

Constitutional Provisions and Women's Rights: A Comparative Study of
Advocacy in Argentina, Chile, Botswana and South Africa*

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Abstract: Constitutions vary tremendously in how they treat gender difference and women's rights. There is considerable debate on whether constitutional rights are merely "parchment barriers" or if they have the potential to further social change. In this paper, we tackle part of this debate by focusing on the strategies and behavior of women's rights advocates. We use a comparative case study of four countries to examine how women's rights advocates use gender provisions and the degree to which such provisions help them achieve their policy goals. The case study considers two pairs of countries (Argentina and Chile, Botswana and South Africa) that share many historical, political and social experiences but differ greatly in the way gender equality is recognized in their constitutions. South Africa and Argentina both have several egalitarian provisions in their constitutions, while Chile and Botswana have no such provisions beyond a sex equality statement. Using archival research and interviews with women's rights advocates, we examine how gender has been constitutionalized and how constitutional provisions have informed the efforts and strategies of women's rights advocates. The case study allows us to evaluate explanations about whether and how the law supports advocacy efforts for social and political change. This research draws upon completed fieldwork and interviews in all four countries.

* Funding for this research was provided by a National Science Foundation, Division of Social and Economic Sciences grant, "RUI Collaborative Research: Gender and Constitutions—A Comparative Analysis of the Effect of Gender Provisions" 2009-2013 (No. 0920998-Scribner, and No. 0920990-Lambert).

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Introduction

How does constitutional law affect social change? There is significant cross-national variation in how women's differences, social roles, and equality with men, are recognized in national constitutions. The constitutions of Botswana and Chile for example have just one provision on sex equality. In contrast, the constitutions of South Africa and Argentina include several provisions relating to sex equality and the obligation of the state to take proactive measures to redress gender inequality and promote women's full participation in society. The presence or absence of such provisions raise fundamental questions about the role of law in structuring social and political power and promoting (or hindering) gender equality. In particular, it relates to the debate about whether constitutional rights are merely "parchment barriers" or if they have the potential to further social change. Those who argue that constitutions and courts can be a mechanism for advancing social causes generally assert that their effects are mediated by social and political actors. In this paper, we try to tackle part of this debate and focus on the strategies and behavior of women's rights advocates. We use a comparative case study to examine how women's rights advocates use gender provisions and the degree to which such provisions help them achieve their policy goals. The case study considers two pairs of countries (Argentina and Chile, Botswana and South Africa) that share many historical, political and social experiences but differ greatly in the way gender equality is recognized in their constitutions. Using archival research and interviews with women's rights advocates, we examine how gender difference has been

constitutionalized and how constitutional provisions have informed the efforts and strategies of women's rights advocates.

Gender provisions, as we use the term, denote the constitutional statements about sex discrimination, gender or sex equality rights, and positive gender-based social rights. Such provisions fall into roughly three different categories: neutral, maternal and egalitarian.¹ Neutral provisions are silent with respect to gender. They tend to recognize equality before the law for all citizens but do not mention sex or gender explicitly in terms of equality or non-discrimination. Maternal provisions support and protect women's traditional gendered care-giving role and value women as mothers and wives. Such provisions might single out mothers, children or families for special protection by the state or as recipients of particular positive social rights. Egalitarian provisions recognize gender difference explicitly (e.g. men and women are equal before the law) and actively promote gender equality by obligating the state to redress the disparity in opportunities that women face in their economic, social and political lives (e.g. use of affirmative action). Across countries, constitutions may include numerous egalitarian provisions (e.g. Brazil, South Africa), primarily maternal provisions (e.g. Ireland), or no gender-specific statements (e.g. US).

We use comparative case studies of Argentina and Chile and South Africa and Botswana to examine how different constitutional gender provisions influence the political strategies of women's rights advocates. The Argentine Constitution (1994) is mainly egalitarian: it has several specific provisions that clearly recognize and seek to

¹ This typology is discussed in detail in a previous article (Lambert and Scribner 2009).

advance gender equality. The Chilean Constitution (1980) was amended in 1999 to contain a gender equality statement; it does not, however, promote gender equality or actively redress gender discrimination. Similarly, Botswana's Constitution contains a simple sex equality statement. South Africa's Constitution, goes the furthest of the four countries toward inscribing gender equality at the constitutional level with an array of gender specific positive rights.

We begin with a discussion of how constitutional provisions contribute to women's rights advocacy to identify several clear expectations about how provisions may affect advocacy. In the two paired comparative case studies that follow we examine how gender has been constitutionalized in individual countries, how constitutional provisions have informed the efforts and strategies of women's rights advocates, and how such provisions may help advocates secure changes in policies that impact women's lives. The comparative analysis uncovers the ways gender provisions in the constitution shape the strategies pursued by women's rights' advocates both within the state and in women's organizations. We find that egalitarian provisions in Argentina's and South Africa's Constitutions have influenced women's rights advocacy strategies and aided their efforts to achieve policy change. However, where gender-equality provisions are minimal, as they are in Chile and Botswana, rights advocates cannot ground their position on positive rights and must pursue a different line of argumentation – we find they tend to rely more heavily on international laws and treaties in their pursuit of policy reform.

I. Advocacy and constitutions

The question of whether women's equality can be furthered by constitutional recognition is closely related to a fundamental debate about the effect of law on society and social change. One perspective is that the law is not transformative and does not independently affect or cause social change. Rather, the law simply reflects the ideology or interests of the dominant classes or groups at the time the law or constitution was written. For example, Strauss (2001) argues that constitutional amendments are "irrelevant" and serve only to "ratify changes that have already taken place in society" (1459). Likewise, in his comparative analysis of constitutional development in four countries, Hirschl (2004) contends that the effect of constitutions on distributive justice is often "overrated if not outright negligible" and "appear to have only a limited capacity to advance progressive notions of social justice" (13). That is, other factors shape and influence social outcomes regardless of whether particular laws or constitutional provisions are in place.

Others recognize potential of law to influence social policy and rights and thus to contribute to progressive social change (Rosenberg 1996). Law's potential is mediated by social and political forces (Epp 1998; McCann 1994; Scheingold 2004). In this view, constitutional provisions concerning gender equality, sex discrimination, and gendered social rights, matter for women, but such provisions are not themselves a panacea (Baines and Rubio-Marin 2005; Banda 2005), nor can a constitution "in itself secure rights for women" (Jagwanth and Murray 2005, 231). As Dobrowolsky and Hart (2003:3) contend,

“... only constant vigilance and the hard grind of sustained activism ensure that over time textual promises are honoured and...women’s lives change for the better.”

Studies on constitutions, gender, and law suggest several reasons why constitutional provisions may provide a powerful tool in the hands of women’s rights advocates. Constitutional provisions “provide important constraining or enabling frameworks that can impact on attempts to achieve changes in gender policy” (Waylen 2007, 158). Clearly articulated constitutional rights and duties can enhance the legitimacy of rights claims by explicitly recognizing rights for women (Jagwanth & Murray 2005; O’Sullivan & Murray 2005). Women’s rights provisions help establish a more solid legal foundation and “provide women with tools to challenge state activity in the courts” (Baines & Rubio-Marin 2005, 9). Baldez, Epstein and Martin (2006) find that equal rights provisions increase the standard of the law that is applied and increase the likelihood of a favorable judicial decision for those asserting women’s rights. The presence of constitutional rights may give courts greater leeway to interpret rights more broadly than legislated rights, whereas the absence of enumerated rights: “...puts pressure on the courts...to stretch their powers of statutory interpretation to its limits” (Fombad 2004, 143). Finally, the presence of rights might encourage underrepresented groups to mobilize for social change (Scheingold 2004).

If constitutional provisions are part of an “enabling framework” that facilitates legal change (Waylen 2007, 538), then we expect policy-makers and women’s rights advocates to identify egalitarian constitutional provisions as central to their advocacy strategies. Second, if egalitarian provisions provide a constitutional anchor for gender

policy reform and enhance the legitimacy of rights claims, we expect advocates to use these tools. That is, we should observe policymakers and rights advocates employ these constitutional rights to shape the discourse, content and framing of legislative debates, and to make explicit reference to constitutional rights in legislation and in court cases. Where these constitutional provisions are weak or absent, women's rights advocates may have a limited capacity to pursue gender policy reform or rely more heavily on international laws and treaties. Similarly, where provisions tie women's citizenship to traditional gender roles or ignore gender difference, women's organizations may find they are constrained by the constitutional discourse of maternalism or gender neutrality, and face incentives to reduce the scope of demands for policy change or frame proposals in terms of women's maternal role rather than women's rights and equality.

II. Cross-regional comparisons

In the two comparative case studies that follow, we outline constitutional provisions each country, considering Argentina and South Africa together as more egalitarian with respect to gender equality, and Chile and Botswana together as more neutral. We then draw on interview data to evaluate 1) how advocates view the constitution and whether it is helpful; 2) whether advocates view it as part of an enabling framework; 3) whether the constitution is used to increase the legitimacy of claims; 4) their dependence on international law; and 5) whether the constitution has contributed to political mobilization. Semi structured interviews were conducted in 2011 and 2012 with a variety of women's rights advocates in the four countries and are coded to reflect the

type of position and thus perspective of interviewees. Six types of individuals were interviewed in each country. References used in the text carry a country initial (B for Botswana for example, and letter for one or more of following identifiers:

G: Government official - former or acting in specific ministries: labor, women, justice, etc.

L: Lawyer/advocate associated with an advocacy NGO

M: Member of parliament or former member of parliament

P: Press / writer reporting on gender issues nationally

S: Scholar / Researcher - academic or practitioner in a national research institute

W: Women's movement member / prominent figure within national women's movement (most often also heading up a national NGO)

Egalitarian constitutions: Argentina and South Africa

Argentina: The Argentine Constitution dates to 1853. Significant constitutional reform was enacted in 1994 and included a number of changes with respect to gender. The changes incorporated three key aspects for defining and promoting gender equality: a constitutional quota (Art. 37), an equal pay for equal work provision (Art. 14 bis), and affirmative action where Congress has the power to “legislate and promote positive measures guaranteeing true equal opportunities and treatment.” (Art. 75, No. 23). According to one lawyer, these provisions “were adopted with a clear political intention to overcome obstacles in the road to equality [and provide the legal] tools and argumentation to overcome existing inequalities. Affirmative action is a very important point in this regard...It has had a transformative effect” (AL1329). It has also served as an important defense against claims that affirmative action is a violation of the right to equality before the law (Lubertino, 2003). In addition, and perhaps most importantly, Argentina's 1994 Constitution explicitly names and incorporates core provisions of the

UN Convention on the Elimination of All Forms of Discrimination against Women, CEDAW (Art. 75, No. 22). This is significant because it provides the legal tools and mechanisms for the direct application of CEDAW provisions and opens the “way for women and women’s organizations to use the courts to gain the enforcement of women’s rights nationally” (Kohen, 2009, p. 95).² The Constitution also gives Congress the power to provide for the protection of mothers and children (Art. 75, No. 23).

South Africa: With respect to substantive rights, the South African constitution is one of the most inclusive in the world. It incorporates individual rights along with a wide array of social and cultural rights, and establishes a clear commitment to overcoming past injustices while recognizing diversity (Bauer and Taylor 2005, 249). The constitution includes the right of human dignity and a principle of nonsexism, a strong and substantive equality-protection clause, and detailed rights for women, including rights to freedom and security of the person and bodily autonomy, freedom from violence, reproductive choice, and a prohibition against any expression that amounts to advocating gender hatred. The constitution requires courts to interpret legislation in the spirit of the Bill of Rights and to let international law and jurisprudence in other democracies guide judicial interpretation of the Bill of Rights (SA Constitution 39 [2]; see also Mokgoro 2004). The constitution is one of the most progressive in terms of seeking to recognize women’s difference, promote gender and racial equality, and redress past discrimination.

² Article 75, No 23 states that Congress has the power to “legislate and promote proactive measures that guarantee true equality of opportunity and treatment, and the full enjoyment and exercise of the rights recognized by this Constitution and by current international treaties on human rights, in particular with respect to children, women, the elderly and people with disabilities.”

The constitution's strong commitment to gender equality is visible both as a foundational value in South Africa's new democracy and as a set of substantive rights specifically related to gender equality. The emphasis on gender equality can be attributed to several factors, including the timing of the transition to democracy, the role of the African National Congress in constitutional negotiation, the inclusion of women at the negotiating table, and a "favorable political opportunity structure" (Hassim 2002; Seidman 1999; Waylen 2007).

Advocacy in Argentina and South Africa

View of the constitution: Interviews with Argentine policy-makers and activists reveal that constitutional (and international law) are central to their activities. In Argentina, individuals in and out of government described the 1994 Constitution as "promoting equality," and identified gender provisions, particularly the codification of CEDAW provisions, as "definitely a tool" for their advocacy efforts and to redress past discrimination through public policy as well as litigation. In addition those in government pointed to international conventions with constitutional status as "vital for putting women's issues on the legislative agenda and promoting change" (AMW4405).

Several members of the Argentine women's movement who were "at the table" during discussions of reforming the Argentine Constitution, characterized the incorporation of CEDAW provisions into the Constitution as a crucial advance for women. For example, one lawyer involved in litigating women's rights issues stated that "the incorporation of the CEDAW convention to the Constitution ... has transformed our understanding and reading of all rights; it was, and is, central to understanding women's

rights in the Constitution” (AL1329). Moreover, because the Constitution provides the legal tools and mechanisms for the direct application of CEDAW provisions, it opens the “way for women and women’s organizations to use the courts to gain the enforcement of women’s rights nationally” (Kohen 2009, 95). Scholars, activists, and legislators consistently described the constitution as providing the tools to redress past discrimination through public policy as well as litigation.

In South Africa as well, women’s groups came together to pressure the ANC to include women in the constitutional convention; the result as noted above was one of the most progressive constitutions in terms of protecting and actively promoting women’s (and minority) rights. Unsurprisingly, advocates saw the constitution as strong one in terms of advancing women’s rights and as an important tool (or “the best tool”) in their legislative and litigation strategies (SM18725, SG14723, SS17724).

[T]he constitution sets the baseline, it sets the agenda, it says ‘this is what we aspire to be,’ but it also gives South African citizens a tool to use if their rights are not being realized, to say ‘but this is what our constitution says.’ (SM18725).

For us [the constitution] has always been sort of the backbone of the work that we do, and it’s been in relation to access to health or justice or equality. We use it as a reference point; [...] it’s more of an anchor. (SS17724).

Enabling framework: With regard to the constitution being part of an enabling framework, we asked advocates about whether and how gender provisions were part of their efforts to remove discriminatory laws and if they were used to support arguments in favor of gender equality legislation. In Argentina, advocates agreed that their efforts were aided by the Constitution (AL1329, AMW4405, AS5405, AS7407, AW14413).

Many cited instances where egalitarian provisions helped further specific efforts in both the legislative and judicial arenas (AMW4405, AS5405, AS7407). “So I relied a lot on constitutional law, and I used it as a foundation not only formally, but also pedagogically. To function in way that is declarative and insistent; that is to try to convince others that they are subject to these obligations” (AMW4405). At the same time, change was not always positive. Labor laws in particular were cited as an area where advocates utilized constitutional provisions but saw little progress. Thus, despite an equal pay for equal work provision as well as equality and affirmative action provisions, labor laws have been slow to change or have even moved in a less egalitarian direction (AG6406, AG9411). That is, provisions were part of their advocacy strategy but did not guarantee success.

In South Africa, advocates repeatedly stated that the constitution (both gender specific rights and socio-economic rights that disproportionately affect women) was part of an enabling framework in several ways: it “provides leverage for gender activists” to push for and get legislative change (SS11717, SM18725, SS17724, SSWG22731), used in litigation and constitutional litigation of women’s rights (SG15724, SSG2381, SL20726, SLW2481), and that without the enumeration of women’s rights, some legislation and court decisions would not have been possible if the constitution didn’t specify rights and obligate the state to act (SLW2481, SL20726, SL12718):

I think it creates an enabling climate for this kind of work to happen. And I do work in other parts of Africa, six other countries at the moment, where that enabling framework isn’t there. [W]e would be hard pressed to fight for certain rights, entitlements and obligations if [the constitution were different] (SS17724).

The ... task of judging and the task of lawyering to promote gender equality is much easier when it's in the constitution (SG15724).

The constitution sets the baseline in that all laws begin with the question of whether or not the law will pass constitutional muster. For example, a private bill seeking to regulate abortion clinics was “stopped in its tracks” when experts testified that it was unconstitutional (SS11717). Thus, even when the political climate is unfavorable (for example during Jacob Zuma’s presidency), constitutional rights were a critical backstop preventing the erosion of women’s rights (SM18725, SL20726, SS13720, SG15724, SSG2381). The enumeration of rights “means it’s not so easy to reverse the gains, and if they are reversed we can run back to the constitution and say ‘we are going against the constitution here, this is what the constitution says’” (SM18725).

As part of an enabling framework, constitutional provisions can also help advocates set the agenda and instruct judges, legislators, and the public about the constitution. Constitutional provisions can be used to point out that the government is obligated to act. Another strategy is to use constitutional provisions to put issues on the agenda by pursuing litigation even when a win was unlikely. One activist described this as “the art of losing a case” (SL12718). Another confirmed that their organization would litigate “risky cases” if it promised to be high profile and would help raise awareness (SL09717). Constitutional provisions also helped determine whether activists take a case: “If a constitutional right is involved, it’s a no brainer to take the case” (SL09717).

Increases legitimacy: Several interviewees referred to constitutional provisions increasing the legitimacy of rights claims and helping bring about change in cultural

attitudes. In the words of one women's rights lawyer, the Constitution "definitely helps. It gives legitimacy to arguments and proposals that would otherwise be very arduous to make. There are still several areas where stereotypes are deeply rooted, and constitutionally based arguments can be a source for movement and change, a way to push the limits in conservative provinces" (AL1329). Another activist noted that the inclusion of CEDAW in the Constitution had resulted in a major cultural shift in legislative discourse and in legislation:

There has been a redefinition of the constitutional standards in the practice of law. Legislative discourse, in Congress... has been transformed. Numerous [pieces of legislation] capture the development and evolution of international law of human rights, now part of Argentine constitutional law, in the justification of laws, in parliamentary debates, and in the justifications for administrative decisions (ALS13414).

However, the same individual went on to say that a similar transformation had not occurred in the judicial arena.

Use of international law: Interviewees reported that international law played a key role in their efforts to promote legislative change and in their lobbying efforts (AS5405, AS7407, AW8408, AW14413). This is due to the fact that international treaties such as CEDAW have constitutional status. That is, human rights treaties ratified by Argentina have the force of constitutional law and can be used to legitimize rights based claims and remind legislators and judges that they are subject to these laws. As one person noted, in Argentina "international law matters a good deal...probably in most of the justifications for the merits of bills" (AL1329). However, this can be a significant barrier because the conservative right can also use international law. In the fight to keep

abortion illegal for example, conservatives use the right to life in the Argentine Constitution and the Convention on the Rights of the Child to make its own rights based claims (AS12413). The use and awareness of international law by the ordinary judiciary is much less common, though superior courts are more likely to reference international law.

In South Africa, international law is mentioned several times in the Constitution and dictates that judicial and legislative branches must take international law into account in decision-making. Many answered that the courts take international law and regional commitments seriously. However, interviewees also said that the South African Constitution is strong and “generally there is not a lot more [in international law] that is not in our text” (SG15724). Thus, international law supplements and strengthens their arguments but does not replace or supersede arguments based on existing constitutional rights (SL20726, SG0176, SG15724, SM18725). “The international commitments that South Africa has made have filtered down quite a lot. But our constitution speaks for itself...you just draw on international law to boost your argument...” (SG0176).

Mobilization: Constitutional provisions, particularly the incorporation of international law into the constitution, were mentioned as being a tool for social movements, a means for shaping the political agenda, and as a catalyst for mobilization (AW14413, AG9411):

For social movements one tool is the national constitution...The addition of a whole package of international treaties ratified by Argentina, including CEDAW, gave a constitutional tool to social movements. They have used the constitution to push for public policy changes, collective action, and entitlements. The constitution is a tool in areas such as the rights of children and women, and the rights of indigenous peoples (AW14413).

The reform of the constitution, in incorporation of international treaties, has affected the topics of legislation and the advances we have made. Last year the ILO worked on the issue of domestic workers, and this year too; this has generated political agendas, discussions about the topic. It has led to mobilization (AG9411).

Neutral constitutions: Chile and Botswana

Chile: Chile transitioned to democracy with the 1980 “Constitution in Liberty,” a document written by the military regime and “inspired by right-wing philosopher Friedrich Hayek” (Waylen, 2007, p. 158). Article 1 of the Constitution contains a neutral statement of equality (all persons). Article 1 also singles out the family as the fundamental unit of society and obligates the state to steps to protect and strengthen the family. In 1999, nearly ten years after the transition to democracy, the Constitution was amended to explicitly include a statement about equality between men and women (Law 19,611) (now part of Art. 19).³ Interviewees indicated that the debate surrounding the constitutional amendment was long and arduous, but succeeded in establishing a general recognition of equality. The Chilean Constitution, however, does not promote gender equality or address gender discrimination, nor does it actively promote or protect motherhood. Thus, we classify the Chilean Constitution as mostly neutral toward gender (Lambert & Scribner, 2009). Interviewees universally confirmed this view of the constitution as neutral.

Botswana: Botswana is one of the few success stories in Africa with a relatively long history of political and economic stability. However, its society and legal system are

³ Chile ratified CEDAW in 1989, but the Constitution did not expressly establish the principle of equality of men and women until 1999.

highly discriminatory against women. As in many African countries, the government has strongly resisted pressures to accommodate gender-based change in the political arena (Leslie 2006). The country gained independence “as a bourgeois, bureaucratic state through a generally peaceful, colonially-mediated process, with no particular commitment to the emancipation of women beyond the right of suffrage and the same ambiguities about women’s status embedded in its Constitution as could be found elsewhere in southern Africa” (Van Allen 2000, 142). At the time of independence, “women did not feature in political parties much at all” and enjoyed few political or economic rights (Geisler 2004, 100). Botswana’s constitution was adopted in 1965 prior to elections and independence in 1966. The constitution mentions “sex” once under the fundamental rights and freedoms of the individual (see Table 1). Additionally, Section 15(3) prohibits discrimination against several categories, but not sex. Many government officials (including the attorney general in the Unity Dow case discussed here) maintained that sex discrimination did not violate the constitution. The absence of a strong women’s movement and the adoption of the constitution well before the appearance of international women’s organizations or broader norms about the promotion of women’s rights help explain the scarcity of gender-equality provisions in the constitution.

Advocacy in Chile and Botswana

View of the constitution: Interviewees agreed that the Chilean Constitution was gender neutral in language, though many argued that neutrality masked and perpetuated patriarchy:

The text is neutral, [but] the debate and thinking behind it was not (CS8311).

I would say that the constitution does NOT say anything about women ... and the gesture of talking about women and men as 'persons' doesn't signify anything. One could understand the constitution as neutral, but neutral is sexist; the change to 'neutral' has changed nothing in practice (CL2072).

The Constitution can be said to be neutral, but it is a neutrality of patriarchy, neutrality that does not name; a neutrality that is consumed as male (CG1041).

Moreover, many argued that despite its gender neutral language, constitutional provisions on the family and their interpretation placed considerable emphasis on women's reproductive role; and the most commonly used provision is the recognition of family as a unit of society (CG1041). As one interviewee summarized it, "[the Constitution] states that the family is the core or nucleus of society, not the people. The concept of gender is tied to the family unit – one that is nuclear, patriarchal, heterosexual... Thus the 1980 Constitution is marked by a certain conception of gender, and I would say is the most traditional of all, [in which] the public domain does not correspond to women" (CL4309). And, "When it comes to interpretation of the constitution, women are uterus, uterus without rights – reproductive beings but not subjects of the law" (CL2072).

As a result, the gender neutral tone of the Chilean Constitution appeared to be of little value to women's rights advocates, while provisions for family often had a negative impact on their efforts. Responses to questions about the Constitution ranged from the "law is irrelevant" (CW6309), to the Constitution is the "main obstacle to achieving progress" (CW11318) on women's issues. Few felt that the constitutional provision for

equality had much impact on their advocacy and policy work, and some felt that individual legislative achievements were fragile because “it’s easy to change a law” (CW13318). “From the point of view of gender transformation, the 1980 Constitution is very limited, it is not a tool” (CL4309). Others argued that although the constitution was “not the most important tool, it has helped to provide generalized arguments and concepts that can appeal to all sectors” (CG7310).

In Botswana, activists did not view the constitution with the same bitterness as Chilean activists seemed to but they did often voice a desire for changes to the existing constitution (BW05711, BW06711, BM07711). The most common wish was the domestication of international law. One lawyer viewed the constitution as “sufficient” so long as there are progressive judges (BL04710). However, no one mentioned using the constitution in their efforts to secure policy changes. One lawyer and politician reported: “I’ll tell you what, we have never made a reference to the national constitution” (BM07711). The director of a human rights NGO made a similar statement; their organization had never “taken a matter forward using the constitution and gender issues” (BW05711). On the other hand, one of the most important aspects of the Botswana’s constitution for women is that while it guarantees equal rights for men and women, it simultaneously states that customary laws are exempt. We “have a Bill of Rights that says nobody must be discriminated against but then in the same constitution you have a protection of customary law that says when it is custom it is not discriminating” (BW0279). For the women’s movement, this inherent contradiction in the constitution creates a gap in practical ability of women to claim their individual rights.

Enabling framework: If a neutral constitution does help women, it does so by protecting negative rights. That is, it is used to remove discriminatory legislation rather than advance women's rights. In both Botswana and Chile, the single equality statement has not been a force for promoting women's equality but advocates have been able to draw upon this provision to revise laws that are explicitly discriminatory. One interviewee in Chile specified how the equality statement has been employed to do this:

Although the Constitution doesn't recognize discrimination, the equality statement [the principle of equality before the law] has served as a basis to argue the unconstitutionality of laws that produced inequalities. This argument was used in various bills presented by the executive and promoted by SERNAM. For example, equality before the law was the constitutional basis for arguing for the Filiation Act (CG7310).⁴

Even in terms of protecting rights in a negative sense, both Chile and Botswana's constitutions are limited because they do not explicitly recognize discrimination or seek to eliminate discrimination. Moreover, attempts to use the equality provision to promote affirmative action have been met with cries from opponents that this would violate the constitution: "For example, many times it was argued that our bills for a quota law would be unconstitutional, or that we would be accused of unconstitutionality because there was not equality before the law, between men and women – positive actions can't pass this constitutional barrier" (CG7310). In Botswana as well, legislative successes have been mostly limited to the removal of discriminatory legislation; proactive measures to increase women's political or economic power have not been enacted. Thus, one of the main uses of the constitution is to change discriminatory laws. "The constitution says we are equal and that is the starting point..." (BW06711).

⁴ The law recognizes that all children are equal independent if born in or out of wedlock.

Increases legitimacy: As noted above, the 1999 equality amendment has meant that laws that were explicitly discriminatory could be revised and several key advances in policy change for women in Chile have been associated with revising discriminatory laws or provisions in the criminal and civil codes, particularly in the realm of family law. In addition, interviewees from government, civil society, and the legislature agreed that the equality statement had impacted the formal language of law and provided a formal basis of legitimacy of new laws. Others suggested that the amendment had served as starting point for negotiation, an “agreed upon principle” that helped to move debate forward in other directions (CL2072, CG7310, CM9315, CM14320). At the same time, “the real currency of negotiation” was the family provision in the constitution (CG12318):

Equality between men and women is now politically correct. One cannot be against it. But the discourse is really dominated by the ‘family’.... So no comes out against women’s equality, but what you see is an ideological discourse that has returned to the family as the core solution to social problems (CW13318).

Thus, constitutional provisions are used to enhance the legitimacy of rights claims, but conservatives in turn have repeatedly employed the family provision: “conservatives grab onto this argument at every turn to limit rights” (CS3308).

Use of international law: Absent more concrete rights in the constitution, many activists in NGOS and advocates for policy change in the state itself have relied upon international law, particularly CEDAW (and in Chile, the Belem do Para Convention as well), to ground their legal arguments and to provide leverage for policy change in areas where the state was not meeting its international obligations (CW6309). “International law is used frequently by the women’s movement and women in government. And it has

been used effectively (in the Violence Against Women law for example)...It is the tool we use most often in discourse, in political argumentation, in projects” (CG7310). Other advocates agreed that international law was very important, particularly in judicial decisions (CG1041, CW6309, CW13318). “International law is what we have most often used, along with many other NGOs nationally and regionally. We have worked with CEDAW since the beginning and CEDAW has been the instrument to which we have turned for campaigns, diffusion of ideas and information” (CW6309). Activists have also used the inter-American system and filed cases at the international level. In one instance, this strategy resulted in a reform in education law when the Inter-American Commission found Chilean law to be discriminatory against pregnant students (CW6309).

At the same time, international law is not a substitute for constitutional provisions. Unlike Argentina, the position of international law in the legal hierarchy is unclear in Chile. In Congress there is reference to international law in debates and “general recognition among congressional members that international law is important and should be reflected in national legislation” (CG7310). But there is also a lack of awareness of international women’s rights and obligations and opposition: “When it comes to actually passing a law...you run into cultural/ideological differences. There is a lot of resistance on sovereignty grounds, and because of the abortion issue with CEDAW” (CG7310).

Similarly, advocates in Botswana draw upon international law as much as possible, but as in Chile, its place within the legal system is uncertain and is frequently met with resistance from judges and lawmakers (BW05711, BL04710, BW0279). One

activist recounted how they used international law arguments, which the judge did not like; they countered that the government had ratified CEDAW and that it is public policy. However, anticipating the judge's skepticism, the constitutional argument was their main argument (BL04710). Another interviewee was even more pessimistic and noted that there was no affirmative action in Botswana regardless of any international treaties Botswana may sign (BW06711).

Mobilization: Despite the lack of attention to women's rights in the Botswana constitution, the single sex-equality clause has proven to be central for women's citizenship and gender-equality struggles. In fact, a constitutional challenge to a 1982 citizenship law became the focal point for women's organization and was instrumental in the development of the women's movement in Botswana. In 1982, the Botswana government passed the Citizenship Act, which denied citizenship to the children of Tswana women married to foreigners. The organization Emang Basadi, or EB, (Emang Basadi is Setswana for "Stand Up, Women!") formed in the mid-1980s to pressure the government to repeal all legislation that was discriminatory against women and, in particular, the Citizenship Act of 1982 (Molokomme 1991; Van Allen 2000). The Citizenship Act was challenged in court by Unity Dow, who argued that the law constituted discrimination and was unconstitutional. The High Court agreed with her. The ruling party, the Botswana Democratic Party (BDP), responded by attempting to amend the constitution to allow the discriminatory Citizenship Act to stand. The threat of amendment galvanized women's organizations (especially Emang Basadi). After two years of campaigning and lobbying, women's groups succeeded in getting the Citizenship

Law changed (Leslie 2006). Emang Basadi built on its success with the Citizenship Act and has continued to organize and raise awareness of women's issues. The EB is now perceived as a legitimate representative of women's interests and is often consulted by government (Leslie 2006).

Conclusion

Returning to the debate on whether the constitution is simply a parchment barrier or a significant tool in the hands of activists seeking social change, this paper focuses on activists and how they use the constitution to achieve their policy goals (and to some degree the ways in which those who oppose change, use the constitution to block progressive legislation). In all four countries, advocates draw upon constitutional rights in both their legislative and litigation strategies. For example, the right to equality has been utilized repeatedly to remove discriminatory legislation and to block new legislation that discriminates against women. However, the degree to which advocates rely upon constitutional rights and its applications are much broader in Argentina and South Africa. In Botswana and Chile, the absence of egalitarian provisions forces advocates to rely more heavily on international law as means to legitimate their claims and fight for favorable policies and court decisions.

Overall, in Botswana and Chile, rights advocates were less enthusiastic about their constitution and often found it to be a barrier to their efforts. In Botswana, the most significant barrier is the constitutional superiority of customary law which essentially sanctions discrimination against women. While in Chile, the biggest barrier is the constitutional provision on the importance of the family. In both countries, opponents of

women's rights have very effectively used these provisions to block gender friendly laws and policies. Given this less favorable domestic legal environment, international law takes on even greater importance.

The Argentina and South Africa case pairing presents a different picture. Everyone we interviewed described their respective national constitutions as egalitarian and as a useful tool in their efforts to get more women-friendly legislation. In both countries there is also evidence that the constitution does form part of an enabling framework and increases legitimacy. Egalitarian provisions are used in a myriad of ways: to set the agenda, to educate (legislators, judges, the public), to justify laws in parliamentary debates, to block discriminatory laws, to determine which cases to pursue in a litigation strategy, and to strengthen one's case in court. Some interviewees contended that egalitarian provisions had led to a cultural shift in the discourse in the legislature. Overall, the egalitarian constitutional provisions seem to have helped activists achieve their goals. Some even argued that key pieces of legislation would not have been possible without specific rights and provisions. Although this paper has drawn upon interview data exclusively related to the strategies of women's rights advocates use to pursue policy change, elsewhere we have explicitly examined how constitutional provisions are used to justify pieces of gender policy legislation, inform legislative floor debates on policy as well as support the decisions of high court justices. That analysis demonstrated how particular constitutional provisions strengthen the legal foundations for challenges to discriminatory laws and give constitutional weight and justification to legislation.

Finally, we want to be very clear about the limited scope of the claims made here. Constitutions matter for strategies, we argue, because they lay out fundamental rights and principles for the political community that create an enabling (or not) framework for activists to pursue policy changes. Constitutional provisions are one tool, one among several, available to rights advocates as they seek social and political change in a social-cultural-political context may be more or (often) less supportive of that change. Even in South Africa and Argentina, where rights advocates are generally pleased with the protections enshrined in their constitution, there are significant hurdles for the advancement of policies and practices that would contribute gender equality.

In all four countries patriarchal political attitudes have affected what is politically possible to achieve, either through the legislature, through courts, or on the streets. Moreover, these same attitudes among government officials such as police, lower court judges, or even hospital administrators, have contributed to significant issues with implementation of those policies that have been achieved. For example, one Argentine NGO researcher working on sexual and reproductive health rights, stated that “[...] all the things we are concerned with (sex education, emergency contraception, voluntary surgical, exceptions to abortion, the decriminalization of abortion, the Sexual Violence Act, the reform of the Family Code) fail at the implementation stage – at this intermediate level where individuals access the state” (AS5405). Implementation difficulties stem from a number of factors including: low administrative capacity, lack of funding, lack of accountability, the absence of a sense of “responsibility” to assure that individual rights are taken into account when accessing state services, gender-stereotyping within state

agencies (particularly the judiciary), and a diffusion of responsibilities (to provincial and other local authorities) (Smulovitz 2010; Franceschet 2011).

State capacity failures clearly affect the strategies of women's rights advocates. Interviewees generally indicated that in a context of low state capacity and in the presence of patriarchal attitudes among everyday state officials, women's organizations must devote energy and resources to holding the state accountable for implementing existing policy, while simultaneously advocating for policy reform in areas where gains have been elusive. On the one hand, strong constitutional statements about women's rights and gender equality, such as those found in the South African case, can provide concrete rights-based legal tools to focus these accountability efforts. On the other hand, as several of our South African interviewees argued, national constitutions are a statement of aspirations and values - of the way we constitute citizenship - and these values affect political practice. "You really can't be seen to be arguing against something that is perceived to be promoting gender equality. A lot of it is lip service, but it's the sort of lip service that people can't avoid and that's not a bad thing" (SG15724). While "law is not transformative in social attitudes and mores in any deep ways," there is a sense that "we can't go back to patriarchy completely protected by the law" (SG15724).

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