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My Body Is Not Really Mine

Lidia Casas Becerra - SELA 2008

Discrimination against women is much more evident in the reproductive sphere, where they can still be deprived of the right to control their own bodies. Throughout Latin America and the Caribbean, and Chile is no exception, the debate has not focused on the notion that women should have control over their bodies. Ownership of our bodies –and I expressly include myself- is not what has guided legislative or policy reforms enacted since the sixties, either. Instead, the strongest impact on women's reproductive rights has come from biomedical- or public health-based arguments. Again, Chile has been no exception.[1] Indeed, public debate here has focused on issues of health rights, bodily integrity, or contraceptive use. A working hypothesis is that, politically speaking, it is easier to defend the public health impact from the point of view of quantifiable evidence, thus eschewing a rights-based discussion, especially if the strategies of the women's movement are as heterogeneous as they are.

The political scenario has changed radically since family planning was first introduced in the region. The return to democracy in both Chile and the rest of the region starting in the eighties, and especially in the nineties, helped fuel the growth of women's groups with an agenda calling for an end to discriminatory legislation, adoption of gender violence laws, and most recently, gender equality in public decision-making. These groups successfully positioned their demands on the public agenda, to a certain extent.[2] But there are certain issues, most notably reproductive autonomy, where the women's agenda has not been as successful in changing the status quo. As a result, discussion of related issues has crossed over into a variety of venues. In some cases, litigation at home and abroad has played a key role.[3]

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[1] This article was written as the Constitutional Court of Chile pondered the constitutionality of National Fertility Regulation Standards in the public health sector. Thirty-six right-wing deputies challenged the use of post-coital contraception, copper- and levonorgestrel-based IUDs, and the provision of teenage counselling and reproductive health services without parental consent.

[2] The effectiveness of gender violence laws aside, they have now been adopted throughout the region.

[3] Luisa Cabal, Monica Roa, & Lilian Sepúlveda-Oliva, What Role can International Litigation Play in the Promotion and Advancement of Reproductive Rights in Latin America?, Health and Human Rights, Vol. 7 No. 1, pp. 51-88.

The purpose of this article is to review the inception and status of the reproductive autonomy discourse in Chile. While it does not set out to be comprehensive, it is set in the context of similar political and social processes taking place elsewhere in Latin America. I will be arguing that ownership of one's own body as a key aspect of privacy rights has not been among successful arguments against criminalization of abortion. Instead, this role has fallen more broadly to women's rights, including health rights, and the rights to life and bodily integrity, all more closely associated with the broader concept of social justice. Affirming the rights of women over our own bodies finds too much political and ideological opposition in a region as beset by social inequity as Latin America and the Caribbean, where concepts such as ownership of our bodies or privacy rights simply do not get much traction as far as women's needs are concerned. As a result, issues of autonomy are much more persuasive if debated in connection with the political, economic and social conditions required for women to exercise their rights.

More often than not, advocating women's autonomy and reproductive rights precludes alliances with broader sectors of society. It also creates an instant disadvantage vis-à-vis opponents who argue from the point of view of the sanctity of human life.

1. In Latin America and the Caribbean, introduction of family planning programs was fiercely opposed by the Vatican and its local representatives. Yet, the issues it was designed to address were of such magnitude, that resistance had to yield in the face of unambiguous evidence that women were regulating their fertility and that denial of the proper means to do so only forced them to resort to abortion. Thus, even if narrowly defined, self-determination implied access to modern methods of fertility regulation. But this right was predicated more on the need to protect health than on privacy rights or the right to be free from State interference. Indeed, a cursory review of Chilean family planning policy shows that programs speak of allowing *families* to choose the number and spacing of children.[4] A 1968 circular stated that "[A]doption of contraceptive methods shall be freely decided *by the spouses*, based on prior

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[4] Lidia Casas, "Del control a la autonomía". Research Report, Law Research Center, Diego Portales University, Santiago, 2003.

professional advise”.[5] Members of the medical team implementing the family planning program at the time confirm that birth control was introduced “as an essentially preventive initiative with health-related objectives”.[6] Although the context was the right to choose the number and spacing of children issuing from the 1968 Teheran Conference on Human Rights, it was the effect of unwanted pregnancies on health and health systems that provided the consensus among public health specialists on granting access to modern contraception.

In Latin America, access to contraception has not exactly proceeded in linear fashion. In Argentina, governments such as Isabel Perón’s in 1974 banned modern contraception from public health policy for reasons of national security. Access was restored only in the eighties.[7] In addition, access to contraception has sometimes been wrapped in the language of health rights and individual choice in order to conceal policies of population growth reduction that trampled on the rights of poor women, as was the case in Peru under the Fujimori government.[8]

As to abortion, the situation has changed little since being included in criminal codes. The status quo in Latin America and the Caribbean ranges from criminal prosecution to leniency under the guise of protecting certain legal interests. Chile, El Salvador, and Nicaragua[9] have moved toward a total ban, while Colombia and Mexico have made strides toward

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[5] René Cabrera, Guillermo Delgado, Erika Taucher and Onofre Avendaño, “Evaluación de 10 años de Planificación de Familia en Chile”, XVI Congreso Chileno de Obstetricia y Ginecología, December 1975, mimeo, p. 20.

[6] Op. cit, p. 3.

[7] Elsa López, “Los dichos y los hechos: formación de la familia y anticoncepción en mujeres pobres del conurbano de Buenos Aires”, Reproducción, Salud y, Sexualidad en América Latina, Edith Alejandra Pantelides and Sarah Bott, Eds., OMS and Editorial Biblos, Geneva, 1999, p. 17; Silvina Ramos, Mónica Gogna, Mónica Petracci et al. Los Médicos frente a la Anticoncepción y el aborto. ¿Una transición ideológica?, CEDES, Buenos Aires, 2001, pp. 32-33.

[8] Fujimori’s policies were marked by tension and contradiction. They were initially welcomed by freedom of choice feminists as standing up to a hegemonic Catholic Church that fiercely opposed modern contraception. Soon after, however, reports began to emerge about rural women being coerced or forced to undergo sterilization. See Susana Chávez and Cisneros, Rosa. *Cuando el fundamentalismo se apodera de las políticas públicas. Políticas de salud sexual y reproductiva en el Perú en el período julio de 2001-junio de 2003*, Centro de la Mujer Peruana Flora Tristán, Lima, 2004; Ombudsman’s Office: Anticoncepción quirúrgica voluntaria. Casos investigados por la Defensoría del Pueblo, Ombudsman’s Office, Lima, 1998.

[9] On 13 September 2007, the Nicaraguan National Assembly voted to repeal therapeutic abortion. Voting in favor were the Sandinistas, the Constitutionalist Liberal Party, and the Nicaraguan Liberal Alliance. The three members of the Sandinista Renewal Movement voted against. Article 165 of the Criminal Code allowing therapeutic abortion was struck down in October 2006.

liberalization of abortion laws. In Argentina, as debate shifts to the issue of authorization of legal abortions, women's groups are calling for clear rules that do not force women to go to court to obtain a legal abortion. In Uruguay, women have unsuccessfully lobbied the government of Socialist President Tabaré Vásquez for changes to abortion laws, but at least the medical profession and other groups have made some headway with health authorities in adopting a hospital protocol to deal with high-risk procured abortions.[10]

Latin American and Caribbean jurisdictions allowing abortion on demand are the exception. Cuba, Puerto Rico, and most recently Mexico City only set a threshold at a certain number of weeks. Restrictive legislation, on the other hand, is often associated with unavailability of hospital abortions, either through direct implementation of restrictive laws or rules or through other factors, such as health care providers claiming conscientious objector status.[11] This is the context for denial of abortion services. This state of affairs is especially dire for women whose only options are either the public system or backstreet abortions.[12] But even where abortion is legal, as in Puerto Rico, serious issues of access remain.[13]

A 2003 report by the National Autonomous University of Mexico estimated abortions in that country at one million a year,[14] even as legislation allows abortion under certain circumstances. In Argentina, research puts the figure at anywhere from 335,000 to 500,000 a year,[15] while in Chile estimates range from 50,000 to 160,000.[16] It is often argued that

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[10] This innovative method allows medical practitioners to counsel patients about illegal, high-risk practices and available alternatives. Women are told about the risks involved in unsafe abortions and about safe use of Misoprostol, should they have recourse to this method. See República Oriental del Uruguay, *Iniciativas sanitarias contra el aborto provocado en condiciones de riesgo, Normativa de Atención Sanitaria y Guías de Práctica Clínica de la Ordenanza 369/04 del M.P.S.*, August 2004.

[11] World Health Organization, Unsafe Abortion. Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2003, Geneva, 2007, p. 2.

[12] Even Eastern European countries where abortion is legal exhibit high rates of unsafe abortion due to cost and other social factors, WHO, Ibid. p. 15.

[13] See, for example, Alice Colón, "El aborto en Puerto Rico: Por qué es insuficiente la legalidad", Cuerpos Autónomos, vidas soberanas, Cuadernos Mujer y Salud 9, 2004, pp. 82-85.

[14] Human Rights Watch, *The Second Assault: Obstructing Access to Legal Abortion after Rape in Mexico: IV. Abortion in Mexico*, 2006, Vol. 18, No. 1 (B), p. 32.

[15] Petracci and Pecheny cite research by Checa and Rosemberg (1996) and estimates by Aller, Atucha and Pailles, also from 1996. See Mónica Petracci and Mario Pecheny. Argentina. Derechos Humanos y Sexualidad, Centro Latinoamericano de Sexualidad y Derechos Humanos, Instituto de Medicina Social de la Universidad del Estado de Rio de Janeiro and CEDES, Buenos Aires, 2007, p. 153.

such estimates are intended to aid the decriminalization debate, as no accurate data can possibly be compiled about an essentially illegal phenomenon laden with moral guilt. Be that as it may, high-risk, unsafe abortion is a fact of life throughout the region. In Mexico alone, at least 837,174 abortion-related admissions were recorded by public hospitals in 2001-2005, an average of 167,000 a year.[17] Chilean hospital records show from 34,000 to 44,000 such admissions a year.[18]

Women's organizations have made slow progress in securing amendments to abortion laws and policy. In addition, clear differences between countries exist. In Mexico, for example, the prochoice movement of the seventies did not bear fruit until the late nineties.[19] Furthermore, the most significant change of the past five years was decriminalization of abortion by the Federal District government in June 2007.[20] "My body is mine", the Mexican slogan of the seventies, gave way to the broader notion of "voluntary motherhood", which encompassed issues of choice, social justice and public health, a crucial distinction in a country where abortion bans hit poor women hardest.[21] In Mexico, the growth of a more secular discourse allowed the debate to focus on both freedom of choice and access to health information and services.[22]

In the nineties, the so-called "Paulina case" exemplified just how vulnerable Mexican women and girls were to restrictive legislation.[23] This 14-year-old girl became pregnant

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[16] Estimates made by medical practitioners based on public health system data. For a discussion of the implications of using these estimates, see Bonnie Shepard & Lidia Casas, Abortion Policies and Practices in Chile: Ambiguities and Dilemmas, Reproductive Health Matters, Vol. 15 No. 30, Nov. 2007, p. 203.

[17] Raffaela Schiavon, Gerardo Polo and Erika Troncoso, "Aportes para el debate sobre la despenalización del aborto", Hoja Informativa IPAS, México City, March 2007, p. 7.

[18] Shepard and Casas, Op. cit.

[19] Marta Lamas & Sharon Bissel, "Abortion and Politics in Mexico: 'Context' is all", Reproductive Health Matters, Vol. 8 No. 16, 2000, pp. 10-34.

[20] Reuters: "La Asamblea Legislativa de México DF despenaliza el aborto", El Mundo in www.elmundo.es/elmundo/2007/04/25/internacional/1177455805.html, visited 28 April 2008.

[21] See Marta Lamas, "Movimiento feminista y discurso político: Los derechos sexuales y reproductivos en la construcción de una ciudadanía moderna", Encuentros y desencuentros en la salud reproductiva. Políticas públicas, marcos normativos y actores sociales, Juan Guillermo Figueroa and Claudio Stern, Coords. El Colegio de México, Mexico City, 2001, pp. 177-194.

[22] Lamas & Bissel, Op. cit.

[23] Paulina Ramírez.

after being raped at her home but was denied a legal abortion by the State of Baja California in spite of meeting requirements and although she was authorized by the State Attorney. This 1999 case triggered widespread protest as many realized that in abortion cases, denial of access often led to glaring injustice. The Paulina case provided the background for a broader debate on inequality and women's reproductive autonomy. In August 2000, the conservative PAN government of the State of Guanajuato moved to repeal laws providing for abortion in rape cases.[24] The reaction was predictable, as Mexican women quickly rallied in defense of what little room for reproductive autonomy they had.

In Latin America and the Caribbean it is quite evident that, beyond statements of good intentions, political parties and women's groups have failed to make much headway in eliciting a broad debate on abortion. In Mexico, many a commitment to do so has been put in the backburner time and again as parties shrink back in fear of paying the price at the polls. The same can be said for most political parties through the region.[25]

In Mexico, the conservative counteroffensive on abortion was widely perceived to be extremely unjust. With the Paulina case fresh in voters' minds, the anti-abortion camp in Guanajuato lost at the polls while the Federal District expressly legislated rape as grounds for legal abortion.[26] As Lamas writes, women's demands must be anchored on a social context if they are to gain political traction.[27] In both Guanajuato and the Federal District, even if the notion of free choice was still in the public mind, the driving force was glaring unfairness.

Rather than the idea of "controlling my own body" it is the issue of unequal access that underlies cases fought through the courts in Argentina. Articles 86(1) and 86(2) of the Argentine Criminal Code allow abortion when a woman's health or life is at risk, in cases

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[24] Rosario Taracena, "Social Actors and Discourse on Abortion in the Mexican Press: The Paulina Case", Reproductive Health Matters, Vol. 10 No. 19, 2002.

[25] Such is definitely the case in Uruguay.

[26] Taracena, Op. cit., p. 109.

[27] Lamas & Bissel, Op. cit. p. 21.

of rape or sexual assault, or when the woman is retarded or mentally unsound. Still, women requesting an abortion under these provisions are routinely turned down by public hospitals. Although the Argentine public health system set court consent as an unstated requirement, the courts are not always up to the task.[28]

As judges rule that such consent is not required, some recognize that jurisprudence has been laying the groundwork for gradual progress.[29] However, this does not mean that the courts are asking the tougher autonomy questions. The legal questions that bear asking in these circumstances are myriad, and include the constitutionality of Criminal Code article 86 in light of the American Convention on Human Rights and the Convention on the Rights of the Child, restrictive interpretations of Criminal Code provisions, or just who is to certify that the grounds for legal abortion have been met.[30] To be sure, feminists and other groups have managed to place two key concepts on the agenda: the inequality implied in women having to negotiate an obstacle course set by the health system and workers, and the costs associated with women's right to life and bodily and mental integrity.[31] In other words, that poor women are especially vulnerable targets for discrimination.

Much the same holds true in Brazil, where freedom of choice strategies advanced by the women's movement have converged with demands by health care providers that abortion be freely accessible where legal.[32] Despite these efforts the literature shows that, in over a decade of working with health care providers, the number of abortions performed in public hospitals remains minute in comparison to the over 300,000 admissions connected to high-

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[28] Recent cases include Supreme Court of Justice of Buenos Aires, "O.M.V. s/ Victima de abuso sexual", Ac. 100.459, 26 February 2007.

[29] Soledad Pujol and Malena Derdoy, "Algunas notas críticas sobre el tratamiento judicial del aborto en Argentina", Anuario de Derechos Humanos, 2007, pp. 137-139.

[30] See Paola Bergallo, Jornadas: Violencia. Sexualidad. Reproducción. Tensiones Éticas, Jurídicas y Políticas, Centro de Encuentros Cultura y Mujer and CEDES, Buenos Aires, 2007, pp. 52-61.

[31] See Florencia Luna et al. Aborto por motivos terapéuticos: Artículo 86 inciso 1° del Código Penal Argentino, Documento No. 2, Flacso-Argentina, Buenos Aires, 2006.

[32] Wilza Villela Vieira, María José de Oliveira Araújo, "Making Legal Abortion Legal in Brazil: Partnerships and Practices", Reproductive Health Matters, Vol. 8 No. 16, pp. 77-82, and Alessandra Casanova Guedes, "Abortion in Brazil: Legislation, Reality and Options", Reproductive Health Matters, Vol. 8 No. 16, pp. 66-76.

risk abortions.[33] Concerned groups advocate drafting clear rules on exceptions to legal abortion or clinical practice guidelines addressing women's needs,[34] irrespective of disallowed cases that may sometimes be settled in court.[35] In anencephaly cases where legal abortion has been disallowed, both in Brazil and Argentina, the trend is for court rulings to shirk difficult questions of women's reproductive autonomy, choosing instead to state that such cases, rather than actual abortions, are the "therapeutic acceleration of birth", as the Supreme Court of Brazil wrote in 2004.[36] The courts in Argentina have traveled down a similar path[37] when attempting to address specific women's demands while refraining from laying down a consistent discourse on autonomy. Interestingly, the Brazilian Supreme Court found that forcing women to carry a pregnancy to term was tantamount to torture,[38] an important decision to the extent that it predated by a year the ruling of the United Nations Human Rights Committee in its communication "K.N.L. vs. Peru",[39] a case involving a 17-year-old girl carrying an anencephalic fetus who was denied a therapeutic abortion at a Lima hospital. She was forced to carry the pregnancy to term and to breastfeed the anencephalic child for four days until it died.

Groups in Argentina,[40] Brazil, Costa Rica[41] and Peru[42] have moved to secure access to legal abortion through enactment of clinical guidelines and specific regulations. These efforts are crucial to countering the unfettered discretion of medical practitioners who, in the absence of clear criteria, set themselves up as judge and jury on who is protected under

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[33] Dirce Guilhem & Anamaría Ferreira Azevedo, "Brazilian Public Policies for Reproductive Health: Family Planning, Abortion and Prenatal Care", Developing World Bioethics, Vol. 7 No. 2, 2007, p. 73.

[34] Ibid., pp. 72-73.

[35] Debora Diniz, "Selective Abortion in Brazil: The Anencephaly Case", Developing World Bioethics, Vol. 7 No. 2, 2007, pp. 64-67.

[36] Ibid. p. 67. Diniz states that beginning in 1989, nearly 3,000 malformation-related abortion requests have been requested in the public health system.

[37] Pedro Hooft, Anencefalia: consideraciones bioéticas y jurídicas. La ausencia de un substrato biológico mínimo ¿genera diferencia moral? Acta Bioethica 2000, 6 (2), pp. 268−82.

[38] Diniz, Op. cit, p. 67.

[39] Human Rights Committee, Karen Llontay v Peru UN Doc.CCPR/C/85/D/1153/2003, November 2005.

[40] Florencia Luna, Op. Cit.

[41] María Carranza, "The Therapeutic Exception: Abortion, Sterilization and Medical Necessity in Costa Rica", Developing World Bioethics, pp. 55-63.

[42] Following the K.N.L. vs. Peru decision.

legal abortion provisions. This does not mean that the prochoice agenda has been shunted aside; it means that the autonomy discourse has taken a back seat to issues of inequality and the risk to health and life faced by women denied a legal abortion. This construction allows for more persuasive arguments before a wider range of social and political sectors. Issues of individual choice become more flexible as affluent women can afford to obtain abortions from private health care providers.

Interestingly, most strategies argue the public health effects and consequences of unsafe abortions, even as they acknowledge that protected cases under the law are insignificant in comparison to the widespread unsafe abortion phenomenon.[43]

2. Some countries, such as Mexico and Colombia, are moving toward decriminalizing abortion under certain circumstances. In Colombia this was made possible by high-profile litigation that placed the issue front and center in the public mind.[44] The action was brought by a feminist attorney who devised a strategy designed to have the Constitutional Court of Colombia rule on the constitutionality of articles 32(7), 122, 123, and 124 in the Criminal Code penalizing all forms of abortion.

The rights whose violation was claimed included personal dignity, the right to life, bodily integrity, equality under the law, individual rights, the right to personal growth and development, reproductive autonomy, and health rights, all recognized under the Constitution and international human rights law and instruments. Some Colombian feminists felt that the action fell short of their expectations, charging that it focused on "easy" cases and failed to place women's reproductive autonomy as the central issue. The underlying question was whether the Court and the concerned actors were prepared to debate abortion.

Yet, abortion was not a new issue to the Court, which acknowledged previous decisions[45] and noted that it intended to be cautious and consistent in order to safeguard legal certainty

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[43] Raffaela Schiavon, Gerardo Polo and Erika Troncoso, op. cit., p. 3.

[44] See Women's Link Worldwide at www.womenslinkworldwide.org/gjo_strategies.html.

[45] C-133 of 1994, C-013 of 1997, C-641 of 2001 and C-198 of 2002.

and the principle of equality under the law. But it also added that previous rulings would not be construed as set in stone, as this could lead to unacceptable prejudice.[46]

Interestingly, in its address to the Court the public prosecutor agreed with the claimants in that criminalization is irrational and disproportionate when conception has occurred against a woman's will, if pregnancy places her life or physical or mental health in serious jeopardy, or when disorders or dysfunctions making the fetus nonviable are medically certified.[47]

In agreeing that the claimed Criminal Code provisions were indeed unconstitutional, the Colombian Court acknowledged that "It is evident that certain situations affect women in particular, notably those concerning their rights over their bodies, sexuality, and reproductive lives,"[48] adding that many international instruments provide a basis for recognizing and protecting women's reproductive rights, notably the right to life, health, equality, non-discrimination, freedom, bodily integrity and to be free from violence, *inter alia*, all of which stand at the core of reproductive rights.

The Court balanced the protected right to life of the unborn against the reproductive rights of women, concluding that such protection cannot be unlimited. In the view of the Court, a systematic interpretation on protecting a new life was required, pointing out the need for judges to carefully balance the rights of the unborn against other rights, i.e., a woman's constitutional rights. While the Court expressly referenced the reproductive rights of women, it did not go beyond stating –nor was it required in those terms by the claimants- that women's rights, including privacy rights, should prevail over the eventual rights or interests of the unborn.

In the view of a key participant, the 2007 decriminalization of abortion in the Federal District of Mexico was more happenstance than the work of the feminist freedom of choice lobby. The event, she noted, originated in popular anger at the narrow win obtained at the

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[46] Constitutional Court of Colombia, C-355/2006, 10 May 2006.
[47] Ibid.
[48] Ibid.

polls by the incumbent conservative PAN party against Democratic Revolutionary Party candidate Andrés Manuel López Obrador. Had that anger not been there, the momentum needed to take bold action on abortion would perhaps not have existed. The defeat of the progressive candidate in a hotly contested election set the stage for a lone legislator to put forward a bill to decriminalize abortion, figuring that it would place conservative foes in a tough position and cost only a low political price. The initiative took on unexpected proportions when other PAN opponents –none of which had ever clearly stated their stand on abortion- seized on it as a means of getting back at the election winners.[49] Unrelenting media exposure and a mature public opinion managed to counteract shrill threats by Catholic Church leaders, including excommunication, who claimed to be concerned over the post-abortion syndrome suffered by aborting women. While this take of events in the Mexican Federal District is valid, as politics is not always a chess game where each move is carefully considered, political and social changes such as this require the presence of countless previous factors to be viable. Chief among these was the existence of a movement capable of seizing the opportunity, delivering strong public arguments, and raising the traditionally elusive issues of reproductive autonomy and decriminalization of abortion. As of this writing, the Federal District legislation was being contested in Constitutional Court by the Mexican Human Rights Commission.

3. In the case of Chile, the track record of reproductive autonomy is both sweet and sour. While free nationwide fertility regulation programs directed at all social sectors exhibit good indicators in some areas, the status of abortion is starkly different.[50] Therapeutic abortion, the only type of legal abortion allowed in the Criminal Code, was struck down in July 1989 by the regime of Augusto Pinochet.[51] In 18 years of democratic government it has been practically impossible to even debate reinstatement of therapeutic abortion.

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[49] Personal communication with a prominent Mexican activist, Geneva, 31 January 2007. To avoid contradicting the feminist “official story”, she spoke on condition of anonymity.

[50] Lidia Casas, Women and Reproduction: From Control to Autonomy? The Case of Chile, American University Journal of Gender, Social Policy and the Law, Vol. 12 No. 3, pp. 427-451.

[51] For a history of the repeal, see Antonio Bascuñán Rodríguez, “El aborto no punible”, Revista Derecho y Humanidades, December 2004.

In Chile, therapeutic abortion was liberally championed by clinical practitioners concerned with issues of health policy and with protecting the life and health of women. Its roots are not in freedom of choice or self-determination. Few Chilean lawyers, for example, are aware that in the early seventies a team of university-trained midwives and ob/gyns at the Barros Luco Trudeau Hospital in Santiago conducted a ground-breaking abortion-on-demand program. Their interpretation of the law was that unsafe, high-risk abortions were having a devastating effect on the morbidity and mortality rates of poor women. These empirically measurable rates laid bare the deadly consequences of the backstreet abortions these women were resorting to as a matter of practice. These clinicians posited that while the recent introduction of family planning programs was successfully curtailing abortion-related maternal deaths, the rate was still unacceptably high. In addition, large numbers of women remained without access to modern contraception methods and were still exposed to unwanted pregnancies.[52] These practitioners held that terminating a pregnancy before the twelfth week on multiparous, destitute women not using contraceptive methods helped prevent loss of health and life. Facing an unwanted pregnancy in a context of social and cultural marginalization, and in the absence of legal abortion services, most such women would turn to traditional birth attendants or lay midwives for help or even self-perform an abortion using rudimentary, high-risk methods. Since women wanting to terminate a pregnancy would in any event be exposed to both health and legal risks, they resolved to offer abortion services in a safe hospital setting under certain conditions. These included signing up for family planning counselling with a view to avoiding new unwanted pregnancies and resulting abortions. If women did not wish to have more children, they could have a voluntary sterilization. When the 1973 coup d'état put an abrupt end to it, the program had performed nearly two thousand abortions.[53]

Ever since the 1990 return to democracy, the right-wing has submitted a raft of bills seeking to

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[52] Tegualda Monreal, "Factores determinantes del aborto ilegal en Chile", Pan American Sanitary Bureau Bulletin 86 (3) 1979, p. 215.
[53] Ibid.

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increase sanctions against anyone performing or undergoing an abortion.[54] This is a consistent aspect of the right-wing agenda which has remained unchanged since the Pinochet era. In contrast, only a handful of bills seeking to reinstate therapeutic abortion or decriminalize abortion outright have been submitted. The first bill, sponsored by the congressional Socialist caucus in 1991, sought to reinstate article 119 of the Health Code allowing therapeutic abortion. Needless to say, the conceptual basis for the bill was not freedom of choice. But the bill failed to garner support for debate and was shelved in 1997.[55]

The right-wing push for harsher penalties for abortion became stronger around the time of the 1994 International Conference on Population and Development. Sectors of the congressional right-wing and Christian Democrats who were fiercely hostile to the concepts of gender and sexual and reproductive health being discussed in international forums felt that the time was right to go on the offensive. Most bills submitted by right-wing legislators were alike, and generally sought to increase penalties, typify abortion as a crime, suppress honor-related exceptions, disallow parole, and encourage turning state's evidence.[56] These bills echoed the proposal submitted by military junta member Admiral José Toribio Merino in 1988 as he successfully pushed to repeal abortion.

One of these bills made it as far as the Senate floor (1998)[57] while two others were shelved after failing to elicit support in the Health Committee of the Chamber of Deputies.[58]

Most of these bills made liberal use of arguments such as the guilt and psychological burden aborting women must bear, a discourse that emerged anew during the 2001 debate on post-coital contraception. Proponents also argue that the best way to prevent abortions was to strengthen family values, exposing a conservative mindset suggesting that if families were built on strong values all manner of scourges, abortion included, would vanish, and

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54 Three bills in all, two sponsored by the Democratic Independent Union (UDI) and one by the National Renewal Party (RN).

55 Bulletin 499–07, 1991, 17 September 1991.

56 Chamber of Deputies, Reforma el Código Penal en Materia de Aborto, Bulletin 1298-18

57 Republic of Chile, Senate, Bulletin 1302-07.

58 Republic of Chile, Chamber of Deputies, Bulletin 1298-18, 2 August 1994. Shelved 25 March 1998, and Republic of Chile, Chamber of Deputies, Bulletin 1297-18.

conversely, that lack of values led women to abortion.

The government and civil society responded in variegated ways. The women's and feminist movements were nowhere to be seen during the congressional debate, depriving legislators of the chance to hear from freedom of choice advocates. Their reaction came somewhat belatedly, when a Senate vote was imminent.

The Bioethics Committee of the College of Physicians opposed the bill, arguing that it would place further restrictions on the few options remaining for medical doctors dealing with life-threatening conditions in pregnant women, and called for reinstatement of therapeutic abortion. A criminal lawyer[59] argued for harsher sentences, echoing demands by some law enforcement representatives who argued that abortion was a serious crime. Paradoxically, other law enforcement agencies contended that therapeutic abortion should be reinstated, pointing out that the bill failed to contemplate cases where a mother's life is threatened or the fetus is nonviable.[60] The Executive Branch reacted by slamming the bill, citing the ineffectiveness of criminal sanctions and the costs associated with unsafe abortions.

After passing first reading in the Constitution, Legislation, Justice and Rules Committee, the bill was forwarded to the Senate Health Committee, whose members declined to support it. Committee Chairman Mariano Ruiz-Esquide said that an expert panel should be convened. Even Sebastián Piñera, then a Senator and now a right-wing presidential hopeful, felt that the bill sent out the wrong signals, failed to grasp the complex nature of the issue, and required an altogether different approach.[61]

The evidence shows that the medical community en masse took a dim view of the bill, arguing that complex issues of public health such as abortion could not be dealt with by increasing penalties and adding that any proposed legislation had to take the impact on women into consideration. They noted that in their clinical experience, women who fear being turned over to police will delay seeking help until it is often too late, thus becoming exposed to more

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59 Professor Luis Rodríguez Collao, Legislative Advisory Program, Catholic University of Valparaíso, Ibid. p. 430.
60 Ibid.
61 Annex to Bulletin 1302-07 p. 524.

severe abortion complications at later stages of pregnancy.[62] They further noted that such a bill was also discriminatory, as it would only be used against poor, vulnerable women. Medical doctors sponsored two proposals to reinstate therapeutic abortion, noting that a ban on a crucial option available to the medical profession was a tragic error.[63]

The only dissonant note was hit by Carlos Oviedo, President of the Conference of Catholic Bishops, who expressed his support of the bill based on the proportionality of the punishment vis-à-vis the crime.[64]

Interestingly, when the military regime debated the issue in 1988, Air Force General Fernando Matthei, then a Junta member, came out against a ban on therapeutic abortion. A decade later, a Senate Committee controlled by the right-wing passed the bill, only to see it rejected by the Senate Health Committee.

Debate on the Senate floor showed that those voting against, especially the Christian Democrats, wanted the record to show that they opposed abortion, which they considered a tragedy, but were not willing to increase the already harsh punishment meted out to aborting women. A group of senators affirmed the right of women to terminate a pregnancy when medically advised, when the fetus is seriously malformed, or when pregnancy results from rape.[65] Many also argued that Chile had signed international instruments –i.e., Cairo and Beijing- requiring the country to revise punitive legislation, and cited research on the effects of criminalization on women.[66] Bill proponents managed to elicit opposition even from anti-abortion senators Evelyn Matthei and Ramón Vega, who held that the issue could not be dealt with by merely enacting harsher penalties.[67] Rather than intervene directly, the women's

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[62] Session 4, Documental Annex, Report of the Health Committee (1302-07) p. 525.

[63] On the status of medical practice in Chile, see Shepard and Casas, Op. cit.

[64] Ibid. p. 535.

[65] Including Senators Muñoz Barra, Boeninger, Bitar, Ominami, Gazmuri, and Carrera. See Session 14 of 15 July 1998, Session 20 of 12 August 1998, and Session 30 of 15 September 1998, Senate Report.

[66] Senators Núñez and Bitar.

[67] Senator Ramón Vega, Session 30, 15 September 1998, p. 3405, and Senator Evelyn Matthei, Session 30, 15 September 1998, p. 3411. Interestingly, Air Force General Fernando Matthei, as a member of the military junta in 1989, had opposed repealing therapeutic abortion and increasing penalties. A decade later, his daughter, Senator Matthei, and his former colleague, Senator Vega, a retired Air Force General, would echo his stand.

health movement simply tried to prevent the slide from being as bad as it could potentially be. Chilean women were far from capable of seizing the opportunity, as our Argentinean counterparts did when former president Carlos Menem convened a Constituent Assembly.

In the end, the bill was defeated by just two votes. Women's autonomy was only weakly heard from during the debate and certainly not from the standpoint of the right to self-determination; only from the idea that certain circumstances place women at a strong disadvantage. While the easy cases, including fetal malformation and therapeutic abortion, had a certain degree of support from members of the ruling coalition, Congress has not debated the issue since.

Conservatives, for their part, have been relentless in their quest for increased punishment. In 2002 congressional conservatives[68] submitted a proposal that was all but identical to previous bills and whose sole innovation was to substitute jail terms for community service with unborn protection groups.[69] A number of additional proposals have been submitted since Michelle Bachelet was elected president. The most important of these, submitted just two weeks into her term, sought to raise the congressional quorum needed to decriminalize abortion.

Some notorious cases, such as those involving anencephalic fetuses, have received wide media exposure[70] but have failed to capture congressional attention, in spite of some initiatives in this regard. The ruling *Concertación* coalition repeats like a mantra that abortion is not on its agenda. The resulting self-censorship leads to hurried efforts to contain the issue every time it rears its head in the public sphere. Proof positive of this faint-hearted stance was provided in November 2006, after the government argued that a draft bill decriminalizing abortion was inadmissible.[71] It would appear that giving the abortion debate a wide berth is how the ruling coalition seeks to steer clear of internal dissent over so-called "value issues".

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[68] Including Rodrigo Álvarez, Marcela Cubillos, José Kast, Darío Paya, Gonzalo Uriarte, Eugenio Bauer, Marcelo Forni, Iván Moreira, Felipe Salaberry, and Ignacio Urrutia. Bulletin 2978-07.

[69] Ibid.

[70] "Los derechos humanos de las mujeres", Informe Anual de Derechos Humanos. Hechos 2002, Diego Portales University, Santiago, 2003, p. Xx.

[71] Lidia Casas, "Del aborto y otros cuentos y la transición democrática" Revista ChileXXI, March 2007, p. 12, in www.chile21.cl/chile21/archivos/revistas/abortion.pdf.

The women's and feminist movements have failed in their efforts to reinstate the debate on ownership of one's own body in the context of abortion. Whenever conservatives have tried to push their agenda, the mantle has fallen to health and legal specialists who have provided new contents for debate. Although freedom of choice continues to loom in the background, the arguments presented seek to dissuade based on crucial concepts such as inequality and the trampling of basic rights, including the right to life, health, and physical integrity, to name a few.

These reflections would be incomplete if they did not include a preliminary assessment of a recent decision by the Constitutional Court of Chile which ruled key aspects of Chilean health policy unconstitutional. In September 2006, thirty-six right-wing members of Congress challenged the constitutionality of National Fertility Regulation Rules requiring the public health system, *inter alia*, to provide counselling as well as prescribe and distribute post-coital contraception and intrauterine devices to teens without parental consent.[72] As the media widely reported that the Court was tipping in favor of the petition, the women's and feminist movements sprang back to action to face the unthinkable: the real possibility that over four decades of contraception policy in the public health system were about to be wiped out.

On 18 April 2008 the Court announced the contents of its decision. The petition had been accepted in part: a request to ban intrauterine devices was disallowed on grounds of incongruity and lack of clarity on the part of the complainants. A request to ban delivery of services to teenagers was also refused. In a split decision, the Court agreed to ban delivery of post-coital contraception services in the public health system. On April 22nd there were mass freedom of choice demonstrations and rallies across Chile.

The women's movement as such did not request to appear before the Court in 2007. The government's position remained indistinct. It was not clear whether it would attempt a line of defense based on rights and freedoms, or if it would stop at standing for public health policy. Reviewing all these events in detail is, however, beyond the scope of this article.

[72] National Fertility Regulation Rules, first passed in September 2006, were confirmed by Executive Decree 48 of

Suffice it to say that it was essentially specialists and representatives of Chilean civil society who appeared at the Constitutional Court hearings. The arguments they presented were based on the exercise and enjoyment of basic women's rights, including freedom of thought, health rights, bodily integrity and privacy rights. Based on solid evidence, these presentations explained the potentially disastrous consequences of demolishing successful health policies dating as far back as 1965.

The Constitutional Court voted 5-4 to bar emergency contraception from the public health system. The decision has no effect on approval to fill prescriptions, nor does it remove post-coital contraception from the National Formulary of essential drugs. As to teenage counselling, the Court ruled by omission, stating that parental rights are not breached by health services provided in confidence. The ruling eschews all mention of adolescent rights to health, privacy or bodily integrity, and stays well clear of interpretations in the light of the Convention on the Rights of the Child.

Although the majority vote made lukewarm references to impinging on individual rights, for all practical purposes women are missing from the equation. While the dissenting vote affirmed women's freedom of thought, only Judge Sergio Vodanovic affirmed individual choice, even alluding directly to abortion.

In brief, as has been the case in other countries, the Chilean debate focused almost exclusively on the right to life of the unborn while refusing to identify or consider the women's rights at stake. The result is a narrative that speaks of life in the abstract and brushes aside the true protagonists: women and their bodies. Upholding the right to privacy does not meet the needs of the individuals involved, since to materialize individual choice a series of conditions are required. The debate over the social dimension versus the denial of certain freedoms is clearly present in the U.S. women's movement, whose most prominent leaders have shown the limitations of the privacy discourse vis-à-vis women's autonomy.[73]

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7 February 2007.

[73] Marlene Gerber Fried, "Transforming the Reproductive Rights Movement: The Post Webster Agenda", From Abortion to Reproductive Freedom: Transforming a Movement, Marlene Gerber Fried Ed., South End Press, Boston, 1990, pp. 1-14; Rhonda Copelon, "From Privacy to Autonomy: The Conditions for Sexual and Reproductive Freedom", From Abortion to Reproductive Freedom: Transforming a Movement, Marlene Gerber

Hence the importance of connecting these freedoms to the social rights that enable them. As Correa and Petchesky have written, freedom of choice means little to the poor and marginalized. As such, speaking about rights over one's body in Latin America and the Caribbean implies contextualizing the stark gender and class discrimination and inequality plaguing the continent as a much more persuasive argument for a wider range of social actors.

In Chile, this was clearly evident in the widespread denunciation of a ruling that upholds discrimination. Indeed, the Constitutional Court's decision reawakened a lethargic movement and prompted over 25,000 Chileans to march against it throughout the country.

The crucial issue now is how to establish the linkages required to stop addressing the easy cases and start building freedom of choice on the basis of a broader understanding of equality capable of lifting women from second-class citizen status.

Fried Ed., South End Press, Boston, 1990, pp. 27-43.