



I. Chile: A Privileged but Fragile Context

This paper aims to reflect the political, legislative and factual situation in Chile regarding the protection of the right to life, the reality of abortion, and the context of reproductive health. Thus, the goal is to provide relevant information for the social, academic and political actors that intend to know about and act on these topics, which, beyond doubt, are decisive in the foundations that guide Latin-American development.

In this context, Chile presents quite a unique and special scene, since it is one of the six countries in the world that forbid abortion under all circumstances. So-called “emergency contraception” has been strongly resisted, and only recently legislated under very restrictive terms. The CEDAW optional protocol has also been strongly resisted, and has not received sufficient support by the Congress for approval. Finally, the majority of the population usually rejects public policies and/or bills that threaten helpless groups’ lives, such as the children to be born and the elderly.

Despite the foregoing, the immense pressure put by international organizations and the irresistible temptation of some groups to “be similar to developed countries” sustain a risk, usually dormant, of eventually attacking human dignity, especially the right to life. Becoming aware of this and having the necessary information and tools to influence political decision-making are fundamental necessities for Chile to continue being proof of the possibility of combining economic growth, technological advances, and human rights protection.

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II. General Right to Life

A. Political and Legal Organization

A.1. Political Organization of the State of Chile

Chile is a unitary state,² which means that the administration, legislation and jurisdiction of the courts of justice have legal authority in all the territory of the Republic. The Republic is also territorially and administratively divided into fifteen regions, which are, in turn, divided into provinces, and these into communes. The exercise of the executive power is then deconcentrated by the President's delegation of powers to the regional official at a regional level, and then to the Governors at a provincial level; and decentralized by the autonomous and independent exercise of the Communal Mayors, elected by the people.



The Chilean Political System is that of a republican democracy, according to Article 4 of the Constitution.

Thus, the democratic character finds its expression in the periodic elections of executive authorities (President of the Republic and Mayors) and legislative authorities (Senators and Deputies). These authorities are elected by all the citizens entitled to vote and registered in the electoral poll.

The republican features are reflected in (i) the responsible exercise of power, which comprises the authorities' regular responsibility, insomuch as they are citizens subject to the rule of the civil and criminal law, their administrative responsibility for crimes committed when acting as public officers, and, in some cases, their political responsibility when violating some assumptions directly established by the Constitution;³ and (ii) in the exercise of power limited both

² Art. 3 of the Constitution.

³ Art. 52, N° 2 of the Political Constitution of the Republic.



in form,⁴ especially relating to the fundamental rights emanating from human nature,⁵ as well as in its term.⁶

The form of government is the presidential Republic, characterized by a strong president,⁷ which several mechanisms try to restrain.⁸

Regarding the Legislative Power,⁹ it is important to note that there are two chambers: (i) the Chamber of Deputies, made up of 120 members democratically

4 Art. 7 of the Constitution establishes the principle of legality, by which the bodies of the State shall subject their creation and exercise to the Constitution and the Acts, therefore becoming an essential pillar of the Chilean *Estado de Derecho* (Rule of Law).

5 Art. 5 of the Constitution.

6 The President's term of office is four years; the Senators', eight years; the Deputies', four years; and the Mayors', four years. Except for the president, the rest of the authorities mentioned can be reelected *ad infinitum*.

7 This is particularly stated in the special powers granted to the President of the Republic (Art. 32 of the Constitution), which almost exceed all the bodies of the State.

8 The first one is the constitutional control, exercised by the Constitutional Court (Art. 93). Its powers are: A. Regarding the Legislative Power: A.1) the preventive and mandatory constitutional control of the organic and interpretative laws and international treaties that deal with said matters, A.2) the preventive and optional control regarding constitutional matters that may arise from a bill or negotiation of an international treaty, A.3) the repressive control of the law in force, which enforcement may be unconstitutional. B. Regarding the President: the control of the constitutionality of the supreme decrees, C. Regarding the Judicial Power: the constitutional control of the auto acordados (Supreme Court legal acts relating to how courts should proceed in the knowledge of certain actions). The second mechanism of control is the political control, mainly exercised by the National Congress by means of the procedures of *acusación constitucional* ("constitutional accusation" a procedure by which charges are brought against the authorities mentioned in the Constitution –the President, a Minister, a Governor, etc.), ministerial interrogation by the Congress, and the creation of investigating committees. (Chamber of Deputies: Art. 52; Senate: Art. 53). The third control is the judicial control, executed by the courts of justice. The fourth and last control is the administrative control, exercised by the General Comptrollership of the Republic, especially through the procedure of *toma de razón* (a previous, general and mandatory legal control performed by the General Comptrollership of the Republic) of the acts performed by a governmental authority. (The General Comptrollership serves as a financial "watchdog" over the use of national funds).

9 See Articles 46 and subsequent of the Constitution.

elected, based on a territorial representation criterion,¹⁰ primarily in charge of supervising the bodies of the Administration; and (ii) the Senate, made up of 48 members democratically elected, and based on a regional criterion,¹¹ in charge of the legislative review, among other responsibilities. Regarding the Parliament, the Chilean electoral system is binominal, which means that the two seats in each constituency or district are occupied by the candidates of the two majority parties (one seat for each party). However, when a party doubles the second one in votes, the former occupies both seats. This aims at strengthening a system consisting of two large political conglomerations. Nowadays this phenomenon is materialized by opposition between the *Coalición por el Cambio*¹² and the *Concertación*.¹³

Finally, with regard to the Judicial Power,¹⁴ it is territorially organized into judges of first instance at a communal level, and Courts of Appeal at a regional level, which are the bodies that review the rulings pronounced by the judges

10 The basis for organization is 60 districts distributed by means of quantitative and communal criteria; two deputies per district are elected.

11 The organization is based on 24 constituencies, some of which represent an entire region (such is the case of the First Region of Tarapacá), or parts of a region (such as the Metropolitan Region which is divided into the East and West constituency). Two senators per constituency are elected.

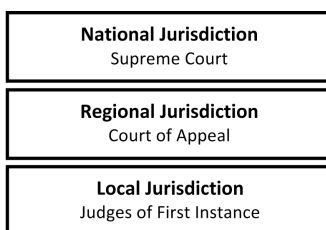
12 The *Coalición por el Cambio* (Coalition for Change) is an electoral, presidential and parliamentary coalition, created in 2009 to support followers of that year's candidate to president Sebastián Piñera, and upon his victory, is now considered a *pro-government* coalition. It is made up of the parties of the political coalition *Alianza por Chile* (Alliance for Chile): the *Unión Demócrata Independiente* or UDI (Independent Democrat Union) and the *Renovación Nacional* or RN (National Renewal); and the political movements *ChilePrimero* or CH1 (ChileFirst), *Norte Grande* (Big North) and *Movimiento Humanista Cristiano* or MHC (Humanist Christian Movement). (*El Mercurio*, May 6, 2009).

13 The *Concertación de Partidos por la Democracia* (Concert of Parties for Democracy) is a coalition of center-left political parties that governed Chile from March 11 1990 to March 11 2010, currently being the party opposing the *Coalición por el Cambio*. It was founded in 1988 as *Concertación de Partidos por el No* (Coalition of Parties for No), uniting the sectors opposing Augusto Pinochet, who was defeated by the *Concertación de Partidos por el No* in the national plebiscite in October that year. It is made up of the following parties: *Demócrata Cristiano* or DC (Christian Democrat), *Por la Democracia* or PPD (For Democracy), *Radical Social Demócrata* or PRSD (Social Democratic Radical Party) and *Partido Socialista* or PS (Socialist Party).

14 See Articles 76 and subsequent of the Constitution.



of first instance. The Supreme Court of the Republic is the head of the judicial system, and has jurisdiction in the entire nation and, by means of appeals in the high court, has the power, in form and substance, to annul and amend the rulings pronounced by lower courts when procedural or substantive defects are present. This aims to make uniform the administration of justice, protecting the guarantee of equality before the law. Moreover, it should be noted that the Constitutional Court has the authority, through preventive controls and controls *a posteriori*, to ensure the rule of constitution at legislative and judicial levels.



A.2. Legal Organization of the State of Chile

Chile has a system of Rule of Constitutional Law, which means that the exercise of power by the authorities and the exercise of rights by the citizens are subject to the rule of a legal system, which main law is the 1980 Political Constitution and its subsequent amendments.

Briefly stated, and only for the purpose of explaining the regulation related to the right to life presented below, the main regulating instruments in Chile, in order of importance, are the following:

- i. Political Constitution of the Republic (1980), characterized by the following features: (i) a significant dogmatic richness, inspired by the natural law school which predominated in the constituent committee, finding its main expression in Chapter I: “The Basis of Unconstitutionality”. The following paragraphs are worth noting: Art. 1, Par. 1, which states that a person is born free and equal to all others in dignity and rights; Art. 1, Par. 4, which sets forth the principle of the state helpfulness towards the human beings and establishes the common welfare as its goal; and Art. 5, Par. 2, which sets the respect and the promotion of the fundamental rights emanating from human nature as the limit to sovereignty. (ii) legal tools that make effective the extensive catalog of rights contained in it, some of them being the protection remedy (Art. 20) and the “nulidad de

derecho público” remedy,¹⁵ (Art. 7). And (iii) the supremacy claim not only in its organization and rules (since it is the law to which all other laws are subject), but also in its practice, which is reflected in Art. 6, in several actions and mechanisms that guarantee its effectiveness before the lower courts and the Constitutional Court; and in the range of topics that are protected by establishing the constitutionally protected rights in Art. 19.

The Constitution is accompanied by other sets of rules that make up the so-called “constitutional block”, among which are several complementary laws, international treaties on human rights, acknowledged by Chile and currently in force, and the constitutional rulings pronounced by the jurisdictional bodies before mentioned, that have set the sense and scope of the constitutional rules.

- ii. The Laws. Although all laws’ legal force is equally important, they can be classified as follows, depending on the quorum necessary for approval: 2.a) laws that construe the Constitution: the quorum must be 3/5 of the members in office; 2.b) organic constitutional laws: the quorum must be 4/7 of the members in office; 2.c) qualified quorum laws: they must obtain an absolute majority; 2.d.) ordinary laws: a simple majority must be obtained.¹⁶ It should also be noted that the matters regulated by law are explicitly stated in the Constitution (Art. 63).
- iii. The International Treaties. Their legal scope is a topic not always pacifically discussed in Chile. The controversy originated after the amendment introduced in the second part of Paragraph 2, in Article 5 of the Constitution, which states that “(...) It is the duty of the bodies of the state to respect and promote said rights [the fundamental rights that emanate from human nature], guaranteed by this Constitution, as well as

15 The enactment by which an act performed by a governmental authority is deprived from its legal effects, on the grounds that a requirement for validity is missing.

16 A high quorum must be obtained for construing laws because they restrict the absolute character of the fundamental law; for organic constitutional laws, because they are constitutional rules as far as they institutionally elaborate on the Constitution; and for qualified quorum laws, because the elector considered its topics as being relevant. It should also be noted that the absolute majority is half plus one of the members in office; and the simple majority is the majority of the members that are present, as long as at least a third of the members in office is present.

the international treaties in force and acknowledged by Chile”.¹⁷ As from that moment, various stances regarding the legal scope of international treaties have arisen. This is decisively relevant regarding their effects, amendments and prevalence in case their content and the domestic legislation contradict each other.¹⁸

The question was raised by the Chilean Constitutional Court in 2002, after 35 deputies filed a request related to the constitutionality of the Rome Statue, creating the International Criminal Court.¹⁹ It was finally decided that the international treaties regulating human rights are infra-constitutional—which means that, in case of contradiction, the Constitution shall prevail, unless the constitution is amended—and supralegal – which means that the law shall be adjusted to the provisions set forth in such documents, especially regarding the guarantees and the rights that may be regulated.

iv. The Authority to Regulate. It consists of the various rules not issued by the Parliament but mandated by the President of the Republic. Some of these rules are identified below:

- The Executive Orders. They are rules issued by the President that immediately acquire the value of a law; they are issued during a government’s terms of office in which the National Congress is not working as normal.
- The Law-Ranking Decrees. They are rules issued by the President of the Republic to regulate specific matters, upon express delegation of said power by the Congress.²⁰ They have the binding force of a law.

17 Constitutional Amendment Act N° 18,825 (1989).

18 Would it be appropriate to file a protection remedy to guard a human right set forth in an international document? If the treaties have a constitutional value, why are they subjected to controls of constitutionality? Would it be possible to amend the Constitution by this means, disregarding the strict proceeding established in it?

19 To see the ruling, please visit http://www.scielo.cl/scielo.php?pid=S0718-00122002000100033&script=sci_arttext

20 The constitution distinguishes two kinds of authority to regulate: a) the authority to execute: by enforcement of the law (Art. 4), and b) autonomous authority: the president’s empowerment by the congress to issue law-ranking decrees regarding matters provided for by the Constitution (Art. 32, Item 3). The Constitution intended to set forth a “maximum legal dominion” (i.e. a limit to the fields that the law regulates), by indicating the matters that the laws regulate in Art. 63: the matters regulated by the organic laws; the matters

- The Regulations. They are general rules issued by the Administration and regulate certain factual assumptions and/or complement what other regulating instruments establish. They are ranked below the Law.
- The Simple Decrees. They are special rule issued by the Administration; should the President of the Republic pronounce them, the name they receive is Supreme Decree.

Finally, the judicial rulings pronounced by the courts of justice shall be applicable only to the parties in the case,²¹ with the exception of the rulings pronounced by the Constitutional Court, in which case the general effect shall be the one stated in Articles 93 and 94 of the Constitution.

B. International Treaties and National Legislation

Now that we have made a general review of the political and legal structures of the State of Chile, the way in which the different regulating instruments make reference to the right of life should be closely examined.

The first element we should analyze is the Political Constitution of the Republic. As mentioned before, its inspiration was in Christian philosophy and in the school of natural law, which means that the Chilean Constitution relies on unrestricted respect for human dignity and the fundamental rights emanating from human nature. Article 1 states that “All and every person are born free and equal

that, according to the Constitution, shall be regulated by the law; the matters related to the labor, trade union, pension and social security legal regimes; public honors; the matters that empower the State to enter into credit agreements or engage in any other activity that may compromise the State credit or sell its goods; the matters related to the political and administrative division of the country; the laws initiated by the president himself/herself; pardon; declaration of war; the laws that set forth the basis of the processes of acts performed by governmental authorities. Article 63 does restrict these limits, and adds that “All other general and mandatory rule that regulates the fundamental basis of a legal system” are also matters regulated by the law.

With regard to the authority to execute, there exist several theories about its extension: a) absolute legal reservation: the law shall regulate in detail, not leaving discretionary power to the administration, b) relative legal reservation: discretionary power is fundamental in order to establish rules, and c) neutral legal reservation: the regulatory authority may complement, regulate and operate in collaboration with the law, though not creating elements in a new rule.

21 Sect. 3 of the Chilean Civil Code.

to others in dignity and rights”, specifying that the expression “are born” implies that every person is protected by the Law from the very beginning of his life. Then paragraph 4 of the same article establishes that the state is at the person’s service and its purpose is to achieve the person’s welfare by fully respecting the rights and guarantees set forth by the Constitution. Article 5, paragraph 2 reinforces the foregoing by stating that the fundamental rights emanating from human nature are an unavoidable limit to state sovereignty; this is necessarily complemented by Art. 19, paragraph 1, which acknowledges that every person is entitled to the right to life and to physical and psychic integrity.

Upon a close analysis of Art. 19, Par. 1, the following conclusions can be drawn: (i) the Constitution protects every person, an assertion that establishes the supremacy of the person over the state for being ontologically superior and chronologically pre-existent; and (ii) the right of the person to be born is expressly protected, which, though having raised a significant controversy in the Constituent Committee,²² turns out to be novel and extremely significant.

There exist other constitutional guarantees set forth in Art. 19 of the Constitution, which are closely related to the right to life (so much so that they are usually referred to when a protection remedy is filed);²³ said constitutional guarantees are the right to live in an environment free from contamination (Art. 19, Par. 8), the right to protection of health (Art. 19, Par 9), and the right to social security (Art. 19, Par. 18).

Paragraph 26 in Art. 19 of the Constitution deserves a note itself: “(...) the legal rules that regulate or complement the constitutional guarantees or that limit

22 Some of the commissioners (Guzmán, mainly) considered that drafting an explicit punishment for abortion in the Constitution was necessary. Others were doubtful as to some abortion assumptions, such as the alleged “therapeutic abortion” or the abortion claimed in cases of rape. The controversy could not be resolved, leading to the text currently in force. Please see the Official Minutes of the Committee of the New Constitution Studies (*Actas oficiales de la Comisión de Estudios de la Nueva Constitución*), session 89, paragraph I, page 18.

23 It is a legal action that can be filed before the Court of Appeals, which shall immediately take all measures it deems necessary to restore the right that has been deprived by means of illegal actions, and to ensure the victim’s adequate protection. It is a legal action that can be filed before the Court of Appeals, which shall immediately take all measures it deems necessary to restore the right that has been deprived by means of illegal actions, and to ensure the victim’s adequate protection. A similar action is called “amparo” in Argentina (see footnote N° 64 in the Argentinean report), and “constitutional tutelage action” in Colombia (see footnote N°11 in the Colombian report).

those guarantees by constitutional mandate shall not affect the rights' essence nor impose conditions, taxes or requirements that prevent them from being freely exercised". It has been interpreted that this guarantee is addressed to the legislators and the State Administration, rather than to the citizens. The underlying premise in this article is the permanent existence of conflicts of rights that the law must solve by regulating, complementing or limiting their exercise. The article mentioned limits the extent of such regulation, not allowing it to affect the *essence* of the rights regulated or to impose conditions that prevent them from being freely exercised. The Constitutional Court has stated that "a right's essence is affected when it is deprived of that which is inherent to it, leaving it unrecognizable, and when it is prevented from being 'freely exercised' in the following cases: a) when the legislators subject it to requirements that are impossible to meet, b) when the legislators analyze it beyond reason, c) when the legislators deprive it of legal protection".

It is also necessary to mention the legal instruments that make a very important reference to the right to life.

We should start by mentioning the Civil Code, which sets forth the moments when the legal existence of a person begins and ends. Section 74 of the Civil Code states that life begins when the person is born, that moment being when it is fully separated from his mother. Thus, the "doctrine of vitality" is embraced—what defines the moment in question is the proof that the fetus has had an independent life—usually by means of hydrostatic medical expert's reports. It should also be mentioned that the majority doctrine considers that this is only relevant for pecuniary effects, mainly relating to inheritance issues – which is confirmed by Section 77 of the Civil Code; it does not aim to define the natural existence of a person. Moreover, Section 76 contains an irrebuttable presumption (i.e. no proof of the contrary is admitted), which establishes that the moment of conception is no more than 300 and no less than 180 full days, counted from the midnight of the day when the birth begins.

Finally, regarding the end of a person's legal existence, the Civil Code only points out in Section 78 that "the existence of a person ends with his natural death", not specifying when that assumption is verified; also, it only regulates the requirements and the proceeding of the death presumption statute, issued when a person is missing.

Then, the Criminal Code classifies the different variants of the crime of homicide in Part II, Article VIII, titled "Crimes and Offences Against the Person", Sections 390–394. Moreover, Act N° 20,480 has incorporated the institution of femicide, which entails a greater punishment if the crime consists in a woman being killed by her partner.

Finally, Act N° 19,451 regulating organ transplant and donation (1996) becomes very important for it is the only legal instrument that details the moment when a person's natural death occurs. Section 11 of this act identifies it as the "total and irreversible abolition of all the encephalic functions, which shall be confirmed by the certain diagnosis of the cause of the problem, according to certain clinical parameters corroborated by the corresponding proofs and examinations. The regulations shall at least consider that the person whose encephalic death is being declared presents the following conditions: 1. No voluntary movement for an hour; 2. Apnea after three minutes disconnected to the ventilator; and 3. Lack of brainstem reflexes. In these cases, the death certificate issued by a medical doctor shall be accompanied by a document proving the preceding facts that led to the confirmation of death". This act, despite its clearly special character, has corrected the omission in Section 78 of the Civil Code.

Now we will refer to the international treaties signed by Chile, indicating their legal status and briefly mentioning the way in which they govern issues related to the right to life, always remembering that the treaties' rank is infra-constitutional and supralegal, as explained above.²⁴

- i. **International Covenant on Civil and Political Rights**, enacted by Decree N° 778, on April 29, 1989, by the Ministry of Foreign Affairs. The signing states undertake to make all the appropriate changes to their legislations for the treaty to be effective. Article 6 stands out for being in full accordance with the 1980 Constitution, which means that nothing was added to the fundamental law.²⁵
- ii. **International Covenant on Economic, Social and Cultural Rights**, enacted by Decree N° 326, in 1989, by the Ministry of Foreign Affairs. This treaty is important considering the provisions in Article 9,²⁶ in full accordance with the right to social security already provided for in the Constitution;

24 For more details on specific treaties and/or enactment decrees, please visit http://www.leychile.cl/Consulta/buscador_tratados. To review the human rights treaties signed and acknowledge by Chile, please visit <http://www.unhchr.ch/tbs/doc.nsf/newhvstatusbycountry?OpenView&Start=1&Count=250&Expand=35#35>

25 Article 6 of the ICCPR expressly establishes that the right to life is inherent to the human being and that it is protected by the law. It also establishes that no one shall ever be arbitrarily deprived of life. (Par. 1).

26 Art. 9: The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

and in Article 10, which establishes that the family, and specially the pregnant woman, receive protection particularly under labor law.

iii. **American Convention on Human Rights, “Pact of San José”**, enacted by Decree N° 873, in 1989, by the Ministry of Foreign Affairs. This document is of fundamental importance and is referred to in various actions and rulings relating to the protection of the right to life and, in particular, the protection of the unborn. Article 4, Paragraph 1 is essential since it considered the moment of conception to be that in which human life—and, therefore, its constitutional protection—begins.²⁷ Thus, the document expands the rule provided for in Art. 19, Sect. 1, Par. 2 of the Constitution, which states that “the law protects the life of the unborn”, not specifying the moment when its existence begins.

iv. **The Convention on the Elimination of All Forms of Discrimination Against Women (UN)**, enacted by Decree N° 789, on December 9, 1989, by the Ministry of Foreign Affairs. This document is also of fundamental importance since, apart from the provisions for the elimination of all forms of discrimination against women, some groups seeking recognition of an alleged right to abortion, have tried to protect the sexual and reproductive’s rights, sexual autonomy, and the “right to abortion” as an integral part of the document.

However, the Convention clearly states that its purpose is to ensure that women enjoy all human rights acknowledged, without discrimination based on sex, and there is no provision mentioning the rights mentioned above and allegedly protected.

The ones who support the idea that sexual and reproductive rights—including the alleged right to abortion—are part of the Convention, base its argument on article 12 and article 16, par. 1, subpar. e) of it; however, it should be clear that the purpose of these articles is to acknowledge, on a basis of equality of men and women, that every woman—especially the pregnant woman—is entitled to the right to health care services.²⁸

27 Art. 4.1. “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life”. It should be noticed, however, that the expression *in general* that the Convention uses in this article has led many people to maintain that, as a matter of fact, it is not an accurate statement regarding the moment in which life begins, but an institution for constituents and legislators to detail the assumptions and exceptions to that general rule.

28 Article 12 of the Convention expressly states: “1. States Parties shall take all appropriate



The fact that the CEDAW's Committee's²⁹ reports include recommendations that go beyond its powers is also questionable. One of the duties undertaken by the States Parties is to periodically report on the legislative, judicial, administrative and any other measures taken in order to make the Convention's provisions effective.³⁰ The Committee evaluates those reports to then render a critical judgment, and makes comments and recommendations. We would like to analyze item 282 of the 2004 examination, which states verbatim: "In its notes on the preceding report, the Committee made reference to the inadequate acknowledgement and protection of women's reproductive rights and to the existence of laws that forbid and punish all kinds of abortion, which affects women's health, leads to an increase in mortality related to maternity, and causes more suffering when women are imprisoned for violating these laws. This committee urges the state to review its legislation related to abortion with the aim of amending it so as to provide abortions under safe conditions and to allow the termination of pregnancies for therapeutic or women's health-related reasons, including women's mental health; and to eliminate the obligation of reporting cases of abortion – an obligation imposed on health care professionals and law enforcement agencies, which apply criminal punishments to those women". Item 285 is also revealing in stating that "as regards abortion, the current government has not yet considered decriminalizing it, claiming that the conditions for opening a public discussion about this issue are still not appropriate, not even with regard to the therapeutic abortion, which existed in Chile

measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. 2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation".

Article 16, par. 1, subpar. e) establishes that "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights".

29 The Committee's creation is established in Art. 17 of the Convention.

30 Pursuant to Art. 18 of the Convention.

until 1989, when it was abolished by the military government. The firm resistance by the conservative media, religious groups that oppose abortion altogether, and the political parties that share this stance to analyzing a phenomenon that affects thousands of women has had a strong effect on public opinion during the last decades”.³¹

These recommendations by the CEDAW committee deserve at least some brief comments. First, it is obvious that, behind the concepts of “sexual rights” or “reproductive health”, certain practices that go against human dignity are hidden. If there were any doubt, the Committee makes it explicitly clear by expressly calling for the decriminalization of abortion. Second, expressions like “the conservative media” and “the religious groups that oppose abortion altogether” clearly show that the Committee does not intend to be a legal institution administering justice, but rather a tool at the service of anti-life ideologies imposed coercively by international treaties. Interference by a treaty monitoring body in domestic policy affairs is not only peculiar, but also without legal foundation. Finally, it must be remembered by the reader that this same strategy (of misinterpreting the meaning of treaties and placing improper demands on signatory states by treaty monitoring bodies) has been the mechanism used for spreading abortion and similar methods of family planning throughout the continent.

On January 23, 2001, the Government started a Bill in order to approve the Optional Protocol by Message N° 282–343 (Bill in Bulletin N° 2667–10). The protocol grants the Committee the jurisdiction to decide on requests and communications filed before it regarding the degree of the state’s compliance with the Convention; these requests and communications can be filed not only by the state, but also by every individual or collective person who considers that the rights contained in said international document have been violated. This way the Committee can investigate and make recommendations to the State Parties. It is also intended to put the CEDAW’s optional protocol on the same level of human rights international treaties, with all the consequences it entails.

Nowadays, this Bill is in the second constitutional procedure, in the Senate’s International Affairs Committee. The fact that the optional

31 For more details on the Committee Examination based on the 2004 Chilean report, please visit <http://www.eclac.org/mujer/noticias/noticias/2/27332/Informe%20CEDAW%2006.%20Version%20no%20editada.pdf>



protocol has not been passed clearly proves that Chile has not decided to abrogate its national sovereignty in favor of the CEDAW's Committee. However, the pressure to pass the protocol re-emerges from time to time.

- v. **Convention on the Rights of the Child**, enacted by Supreme Decree N° 830, on August 14th, 1990, by the Ministry of Foreign Affairs. Following the same logic as in the treaty mentioned above, the State of Chile has undertaken the obligation of adjusting its domestic legislation and public policies to the mandates of the Convention, as well as periodically reporting its progress in the implementation of the measures it sets forth. Article 6, which mentions the “inherent right to life”, simply echoes what the Chilean Constitution already establishes.

Upon consideration of the facts presented above, it can be concluded that the Chilean Constitution is in full agreement with the protection of the right to life as provided for by the international treaties, all of which binds that national state to continue reaffirming its commitment to respect and ensure this fundamental human right.

C. Details by the Courts of Justice

It is interesting to analyze the Chilean courts' decisions on matters relating to the protection of the right to life:

Conceptualization of the Term “Life”

With regard to the conceptualization of the term “life”, the Chilean Constitutional Court Ruling, Case Record N° 220 (August 13th, 1995), on the Transplant Act, indirectly suggests that the term “life” should be defined by the medical sciences. What is actually defined is the term “death”, indirectly delimiting the concept of life. There are no records either in the constitutional or in the ordinary jurisprudence of a clear, accurate definition of the term, but it is obvious that the practice has been to refer to the interpretation by medical experts on these matters.

Determination of the Beginning of Life and its Legal Protection

The beginning of life and its subsequent protection were determined for the first time in the Constitutional Court Ruling on the Supreme Decree that regulates the distribution of the Morning-After Pill (Case Record N° 740). It stated that every person is entitled to the right to life from his conception, since that is the moment when the individual's existence begins, having all the genetic information necessary for his development and being completely

distinct from his father and mother, thus, that individual can be recognized as a person before the law. The Court also held that the protection of the right to life from the moment of conception was guaranteed by the American Convention on Human Rights as well.

This was also acknowledged by the Supreme Court on August 30, 2001, on appeal to the Protection Remedy, Case Record N° 2186–2001 (Postinol Case). The Court pointed out that “the unborn has the right to life, regardless of its pre–natal stage of development—for the law does not distinguish between those stages—which means that he has the right to be born and become a person” (Paragraph 17).

The Right to Life and the Clash of Rights

In cases where rights clash, the jurisprudence of the Courts has tended to organize them into a hierarchy and to consider the right to life as superior with regard to the rest. Therefore, it can be stated that any limitation to this right is inconceivable. Such have been the precedents of the courts in the following cases:

The Right to Life and the Right to Property

The Constitutional Court has privileged the right to live over the property in several occasions. One example is the Catalytic Case, Case Record N° 325 by the Constitutional Court, (June 26, 2001), and the ruling of the case concerning the Mandatory Control of the Law on Rules Adapting the Legal System to the Criminal Procedure Amendment, Case Record N° 349 (April 30, 2002).

The Right to Life and the Freedom of Religion

The clash between the right to life and the freedom of religion usually occurs when Jehovah’s Witnesses go to health care centers, since their religion does not allow them to be given blood transfusions, even in extreme situations. The Court of Appeals of Copiapó, ruling on the protection remedy Case N° 18640–2002 (March 24, 1992), stated that, in cases like this, the right to life predominates over the freedom of religion, without any disrespect to the latter. This ruling was confirmed by the Supreme Court on May 5, 1992, (Case N° 3569–2002). Likewise, the Court of Appeals and the Supreme Court have pronounced similar rulings on several cases.³²

32 Case N° 1030–1995 (October 2nd, 1995), Case N° 332–2000 (January 11, 2001), Case N° 39–2002.

The Right to Life and the Right to Strike

In the case “Rozas Vial, Fernando and others, against Ponce and Parish Priest of San Roque” (Case N° 167-p), the Court of Appeals was confronted with a conflict in which a group of people intended to “exercise” their right to life by using the hunger strike as a means for pressuring certain authorities. In that case, five university students started a hunger strike to call for the return of some of their classmates who had been expelled from the University of Chile for allegedly political reasons. The Court of Appeals heard the case for it considered that the strikers were making an attempt on their own lives, and instructed them to put an end to the strike. The Court stated that “the strikers’ attempt against their lives and physical integrity is an illegal and unlawful act that, though not punishable by the law, infringes the entire social and legal systems (...). Being part of the natural law, the right to life is that by which no one can make an attempt against our lives – this certainly does not mean that we have full dominion over our lives so as to destroy them if we wanted to, but empowers us to demand that others do not violate it (...). As a matter of fact, to have “dominion” necessarily entails a relation between an individual and an object separate from him, while the human being and his life are identical” (Paragraph 10).³³

D. Protection of the Life of the Conceived Unborn Child in the Chilean Law

Civil Protection of the Life of the Conceived

The life and health of the conceived or, as the Roman law expresses it: “the one to be born” (*nasciturus*), has been provided for from the dawn of the Republic. The Civil Code (1855), written by Andrés Bello, clearly established that “the law protects the life of the unborn” (Section 75 of the Civil Code).

As a consequence, the same legal rule grants broad powers to the judge to adopt, at his own initiative or upon the request of any person, “all the directions that he may deem convenient to protect the existence of the unborn, as long as it is believed that said existence is at risk”.

This rule should be associated to the powers that the Act of the Family

33 This was also acknowledged in other cases. Case N° 2268-91, Case N° 2839-95, a 2292-2002 protection remedy. It has only been dismissed in case record N° 1525-96, where the court stated that the strikers’ lives were not at risk.

Courts grants the judges of that jurisdiction regarding the adoption of protection measures in favor of the children whose rights are severely violated or threatened (Act N° 19968, Section 8, Par. 8), specifying that by “children” it should be understood “every human being that has not reached the 14 years of age” (Act N° 19968, Section 16, Par. 3).

The acknowledgment of the right to life originates from the fact that the Civil Code states that “a person is every individual belonging to the human race, regardless of age...” (Sect. 55). The embryo is an individual and belongs to the human race, thus it should be considered a person without regard to its chronological development (age).

Penal Protection of the Life of the Conceived

The life of the conceived is equally protected by the criminal law which punishes every person who archly causes an abortion (Sect. 342 of the Criminal Code). The punishment for a woman who causes her own abortion or agrees to have another person cause her abortion shall be reduced if she did so to hide her dishonor (Sect. 344 of the Criminal Code). The woman can also have her responsibility excused or reduced by resorting to general exemptions and mitigating circumstances acknowledged by the Criminal Code, such as “irresistible forces or insurmountable fear” (Sect. 10, Par. 9 of the Criminal Code).

If the doctor, on the other hand, caused or cooperated with the abortion, he shall have his punishment aggravated compared to that of the woman (Sect. 345 of the Criminal Code).

There are no exceptions to this criminal protection. So-called “therapeutic abortion” was annulled and replaced by the rule of the Health Code, which forbids “any action directly aimed to cause an abortion” (Sect. 119 of the Health Code).

Therapeutic actions practiced in favor of the mother’s health but that result in the death of the fetus are not considered abortions, since they do not comply with the requirements to be such (doctrine of the double effect or indirect intention).

The penal protection of life and integrity from the moment of conception was complemented by passage of the so-called Act N° 20120 on the Human Genome (September 29th, 2006). Section 1 of said legal instrument explicitly states: “this act aims to protect the human beings’ lives from their conception, as well as their physical and psychic integrity, and their genetic variety and identity, with regard to biomedical scientific research and its clinical applications”.

Several specific consequences of the protection of the unborn arise from this act. Cloning human beings is forbidden and entails a criminal punishment, regardless of the purpose or the technique used (Sect. 5 and 17); this means that the prohibition applies not only to so-called reproductive cloning, but also to the



wrongly-called therapeutic cloning, which involves the deliberate destruction of embryos. It also establishes that under no circumstances shall human embryos be destroyed so as to obtain stem cells in order to create tissues and organs (Sect. 6). The act also states that “a scientific research shall not be carried out if there are precedents suggesting that there is risk of destruction, death or serious and lasting bodily injuries to a human being” (Sect. 10, Par. 2).

Constitutional Protection

Article 19 of the Political Constitution (1980) states that the Constitution guarantees certain fundamental rights to “every person”, some of these rights being the person’s right to life and physical and psychic integrity, specifying that the law shall specially protect the life of the conceived human being: “the law protects the life of the unborn” (Art. 19, Par. 1 of the Constitution).

This way, the law has provided for the applicability of the protection remedy³⁴ in order to reestablish the rule of the law in case the right to life is deprived, disturbed or threatened by arbitrary and illegal actions or omissions (Art. 20 of the Constitution). An example of this is the “Carabantes Cárcamo” case (Court of Appeals of Santiago, November 4th, 1991, in *Revista de Derecho y Jurisprudencia*, Volume 88, Section 5, p. 340), in which it was decided that the creature to be born deserves protection if his life is at risk when the mother refuses blood transfusions.

The 1999 constitutional amendment (Act N° 19611) intended to specifically state the equality between men and women. As a result the expression “every man” was replaced by “every person”—the expression used in Art. 1 of the Constitution—and the rest of the text remained unchanged: “are born free and equal to others in dignity and rights”. The former statement links the word “person” with the verb “are born” which might have led to misunderstanding the Constitution, in Article 1, to say it is the human being that has been born—or from the moment he is born—who is a person (with dignity and rights).

Fortunately, this was noticed in time for the Plenary Congress, in exercise of its function of derived constituent power, to restate the constitutional personality of the conceived human being by means of an explicit explanation. Several legislators took the floor and stressed that the change in stating that every person is born free cannot be understood as weakening the right to life of the unborn (Deputy Cristi, Deputy Elgueta, Senator Díez, Deputy José García, Deputy Krauss, Senator Urenda, Senator Zaldívar), nor as “ignoring, suppressing or mitigating the

34 See footnote n° 23.

acknowledgment of the constitutional personality corresponding to men as well as women from the very moment of conception” (Deputy Guzmán, Senator Larraín, Deputy Luksic, Deputy Pérez).³⁵

The Constitutional protection for the conceived’s life and health is reaffirmed in Art. 5, Par. 2 of the Constitution, which sets forth that the duty of the bodies of the state is to respect and promote the fundamental rights that emanate from human nature, guaranteed by the Constitution, as well as “the international treaties in force and acknowledged by Chile”. One of the treaties acknowledged by Chile is the American Convention on Human Rights, also known as “Pact of San José” (Official Gazette Publication: January 5, 1991), which solemnly states that “every person has the right to have his life respected” and that “this right shall be protected by law and, in general, from the moment of conception” (Art. 4.1). It also establishes that every human being has the right to recognition as a person before the law (Art. 3, with relation to Art. 1.2).

Moreover, the International Covenant on Civil and Political Rights (Official Gazette Publication: April 29, 1989) establishes that “Every human being has the inherent right to life”. The expression “human being” clearly refers to every individual of the human race.

Finally, the Convention of the Rights of the Child (Official Gazette Publication: September 27th, 1990), emphatically states that, for its purposes, “a child means every human being below the age of eighteen years...” (Art. 1). This definition includes the *nascituri* since, according to said Convention, “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth*” (Preamble) (emphasis added for this paper).

The center of the debate about the Morning–After Pill has been whether it induces abortion or not. Some people have argued that it does not induce abortion for it does not terminate the pregnancy, which they view as starting with the fertilized ovum’s implantation in the uterus. However, that does not seem to be sustained by the Chilean legislation. In Chile, it has always been understood that the individual susceptible of the crime of abortion is the unborn child from the very moment of fertilization. There is clear evidence of that in the Records of the Criminal Code Drafting Committee: “from the moment the fetus’s existence begins, it contains the germ of a man, and the person who destroys it shall be accused of an extremely serious crime” (Proceedings of the 159th Session). The

35 Cfr. Plenary Congress Session, May 15, 1999, *Senate Session Journal (Diario de Sesiones del Senado)*, p. 4037–4066.



specialists in criminal law emphatically say so. Raimundo del Río, for example, used to teach that “technically, the crime of abortion is committed by a woman who consumes an abortion-inducing substance the day after the fertilization...”,³⁶ an opinion echoed by Alfredo Etcheberry³⁷ and Gustavo Labatut.³⁸

The other point of view says that the morning-after pill does not prevent implantation from occurring, which makes it only a contraceptive and not an abortion-inducing substance. This has been subjected to a judicial discussion.

First, the Supreme Court, in ruling dated August 30, 2001, regarding a protection remedy filed against the Public Health Service resolution authorizing the sale of the morning-after pill, stated that “the right to life is the essence of human rights, since without life, the law does not exist” (Par. 15), and that the unborn individual owns the right to life (Par. 17). The act performed by the Health Care Service was thus pronounced illegal. A new resolution by the Public Health Service then authorized the same drug, though with another trade name, and a legal action to nullify said resolution was filed; however, although the ruling in first instance accepted the original claim for considering that the human embryo’s life and physical integrity were seriously threatened, the Supreme Court of Santiago (a regional court) decided that there was not enough evidence of the anti-implantation effects produced by the drug, that such issue is an unresolved medical-biological problem (Par. 16) and that, therefore, the resolution of the issue depended on medical authorities rather than courts. The National Supreme Court declined to review the facts.

Upon the pronouncement of a supreme decree by the president approving rules on fertility and authorizing the distribution of the morning-after pill by public health centers, a group of deputies requested that the Constitutional Court decide on its effects on the right to life. By its ruling of April 18, 2008, the Court pronounced the unconstitutionality of said item, taking into account that “due to the embryo’s peculiarity, it can be considered, from its conception, a unique being, entitled to the protection of its right from the same moment; also, it cannot be subsumed in another entity or manipulated without affecting the substantial dignity it already enjoys for being a person” (Par. 51). After this, the Court stated that “the reasonable doubt raised regarding whether the ‘morning-after pill,’ compulsorily distributed in the institutions that make up the Health Care Network of the Health Care Services National System, can terminate the embryo’s life by

36 DEL RIO, Raimundo: *Derecho Penal*; Santiago, 1935, Vol. III, p. 182.

37 ETCHEBERRY, Alfredo: *Derecho penal*; Santiago, 1965, Vol. III, p. 89–90.

38 LABAUT, Gustavo: *Derecho penal*; Santiago, 1983, Vol. III, p. 126–90.

preventing its implantation in the female endometrium also raises a doubt about potentially affecting the right to life of an individual who is already a person from his conception under the conditions guaranteed by Article 19, Par. 1 of the Constitution. According to the previous reasoning, the above mentioned doubt should privilege the interpretation that favors ‘the person’s’ right to life over any other interpretation involving the invalidation of such right” (April 18, 2008, Case N° 740–07).

Advocates of the morning–after pill, supported by the Government of Ms. Michelle Bachelet, filed a bill to authorize the so–called emergency contraceptives. Finally, the Congress passed Act N° 20418 on January 28, 2010, on information, guidance and services as regards fertility regulation. Although many people claim that the morning–after pill’s public and private distribution has been allowed (the legislators did not request Constitutional Court review on this point of the act), the truth is that, in accordance with Article 4, the act only makes reference to contraceptives that do not induce an abortion. The exact wording of the act is: “In any case, any method whose main purpose or direct effect is to induce an abortion shall not be considered a contraceptive nor shall it be part of the public policy as regards fertility regulation” (Art. 4). If one of the possible purposes of the morning–after pill is to cause an abortion (i.e. the death of a conceived human being)—as we believe it is and is confirmed by the international manufacturing laboratories themselves – then the pill is not legally authorized and the prior doctrine established by the Constitutional Court is still in force.

III. Abortion in Chile

A. Rules Prohibiting Abortion and Bills Intending to Have it Approved

This analysis should begin by noting –once again– that in Chile abortion is prohibited under all circumstances. The main legislative instruments related to abortion are analyzed below, followed by the description of the constitutional and legislative bills that aim to decriminalize abortion.

Article 19, Par. 1, Subpar. 2 of the **Political Constitution** states that “the law protects the life of the unborn”. The apparent lack of clarity in explicitly prohibiting abortion has led some people to state that the political Code, in accordance with its general spirit, intends to entrust to the legislator to determine the way in which it is reasonably appropriate to put such protection into practice. Other people, on the other hand, point out that the constitution could authorize the inclusion of exceptional situations in which abortion should be considered legal. It is thus necessary to bring up what has been mentioned before regarding the expression “are born” in Article 1, Par. 1 of the Constitution, which, in saying



that every person *is born* free and equal in dignity and rights, is referring not to the birth but to the beginning of its existence. Despite the foregoing, the scope of said expression has also caused a certain amount of controversy.³⁹

Section 75 of the **Civil Code** repeats said idea, imposing on the judge the duty to adopt all directions that he may deem convenient to protect the life of the unborn, in the event it is believed that its life is at risk. The Civil Code then states that the punishment of a mother who intends to affect the fetus's life or health shall be postponed until the birth. Moreover, it is also relevant to mention here the irrebuttable presumption regarding the conception date set forth in Section 76 of said legal instrument.

Sections 342 to 345 of the **Criminal Code** make reference to several situations leading to the crime of abortion, setting different punishments depending on the circumstances under which the abortion is performed: with or without the woman's consent; with or without violence; by a professional doctor.⁴⁰ Since the law does not define what an abortion is, the concept has been subjected to jurisprudential interpretation; the best definition is "to kill the embryo or fetus". Furthermore, Section 342 punishes any person who "archly" causes an abortion, which has raised a debate about whether the characteristic conduct must be defined as direct fraud or may also be negligent – which is also important regarding indirect abortion, occurring when applying the double effect principle.

The **Health Code** refers to abortion in Sections 50 and 119. The first one instructs the civil registry officers to immediately report to the health care authorities the deaths caused by abortions, while the second one establishes that no action intended to cause an abortion can be performed. The latter is especially important since its wording meets the requirements set forth in Act 18826 (1989), which not only amends the former act that left room for abortion in therapeutic cases, but also helps construe the scope of paragraph 1 in Article 19 of the Constitution.

To expand the list even more, some other regulations should also be mentioned: the 2003 **Decree N° 216 by the Ministry of Health**, which modified the General Act of Cemeteries allowing burial of the mortal remains of a fetus and the issuance of a fetal death certificate by a doctor, and instructing the clinics

39 Nonetheless, it should be noted that said article was amended in 1999 through Act N° 19611, substituting the expression "men" with "person;" and, after said amendment, several Senators requested to have it explicitly stated that the word "person" refers to the unborn as well, a clarification finally stated in the proceedings, to keep reliable records of the act.

40 The punishments range between 541 days to 5 years. The maximum punishment applies to both the woman and the professional doctor who performs the abortion.

and hospitals to hand over the fetal remains, without further distinctions; and **Act N° 20357** on crime against humanity, in its Section 5, Par. 4, forbids forcing a woman, by means of violence or threats, to perform an abortion or have an abortion performed on her.

There is, thus, plenty of evidence showing that Chilean legislation unanimously forbids any kind of abortion. However, there exist several constitutional and legal amendment bills that aim to alter this *status quo*, either by decriminalizing certain conduct currently punishable, or by referring to certain issues related to abortion. There are other bills that aim to reinforce the existing prohibition as well.

Some of the most relevant bills are mentioned below.

- i. Bill amending Sect. 119 of the Health Code, to reinstate the therapeutic abortion. (Bulletin N° 6420–11, March 19, 2009). It is in the Chamber of Deputies' Health Committee, in the first constitutional procedure. Similar bills have been filed before, but have not prospered.
- ii. Bill protecting the woman's life when the pregnancy is terminated in the cases the bill provides for. It aims to reinstate "therapeutic abortion" in cases of fetal malformations or rape (Bulletin N° 4845–11, January 18, 2007).
- iii. Bill decriminalizing the termination of pregnancy for medical reasons. It legalizes both indirect and therapeutic abortion (Bulletin N° 7373–07, December 15, 2010). What is interesting about this bill is that it was filed by Senator Matthei, current Ministry of Labor and an activist of the Independent Democrat Union. It is in the first constitutional procedure, its debate not being urgent.
- iv. Bill decriminalizing eugenic abortion, abortion in case of rape, among others (Bulletin N° 7391–07, December 21, 2010). It has been filed by the legislators of the party Concertación in response to the previous bill. It is in the first constitutional procedure, its debate not being urgent.
- v. Bill establishing a master act on health and reproductive sexual rights. It aims to organically regulate abortion as part of women's sexual autonomy prerogatives. It involves the decriminalization of certain types of abortion, a prohibition on doctors reporting their patients' abortions, and the recognition of sexual and reproductive rights under Art. 19 of the Constitution (Bulletin N° 5933–11, July 1, 2008). It is in the first constitutional procedure, its debate not being urgent. This bill is particularly relevant because it uses ambiguous language and is based on international anti-life agendas—always arguing "the importance of catching up with the world" and "the duty to comply with international commitments"—which causes it to receive greater support by the



- members of the parliament, which means pro-life legislators must be sure that the scope of the concepts used are specified.
- vi. Constitutional reform bill, requiring a higher quorum for decriminalizing abortion (Bulletin N° 4121-07, March 22, 2006). It is in the first constitutional procedure, its debate not being urgent. The truth is that, due to the quorum needed to pass bills of this nature, it is presented more as a political rather than a strictly legislative action.
 - vii. Bill amending the Criminal and Health Codes provisions, aiming to specify the actions that constitute the abortion type (Bulletin N° 4447-11, August 22, 2006). It is relevant because it aims to improve the current lack of clarity regarding the scope of the crime of abortion, though critics say this bill goes beyond the criminal code. It is in the first constitutional procedure, its debate not being urgent.

It can be seen that, even though there are several bills related to abortion, they will not gain relevance unless the Government decides to speed up their processing. In that regard, the government of President Sebastián Piñera and the *Coalición por el Cambio* (pro-governmental) are not of only one opinion about the issue, as is reflected in the fact that one of the recent bills was supported by a Senator of the pro-government party. Nevertheless, it is worth acknowledging that most of the pro-government deputies and senators, together with some others from the party *Democracia Cristiana*, refuse to include abortion in the proposed legislation because it would go against the right to life. In this setting, there should not be great innovations regarding either increasing or moderating the punishment for abortion during the current government's term of office.

However, three potential threats should be noted: (i) The first one is that the international treaties and foreign committees' resolutions—particularly the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)—have paved the way for the inclusion of abortion in Chile, with the excuse of complying with the international standards of sexual autonomy and reproductive rights. By means of those arguments, several members of the parliament who are reluctant to decriminalize abortion cannot see that, in practice, said instruments eventually lead to it. (ii) Second, if the latest parliamentary debates and voting sessions, specially the one in which the so-called morning-after pill was introduced in the legal system,⁴¹ are analyzed, it is possible to hypothesize that the trend is moving toward the legalization of abortion in Chile, sooner

41 The current situation of the “emergency contraception” in Chile will be detailed below.

than later. (iii) Finally, it is interesting to examine that the polls, though still not conclusive, have shown results in favor of apparently “moderate” kinds of abortion, such as the so-called therapeutic abortion and/or abortion in case of rape.

B. Legal Precedents: The Highest Courts in Chile Confirm the Rejection of Abortion Under All Circumstances

The most important controversies regarding abortion have not been usually related to cases of explicit abortion, but rather to conflicts associated with “emergency contraception”. Below are five cases that have had the greatest impact, either because of their repercussions in the public debate, or for establishing legislative and/or jurisdictional precedents.⁴²

The reader will see that the rulings follow a sequence and that, after some contradictory rulings by the Court, the uniform criterion used is that of rejecting “emergency contraception”, reinforcing the protection of the unborn’s life.⁴³

Sara Philippi Izquierdo and others v. Public Health Institute, Ministry of Health and the laboratory “Laboratorio Médico Silesia S.A”. (Supreme Court, August 30th, 2001, Case Record N° 2186–01).

The plaintiff filed a protection remedy provided for in Art. 19, Par. 1 and 26 of the Political Constitution, demanding to declare illegal the decision by the the Public Health Institute, through administrative resolution N° 2141 (2001), authorizing the distribution and marketing of the drug “Postinal”. In first instance, the Court of Appeals of Santiago rejected the constitutional action arguing that the complaining parties lacked the legal capacity to represent the unborn in court.⁴⁴ In second instance, the Supreme Court accepted the case and issued the remedy since it considered that one of the effects of the drug Levonorgestrel could be causing an abortion, making an attempt on the unborn’s life, who is acknowledged as a person (Par. 17), and on the woman’s physical and psychic integrity (Par. 9). This is of great importance, because for the first time the Chilean highest jurisdictional court protects the unborn against potential risks caused by the effects of a medicine.

Regardless of the Court’s decision in said ruling, the Public Health Institute

42 All the jurisprudence has been extracted from the *Revista de Estudios Parlamentarios* HEMICICLO, N° 2, 2010.

43 Regardless of this jurisprudential sequence, Act N° 20418, which expressly regulates hormonal “emergency contraception”, was published in 2010, putting an end to this judicial controversy. Please see “Sexual Education and Reproductive Health” in this paper.

44 Court of Appeals of Santiago, in ruling of May 28, 2001, Par. 9, 10 and 11.



moved forward and registered, by means of Resolution N° 7224 of August 24, 2001, the drug “Postinor 2”, which has the same components of the first one, though a different name.⁴⁵

Centro Juvenil AGES v. the Public Health Institute of Chile (Supreme Court, ruling of November 28, 2005, Case Resolution N° 1039–5).

Based on Resolution N° 7224 (mentioned in the previous paragraph), the *Centro Juvenil AGES* filed a legal action for the nullity of the resolution (“nulidad de derecho público” remedy), provided for in Art. 7 of the Constitution, arguing that the Public Health Institute had not respected the Constitution and the law by putting at risk the unborn’s life. The action was accepted in the first instance,⁴⁶ but then rejected by the Court of Appeals.⁴⁷ The petitioner filed an appeal to quash the judgment before the Supreme Court, which pronounced judgment on November 8, 2005, confirming the judgment of the Court of Appeals. The decision’s conclusions are interesting. The Court considered that the appellant has the responsibility to prove that the drug can, in fact, produce the risk of abortion in the pregnant person, which, in the judiciary’s opinion, only generates a doubt and not the certainty required. The Court then affirmed that the law instructs the Public Health Institute to register the medicine required by the population, and to control the quality of said medicine, all duties that, in the Court’s opinion, were fulfilled in accordance with the technical task assigned to the Institute – this seems to mean that the Institute is more competent than the Court to decide about medical issues.

In this regard, four points should be mentioned:

- First, the main conclusion in the ruling is questionable, since, in expressly pronouncing against the Supreme Court ruling on a similar matter —analyzed above—it raises deep doubts in the national legal field.⁴⁸

45 The plaintiffs then recognized that it was not possible to extend the scope of the ruling to all the drugs with similar composition, but only to the one directly appealed, because their appeal was centered on the name used.

46 Ruling by the 20 Civil Court of Santiago, pronounced on June 30, 2004. The judgment is based on the fact that the Supreme Court’s ruling instructing that the registration of the drug “Postinal” be cancelled shall be extended to all medicine containing the same component.

47 Ruling by the 9 Chamber of the Court of Appeals of Santiago, pronounced on December 10, 2004. The first instance ruling was reversed, on the grounds that the court does not have jurisdiction over scientific controversies still under discussion.

48 Antonio Bascañán Rodríguez en “Después de la Píldora”. Anuario de Derechos humanos

- Second, it is evident that the courts of justice are not meant to settle doubts in others fields. However, the fact that there might be a doubt does not release the judge from the duty of making a decision. In this particular case, the judge should have made a decision taking into account the national legal system that protects life since conception, and also that the "biological doubt" involves the possibility that this drug may cause an abortion. In that sense, it seems more appropriate the ruling that will be referred later.⁴⁹
- Third, the reference to the appellant's responsibility to provide proofs seems unfortunate, since even uncertainty is enough to create a risk completely incompatible with the constitutional protection of the unborn and with the *pro hominem* principle, by virtue of which the alternative to be chosen is always the one that better protects the persons' life and integrity (in this case, it is obvious that the risk that Levonorgestrel might eventually cause should be avoided).
- And finally, although it is true that the law instructs certain health agencies to decide on the feasibility of certain pharmacological policies, it is also true that the Constitution sets forth mechanisms that let citizens contest such decisions in the event they find them to be unfair or detrimental to their rights. Arguing that the mere fact that the law grants certain powers to an agency is enough to justify all decisions made by it, would mean affirming a discretionary power that neither the law nor the Constitution intended. Indeed, if things were as the Supreme Court pretends in this ruling, an action—especially an action for nullity under article 7—that the Constitution clears against the State Administration would be futile.

Ruling by the Constitutional Court of Chile, based on the request regarding the Exempt Resolution⁵⁰ by the Ministry of Health which establishes the “National Rules Regulating Fertility” (January 11, 2007).⁵¹

On September 1, 2006, the Ministry of Health, by means of Exempt Resolution

2006, pág. 235–244

49 Vid. infra.

50 A resolution is exempt when the law or the General Comptrollership of the Republic pronounce it. The exempt resolutions do not require the usual legal control as to their legality and constitutionality.

51 Please see the ruling in <http://www.tribunalconstitucional.cl/index.php/sentencias/download/pdf/108>



N° 584, set forth the “National Rules Regulating Fertility”, establishing the compulsory distribution of “emergency contraception” pills, with Levonorgestrel as one of its components, in public health institutions; these pills could even be distributed to minors without their parents’ and/or guardians’ consent or knowledge.

This decision gave rise to a request for a protection remedy, rejected by the Court of Appeals of Santiago in ruling of November 17, 2006,⁵² arguing that the protection remedy is not a mechanism for imposing moral or religious convictions regarding decisions that do not affect the persons’ rights (Par. 4).

Then, on September 30, 2006, 31 deputies requested the Constitutional Court’s intervention to declare the unconstitutionality of said Exempt Resolution, by enforcement of Art. 93, Par. 1, Subpar. 16 of the Constitution.⁵³ The arguments claimed that the legal form chosen by the Ministry of Health to decide on this issue was not the appropriate one, since, for being exempt, it avoided the control by the General Comptrollership of the Republic and the Constitutional Court, and substantively, that the decision could put the unborn’s life at risk and contravene the parents’ right to choose how to educate their children.

Therefore, after an extended discussion in both the courts and the media, the Constitutional Court accepted the plea based only on the formal elements, and not deciding on the substance of the issue. This means that the Court only pronounced the unconstitutionality of the Exempt Resolution, which it considered that, as a Regulation, it had to be rendered by the President of the Republic and be subjected to the controls established by the Constitution. Thus, the above mentioned regulation did not become effective, and the Court did not decide on the substance of the issue.

52 Case Zalaquett, Lagos and Catalán against Minister Soledad Barría, Case Record N° 4693–06. The Court of Appeals’ ruling is appealed but the remedy is dismissed by the later Constitutional Court decision.

53 Article 93, Par. 1, Subpar. 16 establishes that the Constitutional Court shall have the authority to decide on the constitutionality of supreme decrees—regardless of the defect invoked—including the decrees pronounced by the President of the Republic in exercising his statutory autonomous power regarding matters that could be reserved to the law as established in Art. 63.

Ruling by the Constitutional Court of Chile, based on the request regarding the Regulatory Supreme Decree about the “National Rules Regulating Fertility” (April 18, 2008)⁵⁴

In response to the ruling described in the paragraph above, the Government, through its Ministry of Health, rendered the Regulatory Supreme Decree N° 48 on February 3, 2007, establishing the “National Rules Regulating Fertility”, which regulated the same issues included in the resolution that had been declared unconstitutional.

On March 5, 2007, a group of deputies, based on the foregoing and acting by enforcement of Art. 93, Par. 1, Subpar. 16 of the Political Constitution, requested once again the Constitutional Court’s intervention, on the grounds that the mass distribution of drugs which main component is Levonorgestrel through the health public system goes against Art. 19, Par. 1, Subpar. 2 of the Constitution, since it puts the unborn’s life at risk.

After months of discussion in both the courts and the media, the Constitutional Court accepted the plea and stated that the parts of the Regulatory Supreme Decree referring to the distribution of the so-called “Morning-After Pill” were unconstitutional.

The Constitutional Court began by specifying the scope of the ruling, maintaining that, due to the plea’s content and the powers granted by the Constitution, its effects can be extended only to the public health systems.⁵⁵

If we analyze the substance of the issue, the Court’s reasoning can be summarized in the following elements. First, it is confirmed that there actually is contradictory proof regarding the drug’s effects in the fertilization process and the later implantation of the fertilized ovum in the uterus, which raises a scientific doubt. Second, it is confirmed that the Chilean Constitution, in accordance with the content of Articles 1, 5 and 19, Par. 1, Subpar. 2,⁵⁶ largely

54 To read the full ruling, please visit <http://jurisprudencia.vlex.cl/vid/-58941744>.

55 This meant that, although the petitioners required that the ruling be equally effective in all cases and complied with in good faith, the drugs were distributed through the decentralized municipal systems and the private health system.

56 Article 1: “Every person is born free and equal to others in dignity and rights”.

Article 5: Paragraph two: The limits to the exercise of sovereignty are the respect of the fundamental rights emanating from human nature. The duty of bodies of the State is to respect and promote said rights, guaranteed by this Constitution, as well as the international treaties acknowledged by Chile and currently in force.

Article 19, Par. 1, Subpar. 2: The law protects the life of the person to be born.



considers that the unborn's life is constitutionally protected from the moment of conception (Paragraph 49). Finally, in this context the Court echoes the *pro hominem* principle, by virtue of which the alternative to be chosen is always the one that better safeguards and encourages the protection of human beings' rights (Paragraphs 65 and subsequent). It can then be concluded that the most coherent way of facing the doubtful factual assumption raised by the drug in question is to avoid any potential risk to the human being, and thus to forbid the distribution of the "Morning-After Pill" in the public health systems.

Report N° 31356 by the General Comptrollership of the Republic, based on the scope of the ruling by the Constitutional Court of Chile (June 16, 2009).⁵⁷

As mentioned before, the effects of the Constitutional Court's ruling pointed out in the previous paragraph were not obeyed as the petitioners would have expected. The municipal health care centers and the private pharmacies continued distributing the so-called "morning-after pill".

In the face of this situation, the Chilean Association of Municipalities and the lawyer Jorge Reyes, on behalf of pro-life groups, filed a request before the General Comptrollership of the Republic, asking it to declare the binding character of the ruling in question with which every health organization must comply.⁵⁸

The General Comptrollership of the Republic, as stated in the Report N° 31356, considered that the municipal surgeries, in being part of the public health system, have to exercise their powers within the legal framework in force. Therefore, it determined that the ruling affects every institution of the public health system, so distribution of the drug in question is forbidden in all of them. Nonetheless, it noted that the comptroller does not have jurisdiction over private clinics and institutions, which means that it cannot decide on issues related to them.

Conclusion

To sum up, after a long process, it can be seen how the highest jurisdictional bodies in the country have, in most cases, decided against the distribution of the

57 <http://www.contraloria.cl/LegisJuri/DictamenesGeneralesMunicipales.nsf/FrameSetConsultaWebAnonima?OpenFrameset>

58 The General Comptrollership of the Republic is an autonomous state body, established by the Constitution; its function is, among others, to exercise the control of legality of the acts performed by the governmental authorities. In this context, this body has the authority to intervene.

so-called “morning-after pill;” we can thus conclude that, at least in this regard, the permanent stance has been to reject any risk and kind of abortion, and to strengthen the protection of the unborn’s right to life.

However, this matter has been finally solved through the legislative means, which proves once again that these issues are discussed more on political than on strictly legal grounds.⁵⁹

C. Current Context: Organizations Involved and State of the Issue

In Chile, abortion is a topic that creates great controversy, not only in groups and organizations advocating the decriminalization of abortion, but also in many other groups encouraging respect for the life of the unborn child and the prohibition of abortion.

As regards the first group, the following are the most significant organizations:⁶⁰

- i. *Acción AG* is an association of non-governmental organizations that—on their own words—encourage the full exercise of citizenship, participation, and economic, social and cultural rights. This group has launched cultural and social campaigns, such as the “*Campaña Tengo Derecho a Decidir*” (“I have the right to choose” Campaign), which included videos and pamphlets. *Acción AG* also publishes articles and reports, and lobbies for their cause at the municipal government and the parliament.⁶¹
- ii. *Asociación Chilena de Protección de la Familia* or APROFA (Chilean Association for the Protection of the Family),⁶² an International Planned Parenthood Federation⁶³ subsidiary in Chile, fosters—in their own words—

59 See footnote n° 43.

60 Due to space limitations, the following organizations have been omitted: *Católicas por el Derecho a decidir* (Catholic Women for the Right to Decide: www.cddchile.cl); *Centro de Estudios para el Desarrollo de la Mujer* or CEDEM (Center of Studies for the Development of Women: www.cedem.cl); *Movimiento Conspirando* (Conspirando Movement: www.conspirando.cl); *Fundación Ideas* (Ideas Foundation: www.ideas.cl); among others.

61 Vid. www.accionag.cl. Many of the member organizations’ objective is, among others, to encourage the decriminalization of abortion.

62 Vid. www.aprofa.cl.

63 Planned Parenthood Federation is the organization with the greatest world network to foster family planning and reproductive rights. According to the information provided on their webpage, this organization gathers over 180 countries with subsidiaries or links that allow them to spread their perspective about sexuality all over the world. Conf. <http://www.ippf.org>.

- birth control and family planning, mainly through the development of studies, the management of health centers and the creation of a plan for educating and training about sexuality-related issues. This association has actively participated in the debate about the morning-after pill in Chile.
- iii. *Instituto Chileno de Medicina Reproductiva* or ICMER (Chilean Institute of Reproductive Medicine)⁶⁴ is an organization that fosters reproductive health rights and sexual rights among the population by means of rendering medical services, developing studies and research, providing medicines such as emergency contraceptives (it is one of the major importers in Chile), organizing training programs and other services. Dr. Horacio Croxatto, one of the directors, was one of the supporters of introducing Levonorgestrel in public health centers and is a recurrent defender of abortion on TV programs and public debates.
 - iv. The organization *Corporación Humanas*⁶⁵ is devoted to monitoring and observing public policies related to gender and sexuality, among other activities. Lorena Fries, its former president—and current director of the Human Rights Institute—has been part of several publications⁶⁶ and interviews⁶⁷ in which she supports the decriminalization of abortion in Chile. Throughout her career, she has been an active participant in the negotiations for including the CEDAW's Protocol within the domestic legislation.
 - v. *Centro de Medicina Reproductiva y Desarrollo Integral del Adolescente* or CEMERA (Center of Reproductive Medicine and teenagers' comprehensive development)⁶⁸ consists of an academic unit of the University of Chile, and their mission—according to their self-definition—is to improve the academic quality and the services provided in the field of sexual and reproductive health. It develops research, maintains clinics, and carries out training programs about sexual health, and actively participates in parliamentary debates.
 - vi. Center *La Morada* is—according to their self-definition—a feminist

org/en/What-we-do/

64 Vid. www.icmer.org.

65 Vid. www.humanas.cl

66 Vid. “publicaciones” section at www.humanas.cl.

67 <http://www.clam.org.br/publique/cgi/cgilua.exe/sys/start.htm?inford=4643&sid=51>

68 Vid. www.cemera.cl

association working to expand women's rights.⁶⁹ This organization is devoted to radio broadcasting the development of activist campaigns and the coordination of networks.

Regarding the groups encouraging the respect for life and the preservation of the prohibition of abortion, the following are the most outstanding ones:⁷⁰

- i. *Red por la Vida y la Familia* (Network for Life and Family)⁷¹ is a forum, gathering organizations and people who work for the defense of human life. They coordinate strategies, publish reports, participate in parliamentary debates and organize advertising campaigns.
- ii. ISFEM⁷² is a non-governmental organization devoted to research, training and studies about topics related to women. They develop studies presented at governmental, parliamentary and international levels. This organization also organizes campaigns and activities seeking to foster respect for human dignity.
- iii. *Fundación Mirada Más Humana* (A More Humane View Foundation)⁷³ is a non-governmental organization trying to instill a more humane perspective in society. It stands out for its capacity to organize mass events (especially, a pro-life rock concert called Rock for Life) and advertizing videos.
- iv. *Muévete Chile* (Move, Chile!)⁷⁴ is a movement that encourages the participation of young people, the respect for the dignity of human beings, and the respect for life. Their main activities are to develop advertising campaigns and activism via the worldwide web, to spread ideas through different technological media, and to create networks.
- v. *Fundación Chile Unido* (Chile United Foundation)⁷⁵ is devoted to the study and dissemination of social and cultural values that genuinely promote

69 Vid. www.lamorada.cl.

70 Due to space limitations, the mentioning of the following organizations, devoted to encouraging and protecting the rights to life and to safeguarding the unborn children, have been omitted: *Fundación San José* (www.fundacionsanjose.cl), *Siempre por la Vida* (www.siempreporlavida.cl), *Gente Nueva* (<http://gentenueva.cl/sitio/>), *IdeaPaís* (www.ideapais.cl), among others.

71 Vid. www.redprovida.com.

72 Vid. www.isfem.cl

73 Vid. www.miradamashumana.org

74 Vid. www.muevetechile.org

75 Vid. www.chileunido.cl

human progress. They have publications and conduct public opinion studies, and manage programs such as *Acoge una Vida* (Shelter a Life), by means of which mothers who might consider abortion receive support.

In this context, the decriminalization of abortion is an issue always present in public debate, awaiting some occasion that allows it to be realized. The fact that Chile is one of the few countries in the world that still has legislation penalizing abortion in all cases is generating great tension among different national and international organizations.

Those who encourage the decriminalization of abortion have resorted to strategies that are generally replicas of previous experiences in other countries. These strategies are: 1) elevating the topic of abortion in the media as a public health problem, alleging high figures on clandestine abortion and maternal death rate; 2) defending *modernity*, contending that the absence of sexual and reproductive rights demonstrates the lack of progress in Chile; 3) cloaking their true ideas with advocacy of more “moderate” types of abortion (such as therapeutic abortion or abortion in case of rape) in order to gradually expand the margin of what is allowed; 4) give more importance to speech on women’s sexual autonomy and their right to decide on their bodies; 5) arguing that there is lack of equality between women with scarce resources and wealthy women as regards access to “safe” abortions performed by health professionals.

On the other side, the groups in favor of life back their ideas by mentioning: 1) the protection provided by the current legislation; 2) the existence of constitutional and judiciary rulings in favor of their stances; and 3) the importance of the right to life as the fundamental core of any society that wants to perpetuate itself in the future.

Without prejudice to the foregoing, it is important to point that the organizations in favor of establishing abortion are generally better organized and have a larger number of affiliated or sub-groups and greater international support than their counterparts. Furthermore, many times pro-life groups’ strategies do not find their way out of the mere opposition to contrary approaches, when what public opinion actually demands is an agenda with varied proposals explaining how safeguarding life, strengthening motherhood and fostering a society more generous with the underprivileged (like pregnant young women, mothers who abort or elderly people bearing oppressive loneliness) are essential for genuine human development.

At the level of political parties, the topic of abortion divides both political coalitions and individual groups.

Although it seems that most legislators from *Coalición por el Cambio*⁷⁶ seem to be against establishing abortion—which is evidenced by the support given to a demand to the Constitutional Court based on the debate about the so called “Morning–After Pill”—the fact that legislators of the majority party (UDI) have stated their willingness to sponsor legislative bills to decriminalize abortion⁷⁷ is symptomatic of an increasing tendency within Chilean conservatives. In other words, they are gradually convincing themselves that negotiating some issues, such as respect for life, is a reasonable way of enlarging their electoral base. Besides, there are already several political, parliamentary and municipal authorities who openly claim to be in favor of different types of abortion. However, it is still true that the President of the Republic and the presidents of two pro–government parties have claimed that innovations on this issue will not be considered, at least during the current term of office.

On the side of the coalition called *Concertación*,⁷⁸ a majority of the members show a tendency in favor of decriminalizing different types of abortion, such as therapeutic abortion, eugenic abortion and abortion in case of rape.

When debating topics like these, there is clear evidence of the difference between a “progressive” group (*PS–PPD–PRSD*) and *Democracia Cristiana*, which, in spite of being the majority party in this coalition, has been gradually making their stance more flexible. Consequently, it is expected that most authorities belonging to these parties would support projects in favor of decriminalizing abortion in any of the cases already mentioned.

PRI and the left–wing parties deserve to be mentioned separately. *PRI*⁷⁹ is a centrist party with parliamentary representation and has a confusing stance regarding this topic, since some of its leaders seem to agree with the decriminalization of abortion while others would probably not support an idea like that. Instead, all left–wing parties, such as *PRO*, led by the former candidate for president, Marcos Enríquez–Ominami, *MAS*, led by Senator Andrés Navarro, and

76 See footnote N° 12.

77 Vid. *supra*: bill to decriminalize the termination of a pregnancy (Bulletin N° 7373–07, December 15, 2010).

78 See footnote N° 13.

79 *PRI* was born with the fusion of the regional parties *Alianza Nacional de los Independientes* or ANI (National Alliance of Independents) and *Partido de Acción Regionalista* or PAR (Regionalist Action Party), which work in three Southern regions and three Northern regions. Vid. [http://www.pricentro.cl/index.php?option=com_content&view=article&id=123&Itemid=110\(28–mayo–2011\)](http://www.pricentro.cl/index.php?option=com_content&view=article&id=123&Itemid=110(28–mayo–2011))



Partido Comunista (Communist Party), which at present has three representatives in the Chamber of Deputies, are very likely to support any bill encouraging the decriminalization of abortion.

Finally, if we analyze the opinion polls about abortion, the majority of the population claims to be in favor of decriminalizing abortion in those cases when the mother's life is at risk.⁸⁰ It is not evident yet if the public opinion is capable of distinguishing between what is called *therapeutic abortion*, necessarily involving a positive action to end the life of the fetus, and what is called *indirect abortion* or *treatment with fetal risk*, where the work of the professional is exclusively aimed at preserving the life of both the mother and the child, admitting the possibility that the fetus may die as a non-desired effect.

D. Statistics: Little Significant Information

It is very difficult to obtain reliable statistics about the number of abortions performed in Chile. It is exactly because abortion is forbidden that it is only possible to have access to data about miscarriages occurring in health care centers, or abortions of women involved in criminal proceedings. Therefore, any figure regarding the quantity of abortions practiced is based on speculation as to the number of clandestine abortions performed.

By means of a widely distributed publication, the *Asociación Chilena de Protección de la Familia* or APROFA (Chilean Association of Family Protection) states that the number of clandestine abortions is close to 160,000 a year, a figure usually referred to by organizations that promote the decriminalization of abortion, emphasizing the mother's health risk, the existence of a serious but unregulated reality, and the existence of a public health problem behind those numbers.⁸¹

On the other hand, Jorge Reyes has disputed those figures, maintaining that the only reliable statistics are the ones provided by the *Instituto Nacional*

80 According to the latest National Opinion Poll of the National Youth Institute (Encuesta Nacional del Instituto Nacional de la Juventud), which is the most representative evidence inside this age group, most young people are in favor of therapeutic abortion (http://intranet.injuv.gob.cl/cedoc/6_encuesta/cap_19.pdf). On the other hand, in its latest opinion poll, FLACSO gets to the conclusion that over 60% of Chileans is in favor of different types of abortion. (http://www.flacso.cl/extension_despliegue.php?extension_id=846&page=1).

81 Please see Asociación Chilena de Protección de la Familia (APROFA): *Aborto en Chile: Argumentos y testimonios para su despenalización en situaciones calificadas*; February 2010 copy, available in http://issuu.com/doc-aprofa/docs/aborto_en_chile. The 160,000 clandestine abortions mentioning is on page 23.

de Estadísticas or INE (National Institute of Statistics), based on an average of 34,000 annual deaths registered in hospitals, out of which two thirds correspond to miscarriages. In this regard, Reyes shows that supporters of abortion multiply such figure by six or seven, getting the exaggerated number widely spread with propagandist purposes; if such a figure were true, it would mean that, in Chile, for every three children that are born, two others die in an abortion. If such were the case, Chile would easily outdistance other countries which legalize and promote abortion, sometimes even with state funds, which is very unlikely.⁸²

IV. Reproductive Health Legislation

The reproductive health legislation and issues associated with it are scattered in different regulating instruments. The most relevant regulations are mentioned hereunder, especially the ones that refer to “emergency contraception” (EC).

In this sense, it can be observed that EC was included in the first place for the emergency assistance to victims of sexual violence, and ended to be accepted for all cases through Act N° 20418, in 2010. This Act is especially questionable since the Chilean courts have expressly declared the unconstitutionality of such provisions, under the argument that this kind of drugs threatens the life of the unborn.⁸³ However, this act is currently in force, until its constitutionality is challenged.

Health Code: The Health Code consists of the systematization of all the regulations associated with the development of the Chilean public and private health activities. According to the subject being developed, we highlight the state protection to women and child during pregnancy (section 16); gratuitousness in attention of state services (section 17) and responsibility of the National Health Service regarding the fight against venereal diseases (section 38). It should be mentioned that most of the associated regulations are found in lower level regulations and rules which implement the general principles stated in the code.

Rules and clinical guidelines for assisting Victims of Sexual Violence in emergency rooms (Ministry of Health, April 2004): In April 2004, the Ministry of Health issued a new regulation for the emergency assistance to victims of

82 Cf. http://www.redprovida.com/index.php?option=com_content&task=view&id=1829&Itemid=75 to read the letter published on March 25th, 2009, in *Diario el Mercurio*.

83 See, “Legal Precedents: The Highest Courts in Chile Confirm the Rejection of Abortion Under All Circumstances”



sexual violence, incorporating adult and young raped women care, and providing information about “emergency contraception” (EC). (It is important to point out that, upon announcing these rules, the public health network was provided with 35,000 doses of Postinor 2.) The rule states that, when a victim of violence or sexual abuse is taken to an emergency room, they are exercising their right to receive assistance by a health professional or technician. The assistance always aims, in the first place, to recognize, diagnose and adequately treat the symptoms and injuries, in order to reduce the distress and after-effects of the violence suffered. At the same time, the rule establishes that the attorney general acknowledges some specific rights of the victims, some of which are: to be assisted, to be treated in a humane manner, to report the crime, to be informed of their rights and the way to exercise them, to demand protection, to obtain remedy, to be heard, to file an accusation, to participate in the process, to claim.

Regarding treatment, the regulation describes some specific aspects of the interventions aimed to prevent or minimize the pathological or unwanted consequences of violence or abuse. Particularly, it makes reference to pregnancy prevention after a rape: “(...) she has the right to be properly informed that there exists an effective and safe way to prevent a unwanted pregnancy; in the case the woman already has an intrauterine device or uses the hormonal contraception at the moment of the rape, she must still be informed of this treatment, even if the risk of failure is minimum. The professionals who refuse to prescribe these preventive treatments should not assist the victims of rape. In such case, the treating professional shall refer the victim to another professional, since even providing information and advice could lead the victim to make a certain decision”. Furthermore, it is stated that the EC and/or the Yuzpe regime⁸⁴ shall be provided as viable alternatives in this treatment.

National Rules Regulating Fertility (Exempt Resolution N° 584, Ministry of Health, September 2006): In 2006, a new scenario arose as a result of the incorporation of the EC in the new “National Rules Regulating Fertility”. The aim of these rules was to “regulate the quality and accessibility to these services, so as to achieve the decade’s Health Goals, especially to continue decreasing the maternal mortality by reducing the number of unwanted and highly risky pregnancies, to correct inequities in sexual and reproductive health, and to meet the population’s expectations”.

84 The Yuzpe regime is a method of “emergency contraception” that combines estrogen and progesterone hormones.

Basically, this legal instrument sets the general principles, requirements and bases of the development and treatment of sexual and reproductive health in Chile, establishing conditions and obligations with which the institutions and workers providing health assistance in these fields shall comply. Said rules—based on the World Health Organization’s Medical Criteria of Eligibility and Recommendations about Selected Practices for the use of contraceptives—also regulate the guidance, advice and supply or placement of a contraceptive method and of the surgical procedure to avoid pregnancy. This document caused great controversy and involved various requirements and case-laws, which have been referred to before.⁸⁵

Act 20418, which established rules regarding the information, guidance and services relating to fertility regulation; it also authorizes that contraceptive methods—among which are the emergency contraceptives—be provided to the population by the Public Health System (Published January 28, 2010): According to this legal text, every person is entitled to receive information and guidance as regards fertility regulation in a clear, understandable, comprehensive and, if necessary, confidential manner. This right includes free guidance on affective and sexual life, according to each person’s beliefs and education.

The regulations also state that the bodies of the State Administration having jurisdiction over this matter (the System of the Health Services’ National Assistance Network: accident and emergency centers, public hospitals, municipal surgeries, etc.) shall make available to the population the duly authorized contraceptive methods, both hormonal and non-hormonal. In case the person requesting the emergency hormonal contraceptive method (“morning after pill”) is younger than 14 years of age, the doctor or physician, from either the public or private health system, shall provide the medicine and afterwards report to the father, mother or adult in charge indicated by the minor.

The legal dispute about “emergency contraception”⁸⁶ was thus solved by the implementation of an act, which, by the way, generated much discomfort, since it contradicted what had been ruled by the Chilean highest bodies of the original jurisdiction, constitutional and administrative justice, as mentioned before.⁸⁷

85 See, “Legal Precedents: The Highest Courts in Chile Confirm the Rejection of Abortion Under All Circumstances”

86 See, “Legal Precedents: The Highest Courts in Chile Confirm the Rejection of Abortion Under All Circumstances”

87 Ibid..