

Abortion Legalization Proposal in Chile

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I. A bill for the decriminalization of abortion in Chile.

In the previous report on the abortion proposal being discussed by the Chilean Congress –*legislative proposal: decriminalization of abortion in Chile*[3]– a summary of the legislative proceedings up until September 01, 2015 was given. At this time we will address the events occurred after said date, and in particular everything having to do with the amendments to the proposal and the discussions inside the Committee on the Constitution[4].

Amendments to the proposal in the Committee on Health

The proposal we are commenting upon was submitted in January of 2015 to the Chamber of Deputies. The Committee assigned for the initial discussion of the proposal was that of Health, which issued its report and voted in favor of the proposal in mid-September of 2015. By its vote, the Committee upheld the intent to legislate for the approval of abortion for the three original causes written into the proposal, but they were slightly altered from the original draft submitted by the Executive branch. The most relevant alterations are:

1. With respect to the first cause for abortion referring to the danger to the life of the mother, the phrase “risk to life, whether present or future” was modified, eliminating the reference to “whether present or future”. In spite of the fact that this change may appear to be beneficial, in reality it is highly prejudicial since the term of “vital risk” is overbroad and it allows for present danger, future danger, imminent danger, etc[5]. To this we may add the criticism, by which the basis for this cause is unnecessary since the existing legislation already allows for doctors to intervene in order to save women’s lives if endangered, regardless of their pregnant status. In this regard, the president of the advisory group for ethical matters of the Chilean Medical Association, Dr. Julio Montt, confirms, “*for a long time doctors in Chile have been performing therapeutic abortions when the life of the mother is in danger; a form of conduct which has never been penalized nor has it generated litigation. This is already entirely within the scope of physicians legitimate actions*” [6].

2. With respect to the second cause –the lack of viability of the fetus– the phrase “congenital alterations incompatible with extra uterine life” was modified so that it now reads “congenital alterations of a lethal character”. Regardless of this change, the prior criticism of this cause still applies. It remains impossible for physicians to issue a clinical prognosis that is certain with respect to the disease suffered by the fetus. In this sense, it is entirely irresponsible to justify abortion by virtue of an uncertain informed guess, which experience has shown to be fallible and often mistaken[7]. Further, to this point we may add the criticism issued by the President of the Supreme Court, Judge Sergio Muñoz, wondering if the modification that incorporates the concept of “*lethal character*” works in order to elevate the stringency of the requirement for allowing the abortion or if, on the contrary, it was in fact broadening the language for its allowance. Likewise, he asked whether the new language would allow for the abortion of fetuses that would be able to survive outside the womb as long as they were supported artificially, which was entirely uncertain under the current draft[8].

3. With respect to the third cause –rape–, the gestational age limit for the abortion of the fetus was altered, lowering the bar from eighteen to fourteen weeks. However, the great majority of all sexual offences such as rape leave no physical trace of their occurrence so that it is virtually impossible to identify them or, in a minority of cases, physical traces disappear soon after. Because of this, it is entirely uncertain what the actual requirements will be in order for this cause to be verified and allow for the abortion. Will it suffice for the alleged victim to file a complaint? Will it require a conviction for rape on the assailant? To this one may add the criticism issued by the president of the Chilean Medical Association,

Dr. Enrique Paris, who stated “that the courts of law must assume the responsibility of verifying if rape has occurred so that the crime which gave way to the pregnancy be prosecuted, and not to leave it to physicians, as this proposal would do.” [9]

4. The fourth amendment to the legislation has to do with the prior authorization required for children less than fourteen years of age in order to procure an abortion. The proposal allows for a judge to authorize a minor to get an abortion, even with the opposition of her parents. Further, the proposal states that once the judge has issued his authorization, no opposition shall be admitted. As we can see, this involves a grave violation of the right of parents to direct the education and upbringing of their children.

5. Finally, the last relevant amendment has to do with the inclusion of an alleged support program for all women, regardless of their wish to get an abortion or to go through with the pregnancy. This plan, for which there are no appropriated funds as of this writing, has nothing to do with actual and useful crisis pregnancy support programs, which have been established with the objective of persuading women to forego the abortion by convincing them that going through with the pregnancy is better than getting the abortion^[10].

It is necessary to note that the criticisms leveled against the proposal are not meant to perfect the proposal but rather to demonstrate, from a technical standpoint, the many problems with the proposal itself. In this sense, we continue to hold that no amendment to the proposal could ever justify its approval since, even if restricted to a single cause for action, it would still constitute the acceptance of a morally unjust conduct that must never be allowed.

Relevant criticism issued in the Committee on the Constitution

After the Chamber of Deputies Committee on Health analyzed and voted on the proposal, it made its way to the Committee on the Constitution. Since October of 2015 a wide range of specialists have appeared in front of the Committee, shedding light on a series of issues with the proposal. These are:

1. Among the many issues that have been raised to the Committee, the most relevant of them all has to do with the question on human dignity. To the point, scholars Fernando Londoño –criminal law professor of the Diego Portales University– and Álvaro Ferrer –professor of jurisprudence at the Pontifical Catholic University of Chile and board member of Comunidad y Justicia– were emphatic in pointing out that the proposal shreds to pieces the constitutional concept of human dignity since it authorizes the willful destruction of a human individual in all three causes for action being considered.

2. Another relevant discussion within the Committee has to do with the existence of the alleged right to abortion. On this point, Álvaro Paúl –international law professor at the Pontifical Catholic University and current board member of Comunidad y Justicia– argued that the alleged right is non-existent in international law. He explained to the Committee that no international law treaty on human rights that applies to Chile recognizes or protects the so-called right to abortion^[11].

3. Another criticism that has been raised relentlessly but to little avail is that, in spite of the fact that the proposal was introduced with the alleged purpose of decriminalizing abortion, the proposal itself goes towards the legalization of the procedure, not its decriminalization. This is evident from the proposal since it not only amends the Criminal Code in order to exclude from criminal prosecution abortions performed under one of the three causes, but it also eliminates the prohibition of performing acts with the purpose of procuring an abortion that currently exists in the Health Code,^[12] thus legalizing abortion in all three cases. This has been corroborated even by those members of Congress in favor of the proposal, as is the case of the Deputy from the Christian Democrat Party, Fuad Chahín, who affirmed on January 6, 2016 “in reality, the proposal not only decriminalizes but legalizes abortion”.

4. Finally, it has been raised that with respect to the second cause for abortion –fetal unviability– there is a specially grave problems with respect to children aborted but born alive after the performance of the procedure. The question that remains is what will happen with those children declared to be unviable but,

after the pregnancy has been interrupted (the action that is allowed for physicians by the proposal), being born alive and surviving after the fact (as would be a potential case with respect to children diagnosed with anencephaly and with the pregnancy being interrupted at thirty weeks): Will physicians be required to provide medical care? Will the state cover the costs for treatment of the child? Will the medical staff do everything in its power to save his life? Will the physician be responsible for the misdiagnosis of the alleged unviability? Will this not create a perverse incentive for doctors to actually kill the child in order to escape potential liability for *mal praxison* the diagnosis? Comparative experience shows that, when faced with this situation, doctors not only interrupt the pregnancy but instead inject potassium chloride into the heart of the child so that he dies inside the womb, not only eliminating the fetus but also the possibility of acting in such a way to save the life of the child in front of such a crass mistake in diagnosis.

What is coming?

After the Committee on the Constitution evacuates its report (on March 9, 2016) and introduces those amendments that it considers necessary, the proposal will work its way to the Treasury Committee in order to discuss those aspects of the proposal that require the allocation of public funds. After this occurs, the proposal will go to a floor vote by the entire Chamber of Deputies, putting an end to its first legislative stage^[13]. The second legislative stage involves the discussion of the proposal in the Senate, in charge of reviewing the work done by the Chamber of Deputies, through a similar procedure.

II. Crisis pregnancy support: a true solution for at risk pregnancy.

Against the proposal for the legalization of abortion there is another option, which is superior in its humaneness and effectiveness, when facing risky pregnancies: pregnancy support.

At risk pregnancy and support

In a study undertaken by the MELISA Institute, headed by the epidemiologist Elard Koch^[14], in which more than 3100 cases of at risk pregnancies were analyzed^[15], it was concluded that the leading cause by which women seek abortions in Chile is the vulnerability situation in which they find themselves. These situations range from psychosocial factors such as the abandonment by their partner, the loss of life expectations, expulsion from the home, or pregnancy related factors, such as lethal congenital malformations of the fetus or the perceived risk to their life^[16].

The study concludes that when facing these scenarios of at-risk-pregnancies, the most effective way of reverting the vulnerability in which women find themselves and prevent the abortion is to implement integral support plans. According to the statistics compiled by the Chile Unido Foundation, 85% of women that were at high risk of undergoing an abortion –on account of their vulnerability situation– and that receive integral psychosocial support desist from the abortion and decide to carry on with their pregnancy in a calm and hope-filled manner^[17].

Legislative proposal for integral support

There are several proposals that have been submitted to Congress with the purpose of creating such support plans^[18]. However, none of the existing initiatives have prospered, having been unable to secure the political support required for this.

It is however important to underscore the vital role that has been played by the former Senator of the Christian Democrat Party, Soledad Alvear^[19], who has insisted from the beginning of the discussion that an integral support plan is indispensable, lobbying in support of her own proposal to this end.^[20]

Notes

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- [3] Prepared by Patricia Gonelle and submitted on September 1, 2015.
- [4] The procedure may be monitored through: https://www.camara.cl/pley/pley_detalle.aspx?prmID=10315&prmBoletin=9895-11
- [5] In accordance with the juridical maxim: *if the legislator has made no distinction, it is not for the interpreter to make them.*
- [6] La Segunda Newspaper, May 26, 2014.
- [7] Miracle baby is condemned to die defies science and turns fifteen months old: <https://www.aciprensa.com/noticias/bebe-milagro-condenada-a-morir-desafia-a-la-ciencia-y-cumple-15-meses-de-vida-87960/>
- [8] Oficio 105-201, Report from the Supreme Court on the abortion proposal, Santiago, October 2, 2015.
- [9] Medical Association decries ambiguity in the abortion proposal and points its criticism towards the rape provision: <http://www.biobiochile.cl/2015/08/12/colegio-medico-acusa-ambiguedad-en-proyecto-de-aborto-y-apunta-criticas-a-causal-de-violacion.shtml>.
- [10] The Chile Unido Foundation offers a very successful support program, with more than fifteen years of experience operating in he: <http://www.chileunido.cl/>.
- [11] The National Institute of Human Rights, likewise acknowledged in its 2014 report that: *“in order to support the choice of not having children, international organizations have privileged the prevention of unwanted pregnancies. And while the decision to interrupt a pregnancy has not been expressly prohibited, it has not been recognized as a right either”* (p. 196)
- [12] See Art. 119. Health Code. Available at: <http://www.leychile.cl/Navegar?idNorma=5595>
- [13] It is not possible at this time to give an exact date on when the proposal will come to a floor vote, but it is likely to happen by the end of March or early April. This would mark an unprecedented occurrence since never in the two hundred years of our Republic has an abortion proposal made it past the first stage of legislation.
- [14] Cfr. Elard Koch, “Impact of Reproductive Laws on Maternal Mortality: Recent Scientific Evidence from Natural Experiments On Different Populations. Lecture at the Life & Family event in the United Nations”, The Linacre Quarterly, 2013; 80 (2): 151-60. (At: <http://www.alliancedefendingfreedom.org/MDGs>)
- [15] This study was undertaken by using the statistics provided by the Integral Support Program “Adopt a life” implemented by the Chile Unido Foundation.
- [16] Comunidad y Justicia and Idea País. *“Embarazo Vulnerable, Realidad y Propuestas”*, 2014. (Available at: <http://ideapais.cl/especiales/embarazo-vulnerable-realidad-y-propuestas/>)
- [17] http://www.chileunido.cl/wp-content/uploads/2015/06/2015.-Argumentos-frente-a-la-Despenalizacion-del-Aborto-Fundaci_n-Chile-Unido-FINAL-BAJA.pdf
- [18] The last of these proposals was submitted in January of 2015 by a wide coalition of Deputies from various parties, before the abortion proposal was introduced. This proposal was drafted with the support of Comunidad y Justicia. https://www.camara.cl/pley/pley_detalle.aspx?prmID=10294&prmBoletin=9873-11
- [19] For instance, by using her position of public relevance and writing in opposition to the proposal in various media outlets. i.e.: <http://voces.latercera.com/2015/10/14/soledad-alvear/acompanamiento/>
- [20] This proposal has not been formally submitted on account of the fact that it would require the allocation of public funds. Under the Chilean constitutional regime, the Executive must present legislative proposals that require the investment of public monies. The proposal is robust and would be a major improvement to the current situation in Chile: <http://www.eldemocrata.cl/wp-content/uploads/2015/09/PDC-Estructura-para-un-Sistema-de-Acompa%C3%B1amiento1.pdf>