

# The Debate on Legal Pregnancy Termination in Chile: Minimum Conditions to be Guaranteed and Preserved

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In January 2015, Chilean President Michelle Bachelet introduced a bill designed to decriminalize pregnancy termination on three grounds. The bill has been extensively debated in the Chamber of Deputies. In the process, amendments have been proposed that threaten to strip the bill of its original intent by restricting or precluding access to abortion and otherwise limiting women's sexual and reproductive rights. The proposed legislation must still be debated and voted on in the Senate. In this context, local feminist groups have agreed on a number of key components of the bill which must be guaranteed and preserved if it is to truly advance women's freedom and human rights.

Below we review the minimum requirements the proposed bill must meet and the ethics of recognizing and enabling self-determination and the capacity to make choices. We examine the concept of human rights as a basic minimum and the associated views of feminist groups, and argue that decriminalization on the grounds proposed is fully compatible with the Constitution. We further argue that criminalizing abortion violates the human dignity and personal integrity of women, as well as their right to be free from torture. Finally, we review how the abortion grounds proposed in the bill dovetail with the need to recognize women as equals and explore the basic requirements the bill must meet.

A coherent reading of Chile's legal system shows that the abortion bill, as introduced, does help meet minimum State obligations concerning human dignity, integrity, and the right to be free from torture.

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In January 2015, Chilean President Michelle Bachelet introduced a bill decriminalizing voluntary pregnancy termination on grounds of risk to the woman's life, fetal anomaly incompatible with life, and rape.<sup>1</sup> The bill has since been the subject of extensive debate in both the Health and Constitution committees of the Chamber of Deputies.

The debate has tended to stray off course in terms of its appraisal of the rights at stake and lacked a coherent interpretation of Chile's legal system. Some stakeholders find the bill wanting because it does not cover all abortions. Others argue that it curtails women's sexual and reproductive rights. Some work to restrict its scope to health care, while others feel that terminating any pregnancy is a crime.

## 1. On the Scope of Ethics and Autonomy

A key concern of ethics is to "live life in full" and to live "a good life". Hellenistic-Roman philosophy construed ethics as the relationship with oneself; a construction of the self as a moral subject whereby individuals defined their thoughts, actions, positions, and themselves. Ethics is most precisely defined in Plato's *épiméleia heautoû*, the care of self or the government of self by self.<sup>2</sup> The relationship of the subject with himself as the subjectivation or *practice of self* was revisited by Foucault to formulate the concept of *the aesthetics of existence*, i.e., a way of being, a relationship with oneself whose objective is to become the architect of the beauty of one's life.<sup>3</sup>

The aesthetics of existence stands in contrast to a legally structured morality of behavior;<sup>4</sup> that is, any moral code intended to steer us in a predetermined direction, thereby undercutting individual autonomy in favor of the dictates of legal, political, or religious authorities. The aesthetics of existence, the art of living, conceives freedom as an experience to be lived ethically. According to Foucault, "Freedom is the ontological condition of ethics. But ethics is the considered form that freedom takes".<sup>5</sup> The issue at hand is precisely a permanent construction of the self in which the subject accepts or rejects certain ways of being and behaving because the beauty he chooses and wants for his life has no other moral experience than his own.<sup>6</sup>

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<sup>1</sup> Bulletin, Law 9895-11.

<sup>2</sup> Foucault, Michel. *La hermenéutica del sujeto*, Madrid (La Piqueta), 1994, pp. 65 et seq.

<sup>3</sup> Foucault, Michel. "El cuidado de la verdad", in: *Estética, ética y hermenéutica. Obras esenciales*, Vol. III, Barcelona (Paidós), 1999, p. 373.

<sup>4</sup> Cf. Foucault, Michel. "Une esthétique de l'existence", in: *Dits et écrits. 1980-1988*, IV, Paris (Gallimard), 1994, pp. 731-732.

<sup>5</sup> Foucault, Michel. "La ética del cuidado como práctica de libertad", in *El yo minimalista y otras conversaciones*, Buenos Aires (Biblioteca de la Mirada), 2003, p. 148.

<sup>6</sup> The notion of the aesthetics of existence conflicts radically with the liberal principle of personal autonomy. In a Kantian sense, personal autonomy is evident not only in the free choice of moral law but also of any other morality, including principles of heteronomous morality. Liberalism values individuals freely choosing their own life plans and models of personal virtue, yet the State can compel them to conform to its rules willy-nilly, or the autonomy of others would otherwise suffer. Per contra, as the converse of a code of morality, the aesthetics of existence attempts to constitute new forms of subjectivity through practices of resistance that eschew institutional processes of individuation.

Foucault reasserts the power to freely choose one's own lifestyle, since restricting self-determination undermines or nullifies individual rights and freedoms. Consequently, the very possibility of women freely choosing a lifestyle rests crucially on the minimum requirements States must meet to make life more livable.

The Foucauldian view of ethics truly shines when questioning the assumption that motherhood and reproduction are biologically fated.<sup>7</sup> In the *Nicomachean Ethics*, Aristotle wonders if, like artisans and sculptors, we have a specific task (*érgon*) or if we have been born bereft of such a task (*argós*).<sup>8</sup> A few pages later, he defines the task most proper to human beings as a certain life (*zoen tina*), which is in act depending on its rational vital potency (*logos*). Just as the eyes, hands, feet and limbs appear to have a function, Aristotle determines the supreme good of human beings through its connection with a certain consubstantial task.<sup>9</sup>

In his research into the archeology of power, Giorgio Agamben has written extensively on the undertaking of historical or spiritual tasks. Recalling the Aristotelian distinction of potency (*dýnamis*) from act (*enérgeia*), Agamben sets the problem of modern freedom within the notion that all power is, simultaneously, potency and impotence. Individuals have the potential of being and not being, of being in actuality and not being in actuality. It is always possible to do one thing or another, but so is not to do.<sup>10</sup> Agamben proposes to view all human power as impotence, as all potency, activity or work is intertwined with its own privation, i.e., its inoperosity or the absence of work.<sup>11</sup>

We do not intend to delve in detail into the co-belonging of potency and impotence. Yet, to explain the question on the task that is proper to human beings –or absence thereof– it may be relevant to elaborate on the biopolitical status Agamben assigns to life. To him, *life* is not a “scientific-medical” concept; it is philosophical, political and religious. Yet, as the concept of *life* lacks a definition in the West, it is recurrently divided into vegetative and relational life, organic and animal life, *zoé* and *bios*, political and naked life.<sup>12</sup>

Agamben positions life in the form of a potency and upholds the status of a “being of pure potency” that prevents defining human life through an essentiality.<sup>13</sup> “Politics exists because human beings are *argós* [inoperose] beings who cannot be defined by their own operation; that is, beings of pure power who cannot be defined through vocation or

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<sup>7</sup> The Foucauldian view of freedom vacates the humanist myth of an essence that is proper to human beings: “It is not a substance. It is a form, and this form is not primarily or always identical to itself”. Or, more precisely, this is not about the properties of a substance but about its form, which has –and has had– various discursive configurations. Foucault, Michel. *Dits et écrits. 1980-1988*, IV, Paris (Gallimard), 1994, p. 718.

<sup>8</sup> Aristotle, *Ética a Nicómaco*, Madrid (Alianza), 2012, 1097 b 22.

<sup>9</sup> *Ibid.*, 1098 to 7-18.

<sup>10</sup> Agamben, Giorgio. “La potencia del pensamiento”, in *La potencia del pensamiento*, Buenos Aires (Adriana Hidalgo, Ed.), 2005, pp. 351 et seq. See also: Aristotle, *Metafísica*, Madrid (Alianza), 2008, 1046 to 29-31.

<sup>11</sup> *Ibid.*, “La obra del hombre”, pp. 465 et seq.

<sup>12</sup> *Ibid.*, “La inmanencia absoluta”, pp. 481 et seq. See also: Agamben, Giorgio. *Homo sacer. El poder soberano and la nuda vida*, Valencia (Pre-Textos), 2003, pp. 18-19.

<sup>13</sup> *Ibid.*, “La potencia del pensamiento”, pp. 351 et seq.

identity”.<sup>14</sup> Although biopower sets hierarchies and separations upon it, life always exists in the form of a power that can never be defined by any one identity. Humans lack an essence because no act predetermines their lives.

The intersection where all these issues converge is the supposition of a female essence. Feminist discourse holds that women have no predetermined essence since, as Simone de Beauvoir lucidly wrote, no biological, psychological or economic destiny can define the societal image of the human female.<sup>15</sup> Being a woman is not a natural fact with a manifest destiny assigned to it, most especially materializing reproduction at the cost of denial of the self. If they had an essence or destiny to fulfill, women would have no autonomy; only tasks to accomplish. Does that mean women should be freed from the bonds of motherhood? Not at all; but to be a joyful human act, motherhood must be chosen freely, consciously, and responsibly.

Some feminist writers assert that gender is a cultural construct creating binary divisions based on biological and sexual differences.<sup>16</sup> The ability to become pregnant constitutes the basis of a sex-gender system authorizing the subjection of women as a subordinate labor force and means of reproduction. In an absolute abortion ban context, women are not autonomous moral agents capable of constructing their own lifestyle. They are conditioned by biology; bound to a sociocultural and political woman/mother design in which these categories are one and the same. The intent is precisely to negate women in order to affirm motherhood as an epistemic value.

Absolute abortion bans not only deny women their sexual and reproductive rights. Above all, they presuppose an ontological woman/mother unit, the former essentially co-belonging with the latter, and define motherhood as a duty, a debt or an obligation to society and the State.

The most fundamental aspect of ethics may well be self-determination, resting as it does upon the notion that all human beings, as rational entities, are entitled to exercise their personal freedom as long as no harm comes to others. Denial of freedom is the refusal to consider individuals as moral agents capable of making choices about life and death. Unquestionably, autonomy is not to say that personal freedom is a solitary undertaking. It is a dual relationship that constitutes an experience with oneself, others, and their otherness. The ethos of freedom implies freedom for others, insofar as the care of self makes us capable of caring for others.<sup>17</sup> As the actions of one can interfere with the rights of others, autonomy must be weighted, provided that any proposed measure is least

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<sup>14</sup> Agamben, Giorgio. “En este exilio. Diario italiano 1992-94”, in *Medios sin fin. Notas sobre la política*, Valencia (Pre-Textos), 2010, p. 117.

<sup>15</sup> De Beauvoir, Simone, *El segundo sexo*, Vol. II, Madrid (Cátedra), 1999, p. 13.

<sup>16</sup> Lamas, Marta, “El género es cultura”, in *V Campus Iberoamerica de Cooperação Cultural Almada*, Portugal, 2007; Lamas, Marta, “La antropología feminista y la categoría ‘género’”, in *El género. La construcción de la diferencia sexual*, Marta Lamas (Ed.), Programa Universitario de Estudios de Género (National Autonomous University of Mexico), Mexico City, 2000, pp. 97-111.

<sup>17</sup> Foucault, Michel. “La ética del cuidado como práctica de libertad”, in *El yo minimalista y otras conversaciones*, Buenos Aires (Biblioteca de la Mirada), 2003, pp. 116-117.

restrictive for the person's choice of lifestyle and materialization thereof.

Given the implied subordination, exclusion, inequality and denial of women's reproductive rights, forced motherhood stands as the crystallization of the forms in which women are deprived of their basic rights to autonomy, freedom, privacy, and human dignity. In Chilean society, conservatives who systematically oppose decriminalizing abortion and dismiss reproductive autonomy illegitimately attempt to impose on women a burden no one else is required to bear.

## **2. Feminism, Minimum Requirements, and Abortion**

Asserting that a woman's dominion over her body must be absolute, many Chilean feminists find the proposed bill lacking in that it fails to recognize the right to terminate all pregnancies.<sup>18</sup> Yet, some recognize that the bill would help guarantee basic health care for at least some women. They value the protection it would afford women in dire straits, all the while pointing to the "demands of many women who for other legitimate reasons will choose an illegal abortion".<sup>19</sup>

In this light, some feminist groups have reached a consensus on a so-called "basic ethical imperative".<sup>20</sup> This refers to key aspects of the bill which, if rolled back by Congress, would take away the protection of basic freedoms and human rights. We consider freedom one such minimum to be met. With limits, perhaps, but never to the point of negating autonomy. As social instrument, the law cannot coerce supererogatory behavior. Morally heroic deeds are acceptable when driven by self-determination, never when imposed. Opponents of the bill who would have women endure pain and suffering argue that carrying to term a pregnancy involving any of these three causes is a test of human fortitude.<sup>21</sup> But accepting such a test in these or other circumstances constitutes the power of being or not being in a given way. In other words, the basic premise of accepting to be a hero or martyr must be the ability to choose.

As such, human rights must also be a minimum, safe from the arbitrary power of any one person, group, or government. Individual rights are insurance against the State—and others—interfering with personal choice and lifestyle. And as rights must be effectively realizable, States must design institutions guaranteeing the right to freely choose one's

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<sup>18</sup> A concept underlying the contention that reproductive freedom and rights rest on the fundamental nature of women's human dignity and ability to attain their full potential. Salas Salazar, Carolina, *Reproducción humana ¿Derecho fundamental?*, in *Estudios Constitucionales*, Kamel Cazor and Carolina Salas (Eds.) (Librotecnia), Santiago, 2010, pp. 149-150.

<sup>19</sup> *Manifiesto mujeres de la Universidad de Chile por el derecho a decidir*, in *Diálogos sobre el aborto "parir las hablas"*, Santiago, May 2015, p. 27.

<sup>20</sup> Legal abortion is another "ethical minimum" for women's sexual and reproductive rights. Carolina Carrera, "¿Hasta cuándo debemos esperar?", *La Segunda*, 2 February 2016.

<sup>21</sup> Alvaro Ferrer, of the Conference of Catholic Bishops, in the 18 January 2016 session of the Constitution Committee. This is redolent of Jaime Guzmán's 1974 argument in defense of an abortion ban: "A mother must have her child even if abnormal, unwanted, the result of rape, or if it results in her death". Chile, *Proceedings of the Commission to Consider a New Constitution*, Vol. 3, *Constitutional Guarantees*, 87<sup>th</sup> Session, Santiago, p. 14.

lifestyle. Rodolfo Arango's theory on economic, social and cultural rights and the case law of the Constitutional Court of Colombia offer a view of the basic minimum, notably the State obligation to provide material conditions that uphold dignity. States that fail to ensure such basic conditions stand in violation of basic guarantees; *mutatis mutandis*, banning pregnancy termination violates women's basic rights and needlessly imposes indignity, disrespect, and suffering.<sup>22</sup>

Under international human rights law, forced motherhood violates equality, integrity, life, and health rights. International law does not propound abortion on demand but it does embrace the notion of an ethical minimum, notably that States cannot demand heroic behavior from women, especially if driven by entrenched social and cultural domination. Exposing women to risks, from pregnancy or otherwise, that they alone must endure makes them and their bodies subservient and the principles of equality, non-discrimination and equal consideration lose all meaning.

The legalization of abortion must focus on autonomy, as pregnancy termination can't be imposed. The decision to keep or terminate a pregnancy cannot be left solely in the hands of medical practitioners under the pretext that they alone know best.

The proposed bill, a baseline political accord on women and reproduction, is also an attempt to deconstruct the presumption that women are preordained to be mothers. Autonomy is at risk from those who assert that the bill renders the dilemmas facing women upon the private sphere or would have their decisions require consent from fathers or grandparents, as the Constitution Committee of the Chamber of Deputies has heard. Could a father compel a daughter whose life is at stake to heroically carry her pregnancy to term? Does a father who rapes his daughter, or a victim's parents, know better than the woman being violated in her personal integrity? Does a nonviable fetus have a right to be welcomed and loved by its mother, its family, and the entire medical team?<sup>23</sup> These were the arguments advanced by A. Ferrer and S. Alvear,<sup>24</sup> who with utter disregard for their pain and suffering, seem to hold women up as holy vessels whose sole possible lot is motherhood.

In addition to a negative obligation to keep the State from interfering with reproductive choices, the law also has a positive social obligation to provide financial and social support ensuring that such choices are effectively realized. At issue isn't merely to exculpate women who abort with or without help, as some criminal law scholars have argued.

M. M. Ossandón, for example, contends that it suffices for the law to be properly enforced. She would have women confess to having had an illegal abortion impelled by rape, fetal anomaly incompatible with life, mental anguish, fear, or desperation, then claim that no other conduct could reasonably be expected. Based on these circumstances, they

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<sup>22</sup> Arango, Rodolfo. "Los derechos sociales fundamentales como derechos subjetivos", in *Pensamiento jurídico*, 8 (National University of Colombia), 1997, pp. 70-71.

<sup>23</sup> Soledad Alvear, session of 18 January 2016 of the Constitution Committee. See also: Soledad Alvear, "Voces", *La Tercera*, 20 January 2016.

<sup>24</sup> Submission to the Constitution Committee, 18 January 2016.



should be exonerated, as no crime was committed.<sup>25</sup> Ossandón adds that if the circumstances do not meet the required threshold, the criminal justice system can offer alternative measures. She is unconcerned with the violence and suffering endured, focusing instead on more benign criminal sentencing. She would rather expose women to pain and suffering than to ensure humane, dignified treatment, as the underlying logic is that abortion is a crime and women who abort are criminals.

### **3. Constitutionality of the Bill and the Need to Protect Women's Rights**

Article 19(1) of the Chilean Constitution states that “the law protects the life of the unborn”, a provision routinely exploited by opponents of legal abortion to support an absolute ban and assert the unconstitutionality of pregnancy termination. But this conservative, apparently monolithic position does have nuances. Some, for example, have argued that the Constitution allows legal abortion on grounds that certain conducts simply cannot be morally or legally expected.<sup>26</sup>

We hold that article 19(1) does not imply that protection of the unborn begins and ends with criminalizing pregnancy termination, or that under current rules all such protection is constitutional. We see article 19(1) as fully compatible with legal abortion. In fact, a reasoned reading of Chilean law supports the conclusion that legal abortion is compatible with the Constitution and that a ban that fails to protect holders of rights is unconstitutional.

Constitutional debate must center on the complexity of the rights and interests at stake. Acknowledging that the life of the unborn holds significant value for society, and granting even that fetuses ought to have a right to life on a par with women's (a view we do not share), a reasoned review of the Constitution shows that abortion rights are not unconstitutional. For example, in jurisdictions such as Germany, which fully recognizes the value and right to life of the unborn, the Constitution is explicitly compatible with pregnancy termination.<sup>27</sup>

Yet, merely asserting the significance of the unborn life, or that it should enjoy the same protections as women, does not resolve the underlying conflict with women's right to life, health, integrity, human dignity, or autonomy. As such, the actions of all branches of government, as well as the political and legal debate, must appropriately ponder the rights

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<sup>25</sup> Ossandón, María Magdalena, “Regulación penal del aborto consentido y dignidad humana”, en: *El aborto. Perspectivas filosófica, jurídica y médica*, Santiago (Cuadernos de Extensión Jurídica, University of Los Andes), 2015, p. 163. Criminal law specialist Gonzalo García advanced a similar argument before the Constitution Committee, session of 24 November 2015.

<sup>26</sup> Notwithstanding the criticism visited on the Constitutional Court after ruling emergency contraception unconstitutional, Justice Marcelo Venegas, who voted with the majority, wrote as follows: “The Constitution can tolerate specific instances of abortion, provided it is reasonably defined in the law in cases compatible with human dignity and basic rights [...]. The Constitution imposes a high standard for the law to allow abortion in eligible, well-founded cases. I see nothing in it allowing the administration to autonomously authorize abortion at the sole request of the mother.” Although he does not elaborate further, Justice Venegas recognizes the existence of eligible cases in which abortion would not be unconstitutional.

<sup>27</sup> Justice Susanne Baer, Federal Constitutional Court of Germany. Jorge Huneus Zegers Lecture Series, 17 November 2015. UDP School of Law, Santiago, Chile.

and values at stake.

The Constitution is to be read coherently; not as vacuous rhetoric, but as a living, comprehensive normative system. This means connecting the mandate in article 19(1) to the guarantees in article 5(2) (i.e., human dignity and material and spiritual self-realization), and to all other rights and rights holders at play. This exercise shows that the expectation that the legal system provide responses that safeguard all rights and interests at stake is consistent with pregnancy termination on the proposed grounds.

States are expected to respect, protect and fulfill the rights to life, health, and to be free from violence. An examination of the concepts of human dignity, life, integrity and the right to be free from cruel, inhuman or degrading treatment shows that each is inextricably intertwined with the grounds contemplated in the proposed bill.

Although dignity comes up often in the debate, both to claim that abortion should be legal or that it is always a crime,<sup>28</sup> it is not an abstract value grounded on ideology. Human dignity is the right of all members of free, pluralistic and democratic societies to material and spiritual self-realization and to be capable of making their own choices.<sup>29</sup>

While the concept is supported by consensus in the international human rights community, P. Carozza notes strong differences as to its meaning and role, notably whether it is separate from other rights.<sup>30</sup> The issue is not whether the grounds proposed in the bill are in themselves injurious. What is injurious to dignity, life, health and lifestyle is not allowing women to choose whether or not to carry a pregnancy to term. A. Ferrer, spokesman for the Chilean Conference of Catholic Bishops, holds that no one's dignity is hurt and that female autonomy "is a repugnant licence to kill".<sup>31</sup>

Failing to recognize human dignity devalues the particular conditions of women as a whole, what writer N. Fraser refers to as "cultural injustice" based on stereotype or failure to regard women as equals.<sup>32</sup> In the same vein, D. Rème notes that group discrimination

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<sup>28</sup> Siegel, Reva, "La dignidad y el debate del aborto", *Derecho y sexualidades*. SELA 2009 Seminar (Libreria), Buenos Aires, pp. 182-208.

<sup>29</sup> Some writers, including Ángela Vivanco, see human dignity from a faith-based point of view: "While references to 'equal human dignity' in the Constitution can be interpreted in many ways, from referring merely to material or financial needs to the fullest autonomy of all human beings, the fact of the matter is that human dignity as recognized in the Constitution of 1980 is clearly associated with the definitions in natural law", Vivanco, Ángela, *Curso de Derecho Constitucional. Aspectos dogmáticos de la Carta Fundamental de 1980*. Vol. II, 2a ed. Tomo II, 2a ed. ampliada, Facultad de Derecho (Ediciones UC), Santiago, 2004, p. 46. José Luis Cea, for his part, holds that human dignity is linked to freedom (autonomy) and equality and implies "being free from the anguish, trauma or hopelessness that destroy the sense of self-worth required to pursue a personal life plan". Yet, the Roman Catholic Church, of which this writer is a devout member, frowns on many such life plans, notably voluntary motherhood, contraception, and same-sex partnerships. Cea, José Luis, *Derecho constitucional chileno*, Vol. II, 2da ed. (Ediciones UC), Santiago, 2012, pp. 42-43 and note 23.

<sup>30</sup> Carozza, Paolo. "Human dignity", *The Oxford Handbook for International Human Rights Law*, Dinah Shelton, Ed. (Oxford University Press), 2014, pp. 345-354. Note 9 refers specifically to J. Maritain's views on adoption of the Universal Declaration of Human Rights.

<sup>31</sup> Constitution Committee, session of 18 January 2016.

<sup>32</sup> Fraser, Nancy, "Iustitia Interrupta". *Reflexiones críticas desde la posición postsocialista* (Siglo del Hombre



deprives people of rights, devalues them as bearers of rights, and offends their very humanity.<sup>33</sup> Human dignity rests on the equal value, enjoyment, and exercise of rights. The Constitutional Court of Colombia, for one, has expressly noted that human dignity is negated when women are treated as instruments of reproduction expected to make heroic sacrifices required of no one else.<sup>34</sup>

Chile's Constitutional Court has also written about human dignity, notably that the State owes equal respect and protection to all.<sup>35</sup> Court rulings have drawn a clear line from human dignity to the exercise of subjective rights, including to life, physical and mental integrity, and social security.<sup>36</sup> Criminalizing abortion under all circumstances negates the dignity women are entitled to as individuals and the exercise and enjoyment of associated rights, including to non-discrimination, to equality under the law, to be treated with respect, and to be free from violence.

Life and integrity are not an abstract construct. They are cherished by society and enshrined and protected in numerous laws.<sup>37</sup> Banning all forms of abortion in the guise of protecting the unborn sidelines the pregnant women whose life or health may be in peril because of a nonviable fetus or following sexual assault.

Abortion debates tend to be highly polarized. Participants are said to be either for or against life. But these reductionist views oversimplify a complex debate. Constitutional doctrine consistent with international human rights law must be anchored in the reality of people's lives, where the rights to life, integrity and human dignity are inextricably intertwined.

From a constitutional and doctrinal standpoint, integrity involves preventing cruel, inhuman or degrading treatment. Because of their recent history, Chileans tend to restrict the notion to the human rights violations that were prevalent under the Pinochet dictatorship. But from a constitutional, and certainly an international human rights law standpoint, the scope of integrity is much wider. In Chile, where sufficiently dense constitutional doctrine is often lacking, integrity is often linked to physical harm. Its scope extends to mental integrity in the context of domestic violence or the infliction of suffering,

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Editores and University of Los Andes, Bogotá), 1997, p. 33.

<sup>33</sup> Rème, Denise, "Harm and Fault in Discrimination Law", *Theoretical Inquiries in Law* (2001), Vol. 2, No. 1, p. 13.

<sup>34</sup> Jaramillo, Isabel Cristina and Serra, Tatiana, "El derecho como legitimación y distribución", *Aborto y justicia reproductiva*, Paola Bergallo, Ed. (Ediciones del Puerto), Buenos Aires, 2011, p. 338.

<sup>35</sup> A Constitutional Court decision addresses human dignity as follows: "Because it stands at the source of the Chilean system of institutions, it should be noted that article 1(1) of the Constitution provides that 'All are born free and equal in dignity and rights'. The dignity this alludes to is the entitlement of all human beings to be treated with respect. Dignity is at the source of all fundamental rights and of the guarantees designed to safeguard them". Decision 389, c. 17, 4 September 2003. See also Decision 433, cc. 24 and 25, 25 January 2005. In a different decision, the Court drew a link between human dignity and security of private communications, Decision 521, c. 18, 1 August 2006.

<sup>36</sup> The Court has written that human dignity is a principle and a norm to be considered along all other constitutional rights and principles. Decision 1348-09, paras. 31 and 32, 27 April 2010.

<sup>37</sup> Including, without limitation, protection and non-discrimination of pregnant women, measures to prevent workplace violence, drug plan coverage legislation, etc.

indignity, or duress.<sup>38</sup> The purpose of the three grounds proposed in the bill is to prevent the pain and suffering resulting from forced motherhood.

#### **4. Proposed Grounds for Abortion and their Implications for the Rights to Human Dignity, Integrity and to be Free From Torture**

Some have argued that the “risk to life” argument invoked in the bill is superfluous, as in today’s Chile all women whose lives or health are at risk will receive proper medical care, and fetal death from medical interventions intended to save a woman’s life is not an indictable offense. The argument goes that this is standard medical practice which need not be spelled out in the law. As noted in the report of the Health Committee of the Chamber of Deputies, “[some members] felt the need to recognize that while there was general consensus about protecting the life of the unborn, a single member dissented in connection with so-called *therapeutic abortion*, arguing that it would be more appropriate to speak of medical treatment designed to save a mother’s life, with fetal death as a secondary, unwanted result”.<sup>39</sup>

Catholic University president Ignacio Sánchez argued as follows:

Abortion is primarily intended to end the life of the unborn child. What I am saying here is that we should practice good medicine. [...] We will always go by what’s best for the mother in terms of satisfaction and care. If a woman with a 12-week pregnancy presents with advanced cancer, we should obviously fight it. If the baby dies as a result, that is an unwanted adverse effect, not abortion. I repeat: abortion directly attacks the life of the unborn. As such, in my view, the “risk to life” argument is not required in Chile, as it is dealt with by proper medical intervention.<sup>40</sup>

If it is true that in real life, and albeit not contemplated in the law, the medical profession will always intervene to safeguard women’s life and health, then there is nothing innovative in the proposed bill. The “risk to life” grounds contemplated in the bill would only help support good medical practice by preventing qualms and the chilling effect. But the argument that those failing to practice good medicine are open to malpractice litigation refers to an ex post facto contingency that does not address the immediate plight of women at risk. The absence of legislation provides no certainties or precision about the quantification and exposure to risk and/or the timing of termination. As such, legalization prevents unnecessary delays in performing a necessary intervention. The World Health Organization has clearly stated that restrictive legal frameworks may add unnecessary risk to women’s lives.<sup>41</sup>

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<sup>38</sup> See, for example, Cea, José Luis, op. cit., p. 102.

<sup>39</sup> Chamber of Deputies, Health Committee Report on a bill to regulate decriminalization of voluntary pregnancy termination. Bulletin 9895-11, 15 September 2016, pp. 18-19.

<sup>40</sup> Presentation to the Health Committee of the Chamber of Deputies. See also Dr. Mauricio Besio of the Catholic University. Both presentations made on 7 April 2015.

<sup>41</sup> WHO, Safe abortion: technical and policy guidance for health systems, WHO/RHR/15.04 © World Health Organization 2015.

In both the universal and regional systems, international human rights law has made numerous pronouncements on abortion and women's right to life and integrity. The regional system, which is based on a treaty containing specific provisions on protecting life from conception, has issued many resolutions and decisions upholding the life and integrity of women. These include the findings of the Inter-American Court and Commission of Human Rights in *Artavia Murillo v Costa Rica*,<sup>42</sup> measures in favor of Beatriz against El Salvador (2013),<sup>43</sup> and the case of child Mainumby, in which the IACHR urged Paraguay to ensure her life and integrity (2015).<sup>44</sup>

These cases are inextricably linked to interpretations of article 4.1 in the American Convention on Human Rights (ACHR)<sup>45</sup> on integrity, health and autonomy rights in reference to the unborn and especially to women. In seeking to maintain the status quo, Chilean opponents of legalization often claim that the country's constitutional framework is fully consistent with ACHR provisions and obligations to protect the unborn.<sup>46</sup> Alternatively, they claim that the decisions of the international human rights system are not binding on Chile.<sup>47</sup>

The debate around the nonviable fetus grounds reveals that medical teams dealing with such cases will react in a wide range of ways. A recent survey of private and public health practitioners in southern and central Chile conducted by the Diego Portales University (UDP) Human Rights Center showed that some physicians will let the pregnancy run its course, others will move up the delivery by 4 to 6 weeks, and yet others will terminate at weeks 22 to 24.<sup>48</sup> In addition, some physicians in private practice advise their more affluent

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<sup>42</sup> Inter-American Court of Human Rights, *Artavia Murillo and others (in vitro fertilization) v Costa Rica*. Judgment of 20 November 2012 (Preliminary Objections, Merits, Reparations and Costs).

<sup>43</sup> Inter-Am. Ct. H.R., Judgment of 29 May 2013. Provisional Measures with Regard to El Salvador, Matter of B. Álvaro Paúl notes that the Court did not order an abortion to be performed, but rather the adoption of all measures necessary and effective to ensure due protection of the life, personal integrity, and health rights of B. This writer neglects to mention that such measures include pregnancy termination in specific cases, notably when the woman's health is at risk. Paúl, Álvaro, "El estado actual del aborto en el derecho internacional y algunas afirmaciones erradas del proyecto de ley chileno", en *El aborto. Perspectivas filosófica, jurídica y médica* (Cuaderno de Extensión Jurídica), 27, University of Los Andes, p. 217.

<sup>44</sup> Inter-American Commission on Human Rights, Resolution 22/2015, Precautionary Measures 178/15. Matter of child Mainumby in respect of Paraguay, 8 June 2015.

<sup>45</sup> Article 4.1: Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

<sup>46</sup> Gonzalo García, speaking before the Constitution Committee of the Chamber of Deputies, 24 November 2015. A similar argument was made in the Health Committee. See Health Committee Report on a bill to regulate decriminalization of voluntary pregnancy termination. Bulletin 9895-11, 15 September 2016, p. 19. See also, inter alia, the statements of Deputy Jorge Rathgeb in the session of 31 March 2015 and of Claudio Alvarado, of the Instituto de Estudios de la Sociedad (IES), on 15 June 2015, both to the Health Committee.

<sup>47</sup> In a presentation to the Health Committee on 30 June 2015, Ángela Vivanco downplayed the impact of these findings as interpretations of international law that do not apply to Chile by virtue of the delay in adopting treaties into domestic law, an interval in which the Constitution or the text of the treaty, i.e., the Pact of San José, apply. Álvaro Paúl argued likewise before the Constitution Committee on 9 December 2015.

<sup>48</sup> Casas, Lidia; Vivaldi, Lieta, and Álvarez, Juan José, with assistance from Georgina Conway. Informe sobre embarazos en situación de malformación fetal incompatible con la vida post-natal en Chile. Unpublished, September 2015. Partial results were presented at a thematic hearing on violation of the human rights of

patients to seek an abortion abroad. These practitioners tend to rely on intuition to offer distraught patients technical, statutory or moral options. Those who agree to terminate a pregnancy will do so based on medical rather than legal grounds. The choice of language, often driven by the technical requirements of specialized institutions, can also obscure whether pregnancy termination at weeks 18 to 22 is an abortion or an early delivery.<sup>49</sup>

The World Health Organization (WHO) distinguishes abortion from preterm birth based on gestational age. This distinction, which gives medical teams legal “cover”, shows in practice that, faced with inequality under the law, practitioners will act with discretion. Absent a standard procedure, there is no context for protecting or promoting respect for women whose suffering over carrying a nonviable fetus is only increased.<sup>50</sup>

Surveys conducted by the University of Valparaíso’s School of Obstetrics and the University of Chile’s School of Public Health<sup>51</sup> show that some physicians feel helpless in the face of patient pain and suffering. Some even speak of torture, telling of patients who felt like “living coffins” not “in the family way” but “in the deathly way”. Some women attempt suicide or go into pathological grief, while others are driven by faith to expect a miracle. The UDP study shows that the key consideration must be to place women front and center. They alone must choose whether to carry a pregnancy to term, and States must at all times respect their choices and provide all necessary support.

Moreover, withholding pregnancy termination in cases of rape or nonviable fetus may amount to torture or cruel or inhuman treatment, in violation of personal integrity rights protected in both Art. 19(1) of the Chilean Constitution and the International Covenant on Civil and Political Rights. In *K.L. v Peru*, a case involving a 17-year-old carrying an anencephalic fetus,<sup>52</sup> the UN Human Rights Committee found the decision to refuse termination tantamount to cruel, inhuman or degrading treatment, and forced gestation to

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pregnant women of the Inter-American Commission on Human Rights, 156<sup>th</sup> Session, Washington D.C., 19 October 2015. See IACHR, Report on the 156<sup>th</sup> Session, December 2015, p. 13.

<sup>49</sup> In 2003, G.R.’s attending physician at Tisé Hospital in Santiago requested permission to perform an abortion. G.R. presented with a partial molar pregnancy and a fetus with a lethal chromosomal malformation. In addition, the presence of the mole created an additional risk of cancer. The request was denied. At about 22 weeks G.R.’s condition became critical. Without previous consultation, the medical team on duty resolved to terminate the pregnancy. The refusal to allow an abortion was endorsed by then Health Minister Osvaldo Artaza, who stressed that the later procedure involved “pregnancy termination, not abortion”, noting that “as it is not allowed under the law, no one can perform or authorize measures intended to cause an abortion”. *El Mercurio*, “Salud niega apoyo a aborto terapéutico”, 16 January 2003. See coverage in UDP School of Law, *Informe Anual sobre derechos humanos en Chile 2004. Hechos de 2003*, Diego Portales University, Santiago, pp. 226-228 and notes.

<sup>50</sup> Gamboa Wellberg, Constanza, “Algunas consideraciones psicológicas en torno al embarazo inviable. Descripción de una problemática clínica a partir de la experiencia asistencial en un centro de medicina perinatal”, *Revista Gradiva*, 2015.

<sup>51</sup> Interviews with Mariana Arancibia and Anamaria Silva, of the School of Obstetrics, University of Valparaíso, July 2015; Pamela Eguiguren, Ana Oyarce, Rosa Ferrada et al., Investigación-acción de un equipo intersectorial sobre aborto terapéutico, Informe final, School of Public Health, University of Chile; Movimiento de Emancipación de la Mujer Chilena and Foro Red de Salud y Derechos Sexuales y Reproductivos, August 2008. Unpublished.

<sup>52</sup> Human Rights Committee, Communication *K.L. v Peru*, 22 November 2005.

be akin to torture.

Forcing incest or rape survivors to keep a pregnancy subjects them to cruel treatment that can only perpetuate violence. Concepts such as equal consideration and respect, human dignity, and personal integrity are highly relevant. For example, Chilean scholars such as J. L. Cea have written that upholding personal integrity requires refraining from inflicting suffering or duress.<sup>53</sup> The UN Human Rights Committee has deemed forced motherhood following rape or incest to amount to cruel, inhuman or degrading treatment,<sup>54</sup> and the CEDAW Committee has urged Chile to decriminalize abortion in cases of rape and incest or when a woman's life or health are at risk.<sup>55</sup>

Most sex offenses are clearly gender crimes that target girls and women. With many girls, sexual assault is only discovered when pregnancy becomes evident. As such, reasonable time limits that allow abortion to actually occur are a basic requirement.

In the 2012 National Survey of Domestic Violence and Sex Offense Victimization, 7.3% of Chilean boys and girls reported being sexually touched or forced to perform activities of a sexual nature in the previous 12 months. This figure did not include girls who reported assaults by boyfriends less than five years their senior.<sup>56</sup> Regions where abuse was most prevalent were Arica-Parinacota and Los Lagos, with 11% and 11.8%, respectively.<sup>57</sup> Most victims were girls and most offenders were acquaintances and relatives.<sup>58</sup> The prevalence of sex offenses against adult women by partners was lower. Only 6.3% reported at least one lifetime episode and 1.8% reported one episode in the previous 12 months. Only 12% filed charges.<sup>59</sup> The highest levels of sexual violence were reported by respondents in the regions of Arica-Parinacota, O'Higgins, and Bío-Bío, most of them poor women with a partial primary education.<sup>60</sup>

Few victims will report sexual attacks.<sup>61</sup> In 2013, of 143,995 reports filed under domestic violence legislation, only 518 (0.35%) were classified as sex offenses.<sup>62</sup> This tallies with victim data showing that only 12% reported sex offenses, the lowest rate of all forms of violence and the one with the highest rate of retraction.<sup>63</sup> Leading causes for failure to report included shame and fear.<sup>64</sup>

Rape is among the hardest crimes to prosecute. Compounding the difficulties involved

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<sup>53</sup> Cea, José Luis, *op. cit.*, p. 102.

<sup>54</sup> Equality of Rights between Men and Women (Covenant art. 3). General Comment No. 28 of the Human Rights Committee, March 2000, §11, 68<sup>th</sup> Session, U.N. Doc. HRI/GEN/1/Rev.7.

<sup>55</sup> CEDAW, Concluding Observations, CEDAW/C/CHL/CO/5-6, §35 d), 24 October 2012.

<sup>56</sup> Adimark GfK, Encuesta nacional de VIF y delitos sexuales, July 2013, p. 50.

<sup>57</sup> *Ibid.*, p. 50.

<sup>58</sup> *Ibid.*, pp. 51-53.

<sup>59</sup> *Ibid.*, p. 77.

<sup>60</sup> *Ibid.*, p. 80.

<sup>61</sup> Gloria Maira, Paula Santana and Siomara Molina. *Violencia sexual y aborto, Red chilena contra la violencia doméstica y sexual*, Santiago, 2008, pp. 86-87.

<sup>62</sup> Prosecutor's Office, Statistical Bulletin 2013, Santiago, January 2014, Table 23.

<sup>63</sup> Adimark GfK, *op. cit.*, p. 100.

<sup>64</sup> *Ibid.*, pp. 77-78.



in obtaining evidence are prejudice and stereotyping of female sexuality by criminal justice system players and medical practitioners.<sup>65</sup> Empirical studies on violence against women and the administration of justice in Chile bear this out.<sup>66</sup> An Argentine study of practitioners working with rape survivors suggests that the first order of business is to support and empower them to persevere —as distinct from forcing them to report attackers, which could compound their plight.<sup>67</sup>

Furthermore, girls and women are often blamed, which tends to place them, rather than the perpetrators, at the center of the investigation.<sup>68</sup> As the Chilean bill was introduced, this mindset was conspicuously evident in the comments of Christian Democratic Deputy Pablo Lorenzini, who questioned that adult women could be raped.<sup>69</sup> Women know that reporting will result in a high-cost criminal investigation, a fact known to justice system players. In addition, most judges hearing rape cases do not even recognize forced gestation as an aggravating circumstance, which helps the consequences of sexual assault, especially pregnancy, to be perceived as “normal”.<sup>70</sup>

Partner rape of adult women is less visible and, because it causes greater shame and is seldom reported, tends to be much more deeply internalized than physical violence.<sup>71</sup> PAHO notes that sex offenses include coercive marital intercourse and date rape.<sup>72</sup> Women who report partner rape must face the counterargument that intercourse was consensual. As obtaining proof can be difficult, defendants may be convicted of bodily assault but cleared of rape.<sup>73</sup> In this light, the frequent argument that the proposed bill will promote impunity unless mandatory reporting is required<sup>74</sup> stands in contrast with provisions in the Chilean

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<sup>65</sup> See Inter-American Commission on Human Rights, Access to justice for women victims of sexual violence in Mesoamerica, OAS/Ser.L/V/II. Doc. 63, 9 December 2011, Washington, D.C., §56-57. In Chile, see Maira, Molina and Santana, *op. cit.*, pp. 101-105.

<sup>66</sup> Casas, Lidia and Mera, Alejandra, “Violencia de género y reforma procesal penal chilena. Delitos sexuales y lesiones”, Cuadernos de Análisis Jurídico No. 16, Serie Publicaciones especiales (UDP School of Law and Justice Studies Center of the Americas), Santiago, 2004.

<sup>67</sup> Equipo Latinoamericano de Justicia y Género, *Violencia familiar. Aportes para la discusión de políticas públicas y acceso a la justicia*, Buenos Aires, 2009, p. 55.

<sup>68</sup> The mother of an 11-year-old girl impregnated by her common-law partner argued that they had a consensual relationship instigated by the girl. See *Caras*, Belén... 11 July 2013, [www.caras.cl/sociedad/belen](http://www.caras.cl/sociedad/belen). In a UDP study on sex offenses, a respondent related that a mother testified in court that her partner had abused her daughter only once rather than frequently, as claimed by the prosecution.

<sup>69</sup> See *La Tercera*, “Lorenzini: ‘Hay mujeres que tienen relaciones porque, a lo mejor, tomaron un traguito de más, ¿eso es violación también?’”, 6 February 2015, available at [www.latercera.com/noticia/lorenzini-hay-mujeres-que-tienen-relaciones-porque-a-lo-mejor-tomaron-un-traguito-de-mas-es-violacion-tambien/](http://www.latercera.com/noticia/lorenzini-hay-mujeres-que-tienen-relaciones-porque-a-lo-mejor-tomaron-un-traguito-de-mas-es-violacion-tambien/).

<sup>70</sup> Ruiz-Esquide, Isabel, *Determinación judicial de la pena: el embarazo a consecuencia de la violación de una menor de edad y su consideración en la determinación judicial de la pena*, Master’s Thesis in Criminal Law, University of Chile, 2013.

<sup>71</sup> Maira, Molina and Santana, *op. cit.*, p. 88.

<sup>72</sup> Pan American Health Organization (PAHO), *World report on violence and health*, Washington DC., 2003, p. 21.

<sup>73</sup> Preliminary results of the UDP study on sex offenses show men being prosecuted for raping and assaulting their partners. In Los Lagos region, a man was convicted of bodily assault but cleared of rape. In 2015 the Criminal Court of Coyhaique handed down an identical ruling. Case 12-2004, Decision of 29 August 2015.

<sup>74</sup> Soledad Alvear, Constitution Committee, 18 January 2016; María Elena Santibáñez, Health Committee, 14 July 2014.



legal system encouraging victims to drop charges and forgive perpetrators for the sake of the family.<sup>75</sup>

Some authors argue that creating opportunities for pregnancy termination can be devastating for women facing domestic violence. In such cases, it is essential to ensure that perpetrators do not force women to have an abortion and to assist women who wish to leave violent relationships. The absence of legal termination can doubly victimize women: First as victims of rape, then by imposing an abortion. This line of reasoning may mean to protect women from violence, but also suppresses autonomy.

J. P. Mañalich defines autonomy as the “relational status of non-domination”, with rape as “the paradigm of a form of behavior exemplifying a relationship of domination [...] which materializes the pretension of downgrading the worth of someone’s body to the value of its use”,<sup>76</sup> adding that “Those opposed to rape victims legally terminating a pregnancy may believe to be acting on behalf of an ‘innocent, defenseless creature’, but they in fact are acting on behalf of the rapist, embracing his pretension that the victim be forced to have his child and to assume a criminally imposed motherhood”.<sup>77</sup>

As such, banning abortion does not prevent or repair—it just forces women to perpetually recall the violence inflicted on them. Therefore, allowing abortion in rape cases must include mechanisms for the State to protect women, repair the violence inflicted and offer support, whether they wish to stay pregnant or not. Arguments consistent with women’s autonomy must also address the question of the minimum required to guarantee motherhood, should the woman so desire.

International human rights bodies have ruled that forced pregnancy resulting from sex offenses is cruel, inhuman, or degrading treatment. Related decisions include *L.M.R. v Argentina*, a case heard by the UN Human Rights Committee involving a young, cognitively-impaired rape victim who was denied an abortion.<sup>78</sup> In *L.C. v Peru*, the CEDAW Committee excoriated Peru for denying both an abortion and critical spinal surgery to a pregnant 13-year-old rape victim, which led her to attempt suicide. The Committee wrote that these actions disregarded the right to life under both the Convention and the Peruvian Constitution, as well as health rights, including to mental health, under the Peruvian Constitution.<sup>79</sup>

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<sup>75</sup> Senators debating gender killing legislation introduced a provision allowing victims to drop rape charges against spouses or common-law partners “to keep marital quarrels out of the courts and encourage the restoration of relationships of interest to society”. Chief among supporters of this argument was then-senator Soledad Alvear, who says that the current bill is male-oriented and does not protect women. See *Historia de la Ley N° 20.480*, p. 356.

<sup>76</sup> Mañalich, Juan Pablo, “Solidaridad, propiedad y autonomía: la permisibilidad del aborto frente a tres formas de pensamiento jurídico”, en *Diálogos sobre el aborto*, “Violación y aborto: historia, justicia y derechos en Chile” (University of Chile), Santiago, 2015, p. 27.

<sup>77</sup> *Ibid.*

<sup>78</sup> Human Rights Committee, Communication 1608/2007, *L.M.R. v. Argentina*, 28 April 2011.

<sup>79</sup> CEDAW Committee, Communication 22/2009, 25 November 2011, CEDAW/C/50/D/22/2009.

## 5. Five Minimum Conditions as an Ethical Imperative

Feminist groups, independent feminists based in academia, non-governmental organizations and social and political groups have all warned that parliamentary amendments could compound the shortcomings of the bill as introduced, to the point of obliterating its original intent. In this light, a cross-section of feminists have arrived at a consensus on the minimum conditions required to guarantee autonomy and decision-making in connection with motherhood. These include:

1. **Reporting:** Some participants in the parliamentary debate have decried the absence of mandatory reporting provisions, arguing that rapists could walk free as a result. Proponents of the bill have differed, noting that forcing adult women to report would deprive them of agency in criminal proceedings. In addition to denying women their own voice and robbing them of decision-making capacity, this would place an indirect condition on pregnancy termination and may even act as a deterrent, as women would know that the criminal justice system would kick in notwithstanding.

Mandatory reporting may also breach physician-patient privilege and harm relations with the entire health care community. Women who feel that anything they say to health staff will be reported are deprived of a buffer zone that could help them break out of violent relationships.

As noted, victims who go to court must negotiate a treacherous course, which includes systemic skepticism and attempts to discredit them. Forcing women to report partner rape may keep them from exercising their own free will and even promote non-termination. In a 2005 multi-country World Health Organization study, 30% to 56% of respondents reported physical and sexual violence.<sup>80</sup> In a Peruvian study which asked if forcible sex followed bodily assault, 9.5% of respondents said once or twice, 4.9% said several times, and 2.1% said always.<sup>81</sup> Clearly, gender violence is not pure and simple or restricted to blows—it comes with invective, threats, humiliation, and often sexual assault, which if internalized as part of the violence, may not even be reported.<sup>82</sup>

In addition, successful prosecution is by no means guaranteed.<sup>83</sup> As illustrated by a 2007 case in southern Chile, defendants often try to explain injuries away or account for the presence of semen by citing vindictiveness following consensual sex.<sup>84</sup>

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<sup>80</sup> WHO multi-country study on women's health and domestic violence against women: Initial results on prevalence, health outcomes and women's responses, Geneva, 2005, p. 32.

<sup>81</sup> Güezmes, Ana; Palomino, Nancy and Ramos, Miguel, *Violencia sexual y física contra las mujeres en el Perú*, Flora Tristán (World Health Organization and Universidad Peruana Cayetano Heredia), Lima, 2002, p. 84.

<sup>82</sup> In 2014, of 140,002 reports filed under Law 20066 on domestic violence, only 647, or 0.46% of all cases, were classified as sex offenses. See Prosecutor's Office, Statistical Bulletin, 2014, Table 23. Reporting sex offenses is the exception rather than the rule.

<sup>83</sup> The absence of justice is a constant, as shown in Lidia Casas, Francisca Riveros and Macarena Vargas, *Violencia y Administración de Justicia*, Servicio Nacional de la Mujer, Santiago, 2012.

<sup>84</sup> Criminal Court of Villarrica, Case 27-2007, Decision of 25 May 2007. This is one of a handful of successful prosecutions. Coñoemán Iturra was convicted of sexually assaulting his wife while their infant daughter slept in the same bed. The defense claimed ordinary marital intercourse. The authorities were notified by a nurse

As such, requiring mandatory reporting to prevent impunity is an argument that may mask an intent to prevent abortion. It is a harmful practice that introduces secondary victimization, notably invasive tests and adversarial cross-examination. Rape victims seeking care at public health facilities are presumed to have been victims of violence and it is not the role of health staff to suspect their claims. No legal abortion bill introduced thus far has attempted to regulate this aspect in any way.

2. **Conscientious objection:** The proposed bill allows physicians to object to abortion on philosophical, moral or faith grounds by providing administrators with prior written notice. While some would extend conscientious objection to all health staff, and even to entire institutions,<sup>85</sup> this would infringe patient rights under Law 20584.<sup>86</sup> Conscientious objection privileges are restricted to physicians performing the procedure and do not extend to diagnosticians or medical teams.<sup>87</sup> Expanding them would help impede abortion and violate the freedom of physicians willing to perform the procedure.<sup>88</sup> Rights holders possess a conscience, institutions do not.
3. **Confidentiality:** The proposed bill contains confidentiality provisions intended to prevent some of the related consequences of illegal abortion. Under privacy and health rights, no woman who has an illegal abortion should be reported, interrogated, receive treatment contingent on disclosure of the particulars, or have her health status divulged. International treaty monitoring bodies, notably the Committee Against Torture and the CEDAW Committee, have advised Chile that questioning and reporting women admitted for abortion-related emergencies constitutes cruel, inhuman or degrading treatment<sup>89</sup> and that requiring practitioners to report women violates privacy rights and protections against self-incrimination.<sup>90</sup> Provisions in the bill to inform the prosecutor's office when a rape victim asks for an abortion may violate privacy rights and clash with the principles and standards of health rights and duties.<sup>91</sup>

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conducting a regularly scheduled checkup later the same day. The defendant claimed that his wife just wanted to get rid of him.

<sup>85</sup> Notably Catholic University President Ignacio Sánchez in his 7 April 2015 presentation to the Health Committee.

<sup>86</sup> Chile, Law 20584. A Law regulating the rights and duties of patients receiving health care, 12 April 2012. Article 10 establishes the rights to privacy and personal integrity.

<sup>87</sup> Dr. Sergio Valenzuela of the University of Chile, speaking on 18 January 2016 before the Constitution Committee of the Chamber of Deputies, noted that Chile has a shortage of specialists able to diagnose lethal fetal malformations. That said, it is highly contradictory to require specialists but give them the choice not to disclose their findings.

<sup>88</sup> See chapters by Rodolfo Figueroa, Manuel Núñez, and Ángela Vivanco.

<sup>89</sup> Committee Against Torture. Conclusions and recommendations: Chile. 14 June 2004, §6(j).

<sup>90</sup> Concluding Observations, CEDAW Committee. Chile, 09/07/99, CEDAW/C/99/L.2, §28-29. These observations are consistent with General Comment 28 of the Human Rights Committee on the equality of men and women: "States [that] impose a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion" violate the rights to privacy, to life and integrity and to be free from cruel, inhuman or degrading treatment. See Human Rights Committee, General Comment No. 28, Article 3: Equality of Rights between Men and Women, 68<sup>th</sup> Session, U.N. Doc. HRI/GEN/1/Rev.7 at 207 (2000), §20.

<sup>91</sup> Chile, Law 20584. A Law regulating the rights and duties of patients receiving health care, 12 April 2012. Article 5(c) establishes the rights to privacy and human dignity.

4. **Time limits:** Any such restrictions must allow pregnancy termination to actually take place. Imposing time limits on teenage victims of rape or incest must consider the circumstances and the often challenging task of detecting early pregnancies. Setting a 14-week time limit on abortion renders the issue moot and perpetuates a situation of violence. A study in Mozambique, for example, showed that most women who underwent second-trimester legal abortions were poor teenagers,<sup>92</sup> a fact often related to unawareness of pregnancy. A study in the United Kingdom, where abortion is legal, showed that teenagers tend to delay abortion due to fear of the reaction of friends and relatives.<sup>93</sup>

Illustrating the importance of a reasonable time frame, a 4,000-respondent U.S. survey of rape-related pregnancy showed that most teenagers only realized they were pregnant by the second trimester.<sup>94</sup>

5. **Support and counseling:** Decisions to terminate a pregnancy must always be freely made. Counseling should never be designed to sway a woman or deter or prevent an abortion. It must always involve the provision of full and truthful information intended to help women make informed, autonomous decisions. Counseling is a crucial component of the support required by women carrying a nonviable fetus, since such an ordeal may, in addition to the need to recover from the attendant loss and grief, involve genetic counseling. The UDP study on fetal malformation confirmed the crucial role of specialized public-sector care<sup>95</sup> and of providing psychological support to women and couples. These are key resources that should be strengthened.<sup>96</sup>

In cases of rape, the State also has a duty to make reparations. As noted by the Inter-American Commission on Human Rights, States must repair the physical and psychological consequences of sexual violence using a multidisciplinary approach<sup>97</sup> designed to bring about change by tackling the structural discrimination facing women.<sup>98</sup> Subjecting rape victims to counseling intended to deter abortion would infringe their right to determine the best course of action on their own and evince lack of concern for their plight and for their capacity—especially where adult women are concerned—to leave violent relationships. The proper, caring response to sexual assault must always be reparation and support.

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<sup>92</sup> Ustá, Momade Bay. “Who is Excluded When Abortion Access is Restricted to Twelve Weeks? Evidence from Maputo, Mozambique”, *Reproductive Health Matters*, Vol. 16, No. 31, 2008, pp. 14-17.

<sup>93</sup> Roger Ingham, Ellie Lee, Steve Joanna Clements, et al. “Reasons for Second Trimester Abortion in England and Wales”, *Reproductive Health Matters*, Vol. 16, No. 31, 2008, p. 26.

<sup>94</sup> Melisa Holmes, Heidi Resnick, Dean Kilpatrick, et al. “Rape-related pregnancy: estimates and descriptive characteristics from a national sample of women”, *American Journal of Obstetrics and Gynecology*, 75, No. 2, 1996, pp. 320-25.

<sup>95</sup> Including facilities operated by the University of Chile, the Catholic University, and various regional hospitals.

<sup>96</sup> See the experience of the United Kingdom and its pregnancy termination and support protocols. Royal College of Obstetricians & Gynaecologists, “Pregnancy Termination for Fetal Abnormality in England, Scotland and Wales”, 2010.

<sup>97</sup> Inter-American Commission on Human Rights, *Access to justice for women victims of sexual violence in Mesoamerica*, 2011, §101-102, “The multidisciplinary approach to the problem of sexual violence.”

<sup>98</sup> *Ibid.*, §106, referring to the Court’s judgment in the “Cotton Field” case.

## 6. Conclusion

In democratic societies, determining the scope of women's reproductive rights involves not just how these may be violated, but also minimum conditions designed to safeguard women's autonomy and ability to freely choose their lifestyle.

So-called pro-lifers charge that proponents of reproductive freedom and abortion rights do not consider fetuses as human life. These debates, which often revolve around the ontological condition of fetuses and whether they have a right to life, lose all substance when access to the right to life is not equitable. By unrelentingly asserting a fetal right to life, intractable conservatives devalue the inherent rights of women. They seem to forget that the right to life requires not just respecting human life and refraining from arbitrary killings, but also the core ethical obligations that make life livable.

There is no question that the Chilean legal system protects the life of the unborn. It is true that the Constitution gives the fetus moral value and protects it from harm or destruction. But it is also true that fetuses are not conscious of their identity and cannot make lifestyle choices or decisions about themselves. Going back to the distinction between potency and impotence, while a fetus holds the potential to become a person, this is a lesser asset than a woman's power to choose her lifestyle or make decisions about motherhood. This explains our conviction that pregnancies can be terminated—within a reasonable time limit—when required to safeguard the autonomy, the integrity, and the lives of women.

For some feminists, the proposed bill provides a minimum of autonomy in contexts where motherhood may result in greater pain and suffering. If the bill's intent is to safeguard women's rights, crucial components—guaranteed confidentiality, controlled conscientious objection, no mandatory reporting, reasonable time limits, a ban on counseling intended to dissuade—must all be preserved.

Still, decriminalizing abortion within reasonable time limits may well be the most meaningful way of guaranteeing prompt access to safe pregnancy termination without the need to invoke specific grounds. Legalization of abortion on the three grounds proposed in the bill could help women become that much more free and autonomous. But to achieve this, practices and discourses holding that women are foreordained to become mothers must be resisted and dismantled. A coherent reading of Chile's legal system shows that the abortion bill, as introduced, meets minimum State obligations concerning human dignity, integrity, and the right to be free from torture. Should the bill be amended beyond recognition, women would be asked to conform to supererogatory standards well beyond anything a self-respecting, autonomous human being should endure.