Surprisingly Permissive:

Abortion, Same-Sex Marriage and Legal Gender Recognition Policy in post-Authoritarian South Africa and Argentina

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Emma Theresa Budde

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Referent: Professor Doktor Christoph Knill

Koreferent: Professorin Doktor Petra Stykow

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List of Abbreviations

ACDP.....African Christian Democratic Party

ANC ..... African National Congress

APDH .....La Asamblea Permanente por los Derechos Humanos

BRICS.....Brasil, Russia, India, China, South Africa

CAT..... Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment

CCPR..... International Covenant on Civil and Political Rights

CEDAW .....Convention of the Elimination of All Forms of Discrimination against Women

CERD..... International Convention on the Elimination of All Forms of Racial Discrimination

CESCR ..... Covenant on Economic, Social and Cultural Rights

CHA .....Comunidad Homosexual Argentina, Comunidad Homosexual Argentina

CONAPED .....National Commission on the Disappearance of Persons

COSATU ..... Congress of South African Trade Unions

CRC ..... the Convention on the Rights of the Child

DRC .....Dutch Reformed Church

DSOs ..... Data-set observations

ECtHR..... European Court of Human Rights

EVS..... European Value Survey

FALGBT..... Federación Argentina de Lesbianas, Gays, Bisexuales y Trans

FAO..... Food and Agriculture Organisation of the United Nations

FNLID ..... Frente Nacional por la Ley de Identidad de Genero

FpV..... Frente para la Victoria

GDP ..... Gross Domestic Product

GDX.....Gender DynamiX

GII .....Gender Inequality Index

GLB ..... Gay, Lesbian, Trans

GLOW ..... Gays and Lesbians of the Witwaterstrand

HDI ..... Human Development Index

ICPD.....Cairo International Conference on Population and Development (ICPD).

ILGA .....International Lesbian, Gay, Bisexual, Trans and Intersex Association

ILO.....International Labour Organisation

INADI ..... Instituto Nacional contra la Discriminación, la Xenofobia y el Racismo
[National Institute against Discrimination Xenophobia and Racism]

ISOSA .....Intersex Society of South Africa

LAGO .....Lesbian and Gays Against Oppression

LGBT ..... Lesbian, Gay, Bisexual, Trans

LGR..... Legal Gender Recognition

MEDH.....Ecumenical Movement for Human Rights

MJDH .....Jewish Movement for Human Rights

MP .....Member of Parliament

MPNP ..... Multi-party Negotiating Process

NCLGE ..... National Coalition for Gay and Lesbian Equality

NGK ..... Nederduitse Reformede Kerk, Afrikaans for Dutch Reformed Church

NP ..... National Party

OAU ..... Organization of African Unity

OECD ..... Organisation of Economic Cooperation and Development

OHCHR ..... U.N. Office for the High Commissioner for Human Rights

OSCE ..... Organisation for Security and Cooperation of Europe

PJ ..... Partido Justicialista

RRA ..... Reproductive Rights Alliance

TEC ..... Transitional Executive Council

TRC ..... Truth and Reconciliation Commission

UCDP ..... United Christian Democratic Party

UCR ..... Unión Civica Radical

UN ..... United Nations

UNCHR ..... UN Committee of Human Rights

UNCTAD ..... United Nations Conference on Trade and Development

UNDP ..... United Nations Development Programme

UNICEF ..... United Nations Children's Fund

US ..... United States of America

WNC ..... Women's National Coalition

WVS ..... World Value Survey

WWII ..... World War II

1 Introduction

> *"Not too long ago, Argentina was better known for fascist-style militarism (since the 1930s), dirty wars (until the 1970s), a pointless war (against England in the early 1980s), reckless macroeconomics and presidential crises (until the 2000s), institutional disarray and crazy populism (to this day), and one of the most heterosexual and gender-stereotypical dances in the world (the tango)."*
>
> (Corrales & Pecheny, 2010)

The legalisation of same-sex marriage in Argentina in 2010 failed to match our assumptions about Machismo and heteronormativity in the country. Two years after being the first country in Latin America that opened the institution of marriage for same-sex couples on the national level, the Argentine parliament passed ground-breaking legislation on legal gender recognition (LGR), allowing trans[1] and intersex people to change their legal gender on official documents such as birth certificates and passports. A legal gender change in Argentina is now easier than anywhere else in the world. It is a mere administrative act, without the involvement of court decisions or invasive requirements such as having to undergo sex change surgery. Why out of all countries does Argentina grant such far reaching sexual rights to LGBT (Lesbian, Gay, Bisexual, Trans) people?

South Africa is another country that surprises with permissive sexual rights policies. In 1994, South Africa legalised abortion on demand. In 2003, the South African parliament passed a law regulating the legal recognition of gender changes. And finally, in 2006, South Africa was the first (and, at the time of writing, remains the only) country on the African continent to legalise gay marriage. How do these policies fit with the high incidence of homophobic violence and "corrective rape", i.e. the rape of a lesbian to "cure" her homosexuality, faced by LGBT people in South Africa (Thoreson, 2008, pp. 694–695; Thoreson, 2013)?

[1] The word "trans" is used as an umbrella term for various identities in the trans spectrum. In other words, identities that do not confirm to the male/female binary, such as transsexual, transgender, trans-identified, transvestite, gender non-conforming, intersex, gender-fluid, gender-queer, etc.

This dissertation aims to explain the surprising regulations of abortion, same-sex marriage and legal gender recognition (LGR) in post-authoritarian South Africa and Argentina. The primary argument brought forward in this study is that the overall permissive pattern of what I will refer to as sexual rights policy in South Africa and Argentina is a result of the legacy of what I will term an ideological symbiosis between both state and church[2], during Argentina's last military dictatorship (1976 until democratisation in 1983) and the apartheid regime in South Africa (1948 until 1994). This is the case because the church's association with these authoritarian regimes creates unfavourable political opportunity structures for their post-democratic era access to the policy process. Concurrently, these post-authoritarian contexts create favourable conditions for policy influence by social movements, who employ human rights framings for their claims to gain support by democratic politicians for sexual rights policy passage.

What South Africa and Argentina have in common is that they are two countries of the global South that underwent regime transition during what is known as the third wave of democratisation (Huntington, 1991b). Argentina (re)-democratised in 1984 after seven years under a violently repressive military dictatorship. South Africa held its first non-racial democratic elections in 1994, after half a century of rule by the racist apartheid regime. During both authoritarian regimes, the merging of nationalism and Christianity delivered the ideological legitimation of authoritarian rule. The traditionally high societal importance of churches went hand in hand with a high political importance of religious institutions during authoritarianism. The Catholic Church in Argentina and the Dutch Reformed Church in South Africa had close ideological ties to the authoritarian state, informing public policy decisions and doctrinally justifying human rights abuses, such as political murder and torture in Argentina and the policy of "separate development" (*apartheid* in Afrikaans) in South Africa. However, state/church relations were to transform fundamentally during democratisation. Churches associated with the former regimes were blocked from accessing secularised democratic politics.

Sexual rights policies in South Africa and Argentina are surprising on various levels. Perhaps due to the discursive conflation between permissive women's and LGBT rights regulations, modernity and Westernness, South Africa's and Argentina's location in the Southern Hemisphere has led many to overlook their anomalous regulatory paths. Anecdotal references about cultural machismo and sexism but also reports on the grim reality faced by women and LGBT people in both countries contributes to an impression of misfit between the far-reaching legal protection of sexual rights and the reality of South African and Argentine societies.

[2] When I use the term "church", I mean to designate the ecclesiastical hierarchy of Christian churches, not the entirety of its adherents.

Scholarship on religious influence on policy output argues that the religious stratification of society shapes the restrictiveness or permissiveness of policies regulating issues that touch upon fundamental societal norms and values (Budde, Knill, Fernandez-i-Marin, & Preidel, 2017; Castles, 1994; Minkenberg, 2002). On a theoretical level we would expect the societal importance of Catholicism in Argentina and the religious devoutness of South Africa's population to mobilise voters and strengthen churches' bargaining positions to shape policy output according to religious doctrine. Yet, South Africa and Argentina have passed permissive sexual rights policies against the doctrinal preferences of and protest by their respective churches. Thus, from the perspective of existing theories of religious influence on policy output, South Africa and Argentina represent deviant cases.

The explanation I offer for the failure of religious influence to prevent permissive sexual rights policy passage in post-authoritarian South Africa and Argentina is macro-historical in that it explores the past as the history of South Africa and Argentina's present. This present is "post-authoritarian" in that both countries' current constitutional identities are shaped by the experience of authoritarianism. "The broad understanding of how past and present relations are constructed and preserved is reflected in the conception and usage of the term 'post'. Postcolonial, post-apartheid and post-liberation are all terms that define an historical period in contraposition to the previous one." (Bompani 2006, S. 1139)

Democratic South African and Argentine politics are a collective response to their respective authoritarian past. The political cleavage between authoritarianism and democracy marks the boundaries between two historical periods and the association with one of the two shapes the positioning of political players and arguments as either legitimate or illegitimate participants in the political discourse on sexual rights policy. In that way the ideological endorsement of authoritarian regimes by religious institutions would later disqualify religious doctrine as a source of guiding principles for sexual rights policies. At the same time, the regime transition during the international normative context of third wave democratisation made human rights a readily available frame for social movements to claim sexual rights. When framed as human rights, permissive regulations proposed by women's and LGBT rights movements gained support by policy makers.

1.1 Existing Explanations for Abortion, Same-Sex Marriage and LGR Policy Output

Comparative morality policy scholarship and literature on religion and politics offer potential explanations for sexual rights policy output. Morality policy research is a growing branch of scholarship on the public regulation of issues which touch upon fundamental societal and often religious values. Abortion, same-sex marriage and LGR), or sexual rights policies, belong to some of the quintessential morality policies because they touch upon deep rooted societal constructs of gender, sexuality and the role of religious doctrine.

Scholars in the field have argued that the religious stratification of society matters for morality policy output. Castles (1994; Castles, 1998; 1998, 1998) and Minkenberg (2002), for instance, have argued that Catholic countries in Western Europe regulate more restrictively than Protestant ones. Furthermore, Minkenberg (2002) has used the degree of religiosity of the population, measured as church attendance rates, as a proxy for conservative values held by the population. In the US-American context, scholars have linked adherence rates to evangelical Protestantism within a state with morality policy restrictiveness (Scheitle & Hahn, 2011).

After decades of the domination of secularisation and modernisation theory in the social sciences (predicting the disappearance of religion as societies modernise), we must credit morality policy scholarship for contributing to our understanding that religion still matters for political phenomena. However, when it comes to the theorisation of the causal pathways of religious influence and religious non-influence, we only stand at the beginning.

Recent case studies have complemented structural explanations by stressing that the informal relationship between state and church is a decisive factor in accounting for religious influence on sexual rights policies and related issues such as divorce. For instance, Hennig (2012) argues a historically grown pattern of cooperation between state and church to belong to the conditions for church influence on policy output.

Grzymala-Busse (2015) contends that the opposition of churches to foreign hostile regimes, such as the cases for the Catholic Church in Poland during Communism or Chile during the military dictatorship under Pinochet, led to a fusion of political and religious identities. The causal mechanism Grzymala-Busse suggests leads from the church defending the nation to high moral authority of churches after regime change that can be used to gain institutional access to politics. Her argument is aimed at explaining why and how churches can gain institutional access to the political system and shape policy output. For the opposite scenario, that is when churches oppose democracy, Grzymala-Busse (2015, p. 13) simply diagnoses "no mechanism of influence".

What remains undertheorised is exactly how churches are blocked from exerting policy influence and how this produces permissive sexual rights policies. This dissertation seeks to fill this gap by proposing a causal

mechanism that can explain why permissive sexual rights policies were passed in South Africa and Argentina, despite the opposition of historically powerful religious institutions.

Building on Grzymala-Busse's insight that moral authority of churches is a brittle resource that can be in vain if churches do not conduct themselves according to their own moral standards and on Htun (2003, p. 6) and Grzymala-Busse's (2015, p. 39, 47) remarks that support for authoritarian regimes can lead to a loss of moral authority of churches, I theorise a causal mechanism that connects an ideological fusion of church and state during authoritarianism with sexual rights policy output after democratisation. I expand on existing explanations by fleshing out the causal connection between state/church ideological symbiosis and permissive policy output and adding social movements as the pivotal counterparts to religious institutions in trying to shape sexual rights policy output to the explanation.

1.2 The threefold Research Question

Chile and Poland have received considerable scholarly attention as the prime cases of religious influence on morality policy (Grzymala-Busse, 2015a; Hennig, 2012; Htun, 2003). Neither of the two countries has legalised same-sex marriage, LGR, or abortion. A common characteristic of the religious landscape of Chile, Poland, Argentina and South Africa is that all four have religious institutions espousing conservative moral views. For specificity, that are the respective national Catholic Churches in the former three countries, and the Dutch Reformed Church and a multitude of smaller evangelical Protestant churches in South Africa. Religion holds a large societal importance in all four countries, yet religious institutions in South Africa and Argentina were unsuccessful in their attempts to prevent permissive sexual rights policy passage after democratisation.

Three aspects of South African and Argentine sexual rights policies are peculiar. First, the permissiveness of their regulatory approaches compared to Poland and Chile's restrictive regulations. Second, these two countries have opted for unusual regulatory trajectories. When parliaments in South Africa and Argentina passed abortion laws and LGBT rights policy, they did so from relatively restrictive status quos and went towards very permissive regulatory approaches. Both countries have legalised gay marriage without the additional preliminary step of passing a partnership regime. Apart from Spain and Portugal, most other European countries have progressed from partnership regimes with fewer rights than marriage to gay marriage. Third, Argentina's restrictive abortion regulation stands in stark contrast to its LGBT rights policies, which deviates from a standard pattern of rights succession in Europe which moves from abortion policy change decades before LGBT rights policies were passed.

1.3 Research Approach

The overall logic of this dissertation is a comparative case study, tracing the causal mechanism connecting the state/church ideological symbiosis during authoritarian rule with sexual rights policy output after democratisation. South Africa and Argentina not only represent enormously interesting and under researched cases, but they are also deviant cases from the perspective of theories on religious influence on public policy. A deviant case is a case "that, by reference to some general understanding of a topic (either a specific theory or common sense), demonstrates a surprising value [outcome]" (Gerring, 2007, p. 105). A deviant case selection strategy is particularly useful for refining existing theories (Levy, 2008, p. 3) as by explaining why those cases deviate from theoretical predictions, researchers are enabled to modify and refine theory or specify its scope conditions (ibid., p. 5, 8).

Theory-testing process tracing is a method of enquiry for the assessment of the presence of a hypothesised causal mechanism. Process tracing goes beyond the co-occurrence of two phenomena and enables the researcher to establish whether there is indeed a causal connection between them within a single case (Beach & Pedersen, 2013, p. 165). Tracing the unfolding of the causal process in South Africa and Argentina, two cases that are geographically and politically independent from each other, adds a valuable comparative element to process tracing. The mechanistic understanding of causality that underlies process tracing demands for set-theoretical causal propositions, i.e. meaning the theoretical claim is limited to a specific set of cases.

The causal mechanism I propose is set-theoretical, meaning that it "seeks to uncover middle-range theories formulated as a causal mechanism that works within a bounded context, .i.e. spatially or temporally" (Beach & Pedersen, 2013, p. 60). Considering this, three criteria must be fulfilled in order to belong to this set of cases. First, countries must display a religious stratification of society that would lead us to expect religious influence on policy, but which nevertheless pass permissive sexual rights policies. Second, countries must have a clearly identifiable historical pattern of state/church ideological symbiosis during their previous authoritarian regime. Third, these countries must have democratised during what is known as the third wave of democratisation (from the 1970s onwards).

The regime change is an important scope condition for the mechanism because it represents a powerful rupture in path dependent processes and spawns new constitutional identities and power relations. Indeed the timing of the regime change is also relevant because third-wave democratisations take place in a particular international normative environment. This context involves the growing in density and importance of international law and the evolution of the international human rights regime to increasingly include gender and sexuality as human rights issues (Rebouche, 2011, p. 12). Apart from South Africa and Argentina, Spain and Portugal fulfil these criteria and the explanatory relevance of the causal mechanism for those cases will be discussed in the conclusion.

To solve the threefold research question, we will proceed as follows: Chapter two will examine sexual rights policies in South Africa, Argentina, Poland and Chile. We will find that prominent theories in morality policy literature cannot explain why South Africa and Argentina regulate sexual rights policies permissively, and not as restrictively as Poland and Chile do. The third chapter contains the conceptualisation of each step of the causal mechanism of religious blockade, and empirical tests for the tracing of this process in South Africa and Argentina.

Chapters four through seven constitute the empirical investigation and each chapter reviews an element of the causal chain, chronologically tracing the causal process that led from the historical state/church symbiosis in South Africa and Argentina to the permissive policy output of the present. More specifically, chapter four examines the causal condition, how the state/church ideological symbiosis manifested itself in apartheid South Africa and the military dictatorship in Argentina. The fifth chapter investigates the effects of the past-alliance structures for the democratic constitutional identities that develop after regime change. The sixth chapter looks at social movements and analyses the different opportunity structures of interest groups in the abortion and LGBT rights policy processes. In chapter seven we will see how the former components of the causal chain relate to political decision making in debates on sexual rights policies in the present era. It will be shown that the strategic human rights framing by social movements created a rhetorical trap for politicians such that opposing policy reform would equal betrayal of the democratic constitutional identities.

The eighth and final chapter concludes by highlighting the key findings for solving the research puzzle and discusses the implications of this study for morality policy scholarship, literature on religion and politics and secularisation theory more generally. This study closes by critically exploring the real world relevance of permissive sexual rights policies when they are embedded in conservative societies with high levels of inequality.

2 Surprising Patterns of Sexual Rights Policy Output

In recent years we have witnessed a remarkable increase in scholarship on morality policies. Such policies reflect a conflict about first principles, touching upon fundamental societal values (Knill, 2013, p. 309; Mooney, 1999, p. 675). While studies on morality policy have diverse research interests, such as the categorisation of morality policy as its own type of policy (Hurka, Adam, & Knill, 2016; Mooney & Schuldt, 2008; Studlar, Cagossi, & Duval, 2013), the specific politics behind morality policy-making (Haider-Markel & Meier, 1996; Mooney & Lee, 1995b; Tatalovich, Smith, & Bobic, 1994) or the explanation of cross-national policy variance (Blofield, 2006; Engeli, 2009; Knill, Preidel, & Nebel, 2014; Minkenberg, 2002), only the latter is relevant for this study. Abortion and same-sex marriage are two of the quintessential morality policies but others such as euthanasia regulations, gun control, prostitution, pornography and drug regulation can and have been studied as morality policies (Knill, Hurka, & Adam, 2016). With a wealth of analyses looking specifically at abortion and/or same-sex partnership regulation, LGR is thus far a relatively understudied phenomenon (but see Taylor & Haider-Markel, 2015). Within the framework of morality policy research, the various policies are treated as members of a specific class of policies that function according to a common logic that differs from other types such as redistributive policy. Accordingly, most explanatory factors for policy output hold relevance not just for one specific policy, but for morality policy as a group and thus can be applied to LGR as well.

In the second half of the 20th century, we see an emerging trend towards regulatory permissiveness in many Western countries. Because of the association of permissiveness, Westernness and modernity, most comparative studies in the field limit their case selection to Western-Europe and the US (e.g. Brooks, 1992; Knill et al., 2014, 2014; Kollman, 2007; Kreitzer, 2015; Levels et al., 2014, 2014; Medoff, 2002; Medoff & Dennis, 2011; Minkenberg, 2002; Outshoorn, 1996; Schmitt, Euchner, & Preidel, 2013; Studlar et al., 2013; Studlar & Burns, 2015; Wetstein & Albritton, 1995; Yishai, 1993 etc.).

Interestingly, countries such as South Africa and Argentina have largely gone unnoticed, having fundamentally reformed some of their legal provisions regarding moral issues. This is a striking omission because, as we will see in this chapter, their sexual rights policy output is not only intriguing in itself, but a study of these two cases can also contribute to refining theories on religious influence on policy.

2.1 Abortion, Same-Sex Marriage and LGR Policy in South Africa and Argentina

Abortion, same-sex marriage and LGR are issues related to sex and gender, as well as the social norms and roles attached to the binary concepts of women/men and of female/male. Moreover, these issues touch upon fundamental societal values around themes of sexuality, reproduction, gender relations and family. Hence, the regulation of these issues by the state has provoked profound moral conflicts and heated political debates in many countries across the globe.

Abortion policy regulates whether a woman can legally end an unwanted pregnancy, and if so, under which conditions. Owing to women's reproductive potential, abortion policy is targeted at women only. LGR refers to the legally established procedures and hurdles that trans individuals must comply with in order to invoke a change of name and legal gender on official documents, such as birth certificates and passports. Same-sex marriage refers to opening up the legal institution of marriage, with all its rights and duties afforded to same-sex couples.

Until 1975, abortion was illegal in South Africa, except when the life of the mother was endangered. The Abortion and Sterilisation Act of 1975 (Act No. 2 of 1975), as amended in 1982, permitted abortions on further grounds, notably in cases of a threat to the woman's life or physical and/or mental health, physical or mental defects of the foetus and in the case of the pregnancy having resulted from unlawful behaviour such as rape, incest or intercourse with an "idiot or imbelice".

After democratisation in 1994, the South African parliament passed a new abortion law. The Choice on Termination of Pregnancy Act was enacted in 1996 and, as the name suggests, legalised a choice-based model or abortion on demand (Choice on Termination of Pregnancy Act (No 2 of 1996), 1996). More specifically, under this act an abortion can be obtained upon request during the first twelve weeks of pregnancy. Thereafter, from the thirteenth up until the twentieth week of pregnancy, an abortion is legal if a medical practitioner deems the pregnancy a risk to the woman's physical or mental health, the foetus to be at risk of physical or mental abnormality, the pregnancy to have resulted from rape or incest or if the continuation of pregnancy would impact significantly upon the economic or social circumstances of the woman. From the twentieth week of pregnancy up until birth, an abortion can be performed if two medical professionals agree that a continuation of pregnancy endangers the mother's life, or that it would pose a risk of injury or malformation in the foetus.

Another noteworthy aspect regarding additional procedural requirements in South Africa's current abortion regulations is that women who seek an abortion must be informed of their rights when requesting the procedure. Counselling is not mandatory and there is no requirement of spousal or parental consent, even in the case of a minor. Accordingly, the country's abortion regulations are not only exceptional on the African continent but South Africa affords women more legal options to obtain an abortion than most

countries in the world. This is especially the case regarding the legality of abortion up until the twentieth pregnancy week on socio-economic grounds (see e.g. Budde, Knill et al., 2017 for an overview of abortion regulatory approaches in OECD and BRICS states).

Another case of an exceptional regulation can be found in South Africa's same-sex marriage policy. In 2006, South Africa became the first and only country in Africa to extend marriage rights to same-sex couples. The Civil Union Act (No 17 of 2006) provides for the solemnisation of civil unions by way of civil partnership or marriage. Previously, marriage in South Africa was regulated by the Marriage Act of 1961 (Act 25 of 1961) which was based on the common law definition of marriage, precluding same-sex couples (Vos, 2008). In section 1 of the Act of 2006, a civil union is defined as "the voluntary union of two persons who are both 18 years of age or older, which is solemnized and registered by way of marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others." Section 13 determines that both heterosexual and homosexual couples entering into a Civil Union marriage have the same rights, duties and privileges as those entering a marriage under the Marriage Act. As a result, the Civil Union Act amended all existing South African legislation referencing marriage so that they apply equally to same-sex couples (Vos, 2008, p. 169).

It is important to note that marriages in South Africa can currently be solemnised under the Marriage Act of 1961 (heterosexual couples) and under the Civil Union Act of 2006 (heterosexual and homosexual couples). Furthermore, couples can also form a civil partnership under the Civil Union Act (heterosexual and homosexual couples). Both the Civil Union marriage as well as marriage in terms of the Marriage Act can be officiated by public servants and religious officials (ibid., p. 171).

What is interesting about South Africa's marriage legislation is that the Civil Union Act of 2006 was not preceded by the creation of a partnership regime, as was the case in most European countries that legalised gay marriage, such as the Netherlands, Denmark and France. Rather, South Africa went directly from no legal recognition of same-sex partnerships (even having criminalised homosexuality under apartheid up until ten years before) to wholly legalising gay marriage and also creating a partnership regime at the same time.

Same-sex marriage is not the only set of LGBT rights enshrined in South Africa's legal system. In 2003, the country passed the Alteration of Sex Description and Sex Status Act (Act 49 of 2003, commencement date: March 15th 2004). Subsection 2.1 of this Act allows for a change in gender in legal documents for "[a]ny person whose sexual characteristics have been altered by surgical or medical treatment or by evolvement through natural development resulting in gender reassignment, or any person who is intersexed" (Alteration of Sex Description and Sex Status Act 2003, 2003). Individuals can apply for the alteration of the sex description on their birth register to the Director-General of the National Department of Home Affairs. With the application they must submit a report by a medical practitioner stating nature and results

of performed medical treatments, and another report by a second medical practitioner who has medically examined the applicant regarding their new sexual characteristics (subsec. 2.2a and 2.2b). Once the application is granted, the person concerned is deemed for all purposes to be a person of the new sex as from the date of legal gender change (subsec. 3.2).

Turning our attention to Argentina, it became the tenth country in the world when it legalised gay marriage in July 2010 (Law 26.618 on Civil Marriage). This was achieved by passing a law that alters the provisions of the civil code pertaining to marriage, so that reference to heterosexuality or opposite sex partners was changed into a gender neutral form (Congreso de la Nación Argentina, 2010). In art. 42 of the law it states: "No judicial norm in Argentina shall be interpreted or applied in a sense that limits, restricts, excludes or suppresses the enjoyment of the same rights and duties pertaining to marriage constituted of persons of the same sex or formed by persons of distinct sex." Under this law, not only marriage but also adoption by gay couples was legalised. Just as in South Africa, Argentina opened up marriage to same-sex couples without introducing a partnership regime with fewer rights than marriage beforehand. While the introduction of gay marriage in Argentina came as a surprise to many international observers, the most astonishing development in Argentine LGBT legislation was yet to come.

In 2012, Argentina reformed its LGR regulations. Law 26.743 on Gender Identity "establishes the right to gender identity of persons" (Ley de Identidad de Genero, 2012). According to art. 3 of the law, anybody can request an official rectification of sex and change of name if these do not coincide with the self-perceived gender identity. Article 4 contains ground-breaking provisions as it explicitly states that "[i]n no case will it be required to have undergone surgical intervention for total or partial genital reassignment; neither will it be required to have undergone hormone therapy or other psychological or medical treatment." The gender and name change is a mere administrative act without cost to the individual concerned or involvement of courts or lawyers. As a result it is easier to change one's legal gender in Argentina than in any other country in the world, and the passage of the bill was celebrated by human rights activists internationally (OutRight Action International, 2012).

In contrast to Argentina's far developed LGBT rights legislations stands its regulation of abortion. Argentine Criminal Law art. 86 prohibits abortion except in cases of rape[3] or threat to the woman's life (Artículo 86, 1922). The law dates back to 1922 and regulations have not been modified substantially since. The

3 The exact choice of words in Argentina's abortion regulation of 1922 that is still law today is not clear as to whether abortion is permitted in the case of rape generally or only in the case of rape of a mentally handicapped woman. Interpretations of this passage have varied historically in Argentina and only in 2012 a high court decision clarified that any victim of sexual violence has the right to abortion (Diario Judicial, 2012).

fact that Argentina has advanced LGBT rights legislation while abortion is still criminalised in many circumstances is a peculiar situation. In Europe, the progression of gender and sexuality rights has followed a common pattern that included an early reform of regulations of reproductive rights, followed by LGBT rights legislation in later decades (Belgrano Rawson, 2012, p. 173). Argentina's non-legalisation of abortion on demand not only differs from this common pattern of rights succession (from reproductive rights in the 1970s to LGBT rights emerging in the 1990s) as observed in Europe, but also stands in contrast to other sexual rights policies in Argentina.

2.2 Permissive versus Restrictive Regulatory Patterns

To systematically compare morality policy output, scholars often classify countries' policies on a restrictiveness/permissiveness axis, the former conforming to traditionally conservative political views and the latter to more liberal ones (Budde, Knill et al., 2017; Knill et al., 2016; Mooney, 1999; Studlar et al., 2013). In the context of this study, restrictiveness and permissiveness can be understood in terms of how fully a policy grants or restricts the individual's legal ability to autonomously decide regarding their bodies and livelihood in the scope of abortion, marriage and LGR (see e.g. Budde, 2015; Budde & Heichel, 2016; Heichel, Knill, & Schmitt, 2013). Permissive policies grant individuals the right to choose to end a pregnancy, marry a partner of the same sex or legally live in a different gender to the one assigned at birth. On the other hand, restrictive policies limit individual choice by precluding certain options for individuals on the basis of their sex or gender identity. The prohibition of abortion limits a woman's right to choose over her own body. A ban on gay marriage precludes the option to marry a partner of the same sex, such that some cannot marry because they are legally classified as either male or female and their partners are classified as the same. Restrictive LGR policy forces trans individuals to legally live in the gender that matches the assigned birth sex, rather than according to their gender identity.

Countries all over the globe, but also in direct geographical proximity, vary greatly in the permissiveness of their morality policies (see e.g. Knill et al., 2016). In the case of abortion, countries' regulations can straddle anything from total prohibition of abortion under all circumstances, as was the case in Chile[4] until 2017, to leaving the decision entirely to the woman concerned up until a certain week during pregnancy, as we observe in South Africa. In terms of permissiveness, remaining in between the choice model and total prohibition the so-called indication model, under which certain indications have to be fulfilled in order for an abortion to be

[4] Since 1980, Chile`s Constitution establishes a right to life that guarantees the protection of unborn life (1980). While Article 119 of the Sanitary Code [*Codigo Sanitario*] of 1967 still permitted abortion on strictly medical grounds, one of the last acts of the Pinochet dictatorship was to change the Sanitary Code in 1989, ensuring that this option no longer existed (Dudley 1998, p. 49; see also law 18.826 substituting article 119 (Art. 119, 1989)).

legally obtainable. These include the pregnancy posing a threat to the mother's health or being the result of rape or incest. Despite unsuccessful attempts to completely outlaw abortion in 2016, Poland's current legislation[5] is an example of such an indication model, as is Argentina's regulation and Chile's[6] newly passed abortion law introduced in 2017.

Regarding to gay marriage, the most permissive type of regulation is to include same-sex couples in the definition of marriage. South Africa and Argentina are among those countries that redefined the existing institution of marriage to include homosexual couples. Other countries, such as Chile[7], chose to create a separate partnership system instead of redefining marriage. These usually entail fewer rights than marriage, especially when it comes to the adoption of children by same-sex couples. Most restrictive, however, are those countries that do not have any legal recognition of same-sex couples, as is the case in Poland.

When it comes to LGR, some countries do not have any regulation in place, meaning the handling of requests by trans individuals to change their legal gender is up to the discretion of judges (e.g. Chile[8], Poland[9]), resulting in arduous legal battles without certainty of an outcome for those concerned. The countries most supportive of individual choice are those in which the legal gender change is mostly an administrative process without invasive requirements, as in both South Africa and Argentina. In the middle of the spectrum in terms of permissiveness lie certain countries that have specific regulations in place to deal with requests of gender changes but impose the requirement of invasive and often lengthy procedures such as years of psychotherapy, forced sterilisation and divorce or sex reassignment surgery to be met in order to change one's legal gender. For instance, Germany's law on transsexuals of 1980 requires sterilisation and divorce but these provisions were struck down by the constitutional court[10]. Table 1 sums up the possible regulatory approaches in all three policy areas categorised according to their permissiveness, or how fully they grant or restrict individual choice in the matter under regulation.

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[5] Law of 7 January 1993 on family planning, protection of human foetuses and the conditions under which pregnancy termination is permissible (Zgromadzenie Narodowe [Parliament of Poland] (1993)).

[6] Law 41.866 of 2017 regulating the depenalisation of the voluntary interruption of pregnancy under three indications (Law 41.866 of 2017 regulating the depenalisation of the voluntary interruption of pregnancy under three indications, 2017).

[7] Law 20.830 of 2015 Law of civil unions (Crea el Acuerdo de Unión Civil, 2015).

[8] On the 23rd of January 2018, a bill on gender identity was passed in the Chilean House of Representatives. At the time of writing the bill awaits further discussion in the senate. Should the senate approve, it is likely that the bill will have to pass through the constitutional court as well. However, the Chilean LGBT movement's efforts may be thwarted as the newly elected conservative president Piñera will take office in April 2018. If the bill is not passed by then, chances for successful passage are slim (El Mostrador, 2018).

[9] In 2015 both chambers in Poland passed the Gender Accordance Act, which would have regulated LGR. However, a presidential veto stopped the passage. In such cases, the vote of at least 50% of parliament can override a presidential veto. However, such a vote did not even take place as the relevant parliamentary committee failed to prepare a necessary report in time. As a result, Poland still remains without a codification of LGR procedures until today (ILGA, 2015).

[10] Germany passed transgender legislation in 1980 with very restrictive provisions. The German Constitutional Court struck down most of these provisions one by one, including mandatory divorce and sterilisation, a minimum age of 25 and compulsory surgery. While no new law has been passed by parliament, the constitutional court decisions shaped the provision so that currently 'only' two psychological or psychiatric evaluations certifying the person's gender identity are needed to apply for a gender change (Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen, 1980).

Table 1. Classification Scheme of Regulatory Approaches in Sexual Rights Policy

Policy	Restrictive	Medium	Permissive
Abortion	Total Prohibition	Indication Models	Choice Models
SSM	No Recognition	Partnership Regimes	Marriage open to Same-Sex Couples
LGR	No Regulation	Invasive Requirements	Non-invasive Requirements

Note: Invasive requirements for legal gender recognition include the following: sex reassignment surgery, sterilisation and divorce in case of the individual being married. Non-invasive requirements include medical diagnosis of gender dysphoria and the like, proof of medical treatment such as hormone therapy (but no surgery) and proof of psychotherapy.

This classification scheme is applied to the three policies in South Africa, Argentina, Poland and Chile in Table 2. In the table we see that Argentina and South Africa have an overall permissive pattern of regulation, while Chile and Poland regulate more restrictively in almost all policy areas and thus relatively homogenous regulatory patterns across policy issues within countries. This supports the idea underlying morality policy scholarship that such policies form a class of policies with common explanatory factors.

Table 2. Sexual Rights Regulation in Argentina, Chile, Poland and South Africa

Country	Policy Permissiveness in the area of:			
	Abortion	Same-sex marriage	LGR	Overall Pattern
Argentina	M (1922)	X (2010)	X (2012)	X
Chile	M (2017)	M (2015)	0	0
Poland	M (1993)	0	0	0
South Africa	X (1996)	X (2006)	X (2004)	X

Note: X: Permissive Regulation; M: Medium Regulation; 0: Restrictive Regulation, year in parenthesis.
Source: own classification

However, more puzzlingly from the perspective of morality policy scholarship, Argentina and South Africa regulate permissively. As we shall see, most of the prominent theories in the field would lead us to expect South Africa and Argentina to regulate at least as restrictively as Poland and Chile, rather than more permissively.

2.3 Existing Explanations for Sexual Rights Policy Output

In recent decades, scholars have stressed various types of factors accounting for the permissiveness or restrictiveness of sexual rights policy output. Structural explanations focusing on culture and values of countries co-exist with approaches concentrating on the influence exerted by political parties and party systems, and with institutional explanations in studies investigating the impact of formal and informal state/church relationships on policy output.

Explanations of the structural kind are prominent in morality policy research, because such policies regulate value conflicts and are therefore likely to be influenced by the values held by the electorate and politicians. These values are either measured directly, as is the case in accounts of public opinion, or approximated through levels of socio-economic modernisation and religious adherence.

Political parties play an important role in democratic decision making processes. Partisan theory, as one of the classic theories in comparative public policy scholarship, has also left its mark on analyses of morality policy (e.g. Brooks, 1992; Gindulis 2003; Levels et al. 2014; Budde et al. 2017). Furthermore, with the two-worlds theory by Engeli et al. (2012), an explanatory approach developed specifically for the context of morality policy argues that the presence or absence of a religious party cleavage is decisive for the politicisation of moral issues.

Two related but fundamentally differing theoretical arguments exist about the impact of the relationship between state and church. Accounts stressing the importance of the formal state/church relationship look at the legal ties between those two institutions, i.e. whether a state has an official state-church, both are completely separated or something in between (e.g. Minkenberg, 2003). In contrast, scholars stressing the role of the informal state/church relationship assess historically formed cultures of conflict or cooperation between these institutions that can provide opportunities for church influence, independently from formal ties (Grzymala-Busse, 2015; Hennig, 2012; Htun, 2003; Knill & Preidel, 2014).

When testing the explanatory potential of these theories for South African and Argentinian sexual rights regulations, the puzzling nature of their policy output becomes apparent. As we shall see, both countries deviate on almost all accounts from what we would expect according to theories, except in terms of their informal state/church relationship structures.

Structural explanations: culture and values

Structural explanations for policy output seek to account for cross-national variance in policies through the social and economic structure of polities. In morality policy research, theories that stress the role of

the levels of socio-economic modernisation and inequality of a country, of the denominational composition, religiosity of the population and of public opinion can be classified as structural explanations. For clarity, we will review each of these.

Modernisation and inequality. As one of the most influential paradigms in social science research (Stockemer & Sundström, 2016, p. 696), modernisation theory has also left its mark on comparative morality policy scholarship. Perhaps this is the case because the notion of modernity is inextricably linked to progressive values. For instance, Borrillo (2009) observes that same-sex marriage policy has developed into a "thermometer of modernity".

Modernisation theory in comparative policy analysis posits that as a country's level of socio-economic development rises, the state must to respond to an increasingly differentiated and individualistic society. Modernisation theory contains a functionalistic logic in which policy change is a state's response to new demands emerging from a modernising society (Obinger, 1998, 2015). This is especially the case for the processes accompanying the shift from an industrial to a post-industrial society, such as rising education levels and living standards, urbanisation, technological advancements, demographic change, declining fertility rates and women entering the labour force (Bell, 1974; Inglehart & Norris, 2003; Norris & Inglehart, 2004). Moreover, modernisation theory propounds that these processes trigger value shifts in the population from material security towards self-expression and individualism, creating a demand for policies that reflect such post(modern) values. Studies that focus on or control for the role of socio-economic modernisation in morality policy research therefore predict high levels of modernisation in a country to be commensurate with permissive morality policy output (Asal, Brown, & Figueroa, 2008; Gindulis, 2003; Mooney & Lee, 1995a, p. 622).

A sub-variant of modernisation theoretical studies of particular importance for an investigation of non-Western contexts stresses the importance of structural measures of inequality. Simon Kuznet (1955) famously argued that inequality relates to economic modernisation in an inverted U-shaped manner (Kuznet's curve), rising in the early stages of economic development and falling again as modernisation advances. Viewed in that light, both Argentina and South Africa fall in the stage of economic development that is characterised by heightened inequality.

In one of the few studies that explains morality policy output not in exclusively Western contexts, Blofield (2006) makes a structural argument about the relationship between socio-economic inequality and the divorce and abortion policies of Spain, Chile and Argentina. Blofield contends that moral reforms were successful in Spain because of its comparatively low inequality, whereas the conditions of high economic inequality in Chile and Argentina make it difficult for interest groups to accomplish their policy goals.

Accordingly, the causal chain of this argument is that high levels of inequality produce particularly influential political elites, many of whom do not have an interest in morality policy reform. Blofield argues that moral conflict regarding a policy issue can divert attention away from inequality. A religious moral conflict in a country can thus provide legitimacy to a discourse that focuses on a lack of morality as being the root cause for social problems instead of economic inequality. According to Blofield, this lack of support from the disproportionately influential elites make morality policy change in conditions of high inequality less likely.

To specifically account for abortion policy, various other studies test for the influence of structural measures of gender inequality (Asal et al., 2008; Budde & Heichel, 2016; Gindulis, 2003). The causal logic behind these studies is that decreasing gender inequality in societies not only influences female preferences to embrace more pro-abortion stances, but also gives them the political clout to claim reproductive rights.

The empirical expectations that can be derived from modernisation theory generally, as well as specific accounts on inequality, are that high levels of socio-economic modernisation go hand in hand with permissive policy output while high levels of inequality are equally congruent with restrictive regulations.

Table 3 contrasts various measures of socio-economic development and inequality with the overall pattern of permissiveness of moral regulation in South Africa, Argentina, Poland and Chile. In addition to GDP per capita, a classic measurement for economic development, Table 3 includes the Human Development Index[11] (HDI) to better capture the social aspects of socio-economic modernisation. Regarding inequality, Table 3 also includes the Gini Coefficient, a standard measurement of income inequality, and the Gender Inequality Index[12] (GII), a composite measure which captures gender inequality in three dimensions – reproductive health, empowerment and economic status. While the Gini Coefficient ranges between 0 (full income equality) and 1 (maximal income inequality), the GII assigns a country's ranking according to their relative position in terms of gender equality with other countries. Rank position 1 is assigned to the most equal country, while 151 equates to the comparatively most unequal position available.

[11] Apart from income per capita, the HDI also includes measures of education and life expectancy in order to comprehensively capture a country's level of development.

[12] The Gender Inequality Index (GII) is the latest measure of Gender Inequality used by the UNDP. It was introduced to remedy the shortcomings of previously used measures, such as the Gender Development Index (GDI) and the Gender Empowerment Measure (GEM). The GII measures gender inequality on three dimensions. The first, reproductive health, is measured by maternal mortality ratio and adolescent birth rates. The second dimension, empowerment, is measured by the share of women in parliament and with secondary education levels. The third is economic status, which is measured by labour force participation.

Table 3. Measures of Modernisation and Inequality contrasted with Patterns of Moral Regulations

Pattern of moral regulation	Country	GDP	HDI Ranks	Gini Coefficient	Gender Inequality Index Rank
Permissive	Argentina	12337.59 (Up. Mid. Inc.)	49	44.5	77
	South Africa	7508.78 (Up. Mid. Inc.)	118	63.1	94
Restrictive	Chile	12526.56 (High Income)	41	52.1	68
	Poland	16700.9 (High Income)	35	32.7	26

Note: Up. Mid Inc. short for Upper Middle Income; GDP values 2010 from source: Penn World Table (Feenstra, Inklaar, & Timmer, 2013); HDI Ranks 2012; Gini Coefficient 2003-2012; Gender equality Index 2013 (ranked 1 to 151), Source of all: (United Nations Development Programme [UNDP], 2015) UNDP

Interestingly, with its permissive regulations, South Africa is the least modernised country in all measures listed compared with the others featured in the table. Furthermore, with a GDP of roughly $7 500 per capita in South Africa and $12 300 in Argentina respectively, both are classified as "Upper Middle Income" countries by the World Bank, while Chile and Poland are "High Income" countries. Despite that categorisation, Chile and Argentina actually display a very similar level of economic modernisation in terms of GDP, which would lead us to expect similar types of moral regulations. Even more surprising, with around $16 700, Poland's GDP is more than double the size of South Africa's. Thus, we would expect more restrictive regulations in South Africa. Yet, the opposite is true.

Regarding the other measures, the situation is equally puzzling. Contrary to what we would expect and despite its restrictive sexual rights regulation, Poland takes the lead in terms of HDI ranking, followed by Chile. Argentina and South Africa occupy higher HDI ranks, indicating lower development, than the other two. Income inequality alone cannot explain why South Africa and Argentina regulate more permissively than the other two countries either, as both countries have substantively higher levels of inequality than Poland and Chile and we see a similar picture for the gender inequality index that ranks Poland and Chile as more equal than South Africa and Argentina.

In summary, we find that the levels of development and inequality in South Africa and Argentina compared with Poland and Chile would lead us to expect sexual rights regulations in the former two to be at least as restrictive as in the latter two.

Denominational composition and religiosity. The most important influence factor in the literature on morality policies is religion. The regulation of life and death, sexuality and reproduction touch upon many aspects of religious core doctrine (Heichel et al., 2013). This intimate connection between

morality and religion (Engeli, Green-Pedersen, & Thorup Larsen, 2012), and the fact that religious institutions are among the most outspoken opponents against morality policy change towards permissiveness, has provoked great interest in religion by scholars seeking to account for cross-national differences in moral regulations.

Structural explanations of religious influence argue that the denominational composition of societies and levels of religiosity within the population shape policy output. Despite variations in operationalisation, the common expectation behind studies in this area is that countries with a high share of adherents to denominations with conservative moral stances and/or religious devout populations regulate more restrictively than countries whose main denominations have more permissive moral standpoints, or possess a less religiously devout population.

Ever since Minkenberg (2002) used church attendance rates in his pioneering study to measure the religious devoutness of populations, this figure has been included in most studies on religious influence on morality policy. However, the picture is less clear cut when it comes to the denominational factor, as it is operationalised differently according to the cultural context under investigation. Possibly inspired by what Paternotte (2015, p. 660) calls the Scandinavian experience, i.e. same-sex partnership policy originating in the Protestant Scandinavian countries, studies set in a European context mostly use the strength of Catholicism to operationalise denominational composition (Castles, 1994; Castles, 1998; Minkenberg, 2002). Conversely, in the context of the United States, scholars have focused on the role of evangelical Protestantism and the effect of its strongly opposed stance on permissive moral regulations (e.g. Scheitle & Hahn, 2011).

This presents a complication in the application of arguments regarding the denominational composition in the context of the present study. Argentina, Poland and Chile, with their Catholic cultural heritage, would lend themselves to the European approach, while the structure of South Africa's religious landscape is more akin to the US- American context, in that it has a great factionalism within Christianity that includes various, mostly Protestant churches with often conservative but diverging moral standpoints.

In other words, while the share of the Catholic population represents a reasonable approximation of the prevalence of religious conservativism in the three Catholic societies, this is not the case in South Africa. Therefore, an investigation into the religious stratification of South African society must be a two-step process, comprising of a detailed measure of the various denominations present followed by an assessment of their moral standpoints.

I tackled this challenge by first consulting the most recent South African national consensus on religious affiliation (the 2001 Census) to learn about the numerical representation of the various denominations. Afterward, I proceeded to code the degree of moral conservativism of the various Christian denominations

present from information on their individual websites, church publications and indirectly via their membership in international church associations that differ in levels of conservativism. This approach is similar to the one employed by Budde, Knill et al. (2017), with the difference that the latter article did so only for the one most prevalent denomination in every one of its sample countries, however this ventures into more detail by investigating the moral standpoints of any and every Christian denomination with more than 1 percent of the population adhering to it.

Tables 4 and 5 contain data on the religious stratification of South African, Argentine, Polish and Chilean society. South Africa's more complex denominational structure is displayed separately from the others in Table 5.

Table 4. Structural Measures of Religion contrasted with Patterns of Sexual Rights Regulations

Pattern of sexual rights regulation	Country	Protestant	Catholic	Church Attendance > once per month
Permissive	Argentina	0.1	0.75	35.9
	South Africa			69
Restrictive	Chile	0.11	0.76	36.6
	Poland	0.00	0.88	67.2

Data Sources: Denomination Composition: World Religion Dataset- National Religion Dataset, Christian Adherence in 2010; Church Attendance Rates: World Value Survey Wave 6: 2010-2014: Argentina 2013, Chile 2011, Poland 2012, South-Africa 2013.

Table 5.Christian Denominations and their Moral Stances in South Africa

Denomination	Percentage of Total Population	Moral Stance
Dutch Reformed	6.71	conservative
Zion Christian	11.09	conservative
Roman Catholic	7.1	conservative
Methodist	7.37	permissive
Pentecostal/Charismatic	7.64	conservative
Anglican	3.84	permissive
Lutheran	2.52	permissive
Presbyterian	1.86	conservative
Baptist	1.54	conservative
Congregational	1.14	conservative
Apostolic churches, including Apostolic Faith Mission	13.06	conservative
Other Zionist churches	4.21	conservative
Other African independent churches, including Ethiopian type churches	3.43	conservative
Other Christian churches	9.99	n.a.

Source for Denominational Composition: Statistics South Africa, 2001 (Census 2001), Source for moral conservativism: own investigations

Table 4 shows that the majority of the population in Argentina, Poland and Chile is Catholic. Due to their shared Catholic heritage, we would expect all of them to regulate restrictively[13]. While Poland has the highest percentage of Catholics in its population, Argentina and Chile have almost exactly the same share of Catholics, leaving us wondering why religion seems to have impacted upon Chile's legislations, but not on Argentina's.

According to the last South African census that asked about denominational affiliation, over 80 percent of the population adheres to Christianity (Statistics South Africa, 2001, Census 2001). As displayed in Table 5, most of the Christian churches in South Africa have conservative stances on moral issues. Exception to this come in the form of the Methodist, Anglican and Lutheran churches. While the different data sources and approaches for South Africa vis-á-vis the other countries limit comparability between them, Table 5 shows that there is no widespread moral permissiveness of churches that could explain permissive sexual rights policy output in South Africa.

[13] The growing strength of conservative Evangelicalism in Latin America probably underestimates religious conservativism in Argentina and Chile, which would make them even more similar to Poland.

Table 4 also contains data on the religious devoutness within the four countries' populations. South Africa and Poland have comparatively highly religious populations with almost 70 percent attending church at least once per month. Chile and Argentina have almost identical high church attendance rates to each other, around 35 percent. Thus, it is not the religious devoutness that explains the differences in regulatory permissiveness for those cases.

Values in the Population. Public opinion holds an obvious importance for public policy in representative democracies in general. Since morality policies are salient issues characterised by a high public involvement due to their technical simplicity, the stance of the population on moral issues should be very visible to politicians and the link between public opinion and policy output should be even more pronounced than for other policies (Camobreco & Barnello, 2008; Mooney, 1999, p. 676).

Modernisation theory and arguments about the influence of religion on morality policy and other cultural explanations all implicitly include the values of the population in their causal logic. These theories emphasise different factors and associated processes that shape the preferences of the electorate, which are then assumed to be translated into policy via the electoral democratic system. Morality policy research that includes public opinion as an explanatory variable (e.g. Badget 2009; Wetstein & Albritton 1995; Kreitzer 2015) examines a shorter, more direct causal chain by refraining from testing those factors that influence values in order to directly assess whether the public's stance on certain issues translates into policy.

The empirical expectations that can be derived from public opinion as an explanatory factor for morality policy output is that high levels of public support for a certain issue should go hand in hand with a permissive regulatory pattern, and low levels of public support in countries should translate into more restrictive regulations. The direction of influence, however, is not as straightforward. It could also be the case that once a policy is adopted public opinion gradually changes. For example, opening up marriage to same-sex couples could normalise homosexual relations in the eyes of the public and decrease public aversion against homosexuality.

The World Value Survey (WVS) and the European Value Survey (EVS) are the largest surveys of their kind on the value sets held by populations. Both include questions on stances on abortion and homosexuality but no specific question on gender change or gender identity. For a first non-policy specific test of the nexus between postmodern values prevalent in the population and sexual rights policy output, the twelve-item based Post-materialism Index included in the survey datasets can be used. Table 6 lists results of the latest World Value Survey Wave (2010-2014).

Table 6. Post-Materialist Values in the Population contrasted with Pattern of Moral Regulations

Pattern of moral regulation	Country	Mostly Post-Materialist Values, 2010-2014, share of population in percent
	Argentina	32
permissive	South Africa	36
Restrictive	Chile	49
	Poland	36

Source: World Values Survey Wave 6: 2010-2014 (variable y002).
Note: The Likert-Scale responses have been condensed by adding up all response categories that lay closer to the Postmaterialism end of the scale than to the Materialist end (i.e., the variable includes 6 response categories – Materialist, 1,2,3,4, Post-materialist). Included in the table as "Mostly Post-Materialist" are the accumulated responses of Post-materialist and categories 3 and 4.

Contrary to what theory would lead us to expect, with 49 percent of the population, Chile has the highest prevalence of post-materialist values and Argentina has the lowest percentage (32 percent). Divergently regulating South Africa and Poland display the same relatively low spread of post-materialism (36 percent each). It can be seen that none of these four countries have a majority of the population who hold post-materialistic values, which underlines the curiosity of South Africa and Argentina regulating sexual rights issues permissively.

Table 7 lists results from the WVS questions that ask respondents whether they agree that homosexuality and abortion are ever justified. These are contrasted with the disaggregated policy output for these issue areas. In order to rule out the potentially confounding effect of policy change on public opinion, the table lists the survey wave that precedes the first introduction of a permissive policy in the respective issue area (that is the 1989-1993 wave for data on abortion and the 1999-2004 wave for data on homosexuality).

Table 7. Public Opinion contrasted with Sexual Rights Policy Output

Country	SSM Policy	Homosexuality never justified	Abortion Policy	Abortion never justifiable
Argentina	X (2010)	36	M (1922)	45
South Africa	X (2006)	46	X (1996)	59
Chile	M (2015)	35	M (2017)	75
Poland	0	56	M (1993)	43

Source: World Values Survey Wave 1999-2004 (Question: Is Homosexuality justifiable?), World Value Survey Wave 1989-1993 (Is abortion justifiable?).

When it comes to homosexuality, the percentage of the population that found homosexuality unjustified under any circumstance was highest in Poland (56 percent) and South Africa (46 percent), with Argentina and Chile being roughly equal (36 and 35 percent, respectively). In Poland the high percentage of rejection of homosexuality corresponds to the lack of legal recognition of same-sex partnerships. In contrast, in South Africa a relatively high percentage of the population opposing homosexuality stands at odds with the country having legalised gay marriage. In Chile and Argentina, still more than one third of respondents found homosexuality to be unjustified, and that just refers to homosexuality in general and not to the more far-reaching state recognition of homosexual relationships through legalising same-sex marriage.

When looking at abortion policy and public opinion, Table 7 shows that very high levels of anti-abortion stances in the population of Chile (75 percent) go hand in hand with limited abortion rights in the country. A still considerable but lower 43 percent of Polish respondents found no circumstance to justify abortion. Notably, levels of strict anti-abortion stances in South Africa and Argentina are even higher than in Poland (45 and 59 percent). Here especially, the opposing stance of a clear majority of the South African population forms a puzzling contrast to the country's very permissive regulation of abortion.

All in all, the values of the population as measured in public opinion data would lead us to expect South Africa and Argentina to regulate at least equally restrictively as Poland and Chile. More specifically, while the values of most indicators correspond to policy output in the latter two, Argentina and South Africa clearly deviate from theoretical expectations.

Political explanations: Political parties and party systems

Partisan theory holds that the partisan composition of government influences policy output (Schmidt, 1997). From this theoretical perspective, political parties are expected to systematically differ in the policies they pass. If parties are assumed to display policy-seeking behaviour, that is trying to pass policies that express their party's ideological position (regardless of the popularity of that policy in the population), then an assessment of parties in power at the time of policy passage can provide insight into the causes of policy change or stagnation (Wenzelburger, 2015).

While partisan theory is one of the classical approaches in comparative public policy research, an account specific to morality policy is the two words theory, by Engeli et al. (2012). Here the focus rests not on government participation by specific parties but historically formed religious party cleavages that shape party incentives to politicise moral issues in the first place.

Partisan influence. Most comparative studies that use partisan theory to account for morality policy output use the strength of certain party families in government to test whether parties actually play

a role in morality policy creation. For the US context, studies have investigated the influence of Democratic control of government on policy output (e.g. Kreitzer, 2015, p. 46). Cross-national studies have mostly taken into account the role of leftist parties in government (Brooks, 1992, pp. 352–353; Budde, Heichel, Hurka, & Knill, 2017; Gindulis, 2003, pp. 62–64; Levels et al., 2014, p. 103). Since leftist parties tend to occupy more lenient positions on socio-cultural issues, the empirical expectation is government participation by leftist parties to lead to more permissive morality policies than under conservative governments.

After studying government parties in South Africa, Chile, Poland and Argentina, we see that parties on the left held government responsibilities in all of them at some point since their respective democratisations. The exception to this is Argentina, which's party system defies classification in traditional party families. In Chile, leftist parties formed part of governing coalitions multiple times since the end of the Pinochet regime. The *Concertación por la Democracia*, the centre-left party coalition that formed after the Pinochet regime has won several consecutive elections, dominating Chilean politics since the return to democracy. The coalition has since included the Socialist Party, the Radical Social Democratic Party, the Christian Democrats and the Party for Democracy (Alemán & Saiegh, 2007). Nevertheless, Chile's governments refrained from passing very permissive policies. Similarly, Poland has repeatedly been ruled by the Democratic Left Alliance (that formed as a centre-left electoral coalition in 1991 and later became a party in 1999) since democratisation without substantively reforming morality policies towards permissiveness (Szczerbiak, 2016).

Since democratisation in 1994, South Africa has been governed nationally by the African National Congress (ANC), Nelson Mandela's liberalisation movement turned political party. The ANC was formed as an extra-parliamentary organisation in 1912 with the aim to represent the interests of the non-white (i.e. Black, Coloured, Indian) population that was excluded from participating in the electoral parliamentary system (Botha, 1996). During apartheid, race was the main political cleavage, rather than left and right. The phase that led up to democratisation restructured the main cleavage to be between a party's "role in the apartheid system vis-a-vis their role in the liberation struggle" (ibid., p. 215f.). Despite this peculiarity of the South African party system, the ANC can still meaningfully be classified as a leftist party. Scholars describe the ANC as influenced by socialist principles (ibid: 221), as a mass-based party with increasing clientilistic and neopatrialistic tendencies (Lodge, 2014, p. 3), as a leftist mass-party (Heichel & Rinschein, 2015) or as social democratic (Manifesto Project Dataset Version 2014b by Volkens et al., 2014). Due to the ANC's uninterrupted rule since democratisation, all sexual rights policy reforms have been passed under the rule of a leftist party.

The picture is different in Argentina, where neither of the two dominant parties – the Peronist Party *Partido Justicialista* (PJ) and its main competitor the Radical Party *Unión Civica Radical* UCR) fit into the logic of cross-nationally comparable party families. The main political cleavage in Argentina is not between left and right, but rather between Peronism and Anti-Peronism (Ostiguy, 2009, p. 1). Both straddle the full spectrum of positions on the left and right and have historically crosscut the left-right axis. Since the rise of Peronism in the 1940s, a mass movement named after its founder and former Argentine president Juan Peron, scholars have struggled to categorise it (Kitschelt, 2010, p. 93; Lupu & Stokes, 2009, p. 58). Among others, the PJ has been labelled by experts as national-populist, social-Christian, neoliberalist and popular conservative (Ostiguy, 2009, p. 2).

The passage of permissive sexual rights policies culminates during the second presidency of Cristina Fernández de Kirchner (2011-2015). Kirchner's second term in office represents the seventh presidential term led by the Peronist PJ since democratisation in 1984. Directly after the regime change, President Raul Alfonsín, member of the PJ's main competitor UCR whose party unexpectedly won the first newly democratic elections, legalised (heterosexual) divorce. Only after years of stagnation in the legal moral landscape, the second presidency of Kirchner witnessed not only the legalisation of gay marriage in 2010 but also the passage of the Gender Identity Law and also the Dignified Death Law on euthanasia regulations in 2012, as well as regulation on surrogacy motherhood in 2013. While that means that most sexual rights policy change towards permissiveness happened under PJ's rule, the fact that all these changes happened during one PJ presidency only and that no change happened during the six PJ led governments before that suggests that PJ party ideology is not the main determining factor for policy change in Argentina. Furthermore, the defiance of the Argentine party system to conform to traditional party families underlines what other scholars have suggested before; a limited applicability of partisan theory for morality policy outside of the Western context, where it was developed (Blofield, 2006; Burns, 2005; see also Adam, Heichel, & Knill, 2015, p. 713).

Still, more promising as an explanation of sexual rights policies in the cases under study might be not to focus on party ideology, but rather on the facilitating and restricting contextual factors in which parties operate. For instance, the institutional environment in which parties are embedded affects their room to manoeuvre in passing their preferred policies, and can even shape party preferences. As suggested by Engeli et al. (2012), the existence of a religious/secular cleavage in the party system can produce an incentive for parties to politicise morality issues.

Two worlds theory. The two worlds theory by Engeli et al. (2012) posits that the configuration of a state's party system produces distinct patterns in the politicisation of moral issues. Engeli et al. distinguish between what they call the religious and the secular worlds, with the presence or absence of a

historically formed religious party cleavage as the distinguishing factor between the two. If a religious cleavage is present in the party system, the country is classified as belonging to the religious world. Conversely, if there is no such cleavage, it belongs to the secular world (p. 2f.). The authors argue that politicisation of moral issues is more widespread in the religious world. In the historical development of such party systems, a conflict between state and church has led to the formation of religious-based parties, typically in the form of a Christian democratic party (p. 15, 18). Morality issues play out unfavourably for these religiously influenced parties because nowadays these parties need to have a broader appeal to the public, not just devout Christians. However, when confronted with moral issues, these parties tend to position themselves according to traditional Christian values in order to stay true to their basic values. This reduces their appeal to the broader electorate, a conundrum secular parties exploit by intentionally politicising moral issues (p. 15-19).

The central argument of Engeli et al. refers to the politicisation of moral issues rather than policy output. While politicisation can be seen as a necessary condition for policy output, it is not a sufficient one as it does not automatically translate into policy passage. When looking solely at policy output, this means that the co-occurrence of permissive morality policy output with a religious party cleavage would conform to the expectations of the two worlds theory. Permissive policy output, in the absence of a religious party cleavage, would oppose the two world theory. However, a case that displays both restrictive policies and a religious party cleavage would not say anything about the explanatory value of the theory, as it might be the case that politicisation is high but nevertheless no policy was passed.

The first step in investigating whether there is a religious party cleavage in the party system is to identify whether there are any religious parties in a country at all. Secondly, it must be evaluated whether these parties have a significant proportion of votes in order to have sufficient seats in the legislature, and thus constitute a veritable cleavage in the party system. The example of Norway, which Engeli et al. study in their book, helps to guide an evaluation as to the threshold of what constitutes a religious cleavage. The Norwegian Christian Democratic party has traditionally gained around 5 to 14 percent of the votes. In the absence of a consistently stronger result, Engeli et al. (2012, p.188) argue the party was too weak to provoke a religious party cleavage, and so they that find the country to belong to the secular world.

Historically, neither Argentina nor South Africa had a religious cleavage in their respective party systems. In the 19th century, where the foundation of many cleavages that still impact upon today's party systems were laid, the societal cleavage between state and church in Argentina was rather mild and did not trigger the formation of religious parties (McGuire, 1995, p. 227). "[A]nticlericalism was weaker in late nineteenth-century Argentina than in Chile, Ecuador, Venezuela, or Mexico." (Ibid.) Even though a Christian Democratic party emerged in Argentina as early as 1954, it was never able to earn more than 5 percent

of the vote in legislative elections, and thus was not strong enough to create a religious cleavage in Argentina's party system. During the last military dictatorship (1976-1983), the ruling military junta endorsed a Catholic nationalistic agenda but since opposition was oppressed and the junta was not a party in a democratic sense, we cannot speak of a religious party cleavage in Argentina during the dictatorship either.

In South Africa, the picture is similar. During Apartheid (1948-1994) there was no religious party in the party system (Botha, 1996, p. 217). However, the Dutch Reformed Church was very closely linked to the National Party, the leading political force in the apartheid regime. Only after democratisation in 1994, religious parties emerged in the South African party system. The African Christian Democratic Party (ACDP) is based on Christian values, and so is the United Christian Democratic Party (UCDP). But neither has ever achieved more than two percent of the vote in national elections (Heichel & Rinschein, 2015) and as a consequence, like Argentina, South Africa belongs to the secular world.

In Chile, however, the presence of a strong Christian democratic party slants the country towards the religious world. It has a historical Catholic/secular cleavage in the party system that preceded the Pinochet military regime, and re-emerged after democratisation (Bornschier, 2009, p. 8). Poland also displays a strong religious cleavage in its party system (Bértoa, 2012), and therefore belongs to the religious world. Table 8 sums up the worlds inhabited by these countries under the two worlds theory, and contrasts it with patterns of sexual rights policy output.

Table 8 Religious/Secular World Memb. contrasted with Patterns of Sexual Rights Policy Output

Pattern of moral regulation	Country	Two worlds Classification
Permissive	Argentina	Secular
	South Africa	Secular
Restrictive	Chile	Religious
	Poland	Religious

Note: Own classification based on the concept of Engeli et al. (2012)

After studying the above, the empirical pattern is diametrically opposed to what we would expect to discover according to the two worlds theory. Theoretically, we would have expected the presence of a religious party cleavage in Chile and Poland to increase the chances for sexual rights policy change towards permissiveness, as there is a large incentive for Christian Democratic parties' opponents to politicise such policies. However, since politicisation does not equate to policy change, these two cases, while not confirming to two worlds theory, do not contradict it either. In contrast, in Argentina and South Africa, we would have expected the lack of a historically formed religious party cleavage to result

in low chances of politicisation, and thus no policy change. Yet, as we have seen, this could not be further from the truth.

Institutional explanations: Formal and informal state/church relationship

The final important strand of explanations for morality policy output looks directly at religious institutions. However, aside from the structural arguments explored above, institutional explanations examine certain characteristics of the relationship between state and church that shape how institutionalised religion can intervene in the policy process as an actor or interest group.

Accounts on the formal ties between state and church claim the degree of legal separation between these two institutions, e.g. whether there is an established state-church that impacts on the effectiveness with which churches can influence policy. Theories that focus on the informal dimension of state/church relations stress the importance of historically grown cultures of conflict or cooperation between these two institutions, and the moral authority held by churches as a resource they can draw from to influence public policy.

Formal state/church relationship. The rationale of the formal state/church relationship as explanatory factor is based on scholarship on what is known as the economics of religion approach, which argues that a degree of separation between state and church leads to churches competing in a religious market and therefore become more appealing to the public because they work harder in light of the religious competition, i.e. other churches (Iannaccone, 1998). On the other hand, a church that is established as a state-church acts as a public institution and has little or direct real competition on certain pertinent issues in the public domain, resulting in a diminished effectiveness in attracting new adherents and keeping the old ones (ibid.). Relying on this reasoning, Minkenberg (2003) has employed the state/church relationship as an independent variable to explain political outcomes. Minkenberg takes church/state relations as the institutional setting that provides opportunity structures for religious interests to influence state policy (ibid., p. 196). He argues that a state/church relation "at the 'separationist' or 'non-establishment' end of the continuum provides a more favourable opportunity structure for the presence of religious interests in the political process than does a privileged position of churches in countries with officially established state-churches" (p. 209). Regarding expectations for policy output, this means that higher degrees of separation should go hand in hand with more restrictive patterns of morality policy, since churches can be expected to become more impactful due to the favourable independence from the state. Conversely, a close state/church relationship should limit the effectiveness of churches and result in more permissive policies.

In recent decades, scholars have considerably improved the classic trichotomy of state/church separation, cooperation and state-religion. For instance, Chavez and Cann (1992) developed a composite measure of

state and church proximity based on thirteen variables, covering 18 European states. Jonathan Fox' "Religion and State" dataset (Round 2) represents the most comprehensive dataset of its kind in terms of country coverage (177 countries), and detail (151 variables). The data has been compiled on a yearly basis since 1990. The index on government involvement in religion comprises of fourteen categories, ranging from hostile to a religious state. Table 9 lists where Argentina, South Africa, Poland and Chile are ranked on Fox's government involvement in religion index.

Table 9. State/Church Relationship contrasted with Pattern of Sexual Rights Regulations

Pattern of moral regulation	Country	State/church Relationship
permissive	Argentina	Active State Religion (11)
	South Africa	Accommodation (4)
Restrictive	Chile	Preferred (9)
	Poland	Multi-tiered preferences (8)

Note: Data Source: The Religion and State Project Round 2 (Jonathan Fox). Variable used: SBX* "Official Government Involvement in Religion"

The four countries cover a wide range of legal ties between state and religious institutions. South Africa scores lowest, with the state merely accommodating religion while Argentina has the highest score, classified as possessing an active state religion by Fox. Chile and Poland's ranking in between the other two shows that formal state/church relations cannozt explain Argentina's and South Africa's more permissive policies. In the case of South Africa, the merely accomodationist state/church relations would even make us expect the most restrictive policies.

Interestingly, these findings are in line with newer case study evidence that suggests it is not the formal state/church relationship that determines policy output, but rather the informal aspects of the nexus between religious institutions and the state that build the decisive opportunity structures for religious influence on policy.

Informal state/church relationship. Newer comparative case studies stress the influence of historically developed patterns of conflict and cooperation between state and church that can foster or hinder churches' abilities to influence policy (Grzymala-Busse, 2015, 2015b; Hennig, 2012; Htun, 2003; Knill & Preidel, 2014; Warner, 1961). These historical characteristics of state/church interaction can be independent from the formal or legal relationship between the two. Arguments on the role of the informal state/church relationship are based on a completely different logic than those relating to formal ties between them. As discussed above, a formal closeness between the two institutions is expected to decrease

church's abilities to exert influence. However, scholars studying the informal aspects of this relationship find such informal cooperation to actually increase church influence on policies.

Hennig's (2012) detailed study on abortion, artificial insemination and same-sex partnership in Poland, Italy and Spain focuses on the interplay of religion and politics to account for the diverging regulatory approaches of those three countries. Hennig argues that a historically evolved pattern of conflict or cooperation between state and church impacts upon the contemporary interaction between political and religious actors. According to her, the critical distance of state and church in Spain allowed for politicians to opt for confrontation with the church in the policy processes. However, a culture of cooperation in Poland and Italy, make a reform towards permissiveness of morality policies less likely, as politicians ultimately shy away from opposing church views out of tradition and respect for the church's moral authority (p. 388f.).

Among other factors, Htun (2003) also underlines the importance of the informal state/church relations. Employing an institutional perspective in her study on abortion, divorce and family policies in Brazil, Argentina and Chile, she stresses the importance of liberal issue networks whose successes in influencing policy is contingent upon their fit with state institutions. She argues the state/church relationship to be among the various factors determining this fit. As a result, Htun (2003, p. 12) points out "that conflict between church and state create a window of opportunity for change, while Church-state cooperation precludes it". In the case of Chile, Htun (3003, p. 8) argues that "church-state collaboration posed an obstacle to divorce. Chile's progressive Church helped usher in the transition to democracy and was seen to play a crucial role in the consolidation of democratic rule and the protection of human rights."

In a recent study by Grzymala-Busse (2015) on the influence of religious institutions on morality policy in Poland, Croatia, Canada, the US, Italy and Ireland, the author argues that the degree of fusion between national and political identities shapes churches' moral authority. A fusion between these two identities emerges historically in the genesis of the nation. A high degree of fusion translates into high moral authority, which churches can use as a political resource to shape policy. Grzymala-Busse accordingly explains that the restrictive morality policies in Poland are due to the merging of Polish national identity with Catholicism that grants high moral authority and with that great policy influence to the Catholic Church there.

Of the many important insights from these studies, the most crucial to this study concerns the informal aspects of state/church relations, such as cultures of cooperation and conflict to matter and, more practically, that religious influence on policy in Poland and Chile is enabled by the close ideological ties between state and church. Both Hennig (2012) and Grzymala-Busse (2015) assert that a high degree of moral authority of the Catholic Church in Poland makes politicians willing to conform to the church's policy preferences. Quite similarly, in the case of Chile, Htun (2003) has underlined the important role the Chilean Catholic Church played in bringing about democracy that led to state/church cooperation under democracy.

Applying these insights to the question of why Argentina and South Africa reformed their sexual rights policies against church preferences after democratisation (while policies remained mostly restrictive in Chile and Poland) brings us closer to answering the research question. If informal state/church cooperation channelled the church's doctrinal preferences into policy in both Chile and Poland, could an (informal) split between state and church in South Africa and Argentina block the influence of institutionalised religion in these cases?

Whilst not looking at policy influence but rather explaining how churches choose their political allies, we largely owe the insight that state/church alliances can change when a regime changes to a study by Warner (1961). Warner explains the behaviour of the Catholic Church in Italy and France after World War II, with a recourse to the churches' behaviour during Fascism. She asserts that the church neither opposed nor aligned with Fascism in Italy, allowing the church's reputation to remain intact. Therefore the Catholic Church in Italy emerged as a legitimate ally for the Christian Democratic Party during democratic consolidation. In France, on the other hand, the church overly mingled with the Vichy regime, which Warner suggests to be the reason the tentative alliance between the church and the Christian Party in post-war France turned out to be unstable and faded away.

Thus, while informal state/church relations develop historically, they are not necessarily stable over time. As Warner has shown, church behaviour during World War II Fascism has shaped political alliances for the churches post-fascism. A possible contention could be that the close ties between the apartheid regime in South Africa and the military dictatorship in Argentina created unfavourable opportunity structures for the church's influence post-democratisation, which would imply a dramatic transformation of informal state/church relations during democratisation. Is a close relationship between state and church during authoritarianism key to understand the surprising patterns of sexual rights regulations in South Africa and Argentina today? Or more specifically, do the close ties between state and church during the last authoritarian regimes block religious influence on sexual rights policies in South Africa and Argentina today? If so, how does a causal mechanism connecting cause and outcome look like?

Conclusion and implications

Across the scope of reviewing sexual rights policies in the four third-wave democratisation countries of Argentina, South Africa, Chile and Poland, we see that the former two regulate very permissively, having some of the most permissive sexual rights policies worldwide. In contrast, the latter two belong to the most restrictively regulating countries. Chile and Poland's sexual rights policies are in line with expectations derived from most of the prominent theories in morality policy research. Regulatory approaches of both countries reflect conservative attitudes towards abortion and homosexuality in the population, which

also corresponds with high levels of adherence to a religious denomination with a conservative moral outlook (Catholicism), and a very high and high church attendance rate in Poland and Chile, respectively. In fact, Chile and Poland are often the prime examples of religious influence on policy in studies on the subject (e.g. Grzymala-Busse, 2015; Hennig, 2012; Htun, 2003).

In contrast, when considering the empirical data on Argentina and South Africa, we see a most puzzling picture. While having similar or even higher rates of conservative stances concerning these issues in their populations than Chile and Poland, both countries regulate sexual rights issues permissively. Furthermore, just as their restrictively regulating counterparts, Argentina's and South Africa's populations predominantly adhere to religious denominations with conservative moral stances. Additionally, people attend church roughly equally as often in Argentina as they do in Chile, and even slightly more in South Africa as they do in Poland.

Reviewing prominent theories in the literature on morality policies, Chile and Poland's restrictive regulations are not surprising. However, Argentina and South Africa's regulatory patterns are curious to say the least. The question that flows from the regulation of abortion, same-sex marriage and LGR in South Africa and Argentina is threefold.

- First, why do they display a permissive pattern of moral regulations where we would expect them to regulate as restrictively as Chile and Poland do?
- Second, rather than moving incrementally towards more permissive policies, if they reformed regulations, the changes were extreme and sudden. Why did both countries jump from restrictive regulatory status quos to very permissive options without major intermediate steps?
- Third, Argentina's abortion regulation deviates from the generally permissive pattern of sexual rights policies in the country, as well as from the succession of rights observed in Europe where countries granted reproductive rights decades before LGBT rights.

Despite these unusual patterns of regulations in South Africa and Argentina, there is a striking omission of scholarship concerning these countries in morality policy literature. With few notable exceptions, the vast majority of studies have focused on the European and US context, often even defining morality policy change as a Western phenomenon. As the policies in South Africa and Argentina clearly illustrate, this focus is no longer justified. However, a study on sexual rights policy in South Africa and Argentina does not simply fill a gap in the literature in terms of overlooked geographic and cultural contexts. Looking at cases in which religious influence on policy is absent despite widespread religious conservativism also contributes to the literature canon by helping to refine existing theory on religious influence on policy. In light of what studies on morality policy and religion and politics have taught us and also considering that even in the most secular societies, rites of passage such as births, weddings, and funerals are still celebrated

in religious terms, the question we need to ask now is not why churches matter but how church influence can be defeated.

An exciting new body of research has ventured into the concrete pathways and mechanisms through which religious doctrine can translate into policy (Grzymala-Busse, 2015; Hennig, 2012; Htun, 2003; Knill & Preidel, 2014). What remains unexplored, however, is how religious institutions can be blocked from influencing policy in highly religious contexts. In short, we are lacking a mechanism of religious defeat. This study aims to fill this gap.

A mechanism of religious blockage is not simply an inversion of a mechanism of religious influence. Both solve different questions and require a focus on different actors. For instance, Grzymala-Busse (2015), aims to solve the question whether churches can influence policy in secular states at all. Her argument is that a fusion of national and political identities fosters churches' moral authority. The proposed causal chain is that churches with high moral authority can gain institutional access to the political system, enabling them to influence policies through the sordid backroom of politics. With less moral authority, she argues, churches only have the option to form less effective party alliances. Finally, Grzymala-Busse (2015, p. 13) posits that no moral authority means there is no mechanism of religious influence.

However, it is worth adding that the simple absence of a mechanism of religious influence doesn't sufficiently explain why permissive policies are passed, and precisely how religious institutions can be blocked from exerting influence. A mechanism explaining permissive policy output must give recognition to social movements as the main antagonists of religious institutions, and must contain a substantiation of how these social movements manage to overpower religious influence – often against all odds.

This study will attempt to build on the portentous insights provided by existing studies that contend informal state/church relations, although formed historically but often unstable over time, to be significant for policy output and that alliances with authoritarian regimes reduce the chances of churches to allying with political parties after regime change. The following chapter will develop a causal chain that leads from close ties between state and church during authoritarian rule to permissive sexual rights policy outputs today.

3 Hypothesising a Causal Mechanism: From Ideological Symbiosis to Sexual Rights Policy

Having identified the informal aspects of the state/church relationship during South Africa and Argentina's last authoritarian regime as the potential causal condition for sexual rights policy output, what we are still missing is a detailed conceptualisation of an empirically testable mechanism causally connecting these two phenomena.

According to Beach and Pedersen (2013, p. 29), a causal mechanism for a process tracing study should be conceptualised "as a series of parts composed of entities engaging in activities" such that the causal mechanism represents a theory that is composed of interlocking parts that transmit causal forces from X to Y (ibid. p. 29). Such a conception is useful as it necessitates us to be explicit about the actors as well as the actions that bring about change (transmitting causal force). Figure 1 visualises the hypothesised causal chain consisting of the causal condition that triggers three intermediate steps, eventually leading to the outcome of permissive sexual rights policies.

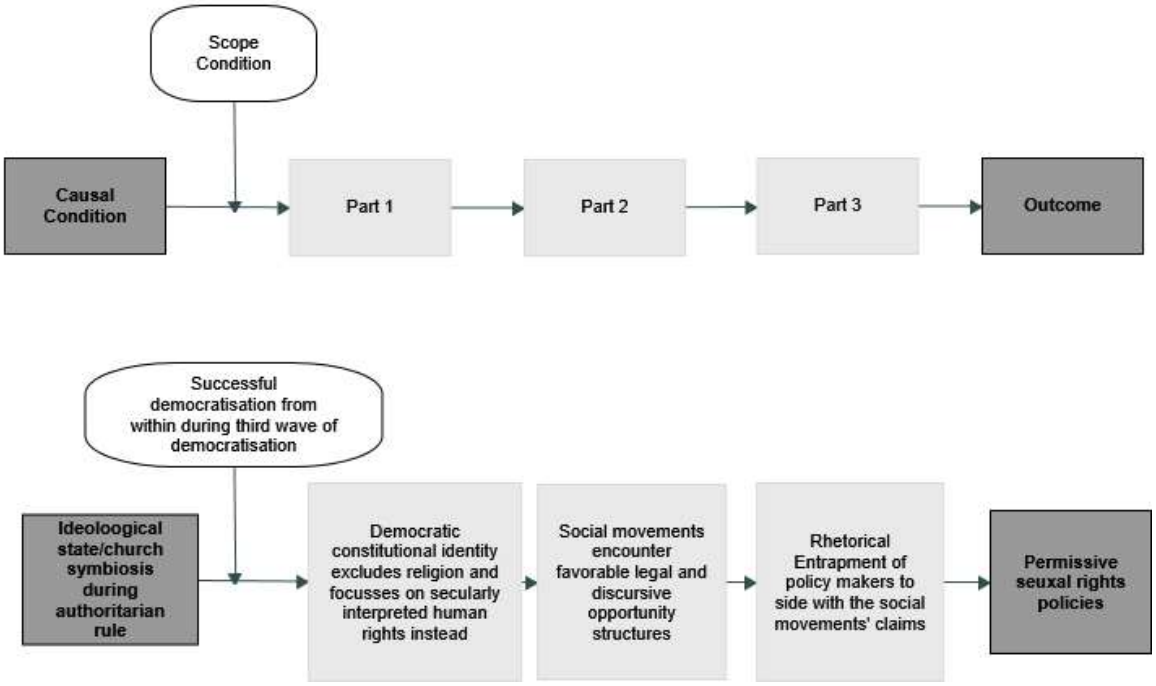

Figure 1. Hypothesised Causal Mechanism

Source: Own illustration.

As illustrated in Figure 1, what triggers the mechanism to unfold is a mutually beneficial ideological relationship between church and state, which I term 'ideological symbiosis', during authoritarian rule. This leads to permissive sexual rights policy output in third-wave democratisation countries because the demise of the former regime goes hand in hand with a delegitimation of religious influence on politics. If a religious institution has become complicit in the ideological legitimation of the regime and its human rights abusing practices, then religion can no longer be used as a tool for identification and legitimation after democratisation. Thus, the newly democratic regime needs to look for an alternative source of political and moral legitimacy.

Human rights, the most legitimate principle of the time of third-wave democratisations, then functionally replace religious principles as the meta-source of moral values for politics and thus the focus of the nascent democratic identity of the country. A constitutional identity focused on a secular interpretation of human rights creates favourable political opportunity structures for social movements wishing to push for policy change. Social movement actors can frame their claims as human rights issues and their liberation as a litmus test for the credibility of the new democratic government's commitment to the constitutional identity. As a result, politicians face rhetorical entrapment in that their commitment to human rights demands the mitigation of current human rights violations by passing sexual rights policies. All the while, religiously based counter arguments can easily be dismissed as non-democratic and diametrically opposed to human rights. This proposition will become clearer as we explore further in more detail below.

Process tracing is a qualitative method that allows for a context sensitive, in-depth analysis of the causal mechanism that connects cause and effect within a specific case (Beach & Pedersen, 2013; Trampusch & Palier, 2016). Process tracing is particularly useful for "obtaining an explanation for deviant cases" (George & Bennett, 2005, pp. 214–215) and it is the method of choice whenever the researcher is assessing "not only whether something mattered or made a difference but also how exactly it influenced the outcome."

While comparative methods are based on the logic of variation and co-variation of potential causes and effects across cases, causality in process tracing is established by evaluating the congruency between predicted information and actual empirical information for each part of a hypothesised causal chain within a case (Beach & Pedersen, 2013, p. 4). Employing process tracing as a method for the analysis of Argentina and South Africa enables a thorough test of the unfolding of the hypothesised mechanism in both cases, and therefore rule out mere coincidental covariation between hypothesised cause and outcome.

The drawback of process tracing as a stand-alone-approach is that inferences are limited to the case(s) under study. "On its own merits, a single process-tracing theory test is unable to produce any cross-case inferences but can only update our confidence in the presence/absence of a causal mechanism in a particular case, enabling strong within-case inferences to be made but not cross-case inferences." (ibid., p. 152)

For inferences across a broader set of cases, process tracing needs to be combined with cross-case comparison. Carrying out process tracing in two cases rather than one adds a comparative element to process tracing as a single case method, and suggests a broader scope of applicability for the theoretical proposition. South Africa and Argentina are geographically and politically independent cases, and establishing a common causal mechanism in these very different contexts suggests a strong case for the mechanism's explanatory potential beyond those two cases. The conclusion of this study will explore the theoretical proposition's suitability to other cases as well.

Currently, various types of process tracing exist. Beach and Pedersen recommend what they call theory testing process tracing whenever existing theories allow to add and order the components of a causal process and thus allow the researcher to create a hypothesised causal mechanism that can be tested (Beach & Pedersen, 2013, p. 65). Following some more elaboration on process tracing, the remainder of this chapter fleshes out the macro-historical mechanism. This will be done by drawing on the insights and concepts of qualitative studies on the religious influence on politics, and complement them with concepts originating in historical institutionalism as well as social movement theory.

3.1 Process Tracing

While the tracing of causal processes is part of most small-n research designs, process tracing has developed as a distinct approach of analysis in political science in recent years (Blatter & Haverland, 2012, p. 79). Its rapidly growing popularity has encouraged many scholarly contributions in the field of qualitative methods, aiming to more strongly define the somewhat fuzzy usage of the term as a label for any study that includes some type of causal narrative into a distinct stand-alone research approach with its own inferential logic, terminology and best practice rules (among the most important contributions on process tracing methodology are (Beach & Pedersen, 2013; Bennett, 2008; Bennett & Checkel, 2015; George & Bennett, 2005; Gerring, 2007; Goertz & Mahoney, 2012, 2012; Hall, 2008; Mahoney, 2010, 2012; Rohlfing, 2012; Trampusch & Palier, 2016; Waldner, 2012).

Ironically, increased scholarly interest in recent years in shaping process tracing into a stand-alone method has led to the development of heterogeneous and sometimes even incommensurable definitions and views about what process tracing is and best practices when applied to research. In a recent overview article about process tracing, Trampusch and Palier (2016, p. 438) identify 18 different variants of this method and describe "the current situation as one of internal debate, considerable disagreement, and occasional confusion."

Starting with an abstraction from the diverging views on process tracing, it has become generally agreed that it is a method for in-depth case study research that allows for within-case causal inference by focusing

on the processes that link causes to their effects (Beach & Pedersen, 2013, p. 23; Blatter & Haverland, 2012, p. 81). Consequently, process tracing can help opening up the black box of causality (Beach & Pedersen, 2013; Trampusch & Palier, 2016). This is done by theorising a chain of events that, in temporal and logical succession, lead from cause to effect (see Beach & Pedersen, 2013; Collier, Brady, & Seawright, 2004; George & Bennett, 2005; Hall, 2003).

Most of the contributions in qualitative methods point out that the logic under which causal inferences are drawn in process tracing differs from the variance/co-variance logic that underpins quantitative research designs (as well as small-n comparative methods). As most prominently expressed by King, Keohane, and Verba (1994, p. 129), causality can be established based on the co-variation between values of X and Y across a range of cases. This understanding of causality is particularly useful when the research aim is finding the average effect of a variable across a population of cases. On the other hand, process tracing aims to specify the processes which causally connect independent and dependent variables within individual cases (Hall, 2008, p. 306). Causality in process tracing is established through an assessment of the empirical fingerprints left by a causal theory within a case. In other words, empirical information is evaluated by whether it suggests a hypothesised causal connection to be present or not. Thus, causal inferences in process tracing are drawn based on a careful comparison between predicted evidence (what we predict to find if the hypothesised causal relation is true) and actual evidence (what is actually revealed in empirical reality), (Beach & Pedersen, 2013; Collier, 2011; George & Bennett, 2005; Rohlfing, 2012).

The empirical information required for process tracing as a case-based research approach differs from quantitative research. Collier and Brady (2004, 2010, pp. 184–188) coined the term "causal process observations" (CPOs) to distinguish the type of empirical evidence required for qualitative research from the "data-set observations" (DSOs) that need to be gathered for variance-based designs. DSOs are "an insight or piece of data that provides information about the context or mechanism and contributes a different kind of leverage in causal inference. It does not necessarily do so as part of a larger, systematized array of observations" (ibid. 2010, pp. 184–185). Rather, it sheds light onto causal mechanisms and is an indispensable supplement and/or alternative to variance-based inference. Other than the data matrices analysed by quantitative researchers, CPOs do not have to be in any particular standardised form. This means CPOs can take on the form of qualitative but also of numerical information (Collier, 2011, p. 825). While many scholars use different terminology for the empirical information required for process tracing, there is a general consensus that it differs from the empirical information used in other types of research. As a result, most scholars refer to the concept of CPOs when coining their own terminology, e.g. Bennett (2008) using the term "process tracing observations" and Beach and Pedersen (2013) using the term "evidence".

The variant of process tracing employed in the present study is what Beach and Pedersen (2013) call "theory-testing process tracing". In this variant the researcher deduces a theory from the existing literature and then tests whether evidence shows that each part of a hypothesised causal mechanism is present in a given case, enabling within-case inferences about whether the mechanism functioned as expected in the case (…) (Beach & Pedersen, 2013, pp. 2–3).

The aim of this variant of process tracing is to verify the presence or absence of a hypothesised causal mechanism in a specific case. Through a diligent application of this method, the prior certainty of the existence of the mechanism in the case can be updated or disconfirmed. However, no inferences regarding a broader set of cases can be done without combining process tracing with other methods.

Each part of the hypothesised mechanism needs to be tested separately and the failure to demonstrate the existence of even just one part of the mechanism disconfirms the presence of the whole mechanism. Needless to say, each part of the theorised mechanism needs to be fastidiously translated into empirically observable manifestations. Thus, the researcher needs to reflect about what empirical traces could increase (or decrease) confidence in the presence of the mechanism prior to data collection. The expected empirical information is then compared with the actual empirical information.

It is important to note that pieces of empirical information differ with regards their inferential leverage. It is useful to think of the logic of process tracing as similar to criminology. In a murder case, finding a suspect at the scene of crime holding a smoking gun is normally a more valuable piece of evidence than finding a suspect's DNA in the victim's apartment. While few alternative explanations could account for a suspect being caught at the crime scene with the murder weapon in hand, more plausible explanations could be put forward to account for the DNA traces. For instance, the victim and suspect could have been friends, which means the suspect has probably visited the apartment before, leaving DNA traces without necessarily being the murderer. Consequently, a smoking gun would allow the identification of the murderer unambiguously, while the DNA traces would not. However, the latter is more likely to be found by a detective than a coincidental stumbling across a smoking gun. If the detective is not as lucky as to be presented with unequivocal evidence, she has to collect an array of weaker types of evidence from which, taken altogether, she infers that the suspect is indeed the murderer beyond a reasonable amount of doubt.

In order to determine the inferential leverage of pieces of information, process tracing scholars (e.g. Beach and Pederson 2013; Bennett 2010; Collier 2011) suggest using four types of empirical tests that build on the work of van Evera (1997). Each of the four tests – doubly decisive test, smoking gun test, hoop test, straw in the wind test - possess a unique combination of high/low theoretical certainty and high/low theoretical uniqueness. In these tests, certainty refers to the veracity or positive identification

of particular evidence if the mechanism is present. Uniqueness refers to whether the presence of a certain piece of evidence can uniquely discriminate between the hypothesised part of the mechanism and alternative explanations.

A doubly decisive test is the strongest of all four tests as it combines high certainty with high uniqueness. In this case, the researcher can be certain that if the piece of evidence is not found, the mechanism is not present (certainty) and if it is found, it cannot be caused by something else than the mechanism (uniqueness).

A 'smoking gun' refers to a piece of evidence that has high uniqueness. Should the test reveal that the evidence indeed is found, it follows that the specific part of the mechanism is surely present. Its name metaphorically draws from classic criminology where a detective finding a suspect with the smoking gun in hand provides overwhelming evidence that this person is indeed the murderer. However, a smoking gun test possesses low theoretical certainty; if the gun is not found, this does not prove the suspect is not guilty. Thus, while the presence of a smoking gun is telling regarding the presence of one part of the mechanism, the absence of a smoking gun is not allowing inferences regarding the absence of that part of the mechanism.

Conversely, a hoop test works the other way around. It has high certainty in that evidence is very likely to be found if the mechanism is present, but a piece of evidence in a hoop test cannot discriminate between the presence of the mechanism and other potential causes.

Finally, a straw in the wind test represents rather weak evidence in that it has both a low uniqueness and a low certainty. In itself the presence of evidence of this kind does not allow for causal inference. Such a test only becomes stronger when combined with other stronger types of evidence or in the presence of many Straw in the Wind tests, and when taken together make the presence of the mechanism plausible. Table 10 sums up the four test types and the inferential leverage they possess.

Table 10. Process Tracing Tests for Causal Inference

		Theoretical Certainty: Low	Theoretical Certainty: High
Theoretical Uniqueness	Low	1.Straw in the Wind a. Passing: Affirms relevance of hypothesis, but does not confirm it. b. Failing: Hypothesis is not eliminated, but slightly weakened.	3. Smoking Gun a. Passing: Confirms hypothesis. b. Failing: Hypothesis is not eliminated, but somewhat weakened.
	High	2.Hoop a. Passing: Affirms relevance of hypothesis, but does not confirm it. b. Failing: Eliminates hypothesis.	4. Doubly Decisive a. Passing: Confirms hypothesis and eliminates others. b. Failing: Eliminates hypothesis.

Source: Adapted from Beach and Pedersen (2013: 103) and Collier (2011: 825). Collier himself builds on Bennett (2010: 210) who in turn builds on categories formulated by Van Evera (1997, 31–32).

3.2 Causal Condition. State/Church Ideological Symbiosis during Authoritarian Rule

The hypothesised causal condition that sets off the mechanism leading to permissive sexual rights policies after democratisation is an ideological symbiosis between state and church during authoritarian rule. Ideological symbiosis is a mutually beneficial alliance between state and church that includes the regime constructing its political identity as based on religion; and the church supporting this regime. What is exchanged is legitimacy for political influence; the regime gaining the former, granting the latter to the church in return. Such symbiosis can only grow in religious societies. Both institutions collude in using this societal importance of religion to justify increased church influence as well as the regime's style of rule. Ideological symbiosis is a type of informal state/church relationship that differs from the official institutional ties captured by measures of state/church or state-religion closeness such as the ones by Fox (2011) or Chavez and Cann (1992) and it can occur independently from formal classification criteria. Ideological symbiosis is present when a) the state employs arguments based on religion to construct its claims of legitimacy, and when b) the church readily accepts this framing and supports the authoritarian regime.

At least since Max Weber, the legitimacy of political rule has been a central topic in political science and political sociology. According to Weber, systems of power "establish and cultivate the belief in its legitimacy" (Weber, Roth, & Wittich, 1979, p. 213). The belief in the legitimacy of authority is directly linked to a system's stability. Legitimate authority is less 'costly' than any other form of authority because it does not need to be enforced through force or rewards (Matheson, 1994, p. 157). Generally, the concept of

legitimacy denotes the acknowledgement or recognition of something or someone as rightful and appropriate. "Deployed by students of national legal systems, the concept of legitimacy is often used to postulate and explain what, other than a command and its enforcement, is required to create a propensity among the citizens generally to obey the rulers and the rules." (Franck, 1990, p. 16)

Divinely derived legitimacy has proven particularly appealing to statesmen across the ages. The advantages of religion as a source of political legitimacy are threefold. First, it exempts political rulers from having to prove their claim to authority. God cannot be proven and neither can God's will, and thus support from religious institutions constitutes a convenient source of credibility. Second, political rulers and regimes can benefit from religion's claim to transcendental or divine sanction and reward. Exploiting the belief in punishment or reward in the afterlife can be a powerful political coercion mechanism. Third, religions often offer a readily available infrastructure to spread (political) ideology to the masses. Through mass and other religious activities, church officials can reach even very remote parts of a country and directly influence all sections of the population. Priests, for example, preaching in support or against specific political ideas or leaders, can be an invaluable resource for politicians. All in all, the support from religious authorities or even an overlap between religious and state authorities can be a cost-effective and desirable source of political legitimacy.

Equally, religious institutions can benefit from lending legitimacy to political leaders. From the opportunity to influence policy according to church doctrine to securing financial support and other privileges, there is a lot to gain for religious institutions by cooperating with the state. However, as Grzymala-Busse (2015) contends, mingling with politics can also be a dangerous route for churches. She argues that a church's moral authority and its ability to influence policy can suffer from alliances with political parties as it can lead the church to being perceived as engaging in party politicking, rather than working for the common good of the nation. More generally, "moral authority can be squandered by failing to live up to standards the churches set for themselves, the standards by which they were judged worthy of authority in the first place." (Grzymala-Busse, 2015, p. 39) In other words, churches' moral authority can be destroyed by actions regarded as immoral. For instance, the paedophilia scandal in the Irish Catholic Church has damaged the traditionally high moral authority of the Church there (ibid.). It is not hard to imagine that an ideological symbiosis with a human rights abusing authoritarian regime such as the apartheid regime or the Argentine military dictatorship is regarded as very immoral; and such alliance to damage moral authority of churches.

For a symbiosis to be present it is necessary that both parties, state and church, are willingly involved. Chile can serve as an illustration of the conceptual boundaries of ideological symbiosis. In Chile, the Pino-

chet regime used religious rhetoric but the Catholic Church rejected ideological entanglement. The military junta that came to power in Chile after a coup in 1973 justified its regime with a defence of Western Christian values against Marxism and proclaimed the regime's economic policies to be an application of social principles formulated by the Pope (Sigmund, 1986, p. 32). However, these sympathies proved to be unilateral as the Bishops Conference called for a restoration of democracy and criticised the regime for human rights abuses (ibid., p.33). The Catholic Church in Chile became the only institution that publicly criticised the violent repression of the regime, establishing the moral opposition against the dictatorship (Huntington, 1991a, p. 33). Thus, Chile did not have an ideological symbiosis during authoritarian rule. Rather, the Chilean Catholic Church challenged the military dictatorship and earned considerable moral authority during democratisation and thereafter.

Only when both state and church have actively allied, the causal condition of the mechanism is met. Thus, only such an active alliance triggers the onset of the causal mechanism. A relationship that was contested by one of the parties or that was more ambiguous and less visible would not become a disadvantage for a church under a new regime. That is the case because the discreteness of church influence rests on the potential of political opponents to use the immoral symbiosis to challenge religious influence on political matters under a new regime.

3.3 Causal Mechanism Part 1. Constitutional Identity based on Human Rights

An ideological symbiosis between state and church in the past has important repercussions for a country's democratic present. The core argument here is that for third-wave democratisation countries, a past immoral alliance between these two institutions leads to the emergence of a new constitutional identity after democratisation that excludes religion and is rather based on a secular interpretation of human rights; the ladder functioning as a kind of political ersatz-religion. This then provides the legal and ideological context in which struggles about sexual rights policies take place later on and are the subject of subsequent parts of the causal mechanism.

The international normative context of third wave democratisation

Before unpacking the causal connection that forms this first part of the causal chain, we will need to first consider the international normative context of third wave democratisations, as it forms an important scope condition for the mechanism.

One of the reasons for the third wave of democratisation was a deepening legitimacy crisis of authoritarian regimes in a global environment in which a focus on democracy and human rights was rapidly embraced

in the international community (Huntington, 1991b, p. 45). Since the end of WWII, the criteria for what constitutes legitimate government has evolved to be the protection of human rights, rather than territorial sovereignty alone (Selznick, 2008, p. 49). What's more, by the time of the third wave of democratisation, the international discourse was shifting to include both reproductive and LGBT rights in the scope of human rights protection.

For instance, the Convention of the Elimination of All Forms of Discrimination against Women (CEDAW), was adopted by the UN General Assembly in 1979 and includes affirmations about women's reproductive rights. It is important to note, however, that assertions of reproductive rights in international human rights treaties, including CEDAW, leave ample room for interpretation when it comes to abortion. This is the result of abortion being a hotly debated subject, often rejected on cultural and religious grounds. Therefore, a right to abortion would not obtain intercultural consensus. Even the less contentious notion of reproductive rights triggered more countries to enter reservations to their ratification to CEDAW than for any other human rights treaty (Steiner, Alston, & Goodman, 2008, p. 185).

While different interpretations of sexual and reproductive rights have existed from the earliest stages of the international human rights discourse, a clash between religious and secular interpretations became increasingly visible at the 1995 Cairo International Conference on Population and Development (ICPD). The link between religion and these rights was actively discussed and several Muslim-majority and Catholic-majority countries, as well as the Holy See voiced reservations about provisions regarding sexual and reproductive rights in the Program of Action adopted at the Cairo Conference (United Nations Population Fund, 2016, p. 24). The ICPD does not include a right to abortion, but rather underlines the need for safe, affordable and effective health services, including reproductive health care. However, since the Cairo conference, abortion rights have "become a marker whether states are committed to women's reproductive rights" (Rebouche, 2011, p. 12).

LGBT rights explicitly found their way into international human rights discourse when the European Court of Human Rights (ECtHR) ruled against Northern Ireland's sodomy law in 1981 (Dudgeon vs. The United Kingdom). A similar case in the UN framework took place when the former UN Committee of Human Rights (UNCHR) struck down Tasmania's sodomy law in 1994 (Toonen vs. Australia) (Sanders, 2002). After that landmark decision, other UN bodies declared that their respective treaties also apply to sexual minorities, among them the Committee on the Elimination of Discrimination against Women (CEDAW), the Committee against Torture (CAT) and the Committee on the Rights of the Child (CRC) (Lau, 2004, p. 1702).

Legal gender recognition specifically was first acknowledged as a human right in the case of Lydia Foy in Ireland. Registered as a boy at birth, Dr Lydia Foy unsuccessfully tried to obtain a new birth certificate reflecting her female gender. After years of legal struggle, an Irish High Court Judge declared in 2007 that

the lack of LGR policy in Ireland is incompatible with the European Convention on Human Rights (Farrell, 2012). In the same year, a group of international human rights experts created the Yogyakarta Principles, the most important document for the incorporation of LGBT rights into international human rights. The principles feature the application of existing international human rights standards on sexual orientation and gender identity. Although not legally binding, they have influenced jurisprudence, practices and laws addressing discrimination based on gender identity and sexual orientation. The UN High Commission for Refugees now cites these principles in its guideline for the protection of refugees (ISHR, 2016).

In 2010, then U.N. Secretary-General Ban Ki-moon called for defending the human rights of LGBT people imprisoned for their sexual orientation, and on a different occasion in the same year he rallied against homophobic bullying (Gary & Rubin, 2012). A report titled "The United Nations Speak Out: Tackling Discrimination on Grounds of Sexual Orientation and Gender Identity", jointly published by the U.N. Office for the High Commissioner for Human Rights (OHCHR), the World Health Organisation (WHO), the U.N. Development Programme (UNDP) and the Joint U.N. Programme on HIV/AIDS (UNAIDS) in 2011 serves as an illustration that LGBT rights as human rights have become mainstream in the UN human rights framework (Gary & Rubin, 2012). However, the fact that several delegates left the room when Hillary Clinton famously proclaimed that gay rights are human rights, during a speech at the United Nations' Palais des Nations in Geneva in 2011, shows that this notion is still strongly contested (Patel, 2015).

While both reproductive and LGBT rights have featured prominently in the international human rights discourse over the years, they remain contested and up to each respective state to interpret and enforce whether human rights include reproductive and LGBT rights. This circumspect interpretation is contingent upon the cultural, religious and political context of the state which can be shaped by past and current alliance structures with religious institutions.

Democratisation as critical juncture for constitutional identity

As Smith (1991, p. 99) argues, an alteration of the political regime always marks a shift in the national identity of states. In that sense, a regime change can be conceptualised as a critical juncture in the identity of a country. The constitutional identity of countries is a specific political identity that is, while not independent, conceptually distinct from national identity. As Jacobsohn (2006, p. 363) contends, constitutional identity "emerges dialogically and represents a mix of political aspirations and commitments that is expressive of a nation's past, as well as the determination of those within the society who seek, in some ways, to transcend that past." His conception of constitutional identity rests on the understanding of constitutions as the foundation for social and legal relations of a polity (ibid. p.364).

Constitutional identities are constructed within and by the political system. They contain more than the text of constitutions but also how this text relates to the national identity, how it is interpreted by the judicial and political system, and what narratives it contains about the essence of the nation and how the current form of government relates to that. It is central to the political legitimacy of governments as it translates certain aspects of the nation's characteristics into claims of legitimacy for a particular form of government. Further, the constitutional identity sets the boundaries for what is recognised as a legitimate argument in political debates and constrains possible policy choices to what is considered appropriate given the fundamental values of the nation and constitution. What Smith (1991, p. 144) contends about national identity is also true for constitutional identity as I use it here; it "determines not only the composition of the regime's personnel, but also legitimizes and often influences policy goals and administrative practices that regulate everyday lives of each citizen." (Smith, 1991, p. 144)

Regime changes constitute critical junctures in the constitutional identity of a country. In the words of Collier and Collier (1991, pp. 29–30), "[a] critical juncture may be defined as a period of significant change, which typically occurs in distinct ways in different countries (…) and which is hypothesised to produce distinct legacies." When countries face such a juncture, the chosen path depends on various contextual and historical factors of that country.

The antecedent condition of state/church ideological symbiosis during authoritarian rule should make it less likely that religion will become part of the ideological fabric of the new regime. The constitutional identity that takes shape during democratisation then sets off path dependent processes because that new identity becomes institutionalised in law and practice and forms the legal and normative context for forthcoming policy battles.

The critical juncture here consists of the following three elements

1. the state/church relationship during authoritarian rule as the antecedent condition
2. the democratic regime change as the trigger
3. the timing of third wave democratisations as a scope condition that becomes paramount as it provides a specific international normative context.

How exactly does the state/church nexus of the past produce a particular constitutional identity in the context of third wave democratisation? In that context, more than ever, authoritarian regimes are highly dependent on performance legitimacy that could easily disappear in the event of economic crisis, military defeat and the like (Huntington, 1991b, p. 45). What is essential is that third wave democratisations are the result of eroding regime legitimacy. If institutionalised religion supported the old regime, a simultaneous decrease in the legitimacy of religious influence on governance can be expected. It seems likely that this precludes churches to become politically influential in the new democracy. A similar dynamic has already been described by Warner (1961), who argued that the Catholic Church in France was too closely associated with the Vichy regime, which impeded successful political alliances after WWII.

In the volatile times of regime change and democratic consolidation, a newly democratic regime needs to gain and project legitimacy, both locally and globally. A nascent regime's legitimacy is an important driving force in the ratification of human rights treaties (Beetham, 2008, p. 115). Neoinstitutionalists, sociologists and constructivist political scientists have argued that by ratifying human rights treaties, states can represent themselves "as normal and legitimate actors to the broad international community and to their own citizens." (Zhou, 2014, p. 480)

The absence of religion as the highest normative principle should make a state more receptive for human rights norms than states that are normatively saturated. Human rights can become a kind of political ersatz-religion in that they functionally replace religious doctrine as the highest source of moral standards for government action. The state/church ideological symbiosis of the past should thus not only heighten the degree to which human rights are embraced by the country, but also shape what kind of interpretation of human rights prevails. If religious influence on governance has become discredited, religious institutions should not be able to steer a country's drive towards embracing human rights away from a secular and inclusive interpretation; the direction the international human rights discourse was taking at the time of third-wave democratisations. This proposition remains to be tested.

Empirical manifestations

The main argument of this section of the mechanism that requires empirical testing is that a state/church ideological symbiosis during authoritarian rule leads to the emergence of a constitutional identity that is based on a secular interpretation of human rights. An appropriate empirical test of this causal connection needs to demonstrate two findings:

1. that the new constitutional identity does indeed rests on (secular) human rights
2. that religion has been replaced by human rights as the legitimising value system of the political system.

There is a strong element of temporality in that the test can only be successful if the new constitutional identity is considered new, i.e. when it differs from the previous regime's ideologies. As a result, this requires a within-case comparison between constitutional identity pre and post-democratisation.

Useful empirical data regarding the constitutional identity and its foundational values can be found in the following areas: a. constitutional texts (the content as well as the political discussions involved in the passage of the constitution); b. the ratification of human rights treaties; c. a country's behaviour in international human rights related organisations; d. symbolic political communication (inaugural speeches, high profile state visits, etc.); and e. public communication by churches (press statements, official church documents, etc.).

A. Constitutions. While not necessarily a reflection of a country's material reality, constitutional texts reflect what the drafters see as a country's core values, aspirations and how they want the country to be seen by its citizens as well as the international community of states. A profound change in constitutional identity should be accompanied by the passage of a whole new constitution rather than mere changes in interpretation. If religious principles and mentions of God have a less prominent role in the new constitution than they had in the previous one, and there is an explicit focus on international law and human rights, this would be an indicator of a shift in constitutional identity and its underlying values. Arguably, this constitutes a hoop test for this part of the mechanism only, as it is quite certain to be found but the predicted evidence in the empirical reality of a case cannot clearly discern between causes other than the ideological relationship between church and the former regime. For instance, a shift from religious principles towards human rights as the raison d'être of government action in the constitution could also be caused by general secularisation and modernisation processes. To this end, four further tests will be undertaken.

B. Human Rights Treaties. Another revealing source of information about a regime's stance and emphasis on human rights are its ratification status of international human rights treaties. If a new constitutional identity is founded on human rights, there ought to be a swift ratification of all major international human rights treaties as well as a comprehensive incorporation of the international human rights regime into the national political system after democratisation. This should especially be the case if human rights

have not featured in a major role in the country's value system before. Finding that the country swiftly ratifies all major human rights treaties after the regime change is theoretically certain. Without committing to uphold human rights, such rights could hardly be part of a country's core values. However, it is not theoretically unique in that most states participate more or less in the international human rights regime. A better indicator of authentic commitment would be the comprehensive incorporation of human rights standards into national law. As was the case for constitutions, the ratification of international human rights treaties constitutes a hoop test which can do little more than nudge our confidence in this part of the mechanism, while its absence would count as disconfirming evidence.

C. International Organisations. The degree and kind of human rights a government supports can be inferred from the behaviour of the country's representatives in international organisations. Do they actively advocate the increasing incorporation of women's and LGBT rights into the international human rights regime? Or are they only mandated to support a more conservative scope of application of human rights? The explicit support of more controversial rights that are incompatible with the country's dominant religious denominations' views would be as theoretically certain as it is unique. A country with a religiously based constitutional identity would surely not subscribe to or even actively advance rights whose underlying values are mismatched with that identity. Therefore, this represents a doubly decisive test.

D. Symbolic political communication. If religious morality was replaced by human rights as the legitimising principles that underpin a new regime's identity, there should not only be traces of an increased emphasis on secularly interpreted human rights, but also reduced emphasis on religion in general. Instances of symbolic political communication such as the content of inaugural speeches, the first democratic parliamentary sessions and high profile state visits in the early years of democratic consolidation are an interesting area of investigation for assessing the constitutional identity, as it is simultaneously an expression of identity and a site for its construction. The absence of religion in such instances would be an indicator of the regime's legitimising value system shifting away from religion. However, if religious customs or references are frequently invoked during symbolic political events, this would count as disconfirming evidence. Investigating whether there was an absence of religion, where it was clearly present before regime change, constitutes an additional hoop test for this section of the mechanism.

E. Official church statements. Discovering signs of dissent between state and church would be more theoretically unique than the mere absence of religion in political events with high symbolic value. Such dissent could be found in various empirical materials, including official church statements, interviews with church leaders in newspaper articles of the time, or publications by the church itself. While dissent between those two formerly colluding institutions would uniquely point towards the erosion of a formerly mutually beneficial relationship, finding such evidence is not certain which makes it a smoking gun type

of test. State and church could be acting covertly instead of publicly, working to keep conflict at a minimum in times of democratic transition and the associated turbulence of a country during large-scale change. Thus, not finding this type of evidence would not disconfirm this section of the mechanism. On the other hand, overly amicable relations between state and church would disconfirm this section.

Table 11 sums up the constitutive components of the first part of the mechanism, the empirical information that ought to be found to confirm that this part of the mechanism indeed unfolded as hypothesised, what test type finding the predicted empirical manifestations constitutes, as well as the specific data required for conducting the test. Taken together, if the empirical tests presented can be passed, this would considerably increase our confidence in the existence of this section of the mechanism.

Table 11. Mechanism Part I. Conceptualisation, Operationalisation, Test Type and Required Data

Conceptualisation of each part of Mechanism	Predicted evidence	Test Type	Required empirical information (data)
Part I. Newly democratic regime seeks legitimacy by constructing a new constitutional identity that excludes religious elements and focuses on a secular interpretation of human rights instead Constitutive elements: - New constitutional identity founded on human rights principles - Religion's role in constitutional identity diminishes compared with pre-democratisation period	a. The passage of a new constitution that entails a relative shift of emphasis from religion towards secular values such as non-discrimination and equality.	a. Hoop	a. constitutions pre- and post-democratisation; transcripts of political debates surrounding the passage of new constitution
	b. The swift ratification of all major international human rights treaties, combined with a comprehensive incorporation of human rights principles into national law.	b. Hoop	b. national laws; data on ratification of treaties
	c. The explicit support for an inclusive interpretation of human rights in international organisations.	c. Doubly decisive	c. transcripts of sessions in international organisations, proposed bills in international organisations
	d. The absence of religion in symbolic political communication (where it was present before regime change).	d. Hoop	d. newspaper articles; transcripts of inaugural speeches, first ever parliamentary sessions, high profile state visits
	e. The presence of dissent between state and church after democratisation.	e. Smoking gun	e. official church statements of the time shortly after democratisation; newspaper articles

3.4 Causal Mechanism Part 2. Legal and Discursive Opportunity Structures

The first step of the causal mechanism hypothesises that a new constitutional identity emerges during democratisation to form the legal and ideological context in which actors operate during the sexual rights policy process. While churches are among the most vocal opponents of morality policy change towards permissiveness, social movements are among the most important reform proponents. Many scholars have highlighted the paramount importance of the LGBT rights movement for LGBT rights policies (e.g. Kollman, 2007; Tremblay, Paternotte, & Johnson, 2011) and of the women's movement for abortion policy making (e.g. Githens & McBride Stetson, 1996). Therefore, the second section of the mechanism focusses on social movements and how the newly emerging constitutional identity creates favourable political opportunity structures for social movement actors seeking to anchor their claims onto the political agenda.

Political opportunity structures have received considerable attention in comparative scholarship on social movements (Wilson, 2006, p. 326). "Political opportunity structures are comprised of specific configurations of resources, institutional arrangements and historical precedents for social mobilization, which facilitate the development of protest movements in some instances and constrain them in others." (Kitschelt, 1986, p. 58) According to Kitschelt, political opportunity structures can influence the strategies through which movements advance their cause, and their ability to impact on policy decisions.

The concept of political opportunity structures has been developed further by scholars who assess so-called legal and discursive opportunity structures. The former designates law as well as national and supranational courts as opportunity structures for movements to push for change (Hilson, 2002; Wilson, 2006). In the present analysis, the legal manifestations of the new democratic identity, such as international human rights commitments and the enshrinement of a secular interpretation of human rights into constitutions and national laws, represent such legal opportunity structures.

A discursive opportunity structure, on the other hand, refers to the broader ideological context that facilitates or constrains successful social movement action (Koopmans & Statham, 1999). The protection of human rights as the main ideological framework for legitimate government action in both newly democratic South Africa and Argentina should help a social movement's claims resonate with the constitutional identity, and be perceived as legitimate. These type of opportunity structures determine the ideas considered sensible, which constructions of reality are regarded as realistic and which claims are taken as legitimate regarding a policy in each specific moment (ibid., p. 228). With that they are closely related to the problem framing, another important concept in the social movement literature. A problem framing defines the legitimate participants of debate and the scope of answers the state can give as well as the boundaries of the general debate.

From this perspective, social movements are not viewed merely as carriers of extant ideas and meanings that grow automatically out of structural arrangements, unanticipated events, or existing ideologies. Rather, movement actors are viewed as signifying agents actively engaged in the production and maintenance of meaning for constituents, antagonists, and bystanders or observers (Benford & Snow, 2000, p. 613).

Therefore, movement actors are involved in what Hall (1982) calls "the politics of signification." When the women's and LGBT movements in Argentina and South Africa strategically frame their cause as human rights matters, the significance of their claims becomes greater than the issues themselves. A successful human rights frame is likely to be taken seriously by both the judiciary and legislators; after all what is at stake is nothing less than the fledgling democratic identity of the country and the credibility of its legitimising values.

Thus, the new constitutional identity focused on a secular interpretation of human rights represents beneficial legal and discursive opportunity structures. The institutionalisation of human rights in national law, constitutions and international human rights commitments should significantly increase the odds of success of legal action undertaken by movement actors. These discursive opportunity structures are equally effective, as movement actors can frame their claims in a way that resonates with the dominant political discourse and the values it entails. Especially the gay rights movement is too small in numbers to have sufficient mobilisation potential. By framing and discursively connecting its struggle with the broader struggles of the society, gay rights groups can gain allies in form of the larger, more established human rights groups in civil society and independent specialised human rights bodies in government. Framing gay and women's rights as human rights and arguing that a true democracy needs to respect the rights of women and sexual minorities, helps to increase social movements' bargaining clout. This is especially true in the absence of a as legitimate perceived religious counter discourse, as the social movement's framing can become dominant when religious opposition to this framing can be quashed by referencing the immoral relationship between the church with the past regime. In other words, the movement actors' claims have a better chance of being acknowledged as rightful when their framing resonates with the country's constitutional identity. In the context of a human rights focused identity, this is easy to achieve for social movement actors pushing for policy change and substantially more difficult for religious institutions attempting to create a religious frame for the subject.

Empirical manifestations

A test of this section of the mechanism must show that the new constitutional identity has indeed produced discursive and legal opportunity structures that can be successfully exploited by social movements.

The tangibility of legal opportunity structures makes them easier to observe in the empirical reality as the discursive structures, which is why a doubly decisive test will suffice for testing the legal aspects of this part. International human rights commitments and their incorporation into domestic law should dramatically increase the expected and actual pay-off for social movements to use legal channels to advance their causes. Thus, a strong focus for women's and LGBT rights movements on legal strategies would count as evidence of the existence of favourable legal opportunity structures. Moreover, movement actors using the judiciary (new constitutions, laws, human rights commitments, courts, constitutional appeal, etc.) to advance their cause represents a doubly decisive test for legal opportunity structures, since the absence of secularly interpreted human rights in domestic law would not provide a legal basis to take matters to court and find a decision in the movement's favour most unlikely. Also, it is quite certain that actors in favour of policy change towards permissiveness use these legal opportunity structures, i.e. go to court to gain rights, when they present themselves. Therefore, successful legal action by social movements would greatly increase our confidence in the existence of favourable legal opportunity structures. Conversely, social movements not using legal channels would count as disconfirming evidence.

Since matters associated with ideology are notoriously difficult to observe, four empirical tests will be conducted to assess the successful exploitation of discursive opportunity structures by social movements. The first assesses the movement's framing itself, while the second focuses on a movement's reactions to the inevitable religious counter discourse on the moral matters under discussion. The third test looks at the reception of the movement's framing by the broader civil society and specialised human rights bodies in government. Lastly, the fourth test assesses the congruence between arguments in the reasons for judgements in relevant court cases on the one side, and arguments brought forward by religious institutions and women's and LGBT rights groups on the other.

A. Social movements' framing. The new constitutional identity and its associated ideology informed by secularly interpreted human rights create a rhetorical advantage for actors who can frame their claims in the language and logic of the nation's dominant ideological discourse at the time. If social movements make use of this discursive opportunity structure, they should be found to deliberately frame their cause as a human rights matter and as an essential component of democracy. Finding such a human rights and democracy frame in public communications (such as newspaper ads, websites, publications, banners at protests, press releases and so forth) of important women's and LGBT rights groups would constitute

the success of a hoop test. It is quite certain that the presence of favourable discursive opportunity structures creates a strong incentive for movement actors to use them. On the other hand, the increasing globalisation and transnationalisation of women's and LGBT rights activism could just as well influence framing, regardless of local political ideologies. Accordingly, the absence of strategic human rights and democracy framing by social movements would disconfirm this section of the mechanism, while its existence only adds minimal confidence at this stage.

B. Reactions to religious frames. While a new democratic identity focused on a secular interpretation of human rights should create a discursive advantage for women's and LGBT rights groups, it should do the opposite for churches with conservative stances on sexual rights policies. Former alliances between religious institutions and authoritarian regimes, combined with a new constitutional identity that deemphasises religious principles should make it difficult for the church to frame its claims in a way that resonates with the dominant ideologies of the time. Religious challenges to the framing of social movements can be countered by referencing the collusion of the church with the past regime, weakening and even delegitimising the church's claims. Finding that religious arguments are countered by referencing the church's poor human rights record and the illegitimacy of religious influence on policy in the new democracy is as theoretically certain as it is unique. We can conclude that this represents a doubly decisive test. We also gain additional confidence in the existence of this section of the mechanism by testing which of the competing problem frames (the church's or the social movements') is adopted by the broader civil society and state institutions, which is the focus of the following two empirical tests.

C. Human rights bodies support the claims of social movements. An indication of a successful human rights framing strategy by LGBT and women's rights groups is when they gain the explicit support of human rights bodies and organisations, such as human rights-based civil society groups or independent human rights commissions within the state. Active support in the form of joint marches, petitions, public statements in support of the movement's claims and other lobbying and supportive activities would uniquely indicate the acceptance of that framing in the broader civil society and by specialised state agencies. However, this finding is contingent upon the existence of a strong and coordinated civil society and/or specific independent state bodies designated for the protection of human rights, which is why finding traces of support from human rights bodies represent a smoking gun type of test. In other words, such a finding would be quite unique but not certain to be found, and so its absence has no inferential value.

D. Reasoning of judges. Another smoking gun type evidence could be found in the reasoning for verdicts rendered in court cases that deal with the issues subject to this study. If a ruling is justified with arguments congruent to the ones brought forward by movements, featuring arguments such as "in our democracy religion ought not to impede the realisation of human rights", this would be unique proof

of successful strategic framing by social movements formally embraced by state institutions. However, finding such evidence is not certain as deliberations for judgements and verdicts may be authored more technically without referencing higher order value systems, like religion.

In summary, a convincing case for the presence of favourable legal opportunity structures and their causal connection to the constitutional identity can be made upon finding that women's and LGBT rights groups successfully employed strategic litigation to further their cause. This includes pushing their claims onto the political agenda via constitutional appeal. Empirical indicators of favourable discursive opportunity structures include the strategic framing of movement claims as human rights matters and their liberation presented as a litmus test for the constitutional identity of the new democracy. Furthermore, the adoption of the movement's framing by human rights organisations, specialised state institutions and in the deliberations of judges would underscore the success of this framing strategy.

Analogous to the table for the first part of the mechanism, table 12 sums up predicted evidence, test type and required data for the second section of the mechanism.

Table 12. Mechanism Part II. Conceptualisation, Operationalisation, Test Type and Required Data

Conceptualisation of each part of Mechanism	Predicted evidence	Test Type	Required empirical information (data)
Part II. Social movements encounter and use favourable political (legal and/or discursive) opportunity structures to push for change. Constitutive elements: - Legal opportunity structure: International human rights commitments and their incorporation into domestic law create opportunities for interest groups to use legal channels to advance their cause. - Discursive opportunity structure: The national identity and its associated ideology of inclusive human rights create a rhetorical advantage for actors who can frame their claims in the language and logic of the nation's dominant ideological discourse at the time.	Legal opportunity structure: Successful use of legal channels by interest groups. Discursive opportunity structure: a. Interest groups strategically frame their cause as a human rights matter and their liberalisation as an essential component of the democracy constitutional identity b. Religiously based challenges to the interest groups' framing are countered by referencing the collusion of the church with the past regime. c. Human rights bodies and/or organisations support interest groups claims. d. Judges argue in their reasons for the judgement that religion should not impede the realisation of human rights.	Doubly decisive a. Hoop b. Doubly Decisive c. Smoking gun d. Smoking gun	thematically relevant court cases a & b. public communication (newspaper ads, websites, publications, banners at protests, press releases, etc.) by important women's rights and LGBT rights interest groups c. public communication by human rights groups; information about joint marches or coordinated lobbying activities together with women's or LGBT rights interest groups. d. reasons for verdicts in subject relevant court cases

3.5 Causal Mechanism Part 3. Parties and Politicians Face Rhetorical Entrapment

The legislative arena is the final battleground for the passage of policies within democratic systems, which is why the third and final missing link of the causal connection focuses on policy makers and their decision making in the parliamentary arena. If the preceding elements of the causal mechanism indeed unfolded as hypothesised, social movements have not only anchored their claims on the political agenda but the scope for acceptable policy design is now limited. In other words, when social movements have successfully framed their claims as human rights issues and made full use of the discursive and/or legal opportunity structures the post-authoritarian constitutional identity can afford them, parties as well as individual politicians face rhetorical entrapment that leads to support for permissive sexual rights bills. Even if competing bills with less far-reaching reforms are on the table, a strongly permissive option will be chosen due to the fact that the framing regarding the regulatory status quo is that it violates the human rights of women or LGBT people, and a policy that violates human rights somewhat less than the status quo is clearly not a feasible option.

This also helps to explain the noticeable difference in the passage of gay marriage in South Africa and Argentina compared with most of their European counterparts; proceeding to fully legalise gay marriage without the intermediate step of a civil partnership regime. More precisely, the successful exploitation of discursive and/or legal opportunity structures by social movements should each limit the scope of the outcome of the policy process in its own way. Regarding the former, a favourable constitutional court decision obliges parliament to remedy the declared unconstitutionality of a regulation. Oftentimes judgements can even limit the scope of acceptable political solutions and prescribe components of future policies, leaving little choice for parliamentary actors but to conform.

If court decisions leave considerable room for variants of policy design or if strategic litigation is less central to a social movement's strategy, the usage of discursive opportunity structures only can have powerful effects on its own. When social movements have successfully presented their cause as an essential test of credibility for a constitutional identity based on the protection of human rights, opposition against that cause, by other religious or political actors, can simply be disqualified as being opposed to democracy and its founding values.

That is not to say that passing these policies does not involve struggle. It is likely that religious institutions still attempt to prevent policy adoption and reframe the issue on more religious grounds. However, when given the choice to side with a church disassociated from the democratic constitutional identity, or with the credible claims for human rights of an oppressed group, sufficient legislative actors should choose to side with social movements.

"Rhetorical entrapment" is a concept elaborated by Schimmelfennig (2001) in his work on the European Union (EU). Lai (2017) explains that,

> The European community committed rhetorically to the integration of all European countries based on their liberal and democratic values, and this rhetorical commitment allowed Central and East European states to justify their bids for EU membership claims according to the EU's essential identity: liberal democracy, multilateralism, and unity. The strategic use of rhetorical commitment turned into rhetorical entrapment by highlighting the importance of the EU to honor its previous commitment. (Lai, 2017, subsec. 3.2)

In post-authoritarian South Africa and Argentina, political parties and politicians have rhetorically committed to human rights as a way to stabilise democracy and regain legitimacy in the eyes of the international community of states. This rhetoric commitment allowed women's and LGBT rights movements to justify their claims for sexual rights on human rights grounds. The strategic human rights framing by social movements turns into rhetorical entrapment for political actors not wanting to undermine the credibility of their commitment to constitutionally protected human rights. Once a human rights framing of sexual rights is adopted by those with authority "this gradually becomes the guiding framework or rhetorical common ground in which actors contest and legitimate the issues" (Hansen, 2006; Lai, 2017, subsec. 3.2).

Especially in light of the contrasting human rights record of the previous regime, parties most likely do not risk to openly oppose reform (and human rights) as it would make them susceptible to the charge of hypocrisy. Thus, parties and politicians facing rhetoric entrapment have strong incentives to support permissive reform, even against the religious beliefs of their constituents.

Furthermore, research has shown that even religiously conservative voters care more about pocketbook issues rather than morality issues (e.g. Hillygus & Shields, 2005). For example, in South Africa, people strongly oppose homosexuality when specifically asked in surveys but do not state homosexuality as a priority issue, rather being more concerned with poverty, unemployment and crime (Thoreson, 2008, p. 686). The credible commitment to human rights, on the other hand, can be decisive for post-authoritarian electoral success. For instance, the surprising victory of Raúl Alfonsín as Argentina's first democratic president after the military dictatorship was a result of his clear commitment to human rights (Viola & Mainwarning, 1984, p. 38).

Religiously affiliated parties, such as Christian democratic parties, should not be a hindrance for sexual rights policy passage either. That is because not only the roots of party preferences lie in the past, but also of the composition of the contemporary party systems. For instance, the formation of Christian democratic parties in Western Europe can be traced back to state/church cleavages in the 19th century that triggered a politicisation of Catholicism to its defence against a secularising state (Engeli et al., 2012, p. 15; Kalyvas, 1996).

This also suggests that cordial relationships between state and church (as prevailed for most of South Africa's and Argentina's history) can lead to the absence of strong Christian democratic parties in a country's party system. It follows that, ironically, if churches have enjoyed relatively unchallenged political influence in the past, this can leave them without a natural ally in the party system after a political transition of the kind that is described in this causal mechanism. If religious parties do form post-democratisation, the delegitimation of religious influence on politics should limit their electoral success. This line of reasoning is supported by the lack of strong religious parties in South Africa's and Argentina's party systems. As shown in the previous chapter, after democratisation in South Africa, the ACDP and the UCPD formed but were never blessed by electoral success beyond 2 percent of votes, despite the highly religious electorate of the country.

In summary, I propose that a historically close state/church relationship leaves churches without a natural ally in the party system when the ideological links between state and church abruptly change during regime transition. This is because the lack of a historical state/church cleavage prevented the formation of religious parties, and the delegitimation of religious influence on politics prevents them from becoming strong in the new democratic present.

The same reason should limit the incentive of conservative parties without explicit religious ties to conform to church demands. Thus, we end in a situation without parties in the party system that are likely to make preventing sexual rights policy change a priority. This explains the unlikely success of social movements to have their demands enshrined in policy, despite the initial lack of intention or preference on the part of the population, parties or politicians.

Empirical manifestations

Three empirical tests can deliver evidence for this final theoretical proposition. The first test focuses on political parties' and politician's actions, while the other two aim to establish which reasons or influences are put forward to justify these actions.

A. Collaboration with social movements. Testing whether women's and LGBT rights groups' claims are perceived as legitimate concerns by parties and their delegates can be done by observing the empirical fingerprints left behind by their active collaboration with such groups. These observations include joint legislative initiatives, joint press conferences and frequent invitations for movement actors to speak at parliamentary committee sessions. Conversely, excluding church leaders would count as evidence of politicians becoming increasingly sympathetic to the social movements' cause. This represents a simple but doubly decisive test. In order to increase confidence that legislative actions are indeed influenced by the preceding components of the mechanism, it is interesting to trace the reasons politicians give for their stances.

B. Politicians' use of a social movement's framing. If politicians use the framing of human rights that has been shaped by the respective social movements, this would count as evidence for their actions being influenced by the successful framing strategies of movements. Frame adoption by politicians is theoretically certain and unique. It is a unique expression of the causal effect of the movements' successful exploitation of ideological opportunity structures, and its absence would disconfirm this section of the mechanism which is why it constitutes a doubly decisive test.

C. Politicians explicitly reject church influence on public policy. What is equally informative in this regard is how religion features in the political debate around the policies in question. If many politicians chose to adapt the church's religious frame of the issue, this would count as evidence against this section of the mechanism. However, if religion is explicitly invoked as not being a legitimate factor to consider for public policy issues, this would constitute smoking gun type evidence. Such evidence would uniquely indicate a process of religious delegitimation having taken place, which is key in explaining how even numerically strong religious institutions can fail to translate their doctrinal values into public policy. However, finding such evidence is not certain as explicitly rejecting religious influence in political statements might increase the moral and political conflict of the debate, therefore politicians may not opt to mention religion at all.

Important empirical material for this section include relevant parliamentary debates, press statements, newspaper articles that contain information on parties' and politicians' stances on and actions regarding the issue under debate and their justifications. As before, table 13 presents an overview on the evidence, test types as well as necessary data.

Table 13. Mechanism Part III. Conceptualisation, Operationalisation, Test Type and Required Data

Conceptualisation of each part of Mechanism	Predicted evidence	Test Type	Required empirical information (data)
Part III. Increasingly, politicians take up the social movement's claims, because granting those rights is more in accordance with the constitutional identity than the church's claims. Constitutive components: - Legislative action (joint law initiatives, joint press conferences by politicians and interest groups, politicians voting for policy passage) - Justification given for action	a. More politicians siding with social movements b. Politicians use interest groups' framing (invoking human rights and democracy) in their justification for actions c. Politicians explicitly mention that religion should not be the basis for laws	a. Doubly decisive b. Doubly decisive c. Smoking gun	a & b & c. press releases, newspaper articles, transcripts of parliamentary debates, law initiatives

4 Causal Condition. State/Church Ideological Symbiosis during South Africa and Argentina's last Authoritarian Regimes

Despite different historical and socio-political contexts, both South Africa and Argentina endured violently repressive authoritarian regimes in the recent past, indelibly shaping their policies and politics up until the present day. The last Argentine military dictatorship, in power from 1976 until democratisation in 1983, is widely accepted as among the most repressive in the history of Latin America. The regime waged a 'dirty war' [*guerra sucia*] against its opponents; during this period of state terror an estimated number of 30 000 people 'disappeared', or abducted by the authorities and never heard of or from again (Langer, 2013). The group of disappeared [*desaparecidos*] consisted mainly of students, unionists and any sort of activists, unconcerned in distinguishing between women, men or children (Madres de Plaza de Mayo, n.d.).

Over 300 clandestine detention camps were set up in which political opponents were often raped, tortured and the vast majority murdered (ibid.). The victims' bodies were commonly disposed of in mass graves and those who survived the torture killed in death flights, that is extrajudicial killings conducted by the military where victims were injected with a venom rendering them unconscious, only to be dropped into the ocean from airplanes (Galván, 2013, p. 160). This costly method of killing via death flights was financed by robbing these same victims of their belongings, conducted as a 'Christian kind of death' to assuage the conscience of the militaries who carried out the operation, choosing to see God's ocean as ultimately killing their victims and not themselves (Abuelas de Plaza de Mayo, 2017b).

Based on the personal account of a military official who participated in the killings, an article in the *New York Times* describes the eerie series of events on the death flights:

> Many of the victims were so weak from torture and detention that they had to be helped aboard the plane. Once in flight, they were injected with a sedative by an Argentine Navy doctor before two officers stripped them and shoved them to their deaths. (Sims, 1995)

Pregnant women were kept alive in captivity, where they gave birth with hoods over their heads. Many were executed shortly after giving birth and their babies given up for adoption by families close to the military (Galván, 2013, p. 160). After the end of the dictatorship many military families moved abroad to escape persecution, burdening an almost impossible task upon an estimated 500 children and surviving members of their families of ever reuniting as the children grew up without knowing their past (ibid.). Thus far (state December 2017), only 126 of these children were identified, mainly through the work of the human rights organisation *Abuelas de la Plaza de Mayo* [Grandmothers of the Plaza de Mayo] that was formed by the mothers of disappeared who became parents in captivity. The search for the missing children via large-scale gene testing in the Argentine population still continues. Despite only having been in power for seven years, Argentine society is trying to heal the scars of the past to this day (Abuelas de Plaza de Mayo, 2017a).

The apartheid regime represents a similar dark episode in South Africa's history like the military dictatorship in Argentina, despite the former being in place for a comparatively longer period from 1948 until 1994. In an effort to secure white supremacy, the apartheid government implemented strict racial segregation policies, including separate designated living areas for different races, entirely separate education systems and public facilities (including segregated public transportation, entrances to buildings, benches on which to sit, areas on the beach, etc.), and the prohibition of "mixed" marriages and inter-racial sexual relations. The government excluded the non-white population from almost any direct political participation and severely restricted their movements. Millions of non-whites were forcibly removed from their homes all over the country and made to live in designated areas, deprived of basic rights and infrastructure. Violence, crime and poverty ran rampant, much of which is still prevalent in many of these areas today. More than 80 percent of the country's territory was reserved for the white minority (which made up only 20 percent of the population) and individuals classified as non-white required passes to enter. Any form of political mobilisation or opposition by non-whites was outlawed and violently oppressed, which also applied to opposition to apartheid by white people (Worden, 1994).

In an effort to discredit the South African regime, the UN declared apartheid a crime in international law in 1973. On this occasion, the UN defined apartheid as "inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them" (International Convention of the Suppression and Punishment of the Crime of Apartheid, 1973). Facing increasing isolation internationally, the regime eventually crumbled and the first democratic elections[14] were held in 1994. Today, the word apartheid [Afrikaans for separateness] is used as a generic label for discriminatory racial segregation worldwide, enshrining the aristocracies of the South African regime in everyday language.

Both the authoritarian apartheid regime in South Africa and the military dictatorship in Argentina ultimately collapsed because their human rights violations led to a loss of legitimacy in the international normative context of human rights. That the regimes could stay in power as long as they did in the first place was significantly influenced by their ideological symbiosis with the respective main religious institutions, the Dutch Reformed Church (DRC) in South Africa and the Catholic Church in Argentina. Both regimes framed the repression they exerted in religious terms, gaining credibility through the explicit support of churches[15].

[14] South Africa had many self-designated "democratic" elections before that but until the end of apartheid, the majority of the population was excluded from participating.

[15] It is important to note that both the Catholic Church in Argentina and the DRC in South Africa were not monolithic actors. Both institutions also included dissident voices. However, these voices were systematically silenced through repression by the regimes and internally by the churches. Since the purpose of this chapter is not a critical appraisal of occasional resistance by some within the ranks of the churches but an analysis of the official positions of these institutions as expressed by their ecclesiastical hierarchies, the regime opposition by few religious actors will not be further considered.

4.1 An Immoral Alliance between State and Church during the last Argentine Military Dictatorship

During the Argentine military dictatorship, religion and nationalism merged to form the ideological underpinnings of the regime. Church and state formed a strong multilevel alliance that had a mutually legitimising function for both institutions. The military regime discursively constructed both the national as well as its own political identity as Catholic, thereby exploiting religion as a legitimising ideology for its rule and ensuing actions. In turn, the Catholic Church in Argentina validated the regimes legitimising religious identity through public support for the regime in general, moral support for the military and practical support in the implementation of state terror, deeply compromising its moral integrity.

Instrumentalisation of religion by the dictatorship

Religion was omnipresent in political rhetoric during the dictatorship. In 1976, Argentina was in the midst of political chaos related to a guerrilla war between extreme left and right wing militia. That is when a military junta overthrew the democratic government "with the help of God", claiming to lead the country on "a quest for the common good, for the full recovery of *el ser nacional*", which Feitlowitz (1998, preface, 1998, p. 24) translates as the collective national essence, soul or consciousness. The discursive construction of this *ser nacional* as Christian and as under threat from subversive 'terrorists' played an important role in the military's justification for its dirty war against allegedly left-wing minded Argentines. In an interview printed in the newspaper *La Prensa* on the 18th of December 1977, the first leader of the regime, Lieutenant General Jorge Rafael Videla, broadly defined terrorists to be not only those carrying weapons "but also those who activate, through ideas that stand against our civilisation, other persons." (General Jorge Videla, 1977, my translation). This deliberately open definition of terrorists left space for the inclusion of anyone opposing the regime, even if that opposition only included ideas the junta deemed threatening.

Upon seizing power, the military junta published a document announcing its immediate overtake of the government and self-declaring its rule to be a 'Process of National Reorganisation' [*Proceso de Reorganización Nacional*], a euphemism for the regime's effort to wipe out the left-wing guerrilla movement. "Swearing to God and the Holy Gospels to act with loyalty and patriotism," the junta declared the Process of National Reorganisation to be necessary to reinstitute the "essential values and morality of society and eradicate subversion." (Acta para la Reorganización Nacional del 24 de marzo de 1976, as documented by Tronosco, 1984)

The junta constructed the national identity being Christian and fundamentally under threat by atheist Communism. In that light, the left wing guerrilla movement was not merely a political enemy but represented the subversion of the Argentine nation itself, significantly raising the stakes of the dirty war. In light of this threat, taking extraordinary (and extra-legal) measures seemed more legitimate. Furthermore, prescribing a religious essence to the Argentine national identity drew a line between 'us' and 'them' along a strictly religious axis, excluding the subversive other from the definition of Argentineness and also from being worthy of state protection (see Barros, 2003).

A statement by General Videla (1977, my translation) underscores this point: "I want to stress that Argentine citizens are not victims of repression. The repression is against a minority, who we do not consider part of Argentina." Instrumentalising religion to draw the distinction between us (Catholic) and them (atheists) loaded these categories with the simple dichotomies of good vs. evil and morally right vs. morally wrong inherent in religious doctrine. Portraying left-wing minded Argentines as the evil other on a quest to destroy Argentine Catholic society served as justification for their destruction and rhetorically elevated the military operation to the status of a holy mission. The steadfast Catholic faith of the military served as proof for the military's belonging to the us category and for the legitimacy of its rule.

Magazines and newspaper articles that spread the word of the coup stressed military dictator Videla's deeply held religious beliefs and moral persuasions (Feitlowitz, 1998). The regime subjected the press to strict censorship and provided journalists with 'publication guidelines' in order to 'purify' the public language from words associated with subversive ideas (Galván, 2013, p. 158), essentially turning large parts of the press into a propaganda machine. Authorised language was only to be related to God, the fatherland and home [Dios, Patria, y Hogar] (ibid.). Accordingly, the newspaper *La Prensa* stated in a front page article after the coup that "the people must learn to recognize the 'civilized' man who does not know how to live in society and who in spite of his appearance and behavior harbors atheist attitudes that leave no space for God." (Feitlowitz, 1998, p. 28; Stockwell, 2014, p. 26) The phrasing of this call for the population to ostensibly denounce atheists (really those suspected to have a left-wing political affiliation) is a prime example of the religious framing the regime regularly employed for political purposes.

The religious rhetoric aimed not only at legitimising the military's rule in the eyes of the population but also amongst the military itself. Dictator Videla wrote a book called *El Ejército de hoy* [The Army of Today], in which he expressed his love for the fatherland, Christian principles and the Catholic Church as a spiritual guide. The book was recommended reading for members of the military and outlined the armed forces' duty to take charge in matters of "ethical purification" and upholding "of the historical-spiritual values" of the nation (Verbitsky, 2012, p. 3). A passage of an interview with church official Padre Bernado conducted by Marchak and Marchak (1999) serves as an illustration of the Christian self-perception of the armed forces during the dictatorship:

> [T]hey were convinced that they were the moral reserve of the country against communism, which was seen as the destruction of the nation. And above all – another sin of our western and Christian culture – communism is against our style of life as Christians, you see? So they took the flag of the country and of religion. If you want to be military, you must be baptised. (Padre Bernado in Marchak & Marchak, 1999, p. 264)

In the aftermath of the coup, numerous members of the military stated that it was not easy for them to carry out the orders of the regime. As a result, so indicated members of the armed forces interviewed by Mallimaci (2012, p. 180, my translation), "they needed, asked for and obtained the 'blessing' of a priest who 'sent' them and authorised this just and holy mission to kill to 'remedy' the malaise of society." This underlines the central role played by church and faith to act as the supreme moral authority, legitimising state violence (ibid.). The testimonies given by victims in the context of the first human rights report uncovering the abuses of the dictatorship, called *Nunca Más* [Never Again], published after the return to democracy, reveal how the regime's discursive construction of the us vs. them binary played out in the concrete implementation of state terror on the ground. Compelled to act in the name of God, soldiers forced victims to recite Christian texts while being tortured. "They told us we were devils"; "they are atheists, children of the devil"; "if you did not know how to recite the Our Father's prayer they hit you"; "if you were a Jew, they tortured you double for being subversive and for being a Jew." (Argentina, 1986)

How can the military have been so convinced to be on a holy mission according to the will of God? The answer lies in the institutional support from the Catholic Church that validated the religious framing of the regime's identity and morally approved of the military's holy mission. Arguably, without the church's support the sacralisation of politics during the military dictatorship would not have been as persuasive; only the church's active support for the regime justifies classifying the relationship of the dictatorship and Catholic Church as an ideological symbiosis.

Church support for the regime

The intersection between state and Catholicism in the Argentine dictatorship went far beyond the regime's rhetorical exploitation of religion. The two institutions formed a veritable entente with committed participation on the side of the church. Church support for the regime can be broken down into three components: public support for the regime, moral support for the military and practical support in the implementation of state terror.

Historically, the Argentine episcopacy has chosen to ally with the military and consequently oppose democracy. Past experience of losing influence in Argentine society during earlier attempts at democracy in the 19th century informed the church's desire to collude with military interests to defend its privileged

position in Argentine society (Marchak & Marchak, 1999, p. 253). Apart from a short struggle with then-president Peron in 1954-55, Catholic Church leaders regularly engaged in "cordial relations with whatever government was in power, concentrating their efforts on guaranteeing control over Argentine culture by legal decree. This policy led the vast majority of church officials to endorse (…) the most recent authoritarian government" (Gill, 1998, p. 149). Even though the Catholic Church's support for the regime is well documented, the church has long denied responsibility and only in 2012 (thirty years after the end of the dictatorship), was there a collective apology from the Argentine bishops about the failures of the church in the dirty war (Langer, 2013). However, the church only admitted to fault by omission, i.e. claiming to only not having actively opposed the regime. Furthermore, despite ample evidence to the contrary, church officials have steadfastly claimed not having known about the human rights abuses.

Amongst the evidence for the church's active support for the regime is that the night before as well as on the day of the 1976 military coup, both church and military leaders met to discuss the immediate future of the country. After the coup, Archbishop Adolfo Tortolo, who was president of the Bishop's Conference as well as vicar of the armed forces, publicly called for the Argentine people to "cooperate in a positive way" with the new military dictatorship, increasing the legitimacy of the military overthrow (Mignone, 1986, p. 2). Still convinced of the righteousness of the dirty war, ex-General Videla gave a series of interviews[16] to newspapers in 2010 (which were only published in 2012), in which he revealed that he had many conversations about the dirty war with Cardinal Raúl Francisco Primatesta during the time of the military regime. Conversations also supposedly took place with other leaders of the Argentine episcopal conference and with Pio Laghi, the papal nuncio at the time. "They advised us about the manner in which to deal with the situation" (Jorge Videla 2010, as quoted in Mercopress, 2012).

At the time, the symbiosis with the regime proved to be beneficial for the church as it maintained its influence in the education system, secured privileged access to the media and enjoyed an increased state support by the Junta in the form of pension plans and monthly salaries for bishops (Fabris, 2012). In return, the church had to pay the price of covering up the immoral behaviour of the regime and deeply compromising its moral integrity by actively participating in the regimes inhumane practices. For example, then-Archbishop of Buenos Aires, Juan Carlos Aramburu, denied the severe human rights abuses of the regime and repeatedly repudiated the fact that countless political opponents disappeared. In the same vein, six month after the coup, Archbishop Tortolo told the press: "I have no knowledge, I have no reliable proof, of human rights being violated in this country" (Goldfrank & Rowell, 2012, p. 38). However, an entry in

[16] While sentenced to a lifetime in prison after the dictatorship during the Alfonsín administration, military leaders were later pardoned later by president Ménem, enabling Videla to give these interviews as a free man. That pardon was subsequently reversed under the Kirchner administration, and Videla died in prison.

the personal diary of vicar Mons. Bonamín at the time suggests otherwise. The diary states that Bonamín consulted with Tortolo (as president of the Bishop's conference the relevant authority for such matters) about the moral dilemma felt by the soldiers while carrying out torture programmes. Tortolo recommended establishing criteria for legitimate torture under Catholic morality. His reasoning was that since the death penalty can be justified in the Catholic moral code, so can torture as it is less harmful than the former (Mallimaci, 2012, p. 175).

Not only individuals among the ranks of the church hierarchy were supportive of the regime and its practices. In one of the first public statements by bishops as a group in 1977, they legitimised the military rule and justified repressions, stating: "We are aware of the threat to national life that subversion has meant and continues to mean. We understand that those who are responsible for the welfare of the country have found it necessary to take *extraordinary* measures." (Goldfrank & Rowell, 2012, p. 38, emphasis added)

Apart from the ecclesiastical hierarchy being closely connected to the military leaders, lower rank church officials played an important role in the implementation of the regime's practices. Argentina's National Commission On The Disappeared revealed the direct participation of clergymen in extra-legal abductions, tortures and killings undertaken by the regime. In clandestine detention camps, clergy supported the military by encouraging prisoners to confess in order to avoid additional torture (Goldfrank & Rowell, 2012, p. 38). In a participant testimony captured in *Nunca Más*, a former police officer testified that after being involved in the brutal extra-legal execution of three regime opponents, he was comforted by church official Father Von Wernich. The latter told him that what he had done "was necessary; it was a patriotic act and God knew it was good for the country" (Testimony of Julio Alberto Emmed, file No. 683 in Nunca Más, Argentina, 1986). Church officials convinced the police and military that their actions constituted a holy duty and played a pivotal role in creating the ideological blindness of the state apparatus necessary for large-scale state terrorism.

Having realised that ideological symbiosis with the regime brought only short-term advantages, the church has denied active involvement with the regime until this day. Especially considering the mounting allegations against the current Pope (Cardinal Jorge Mario Bergoglio, now Pope Francis I) concerning his involvement with the regime, it seems unlikely that it will ever be in the Catholic Church's interest to investigate its role in the dictatorship. Despite the church's opportunistic denial, the immoral alliance of the church and the military regime did not go unnoticed in Argentine society and severely damaged the church's moral authority for the decades to come.

4.2 A Racist Church in Apartheid South Africa

The intermingling of religion and national identity has played a part in South African history since the early days of European settlement in the Cape. Jan Van Riebeeck, a Dutch Christian, founded the Cape Colony in 1652 with a prayer. Shortly after, he founded the South African Dutch Reformed Church (DRC) (Barnard, 2007, p. 502). Since then, the DRC sided with and supported the (white) political establishment. This was true for the early Dutch settlement, later with the British and then with the Afrikaners[17] (Lalloo, 1998, p. 42). The doctrine of apartheid that became institutionalised when the right-wing Afrikaner-controlled National Party came to power in 1948 was modelled on racial segregation in the DRC congregations, and was as much a religious concept as it was a political one. The Afrikaner government ideology and DRC ideology were mutually constitutive and became the foundation that created the apartheid regime.

The apartheid regime and its church

The DRC became an essential component of Afrikaner nationalism ever since it sided with the Boers during the Anglo-Boer war in 1899. When the right-wing Afrikaner-controlled National Party came to power in 1948, it was no coincidence that the first apartheid prime minister, Daniel Francois Malan, was a Dutch Reformed minister. The official church newspaper around the time the National Party came to power proudly stated that "apartheid can rightfully be called a church policy" (Lalloo, 1998, pp. 43–44). After seizing power, the National Party put into legislation the apartheid that was designed in the early 1940s by the church (Ritner, 1967, p. 29). "Very few of the laws that were implemented in 1948 weren't already asked for by the NGK [*Nederduitse Reformede Kerk*, Afrikaans for Dutch Reformed Church) before that." (Kuperus, 1999, p. 87)

Shortly after Afrikaner pastor-turned-statesman Malan took office, parliament, at the insistence of the DRC, passed legislation forbidding mixed marriages and cohabitation between black and white persons (Barnard, 2007, pp. 502–504). Many other laws concerning racial segregation soon followed. Among them, the Immorality Amendment Act (Act No 21 of 1950), which prohibited the sexual contact of whites with members of any of the non-white races (Immorality Amendment Act, 1950, 1950). Throughout its rule, the apartheid regime used church and faith as legitimation of its authoritarian and racist policies. For instance, a law regulating publications was justified as follows: "In the application of this Act the constant endeavour of the population of the Republic of South Africa to uphold a Christian view of life shall be recognised" (§ 1 of Publications Act 42 of 1974, cited in van der Vyver, 1999, p. 636). Even though during

[17] Descendants from mostly Dutch settlers that developed a unique identity as a white ethnic group on the African continent that included the formation of their own language: Afrikaans.

the 20th century no established state-church existed, references to God and faith were numerous in laws and the constitution (ibid., pp. 638). It is undisputed that the DRC provided a powerful moral and theological basis for the regime's policies, "helping to present the Apartheid State as Christian, but creating no distinction between what it saw as Christian values and the need for the apartheid State to be the abode for these particular values" (Rasool, 2004, p. 97). The relationship between state and church was one of,

> close cooperation and mutual support. (…) The government acknowledged the right of the Afrikaans churches to influence public policy with regard to education, welfare and public morality especially. The Afrikaans churches saw it as their responsibility to lend moral and sometimes even theological support to the policies of government (Villiers, 2004, p. 224).

The DRC and its regime

"It was to certain Afrikaner theologians that the National Party ideologists turned for scriptural and theological justification for their racial policies and too readily obtained them (…)" (Gruchy & Gruchy, 2004, p. 33). The dominant theological position of the DRC was that God prescribed the separation of races and therefore the church must work for such (Lalloo, 1998, p. 43). This theological justification of apartheid significantly "prolonged the life of the paradigm" (Lategan, 2004, p. 54). Among other scripturally dubious interpretations, the DRC used the biblical metaphor of the tower of Babel in Genesis 11 to determine God's wishes for racial segregation (Botman, 2004, p. 126). As the biblical story goes, the attempt of many peoples to build a tower to heaven together results in chaos and sin. The inability of different peoples speaking different languages to collaborate in building the tower, the DRC took as scriptural proof that God created separate people that ought not to mix (Lalloo, 1998, p. 48).

During the roughly half a century rule of the apartheid regime, state and church were ideologically inseparable. As one of the most important institutions for Afrikaners, the DRC was a driving force behind spreading a nationalistic agenda throughout the population (Lalloo, 1998). For its involvement with the apartheid regime, almost all international church associations successively excluded the DRC from the 1960s onwards until the last one, the World Alliance of Reformed Churches, officially excluded the DRC in 1982 (Weisse & Anthonissen, 2004, p. 27).

The informal aspects of state/church relations during apartheid were more important than the formal ties. The channel used by the DRC to influence government was one of "silent diplomacy" [*koninklike weg*, in Afrikaans] (Villiers, 2004, p. 225). During informal meetings and agreements, the state and church negotiated the political pathway of the regime (Lalloo, 1998). DRC leaders met government representatives in confidential meetings to ensure the greatest possible commitment of the politicians to "their churches'"

[the three sister churches that collectively formed the DRC] view (Villiers, 2004, p. 225). This was facilitated by the fact that the political and administrative elite was made up of almost exclusively active members of DRC congregations. Former clergyman Johan Heyns estimates that in 1993 (one year before South Africa's regime change), 70 percent of members of parliament and 95 percent of cabinet members were DRC members (Corrado, 2013). Membership in the DRC also extended to other government branches, such as the police and military. The church providing military chaplains is one of the most criticised aspects of DRC involvement in the apartheid regime (Gruchy & Gruchy, 2004). By condoning the regime's violent acts, military chaplains played a pivotal role in compromising the church's moral credibility after the regime's demise (Corrado, 2013; Rickard, 1998).

Aside from the significant overlap between government and church membership, DRC clergy had close personal ties with the political elite, allowing them great influence over government decisions (Cornevin, 1980). Kuperus (1999) conducted an interview with above mentioned DRC official Heyns in which the latter elaborates on the personal relationships between DRC and state officials that were an important pillar of the state/church ideological fusion during apartheid.

> I had access to the ministers, the Prime Minister and the President. They were all members of my congregation. And I visited them regularly, and I prayed with them, and I had discussions with them on current affairs. You see there was a very, very close link and overlap between church and state. (Johan Heyns, as cited in Kuperus, 1999, p. 114)

An analysis of state/church relations during apartheid must also mention the Afrikaner Broederbond, an influential secret organisation inspired by Nazi-ideology that "not only shaped public opinion, but created the conditions for the apartheid paradigm to survive" (Lategan, 2004, p. 60). Every president and prime minister during the half-century rule of the apartheid regime was a member of the Afrikaner Broederbond (Levy, 2011). By the end of apartheid in 1994, most of parliament and almost all of the National Party cabinet members were members of this organisation (ibid.). Furthermore, members of the Afrikaner Broederhood not only held key positions in all levels of government but also in business, police and military, administration, Afrikaans press, state radio and television as well as Afrikaans churches and cultural organisations (Lategan, 2004, p. 61).

The Broederbond was founded in 1918 to defend interests of the Afrikaners [the former Dutch settlers] in a society dominated by the British since the defeat of the Afrikaners in the Anglo-Boer war in 1902. Membership of the organisation was extended by invitation only and was contingent upon being white, Afrikaans-speaking, Protestant, male and well connected in society (Wren, 1990). The Broederbond illustrates how Afrikaner nationalism, Protestantism and the South African state merged to create and up-

hold apartheid ideology. The Broederbond closely supervised the conduct of its members and could terminate their membership for various reasons including "divorce under unacceptable circumstances, (…), conviction of a criminal offence, alcohol abuse, regular participation in Sunday sport or joining a church other than the three Afrikaans churches." (Lategan, 2004, p. 61) The Broederbond also strictly controlled national policy. Specialised committees,

> supervised the implementation of policy by their own members and by government. They also proactively researched and formulated policy. They were composed of highly competent people and experts in their specific fields (…). Virtually all important legislation in the 60s and 70s was prepared in this way before it entered the parliamentary system. (Lategan, 2004, p. 61)

The Broederbond served a critical cohesive function between state and church, enforced the strict church-sanctioned conduct of government officials and religious conformity of government policy, and at the same time ensured the political conformity of the DRC.

4.3 Discussion

The analysis of state/church relations during the last authoritarian regimes in Argentina and South Africa has revealed a mutually beneficial relationship between those two institutions in both countries, justifying the categorisation of the relationship as ideological symbiosis. In their own ways, both regimes acted in the name of religion to cover-up and justify their egregious human rights records. In Argentina, the military junta argued that its coup saved the Christian nation from communism and presented the 'dirty war' against its opponents as a holy mission sanctioned by God. In South Africa, the apartheid regime employed religion to provide a moral justification for its policies of racial segregation and, similarly for the Argentine dictatorship, portrayed its rule as a mission ordained by God.

Through the ideological symbiosis with the regime, the Catholic Church in Argentina and the DRC in South Africa were able to secure privileged positions in society that included financial support from the state and direct influence on regime policy through informal channels. In exchange, both churches contributed to the stability of the regimes by lending moral credibility to the rulers and their policies. Argentine Bishops denied the human rights abuses of the dictatorship to placate the growing public outrage over the disappearance of countless Argentines, all the while participating in the extrajudicial torture and killings administered by the regime. The DRC in South Africa even went a step further to create a complete theological justification of racial segregation, not only legitimising but inspiring many of apartheid crudest policies. In both countries, the churches' moral and even spiritual support for the military helped to create

a powerful sense of moral righteousness necessary to implement the regimes' immoral policies and practices. Both churches also displayed a remarkable theological flexibility to accept each regime's practices as part of a genuinely moral cause.

In both South Africa and Argentina, the ideological symbiosis between state and church was facilitated by the strong personal religious convictions of the respective regimes' rulers and their personal friendships with church leaders, allowing regular interlocution through various informal channels of mutual influence. Considering that both regimes possessed a formal institutional separation of church and state, this illustrates that formal ties between these institutions are not representative of the actual degree of cooperation between religion and politics, and especially do not reflect the degree of policy influence churches can wield.

The discursive construction of a particular constitutional identity based on religion played an important role in the legitimation strategy of both authoritarian regimes. However, the way this played out differs between South Africa and Argentina. In the case of the former, the boundary for which part of the population makes up the nation was drawn along racial lines. The apartheid government explicitly aimed to create artificial nation states for the non-white population in desolate locations to realise the vision of a purely white South Africa. Religion functioned as a legitimising basis for the separateness or apartheid of the population along racial lines. On the other hand, the Argentine military dictatorship constructed the national identity as Christian with the aim to exclude those with left-wing political views (for the left's allegedly inherent atheism) from the definition of Argentineness. In contrast to South Africa's racial lines, religion was constructed as the primary axis of difference in Argentina. It goes without saying that left-wing political affiliation did not really constitute a mutually exclusive category with being Catholic. Framing the battle as religious rather than political was a deliberate strategy employed by the dictatorship to demonise opponents and elevate the military's actions to the status of a holy mission; as observed by Verbitsky (2005) the very requirement for the physical, psychological and moral eradication of the subversive.

The incorporation of religious elements into the regimes' identity constructions had a mutually legitimising and beneficial utility for state and church. On the one hand, religion functioned as a legitimising ideology for the regime, and on the other, a religious identity construction also justified the moral influence of the churches on national policy. Importantly, the churches were willingly involved in this deal.

This is the pivotal difference to other countries such as Germany and Italy. In Italy the church did not oppose but not align with Fascism either. Therefore its reputation was not damaged during Fascism and it emerged as a legitimate ally for the Christian Democratic Party in the phase of democratic consolidation (Warner, 1961). In Germany, the church responded to oppression with conformity but did not too enthusiastically support the regime. The regime itself did not primarily rely on religion to legitimate its violent repression, but rather on its own racial ideology and Hitler actively reduced the influence and

independence of institutionalised religion. While signing the *Reichskonkordat* with the Vatican in 1933, he repeatedly ignored it thereafter and subordinated the church to the state (Conway, 2001, c1968). Thus, there was no ideological symbiosis and the church could ally with the Christian Democratic party upon democratisation (Warner, 1961).

For South Africa and Argentina, the historic temporal position of the regimes in the second half of the 20th century is a decisive context factor that shaped the unfolding of state/church relations. Paradoxically, secularisation processes in the Christian world and the rise of human rights and democracy to the most legitimate principles in the international community of states helped shape the incentive structures for state and church to cooperate in the first place. With both secularisation and modernisation posing threats to its social influence, the churches had a strong incentive to cooperate with the regimes to secure an all but dominant position in society. Among other benefits, the churches enjoyed the privilege of their definition of morality to be enshrined into policy, likely heightening moral influence on national policy far beyond what could have been reached under traditionally democratic conditions. Conversely, inherently weak legitimacy of an authoritarian regime with questionable human rights standards increased its own need for a religious backing to help legitimise its rule.

While the world historical context of the second half of the 20th century enabled the state/church symbiosis in Argentina's and South Africa's last authoritarian regimes in the first place, ironically, it ultimately also led to their demise. While the state/church entente prolonged the life of the authoritarian regimes, both eventually fell apart, paving the way for more democratic, representative governments that followed. Their flagrant human rights abuses contributed to the deterioration of the regimes' legitimacy, leading to increasing international isolation for each that, combined with other domestic factors, eventually lead to democratisation. While in other epochs, a state/church alliance could have had very different repercussions, these churches' ideological symbiosis with these authoritarian regimes within that specific era proved disadvantageous for the churches as it challenged religious institutions' most important resource: their moral authority, as we shall see preventing religion to shape the constitutional identities that emerged after regime transition.

5 Mechanism Part 1. Democratic Constitutional Identities in South Africa and Argentina

"We will seek freedom and democracy for the Argentineans, with the firmness that comes with having lived the dramatic experience of totalitarianism and repression, and we will fight for freedom and democracy in the world."

(Alfonsín, 1983)

"[W]e must (…) engage in an historic effort of redefinition of ourselves as a new nation. Our watch-words must be justice, peace, reconciliation and nation-building in the pursuit of a democratic, non-racial and non-sexist country."

(Mandela, 1994e)

At the end of their violent reigns of repression, both the apartheid regime in South Africa and the last Argentine dictatorship faced deep legitimacy crises. Against the backdrop of economic decline and rising international and internal pressure due to the military regime's human rights abuses, the Argentine dictatorship entered the Falklands/Malvinas War against Britain in April 1982. The war was a last ditch attempt to regain the vanishing glory of the armed forces. The British victory in the same year accelerated the regime's disintegration, and after mass protests the military junta finally called democratic elections, which were carried out in 1983 (Viola & Mainwarning, 1984, p. 38).

Around the same time in South Africa, internal resistance against the apartheid regime grew stronger; increasing political violence and international isolation, which in turn further damaged the economy and finally resulted in a slow shift in approach of the apartheid government. In order to prevent "growing violence, tension and conflict", President de Klerk (1990) of the ruling National Party began giving concessions to the regime opposition. Among these concessions granted was the unbanning of the ANC, in the vain hope of remaining in control of an inevitable political process of transition. As the ANC emerged from the underground around 40 000 exiled members returned to South Africa in the early 1990s, paving the way for the multiparty negotiations that would lead the country towards its first fully representative democratic elections in 1994 (Byrnes, 1997).

Both South Africa's and Argentina's regime transitions towards democracy were accompanied by profound changes in political ideology, legal systems, institutions and political leaders. The discontinuity left

by a moment of political transition allows for the potential of sudden and far reaching changes, the kind that are often precluded in more mature political systems. While a democratisation process is a critical juncture for the future trajectory of a country, this, however, does not mean that all potential paths are open at this crossroad. The historical trajectory of the country, as well as the temporal positioning of this juncture, at the same time both suggest and preclude certain future paths.

In the previous chapter, we reviewed how the causal condition of the theoretical mechanism played out in South African and Argentine reality. This chapter will look at the first part of the mechanism that argues the state/church ideological symbiosis during authoritarian rule to lead to the emergence of a constitutional identity that, in contrast to the identity construction of the preceding authoritarian regime, does not use religion as a tool for legitimation and identification but rather focuses on secularly interpreted human rights instead. To this end, this chapter traces the empirical manifestations of this theoretical connection in the context of South Africa's and Argentina's respective democratic transitions.

As we will see, the pattern of continuities and discontinuities of the democratisation processes causally connect the state/church ideological symbiosis under authoritarianism to a secular constitutional identity focused on human rights after democratisation. The delegitimation of the old regimes and their ideologies led to regime change and with that a shift in political power away from the military in Argentina and away from the Afrikaners in South Africa; and towards the former regime opposition previously banned from political activity, in exile or imprisoned under the authoritarian regimes. The democratic political elite that came to power after the regime changes, exemplified by South Africa's first democratic president Mandela and Argentina's first president after its latest democratisation Alfonín, had personally experienced the religiously legitimated repression of the authoritarian regimes. Pivotal players in the construction of South Africa's and Argentina's post-democratic constitutional identities were among the former regime opposition that was morally failed by religious institutions and indebted to human rights and civil society as compatriots in the struggle for democracy.

While the political transitions included a change in regime ideology and representatives, the staff and ideology of the respective churches were characterised by continuity. Upon democratisation, a changed state then met a static church. The DRCs as well as the Catholic Church's alliances still laid with the representatives of the old regime.

During their political transitions, successful democratisation and consolidation in Argentina and South Africa was by no means certain. While earlier attempts at democracy existed throughout Argentine history, all were short lived before democratisation in 1983. Between 1930 and 1971, Argentina witnessed 26 successful military coups (Brysk, 1994, p. 27). South Africa did not have previous experiences of non-racial democracy prior to 1994 and thus democracy had yet to be invented in the local sense. This proved

to not be an easy endeavour considering more than 40 years of apartheid rule, an upsurge of political violence in the early 1990s and the extraordinary cultural and ethnic diversity even within the racial categories of black, white and coloured in the population. To secure the support needed for their democratic projects to blossom, political leaders in South Africa and Argentina had to design new political systems that would be legitimately accepted by the population and the international community of states, while contemporaneously fighting off internal challengers against the nascent democratic order; namely those from the military in Argentina and the pro-apartheid forces in South Africa. The continued ideological alliance between the church and the representatives of the old regime turned this authoritarian entente into a threat to democracy. In other words, democratic survival depended on fighting off right-wing and church influence.

The highpoint of the democratisation processes was the passage of newly written constitutions. The contestation and reformulation of both countries' formerly religious constitutional identities is mirrored in the constitutional debates that became a battleground for competing versions of constitutional identity along a religious/secular axis. The tension between religion and human rights in the specific context of South Africa and Argentina becomes visible in the way in which human rights arguments were used to limit the symbolic role of religion in the new constitutions and vice versa. Which side of the ideological battle won can be read in the final texts of these new constitutions. The greatly reduced symbolic importance of religion, combined with an extraordinary emphasis on human rights protection, unparalleled in constitutional texts worldwide, in South Africa's and Argentina's new constitutions illustrate how religious institutions being morally compromised at a pivotal time in the political trajectory of both countries precluded their ability to shape and inform the founding values of the new democracies. Those values and their enshrinement in institutions and constitutions of the new regimes then form the opportunity structures for social movement action that will be the focus of the second part of the mechanism analysed in the next chapter.

5.1 Never Again: Argentina's Quest for Democracy

During the dictatorship in Argentina, mothers and grandmothers of the disappeared gathered weekly on Buenos Aires's central plaza, holding pictures of their missing family members while wearing a white headscarf, representing diapers as a symbol for motherhood. These women demanded to know the fate of their disappeared children. Even more chilling was that the children of their disappeared children were born in detention centres and given to military families and regime supporters for adoption (Brysk, 1994, pp. 48–49). That the protesters were women and that they used the regime's own ideological weapons, i.e. a focus on family and motherhood, challenged the military's own legitimacy construction of protecting conservative Christian values, including the family, and contributed to delegitimising the regime.

The so called *Madres de Plaza de Mayo* [Mothers of the Plaza de Mayo, henceforth *Madres*] and the *Abuelas de Plaza de Mayo* [Grandmothers of the Plaza de Mayo, henceforth *Abuelas*] are two of several significant human rights groups formed during the dictatorship, and today are part of the strong, vibrant and highly respected human rights movement of Argentina. As underlined by Brysk (1994, p. 45), "[t]he failure of the Argentine Church is particularly important in explaining the emergence of the human rights movement." Several human rights groups and key activists began movement activity only after unsuccessfully seeking support for their cause from the church. "The human rights movement then assumed the Church's traditional role in elaborating symbols, rituals, and metaphors to explain and resolve death and injustice" (ibid.), acting as a substitute resource for moral claims.

It is important to note that although some religious actors were also among the diversely composed human rights movement, this was not the case for the Catholic hierarchy. Argentine Methodist bishop and human rights advocate Federico Pagura explains:

> [A]t a given moment, the representatives of churches linked to the World Council of Churches proposed to the highest authorities of the Catholic church the establishment of a Vicaría de la Solidaridad in the style of the Chilean church. We were ready to renounce our own identity as evangelical churches and fully support such an initiative if the Catholic church so decided. We were informed that the Argentine church was not ready to follow the Chilean experience and that all the work in relation to human rights was going to be handled by Caritas … For us that meant the death of all initiatives. It was precisely in that response that the Movimiento Ecuménico por los Derechos Humanos [Ecumenical Movement for Human Rights – MEDH] originated. (as cited in Jelin, 1994, p. 41)

The MEDH and the *Movimiento Judió por los Derechos Humanos* [Jewish Movement for Human Rights – MJDH] were two religiously-based human rights organisations whose existence shows that religion was not absent in human rights activism in Argentina, but whose founding history is related to the Catholic

church as the main religious institution failing to support the victims of oppression and collaborating with the state in legitimising and executing political violence. As a result, a heterogeneously composed human rights movement became the only public voice in support of those affected by the atrocities of the dictatorship. In this differentiation between regime resistance and Catholic Church we find one of the roots of human rights in the framework of Argentine democracy being interpreted through a secular lens today.

The work of human rights organisations brought the regime's gross human rights violations to international awareness and contributed to Argentina's increasingly pariah status internationally. In 1977, the US cut its general aid and military aid, as well as initiating multilateral sanctions a few years later. In 1976, the United Nations condemned the country's violation of international norms in form of a resolution and, in 1978, the UN recognised and condemned the practice of disappearances, eventually leading to the establishment of a UN Working group on Forced Disappearance in 1980. The United Nations also supported the Argentine domestic human rights groups, even representing the claims of the *Abuelas* on several occasions to the Argentine government (Brysk, 1994, 31; 53-54).

Raúl Alfonsín of the Radical Civil Union won the first democratic elections after the demise of the military regime with 52% of the votes on 30 October, 1983, marking the return to democracy. The Radical Civil Union competed against the Peronists in the elections and unexpectedly won because of their clear commitment to human rights and democracy (Viola & Mainwarning, 1984, p. 38). Following his election, Alfonsín commissioned the National Commission of the Disappearances of Persons (CONADEP) to shed light on the human rights abuses committed by the military. In 1985, trials against high ranking military officials began which resulted in General Videla to be sentenced to life in prison for crimes against humanity. However, Alfonsín's successor, Carlos Menem, issued a pardon to the military in 1990, which was reversed yet again later under the Kirchner administration. In a narrow sense, Argentina's democratic transition occurred in 1982/1983, but democratic consolidation was arguably only completed with the passage of the new constitution in 1993.

State/church dissent under democracy

"The Argentine Catholic Church criticises the secular attitude of the Raúl Alfonsín government for the first time". (El País, 1984, my translation) This quote is the headline of an article published by Argentine newspaper *El País* in 1984, a few months after the first democratic elections. As the headline suggests, the article reports on the newly transformed ideological relationship between the new democratic regime and the Catholic Church, stating that:

> The Argentine Catholic Church begins to measure the distance that has separated her from the centres of government decision, after a few months of silence. Although Raúl Alfonsín is a Catholic, but it is said that on the day he took office as president, he substituted the traditional Tedéum [Christian Hymn of Faith that gives thanks God, traditionally recited on occasions such as the crowning of kings] in the metropolitan cathedral for a gala function in the Teatro de Colón, and that there are agnostics including confessed atheists in his circle, whose current wives are only theirs before Paraguayan or Uruguayan judges. (El País, 1984, my translation)

This quote is revealing in various respects. First, it illustrates how influential the Catholic Church and its conservative values have traditionally been in support of Argentine governments, so much so that a more secular attitude of the new government was now remarkable and newsworthy. Events of highly symbolic political value, such as the presidential inauguration, were formerly accompanied by religious rites such as the *Tedéum*, that was attended by Argentine presidents in the metropolitan Cathedral since 1810 (Rubin, 2013). Catholic morality was traditionally expected to be upheld by religious leaders in Argentina, such that only the fact that Alfonsín's political advisors allegedly included agnostics and persons who were divorced and remarried was already ruffling feathers in the Argentine Catholic Church. Second, this extract demonstrates that the new government deliberately showcased a transmuted ideological relationship with the church by breaking with highly symbolic religious and political traditions which have accompanied Argentine politics throughout both authoritarian and democratic regimes in the course of its history.

Unsurprisingly, Alfonsín administration's relationship with the church proved to be nothing short of confrontational. The message conveyed by the government was clear: The Catholic Church's influence on government action has ended. Another example appeared in the abolishment of cinematographic censorship after democratisation, which especially awoke the "apocalyptic episcopal criticism" when Carlos Gorostiza, Secretary of State for Culture, declared "his intention to finance the Argentine cinema with the taxes collected by the exhibition of porn movies" (El País, 1984, my translation).

The end of media censorship was doubly unfavourable for the Catholic Church, as the content of Argentina's cultural productions was no longer confined to Catholic moral principles. More importantly, increasing public awareness of the magnitude of state terror committed during the dictatorship and the church's complicity in the exertion of that terror was coming to light. Writer Ernesto Sábato, who chaired the National Commission on the Disappearance of Persons (CONADEP), denounced the church's stance in relation to the former regime. No doubt it was not lost on him that this new uncensored voice was now made freely available to the public by the Argentine news media during democratisation. Sábato declared the church to be especially guilty due to the powerful influence of the Catholic hierarchy in the country: "A word of the Church would have stopped slaughter and torture. Not even the Argentine Army, whose

officers must profess by law the Catholic faith, would have dared to confront the Episcopal Conference." (El País, 1984, my translation)

A controversy that arose in conjunction with CONAPED was based on a list assembled by the commission staff containing the names of around 1500 persons involved in the repression carried out by the former regime. Victim testimonies were the main sources collected during the commission's work. While the list was not made public at first, the information was leaked to the media and Pio Laghi, the papal nuncio's[18] name, appeared on the list. Once in the public domain, families of victims were encouraged to testify against Laghi, who to this day "remains one of the most enigmatic figures of the repression." (Feitlowitz, 1998) The story was broadly disseminated via Argentine newspapers during the Easter week of 1995. Emilio Massera, one of the leading military figures during the last years of the regime, wrote a letter in Laghi's defence to Argentina's most influential news agency.

Massera, who played tennis every other week with the ex-Papal Nuncio, defended Laghi with stating that "all the Church's authorities, and in particular Pio Laghi, (…) were always concerned about the so-called detainees-desaparecidos" (ibid.). As observed by Feitlowitz (1998, 193ff.), this was a curious defence considering that Massera had denied any knowledge about kidnappings, detention centres or torture during his trial. Laghi himself denied having ever known of the regime's repression, which fits uneasily with his alleged concern for the victims thereof during the dictatorship.

This illustrates how the immoral entente between military and church staff maintained its hold even after the transition to democracy, including mutual cover ups of human rights abuses and their involvement in them. While the system of government changed, staff in military and church largely remained the same, and with it their informal web of symbiotic connections that fostered the sense of moral righteousness necessary to execute state terror and that produced a lack of accountability to truth and the public in the name of defending conservative ideology.

The signs of conflict between the newly democratic government and the Catholic Church accumulated during Alfonsín's time in office. In his book "The House is in Order" [L*a casa está en orden*], Alfonsín's ex minister of defence, Horacio Jaunarena (2011) remembers a strange episode that occurred during a religious service he attended with Alfonsín in 1987. The military trials were running concurrently and consternation in the armed forces about the democratic government was widespread. To commemorate those fallen in the Malvinas/Falklands War, the president and his defence minister attended mass on the 2nd of April held by military vicar Monsignor Medina. In the homily [commentary by priest after reading of scripture in mass], the vicar denounced the new democratic government as corrupt. Surprised by this

[18] Papal Nuncio is an ecclesiastical diplomat representing the Holy See to a state or institution.

attack, Alfonsín spontaneously decided to launch a rebuttal attack at the pulpit. Jaunarena, who was sitting in the first row between the president and high ranking military official Teodoro Waldner, remembers the exchange vividly:

> The climate was very tense. When the homily ended and the religious service continued, Alfonsín asked in a low voice: 'Man, can you talk here?' 'Look Raul,' I said, 'I do not understand any of this, I cannot answer because I do not know'. Noticing the restlessness, Jose Ignacio López said yes, that after the Mass you can ask the word, like any parishioner, to address the crowd. Alfonsín then said, 'I'll talk.'
>
> - Where? 'There.' He pointed to the pulpit with his finger. -When? -Now. What do you think? 'I think it's going to be unforgettable.'
>
> Quietly, I immediately told Waldner [the military official] who was at my side: - Prepare yourself because what you are going to see now you will never see again in your life. -What's up? He asked with a surprised gesture. 'The president is going to speak.' -Where? 'There,' I said, pointing to the pulpit with my eyebrows. -When? -Now.
>
> 'Fuck that!' [*A la mierda!*] Said the military chief in a low voice and without a muscle moving in his face. (Jaunarena, 2011, my translation)

Visibly angered, Alfonsín took to addressing Medina and the rest of the audience, defending the integrity of his government. For the first time in Argentine history, a president disrupted a religious homily. During his speech, Alfonsín challenged anyone who had proof of government corruption to step forward at once. As Jaunarena observes, this "was a gesture of presidential authority at a most delicate moment" especially because it happened in a church full of priests and militaries, not in a political context. "Monsignor Medina never spoke again before the president." (Jaunarena, 2011, my translation; see also El Clarín, 2011)

The diminished moral authority of the Catholic Church over political matters would soon be felt in policy as well. Against the wishes of bishops, the new government passed unprecedented laws equating the rights of legitimate and illegitimate children, and granting parental rights to women even if they are divorced and remarried. Furthermore, prominent feminists such as writer Maria Elena Walsh achieved the government's concession for a hour slot daily on a state television channel with a show called *Cicada* that disseminated a feminist points of view on the political situation in the country, much to the irritation of the bishops (El País, 1984). However, the most contentious policy decision was the legalisation of divorce in 1987. By now, the Catholic Church in Argentina was enraged by the Alfonsín administration because new laws directly curbed the church's normative authority (Burdick, 1995, p. 221).

A Supreme Court decision[19] that preceded the legalisation of divorce demonstrates the tensions between Argentina's new found human rights focus and the traditional moral hegemony of the Catholic Church in the Argentine context. The universalism of the former seemed at odds with the particularism of the latter. The Court declared the indissolubility of marriage to be a Catholic teaching and its imposition on the whole of society a violation of the religious freedom of those not professing that religion (Padilla, 2015, p. 73).

Regarding the divorce law, the Episcopal Conference published the following communiqué:

> As we have done other times, and as we will do again, we must illuminate with the light of the Gospel the moral questions that affect the life of the individual and of society when what is at stake are `the fundamental rights of the person or the salvation of souls` (G. et S., 76). That is why today we express the deep sorrow and sadness that we experience before a law that we believe will seriously compromise the future of the family in the Argentine Republic (…). (Conferencia Episcopal Argentina, 1987, my translation)

To protest the divorce law, the church also organised a demonstration on the Plaza de Mayo, where Archbishop Aramburu preached in defence of the family. His sermon was attended by prominent military figures and former ministers of the dictatorship (El País, 1986). As joint protests as the one against divorce demonstrates, the conservative ideological outlook of both military and church ensured their ideological symbiosis continued long after initial democratisation and further prevented the church to meaningfully contribute to the ethical considerations in policymaking under democracy.

Thus, there was a continuity of alliances between military and church that was transmitted from authoritarianism into democracy. Same applies to a human rights focus and a dose of scepticism regarding doctrinal arguments in political matters that democratic politicians acquired during authoritarianism and carried over into democracy. How that shaped the political discourse in newly democratic Argentina is the focus for the upcoming section.

Symbolic political communication

The 10th of December marks a significant date in the national context of Argentina's democratic transition. Worldwide, it is celebrated as the International Day of Human Rights in commemoration of the Universal Declaration of Human Rights, adopted in Paris on the 10th of December 1948. Forty-five years later, on 10th of December 1983, Alfonsín, the newly elected democratic president of Argentina, gave his inaugural speech, promising:

[19] C.S.J.N., Sejean v. Zacks de Sejean (1986), Fallos 308:2268

> On this occasion [of International Human Rights Day] we solemnly reaffirm our faith in the rights of man and the intention of our government to act both internally and internationally so that these rights can be effectively enforced. (…). We will seek the full force of human rights and stand out, for all men who inhabit the Earth, the same rights that we claim for our compatriots. (Alfonsín, 1983, my translation)

As Brysk (1994, p. 61) notes, "the transition elections of October 1983 marked not only a change of regime, but a fundamental change in the character of political life." The victory of the Radical party in the democratic elections was greatly influenced by Alfonsín's human rights rhetoric. Alfonsín himself was the former vice-president of the human rights organisation *La Asamblea Permanente por los Derechos Humanos* [Permanent Assembly for Human Rights - APDH], which was formed in response to the dictatorship's practices in 1975 (Mercosur, 2014). Alfonsín was among the founding members, together with Emilio Mignone, an important figure in the Argentine human rights movement whose daughter was disappeared by the dictatorship in 1976. Mignone (1986) would later write a book about the complicity of the church in executing regime terror. As Argentine sociologist Jelin observes, Alfonsín's victory,

> indicated the acceptance by the new regime of the demands and values expressed by the [human rights] movement or even their incorporation as the ethical foundation of the new state. Much more than in other cases of transitions in Latin America, human rights were an essential element of the new democracy. (Jelin, 1994, p. 46)

Moreover, Alfonsín's victory demonstrates one of the micro-transmissions of causal force that connect the state/church entente of the dictatorship with the way in which the new democracy unfolded and the values for which it stood. The political elite of the new democracy was heavily sympathetic to human rights groups due to their ideological alignment in the struggle against the dictatorship at the least, or even directly involved in their work before becoming the architects of a democratic Argentina.

After the repressive dictatorship, democratisation in Argentina meant the country had to transition into a new democratic identity, or in Alfonsín's words, had to "discover its culture, rediscover and reformulating its national identity" (Alfonsín, 1983, my translation). The choice of date and content of Alfonsín's inaugural speech gives a first indication of the prominence of human rights in the construction of this new identity. The introduction of human rights symbolism into politics was all but unintended. Considering the profound delegitimation of the dictatorship, the new civil government's internal and external legitimacy depended on proving its commitment to values that were opposed to those of the military regime. Accordingly, this was incompatible with the church's previous complicity, and so human rights became the new foundational layer of legitimacy. As noted by Levit (1999, p. 317), human rights gained immense importance "because they

were a symbolic break from the past and thus enhanced Argentina's reputation and standing vis-á-vis Mercosur and other economic integration efforts."

In his inaugural speech, Alfonsín declared that "there are many problems that can't be solved immediately, but public immorality has ended today. We are going to govern with decency" (Alfonsín, 1983). His words make plain the contrast between the past and then-present. Interestingly, this is one of the most prominent stylistic devices in Alfonsín's speech, marking it as the symbolic moment of passage from authoritarianism to democracy. The discursive construction of a radical rupture between the previous and then-incumbent regime not only pertains to the contrast between authoritarianism and democracy, but equally importantly to the higher value system that lends legitimacy to government action. Alfonsín construed ethics, rather than religion, as the moral guiding principles for democracy:

> Yesterday could exist a hopeless, dismal and disbelieving country: today we call on the Argentineans, not only in the name of legitimacy derived from democratic government, but also from the ethical sentiment which sustains this legitimacy. This ethical sentiment constitutes one of the noblest movement of the soul. Even the aim of building national unity must be fully interpreted through ethics. (Alfonsín, 1983)

These ethics, Alfonsín elaborated, are "more than an ideology" and necessary because "you cannot preserve popular protagonism without upholding a policy of principles, ethics that ensure its continuance" (ibid., my translation).

Ethics and religion both constitute a normative system of what is right and wrong but, conceptually, they are distinct. Religion can be a source of ethics but does not have to be. An examination of the content and sources of Alfonsín's ethics gives insight into the role of religion in the discursive construction of constitutional identity during democratisation in Argentina. On the occasion of the first opening session of the second national assembly in democracy, Alfonsín stated:

> This act [of opening parliament] is for me a new, strong and signifying symbol for the consolidation of democracy in Argentina. Like I said, you legitimately represent the varied and multiple face of our country which (…) now seeks to assert itself irrevocably in diversity and freedom. (Alfonsín, 1986, my translation)

Notions of diversity, pluralism and tolerance were frequently invoked by Alfonsín when speaking about Argentina's political trajectory. Another example of this is when he stated that, "without the component of tolerance, democracy is impoverish and endangered (…). Tolerance and pluralism are the preserve of democracy (…)." (Alfonsín, 1986, my translation). What is remarkable about these values is that, while

not necessarily in outright contrast to religion, these new values represent an uneasy fit with the ideological hegemony of the Catholic Church as it played out in Argentina's history. Moreover, this tension between the Catholic moral dominance of the past and the new political value system also became visible in the education reform, which was one of the first projects the democratic government put on its agenda. Regarding that reform, Alfonsín expressed his vision that:

> Freedom, tolerance, pluralism, reciprocal knowledge and respect, and federative construction of social values and goals are the goals that should govern the work in each classroom, in each institution of the Argentine educational system, regardless of the educational agents that support the classroom or institution. (Alfonsín, 1983, my translation)

Worth noting is Alfonsín's reference to the various educational agents. State-run schools have historically coexisted with religious schools in Argentina. Insisting on pluralism and tolerance as the common guiding principles for all educational agents was an assertion of the supremacy of the new democracy's founding values, subjecting religion to constitutional values rather than being informed by it. Such subtle hints of a newly defined role of religion in informing the country's value system are characteristic of Alfonsín's style of political communication during and shorty after democratisation. With that, Alfonsín discursively disempowered the church's normative influence over political matters.

Another nuanced indication of Catholicism's shifted role in the country's political identity construction was Alfonsín's frequent invocation of classic Enlightenment principles. As is well known, the intellectual movement originating in 17th century Europe nowadays subsumed under the term Enlightenment, witnessed the development of back then radical notions of political legitimacy divorced from divine right. Feeding the first secular theories of ethics, ideas that were central to Enlightenment thought are a focus on reason as the tool for human progress on the path towards human dignity, liberty, tolerance and equality. Enlightenment thinkers such as John Locke departed from religion as a source of government legitimacy and developed social contract theory, i.e. government legitimacy to be based on a contract between rational individuals. Locke's ideas regarding a separation of state and church and a peaceful shift of political power through citizen participation, as well as Thomas Hobbes' reflections on natural law as the source of natural rights of individuals later materialised in modern constitutionalism and founding documents such as the American Declaration of Independence of 1776.

Many of the principles invoked in Alfonsín's symbolic political communication follow the example of key enlightenment concepts. In an historic address to the General Assembly of the UN, Alfonsín, having "come before the Assembly with an open heart at a very special time in the life of [his] country", describes the current situation of humanity:

> Man, in his historic quest for perfection, has come to stake his ultimate claim: absolute respect for his dignity. (…) It does not define an ideology, because it is guided by ethics. It does not implement a strategy, because it is supported by the development of natural law. It is simply a vital impulse, or, better still, life itself. In brief, it is the immutable fact of his constant progress. (…) In fact, the industrialized world, without exception, is moving towards a new frontier of progress, which will not be stopped by the logical and, at times, tragic vicissitudes of life. (Alfonsín, 1988)

Aside from human dignity and progress, other Enlightenment principles such as rationality feature prominently in Alfonsín's rhetoric. An example of this is when he introduced rational citizen participation as a tool for democratic consolidation: "To consolidate democratic power, among other things, it is necessary to strengthen civil society, through incentives that encourage the rational participation of citizens in popular organisations." (Alfonsín, 1983, my translation) Just as it did in Enlightenment thought, science and technology have a firm place in the discursive construction of Argentina's present:

> Our time, on the other hand, demands that governments consider the development of pure scientific knowledge and its technological applications as a matter of primary importance. In order to channel this urgent action, we have created the Secretariat of State Science and Technology, which will coordinate these activities in the State and in other sectors, in order to optimally use and increase the national heritage constituted by the intelligence and knowledge of thousands of specialists, many of whom are currently residing abroad for lack of intellectual opportunities in the country or to avoid absurd discrimination. (Alfonsín, 1983, my translation)

The striking parallels between the themes of enlightenment and those present in Argentina's discourse of democratisation is informative regarding the role of religion in the new democratic identity, as it discursively shifts the government's source of legitimacy away from religious principles towards the secular. All things considered, it presents a normative challenge of the church's political influence. Enlightenment concepts in Alfonsín's political speeches metaphorically connect the emergence of modern constitutionalism from the "dark" middle ages and the emergence of democratic Argentina from authoritarianism.

To sum up thus far, it is not just that religion was absent from high profile political speeches, interesting is also what religion has been replaced with in political discourse. Alfonsín constructs ethics as the boundaries for legitimate government action. In an effort to create as much distance as possible from the previous dictatorship's ideology, democratic Argentina is portrayed as committed to human rights, tolerance, pluralism and diversity. While in other contexts not necessarily incommensurable with religion, in Argentina these values were secularly derived. This is directly related to the past and continued personal alliance structures between representatives of the old regime and the church.

Despite this democratic progress, many military and church leaders continued to defend the general righteousness of the "war against subversion" and, if at all, admitted to transgressions by individuals rather than acknowledging the systematic human rights abuses committed by the regime. This stands in stark contrast to Alfonsín's enlightenment-influenced democratic renaissance discourse and the focus on human rights he inscribed into political discourse and as we will see, also materialised in democratic Argentina becoming an active participant in furthering the development and jurisprudence of international human rights law.

Human rights matters

Democratic Argentina's newly found human rights commitments were not confined to the discursive sphere. Upon taking office in 1983, the government swiftly annulled the military's self-amnesty, reformed the military code of justice, brought to trial the human rights abuses committed under the military regime, abolished the death penalty, made torture by public officials a crime punishable by murder, strengthened habeas corpus and created the National Commission on the Disappearance of Persons (Brysk, 1994, pp. 67–68). During the nine months of work by CONADEP, the commission identified 340 clandestine detention centres[20] and documented thousands of unresolved disappearances. The release of CONADEPs final report *Nunca más* [Never Again] was accompanied by demonstrations of 70 000 human rights showing their support (Ibid. pp.70-71). Table 14 provides an overview on Argentina's various ratifications of human rights treaties.

[20]Today, the human rights organisation estimate that up to 600 clandestine detention centres were operating during the dictatorship.

Table 14. Human Rights Treaty Ratification in Argentina

Treaty	Signature Date	Ratification Date, Accession(a)
Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT 1984)	04 Feb 1985	24 Sep 1986
Optional Protocol of the Convention against Torture (CAT-OP 2002)	30 Apr 2003	15 Nov 2004
International Covenant on Civil and Political Rights (CCPR 1966)	19 Feb 1968	08 Aug 1986
Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty (CCPR OP2 DP 1989)	20 Dec 2006	02 Sep 2008
Optional Protocol to the International Covenant on Civil and Political Rights (CCPR OP1 1966)		08 Aug 1986 (a)
Convention for the Protection of All Persons from Enforced Disappearance (CED 2007)	06 Feb 2007	14 Dec 2007
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW 1979)	17 Jul 1980	15 Jul 1985
Optional Protocol - CEDAW (CEDAW-OP 1999)	28 Feb 2000	20 Mar 2007
International Convention on the Elimination of All Forms of Racial Discrimination (CERD 1965)	13 Jul 1967	02 Oct 1968
International Covenant on Economic, Social and Cultural Rights (CESCR 1966)	19 Feb 1968	08 Aug 1986
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW 1990)	10 Aug 2004	23 Feb 2007
Convention on the Rights of the Child (CRC 1990)	29 Jun 1990	04 Dec 1990
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed Conflict (CRC-OP-AC 2000)	15 Jun 2000	10 Sep 2002
Optional Protocol to the Convention on the Rights of the Child on child prostitution and the sale of child pornography (CRC-OP-SC 2000)	01 Apr 2002	25 Sep 2003
Convention on the Rights of Persons with Disabilities (CRPD 2007)	30 Mar 2007	02 Sep 2008

Source: United Nations Human Rights Office of the High Commissioner (n.d.b)

As a sign of serious commitment from the government to human rights, Argentina ratified the American Convention on Human Rights (14.08.1984). In doing so, it recognised the jurisdiction of the American Court of Human Rights (5.9.1984). Further, it ratified the Convention for the Elimination of All Forms of Discrimination against Women (15.7.1985); the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights (including the optional protocol, all 8.8.1986); and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (24.9.1986).

With the accumulation of human rights treaty ratifications shortly after democratisation, Argentina asserted its human rights commitment before both a domestic and international audience. Argentina also immediately became an active member within the UN human rights framework, participating in a joint declaration with Greece, India, Mexico, Sweden and Tanzania on nuclear disarmament in 1984, or through denouncing human rights violations in other countries. Alfonsín also renounced apartheid in South Africa in his address to the UN General Assembly: "The unjust system of apartheid must be eliminated forever. Those who suffer under it can continue to count on the support of the civilised world." (Alfonsín, 1984)

Congruent with its new secularly-based democratic identity, Argentina also became an outspoken proponent of the inclusion of LGBT rights into the international human rights regime. At an event for the promotion of the Yogyakarta Principles[21], jointly sponsored by the permanent mission to the UN of Argentina, Uruguay and Brazil, Federico Villegas Beltrán, the Director of Human Rights at Argentina's Ministry of Foreign Affairs, Trade and Worship emphasised the importance of LGBT human rights within a democratic society. Furthermore, he encouraged the UN Human Rights Council to consider every violation of human rights, including those of LGBT people. At the end of his remarks, he gave the audience a lesson on political correctness, pointing out that the words "tolerance" and "intolerance" should not be used when it comes to LGBT rights because they imply "suffering with patience". As an alternative, he suggested using the phrase "respect for diversity" instead (Human Rights Watch, 2014).

Argentina's support for a comprehensive definition of human rights also applicable to LGBT issues can only be understood in light of the moral delegitimation of the Catholic Church. The Yogyakarta principles were rejected on religious grounds in many other countries. In Poland, for instance, the church's powerful moral authority after democratisation limited the boundaries for an acceptable interpretation of human rights. When the Yogyakarta principles were discussed at the parliamentary assembly of the Organisation for

[21] The Yogyakarta principles articulate the application of existing international human rights law to LGBT people. Developed by an international group of human rights experts, the principles clarify state obligations to protect LGBT people from human rights violations based on sexual orientation and gender identity (Human Rights Watch, 2014).

Security and Cooperation of Europe (OSCE), the Polish representative "made a surprisingly forceful intervention, saying the principles contradicted Poland's constitution, and no international body has ever defined the terms 'sexual orientation' and 'gender identity'." (Gennarini, 2013)

In 2008, the first UN declaration of its kind against homophobia and discrimination based on sexual orientation and gender identity obtained the signatures of 66 UN member states (being strongly rejected by the Vatican). The declaration was introduced by Argentina along with six other countries, and was presented to the General Assembly of the UN by Argentine ambassador Jorge Argüello, urging "all states to take all necessary measures, especially legislative or administrative, to guarantee that sexual orientation and gender identity do not serve, under no circumstances, as the basis for penal sanctions – especially executions -, arrest or detention (Servicio de Noticias de las Naciones Unidas, 2008, my translation).

César Cigliutti, president of the *Comunidad Homosexual Argentina* (CHA), a national LGBT rights organisation, describes Argentina's leading role in this historic declaration as "a gesture that makes us proud and that shows the change that this government is making in foreign policy, expressing an attitude against the discrimination based on sexual orientation and gender identity". (Comunidad Homosexual Argentina, 2008) Conversely, the Vatican lobbied against the declaration. Celestino Migliore, permanent observer of the Vatican to the UN, argued that the declaration would pressure states to legalise gay marriage: "The states that do not recognise the union between two persons of the same sex will be submitted to pressure". Furthermore, he brought forward that: "In particular, the categories sexual orientation and gender identity used in the text do not find recognition in the international legal order. Such a political declaration would create new and implacable discriminations." (El País, 2008, my translation) His statement underlines the existence of two competing interpretations of international human rights texts - some actors, including the Argentine government, defining issues related to sex and gender in its framework, and others who do not.

Another example of Argentina's comprehensive interpretation of human rights extending across sexuality and gender identity is that ambassador Alberto Dumont, on behalf of the Argentine government, supported the incorporation of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) to consultative status in the United Nations. On their website, ILGA expresses special thanks to Belgium, the United States and Argentina for their crucial role in lobbying for a favourable consensus for ILGA to obtain the consultative status (ILGA, 2011).

It is noteworthy that while being an outspoken proponent of LGBT rights as part of human rights internationally, as well as for women's rights in general, Argentina's international positioning vis-à-vis abortion is less supportive. Argentina has been part of the opposition against reproductive rights at the Cairo and

Beijing population conferences (Morgan, 2015). As we shall see later, this is less related to religious influence but rather a focus on family in Latin America in general and a glorification of motherhood and an interpretation of human rights as applying to the embryo, not the pregnant mother, in Argentina specifically.

Argentina's rapid domestic incorporation of international human rights standards found its high point in 1994, when a new constitution was passed. The constitutional project set out to enhance democracy and incorporate all ratified international human rights treaties as part of a new constitution. Chapter IV, Section 75 of the current constitution contains a list of all human rights treaties signed by Argentina and grants them "in the full force of their provisions (…) constitutional hierarchy." (1994) Section 75/23 further introduces affirmative action when it pledges, "[t]o legislate and promote positive measures guaranteeing true equal opportunities and treatment, the full benefit and exercise of the rights recognised by this constitution and by the international treaties on human rights in force, particularly referring to children, women, the aged, and disabled persons."

The 1994 constitution "dramatically altered the Argentine Constitution's substantive treatment of human rights, as well as the legal status of international human rights treaties" and made Argentina the only country in Latin America to grant human rights treaties constitutional rank (Levit, 1999, pp. 291–292). Copies of the Argentine Constitution sold at newsstands on the streets of Buenos Aires at the time also included the following as a type of super appendix: the American Declaration on the Rights and Duties of Man; the American Convention on Human Rights; the Universal Declaration; the International Covenant; the Convention on the Prevention and Sanction of the Crime of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Women; the Convention against Torture and other Forms of Cruel, Inhuman, and Degrading Punishment; and lastly the Convention on the Rights of the Child (see Levit, 1999, p. 342).

Overall, what we see is an extraordinary focus on human rights in post authoritarian Argentina and the embracement of a secular interpretation of human rights that includes the protection of sexual rights. In Poland, the church influenced government's positioning regarding sexual rights as human rights. In Argentina, support for the application of human rights to sexual and gender identity was enabled by a democratic constitutional identity that fed on secular principles rather than religious doctrine. In the following section we will trace this secularisation of constitutional identity in the making of Argentina's new constitution of 1994.

The passage of a new constitution

Since the return to democracy in 1983, there was an interparty consensus about the need to reform the constitution. After assuming office, Alfonsín convened "the Advisory Commission for the Consolidation of Democracy" [*El Consejo para la Consolidación de la Democracia*] that was charged, inter alia, with exploring the options for a major constitutional reform. While the Advisory Commission recommended the convention of a Constitutional Assembly, the reform project only gathered momentum in 1993 when the two main political parties, the Peronists and the Radical Party, agreed to proceed in an agreement known as the *Pacto de Olivos* (Levit, 1999, pp. 289–290). This pact included the Radical Party's concession for the inclusion of an amendment that was aimed to allow Alfonsín's successor, the new Peronist President Carlos Menem, to run for a second term in office, while the Peronist party in turn agreed to a broader scope of reform than it had previously favoured (ibid., p. 315). As a result of the agreement, a convention for constitutional reform consisting of 305 delegates was established to work for three months to draft the new constitution, eventually adapted in August 1994.

The minutes of the constitutional assembly debates reveal a fierce battle to determine the role of religion in the constitution. Perhaps understandably in light of the historical importance of the specific religious adherence of rulers throughout world history, a revision of Article 76 of the old constitution that established that the president and vice-president need to profess the Catholic Roman Apostolic faith became a highly contentious and seminal debate in the constitutional assembly. During day-long discussions filled with impassioned speeches and pathos, delegates debated the essence of Argentina's constitutional identity.

The contributions of those favouring a change in the text regarding the religious background of specific individuals in office mirrored the historical tension between a secular definition of democracy and Catholic particularism in Argentina. In one instance, during a debate on Basic Matters [*Debate de Coincidencias Basicas*] a delegate summed up his party's position as "the desirability of eliminating a clause that could be considered to restrict the access to the exercise of the first magistracy, especially when this constitution aims to advance and provide a framework for *greater democracy, participation and representation*." (Constitutional Assembly Argentina, 1994b, emphasis added, my translation)

Proponents of changing the religious requirement utilised Argentina's human rights commitments to argue against the preferential treatment of the Catholic faith in the constitution. "With that [modification of the religious requirement] I believe we will effectively make a step towards politics of human rights" (Constitutional Assembly Argentina, 1994b, my translation), stated one of the delegates.

Another delegate in favour of eliminating the religious requirement summed up the developments of the time regarding non-discrimination. Within the UN framework, it seeks to delineate the discriminatory character of the religious requirement for office:

> I believe that this is the meaning of the human rights discourse, to pursue the elimination of all forms of discrimination (…). The current doctrine of the United Nations no longer considers the issue of majorities and minorities solely by a numerical function of criterion, but rather by virtue of the privilege or use of the right of the majority or by marginalisation and discrimination against minorities. (…) It is enough for me to invoke the idea of women and children; minorities, but who are majorities numerically. (…) It is the idea of belonging, in equality and freedom to the concept of universality (…). We believe that favouring the elimination of the religious requirement is, precisely, the idea of the universal (…). (Constitutional Assembly Argentina, 1994b, my translation)

Apart from illustrating how human rights was used to strip the Catholic church of its previously privileged position in the new Argentine constitution, the quote above also reveals another salient aspect of the specific interpretation of human rights, prevalent now as it was then in Argentine human rights discourse: the emphasis on the rights of the child. As the analysis continues, the significance of this will become clear.

Those opposing the reform argued that the deletion of the religious requirement for the presidential office would mean erasing national essence and tradition. A delegate brought forward that,

> this modification would hurt the national essence of the republic, its tradition, its history and the conditions under which the Argentine Nation is formed, developed and lives. (…) we must not forget, Mr. President, that the peoples who deny their history or who try to forget it can begin a sad course of national disintegration. The most important thing to introduce into a fundamental statute are the essences of the nation, is to consecrate the essential attributes of man, notwithstanding the broadest freedom that is guaranteed through its maximum status. (Constitutional Assembly Argentina, 1994b, my translation)

Emphasising the historical prevalence of Catholic privilege throughout state and federal constitutions of the Argentine Republic, another delegate remarked: "These historical antecedents make up an identity, which is called the national identity. (…) [R]eceiving the sacrament of baptism - is a requirement that makes the historical entity of the Nation." (Constitutional Assembly Argentina, 1994b, my translation)

Although not a coincidence, the line between opponents and proponents of reforming the religious requirement for the presidential office also separated those in favour from those against giving constitutional status to international human rights treaties. Another delegate argued that through both the reform of the religious requirement and giving international human rights constitutional rank, Argentina goes on a "slide of national disintegration" (Constitutional Assembly Argentina, 1994b, my translation). This can be explained with the tension between religion and human rights in the Argentine context, in which both no-

tions were constructed as alternative and incongruent sources of identification and legitimation. The incommensurability of both of these led the supporters of a religious political identity of Argentina to also reject human rights, as the latter constituted a threat to the former, functionally replacing it in the constitutional identity construction of post-authoritarian Argentina.

The Catholic Church itself advocated for a religious interpretation of constitutional identity. In a document published by the episcopate to elucidate its official stance to the delegates on constitutional reform matters, it says:

> We believe it necessary to judge at least the cultural identity of the Argentine Nation to be from a historical tradition of unquestionable Catholic respect. The president and vice president must swear before God and the Homeland [*Patria*], regardless of their religion, respect, defend and safeguard the constitution and the cultural reality that it expresses, that is theistic, Christian and Catholic. (Constitutional Assembly Argentina, 1994b, my translation)

The intense focus on identity in the constitutional assembly's debate on the role of religion in the new constitution underlines the permeability of a constitutional identity in times of regime transition. Ultimately, it signified the newly diminished role of religion's traditional supporting function in Argentina's national political makeup. The analysis of debates of the constitutional assembly revealed the presence of two competing discourses on the nascent Argentine constitutional identity. The one stressed the historical importance of Catholicism for the nation and the other sought to limit the role of the church using arguments based on human rights. Which of the competing visions for Argentina's constitutional identity would prevail can be inferred from the final text of the Constitution of 1994. Remarkably, it includes a significantly reduced role of religion, including the elimination of the confessional requirement for office. The final decision regarding this highly contentious passage was justified by the institutional assembly as follows:

> With general consensus it is recognized that Article 76 of the National Constitution, insofar as it demands religious confessionality as a condition for access to the presidency and vice-presidency of the Nation, is anachronistic at the present time, in addition to establishing discrimination incompatible with the equality of rights of all citizens. Therefore, it is necessary to delete the clause that established this requirement. (Constitutional Assembly Argentina, 1994a, my translation)

This shows how the tension between religion and human rights, grown out of the experience of the last dictatorship, shaped the discourses on constitutional identity and was decisive in the Catholic Church loosing much of its political privilege. In addition to changes in confessional requirements for both presidential and vice-presidential office, the oath of office for these two posts was changed in Art. 93 in the new constitution (replacing Art. 80 of the old constitution), such that the mandatory oath for "God and the Holy Gospel" [*por Dios y los Santos Evangelios*] was replaced by one that respects the particular orientation of faith

of the office holder. Lastly, the old constitution contained the aim of "converting the indigenous population to Catholicism", while the new constitution protects the freedom of religion and belief and the ethnic origin of the indigenous population (former art. 67 inc. 15 has been replaced by art. 75 inc. 17).

While there were symbolic changes when it comes to the role of religion, there were still continuities regarding the role of Catholicism between the old and new constitutions. The preamble of the new constitution retains the phrase "invoking the protection of God, source of all reason and justice". While establishing freedom of faith in art. 14, it also states in art. 2 that "the government sustains the Catholic faith" [*Artículo 2. El Gobierno federal sostiene el culto católico, apostólico, romano*], which binds the state to economically sustain the Catholic Church and therefore maintains a preferential treatment of the Catholic faith vis-á-vis other denominations.

Despite these continuities, the transformed symbolic role of Catholicism in the constitution is as clear as it is significant. As Argentine supreme court minister Enrique Petracci commented on the constitutional reform in an article published in Argentine newspaper *Pagina 12* in 1995, the changes in the constitution pertaining to religion evidence the intention to accentuate the non-confessional character of the state (Borello, 2013).

Hand in hand with the diminished symbolic representation of religion in the new constitution came a sharp increase in the protection of human rights in Argentina's basic law. The new constitution established the Public Defender, an institution to oversee the protection of human rights and all other rights and guarantees in the constitution. Furthermore, while the old constitution did not include equality measures, chapter 2 of the new constitution now enshrines the "Equality of Opportunity and treatment and the full exercise of rights recognised in this Constitution" as well as the "Real Equality of Opportunity between men and women in accessing elected and party office". As mentioned above, art. 75(22) of the 1994 constitution lists nine international human rights treaties, and thus gives them substantial constitutional standing. All other international treaties are given supra-statutory standing. This means that,

> [t]he Argentine Constitution is no longer a succinct document containing 110 constitutional provisions but rather a compendium of the constitutional text and the nine human rights treaties which, by virtue of their constitutional status, are effectively incorporated into the constitutional text. Therefore, every right, every privilege, every guarantee, that the anointed human rights treaties grant are part of Argentina's Constitution (…), identical in scope, form, and substance. (..) In this sense, Argentina's actions are unique in South America and, arguably, the world. (Levit, 1999, p. 312)

While the specific mention of human rights in national constitutions per se is not unusual, the inclusion of a verbatim replica of international human rights treaties in Argentina is substantively more far reaching than in other countries. With the incorporation of the American Convention into the Argentine constitution, Argentina also constitutionalised the entire regional system consisting of the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights and an investigative/executive and

judicial prong (Levit, 1999, p. 329). The content and passage of the new constitution powerfully demonstrates how the human rights-influenced political identity discourse materialised into the institutions and legal fabric of the new democracy. As we shall see in the next chapter, this was a critical step in forming the opportunity structures for social movement activity later on.

5.2 South Africa: The birth of the "Rainbow Nation"

In February 1990, the South African president from the ruling National Party FW de Klerk announced the unbanning of the ANC and Nelson Mandela's release after 27 years in prison. This unprecedented decision set in motion the long awaited democratic transition, resulting in the first non-racial elections on the 27th of April 1994, the subsequent formation of the first truly democratically elected government led by Mandela and the passage of a new constitution in December 1996. Mandela's release from prison in 1990 and the passage of the final constitution in 1996 represent the timeframe for South Africa's democratisation process.

The National Party's (NP) government policies managed to secure white supremacy for more than 40 years during apartheid. Some of these included the banning of its political opponents, violent oppression of resistance and the deliberate exclusion of non-whites from positions of influence through policy and so-called "Bantu education", which was particularly aimed at leaving the non-white population uneducated and exploitable for labour. However, growing internal resistance, international isolation and steady economic decline in the 1980s eventually pressured the apartheid government enough to embark on a change in approach. The unbanning of the ANC gave way for multiparty negotiations to take place, a critical component in the successful transition. Under the name of Convention for a Democratic South Africa (CODESA), delegates from various political organisations, including from the ruling NP and the now unbanned ANC, started negotiations for the creation of a representative parliament and an interim government to oversee the process of democratic elections.

Negotiations were hampered by diverging interests of the participating parties and escalating political violence in the early 1990s. Resuming negotiations in 1993, this time under the name "Multi-party Negotiating Process" (MPNP), participants agreed on the 27th of April 1994 as the latest date to hold nationwide non-racial elections. In order to fairly oversee the preparations for democratic elections, the Transitional Executive Council (TEC) was set up as a multiracial executive organ sharing governing responsibilities with president de Klerk during the preparation time for elections. In December 1993, an interim constitution was adopted and came into force with the first democratic elections. The interim constitution prescribed the passage of a final constitution within the first two years of the new National Assembly being in power (Byrnes, 1997).

It is important to note that South Africa has not had any experience in governing itself as a non-racial democracy on the national level prior to 1994. In fact, the very definitions of cultural identities and physical boundaries of what constituted South Africa as a nation were not clear when negotiations began in the 1990s. Only in December 1991, during the first formal CODESA negotiations, it was decided that there would be a united South Africa (Klug, 2010). During apartheid, the South African government had "decided unilaterally that its black population consists of a group of `nations`, each of which is entitled to a

homeland" (Butler, Rotberg, & Adams, 1978, p. 1). These designated rural areas (13 percent of the total area of the Republic for the 70 percent of the national population who were black) were supposed to gain independence at some point. Accordingly, both apartheid's ideology and practices promoted physical and identitarian separation between South Africa's subpopulations, deliberately preventing a common identity to develop prior to democratisation.

State/church dissent under democracy

"The Afrikaans churches' support for apartheid is now costing them a lot. Many people feel cheated and want to know, if the church lied to them about apartheid, what else it is lying about?" (Jean Oosthuizen, editor of the DRC church magazine *Die Kerkbode*, as cited in Leonard, 2012)

During the early days of democratic transition, President de Klerk initiated a church conference which took place in November 1990 in the South African town of Rustenburg. The National Conference of Church Leaders in South Africa was attended by delegates from 85 South African churches, including the DRC, all together representing 90 percent of the Christian community. The aim of the conference was to determine the role of the churches in post-apartheid South Africa (Nel, 1991-1992, p. 11; Phiri, 2001, p. 124). Now referred to as "The Rustenburg Declaration", it includes the admission of fault on the churches' part regarding apartheid. Passage 2.5 of the declaration reads:

> We therefore confess that we have in different ways practised, supported, permitted or refused to resist apartheid: 2.5.1 Some of us actively misused the Bible to justify apartheid, leading many to believe that it had the sanction of God. Later, we insisted that its motives were good even though its effects were evil. Our slowness to denounce apartheid as sin encouraged the Government to retain it. (Resolution of the Rustenburg Declaration of the National Conference of Church Leaders held in South Africa in November, 1990)

Acutely aware of religious institutions' shortcomings during apartheid, the document states later on that:

> In the past we have often forfeited our right to address the State by our own complicity in racism, economic and other injustice and the denial of human rights. We also recognise that in our country the State has often co-opted the Church. The Church has often attempted to seek protection for its own vested interests from the State. Our history compromises our credibility in addressing Church-State issues. (Resolution of the Rustenburg Declaration of the National Conference of Church Leaders held in South Africa in November, 1990)

Read closely, the Rustenberg Declaration reveals that even the church authorities themselves sensed that the ideological collusion of religion and the state during apartheid would compromise their legitimacy to influence politics under a subsequent regime (Phiri, 2001, p. 126). However, the full extent of religious powerlessness under the new political dispensation would only gradually reveal itself as democratisation progressed. When the demise of white supremacist rule began to dawn as a political reality, the DRC, in a desperate attempt to secure ongoing influence on government, began to increasingly hold discussions with politicians across the spectrum to establish good relations with the future leaders of the country (Villiers, 2001, p. 53). During those meetings, the DRC handed out official church documents to the political leaders in which they urged, among other things, that a new constitution should include, "the acknowledgement of the supreme authority of the Triune God without whom no government can govern and no nation can survive" (Agenda General Synod, 1990). Despite these efforts, none of the DRC's wishes for South Africa's new political dispensation would eventually materialise in the new constitution of 1996.

The culmination of the democratic transition process came with the passage of the new constitution in 1996. Subsequently, the DRC reflected on the effects of democratisation on the church and published the results of this analysis in a General Synod Report in 1998. In the report, the DRC laments the considerable reduction in public influence that was, among other factors, caused by the negative public perception of the DRC as a result of it having delivered the theological justification of apartheid; and the fact that the new constitution prescribes a secular state that does not allow for religion to influence public policy (Agenda General Synod 1998, p. 69-71, as quoted in Villiers, 2001, p. 57).

Looking more specifically at how the DRC lost its political influence, it can be said that its two primary methods of political influence diminished during the democratic transition period. The first, or "silent diplomacy", secret meetings between church and state officials to jointly discuss public policy, was no longer effective after the fall of apartheid due to the lack of mutual trust and absence of intimate relationships between the new political leaders and the church. The second important influencing mechanism was the representation of church leaders on government appointed statutory bodies and commissions, a privilege that was drastically curtailed as soon as apartheid ended. For instance, the DRC nominated seven candidates for the posts of commissioners in the Truth and Reconciliation Commission (TRC), not one of which was appointment, much to the dismay of the church. The same held true for other statutory bodies, such as those charged with preparing welfare legislations, where DRC representation radically declined (Villiers, 2001, p. 57).

The loss of moral authority in political matters soon manifested in public policy as well. Aside from failing to exert influence on the new constitution, religious institutions attempted preventing the timely reform towards permissiveness of pornography and gambling, as well as failing to prevent the abolishment of the death penalty in the first years of democracy.

In one of the few meetings Nelson Mandela had with representatives of the DRC after the first democratic elections, he reminded the DRC that, "apartheid was fundamentally wrong and sinful." Afterward, he articulated what kind of role the church should have after democratisation: "Having searched your own hearts [and thus having acknowledged your role in this evil system], you must now join hands with all the rest of us to ensure that the Reconstruction and Development Programme succeeds." (Proceedings of the General Synod, 1994, p. 536 as cited in General Synodal Commission of the Dutch Reformed Church, 1996, 6.1.3)

However, the DRC was not interested in supporting the new regime's programmes. It refused to acknowledge its newly-limited influence on government and continued its attempts at influencing public policy in favour of its white membership. For its second and last meeting with then-President Mandela, the DRC prepared a memorandum containing its public policy concerns. In the memorandum, the DRC urged the government to uphold the death penalty (reflecting Afrikaner fears of violent crime in a nation shared with a vast majority of non-whites), not to implement policies of affirmative action (as, ironically, Afrikaners were angered by what they perceived to be discrimination against them) and to increase funds for the welfare services of the DRC (Agenda GSC Meeting Oct 1996, p. 26-47 as cited in Villiers, 2001, p. 59). As noted by Villiers (2001, p. 59), since at that stage, the government was primarily concerned with matters relating to the Truth and Reconciliation Commission and the Reconstruction and Development Programme, the DRC's approach to influence policy was most likely perceived by Mandela as "confrontational and one-sided". Supporting this view is the fact that this was the last meeting of its kind between DRC and government, and that Mandela subsequently publicly criticised the DRC's stance on the death penalty (ibid.).

To this day, the DRC has not recovered from its delegitimation. Shrinking membership numbers and the vanishing of any political significance the church possessed has led to what church minister Andre Achenbach, head of a DRC congregation in Durbanville, Cape Town, called "the slow and steady death of the DRC." In a radio interview, Achenbach stated that, in light of the apartheid history of the church, this slow and steady demise does not come as a surprise and that he considers himself to be a sort of undertaker of the church (Deutschlandfunk, 2012). Ian Nell, scholar of religion at the University of Stellenbosch, explains that when the DRC finally recognised apartheid as a sin in 1992 and acknowledged its complicity, there was nothing to win. It triggered protests in rural conservative DRC congregations that still found apartheid to be morally justified. Other members became alienated when they realised the full extent of political opportunism by the church. According to Nell:

> It is so that there is a whole generation that says `We believed all of it at the time and then we were proven wrong, Apartheid cannot be delineated from the Bible. Why should we still believe anything the church leadership says?` (Ian Nell in Deutschlandfunk, 2012)

When the regime change opened up democracy to the non-white majority, the DRC went from the dominant denomination of the politically powerful to just one of the denominations in South Africa's religious landscape, characterised by high religious devoutness but a heterogeneous denominational composition. In other words, with the inclusion of the non-white population in political decision making, the DRC went from being a majority church to being just one among the larger churches within South African Protestantism. While this power shift of critical mass certainly contributed to the decline in influence the DRC as an institution could exert on modern politics, the state/church symbiosis of the past reduced the role of religious principles in South Africa's constitutional identity in general and thereby also restricted the influence other churches in South Africa.

Issued by all major religious denominations of South Africa, the Rustenberg declaration shows that the history of state/church symbiosis "compromises our [all churches] credibility in addressing Church-State issues" (Resolution of the Rustenburg Declaration of the National Conference of Church Leaders held in South Africa in November 1990). No other single denomination or combination of denominations could replace the DRC as moral guardian of the state as the DRC's relationship with the apartheid regime resulted in a reduced religious influences on politics in general. The churches and their representatives who would gain some political significance after apartheid were the ones not morally compromised by direct association with apartheid. For instance, Nobel peace prize winner Archbishop Desmond Tutu of the Anglican Church was an anti-apartheid activist and for his work for human rights, Mandela made him head of the Truth and Reconciliation Commission (TRC). Tutu is also known for supporting LGBT rights, and the Anglican Church in South Africa regularly weds gay couples.

Yet, the role of religion in politics drastically declined in democratic South Africa compared with apartheid, as we will see in the following section which analyses the political discourse on constitutional identity in post-apartheid South Africa.

Symbolic political communication

Only when taking into account the climate of political violence prevalent in South Africa in the early 1990s does the daunting task political leaders faced become clear while constructing the groundwork for a nascent non-racial democracy. Pressures and influences varied greatly, and included the legacies of colonialism, uncertainty of the nation's geographical boundaries, grievances of apartheid and the extraordinary cultural and ethnic diversity even within the racial categories of blacks, whites and coloured in South Africa's population. In the words of Mandela, South Africa's democratic transition needed a "small miracle" to successfully unfold (Mandela, 1994b).

South Africa's miracle came true through years of negotiations between the most important political groupings of the country, most notably the National Party and the ANC. President de Klerk and Nelson Mandela, the latter of which would become the former's successor and the first democratic South African president, were the symbolic faces of South Africa's negotiated democratic transition. Jointly, Mandela and de Klerk were awarded the Nobel Peace Prize on the 10th of December 1993 "for their work for the peaceful termination of the apartheid regime, and for laying the foundations for a new democratic South Africa" (The Nobel Peace Prize, 1993). Critical to a peaceful transition and democratic consolidation was the need to gain legitimacy for the democratic government. Mandela's focus on human rights can partly be attributed to the functional necessities of gaining domestic and international legitimacy. Human rights could offer a unifying political ideology for the in many ways divided country.

The lack of a racially integrated national identity prior to democratisation proposed the challenge of creating the very nation the government was designated to govern. Thus, regime change represented the beginning of "a new era of hope, reconciliation and nation building" (Mandela, 1994a). Political leaders were acutely aware of the double task as Mandela's many appeals to the population to "join hands and build a truly South African nation" shows (Mandela, 1995c).

While a non-racial democratic identity was new to the country and represented a radical change from apartheid, its content, ironically, remained closely tied to the past, not through similarity but through maximum difference. In political speeches during democratisation, the new South Africa was presented as the diametric opposite to apartheid. Employing simple dichotomies of good vs evil, inhumane vs humane, immoral vs moral and the like, the apartheid era was reconstructed as illegitimate while the emerging political system was discursively positioned as its legitimate antidote. For instance, a speech by Mandela (1994b) claimed "the ideology and practice of apartheid" to represent "the worst in human beings", but having "helped to bring out the best in its opponents". With that, Mandela constructed apartheid's main opponents, including himself, as the good force in battle against the evils of apartheid. During one of the CODESA multiparty negotiations, Mandela explained that its lack of legitimacy and morality are the reasons as to why the apartheid government should not stay in power during the democratic transition period until the first non-racial elections:

> The present government of our country has admitted to the fact that it is not sufficiently representative of the people of our country. For the majority of our people, the matter however goes beyond this. These masses consider this regime to be illegitimate. They accuse it of having brought the country to the sorry state in which it is through the pursuit of the evil and immoral system of apartheid. They are therefore convinced that it has neither the legitimacy nor the moral authority to take the country through to its democratic transformation. (Mandela, 1992)

Considering this, the emerging political leaders of the new South Africa invoked the components of South Africa's new constitutional identity as the direct opposite of what propounded to have been wrong with apartheid. In an address to the Constitutional Assembly on the occasion of the adoption of the new constitution, Mandela proclaimed:

> [W]e stand today before our people and humanity to present this our new basic law of the land, whose founding principles of human dignity, non-racialism and non-sexism, and whose commitment to universal adult suffrage, regular elections and multi-party democracy are immutable. This is our national soul (…). (Mandela, 1996c)

The buzzwords "non-racial" and "non-sexist", frequently employed in political speeches during South Africa's regime transition, are an interesting manifestation of the construction of South Africa's new identity as a reversal of its past. Rather than speaking of gender and racial equality values in an affirmative manner, the negation in the word construction *non*-sexist and *non*-racist contains a label for the present as well as a reference to what was wrong with the past. The same holds true for Mandela's description of South African people's trajectory as "a remarkable transition to reclaim their humanity" (Mandela, 1995c). This humanity, denied to a large part of the population during apartheid, became the epicentre of South Africa's newly emerging humanist value system.

Humanism is a human-centred value system that explicitly excludes faith and religion as sources for moral principles. Occasionally, humanism was directly mentioned as a description of the values of the new South Africa. For instance, during an ANC national conference, Mandela (1994c) proclaimed: "As an expression of its glorious humanism, the new age will, at the same time as it liberates the oppressed, endow the oppressor with the gift of emancipation from ignorance, from fear, and freedom from hatred and bigotry." Mostly, however, the humanist character of South Africa's post-apartheid identity construction reveals itself in the numerous assertions of classic humanist principles, such as human dignity and freedom. In Mandela's speeches, these more abstract concepts were intrinsically linked to the protection of human rights as the only means of restoring the dignity and freedoms denied to the non-white majority during apartheid. The following extract of the State of the Nation address, a yearly high profile speech delivered by the South African president to parliament, demonstrates this point:

> The purpose that will drive this government shall be the expansion of the frontiers of human fulfilment, the continuous extension of the frontiers of freedom. The acid test of the legitimacy of the programmes we elaborate, the government institutions we create, the legislation we adopt must be whether they serve these objectives. (…) We must construct that people-centred society of freedom in such a manner that it guarantees the political liberties and the human rights of all our citizens. (…) As an affirmation of the government's commitment to an entrenched human

> rights culture, we shall immediately take steps to inform the Secretary General of the United Nations that we will subscribe to the Universal Declaration of Human Rights.
>
> In addition, we shall take steps to ensure that we accede to the International Covenant on Civil and Political Rights, the International Covenant on Social and Economic Rights and other human rights instruments of the United Nations.
>
> Our definition of the freedom of the individual must be instructed by the fundamental objective to restore the human dignity of each and every South African. (Mandela, 1994d)

The fact that political discourse during democratisation focuses on humanism as a secular value system is no coincidence. In fact, its secularism is part of the overarching logic of the new South Africa's political identity construction as the diametric opposite to its past. While the political rhetoric of the apartheid regime was characterised by the invocation of religion as the legitimising principle for its policies, post-apartheid political rhetoric is characterised by a conspicuous absence of religion. The acceptance speeches of Mandela and de Klerk on the occasion of jointly receiving the Nobel Piece Price in 1993, in the midst of the transition process, present a rare opportunity for a direct comparison of the rhetoric of the representatives of the old and new regime. The fact that both these speeches were delivered at the same ceremony is advantageous for our analysis. Without the potential confounding process of increasing secularisation of time, we can observe the starkly contrasting role of religion in the speeches of the representatives of apartheid and democracy.

In De Klerk's acceptance speech, religion as the guiding value for politics features prominently:

> The greatest peace, I believe, is the peace which we derive from our faith in God Almighty; from certainty about our relationship with our Creator. Crises might beset us, battles might rage about us – but if we have faith and the certainty it brings, we will enjoy peace – the peace that surpasses all understanding. (…)
>
> One's religious convictions obviously also translate into a specific approach towards peace in a secular sense (…). (Klerk, 1993)

Mandela's speech, in contrast, is characterised by a complete absence of reference to religion. To be sure, this is not due to a difference in privately-held beliefs between the two leaders. As Mandela's autobiography "A Long Walk to Freedom" reveals, Mandela, like the majority of South Africans, was a devout Christian and held deep religious convictions privately (Mandela, 1995, c1994). Both leaders' contrasting rhetoric must be regarded as an expression of the ideological orientation of the ideological frameworks they represent, as opposed to their personal value systems. Rather than religion, Mandela stressed democracy and human rights, mentioning the latter, four times in his short acceptance speech alone, as the only pathway to world peace:

> We live with the hope that as she battles to remake herself, South Africa will be like a microcosm of the new world that is striving to be born. This must be a world of democracy and respect for human rights (…). (Mandela, 1993)

In addition to high profile speeches, South Africa's new identity found its metaphorical expression in the reshuffling and redefinition of public holidays. National holidays give an insight into what a polity values highly, commemorating events of the past of national importance to remember and celebrate aspects of culture considered to be fundamental characteristics of a country's identity. While in pre-democracy South Africa public holidays were exclusively Christian and Afrikaner culture -oriented, this fundamentally changed in the transition process. The Public Holiday Act of 1994 (Act No. 36, Act No. 36 of 1994 To make provision for a new calendar of public holidays; to provide that the public holidays be paid holidays; and for matters incidental thereto, 1994) reshuffled the dates and meanings of public holidays, mostly eliminating religion as a point of reference. Easter Monday, for instance, was renamed "Family Day" to strip it of its Christian connotation. The 16th of December, formerly known as "Day of the Vow" was renamed "Day of Reconciliation". The Vow referred to the Voortrekkers[22] taking a Vow before God to build a church and annually celebrate that day if He was to help them win an upcoming battle against the Zulus[23].

Furthermore, secular holidays were added to the calendar. Among these are "Human Rights Day" on the 21st of March; "Freedom Day" on April 27th to commemorate the first democratic elections held on that day in 1994; "Youth Day" on the 16th of June that was introduced to remember the protest of 20 000 pupils in Soweto against Bantu education; "National Women's Day" on the 9th of August commemorating that date in 1956 were thousands women marched to petition pass laws[24]; and "Heritage Day" on the 24th of September (South African Government, 2017). Regarding the latter, the South African Department of Arts, Culture, Science and Technology issued a statement that, "[w]ithin a broader social and political context, the day's events are a powerful agent for promulgating a South African identity, fostering reconciliation and promoting the notion that variety is a national asset as opposed to igniting conflict." (ibid.), which underlines the intention to reconstruct identity with the change of national holidays.

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[22] The Voortrekkers were descendants from Dutch immigrants that migrated eastwards from the original settlements at the Cape in the 19th century because of struggles with the British-colonial administration. This migratory movement is known as the Great Trek [*Groot Trek*] and holds great significance for Afrikaner identity.

[23] Zulus are an ethnic group from Southern Africa that makes up the largest ethnic group in South Africa today.

[24] Slaves in the Cape had to carry passes to facilitate the control of their movements by their owners and the state. Since the 18th century pass laws have been subsequently used throughout South Africa's history to restrict the movements of African, Coloured and Indian people to ensure the provision of cheap labour and to enforce racial segregation. Pass laws required persons of non-European origin to carry identity documents with them at all times containing stamps as official proof that the person in question had permission to enter an area reserved for white people, which was mostly granted to continue the exploitation of non-Europeans for cheap labour, e.g. as domestic servants (SAHO, 2011).

As the change in national holidays demonstrates, the shift in political discourse from religion to human rights based on secular humanist principles also manifested itself in a shift in the iconographic representation of South Africa's constitutional identity and values during democratisation. Through various means, politicians engaged in a conscious construction of an identity that would unify the diverse racial groups into one nation. While a strong religious devoutness is one of the only common characteristics of the racially and culturally heterogeneous population of South Africa, this option was precluded by the interminglement of religion and apartheid. To earn legitimacy, the new South African state's identity was constructed as apartheid's opposite and the emergence of a secular value system was inevitable in that logic. As a result, the new secular value system focussed on human rights was then enshrined into institutions and constitution of democratic South Africa.

Human rights matters

A secular humanist interpretation of human rights also became the tool with which South Africa rebuilt its foreign relations. During a State of the Nation Address, Mandela (1994d) summed up South Africa's challenge as follows: "We also face a major challenge in re-entering the global economy, while stable prices are vital to the restructuring of our industries and dealing with the critical issue of job-creation." To gain international support for the transition process as well as regain access to international institutions and financial markets, Mandela seized every opportunity to ensure the world of its human rights commitments and its willingness to become a contributing member to the international human rights regime. In an address to the 49th session of the General Assembly of the United Nations, Mandela explained:

> The universal struggle against apartheid was therefore not an act of charity arising out of pity for our people, but an affirmation of our common humanity. (…) [T]he new South Africa which you helped to bring into being and which you have so warmly welcomed among the community of nations will, in its own and in the wider interest, make its own contribution, however small, to the realisation of those hopes. (…) Democratic South Africa rejoins the world community of nations determined to play its role in helping to strengthen the United Nations and to contribute what it can to the furtherance of its purposes. (Mandela, 1994e)

The new South Africa's clear positioning in terms of human rights was well received by the Western world. In a shared radio interview with Mandela, Bill Clinton affirmed that "now South Africa is a model for building the open, tolerant societies that share our values." (Clinton, 1994) Mandela's efforts to make South Africa re-enter world affairs as a legitimate member of the international community soon paid off financially as well. In a high profile speech, Mandela (1994d) rejoiced at the fact "that many of our friends abroad have already made commitments to assist us to generate the reconstruction and development funds we need." Not only did the UN

lift its embargo, but South Africa also received considerable funds from, inter alia, the United Nations Conference on Trade and Development (UNCTAD), the United Nations Children's Fund (UNICEF), the United Nations Development Programme (UNDP), the Food and Agriculture Organisation of the United Nations (FAO), the International Labour Organisation (ILO), and the Habitat housing initiative. Referencing these funds, Mandela declared at a speech for the Freedom Day celebration in 1996 that:

> Such benefit as we derive from this association has further strengthened our resolve to help build the United Nations into a powerful force for good, as we enter the new millennium (…) as a nation we have become an equal and proud participant in world affairs. (Mandela, 1996b)

This quote reveals a somewhat opportunistic motive to embrace human rights in the UN framework in order to receive "benefits", or financial assistance for stabilising the emerging democracy. Nevertheless, in the wake of the first democratic elections, South Africa indeed signed the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Shortly after the first democratic elections, South Africa signed the International Covenant on Civil and Political Rights (CCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the International Covenant on Economic, Social and Cultural Rights (CESCR). Table 15 provides an overview of Human Rights Treaties ratified by South Africa shortly after post-apartheid democratisation.

Table 15. Human Rights Treaty Ratification in South Africa

Treaty	Signature Date	Ratification Date, Accession (a)
Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT 1984)	29 Jan 1993	10 Dec 1998
Optional Protocol of the Convention against Torture (CAT-OP 2002)	20 Sep 2006	
International Covenant on Civil and Political Rights (CCPR 1966)	03 Oct 1994	10 Dec 1998
Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty (CCPR-OP2-DP 1989)		28 Aug 2002 (a)
Optional Protocol to the International Covenant on Civil and Political Rights (CCPR OP1 1966)		28 Aug 2002 (a)
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW 1979)	29 Jan 1993	15 Dec 1995
Optional Protocol - CEDAW (CEDAW-OP 1999)		18 Oct 2005 (a)
International Convention on the Elimination of All Forms of Racial Discrimination (CERD 1965)	03 Oct 1994	10 Dec 1998
International Covenant on Economic, Social and Cultural Rights (CESCR 1966)	03 Oct 1994	12 Jan 2015
Convention on the Rights of the Child (CRC 1990)	29 Jan 1993	16 Jun 1995
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC-OP-AC 2000)	08 Feb 2002	24 Sep 2009
Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child Pornography (CRC-OP-SC 2000)		30 Jun 2003 (a)
Convention on the Rights of Persons with Disabilities (CRPD 2007)	30 Mar 2007	30 Nov 2007
African Charter on Human and Peoples' Rights (Banjul Charter 1981)	09 Jul 1996	09 Jul 1996
Maputo Protocol (Protocol to the African Charter on Human and Peoples' Rights of Women in Africa and the United Nations Convention on all Forms of Discrimination against Women (2003)	16 Mar 2004	17 Dec 2004

Sources: African Commission on Human and Peoples' Rights; Equality Now, 2013; United Nations Human Rights Office of the High Commissioner, n.d.a.

Worth noting is the rapid accumulation of human rights treaty ratifications around the time of democratisation. While before the regime change South Africa was party to the Charter of the United Nations only, this changed during the political transition when South Africa promptly ratified all major international human rights treaties. Furthermore, South Africa did not stay a passive subscriber to these instruments only, but also becoming an active participant in the development and shaping of the regional and global human rights regime.

In terms of the regional human rights system, South Africa became an advocate of deepening human rights commitments on the African continent. Upon receiving the African Peace Award[25], Mandela (1995b) appealed to the representatives of other African states that, "we face the urgent task of deepening the culture of human rights on the continent" and later he suggested that, "the continent could develop creative and effective peace and human rights instruments, characterised by co-operation between governments and civil society." South Africa's human rights advocacy explicitly rests on a secular interpretation of human rights, which is also applicable to matters pertaining to sex and gender. For instance, during the Fourth World Conference on Women in Beijing, the South African delegation was mandated by the government "to fight tooth and nail for the cause of women's emancipation" (Mandela, 1996a). In 2004, South Africa signed and ratified the Maputo protocol, which as an addition to CEDAW by the Organization of African Unity (OAU) focuses on women's human rights in Africa and exceeds the provisions of CEDAW in terms of explicitly urging governments to ensure reproductive rights, including the right to abortion under certain conditions. In March 2016, the South African Human Rights Commission (SAHRC) convened a seminar for African countries to innovate practical solutions to end all forms of discrimination and violence on the basis of gender identity and sexual orientation, resulting in the Ekurhuleni Declaration[26] (Centre for Human Rights of the University of Pretoria, 2016). In 2011, South Africa presented a resolution on human rights, sexual orientation and gender identity to the UN, an important precedent to the 2013 resolution on the same issue in which Argentina also took a leading role (Nair, 2016).

Democratisation presented a sudden and far-reaching shift in South Africa's positioning vis-à-vis human rights. Apart from ratification of treaties and advocacy for human rights internationally (including supporting the application of human rights to sexual orientation, gender identity and reproduction specifically), South Africa also put human rights at the heart of its political institutions and constitution.

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[25] The Africa Peace Award is issued by the African Centre for the Constructive Resolution of Disputes (ACCORD) and is awarded annually to communities, institutions or individuals who contribute to the protection of human rights, the peaceful settlement of disputes and good governance (African Centre for the Constructive Resolution of Disputes [ACCORD] (n.d.)).
[26] Ekurhuleni Declaration on Practical Solutions on Ending Violence and Discrimination against Persons based on Sexual Orientation and Gender Identity and Expression (2016).

The most symbolic and far-reaching result of democratisation in terms of human rights protection is South Africa's new Constitution of 1996, widely acclaimed for its comprehensive Bill of Rights and containing one of the world's strongest constitutional commitments to international law (Dugart, 1996). In terms of its content, the Bill of Rights closely mirrors international human rights provisions (Du Plessis, 2007, pp. 958–959). As the reports of the technical committees of the MPNP reveal, the formulations pertaining to equality, for example, are directly modelled on the ICERD and CEDAW (Technical Committee on Fundamental Rights During the Transition, 1993). Furthermore, the new constitution ensures the consideration of international law in the interpretation of its text. The final section of the Bill of Rights (section 39, commonly known as the interpretation clause) makes provisions on the interpretation of the Bill of Rights stating that:

> When interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. (as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly, 1996)

This clause ensures the consideration of the evolving international human rights regime in domestic matters. The role of international law is further strengthened by schedule 233: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law." In the same section (231.5) the constitution binds the Republic to international agreements South Africa was party to when the constitution took effect. Additionally, the constitution provides for customary international law to be "law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament," (Section 232) which directly incorporates customary international law in South African common law (Du Plessis, 2007, p. 959).

With the passage of the new constitution, other institutions were formed to safeguard the human rights protected in the basic law, among them the Human Rights Commission, the Commission for Gender Equality, the public protector and the constitutional court. At the inauguration of the latter, Mandela (1995a) made the case for how institutions can protect values far longer than individuals: "People come and people go. Customs, fashions, and preferences change. Yet the web of fundamental rights and justice which a nation proclaims, must not be broken. It is the task of this court to ensure this." As we will see in the following chapters, the enshrinement of a secular interpretation of human rights in national institutions and constitutions during democratisation set off a path dependency that would shape morality policymaking in democratic South Africa for the decades to come.

South Africa's newly found focus on human rights from its democratisation onwards can partly be attributed to the functional necessities of gaining domestic and international legitimacy within the international normative context of third wave democratisations. Simply subscribing to international human rights instruments would have adequately fulfilled this function alone. However, South Africa's transformation into an active advocate championing the regional and international human rights regime and the thorough incorporation of international norms into domestic law can only be understood when considering that human rights based on humanist principles has replaced religion as a source of political identification and legitimation in the narratives of constitutional identity. In the logic of democratic South Africa's identity construction in contrast to apartheid, the secularism of the emerging identity and value system was inevitable. As a result, embracing a secular interpretation of human rights as also applicable to reproductive and sexual rights was a logical application of the secular humanist value system that displaced religion during the period of democratisation.

The passage of a new constitution

"The Constitution was the birth certificate of the South African nation. It is one of the most advanced in the world, establishing a constitutional democracy in which a finely-crafted Bill of Rights enjoys pride of place." (Ebrahim, 2004, Chapter 3)

During the apartheid-era, two different constitutions were in effect, passed in 1961[27] and 1983[28], respectively. Since both were a product of the apartheid regime and thereby reflected its racial and authoritarian ideologies, replacing the constitution was critical to the democratisation process were it to have any longevity beyond the first non-racial election. A two-stage process led to the passage of the final constitution in 1996. During the multiparty negotiations in the early 1990s, it was agreed that there should be an interim constitution[29] that would be in effect from 1994 until the first democratic elections would produce a truly representative parliament, which would then act as a constitutional assembly charged with the task of drafting a final constitution (Goldsworthy, 2007, p. 1). Thus, the final constitution of 1996 is the first that was adopted by a democratically constituted body.

The first round of multiparty constitutional talks (CODESA) took place at the end of 1991 in Johannesburg and was attended by 238 representatives of 19 political groupings and almost 1000 international observers (Barnes & Klerk, 2002, p. 27). Much to delegate Helen Suzman's consternation,

[27] Act No. 31 of 1961 (The Republic of South Africa Constitutional Act No. 31 of 1961, 1961))
[28] Act No. 110 of 1983 (Act No. 110 of 1983, 1983)
[29] Act No. 200 of 1993 (Act No. 200 of 1993, 1993)

only about 5 percent of the delegates were women. Directly addressing the political leaders in the plenary, Suzman reminded them of their affirmations of creating a non-racial and non-sexist society:

> Here we are in this great hall at a momentous time, and I can't believe my eyes and ears when I see the number of women in the room. As with racism, so with sexism – you can enact legislation, but despite this, racism and gender discrimination exists. When I look around, there are maybe ten out of 228 delegates who are women. Codesa, as a way forward must include more women. (Convention For A Democratic South Africa [CODESA], 1991, p. 232)

Suzman's remark was greeted with general agreement in the form of an ovation by the plenary. According to Ebrahim (1998), himself a participant in the negotiations, delegates from then onwards made greater efforts in gender representation in the constitutional process.

The second CODESA plenary session (also known as CODESA II) in spring 1992 was marked by escalating tension and unresolvable differences among the negotiating parties which lead to the failure of the CODESA II plenary and a halt in negotiations. One year later, on the 1st of April 1993, negotiations resumed under a new name. The MPNP negotiations included representatives of 26 political groups. The heart of the MPNP structure was a Negotiation Council whose agreements would be ratified in the plenary. Two delegates per party made up the Negotiation Council, at least one of which had to be a woman.

Since religious institutions were excluded from the negotiation process qua definition (as the negotiations were comprised of political groupings only), religious influence on the constitution drafting process could be exerted in two ways; submissions and petitions that the public was invited to submit at various stages in the process, and through religiously affiliated political groupings party to the negotiation process.

Individuals, civil society organisations and religious groups made ample use of the opportunity granted to the public to submit petitions about the content of the new constitution during the CODESA negotiations and the MPNP negotiations, as well as during the two years' work of the constitutional assembly that led to the final constitution of 1996. The constitutional assembly published a working draft of the final constitution on the 22nd of November 1995 of which over 5 million copies were printed in all 11 official languages, distributed by various means including the insertion of copies into newspapers all over the country (Constitutional Assembly South Africa, 1996a, 5CA-6CA). On this working draft alone, the constitutional assembly received 1438 submissions and 245 523 petitions from the public (ibid., 6CA). The content of petitions offers a vivid perspective of the nature of the various contentious issues during the constitution drafting process. The relevant committee report reveals in section 7.2.3: "Petitions covered a wide range of subjects, including the death penalty, right to own firearms, equality clause and sexual orientation, Christianity and the state, property rights, animal rights, Rastafarian rights and abortion."

(ibid., 6CA) Overall, matters pertaining to religion and morality were the most hotly debated issues among the public, with petitions on the former often causing jammed fax lines at the constitutional assembly (Constitutional Assembly South Africa, 1995c).

Many religious institutions, among them the DRC, tried to shape the outcome of the constitutional process to suit their own ends. In an objection to the ratification of the new constitution, the DRC requested the deletion of a reference to reproduction, plead for the protection of the life of the foetus, suggested the inclusion of the rights of the father in the case of abortions, and lamented an over-emphasis of individual rights at the expense of protection of home and family (Nederduitse Gereformeerde Kerk, 1996).

The second point of access for religious influence in the constitution making process were religiously affiliated political entities, such as the apartheid government and the National Party, both partaking in the CODESA negotiations. After the first democratic elections, the ACDP was represented in parliament and thereby party to the constitutional assembly as well. The ACDP tried repeatedly to insert religious references into the constitution. In a submission to the Constitutional Assembly on "the nature and application of a Bill of Rights", the party pleaded for a religiously conservative interpretation of rights. Stipulating that these are inherently God-given and therefore a Bill of Rights ought to enforce "the heritage of divine authority", the ACDP suggested:

> The right to life should make provision for the death penalty, while ruling out abortion and euthanasia. The sanctity of the family must be protected and same-sex relationships should not be recognised (…). In the same vein, pornography and its partner, prostitution, must be specifically excluded from any protection afforded in the Bill, to ensure that the core family is allowed its continued and unthreatened existence. (African Christian Democratic Party [ACDP], 1996)

The ACDP's proposal was discussed in a constitutional committee meeting and contested by the Freedom Front, a party newly formed in 1994, which responded to the ACDP's advances by reminding them "the meeting that Constitutional Principle II required that the Bill of Rights be founded on '*universally accepted human rights*' " (Constitutional Assembly South Africa, 1995a, emphasis added). This demonstrates the separation of human rights from religion in South Africa's constitutional process, with both standing in opposition to one another as apartheid's religiously legitimised human rights abuses made them incommensurable in the new South African context.

Possessing the greatest symbolic power and expressing the fundamental values of a polity, the Preamble was the most contentious section in the drafting of the constitution, in terms of religion. The minutes of the Constitutional Committee meetings reveal an intense struggle around religion in the Preamble's drafting. While the previous constitution's preamble was an almost exclusive homage to God, the new one was to feature themes of human rights and democracy.

The old Preamble of the constitution of 1983 sets an overtly Christian tone and ties the history of South Africa's colonisation to God by referencing His guidance and implying that He himself gave the land to the colonisers, thereby repudiating questions of legitimacy of a white minority regime in Africa within the first two sentences of the constitution. While the Preamble mentions the freedom of faith, it strongly emphasises the Christian variant of faith and even declares the upholding of Christian values as the first national goal:

> IN HUMBLE SUBMISSION to Almighty God, Who controls the destinies of peoples and nations,
> Who gathered our forebears together from many lands and gave them this their own,
> Who has guided them from generation to generation,
> Who has wondrously delivered them from the dangers that beset them,
> WE DECLARE that we
> ARE CONSCIOUS of our responsibility towards God and man;
> ARE CONVINCED of the necessity of standing united and of pursuing the following national goals:
> To uphold Christian values and civilized norms, with recognition and protection of freedom of faith and worship (…) (Act No. 110 of 1983, 1983)

In light of that precedent, the ACDP, NP and other parties insisting on the inclusion of the sentence, "In this we humbly submit to God Almighty", into the new constitution seemed almost modest. This particular proposal was countered by representatives of the ANC in the Constitutional Committee when saying that,

> the ANC believed in the separation of religion and the state. Even those supporters of religion in the ANC (…) did not agree with the changes proposed by the ACDP and other parties since they felt these proposals would amount to discriminating against non-believers." (Constitutional Assembly South Africa, 1996b)

This shows how a religious framing of fundamental values of the new democracy was competing with a secular interpretation of rights in the drafting process of the constitution. Another example of an attempt by the ACDP to mould the constitution according to Christian values was when party leader Kenneth Meshoe requested an amendment to the constitutional principles because they contained a provision to outlaw discrimination on the basis of sexual orientation. Meshoe rejected that the constitution should protect homosexuality because, "[t]he Bible tells us that God created Adam and Eve and not Adam and Steve." While his remark provoked amusement (and even some bemusement) in the

Constitutional Assembly, it did not impact upon the final text of the constitution, and neither did Meshoe's further call for an inclusion of the rights of unborn children (Constitutional Assembly South Africa, 1995b).

When it became apparent that the constitution would endorse a secular state, the ACDP led a protest campaign that included a march on parliament, attracting thousands of Christian supporters. Protesters at the march carried placards conveying messages about a Godless state and church leaders expressed, "that the government was prejudiced against Christianity because of the bias towards the religion during apartheid era" (Constitutional Assembly South Africa, 1995d). This not only underscores the tidal shift in the role of religion in South African democracy but also the link between apartheid-era state/church symbiosis and the inability of religious institutions in general to shape the constitutional direction of post-apartheid South Africa.

The final constitution was adopted 8th of May 1996 and after being rejected by the constitutional court, it was amended on 11th October 1996 by the Constitutional Assembly. It was promulgated on the 28th of December 1996 and came into effect on the 4th of February 1997. The constitution consists of a Preamble laying out the founding values of the document and 14 chapters, the second of which contains the Bill of Rights. The Preamble proclaims the constitution as the supreme law of the Republic and lays out its raison d'être to:

> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
>
> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
>
> Improve the quality of life of all citizens and free the potential of each person; and
>
> Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations. (as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly, 1996)

The Preamble text reflects a strong focus on democracy, equality and human rights. While the constitution establishes a generally secular state in the sense of separation between religion and state, the final passage reveals that the constitution is also not neutral when it comes to religion.

The Preamble's closing sentence states:

> May God protect our people.
> Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.
> God seën Suid-Afrika. God bless South Africa.
> Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika. (as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly, 1996)

These references to God in various South African languages that conclude the Preamble might have been included to appease all negotiating parties, including those with theistic preferences; or reflect the deep religious devoutness of the population. However, compared with the Preamble of the old constitution of 1983, the role of religion has decreased dramatically.

While containing ample reference to the Christian religion overall, the 1983 constitution does not include any reference whatsoever to human rights and generally does not include a Bill of Rights. This stands in stark contrast to the comprehensive inclusion of human rights in the Bill of Rights (chapter 2) of the post-apartheid constitution. The Bill of Rights in the 1996 constitution is far reaching and even includes socio-economic and environmental rights, such as the right to housing (section 26), health care (section 27) and the right to an environment that is not harmful to health and well-being (section 24). Most astonishingly, however, is the way in which the Bill of Rights treats issues pertaining to equality and non-discrimination. As mentioned above, the provisions are directly modelled on international law and thereby "represent the highest aspirations of the global human rights movement" (Klug, 2010, p. 1). The passage (section 9) pertaining to equality in the new Constitution reads as follows:

> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair. (Constitution of the Republic of South Africa, 1996)

Noteworthy is that section 9.2 and 9.5 explicitly allow for affirmative action to be taken to mitigate the enduring discriminatory effects of past injustices. Section 9.3 and 9.4 provide for a vertical (state to person) as well as horizontal (person to person) application of the constitutional equality provision and thereby also binds religious institutions. The inclusion of religion in the enumeration on grounds on which the constitution seeks to protect from discrimination illustrates how religion has shifted from an overarching ideology informing South Africa's legal system to one of the axes of difference that require protection.

Understandably, in light of South African history, race is listed as the first axes of difference to be protected from discrimination, under section 9.3 of the 1996 constitution. True to its commitment to create a non-racist and non-sexist society outlined in the first chapter of the constitution, gender, sex, pregnancy and marital status are listed as grounds for unfair discrimination. These four grounds are specifically provisioned for women. While this is obvious for the first three grounds, marital status requires a contextualisation in South Africa's legal system that acknowledges common law as well as indigenous law as equally valid sources of legal basis. Customary and religious marriages in South Africa include polygamy and sometimes an inferior status of the wife, e.g. prescribing a limited capacity for the wife to own property (Bronstein, 1996). As a result, including marital status was an effort of the constitution drafters to protect women from discrimination in traditional and religious marriages.

The strong protection of women's and LGBT rights in the constitution mirrors the development of the global human rights regime at the time. However South Africa, ventured much further than other third wave democratisation countries. Its truly revolutionary contribution was the incorporation of sexual orientation as a ground for protection against discrimination in the constitution, as no country had ever done before. As religion before in its own era, human rights as a type of Ersatz-Religion became iconised and celebrated as the new national essence.

5.3 Discussion

Argentina and South Africa faced various similar challenges during democratisation. First, successful democratic consolidation was by no means certain in either country. In Argentina, another military coup ending civilian rule was an all too real possibility; and in South Africa, building a nation of equals on the back of centuries of racial domination and exploitation was an equally challenging task. Second, both countries were internationally isolated due to their human rights violations, which, thirdly, contributed to the troubling economic crises both countries faced during their democratic transition periods. Suffice to say, the situation was precarious in both cases and the need to gain internal legitimacy to ensure a peaceful and successful transition was high as was the need to gain external legitimacy, so that both nations could access international financial markets to overcome economic crisis.

In the early stages of democratisation, the future was uncertain but not completely open. Due to the delegitimation of the old regime, the succeeding regime had to be different from the past. Both new regimes' survival depended on gaining legitimacy, which in turn depended on portraying a new and vastly differentiated political identity from its predecessor. In the words of Mandela, South Africa had to "engage in an historic effort of redefinition of [itself] as a new nation" (Mandela, 1994a), and Argentina, in the words of Alfonsín, had to "discover its culture, rediscover and reformulating its national identity" (Alfonsín, 1983).

Democratisation in both countries had brought to power the former opposition of each of the authoritarian regimes, with some if not most of them among the very subjects of the religiously-based oppressive practices. In a political climate where religious institutions could not be counted on to defend the victims of oppression, regime opposition in Argentina and South Africa had turned to the force of argument and institutions of human rights to challenge the repressive regimes. The churches being on the wrong side of the ideological divide between the two former regimes and their respective successors produced a tension between religion and human rights that would carry over into democratic South Africa and Argentina. In Argentina, many of the important human rights groups established during the dictatorship were formed in a direct response to the failure of the church to support the victims of oppression. In South Africa, regime opposition framed their cause as a human rights matter, seeking support from international human rights organisations to strengthen their bargaining position vis-à-vis the religiously backed authoritarian government during the democratic transition process.

Democratic politicians had experienced religiously legitimated oppression themselves and few of them were willing to defend religious interests in the critical times of democratisation in which the new constitutional identity crystallised and was enshrined into institutions and laws of the two countries. While new political leaders came to power during the transition from authoritarianism to democracy, the churches remained largely the same, both ideologically as well as on the individual level. In South Africa, the DRC continued to lobby for political privileges of its white constituency and fell into an identity crisis itself, being torn by internal debates on their role in the legacy of apartheid. In Argentina, church and military officials continued to justify the necessity of the dirty war against subversion and covered up for each other's involvement in the dictatorship when the full extent of state terror exerted began to be known in the early years of Argentine democracy. These continued alliances probably forfeited the already small chances of both churches finding powerful allies under democracy because during the transition period, the churches were allied with the opponents of the new political decision makers, and as a result, a threat to both young democracies.

In Argentina, the military was potentially the greatest destabilising factor to the new democracy and preventing another military coup was one of the prime challenges of the new government. Consequently, the ongoing religious conservative entente between the military and the Catholic Church was an element that needed to be politically disempowered during the transition period for the democratic project to succeed. In a similar vein, in South Africa, the ongoing support of the DRC for the NP, the main antagonist of the ANC during the negotiations that brought about democracy and the new constitution, created a need to reduce religious normative power on politics because it worked in the challengers' favour. These dynamics resulted in the emergence of constitutional identities focused on a secular interpretation of human rights, rather than the continued use of religion as a tool for political legitimation and identification.

Poland and Croatia stand as illustrations of how this constellation fundamentally differed from countries that did not have an ideological symbiosis but opposition between state and church during authoritarian rule. As Grzymala-Busse (2015) analyses for Poland and Croatia,

> Unlike the communist regimes, the new governments were not ideologically hostile to the church, nor did they have to prove their commitment to atheism and anti-clericalism to a foreign sponsor. If anything, they were beholden to a church that had sheltered them during their years as the anti-communist opposition, by reassuring the communist regime and covertly supporting the dissidents. (p. 147)

While South Africa and Argentina underwent a political secularisation from authoritarian to democracy, Poland and Chile's democratic system where much more open to church influence.

> [G]overnments could include clergy in formulating policy, give discretion in naming and vetoing secular officials, and seek out church representatives to secular institutions. (…) Churches could thus gain considerable access during times of potential instability- precisely when institutional and policy frameworks could be transformed. (Grzymala-Busse, 2015, p. 147)

In South Africa and Argentina, churches were mostly excluded from democratic politics and were blocked from access to secular institutions. Being morally compromised and without strong allies in the party systems of both post-authoritarian states, lead to churches' inability to shape the pillars of the new democracies at a pivotal time of great transformative potential. This resulted in new constitutional identities and the exclusion of religion in the construction of democratic government legitimacy, the empirical traces of which are summarised and compared in the following.

The presence of dissent between state and church represents smoking gun type evidence for a transformed constitutional identity. After democratisation, reacting to their loss of influence under the new political dispensations, both churches publicly expressed their discontent. In South Africa, the DRC, in a General Synod Report of 1998, laments the considerable reduction in public influence that was, among other factors, caused by the negative public perception of the DRC as a result of it having delivered the theological justification of apartheid (Agenda General Synod 1998, p. 69-71 as quoted in Villiers, 2001, p. 57). In Argentina, newspapers reported on bishops criticising the secular attitude of the Alfonsín administration (El País, 1984).

Against the opposition of the respective clergies, both newly democratic governments passed policies running counter to religious morality in the first years after regime change. In Argentina, the government passed a law equating the rights of legitimate and illegitimate children, granting parental rights to women even if they are divorced and remarried, abolished the death penalty and legalised divorce. In South Africa,

against fierce resistance from various religious institutions, among them the DRC, the government recognised rights for homosexuals, abolished the death penalty and included a clause on the protection of sexual identity in its constitution.

The analysis revealed that both religious institutions tried to shape constitutional identity and policies of the new regimes according to their teachings and both repeatedly voiced their disappointment when it became clear that their privileged role in politics had ended; clear evidence for the presence of dissent between state and church, indicating a changed role of religious institutions under democracy compared to the preceding authoritarian times.

These smoking gun-type findings are further strengthened by the way in which the democratic identities of both countries were constructed in highly symbolic political acts and communication. The analysis reveals that there is a marked and notable change between the religious rhetoric of the past authoritarian regimes and the rhetoric of the democratic governments. Where religion was omnipresent under authoritarianism, it was virtually absent in political speeches of the new democratic leaders. This suspicious absence of religion is telling in its own right. In an attempt to make absence visible, further evidence was brought forward to sustain the secular constitutional identity hypothesis.

First, not only is the absence of religion informative, but also the presence of value systems that challenge a transcendentally derived legitimation of government action. With Mandela invoking classic humanist principles, such as human dignity and freedom, and Alfonsín borrowing heavily from central Enlightenment concepts, such as human progress through reason, both newly democratic governments constructed a human-centred value system. At its core, it staked that legitimate governing means protecting the human for its own sake, not for the sake of being God's creation. This indicates an utterly diminished role of religion in the discursive legitimation of rule. While religiously derived moral principles have a precarious relationship with human-centred value systems, human rights proved a fitting symbol to credibly showcase a transformed value framework. As symbolic political acts illustrate, such as the changing of public holidays from Christian to secular ones, including adding Human Rights Day to the South African calendar, as well as Alfonsín's inaugural speech in Argentina given on the International Day of Human Rights, human rights became the guiding light for both the Argentine and South African democracy.

Second, there is an overarching theme of marked difference between the old and new regime in high profile political speeches during democratisation in both countries. The presence of religion as an essential element in the identity construction of the old regime precluded its involvement in the new emerging constitutional identities. In both countries, political leaders portrayed the old regimes and its values as immoral and their new government as its diametric opposite. In that sense, religious conservative apartheid produced non-sexist, non-racist democratic South Africa; and the forced ideological and political

unity of the Argentine dictatorship produced tolerance, diversity and pluralism to be the hallmarks of Argentine democracy. The fact that in both countries the new constitutional identity construction rests on being as different as possible from the identity portrayed by the authoritarian regime, illustrates that how, despite being fundamentally new, the democratic identities of both countries were tied to the past. The notable absence of religion in the political communication of democratic leaders, combined with the presence of value systems that contradict religiously derived government legitimacy permit the passage of this hoop test, and additionally increase confidence in the presence of the mechanism.

Further empirical evidence for the theoretical mechanism is that post-authoritarian South Africa and Argentina immediately ratified most international human rights treaties and began to be strong advocates for human rights both regionally and internationally. This represents a stark contrast to the countries' pasts where both were only party to very few selected international human rights instruments and occupied a pariah status in the international community.

Using human rights to regain international legitimacy is a strategy shaped by the international normative context of third wave democratisation countries. That it also took over the function previously held by religion in the governments domestic legitimacy construction is because religious institutions were morally compromised and human rights could provide a new unifying ideological framework for democratic politics that also ensured government support by the strong civil society.

The human rights focus materialised in the far reaching inscription of human rights norms into domestic legal systems. Reforms of the military code of justice, the prohibition of the death penalty, the creation of CONADEP to redress the abuses of the past regime and the inclusion of some of the world's strongest commitment to international law in Argentina's constitution of 1994 were all among the measures taken by the civil Argentine government to strengthen domestic human rights protection under democracy.

In South Africa, the Truth and Reconciliation Commission, the creation of the Human Rights Commission, the Commission for Gender Equality, the public defender and the constitutional court, as well as the close mirroring of human rights norms in South Africa's Bill of Rights had the same function.

The delegitimation of religious influence on politics also limited religious institutions' ability to shape which of the currently prevalent interpretations of human rights took hold during democratisation. South Africa and Argentina both presented initiatives in the UN framework to further the incorporation of matters pertaining to sex and gender in international human rights instruments, evidence that the secular interpretation of human rights spread in both countries.

While finding the swift ratification of human rights treaties after regime change only represents the successful passage of a hoop test for a transformed constitutional identity, as ratifications can probably be

found in most third-wave democratisation countries. The exceptionally thorough incorporation of human rights norms into the domestic legal systems and moreover, both countries advocating for a secular interpretation of human rights internationally, however, suggest a transformed constitutional identity in a doubly decisive manner.

The final piece of evidence for this part of the mechanism is the passage of new constitutions with a relative shift of emphasis from religion towards human rights. A constitution represents a country's guiding values and how it wants to be perceived by its own citizens and the world. Accordingly, constitutions are of paramount importance for political identity. South Africa passed an interim constitution that came into force with the first democratic elections in 1994, which was replaced with the final constitution of 1996. In Argentina, the project for a new constitution was on the table from the early stages of democratisation, but its final passage only materialised in 1993, ten years after the first democratic elections. This timely difference can be explained with the fact that South Africa never had a non-racial democratic system in place prior to democratisation, and the old apartheid constitution reflected the racist ideology of that regime. Therefore, it was not suitable to stay in force for even the shortest time under a democratic dispensation. Argentina, on the other hand, could reinstall a democratic constitutional order that was temporarily abandoned by the military dictatorship, drawing on earlier democratic periods in the country. What unites both countries is that their new constitutions are a source of pride in the population and hold an extraordinarily high importance for the countries' political identities.

Besides a slight variance in timing, both democratic regimes passed new constitutions that reflect a profound change in the role of religion and human rights in their constitutional identities. Particularly noteworthy changes implemented with the constitutional reforms of both countries were the elevation of international human rights treaties to constitutional rank in Argentina and the inclusion of a world-leading Bill of Rights in the South African constitution, that, mirroring "the highest aspirations of the global human rights movement" (Klug, 2010, p. 1), includes a non-discrimination passage protecting, inter alia, from discrimination on the grounds of race, gender, sex and sexual orientation.

Among the modifications pertaining to religion, the new Argentine constitution omitted the religious requirement for the post of president and her vice (Art. 76 of the old constitution, Art. 89 in the new one) and changed the mandatory oath of office for these posts from including the words "God and the Holy Gospel" towards a religiously neutral formula (Art. 93 in the new constitution, replacing Art. 80 of the old one). In South Africa, the Preamble of the constitution was changed from an almost exclusive homage to a Christian God towards emphasising democracy, equality and human rights.

The constitution drafting process in both countries was a strongly contested debate for the soul of the constitutional identity along religious/secular lines. Among them were the new symbolic role of religion

in South Africa's constitution's preamble and the confessional requirement for office in the Argentine constitution, taking place in the relevant commission sessions as well as in the general public and civil society. The tension between human rights and religion that grew out of the historical antecedent condition of state/church ideological symbiosis in South Africa and Argentina manifested in the constitutional debates, such that a secular interpretation of human rights was used in the arguments in favour of limiting the role of religion. In other words, both concepts were played out against each other. For instance, in South Africa's constitutional process, attempts by religious institutions and religiously affiliated parties to maintain a greater emphasis on religion in the constitution were shut down by referencing the incompatibility of a traditionally preferential treatment of religion with the universality of human rights.

The empirical tests conducted have highlighted the various empirical manifestations of a transformed constitutional identity in post-authoritarian South Africa and Argentina. While the mechanism played out differently in both country's specific contexts, on an abstract level the dynamics provoked by the ideological state/church symbiosis during authoritarianism were remarkably similar in both new democracies. The ideological shift from religion towards human rights and its materialisation into the legal fabric and institutions of South African and Argentine democracy constitute the opportunity structures in which LGBT and women's rights activism would take place later on. Thus, this is focus for the second part of the causal mechanism, which will be investigated in the upcoming chapter.

6 Mechanism Part 2. Discursive and Legal Opportunity Structures

"[T]here is no doubt that the religious feelings of some may not be a guide to limit the constitutional rights of others. State powers cannot be called to interpret religious texts or to take sides with their assessment of homosexuality (…)."

(Poder Judicial de la Ciudad Autónoma de Buenos Aires, 2009, my translation)

"[T]he acknowledgement by the state of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages. (…) The religious beliefs of some cannot be used to determine the constitutional rights of others."

(Constitutional Court of South Africa, 2005b)

Very few South African and Argentine political leaders foresaw the potential repercussions of constitutional concessions granted to women's and LGBT rights groups that would manifest in the realm of reproductive and LGBT rights policy later on. The precariousness of democratic stability in the early days of both the Argentine and South African regime transitions had political leaders focus on the most pressing issues of transitional justice, reconciliation and economic stability, overshadowing issues not directly related to democratic consolidation. The turbulence of regime transition also led to a degree of ideological permeability of the state for interest group demands as long as these groups were committed to the democratic project. When debating new constitutions and incorporating international law in the domestic legal systems, politicians welcomed any form of support for a democratic political system.

In contrast, the women's and LGBT rights movements in both countries were acutely aware of the unique opportunities for measureable progress during the transition period. In the early days of democracy, social movements did little more than raise awareness that they too belonged to the formerly oppressed victims of the past political repression. This tactic created a common ground with the new political elite and human rights organisations, and facilitated the acceptance of their oppression as a human rights issue. Only when this link between human rights and discrimination on the grounds of gender and sexuality was firmly established in political discourse, movements began to present more concrete policy demands.

At first glance, the chances seemed slim for the women's and LGBT rights movements to gain policy concessions in South Africa and Argentina. Facing religious institutions that had traditionally dominated discourse in matters pertaining to sexuality and gender, as well as a highly religious and overwhelmingly conservative population, might have proved an insurmountable barrier for framing the cause in any other than religious terms elsewhere; but not so in post-authoritarian South Africa and Argentina. Through a deliberate framing strategy that resonated with the dominant ideologies of both countries' democratic governments and the latest developments of the international human rights discourse, social movements turned into reality what seemed impossible at first; their problem framing overriding traditionally religious narratives on sexuality and transforming their demands for recognition and legalisation from something previously regarded as immoral into an immovable pillar of democracy.

The theoretical mechanism for this section posits that the constitutional identity constructed by the newly democratic governments created a specific set of legal and discursive opportunity structures for stakeholders in abortion, same-sex marriage and LGR policy. The international human rights commitments then-recently entered by the states, a thorough incorporation of human rights law and principles into the domestic legal system (including the respective governments' construction of legitimacy based on secularly interpreted human rights), are the context in which competing problem framings are brought forward by participants in the policy processes. On the one side, the main protagonists are women's and LGBT rights movements, and on the other churches and organisations associated with institutionalised religion in the political spectrum as well as in civil society.

The theoretical proposition, which is subject of this chapter, is that the specific set of opportunity structures stake holders face in post-authoritarian South Africa and Argentina is conducive for actors who can credibly frame their claims as a human rights issue. In South Africa's and Argentina's post-authoritarian context, this should have been easier for social movements than for religious institutions and associated organisations.

Accordingly, to test this logic, we will explore the ways in which the normative and legal structures of the post-authoritarian context have shaped social movements' problem framings and activism strategies in South Africa and Argentina. As we shall see, social movement framings in both countries rely on human rights and indeed closely mirror the ideological meta-narratives of the countries at the time. In contrast, religious doctrine was rejected as a legitimate source of moral principles in the political sphere. Judges in Argentina and South African courts explicitly ruled that the religious convictions of some cannot impede the constitutional rights of others and social movements were quick to reference the ideological symbiosis of the past to challenge churches' moral authority to influence policy.

The dynamics present in the three different policy fields are remarkably similar within and across each country, as the similar framings and strategies of social movements demonstrate a high degree of responsiveness to the specific ideological context of the time. However, abortion activism in Argentina deviates from this general pattern. It is at this stage in the progression of the causal chain where the abortion policy process in Argentina takes a turn different from LGBT rights policy. A specificity of Argentina's human rights discourse has prevented the Argentine women's movement in succeeding to anchor an abortion reform onto the political agenda. Moreover, opportunity structures for the women's movement were less favourable than for the Argentine LGBT rights movement and social movements in South Africa. Rooted in the dictatorial past that included the kidnapping of children of regime opponents, the Argentine human rights discourse features an emphasis on the rights of children that did not allow for a framing of abortion as a human right. Thus, this chapter intends to solve the puzzle of why abortion remains restrictively regulated in Argentina, and, we will see that it was not institutionalised religion that kept abortion from the political agenda but an idiosyncratic factor in Argentina's history that created unfavourable opportunity structures for the Argentine women's movement to push for abortion reform.

6.1 Without Equality there is No Democracy: Strategic Framing and Litigation by Social Movements in Argentina

While there was little to no activism on abortion and LGBT issues during the Argentine dictatorship, the picture radically changed upon democratisation. Newly formed social movements played a crucial role in the problem framing and politicisation of issues related to sexuality and gender in democratic Argentina. These movements successfully employed framings that mirrored the specificities of Argentina's post-authoritarian human rights discourse. LGBT rights organisations framed their claims in human rights language and could form alliances with the broader human rights movement. At the same time, proponents of policy change continuously used the ideological symbiosis of the dictatorship and church to challenge religious frames introduced into the debate by the Catholic Church.

Activism for the introduction of same-sex marriage and LGR faced similarly conducive opportunity structures. When the same organisations that were successful with igniting the legalisation of gay marriage took on the task to lobby for a reform of LGR policy two years later, the momentum of gay marriage proved beneficial for gender recognition reform success. When battling for marriage equality, the movement had framed LGBT rights as human rights and the passage of the gay marriage bill in 2010 was welcomed as a success of their framing efforts, reaffirming a secular interpretation of human rights in Argentina. This further strengthened the discursive opportunity structures for the subsequent struggle for LGR policy, whose reform was then relatively uncontroversial in political terms, and also received less media attention and fewer church interventions than gay marriage.

Other than the case for the LGBT rights movement, the women's rights movement's framing of abortion was ambiguous. It was characterised by a multitude of parallel frames and demands, none of became dominant. Although a human rights frame of abortion was present in the social and political debate, it was mostly used by abortion opponents. A focus on the rights of the child in the Argentine human rights discourse, which emerged as a reaction to illegal adoptions during the dictatorship, allowed abortion opponents to capitalise on Argentina's human rights focused constitutional identity. In other words, for the LGBT rights movement, Argentina's post-authoritarian human rights focus had created favourable opportunity structures, allowing the movement to develop key alliances in the broader human rights spectrum and challenge interventions by the Catholic Church as the main opposition to policy change. However, for the women's rights movement, opportunity structures proved to be different, resulting in ambiguous problem frames and the women's rights movement's failure to set abortion reform as part of the political agenda.

Discursive opportunity structures in Argentina

The LGBT rights movement. The Argentine LGBT rights movement almost completely disappeared during the last dictatorship, however, soon after democratisation, the first groups began to organise. In 1984, one of the first groups that emerged was the *Comunidad Homosexual Argentina* (CHA), whose inaugural motto was "The free exercise of sexuality is a human right" (Encarnación, 2011, p. 106). The CHA was the most influential LGBT rights group in Argentina during the first years of Argentine democracy (Brown, 2002, p. 121). Its first newspaper advertisement in 1984 appeared under the headline, "With Discrimination and Repression There Is No Democracy" (*El Clarin* on 28 May 1984, as cited in Comunidad Homosexual Argentina, n.d.c). In the text, its authors argued that, "there will never be a true democracy in Argentina if society permits the existence of marginalized sectors and the methods of repression that are still in place" and it concluded by stating that 1.5 million Argentine gays are "preoccupied with the national situation" and had experienced "with the rest of the nation the hard years of dictatorial rule" (Encarnación, 2011, p. 107). Thus, from the early days of democracy, the LGBT movement framed its cause within the broader socio-political struggle for democratisation and human rights. Its members having suffered severe repression under the dictatorship, they positioned themselves among the victims of the military regime who are still being repressed and thereby presented their liberation as essential for Argentina to become a true democracy.

When the uprising of nationalist militia in 1987 provoked great concern amongst democratic politicians and human rights organisations alike, the CHA joined a march for democracy on the *Plaza de Mayo*, which resulted them to be included, for the first time, in the joint meetings of the human rights movement (Comunidad Homosexual Argentina, n.d.c). Argentina's threatened democratic stability facilitated the acceptance of the LGBT rights movement among the ranks of human rights and democracy defenders.

Forming alliances with the human rights movement was an important step in the LGBT movement's overall advocacy strategy. When the *Madres* called for a conference under the slogan "Trial and Punishment of the Guilty" shortly after democratisation, the CHA participated with a table on LGBT issues "progressively incorporating the discourse on sexual diversity within the framework of human rights" (Comunidad Homosexual Argentina, n.d.a, my translation). The strategic alliances built with the human rights movement, first related issues unrelated to homosexuality, would later pay off when the LGBT movement pushed for marriage equality and the LGR law. After having deliberately built a presence in the human rights movement, the acceptance of the human rights frame LGBT organisations used to legitimise their demands became widespread.

The gay marriage bill would later be supported by no less than 73 human rights organisations, among them the *Madres*. The group that enjoyed great legitimacy for its fight against the dictatorship gave validity to

the call for LGBT rights by arguing that "[d]enying marriage on the grounds of sexual preference is a form of discrimination prohibited by the national constitution, and creating a separate institution is a flagrant violation of human rights" (*Madres*, as cited in Encarnación, 2011, p. 108).

In 2002, the CHA started lobbying activity to reach legal recognition for same-sex couples on the basis of a civil partnership regime. When the FALGBT [*Federación Argentina de Lesbianas, Gays, Bisexuales y Trans*], an association of LGBT rights groups from all over the country, was founded in 2006 with the specific aim "to gain the same rights with the same name", it replaced the CHA as the leading organisation of the LGBT rights movement and as the public face for the legal recognition of same-sex couples in Argentina (Federacion Argentina LGBT, 2014). Explicitly calling for marriage equality, and not a partnership regime, FALGBT lobbied for a change in the civil code to remove the reference to the sexes of the persons entering marriage. The movement motto to gain marriage rights was "same love, same rights" [*mismo amor, mismos derechos*]. In the media, the movement focused on making diverse forms of families visible, which resonated with the historical family focus in Latin America in general, and of Peronism in Argentina in particular (Tabbush, Díaz, Trebisacce, & Keller, 2016, p. 39).

The movement discursively exploited Argentina's human rights commitment in the new constitution to claim their rights. Gustavo López, lawyer of the FALGBT, told newspaper *Página/12*: "The national Constitution, both in its text and in that of the international human rights treaties incorporated in it, guarantees the right of people to marry and found a family." (López, as cited in Bruno Bimbi, 2008, my translation)

The movement's human rights framing secured alliances with human rights bodies within the state that were created in the new democracy and that, in congruence with the constitutional identity, subscribed to a secular interpretation of human rights. For instance, the National Institute against Discrimination, Xenophobia and Racism [*Instituto Nacional contra la Discriminación, la Xenofobia y el Racismo*, INADI], a specialised institute under the newly created Ministry of Justice and Human Rights of Argentina [*Ministerio de Justicia y Derechos Humanos de Argentina]*, supported the LGBT rights movement in its claim for marriage rights.

The FALGBT, together with the FNLID (*Frente Nacional por la Ley de Identidad de Genero*), were not only advocating for same-sex marriage but also for a gender change law from 2007 onwards, this time calling for "a right to identity". The FNLID, a coalition of LGBT rights groups including the CHA, was formed in 2010 with the aim of concerted lobbying for the passage of a gender recognition law. To advocate for LGR policy, the LGBT rights movement used the slogan, "Without Delay, Identity NOW" [which is much more catchy in Spanish: *¡Sin demora, identidad AHORA!*], thereby referencing the Argentine human rights discourse's focus on identity (Frente Nacional por la Ley de Identidad de Género, 2012).

More specifically, the FALGBT argued:

> Transvestites and transsexuals are denied the right to identity in Argentina, a right enshrined in all international human rights treaties signed by our country and incorporated into the National Constitution in the 1994 reform. They have a name in their documents that differs from the one everyone knows them under, and they are assigned a gender – man or woman – that contradicts their identity. (…). They are the NN [Nomen nescio] of democracy, undocumented and deprived of their most essential rights. (Federacion Argentina LGBT, 2011, my translation)

NN is the designation used in Argentina for the anonymous dead that disappeared at the hands of the regime. Unlike a death memorialised by friends and family, the practice of disappearance deprived victims of their identity. Similar to concentration camps, detainees were not called by their names but given a number instead. Their subsequent extrajudicial killing without documentation and the disposal of their bodies meant that there were no bodies to be buried, and no funerals. In that sense disappearance was not only political homicide but the extinction of the very identity of a person. In the decades following the military dictatorship, some bodies have been found but have remained unidentified, hence many graves are without names. Accordingly, the identity-deprived dead are designated NN [*Nomen nescio*] in Argentina. By framing trans people to be the NN of democracy, the LGBT rights movement drew a parallels between the atrocities of the dictatorship and challenged Argentina's new democratic values as being different from the former regime by portraying the lack of a gender identity law as a crime similar to that of the deprivation of identity under the dictatorship.

Aside from discursively connecting the practice of disappearance under authoritarianism with the treatment of trans people under democracy, the movement's framing of a right to identity resonated with the right to identity of children being one of the focal points of Argentine human rights activism from its inception. This focus originated in the *Abuelas* advocating for the right to identity of the children taken from their mothers in clandestine detention centres, and then illegally sold or given for adoption to regime loyal families.

The *Abuelas* explain that these illegal adoption were done to:

> Annul, erase the identity and roots of these children with the objective that they would not feel and think like their parents but like their enemies. (…) In that way, they made them disappear through annulling their identity, negating them to live with their legitimate families, negating them all their rights and their freedom. There are hundreds of children who were deprived of their identity, family and personal history and raised in a lie. (Las Abuelas de Plaza de Mayo, 2015, my translation)

The right to identity that the *Abuelas* define as, "the right of everyone to be oneself, to know who he is" (ibid., my translation), is widely recognised in Argentina and has even been "exported" into the international human rights regime. The UN International Convention of the Rights of the Child of 1989 includes three article (also called "Argentine Articles") that enshrine the right to identity in international law and that are based on the *Abuelas*' work in Argentina (ibid.).

Since the relevant paperwork for the adoption of Argentina's kidnapped children was forged, these children grew up not under the names given to them by their biological parents, but under a completely new identity given by their adopting families passing them off as their own. Thus far, through large scale gene testing, only some of these children have been reunited with the survivors of their biological families. Some have even decided to retake their original names, given to them by their biological parents upon birth. An emphasis on true identity and names in the discourse on abducted children was appropriated by the LGBT rights movement. On the occasion of "Children's day" [*Día de la Infancia*] in Argentina, María Rachid, at that point president of the FALGBT, stressed that,

> at present, various rights of LGBT children and adolescences are being violated, not allowing a full development of their potential and abilities, without any type of restriction. This is a clear example of the systematic violation of the right to identity of transvestite, transsexual and transgender girls, boys, and adolescents. This violation of the right to identity is the beginning of a chain of exclusions that prevents their full development. (Federacion Argentina LGBT, 2008, my translation)

The women's rights movement. The LGBT movement's framing strategy for same-sex marriage, as well as the gender change law, was an impeccable fit with the broader human rights discourse in Argentina. However, the situation in the case of the women's rights movement advocating for abortion rights was markedly different. Feminists began to focus on reproductive rights in the 1990s when Peronist president Carlos Menem, an outspoken opponent[30] of abortion, tried to steer the constitutional assembly towards including the protection of "life at conception" into the new constitution (Htun, 2003, 161ff.) This is also when abortion emerged as an issue on the political agenda, notably not politicised by movement demands but by attempts of abortion opponents to protect the status quo in the constitution. Pro-abortion activism in that period was therefore concentrated on preventing the protection of the embryo to gain constitutional esteem or in other words, defending the status quo rather than decriminalising abortion.

[30] Menem's credibility of a protector of unborn life was severely compromised when his wife made public that he had urged her to have an (illegal) abortion.

Eventually, the movement prevented the constitutional protection of the unborn child. Other successes of the women's movement in the 1990s included gaining economic and political participation rights for women, including the passage of a law on political quotas in 1991 to increase the participation of women in the national legislature (Tabbush et al., 2016, p. 27).

An explicit focus on abortion reform by the women's rights movement only re-emerged in the 2000s, when women's rights groups organised in a joined national campaign for legal abortion [*Campaña Nacional por el Aborto Legal, Seguro y Gratuito*, following "*Campaña*"]. Currently composed of 338 organisations from all over the country (Campaña, n.d.) The *Campaña* was launched on the 28th of May 2005, which is also the International Day of Action for Women's Health. The *Campaña's* lobbying efforts are carried out under the slogan "Education in order to decide, anti-contraception in order to not abort, legal abortion in order not to die" [*Educación sexual para decidir, anticonceptivos para no abortar, aborto legal para no morir*]. (Campaña, 2011)

The problem framing of the *Campaña* is ambiguous and characterised by the simultaneous employment of a public health, social justice, emancipation, and in recent years, also a human rights framing. Given the relative weight of arguments in the *Campaña's* lobbying activity, the public health framing is the most prominently employed. On its website, for instance, the *Campaña* presents the issue as follows:

> In Argentina, an estimated 500,000 women resort to clandestine abortion each year, showing how the penalty does not impede their practice, but makes it dangerous because of the lack of economic resources of many women. (…) According to official figures, complications due to unsafe abortions are the main preventable cause of maternal mortality in Argentina (…). Since the democratic recovery in December 1983, more than 3,000 women have died as a result of unsafe abortions, thus expressing this great debt of democracy, constituting a very serious public health problem. Most of these women are young and impoverished, showing the inequalities across the problem of access to abortion when a woman decides she cannot go ahead with an unwanted pregnancy. (Campaña, 2011, my translation)

The ambiguous problem framing went hand in hand with the ambiguous naming of the women's movement's demands. Ariza y Valdivia (2015, p. 191) identify competing claims within the women rights movement which has demanded "free abortion" [*aborto libre*], "depenalisation of abortion", "the right to decide" and "abortion as legitimate form of contraception". Tabbush et al. (2016, p. 44) support those findings and also discover a split in movement activity between activism for abortion legalisation, judicial activism to amplify the indications under which abortion is de-penalised, and organisations that focus on direct action to facilitate access to medical abortions.

The abortion issue sparked substantial political and social debate since its initial politicisation in the 1990s, accompanied by high media coverage. Interestingly, opponents, rather than proponents, of decriminalisation used human rights norms and international legislation to argue that abortion impedes the rights of the most

vulnerable: the unborn child (ibid., p. 41). For instance, the Argentine National Academy of Medicine published a nationwide newspaper ad, stating that, "[a]ny legislation that permits abortion violates basic human rights." (Morgan, 2015) Another example is the Federal Network of Families [*Red Federal de Familias*] that, at the time of writing, is pushing to further restrict abortion with the law proposal "Law for the integral protection of the human rights of the pregnant woman and of the unborn children" ["*Ley de protección integral de los derechos humanos de la mujer embarazada y de las niñas y los niños por nacer*"] (Quintans, 2016).

In addition, at pro-life demonstrations in Buenos Aires, the mass chanted: "Today and yesterday it's the same/ If yesterday they stole babies/ Today they kill them in the womb/ What is the difference/ Tell us, President." (Felitti, 2011; see also Morgan, 2015). As sociologist José Manuel Morán Faúndes points out, abortion opponents began to strategically "construct their conservative sexual politics on the basis of rhetorical discourses associated with the condemnation of human rights violations that occurred during the dictatorship." (Morán Faúndes, 2013; see also Morgan, 2015)

The ambiguous problem framing by the women's rights movement, as well as the fact that Argentina's human rights focused identity was exploited by reform opponents (rather than proponents) prevented a human rights framing for abortion rights to become dominant, which is also mirrored by the fact that only few human rights organisations endorsed the women's rights movements claim for abortion rights.

Overall, there are notable differences in the framing strategies of the LGBT rights movement to push for same-sex marriage and LGR, and the women's movements' framing of abortion. These diverging activist strategies grew out of entirely different discursive opportunity structures encountered by both movements. Idiosyncratic factors of the Argentine case allowed human rights to be present in the societal and political abortion discourse, but for the most part these human rights are interpreted as applying to the embryo, not the mother.

It seems that this is due to the traditionally high value attached to motherhood and family in the Argentine context, and a sensitivity to the right of children due to the repercussions of the practices of the dictatorship. Largely made up of Italian and Spanish immigrants, the mother is an immovable figure in Argentine society. The cultural glorification of motherhood in Argentina and in Latin America contributed to the success of the *Madres* and *Abuelas* in challenging the authoritarian regime. However, the articulation and maturation of the Argentine human rights discourse within the framework of missing children produced a human rights focus that, while secularly interpreted, nevertheless has a special commitment to the protection of family and children.

Claiming marriage rights for homosexuals reinforces the cultural focus on family. Furthermore, the right to identity, which was the framing brought forward to advance LGR policy, resonated with the discourse on the right to identity of the robbed children that commenced with the most important human rights report *Nunca Más* during democratisation. In the report it states:

> Deprived of their identity and taken away from their parents, the disappeared children constitute, and will continue to constitute, a deep blemish on our society. In their case, the blows were aimed at the defenceless, the vulnerable and the innocent, and a new type of torment was conceived. (Argentina, 1986)

This prevented a human rights frame for abortion to become dominant. "The perception of women as mothers and wives who would protect their children and 'be on the side of life' was widely shared in Argentine society and formed the basis for the *Madres*' human rights claims." (Morgan, 2015) "This history complicates the demand for legal abortion in ways that are uniquely Argentine." (ibid.) The discursive exclusion of abortion in the framework of human rights allowed the opponents to policy change to capitalise on Argentina's new constitutional identity by framing their opposition in human rights language.

The main obstacle to abortion legalisation in Argentina was thus not a dominance of a religious frame, but the configuration of discursive opportunity structures that allowed abortion opponents to appropriate the human rights focus of Argentina's democratic constitutional identity. This point is further substantiated by the fact that the women's rights movement was highly successful in gaining many other gender related rights[31], but specifically failed to politicise abortion.

Discursive barriers for religious influence. The state/church ideological symbiosis during the dictatorship not only produced a specific discursive opportunity structure permitting the LGBT rights movement to frame their claims as a human rights issue (while also preventing the women's rights movement from doing the same), but it also provided social movements with ample discursive resources to challenge religious influence on legislation.

Acutely aware of its primary adversary, the LGBT movement used a double strategy to achieve their goals. First, the delegitimation of church influence on the issue specifically, as well as challenging religious moral authority in Argentine society in general. Second, framing their claims as human rights issues. "Since its creation, the CHA systematically and courageously denounces the complicity of the Vatican Church in all repressive actions and discriminatory discourses in relation to sexual diversity, and has demanded the separation of Church and State". (Comunidad Homosexual Argentina, 2013, my translation) In 1986,

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[31] For example, in 2002, the national legislature passed a law on Sexual Health and Responsible Procreation [*Salud Sexual y Procreación Responsable*, Ley 25.673 de 2002], obliging public health providers and state agencies to provide free information and counselling about contraceptive methods and including contraceptives under the coverage of public health providers (Pecheny and Petracci (2006)).
In 2006 a reform of public sex education was passed [*Educación Sexual Integral, Ley 26.150, de 2006*], followed by the inclusion of emergency contraception into national health protocols in 2007 (Morgan (2015)). In 2009, a law against violence against women was passed [*Protección Integral para Prevenir, Sancionar y Erradicar La Violencia contra las Mujeres, Ley 26.485, de 2009*]. 2013 witnessed the passage of a law on Assisted Fertilization [Fertilización Asistida, ley 26.862, de 2013] and around the same time, with a maternalist rhetoric strategy, economic and social rights of women and their children were strengthened (Tabbush et al. (2016, p. 28)).

shortly after the return to democracy, the first independently organised action by the CHA was a gathering of 100 persons in front of the Cathedral in Buenos Aires to protest the Vatican's second document on homosexuality, garnering significant media attention (Comunidad Homosexual Argentina, n.d.c).

Denouncing the Catholic church's discriminatory stance on issues gained the movement credibility in light of the historical symbiosis between the dictatorship and church, and thus attacks on the church by the LGBT rights movement always included some type of reference to the past and characterisation of the church's anti-democratic leanings. Two years after Argentine cardinal Bergolio became Pope Francis I, César Cigliutti, president of the CHA, responded to some appeasing gestures by the Vatican towards the LGBT population:

> The Vatican continues with its historical discriminatory positions: they define homosexuality as a deviation from nature, they oppose equal marriage (lobbying around the world so that laws are not passed), the bishops continue with complicity in child abuse, campaigns against abortion, against comprehensive sexual education and against the use of condoms. (Comunidad Homosexual Argentina, n.d.d)

In a press communiqué issued by the CHA one day after Pope Benedict XVI made public that he views gay marriage as "a offence against the truth of the human person and a grave injury to justice and peace", Cigliutti remarked:

> The true offenses against the truth of the human person and 'a serious wound to justice and peace' are the minors who were victims of the sexual abuse that their priests performed with the systematic silence and cover-up of the bishops. The peace of peoples and democracy is equal rights for all citizens. The offense is discrimination against people. (Comunidad Homosexual Argentina, 2010)

And the secretary of the CHA, Pedro Paradiso Sottile, added:

> The offense for humanity is religious fundamentalism, exclusion and terrible discriminatory acts promoted by the hierarchy of the Vatican church, accomplices of shame and silence in the face of processes and dictatorships, to the hegemonic powers, as to the abuses that took peace and life of millions of people in history. We are building an inclusive world, respectful of the rights of all, and for this reason we will continue to work for secular, democratic and diverse states, with love and freedom. (Comunidad Homosexual Argentina, 2010)

An illustrative incidence underscores the fundamentally contrasting discursive opportunity structures faced by the Catholic Church and the LGBT rights movement respectively. In 2010, a letter by Jorge

Bergolio, then-president of the Argentine episcopal conference, addressed to the Carmelita nuns of Buenos Aires, became public. In dramatic terms he warned of the dangers of gay marriage. Bergolio called the project something "the devil would be envious of", the initiative to be "provoked by the father of lies", and concluding by calling for a "war of god" against the policy (NoticiaCristiana, 2010).

Invoking such war of god, a similar rhetoric figure as used by the leaders of the dictatorship, provoked public outcry, turning public sentiments against the church and in favour of the LGBT movement. Then-Argentine President Cristina Fernandez reacted to the letter by publicly asking the cardinal to stop acting "in medieval times and times of inquisition" and used the occasion to, for the first time, state her support for the law project. (NoticiaCristiana, 2010)

In general, the numerous public interventions by the Catholic Church in the public discourse on gay marriage largely backfired as senators reacted to church involvement by expressing their explicit disapproval of church influence on the matter (Hiller, 2011, p. 144).

The women's rights movement also advocated for a secular state. Advocating for a law proposal to decriminalise abortion, la *Campaña* argued:

> Debating and sanctioning this project helps to consolidate a State that is responsible for designing and effectively executing public policies that guarantee the full exercise of the right to integral health, to the autonomy of women, who make up fifty percent of society, to consolidate a secular and democratic state that promotes freedom and respect for the beliefs of all people and to expand the horizons of our democracy. (Campaña, 2016, my translation)

On another occasion, the *Campaña* commented on a change in the civil code that established the Catholic Church as a legal entity under public law. This change in law had nothing to do with abortion, but rather the relationship between the church and state in general. The Campaña argued the Catholic privilege to be:

> A clear contradiction with the principles of equality before the law, freedom of worship and conscience and secularism of the State embodied in our Constitution and in the Human Rights Treaties incorporated into it. (…) At the National Campaign for the Right to Abortion, like other organisations that have already protested, we do not understand or accept this concession to a religious institution that has been complicit in dictatorships, with a morality rooted in the past and the main opponent of advances in the human rights of all people, but especially of women. We advocate a secular state as a fundamental premise for the furtherance of democracy. (…)This cannot be achieved by holding privileges for the Catholic Church. (Campaña, 2012, my translation)

While the women's rights movement did employ the argument of the state/church symbiosis under the military regime to advocate for a secular state, the movement did not focus as aggressively on a delegitimation of the church. This is probably the case because, other than for LGBT rights, the church is not the only or at least the main obstacle to abortion legalisation. Rather, opposition against decriminalisation is more dispersed and includes secular actors, including human rights organisations.

Legal opportunity structures in Argentina

The recently ratified international human rights treaties and the Argentine Constitution of 1994 formed the legal framework that facilitated social movements in Argentine anchoring their cause onto the national agenda. While also used as a rhetorical tool in the debates, the new constitution also proved useful for social movements to gain valid legal grounds for their human rights framing.

In the Argentine constitution of 1994, a right for filing an *Amparo*[32] was codified. An Amparo is a type of constitutional complaints procedure that carries implications for the individual case only, rather than being automatically applicable to similar cases. On the 14th of February 2008, María Rachid, president of the FALGBT, the umbrella organisation of the Argentine LGBT rights groups, and her girlfriend Claudia Castro went to obtain a marriage license from the civil registry in Buenos Aires. Upon their request being rejected, they filed an Amparo, in which they argued that their right to marriage is protected by the constitutional guaranty of equality and in the human rights treaties included in the constitution (Federación Argentina LGBT, 2014).

Due to the nature of this type of constitutional complaint procedure, if Rachid and her partner were successful, the two activists would have been able to get married, despite this going against the law and without such marriage automatically granting the same right to other same-sex couples. However, the *Amparo* was rejected in first instance, but with the help of the judicial team of the FALGBT, the case was taken to the Argentine Supreme Court. While insiders expected a favourable judgement by the court, i.e. it declaring the relevant articles of the civil code unconstitutional, in the end the court did not have to judge the case because congress contemporaneously legalised gay marriage by reforming the civil code shortly before the judgement would have been due. Thus, the issue had already been decided.

A series of successful Amparos (following Rachid's unsuccessful one) eventually led congress to pass the gay marriage bill before the constitutional court judgement. The next chapter features a detailed analysis

[32] An Amparo can be filed by individual who believe their rights as protected in the constitution, other laws and international treaties to be violated.

of the legislative process. The LGBT rights movement initiated a coordinated *Amparo* strategy, with numerous couples following the same blueprint (i.e. applying for a marriage license, getting rejected, filing an Amparo), leaving little choice for politicians but to take the issue seriously.

After the first Amparo by Rachid and Castro, LGBT rights activists Alex Freyre y Jode Di Bello were the first to be successful with their Amparo filing. Judge Gabriela Seijas at the Administrative Court of Buenos Aires declared unconstitutional articles 172 and 188 of the Civil Code on the 10th of November 2009, and ordered the Civil Registry of Buenos Aires to wed Alex Freyre y Jode Di Bello. The judge's reasoning stressed that the religious sentiments of some cannot delimit the constitutional rights of others:

> It is possible that a decision in this regard is considered by some as an affront to religious beliefs deeply rooted in one sector of our community. But in the current state of secularisation of civil institutions there is no doubt that the religious feelings of some may not be a guide to limit the constitutional rights of others. State powers cannot be called to interpret religious texts or to take sides with their assessment of homosexuality (…).
>
> [T]he civil sphere is different and independent of the religious, and this distinction protects the autonomy of the conscience, of the individual liberty and of cults that are fundamental principles of the constitutional democracy (Poder Judicial de la Ciudad Autónoma de Buenos Aires [Judiciary of Buenos Aires], 2009, my translation)

The verdict demonstrates how the new constitutional identity produced favourable legal and discursive opportunity structures for the LGBT rights movement. Without the focus on human rights in the constitution, activists would not have been able to make a case on the basis of them being denied their constitutionally protected human rights. Without the contentious relationship between religion and human rights in the Argentine context, and a secular interpretation of international human rights standards during democratisation, the court would not have taken religious influence to be incompatible with Argentine democratic identity and the rights enshrined in it basic law.

After the judgement, the path towards marriage for Freyre and Di Bello seemed clear and with high media attention, the couple scheduled their wedding for the 1st of December 2009. However, hours before the wedding was about to take place, the *Corporación de Abogados Católicos* [Catholic Lawyers Association] filed a complaint on behalf of a heterosexual couple that claimed that their wedding on the same day would be disturbed by the homosexual one. In response, the City of Buenos Aires suspended the gay wedding and passed the case on to the Supreme Court. In response, the FALGBT pointed out that the *Corporación de Abogados Católicos* also defended the "repressors" of the former military dictatorship, challenging religious influence by arguing that their mentality and action are "incompatible with democratic life" (Federación Argentina LGBT, 2014, my translation).

In light of Buenos Aires' decision to suspend the marriage, Governor Fabiana Rios (of the province *Tierra del Fuego*) offered for the wedding to be held in Ushuaia, a remote city in southern Argentina. Therefore, the first gay wedding in Latin America was held on 28th of December 2009 in Ushuaia. Argentine news agency DyN reported Bishop Juan Carlos of the city of Rio Gallegos saying: "The decision took me by surprise and I'm concerned". Furthermore, he described the wedding as "an attack against the survival of the human species" (TheGuardian.com, 2009). However, Governor Fabiana Rios rejoiced that gay marriage "is an important advance in human rights and social inclusion and we are very happy that this has happened in our state" (ibid.).

After this first gay marriage, other *Amparos* by same-sex couples delivered similarly successful results, with judges continuing to reject religious influence on public policy in their verdicts. The decision for an Amparo filed by Matín Canevaro, for instance, was justified in the following terms:

> It is essential to remember that 'according to the Argentine Constitution the state is secular, even if there is preference or privilege in favour of the Catholic cult' (…). Hence, the Constitutional Court has long maintained that 'establishing the freedom of all cults cannot be sustained (…) if the Catholic Church is a political power in our organisation, with the power to dictate laws of a civil nature such as those that rule the regime of marriage' (Rulings: 53, 188). (…) In this way it would be a violation of art. 14 of the National Constitution to coercively impose just some of the principles of the various religions that coexist in our society. (…) This is so because the National Constitution protects the freedom of all the inhabitants of the Nation who do not profess the Catholic creed, to conceive their marital relations differently than those established by that particular religion.
>
> (Poder Judicial de la Ciudad Autónoma de Buenos Aires, 2010, subsec. 9.2.d, my translation)

The fact that references to the Catholic church has such explicit mention in the verdicts demonstrates the shift in moral authority away from the church, to being subjugated to constitutionally protected human rights as the new super-value informing constitutional identity.

The events surrounding the legal strategy of the LGBT rights movement were highly visible in the media. Coverage about the couples trying to get married portrayed their personal love stories such that the whole country followed their battle for justice, love and human rights. Accordingly, this was a suitable fit with the focus on family in Argentine culture, and that of human rights in Argentine politics. In the end, the *Amparo* strategy led to the curious situation of many gay couples already being married before parliament finally decided to legalise gay marriage.

Inspired by the success of the judicial strategy to gain marriage rights, the LGBT rights movement applied the same tactic to push for LGR policy. A precedent was set by the case of trans actress Florence de la V. With the

support of FALGBT, she requested judicial authorisation to change her first name without having to have had performed genital reassignment surgery beforehand (Tabbush et al., 2016, p. 46). In light of the success of this case, lawyers of the FALGBT started to support, free of charge, other members of the trans community trying to reach authorisation for a gender change via the judiciary (Federación Argentina LGBT, 2011).

Overall, the judicial team of the FALGBT presented more than 30 *Amparos* regarding gender recognition. Judge Guillermo Scheibler who judged the third successful *Amparo* case, in line with the cause of the LGBT movement, emphasised in his judgement that,

> it is highly desirable to sanction a rule of general scope that regulates the procedure to be followed in situations such as the one in the case in order to avoid leaving those possibly interested [to change their legal gender] to the more or less broad or restrictive interpretations that may be displayed on the subject by the various operators of the legal system. (Federación Argentina LGBT, 2011, my translation)

With the judge's recommendation that legislators pass a law that would regulate LGR, the movement's strategy to politicise their claims via the judiciary realised its full efficacy.

In contrast, the women's rights movement did not use litigation as a strategy to advance abortion rights. The active judicialisation of cases related to abortion was principally used by abortion opponents who aimed to impede the performance of non-penalised abortions. The role of the women's movement in those cases consisted of investigating and dismantling the arguments the abortion opponents used in their litigation and as a result, women's rights activism in those cases took on a defensive posture (Tabbush et al., 2016, p. 46). While a 2012 Argentine supreme court ruling (case "FAL") is considered a victory by the women's rights movement because it clarified the indications under which abortion is unpunishable in existing Argentine law (Tabbush et al., 2016, p. 31), this case was also brought to the court by abortion opponents.

Due to an unclear formulation of art. 86 of the Argentine penal code, it was historically contested whether abortion remains unpunishable in the case of a violation of a mentally handicapped woman only, or if that applies to all women who have been violated. The "FAL" case was about a 15 year old minor who had been raped and then aborted the resulting pregnancy. The superior tribunal of justice in Chubut had authorised the abortion but a legal official of *Chubut* Province filed an extraordinary legal injunction on behalf of the foetus, which the Supreme Court rejected in its judgement, arguing that:

> [T]he Constitution and human rights treaties not only do not prohibit the realisation of these types of abortions but, on the contrary, prevent them from being punishable for any victim of rape in accordance with the principles of equality, dignity of persons and legality. (CIJ - Centro de Información Judicial, 2012)

Aside from that judgement in the women's movement's favour, the judiciary did thus far not play a significant role in the legalisation of abortion in Argentina. Congruent with the less favourable discursive opportunity structures faced by the women's movement, legal opportunity structures for the women's rights movement differed from the ones the post-authoritarian legal landscape offered to the LGBT rights movement. As we will see below, South Africa's new constitution already contained reproductive rights, making it easier for the South African women's movement to claim abortion rights. In Argentina, the interpretation of human rights to apply to the embryo led to an omission of reproductive rights in Argentine human rights provisions.

Furthermore, the lack of active judicialisation of abortion may also be related to the difficult match in timings of pregnancies being nine months long and court cases that pass various instances usually taking considerably longer to resolve. The matter may therefore be more difficult to adjudicate by proponents than by opponents.

6.2 Social Movements seek Refuge under South Africa's Rainbow

While democratisation and the passage of the new constitution were promising developments for social movements in South Africa, they did not represent an automatic advancement of abortion and LGBT rights within the country. Rather, social movements had to actively make use of the opportunities presented to them to anchor their claims on the political agenda.

Regarding abortion policy, the 1994 and 1996 constitutions did make reference to reproductive rights, but few negotiators were aware of its potential repercussions. The handful of politicians who did foresee its consequences mostly feared (rather than hoped) that the constitutional provisions could lead to a change in abortion regulations. That reproductive rights were mentioned in the constitutional text in the first place was due to two factors that worked in the women's movement's favour. First, the timely synchronicity of the passage of South Africa's interim constitution of 1994 with the Cairo Population Conference, which took place in the same year and stressed the link between reproductive and human rights. Second, the blurred boundaries between the ANC and civil society.

During most of its existence, the ANC was not a party but a liberation movement and with that "one of the quintessential social movements of the twentieth century" itself (Ballard, Habib, Valodia, & Zuern, 2005, p. 622). This led the post-apartheid state (led by the ANC majority) to develop and maintain cooperative relations with civil society in general. A case in point came in the form of the new government passing laws allowing the registration of NGOs and establishing public funding agencies to provide financial resources to civil society organisations. Moreover, this blurred the boundaries between the ANC as a political party and civil society organisations in democracy as the ANC was transforming into a governing party.

The permeability of boundaries between ANC and civil society manifested in the absorption of feminist activists into the party. As a result, many women MPs were feminists and had an activist background, which subsequently facilitated alliances between reproductive rights groups and feminists in the ANC-led government. As observed by Bompani (2006, p. 1141): "The dialectic relationship between state and organisations involved in the struggle had lost its own raison d'être at the moment when the political arena became populated by the same agents of the grassroots movements". The identity of the ANC as an organisation remains not one of being exclusively a political party, but still a liberation movement (ibid.) Once a coalition of feminists from civil society and within the ANC had ensured the inclusion of reproductive rights in the constitution, the issue of abortion could easily be inserted into the constitutional agenda.

Despite the constitutional protection of sexual identity in the first years of South African democracy, sodomy laws still effectively outlawed male homosexual acts, a mismatch between the far reaching constitutional protections of homosexuality while the act remained criminalised. Interestingly, it underlines an aspect of the genesis of South Africa's permissive contemporary moral regulations: the provisions in the

constitution did not the equal general political will to allow far reaching policy concessions to women and LGBT people. Rather, feminists managed to slip in some formulation on gender into the constitution which then also enabled the LGBT movement, bandwagoning on the feminist success, to have sexual identity protected in the constitution. While only the specific mention of race was set in stone due to apartheid history, once the mentioning of gender was settled, this presented the opportunity to insert even more grounds for protection. However, in the euphoria of democratisation and negotiators focusing on the more pressing issues of democratic survival, the constitutional provisions on discrimination did not represent the will of most politicians, or of the population to legalise abortion, LGR or gay marriage.

Another case in point are LGR regulations, which at first became even more restrictive under democracy than they had been before. Under apartheid, the Birth, Marriages and Death Registration Act of 1963, as amended in 1974, granted the option for transsexuals to change their legal gender after having completed a sex reassignment surgery. During democratisation in 1992, parliament passed a new Births and Death Registration Act (Act 51 of 1992) that was based on a 1976 court decision which argued sex to be a naturally determined category that, by definition, cannot be medically altered (Births and Deaths Registration Act 51 of 1992, 1992). Thus, from 1992 onwards, it was impossible for trans people to change their legal gender, thereby having democratic leaders further restrict trans people's rights rather than advancing them.

Other than in Argentina, where the national idiosyncrasy of the human rights discourse being tied up with the notion of motherhood and identity of children created different opportunity structures for LGBT rights and women's rights activism, South Africa's post-apartheid context provided more similar opportunity structures for both types of movements. While the Argentine women's rights movement's demands for abortion legalisation remained unfulfilled (standing in stark contrast to the highly successful activism of the Argentine LGBT rights movement), the South African women's movement moulded abortion policy to their preferences before the South African LGBT rights movement even gained momentum.

Discursive opportunity structures in South Africa

While during the apartheid regime abortion rights activism was low[33], women's rights groups started to organise in the early 1990s around reproductive rights issues (Albertyn, 2015, pp. 433–434). In 1992, the Women's National Coalition (WNC) formed with the aim of ensuring the inclusion of women's demands in the emerging political system (Feltham-King & Macleod, 2015, pp. 11–12). Its foundation was

[33] An exception to this represents the Abortion Reform Action Group, a small grassroots organisation made up of middle- and upper class white women, who began fighting for a reform of the restrictive abortion law in the early 1970s (Guttmacher, Kapadia, and Jim Te Water Naude and Helen de Pinho (1998)).

based on the realisation that national liberation wouldn't automatically lead to women's liberation. This was proven starkly during the CODESA negotiations, where only 23 of over 400 delegates were women (Goetz, 1998, p. 246; Waylen, 2007, p. 529).

The WNC illustrates the peculiarity of the South African post-apartheid context in the form of blurred lines between civil society and the state. It included women from the ANC as well as women from the NP, the Congress of South African Trade Unions (COSATU), civil society organisations and experienced feminist activists and academics (Goetz: 1998: 246). Thus, the WNC allowed for a "triple alliance" of activists, academics, and politicians who strategically inserted gender issues into the political discourse "at a crucial point during the transition" (Waylen, 2007, p. 525).

The coalition consisted of fourteen regional coalitions and 92 national women's organisations (Feltham-King & Macleod, 2015, pp. 11–12). The WNC was not only nationally unprecedented in size but, according to Goetz (1998, p. 246), globally unprecedented in its scope. "The political, racial, linguistic, and class differences between these groups were tremendous", making the coalition unsustainable in the long run after having fulfilled its primary goal of lobbying for the inclusion of women's demands for gender equality in the negotiations for a new South Africa in the early 1990s (ibid.).

Despite being short-lived, the WNC did fulfil its purpose, making political parties aware of an organised women's constituency and achieving the inclusion of a women in every delegation for the MPNP process. It was also responsible for the successful insertion of non-sexism in the constitutional principles and, most importantly, the inclusion of gender equity into the draft constitution of 1994 (Goetz, 1998, p. 247; Waylen, 2007, p. 532). After the first democratic elections of 1994, the WNC, like most civil society organisations, became "literally decapitated, as their leaders have moved from civil society into politics" (Goetz, 1998, p. 247). However, the concessions the WNC gained in the interim constitution would be carried over into the final constitution of 1996, enabling a framework for reproductive rights activism in the years that followed. The specific inclusion of the protection against gender discrimination in the constitution would also facilitate the lobbying of the LGBT rights movement to include sexual orientation as well.

While the WNC had pushed for reproductive rights, abortion proved to be too divisive an issue for such a broad coalition to endorse. In laying the groundwork for later activism, more specialised interest groups emerged as pivotal players in abortion activism. Other than the WNC, the Reproductive Rights Alliance (RRA) founded in 1995 and was explicitly based on a prochoice position (Waylen, 2007, pp. 537–538). The RRA was a sectoral alliance of women's organisations that allied with women in the ANC and government (Albertyn, 2015, p. 434). The human rights frame for reproductive rights formulated by the RRA gained credibility through three factors. First, it mirrored the language of the Beijing Women's Conference, as well as the Cairo Population Conference. The ICPD took place in 1994, the same year as

South Africa held its first democratic elections and passed the interim constitution, conveniently reminding the government of the connection of reproductive and human rights at a pivotal time of the transition.

Second, South Africa had recently ratified the bulk of its international human rights treaties, lending additional weight to issues that could be framed as human rights matters. A submission to the Constitutional Assembly of the Women's Legal Centre in behalf of the RRA demonstrates how it took advantage of South Africa's newly-minted human rights commitments:

> The right to make decisions concerning reproduction has also been established as a basic human right in international law by the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): a treaty which South Africa has recently ratified. (Women's Legal Centre & Reproductive Rights Alliance, 1996)

Third, human rights organisations not only validated the RRA's frame through approval but some even became part of the RRA as was the case for Lawyers for Human Rights (LHR) and the Human Rights Committee (HRC).

The specificity of the post-apartheid government's legitimation strategy in constructing South Africa's nascent political identity on the basis of secularly interpreted human rights helped the RRA defeat the pro-life lobby's most powerful argument; that a majority of South Africans opposed abortion on demand. The RRA countered such arguments by contending "that democracy is not equivalent to majoritarianism and that a democracy committed to fundamental rights [as South Africa claims to be] must protect the interests of minorities and disadvantaged groups" and further stating that decisions "must be guided only by human rights principles and not majoritarian demands." (Women's Legal Centre & Reproductive Rights Alliance, 1996)

The RRA combined the strategic human rights frame with the argument that free decision making in reproductive matters is "essential to a democratic system of government", presenting it as "the absolute prerequisite for the legitimacy, acceptability and efficacy of our system of self-government" (ibid.). This illustrates how the RRA threatened to challenge the government's constitutional identity construction of being a human rights abiding democracy if delegates were not to include reproductive rights in the final constitution. In other words, the pro-choice lobby was successful because it argued that without fulfilling its demands, the South African political system was not what it claimed. The RRA reasoned that "democracy is achieved when all citizens equally participate in the democratic process. The barriers to controlling reproduction faced by South African women, and the social consequences flowing from those barriers, result in women's democratic participation being severely diminished." (ibid.)

The strategic framing by the women's rights movement granted feminist demands access to the political system and facilitated the minister of health (herself an acclaimed feminist with pro-choice positions) establishing a parliamentary committee in 1996 to change the restrictive abortion law of 1975. The RAA was both formally and informally involved in that process, and made use of its contact with MPs within the framework of the WNC. With the establishment of a parliamentary committee, abortion reform within a rights framework was firmly anchored onto the political agenda. As noted by (Albertyn, 2015, p. 446), the fact that state support for abortion was remarkably consistent despite a growing pro-life movement and ANC intra party dispute over the matter suggests "gender equality and women's human rights remained an important measure of democratic progress for the government".

In short, "the existence of a women's coalition such as the WNC was not sufficient in itself to influence the transition process", but its success was a function of the opportunity structures it faced (Rebouche, 2011, p. 3). The significant influence women's rights organisations could exert during the democratic transition was "due to the desire of those engineering the new democracy to break with the discriminatory policies of the past and to incorporate international human rights norms into the new Constitution" (ibid). In the absence of a legitimately-perceived religious counter discourse, the new government's commitment to human rights and democracy subsequently allowed for the successful politicisation of abortion.

The LGBT rights movement. LGBT rights activism was virtually absent during most of the apartheid regime, with the first groups starting to form only in the 1980s. Among the first that emerged were the organisation Lesbian and Gays Against Oppression (LAGO) and Gays and Lesbians of the Witwatersrand (GLOW), founded in 1986 and 1988, respectively. Given the criminalisation of same-sex sexual activity under religiously conservative apartheid policies, the groups positioned themselves in opposition to the apartheid government (Vos, 2007, p. 435). This facilitated the LGBT rights movement's post-apartheid framing of their struggle as part of the greater socio-political struggle for democracy. As Vos (2007, p. 436) underlines, "[g]ay men and lesbians could refer to this struggle and show that their struggle fitted the same frame, was part, in fact, of the same larger struggle for human rights and the emancipation of the oppressed".

As was the case for the women's rights movement, the LGBT rights movement's framing strategy reflect the discursive opportunity structure of South Africa's transition context. For instance, a representative of GLOW argued:

> In South Africa, gay liberation is charged with distracting from the struggle for a democratic non-racial future. The same charge used to be levelled at the women's movement. Both have subsequently proved that our struggle against oppression can enhance, not divide the offensive. GLOW, like the women's movement, believes that 'None Will Be Free Until All Are Free'. (as quoted in Vos, 2007, p. 436)

Similarly to the women's rights movement, the LGBT rights movement set up a specialised organisation, the Equality Foundation, to lobby for the enumeration of sexual identity as grounds for the protection from discrimination in the interim constitution, which strategically downplayed the potential repercussions this inclusion could have for family law later on (ibid., p. 438). The first success for the movement was the inclusion of sexual identity in the constitution of 1994. By now, a couple of years into the transition process, the government's identity construction based on secularly interpreted human rights was in full swing, leading the LGBT movement to push for a human rights frame for their demands.

At the First National Gay and Lesbian Legal and Human Rights Conference held in Johannesburg in 1994, around 70 organisations joined to form the National Coalition for Gay and Lesbian Equality[34] (NCLGE). Strikingly similar to the RRA as the main protagonist of abortion reform, the NCLGE was made up of LGBT as well as human rights organisations. The NCLGE's approach was to publicise the recognition of all forms of oppression, and campaigning for equality for all (Mtetwa, 2013). Using the emphasis the government put on the human right to equality, the Coalition's framing took a page from the government's racial equality agenda that the women's rights movement was already riding successfully. A prime example is the NCGLE's submission to the Constitutional Assembly in which it outlines that discrimination of the basis of sexual orientation "displays the same basic features as discrimination on the grounds of race and gender" (National Coalition for Gay and Lesbian Equality, 1995, p. 8).

It was the specific aim behind the foundation of the NCLGE to ensure that the non-discrimination clause would remain in the final constitution of 1996. Later on, it would also manage a strategic litigation process that would lead to the legalisation of gay marriage (Vos, 2007, p. 439). Other than abortion reform that was passed soon after democratisation, gay marriage entered the political agenda only years later. This is due to the fact that gay marriage was not yet a popular concept at the time, not just in South Africa but all over the world. Only a couple of years earlier in 1989 had Denmark, the first country worldwide, introduced a registered partnership regime that granted limited rights to same-sex couples; and when South Africa legalised abortion in 1996, it was still five years to go before the first same-sex marriage law in the world came into effect in the Netherlands in 2001.

A specialised trans rights movement. While many groups within the South African LGBT movement claimed to represent LGBT interests, the focus was largely on the rights of gay men and lesbians, resulting in a relative marginalisation of trans rights, even within the movement. Nevertheless, in

[34] The NCLGE changed its name in 1999 on and subsequently operated under the name Lesbian and Gay Equality Project (LGEP), only to change again into the LGBTI Joint Working Group later on.

some LGBT groups trans mobilisation did take place. The Triangle Project, Out in Pretoria, and the Durban Lesbian and Gay Community and Health Centre were among those formed. Other than in Argentina, where the same organisations pushed for gay marriage and LGR, the South African movement eventually differentiated into groups mostly concerned with LGB issues and more specialised trans and intersex organizations from the mid-2000s onwards.

Among these specialised groups were the Intersex Society of South Africa (ISOSA), founded in 2000; the Cape Town Transsexual/Transgender Support Group, founded in 2002; and Gender DynamiX (GDX), founded in 2005. Building on the early gains of the broader movement, such as the popularisation of sexuality matters as human rights and the inclusion of the equality clause in the constitution, trans and intersex activists quickly managed to move "law and society in visible ways" (Thoreson, 2013, p. 650).

Trans rights groups played on the pride and identity that had become attached to South Africa's new constitution. The Transgender/Transsexual Support group closed a submission to parliament with the words:

> South Africa's Constitution is among the most progressive in the world. We believe that our country could also be among the leading in the world when it comes to the legal acknowledgment of the rights and needs of trans and intersexed people. (as cited in Thoreson, 2013, pp. 657–658)

Following the path of the women's and the broader LGBT rights movement, human rights and democracy featured prominently in trans groups' arguments. A trans activist's submission to parliament illustrates this point:

> I am Simone Heradien, a post operative transsexual having had the triadic procedures which is real life experience, hormone therapy complemented with all the necessary and desired surgery to reassigning myself to the gender that I was born, during 1994 when the political term reconstruction and development was the buzz word. I decided to follow suit (as cited in Thoreson, 2013, pp. 657–658).

A human rights framing is particularly visible in the work of GDX that aims to ensure "that transgender struggles do not fall off the LGBTI and broader human rights agenda." (Gender DynamiX, 2015) GDX presents its vision "to be a key role-player toward the realisation of all human rights of transgender and gender nonconforming people within and beyond the borders of South Africa", and its mission as follows: "Using a human rights framework, Gender DynamiX undertakes to advance, promote and defend the rights of trans and gender nonconforming persons in South Africa, Africa and globally. " (Gender DynamiX, 2015)

Convincing specialised human rights institutions within the South African state that were created during democratisation (such as the SAHRC) of the need for protecting the human rights of trans people was perhaps the most important strategy of trans advocacy. This is because those human rights organisations had become strong supporters of the trans movement, which was in accordance with the general trend of international human rights discourse to reframe sexuality and gender as human rights issues in the 1990s.

Accordingly, this helped to push sexual rights policy onto the political agenda and tightened the rhetorical trap for politicians to vote for the passage of LGR policy subsequently. For example, SAHRC argued that its support for a change in LGR regulations was based "on the founding values of our democracy enshrined in our constitution of human dignity, the achievement of equality and the advancement of human rights and freedom" (Thoreson, 2013, p. 663).

Discursive barriers to religious influence. Thus far, it has been shown how both the women's and LGBT movements' framings were a product of the dominant political-ideological climate of South Africa's post transition context. At this point, it has been established how the international normative context of the time and the government's constitutional identity construction worked in tandem to render the movements' framing credible and their demands legitimate. But how did the ideological context shape the fate of those opposing permissive regulations of abortion, same-sex marriage and LGR?

During the early 1990s, as sections of the women's movement started to focus on reproductive rights, a strong pro-life lobby formed. In an effort to impede the inclusion of reproductive rights in the constitution, more than 20 anti-abortion groups organised under the National Alliance for Life, lobbying and holding demonstrations (Guttmacher et al., 1998, p. 193). Up to the last minute, they tried to prevent the reference to reproductive rights in the constitution's final text. Christians for Truth, the Dutch Reformed Church, United Christian Action, and African Christian action, to name but a few, were among the organisations who filed submissions to the Constitutional Court arguing not to certify the constitutional text, in hindsight correctly, fearing that this would open the door to a reform of the abortion law (Women's Legal Centre & Reproductive Rights Alliance, 1996).

Most religious organisations in South Africa opposed abortion. The DRC had also promulgated during apartheid that the white population must increase in order to maintain its supremacy and secure South Africa's existence as a Christian Western country (Guttmacher et al., 1998, p. 192; Rebouche, 2011, p. 8). Apart from a general delegitimation of religious influence on public policy after democratisation, religious framings of abortion subsequently arose particular suspicion. The DRC's mixture of religious and racist population control arguments had irrevocably entangled the abortion issue with race, and a continued ban of abortion was associated with the religio-racist policies of the apartheid state (Guttmacher et al., 1998, p. 192).

This context provided the pro-choice and pro-life lobby with very different opportunity structures, leading to rapid, overwhelming success for the pro-choice lobby and a resounding defeat for those defending pro-life arguments. Considering that South Africa was and is a deeply conservative, religious and patriarchal society, it would be safe to say that without the unique window of opportunity provided by the transition context, abortion reform would not have been possible.

These differential opportunity structures faced by those pushing religious frames, vis-à-vis those employing a human rights frames, also applied to LGBT rights activism. As observed by (Vos, 2007, p. 442), "the prevailing political climate prohibited mainstream constitutional players from opposing the granting of rights to historically marginalised groups." As a result, claims for equality were hard to ignore for politicians. Moreover, remedying racial oppression was the primary concern of most parties at the time and LGBT rights were thus, "not a make or break issue for any political party, bar ACDP, and the statements by this party were so over the top that it alienated other political actors who might have had doubts" (ibid). This strongly reminds of the fate of religious arguments inserted into the debate in Argentina that, in the ignorance of a transformed political climate, seemed anachronistic and alienated those politicians who were still unsure of their position.

How religious arguments were disqualified in debates in South Africa can be seen in the verdicts of courts when deciding on matters brought forward by the LGBT movement. When declaring the prohibition of male sodomy unconstitutional in 1998 (NCGLA vs Justice), the constitutional court argued that while the constitution protects the right of individuals to disagree or condemn homosexuality based on their religious views, the state ought not to endorse a particular belief system (Constitutional Court of South Africa, 1998, para 137).

In the landmark case that paved the way for gay marriage policy (Fourie vs Home Affairs), South Africa's history of religiously based state interference in the intimate relations of the population served as a justification to reject the validity of religious interventions. In counterarguments brought forward by religious groups that the definitional characteristic of marriage is procreation, the court countered that "[a]lthough this view might have some traction in the context of a particular religious world view, from a legal and constitutional point of view, the Court found, it could not hold " (Constitutional Court of South Africa, 2005a) Additionally, the Court repudiated the argument of marriage being by its very nature a religious institution, and thus changing its definition would violate the right to religious freedom. Here the Court reasoned that in a democratic society, this argument is invalid:

> [T]he acknowledgement by the state of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages. The constitutional claims of same-sex couples can accordingly not be negated by invoking the rights of believers to have their religious freedom respected. The two sets of interests involved do not collide, they co-exist in a constitutional realm based on accommodation of diversity. (Constitutional Court of South Africa, 2005a)

A particular passage in the reason for judgement sums up the constitutional court's position regarding religious claims to impede equal marriage rights: "The religious beliefs of some cannot be used to determine the constitutional rights of others." And thus, the court argued, the view of the religious majority shall not impede the human rights of a marginalised minority. That the court's attitude is a direct consequence of the state/church ideological symbiosis during apartheid is illustrated by the fact that it mentions that,

> any endorsement by the State today of Christianity as a privileged religion not only disturbs the general principle of impartiality in relation to matters of belief and opinion, but also serves to activate memories of painful past discrimination and disadvantage based on religious affiliation. (Constitutional Court of South Africa, 2005a)

Legal opportunity structures

The women's and LGBT rights movement in South Africa benefitted from making use of discursive opportunity structures and complemented this strategy, to varying degrees, with the exploitation of legal opportunity structures. The importance of strategic litigation for policy reform varies between the three policies observed in the previous section. While pivotal to achieve the legalisation of gay marriage, legal channels played only a minor role for LGR policy reform. When it came to abortion reform, the role of the court did not feature for the passage of the 1996 abortion law but favourable legal opportunity structures prevented reform opponents from reversing its legalisation, as courts defended the right to abortion on several occasions against legal challenges from conservative sectors of society.

To ensure abortion law reforms, the women's rights movement did not have to make use of the legal opportunity structures presented by the new constitution and the state's international human rights commitments, as the usage of discursive opportunity structures were highly effective in pushing for abortion rights on their own. Within two years of the first democratic elections and in the same year the final constitution was passed, abortion was legalised. The details of the legislative process will be discussed in the next chapter.

Seeing the opportunity to reform abortion through the legislative process, activists chose to abstain from using courts to advance abortion rights as this "would avoid court interpretation of what a right to abortion included", enabling the women's movement to shape the drafting of the law (Rebouche, 2011).

While legal opportunity structures did not play a part in the passage of abortion reform, they prevented the pro-life lobby from successfully challenging the permissive legislation once it was passed in 1996. One year after the passage of the Choice of Termination of Pregnancy Act, the Christian Lawyers Association challenged the constitutionality of the act in a court of law by claiming that it violated the constitutional

right to life of the foetus (Christian Lawyers Association v. Minister of Health). The high court denied their motion, arguing that the foetus is not a person in the legal sense until birth and noting women's constitutional rights to reproductive decision making, thereby precluding future legal challenges of the Choice model (Albertyn, 2015, p. 441).

Two further court challenges to specificities of the Act also failed (Feltham-King & Macleod, 2015, p. 12). Among them was another case by the Christian Lawyers Association against the state, objecting to the right of women under the age of 18 to make a decision regarding the termination of pregnancy without parental consent (Mhlanga, 2003, p. 122). In light of the rule, parliament passed the Choice on Termination of Pregnancy Amendment Act 2008. Against the interest of the claimant (the Catholic Lawyers association), the law was aimed at extending the pool of abortion service providers and advancing the designation of facilities in which terminations of pregnancies can be carried out.

Far more central for the actual policy passage was the use of legal opportunity structures for the LGBT rights movement. Strategic litigation undoubtedly paved the way to marriage equality in South Africa. The first constitutional challenge (NCGLE v Justice), issued by the NCGLE and the Human Rights Commission, was focused on the prohibition of male sodomy that was still in place as one of the last legal vestiges of apartheid. The case was won as the court found that the state may not impose a particular belief system such as religious views on the whole of society. The court argued that while the constitution protects the right of individuals to disagree or condemn homosexuality based on their religious beliefs, the state ought not to endorse a particular belief system (Constitutional Court of South Africa, 1998, para 137). This judgement laid the foundation for the second constitutional challenge presented by the coalition that would deal with same-sex partnership rights. Subsequent successful challenges focused on adoption and pension rights of same-sex couples.

The jurisprudence that successively developed in those less controversial cases left little room for the court when the NCGLE fought its greatest battle yet; the case of Fourie vs Home Affairs. In its judgement, the constitutional court declared the common law definition of marriage of a union between a man and a woman to be invalid and the Marriage Act referring to husband and wife as unconstitutional. The court explicitly referred to the DRC-inspired Immorality Act that outlawed sexual contact and marriage between black and white people, noting that the constitution must be read as a remedy to such discriminatory provision of the past. The history of religiously based state interference in the intimate relations of the population served as the justification for a secular interpretation of South Africa's human rights commitments (Constitutional Court of South Africa, 2005a).

The judgement required parliament to pass new legislation within a year to remedy the unconstitutionality of the marriage act that would grant same-sex couples the same rights and status enjoyed by heterosexual

couples. If parliament failed to do so, the existing marriage act would automatically be amended to include same-sex couples. This demonstrates how few options there were for legislators, other than proceeding along the path towards permissiveness.

Without the backing of successive legal rulings, it is unlikely that parliament would have legalised gay marriage in light of the widespread opposing views in the population. As noted by Thoreson (2008):

> From the earliest days of the post-apartheid era, the movement recognised that coherent, principled rhetoric rather than the support of the masses was the key to success. The reliance on legal battles was not wholly a matter of choice; the movement's lobbyists acknowledged from the outset that they could 'not win by counting numbers in any straw poll' and that their agenda was 'one of principle and [they needed] to constantly position it in that way'. Compared with other post-apartheid movements, the GLB movement has been especially effective at mobilising ideological and organisational resources in the judicial and parliamentary arenas (…). (Thoreson, 2008, pp. 685–686)

Strategic litigation also played a role for LGR policy passage. Indirectly, the litigation brought forward by the broader LGBT movement reinforced the human rights framing adopted by the latter forming more specialised trans interest groups. For instance, in the case National Coalition for Gay and Lesbian Equality v. Minister of Justice, the court clarified that the constitutional protection for sexual orientation includes gay, lesbian, bisexual, and trans persons (Thoreson, 2013, p. 651). Secondly, litigation was important in bringing LGR onto the political agenda. However, in stark contrast to gay marriage, litigation became irrelevant in later stages of the policy process.

While far less publicised, the LGR bill also entered the parliamentary arena in 2003 largely due to litigation against the Department of Home Affairs (Deyi et al., n.d., p. 12). The paradoxical legal situation for trans people not being allowed to change their legal gender anymore prompted legal conflicts between the Department of Home Affairs and individuals, who were at the time not yet acting collectively as a movement. The Department had received a report of the South African Law Commission as early as 1995, suggesting to create a legal framework for gender recognition. However, the project languished with the Department for 7 years, only to be reintroduced in 2003 so that the Department would not have to deal with the increasing number of court cases against it (Vundla, 2003). The reintroduction of the bill catalysed the formation and mobilisation of the trans rights movement. The emerging specialised trans rights groups then successfully intervened in the policy formulation by exploiting discursive opportunity structures, most notably by employing a human rights frame that enabled an alliance with human rights bodies within the state.

6.3 Discussion

In this chapter we have focused on the interaction between various opportunity structures and the success of movement stakeholders in abortion, same-sex marriage and LGR policy to frame their issues as in need of a solution within the political system. The theoretical mechanism posited that the new constitutional identities of South Africa and Argentina create favourable opportunity structures for stakeholders to make use of the framing and language of human rights. In light of the secular interpretation of human rights by the post-authoritarian states as a response to the repressive state/church symbioses of the past, we have hypothesised this to have been a far more successful undertaking for social movements to advance their objectives for equality and non-discrimination than for institutionalised religion and associated organisations.

As a first test for the existence of the mechanism, we have reviewed the framings of the social movements involved in the policy processes. In a remarkably similar fashion, the LGBT rights movements in South Africa and Argentina (as well as more specialised trans groups and the women's movement in South Africa) have framed the legislative status quo as a violation of human rights and inclusive policy change as essential for both countries to portray the kind of democracy the government had espoused. In both South Africa and Argentina, social movements challenged the democratic identities of the government if their rights were not to be granted. Examples of these include the CHA in Argentina arguing that, "With Discrimination and Repression There Is No Democracy" and the South African women's rights movement and the LGBT rights movement asserting that, "None Will Be Free Until All Are Free."

As an exception to the generally successful human rights framings by social movements in both countries stands the women's rights movement in Argentina that, despite its use of human rights framing comparatively late employed various other frames, with public health being the most prominent. As Tarrow (1992) asserts, frames are flexible and groups adjust them according to the specific opportunities available to them. Frames contain specific metaphors and symbolic representations to cast issues in a specific light and serve the purpose of convincing others to support the group's claims. Thus, the contrasting framing of Argentina's abortion lobby must be regarded as a product of different opportunity structures faced by the women's rights movement in Argentina compared to the other groups. This difference in opportunity structures was founded on the focus of motherhood and the rights of children in the Argentine human rights movement, and the failure to politicise abortion was thus not contributable to church success but the specificities of the Argentine human rights discourse that has its roots in the dictatorship.

Apart from this exception, the frames employed by social movements to advance their claims regarding sexual rights policy were remarkably similar, despite the geographical distance of the two continents, different cultures and languages. Overall, similar strategies and framings by social movements in both countries suggest the presence of a common causal mechanism being at work, or more specifically, the

presence of similarly conducive discursive opportunity structures. However, as argued in chapter 3, globalisation and transnationalisation of social movements could also affect framing strategies and therefore, having found human rights and democracy frames can only slightly increase our confidence in a common mechanism; or in process tracing language, these findings only constitute the passage of a hoop test.

Another consideration for the certainty of the presence of a common causal mechanism (and what strongly suggests a causal link between the previous parts of the mechanism and the social movement activities and successes reviewed in this chapter) is the overwhelming support from human rights organisations and institutions received by social movements. In Argentina, highly respected human rights organisations actively supported the LGBT movement, such as by signing petitions for same-sex marriage. This support validated the movement's claims and lent great credibility to the human rights framing, raising the discursive leverage of a minority movement, which is in essence what the LGBT rights movement represents. In South Africa, human rights organisations even became part of the coalitions that cemented sexual rights onto the political agenda.

Furthermore, independent state bodies created for the protection of human rights supported the social movements in both countries. This is true for INADI in Argentina and SAHRC in South Africa. As an example, SAHRC made public statements about the lack of LGR policy in South Africa being akin to human rights violations and subsequently became a co-claimant in strategic litigation cases by the LGBT movement. INADI in Argentina intervened in the debate explaining that a partnership regime would amount to discrimination and only by legalising gay marriage would the human rights violations faced by gay couples be remedied.

The support by human rights organisations in civil society and independent human rights bodies within the state presents smoking gun type evidence for the focus on secularly interpreted human rights in the constitutional identity forming conducive opportunity structures for movement action. In a context in which human rights and religion were not as separated as in post-authoritarian South Africa and Argentina, a human rights framing of sexual rights would not have been created and reinforced so willingly by state institutions and civil society. Rather, the overwhelming support can only be explained by the movements' framing complementing the meta-narratives of democratisation and constitutionally protected human rights that prevailed in political discourses of South Africa and Argentina after the regime transition.

Were it not for South Africa's unbreakable commitment to human rights through the passage of the new constitution and the creation of independent monitoring bodies such as the Human Rights Commission, social movements would not have had the material to build successful discursive and legal traps set for politicians and parties. In hindsight, this led to the politicisation of issues that most politicians would not have otherwise dealt with. Likewise, in Argentina, without the split between human rights groups and the Catholic Church, with the former forming in response to the lack of church support for the victims of

oppression in Argentina's dictatorship, the Argentine human rights movement would not have been able to demonstrate as much strength and resilience nor been as willing to embrace a secular interpretation of human rights that included LGBT rights. Rather, the alliance between the human rights movement and the LGBT movement was an easy fit in Argentina because both were united by a common history of religiously legitimated oppression. The constitutional identities provided fruitful discursive grounds for these alliances to plant the seeds for policy change.

For the presence and successful exploitation of legal opportunity structures, court decisions in the movements' favour as products of strategic litigation provide smoking gun type evidence. Gay marriage is the prime example of legal means employed by social movements in both countries. Without the legal basis in the form of constitutions and international human rights commitments, engaging with courts would not have proven as advantageous for movement actors. Thus, their successful judicial battles count as evidence for conducive legal opportunity structures.

Apart from the human rights framing by interest groups and the way this resonated with the broader civil society and independent human rights bodies within the state, the final piece of evidence is the way in which religious arguments were dismissed from the debates by challenging churches' moral authority. In Argentina, the LGBT rights movement was almost as focused on exposing the church's past and present immoral behaviour as it was in lobbying for its actual cause. There were many cases of abuse scandals of Bishops featured on their websites and alliances with civil society organisations who lobbied for separation of church and state, all the while continuously underlining the moral shortcomings of the church during the dictatorship. In verdicts for judgements given by Argentine and South African judges in relevant court cases, judges explicitly dismissed religious arguments as inappropriate for a democracy, and occasionally even referenced the immoral influence churches have exerted in the past.

For example, a court in Buenos Aires rejected the influence of the Catholic Church on same-sex marriage, arguing that, "the civil sphere is different and independent of the religious, (…) [this belongs to the] fundamental principles of the constitutional democracy" (Poder Judicial de la Ciudad Autónoma de Buenos Aires, 2009, my translation). On another occasion, an Argentine court ruled that "the National Constitution protects the freedom of all the inhabitants of the Nation who do not profess the Catholic creed, to conceive their marital relations differently than those established by that particular religion." (Poder Judicial de la Ciudad Autónoma de Buenos Aires, 2010). In South Africa, the constitutional court rejected religious influence on marriage by stating that, "[a]lthough this view might have some traction in the context of a particular religious world view, from a legal and constitutional point of view, the Court found, it could not hold " (de Vos 2007:456). As the quotes preceding the introduction of this chapter illustrate, courts in both countries found that in a democracy, religious sentiments of some never justify limiting the rights of others.

Perhaps the clearest empirical traces left behind by the causal mechanism reveal that the discursive and legal opportunity structures merged to impose barriers to religious influence and foster the causes of social movements, and not just despite but precisely because of the dominance of churches in national identity and moral matters of the recent past.

In summary, there is sufficient evidence to conclude beyond reasonable doubt the constitutional identities that emerged in the post-authoritarian context provided a set of opportunity structures conducive for actors who could frame their claims as human rights issues, and that such human rights claims were generally easier to formulate for social movements than for institutionalised religion and associated organisations. We have observed a close mirroring of the symbols and language employed by social movements of the specific constitutional identity constructions of the democratic government. The case of abortion in Argentina underlines, rather than challenges this point. While generally social movements in both countries feature strikingly similar characteristics in terms of logic of argument and strategy, the way in which the framing battles played out also reflect specificities of each national context. While the focus on human rights and equality was particular prominent in South Africa due to the racial inequalities of the past, a unique feature of the Argentine human rights discourse prevented a human rights frame of abortion to become dominant in Argentina. On the other hand, the focus on children and identity in Argentina was an important opportunity for trans activism as their claims for the recognition of identity resonated with the broader human rights discourse.

The association with the past regimes disqualified religious institutions and arguments based on religious dogma from shaping the political discourse on sexual rights policies in Argentina and South Africa. As we will see in the following chapter, viewed through the lens of secularly interpreted human rights, rather than from a religious standpoint, policy makers responded to demands for sexual rights with passing permissive bills directly drafted by the social movements themselves.

7 Mechanism Part 3. Parties and Politicians face Rhetorical Entrapment

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"What an important evening for the history of human rights in Argentina and probably the region!"

(MP Alonso in the final debate on the LGR bill, Chamber of Deputies Parliament of Argentina, 2011, my translation)

"[E]very constitutional expert that we have met in the committee agrees with us that there is no getting away from the rights of these individuals because it's entrenched in the Constitution. You cannot run away. It's something that is given and it's something that we have to live with. So obviously, you gave it; you were part of the constitution-making process (…). When we adopted that Constitution, all of us stood there – there is a nice picture outside, showing that you are there – confirming that we will respect and uphold the supreme law of the country which is the Constitution."

(MP Chauke in final debate on same-sex marriage bill, South African Hansard for 14 November, 2006)

The framing and strategy employed by social movements to push for their claims in post-authoritarian South Africa and Argentina resulted in a rhetorical and sometimes also legal, trap for policy makers. Framed as a human rights issue and often claimed in courts, it was almost impossible for political parties and politicians to oppose the passage of more permissive abortion, same-sex partnership and LGR policies without undermining the credibility of their commitment to each of their nascent democracy's post-authoritarian values. Transforming a necessity into a virtue, politicians even began using support for social movements' policy demands as a means of affirming their own commitment to newly emerging constitutional identities.

The theoretical proposition of this final part of the mechanism is as follows: the demands of social movements are increasingly supported by individual politicians and parties because the movements' framings resonate with the constitutional identities which have formed as a response to the previous authoritarian regimes and their alliance structures. While in previous chapters we have explored the ways in which

these democratic identities were constructed by the political elite and with the strategies of social movements making their case on the basis of the opportunities presented to them, this chapter examines the parliamentary arena as the final link that leads to policy output.

As we shall see, despite large sections of South Africa's and Argentina's population and many politicians privately opposing policy reforms, political actors and organisations started to publicly ally with the social movements. Across the spectrum in both countries the collaboration with social movement actors led to the introduction of bills into parliament that were often drafted by organisations within the movements themselves. The framing, as well as constitutional court decisions on these issues, limited the space for appropriate policy design, leaving little choice for politicians but to conform to the far-reaching demands of social movements, rather than opting for less permissive regulations.

In an attempt to reconcile the permissive sexual rights bills with their own religious beliefs (as well as those of a large portion of the population), politicians stressed that the secular character of the state is that which must be separate from the influence of privately held religious beliefs. Somewhat ironically, political support for the policies turned into an homage to the new democracy, despite the oppositional stance of certain demographics. As an example in Argentina, politicians argued the legalisation of gay marriage helps to deepen democracy because it protects the rights of a minority from a hostile majority. In South Africa, the minister of defence contended that gay marriage makes society more democratic and tolerant. In both contexts, politicians argued that granting the demands of the social movements was a logical step in the wake of new constitutions and international human rights commitments.

7.1 Sexual Rights as an Affirmation of Argentine Democracy

On the 5th of May 2010, following months of debate, media coverage and an extended session in the National Congress watched by the whole country, same-sex marriage was legalised in Argentina. Shortly afterward, the gender identity law was passed on the 9th of May 2012. Less successful was a bill on the voluntary interruption of pregnancy that was presented to the Chamber of Deputies on four occasions (2007, 2010, 2012, 2014). Even though the bill was discussed in the parliament's commission of penal legislation more than once, as well as gaining increasing support from legislators, it never reached sufficient support to be passed on to the plenary (Tabbush et al., 2016, p. 29).

The successful passage of the same-sex marriage and gender identity bills as well as several unsuccessful attempts to legalise abortion took place during the presidency of Cristina Fernandez de Kirchner, who was leading the governing party F*rente para la Victoria* (FpV). The FpV was formally a faction of the PJ, i.e. the Peronist Party). The FpV was first led by Nestor Kirchner (2003-2007), followed by his wife Cristina from 2007 to 2011 in her first term and from 2011 to 2015 in her second term as president.

As mentioned in chapter two, Peronism cannot be classified on a left/right axis, but rather straddles a multitude of ideological positions, including leftist, right-wing and conservative stances united by a populist leader cult. The Kirchners are considered to belong to the progressive wing of Peronism (Tabbush et al., 2016, p. 27). Argentina has a presidential political system which grants a high importance the policy position of the president. Cristina Fernandez de Kirchner supported the same-sex marriage and gender identity bills while publicly opposing abortion.

The party system is an eroded two-party system and does not include any religious parties. The national legislature consists of a bicameral congress: the Chamber of Deputies and the Senate, the latter representing the various states that make up the Federal Republic. Both same-sex marriage and LGR policies needed the approval of both chambers to become national law.

Until 2009, the governing bloc FpV had a majority in both chambers. Gay marriage and LGR, however, were legalised after mid-term elections in June 2009, during which the FpV had lost its parliamentary majority. Five months later, the same-sex marriage law was the first to reach quorum in parliament, in a situation of legislative deadlock. According to Hiller (2011, p. 137), this resulted in an interest shared by all parties to demonstrate a functioning parliament through the successful passage of the bill. Both of the policies advocated by the LGBT movement were voted according to the individual conscience of the legislators, freeing the vote from party discipline and reducing the influence of party ideology on the policy processes.

The strategic framing of the LGBT rights movement, which involved presenting their claims as human rights issues, gave the movement enormous discursive leverage as it elevated the lack of LGBT rights from

a problem affecting a small subsection of the population to a problem of Argentine democracy as a whole. As analysed in the preceding chapter, the women's rights movement faced less favourable opportunity structures and subsequently introduced comparatively less clear problem frames into the debate. The differentiated opportunity structures for the two movements resulted in wholly different reactions by legislators. While the human rights frame of the LGBT rights movement was difficult to resist for politicians, the human rights frame of abortion opponents had the same effect, but rather to the disadvantage of the women's rights movement's claims.

Same-sex marriage

The LGBT movement's strategic framing of their claims as human rights issues led to its acceptance in the mainstream political system. For instance, when celebrating the 58th anniversary of the Universal Declaration of Human Rights in 2008, the Argentine parliament invited various representatives from human rights organisations. On that occasion, the CHA was recognised, together with individual human rights activists such as Estrela Carlotta from the *Abuelas* for their "struggle for the full validity of human rights" (Comunidad Homosexual Argentina, n.d.b).

This explicit recognition of LGBT rights as human rights by the political system created a rhetorical trap for politicians when the topic of gay marriage arrived on the scene , since opposing the bill would now equate to opposing human rights; a conundrum for elected officials considering the oppositional stance of a great portion of the electorate. The Amparo strategy of the LGBT rights movement successfully created a legal trap in addition to the rhetorical. On the 12th of November 2009, the first judicial case in favour of two men wanting to marry was decided. The court decision reinforced the movement's human rights framing and presented the issue as a problem that needed to be resolved by the state.

None of the political parties had included the legalisation of gay marriage in their party agendas or manifestos, and neither the LGBT rights movement nor the Catholic Church had a natural ally among the strong parties represented in parliament. As a result, the LGBT movement focused on convincing individual politicians rather than parties as a whole. The first step was to identify potential allies by sending out questionnaires to MPs. An activist recalls:

> When we started to call the offices of MPs about a questionnaire we had sent out on gay marriage and gender change, the majority told us: 'But this topic is not on the agenda, this topic is not even treated in commissions. The delegate does not have a formed opinion.' And then we thought, 'well, apparently there is the concrete necessity to put this on the agenda because until this is not put on the agenda, no one defines their vote.' (activist Esteban Paulón as cited in Hiller, 2011, p. 141, my translation)

Eventually, the issue did enter the parliamentary agenda through individual politicians across the political spectrum collaborating with the LGBT movement. The bill that would change the civil code was introduced by delegate Vilma Ibarra, member of the political party *Nuevo Encuentro,* in 2009. Activists interviewed by Tabbush et al. (2016, p. 33) asserted that Ibarra's office transformed into a space of action for the FALGBT. The LGBT movement had strategically lobbied legislators so that the presidents of both relevant parliamentary commissions - Vilma Ibarra heading the Commission of General Legislation [*Comision de Legislación General*] and Claudia Rucci (*Peronismo Federal*) heading the Commission of Family, Childhood and Adolescence [*Comision de Familia, Nines y Adolescencia*] - followed a concerted approach to include the issue in the parliamentary arena (Hiller, 2011, p. 115; Tabbush et al., 2016, p. 33).

While in 2009 the bill on same-sex marriage did not yet receive the necessary support in the relevant parliamentary commissions, an interparty alliance in support of the bill started to form in early 2010. During a February 2010 press conference, legislators from various parties made known their intention to vote in favour of the bill, some of them speaking as representatives of their party or coalition (*Proyecto Sur; Solidaridad e Igualdad; Socialismo*), while others spoke on their personal account, such as MP Adrian Perez of the *Coalicion Civica* (Hiller, 2011, p. 136).

On the 4th of May 2010, the two relevant commissions then passed on the proposed bill to parliament, where it was discussed one day later in Congress. By the time the bill reached Congress, five homosexual couples were already legally married due to the Amparo strategy of the LGBT rights movement. Each of these weddings was covered by national media in great spectacle.

INADI used its political clout to fight off propositions for a partnership regime in order for gay marriage to be legalised rather than a regime with fewer rights. During a press conference, INADI declared that a partnership regime, "proposes distinctions that are repugnant to the constitutional prohibition of discrimination", and therefore gay marriage constituted the only suitable measure to establish equality and end discrimination. Furthermore, the director of INADI claimed a partnership regime to be comparable to apartheid in South Africa creating separateness, which is never free from discrimination (Vallejos, 2010). Such involvement in the debate by a government institute reinforced the movement's human rights framing.

Overall, politicians were facing the accumulated pressures of:

- state institutions (such as INADI) calling for the legalisation of gay marriage
- the now highly respected human rights movement supporting the LGBT rights movement's demands (73 human rights organisations in total supported the gay marriage bill)
- substantial media attention on cases of gay couples who already got married

- court rulings, such as the one by judge Gabriela Seijas in 2009, declaring the denial of marriage rights for homosexual couples in the Civil Code unconstitutional and stressing that the religious sentiments of some cannot delimit the constitutional rights of others.

That means that additionally to the LGBT movement explicitly calling for marriage rights and rejecting a partnership regime, it became increasingly difficult for politicians to oppose the marriage bill while at the same time credibly upholding their commitment to constitutionally protected human rights and the interpretation of these by the judiciary. Especially since the political system had already acknowledged the contributions by the LGBT rights movement to the advancement of human rights in Argentina, they faced rhetorical entrapment as apposition to granting marriage rights would have meant opposing human rights and constitutional values.

Politicians were free to decide how to vote according to their conscience as parties did not call to vote en bloque. While parties were hesitant to carry the political costs of supporting gay marriage, the rhetorical entrapment faced by politicians led increasingly more MPs to embrace the human rights frame of the LGBT rights movement and openly favour the most permissive option of granting marriage rights to same-sex couples. Relatively late down the line, also the president had begun to personally endorse the project, which, as indicated earlier in this chapter, lends considerable clout to a proposed bill in Argentina's presidential system (Tabbush et al., 2016, p. 34). Activist Maria Rachid explains the free vote with political parties attempting to shirk direct responsibility for the legalisation, fearing electoral consequences:

> In that moment liberty of conscience was given. Because there was a political decision that it was possible that the project would advance but they did not want to take responsibility as a political organisation. (…) Political organisations knew that giving liberty of conscience would advance the project. What they didn't want were the costs. (as quoted in Hiller, 2011, p. 139, my translation)

Other than parties as a whole, individual politicians started to collaborate closely with the LGBT rights movement, affirming their support for the LGBT movement's demands publicly and being the guiding voices when the marriage bill was presented for vote in the Congress and Senate. The final debates on the bill that took place in both parliamentary chambers are revealing in two respects. First, they show a close cooperation between MPs and the LGBT rights movement. Second, they illuminate how MPs reconciled their own, as well as the population's religious convictions, with legalising gay marriage.

Regarding the former point, it is telling that most MPs used exactly the same framing that the LGBT rights movement had carefully crafted in the years leading up to the debate. Thus, MPs posited that Argentina must protect the human rights of LGBT people because the constitution and international human rights commitments demand it. Like most of the delegates speaking after her, Vilma Ibarra explained in the opening statement of the debate in the chamber of deputies that:

> There is an interdiction, a prohibition of our Constitution and international treaties, in the sense that you cannot discriminate, differentiate or distinguish based on sexual orientation. (Chamber of Deputies Parliament of Argentina, 2010, my translation)

Regarding religion, Ibarra reminded the house that:

> [F]irst we want to state that what we are dealing with today is the modification of civil laws in a secular state. We are not addressing, nor could we do it, the marriage of the different religions. We do not address Catholic marriage, we do not address the marriage of the Jewish religion, we do not address the marriage of Muslims. I repeat: we are dealing with civil laws in a secular state. Chamber of Deputies Parliament of Argentina, 2010, my translation)

This shows how religion was relegated to the private sphere by politicians. Embedded in a secular constitutional identity, the framing of human rights was embraced by politicians and religious frames explicitly rejected. Another MP argued:

> The religious should not be part of our debate. But it is valid to remember that there exists in Argentina an explicit division between Church and State. Although article 2 of our National Constitution recognises the apostolic Roman Catholic cult, it is not a state religion and not everyone should profess it. There is no kind of moral union between the constitutional state of law and the Catholic religion that allows the contents of said religion to be transferred to civil society in terms of the regulation of rights (…).
> (Chamber of Deputies Parliament of Argentina, 2010, my translation)

These are examples of how the vote in favour of the bill was justified with a clear distinction between institutionalised religion and the state, the former pertaining to the private sphere and the latter to the public. This moral divorce of state and church also becomes clear in the many contributions by MPs, who did not let their privately held religious beliefs interfere with their commitment to secularly derived principles while voting. As an example stands the following quote by an MP:

> I am a fanatic of the Virgin [Mary], but my religious convictions do not impede looking at this topic from the point of view of natural law, because I am also a man of law. In positive law I have not found a single argument that would tell me that we cannot grant rights to a minority that deserves it. (Chamber of Deputies Parliament of Argentina, 2010, my translation)

The framing of affording human rights to a minority legitimised the passage of gay marriage, despite opposition in the population and relegating religion to the private sphere justified the granting of rights as demanded by the secular constitutional identity of the state. Resultantly, after a 12-hour marathon debate, the bill was approved in the National Congress on the 5th of May 2010 with 126 votes in favour, 110

opposing votes and few abstentions. Few parties with five or more seats in Congress (86% of the lower chamber) voted uniformly on the issue. Those who did were the *Movimiento Proyecto Sur* (5 seats, all in favour), the *Partido Socialista* (6 seats, all in favour) and a sub-party of Peronism, the *Partido Peronista* (6 seats, all against). All the larger parties split the vote on the issue; the governing FpV with 54% of delegates supporting the bill and the UCR with 53% of delegates against (Hiller, 2011, p. 138).

The following month, the bill was discussed in the Senate. The debate went on for many hours, starting on the 14th of July 2010 concluding with a vote at 4am the next morning. Most of the 66 senators present made use of their right to speak. The high level of engagement by legislators was due to the eyes of the country watching them during those hours. The debate was televised by various channels that cleared their schedule to accommodate the live event, some merely covering the proceedings while others broadcast the whole debate live. Outside of the Congress building, opponents of the reform demonstrated and the LGBT movement organised smaller events throughout the capital. The Senate ended up approving the bill with 33 votes in favour, 27 against and three abstentions. Again, support for and opposition to the bill cut across party lines.

Two days after the approbation of the law in both chambers, MP Cynthia Hotton presented a call for a referendum on the issue. Considering the large part of the population, especially outside of Buenos Aires, against the bill, a referendum could have well stopped the passage of the same-sex marriage bill. This initiative, however, was only supported by around 20 members of both legislative chambers and was therefore discarded (Hiller, 2011, p. 162). Corrales and Pecheny (2010) find in the circumvention of the referendum one of the most important victories of the LGBT rights movement.

That the issue was perceived as a human right of a minority is what led politicians to object to calling for a referendum. President Cristina Fernandez made known her support for the bill and her opposition to a referendum by publicly stating that she was concerned about the religious tone of the debate, and that those who call for a plebiscite do not take into account that it would be a plebiscite on a minority right. She further stated that:

> What the regulation targets is something that society already has. And I think it's fair. It is fair to recognise that right of minorities. And I think that a terrible distortion of democracy would be that the majority in the exercise of these majorities denied rights to minorities (…). We are talking about whether we are going to be a society that recognises minority rights. This is the issue (La Nacion, 2010, my translation)

Regarded as the human right of a minority, this helped to democratically justify the legalisation of same-sex marriage. One day after the passage of the bill, the president received LGBT rights organisations in the *Casa Rosada* for the first time in Argentine history (Hiller, 2011, p. 164). As a symbolic act, the state embraced LGBT rights as part of the country's democratic identity. Since then, LGBT rights are a source

of pride for Argentine politicians and serve as a discursive reaffirmation of the constitutional identity as a modern human rights abiding democracy. When LGR policy was passed two years later on, MP Augustin Rossi referred back to the gay marriage decision:

> [F]or all of us this law on equal marriage has in itself a transcendental value. I believe that with it, we have clearly put Argentina in the midst of the most democratic, tolerant and inclusive societies. For us it has also a special symbolic value. (Chamber of Deputies Parliament of Argentina, 2011)

This transcendental meaning of permissive LGBT rights would ensure the passing of the most permissive LGR policy in the world just two years after the gay marriage bill was signed into law.

Legal gender recognition

While the LGBT rights movement experienced rather similar opportunity structures when pushing for gay marriage and gender identity laws, advocating for the latter was a considerably smoother process due to the former having been passed shortly beforehand. Since the battle of frames was already decided during the policy process of same-sex marriage and the legislative decisions taken had officially affirmed state responsibility to redefine LGBT issues as belonging to human rights, the political discourse on LGR became far less polarised. The bill, according to activists and legislators, "passed like a rocket" [*salió como por un tubo*] (Tabbush et al., 2016, p. 35).

The bill was first introduced to parliament by a multiparty coalition of delegates who worked closely with the LGBT rights movement. In 2009, this handful of early collaborators from across the political spectrum presented the gender identity bill to parliament by highlighting that the status quo continues to violate human rights. The text for the bill was drafted in collaboration with the *Frente Nacional por la Ley de Identidad de Género* (which included the CHA, the *Asociación de Lucha por la Identidad Travesti y Transexual (ALITT)* and other organisations and individuals). At this first introduction to parliament, the bill was described to:

> Promote the respect, the protection and the exercise of the human rights of the persons discriminated against on the grounds of gender identity, transsexuals, transvestites, transgender. (Chamber of Deputies Parliament of Argentina, 2009, my translation)

The close collaboration between politicians and the LGBT movement becomes visible in the fact that organisations from the LGBT movement virtually authored the LGR bill, and also in the numerous iterations of politicians indicating the great importance of the LGBT movement in advancing the issue. The MPs who authored the original bill introduced to parliament observed:

> All the advances related to the human rights of trans persons, be it in public policy or legislation, were realised due to the active participation, activism and mobilisation of the social organisations

> of these persons. (…) outstanding is the permanent work of the FALGBT that has already given impulse to legislative measures such as the law on marriage, which guarantees that families formed of same-sex couples have the absolute same conditions than heterosexual couples and the present bill on gender identity. (Chamber of Deputies Parliament of Argentina, 2009, my translation)

As gay marriage before it, the gender identity bill was supported by an alliance of individual MPs across party lines. Similarly to the policy process for the marriage reform, court decisions during the legislative process provided an added sense of legitimacy to the LGBT movement's demands. On the 2nd of December of 2010, in the midst of the legislative process, the first trans person in Argentina (and Latin America) received her new national identity document (DNI) without undergoing sex reassignment surgery beforehand. As a point of affirmation of the new mainstream political appropriation of LGBT rights, Tania Luna was given her new DNI at a salon in the Congress building. César Cigliutti, president of the CHA, celebrated handing over the document. Just 10 days later, trans actress Florencia de la V. was handed her new identity document by Florencio Randazzo, Argentina's interior minister at the time.

After reaching the necessary quorum in the two relevant commissions (the Commission of General Legislation as during the passage of gay marriage, still led by Vilma Ibarra of the party *Nuevo Encuentro;* and the Commission of Justice [*Comisión de Justicia]*, led by Juan Pedro Tunessi of the UCR) on the 8th of November 2011, the CHA approached the presidents of all political parties represented in Congress, lobbying for an affirmative vote in the upcoming session (Comunidad Homosexual Argentina, n.d.e).

As in the case for gay marriage, parties did not demand delegates to vote en bloque. From the 30th of November and until 1st of December 2011, the debate that took place in Congress reveals high levels of support for the bill from across the bench. Vilma Ibarra opened the debate by thanking "the social organisations of sexual diversity, especially activists from the trans community for all their years of work, together with deputies, to reach the recognition of their rights." (Chamber of Deputies Parliament of Argentina, 2011, my translation)

She proceeded to outline both human rights in the constitution as well as Argentina's international human rights commitments which demand the passage of the bill:

> I want to start defending this majority vote [in favour of the bill in the committee sessions] and affirm that we are asking the vote to pass a project of law that would permit trans persons to develop their own life plan according to their gender identity and that respects their dignity, as article 19 of our constitution establishes as well as the international human rights treaties that are part of our constitutional text. (Chamber of Deputies Parliament of Argentina, 2011, my translation)

Considering the support for secular interpretations of human rights and international documents such as the Yogyakarta principles, Ibarra was given ample room to justify the permissiveness of the proposed legislation:

> The difference between sex and gender is not new. It was recognised in numerous cases and the Yogyakarta Principles of 2006 (…) which we, who work on these issues, use as a basis. (Chamber of Deputies Parliament of Argentina, 2011, my translation)

Moreover, in underlining the legitimacy of her point, Ibarra mentioned that the Assembly of the Organisation of American states [*Asamblea de la Organization de los Estados Americanos*] has recognised the right to gender identity and reminded the present politicians that Argentina "together with 65 nations, has signed and presented to the Assembly of the United Nations documents against discrimination, violence and violation of human rights, including the necessity to remove all types of obstacles in the issue of gender identity." (Chamber of Deputies Parliament of Argentina, 2011, my translation)

MP Juliana Di Tullio also began her speech by underlining the fundamental role played by the CHA, FALGBT and ALITT in drafting the bill. She also explained that these organisations, through their constant battles, have "convinced all of us of the necessity to advance in this direction." The way in which Di Tullio's speech proceeded illustrates how the LGBT rights movement's framing produced a situation in which opposing the bill was akin to opposing Argentina's constitutional identity, something which no democratic party could afford:

> My party, the Unión Cívica Radical, could not oppose a legislation of this kind because it defends the National Constitution. It is not a graceful concession because it suffices to read article 19 of the National Constitution to recognise the existence of the right that persons have to autonomy of their will, equality and non-discrimination.
>
> A political party like ours has always defended the spirit and the word of the National Constitution, and would never oppose to consecrate minority rights to equality, diversity, for their autodetermination and the possibility to share a more just and equilibrated society (Chamber of Deputies Parliament of Argentina, 2011, my translation)

It is not only that the LGBT movement's framing had created a rhetorical trap that motivated support by politicians, but that the framing also rapidly escalated the issue's importance from a minor problem concerning a fraction of the population to a matter touching upon the very foundations of the new Argentine democracy. A statement by MP Miguel Angel Barrios demonstrates this point:

> [T]oday we are not only reconstituting the right to identity to the collective of trans persons but we are also passing a law that deepens, strengthens and widens our young democracy by spelling out the rights of an excluded minority. (Chamber of Deputies Parliament of Argentina, 2011, my translation)

Furthermore, MP Paula Cecilia Merchan began her speech by claiming that the political consensus regarding the law "speaks of the clear advances that Argentine society is making in all territories related to equality, liberty and auto-determination of persons." (Chamber of Deputies Parliament of Argentina, 2011, my translation)

As we have explored in the first section of the mechanism regarding Argentina's constitutional identity, the post-authoritarian identity was constructed as a kind of antidote response to the religiously legitimated dictatorship of the past. Due to the LGBT movements framing of their claims, support for the gender identity law by politicians became a tool to thus demonstrate the allegiance of those politicians and parties who supported or reinforced this fledgling identity. Even though the end of the dictatorship and the debate on the gender identity bill in congress were nearly 30 years apart, that the past is pivotal for Argentina's present sexual rights policies is very clear. The speech by MP Silvia Beatriz Vazquez illustrates how closely past and present were connected:

> In the case of our society, of the whole of Argentina, after having traversed so many dictatorships, I believe that democracy can be able to pay off these debts with everyone who has felt or is still feeling marginalisation as products of these dictatorships. (…) And these dictatorships have repressed homosexuality. Being homosexual, heterosexual or bisexual is a distinction that does not concern anyone besides who takes this decision for their own lives. That is what the Constitution says but we have not respected it. It is not that we did not have laws to, from the liberalism that structures this Republic, value the rights to equality and free decision that all Argentine citizens have. But since we have not respected the constitution for so many years and have negated ourselves the right to elect the ones who govern us, we also disrespect our constitution if we negate so many citizens to fully exercise their rights. (Chamber of Deputies Parliament of Argentina, 2011, my translation)

Eventually, the gender identity law was passed in the Chamber of Deputies with an overwhelming majority of 168 votes, with 17 votes against and 6 abstentions (ibid.) However, the law still had to be decided on by the senate. All speeches in the debate held in the senate on the 9th of May 2012 repeated the human rights framing and passage of the law as a logical progression from making good on the promises in the constitution and international human rights treaties. Arguments brought forward mirror the debate in the Chamber of Deputies, but delegates reiterated even more strongly the absolute necessity to finally protect the human rights of this marginalised group. One senator concluded his contribution by stating, "We should have done this much earlier. We could not. Blessed be God that we are doing it today." (Senate Parliament of Argentina, 2012, my translation)

There are two factors that contributed towards the considerable consensus in the Senate. First, after the passage of the gay marriage law, the battle of framing was already settled and LGBT rights were irrevocably

accepted as human rights in Argentina. Second, the way in which the LGBT rights movement framed LGR as an issue of a human right to identity naturally invited the support of politicians eager to demonstrate their commitment to a secularised Argentine constitutional identity. How closely support for the bill by politicians was tied to the dictatorial past demonstrates the following closing statement of a senator in the debate: "[W]e wont permit ever again [*nunca más*] that an Argentine will die without his or her basic right to identity." (Senate Parliament of Argentina, 2012, my translation)

Another example is Senator López' speech when he proposed that identity is the synthesis of all democratic rights in Argentina and then stated that, "without autonomy of conscience [to decide one's gender] there is no personal identity, without the right to choose the profile of the own identity there is no human dignity; and there is no democracy without human dignity" (Senate Parliament of Argentina, 2012, my translation).

In the end, the law was passed unanimously with 55 votes and one abstention in the Senate in April 2012. On the 9th of May 2009, Argentina passed the most permissive gender identity law in the world.

The Law on Gender Identity of 2012 "establishes the rights to gender identity of persons". Art. 1 of the law states that:

> Every person has the right to
>
> a. The recognition of their gender identity
> b. The free development of their person confirming to their gender identity
> c. Be treated according to their gender identity and, in particular, to be identified in that way in the instruments that accredit their identity in respect to the name, image and sex that is registered
>
> (Ley de Identidad de Genero, 2012, my translation)

These far reaching recognitions of a rights to gender identity in Argentina stands in contrast to its restrictive abortion regulation.

Abortion

The *Campaña* presented a bill on the voluntary termination of pregnancy to Congress on four occasions (2007, 2010, 2012, 2014). Despite gaining increased support from legislators each successive time it was presented, it never reached sufficient support to be passed on to the plenary (Tabbush et al., 2016, p. 29).

While former president Cristina Fernandez de Kirchner supported both the same-sex marriage and the gender identity laws, she publicly opposed the passage of permissive abortion regulations. In 2003, while still a national senator and First Lady to then-president Nestor Kirchner, Cristina responded to a question on her position about abortion:

> I am not progre [sic] (an Argentine political term referring to progressivism), I am Peronist (…). Societies have their times and I do not think that Argentina is ready for that. By a small margin we managed to pass a law on sexual education and responsible reproduction and we need to see what that has cost. Furthermore, I am against abortion. (Pisani, 2003)

During her presidential campaign of 2007, Cristina Kirchner had expressed some of her views on sexual rights policies. In their wake she reiterated her stance against the depenalisation of abortion and marijuana (Hiller, 2011, pp. 163–164). Even while the LGBT movements' human rights framing was difficult to resist for politicians, when it came to abortion, politicians did not face rhetorical entrapment and could easily oppose abortion rights without being seen to oppose commitment to Argentina's democratic identity.

However, the women's rights movement in Argentina has increasingly started to frame abortion as a human right and is starting to form alliances with politicians but is nevertheless operating under less promising opportunity structures. At the time of writing (February 2018), current Argentine president Mauricio Macri has granted liberty of conscience for MPs for actions pertaining to abortion regulations, and has allowed two of the delegates of the governing *Cambiemos* to look into the possibility of legalising abortion. Debate in parliament is planned to start on the 6th of March 2018. Macri himself is not supportive of legalisation, and according to news station *teleSUR,* many MPs have publicly announced their disinterest in the bill, mainly of whom claim that the country is currently facing more pressing issues (teleSUR, 2018). While abortion reform is closer than ever in Argentina today, the outcome remains unsure.

7.2 Sexual Rights in the Name of South Africa's Constitution

Abortion entered the parliamentary arena in South Africa roughly a decade before the debates around LGR and same-sex marriage. The topic of abortion went through the legislative process in 1996, the same year the new constitution was passed. Eventually LGR policy and gay marriage were treated in parliament in 2003 and 2006 respectively. The ANC has governed since South Africa's democratisation, which means all policies have been debated and passed under ANC majority rule. An essential component of the ANC's openness to social movement demands was that prior to democratisation the ANC was part of civil society itself and thus personal contacts between politicians and sexual rights activists had already been established before democratisation and were easily converted into policy influence by social movements.

Before entering the legislative arena, there were a few pre-existing factors worth considering. In the case of abortion, the final Constitution of 1996 included the "the right to make decisions concerning reproduction" in section 12(2), as well as the right to access to reproductive health care in section 27. Furthermore, the then-recent conversion of the ANC from a liberation movement to a political organisation with a mandate to govern the country made for soft boundaries between state and civil society. Prior to the first democratic elections, the women's movement and the ANC were both part of civil society, united in their struggle against religiously backed apartheid and thus bound together by "links of comradeship" (Klugman & Varkey, 2001, p. 257). This ensured easy access of civil society to political decision makers.

Furthermore, since the ANC was relatively new to party politics, it had no established research or support staff to help parliamentarians design policy, which is why they turned to their former comrades from civil society, giving "those in the 'prochoice' establishment much greater access than any other groupings." (ibid.) NGO staff that ended up as legal advisers for the ANC translated civil society demands into government. Leading figures of the women's movement were also part of the ANC and ended up in important government positions. For example, Dr. Nkosozana Zuma, the Minister of Health in 1996 was an acclaimed feminist and would become an important player in the legalisation of abortion on demand.

Regarding LGR policy, during democratisation there was a policy change towards restrictiveness when parliament passed the new Birth and Death Registration Act in 1992, which made it impossible to change one's legal gender. A bill regulating LGR was lingering within the Department of Home Affairs since the early 1990s and was only passed on to parliament when litigation was brought against the Department, in addition to the SAHRC strongly advocating for it on the basis of human rights. When the bill finally entered parliament, organisations from both the LGBT and trans rights movements started their lobbying activities. The very need for a more specialised trans movement splitting from the broader LGBT project became clear in the policy process, as the more mainstream gay rights organisations inserted relatively restrictive proposals into the debate that were not in line with the demands of trans activists.

The lack of concerted efforts and the disregard from the broader movement towards the needs of trans individuals led to a final policy that while permissive, is less permissive than its Argentine counterpart. Worth considering, however, is that the law in South Africa was passed almost a decade before Argentina passed the Gender Identity Law in 2012.

The situation for the legislative process of same-sex marriage was particular as the South African constitutional court decision had established firm boundaries for the timeframe and content of a law regulating the legal recognition of same-sex relationships. The case Fourie vs Minister of Home Affairs required parliament to remedy the unconstitutionality of the state's denial of same-sex couples the same rights heterosexual couples enjoy. The court had set a deadline of one year, until the 1st of December 2006, within which parliament had to pass appropriate legislation and if the parliament failed to do so in time, the existing marriage law would automatically be changed to gender neutral terms. A bill on the matter was introduced to parliament in September 2006 and originally provided for the creation of a registered partnership scheme only. However, to fulfil the requirements of the constitutional court the bill was amended by the Portfolio Committee of Home Affairs to include marriage rights. The final vote on the civil union bill was taken on the 14th of November 2006 in the National Assembly and affirmed by the National Council of Provinces on the 28th of November. The next day it was signed by the Deputy President and came into law shortly after, just in time to meet the constitutional court deadline.

Abortion

Considering the conservative attitudes of much of the population and the immense role institutionalised religion had previously played in informing public policies, one might have expected repealing the South African abortion legislation of 1975 would be difficult. "However, the transition from apartheid to a representative democracy produced a crucial moment for feminist advocates: the new government's commitment to human rights would prove pivotal in supporting historically marginalised issues like reproductive rights." (Rebouche, 2011, p. 8)

Much of public opinion as well as a majority of health workers opposed abortion legalisation, which was an important factor in speeding up the process leading to policy passage. Since the government and the RRA were well aware of the dangers of a consultative process or even a referendum, the bill was passed as quickly as possible so opposition forces would have no time to grow and organise (Klugman & Varkey, 2001, p. 262).

With an absolute majority in parliament, the ANC's position on abortion was key to the reform's success. In the early 1990s, the ANC had no policy position on abortion and contained a variety of different views. However, key women activists within the ANC had a pro-choice position and managed, despite some fierce intra-party opposition, to ensure the inclusion of a pro-choice position in the ANC's first election

platform. The culmination of this was the Reconstruction and Development Programme (Waylen, 2007, pp. 537–538). The endorsement of a pro-choice position committed the ANC to legal reform once they were elected, even though the fact that is was contested within the party made ongoing advocacy from the women's movement necessary to keep the issue on the legislative agenda.

When the public was consulted for submissions to parliament, the vast majority of submissions opposed abortion legalisation, mostly on religious grounds. The few submissions in favour of policy change towards permissiveness based their argument on human rights (Albertyn, 2015). The only other point of access for the public were the formal hearings conducted on the bill.

> Those who were against policy change, and indeed against any legal access to abortion, were completely outside of the process. They had no entry point except the formal hearings where they gave evidence. But the ideological environment was against them. (Klugman & Varkey, 2001, p. 259)

Once the constitution was passed, a speedy parliamentary process under the leadership of acclaimed feminist then-Minister of Health, Nkosozana Zuma, and the chair of the portfolio committee led to the debate on abortion taking place in the same year as the passage of the new constitution. The inclusion of reproductive rights formulated as positive rights in the constitution also had implications for policy design as it demanded the delivery of state-funded abortion services (Rebouche, 2011, p. 13).

A free conscience vote for the decision on the abortion bill became a contested issue within many parties. Some members of the ANC called for a free vote because they opposed abortion on religious grounds. "Clearly there were tensions within the ANC once the bill was ready to come to parliament on how to handle the balance between women's rights and religious rights." (Klugman & Varkey, 2001, p. 264) Eventually, the ANC settled for the compromise that members who opposed the bill abstained from attending the voting session. Delegates from the Pan African Congress (PAC) and the Democratic Alliance (DA) voted en bloque in favour of the bill. The NP and the IFP allowed their delegates to vote according to their conscience (Gender Links, n.d.).

Since the bill was drafted and brought to vote by a coalition of feminists within and outside of parliament, the final parliamentary debate on the issue closely mirrored the women's movements framing of abortion. Pregs Govender, who also chaired the parliamentary committee on the Improvement of the Quality of Life and the Status of Women, presented the matter in the debate as an important advancement of South African democracy towards equality:

> The right to control our bodies, the right to choose a safe legal termination of pregnancy, is in the context of political, social and economic choices for women, in the context of moving our society towards equality, respect and a healthy sharing of power and responsibility in the home and in society (South African Hansard for 29 October 1996, as cited in Albertyn, 2016, pp. 15–16).

In keeping with the ANC's overall theme of nation building at the time and South Africa's constitutional commitment to human rights, a majority of MPs decided to vote for human rights, even despite the varied voices of opposition. While, as the rest of the population, most MPs were religiously affiliated, they argued human wellbeing, rather than religious doctrine to be the new yardstick for policy making. In her opening speech, the Minister of Health said:

> We deeply respect the pro-life view of our fellow Christians. Their arguments have some theological support and we sense a genuine concern for the sacredness of life. Their theological explication, however, is idealistic to the point where human suffering is ignored. (South African Hansard for 29 October 1996, as cited in Klugman & Varkey, 2001, p. 277)

Ultimately, the abortion issue cut across political lines and votes were spread out across the bench. The abortion bill was passed in November 1996 with 210 votes in favour, 87 against and 5 abstentions. The Preamble of the Choice of Termination of Pregnancy Act illustrates how the human rights framing employed by the women's movement directly influenced the text of the new abortion law, reflecting South Africa's post-authoritarian secular political identity:

> Recognising the values of human dignity, the achievement of equality, security of the person, non-racialism and non-sexism, and the advancement of human rights and freedoms which underlie a democratic South Africa;
>
> Recognising that the Constitution protects the right of persons to make decisions concerning reproduction and to security in and control over their bodies;
>
> Recognising that both women and men have the right to be informed of and to have access to safe, effective, affordable and acceptable methods of fertility regulation of their choice (…)
>
> This Act therefore repeals the restrictive and inaccessible provisions of the Abortion and Sterilization Act, 1975 (Act No.2 of 1975), and promotes reproductive rights and extends freedom of choice by affording every woman the right to choose whether to have an early, safe and legal termination of pregnancy according to her individual beliefs. (Choice on Termination of Pregnancy Act (No 2 of 1996), 1996))

Legal gender recognition

After democratisation, the LGBT rights movement tried to ensure ongoing government commitment to their cause by lobbying democratic leaders and making them aware that preaching equality logically means supporting LGBT rights as well. Phumi -Mtetwa, an LGBT rights activist, recalls that he was part of a

delegation of the NCGLE that met with President Mandela in February 1995 at the party's headquarters to remind him of the ANCs "commitment to equality, and to reiterate the importance of ensuring that it lives up to that commitment and presented the aspirations of many lesbian and gay people" (Mtetwa, 2013). LGBT activists highlighted their oppositional stance towards the apartheid regime, morally obliging the ANC to support their cause by arguing the "ANC owed them those rights as comrades in the liberation movement" (Thoreson, 2008, p. 690). The experience of repression by the religiously legitimised apartheid regime now played out in the LGBT movement's favour, as it could morally pressure the ANC to support their claims as fellow formerly oppressed. The human rights framing of the movement made it "especially effective at mobilising ideological and organisational resources in the judicial and parliamentary arenas" (ibid., p. 685).

While certain sympathies of the new democratic elite for civil society benefitted the LGBT rights movement as it did for the women's rights movement, the former was not absorbed into the ANC as an organisation, and thus did not enjoy the same kind of insider position within the political system as the women's rights movement. As a result, LGBT rights activists made use of strategic litigation (for gay marriage) to promote their cause on the political agenda and recruited parliamentary allies for support when it came to policy design and passage (with respect to gay marriage and LGR policy). This strategy guaranteed that a well-crafted framing approach could override public opinion. LGBT movement's key audience to convince was the legislative and judicial elite, and not the public at large, something that could not have been achieved in the South African context. As noted by Thoreson (2008, p. 694), "the foremost criterion of a frame's success is its resonance with its audience".

The legislative process for LGR policy largely took place without public involvement, with activists collaborating directly with government departments and committees. Activists made concrete policy and best practice recommendations, which were granted support by official advisory bodies of the state, such as the SAHRC (Thoreson, 2013, p. 653). The SAHRC stated its support for the bill arguing it was based "on the founding values of our democracy enshrined in our constitution of human dignity, the achievement of equality and the advancement of human rights and freedom" (ibid., p. 663).

The original bill on the Alteration of Sex Description and Sex Status included restrictive requirements for the change of legal gender, most notably that individuals need to have undergone surgery beforehand. That the final law features far more permissive wording is due to the openness of politicians to listen to the demands of trans activists within the political debate (Klein, 2009, p. 30).

During the public hearings on the bill, the Cape Town Transsexual/Transgender Support Group made an oral submission, arguing: "It is a human right to alter one's gender – the role of psychologists and medical practitioners in this should be supportive" (Home Affairs Portfolio Committee, 2003). The group suggested

three possible amendments to the bill, the third of which included adding a reference to intersex people and replacing "sex organs" with "sex characteristics", which changed the requirement to undergo surgery to mere hormone treatment. This suggestion was ultimately taken up by the committee and implemented.

The minutes of the parliamentary hearings on the proposed legislation reveal how the human rights framing resonated with legislators. After the representative of the Transsexual/Transgender Support Group concluded their deliberations, the committee chair commented approvingly that, "South Africa is a free and fair society, with the best constitution and bill of rights. Pieces of legislation such as this Bill were beginning to enforce the rights and values in these" (Home Affairs Portfolio Committee, 2003).

That the final bill was not even more permissive was due to the LGBT rights movement's lack of unity and determination. One of the proposals of the Transsexual/Transgender Support Group was also to drop all requirements for a legal gender change whatsoever, but the simultaneous insertion of other less permissive proposals provided legislators the option to comply with movement demands without creating ground-breaking legislation. Moreover, the submission of the Gay and Lesbian Equality Project was not coordinated with the more specialised trans groups because the LGBT rights movement was, other than in Argentina, split. The Equality project even demanded in their oral submission that qualification for gender recognition should rather be restrictive, stating that requirements "need not be surgery, but should involve an act to define or alter one's sex description. Living a particular gender lifestyle is not sufficient – gender is too fluid a concept." The final bill being permissive (but again, not quite as permissive as its Argentine counterpart) can therefore be attributed to more modest demands of a less unified LGBT movement. The modified bill was passed in the relevant committee meeting without objections by any party on the 1st of October 2003 (NCOP Social Services Committee, 2003).

In the National Assembly, the bill was opposed only by the ACDP, based on its belief that sex was determined biologically rather than socially constructed. Steve Swart of the ACDP argued that "this is another example of the impact of secular humanism on our legislative process - secular humanism being undergirded by concepts of atheism and evolution." Another delegate, in contrast, renounced religious influence, saying "It is a common occurrence to find that those that resist change cloak their selfish interests in a religious guise and appoint themselves as God's representatives here on earth." (IOL, 2003).

Politicians faced the pressure of state human rights bodies such as the SAHRC arguing the bill to advance human rights and to base on constitutional principles (Thoreson, 2013, p. 653). Relying on policy proposals of the LGBT rights movement to revise previously more restrictive drafts, an overwhelming majority of politicians ended up voting in favour of the permissive bill on the Alteration of Sex Description and Sex Status.

Same-sex marriage

Like LGR policy, the LGBT movement's oppositional stance to the apartheid government benefitted the cause of same-sex marriage as politicians and activists had formed tentative alliances before democratisation. A statement by Defence Minister Mosiuoa Lekota illustrates this point:

> [I]n the long and arduous struggle for democracy very many men and women of homosexual and lesbian orientation joined the ranks of the liberation and democratic forces. (…) They accepted long prison sentences. Some stood with us, ready to face death sentences. (…) How then can we live with the reality that we should enjoy rights that we fought together for, side-by-side, and deny them that? (South African Hansard for 14 November, 2006)

For its dominant position in post-apartheid politics, the LGBT movement's main target of lobbying for marriage rights was the ANC. The framing strategy of the LGBT rights movement created a rhetorical trap for the ANC as it resonated with the liberation movement's foundational values and South Africa's democratic identity that was largely modelled on the former. Opposing the claim for marriage rights by the LGBT movement after the Fourie judgement would have meant undermining the party's credibility in standing for human rights and equality. Furthermore, democratic politicians had a deep seated respect for their constitution and the constitutional court, which influenced their willingness to accept even unpopular rulings. While privately many ANC members were opposed to gay marriage, the party ultimately supported the movement's claims publicly and even went to great length to enforce party discipline on the issue (Thoreson, 2008, p. 686). An ANC spokesperson stated that:

> ANC policy toward gays and lesbians, and toward other groups in South Africa which are discriminated against, has to be the same because it is an issue of principle enshrined in our Freedom Charter. The raison d'être of the ANC's existence is to fight discrimination and deprivation of gays and lesbians cannot be excluded from that process. (as cited in Thoreson, 2008, pp. 689–690)

While it was no option for the ANC to oppose an issue framed in the human rights language of equality and non-discrimination, offending the religious sentiments of a considerable portion of the population was less of an issue for politicians. In public hearings all over the country, it became clear that a majority of the population rejected the bill on religious grounds, especially opposing the usage of the word "marriage" in that context. But, "[t]he ANC is rife with politicians who routinely reject their constituents' views on capital punishment, reproductive rights, and gay and lesbian issues", as those involved in the anti-apartheid struggle are relatively safe from electoral punishment when defending values in line with the liberation struggle (ibid., p. 686).

Interestingly, support for gay marriage turned into symbolic support for democracy. In other words, a sort of proof of contrast of modern South Africa to its apartheid past. For instance, Defence Minister Mosiuoa Lekota stated that South Africa, "cannot afford to be a prison of timeworn prejudices which have no basis in modern society. Let us bequeath to future generations a society which is more democratic and tolerant than the one that was handed down to us" (as cited in Thoreson, 2008, p. 693).

The newly founded ACDP steadfastly opposed the civil union bill. The party had also voted against the constitution in 1996, as they claimed that it deviated from Christian scripture. However, arguments based on scripture arose suspicion in democratic South Africa due to the ideological symbiosis of DRC and the apartheid state. One LGBT activist noted that conservative churches "used scripture to justify this apartheid split, to racially divide people on the basis of their colour and their culture … [and] people are truly scared to go back to what the original scripture says" (as cited in Thoreson, 2008, p. 687).

As a last resort to circumvent the constitutional court's judgement, the ACDP fought for a constitutional amendment that would ban same-sex marriage. However, the other parties did not want to touch the constitution, now the most important pillar of the country's new democratic identity. The Minister for Home Affairs argued that whilst understanding, "that the Constitution can be amended from time to time to deal with practical arrangements, we are cautious of an amendment to the Bill of Rights, as it is the bedrock on which our Constitution and our democracy is based." (South African Hansard for 14 November, 2006) As observed by Thoreson (2008, p. 691), "[t]he proposal not only attacked the GLB [Gay, Lesbian, Trans] movement but symbolically threatened the entire post-apartheid framework."

While religious institutions had limited access to the legislative process, they could voice their opinion during the hearings in the parliamentary commission sessions. During hearings on the bill in the home affairs portfolio committee, religious groups argued e.g. "that homosexual behaviour was a violation of the anatomical design of humans and was sinful" (His People Christian Ministries in Home Affairs Portfolio Committee, 2006a), or that "Homosexual acts were disordered" (Southern African Catholic Bishop's Conference in Home Affairs Portfolio Committee, 2006a). However, other religious institutions were supportive of LGBT rights, among them the Anglican Church, to which Archbishop Desmond Tutu, a popular figure in South Africa, belongs. Some of the more liberal churches had also opposed apartheid and politicians were therefore more willing to give weight to their supportive stance.

The original Civil Union bill that was discussed in parliamentary commissions proposed the creation of a civil partnership regime only. However, the SAHRC pointed out that this would "not give effect to what the Court intended" and argued that a "separate but equal" type of arrangement would amount to discrimination (SAHRC in Home Affairs Portfolio Committee, 2006a). The LGBT rights movement further argued that a separate regime would amount to sexual apartheid and is discriminatory. Consequently, the

bill was amended last minute to also include same-sex marriage, in addition to the partnership regime.

The final bill must be seen as an attempt to reconcile the incommensurable standpoints of each political actor. The minutes of the relevant committee sessions clearly illustrate that the confusing final legislation was due to delegates' reluctance to change the definition of marriage, therefore retaining the existing marriage provisions and creating a separate bill. Since the constitutional court ruling required complete equality, the new bill eventually included marriage rights as well. Thus, the constitutional court judgement was a legal trap that virtually forced politicians to include marriage, maybe sometimes against their personal preferences. The confusing policy design can therefore be explained with politician's intention "that the passing of the Bill would protect the traditional religious marriage provided for in the Marriage Act, due to the creation of a separate institution for same-sex couples" (Home Affairs Portfolio Committee, 2006b). However, Democratic Alliance MP Kaylan fittingly described in the plenary debate:

> The Bill in front of us today is not purely a Civil Union Bill, but is in fact a second Marriage Act, merely couched in a different name in an effort to appease both sides and arrive at a middle-of-the-road solution. (South African Hansard for 14 November, 2006)

The final debate on the bill in parliament illustrates the extent to which the constitution and the constitutional court judgement had created a discursive and legal trap for politicians. One MP explained:

> [E]very constitutional expert that we have met in the committee agrees with us that there is no getting away from the rights of these individuals because it's entrenched in the Constitution. You cannot run away. It's something that is given and it's something that we have to live with. So obviously, you gave it; you were part of the constitution-making process (…). When we adopted that Constitution, all of us stood there – there is a nice picture outside, showing that you are there – confirming that we will respect and uphold the supreme law of the country which is the Constitution. (South African Hansard for 14 November, 2006)

Ironically, MPs were well aware of the bill going against public opinion, but still managed to celebrate its passage as a tribute to democracy. Another MP stated that:

> This is the tenth anniversary of our beloved Constitution. South Africans always mention with pride that ours is the most progressive constitution in the world. Unfortunately, however, the values of our society do not always match the progressive values of our Constitution. (South African Hansard for 14 November, 2006)

Such as the case in Argentina, religion was prominently mentioned in the final debate on the marriage bill. For example, one MP argued that religion should not influence the state:

> Abanye bavika ngeBhayibheli. Ngifuna ukutjho ukuthi… [Others are using the Bible as a scape-goat. I would like to say…] marriage is an institution recognised by the state in South Africa. Marriage, in terms of the Marriage Act, is a civil act. It is not a religious act. (South African Hansard for 14 November, 2006, original translation)

The final vote on the civil union bill was taken on the 14th of November 2006 in the National Assembly and affirmed by the National Council of Provinces on the 28th of November, just in time to meet the constitutional court's deadline. In the National Assembly, the bill was passed with a great majority of 229 votes in favour, 41 votes against and 2 abstentions. Some opposition parties voted uniformly against it, the ANC in favour and the DA voting dividedly. During the vote in the National Council of Provinces, the bill was passed with 36 votes to 11, with only 1 abstention.

7.3 Discussion

During the course of this chapter, we have explored the final link connecting the state/church symbiosis during authoritarian rule with the extraordinary sexual rights policy output of both post-authoritarian South Africa and Argentina. We have traversed through each of the parliamentary processes that led to LGR and same-sex marriage policy output in Argentina and South Africa, and, in the case of the latter, abortion policy output.

In the theoretical mechanism, I have hypothesised that the framing and strategy employed by the social movements creates a rhetorical trap for political actors, leading to sufficient support from parties and politicians that permissive policies are passed.

An early indicator of the presence of this section of the mechanism is that politicians in South Africa and Argentina began to closely collaborate with social movements. These movements' adroit lobbying efforts were successful in influencing policy makers in key positions. In Argentina, the LGBT rights movement allied with the heads of the relevant parliamentary commissions to advance their goals of submitting same-sex marriage and LGR bills. This is especially remarkable considering that none of the two dominant parties in the Argentine parliament were explicitly leftist or religiously affiliated. Parties granted liberty of conscience for delegates to vote on the issues, which resulted in a coalition of politicians from across the party spectrum, rather than from a specific party, to collaborate with the LGBT rights activists.

In South Africa, the ANC's dominant position post-democratisation made it the most attractive ally for social movements. Due to its overwhelming parliamentary majority, convincing the ANC meant winning

the battle in South Africa. The South African women's movement, working from inside and outside of the ANC, managed to have its pro-choice position included in the ANC's first election platform, which committed the party to policy reform later on. The LGBT rights movement in South Africa morally obliged the ANC to support its cause by tirelessly reminding politicians that notions of non-discrimination and equality must also apply to LGBT people. Since women's and LGBT rights groups had opposed religiously legitimised apartheid alongside the ANC, links of comradeship ensured privileged access to the political system. At the same time, the shadow of the church's influence during apartheid presented considerable barriers to entry for political access for religious institutions, as they lacked the personal relationships and loyalties with democratic leaders, necessary for informal policy influence.

This was very different in countries without ideological symbiosis during authoritarian rule. In Poland and Croatia the collapse of communism opened up great opportunities for church influence. "The new democratic governments were inexperienced, unstable, and often uncertain about their ability to establish durable regimes. Historians, playwrights, and shipyard workers became national leaders overnight". (Grzymala-Busse, 2015, p. 146) The precariousness of democratic stability in Poland and Croatia led democratic governments to seek the support of the Catholic Churches and included clergy in policy formulation and put church representatives in positions in secular institutions (ibid., p. 147).

In South Africa and Argentina, the highly respected civil society benefitted from government inexperience. In both countries, the respective bills were mostly drafted by organisations from the social movements themselves, and inserted into the parliamentary arena by willing politicians. Policy reforms were often initiated by social movement action. The framing of the status-quo as violating the human rights of a marginalised subgroup of society, made permissive policy passage the adequate response to the posed problem.

The key observation that a collaboration between social movements and political actors took place unequivocally illustrates the astonishing success of these social movements in their efforts to convince politicians of their demands. Accordingly, this constitutes the passage of a doubly decisive test.

Further certainty of the presence of this part of the mechanism (and that it is triggered by the strategy and framing of the social movements) can be derived from the way in which politicians defended their support for the social movement's demands. Most notably, politicians in South Africa and Argentina used the exact same problem framing as the respective social movements when speaking about the policy reforms, indicating doubly decisive evidence for the theoretical mechanism. In both countries, politicians argued the reform osexual rights policy (with the exception of abortion policy in Argentina) to be the logical application of what has already been committed to in the new constitutions and international human rights treaties. The new constitutions and human rights documents have an extraordinarily symbolic meaning for the constitutional identities of South African and Argentine democracy, and supporting the passage of

more permissive policies was equivalent to supporting democracy and its founding values. Somewhat ironically, the passage of LGR, same-sex marriage and abortion policy in South Africa and Argentina was celebrated as deepening democracy, despite not exactly reflecting the stances of the demos.

While not necessarily privately endorsed or supported by politicians, the social movements' framings created a rhetorical trap for politicians and parties to comply with the movements' demands. The ambitious legal frameworks created and rhetorically used by politicians as proof of the newly functioning democratic fibre suddenly demanded the passage of more permissive policies. Highly respected independent human rights bodies within the state, constitutional courts and civil society human rights organisations supporting the social movements' claims left little room for politicians other than to simply embrace the social movement's framings. For better or worse, politicians opportunistically embraced policy reform to present themselves (as well as their party and country) as modern and human rights abiding.

The fact that sexual rights policies (again, except abortion in Argentina) were considered to be human rights issues ensured the passage of very permissive bills. For instance, the inclusion of reproductive rights in the South African constitution demanded the formulation of abortion policy that included abortion as a right (rather than, for example, only a non-penalised act such as in German Law) and the coverage of the procedure by public health care. In Argentina, the way in which LGR policy was framed as a human right to identity made even cost coverage by public health care for sex reassignment surgery a logical step. In both countries, less permissive proposals for same-sex partnership regulation were prevented from becoming law because when framed as a human right, anything less than equal was tantamount to discrimination.

Finally, we have encountered smoking gun type evidence in that human rights framing of sexual rights in the context of post-authoritarian South Africa and Argentina had far better chances of convincing politicians than that of religious arguments. Politicians in South Africa and Argentina explicitly rejected both the arguments and influence of certain religious institutions, arguing the issues to be a matter of rights and not religion. The split between human rights and religion that formed due to the ideological symbiosis during authoritarianism (later materialising in a secular interpretation of human rights in both countries) is mirrored in parliamentary debates containing claims that religion should not impede the human rights of others. The separation of democratic identities and institutionalised religion was also an overlapping theme in the parliamentary debates, when politicians repeatedly underlined the secular character of the state, demarcating religion within the private sphere. This disempowerment of institutionalised religion would have been unthinkable for the most part of South African and Argentine history – perhaps just as much as the passage of permissive abortion, same-sex marriage and LGR policies during the years of authoritarian regimes.

8 Conclusion

The roots of South Africa and Argentina's surprising modern day legal regulations of abortion, same-sex marriage and LGR lie in the past. The main argument tested in the present study is that the permissive sexual rights policies of both countries can be traced back to ideological symbiosis between state and church during authoritarianism. It has been shown that the alliance structures between state and church during apartheid South Africa and during Argentina's last military dictatorship created political opportunity structures favourable towards women's and LGBT rights movements' efforts to introduce their claims for sexual rights on the political agenda. When social movements successfully framed their claims as human rights issues, the influence of religious institutions on policy output was blocked, due to their dubious associations with the former human rights abusing regimes.

Accordingly, Argentine and South African churches could not effectively shape sexual rights policy output to their doctrinal preferences, despite high levels of religiosity and corresponding conservative values in both populations, as well as in the face of institutionalised religion's traditionally important role within the political realm. Ironically, the Catholic Church's and DRC's privileged position under authoritarianism directly compromised their ability to shape public policy after regime change.

The research interest that informed this dissertation pertains to the puzzling sexual rights policies in South Africa and Argentina. There are three peculiar aspects of their sexual rights provisions. First, the widespread religious conservative values present within a majority of each population, and high rates of church attendance would lead us to expect Argentina and South Africa to regulate sexual rights issues equally, or even more restrictively than other countries with comparable structural measures of religion (such as Poland and Chile). Yet, South Africa and Argentina regulate overall permissively and consequently deviate from expectations derived from literature on religious influence on policy output.

Second, Argentina's restrictive abortion law stands in stark contrast to its global championing of LGBT rights policy. Especially in light of the standard pattern of rights progression that we observe in European countries, such as the legalisation of abortion preceding the passage of LGBT rights policies by decades, Argentina's abortion policy presents itself as a remarkable exception.

Third, when parliaments in democratic South Africa and Argentina have reformed sexual rights policies, we observe jumps towards permissiveness rather than incremental change. For instance, same-sex marriage was legalised in both countries without having first establishing a type of partnership regime, as most other countries have done.

During the remainder of this conclusion, we will revisit the key findings of the empirical investigation. What follows is a reflection on the explanatory potential of the mechanism beyond South Africa and Argentina, and its limitations. Finally, this chapter ends with a discussion of the implications of the present study for scholarly research, as well as of the relevance of permissive policy output for the lived experience of women and LGBT people in South Africa and Argentina.

8.1 Revisiting the Causal Mechanism

The in-depth process tracing in South Africa and Argentina has revealed ample evidence that there is indeed a common causal process connecting each country's state/church symbiosis during the countries' last authoritarian regimes and sexual rights policy output under democracy. To answer the threefold research question, we now turn to the key findings from the empirical investigation.

The assessment of the causal condition has revealed that a decisive characteristic of the ideological state/church symbiosis during Argentina and South Africa's last authoritarian regime was that it produced a configuration of personal and institutional bonds and oppositions which carried over into democracy, both institutionally and ideologically separating human rights from religion.

On the one hand, the ideological symbiosis was facilitated by close personal relations between both state and church officials, often bound together by friendship, ideological alignment, mutual support and influence. Sometimes, key individuals from church and state even overlapped. On the other side of the democratic/authoritarian cleavage, there was the regime opposition, which included democratic politicians banned or in exile as well as an emerging civil society including human rights groups and women's and LGBT organisations.

During this time, regime opposition formed not only outside of religious institutions but also as part of the forces that challenged and ultimately defeated the authoritarian regime and its source of legitimacy; the church. The failure of religious institutions to speak out against violence and oppression during authoritarianism, led to regime opposition using the institutional support and framing of human rights organisations.

Par contrast, in Poland and Chile, churches provided the physical space for regime opposition against authoritarian governments to form and religious doctrine infused the emerging human rights and democracy activism. In Chile, the Catholic Church called for a return to democracy right after Pinochet's military coup in 1973 and collected records of human rights abuses reported by pastors and individuals, criticised the regime repeatedly for those abuses and offered material assistance to the families of political prisoners (Sigmund, 1986, pp. 32–33). With its human rights programmes and outspoken disapproval of the regime's oppressive practices, the Catholic Church in Chile earned its moral authority through a close connection

to opposition forces. Later on, the church used this influence to shape morality policies according to religious doctrine under democracy (Grzymala-Busse, 2015; Hennig, 2012; Htun, 2003).

In Poland, a degree of general ideological tension between Soviet-style Marxism and Catholicism grew into full-blown antagonism between the Soviet satellite state and the Polish Catholic Church (Walaszek, 1986, p. 120). The de facto eradication of Polish national sovereignty under Soviet influence contributed to the development of the church becoming "the guardian of the Polishness of Poland – that is, of its separate culture and political identity and its democratic heritage" (ibid., p. 131). Polish Cardinal Wyszynski's sermons at the time focused on the threat the anti-religiousness of Communism posed to the survival of Christianity and with his repeated emphasis on the inseparability of the fate of the nation from the fate of its Catholic Church", Wyszynski offered a distinctly Polish national identity as an alternative to Communist internationalism (ibid., p. 130).

As in Chile, the Polish Catholic Church responded to its regime's repressive practices with calling for human rights and dignity and, likewise, the church's institutional infrastructure played a key role for the organised resistance that contributed to the regime's eventual collapse (ibid., p. 133).

The pivotal difference between the two contrasting examples of Chile and Poland versus Argentina and South Africa is the positioning of institutionalised religion on either one of the ideological camps, between authoritarianism and pro-democratic/human rights forces. This had profound implications on various levels, connecting the causal condition with the next component of the mechanism.

First, other than in Poland and Chile, South Africa and Argentina's human rights discourse was decidedly secular because it developed across the opposition's use of the language of human rights as a normative (and, at the time, increasingly internationally accepted) force to denounce oppression and political violence without being supported by the church.

Second, on the individual level, democratic politicians in both South Africa and Argentina had personally interacted with or were part of civil society during the authoritarian period, and were morally indebted to their comrades in the struggle for democracy. Conversely, the democratic elite in Poland and Chile was indebted to the church for providing normative force and physical shelter for oppositional activities during authoritarianism. These links, contacts and shared history between church representatives and democratic politicians in Chile and Poland vs that which existed between civil society and democratic politicians in South Africa and Argentina could later be activated as channels of access for political influence.

This constellation impacted on the nascent democratic constitutional identities that developed during and after democratisation (and the investigation of how they formed) was the focus of chapter five, exploring the first component of the causal mechanism. Here, we have seen that in order to clearly differentiate the

democratic regime as a stable and legitimate alternative compared with its authoritarian predecessor, democratic politicians placed the protection of human rights at the heart of new democratic institutions and constitutions in both South Africa and Argentina. Entrenched in the iconography of resistance, as well as being written firmly into the history of the birth of South African and Argentine democracy, human rights took on an indispensable role in the post-authoritarian constitutional identities. In a matter of years, the two countries underwent what could be called a process of extraordinary political secularisation. Without a significant decline of religious affiliation and church attendance in the population, or even in measures of formal state/church ties, the ability of churches to shape the political sphere drastically declined after democratisation.

In chapter six, we looked at the way the post-authoritarian context shaped the political opportunity structures of two of the most important stakeholders in sexual rights policy making, namely social movements and religious institutions. The investigation revealed that South Africa and Argentina's post-authoritarian constitutional identities created an advantageous environment for actors framing their claims as human rights issues, constituting an advantage for women's and LGBT rights movements vis-à-vis religious institutions.

The LGBT and women's rights movements in South Africa and Argentina were able to successfully exploit political opportunities when they framed their claims for rights and recognition in human rights terms, as well as exposing the status quo as a violation of rights of an oppressed group or minority. In contrast, the efforts of religious institutions in both countries to frame abortion and LGBT policy in religious terms stood under the shadows of association with the former human rights abusing regime, thereby considerably limiting the moral authority of churches to speak on matters pertaining to public policy.

A particular idiosyncratic factor of Argentina's history of political oppression is the focus on motherhood and the right to the identity of children in the country's human rights organisations and discourse. Due to the emergence of powerful human rights organisations as a response to the illegal abduction of children of victims of political murder, human rights in Argentina became to be considered to protect the embry, not the mother. As a result, abortion opponents (rather than abortion activists) could capitalise on the human rights focused constitutional identity.

While the Catholic Church in Argentina favours restrictive abortion regulations, it was not the main factor in impeding abortion policy change. In fact, it was the lack of opportunity for the Argentine women's movement to exploit the potential of a human rights framing to increase its discursive leverage in courts and parliament. It is precisely at this stage of the causal chain that we solve one of the sub-plots of the research question; namely Argentina's relatively restrictive abortion policy diverging from its very permissive LGBT rights policies. Key are the different opportunity structures faced by the Argentine women's rights move-

ment compared with the Argentine LGBT rights movement, preventing the former from successfully framing abortion rights in terms of human rights.

In chapter seven, we explored the way in which the preceding components of the causal mechanism relate to the overall pattern of permissive sexual rights regulations in South Africa and Argentina, as well as their atypical far jumps from relatively restrictive status quos to regulatory permissiveness. The investigation revealed that the strategic human rights framing by social movements resonated with each country's new constitutional identity, creating a rhetoric trap for political parties and their representatives. Thus, problem framings aligned with the constitutional identity meant politicians faced rhetoric entrapment as supporting sexual rights policy meant rejecting or supporting the country's core values. As a result, support for permissive bills turned into an affirmation of the democratic constitutional identity.

Moreover, the framing of human rights limited the options for an appropriate state response to the problem of rights violations. Less permissive bills were rejected, often at the last minute, so that the final policy would comply with constitutional principles and the interpretations thereof by constitutional courts. The result was that highly permissive bills were passed despite staunch opposition by religious institutions. This answers why South Africa and Argentina made large jumps in permissiveness in the regulation of sexual rights– when framed as a human rights violation, a less far reaching reform would not have addressed the problem at its core, and would still constitute a violation of rights.

Overall, the decisive difference between the two groups of cases discussed (South Africa and Argentina in the former and Poland and Chile in the latter) are the informal relations that existed between state and church during authoritarian rule. The post-authoritarian context in South Africa and Argentina fostered the success of political actors who could frame their claims (in front of courts and politicians) as human rights issues.

8.2 Potential and Limitation of the Causal Mechanism beyond South Africa and Argentina

South Africa and Argentina are extraordinary but previously under-researched cases. Both countries deviate from expectations regarding sexual rights policy permissiveness derived from structural arguments in comparative morality policy literature. Apart from solving the questions posed by the sexual rights regulations of these two countries, the analysis of two deviant cases can substantially contribute toward theory development (Levy, 2008, p. 3). While other scholars have focused on theorising the pathways of successful religious influence, this dissertation has focused on explaining why and how religious institutions failed to shape policy decisions.

The argument that informal relations between church and state matter is not new, as it has been argued in various case studies, such as the ones by Grzymala-Busse (2015) and Htun (2003). Also, the idea that the relationship of religious and political identities matter is well established (Grzymala-Busse, 2015). This dissertation has tested and refined those arguments about a causal connection between state/church relations and policy output by thoroughly exploring the causal chain between authoritarian involvement of churches and its effects on sexual rights policy output.

The causal mechanism of religious blockade proposed in this thesis is not an inversion of the causal mechanism of religious influence on morality policy. Rather, it responds to the need to assess social movements as actors competing with churches to influence policy. Accordingly, this helps explain the causal chain's efficacy when understanding permissive policy output, as opposed to restrictive.

A limitation of the explanation for religious blockade offered in this dissertation, that perhaps applies to morality policy research in general, pertains to its validity across time. Morality regulations are subject to constant revision in many countries, as global patterns of regulations and rank orders of permissiveness transform at a rapid pace. Thus, scholars need to understand and account for new developments and phenomena, rendering theories unavoidably incomplete as they account for a snapshot in time only. Just as developments in countries such as South Africa and Argentina have called into question earlier (and simpler) causal propositions regarding the relationship between structural religious factors and morality policy output, future developments in other countries will create new regulatory patterns. This will no doubt invite new theorisation.

For the time being, the causal explanation offered in this thesis can solve the threefold question that flows from South African and Argentine sexual rights regulation. Furthermore, the explanation has potential beyond these two cases. As previously mentioned, the theoretical proposition is set-theoretical, and what follows is a tentative exploration of the explanatory potential of the state-church relationship for Spain and Portugal.

Spain and Portugal are dominantly Catholic third wave democratisation countries, which also passed some highly permissive sexual rights policies. Both legalised gay marriage (Spain in 2005 and Portugal in 2010), have permissive passed LGR policy (Spain in 2007 and Portugal in 2011), and have a choice model when it comes to abortion (2010 and 2007). Can the state-church relationship during their authoritarian regimes also account for their ensuing sexual rights policy output? Examining the state/church relationship during the Franco and Salazar dictatorships can provide an early indication as to whether a state/church symbiosis also resulted in the defiance of church influence over the sexual rights policy processes in Spain and Portugal.

While the Republican state that preceded Generalissimo Francisco Franco's march to power in 1939 Spain was distinctly anticlerical (a formal separation of church and state, secular education and legalising divorce), those changes were reversed during Franco's National Catholic dictatorship, lasting until his death in 1975 (Behar 1990, p. 86). The beginning of Franco's regime was marked by "unparalleled privilege of the Catholic Church and the ideology of national Catholicism" (Edles, 1998, p. 5), and the Catholic Church's symbolic legitimation of the regime was among Franco's greatest resources (Perez-Agote, 2010, p. 227).

> The Nationalists re-established the presence of religion in education, abolished divorce, authorised jurisdiction in marital cases to ecclesiastical courts, gave public funds to pay clerical salaries, and subsidised the reconstruction of churches and convents. Religious symbols dominated the landscape. Bishops and priests occupied a prominent place in any official ceremony, and the authorities attended ex officio religious ceremonies. (…) The intellectual life, media, and school textbooks were subject to government censorship to exclude any criticism of the church. The state had become in many areas the secular arm of the church, while the church contributed to the legitimation of the regime. (Linz, 1991, p. 162)

It is noteworthy that, as everywhere else, the church did not act monolithically during the dictatorship. Towards the last few years of the regime, there was a growing opposition against the regime amongst militant Catholics and Priests (Perez-Agote 2010, p. 228). However, overall, it can be reasonably argued that an ideological symbiosis of state and church is among the main characteristics of Franco's rule.

A similar mutually beneficial relationship between state and church was also present in the Salazar dictatorship in Portugal. After the military coup in 1926, the regime reintroduced religious education and handed previously confiscated property back to the church, among various other acts of generosity. "Meanwhile, the church supported the consolidation of authoritarian rule. And was content to see the regime adopt Catholic principles in its activities, ideology and symbolism" (Pinto & Rezola, 2007, p. 360). Salazar and Cardinal Cerejeira were close personal friends and shared ideas for Portugal as a country. 'God, nation, authority, family', was the new regime's creed, revealing the ideological underpinnings of Portugal's last authoritarian period of rule (ibid., p. 363).

The Catholic Church was a crucial contributor to the ideology of Salazar's regime. Not only did the regime have the church hierarchy's explicit approval to use Catholic symbolism, but it also actively pursued a policy of 'Catholicising' institutions and the education system." (Pinto & Rezola 2007, p. 365–366)

As an overview of the co-variation between state/church relations during authoritarianism and sexual rights policy output after democratisation in Spain, Portugal, South Africa, Argentina, Poland and Chile, Table 16 contrasts the identified state/church relationship with overall patterns of regulatory permissiveness.

Table 16. State/Church Ideological Relationship during Authoritarian rule & Patterns of Sexual Rights Regulations in six countries

Country	State/church ideological Opposition	State/church ideological Symbiosis	Overall Restrictive Pattern of Sexual Rights	Overall Permissive Pattern of Sexual Rights
Argentina		X		X
Chile	X		X	
Poland	X		X	
Portugal		X		X
South Africa		X		X
Spain		X		X

We observe a regular co-occurrence of state/church opposition during authoritarianism and restrictive overall patterns of sexual rights policy output, On the other hand, state/ church symbiosis and overall permissive regulatory patterns co-occur together. This tentatively suggests a more general association between state/church relations during authoritarianism and morality policy output that mediates the relationship between the religious stratifications of polities and morality policy output. Tracing the causal process in other third wave democratisation countries would no doubt be an exciting avenue for further research.

On a more abstract level, it would also be interesting to investigate beyond strictly Christian religio-political alliances, and whether the relationship of an institutionalsised religion with a specific regime bears significance for the level of political secularity after regime change. For example, will Iran undergo rapid political secularisation if the regime was to democratise, and thus undo 40 years of Islamic-political symbiosis? Or does China await a revival and politicisation of religion in a potential post-communist future? These questions are as interesting as they are controversial, and surely worthy material for future research.

8.3 Implications

What do the results of this study imply for morality policy research, literature on religion and politics, secularisation theory in general and the lived experience of women and LGBT in South Africa and Argentina?

First, the results suggest that there is not just one path towards regulatory permissiveness of morality issues. While in Western Europe permissive morality policies have been argued to be a function of societal modernisation and secularisation and corresponding value changes in the population, Argentina and South Africa represent a path towards permissiveness that circumvents public opinion and structural measures of societal modernisation and secularisation. That means that the moral regulatory developments in South Africa and Argentina not only call into question the Western-centric case selection in the field, but they also demonstrate that explanations for morality policy output are more context-dependent than the universal aspirations of our theories have taken into account. Especially the timing of democratic transition constitutes important context condition for the way in which religious institutions were blocked from influencing policy output. This underlines the need to step down the ladder of abstraction and develop typological theories that explain a limited set of cases only.

Second, there is no simple linear relationship between structural measures of religious parameters and policy output. Strong religious convictions in the population can translate into restrictive morality policy output, as it does in Poland and Chile. However, in other cases such as Argentina and South Africa, public policy is relatively unaffected by religious populations. High rates of religious affiliation and church attendance by the population, or societal importance of religion in general, should rather be thought of as a necessary but not sufficient condition for policy influence. Churches backed by religious populations and societal importance can gain institutional access to shape policies when the historical genesis of the state has fused the nation and the church, as Grzymala-Busse (2015, 145, 330) argues for Poland and Chile. However, when the historical context provides for a separation of democratic constitutional identity and religion, as in South Africa and Argentina, the church's influence is greatly diminished. When social movements can frame their claims as human rights issues, they can overtake the influence of even societally powerful churches.

Third, the results support the accounts that stress the importance of the informal aspects of a state/church relationship to matter for policy output, rather than the formal ties (Grzymala-Busse, 2015; Hennig, 2012; Htun, 2003; Knill & Preidel, 2014). In South Africa and Argentina, the formal relationship between religious institutions and state hardly changed during both countries' transition towards democracy.

The ability of churches to access the political system and influence public policy, however, drastically declined after democratisation, as the relationship between the state and church transformed from an ideological symbiosis to an ideological independence/separation. This illustrates the critical importance

of the informal ties between church and state that represent the ideological, personal and institutional de facto points of contact and collaboration that facilitate certain identitarian constructions and narratives of legitimacy, which in turn either foster or hinder the influence of stakeholders in the policy process.

Fourth, the results of this study also have implications for secularisation theory in general. What we see in post-authoritarian South Africa and Argentina is an abrupt political secularisation, not mirrored by societal secularisation. The investigation revealed a virtual relocation of religion by human rights in its function for political legitimacy and identity.

Thomas Luckman's *Invisible religion* postulates not an inevitable decline of religion in general but rather a loss of traditional societal functions (Luckmann, 2014 (1967)). In a similar vein, Casanova's (2008, p. 13) conceptions of secularisation entails "the 'passage', transfer or relocation of persons, things, functions, meanings, and so forth, from their traditional location in the religious sphere to the secular spheres." These accounts stress a differentiation between the public and the religious that becomes relegated to the private sphere. South Africa and Argentina lend support for these conceptions of secularisation, which argue for a privatisation of religion to occur, rather than an inevitable decline and provide an interesting illustration of how such privatisation looks in practice.

The privatisation of religion manifested in South Africa and Argentina such that churches remained powerful socially, maintaining high rates of adherence, mass attendance and the ability to influence the moral values of their members. At the same time, what followed democratisation was a total political disempowerment of institutionalised religion. When confronted with religious arguments, democratic politicians in South Africa and Argentina relegated religious doctrine to the private sphere. In the final debates on abortion, same-sex marriage and LGR policies, MPs in both countries stressed their privately held religious beliefs, in contrast with their political stance on sexual rights issues using human rights, as the decisive values informing policy decisions, not religious sentiments.

The ideological symbiosis of state and church in the past triggered a sudden relegation of religion into the private sphere, and the emergence of a new constitutional identity that displaced religion in its function for identity, legitimacy and guiding principles with new secular raisons d'états. In other words, what we see is that political secularisation does not have to go hand in hand with societal secularisation. Rather, they are distinct phenomena. In South Africa and Argentina, religion did not disappear but rather became de-monopolised as source of values for policy making, moving from a position of symbiosis with the state and into just one of many interest groups in a pluralistic political system during and after democratisation.

A final question worth asking is how much permissive abortion, same-marriage and LGR policy output actually matters for the real life experience of women and LGBT people in South Africa and Argentina. In other words, what are the effects of such alternative paths towards permissiveness that do not come about via societal value change, and thus confronts permissive policies with conservative patriarchal societies?

The lived reality of unequal societies can hinder parts of the target population from reaping the full benefits of permissive sexual rights regulations. Despite the permissive abortion law in South Africa, access to abortion services on the ground is severely limited. Discrimination by service providers, a dearth of clinics in rural areas, social and religious stigma surrounding abortion and a lack of knowledge of the legality of abortion among parts of the population and service providers makes legal abortion inaccessible, and thus unfeasible, for many women (Mhlanga, 2003).

When it comes to same-sex marriage, the circle of direct beneficiaries is quite limited, targeting gay couples that wish to marry only. Perhaps this is only a small victory in light of the common practice of corrective rape in South Africa, the sexual violation against lesbians to "cure" them of their homosexuality. The same applies to the state- of- the- art gender identity law in Argentina that is put into perspective when seeing it as embedded in a society in which LGBT people still face police violence and societal stigma.

Permissive regulations do not directly better the lives of all women and LGBT people. However, the indirect effects of public policy can make an invaluable contribution to creating more equal societies. Policy can normalise issues in the eyes of the public and contribute towards eventual acceptance and can increase visibility. For the relatively privileged, legal provisions can also serve as the basis to fight discrimination with legal means. However, like their constitutions and general human rights commitments, sexual rights in Argentina and South Africa must be seen as an aspiration for the future, rather than an expression of equal societies.

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