broad spectrum of constitutional guarantees. In addition, article 43 created the possibility of bringing legal actions—summary action, \textit{amparo}—to enforce these rights.\textsuperscript{43} Furthermore, the Constitution established as judicially enforceable rights what before were considered interests and expanded the rules of standing. As I show later, various associations and labor unions have relied on these constitutional changes to bring the actions protecting the interests-rights of their members.\textsuperscript{44}


Since 1994 reform, the *erga omnes* effect of judicial decisions according to article 43 was to extend to groups, not just the injured party, standing before the court.\(^{45}\) As a result, groups were permitted to mount challenges to several areas of law.

1. Marriage Law:

   LGBT groups have used courts to gain access to the right to marriage. Marriage law is part of the civil law, and the Civil Code is a national law. In short, national law rules are uniform throughout the states.

2. Property Law:

   Something similar occurs with the use of courts by indigenous people. Property rights are regulated by the civil code. However, the property rights that the communities’ claim are recognized by the Constitution. Courts have yet to rule on these rights. Instead, it is an issue regulated by the national Congress.

D. The Legal Profession

In Argentina, the legal profession is just as influential on the outcome of these group based rights as Epp has shown in the U.S., Canada, India, and Britain. According to Epp, the legal profession in the United States and Canada has become more independent from the bar and more oriented to legal criticism and activism.\(^{46}\) In the case of Argentina, the legal profession has expanded significantly in the last few decades. In the City of Buenos Aires, there are over 65,000 practicing attorneys. The country’s largest law school, the National University of Buenos Aires, United Kingdom, December 2007)


\(^{45}\) Saldivia, “The Argentine Supreme Court and Constitutional Protection of Sexual Minorities.”

\(^{46}\) Epp, “The two motifs of “why the Haves” come out ahead and its heirs.”
is but one of many in the City and has over 24,000 law students. There are 237,378 lawyers in Argentina, and over half (131,507) are active as attorneys. The ratio of lawyers to inhabitants is 341 per 100,000. In comparison, the U.S. ratio is 285 to 100,000 and in Spain 247 to 100,000.

Before 1960 there were only five schools of law and all of them were public institutions. From 1960 to 1970 twelve private law schools were created. Since the recovery of democracy in 1983 six (two private and four public institutions) were created. But it was in the 1990s that the creation of law schools increased considerably. Twenty-two schools were established. The expansion continued after 2000 with the establishment of eight more schools, five public and three private. The increase in the number of law schools in the last 15 years has been dramatic: in the first 150 years of Argentine history, there had been only five schools, but in the last 15 years 30 schools of law were created. The result of the increase in the number of law schools has been the expansion and diversification of the legal profession. Not only are these more trained lawyers, but there is now a more diversified lawyer population both socio-economically and geographically. That phenomenon has helped to raise awareness and draw attention to rights litigation.

In the United States, legal realism and sociological jurisprudence helped to advance the idea that the use of the courts may produce social changes. In Argentina, where legal education has been based on the continental European tradition of the last century, changes in the approach

---

47 Mairal, “Collective and Class Actions in Argentina.”
48 Public Universities in Argentina are free. The students do not have to pay any tuition. The universities are supported by the public expenditures that usually come from taxes.
49 The law 14.545 was enacted which authorized the creation of private universities.
50 The new law of education (No 24.521) provides an important stimulus for the creation of new universities.
51 Rodolfo Díaz, Dos estudios sobre la abogacía y su enseñanza (Mendoza, AR: ZETA Editores, 2005).
to legal education have been gradually moving in the direction of the American approach to legal scholarship. The old system consisted in giving students the accumulative knowledge about law considered as a group of norms created by the State without any critical discussion or analysis. In this method there is a clear division between courses based on substantive areas of law (codified laws) and courses based on theory or the philosophy of law, which are considered just complementary to a law student’s education. Moreover, this normative-deductive approach generally ignores the leading works and data from sociology, political science, or economics.

Today the situation is changing. The interdisciplinary appraisal has progressively been gaining ground sharing the spot with the traditional approach. Some new schools of law have in their curricula classes that show this tendency.\(^52\) Likewise, some public and private universities have been implementing the *Clinical Legal Education*.\(^53\) All these new approaches have given the country’s future lawyers both the tools and understandings that make using courts as a strategy of social transformation possible.

The creation of the Ombudsman offices has increased the judicial oversight of rights and administrative actions. The constitutional reform of 1994 established the national Ombudsman but in the last two decades many of the provinces and several municipal governments have

\(^52\) Universidad de San Andrés, Universidad de Congreso, Universidad de Palermo.

\(^53\) Clinical legal education is the study of law and lawyering in context. Working with real clients with real problems allows law students to begin the lifelong process of becoming thoughtful, responsible, and reflective lawyers. Students working under the close supervision of their clinical professors are encouraged to identify and pursue their own learning goals while providing essential representation to a wide range of clients.


Clinical education is being implemented at University of Buenos Aires, University of Palermo, University of Córdoba, University Nacional de La Plata, and University Nacional del Tucumán, among others.
created their own offices.\textsuperscript{54} In March 2003, these ombudsman offices formed a legal association called Association of the Ombudsman of the Argentine Republic (ADPRA) in order to improve the judicial oversight service, exchange and communicate information, and develop new skills and tools in the defense and protection of rights.\textsuperscript{55} This development, together with the training of a new cadre of lawyers who understand the social function of law, helped to establish in Argentina the support structures needed for legal mobilization.

E. The Use of Courts by Rights-Based Advocacy Groups\textsuperscript{56}

After democratization Argentina experienced a rise of vigorous advocacy NGOs that helped to set the structure for increased right-based social mobilization.\textsuperscript{57} Even though the advocacy organization “sector” is broad, for the purposes of this research I shall focus on the NGOs that adopt a rights-based strategy, considered “activists” organizations. Those NGOs use the “law” as a tool for social change and the “use of courts” is an essential part of their origin and strategy. My aim in studying these advocacy groups is to understand how legal mobilization has been a strategy introduced and used in Argentina by civil society to improve the situation of various disadvantaged groups, not just those that I examine in the two case studies dealing with

\begin{flushleft}
\textsuperscript{55} http://www.adpra.org.ar/
\textsuperscript{56} The section is based on personal interviews made during January and February of 2011 to Roberto Saba, (Universidad de Palermo), Gustavo Maurino (Asociacion Civil por la Igualdad y la Justicia), Alvaro Herrero (Asociacion por los Derechos Civiles). In order to complement the information provided, I used context and data from the organizations’ websites.
\textsuperscript{57} See also Catalina Smulovitz, “Judicialization in Argentina: Legal Culture or Opportunities and Support Structures?” in Javier Couso, Alexandra Huneeus, and Rachel Sieder, Cultures of Legality: Judicialization and Political Activism in Latin America (New York: Cambridge University Press, 2010).
\end{flushleft}
LGBT and indigenous people. I briefly mention general experiences taken from some of the most relevant organizations of that type in Argentina.

While it is true that some of these advocacy associations existed before, the recovery of democracy gave these groups greater relevance and visibility. During the 1990s the number of NGOs proliferated and they became influential players in the policy making process. This development in Argentine politics intensified after the 2001 political and economic crisis. Toward the end of the 1980s groups such as the Environment and Natural Resources Foundation (Fundación Ambiente y Recursos Naturales, FARN in 1985) and Citizen Power (Poder Ciudadano, in 1989) were established. However, during that same decade, the political parties prevailed and became the key players of the public scene. In the 1990s, after the hyperinflation crisis and the “failure” in managing it by one of the biggest and traditional political parties, the emerging party system started to fray. As a consequence, civil society organizations stepped into the breach and began to flourish. While existing NGOs became more active and visible, other organizations were created. For example, in 1995, the Civil Rights Association (Asociación por los Derechos Civiles, ADC) was founded. The same was true after the 2001 crisis: a surge of civil society activities and groups, including neighborhood associations and the like, followed the widespread public perception of the failure of the political party system. One prominent group, established in 2002, was the Civil Association for the Equality and Justice (Asociación Civil por la Igualdad y la Justicia, ACIJ). Today the political system has been rebuilt and some, but not all those civil society “expressions,” still exist. Those remaining include among others the rights-based organizations that helped to bring the cases which are the subject of this dissertation.

---

58 The Center for Legal and Social Studies (Centro de Estudios Legales y Sociales, CELS) was created in 1979.
The activists working in advocacy NGOs consider the “non-profit sector” as a vanguard of certain values, principles and issues that politics has not yet included. These organizations point out the failures of the system and the absence of the state where it must be present. The aim is to get the politicians to address those issues that have been identified by these advocacy organizations. According to these activist lawyers, if the advocacy organizations have the same agenda as the politicians or stay “behind” them, they are not filling their social role. For those activists, what justifies NGOs work is raising awareness of issues in need of reform. The advocacy organizations do no pretend to replace party politics. Indeed, they consider political parties essential, as the better way to achieve change in society. Today, social organizations have a key role to play alongside political parties.

Two of the most important right-based advocacy organizations founded after the recovery of democracy are the Civil Rights Association (ADC) and the Civil Association for the Equality and Justice (ACIJ). Both are relevant to this research because they helped to raise awareness of strategic litigation and encouraged other groups to better understand its value. ADC was founded in 1995 by a group of young, U.S.-trained lawyers with a strong commitment to public interest law. The founding members studied in the United States and may have acquired their sense of social justice from the American experience of working on civil rights. All had seen how civil rights NGOs worked there and particularly how these groups used litigation to achieve their goals on behalf of racial minorities and women. Their objective was to replicate the U.S. experience in Argentina, particularly on how to work on a rights agenda. Roberto Saba, founder and former executive director, explained that the first period of ADC may be portrayed as a

---

59 The founding members include Martín Abregu, Martin Bohmer, Christian Curtis, Robert De Michele, Mirna Goransky, Marcela Rodriguez, Christopher Roger, Agustín Zbar, Roberto Saba, and Alejandro Carrió.
small firm of lawyers working *pro bono* (for the good of the public), though this was not the intention. This small team of lawyers worked on just three or four “strategic” cases per year. The second period was different. When Roberto Saba became the executive director, he reexamined the group’s mission and decided to pattern the organization’s agenda, strategy, and new working areas on the American Civil Liberties Union (ACLU). The agenda would become the issues that were already set in the public agenda such as freedom of expression.

The other organization, ACIJ was founded in 2002.\(^\text{60}\) At that moment (post-2001 crisis) there was a feeling that Argentina was going through a period of reconstruction. Many believe that there was much to be done and that civil society had much to contribute to the process of institutional reconstruction. The founders were three lawyers, who aimed to bring to the organization their youthful vigor and their desire to develop tools and practices of public interest litigation that might bring about social change during this reconstruction period. They believed that NGOs and like organizations had an important role to play along with politicians in taking care of the problems of the most deprived in society. They believed that Argentina had a favorable environment for civic participation, mostly for young people, and that a new constitutional community could be built.

There are some problems with these rights-based NGOs. One is that the advocacy groups mentioned in this section are all located in Buenos Aires. This is not random. This physical barrier makes it difficult for the people from the country’s interior to have access to the organizations which could influence issues on national agenda. In general the local NGOs pressure and lobbied the provincial agendas. In this fashion, when their issues become national they could play a role. The disadvantages are too great for them; it is very hard for them to

---

\(^\text{60}\) Founded by Gustavo Maurino, Martin Sigal, and Ezequiel Nino.
compete with organizations located in Buenos Aires for the same funding taking into account the known impediments and that their impact is mostly local. The “center” NGOs have acquired a dominance over the resources and have adopted “paternalistic” relationship with those from the periphery. In general the norm is for the “center” associations to lead the projects and those on the “periphery” contribute on the local issues. Though the ACIJ and ADC, among others, have some interesting projects with some groups from the interior of the country, it is clear that the groups located in Buenos Aires want to keep the national agenda for themselves and “deliver” the local agendas for provincial advocacy organizations. Again, while they contributed immensely to educate on the benefits of strategic litigation, their outreach have cultural and geographic limitations.

It is important to understand how these organizations work, that is, how they consider law as an instrument of social change and how they use litigation as a strategy. For ACIJ, sooner or later, it includes litigation as a relevant strategy. At the beginning of the organization, almost all the cases were taken to the courts. Litigation was the way and the plan to show to the disadvantaged groups that something could be done. Today, the organization has grown in infrastructure and resources. It has a specific area of litigation that supports all the other areas. Then, it depends on the issue, if the use of the courts will be the unique and particular approach or if there will be a combination of different strategies in which litigation will complement the others. How the organization acquires its cases varies on the issues. Gustavo Maurino, founder

---

ADC worked on government advertising and censorship in five provinces. They worked with journalists in Río Negro, who wrote for the newspaper “Río Negro,” in Córdoba with a journalist and Communications’ students, in Tierra del Fuego with a citizens’ NGO and in Neuquén with the people of Río Negro. They also worked with local alliances on prison issues in Chubut and Tierra del Fuego.
and one of the directors of ACIJ, explains that the team works with grassroots programs mostly focused on the rights of marginalized groups.

Today, the team has built a relationship with the communities in which they work. In this way, they have a long-term agenda as a result of discussions and exchanges with the community about their problems. There are two features that typify the ACIJ’s litigation strategy: first, the use of collective lawsuit (*amparo*) and second, ACIJ leading the court cases as plaintiff. ACIJ is the party bringing the lawsuit, not the community or the disadvantaged group. There have been some cases in which the groups’ requested ACIJ representation and the ACIJ represented them in the traditional way a lawyer serves a client. The idea is that ACIJ is more than a lawyer or just different from a lawyer. They have both led and collaborated with groups on judicial action. The “work” relationship with vulnerable sectors is not the one that a lawyer may have with his client; ACIJ has a more leading role in that sense. The follow up on the cases is crucial in these types of lawsuits. Maurino explains that “when you win the case, it is only the start,” and describes what happens after a favorable judgment. Many cases have an empowerment agenda, which generates influence in different paths (not always necessarily related to the court decision itself). These cases have several repercussions, what the literature calls impact, on the ability to mobilize on other issues. Also, it can help to get the attention from the State to these problems as well as from other policy actors.

Despite some of these inherent difficulties, rights-based advocacy groups have helped to raise awareness of many pressing issues, have mounted some successful litigation campaigns, and have provided the key support structures for future legal mobilization in Argentina. Their work has helped to improve the situation of disadvantaged groups and has even encouraged other
groups to better understand its potential. The groups behind the legal mobilizations that are the subject of this dissertation were certainly influenced by these developments.
Chapter 4: Legal Background of the LGBT and the Indigenous Peoples Movements

A. Legal Background of the LGBT Movement Strategy

In this section, I briefly mention the fundamental legal background relevant to the mobilization of the LGBT movement in Argentina related to same-sex marriage reform. It is important to point out that according to the Argentine legal system and government structure the marriage law is a national law. The Civil Code rules the civil marriage in the whole country – in every local jurisdiction. Since this is a substantive law, the National Congress has the ability to enact those types of laws; unlike the case of the United States in which marriage laws are ruled by governed by state law.

In Argentina, according to the former article 172 of the Civil Code, civil marriage required “full and free consent, expressed personally by man and woman.” The whole civil marriage section of the Civil Code specifically mentioned “man and woman” in its article. That requirement of the article -man and woman- became the target of the LGBT struggle for being discriminatory.

The Supreme Court of Justice has acknowledged that the right to marry is a "fundamental right," and that "State interference is constitutionally justified only to avoid damage to third parties."¹ In this sense, for the LGBT movement the concept of equality and the constitutional obligation of the State to guarantee the free and full exercise of all fundamental rights for all people without distinction were crucial. Equality is a cornerstone of the Argentine Constitution and it is recognized and protected by several of its sections.² Article 16 clearly states that all inhabitants are equals before the law. This was reinforced and made more precise by the

¹ CSJN-Fallos, 308:1412.
² ADC Position Paper on Same Sex Marriage
constitutional reform of 1994. Now, in addition to the right to equal treatment of Article 16, Article 75(23) empowers Congress "to legislate and promote positive measures guaranteeing true equal opportunities and treatment, the full benefit and exercise of the rights recognized by this Constitution and by the international treaties on human rights in force."

The 1994 reform also incorporated into the Constitution several human rights treaties that guarantee equality and protect minorities against discrimination. The Universal Declaration of Human Rights,\(^3\) the American Declaration of the Rights and Duties of Man,\(^4\) the American Convention of Human Rights (Pact of San José, Costa Rica),\(^5\) and the International Covenant on Civil and Political Rights\(^6\) all have constitutional status according to Article 75(22) of the Constitution. Most of these constitutional norms that protect against discrimination also impose the obligation upon the State to take concrete measures to make equality effective.

The principle of equality and nondiscrimination contained in those international treaties possessing constitutional hierarchy, along with the Constitution’s articles, implies the right of people to neither be discriminated against nor deprived of the exercise of any fundamental right based on certain criteria, as for example national origin, race, sex, and religion, that ignore the principle of justice and dignity that must rule interpersonal relationships. These criteria have been considered suspect, to use the term from equal protection analysis in the United States, in some Supreme Court cases regarding “national origin” such as Repetto,\(^7\) Hooft\(^8\) and Gottschau.\(^9\) What this means is a greater level of scrutiny to decide their reasonability than when other

---

\(^6\) Available at: [http://www2.ohchr.org/english/law/ccpr.htm](http://www2.ohchr.org/english/law/ccpr.htm) (accessed March 8 2011).
\(^7\) CSJN-Fallos 311:2272. Court’s minority vote.
\(^8\) CSJN-Fallos 327:5118.
\(^9\) CSJN-Fallos, 329:2986.
criteria to classify have been used. It is considered prima facie arbitrary and prejudiced. The construction of the right to equality and nondiscrimination in these cases are highly encouraging for sexual minorities since such doctrine could logically be extended to other distinctions.\textsuperscript{10} Nevertheless, it should be said that the Supreme Court decides on the constitutionality of laws on a case by case basis, binding only the parties of the legal case but not setting legal precedents for its own future resolutions nor for courts of first and second instance (see Chapter 3).

Another important constitutional norm for the LGBT strategy is the “autonomy principle” established in Article 19. This principle states that every person can decide the “best life plan” for themselves, with the only limitation of avoiding damages to third parties. The right to marry is also recognized in the Constitution in Article 20, which guarantees foreigners the same rights as nationals, and between them the right to marry. The right to marry is expressly protected in constitutionalized international treaties (it is important to point out that none of these norms ban or impede in any way same sex marriage):\textsuperscript{11} a) The Pact of San Jose, Costa Rica (Article 17) recognizes the right of a man and woman to get married under the conditions required by internal laws, if they do not affect the non-discrimination principle; b) The Universal Declaration of Human Rights (Article 16) also protects the right to get married, without restriction for reasons of race, nationality or religion; c) The American Declaration of the Rights and Duties of Man (Article 4), d) The International Covenant on Economic, Social and Cultural Rights\textsuperscript{12} (Article 10[1]), and e) The International Covenant on Civil and Political Rights (Article 23) guarantee the right to create a family.

\textsuperscript{10} Saldivia, “The Argentine Supreme Court and Constitutional Protection of Sexual Minorities.”
\textsuperscript{11} ADC Position Paper on Same Sex Marriage.
\textsuperscript{12} Available at http://www2.ohchr.org/english/law/cescr.htm (accessed March 8 2011).
It is also worth noting that the Supreme Court of Justice made clear that the international human rights treaties are part of the “constitutional bloc”\(^{13}\) of the country, and could only improve and never worsen the protection of rights.\(^{14}\) In this way, since 1994, the international decisions adopted by ruling organizations interpreting the principal international instruments on human rights have served as interpretive guidelines for Argentine judges. In fact, the Supreme Court has claimed that such guidelines should be followed by Argentine legislative branch as well.\(^ {15}\)

The LGBT legal mobilization relied on these favorable constitutional legal tools to frame and base their movement. Although the “rights revolution”-according to Epp- depends on more than the constitutional guarantees of rights, it has been one of the contributing factors. However, to make those rights enforceable it was critical to have a social mobilization-support structure-to “make” the cases, challenge the civil law and be supportive along the process and after the favorable decisions.

B. Legal Background on Indigenous Rights:

As subjects of rights, indigenous communities and their members have experienced an important change in the last decades. Legal transformations occurred both at the domestic and international law levels. There has been a global trend to recognize indigenous rights across the world and Argentina has been part of that development. Currently, the indigenous communities in Argentina have been entitled not only to same rights as others, but to have specific rights as a specific group with its own particular features and history. How these groups had been treated

\(^{13}\) CSJN-Fallos, 323:2359  
\(^{14}\) CSJN-Fallos, 329:2986  
\(^{15}\) Saldivia, “The Argentine Supreme Court and Constitutional Protection of Sexual Minorities.”
and considered by the National State and its law is related to the historical social constructions about them at certain periods in history. First, there was a policy of segregation and mass murder, then the promotion of assimilation into the dominant culture, and finally a multiculturalism that recognizes and seeks to maintain differences. These approaches outline what the indigenous communities have experienced throughout Argentine history. Colonialism established physical segregation and a special legal system for the indigenous communities subordinated to the conqueror culture. At the same time, what remained of the institutional autonomy of the indigenous groups’ own legal system was allowed to continue operating, such as the resolution of domestic conflicts by indigenous authorities.

After Latin America gained independence from Spain, new nations followed similar general approaches with respect to indigenous communities. The conversion to Catholicism was the way to include these communities and consider them citizens and not savages. Indeed, the 1853/60 Argentine Constitution stated in its article 67 (15) that the Congress is obliged to: “…provide the security of the borders… preserve peaceful relationships with indigenous people and promote their conversion to Catholicism.” This endeavor was relatively “successful” in that the cultural features of the native civilizations almost disappeared.

In the twentieth century, with the emergence of human rights, there was an acknowledgment of the existence of indigenous rights as belonging to a specific minority group.

---

Two international human rights principles have emerged to enhance the recognition of indigenous rights. First, as a disadvantaged group that has been the object of historical discrimination and exclusion, they should receive social protection from the State. Second, the principle of cultural diversity exhorts respect for those communities. Under the umbrella of human rights, the first reactions were to see indigenous people as a poor group, not a literally underdeveloped minority. Therefore, the public approach was paternalistic within the framework of welfarism in a monocultural State.

Today the theoretical approach is different. Legal pluralism accepts the coexistence of different communities within a State with their own rules and authorities under the umbrella of multiculturalism and interculturalism. Particularly, in the case of Argentina after the reestablishment of democracy, the status of indigenous rights experienced a transformation within the new international human rights framework. During the 1980s, several provinces enacted important laws leading the way on the subject (e.g. Formosa –law 426-, Salta -6373-, Chaco -3258-, Chubut -6357-, Rio Negro -2287-, Misiones -2727- among others). At the national level, in 1985 the Congress passed the law 23,302; it was an integral law regulating almost all the issues important to indigenous communities (the right of being a subject of rights, property rights, education, health, social security, housing projects, and welfare). In addition, the law established the National Institute of Indigenous Affairs (INAI) which is the competent authority. Even though this law has undergone several amendments, it is still the legal framework for some indigenous affairs. Also, in 1989, the International Labor Organization

---

17 Yrigoyen Fajardo, “Hitos del Reconocimiento del pluralismo jurídico y el derecho indígena en las políticas indigenistas y el constitucionalismo andino.”
18 This Institute operates within the competence of the Ministry of Social Development.
19 For instance -among others- Law number 25,799 amended the plan of housing.
(ILO) adopted the 169 Convention on Indigenous and Tribal Peoples.\(^{20}\) In 1992, the law 24,071 ratified the convention that came into force in 2000. This legal instrument is the most precise and developed on this subject. The Convention is a significant legal and international tool for indigenous communities at the international level. It recognizes and respects the cultural diversity of the indigenous people. The treaty also recognizes the right of indigenous communities to manage their own resources, communal property rights over their land, and the right to solve their own problems according to their own procedures. This document is framed in a multicultural perspective.\(^{21}\) This Convention is an improvement from law 23,302. It is important to note that there is more legislation on those subjects. Here I have only cited the most relevant to my research.\(^{22}\)

The constitutional reform of 1994 consecrated indigenous rights\(^{23}\) at the highest level in article 75 (17) (19) of the National Constitution with unanimous vote; at that moment there were fifteen indigenous communities on the floor advocating for those rights. According to this article

\(^{20}\) The trigger of this convention was the cheap labor of indigenous people in several countries. They were workers in a vulnerable situation. It had to be necessary to regulate their rights.

\(^{21}\) Silvina Ramírez, _La Guerra Silenciosa: despojo y resistencia de los pueblos indígenas_, (Buenos Aires: Capital Intelectual, 2006), 36-37.

\(^{22}\) The legislation that regulates indigenous issues is vast. See:


\(^{23}\) Before the reform there were some states that had already legislated about indigenous rights, particularly about the communities as legal entities (law 426 -Formosa-, law 6373 -Salta-, law 3258 -Chaco-, law 2435 -Misiones-, law 2287 -Río Negro-, law 3657 -Chubut-, and law 11.078 -Santa Fe-). This legislation was considered unconstitutional since this type of legislation should be national. At a national level in 1985, law 23,302 regulated indigenous rights and created the National Institution of Indigenous Affairs (I.N.A.I.) and The Registry of Indigenous Community (RE.NA.CI) (http://www.desarrollosocial.gov.ar/INAI/site/tierras/tierras.asp), both within the competence of the Ministry of Social Development. After the reform, in 1996 the Ministry of Social Development passed a resolution (No 4811) to homogenize criteria for inscription with the ones required by the National Constitution.
and its sections, the Congress has the authority to recognize the ethnic and cultural preexistence of the indigenous people on Argentinean soil; guarantee the respect for their identity and bilingual education; recognize the legal entity of their communities and the communal property rights over the lands that they have traditionally occupied; and regulate other lands appropriate to their human development. Those lands neither will be transferred nor seized. Also, the Congress should assure indigenous participation in the management of the natural resources and other interests that involved them. The local states have concurrent powers with the Congress.²⁴

Some scholars explain that the constitutional reform substantially modifies the previous law 23,302 that regulated indigenous rights. The Constitution raised the legal status of the indigenous communities to a public legal entity different from the private legal entities regulated in the Civil Code. A similar situation happened with the legal status of communal property. For those reasons and in order to observe the constitution, they consider that it is unavoidable to grant the non-state public legal entity to those groups.²⁵ In this fashion, those scholars explain that from the epistemological point of view, academia should talk about the indigenous law as well as study civil and commercial law among others. Though some scholars have criticized these amendments,²⁶ it is beyond the scope of this dissertation.

Along with article 75 (17), the constitutional reform recognized, within the constitutional hierarchy, several international treaties that also acknowledge indigenous rights, for instance: the Universal Declaration of Human Rights (art. 17), the American Convention of Human Rights

²⁴ Article 75 (17).
(art. 21), and the American Declaration of the Rights and Duties of Man (art. XXIII). It is important to emphasize that the 1994 constitutional reform put an end to the discussion about the enforcement of the international treaties and their hierarchy within the domestic law system.\textsuperscript{27} The Argentine fundamental law (also called the federal constitutional bloc) is composed of the Constitution, the international treaties with constitutional hierarchy mentioned in article 75, and other international conventions with the same hierarchy. In order to possess constitutional hierarchy, those other treaties and conventions on human rights require, after being approved by Congress, the vote of two-thirds of the whole membership of the House of Representatives and the Senate. Furthermore, the local constitutional reforms have followed the national article 75 and its sections as an example. That is the case of the constitutions of Chaco, Salta, Formosa, Chubut, and Neuquén.\textsuperscript{28} I mention the constitutions of Neuquén and Mendoza because those are the two particular cases of this research.

The Constitution of Neuquén was reformed in 2006 and indigenous rights were included in the chapter on social rights. Article 53 followed the written model of article 75. However, it improves upon the formulation of the national article. First, the Neuquén article is in the chapter on declarations, rights and guarantees. In this way, it cannot be argued that the indigenous rights are an attribute of the Congress (which is one of the main criticisms to the national constitutional reform on this subject). Second, the State assumes an obligation to take positive actions to guarantee those rights. Third, the statement that recognizes the indigenous people as part of the

\textsuperscript{27} Previous to the constitutional reform there was a Supreme Court decision, "Ekmekejian," that established that international human rights treaties have more hierarchy than domestic laws and are enforceable by the judges.

national identity and provincial idiosyncrasy is a very important enhancement. In the case of Mendoza the constitution dates back to 1916; for that reason and as I explained before, indigenous people were not subject of rights at that historical moment.

Going back to article 75 (17), which acknowledges the indigenous’ rights have arisen, there are both legal and technical debates as well as some practical problems. I analyze them briefly. First, some scholars question the placement of the article in the Constitution. They assert that indigenous rights should have been included in the first section called “The New Rights and Guarantees” and not in the attributes of the Congress. Since the indigenous rights are not an attribution of the Congress, their existence and enforcement should be independent from that. As a consequence, there are some distorted effects like questioning about the direct enforcement of those rights.29 Second, and linked to that matter, is the question of whether those rights are judicially enforceable or just programmatic. Programmatic means statements of goals to be pursued by political branches but not judicially enforceable individually or collective entitlements.30 Some scholars consider those rights to be contrary to programmatic.31 Others understand that it is necessary to enact a law that regulates the aspect recognized by the

30 Several scholars distinguish between programmatic rights and operative rights. The first group needs a law that regulates them in order to make them enforceable in courts. The latter group is enforceable just claiming the constitution.
31 According to Gregorio Badeni, law number 23.302 (Adla, XLV-D, 3647) has regulated all aspects of the constitutional clause. While Hector Quiroga Lavié, Alterini, Corna y Vázquez consider that the constitutional clause is enforceable straightforward. All cited in Chiacchiera Castro, “La cuestión indígena en la jurisprudencia de la Corte Suprema de Justicia de la Nación (1994/2008).” In the same way -in favor-, German Bidart Campos, Tratado Elemental de Derecho Constitucional Argentino Vol 1 (Buenos Aires: EDIAR, 1995); “Los derechos de los Pueblos Indígenas Argentinos”, LL, 1996-B.1205.
constitution in order to make that constitutional clause enforceable.\textsuperscript{32} Nevertheless, the jurisprudence\textsuperscript{33} has recognized the enforcement of those rights without taking into account if a law has regulated them or not. I agree with other scholars that it is an outdated debate.\textsuperscript{34} Third, the constitution introduces the concept of communal property. Moreover, the constitution states that those lands won’t be able to be transferred and/or seized.\textsuperscript{35} With respect to communal property, some scholars have pointed out that that concept is wider than the classical concept of property rights which are individual rights.\textsuperscript{36} It is clear that this concept is different from the property rights regulated in the civil code. The indigenous people have a special relationship with the land. It is not an individual relation. It is a spiritual and material relationship. The land binds them with their ancestry and allows them to develop themselves in a material and spiritual way.\textsuperscript{37} The concept of communal property is the center of their rights and at the same time is a

\textsuperscript{32} For some authors like Zarini, Segovia and Segovia, and Ekmekdjian this constitutional norm needs to be “regulated” in order to be enforceable. All cited in Chiacchiera Castro, “La cuestión indígena en la jurisprudencia de la Corte Suprema de Justicia de la Nación.”


\textsuperscript{34} Christian Courtis, “Judicial Enforcement of Social Rights: Perspectives from Latin America,” in Roberto Gargarella, Pilar Domingo and Theunis Roux, eds., \textit{Courts and Social Transformation in New Democracies} (Aldershot: Ashgate, 2006), 170; and Hualpa, “Jueces, pueblos indígenas y derechos.”

\textsuperscript{35} Based on the constitutional rights, laws 23,302 and 24,071, and Decree 155/98, judges confirmed prior court decision that annulled the seizure of the land of the Indigenous Community (defendant). In other cases of eviction it has also been alleged that same constitutional clause to protect these communities. "De Zavalía, Federico c. Comunidad de Amaicha del Valle", 11/05/2007, la Cámara de Ap. en Documentos y Locaciones de Tucumán, Sala I, (13) (this case is cited in Chiacchiera Castro, “La cuestión indígena en la jurisprudencia de la Corte Suprema de Justicia de la Nación.”)


\textsuperscript{37} Vote of the Judge Salgado Pesantes in the decisión of the Interamerican Court of Human Rights 2001/08/31, \textit{La Ley Suplemento Derecho Constitucional}, 3/21/2003. And vote of the
completely alien to our legal system. There is no legislation that specifically regulates those issues. Nevertheless, the jurisprudence is filling the gap in defining the new concept in Argentinean legislation of communal property right and its consequences. Eduardo Hualpa, a respected scholar, understands that the problems about the application of the civil code to the concept of communal property can be surpassed if it is recognized that the Constitution is judicially enforceable and the Supreme Law of the Nation along with human right treaties -which have a superior hierarchy than the civil code that is just a law. In the same way, some scholars consider it inconvenient that community-property rights were inserted into the Civil Code. In this fashion, the regulation needs to be precise and limit the institution – communal property. This situation might affect the hierarchy of communal property since, as I mentioned before, the Constitution raised the legal status of communal property. Accordingly, some scholars believe that indigenous property rights are an institution of the public law and it should not be regulated as an institution of the civil law. The legal cause of the indigenous property rights is free

judge Noemi A. Demattei De Alcoba in “Demanda Ordinaria por prescripción adquisitiva de dominio “Comunidad Aborigen Laguna de Tesorero –Pueblo Ocloya c/ Cesar Eduardo Cosentini”, Sala Segunda de la Cámara en lo Civil y Comercial de Jujuy 15/12/03. Both cases cited in Hualpa, “Jueces, pueblos indígenas y derechos.”

38 “Sede Alfredo y otros c. Villa Herminia y otro s/ desalojo”, Juzgado de Primera Instancia en lo Civil, Comercial y Mineria Nro. 5 de la ciudad de Bariloche (Río Negro), 08/12/2004, enforces the article 75 (17) and establishes that the civil code is only subsidiary applicable, also to recognize that right what is required. In several cases the constitutional law has been appealed to avoid the eviction or to defend them when they were sued for usurpation. Cfr. Sup. Trib. de Río Negro, "Ogilvie, John G. y otra c. Galván Santiago y/u ocupantes s/Desalojo s/Casación" (07/02/2007). Cfr. Juzg. de Instrucción en lo Criminal y Correccional Nro. 2, San Carlos de Bariloche, Río Negro, "Figueirido Bárbara s/dcia. usurpación" (26/10/2007) y "Guarda, Fidel" (10/11/2004); Juzgado de Inst. Nro. 2, San Carlos de Bariloche, "Fernández, Edgardo R. s/dcia" (21/04/2004). (Cases cited in Chiacchiera Castro, “La cuestión indígena en la jurisprudencia de la Corte Suprema de Justicia de la Nación.”)

39 Hualpa, “Jueces, pueblos indígenas y derechos.”

determination. The possession and occupation of communal property should be regulated by indigenous customs and laws. The indigenous property rights are recognized by the Constitution as having a higher hierarchy than the civil law.\textsuperscript{41} However, it would be easier if the Congress passes a law regulating, clarifying and establishing the spectrum and the nature of communal property. Fourth, the other topic under debate is if tribunals (either federal or local) have jurisdiction on this matter. Chicchiera, following the Supreme Court precedents, considers that the debate about jurisdiction has been solved in favor of the local courts.\textsuperscript{42} Notwithstanding, other scholars such as Ramírez, claim that this should be solved in favor of the federal jurisdiction. Ramírez bases her argument on the recognition of the “preexistence of indigenous people” made by article 75 (17). Article 116 and 117 of the Constitution, state the federal jurisdiction as follows: “The Supreme Court and federal tribunals shall extend to all cases arising under this Constitution, the laws of Argentina -with the exception of what it is stated in article 75 (12)- and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies

\textsuperscript{41} Juan Manuel Salgado, “Comments on the Silvia Vazquez draft of the historic acknowledgement of indigenous people law” (unpublished paper).

between two or more states; between a state and citizens of another state: between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.” “In all the other cases aforementioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make. Although, in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original and exclusive jurisdiction.” The enumeration of these articles is considered fixed (numerus clausus). However, if these communities pre-exist (they exist before the local states and the national states) they should be considered as local states from the legal point of view. Therefore, according to Ramírez, if the cases that involve indigenous communities and their collective rights may be equalized to “which a state shall be party,” then the Supreme Court shall have original and exclusive jurisdiction.43 In this fashion, the last part of the article that states that the Nation and the States have concurrent attributions also generates some overlaps and contradictions. Given the different realities of both the communities and the provinces, the local states should have this attribute. Indeed, there are several local laws that rule these rights. Nevertheless, there should be a national law that, following the Constitution, states general guidelines that should be respected by every province.

Lastly, there are diverse practical and theoretical problems that the recognition of the legal entity of the indigenous has provoked. From a practical point of view, and in order for indigenous and non-indigenous people to peacefully coexist in the same State, the writers of the

43 Ramírez, “Derecho de los Pueblos Indígenas.”
constitutions gave the indigenous communities the recognition of being a subject of rights. In this way, the communities themselves have legal existence to claim and defend their rights.

The concession of the legal entity is granted either by the national or local state. Some scholars have pointed out that this situation produces overlaps and contradictions. For instance, in many cases the communities are granted two types of legal entities - national and local. In other cases, the national organization concedes the license while the local one denies it to the same communities. Additionally, sometimes legal procedures are strange and contradictory to indigenous customs as well as too difficult for them to follow.

From the theoretical point of view, some academics have pointed out that the constitutional reform has raised the legal status of indigenous communities to a public legal entity different from the private legal entities regulated in the Civil Code. For that reason, they do not agree with framing the granting of the legal entity under the civil law.

In this dissertation, I am interested in how these amendments have been seen and used as a tool by the indigenous people, contributing the judicialization of their rights. I examine how this disadvantaged group has attempted to use courts to obtain favorable policy change. I am interested in determining if those new legal tools have worked to enact some legislation to improve the life of these communities. From a normative perspective, the advancement has been essential. Notwithstanding, it is clear that just either a law reform or a new law does not produce any practical change by itself. However, those new rights -achieved in part by indigenous activism- have empowered this group with new tools to work with in their struggle for achieving their goals in the public policy arena.

After the constitutional reform, the law 25,607 was passed, organizing a system for promoting indigenous rights. Besides, law 24, 515 created the National Institute against
Discrimination, Xenophobia, and Racism (INADI). Finally, in November 2006 the Congress enacted law 26,160⁴⁴ that declares a period of four years, from 2006 to 2010, for the emergency on possession and property rights over the lands traditionally, currently and publicly occupied by indigenous people. This means the postponement of any court or administrative decision that orders clearing those lands for that period of time. During that time it was thought that the INAI should have done an inventory and a legal cadastre of those lands; a program of regularization, titling and registration of the indigenous property rights; as well as provided legal advice in judicial and non judicial processes regarding those rights. Indeed, there was a budget of thirty million pesos for that purpose but the fact is that the INAI never finished that inventory. The scenario with respect to who are the owners of the lands is uncertain. Therefore, the communities have become plaintiffs or defendants in these types of conflicts. Litigation seems the best alternative to claim or defend their rights. They have decided to use courts; however, without a legal corpus of the land regularization the judges do not give a uniform solution.

The indigenous organizations, and the NGOs which work with their communities, lobbied Congress to postpone the deadlines of law 26,160 in order to do the legal cadastre,⁴⁵ the regularization, titling and registration, and have an accurate land registry. Lastly, in November 2009 the Congress passed law 26,554 that states an extension of the emergency until November 2013. In 2009 the ENDEPA established that around 66% of the indigenous communities still did not have the titling of their property rights.⁴⁶

⁴⁴ Law 26,160 was promulgated on November 23, 2006.
⁴⁵ Legal Cadastre shows the relationship between the owner and the property, and with the community. One purpose of the legal cadastre is to keep the legal security of property rights through the approval and filing of the surveying that are the basis of the property deeds. The cadastre is an inventory of all real estates of a country or region.
⁴⁶ Ramirez, *La Guerra Silenciosa.*
In 2007, Argentina signed the Declaration of United Nations of Indigenous Communities Rights. This Declaration recognized the right of every community of being considered equal but to be respected in its differences. The document admits that this group has historically been subject to hostility, violence, expropriation and discrimination. Although this declaration is not binding for national states, by signing this declaration the country commits itself to respect the diversity and value the contributions of the indigenous community to Argentine culture in general.\textsuperscript{47} Article 75 (17) and Convention 169 challenge and raise several questions with respect to some strong and old statements such as: the equality proposed does not allow differentiated jurisdictions; the legality impedes the validity of any law that comes from other source than formal law, and the sovereignty is not divisible.\textsuperscript{48}

In this fashion, some scholars have pointed out the huge gap between the “indigenous law in books and law in action.” They explain that although that situation happens in all areas of law, in the field of indigenous rights the gap is gross. Judges’ decisions are either uninformed or ignore on purpose the constitutional mandate. The excessive formalism of the civil law system and the lack of domestic law adjustment to the constitutional directives allow and support those courts’ decisions. Along with those features, the aim of the continental law system is the legislative completeness and the nonexistence of judicial precedents, which contribute to a lack of enforcement of the indigenous rights. In general, when the indigenous people claim their protection based on the constitutional and international treaties, they are unheard, or prosecuted,

\textsuperscript{47} María Elena Barbagelata, “Indígenas, Tierra y Justicia,” in Aldo Etchegoyen, ed., Pueblos Originarios y Acceso a la Justicia (Buenos Aires: El Mono Armado, 2010), 238.
arrested, evicted and so on. As I explain later (Chapter 6), the courts have been used against them.

Indigenous rights have been recognized explicitly in the Constitution. In fact the outdated academic debate about their enforceability has been overcome. Therefore, the factor of having constitutional guarantees to the rights revolution is given. Nevertheless, it is clear just the mere consecration in the legal texts is not a guarantee of their enforcement and respect. Indeed, they are not only ignored but also contradict and hinder by provincial laws. The social mobilization—support structure—could be essential for change that situation.

C. Governmental Institutions Relevant to the LGBT and Indigenous Movements

Here I present two of the most relevant regulated governmental institutions that are a crucial part of the structure used by both LGBT and indigenous people in their legal mobilization strategy. The first, the National Institute against Discrimination, Xenophobia and Racism (INADI), is a vital part of the LGBT strategy and it has also played a modest role in promoting and supporting indigenous issues in some provinces but not in all of them. The second institution that I describe is the National Institute of Indigenous Affairs (INAI), an institution that has been subject to repeated criticism by indigenous, scholars, and activists, and I believe needs to play an important role in the advancement of indigenous public policy. The INAI has helped to address some issues for the indigenous movement, but there is general consensus that it has not done enough.

49 Salgado and Gomiz, Convenio 169 de la O.I.T. sobre Pueblos Indígenas, Su aplicación en el derecho interno argentino.
1. National Institute against Discrimination, Xenophobia, and Racism (INADI)

The INADI is a decentralized, economically self-sufficient entity created by law 24,515 in 1995. According to that law, the Institute was within jurisdiction of the Minister of the Interior. In this way, the INADI’s resources depended on the Ministry’s budgetary allocation. In 1997, law 25,672 transferred the INADI to the Executive Power sphere and established an independent budget allocation for the institute in the National General Budget. As a consequence, the INADI started working in 1997 within the sphere of the Executive Power. In 2005, the President ordered by decree that the institution work within the Ministry of Justice, Security and Human Rights area and run the national and federal plan against discrimination.

The INADI elaborates and proposes public policies to fight against discrimination, xenophobia, and racism, among other objectives. Moreover, the institution seeks to promote the values of the Constitution, contributing to the guarantee of having the same rights and equal treatment for minorities as for the whole society. In this way, the INADI brings information and advice for free to the community on these topics. Something to point out is that the board of the institute is not only composed of government officials but also members of non-governmental organizations. Another objective of the INADI is to coordinate and bring all the NGOs, organizations and groups that work on these issues together to join forces. Likewise, the INADI runs the national plan against discrimination, implemented on the base of the diagnosis started in 2004 and published in 2005. This plan to analyze the matrix of discriminatory practices considers three transversal axes of study – racism, social exclusion, and the relationship between State and society. In this way, the plan examines areas of analysis that are crossed by racism, social exclusion, and the relationship between State and society axes. One of those areas is discrimination against National-Ethnic groups (it corresponds to a stereotype built on nationality
and/or ethnic origin of their victims), which includes the indigenous communities. The plan emphasizes how the gap between the law in the books and the law in action maintains the situation of discrimination towards the indigenous people. The plan shows that the discrimination is present at two levels: discrimination in the access to services and benefits enjoyed by the rest of the population, and the lack of enforcement of their constitutional rights.

The discrimination against indigenous people exists in the education, health, and socio-economic fields. However, I am more interested in other more fundamental forms of discrimination in this project. The civil and political rights are hindered because of the obstacles and denials of registration for the communities as legal entities as well as the important number of undocumented indigenous people. Also, the INADI and the National Human Rights Secretariat receive continuous claims of police abuse against indigenous people as well as the unfair and unequal treatment in the judicial system. Likewise, the lack of translators and the economic resources in order to receive dedicated legal advice or defense put them in a disadvantaged position, resorting in all the cases to the public defenders. The use of courts is not necessarily an easy path for them.

According to that scenario, the INADI has made proposals to change the matrix of discrimination in order to step by step eradicate it from Argentina. The Institute has made several recommendations in the legislative arena and in diverse institutional fields -justice, public administration, education, security forces, media, and health. It should be said that several of those projects exceed the legal powers and capacity of the INADI. It can only push, lobby, and promote them.

The INADI is the enforcement authority of the International Convention on the Elimination of All Forms of Racial Discrimination that receives and examines all the claims
presented (Article 2, law 26,162). The 2009-2010 Annual Report of the Human Rights of the Mapuche people in Neuquén Province, made by the Observatory of Human Rights of Indigenous People, refers to the INADI’s intervention in discriminatory cases against Mapuches. Although the report refers the INADI’s actions as positive experiences, the government of Neuquén completely ignored its findings.

For the purposes of this research, it is important to emphasize the relevance of the INADI in the LGTB strategy towards the approval of the Same Sex Marriage Law. Its role was a fundamental part of the LGBT legal mobilization. María José Lubertino, the president of the INADI from 2003 to 2006, invited María Rachid\textsuperscript{54} and Flavio Rapisardi\textsuperscript{55} to work at and with the INADI. Both María and Flavio were summoned as leaders of social movements who have worked against discrimination. That was a major development in the history of INADI, as it opened a new dimension of its work.

The INADI did not have an agenda on diversity issues. It had thirty employees and a budget of $1,700,000 (ARG) (around $435,000 USD in 2011). During Lubertino’s administration, María Rachid set the diversity agenda following the priorities and strategies of the LGBT Federation. The budget grew to $24,000,000 (around $6,125,000 USD) and today there are 300 employees. Currently, the new president, Claudio Morgado, continues with the same diversity policy albeit with some restrictions in the diversity budget. Recently, and

\begin{itemize}
\item \textsuperscript{52} The International Convention on the Elimination of All Forms of Racial Discrimination was approved by law 17,722.
\item \textsuperscript{53} Juan Manuel Salgado, María Micaela Gomiz and Verónica Huilipan, “Informe de Situación de los Derechos Humanos del Pueblo Mapuche en la Provincia del Neuquén 2009-2010,” Observatorio de Derechos Humanos de Pueblos Indígenas, Neuquén, 2010.
\item \textsuperscript{54} María Rachid is president of the LGBT Federation, as well as official of the INADI. She is recognized as the most prominent leader of the LGBT activist strategy.
\item \textsuperscript{55} Flavio Rapisardi, activist, member of the LGBT Federation, and Coordinator of the Civil Society Forum at INADI.
\end{itemize}
according to the high visibility the INADI achieved during the same-sex marriage campaign led by María Rachid, at the end of 2010, she was entrusted with the position of vice-president of the INADI. All indicates that the agenda for diversity will go further. The fact that several people from many social movements have been working in the INADI has helped to enhance the organization’s actions and their outcomes.

2. National Indigenous Affairs Institute (INAI)

Law 23,302 created the National Indigenous Affairs Institute (INAI) regulated by the decree 155/89. Later, it enacted the decree 410 that ruled the INAI changing some aspects of its organization. Law 26,160 was passed in November 2006, and its decree 1122/07 gave the INAI more responsibilities and designated it the enforcement authority of that law. Later, the INAI sanctioned a resolution 587/07 that creates the national program of “Implementation and Development of the Legal and Technical Cadastral Survey or Mapping.” The program has had both a decentralized and a centralized organization, taking into account the features of each province. Later, law 26,554 extended the deadlines to comply with those responsibilities.

According to these laws and decrees, the INAI is a decentralized organization within the sphere of the Ministry of the Social Development. Its objectives are to guarantee and enforce indigenous constitutional rights as well as to watch over their full exercise of citizenship rights. The Institute is the competent and enforcement authority to rule and control the indigenous public policy. It addresses the participation of the communities on the design and management of the public policies that involved them. The INAI aims to respect the indigenous organizations and promotes the strengthening of their identities towards an integral and sustainable development.

In Spanish: Programa nacional de relevamiento técnico-jurídico-catastral.
The law states that the responsibilities of the INAI are to implement the procedure to grant legal recognition to the indigenous communities;\textsuperscript{57} to grant the acknowledgment of the possession and communal property rights over the lands traditionally occupied by them, or regulate the return of land to indigenous peoples appropriate to human development; to implement the National Program “Implementation and Development of the Legal and Technical Cadastral Survey or Mapping” as provided by the law 26,160 regulated by decree 1122/2007 modified currently by the law 26,554; and to design, fund, and execute, along with the local government and indigenous communities, the property regularization programs.

According to the government, the centralized assessment and measuring of the lands has been accomplished in Córdoba, Entre Ríos, Tierra del Fuego, La Pampa, and San Juan. The program is in advanced execution in the Province of Santiago del Estero and Catamarca. Also, the INAI, along with the local governments and the indigenous communities, has regularized the communal property rights of around 9,900,000 acres at different levels of instrumentation.\textsuperscript{58}

The Executive Branch, through the decrees 700/2010 and 701/2010, established the Commission of the Analysis and Legal Implementation of the Communal Property. The Commission works within the INAI sphere observing the whole regulation in order to institute a channel of legitimate representation. It is integrated by members of the Executive Branch, local states and indigenous communities, and it is chaired by the president of the INAI. The members are \textit{ad honorem}. The responsibilities of the commission are: send a law project to establishing the procedure to grant the communal property rights and its regulation to the Executive Branch;

\textsuperscript{57} The registration at the National Registry of Indigenous Communities (Re.Na.C.I) means the recognition of their formal ethnic and cultural preexistence.
\textsuperscript{58} See: \url{http://infoleg.mecon.gov.ar/infolegInternet/anexos/165000-169999/167619/norma.htm} (accessed March 8 2011).
evaluate the implementation of the national program of “Implementation and Development of the Legal and Technical Cadastral Survey or Mapping” within the framework of laws 26,160 and 26,554; and elaborate law projects to unify the legal regime to grant the legal authority.

Some activist lawyers, such as Fernando Kosovsky,59 have pointed out the inefficiency and ineffectiveness of the INAI. As part of the Executive Power (Ministry of Social Development), the institute lacks political and economic independence. He explains that the evidence is the discrentional treatment of indigenous affairs as well as the sub-execution of the budget. Reinforcing that idea, the INADI has published some interviews of indigenous leaders in its national plan against discrimination. They pointed out that the INAI has always had an insufficient budget to address policies for indigenous needs, which it has only worked in the field of welfare and not as an autonomous organism with indigenous participation. Moreover, the INAI has very few local delegations where indigenous people can file claims about indigenous issues.60

In the same way, Silvina Ramírez61 observes that since the passing of law 23,302, the INAI never fulfilled the law’s main objective: to do the legal and technical cadastrre, and the regularization, titling, and registration of the indigenous lands as their communal property rights. Failing on that important legal obligation, the INAI never became the genuine interlocutor to the indigenous communities. Ramírez considers that INAI acts with discretion, without transparency, and that it responds to political juncture and interests, although it has the legal

60 Kosovsky, “Estudio sobre propiedad comunitaria de la tierra Argentina.”
61 Silvina Ramírez (Scholar of the University of Buenos Aires, President of the Indigenous Law Argentine Association-AADI, Lawyer), Personal Interview, January 20, 2011.
power to act in accordance with its obligations. Likewise, Sonia Ivanoff, an activist lawyer, considers that INAI continues to be attached to some clientelistic practices.\textsuperscript{62} However, Ramírez points out two cases in two provinces with many indigenous issues (Chubut and Chaco)\textsuperscript{63} where there were some positive outcomes.

María Elena Barbagelata, former National House Representative for the Socialist Party of the City of Buenos Aires and former president of the Population and Human Development Commission of the Chamber, agreed that the Commission of the Analysis and Legal Implementation of the Communal Property created by those decrees is more of the same and does not show any change. There is no political will to solve the real problem: measuring the land in order to give it to indigenous communities and regulating indigenous property rights. The lack of an appropriate budget and political will has worsened the indigenous legal and political situation.\textsuperscript{64}

Nevertheless, there are some positive experiences to build on. The INAI recognizes the communal property rights, and titles and registers those lands traditionally occupied by the indigenous community of Amaicha del Valle.\textsuperscript{65} In this way, in October 2010 in Esquel –Province of Chubut– the INAI organized a meeting with several communities in order to start the legal and technical cadastre of the lands for their future regularization, titling, and registration.\textsuperscript{66} Those experiences are part of the national program of “Implementation of the Legal and Technical

\textsuperscript{62} Sonia Ivanoff (Activist, Lawyer) E-mail message, January 25, 2011.
\textsuperscript{63} Silvina Ramírez (Scholar of the University of Buenos Aires, President of the Lawyers of Indigenous Rights Association –AADI-, Lawyer), Personal Interview, January 20, 2011.
\textsuperscript{64} María Elena Barbagelata (Former Congresswomen), Personal Interview, February 2, 2011.
\textsuperscript{65} Kosovsky, “Estudio sobre propiedad comunitaria de la tierra Argentina.”
\textsuperscript{66} http://www.ceppas.org/gajat/ (accessed November 2010).
Cadastral Mapping.\textsuperscript{67} I want to pay special attention to the performance of this program in Neuquén and Mendoza, the provinces in which the communities and legal cases of this research are settled.

In the case of Neuquén,\textsuperscript{68} the compliance of the laws (26,160/26,554) with the corresponding process of legal and technical cadastral mapping has not started in the province. It should be said that the law entrusts the execution of the territorial survey to the INAI together with the Council of Indigenous Participation and provincial authorities. However, the local government always refused to either endorse or participate in any organization of the survey that was not addressed to it. Recently, three years after the law passed in 2009, the INAI signed an agreement with the National University of Comahue. The University will lead and execute the national program in Neuquén. The Council of Indigenous Participation has also joined the team of work. Together, they have elaborated the draft of the final project and selected the Operational Technical Team. Moreover, they have emphasized the involvement of the Mapuche Neuquén Confederation as an interested participant in the survey and its outcomes.

However, the provincial legislature enacted a resolution by the governing party representation rejecting the agreement signed between the INAI and the University. The provincial government alleged that they never approved that agreement. In contrast, the INAI and the University explained that although the Government was invited to be part of this process, it maintained a policy of boycotting the agreement. In this context, the government summoned the University and the INAI through official letters in order to refrain from initiating the survey.


\textsuperscript{68} The information about the INAI’s performance was obtained from the 2009-2010 Annual Report of the Human Rights of Mapuche People in the Neuquen Province; the written petition to the Inter American Court by Juan Manuel Salgado and Veronica Huilipan; and Aranda, \textit{Argentina Originaria, Genocidios, Saqueos y Resistencias}, 52.
In the meantime, the Inter-American Commission on Human Rights requested information from the Argentine State about the observance of the law 26,160 in the province of Neuquén. The answer came in February 2010 and stated:

"To date, the provincial government and the indigenous representation support instead of the National University of Comahue, the National Technological University. They are preparing the required legal instruments to sign. Once accomplished, this instance may initiate the survey in the province."\(^{69}\)

Currently there is a general uncertainty regarding the program execution. The fact is that the INAI still has not started the program.

The case of Mendoza presents a totally different situation. The government, along with the INAI, has granted the property title to the Huarpe Communities. However, there is a conflict between them, which I analyze in Chapter 6.

\(^{69}\) Salgado and Huilipan, written petition to the Inter-American Court of Human Rights.
Chapter 5: The Use of Courts by the LGBT movement

A. Organization and Mobilization Background of LGBT People in Argentina

In this section, I summarize the scenario of LGBT organizations in Argentina. There are several associations, NGOs, and groups that address the issue of LGBT rights. Nevertheless, only a few of them have a committed work relationship with the community influencing the government agenda.¹

The 1960s and 1970s were periods of the history well known for liberation, mobilization, and breaking away from old models and structures. At that moment, different groups of the society got fired up to express themselves. It was a time where the gay movement started to organize their mobilization in Argentina. The first example of social mobilization was the organization called Our World Group (Grupo Nuestro Mundo) founded in Buenos Aires in 1969, which was the first formal gay organization in Latin America. The second and main precedent was the Homosexual Liberation Front (Frente de Liberación Homosexual: FLH),² founded in 1971. Néstor Perlongher—also a socialist party activist—was the most prominent member of the organization, and was acknowledged for his revolutionary ideas. He rejected the old organizational structures since they subordinated and depreciated homosexuals and women. They followed other examples of organization structures from Europe and the United States. His energy and new ideas made this group very politically active. He led the organization to join forces with other minorities like women.

---

¹ María Rachid (President of the LGBT Federation and former president of FULANA), Personal interview, February 10, 2011.
In 1976 (a time of political violence and the year of the most virulent military coup), he was prosecuted and condemned. After this situation, the persecution of gay people was dreadful. With this situation, the FLH started to weaken and eventually disappeared.

The following is a basic description about the two most active organizations that are relevant to this dissertation.

1. Argentine Homosexual Community (Comunidad Homosexual Argentina: CHA)³
   a. History, Location, and Structure of the Organization

   The 1980s was a decade of changes in Argentina, and the recovery of democracy in 1983 brought fresh air to the society. Precisely in that year, Carlos Jauregui started with the project of creating the CHA (Argentinean Homosexual Community). In 1984, the CHA was established as a civil association and Jauregui was elected its president. This was the first association that legally started in Argentina, and the second in Latin America.⁴ At that moment, ten independent activist gay groups across Argentina joined the CHA. The organization framed the fight in the human rights struggle in Argentina. Today it is the oldest association advocating for LGBT rights in the region.

   The organization is located in the City of Buenos Aires, and it is structured by areas (legal, cultural, youth, health, and financial). One interesting fact to mention is that they only work and decide by consensus. The dissent of any member is a veto for any proposal. They explained that they are trying to learn about tolerance by practicing it “at home.”

   The legal area -one of the most relevant in the association- receives around 1,500 cases per year. The legal advice given in those cases is free. Nevertheless, they do not assume the legal

---
³ Pedro Sottile (Coordinator of the CHA Legal Area), Personal interview, February 5, 2011) and http://www.cha.org.ar (accessed March 8 2011)
⁴ The first legal organization in Latin America was in Bahia, Brazil.
representation of all the cases because it is impossible for the association to afford those costs. However, occasionally resorting to the strategy of using the courts the legal area of the CHA makes exceptions and chooses some of those cases if the lawyers consider that they might be a symbol and set precedents for changes. Moreover, the CHA brings cases to the courts purposely selected for using courts to advance the public policy agenda. I get back to this issue later.

b. Funding

As any legal civil associations there are voluntary membership fees. Moreover, all the CHA members contribute with their time and work to the projects of the organization. In addition, there has been some international funding for specific projects such as the fight against AIDS -at an international level- and to elaborate projects of law at the national level.

Something to point out is that they are very careful in not being influenced by the State through funding. They emphasize their intellectual and political independence when they look for donors and funding. They highlight the importance of setting the agenda by themselves.

c. Members and Human Resources

There are fifty active members who work on a daily basis. The members’ backgrounds are very diverse. Some of them are professionals and some are not, some are employed and some are not, and they also have university students in their membership.

d. Goals achieved and Strategies followed

In general, the organization does a cost-benefit analysis in every decision they take and every strategy they pursue. The CHA takes into account the current political and social environment at the moment to propose any action. The organization tries to avoid high political
costs to avoid losing the trust of their members. A prominent characteristic of the organization and its leadership is that they are very pragmatic.⁵

The first goals of the CHA were to establish headquarters; give free legal advice and representation to gay community; and issue a newsletter. During 1985 the organization worked on giving some visibility to their objectives. They also have pointed out the police persecution against gay people and lobbied for the repeal of the infringement code.

In 1986, their free legal assistance was working and the organization proposed to legislators that they modify the antidiscrimination law including “sexual orientation” along with the other reasons for discrimination -race, religion, nationality, ideology, political opinion, socio-economic class, gender and physical features. In June, after some renewal of their leadership, with bigger headquarters—and after some negotiations—the CHA absorbed most of the gay independent groups in the country. A cornerstone of the organization was in 1987, when the CHA launched the first public campaign organized by an NGO against AIDS called “Stop AIDS.” This promotion is still working to raise community awareness about AIDS and preventing further infection of the illness.

In 1989, the CHA reconsidered its actions due to a low level of participation deciding to ask for the official authorization as legal entity, situation that would open the door to other options of actions. In December, the General Inspection of Justice denied the authorization as legal entity of the association. In 1990, the CHA filed an appeal to the National Appeal Chamber. The court ratified the Inspection’s decision. The CHA looked for help abroad, and some organizations—for instance the IGLHRC⁶ and ACT-UP⁷—supported the CHA’s struggle.

---

⁵ Pedro Sottile. Personal interview, February 5, 2011.
⁶ International Gay and Lesbian Human Rights Commission

In 1991, the CHA filed an appeal—an extraordinary complaint—to the Supreme Court. The Supreme Court declared the file inadmissible. However, on May 17, 1992, the president of Argentina, Carlos Menem, granted the authorization of legal entity to the CHA. This was an important achievement for them. I return to this issue more in depth later.

In July 1992, the CHA started to hold the gay pride parade, which even today is still celebrated and growing in participation. This important initiative of the CHA started with some conflicts, as other groups (who did not like to be compared to or considered similar to transsexuals, transvestites, or other homosexuals who are called “queers” in a pejorative way) organized the “counter-parade” (*contramarcha*) for many years.

In 1992, the CHA along with GaysDC⁸ achieved the first successful court decision regarding an unjustified and illegal dismissal due to the HIV virus. In 1996, the CHA effectively lobbied to include Article 11 in the new Constitution of the City of Buenos Aires, which does not allow any discrimination for sexual orientation, among other reasons. In 1998, the CHA again took up a claim against the infringement code started by the FLH in the 1970s. Along with the CELS, the CHA achieved the goal of the abolition of “police edicts”⁹ in the City of Buenos Aires.

In 2001 the CHA presented a law proposal for civil unions in the City of Buenos Aires written by judge Graciela Medina, a prominent family law scholar and adviser to the CHA. This CHA initiative was joined by other organizations. The law was passed in December 2002 as the Law 1,004. On July 18, 2003, a couple from the CHA got a civil union under that law.

---

⁷ AIDS Coalition to Unleash Power
⁸ Gays por los derechos civiles (Gays for civil rights)
⁹ Edict is a discretionary order given by the authority of the police officers.
In December of 2005 they presented a national civil union law proposal to the House of Representatives. They strongly believed in the necessity of a whole reform of the marriage institution. They understood that the institution of marriage currently in force at that time was anachronistic, not secular, and sexist. That proposal was blocked and never got legislative status. That experience was a low blow for the activists, and they re-thought the strategy. The CHA decided to publish a book about a very controversial issue: “adoption by gay couples” with important authors from different backgrounds and sexual orientations. Moreover, a couple of activists got married in Spain and came back in 2008 asking for the registration and recognition in Argentina as a way to pull off the National Law of Civil Unions.

The CHA has also been working internationally, participating at the UN level (at the General Assembly and Human Rights Commission) and through the International Lesbian and Gay Association (ILGA). Indeed, Pedro Sottile—the coordinator of the legal area of the CHA—was elected the regional coordinator for ILGA.

In 2008, the death pension for spouses of gay people was recognized by the President of Argentina, Cristina Fernandez de Kirchner, through a resolution of the social security agency (ANSES). The first pension was given to Alfredo Pascale after a long struggle of 12 years. The CHA and the legal clinics of the University of Palermo brought the emblematic case to the Supreme Court. Also in 2008, Judge Pedro Hooft recognized in Mar del Plata the gender identity of Tania Luna in her National Identity Document (ID) without surgical intervention. In this case, the CHA helped giving legal advice and representation. This decision signified an

---

10 Sex reassignment surgery (initialized as SRS; also known as gender reassignment surgery, genital reconstruction surgery, sex affirmation surgery, sex realignment surgery or sex-change operation) is a term for the surgical procedures by which a person's physical appearance and function of their existing sexual characteristics are altered to resemble that of the other sex.
important precedent for the National law proposal about Gender Identity. Finally, in 2010 the CHA publicly joined the campaign for same-sex marriage lead by the LGBT Federation with successful results.

2. Argentine LGBT Federation (Federación Argentina LGTB: Federation)\textsuperscript{11}

   a. History, Location, and Structure of the Organization

   The enactment of the civil union law in Buenos Aires was the trigger for the creation of the Federation. This successful accomplishment was tremendously difficult to achieve, and showed some flaws in the articulation of the LGBT organizations. The associations that participated in the “lobbying” process of the civil union law were just the CHA and the FULANA.\textsuperscript{12} The FULANA worked very hard in the legislative lobby and spreading awareness of the law before and after it was passed. After that experience, the FULANA recognized that with the involvement of other groups of the LGBT movement, the process would have been easier. Joining forces was a crucial necessity if they were going for a national law.

   The context was good to embark in the struggle for a national law. First, the social and political environment was favorable. Second, the positive effects of the law exceeded the rights recognized in it. Third, Spain approved a marriage law for everyone (without sexual distinction). Precisely, the Spanish associative model of support and articulation, and the strategy that the Triángulo Foundation and the Spanish LGBT Federation used to achieve success in the Spanish Equality Law, inspired the FULANA. The Spanish social mobilization approach guided the Federation’s organization and strategy. The Spaniard LGBT movement did not use the courts, but it was an example to follow in the way they organized a cohesive grassroots movement.

\textsuperscript{11} María Rachid (President of the LGBT Federation and former president of FULANA) Personal interview, February 10, 2011; and http://www.lgbt.org.ar (accessed March 8 2011)
\textsuperscript{12} FULANA is a lesbian rights association.
Indeed, Pedro Zerolo – Madrid’s Councilman and member of the Spanish Socialist Party— became a close friend and strong activist during the same-sex marriage campaign. In this way, Spain is a country that has influenced Argentina in its Civil Law as well as in other legal, social and political institutions. The similar historical, cultural and traditional roots made the passing of that legislation an example to follow. For those reasons, the FULANA called for a meeting with different LGBT organizations in order to explore common goals and establish a strategy for the marriage law. Together, they established contact with the Spanish LGBT Federation to learn from their experience as an association and with struggling for the approval of the law. In Argentina, prior attempts to coordinate LGBT movement groups\textsuperscript{13} had not been successful. Therefore, they analyzed the similarities and differences between Argentina and Spain and tried to learn from the experience.

Something to point out is the consequence of passing the union civil law in the City of Buenos Aires. The effects expanded to new aspects that were not initially foreseen. This law not only recognizes some rights, but also legitimizes the “being homosexual.” As the book *Queer Mobilization*\textsuperscript{14} analyzes, the law sends the symbolic messages of what is and is not acceptable for society. It was a public statement about a group that had been invisible to the State before. Some lesbians told their groups about the constructive reactions of their families and colleagues. It is clear that “the use” of law, as a strategy, was very effective in influencing cultural changes in the society. Additionally, it was an efficient way to work with the media. Newspapers set up the topic at the national level, mixing the words civil union and marriage. The right wing groups and

\textsuperscript{13} See: Kathryn A, Sikkink, Sanjeev Khagram and James Riker, eds., *Restructuring World Politics: Transnational Social Movements, Networks, and Norms* (Minneapolis: University of Minnesota Press, 2002).

the Catholic Church expressed that marriage is just between men and women, unlike a civil union. The civil union issue went beyond the borders of the City of Buenos Aires, where the law was passed, and triggered other debates. Same-sex marriage was not on the agenda of the LGBT community. Nonetheless, when they realized the cultural, social and political changes the gay marriage law would bring, they decided to put marriage on top of the agenda.

Those responses provoked changes in how some organizations had been working. For instance, the FULANA had focused aggressively on cultural changes, and from that moment put its emphasis on looking for strategies to achieve legal changes. Along with other organizations, and through the Federation, the FULANA started working on the legal strategy. Therefore, five organizations (Asociación de Travestis, Transexuales y Transgéneros de Argentina, FULANA, Nexo Asociación Civil, Fundación Buenos Aires SIDA, and VOX Asociación Civil) founded the LGBT Federation in 2006. They decided to create the federation in order to satisfy a concrete demand: to join forces to achieve their shared objectives. Those five groups had strong track records for 15 to 20 years on LGBT rights issues and grassroots commitments with the community. As a federation, its members are associations and/or organizations but not individuals, with the exception of individuals who want to collaborate in its secretariats. There are two forms of participation: by being one of the organization’s members, and or by being one of the organization’s adherents. Unlike members who have a voice and can vote, the responsibilities of the daily organizational jobs, and the constitution of the executive commission, adherents only have a voice. The adherents used to replicate some activities that Federation does in Buenos Aires in their provinces.
Since a number of “fake” associations\(^\text{15}\) exist throughout the country, the organization’s founders stated some requirements to be accepted as a member. Any association that wants to be a member has to demonstrate two conditions: first, they have interacted with the government either by dialoguing or filing claims; and second, they have worked with the local community in a coordinated way.

The headquarters are located in the City of Buenos Aires, and the Federation is currently working in 18 provinces. However, the stronger and more activist cities aside from Buenos Aires are Córdoba, Rosario, and Puerto Madryn.

b. Funding

The main sources first come from the fees of the federation members. Second, from individual members who work in the government and donate a percentage of their income. There is an important number of individuals who work at the National Institute against Discrimination, Xenophobia and Racism (INADI). Moreover, there has been some funding received for a specific project (publishing and the creation of the LGBT Network of Mercosur).\(^\text{16}\)

c. Members and Human Resources

The Federation currently has seven organizations members and 36 adherent members. There are 20 active individuals that contribute their work, who are lawyers and people from different professions.

d. Goals achieved and Strategies followed

\(^{15}\) María Rachid called them like this, pointing out that they just exist in order to receive subsidies and donations.

\(^{16}\) Mercado Común del Sur (Southern Common Market)
One goal achieved is the establishment of the Federation itself. The former method of coordination used to be that of a strong organization with satellite associations. Those practices did not work. Also, another relevant goal achieved is the quantity of groups that has joined the Federation, which is still growing.

Aside from that, the Federation established five initial objectives: 1) same-sex marriage and adoption (the strategy was called “the same names, the same rights”), 2) gender identity for transsexual individuals, 3) antidiscrimination law, 4) sexual education law, and 5) the code of noncriminal wrongdoing.

Above all, the fact that the Federation is the most prominent advocate of the movement in the country is a very significant objective itself. Other accomplishments are, for instance: having introduced the same-sex marriage to the government and being able to set the agenda of sexual diversity; having their own headquarters and economic independence.

Finally, it should be said that the achievement of passing the law of same-sex marriage (within the campaign of “the same names, the same rights”) is the most visible and important one. The process started with the use of courts “pushing” the political agenda of the Congress. Then lobbying both at the House of Representatives, which passed the project, and later at the Senate that enacted the law within two months—which is an achievement in terms of speed. Finally, President Fernandez de Kirchner promulgated the law six days after the approval, also in a record time on July 21, 2010.

The social mobilization-support structure- they have built along with alliances with the INADI has provided their legal mobilization with all types of resources and support (lawyers, access to the media and money) not only in the capital city but also in the interior of the country. With all these resources the Federation has become a “haves,” in Marc Galanter’s terms. To have
a presence across the country has been extremely important, taking into account that the
marriage law is a national law and needed the votes of the representatives of the majority of the
provinces to be passed.

The Argentine LGBT movement has other groups. In general, they were constituted in
the early 1990s such as the following: the Moons and the Others (Las Lunas y las Otras), Gays
and Lesbians for Civil Rights (Gays y Lesbianas por los Derechos Civiles), Vox Civil
Association (Vox Asociación Civil), Association of Struggle for the Liberation of Travesty
Identity (Asociación Lucha por la Identidad Travesti: ALITT), and Argentine Association of
Transvestites and Transsexuals (ATTA: Asociación Argentina de Travestis y Transexuales de
Argentina). Almost all of them are members of the Federation. In this way, though they
themselves are small and lack a well-institutionalized framework, being part of one biggest
group with the same objectives make them stronger.

B. Common Features of the LGBT Mobilization

In general, the leading groups of the LGBT social mobilization present some common
features. They advocate for a progressive agenda (equal rights for minorities, gender issues,
abortion, among others) and join forces with other organizations that are supporters of human
rights. Moreover, their activists usually belong to an educated middle class. Those activist groups
count with lawyers, professors, academics, graduate and undergraduate students among their
members. According to the reformulation of Marc Galanter’s theory these activists may be
categorized as the “haves” who fight for a “progressive agenda.” All these statements do not
mean to stereotype LGBT people into well-educated, middle class individuals with progressive
ideas. It should be noticed that there are a very important number of LGBT people living in bad conditions with no economic resources, unemployment and with no access to education.

There is something relevant to indicate regarding the wording and discourse of the movement. At the beginning, the activists identified themselves as the gay movement, however, in the last decade the abbreviation LGBT was the one chosen by them. That change shows the growth as well as the openness of the movement.

C. The Conflicts and Differences within the Social Movement

Within the social movement there are different points of view regarding some issues that matter to the LGBT community. The most relevant organizations (CHA and the Federation) have sometimes had different agendas and activism approaches. The CHA has been criticized by other organizations for different reasons. First, some lesbians from other groups have felt that they are not welcome to this organization. Those women considered that the CHA in reality is closed for lesbians.

Second, although the community acknowledges the important work done by CHA at the beginning of the LGBT movement, some members of the LGBT movement understand that this group has become a very self-oriented organization reduced to small groups of activists. Indeed, the majority of young people are politically active in other organizations. Moreover, from the activities of the CHA it is easily inferred—as some members of the community told me—that it is an urban-centralist organization. The interior of the country does not come within the CHA’s objectives. Nevertheless, the CHA members have done an excellent job at the international network level with other international organizations in making the LGBT Argentine movement known abroad.
Moreover, they are considered too cautious and politically correct or pro-system in their fights. It is interesting to point out that for the CHA this cautiousness is a virtue, and for other activists is not. The CHA believes that it is fundamental to do realistic cost-benefit analysis in every action because the defeats are too frustrating for the activists. They trust in incremental changes.

On the other hand, some members of the LGBT community consider that the government influenced the political action of the Federation. It has been criticized for not being enough independent in its sources and agendas. The reason is that because a lot of members of the Federation, including its president, María Rachid, work actively at the INADI. The fact that she has been nominated vice president of the INADI –at the end of last year– demonstrated that the Federation and INADI are “part” of the “same structure with agreed goals,” one from official and the other from the grassroots perspective.

In contrast, the people of the Federation understand this situation as an asset. In this way, they explain that it is the Federation that has introduced a diversity agenda into government issues. According to them, before this circumstance the government did not have any agenda for sexual diversity. Moreover, they understand that with the help of the INADI they may reach out for more support in the interior and spread their activities. Indeed, the Federation has put emphasis on having its presence in the Argentine provinces.

In fact, at the beginning they did not agree with the same sex marriage legislation battle. The CHA believes the institution of marriage is patriarchal, sexist, chauvinist, and not secular in name. In addition, they thought it was impossible to reach that goal in our country because of the traditional and symbolic meaning of marriage, and especially, after their experience with the
national law proposal of civil unions. For that reason, they thought that it was more convenient not to raise the expectations.

Nevertheless, there are some contradictions here, since the national civil union project subscribed by them is far more ambitious than the same-sex marriage law supported by the Federation and then passed by the Congress. Later in the process they publicly joined and support the activism for that the same-sex marriage law.

D. The Strategy: “the Same Names, the Same Rights,” a Superior and Common Objective Prevailed

As I mentioned before, in the beginning the LGBT social mobilization did not include among their demands same-sex marriage legalization. There were other objectives and struggles to fight for. The most used ways of the different groups to raise their voices were several: publications in journals and popular newspapers, seminars, gay parades, lobbying, etc. Later, and particularly after the constitutional reform in 1994, they gradually introduced in their strategy “the use of the courts” -more aggressively after the approval of the civil union law in the City of Buenos Aires. This law boosted the idea of a legal change and its symbolic “revolution” in the whole society.

The CHA started with the use of courts by bringing a strategic case before the constitutional reform. The first and most relevant case with broad repercussions was the extraordinary appeal and complaint filed by the CHA to the Supreme Court in 1991: Comunidad Homosexual Argentina c/ Resolución Inspección General de Justicia s/ personas jurídicas y
This lawsuit sought to overrule the prior decisions that ratified the denial of the legal entity to the association by the General Inspection of Justice (Executive Power).

Although the Supreme Court declared the file inadmissible, the arguments of the minority and the later granting of the legal authorization by the Executive Power with its impact made this lawsuit very relevant. In this fashion, that case opened the door to other legal challenges, such as the lawsuit brought to the Supreme Court by the Asociación Lucha por la Identidad Travesti-Transexual (ALITT) fifteen years later.

The key arguments of the Supreme Court in the CHA decision were related to the concept of the common good, the violation or not of the law (23,592-Discriminatory Acts) and the constitutional rights to association (art. 14, C.N.), freedom of expression (art. 14, C.N.), and privacy (art. 19, C.N.). Firstly, according to the vote of the majority of the Supreme Court, the fundamental right to association guarantees the possibility to form and be a member of a group/association recognized by the law (subject of rights), but not to obtain a legal entity from the State. Therefore, there was no violation of the fundamental right of association. Moreover, that subject of rights may exercise its rights fully and freely. Second, regarding to the Justices’ arguments, freedom of expression is not infringed for being a subject of rights without legal entity. Freedom of expression may be extensively exercised without the State’s authorization.

With respect to the concept of the common good as a requirement of Civil Law, it is important to remember that a person exercises their constitutional rights in accordance with the law that regulates their enforcement (art. 28 and 14, C.N.). Therefore, article 33 of the Civil Code establishes a positive requirement for legal associations that ask for government authorization: the object of those subjects of rights should align with the common good.

---

17 CSJN-Fallos: 314: 1531
Justices maintained that the object of the association being the public defense of homosexuality is contrary to the concept of common good. I consider that the problem is that the concept is too vague. Hence, the concept is defined according to the values of the interpreter and may drive different acts of injustice.

Justice Augusto Bellucio mentions that the discrimination “does not happen in Argentina,” considering that there is no punishment for sodomy as it happens in the U.S. In addition, “the homosexuals occupy very distinguished positions in cultural, academic, and scientific spheres of Argentine society.”

For Justice Antonio Boggiano, the status equalization of heterosexual and homosexual could imply a broader authorization from the State allowing the CHA to embark in multiple reforms in different areas, particularly law reform. He believed that democracy is built on some common values, and the destruction of those may damage social cohesion. Also, he considered that the right to privacy (art.19, C.N.) does not apply to this case since the object of the association is something public – the public defense of homosexuality. This is not a discussion about the private life of the members of the association, which is protected by article 19.

Justice Carlos Fayt and Justice Enrique Petracchi voted in dissent. Justice Fayt focused his argument on article 19 of the Constitution. He stated that the respect of private actions means a respect for human dignity. This value is essential in a democratic system and makes the difference between an authoritarian regime and a democratic system. In the case that the dignity of a group of persons could be affected—and it should be protected by the Constitution—their organization should be legitimized in order to preserve their dignity. Also, the rights of

---

18 CSJN-Fallos: 314:1531
minorities are recognized in all modern constitutions. In the Argentine Constitution are inferred from the articles 16 and 19.\textsuperscript{19}

The right of association is subject to its regulation (art. 28 and 14, C.N.). However, that regulation must not denaturalize the right. The legal norms should be coherent with the constitutional norms. In this way, the interpretation cannot ask for more requirements than the ones demanded by the law. This is the decision of the Tribunal of Appeal.\textsuperscript{20} The CHA is a subject of rights without the State’s authorization. However, there are many rights that the CHA cannot exercise because of the lack of authorization. Moreover, by giving legal authorization, the State fulfills its regulatory role in supervising all legal associations. For the abovementioned reasons, Justice Fayt accepted the lawsuit and overruled the prior decision.

Justice Petracchi considered that the aims pursued by the CHA were not incompatible with the constitutional right of association. On the contrary, the right of association promotes cooperation among individuals joining forces towards common objectives and endorses their channeled collective energy. Additionally, the whole community takes advantage of the proliferation of the right of association through the State authorizations since it is a civilized way to exchange ideas and solve conflicts within the framework of the rule of law. In consequence, the denial of that right runs the risk of isolating some minorities fomenting the violence and selfishness.

\textsuperscript{19} The Justice cited the precedent “\textit{U.S. Carolene Products}” 304 U.S. 144 (1938) in which it is established that legislation that affects minorities should be rejected, and the subordination of the minorities for a communitarian objective is dangerous.

\textsuperscript{20} The judge of the Tribunal of Appeal considered that granting the legal authorization would infringe the protection of the family (art. 14 bis). This right should be interpreted in agreement and with reference to other rights. The structure of the family is very important to the social system; nevertheless, it cannot be superimpose over private actions. If that would happen it would impose a channeled and planned life and family.
Furthermore, the object of the CHA is not an apology for homosexuality. It is a public defense against any kind of discrimination against homosexuals, and this is protected by article 14 of the Constitution. The Tribunal of Appeal established a paternalistic State ethic. This situation would allow the State to intervene in a capable individual’s decisions about their personal life. The State should guarantee to all capable individuals the right to plan their lives freely to achieve their happiness and personal development. It is extremely dangerous to open the door to the state’s regulation into private actions of people. Moreover, the Justice explained that it is right to protect the traditional family; however, this cannot justify failing to protect other sexual minorities in their life plans which include different sexual unions. Hence, Justice Petracchi accepted the appeal. The Supreme Court decision was against the CHA claim. Nevertheless, President Carlos Menem granted state authorization to the CHA in 1992. The CHA finally achieved its goal.

The second case that set a precedent was 15 years later, on November 22, 2006. The ALITT was struggling for the legal and social recognition of transvestites as a unique identity and citizens with full rights. The constitutional reform has yielded interesting and important arguments to make a case in favor of equality and diversity. The ALITT presented an extraordinary appeal to the Supreme Court and filed a complaint against the Tribunal of Appeal decision. On June 29, 2008 the Supreme Court overruled the CHA decision and set an important and visible precedent. This court decision happened while an important transvestite activism was taking place –the first national parade of travesties, transsexuals, and transgender.
Going back to the case, the majority of the Court decided to grant the authorization to the ALITT, doing an integral interpretation of the right of association -art.14 C.N.- in concordance with article 19, 16, and particularly with the international treaties of human rights in article 75 (22) of the Constitution. Moreover, the Court also based its decision on some arguments of the votes of Justices Fayt and Petracchi in the aforesaid overridden case. Once more, the denial of state authorization was based on the unsatisfied requirement of the common good. This time, the definition of the common good was not Christian morals but social utility. The judges of the Tribunal of Appeal considered that the ALITT’s object was to fulfill the individual interests of its members instead of a general common interest, which would provide social utility.

The claimants argued to the Supreme Court that the interpretation of art. 33 of the Civil Code was unconstitutional since it was discordant and un-systemic with other articles such as (art.16 right to be equal under the law, to have equal opportunities and treatment; art. 14 right to association; and the right to be equal and not be discriminated against established in the international treaties 75 (22), and especially articles 2 and 7 of the Universal Declaration of Human Rights, 1 and 24 of the American Convention of Human Rights, 1 and 26 of the International Covenant of Civil and Political Rights, and 2.2 of the Covenant of Economic, Social and Cultural Rights). Also, being that the CHA was a subject of rights with State authorization, there were few reasons to deny that authorization to the ALITT.

The Supreme Court decision established that the denial of the State authorization to a subject of rights infringes the right of association in a way that impedes its full exercise. For

---

21 CSJN Fallos 329:5266  
22 CSJN Fallos 329:5266
instance, a subject of rights with authorization has a system of responsibility and a group of rights that differ considerably from the simple associations without State authorization. The denial of State authorization causes offense since it impedes access to the highest status of the right of association established by the Civil Code. Any type of organization that peacefully observes the principles of democracy and pursues any aim that does not offend the moral and public order and does not damage the interests or goods of a third party satisfies the constitutional threshold. Only the illegality of the object or it being contrary to the constitutional clauses, allows restricting the right of association, especially considering the 1994 reform in which the constitutional hierarchy of several treaties of human rights (art. 75[22]) that acknowledge the right against any kind of discrimination is recognized. In that way, the denial of the authorization would be a clear discrimination. Moreover, the Court decision sustains—as did the dissent votes of the CHA decision—the social and democratic utility of promoting the association of groups in which the solution of the problems will be within the framework of the rule of law. In that way, these practices will be beneficial for increasing the respect and tolerance of different ideas and strengthening diversity.

Following that idea, the concept of the common good should not be identified with the interest of the majority. Arguing against the Tribunal of Appeal’s decision, the judges stated that the ALITT is engaged in attaining a particular interest, as well as any other association. However, it does not mean that its particular goals do not benefit and positively involve the whole society. Conversely, those associations contribute by both channeling and normalizing social demands and the solutions to social conflicts. Looking for rescuing the transvestites and transsexuals from marginality to provide them a better quality of life seems like an objective that aligns to the common good. Furthermore, the citizens’ right of association according to their
interests is an indicator of a healthy institutional democracy of a country. The Supreme Court granted State authorization to the ALITT. This decision gives hope for favorable rulings in future similar cases in which sexual minorities were involved. Notwithstanding, the principle of equality and non-discrimination would have been further elaborated. In this way, the strict scrutiny used by the Court in cases related to “national origin” was not considered – at least in the cases involving sexual minorities. These Supreme Court cases and their positive externalities are important steps in the social mobilization of the LGBT community.

The composition of the Court was different in those cases. In the second decision, there were only two justices from the old Court: Carlos Fayt and Enrique Petracchi. Some scholars have pointed out a significant feature to this study: the conservatism of the jurisprudence of the Court of the 1990s. Roberto Gargarella explains how the majority of the Court decisions were conservative showing a strong defense of authoritative and traditional morals. Gargarella examines the rationale of that CHA decision according to the conservative principles. First, the interests of the community may be the reason to ignore some individual rights instead of considering those rights an insurmountable barrier to collective interests. Second, the idea of considering that society should be structured on shared common values. Third, that those dominant morals should be preserved from some behaviors that put the cohesion of society at risk. Therefore, this thought shows a disdainful approach to the “autonomy principle.”

---

23 On December 18, 2006, law 26,183 reduced the number of the Justices to five. At the moment, there are still seven justices.

this principle, the person should have the possibility to freely develop her or his life plan and what she or he considers the ideals of personal excellence.

The renewal of the Court meant more independence from political power and brought some positive features: more diversity in thinking, religion, and gender. Currently, not all the Justices are Catholic. In this fashion, two women were appointed: one of them is known for being feminist and atheist.

After those significant cases, I analyze the first legislative achievement, which encouraged the use of legal strategies by the LGBT social mobilization. Following the recognition of the CHA as a subject of rights, in December 12, 2002 the Legislature of the City of Buenos Aires passed the Civil Union Law. This law legally recognized a union between two individuals not taking into account their sexual orientation. Argentina was the first country in Latin America with this type of legislation.

This law rules several rights for gay partners such as the legal recognition of homosexual couples, the extension of social security benefits, health insurance, subsidies, and social programs, the option of taking loans jointly, the license of one member to take care of the other in the case either of illness or death, preferential visits in the case either of hospitalization or imprisonment, and the power to decide over the health issues of the other spouse, among other.

Notwithstanding, the scope of this law is very limited because the attribution of legislating the Civil Law (in this case: civil marriage) corresponds to the National Congress. The “big” issues that the civil union does not rule are regarding patrimonial assets and adoption, among others.

The law proposal was written by Graciela Medina—the CHA legal advisor—and promoted with determination by the CHA. The FULANA also contributed in lobbying to pass the legislation. In this case, the LGBT community acknowledged the CHA’s efforts.
strategically decided where and when present the law proposal. The Legislature of the City of Buenos Aires and the year 2002 were the right moment and place. Additionally, the Mayor of the City of Buenos Aires at that moment, Aníbal Ibarra, had a positive opinion with respect to the civil union.

After the 2001 Argentine crisis, there was a collapse of political parties and a proliferation of small ones. The bipartisan system disappeared. The legislature was divided into several small parties and was formed by legislators with very different backgrounds. Party discipline did not exist. Moreover, the number of legislators was not too big: 59. Moreover, the Constitution of The City of Buenos Aires is the only one within the country that establishes sexual orientation as a suspect classification in cases of discrimination. In this context, there was a better position to persuade legislators to pass the law. The conditions were there to push for policy advancements in this area. According to this scenario, the Civil Union law project had good chances to be passed by the Legislature of Buenos Aires. The debate on the floor took five hours. There were 29 votes in favor and ten against.

Following the experience of the City of Buenos Aires, the province of Río Negro approved a Civil Union law on December 17, 2002. Later, the city of Carlos Paz—in the province of Cordoba—passed the law for freedom of consciousness with 12 votes in favor and six against on November 23, 2007. On May 5, 2009, in the city of Rio IV—province of Cordoba—the city councilors followed the same path voting unanimously. The strategy of achieving local civil union laws in either several cities or provinces, and later a national civil union law instead of national same-sex marriage law was planned by the CHA. First of all, they were looking to end with the hegemony of the institution of marriage, as it has been known. Second, their aspiration was an integral modification of the institution of marriage, including the name. Nevertheless the
experience of the City of Buenos Aires was successful and boosted LGBT community activism; it also showed the flaws of the social mobilization and the lack of union and coordination among the different organizations of the community. Also, this situation was an excellent training to understand the dynamics of the legislators and to analyze the arguments of the opposition and the Church.

On one hand, the unexpected positive repercussions as well as the faults of the movement that came to light on that process drove the creation of the LGBT Federation, formally constituted in 2006, with one clear objective, among others, to push the promulgation of the same-sex marriage using all the tools at hand. On the other hand, facing the same circumstances, the CHA presented a project for a national civil union law in 2005 but lost parliamentary status. From that moment, the CHA strategy changed its course until the whole LGBT social mobilization agreed on the same agenda.

It should be said that there were some previous proposal for those types of laws. In the 1990s, the association Gays for Civil Rights tried to promote a proposal for civil marriage with no results. In 1998, the congresswoman, Laura Musa from Affirmation for Egalitarian Republic (ARI), wrote a law proposal for civil unions, however it lost parliamentary status. Margarita Stolbizer Radical Civic Union (UCR) presented the same proposal in 2000. Then, over again Laura Musa tried in 2002 and 2004. In 2005, the not yet constituted Federation but in process and the congressman Eduardo Di Pollina from socialist party introduced a project for a same-sex marriage law. This project was countersigned by others legislators from several political parties. Regrettably, it lost the parliamentary status and the representative ended his tenure.

The battle to either pass a new whole institution that rules the Argentine family or modify the existent marriage law by giving access to marriage to homosexual couples had already been
started at the end of the 1990s. Facing this scenario, the LGBT Federation decided to use another very powerful tool for minorities, the courts. The judicial decisions are important because they set precedents –not binding in our system- but they send broader symbolic messages to society about what is and is not acceptable.\textsuperscript{25} Furthermore, lawsuits would generate media attention, can educate the public and gain some leverage. They focused on using all the possible tools at hand to achieve the same-sex marriage law. The movement considers that this legal accomplishment synthesizes many fights into one. It is a symbolic claim because it means to equalize this minority to the whole society in several aspects. The law helps construct some identities, persons and families as “normal,” while others are deemed “deviant.” Those who do are include in those “legal definitions” are denied basic rights to which others are entitled.\textsuperscript{26} The Federation was prepared to fight that battle. The social mobilization -support structure- that they had built was ready to go to courts. They have built a “haves” organization able to lead, support, and follow up on the cases.

Maria Rachid took the political decisions of the group and pointed out the plan to follow. They were determined to use courts to advance the public policy agenda. Under her decisions as the president of the Federation, there were a group of lawyers who had been working on the strategies of the cases and other members working on their media repercussion, and they also had the support of the INADI.

The strategy was to first present three types of \textit{amparos}. Every \textit{amparo} has had particular features taking into account who were the people asking for the right to marriage. The approach looked for involving different groups of the society -political, cultural- and having impact at

\textsuperscript{26} Bernstein and Marshall, “The Challenge of Law.”
national and local level from groups from the center and from the periphery. In each case, the Federation analyzed the pros and cons of every couple, the visibility and the empathy with the society. The Federation prepared and coached them for the media discussion and possible debates. They needed to know how to publicly and precisely defend same sex marriage. It could not be a random couple that did not understand and support the movement claims. The civil union law opened a window of opportunity. They could not miss it.

Those lawsuits were brought to the Civil Tribunal taking into account the object of the demand. On February 14, 2007, Claudia Castro –coordinator of the FULANA- and María Rachid went to the City Council asking for an appointment in the civil registration office to get married. The civil servant official denied the request, arguing that the Civil Law does not allow her to celebrate a same sex marriage. The Civil Law requires the consent of a woman and a man (articles 172 and 180, Civil Code). At that moment, it was drafting a “marriage certificate” with the witnesses of the failed marriage. The witnesses were: the president of INADI, María José Lubertino; and the house representatives Eduardo Di Pollina (PS), Marta Maffei (ARI), and Silvia Ausgburguer (PS); and the journalist Osvaldo Bazán. This unsuccessful celebration of marriage had a political hint. They wanted to give high visibility to this first presentation.

Therefore, María Rachid and Claudia Castro brought the first amparo to the National Civil Tribunal of First Instance (Juzgado Nacional de Primera Instancia en lo Civil). Some lawyers and an interdisciplinary group of professionals who belonged to the Federation, led by Gustavo López, Florencia Krávetz, and Analía Más, drafted their lawsuit. Judge María Ofelia Bacigalupo ruled against the couple.27 The claimants appealed to the National Chamber and then

went to the Supreme Court. However, after the passing of the Equal Marriage Law the case was declared moot by the Supreme Court in August 2010.\footnote{CSJN - R. 90. XLIV. Recurso de hecho. Rachid, María de la Cruz y otro c/ Registro Nacional de Estado Civil y Capacidad de las Personas s/ medidas precautorias, 8/24/2010.}

The second request for a date at the civil registration office was sought by a couple of artists, Ernesto Larrese and Alejandro Villalba on June 27, 2007. This presentation involved the cultural and artistic community of the City of Buenos Aires. The parties of this case were a soap opera actor, Ernesto Larrese, and an actor manager, Alejandro Vannelli. The idea of a soap opera actor getting married makes this celebration more familiar and brought the same-sex marriage matter to the people. Additionally, the witnesses were a renowned actor –Boy Olmi- and a famous actress –Mercedes Moran; the president of INADI -María José Lubertino; and the representative of the House of the City of Buenos Aires, Patricia Walsh. The refusal, based on the previously written fundamentals of that demand, led to an amparo. The lawsuit was presented again to María Ofelia Bacigalupo’s Tribunal.

The last of the first series of those amparos\footnote{See: http://agmagazine.com.ar/index.php?IdNot=2920 (accessed March 5 2011)} was one in the interior of the country on February 18, 2008. They are members of VOX, an association for LGBT rights located in Rosario. Neither one of the couple of Martín Peretti Scioli and Oscar Marvich obtained a favorable answer from the registration office. The witnesses of that denial were people from the political and artistic spheres. Among them, the president of the city council of Rosario, Miguel Zamarini; the city council representatives Pablo Colono and Carlos Comi; the local legislators of Santa Fe Lucrecia Aranda and Alicia Gutiérrez; and the National House representative Verónica Benas along with Silvia Augsburger, president of the Socialist Party at the National House of Representatives. Hence, they also brought an amparo to the courts. The local justice of the city
of Rosario studied the case and ruled against the claimants’ demand (Judge Graciela Abraham of The Civil and Commercial Tribunal Number Six located in the city of Rosario). The Civil and Commercial National Chamber of Appeal (Sala III) ratified the first instance decision and asked the Congress for a decision on this issue.

Those *amparos* at those jurisdictions have not obtained favorable court decisions. In fact, the cases: *María Rachid* and *Vanelli* had waited in the Supreme Court until they were declared moot after the sanctioning of the law. Nevertheless, as McCann has explained, even though litigation can be unsuccessful, rights-based strategies further social movement goals. Indeed, the great ramifications of those cases gave the right push to present once again a project of same-sex marriage to the House of Representatives jointly with the representatives Di Polina and Silvia Augsburger from the Socialist Party, on April 30, 2007. In the same line, in October 2007, the senator Vilma Ibarra presented a project of her authorship also with the support of the Federation in the Senate. Simultaneously, the president of the INADI, María José Lubertino, presented another initiative through the Executive Power.

After the above cited litigation experiences, the Federation decided to change the strategy a little bit and sued at different jurisdictions. The relevant Court of Administrative Law Claims was selected according to the parties of the lawsuit (individuals v. the city of Buenos Aires). The people of the Federation had been told that the judges of that jurisdiction were younger, less prejudiced and less risk averse. In Marc Galanter’s words the LGBT social mobilization had been developing the expertise of “repeat players.” In fact, the outcomes confirmed the aforesaid opinion.

---

Considering that the Government of the City of Buenos Aires would appeal given their conservative ideology, the Federation’s objective was to bring the cases to the Supreme Court. A favorable decision would have been expected according to previous precedents and background of this National Court. In the Contentious-Administrative jurisdiction the new legal cases achieved favorable decisions. In the first amparo, nobody thought that the Government of the City was not going to appeal. It was a really a surprise. That was a good indicator of the favorable political environment.

Therefore, those partners: Alex and José María, and others like Jorge and Damian, and, Norma Castillo and Ramona Arévalo got married. After those successful experiences, there were proliferations of judicial presentations. Those circumstances were widely covered by the media (newspaper, TV shows, radios and magazines) with a supportive point of view.

Along with this positive juncture, the Federation spread the news, encouraging gay couples throughout the country to bring their cases to the courts. In this fashion, the Federation provided for free legal advice to couples in order to present their amparos. Thousands of requests arrived to the organization. The Federation built a network with different lawyers across the country that wanted to volunteer their services. The demand was overwhelming. The Federation was not trying to judicialize all the marriage celebrations. They intelligently used this tool to pressure and persuade the Congress. They were aiming for a new marriage law. However, the way to get married was not easy for any of these cases. There were several deliberations with

---

31 Freyre Alejandro C/ GCBA S/Amparo (Art. 14 CCABA), Exp 34292 / 0
32 Bernath Damien Ariel y otros C/GCBA S/Amparo (Art. 14 CCABA), Exp 36117/0
33 Castillo, Norma Edith y otros C/GCBA S/Amparo (Art. 14 CCABA)
34 Canevaro, Martin y otro C/GCBA S/Amparo (Art. 14 CCABA), Exp 36410/0
respect to the validity of those marriages. In fact, some of those invalid requests were channeled through the courts.

Going back to the second group of those three *amparos*, I overview one of the most symbolic cases for the social mobilization goals: the case of Alex Freyre and José María Di Bello.\(^\text{35}\) This case has some interesting characteristics. They are activists from AIDS Buenos Aires Foundation and Argentine Red Cross and Positive Effect, respectively. Moreover, they live with HIV-AIDS. As with all the other couples, they went to the civil registration office asking for a date on April 22, 2009 and it was denied. A month later they sued against the City of Buenos Aires (an *amparo*). The judge, Gabriela Seijas (Tribunal Number 15 on Contentious-Administrative) ruled in favor of the claimants. She declared the unconstitutionality of the Civil Code articles (172 and 188).

The City of Buenos Aires did not appeal. Thus, *res judicata* gave them a vested right to get married. According to the judge’s order, they were going to get married on April 1. That date was selected as a political statement since is the international day of the struggle against AIDS and any kind of discrimination. However, a week later the lawyer Francisco Roggero demanded a preliminary injunction to nullify Seijas’ judgment with the legal representation of the Catholic Lawyers Corporation. The judge of the National Civil Tribunal (Number 85), María Marta Gómez Alsina, ruled in favor of Roggero’s claim and suspended the marriage celebration.\(^\text{36}\) Roggero stated that the LGBT community was looking for tenacious judges at hand in bringing the cases to the administrative jurisdiction.

\(^{35}\) Freyre Alejandro C/ GCBA S/Amparo (Art. 14 CCABA), Exp 34292 / 0

\(^{36}\) From the legal point of view, this legal action was highly questioned because the person who promoted was not part of the relationship. He was a third party whose rights or interests were not being infringed.
The arguments of this court decision were that judge Seijas did not have either jurisdiction or competence on subjects ruled by the Civil Code. Indeed, the former demands for getting married in the civil jurisdiction were dismissed. The National Chamber ratified the previous verdict on December 1, 2009. As a consequence, the official of the civil registration office followed the prior mentioned civil judgments and decided not to celebrate the marriage. In this way, having two contradictory sentences, the General Attorney of the City made a presentation to the Supreme Court. That presentation was turned down.

Given these circumstances, the Federation looked for a province in which it was possible to observe the judicial decision. The Governor of Tierra del Fuego, Fabiana Ríos, had always expressed her approval of same-sex marriage and assented to support the Federation strategy. Thus, the Federation along with the INADI organized everything in absolute secret to travel to Ushuaia, Tierra del Fuego and make possible the celebration of the marriage. Alex and José María went to Ushuaia and stayed there for two weeks. They changed their legal address. Therefore, after being rejected by a civil registration office of that province they filed an administrative complaint. Finally, the governor, Fabiana Ríos, authorized the celebration of the marriage following the Seijas’ judicial decision and endorsing the law proposal of same-sex marriage. Alex and José María finally got married on December 28, 2009. That marriage was the first same-sex marriage in Latin America.37

37 From a legal standpoint, the validity of the marriage was highly contested. The ruling of Judge Seijas did not oblige Governor Fabiana Ríos, because her court rules within a different jurisdiction. Also, the change of the legal residence did not respond to an actual event but only for the purpose of the marriage celebration.
E. The LGBT Movement beyond the Courts. The Time for a Legislative Agenda: Equal Marriage Reform

Those cases had huge media impact and provoked debates in the whole society. The debate was across all kinds of TV shows: political programs, interview programs, talk shows, gossip shows, and recreational programs. The same was happening on the radio and on social networks like Facebook and Twitter. The stories occupied the front-page of newspapers, and the news websites had a special tab with the label “gay marriage.” It was an issue not only discussed in academia and among interested people, but also at every kitchen table and coffee shop in Argentina.

The issue was finally on top of the public opinion’s agenda. At that moment, Vilma Ibarra—the House Representative from the Encounter for Democracy and Equality Party and President of the General Legislation Commission—jointly with Juliana Di Tullio—from the Peronist Party and President of the Family, Women, Children and Adolescence Commission of the House of Representatives—put the issue on the list of items to debate in the plenary, on October 29, 2009. That decision was taken between Ibarra, Di Tullio, Augsburger and María Rachid, taking into account the momentum generated by court decisions and waiting for the right moment to do it. The Plenary Commission was expected to discuss two projects: one introduced by Ibarra in 2008 and the other drafted by Silvia Augsburger. That was the first time that the Congress dealt with a taboo topic for governmental institutions.

The Federation did an important work insisting to every representative to attend the commission session. On October 29, 2009, the Plenary Commission reached the quorum and debated the projects. There were several speakers. Representatives Augsburger and Ibarra
explained and defend their initiatives as well as the president of the INADI. The constitutional law experts Roberto Saba and Andrés Gil Domínguez presented their arguments as well.

Then, the Federation along with the representatives established a list of 20 speakers in favor of and against the drafts. Spaniard activists Antonio Poveda and Pedro Zerolo, the constitutional law experts Roberto Gargarella and José Miguel Onaindia, the journalist Osvaldo Bazán, the psychiatrist Alfredo Grande, and the president of the CHA Cesar Cigliutti spoke in favor of the initiative. The CHA expressed its support of the same-sex marriage project after the failure of the civil union as an LGBT community proposal. After two intense days of debate, it was believed that there were real possibilities to obtain a commission ruling in order to discuss the drafts on the floor. However, the Civic Union Radical (U.C.R.) and Front for the Victory (F.P.V.) did not give quorum. The explanation seems to be the President’s impending visit to the Pope scheduled for two days after.

With the June 2009 legislative elections, the composition of the Chamber was going to change to having a more conservative presence. Thus, the chances of debating the project and obtaining the necessary votes to approve the law by the House of Representatives were very low. At the beginning of the congressional sessions in March 2010, the Federation called a press conference in which it asked for support for the same-sex marriage drafts in order to extend the recognized rights to some couples through the courts to all the LGBT community across the country. The key actors of the House of Representatives were at that conference.

After these demonstrations, Ibarra, the president of the General Legislation Commission, and Claudia Rucci, the new president of Family, Women, Childhood, and Adolescence, called for a plenary commission session on March 25, 2010. Once more, Ibarra and Augsburger

38 The FPV is a Peronist Party coalition
presented their drafts for deliberation. For a second time, the same speakers of 2009 expressed their opinions. In addition, the new president of INADI, Claudio Morgado, and the judge of the first favorable decision, Gabriela Seijas, presented their arguments.

The sessions in the commission were an excellent picture of the situation. The room was divided in two. In one area of the room were the flags and signs of the LGBT movement with words and phrases like “equality,” “the same rights with the same names.” On the other side of the room, signs with drawings of families and the words “I want a mom and dad.” The respect and civility of the attendants were admirable. In that room the two groups were tolerant, although they were clearly uncomfortable with each other. In any case, and especially remembering Argentina’s virulent history, it was a civic and democratic celebration. On April 15, 2010 the Plenary Commission signed a ruling of the majority giving the green light to the draft to be discussed on the floor. There was also a ruling of the minority proposing a new concept of “family union.”

The general session at the House of Representatives was scheduled on April 28, 2010. The agenda of the debate established other previous issues to the deliberate before the civil marriage law modification. This complicated the strategy, as there were politically conflictive issues that the Peronist Party wanted to avoid. The same-sex marriage issue, although originated in Congress by some independents and socialists representatives, got an important backing and support from the Government (from the Peronist Party) and its legislators. But due to those other issues that were supposed to be treated before, the Peronist bloc and its allies did not give a quorum to deliberate. Although their strategy was disrupted and divided by this political fight, the Federation vigorously called on its supporters to not make this situation helpful to the opposition.
Finally, a special session to discuss the drafts was called. On May 4, 2010, the House of Representatives approved the law. The session started at 2:30 pm and lasted over twelve hours without interruptions. In a remarkable day for Congress, there were 240 interventions and the final vote ended with 126 in favor of the same-sex marriage, 114 against it, and only four abstentions. It was a very civilized debate in which respect and tolerance marked the debate and deliberations.

After this accomplishment, the Federation started to lobby the senators in order to persuade them to vote the law. The Senate presents different features from the House of Representatives. There are fewer people (72), and thus it is easier to get in touch with them personally. In addition, they are more visible and known. In the Senate it is more common to find prominent political figures. These characteristics make it easier to make them socially accountable. In fact, the constituency identifies more easily with its senators and that is not true about its representatives in the House, where there are 257 people. Moreover, the Senate is far more conservative than the House. Senators represent the local states’ constituencies that are much more traditional and religious than the constituency of the City of Buenos Aires and its surroundings.

At the same time, the opponents of the Civil Law modification intensified their activism and demonstrations against the law proposal. The Catholic Church had some severe statements against the LGBT community and the people who support its struggle.

The strategy of the LGBT movement incorporated a new language at this point. With the support of a good part of the media, artists and progressive intellectuals, they started to name the law: “Equal Marriage Law.” This proved to be a smart strategy that increased the positive impact of the issue in the society. Therefore, the pressure on the senators was even bigger.
In this scenario, the general legislation commission chaired by Senator Liliana Negre de Alonso (Federal Peronist) and one of the most prominent opponents to the marriage draft law decided upon the House of Representatives report of the majority. In the commission, that report did not reach the enough votes and it became the report of the minority. In addition, the commission signed a Senate report of the majority proposing a civil union law. This draft did not include the right of adoption and prohibited assisted fertilization techniques.

In all fairness, Senator Negre de Alonso, as president of the commission, did a good job. She not only called on the main figures in this topic in the City of Buenos Aires, but also went with other members of the Senate to several provinces and opened the debate to the different voices: experts, academics, social key players, and activists.

The floor session was set for July 14, 2010. A few days before that date, the archbishop of Buenos Aires sent a public letter in which he considered among other statements that the same-sex marriage law was a “pretension to destroy God’s plan.” The night before the Senate’s session there was a huge demonstration called by the Catholic and Evangelic churches in favor of heterosexual marriage.

That Senate deliberation was opened by Senator Negre de Alonso. She showed a ten minute video that briefed one hundred hours of debate organized in nine provinces. The session lasted more than thirteen hours. The debate was closed and only a few political figures were able to be on the floor as an audience. The media and other guests were in a special room. The debate was passionate, but polite. Likewise, there were several moments of strong tension. The uncertainty of the outcomes was present until the end. It was thought that Senator José Pampuro, the provisional president of the Senate, was going to break the deadlock. The difference of the

39 A dissident Peronist bloc, that broke with the Peronist Party
voting in favor of the law was a surprise. Finally, on July 15, 2010, the Senate passed the law with 30 votes in favor, 27 against and three abstentions.

Argentina is the first country in Latin America that has passed a marriage law for everyone. The new law modified several articles of the Civil Code, replacing the words “husband” and “wife” with “contracting parties” - a neutral word - recognizing the same rights to same-sex marriages.

There have been several criticisms of the law, including those from people in favor of same-sex marriage. It would have been a great moment to pass a law that contemplates all the aspects of this legal advancement and also modified also old existent concepts in the civil marriage. Moreover, the words mother, grandmother, and grandmother have been totally erased from the law. There were some interesting contributions from well-known scholars but none of them were taken into account. The fact is that from the LGBT activist point of view and the perspective of the proponents of the law, they just wanted to assure passing the new law. They believed that adding changes or improvements to the draft would have risked its approval. The priority was to seize the opportunity.

Six days after the approval of the law - July 21, 2010 - the president signed the law in an insightful ceremony. Activists of the LGBT community, human rights groups, artists, the author of the project, political figures that support the project, among others attended the ceremony. President Fernandez de Kirchner said: “I am proud to say that today; we are a society more equal than last week.”

After that great accomplishment, the activists were extremely happy, but they are not resting. They followed up on the enforcement of the law, understanding that that task is important. A long list of new same-sex marriages started to take place on July 30, 2010. The first
couple got married that day at 7:45 am in Santiago del Estero. Later, Alejendro Vanelli and Ernesto Larresse who presented the second amparo three years earlier celebrated their marriage in the City of Buenos Aires, after 34 years of living together. On July 31, Martín Peretti Scioli and Oscar Eduardo Marvich, who had brought the third amparo, also got married in Santa Fe. On the same date, two Chileans celebrated their marriage in Mendoza where they have been living for 14 years. They have been together as a couple for 22 years. Two women married in Rio Gallegos, Santa Cruz, among a significant number of other partners. It was expected that at least 200 couples would marry during those weeks. All of this happened in a remarkable environment of respect from all the Argentine society. This would have been unthinkable only a few years ago.
Chapter 6: The Use of Courts by Indigenous Peoples

A. Organization and Mobilization Background:

In the past, the lack of data about the indigenous population showed the state public policy of invisibility and indifference regarding this minority as well as the lack of organization and mobilization of this disadvantaged group. The process of recognizing and setting this issue forth on the public agenda was a goal reached by the indigenous movement. The first legal advances in the 1980s and especially in the 1990s are in part effects of the indigenous legal mobilization.¹

The Argentine people’s capacity for gathering and joining forces is impressive. The outcome of this energy is the significant number of organizations that work for indigenous rights. However, the level of organization of indigenous social mobilization as well as the level of its impact varies. Very few of them have enough resources (money, people, knowledge, tools, etc.) to become known and influential. Additionally, it should be said that within the indigenous movement there is an important level of conflict and fragmentation. In this way, with regards to the negotiating position with the State there are groups with radical and irreconcilable ideas and, on the other hand, the ones that want to cooperate looking for an agreed solution. This situation prevents the movement from showing itself as a unified and powerful player.²

In this chapter I briefly examine the map of the main indigenous organizations in Argentina. The description about the organizations studied below derives from the available information on the Internet, books, journals, media, and interviews done. In this concise synopsis, the more developed and structured analysis will be about the organizations that have

¹ http://lanic.utexas.edu/project/laoap/claspo/dt/0004.pdf (accessed January 7 2011)
² Ramírez, La Guerra Silenciosa, 46.
been involved in the lawsuits studied in this dissertation. There are different types of organizations. According to their characteristics some of those advocacy groups are organized by indigenous people themselves. With respect to this group, I analyze just the ones that are particularly related to the cases of this research.\(^3\) Something interesting to emphasize is that in these groups, the Catholic Church has a significant role. Within this first group, we find the Mapuche Neuquén Confederation (Confederación Mapuche Neuquina: CMN).\(^4\) In June 1970, in a meeting organized by the bishopric, 30 representatives of different Mapuche communities created this organization. The original representatives of each native Mapuche community constitute the Confederation. This is how the Mapuches had organized themselves as the people of Mapuches. The Confederation represents the Mapuche people of Neuquén province before governmental institutions, and it is among the oldest of these types of organizations of the province.

The formal location is at the Capital of the province of Neuquén. The members of the Confederation are the communities. Since 2008 the Confederation has five-sub division according to the geographic location because the communities are scattered along the territory.

---

\(^3\) There are other examples of advocacy groups formed by indigenous people like the following: See: http://www.coaj.org.ar/ (accessed June 3 2010)
1) The Council of the Indigenous Organizations of the Jujuy Province (Consejo de Organizaciones Aborígenes de la Provincia de Jujuy). The descendants and members of the Kolla community from Jujuy created this organization in 1989. Later the Guarani, Ochoayas, Quechua, Omaquaca, and Atacama joined the organization. The COAJ has an executive commission that runs the association; the general coordinator is the legal representative. The general assembly gathers the representatives of each community and meets periodically. The association has been growing and recruiting new members, organizing the first and second congress of the indigenous communities of Jujuy. More than two hundred communities were represented in the 2002 meeting.

\(^4\) http://www.confederacionmapuce.com.ar/ The website of the Confederation is complete and updated. There is a possibility to contact them by email but I contacted them and nobody responds.
The sub-divisions are south, north, center, Aluminé and Confluencia zones. Every sub-division has its own Council. Each Council may designate two representatives for the Board of Directors of the Indigenous Confederation. The communities belong to the sub-division that corresponds to them geographically. The Councils establish the economic strategy along with the Board of Directors of the Confederation, manage the budget stated by the Confederation -given by the government, - administer indigenous justice, and distribute the social and welfare plans of the government. With that structure, the diverse demands find an easy and quick way to be attended to.

The goals of this organization are: the conservation of their natural resources, the transmission of their culture, the defense and enforcement of their property rights, participation rights, and other rights recognized in the Argentine Constitution, and the strengthening of their Mapuche institutions. The Confederation has formulated several strategies, working along with other groups and developing a synergy between them to strengthen the indigenous mobilization. For instance, the Azkintuwe and 8300 are organizations of independent media with websites, online and paper newspapers, and radios located principally in Chile and Argentina respectively. In the same line, the National University of Comahue and the Cooperative of Electricity created a local radio station in 1987.

In March 2009, the Confederation, along with other human rights organizations, scholars and professionals from different disciplines, and activists, instituted the Observatory of Human Rights of Indigenous People (Observatorio de Derechos Humanos de Pueblos Indígenas: ODPHI). The ODPHI is an NGO that focuses on the legal aspects of the mobilization aiming to sue for the enforcement of the indigenous rights at the local, national, and international level. The ODPHI has different areas: the guarantee and exercise of rights, training, diffusion, and
research. The organization has an honorary board and their members are important personalities of the human rights movement. Lawyers who were working with the Confederation, and institutionalized their work through the constitution of the NGO, form the staff of the ODPHI. As in the past, they serve as the Confederation’s legal team. Today, the NGO counts with seven lawyers who are the defenders of the indigenous in almost twenty criminal cases at the local Supreme Court of Neuquén. The ODPHI receives funds from international donors as well as from the INAI program for access to justice. However, according to the Director of the organization the financial support of the INAI is not enough. The Mapuche mobilization has evolved and became stronger in the last fifteen years, achieving more visibility for the indigenous people and their claims.

The second advocacy group that I mention here is the National Work Team of Aboriginal Pastoral (Equipo Nacional de la Pastoral Aborigen: ENDEPA). After several ecumenical meetings promoted by the Catholic Church, the ENDEPA was created in 1984. The ENDEPA, with its sub-organizations (EMIPA, EDIPAM, and others), is an organization that works with indigenous communities.

The ENDEPA has thirteen diocesan teams in ten provinces and sixty local teams. The organization has a strong presence of indigenous and catholic people. However, there are numerous non-indigenous people and laypersons. For that reason, today the organization is

---

5 Juan Manuel Salgado (Director of Observatory of Human Rights of Indigenous People - Observatorio de Derechos Humanos de Pueblos Indígenas: ODPHI-, Activist, Scholar of the University of Comahue, Lawyer), Personal Interview, February 22, 2011.
6 See: http://www.endepa.org.ar/ The website of the ENDEPA is complete but the information is not updated. There is a possibility to contact them by email but I contacted them and nobody answers.
secular. Even so, some authorities of the organization are still catholic people. However, the coordinators are laypersons.

The structure of the organization is the following: a national assembly, a regional assembly, a national coordinator, and a regional coordinator. The National Assembly meets every three years to establish the general goals and the person who runs the association. The regional assembly meets every year, both in the north and in the south of the country. The national coordinator —located in the province of Formosa— is in charge of the legal representation and the management of the association along with the regional coordinators. The regional coordinators are located at the northwest, the northeast, and the South. Below the umbrella of the ENDEPA have grown others organizations such as Misiones Work Team of Aboriginal Pastoral (Equipo Misiones de Pastoral Aborígen; EMiPA), and Mendoza Work Team of Aboriginal Pastoral (ENDIPAM).

The organization looks for the promotion and defense of the following values: respect for the earth, diversity, dignity, protagonist participation, and solidarity. Although the organization is secular, one of the values is the promotion of the gospel. They have strong grassroots work. The laypersons and the priests have strong ties to indigenous communities. They know the field and the people, and the indigenous people trust them. In many cases they provide or find the legal advice or representation for the indigenous’ complaints and defenses. For instance: the lawyer who represents the community of Pilagás of El Descanso -Formosa-, Roxana Silva, is an ENDEPA’s member. The EDIPAM works continuously with the Huarpe communities in Mendoza and stays with them in their struggle.
Then, there is another group of organizations. This group is formed by the non-profit organizations, which help, advice, and sometimes represent the indigenous people, but the organizations themselves are not part of the community. In this group the associations combine strategies of activism in trying to achieve their policy goals and the production of knowledge (research). For instance, the NGO called Legal Advisor to Have Access to the Land (Grupo de Acceso Jurídico a la Tierra: GAJAT). GAJAT is one of the institutes of the Center for Public Policies of the Socialist Party (CEPPAS), and was established in 2003 by a group of lawyers committed to work with indigenous rights. This non-profit association, among other activities, has emphasized the lawyering aspects with some projects. One example of them is the “Peasants

---

7 Examples: 1) The Center for Human Rights and Environment (Centro de Derechos Humanos y Ambiente: CEDHA): This NGO was created in 1999 and it is located in Cordoba, Argentina. Its main objective is to build a harmonious relationship between human beings and their environment. The CEDHA fosters the creation of an inclusive public policy that promotes socially inclusive and environmentally sustainable development, through community participation, public interest litigation, strengthening democratic institutions, and the capacity building of key actors. The organization occasionally examines indigenous rights when are involved in environment issues. 2) International Work Group for Indigenous Affairs: IWGIA. IWGIA is an independent international membership organization staffed by specialists and advisers on indigenous affairs. It supports indigenous peoples' struggle for human rights, self-determination, rights to territory, control of land and resources, cultural integrity, and the right to development. Networking and information dissemination is maintained with indigenous organizations all over the world. In Latin America, they support several project activities in Peru, Colombia, Bolivia, Venezuela and Chile. In Argentina, they works with the Lhaka Honhat organization of the Chaco region in Salta, which groups together Wichi, Toba and Chorote communities who are demanding the titling of their ancestral lands. Through an agreement with the Centre for Legal and Social Studies, IWGIA also funds support for indigenous demands against the Argentine state at the Inter-American Commission for Human Rights. 3) Lawyers from the Argentine Northeast in Human Rights and Social Studies (Abogados y Abogadas del Noroeste Argentino en Derechos Humanos y Estudios Sociales: ANDHES). In 2001 some lawyers that had been advocating together when they were students, founded the ANDHES. They have two offices – one in Tucuman and the other in Jujuy. Among other topics (gender, democracy, and security), the organization works on indigenous rights. They have different approaches to influence the political agenda: bringing cases to the courts, lobbying in the legislative and the executive power, and joining forces with other NGOs. See: http://www.andhes.org.ar/

8 See: http://www.ceppas.org/gajat/ and interview with Patricia Bryun.
Legal Promoters” project, which aims to empower the indigenous communities in the defense of their rights.

Additionally, in this second group there are other NGOs that just produce research. One good example is Indigenous Law Lawyers Association (Asociación de Abogado/as de Derecho Indígena: AADI), created in 2008 and composed of lawyers specialized in indigenous law who work on these topics across the country. The main objective of the association is to build a network among those lawyers to support each other, and exchange experiences and knowledge. In fact, the organization has members in almost all the regions of the country (south, northeast, northwest, and center). Some of those lawyers have worked advising and representing the communities. Others are scholars who do research and teach in national public and private universities.

---

9) Commission of Indigenous Jurists of the Republic of Argentina (Comisión de Juristas Indígenas en la República Argentina -Pers. Jurid. Resol. 1344/99 IGJ-): It was established in 2006. It seeks for the spread, defense and development of the indigenous rights. Its current president and founder was the first indigenous (kolla) lawyer, Eulogio Frites. 2) See: http://www.elequeco.com.ar/: Grupo Fogon Andino: In 2000, professionals and students from anthropology, sociology and law created this interdisciplinary group. They have founded a journal, “El Equeco”. The journal aims to socialize the indigenous problems and to be an instrument of interaction between them, working as a network. 3) See: http://www.alertanet.org/relaju.html Latin American Network of Legal Anthropology (Red Latinoamericana de Antropología Jurídica: RELAJU). This academic association gathers anthropologists, sociologists, lawyers and scholarly experts on Latin American topics interested in studying legal pluralism in countries with the presence of indigenous people and ethnic minorities. The association aims to build a network of knowledge and experience. Other associations: the Movement of Professionals for the People (Movimiento de Profesionales para los Pueblos: MPP). Lawyers which goal is to legally support the social demands of social movements constitute it.

10) See: http://www.derechosindigenas.org.ar/
Also, there is a specialized media with a clear editorial ideology. The most relevant group is the Indymedia.\textsuperscript{11} It is a collective of independent media organizations and hundreds of journalists offering grassroots, non-corporate coverage. Each independent media center (IMC) is an autonomous group that has its own mission statement, manages its own finances and makes its own decisions through its own processes. Anyone may participate in Indymedia organizing and anyone may post to the Indymedia newswires. Most, if not all, local IMCs, have explicit policies to strongly deter reporters from participating in direct actions while reporting for Indymedia. The Argentine Indymedia started covering a protest against the Free Trade Agreement of the Americas (FTAA). One of the main and most important topics covered by them is the “original people.”\textsuperscript{12}

B. Common Features of the Indigenous Mobilization to Point Out

In general, the indigenous legal mobilization presents some common features. They advocate for the enforcement of the rights recognized in the National Constitution and international treaties, which are the full enjoyment of their legal status and their communal property rights, understanding their special relationship with the land. And as a consequence of their collective ownership, the right of previous consultation and participation on the potential activities that affect the territory.

\textsuperscript{11} The Indymedia was established in 1999 to provide grassroots coverage of the World Trade Organization (WTO) protests in Seattle. Many Indymedia organizers and people who post to the Indymedia newswires are supporters of the “anti-globalization” movement. No corporation owns Indymedia and no government manages the organization. Its activities are funded through small donations from ordinary people. For more information see: http://argentina.indymedia.org/features/pueblos/

\textsuperscript{12} The way they name indigenous people.
Moreover, the majority of indigenous population lives in poverty, belongs to a lower social class -from the western perspective-, and is illiterate. They usually are invisible to the rest of the society. It does not mean to stereotype the indigenous people but draw the general features of this disadvantaged group. One of the evident examples of this heartbreaking reality is the death of Javier Chocobar, a Diaguita of Chuschagasta in Tucumán in 2009. The man was killed while four other members of the community were injured, including a child. The indigenous were defending the territories they occupy. A landowner and their "white guard" gunmen opened the fire on these people. The police report mentions “a revolt.” In the same way, the main newspaper of this province mentions that fact in its police news section in this way: "A man died and at least four others were injured last night after a violent dispute in Chuscha, North of the province." Other headlines were "a riot among gangs" or "territorial fights." In February 2009, the Court of Appeals declared void a resolution ordering pre-trial detention of the two guards for lack of evidence. This led to the accused being released, and the death of this Diaguita happened unnoticed. With other similar types of deaths that happened to middle class people the same thing has not occurred.\textsuperscript{13} Similar facts occurred in Formosa in November 2010.\textsuperscript{14}

Additionally, and though, in many cases and through the years they have learned about their rights, they often need to outsource legal advice, representation and so on. Furthermore, along the years they have also become skilled at seeing themselves as a transnational movement.

\textsuperscript{13} Carlos Fuentealba was a teacher and union leader and was killed from the back by the local police force in the Province of Neuquen. Mariano Ferreira, a student who was active in the Labor Party, was shot dead in a dispute involving railway workers in Bs. As.

\textsuperscript{14} The Qom were blocking a National Road asking for their lands. When landowners accompanied by the police went there and asked them to leave, the conflict started. Two indigenous and a policeman were killed after the clash between them. In addition to this, there were about ten injured and 29 arrested as a consequence of that episode.
However, the disagreements between them make the indigenous social mobilization malleable, weak and lacking in unity.

**C. The Conflicts and Differences within the Indigenous Movement**

The social mobilization -support structure- behind the indigenous disadvantaged groups and their level of organization varies tremendously. There are several factors to take into account: the geographical region where the population is located, the size of the population of the specific indigenous people, the particular features of the community -nomadic or not-, the resources that they possess (human, capital, and land), the level of cohesion within the communities, how open they are to the support of other organizations, the level of influence from political powers, and their level of self-esteem.

For example, consider the case of the Mapuches. Their level of organization is one of the strongest and its population is considerable. The lands that they occupy are in demand. Their leaders are prepared and ready to challenge any power with strong self-esteem. Moreover, they have built a considerable network with other NGOs, activist lawyers, and scholars. The support structure allows them to continue in the struggle despite adversities. The social mobilization behind those disadvantaged groups’ fights makes them visible.

Quite the opposite is the situation of the communities that live in Formosa, Misiones, and Chaco. They are small, without any kind of resources, and vulnerable to be influenced by political, economic power, or particular interests. In this way, these disadvantaged groups are not used to pulling things together. They are totally invisible. With those dissimilarities and the plentiful necessities they suffer, it is really difficult to achieve a unified and well-built social mobilization that draws a common strategy.
In this way, the claim for communal property brings together diverse types of strong interests among the indigenous and from outside the community. Sometimes, the possibility of grabbing a part of those resources makes them lose the general common objective.

D. The High Profile Legal Cases: the Common Strategy or the Absence of it

The indigenous people, through their associations, have judicialized their conflicts as one of the strategies in order to advance their policy agenda.\(^{15}\) Ramírez explained that there has been a tendency to bring the “difficult cases” to the courts.\(^{16}\)

This practice has gone through diverse stages. This approach of litigation had started before law 26,160 and it increased after the law was passed. However, this strategy—the use of the courts—has not always reached successful outcomes, maybe the contrary. Indeed, today, the counterparties of the indigenous communities—economic groups interested in the lands, and the local states as potential owners—are using the same strategy. In fact, some of the indigenous have mentioned that they are more often the defendants than the plaintiffs.\(^{17}\) Indeed, in 2006 the Special Rapporteur on the situation of human rights of indigenous people at United Nations


\(^{16}\) Ramírez, “Derechos de los pueblos indígenas: protección normativa, reconocimiento constitucional y decisiones judiciales,” 922; Puga, “Intervención Judicial y Nuevos Espacios Públicos. El caso de los cañones de nieve en el Cerro Chapelco y el Pueblo Mapuche.”

\(^{17}\) Silvina Ramírez (Scholar, University of Buenos Aires, Lawyer), Personal Interview, January 28, 2011.
raised concern about the criminalization of the indigenous mobilization throughout Latin America.\textsuperscript{18}

Moreover, the difference in power between the parties is notorious. This is what Galanter called the “have” and “have-nots.” The counter-party usually is either an individual or group who belongs to an upper class (companies, landowners, or foreign people) or the local or national state. In those cases, they are in privileged positions compared to the indigenous people. It is self-evident that the indigenous are the typical “have-nots” and their counter-parties the “haves.” It is difficult to prepare good cases and bring them to the court asking for the enforcement of their rights. The basic architecture of the legal system—-institutions and rules—creates and limits the possibilities for indigenous people of using the system for change, at least as plaintiffs. In general, the pattern shows that judges do not apply the indigenous law either for ignorance or prejudice. There is a systematic discrimination from the judicial power to them. Besides, there is not a specific procedural tool to claim for their property rights. Although, the \textit{amparo} seems suitable for that it has not work very well in local courts.\textsuperscript{19} The fact is that the law gives huge discretionarily to the judge to accept or decline the \textit{amparo}. Therefore, judges often reject this procedural tool arguing that the lawsuits do not fulfill the requirements of the \textit{amparo}.\textsuperscript{20}

\textsuperscript{18} Dario Aranda, \textit{Argentina Originaria, Genocidios, Saqueos y Resistencias} (Buenos Aires: La Vaca, 2010), 15.
\textsuperscript{19} Julio García, “Pueblo Originarios y Acceso a la Justicia,” in Aldo Etchegoyen, \textit{Pueblos Originarios y Acceso a la Justicia} (Buenos Aires: El Mono Armado, 2010); Juan Manuel Salgado, Personal interview (February 22, 2011).
\textsuperscript{20} The \textit{amparo} tool requires that the act or omission which infringes the constitutional rights is current or imminent, and may damage, limit, modify or threaten constitutional rights in an explicit arbitrary or illegal way.
To think of using the courts as strategy, not only economic resources are necessary, but also human resources having that specific knowledge. Very few lawyers work on indigenous rights and to know the law well is not enough. In these cases, it is fundamental to be familiar with the indigenous fieldwork and grassroots. Thus, even if they have developed the expertise of being in court –in their case as defendants, -they are still in an unequal and disadvantaged position. Therefore, according to those facts, some indigenous groups have decided to use criminalization as a strategy. They are brought to a court for being implicated in criminal cases and there they take “advantage” of this situation arguing and informing the judges about their rights. I return to this issue in the following item.

To bring a lawsuit to the court -claiming for their rights, - to keep on during the whole process, to prepare a “good case” and being successful requires resources -what Epp calls a support structure and considers to be essential to the “rights revolution.” In this way, the indigenous support structure –social mobilization- using the criminalization strategy has increased the rate of litigation and its nature. However, it has not been fully successful in accomplishing the rights revolution in Epp’s terms.

First of all, I mention here two relevant and interesting cases taken to the Supreme Court. These cases put the issue on the political agenda and were captured by the media. Those cases made the indigenous communities more visible. Nevertheless, the Supreme Court denied its jurisdiction to decide on the problems raised by the lawsuits but either ordered to the local supreme courts to do it or exhorted the executives to solve some extreme situations.

Sometimes, the problem with litigation is the Judicial Power’s organization. The structure of the Argentine courts has different levels (provincial and federal). This sometimes makes the situation more complex. Morover, since the Supreme Court has not decided the final
interpretation and application of the Constitution there is not a uniform version to solve the court cases that bind the lower courts. Anyway, the argentine constitutional system, as I mentioned in Chapter 3, does not apply the case precedents. On the top of it, judges are not always familiar and receptive to indigenous issues.

The article 75 section 17 of the Constitution recognizes several rights, for instance: the right to a bilingual and intercultural education, the right to preserve their identity, the right to participate in the decisions about natural resources and other interests which involve them, and the possession of and property rights over the lands traditionally occupied by them. However, most of the cases brought to courts claim for or are related to their possession and property rights.

In this passage I summarize two relevant Supreme Court cases showing the Court’s approach to those issues. The Court has said that there is no federal jurisdiction for indigenous rights. Only in extreme cases it has given place to the provisional measures asked by the claimants.

1. National Supreme Court Cases


   The office of the National Ombudsman brought a lawsuit to the courts against the National State and the province of Chaco. The demand was based on the substandard living conditions in which the Toba community lives. The office demanded the State to grant the fundamental socio-economic rights. Also, the National Ombudsman demanded the State to fulfill the elemental duties of potable water, sanitary conditions and food to live. The lawsuit was based

---

on article 75, section 17, among others (14 bis, 19, and 33) of the National Constitution. In this way, the plaintiff also based its claim on international human treaties like the American Declaration of Rights and Duties of Men (11, 12, and 18), the International Convention of Social, Economic and Cultural Rights, the Convention 169 and national law 23,302, and among others international treaties and constitutional rights.

The Supreme Court decision\(^{22}\) followed its own path and continued playing an important political role in promoting the political dialogue and giving some policy guidelines. The Court, through a provisional measure, urged the National and the State Executive Powers to provide primary necessities to the Tobas. They had to inform the Court about the measures and their implementation plan to improve the human conditions of the Tobas within 30 days. Moreover, the court made the parties -the Executive Power of Chaco, the representatives of Tobas, Mocovi, Wichism, and the Chaqueño Aborigine Institute (Instituto del Aborígen Chaqueño: IDACH)-present themselves at a public hearing at the Supreme Court building to discuss the report presented by the governments.

In July 30, 2010 there was a meeting between the Executive Power of the Province, the Ministry of Social Development representing the National Executive Branch, and the National Ombudsman to analyze the improvement of the human conditions of Toba community. While the outcome was positive overall, there are still extensive issues and areas to improve.\(^{23}\)

b. Association Aborigine Community v. The Province of Salta\(^{24}\)

\(^{22}\) The Court decided on the injunctions, not about the substantive issue.


\(^{24}\) A. 1596. XLI ORIGINARIO – “Asociación de Comunidades Aborígenes Lhaka Honhat c/ Salta, Provincia de y otro s/ acción declarativa de certeza” – CSJN – 27/09/2005
Francisco Pérez acting on his own behalf and on behalf of the representation of the Aborigine Community Association "Lhaka Honhat"\(^{25}\) sued the local State of Salta and the National State in order to declare the unconstitutionality of the provincial law 7,352 regulated by decree 1492/05. That law called for a binding referendum about the decision of entitlements for the indigenous communities to specific lands traditionally occupied by them. The lawsuit sought to stop the referendum and obtain a declaratory judgment on their communal property rights over those lands according to the National Constitution. The Supreme Court rejected the lawsuit, considering that there was not original and exclusive competence of the National Court on those issues. The case should be decided first at local justice. In the next passage I summarize some relevant provincial cases important to this study.

2. Provincial Court Cases

   a. Neuquén

Now, I explain in more detail the legal cases against the Mapuche people of Neuquén and the lawsuits brought by them to courts.\(^{26}\) As I previously mentioned, the framework of the indigenous rights is the constitutional bloc and those rights are directly enforceable. They do not need any regulation to be applicable, However, a local law would make easier their interpretation and application. In Neuquén, not only the judicial power has often denied enforcement of those indigenous rights but also there is no any law or decree that regulates them, as well as the rights acknowledged in the international treaties. In addition to this, in general judges do not apply and ignore the rights recognized in those legal instruments. An example of the State denial and the

---

\(^{25}\) Aborigine Community Association "Lhaka Honhat" is constituted by different communities from diverse ethnic groups: WICHI (Mataco), YOWAJA (Chorote), NIWACLE (Chulupi), KOMLEK (Toba) and TAPY’Y (Tapiete).

\(^{26}\) Substantial information about the cases analyzed in this section has been obtained from the 2009-2010 Annual Report of the Human Rights of Mapuche People in the Neuquén Province.
invisibility of this disadvantaged group for the institutions is the local legislature. The indigenous affairs are not addressed in any of the eleven parliamentary commissions. In the same way, the provincial budget has not provided any significant budget allocation for this ethnic group.

The typical legal cases that involve the indigenous people are related to controversies over land rights, since the ownership rights involve a collective meaning and a special relationship that the indigenous people have with their territory. The indigenous people derive not only the material resources to live but also their identity, culture and spirituality from the communal possession. Their whole life style and worldview includes their relationship with the land. In most of the legal cases, the indigenous are the defendants or accused parties of the trial.

The laws that rule the current eviction procedures, in the Province of Neuquén, authorize judges to order evictions without prior knowledge on the part of the affected parties, who therefore lack a proper defense. These laws were framed over four decades ago, and some of them were even passed during military dictatorships without legislative debate. Today, constitutional guarantees and the subsequent ratification of international treaties seriously question the validity of those statutes; however, they are still governing.

These rules become far more oppressive when applied to indigenous lands and territories because they are the foundation of indigenous peoples’ communal life. First of all, enforcing said rules ignore the protection provided by the treaties with regard to indigenous property rights. Also, that enforcement disregards the different meaning of civil code ownership from the one given by the international treaties and Argentine Constitution that not only cover the issues of physical presence and land use but also rights of way and access, nature conservation, seasonal
pasture, fruit and medicinal herbs picking, religious ceremonies, and other forms of land use traditions.  

Indigenous communities learn about the dispossession order when the police appear in person to execute it. During the last years, the communities of the Catalan, Wiñoy Tayin Raquizum, Puel, Lonko Puran, Tuwun Kupalmeo Maliqueo, Huenctru Trawel Leufu and Currumil have suffered these types of abuse. According to those experiences, the strategy of the Confederation along with the ODHPI has been the criminalization. In this way, the indigenous have been criminalized as victims of unfair evictions and/or as a consequence of a planned usurpation of the lands with the purpose of taking possession, being accused and later claim for their rights alleging the indigenous law. The ODHPI has tried to use courts to contribute with the mobilization, give light to the indigenous problems and point out the enforcement of indigenous law. As the director of the ODHPI Juan Manuel Salgado explains, the judicialization should be used smartly because it may mobilize or demobilize the communities. The community should be involved in the legal cases and the strategy planned together. In the following cases, in which the Mapuches has been involved, the ODHIP has legally represented them.

i. The Kaxipayiñ Community

This community lives in the area currently known as “Loma de la Lata,” in the district of Añelo. For several generations, they lived by their Mapuche cultural traditions, which are based on pasture and livestock breeding. However, during the last military dictatorship, natural gas production facilities were set up in the area, and were later expanded after the privatization of the oil company YPF, during the 1990s.

---

27 Convention No. 169 of International Labor Organization.
28 Juan Manuel Salgado (Director of the ODHPI), Personal Interview, March 1 2011.
In 1998, after a conflict over the construction of a hydrocarbons plant—planned by the national government and several companies—the community achieved an agreement with the provincial government. In a settlement agreement set forth before the Federal Judge of Neuquén by the governor and the community, the province undertook to acknowledge indigenous ownership of part of the claimed land. Nevertheless, that acknowledgment would only happen once the community acquired its legal status as a subject of rights. The fact is that the community was already registered at the INAI as having that legal status. According to Argentine constitutional hierarchy, the Province of Neuquén could not ignore the validity of the community status given by the INAI. However, in 2003, Governor Jorge Sobisch did not pay attention to our legal system and defeated the petition through provincial executive order 1061.

In the same year, 2003, the community filed a complaint in the Local Supreme Court claiming the invalidity of the provincial executive order, and claiming title to their territory. In spite of the simplicity of the case under the light of the rules to be applied, and in spite of the national government’s prior acknowledgment of their possession rights, it took four years to process the case file. The trial of the case ended on December 2007. Ten months later, the case was ready to be decided but, since then, it is awaiting the pronouncement of judgment – despite the original 40-day term fixed to settle the case. In short, regardless of the government promise endorsed in 1998, the Community still lacks official recognition of its ownership rights and has to endure the huge hydrocarbons plant production on its lands without taking participation in any management decisions and without receiving any benefits.
ii. The Paichil Antreao Community²⁹

In 1902 the national government handed over the plot nine to María Paichil and Ignacio Antreao as native settlers. They exercised their possession over that plot according to their customs in a migratory way. Little by little they were being moved by the “whites” who occupied those lands. Today, Villa Langostura and the National Park Nahuel Huapi are located in part of plot nine.

Since the 1990s, the community has mobilized itself. Indeed, in 1993, the city council of Villa Langostura recognized the Mapuches’ presence in the province and their rights over the lands. The mobilization became stronger after the 1994 reform and the Convention 169. They participated actively in the Mapuche Confederation as well as filed a petition for the recognition of its legal status at the INAI. The Institute acknowledged its status with the resolution 003/2007 in 2007.

Today, 25 families constitute the community of Paichil Antreao, located on Belvedere Hill and by the shore of the lake Correntoso, two areas extremely in demand for the real estate business. As of 2005, while the local government delayed the recognition of the community’s legal status, as acknowledged by the INAI, many individuals took advantage of the situation and started to claim the community territory plots.

In all the cases in which the indigenous were accused in criminal jurisdiction -one of them being subject to a prior order of eviction which the community resisted- the community’s prior possession rights were finally acknowledged. However, in civil proceedings for eviction filed against the community regarding land ownership, judges have not applied the suspension

²⁹ For this case also the information was obtained by the already cited Dario Aranda’s book, and the also cited written petition brought to the Inter American Court by Juan Manuel Salgado and Veronica Huilipan.
provisions set forth in National Law 26,160. All these cases are awaiting judgment. All but one: a case which was subject to procedural fraud and triggered one of the greatest legal disputes and scandals of the Province regarding indigenous lands.

In 2006, U.S. citizen William Fisher filed a complaint before the local judge, Mr. Jorge Videla, against the community’s authorities, claiming the restitution of approximately 25 acres to which he alleged to have a property title of ownership since 1983. From the beginning, the judge ignored law 26,160 that mandated the suspension of evictions, the legal cadastre, regularization, titling, and registration of the lands. In fact, the complaint was not sent to its intended addressees – who did not have interest in that lawsuit— but to non-community members. These non-indigenous people were living momentarily in a borrowed house of the community located in a different place than the object of the legal conflict. Then, the plaintiff abandoned the action against the community’s authorities and decided to continue the proceedings against the addressed parties. They did not answer the complaint and did not appear to testify. In 2007, the judge construed that silence meant assent, and ordered the “restitution of possession” to Fisher. This court decision was not appealed.

Later, the dispossession was attempted and failed due to community resistance. From the legal perspective, the community was not able to defend itself for several reasons. First, the community was not notified about the lawsuit and the court decision. Second, it was very difficult to find a lawyer who knows about indigenous rights in Villa La Angostura to bring the complaint into the courts within the brief legal period given by the summary proceedings. There are no attorneys related to the community and with indigenous law knowledge there. Public

30 “Fischer, William Henry c/Antriau, Ernesto y otros/ Interdicto de Recobrar” (Exp. Nº 348, 2006).
defendants have the same problems. Furthermore, the community decision-making process takes more time than those established by the legal deadlines. Once they found a lawyer and took an internal decision, the deadline had expired.

Regardless, the community filed a petition claiming the invalidity of the procedure, as they had never been summoned and Fisher had even abandoned his case against them, since under those circumstances the community was not able to defend itself by explaining that ancestral indigenous possession prevails over the Civil Code, and could not claim the suspension of the eviction orders entered under law 26,160. Moreover, the indigenous people argued that the rules protecting community property are public order provisions and should have been applied by the Court at its own initiative. Additionally, it is complex to make a proper defense of fundamental rights like the indigenous ownership in a summary proceeding.

The judge defeated the community’s petition, stating that the matter was to be settled under private law and saying the petition was filed after the expiration of the two-day term. He not only totally overlooked the indigenous law but also failed to pay attention to who had legal standing to represent the community in that trial. The community appealed against the ruling and was later overruled by the same judge.

The Community filed a complaint before the Inter-American Commission on Human Rights, stating that their rights to judicial protection and to an independent impartial court had been disregarded, while their property rights had been overridden. In addition to this, the summary proceedings with minimum terms prevented them from a proper defense and challenged fundamental rights protecting indigenous peoples’ cultural and territorial integrity. The petition is still pending before the Commission.
On the morning of December 2, 2009, the community was evicted and none of the previous government recognitions (1902, 1993) were considered. Led by the Province’s Secretary of Security, Villa La Angostura’s district attorney, and Mr. Fisher’s attorney-at-law, a special police task force, and a group of civilians hired to that effect, broke into the community land and forced everyone out of their homes, destroying their houses and taking their belongings. With the aid of the city council, they took the evicted parties by truck to a local gym, where they were accommodated.

When officials from the INADI appeared to assess the situation, the provincial police blocked their way. Since then, the same judge that ordered the eviction has instigated new criminal actions, charging the community with resisting the authority, illegal appropriation, and disobedience. On the contrary, the community’s claims have not been investigated and no police officer has been summoned to give an explanation.

In turn, Fisher started construction works on the community’s sacred place for ceremonies. Judge Sommer, from another jurisdiction, but incumbent during January’s court recess, allowed a restraining order intended to protect the indigenous’ land. Fisher has now demanded that Judge Sommer be removed from his office. Above all, he continues to destroy the community’s sacred place, notwithstanding the restraining order. Justice is not holding Mr. Fisher accountable. Even though in all the cases the courts decided that the community members were acquitted or discharged, the district attorney continues instigating criminal actions against them.

iii. The Huenctru Trawel Leufu Community

This community is settled in Cerro León, towards the South of the Province. The community’s legal status was recognized by the INAI in 2008 through resolution 154/08.
Nevertheless, the provincial government has not granted them property title over their territory, which is still recorded as public domain lands in the real estate registry.

In the 1990s the government of Neuquén passed orders 2737/95 and 127/97 to entrust Hydrocarbon Neuquén Corporation (Hidrocarburos del Neuquén S.A.) with the exploration and exploitation of a hydrocarbon area located in part of the community territory without any prior consultation and notification to the community. In 2007, the corporation transferred its rights to Sima Engineering Corporation (Ingenieria Sima S.A.), which in turn assigned its rights to the Eagle Stone Oil Company (Petrolera Piedra del Aguila S.A.). Both transfers were approved by decrees of the Local Executive Power (278/07) and in none of them the Community was previously consulted or given notice about these operations.

In 2007, the Eagle Stone Oil Company tried to gain access to the community’s territory authorized by an official exploration concession. However, the indigenous people denied the company access to their land, stating that their rights of consultation and participation had been overridden. On July 2, 2007 the company filed a complaint against the community’s authorities to prevent them from impeding the exploration with the legal representation of the son of a judge currently sitting in the Local Supreme Court whose law firm’s address is that of another court member’s husband – at that moment Judge of the Court of Appeal. On that very same day, Judge Graciela Blanco issued a preliminary injunction barring any action intended to hinder the company’s activities. The grounds for this decision were not explained, and no one stated the reasons for sustaining a petition that was contrary to the right of prior consultation. The situation highlights the expeditiousness of Judge’s decisions regarding the company’s interests against the

31 “Petrolera Piedra del Aguila c/ Curruhuinca, Victorino y otros s/ Accion de amparo” (N° 43.907/7 – 2nd Civil Court of Cutral Co city).
community’s interests. Since then, and so far, the preliminary injunction is still in force and has been maintained with a large police presence and security people hired by the company and with the acceptance of the Judicial Power.

On September 5, 2007, the Mapuche Confederation appealed the resolution and asked for its right to legal standing on behalf of their people - the community - by invoking the representation that article 12 of Convention 169 of the ILO recognizes to indigenous institutions. Judge Vielma denied the Confederation’s right of acting at the trial. Moreover, the appeal was rejected and the Local Supreme Court, two years later, refused the complaint to the court for formal reasons.\(^\text{32}\)

On February 20, 2008, the defendant and member of the community, Teresa Curruhuinca, asked for the lifting of the preliminary injunction. She argued that in the agreements signed between the local government and the company they admitted that the family of defendants belongs to the indigenous people and recognized the right of prior consultation. Judge Vielma rejected the request because the community was not a party in this case.\(^\text{33}\)

On July 8, 2008 judge Vielma decided in favor of the company, ordering the community not to obstruct oil exploration tasks. Also she held, as the demand had not been against the community but its individual members the indigenous rights do not rule and enforce in this case (giving the choice of applicable law to the company). The decision was appealed but the Court of Appeals sent it back to the judge of first instance to notify "any other occupant." overturning the ruling of the previous judge and returning the court case at the beginning. Although that


\(^{33}\) Motion/ Indecental proceeding (Incidente de medida cautelar: Expediente Nº 329/09).
happened in September 2008, the notifications were made six months later in March 2009. During that time the existing preliminary injunction was still valid.

After the annulment of the court decision, the lawsuit began again, and the Community - already recognized to have legal status by the INAI - answered the demand, appealed the preliminary injunction and recused Judge Blanco who had replaced Judge Vielma. Judge Blanco had dictated the preliminary injunction omitting the community right of prior consultation.

Judge Carina Alvarez, the acting judge, rejected the appeal of the preliminary injunction, arguing that the photocopies needed to form the incident of appeal had been submitted by defendants Rufino Curruhuinca and Juan Carlos Curruhuinca and not by the community. This made no sense. The community had not been able to make photocopies because the case file was not available. The community brought claims before the Court of Appeals and then to the Local Supreme Court. It refused the complaint since it was not a final judgment. After that, they filed an appeal - an extraordinary complaint - to the National Supreme Court. The Local Supreme Court should have decided whether to grant the appeal two months ago.

Meanwhile, Judge Carina Alvarez extended the amount of police officers appointed to serve the company. The police destroyed the community’s assembly hall, burnt the Mapuche flag, ruined the roads, killed livestock, and continued to threaten and mistreat community members, abusing their authority. The government explicitly supports all these abuses. In spite of a ministerial resolution by INAI to the contrary, the Undersecretary of Hydrocarbons stated that the community was “not actually a Mapuche community” and that they were not “recognized by the Province.”

Meanwhile, the Court of Appeals rejected the objection against Judge Blanco failing to consider the international standards of article 8 (1) of the American Convention while their
petition had expressly requested it. Judge Blanco was then asked to continue the trial. Her first action was the acceptance of the answer of the community demand submitted in September 2009. The judge just did it in late February 2010, five months later, despite the "summary" character of the process. Anyway, the trial is not moving. She ordered a new "settlement hearing" instead of asking to substantiate the evidence.

The community decided not to surrender their lands by observing court orders that violate international treaties rules. They acted on this belief, and endured the ongoing aggression of the company’s security personnel and the police. Communal works, such as crop growing and livestock breeding, suffered. Two community vehicles were damaged (one of them was burnt entirely). Communal traditional life was disturbed by the presence of armed personnel and three police posts within the territory. Roads have been widened, vegetation has been cleared, pits have been dug, and water wells have been polluted with judicial authorization.

So far, the main file (No. 43,907/7) has more than 1,000 folios and the preliminary injunction (No. 329 / 9) has another 500, and has remained unsettled for almost three years, through which three judges have heard the case: Mrs. Graciela Blanco, Mrs. Nancy Vielma, and Mrs. Carina Alvarez. The defense has let them know that the indigenous laws rule the case. However, none of these judges’ decisions, neither at the Appellate Court nor the Local Supreme Court, provide for indigenous peoples’ laws or their customary law.

To make matters worse, during all these years the preliminary injunction has been in place depriving the Community of their right to prior consultation. On the other hand, however, company demands were answered expeditiously, even on the same day.

iv. Criminalization
There are over 40 criminal cases instituted against over 200 members of Mapuche communities\(^{34}\) who were trying to advocate for the rights that had been thrown away by the government. This situation evidences that judges have failed to fulfill the only duty that justifies their privileges: to protect the rights of the weakest members of society.

In 2000, the Plácido Puel community’s territory -not recognized by the government- is being used to build the city of Villa Pehuenia. Given that situation, the members of the community fenced in part their traditionally owned and occupied lands. As a result of that action, charges were pressed against them. They were accused of blocking the road –although said road only led to the house of one community member- and they were ordered to remove the fence immediately. The charged parties stated they were exercising their ownership rights. They were acquitted only after their attorney-at-law stated that he was the one who recommended assembling the fence. Had it been a crime, the judge should have summoned the attorney-at-law as the inciter.

Plácido Puel Community is one of the smallest communities in the Province, but has been a frequent target of criminal persecution. In 2002, members of the Lonko Puran Community were charged with illegal appropriation, after they hindered the activities of an oil company operating within their territory. Said company had been granted a concession without prior consultation. Five years later, and after several police interventions, the accused parties were discharged because they had never acted violently or in a threatening manner. One of the judges even highlighted that they were only exercising their rights within their ownership. No

\(^{34}\) Aranda, *Argentina Originaria, Genocidios, Saqueos y Resistencias*. In this book Aranda mentions 32 criminal cases instituted over 150 members of Mapuches.
investigations were conducted on the officials who authorized the works without prior consultation, the company, or the policemen who oppressed the Community.

In 2005, in Villa La Angostura, someone took a group of laborers to carry out some works on the Paichil Antreao Community’s territory. The group was denied access and, after they insisted, there was a confrontation. Four persons suffered minor injuries. Three of them were community members, while the fourth person was one of the hired laborers. All of them reported the fight, but only one community member had to face criminal charges. In 2009, during a public hearing, the defendant offered evidence orally before the judge, but the highest decision making authority did not enter judgment.

In 2005 again in Villa La Angostura, one person claiming to act on behalf of a group of owners tried to fence in part of the land. The community threw him out. Later, carrying out a judicial order, the police evicted the community forcibly. This situation continued for ten days. In 2008, at the end of the lawsuit, all accused parties were acquitted; as it was proven that their possession rights were prior to the arrival of the plaintiff’s group. Violent abuses suffered by the community were never investigated.

In 2007, the oil company denounced the members of the Huenctrup Trawel Leufu Community again for usurpation. After two years of summons and threats, both prosecutors in the first and second instances asked for the acquittal of the affected parties and the judge had to accept it.

b. Mendoza35

---

35 Substantial information for this section was obtained from: Benito Sellito, La Historia Oculta del Pueblo Huarpe: Purificar la Historia Heleleleguy Epiguyamche Maz (Mendoza: ENDEPA, 2010).
i. Huarpes

In this study I also address more in depth the experience of Huarpes which is different from Mapuches. The tools used in their struggle and their achievements vary. Since the 1980s, some people began showing up at the lands where the Huarpes used to live and claimed property rights for themselves over those lands.

The Huarpes are in a terrible social situation. In 1991, the eleven Huarpe communities, the church (a priest who belongs to EDIPAM), the national university, and the City Council started meeting to work on developing a plan to improve the quality of life of the Huanacahe inhabitants. They realized that the first step had to be obtaining the property title over the lands they have traditionally occupied.

One of the outcomes of that plan was the law project of puesteros (herdsmen), law 6086 passed in 1993. Among other objectives the law sought to propel access to land ownership, legitimize legal possession and regularize the property title of the puesteros that could prove its actual possession. It should be clarified that the Huarpes often work as puesteros, so for that reason that law directly concerned them. However, the institution of property established in that

http://www.mdzol.com/mdz/nota/207818-huarpes-reclaman-desagravio-de-jaque-y-denuncian-que-no-hubo-entrega-de-tierras/ (accessed January 19, 2011)
law was the one stated in Civil Code. The law was enacted before the 1994 constitutional reform, which explicitly recognized the indigenous as an ethnic group their communal possession and property rights over the lands traditionally occupied by them.

Once the law was enacted, there were several obstacles in the process; it was only published in the official state gazette (BO) in 1994 and the decree that regulated it passed in 1996, three years later. Moreover, the enforcement of the law was not smooth, but in fact brought several court conflicts. There was an interesting legal case in which the plaintiff claimed his property rights over the land occupied by the *puestero*. The Provincial Supreme Court decision decided in favor of the *puestero*, understanding his possession rights prevailed over the claimant. The law 6086 implemented a registry office of *puesteros*.

The struggle is likely to continue. The constitutional reform brought social legitimization to indigenous people and concrete incentives to continue fighting. Mainly the schools helped to begin raising awareness among children of their identity and dignity as Huarpes as well as with their parents, grandparents, and uncles. The people identified themselves as Huarpes and concluded that their culture was not extinct. In late 1998, the Huarpes started to organize their communities elaborating the statutes, defining the goals, drafting the few lines of the Huarpe history supported by documentation and choosing their Councils. The eleven communities, along with the support of the church, battled for their acknowledgment to their identity and rights. In 1999, the INAI granted the legal status to the indigenous people and their eleven communities.

---

36 Fallo No 163-S.C.J. Mza, Sala I- del 02/02/1993 –Tecnicagua S.A c/ Guine, Gerardo.”
37 Huarpe Community “Guentota” del Puerto, Exp. 3369/97 resolution 679/98
Huarpe Community “Juan Manuel Villegas” de San José, Exp. 10557/98 resolution 3137/99
Huarpe Community “Elias Guaquinchay” del El Retamo, Exp. 4997/99 resolution 3143/99
Huarpe Community “Lagunas del Rosario de Lagunas del Rosario, Exp. 4999/99 resolution 3142/99

183
Moreover, several of the presidents of the communities have been members of the Indigenous Participation Council of the INAI.

Meanwhile, they were preparing a legal project to recognize the communal property of the Huarpes. The project was checked and given approval by the Attorney General of the Province, State Prosecutor’s Office, and the Cabinet of Arturo Lafalla – the governor at that moment. In 1999, Governor Arturo Lafalla introduced into the local deputy chamber the legal project in which the province recognized those rights. At the preliminary session, the Constitutional Affairs Commission raised the necessity of previous surveying and cadastral mapping. Later in 2001, the Minister of Infrastructure, Julio Cobos, and the Mayor of Lavalle, Carlos Masoero, offered AR$60,000 to have the work done. In April 2001, the survey and the study of titles were handed to the presidents of the Huarpe communities.

The same year, the legislature of Mendoza unanimously passed the law 6,920 that acknowledges the pre-existence of the Huarpe Milcallac people and declared subject to expropriation, more than 1.8 million acres to be delivered to the communities. These lands are located in the Department of Gral. Lavalle, located at the northern of Mendoza Province, bordering the province of San Juan.

The law was the outcome of years of debates and investigations involving the participation of numerous scholars, professionals and the members of the communities that

Huarpe Community “Juan Bautista Villegas” de El Cavadito, Exp. 5000/99 resolution 3141/99
Huarpe Community “Josefa Perez” de la Josefa, Exp. 5001/99 resolution 3139/99
Huarpe Community “Secundino Talquenca” de El Retiro, Exp. 5002/99 resolution 3140/99
Huarpe Community “Paula Gaunquinchay” de Asuncion, Exp. 5003/99 resolution 3138/99
Huarpe Community “Jose Andres Diaz” de los Sauces, Exp. 5004/99 resolution 3426/99
Huarpe Community “Santos Guayama” de Lagunitas, Exp. 4998/99 resolution 3427/99
Huarpe Community “Jose Ramon Guaquinchay” de El Forzudo, Exp. 4996/99 resolution 3613/99
demanded time and financial resources. There is a key difference between law 6,086 and 6,920, the second recognized the communal ownership of the lands to the Huarpes. During the meetings and debates, the indigenous had emphasized that feature as essential to their way of exercising the property rights in accordance with the national constitution. Whereas, although no private person ever expressed opposition to laws 6,086 and 6,920 every day the lands were being fenced in.

In October 2001, the State Prosecutor, Pedro Sin, claimed to the provincial Supreme Court the unconstitutionality of law 6,920. He based his allegation on explaining that the expropriation of property without prior compensation and the declaration of the public utility of 1.8 million acres of land that represents three quarters of Lavalle infringe the property rights and the principle of reasonableness respectively (articles 17 and 28 of the National Constitution). At least, this complaint seemed contradictory after all these years of discussion involving all the key players.

Notwithstanding, the communities tried to make themselves visible. They were asking for support through signatures in the city of Mendoza. They got 8,000 signatures, and they ended their demonstration with a protest along San Martin Avenue of the City of Mendoza demanding their rights. As a result, in 2003 the Executive Branch created a Commission of notables to study the indigenous affairs, and if it was the case, to find an alternative solution to the law. This initiative at least seems contradictory since the Executive Power, as the demanded party, “should” defend the enacted law. Moreover, the Huarpes were never invited, in clear violation of the international treaties and the Constitution. In accordance with some statements, the Huarpes would have been invited but they never were involved in the process. Gerardo Vaquer, official
from the Lavalle government, said their participation was useless because there were technical issues that they could not understand.

The final ruling of the Commission was to repeal the law for unconstitutional and go for supplementary titles for each community. Determining the constitutionally or not of a law is not an attribution of an ad hoc commission, this is a faculty of courts. The communities felt that this commission was a legal trap since during that time the legal case was suspended as well as the validity of the law. To contrast, it has been explained along the process of drafting the law that the only way to clean up the problems that would arise from the overlapping titles on more than 2,471,000 acres would be the expropriation of those lands.

The supplementary title solution did not respond in the way the Huarpes understand their relationship with the land. The vision of their property rights is communitarian for all the Huarpe people without division between communities. Additionally, this is the right granted in the National Constitution. Moreover, given the overlapping of registered owners on the same land—situation that must be solved in order to grant a supplementary title—the effective delivery of those titles is almost impossible.

After those circumstances, the legal case followed the regular procedural steps. Among the informative proofs, the City Council of Lavalle reported that there were no studies to determine the ownership of lands by the Huarpes’ Communities.

Once more, the rights of the communities were frustrated and mocked. Over and over again, they protested throughout the City with the church’s support. This time, the priest walked barefoot. In addition to this, the communities sued the Mayor of Lavalle for “ideological falsehood.” The lawsuit was unsuccessful and the Mayor was acquitted.
In the court case proceeding, the province of Mendoza answered the demand calling for a conciliation hearing and requesting the rejection of the action. On the same page, the Huarpe communities through their representatives—the presidents of the communities—responded as a third party intervener. The legal process was fraught with delays and obstacles. It was the community as a third intervener who drove the legal process instead of the interested parties, in this case the executive as a defendant.

The Provincial Supreme Court ruled in 2008 rejecting the unconstitutional declaration of the law. The Court explained that the expropriation procedure always includes compensation. Then, the Court explained that the Executive Power had only observed the first step of that procedure: the declaration of expropriation. In the second step, the Executive must complement the legislative action specifying which of those lands are affected by the expropriation. Compensation is the next step. There is nothing unconstitutional in this statement. Moreover, regarding to the specialist’s testimonies at the court, the extension of the land is according to the activities the Huarpe do for a living. Also, it should be said that these lands are called the desert of Lavalle. Today, they are not suitable for cultivation and their price is very low.

In October 2008, the executive branch, the City Council of Lavalle and only the community of Lagunas del Rosario signed a cooperation agreement to regularize the possession of the land, land use planning and to promote projects of development in the area. This was the trigger that showed how the differences between the communities and the hostilities were made public. These circumstances show the fragility of their union as one of the problems of the indigenous legal mobilization. After that judgment of the Provincial Supreme Court in December 2008, and after almost a decade of prevarication, it seemed that the province would give full compliance with provincial law 6,920.
On April 19, 2010, the Governor Celso Jaque, in the presence of representatives of the Huarpe Milcallac people, signed the decree\(^\text{38}\) that awarded 261,000 acres to the original settlers of the desert Lavallino and initiated the expropriation of 1,600,000 acres of the other part of the territory under the law. The State is the owner of those 261,000 acres. For the remaining 1,600,000 acres subject to expropriation, the executive order has created a fund of more than AR$ 2 million to make the payments of the compensations for individuals who claim property rights over those lands to the courts. In the same way, the enacted decree 2588/09 fulfilled a key action of this complex process of land allocation. This decree made the “call advertising news.” This is the act of writing down the affectation to expropriation by the State on the registration of the property claimed. This is required for the later allocation of the lands to the communities.

Two days later, the 11 communities sent a public note that denounced the government for not having been invited to the announcement. The letter expressed that there was not a historical reparation but discrimination. On October 2010, the president, Eudes Nievas, in representation of his community, “Lagunas del Rosario,” received from the Governor the deed of more than 178,000 acres of land located in that area. This community took that decision after a consultation with its members and by its own determination to receive the deed for those lands, although not abandoning the claim to the lands around the Huarpe Milcallac village. “Lagunas del Rosario” is the biggest and oldest community.

Out of the 249,000 acres awarded in the decree, 188,000 acres are granted in the property deed to the Community “Lagunas del Rosario” in accordance with the measurement. The remaining acres should be delivered to the other corresponding communities. The INAI worked together in the whole process with the province, the municipality and the community. Indeed, the

\(^{38} \text{633/10}\)
INAI signed an agreement to provide the funding for completion of surveying the area to expropriate—1,600,000 acres—that started the City Council of Lavalle in 2001. Notwithstanding, the communities have been always claiming for a unique communal property deed with its corresponding cadastral mapping. This is the essence of their culture. The governmental approach is not consistent with the community’s historical demand.

The rest of the communities asserted that this approach of delivering the lands and their property deeds by parts is a strategy of the Mayor and the local government to not observe the enforcement of the law. They do not trust in the Mayor who did not acknowledge their presence in Lavalle at the court. The communities claim for the enforcement of the law, not for new decrees that ignore that legislation.

According to the statements of the other communities, Eudes Nievas and Daniel Quiroga—the previous president—have been corrupted by gifts and donations bestowed upon them by the Mayor and the Government. Moreover, the other community presidents do not consider them as legitimate representatives. Indeed, currently there are two councils in “Lagunas del Rosario” and the community is divided in two. Eudes Nievas considered the legitimate president by the municipality and Ruben Diaz the other president recognized by the other communities.

On the other hand, Diego Fernandez, the Director of Land Use Planning of the Province, explained that they want to resolve the indigenous problems. However, he confirmed that public lands must be submitted separately from the expropriated ones that involve a more complex process. For him, this is the best, fastest, and easiest approach to observe the law. Furthermore, he said that the inhabitants still do not make up the Advisory Council required by

39 All his statements were obtained from: http://www.diariouno.com.ar/edimpresa/2010/05/09/nota242539.html (accessed January 19 2011)
official decree in order to follow the steps to continue with the procedure of delivering the lands. He recognizes that it is a community that has been battered for years and to which we owe respect.

Eudes Nievas\textsuperscript{40} answered those grievances. He explained that the other communities look bad in relation to the Government. The main problem is the repeated betrayals that the Huarpes have tolerated for several centuries. He is a fighter and he will not sell his identity for “colored mirrors.”

He continues explaining that in order to sign the deed of 179,000 acres; he had to make a subdivision of all claimed lands in order to not enter in conflict with neighboring communities. The property deed is on behalf of the community of Laguna del Rosario and each family will receive a copy of the title. They are in total 172 heads of families, including the elderly and children. Regarding the use of the land, nothing changes. The difference is the power that gives the Huarpes the property deed over others. Now, they can protect their territory against someone who wants to cut down trees or do something in their fields. They do have the legal tools to go to court and claim their rights. Today they are backed by legal norms.

He tells the history of their struggle since 2008, when the community of Laguna del Rosario revoked the power from the attorney and the local priest who managed the land issue because they wanted to build another school. Later, the community asked the City Council to articulate the provision of the property titles and thus began the break with other communities. There were several meetings, but the communities did not arrive to an agreement. Nievas states that his community wants its land but they still support the general claim. The fact is that the

\textsuperscript{40} All his statements were obtained from: http://elsolonline.com/noticias/viewold/56300/laguna-del-rosario--un-pueblo-olvidado-que-se-reivindica (accessed January 19 2011)
process continues but has not concluded. Also, Nievas claims that his community does not oppose to the rights of anyone, and for that reason they get what they ask for. The other representatives of the remaining communities respond to others by telling them what to do.

However, the rest of the communities consider that the government has incurred in a delay in the implementation of the law. They sent a registered letter to the executive branch and the state prosecutor letting them know that the communities would start a criminal case for the breach of public function if the law is not enforced. Today, the communities have sued the executive power claiming the unconstitutionality of the above-mentioned decrees. This is the scenario and at the present time, both the communities and the lands are divided.

E. The Indigenous Movement beyond the Courts. Is there a Legislative Agenda?

The Argentine regulatory plexus that rules and guarantees rights to the indigenous people is quite complete; the problem is their implementation. Those rights are undoubtedly enforceable and should be interpreted and put into effect in the light of human rights. However, the combination of good faith ignorance or purposely overlooking by the legal actors (judges, lawyers, fiscals) of indigenous laws, and the lack of a statute that specifies the implementation of those rights makes them nonexistent in practice.

The issues regarding indigenous people have never been at the center of the legislative agenda. In the National Congress there is great indifference to these topics. It is at the Population and Human Development Commission of the National House of Representatives in which those

---

41 Provincial Supreme Court of Rio Negro, “CODECI s/accion de amparo,” 8/16/2005 (Lexis 35002186); Civil and Commercial Chamber of the Jujuy Province, Sala 1 “Comunidad Aborigen de Quera y Aguas Calientes, pueblo Cochinoca c/ Provincia de Jujuy s/ prescripción adquisitiva,” 9/14/2001.
affairs should be treated. Until 2004, the Commission focused on immigration problems only. However, with María Barbagelata’s presidency of the Commission, the complaints related to indigenous problems started to appear. The representatives began to pay more attention to indigenous affairs since there was a huge list of complaints presented to the Commission particularly during 2004-2005. The increasing number of violent evictions of the indigenous people was alarming. Indeed, the problems of eviction monopolized the agenda. The Commission debated three projects to stop the evictions of the indigenous people. All these projects dealt with evictions and communal property rights. One of the projects proposed an expedited process to grant the property title to indigenous communities. The proposal got great support from the indigenous people but did not obtain the necessary consensus in the Commission.

From 2004 to 2005, the indigenous communities, NGOs, scholars, activist lawyers, and governmental organizations debated those projects, made suggestions, and gave advice on them. The Commission received thousands of supporting letters in favor of those initiatives. To elaborate an agreed upon law project among the different key players was not an easy job. The debate at the Commission took a whole year. On May 23, 2005 the commissions of Population and Human Development, Justice, and General Legislation decided in plenary a ruling in favor of the law project with 31 votes in favor and five against. The law project declared the emergency of indigenous possession and property rights and suspended the evictions for four

---

42 Expte. 3478-D-04 (Maffei and other representatives); Expte. 3951-D-04 (Barbagelata and other representatives); 48-P.E.-04 of National Executive Power.
43 Expte. 3951-D-04
years. That ruling of the commission was not addressed during 2005 and lost parliamentary status. This is the most important precedent of law 26,160.

After more than three years of debate, Congress passed the law 26,160 on November 1, 2006. As I mentioned in Chapter 4, the law 26,160 was not fully observed. Indeed, close to the four year deadline and with the technical and legal cadastre unfinished, the indigenous organizations, and NGOs, which work with the communities, lobbied at the Congress to postpone those deadlines. Lastly, on November 18, 2009 the Congress passed law 26,554 that simply extends the emergency until November 23, 2013.

Nevertheless, those laws have not been solved and neither have the substantial problems relate to the possession and property rights been addressed. It may be said that those laws are the first step. In fact, as several indigenous leaders have said, they already have their rights -they do not need more laws; they need the enforcement of the existing ones. They continue explaining that the national constitution, the international treaties, and in many cases the provincial constitutions already have recognized their rights, but there is no political will either in the executive or judicial branch to enforce them.

In the legislative period from 2008 to 2010 there has been some legislative activity but, once more, the majority of these projects do not refer to substantial issues and in general they never get parliamentary status or expired. The majority of those projects are related to the request to the Executive Branch for reports about the compliance of the law 26,160. Others suggest the creation of a Commission that particularly study and legislate on indigenous affairs. Some of them propose granting constitutional hierarchy to Convention 169. The rest of the projects propose giving some rights to indigenous people such as: an indigenous pension, access to
justice –litigation- without any costs, forming a council for the rights of indigenous women, and so on. Lastly, there are few projects that intend to regulate the communal property rights.45

In 2010, the anniversary of the Argentine bicentenary, the indigenous claims came forth again to be set in the public agenda. Along with the official festivities, including an official indigenous celebration, there were some indigenous non-official demonstrations. In May, the official demonstration consisted of 8,000 indigenous peoples that walked to the Government House. There, they proclaimed their culture and identity, the restitution of ancestral lands, and the creation of a multinational state, but recognized themselves as Argentines. President Cristina Fernandez de Kirchner received them and, as a consequence, the Executive Power issued executive orders -previously mentioned- that created the commission of Analysis and Implementation of the Indigenous Communal Property with the goal of the elaboration of a law project that regulated the issues that concern them.

Other communities did their own protest called the "Other Bicentennial" before the National Congress. There were different grassroots organizations such as environmental groups, community media, and recovered factories. Their aim was not to celebrate but reflect on the colonial policies of the past and the present.

In this same framework, there have been some legislative initiatives in the House of Representatives related to the regulation of the communal property and other issues such as their legal status. Indeed, Silvia Vazquez –a deputy from Buenos Aires- and author of one of those projects achieved through a floor resolution a mandatory plenary meeting of three Commissions (Population and Human Development, General Legislation, and Finance and Budget) to debate about those projects. The plenary meeting showed the most profound and sad divisions within

---

45 See: www.ceppas.org/gajat/ (accessed January 24 2011)
the indigenous movement and the impossibility of reaching a common goal. Moreover, it demonstrated the lack of coordination among the representatives. There were four different projects in parallel analyzing the same topics. Each legislator had his or her own indigenous supporters and agendas. The meeting became a public fight between them.
Chapter 7: Conclusion

The purpose of this research has been to describe and analyze how two disadvantaged groups in Argentina—LGBT individuals and the indigenous people—used law and courts to achieve their policy ends. I began by surveying the literature on legal mobilization and judicialization of politics, and then examined how these two groups in Argentina built their “social structures for legal mobilization” and mounted their legal campaigns for social change. Although there are some important similarities and differences between these groups, both have used the courts to advance their rights. By selecting these two groups as the case studies for this dissertation, I hope to draw a more complete picture of the use of courts and their impact on Argentine society and politics. The impact of the recent efforts of legal mobilization on behalf of LGBT individuals and indigenous people on the national Congress and the media turned out to be different. The result is a fuller understanding of the extent to which courts play a new role in Argentine politics. The case studies developed here indicate that when causes are being advanced in court by groups that enjoy considerable social mobilization, what the literature calls the “support structures for legal mobilization,” they are likely to achieve the objectives that are sought.

Moreover, this study sheds new light on the phenomenon known as the “judicialization of politics,” that is, how ordinary demands for policy change are converted into lawsuits and advanced by groups in courts. Scholars have show how this trend had become a characteristic feature of the law and politics of many countries in the second half of the 20th century.1 Few studies exist in the Argentine literature on the judicialization of politics by the LGBT community.

and they are for the most part journalistic accounts. Indigenous mobilization has been examined from the perspectives of anthropology and history and there are even some studies from a legal perspective. What I have tried to do is different. The aim of this dissertation has been to understand through an interdisciplinary appraisal and the use of empirical analysis how various groups in Argentine society mobilize and turn to courts to accomplish their policy goals. My hope has been that this interdisciplinary approach fills the gap and adds to the existing literature by suggesting some answers to the questions posed here about the features of those groups, what factors make the groups choose the courts, the impact of using the courts, whether social mobilization - support structure - makes any difference on judicial impact, and what “new” roles are thrust upon courts in the policy making process.

A. Final Thoughts about LGBT Mobilization

By observing the experience of the LGBT social mobilization in Argentina, which included lobbying, demonstrations, and particularly the legal cases brought to the courts, several factors compelled them to focus their strategy on the use of courts. The legal changes were not at the core of the LGBT mobilization. Some small legal changes were occasionally accomplished in conjunction with other stronger organizations doing some lobbying. They offered some free legal advice for particular cases, but not strategically. The only successful strategic case was the request for the official authorization of the legal entity status for the Argentine Homosexual Community (CHA). I say “successful” strategic case because the court decision may not have produced the result that was sought, and thus did not create a favorable precedent, but it did place the issue on the public agenda. This was a single isolated case because of the lack of two important factors. They did not have the powerful legal tools and arguments given to the
movement by the 1994 constitutional reform. Second, there was not a strong social mobilization support structure behind those actions. Indeed, at that time the CHA was reconsidering its role due to a low level of participation. As we saw later and with better results, the Association of Struggle for the Liberation of Travesty Identity (ALITT) had a different experience in achieving its legal authorization at the Supreme Court. However, it was also a one-time isolated case disconnected from a broader strategy.

Many factors compelled the LGBT movement to turn to courts as part of its strategic efforts to achieve their policy objectives. They realized the cultural, social, and political changes that a series of legal reforms could bring. The consequences of passing the Civil Union Law expanded to new aspects that were not initially foreseen, exceeded the benefits expected, and went beyond the borders of the City of Buenos Aires. Those circumstances revolutionized the approach of how some organizations had been working, changing their emphasis towards litigation strategies to achieve social, political, and legal reforms. In this fashion, they have also acknowledged that their legal mobilization could count upon strong legal arguments and tools established in the set of constitutional reforms consecrated in 1994.

After the experience at the level of the city of Buenos Aires, they realized how difficult it would be to achieve more advancement if mobilization was not well organized. At the City level it was easier than on a National scale. The legislature of the City of Buenos Aires presented some features that did not exist at the National Congress. There were fewer legislators and the collective body was a political mosaic that was not very well organized and lacking disciplined voting blocs. Additionally, the CHA’s frustrating experience with its national civil union project and other unsuccessful attempts from some legislators were lessons well learned. Therefore,
while lobbying for legal changes proved to be effective at a local level, the conditions were more challenging if the LGBT mobilization wanted to nationalize its struggle.

At that time, the conditions to start well-planned litigation strategy were there, and the social and political climate was more encouraging. The LGBT community did have more legal tools on which to rely based on the reformed Constitution of 1994 and some new Supreme Court rulings. Also, the LGBT movement managed to develop a strong support structure for social mobilization along the lines of what Epp had shown was.² For Epp, the required sources of support consist of rights advocacy lawyers, rights advocacy organizations, sources of financing of various types and governmental rights-enforcement agencies. This support structure permits a widespread, sustained, and successful rights-litigation.

Before the LGBT Federation prepared the ground, various organizations existed but they clearly were not as successful. The support structure for legal mobilization that the LGTB Federation carefully developed is the determinative factor explaining this major achievement of passing the equal marriage law. Some features of the social mobilization confirm this conclusion. First, it is an organization that has encouraged the agreement and the union of forces of all the LGBT groups throughout the country. Second, this is an organization formed by smaller groups, which has contained them and given them a direction, and a sense of purpose. Therefore, it is an organization that truly represents the claims of the LGBT community, and has included people actually affected. Third, most Federation members have an activist background and are well trained for activist initiatives. Indeed, the organization did not need to hire legal advice because the lawyers who took the cases are active members of the group. Fourth, the Federation’s

developed an experience and expertise in litigation needed for later success improving their *amparos* among other tactics and learned from its own practices. Fifth, although the Federation did not have a substantial budget, they wisely took advantage of the INADI and its resources as a springboard to reach its objectives.

Thus, one of my principal findings is that the LGBT movement developed a well-established structure with all types of resources and a particular expertise in litigation. Then, it is an organization that should be considered “repeat players” and a “haves” in the terms suggested by Galanter in his famous study. In the same way, a new reading of Galanter’s analysis that states that the “haves” change its composition and have a new agenda based on social justice and quality of life - issues enjoy the sympathy of educated and professional people-, this organization should be understood also as a “haves.”

The agreement on the strategy between the two most important groups of the LGBT movement came out once the Federation’s strategy started to show some chances of success. In the same way, the CHA did not agree with the close relationship with the INADI. In the end, the organizations stuck together and it worked. The superior and common objective prevailed. This movement clearly showed a capability to organize themselves, even under challenging circumstances. Through a wise use of its own resources and a well-planned strategy, the LGBT movement gained access to the judicial system. The strategy of the legal cases worked very well at comparatively low costs. The arguments introduced in court, even those in cases that turned out to be unsuccessful, helped to place the organization’s issues on the public agenda, highlighting the specific rights at the core of the struggle. However, some conservative legal voices questioned some aspects of the legal process: the forum shopping and the validity of the

---

3 Ian Brodie et al, “Do the “Haves” Still Come out Ahead in Canada?”
court decisions. The LGBT lawyers strategically selected the jurisdiction. This practice is labeled in the legal literature as forum shopping.⁴ Some scholars criticize this practice and others support it. In this particular case, those who criticize the selection of the jurisdiction understand that those judges were not competent to decide about marriage rights. The observation about the validity of the judges’ rulings is directly related to the consideration of the forum shopping as pejorative and unethical practice as well as the misunderstood flexibility of the jurisdiction rules.

It is important to emphasize that the key players of the Federation were dedicated to preparing the cases full time, training the parties, and looking for the most opportune moment and the “right” judges to present the cases. Not only that, they followed up on the court decisions and knew the importance of the media in each of those actions.

In addition, the work of political leaders was coordinated with the forces and strategies of the social movement. The legislators knew how to manage the agenda and cooperate with them despite their different political backgrounds. They agreed that there was a common goal to achieve and left out political differences. Representative Vilma Ibarra took advantage of being the president of the General Legislation Commission to set the issue on the agenda, joining forces with the representatives that had presented initiatives to modify the marriage law before (Di Polina, Sburguer). In general, during the whole process, the politicians and the LGBT social mobilization worked as a cohesive bloc.

⁴ Mary Garvey Algero, “In defense of Forum Shopping: A Realistic View at Selecting Venue,” Nebraska Law Review 78, (1999): 79. For Garvey Algero, forum shopping refers to the act of seeking the most advantageous venue in which to try a case. Forum shopping can take place “horizontally” when a party is shopping for the best venue from among the courts within the same court system. Forum shopping can also take place “vertically” when a party is trying to move from state court to federal court or vice versa.
The efforts of the LGBT mobilization had an important impact on the media. There has been widespread media coverage of this issue, usually appearing on the front pages and in primetime news shows. In the last years, the main TV channels broadcast at prime time their most popular program which involved a gay couple in the story. In general, media coverage was positive and supportive of the initiative of the LGBT movement.

On the other hand, opponents contributed to the success of the LGBT mobilization in several ways. First, the lawsuits brought by them were generally poorly reasoned and without legal grounds from a substantive law perspective and from a procedural standpoint since third party people who were not part of the cases presented them. Second, opponents delayed their activism against the same-sex marriage proposal. They underestimated both the power of the LGBT social mobilization and the intensity of public opinion. In this way, Argentine society showed its high level of secularism. Third, the aggressive discourse of the extreme right wing turned away the “undecided.” There were many people who had initial reservations to same-sex marriage, but they did not agree with the violence of some opponent’s statements. This made them more sympathetic to the LGBT cause. In the process, conservative groups became more skilled at communicating their ideas in more positive and less hostile ways.

With regard to public discourse and public relations, both sides learned from their experiences. In the case of the LGBT mobilization, they used the slogan “the same name, the same rights.” Nevertheless, when the media communicated on the LGBT struggle they often called it “gay marriage.” After the House of Representatives passed the law, the Federation

---

5 Canal 13 and Telefe.
6 Botineras (Telefe), El elegido (Telefe), Para vestir santos (Canal 13), Herederos de una pasion (Canal 13), among others.
insisted upon a new label: “equal marriage.” This was a different message and it produced successful results.

The issue involving the adoption of children proved to be just as controversial. Instead of avoiding the debate, the LGBT organization addressed it squarely. They explained that the actual law allows single LGBT persons to adopt children. Thus, the equal marriage law would improve and equalize the situation between adoptions by heterosexual couples and LGBT partners giving to those children the same rights of the others. They focused the debate on expanding children’s rights, not discriminating against them.

The strategy of the use of courts by the LGBT movement undoubtedly had an impact on the other branches of government. Congress certainly felt the pressure of the social mobilization and the legal arguments of the court decisions addressing the fundamental law: the Constitution. Moreover, the social mobilization joined forces with the progressive political parties (socialist and other minor parties), and found the backing of the ruling party and the Executive. The Executive showed its support through the INADI; then by the chief of staff, later through Ministers, and eventually the President herself expressed her commitment with this struggle.

It is worth highlighting the fact that all the parties gave their legislators freedom to vote their consciences on this issue, liberating them from party discipline. This issue proved to be important for Argentine democracy. The equal marriage issue was beyond the normal political “quarrels” and resulted in an informed discussion of substantial content throughout the political debate. Citizens, journalists, politicians, academics, and artists expressed their opinions in favor or against, but the whole society was discussing this important issue. It was a topic that

---
7 Example with the equal marriage law: if one member of the couple dies, then the other can continue rearing the child while at the same time maintaining rights of inheritance from the deceased. Under the civil code marriage law that was not possible.
transcended political parties. Some rights are universal and touch all of us, and the outcome of the political debate in Argentina was a true celebration of democracy.

This research shows that social mobilization -support structure- contributed to those outcomes, and courts played an important role. The Argentine private law (Civil Law) has been constitutionalized, and the amparo - summary legal instrument - to access the courts has become more ordinary. This helps to facilitate access to justice and the equal recognition of rights to all citizens, especially the disadvantaged ones.

B. Final Thoughts on the Indigenous Mobilization

The indigenous movement resulted in the constitutional recognition of their rights along with the most important international treaties that regulates them in 1994. As I mentioned before, the problem is not so much the lack of rights as it is the enforcement and implementation. Indigenous rights are quite vast and comprehensive, but the principal problem is in enforcing and implementing the rights that already exist.

By observing the social mobilization of the indigenous groups and the legal cases in which they have been involved it is possible to infer some answers to the research questions. They have been victims of unfair and illegal evictions that are contrary to the constitutional reforms introduced since 1994. At this stage of the legal process, the indigenous people usually found themselves in court as defendants. As a consequence, there were numerous complaints brought to the Congress that pressured legislators to pay attention to indigenous affairs. The outcome of such action was a new law 26,160 and it represented the culmination of multiple negotiations and political alliances. After the law 26,160 was passed, its implementation was delayed. It was at this stage that the indigenous movement established the strategy of using the
courts, this time, as plaintiffs. Having the legal tools on their side, they considered that this was both the right path and the right time to bring the challenges. They brought to the courts several cases looking to establish new precedents that would help promote the recognition of these rights among judges and other officials. However, the cases that reached the Supreme Court were not decided as they had hoped. The Court, in general, ruled that these cases were not within its competence. Nevertheless, there were some particularly egregious cases in which the Court boldly provided some provisional measures of relief and exhorted the Executives to address the problems. These lawsuits helped to place the issue of indigenous rights in the media and to raise the political stakes.

The constitutional rights of indigenous peoples seem to be a fairly straightforward declaration of basic rights. The view within indigenous communities is that they did not need more rights, but rather they needed more justice. They understood that those rights and the laws stemming from them were but “dead letters” if there was not any state power (Judicial, Executive) to give them full effect and protect them against abuses. Though the gap between the law “in books” and law “in action” was wide on this issue, the efforts of the indigenous groups as plaintiffs to point out that disparity were not always successful.

Moreover, the structure of the Argentine legal system at the local level regularly creates obstacles and limits the chances of using the court system to implement their rights. The federal system plays a role in the indigenous legal mobilization since the same constitutional article where the indigenous rights are recognized establishes that local provinces have concurrent powers with the national government regarding indigenous affairs. In addition, natural resources, which are often at issue in these cases involving indigenous peoples, are the fiscal property of local states. For those reasons, the Supreme Court has never decided the most consequential
issues at stake when it comes to the problems associated with indigenous rights; and the local judiciaries often rule against the communal property right claims since they are often not in line with the economic interests of the provinces. These findings show that on indigenous rights, local jurisdictions are not more sympathetic than national jurisdictions.

In this context, the evictions continued and increased. The indigenous frequently appeared in court as defendants. In response, they changed the strategy and even tried sometimes to provoke the situation, just to begin an eviction. The lawyers who work with indigenous communities during these years have built up an expertise in criminal cases. However, the lack of economic resources as well as the high level of unemployment and illiteracy did not help to build a strong social mobilization – support structure- able to introduce and follow up on the legal cases.

Another problem was that the indigenous mobilization included very different people from diverse communities and distinctive custom. It is true that they have the same terrible past and present. However, the disparities brought to light the multiple disagreements and fragmentations within the movement. Their lack of unity allowed outsiders to manipulate them. Also, their lack of cohesion made it difficult to know who were the legitimate representatives. Moreover, the principal claim of the legal mobilization involved property rights which often brought competing economic interests of the State, companies, and landowners into conflict. At the same time, these kinds of demands often resulted in some indigenous groups prevailing and then forgetting to share the windfall with others. All these factors conspired to weaken the support structure for legal mobilization for indigenous groups.

Furthermore, there is a widespread ignorance among the state powers (judicial, executive, legislatures) about indigenous world. There is also no apparent national political will power to
enact a law that precisely regulates indigenous rights. Even though the applied legal framework is the Constitution -which is perfectly enforceable- a specific law would help to clarify some of the issues of enforcement and implementation for both courts and society.

Many factor, including their conviction that what they were doing was needed, led the indigenous movement to turn to courts. The low level of impact is clearly linked to the weak social mobilization –support structure which also explains the lack of success in achieving their policy aims (property rights). In this case, the courts have not played a different role. On the contrary, they have closed their doors to those most in need and failed to protect the least advantaged in society.

C. Summary of Principal Conclusions

In this dissertation, I analyzed two disadvantaged groups, their social mobilization, their litigation and political strategies, and the likely impact of those strategies on other political actors and society in general. Both groups have turned to courts claiming for their rights but each presents its own unique features and actions within distinctive political environments. The result has been an enriched understanding of those contrasting experiences in legal mobilization on behalf of social change.

By examining those vulnerable groups and their activist members, it is possible to infer the distinctiveness and generalities about them as well as their capacity to organize and mobilize themselves. It is clear that both have been invisible for the society and for the state and its public policy. Though they have been culturally, socially and politically ignored, the state and society have had singular differentiated approach towards them. For many years, indigenous people have been treated by the state and social organizations in a paternalistic way, considered as subjects of
charity, compassion, and solidarity. Rarely have they been empowered to guide their own destinies. Although today it is not always like that, the paternalistic approach can still be discerned. These circumstances along with their disadvantaged position, and taking into account the lack of resources, their low level of literacy, their social exclusion, their different culture from the dominant one, the high level of unemployment, and their geographic location -far away from urban areas- make them excluded and discriminated from the system. In the Marc Galanter’s words, they are a perfect example of “have-nots.”

The experiences of the LGBT community have been different. They are part of the dominant culture -even though they are often subjected to discrimination. Unlike indigenous groups, they do not belong to another “civilization.” LGBT activists live in urban areas, work, attend universities, and generally belong to the middle class. It is common to find members of the community who are significant personalities of the artistic, cultural, scientific, and educational environments. The discrimination they endure is similar to the discrimination indigenous people are often subjected. Nevertheless, they know the system, understand it, and grew up in it, even thought about how they might change some of its rules and practices. It is easier for them fight against the system from within. LGBT activists may thus be considered as a “haves” according to Galanter’s theory.

Those features are closely related with the diverse capacity they have to organize themselves. The indigenous mobilization contained totally different population with various and dissimilar customs and ways of living. In this way, there is a lack of unity and sometimes it is difficult to define a common purpose and objective. At the time of the 1994 constitutional convention, there was considerable unity around the recognition of their fundamental rights. That unity of purpose was lost over time. Now it is the collective ownership and the consultation and
free determination issues that usually help to unite the movement and its demands. The symbolic idea of Law seems to be the “glue” of some of those ruptures. However, the lack of resources does not help the cause of legal mobilization and the nature of the property rights claims sometimes raises competing interests that divide the communities.

The LGBT community has shown that it has an impressive capacity to mobilize. The leadership of the LGBT mobilization – in the head of María Rachid and the people of the Federation- organized the group around a clear and precise objective including a strong participation of lesbians and people from the interior of the country who often were outside of the movement. With this direction they overcame the natural or inherent differences within the movement, particularly the conflicts with the main organizations. Within the both the LGBT and the indigenous peoples’ movement, there are a variety of identities. However, well-defined goals help to create a more cohesive movement with a more coherent legal strategy. It also helps to have strategic alliances with key players in order to mobilize, set the agenda and funding the campaign. The INADI, with María José Lubertino as a president, was a key player and ally providing important resources to support both the social mobilization and the legal strategy.

Both movements with their organizational capacity turned to courts as an important tool of their approach. However, the experiences were different for these two disadvantaged groups. In the case of the indigenous, the rights may have been explicitly recognized, but it turned out to be just a mere declaration. The enforcement of those rights by the state powers has not happened and, to make matters worse, some local authorities continue to violate the fundamental law. The law on the books remains divorced from the law in action. The indigenous decided to use the courts taking advantaged of being criminalized and then looking for respect and enforcement of their already acknowledge rights. In the LGBT case, the civil law undoubtedly excluded them
from the marriage even though the new constitutional amendments in 1994 put into question the constitutionality of that article. Therefore, they brought the cases to court in an effort to both raise awareness to the problem and to obtain a favorable court decision which declared the unconstitutionality of that exclusion from the legal institution of marriage.

Because both groups were effectively excluded from the majoritarian institutions – National Congress-, they sought alternative channels to advance their rights. The conservatism, the religious thinking and relationships with the Church in the LGBT case and the important economic interests at stake in the other, presented natural impediments to achieving the policy changes sought in the political arena. Moreover, the Argentine National Congress has not been particularly “pro-active.” In general, it has been considered a reactive institution, which is subject to debilitating political quarrels. Instead of legislating and elaborating public policies for the present and the future, the Congress has been portrayed as an institution that just decides about minor current issues without relevance and implication for the long-term effects.

The judicialization of politics was not the only tool used by these groups to advance their policy aims, but it was a relevant one. The use of courts as a strategy without an adequate support structure for legal mobilization and when the judiciary is one that usually has barriers preventing to cases promoting social change is certainly a problem. However, the use of courts or even the threat of litigation can be understood as part of a broader line of attack along with strong social mobilization. Under these circumstances, as McCann explains, the group’s issue stands a better chance of getting placed on the political agenda and being acted upon.

The experience of the indigenous groups’ efforts to mobilize in Argentina can be described in two stages. In the first stage, the initial use of courts for strategic purposes produced few accomplishments. But in the second stage, they adjusted their strategy based on the nature of
the cases they got, which meant representing indigenous peoples as criminal defendants, not as plaintiffs. Indeed, the lawyers working with these communities developed an expertise on these criminal cases. However, their legal mobilization has not always been supported by strong social mobilization. Indeed, their lack of unity and cohesion as well as the lack of resources undermined their changes of many successful achievements. Along with this situation of being typical “not-haves,” the local judicial institutions, whose judges harbored prejudice and were not always informed about the laws governing indigenous peoples. The result was that rights’ enforcement was compromised. The courts generally have been a “machine” to impede. Regarding indigenous people, the judiciary has not been very receptive to claims for rights protection. Although the recent efforts to advance indigenous rights in court have helped to raise awareness to the issue and have helped modestly to give substantive content to the rights claims themselves, the indigenous legal mobilization still has a way to go before achieving their goals.

For the LGBT case, the use of courts was the catalyst, for the subsequent treatment of the equal marriage reform proposal at the National Congress. The courts in this case played a new role. The unsuccessful ruling got the issue covered in the media which, in turn, raised the public’s consciousness about the matter. The first successful judgment provoked a broad response from many sectors of society – politics, media, academia, show business, and religious groups- and empowered the movement by generating a “waterfall” of new legal cases. Obviously, other variables – favorable public opinion, political will, secularism of the political parties and society, and the aggressiveness of the Church- also contribute to the eventual change in the marriage law. But it the importance of the social structure for legal mobilization in every corner of the country cannot be underestimated. The LGBT community’s success was built upon a strong support structure that developed an expertise in litigation so that they could acquired the
strategic advantages of both repeat players and a “haves” organization when they promote their progressive agenda.

These groups fought for a place in the society and recognition by the law. That law defines, gives content to the rights and determines how and under what conditions the people will live in a modern society. The law may include or exclude them from the system. The law makes them visible or invisible within the state, society, and sometimes even in their own family. The law on the books requires formal equality and they have pressed for substantive equality in the law in action. These groups have used the litigation as part of its overall strategy for social change. Both “have-nots” (indigenous people) and “haves” (LGBT) turned to the courts and, in doing so, they acquired an expertise in litigation as “repeat players.” The different outcomes in their efforts show just how important it is to have a strong support structure for social mobilization behind every action. But a support structure for legal mobilization is not enough. Also, a receptive judicial system willing to hear and act upon the novel claims being brought by these groups is needed.

This work contributes to interdisciplinary socio-legal scholarship by helping to understand the dynamics of legal mobilization on behalf of disadvantaged groups in the context of new democracies. I have found that the judicialization of politics can be an effective means for disadvantaged groups seeking to achieve certain policy goals and institutional changes. But the key to make this possible is the presence of a strong support structure for legal mobilization.
Bibliography


Mayer, Steven, E. What is a Disadvantaged Group? www.effectivecommunities.com


---- “Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process” (unpublished)

---- “Evaluating the Argentine Supreme Court under President Alfonsin and Menem (1883-1999)”. 7Sw.J.of L. & Trade Am. 369.


*Jurisprudence and Administrative Decisions*


Agüero, Aurelio E. C/ GCBA s/ Amparo.

Asociación de Comunidades Aborígenes Lhaka Honhat c. Salta, Provincia de y otro s/acción declarativa de certeza, Fallos 328:3555 (2005).


Asociación de Grandes Usuarios de Energía de la Rca Arg v. Prov. De Bs As, 1997-C L.L. 322.

Asociación Civil Ayo La Bomba y otro c. Provincia de Formosa y otro, (Fallos 328:3657), 2005.


Avico c/ De la Pesa, Fallos 172:29 (1934).


Bernath Damien Ariel y otros C/GCBA S/Amparo (Art. 14 CCABA), Exp 36117/0


Canevaro, Martín y otro C/GCBA S/Amparo (Art. 14 CCABA), Exp 36410/0

Castillo, Norma Edith y otros C/GCBA S/Amparo (Art. 14 CCABA).


Comunidad Aborigen de Tekoa Ima y de Kappi Yuate c. Misiones, Provincia de y Estado Nacional s/demanda ordinaria de acción de reconocimiento de posesión y propiedad comunitaria indígena y daños y perjuicios, 21/3/2006.

Comunidad Indígena del Pueblo Guarani Kuña Piru II c. Misiones, Provincia de y Estado Nacional s/ denuncia ordinaria de acción de reconocimiento de posesión y propiedad comunitaria indígena, escrituración, y daños y perjuicios, 21/3/2006.

De Zavalia Aguilar Federico Ernesto c/ Comunidad de Amaicha del Valle s/ Cumplimiento de contrato s/ x* incidente (Inc. Levant. de embargo Prom. P/el demandado). Expte. n°: 10669/97-I1.

Defensor del Pueblo de la Nacion c/ Estado Nacional y otra (Provincia del Chaco) s/proceso de conocimiento, first resolution of the Supreme Court 9/18/2007 (Fallos: 330:4134).

Demanda Ordinaria por prescripción adquisitiva de dominio “Comunidad Aborigen Laguna de Tesorero –Pueblo Ocloya c/ Cesar Eduardo Cosentini”. Sala Segunda de la Cámara en lo Civil y Comercial de Jujuy 15/12/03.


Ercolano c/ Lanteri (Fallos: 136:170), 1922.

Fernández, Edgardo R. s/dcias. Expte Nº 166-266-04/04

Figueirido Bábara s/dcias. usurpación (26/10/2007).

Freyre Alejandro C/ GCBA S/Amparo (Art. 14 CCABA), Exp 34292 / 0


Gottschau, Evelyn Patrizia c/ Consejo de la Magistratura de la Ciudad Autónoma de Buenos Aires s/ amparo (CSJN-Fallos 329: 2986), 2006.


Hooft, Pedro Cornelio Federico c/Pcia. Bs. As. (Fallos: 327:5118).


Huarpe Community “Elias Guaquinchay” del El Retamo, Exp. 4997/99 resolution 3143/99

Huarpe Community “Guentota” del Puerto, Exp. 3369/97 resolution 679/98.

Huarpe Community “José Andres Diaz” de los Sauces, Exp. 5004/99 resolution 3426/99

Huarpe Community “Jose Ramon Guaquinchay” de El Forzudo, Exp. 4996/99 resolution 3613/99
Huarpe Community “Josefa Perez” de la Josefa, Exp. 5001/99 resolution 3139/99

Huarpe Community “Juan Bautista Villegas” de El Cavadito, Exp. 5000/99 resolution 3141/99

Huarpe Community “Juan Manuel Villegas” de San Jose, Exp. 10557/98 resolution 3137/99

Huarpe Community “Lagunas del Rosario de Lagunas del Rosario, Exp. 4999/99 resolution 3142/99

Huarpe Community “Paula Gaunquinchay” de Asuncion, Exp. 5003/99 resolution 3138/99

Huarpe Community “Santos Guayama” de Lagunitas, Exp. 4998/99 resolution 3427/99

Huarpe Community “Secundino Talquenca” de El Retiro, Exp. 5002/99 resolution 3140/99


Lavado, Diego Jorge y otros c/ Mendoza, Provincia de y otro s/ acción declarativa de certeza (Fallo: 330:111)


Local Supreme Court of Rio Negro, “CODECI s/accion de amparo”, 16/08/2005 (Lexis 35002186).


Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).


Petrolera Piedra del Aguila c/ Curruhuinca, Victorino y otros s/ Accion de amparo” (Nº 43.907/7 del Juzgado Civil 2 de la ciudad de Cutral Co).


Repetto, Inés María c/ provincia de Buenos Aires" (Fallos 311:2272).


Sede Alfredo y otros c. Villa Herminia y otro s/ desalojo. Juzgado de Primera Instancia en lo Civil, Comercial y Minería Nro. 5 de la ciudad de Bariloche (Río Negro), 08/12/2004.


Sojo, Eduardo c/ Cámara de Diputados de la Nación (Fallos 32:125).

Tecnicagua S.A c/ Guine, Gerardo. Fallo No 163-S.C.J. Mza, Sala I (02/02/1993) .


West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).