

## **The Constitutional Recognition of Gender Equality in Chile and Argentina**

**Priscilla Lambert, Western Michigan University (priscilla.lambert@wmich.edu)**  
**Druscilla Scribner, University of Wisconsin Oshkosh (scribned@uwosh.edu)**

**Prepared for the Western Political Science Association Annual Meeting  
April 13 - 15, 2017, - Hyatt Regency, Vancouver, British Columbia**

**Abstract:** Does constitutionalizing gender serve to empower women? If so, how might constitutional rights translate into real change? Using a case study analysis of Argentina and Chile, we consider how constitutional provisions might influence policy outcomes, judicial decisions, and the legitimacy of rights claims. We find that, overall, Argentina's numerous constitutional gender rights do correspond with more women-friendly outcomes. Chile's constitution, which largely ignores women's difference, has not been a tool for women's rights advocates.

### **Introduction**

National constitutions differ significantly in how women's differences, social roles, and equality with men, are recognized and valued. Some constitutional texts are silent altogether, others have a simple sex based non-discrimination clause. Others not only recognize gender equality as a value and a right, but additionally oblige the state to take proactive measures to redress gender inequality and promote women's full participation in society. In earlier work we examined gender provisions cross nationally and found that they fall into roughly three different categories: neutral, maternal and egalitarian (Lambert and Scribner 2009). 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. the United States). The presence or absence of such "gendered" language and provisions in constitutions raises fundamental questions about how the constitution affects the ability to achieve social change. In this paper we explore whether and how constitutionalizing gender affects policy: legislative and judicial outcomes that impact women's lives.

There are contrasting views on the relationship between law and social change. Some see enumerated rights as merely "parchment barriers" -- while others argue that the recognition of fundamental rights for women can be a tool for advancing policy change. We begin with a brief discussion of how constitutional law can affect social change. The law and social change literature suggests that gendered constitutional provisions may affect policy outcomes because they provide a legal basis and legitimacy for women's rights advocacy, help prevent policy reversal, and increase the likelihood of favorable decisions in the courts. We then present a paired case study of two countries that share many historical, political and social experiences, but differ in the way gender equality is recognized in the constitution: Argentina and Chile. The Argentine Constitution (reformed in 1994) contains a number specific provisions that clearly recognize and seek to advance gender equality. It also recognizes and incorporates international law. The Chilean

Constitution (1980) is mostly a neutral type. It was amended in 1999 to contain a gender equality statement; however, it does not promote gender equality, nor does it actively redress gender discrimination.

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. We specifically examine efforts to secure legislative and judicial change in four areas: women's rights within the family, gender-based violence, sexual and reproductive health, and employment rights. In each of the policy areas, the case studies illustrate how constitutional language that enumerates women's rights influences the content of legislation as well as judicial review of government policy.<sup>1</sup> The comparative analysis demonstrates that where egalitarian provisions are minimal (as in Chile), political actors are more limited in their efforts to pursue policies that contribute to women's equality.

### 1. **How and Why Constitutional Provisions Matter**

The question of whether women's equality can be furthered by constitutional recognition is closely related to thinking about how law generally affects 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 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

---

<sup>1</sup> The analysis presented here is limited to the relationship between constitutional provisions, advocacy for policy change, and national legislation. Policy implementation and enforcement issues deserve much closer examination in future research.

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.

Another perspective argues that law can influence social policy and rights and “has the potential to further progressive causes” (Rosenberg, 1996). This potential, however, may be mediated by social and political forces (McCann, 1994; Scheingold, 2004). Thus constitutional law can matter gender-policy, but it is not a panacea (Baines & Rubio-Marin, 2005), nor can a constitution “in itself secure rights for women” (Jagwanth & Murray, 2005, p. 231). In their analysis of women and constitutions, Dobrowolsky and Hart (2003) agree that both constitutional provisions and activism are necessary, and “...that while women must help write the constitutional text, [and] women’s citizenship and equality must be inscribed in the constitutional text, 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” (3).

Studies on constitutions, gender, and law suggest that constitutional gender equality provisions provide a legal basis for women’s rights advocacy and inspire the content of subsequent legislation and judicial interpretation of laws and constitutional rights. Below we highlight three broad propositions: that recognizing gender equality in the constitution facilitates gender policy reform, equips women’s rights advocates with legal tools and argumentation to pursue litigation, and provides legal legitimacy for a variety of efforts toward securing policy change. We evaluate these claims in the context of our country cases; which affords us an opportunity to examine the potential effects of recognizing gender equality in the constitution.

#### *Enables gender policy reforms*

First, scholars contend that constitutional provisions can be part of an “enabling framework” that facilitates legal change (Waylen 2007: 201). Women’s movements can use egalitarian constitutional provisions as a tool to fight gender discrimination and pursue policy

changes that address gender-based power disparities. We refer to such policies as gender policy and gender policy reforms; these are policies that affect “women’s access to education and employment, their ability to care for their families, and their chances to escape poverty and enjoy good health” (Htun and Weldon 2010, 207). Where egalitarian constitutional provisions are weak or absent, women’s movements (and the political and institutional machinery of which they are a part) 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 gender neutrality or maternalism, 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.

In Argentina constitutional gender provisions provide a foundation for gender rights claims, thus we would expect policy-makers and women’s rights advocates to identify egalitarian constitutional provisions as a central tool to pursue policy change in Argentina. We would also expect to see more gender policy, comparatively; and legislation and discourse around policy change to draw on egalitarian language in the constitution. In the Chilean case we would expect the absence of egalitarian provisions to be constraining for advocates seeking policy change. Because Chile amended its constitution to include a sex equality statement 1999, we can examine the extent to which advocates see this constitutional change as helpful for achieving policy change.

*Provides legal tools and arguments*

Second, constitutional language affects judicial interpretation of laws and the protection and advancement of constitutional rights by courts. Where constitutional rights for women’s equality are enumerated, the resulting legal foundation for rights claims can “provide women with tools to challenge state activity in the courts” (Baines & Rubio-Marin, 2005, p. 9). Furthermore, 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. If gender provisions in the national constitution improve the opportunity to advance litigation on women's rights and/or improve the chances of "women-friendly" decisions, as asserted in the literature, we would expect to see different outcomes in our two case studies, with a greater probability of judicial decisions favoring women's rights claims in Argentina. Finally, 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, p. 143). These expectations are assessed using both data from interviews with litigators and judicial personnel as well as a review of court decisions in both countries.

*Enhances the legitimacy of rights claims*

A third broad claim in the literature is that clearly articulated constitutional rights and duties can enhance the legitimacy of rights claims (Jagwanth & Murray, 2005; O'Sullivan & Murray, 2005), and may encourage underrepresented groups to mobilize for social change (Scheingold, 2004). Constitutional provisions are a source of legitimacy because they are "reflections of shared values" (Ginsberg and Huq 2014: 121). Thus, the presence of a stated constitutional commitment to gender equality should increase the legitimacy gender policy and ground arguments for gender policy change, whether through legislative, administrative or judicial action. Legitimacy is by no means a simple concept to define or measure, and it cannot be separated from the propositions outlined above.

Drawing on Ginsberg and Huq (2014), we propose several possible ways to gauge legitimacy and compare how constitutional provisions might affect the legitimacy of rights claims. We would expect a discourse of constitutionally recognized gender rights to be reflected in the

language introducing, framing and debating gender policy. Women's rights-based arguments and proposals should be less politically controversial in Argentina where constitutional values about gender equality are explicit and thus provide constitutional legitimacy than in Chile. Additionally we would expect to see greater reliance on international law arguments in our neutral constitution type as the constitution itself does not provide a strong legal platform for gender equality.

Interviews with policy-makers and women's rights advocates is one method to confirm or disconfirm that the enumeration of rights in the constitution enhances the legitimacy of their demands for change and their ability to succeed in litigation. Another is to examine public opinion data. Although beyond this paper, we would argue that greater levels of general public acceptance of gender rights and the legitimacy of gender-based rights claims in public opinion polls should be evident in our egalitarian constitution type case.

For each of these broad theoretical propositions it is difficult to disentangle cause from effect and to sort out whether constitutional provisions, or institutions generally, are an independent variable shaping behavior, strategies and outcomes, or instead a product of social and political change. The ability to demonstrate causality is problematic for all institutional analysis. As Przeworski (2004) notes, one cannot easily separate the effect of the institution from the causal effect of social and political forces that gave rise to it. While we recognize the theoretical difficulty posed by endogeneity we agree with Carey (2000) that it "is not damning to the project of studying institutional effects on behavior... What is set down on parchment may be endogenous to a set of social conditions at the moment of institutional foundation, but to the extent that re-coordinating around an alternative set of institutions is difficult, the effects of the parchment may endure even as social conditions change" (754). Constitutions by themselves do not constrain government power and do not produce social or legal change. Constitutional provisions must be taken up, claimed, and used by political and social actors in service of such goals in the political context of their time. As

Hirschl and Sachar remark “constitutional rights are never interpreted or implemented in a political or ideological vacuum” (p. 228 in Baines and Rubio-Marin 2005). Our goal here is to explore the possible links between constitutional rights and mid-range legislative and judicial outcomes without ignoring the social and political conditions in which actors are embedded.

### *Case selection*

Argentina and Chile share some important regional and historical conditions that make them useful comparative cases. Historically, they are among the most socio-economically developed of the Latin American countries. Each is predominately Catholic and the Church has been, and remains, an important non-state political actor for issues affecting the family and reproductive health policies. Catholicism is an important influence on culture. Cultural attitudes about gender roles often times are a barrier to the legislation and implementation of policies that promote women’s equality in both countries. Both countries experienced a prolonged period of repressive military rule in the 1970s (Chile from 1973-1990; Argentina 1976-1983), followed by re-democratization in the 1980s and early 1990s and neo-liberal economic restructuring. Strong women’s movements emerged in both countries and played a significant role in bringing down authoritarian regimes (Jaquette 2001; Waylen 2007, 66). Women’s rights organizations are professionalized and well-connected to regional and international networks of women’s and human rights groups; these ties provide important resources and assistance to national actors.<sup>2</sup> Both countries are exposed to global and regional pressures to implement policies and strengthen national gender machineries to improve the lives of women (Craske and Molyneux 2002, 10-11). Finally, in both countries, the women’s movement is now weaker and more fragmented than it was

---

<sup>2</sup> The international networks include: participation in the UN Decade for Women (1976-85) and numerous international conferences that followed such as the 1994 Population and Development Conference, the 1995 Fourth World Conference on Women in Beijing and “Beijing Plus” meetings, as well as the adoption of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). Examples of regional networks include: the Latin American and Caribbean Committee for the Defense of Women’s Rights (CLADEM), the Latin American and Caribbean Women’s Health Network (RSMLAC), and the Organization of American States Commission on Women.



at the time of democratic transition (Alvarez, Dagnino, and Escobar 1998, 306-308; Franceschet 2005; Jaquette 2009; Vargas 2002).

There are also some important differences. In Argentina, there are far more women in parliament than in Chile, however, the degree to which this translates into substantive representation is debatable (Franchesett and Piscopo 2008).<sup>3</sup> Left parties have been a stronger presence in Argentina than in Chile. At the same time, the relative weakness of political parties in Argentina tempers the potential impact of left parties on gender policy. Moreover, Chile's National Office of Women's Affairs or SERNAM (*Servicio Nacional de la Mujer*) has been a site for advocacy and an ally in achieving policy. SERNAM has generally been stronger and more influential than its Argentine counterpart, the National Women's Council (CNM, *Consejo Nacional de la Mujer*), which has been chronically underfunded and lacking in administrative status and capacity. Nonetheless SERNAM's ties to the conservative Christian Democratic Party and the political role of the Church have dampened reform efforts in Chile. (Blofield and Haas 2005; Rios Tobar 2007).<sup>4</sup> Finally, in both countries the judiciary has not been a major player in defining gender-based rights, and generally not progressive. The Argentine courts have been more active, and as a federal system, face the possibility of different kinds of claims, which have produced some important landmark decisions. These different political circumstances affect the legislative climate for passing gender policy.

The following two sections present a comparative case study assessing the theoretical propositions outlined above. The case study uses a mixed methods approach. In each country we conducted over 30 in-depth interviews with several types of individuals: leaders of

---

<sup>3</sup> In contrast to Argentina, Chile does not have a quota system in place affecting female legislative representation. In the five parliamentary elections occurring from 1989-2005, men accounted for over 90 percent of party candidates, and Chile remains well below world and regional averages for women's representation (Fernández Ramil, 2008).

<sup>4</sup> National Human Rights NGO, Lawyer, Interview March 2011-Chile (CL2072). Also: Media-NGO, Interview March 2011-Chile (CP10317); SERNAM, Interview March 2011-Chile (CG7310); Women's movement, Gender NGO, Interview March 2011-Chile (CW6309); and Gender based violence NGO, Activists, Interview March 2011-Chile (CW11318).

non-governmental organizations and prominent women's movement activists; well-known women legislators; scholars and researchers working on women's issues and gender justice; and former secretaries of key ministries and current government officials involved in policy change on women's issues. The interviews centered around three themes. First, we were interested in how interviewees view and understand the way their national constitution conceptualizes gender. Second, we wanted to gain a deeper qualitative understanding of how constitutional recognition of gender equality and difference shapes political strategies to change public policy. Finally, we explored how constitutional provisions interacted with other factors in the policy-making process such as the character of the women's movement, gender machinery, and the party in power. In section two we examine how different actors view those provisions as informing their work and providing greater legitimacy for women's rights-based claims for policy change. Section three gets at the question of whether and how the way gender equality is recognized in the constitution affected policy outcomes specifically - legislation and to some extent judicial decisions.

## 2. Gender Equality and Constitutional Language in Context

**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."<sup>5</sup> It has also served as an important defense against

---

<sup>5</sup> Interview with women's rights lawyer, March 2011 (AL1329).

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).<sup>6</sup> The Constitution also gives Congress the power to provide for the protection of mothers and children (Art. 75, No. 23).

The commitment to gender equality implied by the incorporation of CEDAW provisions into the constitution is a repeated theme in the literature on Argentina. Interviewees pointed to the vital importance of the explicit constitutional recognition of CEDAW for understanding how gender equality is conceptualized within the constitution and for understanding how gender equality should be read and balanced with other constitutional provisions. In fact, members of the women's movement who were "at the table" during discussions of reforming the Argentine constitution indicated that the incorporation of international norms, and CEDAW provisions in particular, was a "crucial advance" that has served as an important tool for getting women's issues on the political agenda through statutory reforms, administrative actions, and national and international litigation.<sup>7</sup> Scholars, activists, and legislators consistently described the constitution as providing the tools to redress past discrimination through public policy as well as litigation, but they also noted that these tools were under-utilized.<sup>8</sup> Interviewees, particularly those working in or with the state, viewed the

---

<sup>6</sup> 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."

<sup>7</sup> Interview with legislator, April 2011 (AMW4405).

<sup>8</sup> While CEDAW provisions have informed policy, "In the resolution of administrative and judicial cases, the rulings handed down generally do not take account of the provisions of the [CEDAW]. In fact the parties themselves reveal a lack of knowledge of such provisions when filing their complaints" ("Questionnaire on Implementation of the Beijing Platform for Action (1995) and the Outcome of the Twenty-Third Special

implementation of law as problematic. Difficulties stem from a number of factors including low administrative capacity, lack of funding, lack of accountability, the absence of a sense of “responsibility” or ethic of care on the part the state for ensuring individual rights are taken into account when accessing state services, and continued gender-stereotyping within state agencies (particularly the judiciary). Women’s organizations are divided in their efforts between holding the state accountable for implementing policy that has already been passed and advocating for additional policy change in areas such as reproductive rights and the extension of labor laws to informal sector workers.

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). Given its roots in the military dictatorship (1973 to 1989) the legitimacy of the constitution itself has been hotly contested over the years, particularly by those on the political left. As part of her electoral campaign, current president Bachelet promised to completely overhaul the constitution; and a draft is due late in 2017.<sup>9</sup> 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 No. 2 and 3).

<sup>10</sup> Interviewees indicated that the debate surrounding the constitutional amendment was long and arduous, but succeeded in establishing a general recognition of equality that is largely symbolic.

The Chilean Constitution, however, does not promote gender equality or address gender

---

Session of the General Assembly (2000) available at:

<http://www.un.org/womenwatch/daw/Review/responses/ARGENTINA-English.pdf>.

<sup>9</sup> The reform process, which includes public debate and commitment, has its own website:

<https://www.unaconstitucionparachile.cl/>

<sup>10</sup> Chile ratified CEDAW in 1989, but the Constitution did not expressly establish the principle of equality of men and women until 1999.

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, though many argued that neutrality masked and perpetuated patriarchy: “the text is neutral, [but] the debate and thinking behind was not.”<sup>11</sup>

The gender neutral Constitution appears to be marginal to the activities of women’s rights advocates, while provisions on the family often have a negative impact. When asked about how constitutional provisions and values shape policy, many interviewees felt the constitution was not a tool or even considered it “the main obstacle to achieving progress.”<sup>12</sup> Most believed that the equality statement was symbolically important; a few thought it could be leveraged to lend legitimacy to proposals seeking to revise laws that were explicitly discriminatory. The provision on family carried far more weight: “the [constitutional provision] that is most commonly used is the recognition of the family as the fundamental unit of society.”<sup>13</sup> The view that the Constitution was not particularly ‘helpful’ was echoed by those involved in human rights litigation. It was clear that while “very few women are using the courts to press inequality claims” it is due in part to a legal culture that prefers arguments (and judgments) based on statute, rather than the constitution as the “starting point for legal argument and interpretation.”<sup>14</sup> In sum, “Women haven’t used the tools, the judicial tools, to protect the principle of equality or to protect or amplify their rights.”<sup>15</sup>

Many suggested that the political right had been more active and adept at using the constitution to block gender policy change than the political center and left had been at achieving

---

<sup>11</sup> Interviews with Human Rights Lawyer, (CS8311), Ministry of Labor (CG1041). National Human Rights NGO, Lawyer, (CL2072) in March 2011 in Chile.

<sup>12</sup> National Human Rights NGO (CL4309); Gender based violence NGO (CW11318). Interviews in March 2011, Chile.

<sup>13</sup> Ministry of Labor interview, March 2011, Chile (CG 1041)

<sup>14</sup> Interview with Chilean scholar,, March 2011,( CS5309), SERNAM Interview March 2011, Chile (CG7310), Interview March 2011-Chile (CS3308).

<sup>15</sup> SERNAM interview, March 2011, Chile (CM9315).

change with respect to women's issues. Policy proposals face a stiff bargaining environment in Chile - the result of coalition politics. This often means that a discourse of women's rights and gender equality is strategically dropped for the more palatable and legislatively successful discourse of family and motherhood.<sup>16</sup> As one legislator put it, "A discourse based on family, women as mothers, in the end has much more weight and support than a discourse of women's rights."<sup>17</sup>

Absent more concrete rights in the constitution, many activists in NGOs and in the state have relied upon international law, particularly CEDAW and Belem do Para, to ground their legal arguments and to provide leverage for policy change in areas where the state was not meeting its international obligations.<sup>18</sup> "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."<sup>19</sup> However, international law is not a substitute for constitutional provisions. Unlike Argentina, the position of international law in the legal hierarchy is unclear in Chile.

Here we have briefly evaluated the expectation that egalitarian constitutional provisions are a central tool for women's rights advocates to advance their gender policy reform agenda. The interview data indicate that this is the case in Argentina; in Chile the gender-neutral constitution was marginal to advocates' efforts. The key theoretical propositions outlined earlier also suggest that the national constitution should shape the discourse, content and framing of gender policy bills, committee and floor debates, and ultimately legislation and court decisions.

### **3. Policy area comparison**

In this section we compare legislative reforms and judicial decisions in four policy areas:

---

<sup>16</sup> Interviews with: Ministry of Health (CG12318), Ministry of Labor (CG1041), women's rights NGO (CW13318), Legislator (CM14320), National Human Rights NGO Lawyer (CL2072). March 2011 in Chile.

<sup>17</sup> Legislator interview, March 2011, Chile.

<sup>18</sup> Women's Movement, Gender NGO, Interview March 2011, Chile (CW6309)

<sup>19</sup> SERNAM, Interview March 2011, Chile (CG7310).

women's rights within the family, gender-based violence, sexual and reproductive health, and employment rights. There are several expectations that follow from the law and social change literature discussed earlier. First, if constitutional rights provisions increase the legitimacy of rights claims or provide an enabling legal framework for policy change, Argentina should be more likely to pass gender-specific laws. We also might expect that the rights and protections elaborated in these laws would be more proactive in Argentina and make reference to constitutional rights. Judicial challenges to existing law and administrative action (or lack of action) should also follow expectations regarding strength and legitimacy of rights-based claims; where advocates can base their claims on constitutional provisions that clearly enumerate women's rights as equal citizens, we should see more successful favorable judicial decisions.<sup>20</sup>

To evaluate these expectations we analyzed legislative histories and floor debates and asked interviewees about the scope of the law and the policy process. We identified all gender related legislation from 1990 to 2010, and closely examined all these laws for references to the constitution, for specificity with respect to enforcement and sanctions, and whether the law reflected a discourse of rights or traditional gender roles. For key pieces of legislation, we also read and analyzed legislative floor debates.<sup>21</sup> Legislative change in the four policy areas highlights how constitutional norms and guarantees concerning gender equality and women's social roles inform and help structure gender policy outcomes. In Argentina, legislation, policy debates and reforms largely reflect the constitutional commitment to gender equality, particularly the commitment to CEDAW. In Chile, legislative debates reflect competing frames of reference, one stressing a gender-neutral equality, and the other stressing preservation of the family. Gender-specific bills

---

<sup>20</sup> Because judicial record keeping is incomplete in both countries and cases are differently indexed, it is not possible to systematically identify and analyzing high court cases in the four policy areas considered.

<sup>21</sup>In this paper we are primarily focused on key reforms during the 2000-2010 which correspond to the qualitative interview data. Important policy reforms and court decisions after this period are also noted.

that emphasized women's role within the family (rather than gender equality) were much more likely to be passed into law.

With respect litigation we thoroughly examined the record of high court decisions related to the four policy areas during the same timeframe (1990-2010). We also discussed litigation strategies and individual cases with our interviewees, asking how and whether gender equality constitutional provisions was reflected in judicial decisions. The picture is mixed. In both countries the judiciary is a relatively conservative institution and there have not been many "gender" cases. In large part because gender equality arguments have not been a winning strategy for litigators. Nonetheless, we would expect to see a difference in judicial outcomes between the two cases based on the different rights and recognition of gender equality afforded women and the role of international law and treaties in the legal hierarchy in each country. These differences are present in the policy area analyses presented below.

Specifically, in Argentina interviewees noted that litigation was part of a larger, multi-pronged strategy in some policy areas; and that constitutional provisions, including CEDAW's legal standing enabled mutually reinforcing strategies of litigation, lobbying, and social mobilization. As one scholar stated, using marriage equality as an example, "the fight for justice is done on four legs [...] a case is put to a judge, it becomes official public record and that serves to mobilize social movements, serves as an "event" for the press to cover. Then, ultimately judges, with some reason, have said, that parliament needs to resolve the issue. [Ultimately] changes have come with legislation."<sup>22</sup> Similarly when we examine the issue of violence against women, the high courts in Argentina are more apt to reference international law, comparative law, and regional decisions (by the Inter-American Commission, and Inter-American Court, of Human Rights). This is much less the case in Chile where there are very few constitutional claims to women's rights or equality made

---

<sup>22</sup> Interview with Argentine reproductive rights scholar, April 2011(AS12413).



in the courts. As one interviewee put it, “there really isn’t a culture of claiming rights for discrimination. And there are not very good mechanisms for doing so either.”<sup>23</sup> Moreover, when women do litigate, they use the statute, not the constitution, as the starting point. They are not making constitutional rights claims.<sup>24</sup> Finally, because the position of international law in the legal hierarchy is unsettled in Chile, lawyers do not center arguments on international law; as a result the courts are not a primary venue to advance a broad interpretation of constitutional rights.

### ***Family law***

Family law reform has centered on divorce, parental authority, and children’s rights and maintenance. At the time of democratic transition in both countries (the early 1980s for Argentina and the early 1990s for Chile), divorce was illegal, parental rights remained unequal as fathers retained primary legal guardianship of children (*patria potestad*), and children born out of wedlock were legally distinguished from “marital” children and treated unequally in terms of inheritance, support, and social services. In Argentina, lawyers, feminists and legislators lobbied hard for family law reforms that would achieve more egalitarian treatment of men and women (Kohen 2009, 86). While family law reforms faced stiff opposition from the Catholic Church in both countries (Htun 2003), movement toward a legal regime recognizing gender equality with the ratification of CEDAW proved crucial for early reforms in Argentina. In Chile, on the other hand, the definition of family in the Constitution was key in legislative debates and for conservative strategies to defend the legislative status quo in family law (Blofield and Haas 2005, 62).

In the 1980s, Argentina was undergoing a political transition to democracy, characterized by high levels of women’s mobilization and a growing discourse concerning women’s equality supported by ratification of CEDAW. The feminist family law agenda in Argentina sought changes to

---

<sup>23</sup> SERNAM interview, March 2011, Chile (CG7310).

<sup>24</sup> Interview with Chilean scholar, March 2011 (CS5309).

parental and children's rights (Htun 2003). Central to getting these issues on the political agenda (and passed) was a commitment to equality provisions as defined by CEDAW and support from the party and president in power at the time of democratic transition. CEDAW provisions and language were incorporated into the legal hierarchy in 1984 when Argentina ratified the Convention. The government then worked with women's groups, the head of the Women's Directorate, and civil law jurists to revise Argentine family law to bring it in line with CEDAW provisions. Legislation granting shared parental power and equalizing children's rights was passed 1985. In November of 1986, while a divorce law was being debated in the legislature (and bitterly contested by the Church), the Argentine Supreme Court issued a landmark ruling finding the old civil marriage law unconstitutional and allowing legally separated couples to remarry. The ruling paved the way for passage of a new "broadly egalitarian" divorce law in 1987, several years before the new constitution was promulgated (Htun 2003: 102; Blofield 2006: 131). In 2010, Argentina legalized same-sex civil marriage, with the same legal protections of marriage afforded to heterosexual couples, including adoption and pension benefits.<sup>25</sup> A series of court cases helped to set the stage for passing 2010 "Marriage Equality Law," and highlight the use of litigation strategy to achieve legislative change (Pierceson, Piatti-Crocker, and Schulenberg 2013: 143).

In the courts, however, gender discrimination and the application of gender based stereotypes have persisted to some extent. In *DPV, A c. O., CH* (1 November 1999) for example, a woman who had an extramarital child wanted to challenge the husband's paternity of this child. The Supreme Court upheld a differentiated ability to challenge paternity within marriage based in the civil code which gave that right to men, but not women. In a similar case, during a divorce trial,

---

<sup>25</sup> Human Rights Watch (2007 World Report) reports that nearly 15,000 same sex couples have married in Argentina since the law went into effect (<https://www.hrw.org/world-report/2017/country-chapters/argentina#d91ede>). In 2012, Argentina passed a landmark Gender Identity Law establishing the right of adults to choose their gender identity (including undergoing gender reassignment) without any prior judicial or medical approval.

the husband argues that he is not the father of couple's underage child, and he wants a DNA test to prove that his wife was unfaithful. The mother opposes this, but the first instance court accepts the husband's petition. On appeal, the Supreme Court reversed this decision based on international law which again, has constitutional status in Argentina, in this case the Convention on the Rights of the Child (Recurso de hecho deducido por la actora en la causa P. de la S., L. del C. c/ P., G. E. s/ divorcio y tenencia, 8 August 2010).

In a related area, pension benefits are related to marriage in that widows are treated differently from non-married (cohabiting) women who lose their life partner. This is a question considered by the Supreme Court in Benitez ME s / unconstitutionality action (13 April 2010). The Court rules that in concrete cases, given the needs of the woman to access social services and income support, and the length of time of the cohabitation (over 30 years), that the lower court should have dispensed with excessive formalities. Here the ruling favors equal treatment across classification of women (wives v. partners), but does not take up this question directly as a constitutional challenge. A final example of a gender-role based decision, is the 2014 the Superior Court of Justice of Córdoba judgment in M.M.R. (25 February 2014) which rejected an appeal by a prisoner to overturn the decision of lower court that had denied his request to serve his sentence as house arrest because his wife suffers from psychiatric problems and had difficulty caring for their minor children on her own. Both the lower court and the court of appeal considered that the benefit of serving house arrest only applies to women as mothers and cannot apply to men.

In Chile, SERNAM was particularly active in drafting and proposing reforms concerning family law early in the transition years. At the time, Chilean men exercised *patria potestad* (custody rights) and controlled marital property. Over-representation of the political right in Chile's electoral system and the role of the Christian Democrats in the governing coalition made reform difficult. SERNAM's efforts stalled in the face of opposition in the Senate because the family equality bill,

equalizing the rights of marital and extramarital children, “threatened to devalue the family in society” and “contradicted the constitutional principle establishing the family as the essential nucleus of society” (Htun 2003, 139). The argument made by Carlos Bombal of the Independent Democratic Union Party is a good example of how the Constitution was used to justify continued discrimination: “The different treatment of the children, by their position in the family, comes precisely from the precept that our own Constitution enshrines, recognizing that ‘the family is the fundamental unit of society,’ ... I have no doubt that [this bill], will forever weaken the institution of marriage.”<sup>26</sup> The Filiation Act establishing equal treatment for children born out of marriage was finally approved by the Senate, but not until 1998. The Supreme Court reinforced provisions of the law in *Marisol Moreno González v. Sucesión de Valericio Bravo Poblete* (4 April 2011), a paternity challenge in which the Court held that lower courts must seek available evidence, including DNA testing, to uphold the obligations of equal treatment enumerated in the Filiation Act and to comply with international law on the Rights the Child (to know their identity).

In Chile, mobilization on divorce also began as the new democratic government took power (in 1990). However, the Church’s influence within the governing Christian Democratic Party, the overrepresentation of the right, and the need to bargain among coalition partners, meant that divorce bills were not able to advance through the legislature. Eighteen separate bills were initiated and defeated in Chile prior to legalization of divorce in 2004 (Waylen 2007: 167); and concessions to the Christian Democrats pushed the legislative debate and the final legislation in a more conservative direction. Debate on the bill centered on constitutional recognition and protection of the family rather than on individual rights or equality.<sup>27</sup> The law that did finally pass, the 2004

---

<sup>26</sup> Historia de la Ley 19585, p. 170. Available at: <http://www.bcn.cl/histley/historias-de-la-ley-ordenadas-por-numero>.

<sup>27</sup> Committee and floor debates are provided for select laws are provided by the Chilean Congressional Library: The ‘history’ of the Civil Marriage bill is available at: <http://www.bcn.cl/histley/lfs/hdl-19947/HL19947.pdf>.

“New Civil Marriage Law,” reinforces traditional family values and even avoids the word divorce (Blofield and Haas 2005, 58). Although divorce can be initiated by either spouse, couples are required to demonstrate that they are no longer cohabiting for more than year to in order to get a divorce.

Women’s parental authority is not on equal footing with men in Chile. Parental authority is held by the father during marriage and married women have diminished decision making power in marriage. The husband is the “head of the conjugal partnership” and administrators of the family’s assets (even property inherited by wives before the marriage) (Civil Code Art. 1749). The ordinary courts have not taken up the question of gender discrimination in the Civil Code (Irrarrázaval and Massuh 2014: 464). Consistent with Chilean judicial process and culture, the role of ordinary courts is to apply the law as written. At the same time, Civil Code (Art. 225) views women as the “natural” caregiver for children when parents are separated, and requires supplemental support go to the mother to support her in this role. In general courts have held that children belong with their mothers, because that is the natural order of things (Irrarrázaval and Massuh 2014: 460). This reasoning is born out in the Supreme Court judgement *San Martin con Staffan* (15 July 2008). However, if the mother is considered unsuitable, placement will be with the father as was the reasoning in the *Atala* case. The Supreme Court upheld a lower court decision that stripped Karen Atala, a judge, of her parental rights due to her sexual orientation, ordering custody of the children go to her estranged ex-husband on the basis that the children would be put at risk if raised in a lesbian household. In 2012 the Inter-American Court decided against Chile in the case of *Atala and Daughters v. Chile* (IACtHR judgement 21 March 2012).<sup>28</sup>

---

<sup>28</sup> In January 2016 President Michelle Bachelet announced the start of an open public discussion on same-sex marriage aimed at producing a “satisfactory bill on marriage equality, recognizing the same rights for everyone.” It was, she said, “not only a demand of the international Justice system, but a legitimate demand of Chilean society.” - as reported by Human Rights Watch January 7th 2016.

### ***Gender-based violence***

Gender-based violence (violence against women generally and domestic or partner violence specifically) is a significant social problem in Argentina and Chile and long on the reform agenda for women's rights advocates. Unlike family law and reproductive rights, this is a policy area that does not necessarily challenge the political or cultural power of the Church (Htun and Weldon 2010). Both countries ratified the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (commonly known as the *Convention of Belém do Pará*) in 1996, and both are obligated to introduce measures to eliminate or limit violence against women and to monitor violence against women.

Both Chile and Argentina passed anti-violence laws in the mid-1990s and passed stronger anti-violence laws in recent years. Neither the Chilean Constitution nor the Argentine constitution includes specific provisions about bodily integrity of gender-based violence. However, under Article 75 of the Argentine Constitution, the *Convention of Belém do Pará* has constitutional status. Argentina's 2009 law explicitly draws upon constitutional rights and writes the principle of gender equality and women's rights into the legislation. In Chile the framing of legislative debate and the law itself is oriented toward the family and women's role within the family.

In Argentina, gender-based violence was on the political agenda of the Radical Party in the mid 1980s, but legislative initiatives were tabled and not reintroduced until 1994. The first major piece of legislation, the 1994 Protection from Family Violence Law, went into effect in 1996. The law "constituted a major victory for the feminist movement, which had campaigned for this legal tool for years" (Kohen, 2009, p. 87). However, its enforcement mechanisms were weak and provided no punishment for failure to comply with judicial orders (of restraint for example). Domestic violence was adjudicated in family courts, which can have advantages for women and for

children with respect to access, but domestic violence was not considered part of criminal law.<sup>29</sup>

Overall, the law was fragmentary (laws and protections varied across provinces) and did not take a comprehensive view of the causes or consequences of violence in women's lives, though it did recognize domestic/family violence as a public (rather than solely private) issue.<sup>30</sup>

The Law for the Comprehensive Protection of Women (Law 26.485), passed in 2009, represents a major legal advance and goes much farther than previous legislation to incorporate the norm of gender equality. In particular, it draws on the constitutional right to equality between men and women and the international agreements referenced in Art 75 of the constitution: the CEDAW, the Convention Belém do Pará, and Convention on the Rights of the Child. The law incorporates the broad definition of violence of the Convention Belém do Pará<sup>31</sup> and mandates “a national action plan to combat violence against women, guarantees access to justice by providing for free legal assistance and expedited legal proceedings, ensures comprehensive assistance for the victims, and makes a commitment to tear down socio-cultural patterns that foment gender violence.”<sup>32</sup> The language of rights and gender equality permeates both the text of the 2009 statute and the legislative floor debates. Representative Juliana Tullio, for example, declared that “finally we will have a standard to protect women's rights, sanction violence, and promote the right of women to live free from violence;” and representative Silvia Storni emphasized that advancing and attaining equality between women and men is a question of human rights. Likewise, Hugo Rudolfo Acuna

---

<sup>29</sup> Kohen (2009, pp. 88-89) suggests that Domestic Violence law's family courts have been successful in increasing access to justice for women, but the record is mixed because family law is overwhelmed by claims, and many women do not have access due to the lack of legal aid.

<sup>30</sup> Senator Maria Cristina Perceval (head of the Women's Bench in the Argentine Congress) and a sponsor of the 2009 bill (Interview with the Senator by Gabriel Conte March 27, 2009 for “Bill targets violence against women” (Comunidad Segura). Available at: <http://www.comunidadesegura.org/en/node/42118> [accessed April 13, 2010]:

<sup>31</sup> The Convention recognizes five types of violence (Art. 4): physical, psychological, sexual, economic, and symbolic in both private and public spheres; including marital rape.

<sup>32</sup> “Bold New Law on Violence against Women” by Marcela Valente, March 12, 2009. (IPS). Available at: <http://ipsnews.net/news.asp?idnews=46092> [accessed April 13, 2010].

reminded members that while men and women are different they are equal in dignity and therefore should enjoy equal opportunities.<sup>33</sup>

The 2009 legislation requires all levels of government to adopt the means necessary to implement the law, mandates budgetary outlays, requires reporting and statistics generation, and obligates the state to act. The law charges the CNM with oversight and implementation. Given the institutional weakness of the CNM discussed earlier, the resulting problems with implementation and interagency coordination were predictable (Franceschet 2008). Implementation is further complicated by Argentina's federal system as each province is expected to implement its own law within the outlines of the federal mandate (Smulovitz 2010; Franceschet 2011). Moreover, although the 2009 legislation provides a comprehensive definition that includes domestic violence, it remains a misdemeanor and is prosecuted in civil court unless there is a "crime against sexual integrity" which carries a harsher punishment. In the case of rape, the need to provide proof of sexual injury resulting from the rape can make conviction difficult (Boyne 2011).

When these enter the court system, at multiple levels, judges may simply fail to investigate, dismiss the case as a "private matter" beyond the judicial system, require the victim to provide additional proof, apply gender stereotypes, and "re-victimize" the victim by focusing the investigation on a woman's body or character (Asensio 2010). A prominent example is *L.N.P. v. Argentina*. LNP, a 15 year old indigenous girl, was raped in a small isolated town behind the church in the main square in a northern province by three Creole youths. After a process plagued by judicial irregularities, gender stereotyping, and racial discrimination, the three were absolved. For example, witnesses were asked whether LNP had a boyfriend, if one of the accused was her boyfriend, and if she was a prostitute (as the youths had claimed). Her injuries were extensive and

---

<sup>33</sup> Versión Taquigráfica, Cámara de Diputados. Expediente No: 0250-S-2007.  
<http://www.diputados.gov.ar/secparl/dtaqui/versiones/>



verified, yet the judge doubted her lack of consent, suggesting that she did not resist seriously enough, that rape can be confused with violence common to the sexual act, and that the injuries were due the nature of the act (anal penetration), the impetus with which the act occurred, and the youth of the subject. In 2009, the State publically acknowledged its responsibility and issued a public apology to LNP, her family, and the indigenous community. The case was followed in the national and local media and demonstrates the contradictions and gaps between national and provincial legislation, which incorporates international norms, definitions, and standards of women's human rights, and judicial processes and practices in concrete cases (Equipo Latinoamericano de Justicia y Género - ELA 2009, 514). As awareness and use of international law has grown in litigation, higher court decisions reflect these changes and a number draw on constitutional and international law to justify their judgements in gender-based violence cases.<sup>34</sup>

In 2012 Argentina legislated on the issue of femicide. The UN defines femicide as the murder of women because they are women.<sup>35</sup> NGOs estimated in 2015 that a woman is killed every 30 hours in Argentina; numbers that have been rising (perhaps due to increased reporting) in the last decade despite legislative changes. Large public protests against femicide and violence against women have taken place in 2015 and 2016 under the slogan and hashtag #NiUnaMenos ("NotOneLess").<sup>36</sup> The circumstances surrounding the protests highlight the large gap between achievements in legal and policy reform on the one hand and the complexity of policy implementation of gender policy on the other.

Chile also passed anti-violence legislation in the mid-1990s and reformed that law in the 2000s. The Family Violence Law (1994) was one of the earliest pieces of gender policy in

---

<sup>34</sup> This is based on the assessment of experts at Observatorio de Sentencias Judiciales. Available at: <http://www.articulacionfeminista.org/a2/index.cfm?cnl=41&opc=9>

<sup>35</sup> See [http://oig.cepal.org/sites/default/files/noteforequality\\_17\\_0.pdf](http://oig.cepal.org/sites/default/files/noteforequality_17_0.pdf) for a list of legislative changes in Latin America.

<sup>36</sup> See reporting by the Guardian on sexual violence at: <https://www.theguardian.com/global-development/sexual-violence>.

re-democratized Chile and is the result of the “sometimes troubled alliance” between SERNAM, activists, and legislators. The legislation faced the same conservative political environment that family law did; the resulting policy was more moderate than activists had wanted and emphasized protection of the family and marital reconciliation (Franceschet, 2008, p. 13; Waylen, 2007, p. 168). The introduction to the bill drew upon the constitutional rights to life, physical and psychological integrity, and equality before the law to justify the need to protect women and families against domestic violence. However, the discourse on ‘domestic violence’ was dropped and replaced by ‘family violence;’ and there was a reduction of punishment for offenders (Blofield and Haas 2005). Once enacted, the Family Violence Law was hamstrung by an inadequate budget, and deficiencies associated with judicial procedures and weak sanctions that left victims vulnerable.

As in Argentina, there was pressure for reform. A new domestic violence bill was introduced in 1999 that eventually passed Congress in 2005, after extensive debate and the passage of the Family Courts Act.<sup>37</sup> In the debates over modifications to the 1994 family violence law, gender equality is rarely mentioned but human rights are referred to occasionally. For example, Cecilia Perez of SERNAM argued that passage of the bill would constitute a substantial advance in the promotion, protection and defense of human rights in Chile. Protecting the family, however, is cited more frequently and used by supporters of the bill. This is evident in comments made by representative Maria Angelica Cristi, whose remarks echo the constitutional provision on family: “We must recognize that the family is the fundamental unit in which humans socialize. A weak or unprotected family is at risk for violence.” Fidel Espinoza of the Socialist Party couched his support in similar terms.<sup>38</sup> The final statute identifies inequality of power as a foundation for familial

---

<sup>37</sup> The Chilean government passed a law extending the legal definition of rape and increasing punishments for offenders. The 1999 law also dropped the requirement that women be of “good character” to be considered a “victim.” Chilean law now recognizes and punishes spousal rape.

<sup>38</sup> Historia de la Ley 20.066, pp. 119, 172, 177. Available at <http://www.bcn.cl/histley/historias-de-la-ley-ordenadas-por-numero>

violence, but does not identify gender inequality or acknowledge the gendered nature of family violence.

The improvements to the 2005 law include: increased penalties, the addition of physical and psychological violence to the criminal code, overhaul of family tribunals, increased budget (to SERNAM for shelters and data collection), and creation and maintenance of national data registries to track the incidence and handling of domestic violence cases. The reform has had a substantial effect: in the year following its enactment, there was a 151% increase in arrests (Franceschet 2008). Despite these improvements, interviewees working in this area remained critical of the Family Violence Law. They noted that the Chilean law continues to be limited to family violence and centered on a discourse of domestic violence, rather than the broader human rights discourse of gender-based violence that informs the Convention of Belem do Para. Moreover, interviewees reported that the new complaint procedures that make family courts responsible for referring cases of habitual abuse to the criminal justice system burdened victims with additional legal processes.

In 2010 Chilean criminal code was amended to recognize the crime of femicide.<sup>39</sup> This legal reform was explicitly motivated by gender equality concerns; however the language of law is largely symbolic (Irrarrázaval and Massuh 2014: 452). Stereotyping continues to be an issue in the judiciary, particularly at lower court levels as demonstrated in a recent (2016) a ‘crime of passion’ defense for attempted femicide. When police officers responded, the woman’s partner was brutally beating and stabbing her in their home and did not desist from the attack until one of the officers shot him. The partner was convicted of attempted femicide but the trial court reduced the sentence to probation because partner acted in a ‘fit of rage’ over the victim’s alleged infidelity.<sup>40</sup>

### ***Workplace equality***

---

<sup>39</sup> Law No. 20.480; amending Article 390 No. 2 of the Código Penal.

<sup>40</sup> See [Critican fallo que acoge infidelidad como atenuante de femicidio](#), La Tercera (7 April 2016).

Recognizing and promoting gender equality and equal opportunities in the workplace, including equal pay legislation, have been on the reform agenda for women's organizations in both countries during the 20 years in our study. In both countries, women's groups have enjoyed less success on labor policy than in other issue areas; possibly due to the strong influence of employers. Nonetheless, rights advocates pursuing workplace equality have drawn on the constitution and international law commitments (especially the CEDAW and the International Labor Organization), but with different degrees of success and different discourse concerning equality.

The Argentine Constitution (Section 14) includes the principle of equal pay for equal work and incorporates international law and treaties (Section 75) containing human rights principles regarding gender discrimination.<sup>41</sup> Additionally, the Constitution authorizes Congress to pass laws with positive (affirmative) actions toward creating a level playing field for women. The Law on Employment Contracts (1976) regulates employment policy, including leave, wage, and retirement regulations, as well as protections for female workers and maternity leave.<sup>42</sup> After the transition to democracy, various pieces of legislation were passed that modify the Law on Employment Contracts in an egalitarian way. These changes are recognized in the National Plan for Equal Opportunity in the Workplace (1998).<sup>43</sup> The National Plan lists the previous laws advancing gender equality including: equal opportunities and treatment for workers with family responsibilities; the right of all workers to upgrade their skills without discrimination; the right to equal pay for work of equal value; approval of Convention No. 100 of the International Labor Organization; and the

---

<sup>41</sup> In addition to CEDAW, the Argentina has ratified the ILO Discrimination (Employment and Occupation) Convention of 1958 N° 111 and the Equal Remuneration Convention of 1951 N° 100; and the Anti-Discrimination Law N° 23,592 specifically prohibits any discriminatory practice on grounds including sex.

<sup>42</sup> Law No. 20,744, 1976. Title VII of this law specifies rights for women, including protections against termination for pregnancy and marriage, provisions for child care leave, and prohibition on women working from home so that women are not required to work instead of caring for children. Several of these are "conservative" in that they work to conserve the traditional role of women as wives and mothers caring for children in the home.

<sup>43</sup> Decree No. 254, 1998.

adoption of the Convention on the Prevention, Punishment and Eradication of Violence, which recognizes sexual harassment in the workplace. The National Plan draws heavily on a discourse of gender equality in the Constitution, repeatedly notes the constitutional status of CEDAW in Argentina, and calls on the CNM to coordinate and implement prior legislation.

A number of employment laws address issues of equal opportunity and non-discrimination. Constitutional rights and CEDAW provisions frequently appear in the text of the law itself and nearly always are cited in legislative debates. For example, the Trade Union Quota Act (2002) introduces a 30 percent gender quota for trade union elections. The preamble of the bill explains that the Constitution provides for legislation that promotes equal opportunity, thus the law “aims to give effect to this guarantee, so that women workers are represented in the discussion of their work conditions.”<sup>44</sup> Senator Carmen Gómez de Bertone, of the Justicialist Party, argued that the law would strengthen the labor movement. Increasing the number of women in leadership positions, she stated, would bring a new perspective and “open possibilities of transformation in terms of equality.”<sup>45</sup>

Possibly the most significant legislation affecting women’s employment is the passage of the Domestic Worker Law (Law 26,844, 2013). This law introduces numerous rights and protections to domestic workers including maternity leave, paid holidays, yearly bonuses, compensation for dismissal, and sets maximum working hours to 8 hours a day and 48 hours per week. The law follows the principles and recommendations laid out in the ILO Convention No. 189 which Argentina has ratified.

On the other hand, several of the laws that were passed reflect a more maternal orientation. For example, the Act on Justified Absences for Students and the Law Protecting Women in Public

---

<sup>44</sup> Versión Taquigráfica, Cámara de Diputados. Expediente No: 7946-D-2000/0163-CD-2001. Orden del Día, Cámara de Diputados. <http://www.diputados.gov.ar/index.html>

<sup>45</sup> Versión Taquigráfica, Cámara de Diputados. Expediente No: 7946-D-2000/0163-CD-2001. <http://www.diputados.gov.ar/index.html>

Schools establish or reinforce the rights of pregnant students. The Housewives Retirement Act makes it possible for housewives to collect pensions even if they haven't contributed—a law that some would argue reinforces the traditional division of labor, but that also could be viewed as recognizing the contribution of women in the domestic sphere.

Overall, labor law reflects a variety of approaches to women in the labor market, from maternalist and protective legislation, to egalitarian reforms, such as the Trade Union Quota Act (2002) discussed above, that clearly draw on the Constitution and use the language of women's rights, equal opportunity, and equality. Still others have been influenced by international commitments (CEDAW and ILO) with clear gender equality goals, but have stopped short of really addressing the gendered structural inequalities that impact women in the labor market.

Court decisions reflect, to some extent, the egalitarian constitution. "*Asociación Mujeres en Igualdad v. Freddo S.A* (16 December 2002) is a landmark sex discrimination case in Argentina. In this case a well known ice cream chain, Freddo, was found to have engaged in discriminatory hiring practices in violation of the Constitution. The National Court of Appeals (for civil matters) seated in Buenos Aires required the company to take positive, affirmative, actions to hire women to correct the discrepancy. It was the first case in which the Argentine judicial branch imposed affirmative action to address discrimination. Most recently, in *Mirtha Graciela and others v. Taldelva SRL and others / amparo* (20 May 2014), the Supreme Court decided a case concerning gender discrimination with respect to occupation: bus driving. A woman in Salta, who met all the requirements to be hired as a bus driver, claimed she was not given a job because she is a woman. Her suit made important rights-based arguments about gender equality, discrimination on the basis gender, and the violation of women's rights. The Court of Salta (province) had imposed a quota (30%) for females driver positions, a decision that was vacated by the Court of Appeals. The Supreme Court sided with the provincial high court, basing its decision in national and international

constitutional commitments to equality and non-discrimination, including CEDAW obligations. These two decisions are particularly important because they impose affirmative action remedies on private sector businesses. In general, gender equity and non-discrimination policy is applied in public sector, but lags substantially in the private sector.

Changes in Chilean labor law reflect a tension between the constitutional commitment to family and the more recent constitutional amendment incorporating a sex equality statement. Some important legislation advancing women's rights in the workplace has been passed, for example, the Sexual Harassment Law and the Equal Pay Law. However, the majority of gender policy labor law reforms have been justified by family needs; these reforms mostly concern maternity rights and benefits, childcare leave, and childcare.

The tension between protecting the family and equal rights is apparent in the legislation and in legislative debates. In employment policy, the content of the laws tends to be more supportive of gender equality, and the discourse of rights appears more often in legislative debates in this policy area than in other policy areas. However, promotion of the family still tends to dominate. Even policy changes that are potentially supportive of gender equality in the workplace are framed in terms of women's traditional care giving role and constitutional protection of the family. The 2002 Child Care Act is a good example. The law requiring business to establish on-site nurseries for its female employees was supposed to enable more mothers to remain in the workforce and was described as "an important support for motherhood." In reality, "...the bill implicitly accepts child care as solely a woman's responsibility" (Blofield and Haas 2005, 54). A 2009 bill proposed to extend this right to fathers when the mother was absent or unable to care for a child under two; however, the final law applies only to fathers with sole custody by court order (and more recently temporary custody) or in the case of the death of the mother. The legislation of paternity leave was also focused on the family and focused on Art. 1 of the constitution which states

that family is the fundamental nucleus of society. Legislators argued that since motherhood is necessary for that nucleus, it follows that fathers should have leave at the birth of a child to “support the mother and child precisely in the moment in which they need additional care and contribute to stronger bonds of affection within the nuclear family.”<sup>46</sup> In short, framing the debate in terms of women’s traditional care-giving role is an effective legislative strategy to gain conservative party support for these bills in Chile (Blofield and Haas 2005: 54-55).

Many labor and employment related cases in Chile concern dismissal without just cause--often claiming pregnancy discrimination--these go through an administrative labor complaint procedure, rather than through the regular court system. A small number are appealed to the Supreme Court, typically on the basis that the law was not applied correctly (rather than as a constitutional rights claim). For example, in *Maria Riesco Loyola v. Colegio Alicante del Rosal S.A.* (1 June 2011) a female employee sought to have her dismissal during her maternity leave declared unjustified; on appeal, the Supreme Court upheld lower court rulings against the employer on the basis of the labor code. Like most cases in Chile, the questions raised do not require the application of constitutional law to be resolved. Similarly in *Elizabeth Galaz Cuadra v. Fisco de Chile* (19 November 2010) a woman who was dismissed from her position as a judge during pregnancy sought to be reinstated in her position. The Court upheld the dismissal on the grounds that judicial personnel are not covered by the labor law, but by a separate law. In a few cases raising constitutional questions, decisions of the Court have varied. In *María Angela Salazar v. Universidad San Sebastián* (19 May 2009) concerning the harassment and dismissal of a pregnant university professor and dean the Court, on appeal, found that employers are limited by the constitutional rights of the workers as individuals, particularly with respect to their private intimate lives and

---

<sup>46</sup> Available at: <http://www.bcn.cl/histley/lfs/hdl-20047/HL20047.pdf>



dignity. More recently, a lower court found in the employer's favor in a case concerning discrimination (plaintiff was demoted) on the basis of sexual orientation, citing insufficient proof.<sup>47</sup>

The Equal Pay Law is clearly oriented to advancing equality. The bill was introduced in the lower house and enjoyed broad political support from both the Bachelet administration and members of the opposition. The bill's language on pay equity was clearly rooted in gender equality arguments and represents a departure from the previous emphasis on women's role in the family by explicitly tying the legislation to gender equality and non-discrimination provisions in the Constitution as well as international law and practice.<sup>48</sup> This same foundation was clear in the President's speech on the occasion of its passage, which declared that Chile was now fulfilling and ethical obligation to demonstrate that men and women are equal before the law" (Irrarrázaval and Massuh 2014: 254).<sup>49</sup> Proponents, however, hastened to add that women's rights were not the only issue at stake, but also family stability since women contribute significantly to family income. Family and role based arguments appear in the legislative record, such as "Wage discrimination, not only undermines the rights of women.... [it] is contrary to the interests, and even the stability of the family"<sup>50</sup>

Tracing the passage of the Act on Sexual Harassment in the Workplace reveals a similar pattern. In justifying the amendments to the labor code to make sexual harassment illegal and set up a complaint mechanism, SERNAM and the main sponsor, Representative Adriana Muñoz, made direct reference to women's rights: "If the bill is passed in Congress, it will [...] send a powerful signal that more women and young women can enter the employment world confident in the

---

<sup>47</sup> Sentencia n° T-6-2015 de Juzgado de Letras de La Calera (10 August 2015) available at:

<http://jurisprudencia.vlex.cl/vid/581978206>

<sup>48</sup> Moción Parlamentaria. Historia de la Ley N° 20.348, p. 7.

<sup>49</sup> The Equal Pay Law did not include language about equal pay for equal work - something noted in the CEDAW Committee's response to Chile's 2012 regular report. A 2016 bill working its way through the Chilean lower house seeks to reform the law (see: [https://www.camara.cl/pley/pley\\_detalle.aspx?prmID=10998&prmBoletin=10576-13](https://www.camara.cl/pley/pley_detalle.aspx?prmID=10998&prmBoletin=10576-13)).

<sup>50</sup> Eduardo Díaz, Independent Regionalist Party. Historia de la Ley 20348, pp. 77, Similar quotes on pp. 112, 214. Available at <http://www.bcn.cl/histley/historias-de-la-ley-ordenadas-por-numero>

knowledge that their rights will be respected.”<sup>51</sup> However, by 2005 when the final version of the bill came to a vote, there was no mention of women’s rights or constitutional rights. It is interesting to note, that in her final defense of the law, Adriana Munoz herself does not refer to rights or even dignity, but returns to the theme of family: “Sexual harassment highlights the lack of security and safety that women experience in their employment.” Considering the proportion of female headed households with dependent children “the fact that their jobs are constantly in question because of abuse of power, makes their situation all the more dramatic.”<sup>52</sup> Cases of sexual harassment have not fared particularly well in the courts because of the need to prove significant harassment to judges in a context in which sexual harassment has become naturalized and accepted.<sup>53</sup>

### ***Sexual and Reproductive Health***

Legislation and process in this policy area reveal a stark contrast between Argentina and Chile. Overall, reform in sexual and reproductive health has been very limited in Chile and generally has not been oriented toward gender equality. Argentina has passed more laws in this policy area including the right to surgical contraception, rights of mothers and fathers during childbirth, establishing a national program for family planning and access to contraception, and the creation of a national sexual education program. Although the Argentine Constitution does not have specific provisions on sexual health and reproductive rights, the Constitution has proven important to advocacy efforts. A researcher on sexual and reproductive health rights in Argentina clarified the importance of the 1994 Constitution for policy reform in this way: “Precisely because of the Constitution, which introduced the strategies and language of Nairobi and the International Women’s Conferences [etc.]; reforms such as the reproductive health act, the national law on sexual

---

<sup>51</sup> Moción Parlamentaria. Historia de la Ley N° 20005, p. 44.

<sup>52</sup> Historia de la Ley N° 20005, p. 351.

<sup>53</sup> See for example: Jessica Oyarzún and other / Promociones Financieras Ltda. (14 January 2009), and Gisselle Maturana / Sociedad Comercial Maicao Limitada. (18 March 2009).

and reproductive health, voluntary surgical contraception, emergency contraception, and the comprehensive sexual health law were all based in these commitments.”<sup>54</sup>

The language of women’s rights, gender equality, and the rights of individuals appears in most of the laws in this policy area as well as in legislative floor debates. For example, in her introduction of the Sexual Health and Responsible Parenthood bill, Representative Cristina Guevara noted that the proposed law is grounded in international laws and conventions, particularly CEDAW and pointed out CEDAW’s constitutional status and the Argentine government’s obligation to ensure that all citizens can exercise those rights.<sup>55</sup> In legislative debates, legislators frequently cited equality of opportunity and women’s rights as reasons to support the law. For example, Deputy Silvia Marta Milesi of the Radical Civic Union (the UCR) saw the law as providing “equal opportunity” for poor women, who lack choice and agency in their lives.<sup>56</sup> Senator Mabel Caparros of the Justicialist Party (the PJ) stated that “adoption of this law is an achievement not only for women but also for men, because it means that citizens have access to the health care system on equal terms.”<sup>57</sup> Floor debates concerning the Law on Surgical Contraception, which entitles adults to tubal ligation or vasectomy through the health system, as well as the debates and final legislation for the National Program for Comprehensive Sexual Education also refer frequently to gender equality as provided in the constitution.

With respect to litigation, however, the picture is mixed. The programs above face opposition in some provinces and significant opposition from conservative groups which challenged aspects of the national health program in different domestic judicial venues. In particular, legal challenges were lodged against the distribution of emergency contraception and

---

<sup>54</sup> Interview April, 2011-Argentina (AS5405).

<sup>55</sup> Versión Taquigráfica, Cámara de Diputados. Expediente No: 1196-D-1999/0016-CD-2001. <http://www.diputados.gov.ar/secparl/dtaqui/versiones/>

<sup>56</sup> Versión Taquigráfica, Cámara de Diputados, Expediente No: 1196-D-1999/0016-CD-2001, p. 24. <http://www.diputados.gov.ar/secparl/dtaqui/versiones/>

<sup>57</sup> Versión Taquigráfica, Cámara de Diputados, Expediente No: 1196-D-1999/0016-CD-2001, p. 46. <http://www.diputados.gov.ar/secparl/dtaqui/versiones/>

the sex education programs (Equipo Latinoamericano de Justicia y Género - ELA 2009, 269-270). Abortion, which is not regulated by these legal changes, remains a central social, legal, and political problem and a leading cause of maternal mortality. Abortion is illegal under the Criminal Code, but permitted under exceptional circumstances. Ambiguity surrounding the interpretation of the exceptions generates judicial debate, inconsistent judicial rulings and legal uncertainty (Bergallo, 2010). “The situation has made doctors very cautious, and women are often denied abortions to which they are legally entitled. Doctors, fearing the possibility of criminal prosecution, often fail to seek judicial authorization to perform abortions” and judges fearing career repercussions, or out of conscientious objection, refuse to grant judicial authorization (Kohen 2009, 105). This can have tragic consequences. In the case of Ana María Acevedo, a 19-year-old pregnant woman diagnosed with cancer, doctors refused to begin cancer treatment or to carry out an abortion. Both Ana and the baby died.

In a growing body of abortion related cases, there are two kinds of cases. In one set, the *definition* of abortion is at play - this is also the case for Chile as discussed below. The Supreme Court decision in *Portal de Belén* (2002), is a prime example. In this case, brought by pro-life activists, the Supreme Court prohibited a brand name of emergency contraception on the grounds that it was considered an *abortifacient*. The decision served as a precedent for successful litigation by conservative groups against the provincial distribution of emergency contraception as part of the National Program for Sexual Health and Responsible Procreation. A second definitional issue is related cases of fetal malformation (typically *Anencephaly*). In *TS v. Gobierno de la Ciudad de Buenos Aires* (2001) the Court authorized an induction post viability (after 24 weeks) and not an abortion, establishing the precedent that fetal malformation does not fit within the exceptions contemplated by the criminal code and is incompatible with the right to life as guaranteed by the American

Convention. The City of Buenos Aires subsequently sanctioned Law 1044 in 2003 requiring such pregnancies be carried to 24 weeks (the point to viability).

A second important category of judicial decisions on abortion concern judicial definitions of what constitutes a legal abortion (*aborto no punible*) under the criminal code. At the center of this definition is the question of whether the exception in the case of rape covers rape generally or only rape of a mentally handicapped women or girl. The conservative and literal reading is the later. There are numerous and conflicting examples of both interpretations (Bergallo 2010; Carbajal 2009; Kohen 2009; ELA 2009). A leading case is that of LMR, a 20 year old mentally handicapped woman who was raped by her uncle. LMR lived with her mother who requested to have the pregnancy terminated; LMR has a mental capacity of an 8-10 year old. The hospital refused the request. The mother filed a police complaint concerning the rape and took LMR to another public hospital where an urgent meeting of the Bioethics Committee was requested. Despite the fact the request clearly fit within the exceptions contemplated by the criminal code, a judge for minors intervened to impede the abortion. The mother appealed the order through several instances to the Provincial Supreme Court of Buenos Aires, which ruled that in cases of “legal” abortion no judicial authorization is necessary. However, LMR was unable to exercise this legal right because multiple hospitals refused to treat her; she eventually had an abortion in a clandestine clinic. The case, which was referred to an international body given the State’s failure to protect her human rights, raised awareness of the serious legal and practical issues in securing a “legal” abortion under current law.<sup>58</sup>

A second leading case, decided by the Argentine Supreme Court, settled the definition of “legal” abortion. March 2010 the Superior Tribunal of Chubut authorized an abortion for a rape victim, who was not mentally retarded. The Chubut ruling set a clear precedent at the provincial

---

<sup>58</sup> CLADEM’s summary of the facts of the case and a copy of the Committee’s judgment of April 28, 2011 is available at: [www.cladem.org](http://www.cladem.org).

level that rape qualifies, on its own, as an exceptional circumstance for accessing a safe and legal abortion. Behind the controversy of how to interpret Art. 86 of the Penal Code, is a longer political story and struggle to reform the Penal Code. The ambiguity regarding the relationship between the conditions of rape and mental incapacity was resolved under the military regime (in favor of rape as a stand-alone exception to the penalization of abortion), but then overturned with the transition to democracy. Since the transition to democracy over 50 legislative bills concerning abortion have been proposed; none have made it to floor for debate (Equipo Latinoamericano de Justicia y Género - ELA 2009, 276). The Chubut case eventually reached the Argentine Supreme Court on appeal. On 13 March 2012, in a landmark decision, the Supreme Court upheld the provincial ruling and took the opportunity to clarify the meaning of the law in a decision that references the constitution and international law obligations.

Bergallo (2010) suggests that one of the consequences of the inconsistent and conservative jurisprudence at the provincial level in Argentina and the relative lack of direction from the Supreme Court in Argentina is the invisibility of women and women's rights in reproductive rights litigation. In the kinds of cases discussed above (those defining abortion and defining exceptions to the penalization of abortion) women as holders of rights, women as subjects of law, and women's rights as human rights are simply absent; there are no references to the right to family planning, contraception, or reproductive autonomy all which have legal anchors in the Argentine Constitution and the CEDAW provisions (which have constitutional status). Likewise there is little recognition of the social conditions that are at play in the majority of cases in which a legal abortion has been denied by either medical or judicial personnel. Certainly part of this lack of visibility has to do the nature of support (and lack of support) for litigation of women's rights as human rights. This is a theme we see repeated in the Chilean case as well.

Chile has done much less to further women's reproductive rights in this time frame. In 1989, in the twilight of the authoritarian regime, abortion was criminalized.<sup>59</sup> Other areas of reproductive health such as sterilization, education, and comprehensive access to family planning were already quite restrictive (Casas 2004). Moreover, any discussion of reproductive health, particularly abortion, sterilization and the approval of the morning after pill, has been dominated by references to Article 19 (1.2) to the Chilean Constitution, which "protects the life of those about to be born." As one health sector researcher explained, "in the areas of sexual and reproductive health the Constitution makes it difficult to guarantee women's rights to reproductive health. One has to use the right to life, the right to health, and the relationship between rights to do so."<sup>60</sup> As a result, policy change in this area has been very limited and mention of women's rights or equality in law or floor debates is rare. The Fixing Norms Act of Information, Orientation and Presentation of Fertility Regulation, which deals with sexual and reproductive health information including emergency contraception, is perhaps the only law in this policy area that advances women's equality. Proponents of this law drew upon the language of human rights and even women's rights far more often than they did in other legislative debates. For example, Representative Osvaldo Palma stated that "we're dealing with the freedom to choose, non-discrimination, the rights of women, the rights of families, the right to free and informed decision as to when and how many children they want and can have, the right to decide on something as personal and intimate as their bodies, their self-determination, their sexual freedom."<sup>61</sup> In January 2017 a bill legalizing therapeutic abortion (allowing abortion in cases of rape, fetal malformation, and health of the mother) was approved by the Chilean Senate.<sup>62</sup> It was introduced by the Michele Bachelet administration in 2015 and now

---

<sup>59</sup> From 1931 to 1989 Abortion for medical purposes (to save the life or preserve the health of the mother) was legal. General Augusto Pinochet, in a conciliatory gesture to the Catholic Church, revised the penal code in 1989 as transition to democracy was imminent.

<sup>60</sup> Interview March 2011-Chile (CS3308).

<sup>61</sup> Historia de la Ley 20418, pp. 97, 116.

<sup>62</sup> "Proyecto De Ley Que Regula La Despenalización De La Interrupción Voluntaria Del Embarazo"

advances to committee. The bill has faced stiff opposition from right to life groups at each at each stage who argue that life of the unborn is constitutionally protected in Chile.

In Chile the political role of the Catholic Church and SERNAM have interacted with constitutional provisions to limit opportunities for policy change in Chile (Caivano and Marcus-Delgado 2012, 11). There were repeated attempts (in 1991, 2001, 2006, and 2012) to introduce legislation decriminalizing abortion in Chile. Each of these were unsuccessful and countered by harsh proposals from the conservative right, including a proposal to amend the constitution (Caivano and Marcus-Delgado 2012, 11).<sup>63</sup> The government of Bachelet (2006-2010) sidestepped the abortion issue and instead pushed for the public distribution of emergency contraception, also known as the morning after pill. The administrative action was challenged in the Constitutional Court.<sup>64</sup> Historically the courts in Chile have been reticent to take up constitutional questions and have preferred to issue judgments which conservatively keep the courts out of political questions. As Hilbink and Couso (2011) note, the Morning After Pill cases were exceptional as the Constitutional Tribunal stepped willingly into a hot button issue, restricting this distribution of the medication on grounds that it was abortive. More than 15,000 people marched in the Chilean capital to protest the ruling that banned the free distribution of the "morning-after" pill by the public health system. The case and the controversy that followed were important because it made the population and the NGO community aware of the Constitutional Tribunal, which didn't have a very public profile. That awareness has "altered the strategic calculations for NGOs that litigate and opened a space for constitutional and legal action that before wasn't there, or at least was untried."

<sup>65</sup>A new law passed in 2010 allowed the public health system to distribute emergency

---

<sup>63</sup> According to Shepard and Casas (2007), one of the seven bills introduced by the political right in the first years of the Bachelet administration proposed that decriminalization of abortion would require a Constitutional amendment, requiring a 60% majority for approval.

<sup>64</sup> Judgment ROL 740-07-CDS.

<sup>65</sup> National Human Rights NGO, Lawyer, (CL2072) in March 2011 in Chile



contraception. However, some saw the legislation as a “retreat rather than a victory” noting that “legal change is not necessarily progressive; you may also roll back.”<sup>66</sup> This is particularly true when debate over reproductive health issues is dominated by conservative positions (Peña, Aguayo, and Orellana 2012).

## **Conclusion**

In this paper, we sought to clarify some of the claims in the literature that link constitutional provisions to differences in outcomes. The literature contends that constitutional provisions can provide an enabling framework for women’s rights advocacy and inspire and shape the content of subsequent legislation. We hypothesized that the way gender is framed in the national constitution will be reflected in policy change strategies, proposals, debates, and ultimately in the law itself. When constitutions contain egalitarian provisions that recognize difference and seek to redress inequalities and promote gender equality, we would expect to see legislative proposals, floor debate, and legislation framed in gender equality terms. The literature also claims that constitutional rights can lead to more favorable judicial outcomes. Third, constitutional provisions are expected to enhance the legitimacy of rights claims.

These expectations are largely born out by our interviews with activists and policy makers in Argentina, by the analysis of legislation, and in the court cases. Constitutional provisions do appear to be part of an enabling framework. Activists in Argentina repeatedly indicated that the constitutional gender provisions informed and “assisted” their efforts. Whereas in Chile, the constitution often thwarted their efforts; not one individual interviewed in Chile identified the neutral constitution as helpful. In most of our policy areas, Argentinian law is more gender friendly and addresses more issues than legislation in Chile. This is particularly true for the policy area of

---

<sup>66</sup> Ministry of Health, Interview March 2011-Chile (CG12318).

sexual and reproductive rights. In Chile, the constitutional provision on family often dominates and is used to justify gender policy, even when it is directly related to women's rights. That is, although there is an equality statement in the Chilean constitution, it has not been enough to justify or push through a feminist agenda. Rather, if advocates draw upon the constitution, they must refer to family provision to legitimize their claims. The supposed neutrality of the constitution, and the family provision, appear to have been a serious hindrance to rights advocates.

With regards to the relationship between constitutional provisions and judicial outcomes, in both countries, gender discrimination cases are rare. In Argentina, having constitutional rights makes it possible to make rights-based claims and bring cases to trial. Though few in number, we do see important victories in the courts and increasingly, the courts are drawing on constitutional and international law and developing lines of argumentation that recognize and advance gender equality. In Chile, the absence of constitutional values and rights supporting gender equality means the legal grounds for rights-based claims are less favorable. A conservative judicial culture in which judges prefer to decide cases on the basis of the statute, and in which international law is not officially a part of the constitutional order, provides infertile soil for a litigation based advocacy strategy. In this environment, getting statutory policy change "right" becomes imperative.

Last, we see evidence of advocates using the constitution to legitimize their claims and that the language of constitutional rights and equality is frequently used in debates and is present in many of the laws and court decisions in Argentina. In Chile, however, although government officials or activists may, at first, justify legislation by referring to the equal rights provision, these references are often dropped, even by feminists, and the content of the law is subsequently greatly weakened.

### Selected Bibliography

- Alvarez, S. E. (1990). *Democracy in Brazil: Women's Movements in Transition Politics*. New Jersey: University of Princeton Press.
- Alvarez, S. E., Dagnino, E., & Escobar, A. (1998). *Cultures of Politics, Politics of Cultures: Re-visioning Latin American Social Movements*: Westview Press.
- Archenti, N., & Johnson, N. (2006). Engendering the Legislative Agenda with and without the Quota: A Comparative Study of Argentina and Uruguay. *Sociología, Problemas e Prácticas*, 52, 133-153.
- Baines, B., & Rubio-Marin, R. (2005). Introduction: Towards a Feminist Constitutional Agenda. In B. Baines & R. Rubio-Marin (Eds.), *The Gender of Constitutional Jurisprudence*. Cambridge: Cambridge University Press.
- Baldez, L. (2002). *Why Women Protest : Women's Movements in Chile*. Cambridge, UK ; New York, NY: Cambridge University Press.
- Baldez, L., Epstein, L., & Martin, A. (2006). Does the US Constitution Need and Equal Rights Amendment? *Journal of Legal Studies*, 35, 243-283.
- Blofield, M. (2006). *The Politics of Moral Sin: Abortion and Divorce in Spain, Chile and Argentina*. New York: Routledge.
- Blofield, M. H., & Haas, L. (2005). Defining a Democracy: Reforming the Laws on Women's Rights in Chile, 1990-2002. *Latin American Politics and Society*, 47(3), 35-68.
- Kery Boyne. (2011). Note, UN Women: Jumping the Hurdles to Overcoming Gender Inequality, or Falling Short of Expectations? in *Cardozo Journal of Law & Gender* 17: 683.
- Carrio, E. M. (2002). Los Retos de la Participación de las Mujeres en el Parlamento. Una Nueva Mirada al Caso Argentino. In G. Abu-Zayd, M. Méndez-Montalvo, J. Ballington & I. I. f. D. a. E. Assistance (Eds.), *Mujeres en el Parlamento: Más allá de los Números* (Ed. en español / ed.). Estocolmo: International IDEA.
- Couso, Javier and Lisa Hilbink. (2011). "From Quietism to Incipient Activism: The Institutional and Ideological Roots of Rights Adjudication in Chile " in *Courts in Latin America* - Edited by Gretchen Helmke and Julio Ríos-Figueroa pp. 99-127. Cambridge University Press.
- Craske, N. (1999). *Women and Politics in Latin America*. New Brunswick, NJ: Rutgers University Press.
- Craske, N., & Molyneux, M. (2002). The Local, the Regional, and the Global: Transforming the Politics of Rights. In N. Craske & M. Molyneux (Eds.), *Gender and the Politics of Rights and Democracy in Latin America*. New York: Palgrave Publishers Ltd.
- Dandavati, A. G. (1996). *The Women's Movement and the Transition to Democracy in Chile*. New York: P. Lang.
- Dobrowolsky, A., & Hart, V. (2003). "Introduction: Women, New Politics and Constitutional Change." In A. D. a. V. Hart (Ed.), *Women Making Constitutions: New Politics and Comparative Perspectives*. . New York: Palgrave Macmillan.
- Fernández Ramil, M. d. I. Á. (2008). Equidad Política de Género en el Chile Actual: Entre Promesas y Resistencias. *Anuario de Derechos Humanos [University of Chile]*, 221-228.
- Fombad, C. M. (2004). The Constitutional Protection against Discrimination in Botswana. *International and Comparative Law Quarterly*, 53, 139-170.
- Franceschet, S. (2005). *Women and Politics in Chile*. Boulder: Lynne Rienner.
- Franceschet, S. (2008). The Politics of Domestic Violence Policy in Latin America. University of Calgary: Institute for Advanced Policy Research.
- Franceschet, S., & Piscopo, J. M. (2008). *Gender Quotas and Women's Substantive Representation: Lessons from Argentina*. Paper presented at the Midwest Political Science Association.

- Ginsberg, Tom and Aziz Huq. 2014. "What Can Constitutions Do? The Afghan Case." *Journal of Democracy*. Volume 25, No. 1.
- Hirschl, R. (2004). *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (pp. 286). Cambridge: Harvard University Press.
- Htun, M. (2003). *Sex and the State: Abortion, Divorce, and the Family under Latin American Dictatorships and Democracies*. Cambridge, UK ; New York: Cambridge University Press.
- Htun, M., & Weldon, S. L. (2010). When do Governments Promote Women's Rights? A Framework for the Comparative Analysis of Sex Equality Policy. *Perspectives on Politics*, 8(1), 207-216.
- Irarrázaval, Luis Alejandro Silva and Jorge Ignacio Arab Massuh. (2014). Legisladores y Jueces Frente a la Igualdad Constitucional de los Sexos in *Revista de Derecho Universidad Católica del Norte*. Año 21, No. 1.
- Jagwanth, S., & Murray, C. (2005). No Nation Can Be Free When Half of it Is Enslaved. In B. Baines & R. Rubio-Marin (Eds.), *The Gender of Constitutional Jurisprudence* (pp. 342). Cambridge: Cambridge University Press.
- Jaquette, J. S. (2001). Regional Differences and Contrasting Views. *Journal of Democracy*, 12(3), 111-125.
- Jaquette, J. S. (2009). *Feminist Agendas and Democracy in Latin America*. Durham: Duke University Press.
- Kohen, B. (2009). The Effectiveness of Legal Strates in Argentina. In J. S. Jaquette (Ed.), *Feminist Agendas and Democracy in Latin America* (pp. 83-112). Durham: Duke University Press.
- Lambert, P., & Scribner, D. (2009). A Politics of Difference vs. a Politics of Equality: Do Constitutions Matter? *Comparative Politics*, 41(3), 337-357.
- Lubertino, M. J. (2003). *Pioneering Quotas: The Argentine Experience and Beyond*. Paper presented at the The Implementation of Quotas: Latin American Experiences. Retrieved from [http://www.quotaproject.org/CS/CS\\_Lubertino\\_27-11-2003.pdf](http://www.quotaproject.org/CS/CS_Lubertino_27-11-2003.pdf)
- McCann, M. W. (1994). *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*. Chicago: University of Chicago Press.
- O'Donnell, G. (1994). Delegative Democracy. *Journal of Democracy*, 5(1), 55-70.
- O'Sullivan, M., & Murray, C. (2005). Brooms Sweeping Oceans? Women's Rights in South Africa's First Decade of Democracy. *Acta Juridica*, 17, 1-41.
- Peruzzotti, E. a. C. Smulovitz, (eds.). (2006). *Enforcing the Rule of Law: Social Accountability in New Latin American Democracies*. Pittsburgh: University of Pittsburgh Press.
- Pierceson, Jason , Adriana Piatti-Crocker, Shawn Schulenberg. (2013). *Same-sex Marriage in Latin America: Promise and Resistance*. Rowman & Littlefield.
- Pribble, J. (2006). Women and Welfare: The Politics of Coping with New Social Risks in Chile and Uruguay. *Latin American Research Review*, 41(2), 84-111.
- Ríos Tobar, M., Godoy, L., & Guerrero, E. (2003). *Un Nuevo Silencio Feminista? La Transformación de un Movimiento Social en el Chile Posdictadura*. Santiago: Centro de Estudios de la Mujer : Cuarto Propio.
- Rosenberg, G. (1996). Positivism, Interpretivism, and the Study of Law. 21(1), 435-455.
- Scheingold, S. A. (2004). *The Politics of Rights: Lawyers, Public Policy, and Political Change* (2nd ed.). Ann Arbor, MI: University of Michigan Press.
- Scribner, D., & Lambert, P. A. (2010). Constitutionalizing Difference: A Case Study Analysis of Gender Provisions in Botswana and South Africa. *Politics & Gender*, 6(1), 37-61.
- Siavelis, P. M. (1999). Continuidad y Transformación del Sistema de Partidos en una Trascición 'Modelo'. In P. D. I. Jaksic (Ed.), *Democracia y Desarrollo en los '90*. Santiago: Lom Ediciones.
- Strauss, D. (2001). "The Irrelevance of Constitutional Amendments.". *Harvard Law Review* 90, 1457-1505.

- Vargas, V. (2002). The Struggle by Latin American Feminisms for Rights and Autonomy. In N. Craske & M. Molyneux (Eds.), *Gender and the Politics of Rights and Democracy in Latin America*. New York: Palgrave Publishers Ltd.
- Waylen, G. (2000). Gender and Democratic Politics : A Comparative Analysis of Consolidation in Argentina and Chile. *Journal of Latin American Studies*, 32, 765-793.
- Waylen, G. (2007). *Engendering Transitions: Women's Mobilization, Institutions, and Gender Outcomes*. Oxford; New York: Oxford University Press.