Reproductive Rights in Chile: An analysis of abortion legislation in one of the world’s most restrictive legal contexts

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OBJECTIVE
I analyzed international and regional human rights norms and case law related to abortion—focusing on the potential conflict between women’s rights and embryonic/fetal rights—to identify justifications for reforms to abortion law in Chile to match human rights standards. I also considered public health and public opinion justifications.

HISTORY OF CHILE’S ABORTION LAW
- 1874: Penal Code criminalizes abortion in all circumstances
- Several legislative attempts failed in recent years to legalize abortion
- 2013 bill proposed by civil society group “Miles” legalizing abortion in three circumstances: 1. Conditions that place a woman’s health or life in danger 2. Congenital fetal malformations incompatible with the child’s survival after birth 3. Rape

PUBLIC OPINION IN CHILE
In a national survey conducted in 2009, a majority agreed abortion should be available in cases of rape (67%), malformation of the fetus (64%), danger to the woman’s life as a result of the pregnancy (64%), and incest (58%); 40% supported abortion legalization for reasons related to the mother’s mental health and 15% believed abortion should be available for “any reason that the woman decides.” (Díezes et al., 2011)

HUMAN RIGHTS ANALYSIS
Women’s right to abortion
1. Several human rights are relevant for women’s right to abortion (see Table)
2. Several Latin American and Islamic states issued formal reservations to the Cairo Program of Action due to a possible interpretation allowing for legal abortion, though Chile was not one of them; Chile also signed on to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and joined the Beijing Platform consensus—both of which suggest a right to abortion in certain circumstances
3. Highlights of abortion rights interpretation and regional case law:
   - Committee on Economic, Social and Cultural Rights (CESCR) 2004 and CEDAW 2006 & 2012: recommended Chile decriminalize abortion in cases of rape, incest, and threat to women’s life/health
   - Committee against Torture (CAT) 2004: recommended Chile stop extracting confessions from women seeking post-abortion care after having illegal abortions
   - Cases in other South American countries related to women’s rights violations from denial of abortion access have been adjudicated by human rights bodies
   - Only legally-binding statement making explicit a right to abortion is regional African Maputo Protocol
4. Inter-American Commission on Human Rights held hearing on impact of criminal abortion laws in 2013

Embryonic/fetal rights?
1. Interpretation of human rights treaties suggests protections do not begin before birth (CRR 2012)
   - Universal Declaration of Human Rights: “All humans born free and equal in dignity and rights”
   - International Covenant on Civil and Political Rights (ICCPR): Drafters rejected proposal to amend article 6 to extend right to life to conception
   - Convention on the Rights of the Child: issued no comments suggesting right to life before birth
2. American Convention on Human Rights: “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.”
   - Interpretation suggests no absolute protections: in Baby Boy v. United States, Inter-American Commission on Human Rights clarified that this does not preclude a liberal abortion law, and in 2012 the Inter-American Court struck down Costa Rica’s ban on in-vitro fertilization
3. Chilean Constitution: “The constitution assures the right of all people to life and physical and mental integrity. The law protects the life of those about to be born.”
   - Establishes distinct judicial status for embryo/fetus as “object of imperative protection”; this protection is akin to responsibility of State to project environment and animals (Lux 2011)
   - September 2013: Legislators established annual “Day of Those About to Be Born and Adoption”

CONCLUSION
- Chile’s relatively low maternal mortality rate is unique among countries with highly restrictive abortion laws
- International and regional human rights norms and treaty monitoring bodies reveal unquestioned support for abortion in cases of life endangerment and rape given the need to protect women’s right to physical integrity
- The relationship of abortion with rights to privacy, autonomy, non-discrimination, and religious freedom, and the 2011 statement by the Special Rapporteur on the Right to Health (see below) supporting decriminalization of abortion in all circumstances, suggest that human rights norms and decisions should eventually more clearly support abortion in more circumstances
- The imperative to protect prenatal life— as in the American Convention on Human Rights and the Chilean constitution—has not been interpreted as absolute. Further explicit guidance from Human Rights normative bodies is needed to clarify potential conflict of prenatal protections and human rights

RECOMMENDATIONS
- Chile should modify its abortion law to match human rights standards and protect women’s health and rights
- Advocacy efforts can be bolstered by human rights guidance, public opinion polls, and momentum for legal change in other countries in the region

“Criminal laws penalizing and restricting induced abortion are the paradigmatic examples of impermissible barriers to the realization of women’s right to health and must be eliminated. These laws infringe women’s dignity and autonomy by severely restricting decision-making by women in respect of their reproduction.”