Proposal to request the unconstitutionality of the provisions that criminalize abortion in Chile

by

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Faculty of Law
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Abstract
This paper proposes a judicial advocacy strategy aimed to challenge the constitutionality of the law that imposes an absolute prohibition of abortion in Chile. Examines the origin of the criminalization provisions in light to the constitutional mandate to protect the life of the unborn, presents an overview of the arguments used in the legislative to request the partial decriminalization of abortion, the tendency of the executive in the past years in this matter, and the criminal strategy that has been used in cases where women have been prosecuted by abortion, based on what has been intended so far the paper conclude a solicitude to declare unconstitutional the criminal abortion provisions because they do not protect the life of the unborn.
Acknowledgments

A mi mamá, que porque pudo elegir libremente sobre su maternidad, me hace sentir infinitamente amada. A ella, una mujer total, que me dio una vida más allá de la que estaba destinada para mí.

A mi "partner", al que quiero que sea el papá de mis hijos o de mis hijas. porque es un hombre que me abre y le abrirá las puertas a ellas para que sean las mujeres que quieran ser. Porque soy libre a su lado.
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Introduction

Chile, Nicaragua and El Salvador, are the only countries in the Americas that criminalize abortion in all circumstances. Chile presents an interesting historical paradox. During the last century the southern country not only had particularly liberal laws, allowing the termination of the life of the unborn up to 12 weeks of gestation for therapeutical reasons, but it was also a pioneer in its respect and promotion of the sexual and reproductive health of women in the Americas. During Pinochet’s military dictatorship -which lasted almost seventeen years- the abortion laws remained as liberal as they had ever been, however just as his regime was coming to a close, abortion was criminalized in all circumstances. The prohibition remains the same ever since.

During the past two decades multiple initiatives had been filed in the parliament seeking to partially decriminalize abortion: none have succeeded. The parliament has refused to advance the discussion of abortion decriminalization: the former left government publicly conceded that the abortion discussion was not part of their agenda and the current government has said in the media that it does not promote nor approve of the decriminalization of abortion in any circumstance. Regardless, large numbers of the population support the decriminalization of abortion in some scenarios. Vulnerable women risk their lives, integrity and freedom because legislation has a discriminatory effect.

While this thesis was being written, an eleven years old girl became pregnant after being raped by her stepfather –in Chile the sexual relationships with children under the age of consent, 14 years old- is a crime. Nonetheless, the President stated: “I have asked the Minister of Health to personally take care for the health of X1, who surprised everyone with her words showing her maturity when she said that despite the pain that the man who raped her had caused her, she was going to love and care for her baby (...) if it is necessary to undergo a premature birth, the procedure has to be performed, because in

1 Based on the child’s right to privacy I decide to omit the name of the children in the reference.
our country the life of the woman is in the first place”². The case of the girl is not new, every once in a while a extreme case shocks the country and the current legislation threatens women if they try to pursue abortion even when their life is in danger due to the pregnancy or when the pregnancy is the result of a crime.

This paper acknowledges the fact that in Chile the official records do not show an increase of the practice of abortion, that the maternal mortality is low in comparative terms, and that the few women who are criminalized do not necessarily receive imprisonment as a penalty. Despite the above, it will demonstrate that it is necessary to reform the legislation on abortion because it is discriminatory against certain kinds of women without any reasonable justification. Moreover, the criminalization of abortion does not protect the life of the unborn and therefore does not accomplish its constitutional mandate. This paper will propose an initiative that has not been used before: a judicial advocacy strategy aimed at challenging the constitutionality of the law that imposes an absolute prohibition of abortion. In order to present my proposal it is necessary to begin with an explanation of the current picture of abortion in Chile, the context will justify why it is important to advocate for decriminalization.

It will then be necessary to provide the historical context to the law prohibiting the abortion in Chile. The prohibition of abortion is grounded in the Criminal Code and has been wrongly justified under the constitutional provision that protects the life of the unborn. A close examination of the history of the Criminal Code and Sanitary Code (which establishes the absolute prohibition to perform an abortion) provisions on abortion will reflect that its constitutional grounding is questionable because it fail to take into account the distinction made in the constitution between the right to life of the person and the duty to protect the life of the unborn and instead completely avoids analyzing its suitability to protect the life of the unborn.

Next, I will briefly examine the arguments that have been proffered by the legislative and the executive branches to defend and attack the current ban. The analysis of these

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arguments demonstrates that the debate has been polarized between pro-life and pro-choice advocates and their focus on determining when life begins and when its entitled to rights, leaving aside the discussion of two major points: first, that there is a constitutional mandate to protect the life of the unborn and that this does not depend on the certainty about when human life begins; and second, whether the absolute criminalization of abortion fulfill this goal and if not, how it can be accomplished.

Finally, this paper will conclude with a proposal for how to successfully argue to the courts that the Sanitary Code provisions relating to abortion in Chile are unconstitutional. To explain the proposal, I will begin by presenting a brief overview of the criminal strategy that has been used so far in cases where women have been prosecuted by abortion. This explanation allows us to conclude that the strategy used so far has relied on the Criminal Code only and has been aimed at reducing women’s responsibility and imprisonment time, producing a legitimizing effect on an unconstitutional norm. I will follow this discussion with an explanation of the procedure of the inapplicability due to unconstitutionality action (acción de inaplicabilidad por inconstitucionalidad in Spanish), and, conclude, finally, with a presentation of the arguments on which the solicitude it is based. These arguments will incorporate international strategies that have been used in other countries and that may be relevant to enriching the Chilean litigation.
Abortion in today's Chile

The current picture of abortion in Chile is not a black and white issue. It is important to recognize that even though there is an absolute prohibition of abortion in Chile, today the number of women who have died as consequence of illegal abortions complications has decreased compared to the previous decades. According to the “Servicio Nacional de la Mujer” – SERNAM (National Women’s Service in English) and the Ministry of Health numbers, the rate of maternal mortality produced by abortion remains stable since 2001; 10% of deaths are product of abortion and 4% deaths corresponds to induced abortion. In 2008 five women died as a consequence of abortion and in six women died in 2010 for the same cause. In 2001 the prevalence of abortions in Chile was approximately 34,500 women. In 2010, the number was 32,000.3

Second, it must be noted that in the recent past, women who came to public hospitals seeking health care for complications produced by clandestine abortions were reported to the police by the attending physicians. This practice caught the attention of the Committee Against Torture, which recommended its abolition because it constitutes a cruel, inhuman and degrading treatment.4 As a consequence the Ministry of Health released an internal communication5 aimed at reducing this practice. Despite the circular, the number of criminal investigations against women who practiced an abortion have risen 40% since 2008, according to statistics from the National Prosecution.6 However there is no mechanism to monitor the compliance with this guideline.

To the numbers above it must be added that “more than 99% of induced abortions are not reported at all; the cases are disguised as a different procedure or reported as

4 Committee Against Torture, Conclusions and recommendations, CAT, 32 session, C/CR/32/514, (2004), paragraph. 6.j
spontaneous abortion in public hospitals (to protect both, women and hospital staff from prosecution, hospital patient data reported to the Ministry of Health does not differentiate between spontaneous and induced abortion)". Thus, it is logical to conclude that despite the criminalization of abortion, its practice continues and the official numbers do not account for its frequency, nor for what conditions it is practiced under.

The most recent and complete analysis of the profile of the women who are prosecuted and imprisoned in Chile for abortion dates back to 1997. The investigation at that time revealed that: “low-income women and adolescents account for the great majority of abortions complications, since they have recourse only to unsafe abortions, a situation of tremendous social inequity. Since all abortion services operate clandestinely in Chile, very little is known about actual practice or the profile of women having abortions”.

The author of the 1997 study concludes that the same situation persists today: “while restrictions on abortion affect all women, the burden is heaviest for low-income women who depend upon public health care institutions, where there is also more state oversight. Most of the harm to women is unseen and unknown, with no research data: the emotional trauma of seeking an illegal procedure or carrying an unwanted child, the health consequences when pregnancy is contra-indicated or from unsafe procedures, the trauma of facing criminal prosecution if caught, and death for the unlucky few”

The Public Defender published a review of 201 abortions cases under its knowledge from 2000 to 2009. Regarding the age of the women who practiced abortion, it concluded: “11% are minors between 14 and 17 years, 64.4% between 18 to 29, and 22.9% are between 30 and 45 years. The vast majority of women who had abortions are of lower class and lower middle class (with monthly incomes between $0 and $320 USD), and of this majority; 46% have children at the time of the abortion, while 20.6% do not; there is no information about the remaining 33.3% of low to middle income women. 18.6% of women who had

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9 Shepard & Casas, supra note 7
abortions had medium levels of income (up to $1000) and mostly had no children and a steady job or were enrolled in school. Finally, only 1.7% (2 earned) present upper-middle socioeconomic levels, one of which has children”

The numbers of women found guilty of the crime of abortion is not trivial: “In 2000, 46 women were found guilty of abortion and 31 in 2001”

Although it is true that currently women who are prosecuted are no longer sent to jail is not less true that the conviction remains on their records and in some cases they must remain detainees as a "preventive measure" until the time of trial.

These numbers were introduced here with the aim of portraying the reality of abortion in Chile. Sadly they do not account for the conditions, feelings or realities of the individual women, nor do they answer why women feel the need to get an abortion.

The general picture of abortion tells us that women find a way –some even risking their lives- to access an abortion; the numbers reflect that the prohibition has not persuaded them to act otherwise. The data does not account for any of the concerns in which the decriminalization requests have been based: women who need an abortion because her pregnancy endangers their mental or physical health; because the fetus is not viable or suffers from serious malformations; because the birth control method did not work properly or because the women was a victim of rape.

In an attempt to challenge the request for decriminalization, the Health Minister, Jaime Mañalich, stated that the three bills that sought decriminalize abortion in the circumstances set out above were not necessary. Mañalich argued that, in practice, an abortion is performed every time there is risk to the mother’s life and that in his opinion the bills were very lax opened up the possibility of abortion at will. He argued that those seeking to legalize therapeutic abortions, which in his view, already exist in Chile, do so

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10 Defensoría Penal Pública. Abortos e infanticidios: delitos procesados en Chile, 2009
11 Shepard & Casas, supra note 7
12 Shepard & Casas, supra note 7
from ignorance, he argued that no criminal claims have been brought in such cases and that the Catholic Church permit abortions in such situations.\(^{14}\)

The reality however does not match the Minister’s affirmations: in fact it seems to contradict it. Many public cases demonstrate that women’s lives have been put at risk needlessly; some doctors wait until the very end of the pregnancy to perform an abortion even though it was known since the very beginning that the fetus would not survive and that waiting would not only traumatize the women but also risk her health. In other cases, women had to face prosecution even though the pregnancy was the result of the criminal act of rape.

The “human rights annual report” of the Diego Portales University Human Rights Center states that

“In one high-profile case highlighted in the media, in 2003, a woman with a molar pregnancy\(^{15}\) was denied an abortion in spite of public support by the Medical College of Chile for her request”. Finally, at 22 weeks after she developed severe health complications, her pregnancy was terminated.\(^{16}\)

The 2009 Public Defender’s report affirms that two women were formally charged by abortion; one for wanting to abort a pregnancy resulting from rape and the other because she was carrying a fetus with malformations. In June of 2012, a young woman who was pregnant as a result from rape was charged after the doctor who attended her -after her attempt to get an abortion failed- obtained a confession from induced abortion and


\(^{15}\) According to the Mayo Clinic, a molar pregnancy —also known as hydatidiform mole— is “a noncancerous (benign) tumor that develops in the uterus. A molar pregnancy occurs when there is an extra set of paternal chromosomes in a fertilized egg. This error at the time of conception transforms what would normally become the placenta into a growing mass of cysts. Online: in: [http://www.mayoclinic.com/health/molar-pregnancy/DS01155](http://www.mayoclinic.com/health/molar-pregnancy/DS01155)

reported the situation to the prosecutor.” These considerations were introduced in the bills that were rejected without discussion in Congress.

According to Casas and Shepard, “the case of ectopic pregnancies illustrates this widespread interpretation of the law. Most informants agreed that Chilean doctors will terminate an ectopic pregnancy, because the woman would inevitably die long before viability. However, two cases in a Catholic hospital were reported of doctors who waited until the fetal heartbeat ceased before intervening; in doing so, they put the women suffering with cancer at risk.” Therefore, while it is worthwhile to affirm that the current legislation allows doctors to be as subjective as they want regarding the adequate treatment of women whose lives are in danger, the result is that the infringement -or not- of women’s rights depends entirely on the criteria of the doctor who attended them. In the view of the experts quoted above: “medical professionals interviewed had varying opinions on what to do if a woman’s life is threatened. While there may be more leeway in practice than the current law allows, there is no uniform policy regarding medically indicated abortions”.

The testimony of health professionals reflects that: “the current legislation leaves them in a difficult situation: when women come to the service to receive care with signs of having used the probe, or traces of misoprostrol we cannot ignore and we must inform it. Most professionals interviewed were not aware of the role that they have to meet to host a woman that tried to terminate her pregnancy nor of the Ministry of Health directive which mandates the humane treatment of women who attempt abortions. One doctor interviewed said that he has watched some of his colleagues be more concerned about how to make a woman confess to her attempted abortion than about treating her in accordance with her needs. The doctor’s intervention ‘is intended to obtain information about the abortion and then gossip in the hall or during coffee breaks about when or how

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18 Shepard and Casas, supra, note 7
much did they have to struggle to make the women talk’. The absence of laws permitting abortion under certain circumstances left them with their hands tied.”

Regarding non-viable pregnancies, as in the case of an anencephalic fetus, the situation is equally arbitrary as in the case of therapeutic abortions. The absolute prohibition on abortion empowers doctors to extend woman’s pregnancy as their discretion, knowing full well delivering a living human being is not possible. This lack of regulation means even doctors that are willing to perform abortions are not in pace with best practices, which in turn harms women’s wellbeing: “according to several informants and the obstetrics manual of the school of medicine, in the Catholic University of Chile, the dilation and the curettage are still used for post abortion care in the first trimester. This method is more intrusive and risky than vacuum aspiration and medical abortion. Both recommended by the WHO for many years now.

The examples above shows that contrary to the claims of the Minister of Health, at least regarding to the therapeutic abortion, is it necessary to set regulations that establish in an unequivocal manner what to do if the pregnancy poses a risk to the physical and or mental health of the woman and which defines the cases when interrupting a pregnancy is permitted. The absolute prohibition not only endangers women’s lives but subject them to unnecessary suffering that may well be avoided from the very of beginning and prevent doctors from properly exercising their professional duty.

Another scenario which merits consideration is that of women who become pregnant as a consequence of a criminal act, such as sexual relations against their will or under the age of consent. Just this year, the case of an eleven years old girl who became pregnant after her step father raped her, grabbed the attention of pro-abortion activists who, following the example of the public manifestations that have been ongoing in Chile since 2011,

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marched in the streets of Santiago de Chile asking for the absolute decriminalization of abortion.\textsuperscript{21} This situation, however, is not new; every once in a while cases like this shakes up the country. Casas and Shepard reported that in 2005 “a 9 year old girl was forced to carry her pregnancy to term even though her step father sexually abused her.”\textsuperscript{22}

Finally, as if the cases themselves were insufficient to demonstrate that the legislation must be changed, it should be emphasized that Chile is in violation of multiple international obligations as a result of its absolute prohibition of abortion. In the last two decades various international bodies: the UN Human Rights Committee in 2007 and 1999, the Children’s Rights Committee in 2007, the Committee on the Elimination of Discrimination against Women in 2006 and 1999, the Committee on Economic, Social and Cultural Rights in 2004, and the Committee against Torture in the same year, have urged Chile to review such punitive legislation and to open the possibility of abortion at minimum where the mother’s life is at risk and when pregnancy results from rape or incest. In February of 2013, the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, ratified the consensus of multiple Human Rights Bodies and established that “the absolute ban on abortion violates the prohibition of torture and ill-treatment”\textsuperscript{23}.

In sum, while it is true that the numbers of deaths due to abortion have decreased over the past years, it certainly is not possible to conclude that this is an effect of the absolute prohibition of abortion nor of the success of state’s policy in reducing unwanted pregnancies, but instead a consequence of women’s greater and easier access to less risky abortion methods. In Chile women who have the need for an abortion find a way to do it: those with financial means and access to relevant information turn to trusted doctors, travel outside of the country or choose to import the medicines necessary to induce abortion; those without financial means choose to risk their liberty or their lives by using uncertified drugs on the black market or getting an abortion with risky methods in

\textsuperscript{22} Shepard and Casas, supra, note 7
\textsuperscript{23} Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 32th session, A/HRC/22/53 (2013) par. 50
clandestine settings or with inexperienced staff. The prohibition therefore primarily impacts low-income women.

It must be noted that it is uncommon for women who are found guilty of abortion to receive imprisonment as a punishment. Without a doubt, this is a relief, but the consequences of the absolute prohibition of abortion on women’s lives are not less severe; the anguish they feel because they must subject themselves to medical procedures in secrecy, the helplessness of not being able to sue their unprofessional service providers because they would face inevitable conviction themselves, the risks to their health and freedom, and the social condemnation and permanence of criminal record labeling them criminals are all serious impacts on women’s lives.

Additionally, although there is agreement in the medical and religious communities that when a mother's life is endangered by pregnancy, termination it is not illegal because of the “double effect” doctrine, the absolute prohibition does not allow to the generalization and democratization of this practice. Instead, depends on the whim of the doctor to decide whether and when to terminate a pregnancy, leaving the woman totally unprotected. Furthermore, and perhaps most importantly, the criminal legislation as it is, does not fulfill its constitutional mandate: to protect the life of the unborn, nor does it protect the life of women either.
A brief history of abortion provisions.

It is well known that back in 1973, in the decade before the Chile’s dictatorship, many abortions were conducted under the guise of a therapeutic abortion, without necessarily being therapeutic. As stated in the beginning of this paper, this legislation remained the same during the military regime and changed just a few months before democracy returned.

A close examination of the recent history of the abortion ban provision, along with the constitutional provision on which supposedly it is based, will allow me to support the argument that in both the debate that led to the prohibition of abortion in every circumstance and the current debate on decriminalizing it, the considerations that justify the distinction between the right to life and the protection of the life of the unborn in the constitutional provision have been absent.

I) Abortion in the Criminal Code

Since 1874, the year of the first Criminal Code, the prohibition of abortion was consigned to title VII, related to the crimes and misdemeanors against the order of families and against public morality. The provision established:

“Abortion. Article 342: whoever’s malicious act would result in abortion will be punished”24 (translation made by the author from the official version in Spanish)

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With the imprisonment within its maximum, although they do not exercise it, I will work without consent of the woman.
With the of imprisonment in its medium degree, if the woman consents.
Article 343 shall be punished with imprisonment in its minimum to medium degrees, which with violence thereby incur an abortion, even if there had intended to cause it, provided the pregnancy status of women will be known or appear or the perpetrator.
Article 344 The woman who causes her abortion or consents that would cause another person shall be punished by imprisonment in its maximum degree. If you do so to hide their shame, incur the penalty of imprisonment in its medium degree.
Article 345 The doctor who abused his office, causes abortion or he will cooperate, respectively incur the penalties prescribed in Article 342, increased to a degree” (in spanish)
online: http://www.leychile.cl/Navegar?idNorma=1984
According to Antonio Bascuñan “already in the discussion in the heart of the Commission that drafted the Criminal Code, the idea that an abortion committed by certain means could be lawful in certain cases was present. In recognition of this claim is the use of the expression "malicious" by the legal text”\textsuperscript{25}. According to Undurraga: “The criminal and forensic doctrine of the late nineteenth and early twentieth centuries had agreed that there were situations of therapeutic indication in which abortion was a lawful action”\textsuperscript{26}

In conclusion, the Criminal Code was written with the intention to punish abortion caused maliciously and therefore allowed those caused without malicious purpose. The text of the abortion provision in Criminal Code has not been reformed until today.

II) The constitutional provision on the right to life

Although it is true that the legislation on abortion changed just months before the dictatorship ended, the attempts to change the Constitution to protect the life of the unborn were made at the very beginning of the military regime. Once the Military Government Junta (MGJ), with Pinochet in command arrived to power, they dissolved the parliament and set in motion a mechanism to reform the Constitution. They create the Commission of Studies for the New Political Constitution (known as the Ortúzar Commission\textsuperscript{27}) that was in charge of the elaboration of a new Constitutional bill that would have to be approved later by the State Council and the Military Board before it will be popularly ratified by the people. The Constitution was approved in 1980 and is still in force.

The Commission proposed, amongst others, a chart of rights and specifically discussed the content of the right to life. The discussion began by clarifying that “the Commission


\textsuperscript{26} Verónica, Undurraga, “ propuesta interpretativa del mandato de protección del que está por nacer bajo la constitución chilena en el contexto de la regulación jurídica del aborto”, Universidad de Chile, Facultad de Ciencias Jurídicas y Sociales, Escuela de Derecho, (2012), pag. 58.

\textsuperscript{27} The Ortuzar Commission was integrated by: Sergio Díez Urzúa, Jaime Guzmán Errázuriz, Enrique Ortúzar Escobar, Jorge Ovalle Quiroz, Rafael Eyzaguirre Écheverría, Enrique Evans de la Cuadra, Gustavo Lorca Rojas y Alejandro Silva Bascuñán.
considered from the beginning, when this right was mentioned, the need for a provision that allows the State the opportunity to apply the death penalty, by way of sanction, in cases of certain crimes.”28 Thus, from the very beginning the Commission was aware that the right to life was not an absolute right.

The text that was proposed and agreed to as the content of the article of the right to life is:

Art 19: The Constitution guarantees to all persons:

1°. The right to life and physical and mental integrity of the person.

The law protects the life of the unborn.

The death penalty may be imposed only by crime under legislation passed by a qualified quorum

(...) 

2°. Equality before the law. In Chile there are no privileged persons or groups. In Chile there are no slaves and whoever steps into this territory is free. Men and women are equal before the law. Neither the law nor authority may establish arbitrary differences.”29 (emphasis added)

From the reading of the drafts on the content of the right to life, at least two things can be concluded about the constituents’ view on abortion: first, the Committee was unable to reach an agreement on the absolute prohibition of abortion, which is why it secured the protection of the unborn, emphasizing the word protection instead of right, which was used in the case of individuals; second, the right to life is not an absolute right, which follows from the introduction of the death penalty as a ground for limiting the right to life.

In the view of Jaime Guzman, the only commissioner who supported the absolute prohibition of abortion, and whose opinion is worth to highlighting:

“From the moment the child, the son, is conceived, it happens to have a soul and becomes a human. Life does not begin with birth, it begins at conception. Then abortion is plainly a

28 Biblioteca del Congreso Nacional de Chile, Actas oficiales de la Comisión Constituyente. (Comisión Ortuzar) Sesión 87a, celebrada en jueves 14 de noviembre de 1974. Pag. 115
29 Constitución política de chile. Articulo 19, numerals 1 and 2.
homicide and the deprivation of life by human volition is not admissible, except, in cases where it is applied by a competent authority as in the death penalty or in acts of self-defense.

In these two eventualities I point not to murder, but to depriving someone of life. But in the case of abortion it is a murder (...) The mother should have the child even if it comes out abnormal, although she has not wanted it, even if it is the result of rape or even of having the child will cause her death. A person can not ever legitimately practice abortion because it is murder and all negative or painful consequences that follow from assuming the responsibilities described are simply part of the duty to always uphold the moral law, whatever the pain it may cause. This is precisely what God has tasked humans with.

(...) the seriousness or tragedy that follows the observation of the moral law can never be invoked as an element to negate from the obligation to comply”30.

Guzmán’s position is rejected by the majority of the Commission, who, unconvinced by the arguments of Guzman who said his stance “impose a religious conception, which was inconsistent with a Constitution designed to govern a pluralistic society”31.

The Commission's agreement, achieved in session 90, condemns abortion as a general rule but leaves to the legislature to determine whether there are cases that qualify as therapeutic abortion and therefore not constitute a crime. When the Commission approved this rule, they agreed to put on the record the interpretations that Mr. Silva and Mr. Evans made of paragraph 2 of Article 19 No. 1

Bascuñán Silva's interpretation is that paragraph 2 is justified because it prevents the legislature from allowing the excessive legalization of abortion, and contains an implicit condemnation of any abuse by the legislature.32.

Mr. Evans, on the other hand, considered the provision to imply a flexible mandate to not

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30 Comisión Ortuzar, supra, Tomo III, Sesión 87°, pag. 120
31 Comisión Ortuzar, supra, Tomo III, Sesión 87° pag .128
32 Comisión Ortuzar, supra, Tomo III, Sesión 90° pag .206.
penalize forms of therapeutic abortion that have been mediated as a responsible decision of the parent or physician. Also transcribed in the record are the views of Mr. Ovalle and Mr. Ortúzar who believe that flexibility can be extended to other situations such as in the case of rape (Ortúzar) or other situations (Ovalle) within restricted ranges.

III) The change of abortion dispositions of the Sanitary Code.

In 1931, the Executive promulgated the Decree with force of law No. 226. This law is known as the Sanitary Code, and their provisions regarding abortion have been modified on at least two occasions.

In 1931, the article 226 of the Sanitary Code permitted therapeutic abortion, establishing:

“Only for therapeutic purposes it may be possible to terminate a pregnancy or have an intervention to make a woman sterile.

To carry out these interventions it is required the documented opinion of three doctors. When it is not possible to proceed as aforesaid, by urgency of the case or lack of doctors in the town, it will be documented as performed by the physician and two witnesses, one being held by the relevant testimony”

The term “therapeutic purposes” used in this disposition, has to be understood to complement the exclusion of punishability established in the criminal code; this is the “maliciously” requirement of the abortion in order to be considered punishable. Thus, if an abortion has to be carried out because is it necessary for a therapeutic purpose, there will be no maliciousness and therefore no sanction nor crime.

The redaction of the norm was wide; indeed the term “therapeutic” was used to perform abortions under many circumstances that did not necessarily create the need to terminate a pregnancy because it endangered a woman’s life.

33 ibid.
34 Biblioteca del Congreso Nacional de Chile, Decreto con fuerza de Ley No. 226, May 15 of 1931, online: http://www.cepal.org/oig/doc/LeyesSobreAborto/Chile/1931_DFL-226_Chile.pdf
According to APROFA (Association for the Protection of the Family) just after the publication of the law, many abortions were practiced in order to provide a more effective medical treatment to women with certain medical conditions that were not life threatening. “It has been documented that one of the most common grounds to justify this intervention were numerous cases of rubella and syphilis presenting in women, conditions that increased the likelihood of gestating a fetus with severe malformations and complications, which necessitated the termination of pregnancy. According to investigations, epidemiological data indicated that in the early thirties half of the women who had induced an abortion were hospitalized”35.

The Doctor Ramiro Molina affirms that abortion: “was applied two to three times per year depending on the discharge records of the National Health Service and certainly it was not considered one of the routine procedures that were performed to terminate an ectopic pregnancy, to interrupt a molar pregnancy, to treat maternal sepsis, and many other serious and severe situations and some very rare, which were the subject of discussions in the respective medical indication of Obstetrics and Gynecology Services. These discharge diagnoses were recorded in the respective gynecologic, obstetric or fetal pathologies”36.

According to APROFA, the exceptional allowance for abortion in the sanitary code accounted for only a small number of the actual abortions (the numbers of clandestine abortion do not appear in official records). By 1950, the number of women who had performed an abortion and ended up hospitalized reached 16,560, almost 14 per thousand women of childbearing age. In 1960, these figures more than doubled, reaching 48,186 women who held a fifth of the beds in the maternity services. Later in 1964, these cases decreased, accounting for 8% of all hospital discharges. The profile of most women receiving abortions was 25 to 34 years of age, living in relationships, married and

35 APROFA, El aborto en Chile, argumentos y testimonios para su despenalización en situaciones calificadas, Asociación Chilena de Protección a la Familia. Febrero de 2010. Pag 30
Online: http://issuu.com/doc-aprofa/docs/aborto_en_chile

36 Ramiro, Molina, ¿Es seguro el aborto de causa médica en Chile?. Revista chilena de obstetricia y ginecología. vol.74, n.5 (2009), pag. 273 at275.
This stage is characterized by a large number of women seeking abortions and this reality must be understood in the context of lack of public policies on family planning and sexual and reproductive health.

Later in 1965 the Executive implemented the National Planning Family Program. Through this program, the state provided counseling to people so they could have the appropriate means to plan their fertility and prevent unwanted pregnancies through contraception and voluntary sterilization.

Two years later, in 1967, another modification was introduced to the art. 226 of the Sanitary Code. The change consisted in reduce from three to two, the number of doctors required to authorize an abortion. Bascuñan Rodríguez affirms that the change in the provision produced new interpretations about the meaning of “therapeutic purposes”, giving space to more restricted views in light of the advances of medicine that diminished the need to perform an abortion in order to save a woman’s life. In his view, the article of the Sanitary Code continued to play an important role in the justification of the use of abortions in the context of medical practice.

In view of the author of this paper, Bascuñan fails to demonstrate the link between the change of the provision and the arousal of new interpretations of the term “therapeutic”. Bascuñan ignores the fact that these new interpretations could reflect new realities clamoring to pushing the boundaries of the decriminalization of abortion to prevent deaths due to illegal abortions, among other possible reasons. There is no relationship between the more restricted views about the meaning of “therapeutic” and the change in the legislation, especially if we consider that the disposition changed only to reform the

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37 APROFA, supra, note 35. Pag 30
38 Claudia, Mira, “historia de la política de planificación familiar en Chile, un caso paradigmático”. Publicado en Debate Feminista, V.10 (1994), Mexico Pag. 200. According to Mira “the contraceptive activities were recognized in Chile since 1930, but only began to be systematized in 1962. They had a private nature and local extent The Ministry of Health did not comment on these activities, they were tolerated but were not included in health programs” pag 199.
40 Antonio Bascuñan, supra, note 26. Pag 142 at 181
procedure to endorse an abortion but not the term therapeutical, which was kept as it was since its initial formulation.

During the following years, until 1973, there was a reduction in the number of abortions, probably because of the Family Planning introduced in 1965. According to APROFA, “in 1970, the number of hospital abortions had fallen 36%. During 1973, under the government of communist Salvador Allende, the Department of Gynecology and Obstetrics of the Barros Luco public hospital, decided to perform abortions legally, due to the number of deaths and serious injuries caused by abortions. To find authority to do so, the hospital took a singular interpretation of the existing legal standard. The hospital standard is stated that under certain conditions and in cases of extreme poverty, preexisting high parity and unwanted pregnancies, the medical team could authorize abortions for women with pregnancies of less than twelve weeks. Also it was required that after the pregnancy the woman must be willing to use birth control, and in the case of not wanting to have children, to be sterilized. The experience lasted for eight months, and in that period of thirty thousand abortions were performed for free.”

In 1973, a military coup took the country by force and lasted for nearly 17 years. Many changes were introduced in multiple fields, but the legislation on abortion remained the same. To be more precise; during the dictatorship the legal dispositions on abortion remained exactly the same as in 1967 and this changed only six months before Pinochet left power. In September of 1989 the MGJ ruled to change the Sanitary Code and prohibited abortion in all circumstances.

It must be pointed out that even though it is true that the changes to the legislation on abortion were made nearly at the end of the dictatorship, its roots dated back to the beginning of the regime. The public policy of the regime was officially declared in the document entitled "Population Policy" published by the National Planning Office in 1979. The program was based on the concept of the nuclear family, whose pillars were the

41 APROFA, supra, note 35. Pag. 30
42 In 1988, almost one year earlier of the legal modification there was a popular plebiscite to decide the continuity of the dictatorship or the return of the democracy. The dictatorship was defeated by 51% of the vows.
father, mother and children. This approach exaggerated gender roles and motherhood was the only recognized and valued role for women. In the executive’s view the cause of the problems facing the family, were due largely to women incorporating into the workforce and thus reducing the number of children.\footnote{APROFA, supra, note 35. Pag 54}

In order to understand the fundamentals of the current abortion disposition and the incoherence with the Constitution in which it supposedly bases on, I will transcript below the most revealing excerpts of the discussions\footnote{Biblioteca del Congreso Nacional de Chile. Historia de la Ley 18826. Boletín N° 986-07. Santiago de Chile, 6 of July of 1988} within the advisory committees of the Military Board.

Near the end of the dictatorship, a member of the Military Junta proposed to change the legislation on abortion in two aspects: first; to change the article 119 of the Sanitary Code in the following terms: “to replace by a new one that both establish a ban on acts of abortion and also resolve the situation of the death of the unborn as indirect and unintended consequence of a necessary medical action to be developed in the sick mother” and second; to replace the Articles 342 to 345 of the Criminal Code, for which it was considered appropriate to start the paragraph by describing the conduct of abortion, and then to modify it penalty by assimilating it to the offense of simple homicide\footnote{Op cit. Historia de la Ley N° 18.826 de 1989. pag 4 at 5.}

The initiative concluded first by amending the Sanitary Code as follows: "\textit{It cannot be executed any action whose purpose is to cause an abortion}" and second by keeping the Criminal Code text and penalties intact. In this order of ideas, the change does not allow therapeutic abortion, but rather the indirect death of the unborn, as intended by the promoter of legislative change\footnote{Op cit Historia de la Ley N° 18.826 de 1989. pagina}.

It is worthy to highlight the process by which the result was reached, because it allow us to demonstrate that even in the Military Board there was not consensus about the absolute ban of abortion and that the final decision was not the product of deliberation but instead of the discretionally and excessive power of the executive: from four of the legislative
advisory committees that integrated the Military Board, only one committee agreed to make any changes to the legislation on abortion. The consensus however was not necessary because the MJG, integrated by the commanders of the four highest military forces, was entitled to make a decision, as happened at the end passing without any discussion the proposal to change the sanitary code.

The arguments to introduce the reform of the code in the very last minute of the military regime were not hidden, in fact the promoter of the initiative, Admiral José Toribio Merino, affirmed: “The best and perhaps the last opportunity to legislate is provided by the remaining period of the Military Government and Order whose only commitment are to the entire nation, with its permanent values and the future of those values. (...) we all know who is behind the "progress" of the society and we all know their purpose. We all know what has been the method and the systems used to uproot our values slowly and sneaky, but in an effective way. We can not wait then until our system has changed, since the same tools we have today will be no further available, and in a little more time, the ideological transshipment is already producing fruits of modernism that future generations should suffer with the disintegration of values as fundamental as the family, human life and the homeland”47

The proposal was supported by the Catholic Church, which joined the arguments of the Admiral. The church sent a letter to the Joint Commission in order to advocate for the initiative. The arguments were similar as those of the regime: “Unfortunately the way for the massification of abortion in Chile is open. I remember in popular drive time this was the way to perform abortions under legal protection. Is possible that there is no other opportunity like this to change the course of a legislation that contradicts the Christian morality and whose effects can be harmful to the existence of the great values that form the national soul and I think you have a unique occasion to rid the Chilean society of a shameful practice”48.

Of all of the Commissions, the First was the only who supported the idea of an absolute

47 Op cit, Historia de la Ley № 18.826 de 1989. pag 133.
48 Op cit Historia de la Ley 18826. Pag. 166
ban on abortion. In view of José Toribio Merino, president of the Commission: “the Article 119 of the Sanitary Code not only does not protects the life of the unborn but explicitly authorizes abortion, under the guise of prohibitory rule. The so-called "therapeutic abortion" obsolete denomination in modern medical practice, has become a name that conceals and legalizes a heinous and monstrous crime.

(...) 

The current military regime has repeatedly held against various global cultural situations that come to our knowledge. The enthronement of certain philosophical-moral factions of all modern society leads to its own destruction, because they are contrary to the values and essential principles. (...) it also attacks the family and life itself through permissive abortion laws with varied range of "indications", and selling products directly abortifacients without restriction.

Far from admitting that legislation to ban abortion may be a contrary attitude or retarding progress, we believe that it would assume the defense of imperishable and immutable values of our culture and a healthy reaction against that which is the very negation of progress i.e the death and dissolution of the family

If I had to point out a difference, it would be that the helpless beings need their needs to be met, which is perfectly consistent with the approach taken in view of the First Legislative Commission to present this project. To not legislate in relation to this matter, considering that the life of the unborn has a different connotation value or the baby, carries an implicit acceptance of the practice of abortion as now performed in our country, under the protection of the law.

(...) 

Moreover, it is noted that the increase of the penalty proposed by the project is intended to assess only the product of conception in terms similar to human life"\(^{49}\)

The remaining commissions pronounced in the matter in the following terms:

\(^{49}\) Op cit, Historia de la Ley 18826. Pág. 132.
“The abortion has medical, social, ethical, religious, legal and even psychopathological connotations, so it is essential to separate the ethical moral perspective from the wrongfulness of abortion, and the increment of the penalties for this crime. This leads to think that before studying a different penalty for this offense would be necessary to investigate the reasons that lead to abortion.

(...)  

It is not in the opinion of this Commission that increasing the penalties is going to solve the problem, because every time they increase, the courts are reluctant to apply them.

Given the fact that only low-income people cases with complications of abortions come to courts, the legislation will sanction with more grief only the people in this segment of the population”

The Third Legislative Committee rejects the idea of legislating instead suggests to perfectionate the Article 119, considering the desire to legislate on the subject of the Sanitary Code.

Is the opinion of the Commission that the protection of the life of the unborn should left handed over to the law and that it is impossible to equate the dependent life from the independent life, they are the same juridical goods but with legally different connotations.

If it comes into the analysis of the project, it should be studied; when the crime occurs, the description of the figure, its penalty and its location in another title of the Penal Code. It considers inconvenient to establish a culpable offense in this area and is not in favor of increasing the penalty, which only lead to inefficiency of the standard without correction achieved social behavior.

The bill eliminates the "therapeutic indication." The Commission believes that the Otherwise, be perfected so that it includes the life and health of mother and study the possibility of including other indications, as do

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50 Op cit, Historia de la Ley 18826. Pag. 191
some laws, to give a solution to absolutely exceptional cases the rape of the mother.\textsuperscript{51}

At the end, due to the lack of agreement of the Commissions, the MJG approved the bill without any discussion\textsuperscript{52}.

The reading of the records makes visible the following:

The consideration offered to amend the legislation, as well as those advanced to preserve it intact, did not take into account the analysis of the principles of criminal law that should inform the decisions on this area: principle of subsidiarity, guilt, proportionality, equality, appropriateness, necessity, among others.

Also missing from the debate is the discussion about the nature of the legal good that is protected by the criminalization and the necessity and rationality of the criminalization, the values protected by the criminalization of the act and its coherence with the constitutional values and principles, the role of the criminal law, and the purpose of the punishment.

There is not analysis of the characteristics of the women who have abortions and the type of cases and which women go to court, neither were presented the justifications women argued to commit abortion, the effect (deterrent or not) of the rule that criminalizes abortion and the effectiveness of it.

The changes were requested justifying the need to change the criminal law to be consistent with the constitutional provision that establishes that the "life of the unborn" should be protected. However, it failed to take into account the considerations discussed within the Commission Ortuzar in which is clear that its members failed to agree on the absolute criminalization of abortion and this is precisely why the redaction of the paragraph about the protection of the life of the unborn was left open.

\textsuperscript{51} Op cit, Historia de la Ley 18826. Pag 119
\textsuperscript{52} Op cit, Historia de la Ley 18826. Pag 196.
The abortion in the legislative and executive branch

a. In the legislative

The following is an attempt to highlight the main arguments of the bills introduced to the parliament in abortion regulation. The portrait of the bills will allow us to have an overview of the state of the art of the arguments used to both defend and challenge the abortion criminalization.

In 1991, the first bill introduced, was emphasized in the consequences the women’s death would bring to the welfare of the family and the pain it would cause to the children, as a result of not having access to therapeutic abortions instead of being focused in the life/health of the women. Later, the arguments were in some extent based on international human rights trends –abortion as a sexual and reproductive right, women’s autonomy, etc. In all of the proposals the decision to perform an abortion was determined by a committee of doctors.

One of the first bills introduced to legislate on abortion was filled in 1991; another initiative introduced in 2003 was identical. Both proposed to emend the article 119 of the sanitary code to allow the termination of a pregnancy only for therapeutic purposes and with the certified opinion of two doctors.53

The arguments behind the solicitudes were based on three issues: first, the consequences for the family after the mother’s death due to the impossibility to have access to a therapeutically abortion, second, the abortion as a moral an intimate medical decision that should be respected, and third, the opinion polls that reflected the majority’s acceptance of the abortion for therapeutically reasons. The bills stated: “the therapeutic abortion enshrined in Article 119 of the Sanitary Code was never constitutionally challenged during the term of the 1925 Constitution, and for eight years during the term of the current Constitution. (...) there is no history of the provision that can be used to analyze the

53 Bills available at: http://www.senado.cl/appsenado/templates/tramitacion/index.php# using the critheria: “word or phrase”(originally in spanish) then will appear the fifteen Bills that have been introduced so far in the Congress in the matter of abortion. Bill 499-07 Bill 3197/11
considerations that the legislature had to ban abortion and replacing the rule contained in Article 119 of the Health Code"\textsuperscript{54}

The claims of the proponents about the inexistence of constitutional challenges to the Sanitary Code provision on abortion and the inexistence of arguments in the legislative to totally criminalize abortion are not true: the therapeutic abortion was accused of unconstitutionality in the final phase of the dictatorship and there is sufficient records, presented above, to analyze the arguments that the legislature presented to replace the rule of the article 119.

The bills 1302-07\textsuperscript{55} and 2978-07\textsuperscript{56}, intended to raise the penalties for abortion. The former linking the increment of the years in prison to the deterrence effect they believe it will produce in women’s who try to get access to abortion, and the latter, alleging that because there is no doubt regarding the time when life initiates (conception) the abortion prohibition should be moved from the “crimes against the public morality and the family order” section to the “crimes against persons” section, which will imply more years in prison. In both bills there was no mention to how the increment on the penalties will traduce in a deterrence effect or if the criminal law were the most appropriate method to protect the life of the unborn.

The bill 4121-07, proposed to increase the quorum for abortion decriminalization and the bill 4122-07 intended to amend the criminal code to establish that only through a constitutional amendment it could be possible to overturn the crime of abortion. The arguments of the two projects were identical: both affirmed that the criminalization of abortion protects the right to life, but they did not explain how, and used the articles of the Chilean law that establishes the protection of the life of the unborn as source for the initiative. The bill 4447-11 proposed to amend the Criminal Code provision on abortion suggesting a definition that describes all the possible actions that could result in an abortion, and to amend the Sanitary Code to specify that “it can not be performed any surgical or medical procedure, treatment, therapy or prescription drugs that aim to cause

\begin{itemize}
  \item \textsuperscript{54} Bill 499-07 Bill 3197/11
  \item \textsuperscript{55} Bill 1302-07
  \item \textsuperscript{56} Bill 2978-04
\end{itemize}
an abortion”. The proponents affirms that it is wrongful and unconstitutional to subordinate the unborn’ life and integrity to the women’s right to life, specially taking into account that because it has not being born it can not defense itself and has to be specially protected.

The bills 3608-04, 4818-24, and 8708-04 proposed to build monuments in favor of the victims of abortion.57

Finally, in recent years there have been introduced three bills58, two in 2010 and one this year. The first 2010 bill No. 6845-07 intended to eliminate the abortion provision in the Criminal Code and regulate the therapeutical abortion in the Sanitary Code.59 This was the first time that the abortion decriminalization had been made from multiple perspectives:

Women’s autonomy and dignity: “From a legal standpoint, the right of women to decide about their own body is the basis of the argument in favor of abortion legalization, as well as the need to ensure the appropriate sanitary and safety conditions to the approximately 160,000 Chilean women who each year undergoes abortions. The freedom to decide and thus to abort, belongs to a greater freedom, which is given by the bundle of rights that involve the so-called "reproductive rights". Reproductive freedom also implies the right to abortion. (…)

Chile’s international obligations in sexual and reproductive rights: “Several international human rights treaties allowed states to regulate abortion in their domestic legislation, not necessarily as a provision designed for the unborn but rather to ensure women’s right to life and their physical and psychological integrity while seeking for abortions (…)

Women's autonomy: “Respect for the freedom of conscience. From an ethical perspective, what is decided in conscience, autonomy, and with the dignity that is the fundament of being a person, should not be subjected to an external moral filter in order to change the

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57 The bills 1297-18 and 1298-18, appears in the records of the national congress library as related somehow to abortion proposals but their text is not available online.
58 Bill 6845-07, Bill 7391-07 and 9021-11,
59 Boletín 6845-07
person mind, that's what the church and confessional institutions does. Besides what distinguishes the juridical rules from the moral rules is that the former has heteronomy and enforcement and the latter only responses to the autonomy of the individual without coercion whatsoever” (....)

Absence of a public policy regarding sexual and reproductive rights: “Due to the fact that there is no explicit provision in Chile regarding reproductive rights, there is no public policy that promote and guarantee it, thus, women are forced, firstly to face a loneliness decision about abortion without any entitlement to public information relating her health care, medical assistance, or the knowledge of the consequences in the long term, and secondly, they face the risk of being discovered committing a crime and thus to be subjected to criminal prosecution”

Finally, the proponents argued reasons of socioeconomically discrimination, affirming that the current legislation widen the existing social gap, because only provides the option of deciding to persons of higher socioeconomic class, because they are the only ones with the possibility to pay the high economic cost of a specialist that can perform safe induced abortions.

In 2010, another bill -7391-07 were introduced, aimed to: i) restore the former disposition of the sanitary code regarding therapeutically abortion and ii) introduce a new causal for abortion decriminalization: when the pregnancy is consequence of rape. According to the bill, the Sanitary Code must specify that abortion is permitted when "it was necessary and no other means will safe women's life, when it was clinically established that the fetus will present severe physical or psychical malformations". The proponents justified their project would be limited only to allow therapeutic abortion in the reality of the Chilean society, stating that it was not easy or understandable to propose a legislation to decriminalize certain types of abortion in a conservative society such as the Chilean. For the first time, a bill introduces arguments of criminal policy: this is the use of the criminal law as ultima ratio and the need to take into account the recent trends that choose to impose alternative penalties that respects women’s dignity. The bill however, mentions the criminal policy without developing how is that the criminal law is efficient or
not to reduce abortions, which is the role of the legislative and the law in shaping human behavior and costumes, and why alternative penalties are more appropriate than incarceration. This year, another bill -9.021-11- was introduced, its content is identical to the bill 7391-07.

During the past years, and in 2013, with the controversy generated by the case of the eleven years old child raped by his stepfather, some congressman expressed their opinion about the need to legislate in the issue of abortion. Francisco Chahuan vice-president of “Renovación Nacional” (Right wing political party) stated: “it is necessary to approach to this issue case by case. Discussing the abortion law does not have any intrinsic link with rapes, decriminalize abortion could indeed promote the increase of rapes and violations” Ignacio Walker, president of “Democracia Cristiana” party, wrote a letter to a mass media newspaper clarifying its party and his personal position on the subject. According to Walker (whose own daughter has to face the decision of terminate a pregnancy due to an unviable fetus) his party: 1. Protects the life regardless of when it begins; 2. The termination of a pregnancy because it endangers women’s life is not considered an abortion, and in this aspect some of the congressman of the party believes it is not necessary to legislate to decriminalize it, because the criminal code has a “state of necessity” exception that it is applicable; 3. Some of them agree that abortion should not be criminalized when the pregnancy is the result of a rape.

b. In the executive.

During the last year discussions on abortion, the actual President of Chile, Sebastián Piñera wrote a letter to a mass media newspaper expressing his position against the decriminalization of abortion. Piñera explained why the governmental efforts are enough to reduce abortion: “first, we have expanded the postnatal term from three to six months.

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60 Renovación Nacional websit: http://rn.cl/v1/directiva
63 La Tercera, “la historia de Elisa, Francisco y Ángela”, online: http://diario.latercera.com/2012/03/18/01/contenido/la-tercera-el-semanal/34-104076-9-la-historia-de-elisa-francisco-y-angela.shtml
and its coverage from one of three women, to all working women in childbearing age. Thus, motherhood will never be a barrier to have a job, or having a job will not be an obstacle to become a mother. Second, the vulnerable motherhood program, developed by the Sernam, has already helped more than 55,000 women. This program, which includes psychologists, lawyers, sociologists and social workers, provides care and online support for women with problems related to pregnancy or maternity, such as access to pre and postnatal care, pre and postpartum depression, unwanted pregnancies, grieving (for losing a child), alimony issues, etc. Third, the Sernam has oriented a program for adolescent mothers; serving thousands of women in terms of educational and occupational reintegration, child care, prevention of additional unwanted pregnancies.”64 In his view, the legislation on abortion should not be reformed and the governmental efforts are enough to prevent unwanted pregnancies and to encourage women to carry their pregnancies to term.

Currently, two women are candidates for running the country during the next four years, beginning in 2014. Evelyn Matthei, representing the right wing parties, has stated that if she became president she will not reestablish her proposal to regulate therapeutical abortion because “it will be a bomb that for sure will accentuate the differences inside the Alianza”65. On the other side, Michelle Bachelet, former president and now candidate, varied her position toward abortion. In 2006, when she was running for Presidency she did not mention the abortion specifically but in her government program66 she made a compromise to advance in a sexual and reproductive rights framework law67 which did not mention even implicitly the decriminalization of abortion, but instead the promotion of a human treatment of abortion complications. During her secretariat at UN Women, she avoided universal statements about abortion and affirmed that the abortion public policy

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64 El Mercurio, “mi compromiso con la vida” online: http://www.emol.com/documentos/archivos/2012/03/18/2012031810505.pdf
should take into account the social and political forces behind it in every country. In 2013, she made public her desires to advance in the decriminalization of therapeutical abortion and in case of rape.

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68 El Mostrador, “Bachelet dice que el debate sobre la salud de la mujer va más allá del aborto” online: http://www.elmostrador.cl/noticias/pais/2010/12/05/bachelet-dice-que-el-debate-sobre-la-salud-de-la-mujer-va-mas-all-a-del-aborto/

Proposal to request the abortion decriminalization

The current state of art allows us to conclude that the decriminalization of abortion following the representative channels - legislative, executive - does not seem a viable alternative. The legislative has filled all the bills that has received even though in some occasions has stated that it was willing to discuss abortion regulation, the executive on the other hand does not have the abortion on its agenda or is in full opposition to the idea of decriminalize it under any circumstance. The idea of exploring other activism alternatives that has not been explored to; advance and extent to other institutions the discussion on the effectiveness of the provisions that criminalize abortion, how it violates the dignity of women and do not protect the lives of the unborn, seems more than necessary. I intend to provide an alternative that has not been intended so far and explain briefly the arguments to claim the unconstitutionality of the Sanitary Code disposition that prohibits the termination of the pregnancy in any event.

In order to do so, I will briefly address: i) the arguments that has been claimed by the criminal defense of women who have been prosecuted for the crime of abortion; ii) the procedure to request the inapplicability of the abortion dispositions due to its unconstitutionality, iii) the arguments on which the request is based on: 1. The dispositions on abortion are unconstitutional because they are discriminatory; 2. The dispositions on abortion are unconstitutional because they violate women’s right to life and physical and psychical integrity.

An overview of the defense in the public criminal service

According to the information provided by the Public Criminal Defense\textsuperscript{70}, the entity in charge of providing free legal assistance in criminal proceedings for people with limited economical resources, its litigation strategy in cases of women prosecuted by abortion has been directed to: 1.) Argue self defense or state of need in cases when women’s right is in

\textsuperscript{70} The Public Criminal Defense provided confidential access to 25 abortion-related rulings in criminal matters, in various instances. In addition consult the public access document: Alejandra, Castillo, Defensoría Penal Pública: “Aborto e infanticidio: cómo sostener una adecuada defensa”, April 4 2010, online: http://www.dpp.cl/resources/upload/d94a57f340a1eb8245508ee628145667.pdf
danger if the pregnancy continues\(^\text{71}\); 2.) Argue overwhelming fear in cases when women acted fearing for their life, health or when having a child meant too onerous economic burden for women\(^\text{72}\); 3.) Argue women’s absolution due to the impossibility to prove the existence of pregnancy as a requirement of the offense.

In the 25 cases provided by the Public Defender, there are no arguments to justify women’s behavior in acquittals circumstances: abortion as a consequence of a rape, incest, danger of women’s life, unviable fetus. There is no reference either to women sexual and reproductive rights or women’s dignity. The defense does not incorporate international human rights standards, and specially important for this paper is the fact that the entity does not demand the unconstitutionality of the provisions of the Sanitary or the Criminal Code even though the entity states that the Criminal Code disposition “undermines women’s sexual and reproductive autonomy (…) the state forces women to carry to term an unwanted pregnancy. There is an affectation of woman’s body and privacy”\(^\text{73}\); “there is not recognition of the right to life of the unborn, but instead a mandate for regulation, and the right, reading of the constitutional disposition should be to consider the unborn as an object of protection and not as a titular of the right to life. The constituent in the second numeral of the article 19 established a distinction”\(^\text{74}\)

In sum, the public criminal defense has been focused exclusively on defending women using the criminal technique, even though the entity has full knowledge of the injustice of the legal provisions on abortion and the inadequacy to interpret the “protection of the life of the unborn” constitutional provision as a criminalization mandate.

The cases provided by the Public Defender are also useful to understand the reasoning of the courts that decide in abortion cases, the following are some excerpts:

“There is a general agreement around the concept of independent life as legal good that should be protected and it cannot be otherwise if is taken into account the differentiated

\(^{71}\) Op cit, Castillo, pag 36 at 40  
\(^{72}\) Op cit, Castillo, pag 41  
\(^{73}\) Op cit, Castillo, pag 16 at 17  
\(^{74}\) Op cit, Castillo, pag 21
**protection of the dependent human life that is accomplished with the criminalization of abortion.** The dependence or independence of human life sets the limit between two kinds of offenses and introduces the first legislator's principle position: to treat differently two situations that are not only different from a biological point of view but also valued unequally in social terms. So, even from the toughest criminal perspectives the abortion cannot be punished equal as the homicide."75 (bold outside text)

“There is an agreement that the independent human life begins with the birth. The problem is to set when the birth happens. (...) the most appropriate approach is related to the autonomy of life, that is, since the moment the subject, functionally autonomous from the mother, is considered to have been born, without requiring crucial factor the peeling or cutting the umbilical cord”76

The judges of the Court Oral Criminal did not had a mistaken interpretation of the rule in Article 342 No. 3 of the Penal Code, since they did not give that provision a different meaning from what it has, this is, the legal good protected by the offense of abortion is the life in formation and therefore the passive subject is the fruit of conception”77

The rulings above, shows that the Courts; i) despite what it sets in the Criminal Code, interprets the crime of abortion under the title of crimes against life, ii) assign a different value to the life of the unborn and the life of a person, and iii) rely in medical details to define legal concepts, for example, the moment of birth.

**Procedure to request the unconstitutionality**

The claim of unconstitutionality of a law before the Constitutional Court is a two-step process; the inapplicability and the unconstitutionality. In order to claim the latter it is necessary to exhaust the first. Both of them are established and regulated in the

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75 Corte de Apelaciones de Santiago. Partes: Patricio Osvaldo Baeza Rodríguez con Hospital del Profesor; Paula Andrea Astroza Zúñiga. Rol: 2133-2010. Magistrado: Villarroel Ramírez, Cornelio
76 Corte de Apelaciones de Santiago. Partes: Patricio Osvaldo Baeza Rodríguez con Hospital del Profesor; Paula Andrea Astroza Zúñiga. Rol: 2133-2010. Magistrado: Villarroel Ramírez, Cornelio
Constitution, art. 93. Numerals 6 and 7. According to the Chart, the Constitutional Court has the faculty to decide if a particular law should not be applied to a particular case because its application would result contrary to the Constitution. The inapplicability due to unconstitutionality challenge could be promoted by a party or by the judge who knows of the case at any stage of the process, as long as the case has not been decided formally - *res judicata*. The Constitutional Court ruling on the inapplicability of a certain law to a particular case only has an interparty effect.

The ruling on inapplicability made by the Constitutional Court, can open the door to the declaration of unconstitutionality of the law, this time with an *erga omnes* effect. In such case, the judgment declaring the inapplicability rises as the procedural ground for the declaration of unconstitutionality of the statute itself, also made by the Constitutional Court, according to Article 93.7. This declaration of unconstitutionality requires a reinforced minimum quorum of eight out of ten members of the Tribunal. If the quorum is reached, the law is declared unconstitutional and is declared invalid and should be repealed.

*Arguments*

The question that the Constitutional Court must answer is whether the application of the Article 119 of the Sanitary Code that establishes the absolute prohibition of abortion and the Arts 342.3, 344 and 345 of the Criminal Code which establishes the crime of abortion, to a particular case is unconstitutional or not. The first logical step to examine the constitutionality of the dispositions is to set the meaning of the article 19. Numerals 1 and 2 of the Constitution.

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78 Biblioteca del Congreso Nacional de Chile, Constitución Política, online: http://www.leychile.cl/Navegar?idNorma=242302
79 Francisco, Vega, & Francisco, Zúñiga “El nuevo recurso de inaplicabilidad por inconstitucionalidad ante el tribunal constitucional. Teoría y práctica”, Universidad de Talca, facultad de ciencias jurídicas y sociales, Estudios Constitucionales, revista semestral del centro de estudios constitucionales, Talca, Chile, noviembre de 2006
80 Art. 119 Sanitary Code: “it cannot be performed any action whose purpose is to cause an abortion” (non oficial translation. Online: http://www.sernac.cl/wp-content/uploads/leyes/dfl/DFL725_Codigo_Sanitario.pdf
81 Código Penal, Supra, note 25
Since the first reading of the constitutional provision it is possible to conclude that there is a distinction between persons; as the holders of the right to life, and the unborn; as objects of constitutional protection. This assumption: that the Ortuzar Commission had purpose to distinguish between persons and unborn, is confirmed after the reading of the discussions that the Ortuzar Commission had back in the days when they were writing the constitutional text that was approved later by the constituent.

The discussion of the content of the right to life took several sessions. In the 88th session, the Commission sets the legal concern on this matter: “The question that has to be answered by the Commission is if establish in the constitution the right to life as a guarantee requires to mention the specific protection to the life of the unborn and the prohibition of the abortion, or if is preferable to remain in silence about the abortion and to establish a flexible disposition that delegates in the law the faculty to study and define the therapeutically abortion”\(^2\)

After a long discussion, the Commission reaches an agreement: “Mr. Silva stated that there is a consensus not to establish anything related to abortion. Mr. Ortuzar added that by giving the power to the legislator, is this institution the one in charge to decide in what cases and by which means it will protect the life of the unborn”\(^3\).

When read carefully, the agreement refers to delegate to the legislature the power to define how to protect the life of the unborn and about the admissibility of therapeutic abortion. On the other points: if the unborn born is entitled to rights and under what grounds the early termination of a pregnancy its permissible there was no agreement. The conclusion of the work of the commission is that the life of the unborn should be protected.

According to Undurraga, who dedicates her doctoral thesis to propose an interpretation of the constitutional mandate of the Article 19, the first paragraph explicitly mentions the right to life of the person. The second paragraph omits the reference to a right in respect of the unborn child and only speaks of a legal duty of protection. This leaves open the

\(^2\) Comisión Ortuzar, supra, note 28, Pag 153
\(^3\) Comisión Ortuzar, supra, note 28. Pag 214
possibility that the Constitution is protecting the life of the unborn as an objective juridical good rather than a subjective right. However, in her opinion, the reading of the text only, does not necessarily confirm this interpretation, because an integrate reading of the two paragraphs could indicate that the protection of the life of the unborn exists because the unborn is entitled too to the right to life\textsuperscript{84}. In her view, precisely because the meaning of the text it is not obvious, some Courts have authorized medical treatments against pregnant women’s will, justifying themselves in the protection of the unborn’s right to life, and they have been forced to take those treatments using the public force to ensure that the courts mandate is respected.

However, even though I understand that the provision could be interpreted as to derivate the protection of the unborn because of its right to life, when read the whole records of the Commission, there is no doubt about that even if in the sake of the discussion we accepted that the commission recognized the right to life of the unborn –which is not mentioned anywhere- it did not understood the right to life as an absolute right, this can be concluded after the reading on its opinion regarding the allowance of the death penalty.

“The rights of men are susceptible of limitation, without exception, starting with the right to life, which can be limited or restricted by the death penalty, its inconvenience or convenience may be discussed, but, its legitimacy is absolutely undeniable, and when the right to life is restraienable is evident that all the others can also be”\textsuperscript{85}

\textit{The art 19 of the sanitary code and the arts 342.3, 344 and 345 of the Criminal Code are unconstitutional because they violate the right to equality established in the Art. 19.2 of the Constitution.}

The article 19 of the Constitution “ensures to all people, 2. The equality before the law”. As well establishes that “neither law nor authority could establish arbitrary differences”.

The Art. 119 of the Sanitary Code and the Arts. 342.3, 344 and 345 of the Criminal Code are unconstitutional because they establish arbitrary differences. Under these provisions only

\textsuperscript{84} Undurraga, supra, note 27, pag. 80.
\textsuperscript{85} Comisión Ortuzar, supra, note 28, pag 29
certain kind of women are criminalized because of abortion. The evidence discussed in this paper show that the consequence of the criminalization of abortion is the criminal prosecution against the poor and less educated women in the country. Thus the material consequence of the provisions is to affect in a discriminatory and arbitrary way women of certain socio-economical group.

A brief statistical synthesis of the numbers around criminalization of abortion in Chile corroborates this fact; the Public Defender data regarding women prosecuted by abortion shows that: “almost 36% of them did not reach complete secondary education, 22% had finished their secondary education, 20% had incomplete technical or university studies and only 4% had completed postsecondary education”. The report affirms that: “Most of them are of lower class and lower middle class women (with incomes between $0 and $160,000⁸⁶), and of this majority; 46% have children at the time of the abortion, 20.6% do not have and there is no information about the remaining 33.3%. There is a group charged with medium levels of income (up to $500,000), which corresponds to 18.6%. Mostly has no children, do not have a steady job or are studying. Finally, only 1.7%, are of upper-middle socioeconomic levels⁸⁷. The data is clear: the provisions effect is to prosecute low income and less educated women establishing a difference without fundament in practice. The key point to solve is if that difference is discriminatory and it will depend if is arbitrary or not. A disposition is arbitrary if is “based on random choice or personal whim, rather than any reason or system”⁸⁸

Thus, is important to briefly examine if the Criminal Code and Sanitary Code dispositions comply with the constitutional mandate to protect the life of the unborn. Regarding the Criminal Code, the disposition on abortion remains the same since 1874, because it existed before the current constitution mandate “to protect the life of the unborn”, the constitution then cannot be referred as its fundament. Furthermore, the abortion was criminalized to protect the “order of the family and the public morality” as legal good, and not the life. Finally because it allowed therapeutical abortions due to the fact that only criminalized

⁸⁶ Numbers in Chilean pesos. In Chile, the minimum wage is 210.000 chilean pesos. Ministerio del Trabajo y Previsión Social, online: http://www.mintrab.gob.cl/?p=8334
⁸⁷ Defensoría Penal Pública. Supra, note 11
those who were caused “maliciously”\textsuperscript{89}, it is understood that it allowed limitations to the life of the unborn.

Now, regarding the Sanitary Code, this paper has documented in detail how the full ban of abortion happened near the end of the dictatorship. The Board of government supported Merinos’s arguments to absolute ban the abortion (more details in the chapter Abortion today in Chile) which basically consisted in affirming without further analysis that the abortion absolute prohibition was necessary to protect: the life of the unborn, the family, the immutable values of the Chilean culture, amongst others.

Still it is necessary to tackle the objection that affirms that because the protection of the life of the unborn is what justifies the criminalization of abortion, the practical difference stated above is a non-arbitrary difference, and therefore it does not violate the constitutional mandate. The question is if the criminalization of abortion effectively protects the life of the unborn?

Again, the reality is far from the intention: the numbers shows that women of all socio-economical levels keep aborting even with the absolute ban of abortion and therefore there is not protection of the unborn: “The Ministry of Health, in the formulation of the health objectives for the decade 2000-2010, estimated the number of induced abortions between 100,000 and 150,000. The current President during his presidential campaign, in October 2009, spoke of a number of clandestine abortions of 100,000, in his speech on May 21, 2010 he stated that-for every child born alive one does not born due to abortions. According to this information, the number would exceed the 250,000 abortions a year. The most cited study is conducted by The Alan Guttmacher Institute, which calculates the number of induced abortions per year in Chile in 159.650, equivalent to an annual rate of 45.4 per thousand women aged 15 to 49 years”\textsuperscript{90}. The data is clear, the absolute prohibition do not protect the life of the unborn. Instead, the state only has knowledge of the existence of an unborn once the abortion has been committed. The abortions happen

\textsuperscript{89} Bascuñan, supra, note 26. Pag 144 at 145 : “According to the 160 session dated on June 25, 1873, which comprises: "The expression of purpose could apply to many people who in good faith, come, for example, the physician who needs to cause an abortion and gives remedies to attempt it to save a patient’s life in danger"

\textsuperscript{90} Undurraga, supra, note 27, pag 34 at 35
in illegal and hidden conditions and the result of the norm is not to protect the life of the unborn but to criminalize certain kind of women: those who seek medical attention after complications produced by illegal abortions.

What we see is that the criminalization of abortion not only discriminate arbitrarily, but does so without any plausible reason, since the rule does not protect the life of the unborn. There is no doubt that the protection of the life of the unborn, beyond the public debate under the Chilean constitutional dogma, is a legal good that must be protected. This brings us to another interesting idea in favor of the decriminalization of abortion: decriminalize the abortion protects the life of the unborn.

That is the case followed by the German Constitutional Court, which is worthy to highlight in extent because it departs from the constitutional mandate to protect of the unborn, as in the Chilean case, and analyses the most adequate mean to achieve it: “given the evidence the ineffectiveness of the use of criminal law to achieve real protection of unborn life, concludes that the State has not accomplish its duty to defend the life of the unborn if only uses the criminal tool for this purpose. The Court points out that the existence of a significant number of illegal abortions despite the criminal prohibition, is a demonstration that the State does not fulfill its obligation to protect the life of the unborn. The Court even noted that the general criminalization of abortion may have contributed to the high number of illegal abortions because the State did not bother to use the appropriate tools for the protection of the unborn life (...)”

By raising In this way the discussion in the second ruling, the German Court must resolved how to reconcile its commitment to the personal protection to the unborn (which required, as had been established, the use of criminal law) with its commitment to the effective protection of the unborn life, which according to the evidence presented to the court, could only be achieved by partially decriminalizing abortion.

In the Court opinion, the fact that the unborn is within the body of the woman and that only she and those who she choose to report it, can know about the existence of the unborn in the first stage of her pregnancy, makes that any legislation intended to prevent abortions should
be done with the cooperation of women. The criminal threat, of very limited deterrent effect, also has the perverse effect of transforming abortion into a clandestine activity and further hinder any preventive intervention of the State. The secrecy regarding the unborn, its vulnerability and dependence and its unique bond with his mother seem to justify the idea that the state possibilities to protect it are greater if the state works with the mother.

The resolution of the conflict by the German Court reveals this tension. To achieve the effective protection of the unborn, the Court in its second ruling uphold the constitutionality of the law that decriminalize abortion during the first twelve weeks of pregnancy, as long as the pregnant woman undergo previous counseling in which she is informed of her duty to maintain the pregnancy unless there are sufficient and compelling reasons that turns that duty unenforceable, she is also advised on the state aid available that it is available in case she decide to raise her child. However, to keep the judgment of reproach of the criminal system, aimed at creating legal awareness on the value of unborn life, the abortions that take place anyway after counseling, although not punishable, are declared wrongful.\textsuperscript{91}

In the case of abortion one might think at first glance that the criminalization is sufficient to protect the life of the unborn, and this could be true only if the state; i) knows about the existence of an individual unborn; and ii) constantly monitor the behavior of the pregnant woman to ensure that she is not going to abort under any circumstance. But the reality is that even knowing, the state cannot watch her so close as to prevent her from abort, the state does not have the means to permanently monitor her without seriously violate women rights. View it from an individual perspective the criminalization of abortion is not effective in protecting the unborn life, seen from a general perspective is even less. As we have seen in this paper the absolute ban of abortion does not dissuade women to seek for an abortion, the figures shows that the absolute criminalization of abortion has not served to reduce the number of abortions that occurs, therefore it is clear that the criminal law has not a deterrent function. In the best case, one could argue that abortion numbers have not grown, but this could not be said is the result of the criminal law, because one thing is that the state is not aware of the abortions and another thing is that because the state does not know the abortions does not occur. In any scenario: with the number of abortions

\textsuperscript{91} Undurraga, supra, note 27, pag 135.
stable or with the rise of clandestine abortions, the criminal law is not an effective mean to protect the life of the unborn because instead to bringing women close to the state so the state can support them and offer them guidance to keep their child, keeps women away under the threat that if they abort they will go to jail. Moreover, in the Chilean case, the criminalization only affects certain kind of women.

According to Undurraga, "it is reasonable that a policy of effective protection to life of the unborn consider to replace the criminal threat for a preventive policy which consider the participation of the pregnant woman herself"92

One question remains and is if the decriminalization of abortion produces a rise in the numbers of abortions? The numbers again are clear. According to the Guttmacher Institute: "Highly restrictive abortion laws are not associated with lower abortion rates. For example, the abortion rate is 29 per 1,000 women of childbearing age in Africa and 32 per 1,000 in Latin America—regions in which abortion is illegal under most circumstances in the majority of countries"93 However, according to the same source, “Both the lowest and highest sub-regional abortion rates are in Europe, where abortion is generally legal under broad grounds. In Western Europe, the rate is 12 per 1,000 women, while in Eastern Europe it is 43. The discrepancy in rates between the two regions reflects relatively low contraceptive use in Eastern Europe, as well as a high degree of reliance on methods with relatively high user failure rates, such as the condom, withdrawal and the rhythm method”94. Thus, the numbers indicates that the restrictive abortion laws do not lead to lower abortion figures, that the legalization of abortion does not have a correlation with higher rates of abortion, but neither decreases it and that the factor that explains better the low rates of abortion is the access to effective methods for motherhood planning.

Considering that the criminalization of abortion does not protect the life of the unborn and on the other hand the decriminalization does not imply an increase in the number of abortions, the question to ask is, which is the effect of criminalization on women's lives?

92 Undurraga, supra, note 27, pag. 149
94 ibid.
We already prove that it does not have any positive effect on the lives of the unborn. The answer is disappointing: in the best case scenario the prohibition indiscriminately send women to jail, and in the worst case scenario, threatens the life of certain women and their rights without protecting the lives of the unborn.

According to the Guttmacher institute: “where abortion is permitted on broad legal grounds, it is generally safe, and where it is highly restricted, it is typically unsafe. In developing countries, relatively liberal abortion laws are associated with fewer negative health consequences from unsafe abortion than are highly restrictive laws”.95 Examples to take into account are the following:

• In the United States, legal induced abortion results in 0.6 deaths per 100,000 procedures. Worldwide, unsafe abortion accounts for a death rate that is 350 times higher (220 per 100,000), and, in Sub-Saharan Africa, the rate is 800 times higher, at 460 per 100,000.96

• Almost all abortion-related deaths occur in developing countries, with the highest number occurring in Africa.97

• Unsafe abortion is a significant cause of ill-health among women in the developing world. Estimates for 2005 indicate that 8.5 million women annually experience complications from unsafe abortion that require medical attention, and three million do not receive the care they need98.

• Unsafe abortion has significant negative consequences beyond its immediate effects on women’s health. For example, complications from unsafe abortion may reduce women’s productivity, increasing the economic burden on poor families; cause maternal deaths that leave children motherless; cause long-term health problems, such as infertility; and result in considerable costs to already struggling public health systems99.

95 Ibid.
97 Guttmacher , supra, note 94
98 Singh S, Hospital admissions resulting from unsafe abortion: estimates from 13 developing countries, Lancet, (2006) 368, 1887 at 1892.
99 Guttmacher , supra, note 94
• In South Africa, the annual number of abortion-related deaths fell by 91% after the liberalization of the abortion law.100

• In Nepal, where abortion was made legal on broad grounds in 2002, it appears that abortion-related complications are on the decline: A recent study in eight districts found that abortion-related complications accounted for 54% of all facility-treated maternal illnesses in 1998, but for only 28% in 2008–2009.101

• In Latin America, 95% of abortions were unsafe, a proportion that did not change between 1995 and 2008. Nearly all safe abortions occurred in the Caribbean, primarily in Cuba and several other countries where the law is liberal and safe abortions are accessible.102

• Worldwide, medication abortion (a technique using a combination of the drugs mifepristone and misoprostol, or misoprostol alone) has become more common in both legal and clandestine procedures. Increased use of medication abortion has likely contributed to declines in the proportion of clandestine abortions that result in severe morbidity and maternal death.103

In Chile, as mentioned in the beginning of this paper, the number of deaths because of abortions is not alarming in comparative terms, we have mentioned before that the rate of maternal mortality produced by abortion remains stable since 2001; 10% of deaths are product of abortion and 4% deaths corresponds to induced abortion. In 2008 five women died as a consequence of abortion and in six women died in 2010 for the same cause.104 However, the fact that women do not die in alarming numbers does not makes this a minor issue, especially if consider that even though many do not die they did face serious effects

102 Sedgh G et al., Induced abortion worldwide in 2008: levels and trends, Lancet, 2012,
103 Guttmacher, supra, note 94
on their physical and psychic health and the risk is even higher between vulnerable women.

**The art 19 of the sanitary code and the arts 342.3, 344 and 345 of the Criminal Code are unconstitutional because they violate the right to life and the right to physical and psychical integrity of the person, established in the article 19.1 of the Constitution**

The article 19 of the Constitution “ensures to all people, 1. The right to life and the physical and psychical integrity of the person”

The Art. 119 of the Sanitary Code and the Arts. 342.3, 344 and 345 of the Criminal Code are unconstitutional because they violate women’s right to life and their right to physical and psychical integrity. Under these provisions women died or suffer inhuman and degrading treatment because of abortion. The evidence discussed in this paper shows that the consequence of the criminalization of abortion is the death or the inhuman and degrading treatment of women, which is aggravated amongst the most vulnerable women.

The Human Rights Committee has stated that the absolute ban of abortion leads women to undergo insecure abortions putting women’s life in danger. Therefore, the Committee has recommended Chile, amongst other countries to introduce exceptions to the absolute prohibition of abortion.\(^{105}\)

The comparative experience has also considered that the absolute prohibition of abortion constitutes a cruel and inhuman treatment against women, the Colombian Constitutional Court “considered that criminalize abortion when the pregnancy is the result of a criminal act of rape, incest, involuntary artificial insemination or involuntary implantation of a fertilized egg, even with a reduced penalty, is unconstitutional because it ignores the dignity and autonomy of the pregnant woman. The law cannot impose standards of perfectionists conduct or require heroic behavior. Similarly, a woman cannot be forced to endure unusual sacrifices and give up their right to physical and mental health and personal integrity, in order to protect the fetal life. The Court also stated that forcing a woman to continue a pregnancy and give birth to a nonviable fetus is an undue burden,

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that constitutes a cruel, inhuman and degrading treatment, and that affect the women’s moral and their right to dignity.\textsuperscript{106}

The recent annual report by the University Diego Portales presents the latest portrait\textsuperscript{107} of the women who undergo abortions and some of the risk they face in their attempts:

“A young woman was aware of the increased risk, having lost 4 weeks after a first attempt with misoprostol failed because the drug was fraudulent. The person to whom I bought at the second attempt asked to see the result of ultrasonography to be certain of the weeks of gestation and accordingly recommended a higher dose, he also recommended me that a doctor check me later. The woman performed the abortion without companion after fighting with her partner; she was about five hours with contractions, pain and fainted. After regaining consciousness she called to be assisted by her boyfriend. The doctor who reviewed her later said the dose she took could have killed her” Another woman interviewed affirm: “I learned to give prostaglandin injections to help women with abortion. I did it free of charge and stayed with the woman all day and night because this method not only causes bleeding and uterine pain but also a total decomposition of the body, very strong diarrhea, dizziness and vomiting”\textsuperscript{108}.

The report shows the disinformation to which women are subjected when they cannot have an adequate and reliable guide. “The fear of death appears strongly in all the interviews. Panic of not have the chance to awake after the sedation, to bled to death because the use of misoprostol, or to face anemia, the fear of not having children in the future is an issue that crosses all the women regardless of their social class and age. This risk materialized in some of the interviewed women, who suffered different complications: one underwent a hysterectomy, one had an infection after a surgical abortion in Tacna, and the third had to go to the public health service after an excessive bleeding for a retained abortion by misoprostol. The latter had a greater gestation pregnancy because she had not realized she was pregnant because she had the period throughout the pregnancy and due to the delay in acquiring the misoprostol. She knew she would have more bleeding, than

\textsuperscript{106} Constitutional Court Colombia. Sentencia C-355/2006, 10 de mayo de 2006,

\textsuperscript{107} A full portrait is the book LAGOS, L. Claudia, “Abortion in Chile”, Nuevo Periodismo, Chile, 2001

\textsuperscript{108} Universidad Diego Portales, supra, note 20
usual and when the amount of pads exceeded the amount advised, the woman went to the urgency service and a scaling was performed”109.

According to the Guttmacher Institute: “Some 82% of unintended pregnancies in developing countries occur among women who have an unmet need for modern contraception. In the developing world, women’s reasons for not using contraceptives most commonly include concerns about possible side-effects, the belief that they are not at risk of getting pregnant, poor access to family planning, and their partners’ opposition to contraception. Reducing unmet need for modern contraception is an effective way to prevent unintended pregnancies, abortions and unplanned births”110

As Undurraga stated “the high rates of abortion in Chile correspond to a desperate and risky method of fertility control, which could be prevented effectively if taken health measures and public education to increase access to contraception for women at risk, and measures also improve maternity support”111

The numbers presented in the section above allow us to conclude that the criminalization of abortion do endanger women’s life and physical and psychical health, that this danger is even more accentuated in vulnerable women and that there is not a legitimate goal that can be argue to justify this violation due to the fact, as we demonstrated, that the criminalization does not protect the life of the unborn.

109 Universidad Diego Portales, supra, note 20.
110 Guttmacher, supra, note 94
111 Undurraga, supra, note 27, pag 44
Conclusion:
As demonstrated in this paper, it is necessary to expand the strategies used to advocate for abortion decriminalization. The legislative and the executive had not been open to discuss abortion regulation and this scenario has few possibilities of changing any time soon. The arguments used so far to seek for abortion decriminalization has been stuck in the debate about when life begins, if the unborn has rights, if the right to life has limits and more or less in women’s rights, leaving aside a discussion of the major importance: regarding their positions on those issues, the constitution mandates to protect the life of the unborn and the criminalization of abortion is not an effective mean to achieve that goal.

This paper has proved that the criminalization of abortion objectively discriminates poor and uneducated women. This discrimination is based on two factors: i) the provisions force women to abort according to their economic and social possibilities, therefore those who can pay for a professional and safe service escape from the law, and those who cannot pay are forced to abort in unsafe conditions and to receive care in the public service health to address the complications of a botched abortion and then be criminalized, ii) the difference between low income and high-medium income women is arbitrary because the law in which is based, apparently follows from a constitutional mandate (and this assertion is not even accurate as the records of the creation of the norms involved reflects) but does not fulfill that mandate because does nothing in protecting the life of the unborn, and therefore it turns in discriminatory.

The evidence also shows, as we have discussed in this in this paper, that the criminalization of abortion seriously affects the physical and mental integrity of women, on the contrary, the decriminalization of abortion with protective public policies have proven to be more protective of life, not only of the unborn, but also of women facing the decision to abort.

In short, the classic identification of positions between "pro-choice" and "pro-life" has proven to be only apparent. Decriminalize abortion, and to protect and trust the decision on abortion in women is the more realistic formula and the more protective of life. At the end of the day, the pro-choice alternative is the true pro-life position.
This advocacy strategy aimed to decriminalize abortion is just a first attempt that has not been tried before, the study of the composition of the constitutional tribunal, the high impact litigation, the mass media associated to it, the selection of a case that can be useful to litigate it, are tasks that are still pending. My hope is that this paper contributes at least in setting the discussion if the courts are instruments that we can use to get social change.
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