

# WOMEN AND REPRODUCTION: FROM CONTROL TO AUTONOMY? THE CASE OF CHILE\*

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## INTRODUCTION

Discrimination against women is seldom more evident than in the sphere of human reproduction.<sup>1</sup> A woman's reproductive decisions are often hindered by laws protecting a range of interests, from the rights of the fetus to the nebulous obligations arising from marriage and family life.<sup>2</sup>

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1. See Rebecca M. Albury, *Law Reform and Human Reproduction: Implications for Women*, in SOURCEBOOK ON FEMINIST JURISPRUDENCE 523, 524 (Hilaire Barnett ed., 1997) (asserting that the private sphere of reproduction defines women by their roles as childbearers, while the public sphere defines men by their "capacity for rational thought").

2. See THE CENTER FOR REPRODUCTIVE LAW AND POLICY, WOMEN BEHIND BARS: CHILE'S ABORTION LAWS 30 (1998) [hereinafter WOMEN BEHIND BARS] (arguing that Chile's abortion laws constitute gender discrimination because such laws exert "a paternalistic control over women's reproductive lives").

In many societies, as in Chile, the rationale behind most, if not all, of these laws comes from a gender-based philosophy that emphasizes the role of women as mothers and caregivers. This philosophy became particularly evident in 2001, when the Chilean Senate debated the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”).<sup>3</sup> The Catholic Church leadership, as elsewhere in the region, deemed the recommendations of the CEDAW Committee unacceptable and urged senators to reject the Optional Protocol.<sup>4</sup>

New democratic governments in Chile have been indecisive about recognizing full citizenship for women and ending the constraints imposed on them by outdated traditions and laws.<sup>5</sup> Since restoring democracy in 1990, Chilean society has been in a constant state of tension between those who want greater autonomy for women and those who continue to fight family planning programs in effect since the 1960s.

Several high-profile figures, from both the political right and the economic elite,<sup>6</sup> who have been linked to conservative groups such as the Opus Dei and the Legionnaires of Christ, have become the leaders of a moral crusade, shaping the issues on the public agenda and influencing both policymakers and the political debate.<sup>7</sup> Their strategy has been effective in limiting the political debate by focusing on technical issues, such as the approval of dedicated emergency contraception. The Christian Democratic Party, the largest partner in the ruling coalition, generally accommodates the decrees set forth by

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3. See U.N. *Pressuring Nations to Undermine the Family: Chilean Cardinal Condemns “Cultural Colonialism,”* ZENIT NEWS AGENCY, Jan. 26, 2002 [hereinafter *Cultural Colonialism*] (discussing testimony before the Senate’s Foreign Relations Commission that the guarantees contained in CEDAW would undermine Chile’s sovereignty), available at <http://www.zenit.org/english/visualizza.phtml?sid=15701> (last visited Oct. 22, 2004). By ratifying the Optional Protocol, a state gives the United Nations the power to accept and investigate complaints from claimants within its jurisdiction. *Id.*

4. See *id.* (discussing that the newspaper *El Mercurio* reported on January 9, 2002 that the Catholic Church asked the Senate not to ratify the Optional Protocol because such action might require Chile to legalize abortion).

5. See INTERNATIONAL WOMEN’S RIGHTS ACTION WATCH, COUNTRY REPORTS: CHILE 5 (1995) (reporting that the national Plan for Equal Opportunities for Women, launched by the new democratic government in 1993, became hampered by the constraints of traditional society), available at <http://iwwraw.igc.org/publications/countries/chile.htm> (last visited Oct. 22, 2004).

6. See MARIA OLIVIA MONCKEBERG, *EL SAQUEO DE LOS GRUPOS ECONOMICOS AL ESTADO DE CHILE*, Ch. 1 (2001) (profiling prominent members of the Pinochet regime).

7. See generally François Normand, *El Poder del Opus Dei*, LE MONDE DIPLOMATIQUE (2001) (basing the success of the Opus Dei on its personal charisma and strength).

the Catholic Church. Thus, government policies and legislation often give rise to contentious issues, but such policies are ultimately limited to areas that even the opposition would support.

The return to democratic rule weakened both civil society organizations and the social movement, including the women's movement.<sup>8</sup> Surprisingly, feminists have not played a significant role in setting the reproductive agenda.<sup>9</sup> The ability to mobilize women in this area was limited, owing perhaps to a marked inability to forge alliances and a keen readiness to needlessly label all those who do not share their views. Most public figures tread very carefully on the issue of reproduction, particularly abortion. This is true of traditional political actors and members of the academic community who acted in defiance of the progressive position Chileans consistently stated in opinion polls.<sup>10</sup>

This paper is part of a larger study of reproductive rights currently in progress. The paper reviews some of the public policy initiatives that directly impact reproductive rights in the 1990s, notably new voluntary sterilization rules and more recently, the 2001 approval of emergency contraception.

#### I. FROM DEMOGRAPHIC CONTROL TO THE CONSTRUCTION OF RIGHTS

In Chile, most progress in reproductive health and women's reproductive rights started with the pioneering work of a small but influential group of medical practitioners concerned with high maternal and neonatal mortality rates and infant malnutrition.<sup>11</sup> In the 1960s, when birth control methods were massively introduced in the United States and elsewhere, Chilean women had only limited

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8. Some would argue that the concept of "movement" is a misnomer, however, that discussion is outside the scope of this paper.

9. See INTERNATIONAL WOMEN'S RIGHTS ACTION WATCH, *supra* note 5, at 1 (reporting that in Chile, feminism is depicted as an anti-male movement that does not represent the majority of women).

10. See Bonnie Shepard, *The 'Double Discourse' on Sexual and Reproductive Rights in Latin America: The Chasm Between Public Policy and Private Actions*, 4 HEALTH AND HUM. RTS. 110, 118, 123 n.16 (2000) (relying on the Grupo Iniciativa Mujeres national survey to compare Chile's restrictive public norms with private discourses favoring the expansion of reproductive rights). Out of 1,800 women in twenty-two cities surveyed, most respondents agreed that abortion should be allowed when pregnancy presents a clear and present danger to the mother (78%); when the fetus presents congenital abnormalities (70%); or in the case of rape or incest (59%). *Id.*

11. See Jadwiga E. Pieper, *From Contested Duties to Disputed Rights: The Social Politics of Fertility Regulation in Chile, 1964-1989* 65 (2000) (unpublished Ph.D. dissertation, Rutgers University) (stating that Dr. Jaime Zipper and other physicians began organizing the first family planning programs and distributing contraceptives in the 1960s without government endorsement).

access to such methods. As poverty and an exploding population became perceived as politically destabilizing forces in Latin America, the key focus of U.S. aid programs was to promote birth control in the area, a continent where the vast majority of the population are practicing Catholics.<sup>12</sup>

Other members of the Chilean medical community argued that women's rights, in addition to mortality rates, were of concern.<sup>13</sup> To circumvent the influence and resistance of the Catholic Church, the medical community devised a strategy based on irrefutable medical evidence: half of the hospital blood supply was being used to treat backstreet abortions gone awry; half of maternal deaths were abortion-related; and treatment for abortion complications was costing taxpayers more than a half million dollars per year.<sup>14</sup> In the intervening years, the medical community's strategy has not changed much.

Therefore, the major impact on women's rights came from the medical community rather than the women's movement.<sup>15</sup> Due to the traditionally strong resistance to birth control, public debate focused on issues varying from poverty reduction and the role of public health to the exclusion of women and women's rights. Historically, all key players in this debate have been medical practitioners.

The Asociación Chilena de Protección de la Familia ("APROFA"), which later became formally affiliated with the International Planned Parent Federation ("IPPF"), was established in 1964 by a small, private

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12. See, e.g., United Nations Economic Commission for Latin America and the Caribbean, Sessional Ad Hoc Committee on Population and Development; Latin America and the Caribbean: Review and Appraisal of the Implementation of the Programme of Action on Population and Development, U.N. Doc. LC/DEM/G.184 (1999) (noting that in 1998 and 1999, the United States Agency for International Development budgeted about 140 million dollars for population and health programs, which included a strong reproductive and sexual health component in Latin America).

13. An issue about which I have had many heated but amicable discussions with a female physician who started out in public health in the 1960s.

14. See Pablo Lavín, *El Costo Asociado al Aborto Inducido*, ENCUESTO INTERNACIONAL DE INVESTIGADORES SOBRE ABORTO INDUCIDO, SANTA FE DE BOGOTÁ, COLOMBIA (1994) (finding that treatment for abortion complications in 1995 cost public hospitals about fourteen million dollars, enough to fund a sixty-eight bed facility for an entire year). This figure did not consider Fonda Nacional de Salud ("FONASA") or Institucion de Salud Previsional ("ISAPRE") health insurance refunds. *Id.*

15. See Pieper, *supra* note 11, at 62 (observing that the physicians initiatives in the 1950s focused on bio-medical and scientific goals, which promoted birth control within family planning programs even though such programs did not allow women to act on the basis of their individual needs).

association of health providers.<sup>16</sup> In 1966, based on APROFA's advice, the government passed the successful Family Health and Birth Regulation ("FHBR") Program, whose stated goal was to ensure that couples were free to choose the number of children they wanted to raise.

Politically, not even the Christian Democratic administration of President Eduardo Frei, Sr. could disagree about the serious consequences of not having a birth control program.<sup>17</sup> The FHBR program's immediate goal was to reduce unsafe abortions and the attendant risks to women's health.<sup>18</sup> Birth control was made freely available in public health clinics and hospitals. The original aim was to reach fifteen percent of the population, especially those at risk. With support from private institutions, the government set up outreach programs based on the concept that family planning is the cornerstone of policies protecting women's and children's health.<sup>19</sup>

By 1971, under the Allende Administration, the program reached forty percent of the population, including high-risk, poor women with many children and a history of unsafe abortions. Thus, abortions and maternal deaths associated with unsafe abortions fell dramatically.<sup>20</sup>

In addition to working for the right of couples to limit the size of their families and protecting the lives of women, the Chilean medical community also contributed key research. Thus, the joint work of Dr. Jaime Zipper, developer of the Zipper ring,<sup>21</sup> and Dr. Howard Tatum led to development of the copper T intrauterine device. Massive use

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16. See *id.* at 85 (noting that when the Chilean Committee for the Protection of the Family (Comite Chileno de Protección de la Familia) partnered with the IPPF to become the APROFA, the IPPF backed its support with a \$50,000 subsidy). At the same time, the Ford and Rockefeller Foundations, along with the Population Council, began providing financial support, contraceptive devices, and materials for family planning education. *Id.*

17. See *id.* at 96, 101 (noting that the Catholic Church's social doctrines guided the Christian Democratic administration's family planning policy goals in attempting to reach the urban poor and women, while still trying to maintain its pro-life position regarding reproductive policy).

18. See *id.* at 106-07 (noting that President Frei, Sr.'s Minister of Health, Dr. Ramón Valdivieso, while speaking at an IPPF Conference, suggested that family planning should be supported with the ultimate purpose of protecting mothers, children, and family health).

19. See, e.g., Benjamin Viel, *Chile: The Need for Reform*, in PLANNED PARENTHOOD CHALLENGES 12, 13 (1993) (noting that the government's launching of family planning information programs and the increased accessibility of contraceptive services were immediately successful as indicated by a fall in the number of women hospitalized for complications from abortion procedures).

20. See *id.* (indicating the immediate decline in women hospitalized for unsafe abortions after the implementation of family planning programs).

21. See Pieper, *supra* note 11, at 61 (relating a 1997 taped interview with Dr. Jaime Zipper, the inventor of the "Zipper ring," an intrauterine device, stating that he opened the first contraceptive clinic in Chile in the late 1950s).

of these highly effective, low-cost methods elicited a virulent campaign against intrauterine devices (“IUD”).<sup>22</sup> Dr. Benjamín Viel, one of Chile’s grand old men of family planning, wrote that “pro-natalist” groups attributed unproven effects to IUDs and termed them “abortifacients.”<sup>23</sup> The debate on birth control, and especially on IUDs, raged in newspapers, which ran editorials reviling IUD use. The offensive did not succeed in forcing the government to backtrack. Now, IUDs, which cost little, can last up to twelve years, can be fitted by non-medical personnel, boast low failure rates, and remain the single-largest method used in the Chilean government’s family planning program.<sup>24</sup>

Implementation of family planning programs proceeded uneventfully until the Pinochet regime took over and turned family planning policy on its head.<sup>25</sup> Through the 1980s, the rise of the doctrine of national security among military governments in the region led to the dismantling or weakening of family planning programs designed to achieve population goals.<sup>26</sup> In Chile, the new doctrine was spelled out in *Política de Población*, an official document published in 1979, which advised medical personnel to steer clear of *abusive use* of birth control methods:

The service infrastructure will provide information services that are timely, complete and selective in terms of the maturity and

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22. See *id.* at 75-76 (stating that during the early stages of the introduction of IUDs in Chile, physicians viewed the practice of inserting foreign materials into the body as potentially dangerous). Cultural opposition challenged women who wanted to use family planning because women were expected to be highly fertile mothers. *Id.*

23. See Benjamín Viel, *Prologo*, in DE LA MIEL A LOS IMPLANTES: HISTORIA DE LAS POLÍTICAS DE REGULACIÓN DE LA FECUNDIDAD 7 (Ximena Jiles Moreno ed., 1992).

24. See, e.g., Nancy L. Stanwood, David A. Grimes & Kenneth F. Schulz, *Insertion of an Intrauterine Contraceptive Device After Induced or Spontaneous Abortion: A Review of the Evidence*, 108 BJOG: AN INT’L J. OF OBSTETRICS & GYNECOLOGY 1168 (2001) (concluding that IUD insertion is safe and effective); David Hubacher, *The Checkered History and Bright Future of Intrauterine Contraception in the U.S.*, 34 FAMILY PLANNING PERSPECTIVES 98, 99-100 (2002); Kirti Iyengar & Sharad D. Iyengar, *The Copper T-380A IUD: A Ten-Year Alternative to Female Sterilization in India*, 8 REPROD. HEALTH MATTERS 125, 127-28 (2002). Chilean Ministry of Health statistics showed that in 2001, 58.5% of women in public service facilities were IUD users. See SCHIAPPACASSE, VIDAL, CASAS, DIDES Y DIAZ, CHILE: SITUACIÓN DE LA SALUD Y LOS DERECHOS REPRODUCTIVOS 44 (Servicio Nacional de la Mujer, Santiago, 2003).

25. See Gustavo Gonzalez, *Rights-Chile: Supreme Court Bans “Morning After” Pill*, INTERPRESS SERVICE (2001) (reporting that abortion has been illegal in Chile since the dictatorship of Gen. Augusto Pinochet).

26. See María Elena Valenzuela, *The Evolving Roles of Women Under Military Rule*, in THE STRUGGLE FOR DEMOCRACY IN CHILE, 1982-1990 161-62 (Paul W. Drake & Iván Jaksic eds., Lincoln: Univ. of Nebraska Press 1991) (explaining that the policies developed by the military regime after 1983 “promoted women’s return to family life and discouraged their participation in the work force and in government, focusing instead on their roles as mothers”).

receptivity of the population. Access to birth control measures will be controlled in order to avoid an excess of ease that could result in imposition or coercion. Excess or abuses that could hinder the right to decide freely are to be avoided.<sup>27</sup>

Health care workers, especially public sector midwives, recall that the policy prompted some public clinics and hospitals to stop advertising their services, effectively removing birth control services from public view. Women from disadvantaged backgrounds grew highly distrustful of health personnel, as stories of women having their IUDs removed without consent began to circulate.

During the early years of the military dictatorship, a group of conservative doctors tried to reopen the debate about the mechanism of intrauterine devices.<sup>28</sup> Their efforts did not persuade government policymakers because cost-efficiency was an overriding factor while Chile was receiving foreign, family planning assistance.<sup>29</sup>

In 1975, the government issued Resolution 003 on voluntary female sterilization.<sup>30</sup> The resolution was an attempt, again by medical doctors, to perform sterilizations without fear of reprisals from supervisors who would question their requests for the need to end a woman's reproductive life. The Chilean experience differs somewhat from that of Argentina,<sup>31</sup> where sterilization was banned outright because of population goals; or from Puerto Rico, where the United States administration's xenophobic attitudes resulted in the massive

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27. NATIONAL PLANNING BUREAU, POPULATION POLICY, 1979-1983 NATIONAL DEVELOPMENT PLAN 7 (1979); see Lucy Alexander & Claudia Iriarte, *Chile, in THE RIGHT TO KNOW: HUMAN RIGHTS AND ACCESS TO REPRODUCTIVE HEALTH INFORMATION* 143 (Sandra Coliver ed., London: Article 19 International Centre Against Censorship and Univ. of Pennsylvania Press 1995).

28. See generally Lezak Shallat, *Business as Usual for Quinacrine Sterilisation in Chile*, 6 REPRODUCT. HEALTH MATTERS 144 (1995) (noting the efforts of Chilean scientist Dr. Jaime Zipper, inventor of female sterilization with quinacrine, and his team of doctors who introduced the method in Chile in the early 1970s).

29. Cf. VIVIANA WAISMAN ET AL., CTR. FOR REPROD. LAW AND POLICY, REPRODUCTIVE RIGHTS 2000: MOVING FORWARD 21 (2000) (noting that even in recent years, at the five-year review of the 1994 International Conference on Population and Development, the United States, the European Union, and other donor nations tried to insert the phrase "including female-controlled methods such as female condoms and emergency contraceptives and underutilized methods such as vasectomy and male condoms" into a phrase dealing with donors providing sufficient resources to family planning initiatives).

30. The Resolution was later published in the MINISTRY OF HEALTH, MATERNAL AND PERINATAL HEALTH PROGRAM, RESPONSIBLE PARENTHOOD 1993 102-09 (1993) [hereinafter RESPONSIBLE PARENTHOOD]. See also Shallat, *supra* note 28, at 145 (referring to the 1975 decree by the pro-natalist Pinochet regime that permitted a highly restrictive female sterilization program).

31. See MARIA CORREIA, THE WORLD BANK, GENDER PORTFOLIO REVIEW ARGENTINA, CHILE, URUGUAY PROGRAM 8 (1998) (stating that in 1974, Argentina passed a law making birth control and the sale of contraceptives illegal).

use of sterilization.<sup>32</sup>

While allowing sterilization, Resolution 003 considered women's concerns or demands irrelevant because it provided for sterilization only when medical conditions justified the procedure.<sup>33</sup> In order to qualify for the sterilization procedure, eligible women had to apply, be over age thirty-two (or age thirty for certain conditions), and have four living children.<sup>34</sup> In addition, hospitals started illegally requiring signed spousal consent, a practice never challenged in court.<sup>35</sup> Male consent became a *de facto* veto over women's reproductive choices. Even widows had to obtain consent. In order to comply with the rule, women started resorting to asking friends, neighbors, or boyfriends for their consent.<sup>36</sup>

Although Resolution 003 said nothing about vasectomy, some doctors were quickly reprimanded when they attempted to provide the procedure under the family planning program.<sup>37</sup> Even though

32. See BETH FREDERICK & DR. ANA LANGER, THE ALAN GUTTMACHER INSTITUTE & THE POPULATION COUNCIL, UNWANTED PREGNANCY AND ABORTION: PUBLIC HEALTH CHALLENGES IN LATIN AMERICA AND THE CARIBBEAN 10 (2001) (reporting that in terms of abortion laws, Puerto Rico is a unique case where United States law applies to a society that faces many of the same cultural barriers as other parts of the region); see, e.g., Angela Davis, *Racism, Birth Control and Reproductive Rights*, in FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT 15, 23-25 (Marlene Gerber Fried ed., 1990); Marlene Gerber Fried, *Abortion and Sterilization in the Third World*, in FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT 63 (Marlene Gerber Fried ed., 1990). For further discussion, see C. Chase, R. Rochat & J. Becerra, *Sterilization Regret Among Puerto Rican Women*, 49 FERTILITY & STERILITY 973 (1988), where it states that a survey conducted in 1982 found that forty percent of women aged fifteen to forty-nine relied on sterilization. Another survey completed in 1968 found that one-third of women were sterilized. See Harriet Presser, *The Role of Sterilization in Controlling Puerto Rican Fertility*, 23 POPULATION STUDIES 343-61 (1969) (cited in José L. Vázquez Calzada, *La Esterilización Femenina en Puerto Rico*, 3 REVISTA DE CIENCIAS SOCIALES 281-308 (Universidad de Puerto Rico 1973)).

33. See Pieper, *supra* note 11, at 182 (stating that Pinochet's policies did not focus on women's access to contraceptive devices, but on the expansion of health services, improving physician training, and researching medical technology).

34. See VERÓNICA MATUS, CARMEN ANTONY & JOSEFINA HURTADO, CTR. FOR REPROD. LAW AND POLICY, WOMEN'S REPRODUCTIVE RIGHTS IN CHILE: A SHADOW REPORT 17 (1999) (noting that the consequence of requiring conditions for sterilization is to impede access to this service, which is a violation of the reproductive rights of Chilean women).

35. Because Chile has no divorce legislation, this requirement was broadly construed as consent from any male partner—even if the woman was single. Although Chile has enacted divorce legislation on May 7, 2004 that took effect in November 2004, the divorce legislation will have no effect on the regulation of sterilization because the consent requirement was repealed in 2000. See also Alexander & Iriarte, *supra* note 27, at 145, 156.

36. See generally Committee on the Elimination of Discrimination Against Women, Concluding Observations: Chile §§ 202-235, § 229, UN Doc. A/54/38 (June 22, 1999) (recommending that Chile grant women the right to undergo sterilization without requiring their husband's, or anyone else's, prior consent), available at <http://www1.umn.edu/humanrts/cedaw/chile1999.html>.

37. See Shallat, *supra* note 28, at 145 (stating that even though vasectomy is

none of the above requirements applied to private sector users,<sup>38</sup> most practitioners recognized at that point that family planning was a human right.<sup>39</sup>

In short, the policies implemented through the 1980s never took much account of the right of women to freely decide the number of children they wanted to raise, thus, medical staff and hospital directors used their personal views to control access to and the provision of reproductive health services.<sup>40</sup> Therefore, years of family planning programs have yet to produce a strong notion of a woman's right to make reproductive decisions.<sup>41</sup>

## II. THE 1990S AND THE NEW FERTILITY REGULATION ACTORS

After the restoration of democracy, the Maternal and Perinatal Health Program ("MPHP") established key health policies.<sup>42</sup> The Women's Health Program ("WHP") later superseded the MPHP by implementing a new framework for intervention, designed with a focus towards women's health and rights.<sup>43</sup> The WHP established the Commission on Family Planning and Responsible Parenthood, which executed a number of new "responsible parenthood" rules and regulations for medical staff.<sup>44</sup>

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technically legal, it "is viewed by the Catholic Church as a form of mutilation and is virtually impossible to get in the public health services"). See generally Alexander & Iriarte, *supra* note 27.

38. See Shallat, *supra* note 28, at 145 (noting that women with private physicians usually have no difficulty obtaining sterilization, especially after a caesarean delivery).

39. See generally WOMEN BEHIND BARS, *supra* note 2, at 32 (noting that Chile ratified the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, which regards family planning as a human right guaranteed to men and women in deciding the number and spacing of their children).

40. See Peiper, *supra* note 11, at 177-78 (noting that the decentralization and deterioration of public health services led to confusing government policies, which caused family planning services to become dependent on the subjective interpretations by health care personnel).

41. See generally THE ALAN GUTTMACHER INSTITUTE, CLANDESTINE ABORTION: A LATIN AMERICAN REALITY (1994) (noting that fifty-six percent of the Chilean women surveyed reported induced abortions or unwanted births).

42. See WOMEN BEHIND BARS, *supra* note 2, at 37-38 (1998) (listing the primary activities of the Maternal and Perinatal Health Program as related to pregnancy, child birth, and nursing, as well as describing the program's various reproductive services).

43. See MATUS, ANTONY & HURTADO, *supra* note 34, at 16 (stating that the Women's Health Program includes advances such as inclusion of comprehensive coverage and a gender perspective, but that the program's stated objectives differ from its actual application); see also Pieper, *supra* note 11, at 176 (stating that after the military takeover, the government appeared to support policies which would allow women a voice in making their own reproductive decisions).

44. RESPONSIBLE PARENTHOOD, *supra* note 30, at 17 (noting that voluntary sterilization is now classified in the Responsible Parenthood Norms of the Ministry of Health as an irreversible contraceptive method); see also Alexander & Iriarte, *supra* note 27, at 144.

The creation of the WHP, however, resulted more from the new administration's desire to appear politically correct rather than a serious effort to make services gender-sensitive.<sup>45</sup> Therefore, management officials paid little attention to the new rules. For example, provisions of birth control services allowed only "young mothers" to access these family planning services, thus excluding the needs of other young women.<sup>46</sup> Nevertheless, at least all official documents recognized that family planning was a necessary and beneficial social policy.<sup>47</sup>

Health care personnel construed the new rules and regulations to have the same force as legal statutes. This response has been understood in the wider context as that of an overly law-abiding Chilean society and explains why updating technical standards is not an easy task for advocates.<sup>48</sup>

The Chilean government's position must also be viewed in the context of the 1994 Cairo Conference.<sup>49</sup> Given the overall international consensus, the democratically elected Aylwin Administration accepted the Cairo framework because it allowed for abortion to be disregarded as a birth control method.<sup>50</sup> Domestically, there was less concern for reproductive rights and more concern for

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45. See Pieper, *supra* note 11, at 176 (interpreting the Commission's establishment as a "calculated political step" due to the need of the military to keep ties to the United States). United States based groups sponsored the "Responsible Parenthood" program. *Id.*

46. See *id.* at 177 (reporting that cutbacks and redistribution of state funding caused family planning services to assign the lowest priority to preventive care).

47. The Program states that "the Government of Chile recognizes the benefits accruing to the population from family planning programs which help ensure they have the number of children they want, when they want them." Additionally, the Program states: "This recognizes the entitlement of individuals, couples and families to freely decide, based on adequate information, whether to use available birth control methods. Access will be extended to include all accepted methods of birth control, including abstinence . . ." RESPONSIBLE PARENTHOOD, *supra* note 30, at 5; see also Alexander & Iriarte, *supra* note 27; Pieper, *supra* note 11, at 177 (recognizing that the new program continued to exist on paper after the new administration eliminated most of the social reforms that provided access to family planning services).

48. See Shepard, *supra* note 10, at 125 (explaining that while Chile is renowned as a legalistic culture, their legalism is "selective and arbitrarily applied" towards abortion laws).

49. See U.N. REPORT OF THE INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT at 43, 117, U.N. Doc. A/CONF.171/13/Rev.1, U.N. Sales No. 95.XIII.18 (1995) (indicating Chile's attendance at the 1994 Cairo International Conference on Population and Development ("ICPD") where participants held reproductive rights to be a human right where men and women have the right to information and access to family planning methods of their choice).

50. See MINISTER'S COMMISSION ON THE ICPD, POSITION OF CHILE BEFORE THE INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT 6 (1994) (unpublished document, on file with the Ministry of Health).

the implications of agreeing to an instrument that could force Chile to legalize abortion.<sup>51</sup> In spite of some rather feeble attempts by some feminists and government supporters, the administration successfully eschewed a debate on abortion.<sup>52</sup> In contrast, congressional groups with close links to the Pinochet regime submitted three different bills seeking stronger penalties for women who chose abortion.<sup>53</sup>

In 1995, as the Fourth World Conference on Women drew near, the Catholic Church joined the debate in the form of a letter cosigned by both government and opposition senators, denouncing acceptance of the concept of gender by the Ministry of Foreign Affairs and the Department on the Status of Women ("SERNAM"). The Chilean delegation stood fast and signed the final Declaration<sup>54</sup> and the Platform for Action<sup>55</sup> of the Beijing Conference.

It then fell to SERNAM Minister Josefina Bilbao, a Christian Democrat sympathizer, to publicly defend the acceptance of the gender-sensitive Beijing framework. The greatest concern among right-wing advocates and some Christian Democrats regarding the Platform for Action involved the signees' obligation to revise punitive abortion laws. SERNAM amended the goals of its ten-year plan to include improving the status of women and dealing with sexuality and reproduction issues from a gender perspective.<sup>56</sup>

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51. See WOMEN BEHIND BARS, *supra* note 2, at 43 (stating that during the last weeks of the Pinochet regime in 1989, the government banned therapeutic abortions, which was Chile's only exception to the ban against abortion).

52. See Shepard, *supra* note 10, at 130-31 (observing that citizen advocacy groups often had difficulty mobilizing due to a lack of foreign funding, an overextended staff, and exclusion from government contracts because of their opposition to the state's position on reproductive rights).

53. See *id.* at 123 ("While progressive Catholic legislators and officials [advocated for] increased support for family planning services to prevent abortions, conservative legislators revived their attempts to increase the criminal penalties for abortion.").

54. *Report of Fourth World Conference on Women in Beijing in 1995*, U.N. Sales No. E.96.IV.13, chap. I, res. 1, annex I., available at <http://www.un.org/womenwatch/daw/beijing/platform/declar.htm> (last visited Oct. 22, 2004).

55. *Id.* at Annex II.

56. The Equal Opportunity Plan has a chapter on reproductive rights which states:

[E]nsure the exercise of reproductive rights and the right to freely decide the number and spacing of children. Information and education, as well as access to available methods of birth control, are indispensable for responsible decision-making about parenthood. This guarantees the right of individuals to make decisions consistent with their values.

SERNAM, 1994-1999 EQUAL OPPORTUNITY PLAN 50 (1996). See, e.g., MATUS, ANTONY & HURTADO, *supra* note 34, at 9 (noting that neither the Chilean government agencies nor civil society has yet to accord legitimacy to the First Equal Opportunity for Women Plan, formulated from 1990-1994, which was amended by the second coalition government in 1994 to provide a more coherent strategy in improving the

In other words, as long as abortion is avoided, all official documents recognize women's reproductive autonomy, emphasizing a freedom of conscience. The quandary faced by administrations following the Pinochet regime is that while their rhetoric is politically correct, administrations lack the political will required to deal with issues that could splinter the coalition. In addition, they are loath to run afoul of the Catholic Church, a former key ally in the defense of human rights during the military regime.<sup>57</sup>

### III. THE GOVERNING COALITION

While in Cairo and Beijing, the Chilean government stood for reproductive rights, but then failed to follow through with such policies domestically.<sup>58</sup> A case in point is the failure to produce a sex education curriculum despite the urgent need to reduce teenage pregnancy.<sup>59</sup> This failure resulted mainly from opposition by the Catholic Church, whose influence in education, as well as in other areas, cannot be underestimated.<sup>60</sup> In addition, the Church succeeded in delaying changes to voluntary sterilization rules by as much as three years and launched a major drive against the inclusion of emergency contraception in the treatment protocol for victims of sexual violence.<sup>61</sup>

Meanwhile, the women's movement successfully lobbied the

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situation of women); *see also Report of the Committee on the Elimination of Discrimination Against Women*, U.N. GAOR, 21st Sess., Supp. No. 38, at 65, U.N. Doc. A/54/38/Rev.1 (1999) (summarizing Minister Maria Josefina Bilbao's presentation of Chile's second and third reports on the Status of Implementation of the CEDAW), available at <http://www.un.org/womenwatch/daw/cedaw/reports/21report.pdf> (last visited Oct. 22, 2004).

57. *See* Shepard, *supra* note 10, at 117 ("During the 17 years of military dictatorship . . . the Catholic Church played a progressive role in Chile as the main proponent of respect for human rights and social justice.").

58. *See, e.g.*, MATUS, ANTONY & HURTADO, *supra* note 34, at 8 (asserting that even though Chile ratified the 1994 Cairo ICPD platform and it theoretically has the status of law, its provisions have not been given full legal effect in practice).

59. *See Report of the Committee on the Elimination of Discrimination Against Women*, *supra* note 56, at 67 (recommending that the government and SERNAM prioritize teenage pregnancy by disseminating family planning and contraceptive information via sex education programs).

60. *See* INTERNATIONAL WOMEN'S RIGHTS ACTION WATCH, *supra* note 5 (noting that in 1996, the Ministry of Education along with the Ministry of Health launched a national sex education program in schools, but suspended the program just a few days after introduction due to opposition from the Catholic Church).

61. *See* Brian Loveman, *The Transition to Civilian Government in Chile, 1990-1994*, in *THE STRUGGLE FOR DEMOCRACY IN CHILE, 1982-1990* 326 (Paul W. Drake & Iván Jaksí eds., Lincoln: Univ. of Nebraska Press 1991) (noting that the strength of the Catholic Church's opposition of SERNAM's education, birth control and abortion initiatives was shown by the reluctance of Chilean legislators to address these issues in Congress).

Chilean government to reduce obstacles to women's autonomy, eventually achieving a reform of Resolution 003 on the grounds that it discriminated on the basis of sex and class. For instance, in 1994, the public health system required poor women to have four living children before obtaining a sterilization procedure, even though the average number of children for Chilean women was 2.1. Women's non-governmental organizations ("NGOs") then pressured the public health system to enact the changes. They found a sympathetic ear but little action from SERNAM's middle and senior government officials, who aside from issuing documents and declarations, did not actually improve women's reproductive rights.

While some say that such inaction was due to Minister Bilbao's Christian Democratic affiliation, her social democratic successor did not improve on reproductive issues either.<sup>62</sup> It appears that such change has little to do with who heads SERNAM and much more to do with a lack of consensus within the government coalition; a fact that resonates strongly within SERNAM, leading it to avoid divisive issues altogether. In other words, because reproductive rights divided the governing coalition, ministries and institutions such as SERNAM became neutralized. In the absence of consensus, debate focused on technical issues such as medical evidence or public health consequences. Once again, the key argument derived from the scientific and medical evidence surrounding public health, not the rights of women.

An interesting example came out of the Office of the Superintendent of Health Insurance Companies, a health insurance watchdog, as it dealt with an insurer's refusal to reimburse a woman for sterilization on grounds that the procedure was not medically required and amounted to willful obliteration of healthy organs.<sup>63</sup> The Superintendent limited its case to arguing that private insurers had an obligation under the law to match the public system coverage.<sup>64</sup>

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62. See, e.g., Minister Adriana Delpiano, Statement at the Twenty-Third Special Session of the General Assembly "Women 2000" Gender Equality, Development and Peace for the Twenty-First Century (June 5, 2000) (reiterating Chile's anti-abortion position while promoting responsible parental decision making in family planning), available at <http://www.un.org/womenwatch/daw/followup/beijing+5stat/statments/chile5.htm> (last visited Oct. 22, 2004).

63. Memorandum 4148 from the Office of the Superintendent of Health Insurance Companies (Aug. 27, 1997) (on file with author).

64. The decision of the Santiago Appeals Court went beyond technical arguments, stating that a woman's reasons for getting a tubal ligation were a private matter insurers could not question. The Supreme Court upheld the decision but repealed that consideration. *Cigna Salud Isapre S.A. vs. Superintendent of Health Insurance Cos.*, No. 1416-98 (Sept. 15, 1998), published in CUERPO Y DERECHO:

Little change took place until late 1997, when feminist legislator María Antonieta Saa successfully argued for the creation of the Voluntary Sterilization Working Group within the Ministry of Health. The Group sought to gradually eliminate outdated and discriminatory regulations, adopt new rules protecting women's rights, and include vasectomy as a service offered by the public health system. The Group chose to utilize an administrative route to adopting rules that protect women's rights because it was less cumbersome than the legislative alternative. However, a drawback to the faster administrative route was that the Group restricted its debates to experts rather than opening them to the public.

For its debates, the Group invited medical societies,<sup>65</sup> midwives' professional association,<sup>66</sup> a women's reproductive and sexual rights network, IPPF affiliate APROFA,<sup>67</sup> SERNAM, and Ministry officials in charge of the Women's Health Program.<sup>68</sup> However, some participants withdrew when they realized that their discussions would lead to new regulations. Among the issues discussed, including women with disabilities, women's autonomy, and women's medical decision making powers, the most debated issue was the male consent requirement. Most practitioners agreed that public system requirements could not apply to private practice. However, they agreed that in the limited circumstances where a woman's life was at stake, sterilization could be performed without consent.

The Group's sterilization reform proposal was submitted to the Ministry in mid-1998 and was promptly set aside because health officials believed that a more favorable political climate was needed.<sup>69</sup>

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LEGISLACION Y JURISPRUDENCIA EN AMERICA LATINA 183 (Luisa Cabal et al. eds., Editorial Temis S.A. 2001).

65. The medical societies invited were the Chilean Gynecology and Obstetrics Society, the Chilean Infant and Adolescent Gynecology and Obstetrics Society, and Society of Urology.

66. The midwives' professional associations invited were the Chilean College of Physicians and the Chilean College of Midwives.

67. See generally ASOCIACION CHILENA DE PROTECCION DE LA FAMILIA (stating that APROFA is a nongovernmental institution aimed at improving the sexual and reproductive health of Chile), available at <http://www.aprofa.cl/> (last visited Oct. 22, 2004). APROFA is a member of the IPPF. *Id.*

68. See LIDIA CASAS & GIORGIO SOLIMANO, CORPORACION DE SALUD Y POLITICAS SOCIALES (CORSAPS), ESTERILIZACION VOLUNTARIA: ANTECEDENTES SELECCIONADOS (1999) (on file with author).

69. See INTERNATIONAL WOMEN'S RIGHTS ACTION WATCH, *supra* note 5, at 6 (noting that in 1991, "the ruling coalition Concertacion de Partidos por la Democracia" introduced a project to reestablish therapeutic abortion). Between 1994 and 1995, an NGO, Open Forum on Reproductive Health and Rights, developed a legal advocacy project that would allow for abortion in cases of incest and HIV/AIDS. *Id.* Neither of these initiatives were successful. *Id.* In 1998, Senator Hernan Lararain submitted a proposal that would impose heavier penalties on both

After many fruitless meetings with the Ministry, several organizations filed two shadow reports to the CEDAW Committee, one of them by the Corporación de la Mujer La Morada (“La Morada”), the Latin American and Caribbean Committee for the Defense of Women’s Rights (“CLADEM”), and the Open Forum on Reproductive and Sexual Rights (“Open Forum”), and the other submitted by the Center for Reproductive Law and Policy (“CRLP”) about ongoing discrimination against women in Chile.<sup>70</sup> In the third periodic report of Chile submitted to the CEDAW Committee, Maria Josefina Bilbao, the Minister Director of SERNAM, reported that Chile participated in an open-ended working group that would allow for increased women’s rights.<sup>71</sup> The Committee, however, believed that the government of Chile insufficiently consulted women’s groups and NGOs in Chile when drafting legislation.<sup>72</sup> Because Chilean women play such an important role in the economic, political, and cultural development of the country, the Committee criticized the lack of visibility and input of women in the government’s report.<sup>73</sup>

In December 2000, the Chilean legislature finally adopted the Group’s proposal.<sup>74</sup> In its preamble, the new Resolution stated that it was adopted in compliance with CEDAW, the Beijing Declaration,<sup>75</sup>

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abortion providers and on women who seek abortion. *Id.*

70. See MATUS, ANTONY & HURTADO, *supra* note 34, at 3 (stating that this “shadow” report is intended to supplement the report of the government of Chile to CEDAW); see also *Third Periodic Reports of States Parties: Chile*, U.N. GAOR, 21st Sess., at 2, U.N. Doc. CEDAW/C/CHI/3 (1999) [hereinafter *Third Periodic Reports of States Parties*] (providing updated information on the status of the CEDAW implementation by the government of Chile), available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N99/025/99/PDF/N9902599.pdf?OpenElement> (last visited Oct. 22, 2004).

71. See *Third Periodic Reports of States Parties*, *supra* note 70, at 8 (stating that women would gain the ability to participate in political, economic, social, cultural, and civil fields without being the subjects of discrimination); see also *Report of the Committee on the Elimination of Discrimination Against Women*, *supra* note 56, at 65 (recounting that Bilbao stressed that the Government of Chile’s Equal Opportunity Plan for Women covering 2000-2010 would be prepared with the participation of all sectors of Chilean society).

72. See Press Release, Chile Ending “Gender Order” Based on Exclusion, Violence Against Women, Women’s Anti-Discrimination Committee Told (June 22, 1999) (noting that cooperation with non-governmental organizations would give SERNAM more visibility as an institution in Chilean society), available at <http://www.un.org/News/Press/docs/1999/19990622.wom1144.html>. The Committee believed that maintaining a linkage with civil society and non-governmental organizations was crucial for promoting the status of women. *Id.*

73. See *id.* (conveying that although SERNAM enjoyed political support from the Executive Branch, the collaboration with the Executive Branch did not involve women). A more direct and closer dialogue among SERNAM, the Executive Branch, and women’s groups would provide a constant updating and flow of information. *Id.*

74. Regulating the Conditions for Male and Female Sterilization, Res. 2326, Ministry of Health (2000).

75. See generally *Report of Fourth World Conference on Women in Beijing in*

and the Platform for Action.<sup>76</sup> In the summer of 2000, the Independent Democratic Union (“IDU”), an ultra right-wing party, and the Catholic Church called the regulation “a Malthusian measure” that would undermine family life and harmony.<sup>77</sup> Pro-life groups criticized the Resolution by analogizing it to debates about divorce and abortion: “[This is] another attempt to separate men from women and to destroy the family unit. [T]his is an aberration, a new effort against life and for a culture of death. For a country where abortion is banned, this is a rapid step towards allowing it.”<sup>78</sup>

While enacting rules sensitive to women’s rights is a positive development for Chilean women, the administrative approach used by the Group has its limitations. For example, the rules adopted by the Group are vulnerable to political changes within both the Ministry and the Chilean government. Because of the potential fluctuation of women’s rights with each new political administration, women’s rights may not be fully recognized until Congress debates and passes the proposed Reproductive Rights Bill.<sup>79</sup>

#### IV. CONTROVERSY SURROUNDING THE INTRODUCTION OF POSTINAL

Emergency contraception (“EC”)<sup>80</sup> is described in the Ministry of

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1995, *supra* note 54, Annex I (affirming commitment to equal rights and inherent human dignity of women and men and other purposes and principles enshrined in the Charter of the United Nations).

76. *See id.* at Annex II (affirming that the human rights of women are an inalienable, integral, and indivisible part of the universal human rights).

77. FACULTAD DE DERECHO, UNIVERSIDAD DIEGO PORTALES, 2004 INFORME ANUAL DE DERECHOS HUMANOS EN CHILE 280-81 (2004); *see also Right Slams Liberal Stance in UN Women Conference*, SANTIAGO TIMES, May 25, 2000, available at 2000 WL 7221935 (reporting that Union Demócrata Independiente (“UDI”) representatives criticized the Chilean government for sending only feminists to a United Nations conference in June 2000 rather than sending pro-life organizations to the conference).

78. Magdalena Ossandón, *Oferta Esterilizadora ¿Hacia una Sociedad Infértil?*, EL MERCURIO, Feb. 4 2001, at D-14.

79. The proposed Reproductive Rights Bill was drafted by civil society groups and submitted to Congress by former legislator Fanny Pollarolo. In its origins, it was very similar to a bill about discrimination against people living with HIV, also drafted by civil society groups and submitted by Pollarolo. The Bill proposes a framework for gradual introduction of reproductive rights. It also regulates specific issues, penalizes discrimination, and safeguards the confidentiality of medical records. Boleín 2808-11, available at [www.sexualidadjoven.cl/legislacion/leg\\_chile\\_ley\\_marco\\_derechos\\_sexuales\\_6genero.htm](http://www.sexualidadjoven.cl/legislacion/leg_chile_ley_marco_derechos_sexuales_6genero.htm) (last visited Sept. 9, 2004).

80. WORLD HEALTH ORGANIZATION, EMERGENCY CONTRACEPTION: A GUIDE FOR SERVICE DELIVERY 20, WHO/FRH/FPP/98.19 (1999) [hereinafter EMERGENCY CONTRACEPTION] (explaining EC as a method of preventing pregnancy after unprotected sexual intercourse), available at [http://www.who.int/reproductive-health/publications/FPP\\_98\\_19/FPP\\_98\\_19\\_abstract.en.html](http://www.who.int/reproductive-health/publications/FPP_98_19/FPP_98_19_abstract.en.html) (last visited Apr. 7, 2004). Because EC does not interrupt pregnancy, it is not considered a form of abortion.

Health's technical documents on family planning.<sup>81</sup> Discussion regarding its introduction started in 1996, with the work of women's health and rights' advocates. While EC had long been prescribed in Chilean hospitals to victims of rape, its use was discontinued until an indeterminate date.<sup>82</sup>

In the late 1990s, the Instituto Chileno de Medicina Reproductiva ("ICMER"), a NGO working on reproductive health and rights issues, began researching the acceptability of EC among potential users, providers, and policymakers.<sup>83</sup> A team of medical practitioners within the public system worked concurrently to develop a new protocol for treating rape victims.

The ICMER study found that while detailed information was sorely lacking, EC was widely accepted by potential users and health care providers.<sup>84</sup> Armed with the report, advocates lobbied policymakers to introduce EC use, especially for rape victims, emphasizing its potential impact on unsafe abortions and unwanted pregnancy rates.<sup>85</sup> Legislators and NGOs also joined the lobbying effort.<sup>86</sup> Yet while most decisionmakers agreed with the value of introducing EC, policy change is easier said than done, and the effort eventually failed to secure significant progress in reproductive health policy.<sup>87</sup>

Public servants were often unwilling and fearful to speak openly about issues perceived to be perilously close to abortion during the

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81. EC is discussed in a section about anovulatory methods unavailable in Chile. RESPONSIBLE PARENTHOOD, *supra* note 30, at 73.

82. See Deborah Meacham & Lezak Shallat, *Morning After Pill: Chile Grapples With Sex*, WOMEN'S HEALTH J. 47 (2002) (showing that Dr. Soledad Diaz of the Instituto Chileno de Medicina Reproductiva cited wide acceptance of EC in a lobbying effort to make it more available over-the-counter in Chilean pharmacies).

83. See J. Villar & E. Ezcurra, *National Reproductive Health Research, the Americas*, WORLD HEALTH ORGANIZATION ANNUAL TECH. REP. 215 (1998) (describing how ICIMER began an enormous institution-initiated research project focused on biomedical and social science integration aimed at improving contraception in Chile).

84. *But see* Soledad Diaz, Ellen Hardy, Gloria Alvarado & Enrique Ezcurra, *Acceptability of Emergency Contraception in Brazil, Chile, and Mexico*, 19 CADERNOS DE SAUDE PUBLICA 1729, 1733 (2003) (noting that some users feared acute or long term side effects, as well as the need to access a health service facility in seventy-two hours). Additionally, the acceptability of EC is questionable due to the lack of education surrounding EC. *Id.*

85. See Meacham & Shallat, *supra* note 82, at 47 (reporting that "in Chile, approximately 20,000 cases of sexual abuse occur yearly—or a rape every 26 minutes—according to the Centro de Atencion a Victimas de Atentados Sexuales. Only 10% of all cases of rape are reported and less [than] 3% are brought to court").

86. See *id.* (listing Dr. Soledad Diaz from the ICIMER as one believing that EC should be available without a prescription).

87. See *id.* ("[The] Health Ministry has yet to stand by its guns and distribute emergency contraception, citing lack of procedural guidelines. Meanwhile, Chilean women are still waiting.").

EC education process.<sup>88</sup> Some health facilities openly acknowledged that they preferred to refer rape victims to other, more willing public system practitioners. They were aware of the method and its effectiveness, but fear of reprisal from senior staff and hospital administrators made them unwilling to prescribe it.<sup>89</sup> This practice speaks volumes about Chilean idiosyncrasy—we do not do such a thing here, but here is a tip about where you can go. Partly out of fear and partly out of self-censorship, the medical community would rather wash its hands and pass the burden to the user.

Public sector lawyers, brasher than medical staff and less encumbered with medical knowledge, were more willing to venture an opinion even if they knew nothing about the method.<sup>90</sup> A senior departmental counsel convinced his superiors that the method could not possibly be allowed because the Constitution bans abortion.<sup>91</sup> These lawyers became a serious obstacle, as their understanding of the law was based on an “official,” outdated, interpretation of constitutional and criminal doctrine, which they passed on to their superiors.<sup>92</sup>

Medical practitioners fully realized the importance of EC.<sup>93</sup> As the nature of their profession forces them to constantly update their skills and knowledge, medical practitioners proposed a new health services protocol that included EC for rape victims.<sup>94</sup> Health care providers also proposed EC as a treatment option in their clinics despite the absence of national guidelines for family planning.<sup>95</sup>

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88. See Diaz et al., *supra* note 84, at 1734 (explaining that medical practitioners in Chile anticipated strong opposition to EC from the Catholic Church and the political right due to their belief that EC differed little from abortion).

89. See *id.* at 1733 (providing a statement from a Chilean midwife, “When 14-year-old girls come for contraception, it’s difficult for us. If the parents find out and complain, we’re unprotected.”). *But see* Meecham & Shallat, *supra* note 82, at 47 (quoting Dr. Ramon Osses, Vice President of the Chilean Medical Association, who said that prior to the approval of Postinor-2, doctors created their own version of EC).

90. See Diaz et al., *supra* note 84, at 1731 (stressing that legal interpretations regarding EC presented obstacles to implementation of a contraception program because lawyers perceived EC as “micro-abortions”).

91. See *id.* at 1735-36 (indicating that influential political organizations perceive all laws of post-intercourse intervention as an illegal abortion).

92. *Id.*

93. See *id.* at 1733-34 (stating that medical professionals in Chile believed that EC could decrease the rising number of teenage pregnancies resulting from rape).

94. See *id.* at 1734 (noting that by including EC in the case of rape, conservative groups opposed to EC would be more accepting of the value of the method).

95. See *id.* at 1735 (indicating that medical practitioners could increase women’s awareness of EC through the dissemination of information through women’s magazines, radio broadcasts, and television programs because journalists are open to discussing sexual and reproductive issues).

In late 1998, the Minister of Health, a Christian Democrat, received a call from the head of the Catholic University School of Medicine. Soon after the conversation, distribution of the protocol was halted and a terse erratum added: "Ignore section on Emergency Contraception."<sup>96</sup> Despite the outrage caused by the elimination of EC from the guidelines, the situation remained stagnant until the election of social democratic President Ricardo Lagos.<sup>97</sup>

In 2001, an application to the Public Health Institute ("ISP") for the approval of an EC product sparked a fierce debate on the issues of choice, birth control, and women's autonomy. Mirroring prior events in Colombia,<sup>98</sup> EC foes in Chile quickly charged that the product prevented implantation of the fertilized egg in the womb, which amounted to a "micro-abortion."<sup>99</sup>

Because of these views on EC, self-styled, pro-life organizations, most with no prior legal experience,<sup>100</sup> subsequently filed a constitutional challenge against the Minister of Health, the ISP, and the drug manufacturer of EC.<sup>101</sup> The plaintiffs, mostly members of the Catholic groups Opus Dei and Legionnaires of Christ, filed four different actions "to protect the life of the unborn."<sup>102</sup> One plaintiff,

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96. See *id.* at 1731-32 (mentioning that EC was a specific guideline for care of adolescent victims of sexual violence in the 1998 Ministry of Health guidelines until an erratum specifically requested that pregnancy prevention be ignored).

97. See Ricardo Lagos, Address at the First Meeting of the Global Progress Commission (Mar. 4, 1997) (stating that every Chilean family, especially the poor, should have access to information on all methods of contraception), available at <http://www.globalprogress.org/ingles/madrid/lagos.html> (last visited Oct. 22, 2004).

98. See Eva Bazant, Abstract, *Lessons Learned from Promoting Emergency Contraception from a Rights Perspective: The Case of Profamilia, Colombia* (2002) (discussing the role of Profamilia, an IPPF affiliate in Colombia, in overcoming the Church's efforts to revoke the registration of Postinor 2). In Colombia, the National Food and Drug Institute ("INVIMA") approved Postinor 2 for sale. The Conference of Catholic Bishops asked INVIMA to withdraw its approval. Their request was denied, and, as in Chile, the issue led to a fierce, protracted battle. PROFAMILIA, ANTICONCEPCIÓN DE EMERGENCIA, UN DERECHO DE LA MUJER, LA EXPERIENCIA COLOMBIANA (International Planned Parenthood Federation & Profamilia eds., Bogotá, 2001).

99. See Diaz et al., *supra* note 84, at 1731.

100. Some of the organizations included the newly-minted Front for Life and Solidarity Action; the Research, Training and Study of Women; the International Center for the Study of Human Life; the Antu-Kuyén Pro-Life National Movement; the Youth Community Organization; and the World Mothers' Movement.

101. See generally *Pro Lifers File Suit Against Morning After Pill*, SANTIAGO TIMES, Feb. 14, 2001, available at 2001 WL 5995227 [hereinafter *Pro Lifers File Suit*] (reporting that the three organizations that filed suit were the Research, Training and Study of Women, the International Center for the Study of Human Life, and the World Mothers' Movement). These organizations filed suit in the Santiago Appeals Court based on constitutional guarantees of the right to life and of the physical and psychological integrity of women. *Id.*

102. Corte de Apelaciones de Santiago, Rol. 850-2001 (2001) (Chile).

professing to act on behalf of women, believed that women who used EC would experience devastating psychological consequences after they realized that they had committed a crime.<sup>103</sup>

The plaintiffs asked the court to ban the generic drug used to manufacture the “morning-after” pill and all other products having the same effects.<sup>104</sup> This request was particularly disturbing for physicians. The “morning-after” pill is essentially the regular birth control pill in a larger dose.<sup>105</sup> Therefore, the case could potentially result in a ban against most hormonal contraceptives sold in Chile. Making a case against the “morning-after” pill in these terms could open the floodgates for a major debate on contraception in general.

The filing of the court action restricted both the number of actors involved in the debate and the breadth of the debate. This was an astute approach because it stymied wider political deliberation because public officials generally shy away from commenting on cases before the courts. Chilean courts have proven to be fertile ground for debates with moral undertones because Chilean judges are permeable to conservative arguments.

The case presented interesting points of law that needed to be addressed. One point was whether a party could bring a constitutional challenge based on dubious facts. Another point was whether anyone could litigate on behalf of the unborn.<sup>106</sup> Chilean case law has traditionally rejected the notion of using constitutional challenges to fight class actions or on the behalf of unidentified individuals or differing interests.

The factual issues addressed were highly relevant. Unsupported by the medical literature, the plaintiffs claimed that EC prevented a fertilized egg from becoming implanted in the womb.<sup>107</sup> The literature does present clear evidence of two possible effects of EC but none related to implantation. Additionally, it was questionable

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103. *See id.*

104. *See id.* at ¶ 1.

105. *See* GENERAL PRACTICE NOTEBOOK: A UK MEDICAL ENCYCLOPEDIA ON THE WORLD WIDE WEB (2004), (explaining that the Yuzpe regimen, a method for preventing an unwanted pregnancy after intercourse, involves consuming two high-dosage estrogen tablets immediately after intercourse and repeating the same dosage twelve hours later), available at [http://www.gpnotebook.co.uk/simple\\_page.cfm?ID=1697644474](http://www.gpnotebook.co.uk/simple_page.cfm?ID=1697644474) (last visited Oct. 22, 2004).

106. *See* Rol. 850-2001, at ¶ 6-8 (holding that the plaintiffs, acting on behalf of all unborn children, did not comply with the constitutional principle proscribing abstract, unidentified individuals from filing suit). *See generally Pro Lifers File Suit, supra* note 101 (reporting that Jorge Reyes, the lawyer for the plaintiffs, stated that he believed the court would rule in their favor based on respect of life and human rights for unborn children).

107. *See* Rol. 850-2001, at ¶ 1 (claiming that the drug prevents ovulation).

whether the court could determine a point of fact in a procedure where the rules did not allow for the submission of evidence.

The plaintiffs further alleged a breach of both the Constitution and the American Convention on Human Rights. Given Chile's recent history of human and civil rights violations under an ultra right-wing regime, using an international human rights instrument was an ironic twist. Other legal arguments included violations of the Criminal and Civil Codes.

Once the writs were filed, women's rights organizations and other groups requested intervenor status.<sup>108</sup> As the Chilean system does not include the institution of the *amicus curiae*, the Court summarily denied these petitions because the applicants did not meet the constitutional requirements. The ruling galvanized the weakened women's movement for the first time in years.<sup>109</sup>

Some legal system players speculated that the court had turned down the women's groups because it had already decided that the actions were going nowhere. But if the court had already decided the case, it would have thrown it out on technicalities and would not have reviewed its substance. There was no evidence that EC caused psychological trauma or had any impact on a fetus,<sup>110</sup> so the only remaining question was whether it had an effect on fertilized eggs before implantation.<sup>111</sup> Sure enough, the court ruled that the plaintiffs could not litigate on behalf of a class of abstract individuals and did not find that they had a legitimate interest in the rights of the unborn.<sup>112</sup> In addition, it stated that a summary action was not the

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108. See *Global Controversy: Citizens Demand the "Morning-After" Pill*, WOMEN'S HEALTH J. 23 n.2 (2001) (reporting that on May 3, 2001, organizations, such as the Forum Network for Sexual and Reproductive Health and Rights, La Morada Corporation for Women's Development, Chilean Women's Emancipation Movement, and the Women's Institute, joined together to submit formal requests to the Chilean courts and demand dismissal of the case).

109. See *Chilean Supreme Court Approves Sale of Emergency Contraception*, WOMEN'S HEALTH J. 19 n.4 (2001) (listing twelve women's groups who brought a complaint before the Inter-American Human Rights Commission, accusing the Chilean government of giving priority to the pro-life groups, and violating women's legitimate right to privacy regarding their sexual behavior and reproductive health by denying medical and scientific experts and women's organizations access to the legal proceedings on the sale of Postinal). Among the list were the following: the Center for Justice and International Law ("CEJIL"), the Chilean Association for the Protection of Families, La Morada Corporation for Women's Development, and the Chilean Institute of Reproductive Medicine. *Id.*

110. See EMERGENCY CONTRACEPTION, *supra* note 80.

111. See Meacham & Shallat, *supra* note 82, at 47 (explaining that emergency contraception has effects well before the fertilized egg is implanted into the uterine wall).

112. See Rol. 850-2001, at ¶ 6-8.

proper setting for highly controversial and technical issues of fact.<sup>113</sup>

The decision remained silent on substantive issues, reflecting the fact that the attention of the justices was focused only on procedural issues. At certain points, the hearings resembled more of a political arena than a court of law. The attorney representing the Health Minister spent most of his allotted time stressing that he was a good Catholic, Democrat, and an ethical man acting on the dictates of his conscience. The plaintiffs' team of high-powered attorneys spoke of genocide, invoked every known argument against abortion, and concluded that allowing EC would foster a culture of death that ran counter to cherished Chilean values. The defense failed to address important points of law, did not bring up international human rights instruments, made a weak constitutional case, and spent most of its time making barely relevant political points.

In her dissenting vote, Madam Justice María Antonia Morales wrote that the disputed effect did exist as the pill, according to her and citing no evidence, does cause changes in the lining of the uterus.<sup>114</sup> She argued that the Chilean legal system had rules protecting the life of the unborn child at all stages of development, in line with Article 4.1 of the American Human Rights Convention, which she read as stating that "life begins at conception."<sup>115</sup>

On appeal, in late August 2001, the Supreme Court upheld Madam Justice Morales' dissenting opinion three-to-two and rescinded authorization to manufacture, distribute and sell Postinal, the brand-name of EC.<sup>116</sup> On the issue of the plaintiffs' entitlement to file an action on behalf of the unborn child, the chamber ruled that the conditions were met by the very nature of the groups involved.<sup>117</sup> In

113. See *id.* at ¶ 11.

114. Rol. 850-2001, at (a) (Morales, J., dissenting). See generally *Questions and Answers: Emergency Contraception*, 20 CONSCIENCE: A NEWS J. OF PROCHOICE CATH. OPINION 23 (1999) (explaining that emergency contraception "may prevent or delay ovulation, alter the lining of the fallopian tubes so that the egg and sperm are less likely to meet, or alter the lining of the uterus to prevent implantation of a fertilized egg").

115. Rol. 850-2001, at (b) (Morales, J., dissenting); see CHILE CONST. ch. 3, art. 19 (guaranteeing to all persons "[t]he right to life and to the physical and psychological integrity of the individual [and declaring that] the law protects the life of those about to be born"); American Convention on Human Rights, July 18, 1978, art. 4.1, 1144 U.N.T.S. 123 ("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.").

116. See Corte Suprema de Chile, No. 2186-2001, at ¶ 20 (2001) (Supreme Court of Chile). But see *Chilean Supreme Court Approves Sale of Emergency Contraception*, *supra* note 109 (explaining that despite their prohibition on Postinal, the Supreme Court has authorized the sale of Levonorgestrel, which is the active ingredient in the emergency contraceptive Postinor 2).

117. See No. 2186-2001, at ¶¶ 3-4, 7-8 (clarifying that the constitution only

other words, because the group's driving force was the fight against abortion, their interest was legally justified, a decision that stood in sharp contrast to the chamber's refusal to recognize women's organizations and APROFA, the local chapter of IPPF.<sup>118</sup>

The Supreme Court ruling provided additional substantive arguments on the status of the fetus. Breaking with a consistent, time-honored line of interpretation of criminal law by both courts and scholars, the chamber said that a fetus has a constitutional right to be born and become a person.<sup>119</sup> Any threat or harm to a fertilized egg would constitute abortion under the Criminal Code.<sup>120</sup>

The minority vote said the status of the fetus could not be established in a summary action where other interested parties had not been allowed to intervene, much less in the absence of factual evidence.<sup>121</sup> President Lagos resolved that his government would stand fast on what he saw as an issue of freedom of thought.<sup>122</sup> Thus, soon afterwards, the ISP approved for sale an equivalent EC product manufactured by a different drug company.<sup>123</sup> The plaintiffs in the original action responded to this development by asking the Supreme Court to declare that their ruling was binding on any and all parties. The Court declined. Madam Justice Morales, the Court of Appeals member who had written the dissenting opinion, agreed that the

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requires concrete individuals who could be affected by the cause of action, even when the whereabouts and name of those individuals are unknown).

118. See Gonzalez, *supra* note 25 (reporting that the justices accepted arguments by three conservative, Catholic Church-backed groups who said that the emergency contraception pill was an abortion, which is illegal in Chile). "Socialist parliamentary deputy Fanny Pollarolo, said the judges ignored scientific arguments that contradict assertions that the drug causes abortion, adding that the court's ruling constitutes 'a serious step backwards, one that closes off the possibility for being much more democratic and for recognizing ourselves as adults and pluralists.'" *Id.*

119. See No. 2186-2001, at ¶ 16-17 (claiming that the right of the unborn to live is supported by Article 19 of the Chilean Constitution and Article 5 of the Constitution, which provides that it is the state's duty to respect and promote the essential rights individuals have by virtue of their human nature).

120. See CUERPO Y DERECHO: LEGISLACIÓN Y JURISPRUDENCIA EN AMERICA LATINA 183 (Luisa Cabal et al. eds., Editorial Temis S.A. 2001) (explaining that the Supreme Court's prohibition of the use of Postinal was based on the notion that the use of the contraceptive medicine violated the fetus' right to life).

121. See No. 2186-2001, at ¶ 2-3 (Yurac, J., and Kokisch, J., dissenting).

122. See *Pugna Tras El Veto a La Píldora del Día Después*, EL SUR, Aug. 31, 2001 (recounting President Ricardo Lagos' endorsement of the use of the pill and support of the ISP's work).

123. See *Chilean Supreme Court Approves Sale of Emergency Contraception*, *supra* note 109, at 19 (detailing that on December 21, 2001, the Supreme Court authorized the sale of Levonorgestrel, which is the key ingredient used in emergency contraceptives, including the banned Postinal, and that there are no restrictions to the sale of other emergency contraceptive drugs containing this ingredient).

ruling applied expressly to Postinal and to no other product.<sup>124</sup>

Cynics argued that the ambiguous outcome was characteristically Chilean. Optimists, myself included, think that the Supreme Court realized that their ruling could cause serious harm to a family planning program, which had managed to survive many governments and more than thirty years of operation with no interference from anyone except self-styled, pro-life organizations.

EC detractors are not uncreative people. After the Supreme Court decision of December 2001, the groups opposed to EC who filed the original suit tried every available venue to stop the sale of the “morning-after” pill. Some of these groups, such as the Antu-Kuyén Pro-Life National Movement, Front for Life and Solidarity Action, and the World Mothers’ Movement, brought a consumer legislation suit against drugstores, arguing that fetuses were consumers who would be harmed by the pill.<sup>125</sup> Later, they petitioned the Comptroller General of Chile for an investigation and disciplinary action against ISP officials who approved the alternative EC product.<sup>126</sup> None of these strategies bore fruit and some even backfired. The career prospects of the heir-apparent to the outgoing Comptroller General all but ended after the media took notice that a particularly strident petitioner in the case was a son of his.<sup>127</sup>

As in Colombia, where a fierce battle over EC also raged, Postinor 2 was approved for sale as a prescription drug only.<sup>128</sup> This was a rather odd decision, given that the government was willing to fight the good fight at first, but then imposed a needless restriction.

124. See *Aprueban Unánimemente Venta de Píldora Abortiva en Chile*, ACI DIGITAL, Jan. 2, 2002 (stating that the Supreme Court’s resolution was “not pronounced in general and absolute terms [in regards to] prohibiting the circulation and commercialization of drugs with . . . Levonorgestrel”).

125. See *Chile: Aliances Around the Contraception of Emergency are Reinforced*, RED DE SALUD DE LAS MUJERES LATINOAMERICANAS Y DEL CARIBE, Oct. 10, 2003 (indicating that pro-life organizations and opposition to emergency contraception initiated new legal actions in courts to reverse the authorization of Postinor 2).

126. See *id.* (reporting that despite their efforts to argue on different grounds, pro-life organizations’ attempts to prohibit the sale of drugs with similar contents to Postinal ultimately failed).

127. See *Caso Píldora Complica a Subcontralor*, LA TERCERA, available at [www.mujereschile.cl/conocedoras/articulos.php?articulo=802&crea=kiosko](http://www.mujereschile.cl/conocedoras/articulos.php?articulo=802&crea=kiosko) (last visited Oct. 22, 2004); Ángela Vergara y Carlos Saldivia, *La Limpieza Política de Lagos en la Contraloría*, QUE PASA, Aug. 2, 2002, available at [www.quepasa.cl/revista/2002/08/02/t-02.08.QP.NAC.CONTRALORIA.html](http://www.quepasa.cl/revista/2002/08/02/t-02.08.QP.NAC.CONTRALORIA.html) (last visited on Oct. 22, 2004).

128. See *Chile To Distribute Free Abortifacient Morning-After Pill*, CATHOLIC WORLD NEWS, Oct. 16, 2001 (reporting that the same day the Chilean Supreme Court banned the morning-after pill Postinal on the grounds that it can cause an abortion, the Ministry of Health surprisingly approved Postinor 2, claiming that the Court only banned a certain morning-after pill brand), available at <http://www.cwnews.com/news/viewstory.cfm?recnum=16607> (last visited Oct. 22, 2004).

## CONCLUSION

Although Chile has made great strides in terms of civil liberties, the concept of an open society still seems to apply mostly to economics. Our institutions work, or appear to work; we enjoy freedom; but we are not overly concerned about ensuring that our domestic policies and legislation are consistent with our politically-correct, outward facade.

By eschewing issues of reproduction and sexuality in order to avoid internal conflict, the ruling coalition has deprived Chileans of a chance to build a more democratic society. This self-imposed silence has given conservative groups a free hand to shape the public agenda.