

***The Legal and Political Battles over the Distribution of  
Emergency Contraception in Chile under the  
Presidencies of Ricardo Lagos (2000-2005) and Michelle  
Bachelet (2006-2010)***

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*I, Carmen G. Sepúlveda Zelaya confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.*

### ***Abstract***

This thesis analyses the policy process behind the distribution of Emergency Contraception (EC) in Chile during the administrations of Ricardo Lagos (2000-2005) and Michelle Bachelet (2006-2010). For more than ten years, this policy process was marked by a series of political and legal battles at the centre of which were women's sexual and reproductive rights. The legalisation and distribution of EC had the effect of alerting conservative and religious groups opposing EC for its alleged abortive effect. What could have been considered a minor policy issue by many political analysts became a particularly visible and influential issue, especially once Michelle Bachelet, Chile's first female president, took power in 2006. Feminists, the Catholic Church, lawyers and doctors became the main players in front of tribunals supporting or opposing the public policy. The main concern of this research is to understand why the EC policy was such a contentious issue in Chile and elucidate which were the main factors affecting the advancement of this progressive social policy and its final gendered outcome. The central research question driving this study is what does the EC policy process tell us about the role of institutions in the advancement of women's sexual and reproductive rights in Chile? The thesis shows that both formal and informal institutions played a major role in the policy environment in which feminist and sexual and reproductive health and rights advocates had to engage. The role of formal institutions such as the Constitutional Tribunal and the power held by the executive were matched by the power of informal institutions such as the consensus rule, the role of judges and informal lobbying by social actors, as well as the presence of the first female president. Bachelet's profile as a doctor, feminist and woman mixed with her presidential power provides an important explanation to the positive outcome of the policy process.

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## Glossary

<b>ACHM</b>	Asociación Chilena de Municipalidades (Association of Municipalities of Chile)
<b>APROFA</b>	Family Planning Association of Chile, formerly known as Asociación Chilena de Protección a la Familia, member of the International Planned Parenthood Federation (IPPF)
<b>CEMERA</b>	Centro de Medicina Reproductiva y Desarrollo Integral del Adolescente, Universidad de Chile (Centre for Reproductive Medicine and Integral Development of Adolescents, University of Chile)
<b>CIBISAP</b>	Centro de Investigaciones en Bioética y Salud Pública, Universidad de Santiago (USACH) (Centre for Research on Bioethics and Public Health, University of Santiago)
<b>CONFUSAM</b>	Confederación Nacional de Funcionarios de Salud Municipalizada (National Confederation of Municipal Health Civil Servants)
<b>CORSAPS</b>	Corporación de Salud y Políticas Sociales (Health and Social Policy Corporation)
<b>Decreto Supremo</b>	Supreme Decree
<b>EC</b>	Emergency Contraception
<b>FIGO</b>	International Federation of Gynaecology and Obstetrics
<b>FLACSO</b>	Facultad Latinoamericana de Ciencias Sociales (Latin American Faculty of Social Sciences)
<b>Foro Salud or ‘Foro’</b>	Foro Red de Salud y Derechos Sexuales y Reproductivos (Network Forum for Sexual and Reproductive Health and Rights)
<b>ICEC</b>	International Consortium for Emergency Contraception

<b>ICMER</b>	Instituto Chileno de Medicina Reproductiva (Chilean Institute of Reproductive Medicine)
<b>IPPF</b>	International Planned Parenthood Federation
<b>ISP</b>	Instituto de Salud Pública (Institute of Public Health)
<b>MIDEPLAN</b>	Ministerio de Planificación (Ministry of Planning)
<b>MINED</b>	Ministerio de Educación de Chile (Ministry of Education of Chile)
<b>MINJU</b>	Ministerio de Justicia (Ministry of Justice)
<b>MINSAL</b>	Ministerio de Salud de Chile (Ministry of Health of Chile)
<b>ODEPLAN</b>	Oficina de Planificación Nacional (National Planning Bureau), which later became known as MIDEPLAN
<b>Optinor</b>	Third brand of Emergency Contraception Pill authorised in Chile, produced by the Indian pharmaceutical company ICON based in the UK
<b>Postday</b>	A Colombian brand of Emergency Contraception Pill authorised in Chile, produced by the pharmaceutical company Lafrancol
<b>Postinal</b>	First brand of Emergency Contraception Pill authorised in Chile, produced by the pharmaceutical company Silesia
<b>Postinor-2</b>	Second brand of Emergency Contraception Pill authorised in Chile, produced by the pharmaceutical company Grünenthal
<b>PUC</b>	Pontificia Universidad Católica de Chile (Pontifical Catholic University of Chile)
<b>RSMLAC</b>	Red de Salud de Mujeres de América Latina y el Caribe (Women's Health Network for Latin America and the Caribbean)
<b>SEGPRES</b>	Secretaría General de la Presidencia (The Presidency's General

	Secretary (The Executive's Coordinating Body))
<b>SERNAM</b>	Servicio Nacional de la Mujer (Women's Affairs Ministry of Chile)
<b>SRHR</b>	Sexual and Reproductive Health and Rights
<b>TACE</b>	A brand of Emergency Contraception Pill commercialised by the pharmaceutical company Recalcine
<b>TC</b>	Tribunal Constitucional (Constitutional Tribunal)
<b>ULA</b>	Universidad de los Andes (University of the Andes), belonging to the Opus Dei
<b>UNFPA</b>	United Nations Population Fund
<b>WHO</b>	World Health Organisation

#### Political Parties

<b>PDC (or DC)</b>	Partido Demócrata Cristiano (Christian Democrat Party)
<b>PPD</b>	Partido por la Democracia (Party for Democracy)
<b>PRSD</b>	Partido Radical Social Demócrata (Radical Social Democrat Party)
<b>PS</b>	Partido Socialista (Socialist Party)
<b>RN</b>	Renovación Nacional (National Renewal)
<b>UDI</b>	Unión Demócrata Independiente (Democratic Independent Union)

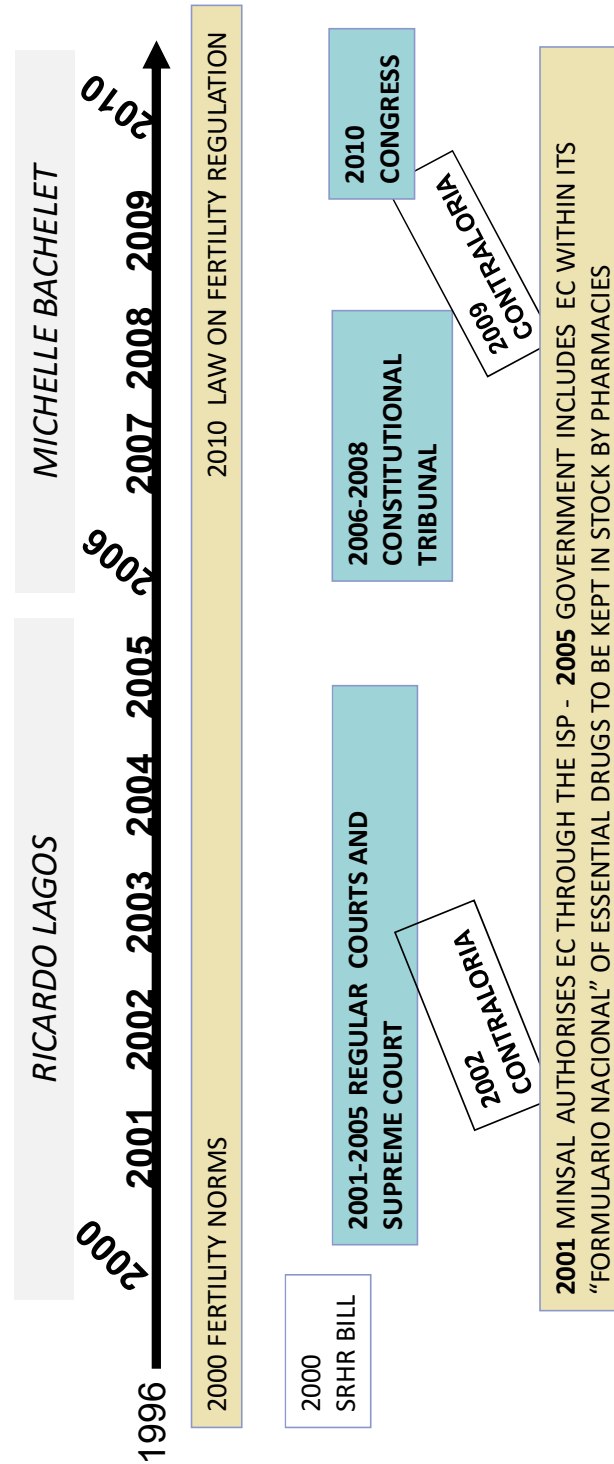
## Brief timeline for the EC legal and political process

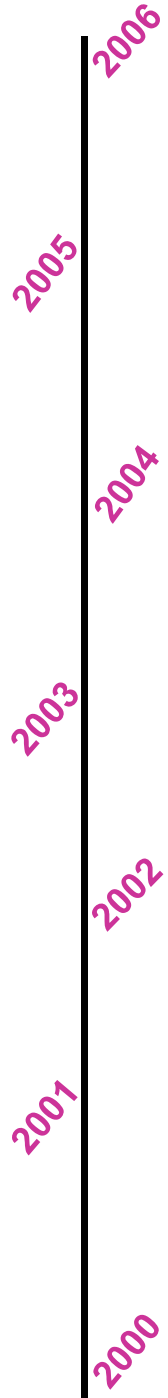
<b>1998</b>	<ul style="list-style-type: none"> <li>• Scoping research is carried out by Dr Díaz and ICMER to identify the need for EC and acceptability by the population.</li> <li>• The Frei Administration launches the ‘Guidelines for the Treatment of Victims of Sexual Violence in Emergency Health Services’, which originally include the distribution of EC, but is excluded in the final version.</li> </ul>
<b>2000</b>	<ul style="list-style-type: none"> <li>• <b>Ricardo Lagos becomes president.</b></li> </ul>
<b>2001</b>	<ul style="list-style-type: none"> <li>• The ISP authorises the production and commercialisation of EC in Chile. The first EC brand, Postinal, is produced by pharmaceutical company Silesia.</li> <li>• The Church immediately denounces EC for its alleged abortifacient effect.</li> <li>• Pro-life groups launch the first legal claim against the ISP and Silesia, successfully blocking EC distribution as Postinal.</li> <li>• The ISP with pharmaceutical company Grünenthal launch an alternative EC brand, Postinor-2, avoiding the impact of the earlier ruling.</li> </ul>
<b>2002</b>	<ul style="list-style-type: none"> <li>• The pro-life lobby brings a new legal claim against EC by attacking Postinor-2.</li> <li>• Civil society and SRHR advocates work on the update of the “National Fertility Norms.”</li> </ul>
<b>2003</b>	<ul style="list-style-type: none"> <li>• The court rules in favour of the pro-life petitioners and prohibits the distribution of Postinor-2.</li> </ul>
<b>2004</b>	<ul style="list-style-type: none"> <li>• A court of appeals revokes the first sentence against the distribution of Postinor-2. The pro-life lobby brings case to the Supreme Court.</li> </ul>
<b>2005</b>	<ul style="list-style-type: none"> <li>• Presidential election campaign.</li> <li>• <b>Infante, Sub-Secretary of Health, announces that the Norms are ready to be published and will include the distribution of EC to all women. Infante is forced to resign immediately.</b></li> <li>• The Supreme Court rules against the pro-life petitioners, reaffirming that it is not the role of judges and courts to decide on scientific matters.</li> </ul>
<b>2006</b>	<ul style="list-style-type: none"> <li>• <b>Bachelet becomes president.</b></li> <li>• Barria, Minister of Health, announces the planned launch of the Norms, which include the distribution of EC.</li> <li>• The anti-EC lobby, supported by 36 Parliamentarians, brings a case against the President to the Constitutional Tribunal.</li> </ul>

<b>2007</b>	<ul style="list-style-type: none"> <li>• Bachelet signs a Supreme Decree to launch the Norms, thereby precluding any potential claim regarding the unconstitutional right to the distribution of EC.</li> <li>• The anti-EC lobby once again brings the case to the Constitutional Tribunal with the support of Parliamentarians.</li> </ul>
<b>2008</b>	<ul style="list-style-type: none"> <li>• Municipal elections campaign.</li> <li>• The Constitutional Tribunal rules against the distribution of EC through the national health system based on “a reasonable doubt” about the abortive nature of EC.</li> <li>• EC remains available in pharmacies because of a legal loophole.</li> <li>• Mass protests take place led by feminist organisations and the Movimiento por la Anticoncepción.</li> <li>• Government decides to distribute EC through municipal health system.</li> <li>• Opposition parties challenge the municipal distribution of EC and bring case to the Contraloría.</li> </ul>
<b>2009</b>	<ul style="list-style-type: none"> <li>• Presidential and Parliamentarian elections campaign.</li> <li>• The Contraloría rules that EC is legal but cannot be distributed by municipal health services, producing a legal vacuum and popular uproars including civil society and politicians.</li> <li>• Bachelet sends the Fertility Bill to Congress with “urgency”. It is approved in Parliament through cross-party support.</li> </ul>
<b>2010</b>	<ul style="list-style-type: none"> <li>• Bachelet promulgates the “Law for the Regulation of Fertility...” in the last weeks of her mandate.</li> </ul>

## Visual timeline and description of the stages of the judicialization process

### THE STAGES OF THE JUDICIALIZATION OF THE EC POLICY 2000-2010





2000-2005 RICARDO LAGOS PRESIDENT	
2000-2003 MICHELLE BACHELET IS MINISTER OF HEALTH	2003-2005 PEDRO GARCIA IS MINISTER OF HEALTH
2000 UPDATE OF FERTILITY NORMS STARTS – READY FOR PUBLICATION END OF 2004	
MARCH 2001: FIRST BRAND OF EC AUTHORISED -START OF SERIES OF JUDICIAL CHALLENGES	
<p><b>MARCH 2001:</b> FIRST CASE BROUGHT BY PRO-LIFE GROUPS TO <b>COURT OF APPEALS</b> THAT RULES IN FAVOUR OF GOVERNMENT</p> <p><b>MAY 2001</b> PRO-LIFE GROUPS BRING NEW CASE TO <b>COURT OF APPEALS</b> BUT COURT DISMISSES THEIR CASE</p>	<p><b>JANUARY 2002</b> PRO-LIFE GROUPS APPEAL TO GENERAL COMPTROLLES AGAINST POSTINOR-2 <b>CONTRALORIA RULES IN FAVOUR OF GOVERNMENT</b></p> <p>CASE AGAINST PHARMACIES SELLING EC IS DROPPED BY PRO-LIFE GROUPS</p>
<p><b>MARCH 2001:</b> FERTILITY NORMS WORKING GROUP IS CREATED</p>	<p><b>JUNE 2004</b> ORDINARY COURT RULES AGAINST THE GOVERNMENT AND PHARMACEUTICAL BEHIND EC: EC WITHDRAWN FROM MARKET AND GOVT STOCKS SEIZED IRREGULARLY</p>
<p><b>AUGUST 2001</b> NEW APPEAL AGAINST <b>POSTINOR-2</b> GOVERNMENT BUT MINSAL LAUNCHES A NEW BRAND OF EC POSTINOR-2/ PRO-LIFE GROUP TRY TO EXTEND RULING TO INCLUDE POSTINOR-2 BUT SUPREME COURT REFUSES</p>	<p><b>DECEMBER 2002</b> PRO-LIFE GROUPS BRING NEW CASE TO ORDINARY COURT AGAINST HEALTH AUTHORITIES QUESTIONING LEGALITY AND CONSTITUTIONALITY OF DISTRIBUTION OF EC</p> <p><b>CIVIL SOCIETY AND WOMEN'S GROUPS JOIN THE CASE</b></p>
<p>1998 EC IN <b>PROTOCOL FOR CARE OF CHILDREN VICTIMS OF SEXUAL ABUSE/ BUT WITHDRAWN</b></p>	<p><b>MARCH 2005: GOVERNMENT ANNOUNCES LAUNCH OF FERTILITY NORMS</b> BUT RETRACTS- LAGOS SACKS DR. INFANTE UNDER PRESSURE FROM PDC</p> <p><b>SEPTEMBER 2005</b> PRO-LIFE GROUPS APPEAL TO <b>SUPREME COURT</b> FOR THE SECOND TIME</p> <p><b>DECEMBER 2005</b> SUPREME COURT RULES IN FAVOUR OF THE GOVERNMENT AND CONFIRMS EC IS LEGAL</p>

2007

2009

2006

2008

2010

2006-2010 MICHELLE BACHELET BECOMES PRESIDENT

2006-2008 SOLEDAD BARRIA IS MINISTER OF HEALTH

MARCH 2006: BARRIA ANNOUNCES THE 'FERTILITY NORMS' AND TRIGGERS NEW JUDICIALIZATION PROCESS

JANUARY 2006  
AGES BRINGS  
PHARMACEUTIC  
AL COMPANY  
GRUNENTHAL  
TO COURT  
  
THE COMPANY  
DECIDES TO  
STOP SELLING EC  
IN CHILE

SEPTEMBER 2006  
PRO-LIFE GROUPS  
AND MEMBERS OF  
PARLIAMENT  
APPEAL TO THE  
CONSTITUTIONAL  
TRIBUNAL

CONSTITUTIONAL  
TRIBUNAL  
ACCEPTS TO  
REVIEW THE EC  
CASE AND  
REQUESTS THE  
PRESIDENT TO  
SIGN A SUPREME  
DECREE

JANUARY 2007  
BACHELET SIGNS  
THE SUPREME  
DECREE

MARCH 2007  
PRO-LIFE  
GROUPS AND  
MEMBERS OF  
PARLIAMENT  
APPEAL TO THE  
CONSTITUTIONAL  
TRIBUNAL  
AGAIN

GOVERNMENT  
FINES  
PHARMACIES  
REFUSING TO  
STOCK & SELL EC

MARCH 2008  
TC RULES AGAINST EC  
BASED ON  
'REASONABLE DOUBT'-  
EC NOT DISTRIBUTED  
VIA HEALTH SYSTEM,  
ONLY PHARMACIES

22 APRIL 2008  
PRO-EC MARCH  
ORGANISED BY  
FEMINISTS GATHERS  
20000 PEOPLE IN THE  
STREETS

ANTI-EC COALITION  
ASKS THE GENERAL  
COMPTROLLER TO  
REVIEW GOVERNMENT  
DECISION TO  
DISTRIBUTE EC AT  
MUNICIPAL LEVEL

ELECTORAL YEAR:  
MARCH 2009  
CONCERTACION'S  
CANDIDATE FREI  
SUPPORTS THERAPEUTIC  
ABORTION

JUNE 2009  
GENERAL COMPTROLLER  
EXTENDS TC RULING ON  
EC TO MUNICIPAL HEALTH  
DISTRIBUTION OF EC

JULY 2009: ALL  
PRESIDENTIAL  
CANDIDATES OPPOSE  
RULING AND SUPPORT  
BACHELET'S BILL WITH  
PRESIDENTIAL URGENCY  
APPROVED ON JULY 15

JANUARY 2010:  
BACHELET SIGNS  
LAW APPROVED BY  
CONGRESS  
ALLOWING EC AND  
POLICIES ON  
REPRODUCTIVE  
ISSUES BY THE STATE

PHARMECEUTICAL COMPANIES UNDER PRESSURE

## CHAPTER 1: Introduction

In January 2010, during the last month of her presidential mandate and on the day after her political coalition the *Concertación* was defeated for the first time in twenty years, Michelle Bachelet signed the “Ley sobre Normas sobre Información, Orientación y Prestaciones en Materia de Regulación de la Fertilidad (Law on Information, Orientation and Services for Fertility Regulation Issues) (Biblioteca del Congreso, 2010). This watershed law came about to put an end to the ten year old “saga”<sup>1</sup> surrounding the policy efforts for the distribution of emergency contraception (EC) in Chile. Under the Lagos and Bachelet administrations, EC became one of the most contentious issues and controversial debates in Chilean society regarding women’s reproductive health and rights. Ultra-conservative sectors of Chilean society in alliance with the Catholic Church spent the first ten years of the century fiercely opposing both the legalisation and free distribution of EC to women by the government.

This research analyses the policy process behind the distribution of EC between 2000 and 2010, under the administrations of Ricardo Lagos and Michelle Bachelet. The study shows that the political and institutional environment in which the policy for the distribution of EC was set explains the gradual politicisation of the role of the courts

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<sup>1</sup> The term was coined by Lidia Casas who has produced a detailed account of the legal challenges that surrounded the legalisation and distribution of emergency contraception in Chile (Casas Becerra 2008).

and judges, also known as a process of judicialisation.<sup>2</sup> This had important implications for all actors<sup>3</sup> involved in the policy process.<sup>4</sup>

The research uses a Feminist Institutionalism (FI) approach to analyse why specific institutions and actors are given more weight more than others during the policy-making process for the advancement of women's sexual and reproductive rights. The analysis aims to unveil how power is sometimes invisible in these processes which are deeply gendered. Thus, the main question driving the research is: What does the EC policy process tell us about the role of institutions in the advancement of women's sexual and reproductive rights in Chile?

The thesis addresses these issues by looking at institutions,<sup>5</sup> in particular judicial ones, and the impact these have on feminist demands regarding sexual and reproductive health and rights (SRHR) policies. The institutionalist approach used includes a Historical Institutionalism (HI) component to show that the historical background of the transition to democracy in Chile has not only affected the capacity of civil society in general to act but has also shaped the ways in which feminists can access spaces to produce policy change regarding SRHR. The thesis also analyses the judicialisation

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<sup>2</sup> I follow Pilar Domingo's (2004) definition of judicialisation as the "greater involvement by judges in law-making and social control". Domingo highlights the increasing presence of "judicial processes and court rulings in political life", and how this is probably a manifestation of the fact that an increasing number of political, social and state-society conflicts are resolved in courts. Social actors in fact seek the arbitration of judges to advance their interests, especially to hold the state accountable for citizens' rights (2004, 1-2)

<sup>3</sup> Policy actors are defined in this thesis as both individuals and groups involved directly or indirectly, formally and informally in the efforts to influence the policy process. They can include politicians, grassroots' activists, the Church, judges, civil servants, unions, etc.

<sup>4</sup> By "policy process" I understand the diverse and complex type of stages, institutions and actors involved in the making of public policy. Here I refer more to the work of Paul Sabatier who proposes a more integrated model of policy process analysis in the form of the Advocacy Coalition Framework (Sabatier and Weible 2006; Sabatier 1991).

<sup>5</sup> The thesis uses the definition of institutions understood as the "rules of the game" or set of formal and informal rules and norms that dictates our lives (see Ch. 3), and are part of a shared understanding in society with clear sanctions attached to them. Thus institutions can be social, economic or political, etc.

process and the role of courts and judges under the administrations of Lagos and Bachelet through a FI lens which gives equal importance to formal and informal institutions. In so doing, the thesis also provides new insights on why other crucial reproductive issues, such as the right to abortion have not been reinstated in Chile since 1989.

This thesis looks at the specific features of the context in which the policy process behind the emergency contraception policy took place through the following sub-questions: How did formal and informal institutions influence the EC policy process, in particular during the judicialisation process? How did actors see their ideas reflected or ignored during the policy process? What was the impact of ten years of legal and political battles for the distribution of EC on feminists and other civil society groups? What do we learn about their capacity to mobilise and the efficacy of women and feminist networks trying to influence the SRHR agenda in Chile? How did the presence of a feminist and first female president impact on the outcomes of the policy process?

Michelle Bachelet's administration is of particular interest from a feminist perspective. Her election in December 2005 represents one of the most important political milestones for women in Chile and Latin America, since she was the first woman in South America to reach this leadership position through her own political career rather than other factors such as family ties. As Marcela Ríos Tobar explains:

... she was no 'ordinary woman', but a long-time socialist militant, a recognized agnostic, and a divorced mother of three whose father had been imprisoned and killed during the military dictatorship and who had herself, together with her mother, survived torture, imprisonment and exile. (Ríos Tobar 2009a: 1)

It has been argued that Bachelet's arrival to power responds more to political factors than cultural or social ones; this implies that she was more the product of the

Concertación parties' manoeuvres to stay in power for another presidential term and to incite the media's curiosity and excitement, than the result of a major change in Chile's political culture allowing a female to become president for the first time. Her leadership was questioned to the extent that she was defined as a "lame duck" in international media (Webber 2007).

Despite the political decision to have a female candidate by Concertación, Bachelet's appeal was a mix of her well-known biography and her gender (Siavelis 2010). Bachelet's election heightened expectations of change for women's citizenship amongst women of different socio-economic backgrounds due to her well-known commitment to gender equality. However, this was particularly true amongst feminists who thought she would tackle the most outstanding gender-equality issues in the country (Borzutzky and Weeks 2010: 20). Michelle Bachelet also represented a surprise as much as a mystery for many who tried to understand this political "phenomenon" of having a female president in a country considered so conservative and chauvinistic. As Ríos Tobar mentions, despite the importance of women and feminists in the transition to democracy:

... neither the mainstream media nor the male political establishment had ever paid so much attention to questions of women's political representation, women's leadership, and gender relations as they did during this election. (Ríos Tobar 2009a: 2)

The thesis thus analyses the importance of having Bachelet as the first female president, and shows that her profile made her a champion at the top of the political pyramid for the advancement of women's rights. The analysis contrasts Bachelet's political attributes with those of Ricardo Lagos and the way in which they each confronted the issue of emergency contraception and reproductive rights. The research shows that

despite the political logic that brought her to office to maintain her political coalition in power, Bachelet used all presidential prerogatives – from Supreme Decrees to the presidential power to legislate – to ensure the distribution of emergency contraception.

### **Contribution of the thesis**

Although a substantial amount of literature on abortion in Chile is available, this thesis contributes to the gender and politics and SRHR literature by being the first to focus exclusively on emergency contraception. Based on elite and key informant interviews, it provides an in-depth understanding of the judicial processes and the actors and institutions involved. The research is based on a network analysis of the advocacy coalitions in favour and against EC, their influence, and use of both formal and informal institutions to achieve their goals. This thesis is also the first to look at the EC judicialisation process through a gender lens, contributing to the literature on FI and judicialisation.

### **The thesis and EC**

This research focuses on the specific social policy to distribute EC, differentiating itself from most studies on legal initiatives on the issue of abortion and SRHR available until now (Blofield 2006; Haas 2006; Htun 2003; Shepard and Casas Becerra 2007; Shepard 2006).

The EC policy process is particularly interesting because of its origins and the contexts in which it evolved from a regular internal initiative within the Ministry of Health to a major debate brought to the courts via judicialisation, and eventually reached Parliament as a bill. In this process the emergency contraception policy was at the centre of influence and battles between different formal and informal institutions and actors. This thesis gives particular emphasis to the political and judicial battles at the Constitutional

Tribunal (2006-2008) since these battles represent a unique gendered political struggle, with an important outcome for gender rights. The arguments advanced to defend and to oppose the distribution of emergency contraception reveal the deep ideological divisions within Chilean society, which until now were rather blurred by Chile's image as simply a conservative country. This research's focus on the policy process, the role of actors, ideas and beliefs, as well as political and judicial institutions, provides a more nuanced reality and sheds light on the power struggles involved in policy-making.

The study engages with three main bodies of literature to which it aims to contribute: gender and politics and women's movement in Latin America; new institutionalism and judicialisation; and the more recent and ever-growing body of literature of Feminist Institutionalism. Chapters 2 and 3 include an introduction to these three bodies of literature in relation to the research, as well as discussion on how they create an appropriate conceptual framework.

### **Emergency contraception in Chile**

The introduction of emergency contraception in Chile in 1998 was the result of a health policy initiative to reduce the rate of teenage pregnancies in the country – one of the highest in Latin America – by making it available to all women above the age of 14, as well as to victims of sexual violence. This initiative was the result of the work of NGOs and civil society groups aiming to update the “Normas nacionales sobre la regulación de la fertilidad” (National Guidelines for the Regulation of Fertility) (MINSAL et al. 2006) used by the Ministry of Health, and to bring a language of rights to Chile's reproductive health services in line with the international legal framework defining SRHR since the 1990s (see Ch. 7).

Chile has a longstanding tradition of social policy regarding maternal health and family planning dating from the 1930s, but in particular since the 1960s when reproductive issues and birth control methods were introduced through family planning policies with little controversy, and in fact with the Church's tacit support (Rojas M. 2009) (see Ch. 4). The thesis shows that many of the actors and institutions involved with health policies at that time are still present nowadays, including the feminists, with some new social actors such as conservative militant groups (see Chs 4, 5 and 6).

There is in this sense a similarity in the approach to the distribution of EC. Doctors and government officials defined EC as a priority for public health, just as abortion was framed in the 1960s, although in official documents EC was described in the language of sexual and reproductive rights. The strategy of putting medical emphasis on this issue means that since 2000 it was not SERNAM but rather the Ministry of Health (MINSAL) that was in charge of the distribution of EC, opening up a new arena of negotiation for doctors and feminists wanting to advance SRHR. The following chapters show that during this period (2001-2010), feminists felt less at ease working in a medical framework compared to previous policy initiatives including violence against women (VAW), which were located within SERNAM, the ministry in charge of advancing gender equality. The research shows how this posed specific challenges for feminists and their capacity to frame and negotiate the terms behind the distribution of EC. It also shaped which alliances they needed to forge to influence the policy agenda. Concerned about retaining control over the policy process, feminists were reluctant to engage under these conditions.

Emergency contraception has had the surprising effect of reopening a long-postponed debate in Chilean society – the right to abortion. EC awakened the fear in conservative

sectors that its distribution could open the door for the reinstatement to the right to abortion. Thus, from very early on, conservative sectors of society – belonging to networks linked to the Catholic Church – led an organised opposition to the legalisation of EC in Chile on the presumption that the emergency contraception pill was abortive. What started as a simple judicial challenge against the drug in 2001 eventually evolved into a series of political and judicial battles, which ended with a case in the Constitutional Tribunal against Michelle Bachelet as president.<sup>6</sup> Over the ten years of judicial and political confrontations, the debate was permanently centred on the right to abortion and the right to life. Yet as the issue became more political and visible, it eventually evolved into a wider debate on women's rights and sexual and reproductive autonomy, as well as poverty, inequality and justice.

### **Abortion in Chile**

Chile is one of the few countries in the world where abortion is still illegal and penalised under any circumstances; it is a criminal offence for both women seeking the service and those providing it. This was not always the case; in fact, therapeutic abortion<sup>7</sup> was legal and available from 1931 until 1989, when Augusto Pinochet's military regime decided to modify Chile's health code during its last months in power through a rather rushed and covert process. This was done in the context of many other constitutional reforms included in the pact made between the military and newly elected civilian government in order to reinstate democracy (see Ch. 4).

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<sup>6</sup> This thesis refers to the "Constitutional Tribunal" since this is the closest translation for *Tribunal Constitucional*, which is the way the court is referred to in Spanish

<sup>7</sup> This generally includes the right to seek a medical induced abortion in cases of danger for a pregnant woman's life, and when the foetus is not viable due to any malformation of pathology.

Good access to mother and child medical care as well as low rates of maternal mortality and deaths due to abortion over the last decades may have given the statistical impression that Chile had no need for particular initiatives on the SRHR front.<sup>8</sup> However, it is estimated that the rate of abortions in Chile is 50 per 1,000 women, which would represent around 160,000 abortions per year – one of the highest in Latin America – according to the latest studies dating from the 1990s (Faúndes and Barzelatto 2007; Henshaw, Singh, and Haas 1999). In 2000, a quarter of the deaths recorded as maternal mortalities were still consequences of complications of backstreet abortions, making abortion the primary cause of maternal mortality in Chile (C. Dides et al. 2007).<sup>9</sup>

As explained by Guzmán and Seibert, “Sexual and Reproductive Rights constitute the most prominent area of political confrontation between the Catholic Church and progressive movements” (2010: 3). In the case of Chile, this and the close relationship between the Catholic hierarchy and the economic and political elite of the country, has given the Church a certain advantage and influence in policy-making since democracy was re-established in 1990.

### **The policy and institutional environment defining policy-making in Chile**

This research is located within the current debate over feminism and institutionalism and the way in which the relationship between women’s movements, the state and institutions are all perceived as interlinked. Sustaining this approach is the belief that if the political environment and policy process behind any policy-making initiative are

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<sup>8</sup> The rate of deaths as a direct consequence of abortion between 1960 and 2000 went down from 10.7 to 0.5 deaths for every 10,000 new-borns (Departamento de Estadística e Información de Salud 2001 cited in Dides et al. 2007; Schiappacasse et al. 2003).

<sup>9</sup> Although this no longer the case, most abortions still remain either unsafe or clandestine (the case of poor women) or happen in private clinics where there are no records of these procedures (in the case of wealthier women).

gendered, the outcomes of any policy – whether a social policy, a law or the discourse surrounding it – will necessarily also be gendered (Htun and Weldon 2010).

New Institutionalism (NI) has shown that the political and institutional environments of a country are pivotal when analysing any policy process, as well as initiatives and strategies by advocacy coalitions and political actors (see Ch. 3). In Chile, the policy process will necessarily be shaped by the political system surrounding it. The transition to democracy in 1990 marks the beginning of a new democratic institutional framework in which both the state's actions and civil society's participation were framed within the parameters of the inherited political agreements and pacts between the departing military regime and the newly elected democratic government. As Waylen has shown, the transition was a highly gendered process in which the women's movement found it difficult to translate their efforts and their influence into greater gains (Waylen 2007).

Angell has described Chile as a “very constitutionally minded country” (2003), which in his opinion has allowed Chile to have a peaceful transition to democracy, forcing Augusto Pinochet to abandon power respecting the agreements taken with the opposition. But its long transition from dictatorial regime to democracy has been highly questioned over the past decade by Chilean scholars for its incapacity to enable and support the full participation of citizens.

Indeed, Chile's democracy has recently been portrayed as an elitist democracy in nature and practice (Delamaza 2010). The evident weakness of civil society despite its active role, in particular through social policies, has left it with limited power to influence wider political debates or discourses (Delamaza 2005). As Navia (2010) explains, although Chile's political system is now more inclusive and consolidated, its foundations lie on the 1980 Constitution shaped by former dictator Augusto Pinochet.

This leads Navia (2010) to highlight that although the transition had initially accepted some limits to democratisation in regard to human rights and justice – what was known as “justice to the extent possible” – it would seem that Chile has adopted a model of “democracy to the extent possible”. This was already raised by Motta (2008) who saw a danger in the politics of “consensus” as a way to “disarticulating dissent to neo-liberal hegemony in Chile”.

Altman argues that it is surprising to observe the unusual longevity of Concertación governments, probably one of the few party coalitions in the world to stay in power and share in turn the role of executive (Altman 2006). The first three presidents of the Concertación – Aylwin, Frei and Lagos – maintained a pattern of government based on the close relationship with the party elites and the attempt to avoid any conflicts that could trigger “an authoritarian reversal” (Valenzuela and Dammert 2006).

Bachelet’s election on the other hand marked a strong change in this line of Concertación political continuum. Not only was her election a surprise because she was the first female elected without any family ties to a male politician and because of her personal profile as a woman, but mostly because she brought the idea of a renewal in the leadership of her centre-left coalition and of citizen participation (Valenzuela and Dammert 2006).

Feminist scholars and political analysts have also started debating if Bachelet’s ascent to power was due to a major cultural change (T. Valdés 2010) or if it was the result of political calculus or circumstances. Most tend to agree that Bachelet came to power due to political reasons (Morales Quiroga 2008; Ríos Tobar 2006). As many have affirmed,

Bachelet became president despite the party elites of the last fifteen years of Concertación power, although clearly helped by the fact that feminists had asked Ricardo Lagos to name more women in his cabinet and he eventually included Bachelet (Ríos Tobar 2009a). This shows that the institutional environment is directly affected by actors and their strategies, and in Chile feminists have been working hard to influence electoral and institutional processes which feminists have denounced as strongly gendered.

### **The policy process, policy-making and the feminist critique of New Institutionalism**

The literature focusing on the analysis of policy-making has seen a progressive shift from the emphasis on the role of the state and social evolution towards interest in the role and agency of actors involved in the policy process, and their ideas and beliefs as source of their actions. This new research orientation therefore focuses on the cognitive aspects of policy processes, highlighting “the importance of values, ideas and representations in the study of public policy” (Surel 2000).

Feminist critiques of comparative politics and New Institutionalism (NI) (see Ch. 3) highlight the way in which neither theory has focused on sex equality and women’s rights as a major topic (Htun and Weldon 2010). Htun and Weldon have argued that the main approaches of comparative politics are strongly biased towards men’s activities and political participation, which has led feminists to consider the necessity to “formulate new theories of change in women’s rights” by “moving gender from the margin to the centre of comparative politics” (2010: 208).

This is also something highlighted by feminist scholars working in the field of Feminist Institutionalism who are reclaiming a gender-neutral strand of political science.

Mackay, Kenny and Chappell (2011) highlight the way in which NI conceptions of both structure and agency are often limited, and “remain an ongoing debate in the field”. The authors also highlight the deficit in the study of power within NI, with strands of Historical Institutionalism (HI) for example often putting too much emphasis on “the power that past decisions hold for future developments” (Mackay et al. 2011: 579).

Power remains at the core of any gender analysis, and feminist notions of agency refute any static notion of power relations whether on the side of actors or the structures and institutions. In this sense, new research has been carried out by authors like Thelen within a HI framework, “arguing that institutional development and change are driven by ongoing political conflict and contestation” (Mackay et al. 2011: 579). Behind these initiatives is the concern to not only understand how institutional change occurs, but also how that change is gendered (Waylen 2013). One way to achieve this is by looking at the “often ‘hidden’ aspects of political institutions – in particular, the informal aspects of the executive, legislative, bureaucratic, legal and constitutional arenas – to highlight the influence informal rules and practices have on institutional design and outcomes” (Chappell and Waylen 2013).

The literature shows that much research has been done on women and the state in Latin America (see Ch. 2), especially within the context of transitions to democracy in the 1980s and 1990s. Unfortunately this type of research leaves out many factors that may sit outside the binary relationship between feminists or women’s movements and the state. Something similar happens with citizenship studies which also give great importance to the binary relationship between state and citizens, and certainly complements the previous approach by looking at power and authority beyond traditional state boundaries (Molyneux 2000). The studies on citizenship in fact give

more visibility to the power struggles coming from citizenry and the way they produce and redefine both citizen's entitlements and citizenship in front of authorities (Franceschet and Macdonald 2004). It is therefore imperative to pay more attention to institutions and look into a wider network of influences, as well as power relations affecting gendered outcomes in both political and policy processes.

Among the recent initiatives to use a FI and HI approach is the work of Waylen, who has reviewed our understanding of gender outcomes within the transitions to democracy different countries have experienced (Waylen 2007). According to Waylen (2007), post-transition polities do not begin "with a blank slate" and therefore the status quo affecting gender rights in place during a transition, as well as the institutional legacy of the non-democratic regime, shape the opportunities actors have to change gender rights in post-transition periods. This creates specific opportunities or limits for women's rights advocates in particular when the legacy of a previous regime is institutionalised as in the case of Chile.

Regarding institutions and reproductive freedom in Chile, most authors have focused on abortion and the status quo surrounding its legal status banning the practice under any circumstance (Blofield 2006; Htun 2003; Macaulay 2006; Waylen 2007). It is interesting to note that outside of feminist scholarship, the issue of EC has begun to be highlighted in the analysis of other scholars looking at Concertación governments and especially at Bachelet's government (Couso and Tohá 2009; Funk 2009). This shows that reproductive rights and health have extended beyond a feminist agenda to become a central part of the agenda of human rights, and EC has come to occupy an important place next to the abortion debate.

Therefore, this thesis seeks to provide an in-depth analysis of the emergency contraception policy process in order to contribute to the knowledge on gender change to promote SRHR. The judicialisation of EC permits a different approach to institutions by giving insight into the gendered practices of judicial institutions and actors. Blofield and Haas (2005), who have carried out work looking at institutions in Chile, argue that Chile is an ideal case for analysing policies and institutions due to the country's stability, its non-democratic institutional structure, its anachronistic legal framework where the rights of women have been upheld by a women's movement pressuring for change, and the presence of political parties willing to join that fight.

Most studies on gendered policy initiatives have focused on the analysis of policy-making through the study of legal initiatives (Blofield and Haas 2005; Blofield 2006; Htun 2003). This research is original in that it focuses on a social policy measure emanating from the executive via the Ministry of Health which produced a judicialisation process. The policy eventually evolved into an inter-ministerial issue, which was supported by other executive branches such as SERNAM, to finally become a bill by presidential initiative as a way to provide the policy with a strong legal and political legitimacy. This raises questions regarding the role of different institutions, both formal and informal, within different political and judicial contexts, as well as the impact of different sets of actors, such as the Church and conservative groups, the courts and judges, the medical lobby, lawyers and feminists.

### **Outline of the thesis**

This chapter introduced the topic of this research – that is, the policy process for the distribution of emergency contraception. It introduced the Feminist Institutional lens used for this research that focuses on the role of formal and informal institutions during

the judicialisation process and their gendered impact for women's sexual and reproductive rights and women's political participation. This chapter also highlighted the importance of looking at the role of Bachelet as a female president and her institutional role and power during the process.

Chapter 2 presents the literature review, introducing the main works available on EC and putting the Chilean case in context with the international debates on EC and SRHR. The review highlights the political, social and cultural debates affecting SRHR and EC nationally and internationally. The chapter contrasts the apparent availability of medico-scientific and legal sources with the lack of gendered feminist and political analysis on EC available until very recently. The chapter links the literature on EC and SRHR to the literature on women's movements and SRHR, gender and politics, and gender and the state. The chapter ends by discussing how feminists and women's movements have engaged with sexuality and reproduction in the last two decades and how institutional approaches have given much attention to the issue of abortion, thus providing a good framework of analysis and raising important questions to analyse EC.

Chapter 3 presents the conceptual framework and introduces the methodology. It evaluates the way in which the literature on FI, judicialisation and policy process have helped this analysis to look in-depth at the EC policy process and provided an innovative account of the power dynamics among actors and institutions underlining the ten-year-long policy "saga". It reviews current discussions around new institutionalism and feminism and the necessity to look at institutions with a historical perspective in order to better approach the analysis of policy-making, as well as women and feminist organising. The utility of Sabatier's Advocacy Coalition Framework for the research is discussed in relation with NI and FI debates. The final section presents the methodology

and justification for the plan of inquiry and data collection, while also discussing their limitations.

Chapter 4 presents a gendered historical institutionalist analysis of SRHR and family planning issues in Chile since the 1960s. It puts particular emphasis on the immediate pre- and post-authoritarian regimes periods to highlight how the seventeen years of Pinochet's brutal rule had a major impact on the shaping of social and political institutions present in democracy. Using a HI focus, the chapter shows how SRHR and women's rights were directly affected by the legacy of the post-authoritarian 1980 Constitution. The chapter shows how the first two democratic Aylwin and Frei administrations addressed SRHR through the enforcement of the "consensus rule" imposing a self-censorship on these issues within state institutions such as SERNAM and amongst politicians and policy-makers. The chapter also shows the limits of the constitutional reforms of the Lagos administration for SRHR.

Chapters 5a and 5b introduce the pro-SRHR and anti-SRHR advocacy coalitions using Sabatier's ACF and the concepts of "deep core" and "policy core" to highlight the linkages between different actors and between the advocacy coalitions. The chapter analyses these advocacy's strategies and belief systems, and actions during the policy process to evaluate their influence on the process. Chapter 5a focuses on the conservative actors and their profiles, as well as their links with political parties, showing the influence of the Catholic Church's doctrine in their belief-system. Chapter 5b focuses on the SRHR advocates, policy-makers and the feminist movement and its impact on policy-making regarding SRHR. The chapter analyses the process behind the SRHR Bill to illustrate how these actors struggle to maintain long-lasting strategic alliances to defend SRHR.

Chapters 6 and 7 review the judicialisation of the EC policy process under the Lagos and Bachelet presidencies. These chapters show how the post-authoritarian legacy of the judicial institutions, the criminalisation of abortion and the historical background of the transition process shaped the manner in which actors and institutions interacted. Both chapters pay particular attention to the role of judges and their beliefs and actions as informal institutions of the policy process. Using primary materials and interviews to bring out rich details, the chapters illustrate the way in which feminists were often cast aside and how at other times they marginalised themselves from the main processes due to a historical disenchantment with the political system. It shows that Chile's transition has affected civil society's mobilisation more than might be expected. There has, however, been a great deal of feminist organising within civil society. SRHR advocates and in particular the biomedical lobby appear as key actors of the policy process. The chapters also contrast the way in which Lagos and Bachelet engaged with the EC, showing how Lagos' close ties with the political elite of the Concertación meant he had no hesitation to put a halt to the EC policy to maintain the consensus. Bachelet, on the other hand, as Minister of Health and then as president, granted the most crucial political backing to the issue of EC for more than ten years as part of her wider commitment to gender equality.

Chapter 8 discusses the sentence of the Constitutional Tribunal against EC and its political and legal consequences. The chapter shows how the decision by the Constitutional Tribunal to put a halt to the distribution of EC was highly ideological. The conservative ruling had the clear purpose to maintain the status quo regarding women's rights in the country. The chapter highlights the importance of feminists in the mass mobilisation against the ruling of the Tribunal and in the way emergency contraception was reframed as a policy in the public domain to highlight the injustice

against women and the violation of their rights. The evidence also shows that the short-lived experience of the movement for the defence of EC is closely linked to internal disputes within the women's movement that is divided along political and generational lines. Finally, the chapter shows how the approval of the Fertility Bill in Congress was a major success for the constant support granted by Bachelet to EC and how the political and legal battles for its distribution permitted a change in the discourse affecting women's and sexual and reproductive rights.

The last chapter presents the conclusions to my initial questions regarding the roles of both actors and institutions. It evaluates how the original hypothesis coming from the literature review applies to the case of EC and the subsequent policy process.

## **CHAPTER 2: Locating and Contextualising the Research**

### **Introduction**

This chapter introduces the main literature available on emergency contraception, in particular in relation to the Latin American and Chilean contexts. A significant amount of the recent literature on EC has emerged from Latin America, showing the increasing importance of EC for the struggle to promote sexual and reproductive rights as women's rights in the region. This review focuses on the political, social and cultural debates affecting the public health policies advanced by SRHR advocates to make EC available to women nationally and internationally. The Chilean case is of particular interest since the challenge to EC has been constant since the end of the 1990s when the issue first appeared on the political agenda. In the Chilean case, studies find strong similarities with the scientific, legal, moral and political controversies surrounding EC at the regional and international levels.

The chapter begins with an overview of the main studies and moves into the main issues and gaps in the literature. It contrasts the apparent availability of medico-scientific and legal sources with the lack of gendered feminist and political analysis up until very recently. The first section focuses on EC itself, whereas the final section concentrates on the literature on women's movements and SRHR in Latin America and Chile. It seeks to understand how feminists and women's groups have engaged with sexuality and reproduction issues. The review places the Chilean context within the regional context in an effort to show how, at times, similar debates have led to different outcomes. In doing so, it locates this research within the wider literature on SRHR and women's rights in Latin America.

This chapter argues that there are elements in the literature on feminism, gender, sexuality and reproduction that are useful to the analysis of the role of feminists and women's health advocates during the EC battles, yet the literature lacks studies focusing on the importance of policy initiatives to distribute EC for the feminist agenda in Chile and the region. This thesis contributes to the literature precisely by addressing this void, and by looking into the links between the participation of feminists and women's movements in the EC battles and the role of doctors, lawyers and the Church in Chile. It pays particular attention to the strategic alliances between feminists and doctors, the Church and the medical lobby, as well as to the importance of institutions for feminist participation and discourses on sexuality and reproduction in Chile and the region.

### **General overview of the literature**

Until the mid-2000s most international research on EC, including in Latin America – unlike most research on SRHR and abortion – was located within the medical and legal scholarship rather than the gender and politics, or feminist literature. Scientific publications principally dealt with the mechanism of action of *Levonorgestrel*, the main component of EC. The first body of articles showcases the results of experiments that demonstrate that EC is not abortifacient, while others include fierce debates and scientific discussions via letters to the journals of those questioning the results of such experiments (Croxatto 2007b; Durand et al. 2001; Noé et al. 2010, 2011a; Novikova et al. 2007; Puccetti et al. 2012).

A second strand of articles and publications discusses the importance of EC for SRHR and women's bodily autonomy found in journals such as *Contraception*, *Health and Human Rights*, *International Journal of Gynaecology and Obstetrics*, *Revista Panamericana de Salud Pública*, and *Population* (Cardenas 2009, 2010; Cook et al.

2001; Croxatto and Díaz Fernández 2006; Díaz et al. 2003; Hevia 2012; ICMER (Instituto Chileno de Medicina Reproductiva) 1999; Novikova et al. 2007; Principal et al. 2003; Wynn et al. 2011). The obvious scientific and medical component of the debates and research on EC explains its importance from a public health point of view to promote reproductive health. The apparent missing feminist gendered analysis on EC may be explained by Germain and Liljestrand's (2009) argument suggesting that it is often national societies of obstetrics and gynaecology that have led most initiatives on SRHR worldwide.

The exceptions to this lack of gendered perspectives are to be found in articles published, for example, in *Reproductive Health Matters*, an international journal committed to supporting and promoting sexual and reproductive health and rights. The journal brings together the voices of medical, legal, and women's rights practitioners and advocates working on these issues, highlighting the role of alliances between these actors. For instance, Heimbürger et al. (2003) focus on the strategic advocacy carried out by the International Planned Parenthood Federation (IPPF) – the international umbrella organisation of family planning agencies – to promote EC within health reforms taking place in Latin America. They highlight how in Colombia, for example, the alliances with feminist groups contributed to a positive final outcome for the legalisation and distribution of EC.

A similar point is made by Chávez and Coe (2007) who discuss how in Peru – a USAID aid-recipient country – from 2001 onwards, the US government tried to promote its conservative agenda despite the fact that EC was part of a policy by the Peruvian government. It imposed the adoption of a “neutral” position on EC on the NGO recipients of aid, and pressured the Peruvian government to remove EC from its SRHR

norms. This directly affected both women's access to this contraceptive method and the work being done on the ground by feminist organisations to make it more available. Alliances between national and international coalitions, including women's health and biomedical organisations, proved important when pressuring the US government to review its position and defending EC at the Supreme Court, as well as at the Women's Rights Ombudsman.

Faúndes et al. (2007) and Heimbürger et al. (2002) have also highlighted the role of alliances between the medical establishment and other civil society groups, including women's health advocates, within the work of the International Consortium for Emergency Contraception (ICEC), an international "umbrella organisation" gathering "feminist and organisations at the national and local level [to] provide grassroots support for emergency contraception, the regional bodies give scientific and professional credibility to the arguments national and regional governmental and non-governmental organisations working to promote EC and SRHR" (Faúndes et al. 2007: 133). Faúndes et al. highlight the important role "played by the research institutions and individual researchers who have provided the scientific evidence" who sometimes have gone beyond their scientific research role and "have also played an important role in the defence of access to emergency contraception" (2007: 133).

Despite mentioning feminism and women's health advocates, these types of articles remain located within a public health analysis of the EC policy process, contributing mostly to an understanding of the role of institutions such as the ministries of health and the medical lobby around EC distribution. In contrast, this study seeks to address the lack of research on the role of feminists and women's health advocates as key actors of these policy processes. By paying closer attention to the roles played by feminists and

women's advocates in forming these alliances, we can obtain a clearer vision of the interactions of actors and the institutional frameworks they face.

Since 2010, gendered political contributions on EC are to be found in recent publications by *UNRISD* and in *Third World Quarterly* where authors have shown a renewed interest in the role of religion and religious institutions in the policy-making process affecting the promotion of women's rights. Using a gender and politics focus, Guzmán and Seibert (2010) analyse the way in which the issue of EC has been affected by the influence of the Catholic and Evangelical churches in policies aimed at improving women's autonomy to exercise their sexual and reproductive rights in Chile.

Guzmán et al. (2010) also look at emergency contraception, and the issue of sexual education to measure the influence of the Catholic and Evangelical churches on policies related to the advancement of women's rights in Chile's political arena, and highlight the role of different actors and their ideological and power positions. They conclude that with time the government has become increasingly inclined to resist the Catholic Church's influence, and this is probably due to a political context where the authoritarian enclaves of the past dictatorship, present for more than twenty years, have started to fade and society has become more liberal. Their analysis is optimistic, and highlights that the SRHR movement has been fortified within the feminist movement and, "the appearance of different discourses and social practices with regard to family and sexuality have and will further debilitate the hegemony of the Catholic Church" (Hurtado and Dides 2004 cited in Guzman et al. 2010: 984).

Finally Razavi and Jenichen (2010) have carried out a global comparative analysis on the influence of religion as a political force affecting the struggles for gender equality in diverse political and social contexts around the world. Their assessment concluded that

democratisation processes have sometimes empowered feminist groups and women's advocates seeking reform, while in other contexts they have reinforced the power of religious institutions opposed to the advancement of gender equality and feminist discourses. This research engages with their argument by showing how the post-authoritarian institutional framework still in place within the judiciary has helped conservative forces to hold on to their last power strongholds.

The works mentioned above represent a growing concern for feminists struggling to promote women's rights, and in particular sexual and reproductive rights in the face of organised opposition by fundamentalist religious groups in the national and international agendas. Sexuality and reproduction have indeed become crucial "sites of intense public contestation between conservative religious actors wishing to regulate them based on some transcendent moral principle, and feminist and other human rights advocates basing their claims on pluralist and time-and-context specific solutions" (Razavi and Jenichen 2010: 833). Therefore, this research takes into consideration this renewed interest on the plurality of actors and institutions involved in the policy processes affecting women's SRHR by paying specific attention to the confrontation between feminist perspectives and the Church dogma and their allies in Chile.

In this sense, the recent work on abortion by Reuterswaerd et al. is particularly insightful for the case of EC. The authors' proposition to look at the state and its judicial arena in order to better grasp the complexities of policy processes regarding sexual and reproductive rights and the way feminists navigate these spheres of power is especially relevant (Reuterswaerd et al. 2011). They also highlight the importance of looking at strategic alliances and analysing women's groups and feminists as one group of actors among many others, to get a better sense of their participation in the process. Their

work is an important contribution to research focusing on EC from a legal perspective. This research aims to provide a gendered political analysis of the policy process behind the distribution of EC with a specific emphasis on judicial processes as key components for our understanding of gender policy reform and feminist activism worldwide.

### **The legal view on women's SRHR and the judicialisation of EC**

In the past twenty five years there has been increasing opposition by conservative groups worldwide to the very notion of sexual and reproductive rights. Due to their nature, and their redefinition as “rights” since the 1990s at the Beijing and Cairo UN Conferences, sexuality and reproduction issues are likely to be challenged in court more frequently in future by their opponents. In fact, feminists have highlighted the connection between SRHR and social justice (Berer 2004), as well as citizenship, which are both deeply gendered concepts (Lister 1997; Mouffe 2005). The way feminists have approached sexual and reproductive rights has involved looking at these rights beyond an individualist tradition to redefine them as “social rights” (Corrêa and Petchesky 1996), coupled with the move by countries in recent years to incorporate reproductive rights into their constitutions and legal codes (Fellmeth 2000). This implies in feminist terms that there has been growing recognition of a woman's right to choose – the initial meaning of reproductive rights (Berer 1988: 24). However, in practice the right of women to control their reproductive lives has been, and is increasingly being, challenged in courts, posing problems for their access to health services (Cook and Dickens 2009).

There is a regional and worldwide context of judicial battles regarding the access to reproductive health services and contraceptive methods that influenced the judicialisation of the process in Chile, just as has happened elsewhere. In many

countries in Latin America (Amuchastegui et al. 2010; Cardenas 2009, 2010; Faúndes et al. 2007; Heimbürger, Gras, and Guedes 2003), in the US and Canada (Davidoff and Trussell 2006; Wynn et al. 2011), as well as in Europe (Cook 2011) conservative and religious groups have opposed EC's distribution and approval as an authorised drug via the courts.

Chile and Argentina were among the first countries where the controversy between religious ideology and scientific knowledge in this field emerged, and where similar judicial tactics were used to prevent the distribution of EC (Heimbürger, Gras, and Guedes 2003). In both countries the influence of the Catholic Church is strong and their proximity probably helped the sharing of information amongst opponents and supporters of EC. Brazil and Colombia have also been used as examples of effective health policy advocacy and reform promotion in the region (Heimbürger, Gras, and Guedes 2003). Heimbürger et al. (2003) explain that in both countries EC was easily included as part of health norms by the authorities and its distribution faced little opposition. This was partly due to the decentralisation of health services in Brazil, and the health reforms that started in 1993 in Colombia, leading to a rights-based approach to health within the universal care system allowing women's groups and advocacy organisations to monitor the compliance of the Colombian state with its international commitments on SRHR (Heimbürger et al. 2003).

What is particular to Latin America, as is the case with Chile, is that a common attack on EC is centred around the promotion of laws to protect human life from conception, and claims that EC is abortifacient (Cook et al. 2001). This has led to a significant shift in the abortion debate and the "right to life" to the arena of contraception (Cook 2011), challenging longstanding rights acquired by women. The legal research by Rebecca

Cook et al. (2001) in this sense represents an important contribution, since they highlighted very early on the political elements behind the legal challenges to EC, especially in Latin America, in particular the use and promotion of the legal status of the unborn as a counteraction against women's bodily autonomy and rights. Cook et al. are persuasive in arguing that abortion has been linked to contraception. Therefore, we cannot understand the current battles surrounding EC without linking them to previous and ongoing abortion battles in Latin America. In the case of Chile, this is especially relevant since abortion is forbidden under any circumstances. The research therefore aims to link the findings on EC to a wider understanding of the processes and debates affecting the liberalisation of abortion in Chile.

This research shows there is a strong ideological component in the legal strategies of conservative and religious lobbies against EC. A good example is the legal argument used in Chile by the Constitutional Tribunal – and which had been used elsewhere in Latin America – called “duda razonable” (reasonable doubt) (Cardenas 2010), which allows judges to justify their opposition to not uphold women's reproductive rights under constitutional law. This ideological battle on the constitutional understanding of the right to life, the rights of the unborn and the way life is defined, shows the power of culture and religion in legal debates. Judges in Chile, in this sense, played a key role in the way they decided to engage with reproductive rights and women's rights. This highlights the importance of focusing on the judicial politics surrounding women's rights and of questioning the limits of judges' impartiality within specific gender regimes. This is the focus of the rich literature on judicialisation (see Ch. 3) that since the mid-2000s has begun to engage with SRHR issues, and is composed of a mixture of published articles and conference proceedings (Casas Becerra 2004a; Melzi 2005; Peñas Defago 2009; Ruibal 2011).

### **The EC “saga” in Chile**

The introduction of EC in Chile – dubbed by Faúndes et al. (2007) as the most “furious” struggle for EC in the region – was the result of a health policy initiative to reduce the rate of teenage pregnancies in Chile. Teenage pregnancy has been related to poverty and discrimination issues, and, as suggested by Valdés and Guajardo (2007: 61), despite efforts has become a public health issue since it has not been reduced over the last two decades, following a regional trend (ECLAC and UNICEF 2007: 5). The policy aim was to make EC available to all women above the age of 14, as well as to victims of sexual violence to prevent unwanted pregnancies. The fertility guidelines published under the Bachelet administration, contain an explicit acknowledgement of the contribution of a rights-based approach which positions women as “active social subjects, with autonomy, and who due to the social construction of the feminine still in place, perform multiple roles in society” (MINSAL et al 2006 : 7).

Chilean scholars have produced a large amount of publications on this topic as the legal battles for EC have developed over the last decade. The work by the lawyer Lidia Casas on EC is without doubt one of the most important sources of detailed information on the legal stages and challenges faced by the supporters of EC during the ten years of legal challenges (Casas B. 2001; Casas Becerra 2004a, 2008; Casas and Contesse 2006) , for which she coined the term “the saga” of EC (Casas Becerra 2008). She shows the long and often contradictory ways in which the courts and the opponents to EC distribution built their legal strategies. Casas has substantial experience working on SRHR and women’s rights in Chile, and particularly abortion.<sup>10</sup> She has also been an important

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<sup>10</sup> Her publications on abortion and the criminalisation of women in Chile have become unavoidable references (Casas Becerra 1997; Shepard and Casas Becerra 2007).

contributor to networks working on EC and SRHR in the region.<sup>11</sup> In this sense she has contributed to linking what happened to EC in Chile with similar litigation strategies and tactics used in Peru and Mexico, such as the common use of “conscientious objection” by conservative opponents (Casas 2009). Her emphasis on promoting women’s reproductive freedom and autonomy has been a constant theme in her work, denouncing the way in which laws maintain a certain gender order and limit women’s control over their bodies (Casas Becerra 2004b; Casas 2008).

Casas sustains that since the restoration of democracy in 1990, there has been “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” (Casas Becerra 2004b: 428). Casas denounces the new democratic government’s indecisiveness in recognising “the full citizenship for women and ending the constraints imposed on them by outdated traditions and laws” (Casas Becerra 2004b: 428). This has been reinforced by the moral crusade carried forward by the political right and economic elite that has been permeated by extremist Catholic groups such as the Opus Dei and Legionnaires of Christ (Casas Becerra 2004b: 428). According to Casas, the success of these groups’ strategy has been the ability to limit “the political debate by focusing on technical issues, such as the approval of dedicated emergency contraception” (Casas Becerra 2004b: 428). They were also successful in mounting resistance from pharmacists arguing “conscientious objection” to EC, and also threatened pharmaceutical companies wanting to sell EC to the Ministry of Health (Casas Becerra 2008). These are tactics that were also used by pro-life and conservative groups

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<sup>11</sup> She has also been a contributor together with other crucial advocates of EC in *Redes Laicas*, the secular network working on reproductive issues in Latin America (Schiappacasse et al. 2003).

elsewhere in Latin and North America (Faúndes et al. 2007; Fenton and Lomasky 2005; Wynn et al. 2011).

Casas questions the extent to which the women's movements and feminist groups have been able to influence the reproductive rights agenda in Chile. She is openly critical of their limited capacity to forge alliances and mobilise with other actors:

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. (Casas Becerra 2004b: 429)

For Casas, alliance building is therefore closely related to the belief-system of the actors trying to work together. However, she also acknowledges that reproductive issues are sensitive for most political and social actors:

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. (Casas Becerra 2004b: 429)

Although Casas' work provides the most detailed account of the legal battles and challenges faced by human rights, biomedical and women's health advocates in their quest to support the distribution of EC between 2001 and 2008, most of her contribution remains in the sphere of legal analysis. The legal nature of her work does not provide a deeper analysis on the impact of feminism and women's health advocates on the EC policy process of which she is very critical. The importance of feminist discourses, however, cannot be underestimated, especially when this discourse is the engine of a rights-based discourse. Wynn et al. (Wynn et al. 2011) compare the discourses used to support the distribution of EC in Canada and the US and highlight how the "harm reduction" argument used in public health is not sufficient to advance women's rights in the long-term:

Reframing the debate around rights and toward a positive view of women, their sexuality, and their right to make informed decisions about their reproductive and sexual health abruptly shifts the perspective... The language of fair and equitable access to health care services and products may be less hegemonic than that of health and science, but it is less vulnerable to co-optation. (Wynn et al. 2011: 262-263)

This research endeavours to build on Casas' work and contributes to the missing 2008-2010 period during the judicial process at the Constitutional Tribunal. In the first instance the EC policy process followed a regular internal policy process despite the fact that, as stated by Casas, previous efforts – namely, the sterilisation guidelines a few years before – had proved to have a limited impact on reproductive rights. This was due to changes in political leadership within the government, and the fact that the issue was kept away from a public opinion debate (Casas Becerra 2004b: 440).

The sociological work by the Chilean scholar Claudia Dides also complements the work by Casas and brings to light the power of ideas and beliefs. In her research on the conservative discourses surrounding the debate on emergency contraception, Dides (2006) highlights how “science” and the “scientific discourse” were instrumentalised by conservative forces to legitimise their worldviews and therefore ultimately becoming a key source of power. She also highlights the role played by human rights, women's rights and SRHR advocates in a political context where conservative groups have a clear advantage in the access to mass media and therefore the channels to inform and influence public opinion on these debates.

Thus, according to Dides, the EC legal battles have become a symbol of a much deeper politico-ideological struggle that has been taking in place in Chile since the 1990s regarding SRHR (2006: 12). As she explains, this transition was marked by the constant

tension between modernising efforts and conservative resistance in a society trying to come to terms with new understandings of sexuality and reproduction (Dides Castillo 2006). Thus, the way in which Dides inserts the debates surrounding EC within the transition to democracy in Chile is particularly useful for this study (2006: 13).

It has been well-documented that the transition to democracy had a major impact on Chilean institutions and social movements, in particular the women's movement, due to the gendered component of such transition (Waylen 2007, 2010). Yet we do not have a clear account of how this played out during the ten-year legal battles on EC. Unfortunately the research by Dides only covered the years between 2001 and 2005, therefore the second part of the judicialisation of EC at the Constitutional Tribunal under Bachelet's administration remain unexplored. This research supplements this void in the literature to contrast and explore how conservative and progressive discourses were affected by this new series of legal battles, shaped by different actors and institutions, religious or not.

Finally, publications by doctors and members of the biomedical lobby contribute the most up-to-date scientific evidence and arguments to support this public health policy. From the very beginning members of the biomedical establishment carried out research on the acceptability of EC among the target population for the policy from a gender perspective (Díaz et al. 2003; Vidal Pollarolo 2002). This mirrors what had been done internationally and in developed countries to support EC distribution (Ellertson et al. 2000). The result was an overwhelmingly positive reception for this new contraceptive method.

In Chile this work was carried out by the Chilean Institute for Reproductive Medicine (ICMER), which was a key advocating organisation for EC, and a close partner of the

Ministry of Health from the beginning until the end of the policy process. There, Dr Horacio Croxatto's work was published in parallel to the majority of purely scientific research on the mechanisms of action of EC carried out by an international team of scientists of which Croxatto was a member (Croxatto 2007a; Noé et al. 2010, 2011a, 2011b; Novikova et al. 2007).

Dr Croxatto and Dr Díaz, co-founders of ICMER, published jointly on the importance of supporting EC from a human rights perspective, and issued public statements based on the existing evidence that EC is not abortifacient (see Croxatto and Ortiz 2006). Croxatto also wrote in a well-known theological journal criticising the unfounded claims and challenges against EC by conservative groups and the way they dismissed evidence-based arguments without having evidence themselves to sustain their claims (Croxatto Avoni 2004). This ideological battle within the Chilean scientific community was intense and often took the form of exchanges of letters, not only in international academic journals but also in well-known local newspapers where they could be read by the public. As Wittig (2005) argues, scientist members of conservative groups often avoid the well-established rules of engagement for serious scientific debate and conflict resolution, and instead resort to strategic resources or “movidas falaces” (treacherous moves) to avoid acknowledging the sound arguments advanced by their opponents. As will be discussed in Ch. 7, this took place during the sessions at the Constitutional Court and in previous legal processes, putting the medical lobby at the centre of the technical debates.

### **The EC pill and the controversy surrounding it**

The current problem faced by the proponents of EC is that it is being challenged internationally by different conservative forces, and in particular by the Catholic Church

whose take on sexuality and reproduction is simply opposed to the ideals of individual freedom, bodily autonomy, gender equality and women's empowerment – this is, all moral stances that support the international SRHR agenda (Cardenas 2009). As explained by Croxatto and Díaz, allowing those conservative voices “appealing to moral values that are not universally shared in pluralistic societies” restricts the choice of women and men to control their fertility and violates not only people's freedom of conscience but also their human rights (2006: 311).

### **The Catholic Church's international mobilisation against SRHR and EC**

The Vatican has launched a worldwide campaign against SRHR to oppose most forms of family planning and sexual education, including in the fight against HIV and AIDS, abortion and the advancement of homosexual rights, with a special emphasis over the last decade on emergency contraception, including in contexts where it is desperately needed, such as in post-conflict situations<sup>12</sup> (Radford Ruether 2008: 189).

The opposition of the Catholic Church to EC is part of a belief whereby sexuality and reproduction cannot be separated and must be considered a matter for married couples since “marriage and in its indissoluble unity [is] the only setting worthy of truly responsible procreation” (Congregation for the Doctrine of the Faith 1987). This justifies the Church's opposition to any rights of adolescents to confidentiality and access to SRHR, as well as the concept of bodily autonomy and women's right to choose.

Catholicism contains set views on gender relations. Craske (1999) has highlighted how in Latin America this is visible in the weight of Marianismo in society. Marianismo

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<sup>12</sup> The Catholic Church voiced its opposition to refugee women in Kosovo who had been raped, and Pope John Paul II asked these Bosnian Muslim women to “accept the enemy into them” and carry the pregnancies to term (Radford Ruether 2008: 190).

defines the ideal of womanhood as self-abnegating motherhood (Craske 1999: 12) and this focus on motherhood “is a potent cultural symbol” reinforced by the Catholic Church (Craske 1999: 196). Craske (1999) explains that motherhood on occasions had been “a strategically useful mobilizing point” and therefore it had been politicised as a means to advance women’s demands. Marianismo hence has played an important role in the definitions of policies aiming at expanding women’s rights (Craske 1999). Yet some have argued that despite the weight of Marianismo, “women’s cultural roles in the region are in flux” (Drogus 1994), creating new spaces for the interaction between religion and gender issues, including SRHR.

### **The Vatican forging international alliances and the resistance of global civil society**

The international success that the Vatican has had in hindering the advances of the SRHR agenda through negotiations and through “the construction of a hegemonic discourse on abortion and contraception, has confirmed its importance and presence as a political actor” (Sjorup 1999) at the local, regional and global levels. The Catholic Church has been particularly successful in establishing its understanding of “life” and “life’s beginning” from fertilisation. A fertilised egg represents for the Catholic credo a potential life that needs protection from its conception. This puts the Church in the position of opposing anything that can affect the development of the fertilised egg. For the Church, despite all the recent scientific evidence, EC is abortive and therefore is illegal. As clearly stated by the Pontifical Academy of Life (2000):

... the proven “anti-implantation” action of the morning-after pill is really nothing other than a chemically induced abortion. It is neither intellectually consistent nor scientifically justifiable to say that we are not dealing with the same thing... those who ask for or offer this pill are seeking the direct termination of a possible pregnancy already in progress, just as in the case of abortion. Pregnancy, in fact,

begins with fertilization and not with the implantation of the blastocyst in the uterine wall...

Linking EC to abortion has important implications. On abortion – as the Holy See indicated in its position paper addressed to women during the Beijing conference in 1995 – the Church has the view that “[a]bortion is not a problem uniquely concerning women; it also involves men and society” (Priests for Life 1995). This sustains their direct challenge to feminist views on bodily autonomy or even privacy and self-determination arguments.

Kissling has noted how “the oppositional role to the International Conference on Population and Development (ICPD) played by conservative religious groups, especially the Vatican... has not diminished since the conference took place in 1994” (2009: 211). The Vatican has also found a key ally in the US government, under the Bush administration (Radford Ruether 2008: 189), forging unexpected alliances to oppose the SRHR agenda.<sup>13</sup> It has also benefited in the rise of an international conservative lobby against sexual and reproductive rights, which has been legitimised since 2001 within the US government’s foreign policy at the UN conferences and meetings in particular (Germain and Liljestrand 2009: 186).

The Bush administration’s opposition meant the international community of SRHR advocates had to concentrate their efforts on protecting the advances gained over the previous decade rather than furthering the SRHR agenda internationally and nationally (Germain and Liljestrand 2009; Radford Ruether 2008). Girard argues that considering the incessant and well-orchestrated opposition to SRHR since the mid-1990s, “activists

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<sup>13</sup> The Vatican has also found unexpected allies in international fora to sustain its attacks on the SRHR agenda, this includes right-wing Protestants and Muslims, including countries such as Iran, Libya and Sudan (Girard 2002; Radford Ruether 2008).

can take pride in the fact that the ICPD and Beijing agreements have been preserved. Women's health advocates and progressive governments weathered the storm, and successfully pushed back attacks on sexual and reproductive health" (2009: 181).

For Kissling, the "vehemence and sometimes viciousness with which conservative religious groups still struggle against public policies that support the rather modest reproductive health objectives developed at the ICPD is a primary obstacle to improving services and creating political will in favour of sexual and reproductive health and rights worldwide" (2009: 211). This has prompted resistance from global civil society and in particular women's rights groups.

Women's groups among Catholics, for example, have launched international campaigns to oppose the monopoly of the Church's views in these debates (Radford Ruether 2006). This is allowing Catholic women all over the continent to articulate an opposition to the Church's teachings and dogma (Radford Ruether 2008). Working from a feminist theology point of view, groups like Catholics for a Free Choice have challenged the doctrine of the Church regarding abortion and reproduction (Hurst 2004; Red Latinoamericana de Católicas por el Derecho a Decidir 2007), denouncing the influence of the most fundamentalist groups within the Church such as Opus Dei (Catholics for a Free Choice 1997), and most importantly have highlighted the contradiction in the bishops' opposition to EC while most Catholics support its distribution (International Consortium for Emergency Contraception and Catholics for a Free Choice 2011).

Resistance from within the Catholic community is important because, as Sjørup (1999) has shown, in Latin America and in Chile in particular, there has always been space within the Catholic doctrine to challenge the top-down messages of the Vatican, and Catholic women worldwide have historically negotiated their relationship with

feminism (Ecklund and Howard 2003). This breaks a static or path-dependent view on the politics of reproduction and sexuality and provides a space for the agency of women and other actors in a Catholic-dominated context.

### **The Church and SRHR in Chile**

With the Catholic Church having established itself as a main political player in the transition to Democracy, and the left having conceded an overrepresentation to conservative forces in Congress, the space for negotiation on these issues was minimal. As explained by Guzmán and Seibert, “Sexual and Reproductive Rights constitute the most prominent area of political confrontation between the Catholic Church and progressive movements” (2010: 3). In Chile, the Catholic hierarchy is closely linked to the economic and political elite who identify themselves as practising Catholics and belong to very selective Catholic groups (Thumala 2007). These strong alliances through a new understanding of religion for the elite have erased the presence of popular Catholicism – in particular the theology of liberation and Jesuit influence that favoured more progressive debates in the 1960s (Craske 1999; Sjørup 1999) – giving the Church the upper hand to influence policy-making since democracy was re-established in 1990 (Blofield 2006).

### **The attack on scientific evidence and evidence-based health policies**

A crucial aspect of the EC controversy and the struggles for SRHR is how conservative groups and in particular the Catholic Church have constantly tried to dismiss scientific knowledge and evidence-based arguments when they contradict their faith-based beliefs (Faúndes et al. 2007; Martin 2004). As argued by Buse et al., “[p]olitical factors are often pivotal in the policy process” to counter this challenge since:

They can determine which sexual and reproductive health issues are included in national policy agendas, which evidence is examined (or excluded), which policy

alternatives are considered (and ultimately adopted), and the degree to which they are implemented. (2006: 2101)

The pro-choice medical establishment and civil society groups working on EC that founded the ICEC in 2000,<sup>14</sup> came together to establish international and regional alliances to face the assault on scientific evidence in the legal and political challenges around EC (Martin 2004). ICEC allowed these actors to organise and share information and experiences to counter the conservative attack on EC, as well as disseminating their opinions and scientific findings to support their position, bringing together academics, scientists, parliamentarians, and civil society groups (Faúndes et al. 2007; Martin 2004). ICEC was particularly successful in the first years when many countries quickly adopted a formal policy on EC and had legalised the drug (Martin 2004). In Chile, the national section of ICEC from very early on brought together biomedical organisations, lawyers and even feminists groups (Díaz and Schiappacasse 2012).

In some circumstances, the challenge to evidence-based policies has taken the form of scientific exchanges in scientific journals such as *Contraception* and *Human Reproduction* where the existing research carried out by doctors working on EC has been openly challenged by fellow scientists, often linked to Catholic institutions or the new conservative right in the US (H. Croxatto 2007b; Mena 2005; Noé et al. 2011b; Puccetti et al. 2012). This shows the level of sophistication and visibility that the lobby against EC has obtained, something also observed with other reproductive issues in the last decade (Fenton 2006).

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<sup>14</sup> The ICEC is known in Spanish as Consorcio Latinoamericano de Anticoncepción de Emergencia (CLAE) and was founded in October 2000. Since then it organised many regional conferences that allowed a closer relationship between all actors working on the issue and especially information sharing and dissemination as a strategy.

This means the anti-choice lobby has diversified and is able to pursue sophisticated legal strategies regarding sexual and reproductive rights in the courts. The fact that current battles taking place at the courts all over the continent are of an ideological nature means religious ideas and beliefs are permeating institutions seeking to structure the way reproductive rights are defined and upheld. Casas argues that in Chile judges are particularly susceptible to conservative views when it comes to reproduction (Casas Becerra 2004b), something that confirms what is sustained in the judicialisation literature on the conservatism of the judicial power in Chile in general (Scribner 2011). This matters because feminists have long-argued and shown that “[p]ower operates through discourse to fix a certain construction of gender relations as dominant and marginalize or exclude counter-discourses, therefore constraining and bounding the agency of female actors, including feminists” (Mackay 2011: 192).

### **The role of the medical establishment**

Health professionals and scientists can be strong defenders of sexual and reproductive rights, but at times they have also joined the ranks of anti-choice coalitions. This poses new challenges for feminists in particular since doctors have historically dominated the debates regarding reproduction – in particular abortion (Engeli 2009) – and are increasingly doing so in current legal debates around issues such as assisted reproduction (Engeli 2009; Fenton 2006).

The Catholic Church in particular counts on the support of numerous health and legal professionals via its universities, hospitals and research centres in many countries, which were at the forefront of the opposition to EC by the Church in the late 1990s (Faúndes et al. 2007). Chile’s experience in this sense is no different to the rest of the region (Blofield 2006; Dides Castillo 2006a; Haas 2010). Even the presence of

proactive new pro-life NGOs and groups linked to US pro-life movements opposing EC is a common pattern (Faúndes et al. 2007).

The literature shows that divisions within the medical profession may affect the success of progressive laws and policies. For Engeli, “the strong coherence within the medical community explains a great deal of the variation between reproduction policies” (2009: 64). The literature seems to indicate that congruence among physicians would lead to more restrictive laws based on self-regulation established by doctors, while division or “fragmentation” would allow for more permissive policy-making (Varone et al. 2006 cited in Engeli 2009: 67). This is sometimes due to the fact that when faced with a polarised or fragmented medical profession, the state cannot rely on physicians to settle a controversy and produce a clear policy (Engeli 2007 cited in Engeli 2009).

The question is whether in contexts where we know physicians are divided due to strong religious influences, yet are actively involved in lobbying – such as in the case of Chile with EC – the cohesion or division of the medical establishment, including doctors, scientists and science or medicine-related advocates, will affect its capacity for impact during the policy process and its relation with other actors and institutions. If one takes the case of a Catholic country such as Italy, the literature tends to highlight that the positive effect of fragmentation amongst doctors does not apply (Engeli 2009; Fenton 2006). Doctors in Italy where Catholicism is very influential are not a cohesive group with one clear and united set of beliefs (Varone, Rothmayr, and Montpetit 2006). In the case of assisted reproductive technologies, they are highly fragmented along the religion versus secularity lines, giving the Church the upper hand in influencing law-makers and State institutions and producing a highly restrictive law (Fenton 2006).

It is therefore crucial to look at the role of physicians in the policy process and within alliances. Mala Htun's seminal "Sex and the State", a comparative study on abortion, divorce and family laws in Argentina, Brazil and Chile, highlights the role played by "'issue networks' – elite coalitions of lawyers, feminist activists, doctors, legislators, and state officials – in bringing about policy change" (2003: 5). Htun (2003) argues that sometimes members of issue networks, such as lawyers, are not necessarily feminists yet can play decisive roles in gender policy outcomes. She also emphasises that doctors have forged an important "network" around reproductive issues, in particular abortion, often at times when women's groups were not particularly active or united (Htun 2003).

### **The role of strategic alliances in promoting SRHR**

The literature shows that alliances and strategic litigation have proved key in advancing the SRHR agenda (Cabal, Roa, and Sepúlveda-Oliva 2003). This was the case in Colombia at the Constitutional Court to legalise abortion (Reuterswaerd et al. 2011), and internationally and nationally to implement sexual and reproductive health and rights' agreements (Germain and Liljestrand 2009). Although the literature highlights how, since the 1980s, biomedical and health institutions, as well as researchers working on these issues, have become key allies of women's health advocates, it also points to the fact that these alliances are not always easy to achieve internationally or nationally (Fenton 2006; Germain and Liljestrand 2009). In fact, at times disagreements have been too significant and these groups have refused to work with each other (Germain and Liljestrand 2009). This poses specific challenges for those women's advocates and feminist groups promoting and defending reproductive rights across the Latin American region where often the initiatives around SRHR have been led by national societies of obstetrics and gynaecology (Germain and Liljestrand 2009).

Feminists have historically entered the arena of SRHR from a different perspective to health professionals, scientists and lawyers. Since the 1980s and 1990s, feminist views on sexuality and reproduction have been inserted in the context of democratisation, and are therefore often linked to struggles around citizenship which defines the body as a new public space of political struggle (Ávila 2001; Escobar & Harcourt 2005, cited in *Conciencia Latinoamericana* 2006: 42). This new optic on the “political body” was supposed to allow them to build and widen alliances with other social movements and actors (*Conciencia Latinoamericana* 2006: 43).

In this context, therefore, the relationship between feminists and other groups working on matters of reproduction and sexuality, in particular doctors, has often been accompanied by distrust towards the biomedical, religious, and state frameworks around the body and gender equality (*Católicas por el Derecho a Decidir-Conciencia Latinoamericana* 2006). A good example of this historical tension is the struggles for the legalisation of abortion in the 1970s which had to do with the de-medicalisation of birth and promoting more respect for women’s bodies especially from the medical profession (Fenton 2006).

The existence of the ICEC confirms a tendency to work together, but the experience of working jointly at the local level has not been systematically explored. This is important because the reticence to create real joint strategies and alliances may be affecting the way in which women’s health advocates and feminist groups engage with the medical profession and other important players in the field such as lawyers. This research explores if such alliances were created in Chile, what their nature would be and whether the different actors of the pro-SRHR coalition would work effectively or not on the ground during the EC policy process. In doing so, the research engages with the

argument advanced by Casas that the inability of feminists and women's groups in Chile to forge stable and strategic alliances limited their effectiveness and ability to have an impact on the EC debates in the 2000s.

### **Pharmaceutical companies and pharmacists**

A no less important aspect of the battles for the distribution of EC is the way the private sector, in particular pharmaceutical companies and pharmacies, has been targeted as part of an international strategy to prevent EC distribution (Casas Becerra 2008); this has led to groups such as the Consortium for EC working with local NGOs to support small pharmaceutical companies to produce the drug to make it available to women in all countries in the region (Faúndes et al. 2007). Pharmaceutical companies can therefore be key actors or victims in the process of EC distribution. The impact they can have in the effective and easy access to EC cannot be underestimated. In the US between 2005 and 2010 pharmacists were proactive in opposing EC and invoked their right to “conscientious objection”, while in Canada in 2005, where conscientious objection cannot be invoked by corporations (Wynn et al. 2011), they opposed the barriers being imposed on women to access EC and the violation of privacy and confidentiality in their work (Eggerton 2006). As explained by Wynn et al.:

The comparison between two neighbouring nations highlights the extent to which discussions of the ethics of reproductive health care are culturally and politically specific, despite the deployment of naturalizing terms such as “health” and “science” and universalizing terms such as “rights”. (2011: 253)

Although one of the first tasks by advocates of EC in Chile was to carry out studies on the attitudes of people and health workers towards EC (Schiappacasse and Diaz 2006), they did not involve the attitudes of private sector workers such as pharmacists whose conservative reaction proved a surprise for the political establishment and public

opinion. Attitudes and beliefs of individuals, whether political, ethical, or religious, can play an important role as barriers to access, as shown by more recent studies carried out in Chile and Argentina (ANDÍA et al. 2010).

### **The politics of sexuality and reproduction in Latin America and Chile**

Over the last three decades, most literature on gender and politics in Latin America has focused on women's movements, women's representation and women's interaction with the state, developed in the context of the study of democratisation. In the 1980s, most political and social researchers working in Latin America focused on the rise and fall of democracies, and particularly on the breakdown of authoritarianism by looking at the consequent transition and consolidation periods, often lacking a gendered perspective (Waylen 1994, 1996b). In the mid-1980s and from the beginning of the 1990s, feminist academics quickly joined this line of research to show that all these political processes were gendered (Alvarez 1990, 1994; Alvarez et al. 2003; Chuchryk 1989, 1994; Craske 1999; Feijoó and Nari 1994; Feijoó 1989; Franceschet 2005; Jaquette 1989, 1994; Molyneux 1986; Safa 1990; Waylen 1996b).

However, women's movements in the region have also worked hard over the last 40 years, even during dictatorship periods, to advance women's sexual and reproductive rights. Feminists have been key actors in advancing the SRHR agenda since the 1990s, as part of their involvement and commitment to the UN conferences, which captured the essence of the close relationship between sexuality, bodily autonomy and reproduction for women's rights (Haussman 2005). They made their appearance in the international legal arena bringing a new way of reconceptualising the basic freedoms of human beings, regarding their reproductive capacity and sexual lives, promoting a whole new set of duties for states to uphold these rights and promoting adequate health policies.

Women's health movements in the region have therefore gained a strong reputation in promoting progressive agendas and having political impact as part of their struggle for equal citizenship (Alvarez, Dagnino, and Escobar 1998; Alvarez 1990; Franceschet and Macdonald 2004; Petchesky and Judd 1998).

Although numerous organisations in Latin America have been working on these issues since the 1990s, abortion was already on many organisations' agenda since the late 1980s (Saporta Sternbach et al. 1992). Openly embracing abortion, however, was not easy for many of them. There was originally a strong resistance and concern in adopting what was perceived as "bourgeois" and "bad feminist beliefs" by working class sectors on the left (Saporta Sternbach et al. 1992: 402). This did not stop the Latin American feminist movement from creating umbrella organisations providing coordination and advocacy support to national NGOs advocating in favour of abortion rights.<sup>15</sup> The region-wide feminist meetings known as *Encuentros* "helped forge a regional feminist identity" and "facilitated the emergence of dozens of region-wide issue- or identity-based feminist networks" (Alvarez 2000: 1).

At the same time the SRHR agenda was disaggregated by issues and impacted by what Alvarez (Alvarez 1999) called the NGOisation of feminism. Back in 1999, Alvarez was very critical of the effects that the professionalisation and institutionalisation of feminist organisations under the form of NGOs could have for feminist activism and their autonomy, in particular due to their high dependence on international and national funding. In 2009, however, Alvarez reviewed her opinion and acknowledged the "ambiguities and variations in and among NGOs" and the "dual or hybrid identity of

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<sup>15</sup> The Campaña 28 de Septiembre, CLADEM and the Red de Salud de Mujeres de Latinoamérica y el Caribe (RSMILAC) are good examples of the main regional organisations working on SRHR but more specifically on the issue of abortion, both to legalise and expand its access.

feminist NGOs, their two facets, as technical professional organizations that are at once integral parts of feminist movements” (2009: 175).

Many women’s movements originated under oppressive regimes, which led them to identify “as oppositional and anti-state” while also making autonomy “a principle of political organisation” (Molyneux 2001), leading to much tension between feminist “autónomas” (autonomous) and “institucionales” (institutionals, within parties or state bureaucracy) which only began to diffuse in the early 2000s to allow for the heterogeneity and diversity of the movement to become more visible (Alvarez et al. 2003). Molyneux argues that while “autonomy has long been a principle of feminist organisation, in practice women’s movements have been associated with a variety of forms of political linkage, within as well as outside the institutions of party and state” (2001: 3). In the past decade, class, race, and ethnic divisions have become more apparent (Jaquette 2009: 5); and a late comer, sexual diversity, has also challenged the understandings of Latin American feminism (Friedman 2009). Ríos Tobar (2009a) has also highlighted the presence of generational conflicts, something that echoes with the complicated relations between younger and older feminists in the US with the appearance of third-wave feminism (Ewig and Ferree 2013: 447-448).

Craske noticed that the 1990s had been “a period of consolidation” and women’s movements were not so visible at the national level but were “still there, becoming smaller and more focused on specific issues which are of the interest of the activists concerned” (1999: 190). Recently Jaquette has also argued that as social movements, women’s movements have stopped being the significant actors they once were in the region, and despite the existence of active groups and actors belonging to different feminisms, they “rarely achieve the level of coordination and consensus that the term

movement implies” (2009: 6). Yet the definition of women’s movement is often at the centre of debate among scholars.

Molyneux has argued that there are “contrasting views on what constitutes a women’s movement” and questioned Alvarez’s “criteria involving the pursuit of women’s interests and independent self-activity” for it conflates the issue of “organisational autonomy and ‘women’s interests’” (2001: 146). For Molyneux, “a women’s movement does not have to have a single organisational expression, and may be characterised by a diversity of interests, forms of expression and spatial location. Logically, it comprises a substantial majority of women, where it is not exclusively made up of women” (2001: 144). Molyneux in fact suggested looking at *associational linkages* where “independent women’s organisations with their particular goals and institutional autonomy choose to form alliances with other political organisations with which they are in agreement on a range of issues” (2001: 148).

Questioning the supposed decline of both feminist activities and incidence due to a perceived invisibility of women’s movements, as well as incorporating an idea similar to associational linkages, Ewig and Ferree have suggested looking at “feminist organizing” (2013). Starting from the premise that “feminists are individually on the move, in and out of institutions, offices and political engagements, but also their collective mobilizations”, feminist organising includes “efforts led by women explicitly challenging women’s subordination to men” differing from both” women’s movements (a wider notion of women looking for social change), and feminists (the concern with women’s empowerment, not necessarily collectively organised) (Ewig and Ferree 2013: 437). This recalls Craske who argues that the “growth of feminism” can be “judged in the way that the language of equal opportunities has permeated most levels of politics”

(Craske 1999: 190). Therefore it is with this understanding of feminist praxis that we need to explore the case of Chile and how the women's and feminist movements operate and address SRHR.

### **The women's movement and feminists in Chile**

An important part of the literature on gender and politics in Chile addresses the problems that both feminists and the women's movement have faced since the transition to democracy (Chuchryk 1989, 1994; Franceschet 2003, 2005; Guzman, Seibert, and Staab 2010; Haas 2006; Ríos Tobar 2003a, 2009a; Woitowicz and Pedro 2009). The transition meant that “for the first time in decades [feminists] were confronted with having to interact with the state, state actors, an professional politicians, and to negotiate their political role with respect to the political parties now dominating the public sphere” (Ríos Tobar 2009a: 28).

There is an overall impression that since the early 1990s, the women's movement has become invisible and lost its capacity to influence and frame policies and to mobilise support (Ríos Tobar et al. 2003; Ríos Tobar, 2003), giving “origin to real fractures between the different expressions of contemporary feminism” (Ríos Tobar et al. 2003: 310). Others consider that rather than disappearing, the women's movement(s) has evolved and adapted strategically to the political conditions they face (Franceschet 2005), or that despite its internal limitations and institutional political barriers, feminists in particular have been able to make important policy changes for women's rights and make feminist discourse present in the legislative arena (Haas 2006, 2010). Yet it seems that despite its relative success in pushing laws and initiating policies to improve women's status in society, the Chilean women's movement remains divided and weak. Feminism in particular does not seem able to overcome the extreme polarisation and

diversity that impedes any form of joint strategy; nor has it managed to establish closer links with popular organisations, limiting its capacity for mobilisation and its voice in public debates (Ríos Tobar 2009a). Ríos Tobar (2009) explains that autonomy remains one of the main sources of conflict among feminists. The internal dynamics of the movement in this sense explain much about the shortcomings of feminists as a movement “and despite the importance of structural factors the transformation of the feminist movement cannot be understood as a mere by-product of these structural processes” and thus:

... Any analysis of its reconfiguration must necessarily consider the internal dynamics of the movement, its links with the political system, alliances with other civil society actors, as well as its capacity to react and adjust to new social and political conditions. It is precisely the interaction between these macro and micro levels, which characterizes the specificity of feminist action and distinguishes it from similar experiences by other social actors. (Ríos Tobar 2003: 258)

This research engages with Marcela Ríos Tobar’s most recent portrayal of Chile’s feminist movement as composed of scattered yet numerous active institutional spheres and organisational structures – including NGOs, feminist collectives, women’s studies programmes at universities, thematic networks, small media initiatives, etc – divided by a thematic division rather than pursuing a broader political platform for gender equality, which affects its capacity to influence wider political debates (2009a: 28-29).

The research finds particularly relevant Ríos Tobar’s argument that there is an increasing number of young feminists claiming a feminist identity who want to have more of a voice (2009: 31), but are often relegated by the older and more influential members of the feminist movement. This was particularly visible during the legal and political battles surrounding EC under the Bachelet administration, raising questions for the future of the movement.

### **The SRHR agenda in Chile**

The development of a feminist and progressive work and discourse on SRHR in Chile was a direct consequence of the participation of women's organisations in the UN conferences in the 1990s (Valdés and Busto 1994) and follow-up conferences and gatherings at the regional and international level. This discourse has nonetheless tended to stay within a circle of specialists working on social policy, reproductive health and politicians. In Chile, sexual and reproductive rights have not been discussed, either in an open and extensive manner in public opinion nor the media, with the exception of specific moments regarding the status of abortion and the debate on sexual education (Shepard 2006). According to Shepard (2000), Chile like the rest of Latin America is affected by the existence of a “‘double discourse system,’ which defends repressive or negligent public policies while privately tolerating unofficial and often illegal mechanisms that expand private sexual and reproductive choices.

Abortion remains a major concern from both a feminist and public health perspective, but since it is illegal, collecting data on the real extent of unsafe abortions is very difficult for the government (Shepard and Casas Becerra 2007). Without clear evidence and data, it is a challenge to try to make the case for the legalisation of abortion and the issue remains a source of heated debates. It is clear, however, that the legal ban produces and reinforces the socio-economic discrimination of poor women and young girls, and all women unable to pay for the private services to get a confidential and safe abortion.

Although Chile had a strong and visible women's movement that fought to topple Pinochet's brutal dictatorship, feminists and women's groups have not been able to put the issues of SRHR as a priority in the agenda of Concertación governments who led the

country between 1990 and 2010. Despite the known reality of abortion, this has not been taken on board by those political parties who have been in power since 1990 (Maira Vargas, Santana Nazarit, and Molina Sáez 2008). Grassroots women's groups working with *pobladoras* – women from low-income settlements – have made advances in creating spaces for women to debate and redefine their rights as citizens, in particular SRHR (Willmott 2002).

As explained by Siavelis (2000), coalition politics in the transition to democracy has meant that parties avoid issues affecting the strength of political alliances. In Chile, the double militancy of women in civil society and parties has been a cause of tension to promote a feminist agenda (Franceschet 2005). Women's groups and feminists remain divided on the issue of abortion (Memoria Encuentro Nacional Feminista 2005), with women's NGOs exercising self-censorship (Shepard 2006: 25), and since 1990 those closely involved in party politics having accepted not to raise the issue so as not to harm their political community, or the consecutive governments of the Concertación's centre-right coalition, in power since 1990.

In Chile, many NGOs have worked directly or indirectly on abortion issues. A core of organisations is generally seen as supporting legal initiatives or producing materials on the topic, but many suffer from a lack of resources and numbers to mobilise and be more visible. As the literature on Latin American feminist NGOs has explained, the professionalisation of these organisations – also known as “NGOisation” (Alvarez 1999) – has meant that they are now more distant from more popular movements or associations while being more integrated regionally and internationally. This has created elites of feminists and women's rights advocates who often work on specific policy advocacy initiatives separately from a wider women's network. This is no different in

Chile: “the public presence of the women’s movement, including feminist organizations, has gradually disappeared as a political force in post-transition Chile” (Ríos Tobar 2003: 257). This means that it is difficult for feminists located in different organisational spaces to come together and act for a single reformist agenda, affecting issues such as abortion or EC which should be part of a wider SRHR agenda.

### **SRHR, the state and institutions**

Chile figures prominently in the literature focusing on gender and politics, and gender and the state in Latin America due to its well-known transition after 17 years of dictatorship and the role women played in demanding the return of democracy (Baldez 1997, 2002; Blofield and Haas 2005; Blofield 2006; Casas 2009; Craske 1999; Franceschet 2003, 2005; Htun 2003; Macaulay 2006; Power 2004; Richards 2005, 2006; Roseblatt 2000a; Schild 1994; Waylen 1996a, 2007, 2010). Nevertheless, Chile is also one of the few countries worldwide where abortion is illegal under any circumstance, and penalised by law. This has attracted research on the issue over the last decade, in particular through a feminist lens of citizenship (Franceschet 2005), institutions (Haas 2010; Htun 2003; Macaulay 2006; Waylen 2007), but also from the point of view of socio-economic inequalities (Blofield 2006). Most authors have used the case of abortion as a way to look at progress in the area of reproduction in their wider analysis of gender policy outcomes.

### **SERNAM and feminist policy-making**

An important part of the literature on women and the state in Chile has shown how feminists within the feminist movement and within the State and political parties succeeded in creating a women’s machinery built with the aim of leading the work for gender equality: SERNAM (*Servicio Nacional de la Mujer*; National Women’s

Service). SERNAM has in fact channelled most gender or women's issues and legal or policy initiatives over the last twenty years (Blofield and Haas 2005; Franceschet 2003, 2005; Haas 2006; Macaulay 2006; Waylen 1996a, 2000).

Together with feminist politicians and civil society, SERNAM has shaped the way in which feminist policy-making and gender-equality initiatives were framed (Haas 2006, 2010). Most literature agrees, however, that SERNAM promoted gender issues within a conservative framework built around the institutions of family and motherhood, especially in the early 1990s (Haas 2006; Macaulay 2006; Waylen 2000). Thus, SERNAM's official mandate never included promoting sexual and reproductive health and rights on which it imposed "self-censorship" (Macaulay 2006: 177). However the politics behind the transition strongly influenced the success and development of SERNAM (Macaulay 2006; Waylen 1996b).

Besides the many gender-sensitive policies put in place or supported by the executive through SERNAM, many legal initiatives were born in Congress to ensure women's legal equality and uphold their rights (Blofield and Haas 2005; Haas 2006, 2010). According to Haas (2006), the overall record of initiatives is positive and shows the slow permeation of feminist ideas in mainstream politics. Despite a well-known historical dominance of the legislative initiative by the executive, there is increasing competition with Congress in policy development, but this poses a challenge for SERNAM, women's NGOs and feminist representatives in Congress who struggle to cooperate (Haas 2010). This research looks at the tensions present during the EC policy process and how these groups tended to work.

In the area of SRHR, Haas for instance shows that SERNAM refused to support congressional efforts to reinstate and decriminalize therapeutic abortion leaving

parliamentarians on their own to carry forward the legal process and face a Conservative backlash. Interestingly, the feminist movement did not grant its support either to the congresswoman leading these efforts considering that feminists had not been duly consulted or included in the process of drafting the bill (Haas 2006).

### **Feminists and the executive v legislative battle**

The relationship between the executive and legislative powers remains shaped by the disproportionate powers given to the executive to control the legislative agenda and give priority to some initiatives over others. Contrary to the assumptions in most of the literature, feminists do not automatically cooperate to promote feminist policy (Haas 2010). This is not only to do with the notion of autonomy defended by many groups, but also with the capacity of feminists to forge alliances. This research therefore engages with Haas' argument for caution regarding the mistaken assumption that feminists will automatically join efforts to promote feminist policy.

### **The SRHR Bill**

The only comprehensive bill on SRHR introduced to Parliament so far – *Ley Marco Derechos Sexuales y Reproductivos* – was initiated by the feminist movement, who obtained the wide support of a diverse range of civil society organisations, and by feminist and politicians committed to gender and women's rights issues in Congress (C. Dides 2002). Despite this wide support, it has never been discussed and has remained entangled in the internal political procedures of Congress. This bill and EC were part of Bachelet's presidential programme and gender commitments agreed with the women's movement and the civil society organisations working on these issues (SERNAM 2008). This research discusses the process of that bill since the actors involved in it are similar to the ones behind the EC policy process (see Ch. 6).

### **SRHR policy-making: Actors, class, institutions and the state**

At the end of the 1990s, feminist scholars started focusing on the state as part of their wider work on gender and politics (Chappell 2000; Dore and Molyneux 2000; Dore 2000; Molyneux 1996, 2000, 2001; Waylen 1998). The emerging work then was disaggregating “the state to consider the way different political institutions shape and are shaped by engagement with feminist actors” (Chappell 2000), and the way the different types of states shaped feminist and women’s engagement (Molyneux 2001).

Many authors have focused on gender, institutions and the state in Chile, and the way in which they influence the promotion of women’s rights and policies (Blofield and Haas 2005; Blofield 2006; Franceschet 2001, 2004, 2005; Haas 2010; Htun 2003; Macaulay 2006; Waylen 2010, 2000, 2007). The works of Htun (2003), Blofield (2006), Macaulay (2006), Waylen (2007) and Haas (2010) are particularly relevant for this research since they directly engage with SRHR and the issue of abortion.

Htun (2003) works from an institutionalist point of view giving particular relevance to the role of ideas and beliefs in policy-making. Through her historical analysis of legal and policy initiatives by institutions in Argentina, Chile and Brazil, Htun highlights that “gender rights” are “not one issue but many” (2003: 5). Htun focuses on the way gender issues such as family laws, divorce, abortion are taken on by states, and argues that we must disaggregate gender issues because they produce different political dynamics which lead to differentiated results in terms of gender reforms. Moreover, she highlights that possibilities for policy change depend on how elite issue networks are “able to hook into state institutions” (2003: 5). Abortion, in her opinion, is the issue that in Chile had the most difficult dynamic, and therefore has made fewer advances. Htun highlights that a “major factor shaping issue networks’ success was the relationship between the

Church and the state”, where Church-state conflict can create a “window of opportunity” for networks’ access to influence a policy (2003: 6). She also emphasises that the authoritarian legacy in Chile was stronger than in Argentina and Brazil, due to the “‘authoritarian enclaves’ in the political system and coalitional dynamics among governing parties” (2003: 8)

By treating gender issues in a differentiated manner, Htun (2003) identifies the need to look at the institutions where the policy and political negotiations happen and the “elite networks” that are at the origin of lobby and public interest. Htun, in fact, downplays the role of economic development and class in explaining these policy and legal changes to give more relevance to “elite issue networks” and their ability to effectively lobby around specific issues. This research follows Htun’s argument by placing alliances and the behaviour of elite networks and their interaction with the state and institutions at the centre of the analysis.

Blofield (2006) in her comparative study on divorce and abortion in Argentina, Chile and Spain, focuses on economic power as linked to political power to explain the power differentials between the members of “issue networks” or policy elites. The author pays much attention to the power of the Catholic Church in Chile and the organised conservative lobby and their financial access as a way to explain policy outcomes. Blofield asserts that the class nature of issues such as abortion and divorce, matters more, and that access to resources of actors will be the key determinant of the success or failure of any policy initiative on the issue.

Both Htun (2003) and Blofield (2006) are interested in the analysis of gender issues in a broader sense and coincide in comparing abortion and divorce in countries similar to Chile. Both their approaches are comparative. By focusing on elite networks, Htun does

not allow much space for non-institutional actors such as women's rights groups and the media, while Blofield's emphasis on the socio-economic differential risks produce a rather static account of the power differentials in society, denying civil society and feminists, as well as other actors such as the executive much agency.

Macaulay's research (2006) compares the role of parties in gender outcomes in national and local policymaking in Chile and Brazil. Her research is innovative in that it looks at the often forgotten institution of the party system. Macaulay provides an analysis of the workings of gender policies in political agendas and highlights the strategic role of parties, which are "complex beasts, directed not just by their ideology, but also by their histories, leaders, members and organizational cultures" all of which influence the "response to the institutional environment" (2006: 182). On abortion, Macaulay explains that parties have left the issue outside the political agenda of Concertación because it was perceived as a factor causing division within the wider political coalition, and the "conservatives' assertive veto and agenda-setting role succeeded in restricting both SERNAM's substantive mandate and institutional reach and resources, and created an environment of politicised morality more radical than public opinion, in the face of which the secular Left, especially the still class-based Socialists, remained reactive" (2006: 177).

Macaulay's work in this sense gives a detailed account that complements Htun and Waylen's views on the importance of the transition and the way political institutions were shaped by it. Macaulay shows the rational prioritisation of parties when excluding all issues that could represent a threat to the political power of the government alliance. The double militancy of feminists has made them very aware of this point, and they also may be more inclined to accept this position coming from their own parties. Macaulay's

research needs to be complemented by taking into account the way the “consensus” has evolved or dissolved over the years within the Concertación parties. As suggested by Borzutzky and Weeks, when Bachelet came to power in 2006, she “inherited a consensus that was starting to show wear” (2010: 12).

Waylen’s work (2007) is part of recent initiatives by feminists to use historical institutionalism to explain gender outcomes within the transitions to democracy in different countries. The author asks why women’s movements that were important in pre-transition settings were not able to obtain “greater gains in the immediate post-transition period?” (2007: 1). For Waylen, it is important to look at institutions within a historical frame because “new polities in post-transition polities do not begin with a blank slate” (2007: 47). Both the gender rights’ status quo at the time of transition and the institutional legacy of the non-democratic regimes contribute to the size of the policy window for gender reform open to actors in the post-transition period. The speed and openness of the transition, as well as the balance of forces at the point of transition affect the institutional legacy left by the outgoing non-democratic regime (Waylen 2007).

Waylen’s argument is particularly convincing for the case of Chile that experienced an important pacted transition to democracy, a process that was crucial in shaping the way the democratic institutions have been working for the past twenty years or so. Waylen suggests focusing on the interaction of “structure and agency” (2007: 38) by looking at multiple factors and beyond the exclusive role of women’s movements and feminists, to explain the gender outcomes of policy-making and role of actors within specific institutional contexts.

Finally, in a similar line to the institutional approach of Htun and Waylen, Haas's review of "Feminist Policymaking in Chile" (2010) introduces the notion of dynamics in the political environment affecting policy-making in order to evaluate how successful feminists have been in passing laws belonging to their agenda. Haas provides a good model of analysis of strategies used by the feminists by looking at the micro-level as well as the macro-level when for example engaging with the women's machinery or parties.

Two components of Haas's analysis are particularly convincing: the way she looks at institutional structures and the power incentives and disincentives they create, as well as the presence of Bachelet as President within the very rigid and sometimes static Chilean political system. As Haas explains, feminist strategies and civil society's actions matter because "while institutional structures may remain static for long periods, the larger political environment remains surprisingly dynamic and responsive to political tactics. In other words, politics matter" (Haas 2010).

Haas's approach is closer to the one used in this research, giving visibility to both pro- and anti-SRHR advocacy coalitions, while looking at their strategies, tactics, and the way this interaction with formal power evolves over the ten years of political and judicial processes, with particular attention to Bachelet's government and her role as president. This research therefore distances itself from Blofield's over-emphasis on socio-economic conditions as the main explanation for the failure of feminist influence in the political arena. This research considers that it is in their political engagement as feminists, as well as part of a wider coalition that we can see how effective feminists are at framing an issue and advancing their own agenda.

An important aspect of feminist policy-making in Chile has been the learning process represented in the long-fought battles for women's rights. According to Haas, feminists have learned two main lessons in the process of legislating to reinstate therapeutic abortion: "the futility of attempting to legislate on such a controversial issue, in the absence of public support for policy reform. Feminists also gained experience framing their proposals to try to overcome conservative opposition" (Haas 2006: 218).

Haas (2006) shows how the limits to strategic framing and negotiation of feminist proposals has taught feminist parliamentarians to pre-empt criticism and hostility by framing their initiatives in a pro-family language and public health perspective. This is understandable since as explained in the literature on SRHR, by suppressing or marginalising the "sexual" in official policies related to sexuality in favour of a low-profile "public health" discourse, advocacy groups sometimes create opportunities for important legal changes (Cáceres, Cueto, and Palomino 2007).

Htun and Weldon (2010) have proposed a framework to analyse the probabilities of policy change for women's rights. They argue that sex equality policies can be regrouped in two groups: a) those that alleviate gender-based class inequalities; and b) those that challenge the doctrine of organised religion. Htun and Weldon explain that policies that have a high doctrinal component and class-based component requiring financial means to promote the policy are the ones that will face stronger opposition. Here the question remains whether the framing or the nature of an issue matters more. The Chilean government – in the same way it addressed abortion in the 1960s – pursued a rather gender-neutral policy, justified as a public health policy to distribute EC. This research analyses how the framing of the issue evolved over the 10 years of policy process and how this affected the outcome of the policy initiative.

Finally, Ríos Tobar (2009b), who reviewed the evolution of feminism in Chile over the 1990s, sustains that although the structural political factors regulating state/society relations are extremely important, we must look into the internal dynamics of the feminist movement. This recalls Haas' view on micro and macro processes. For Ríos Tobar national processes have shaped the evolution of feminism in Chile, and like Waylen, she maintains that:

... the transformation of feminist politics has at the same time coincided and been shaped by the change in political regime. In the case of Chile, this transition had a negative impact on the ability of social actors to mobilize politically and represent their interests in the public sphere (Garretón 1995; Moulián 1997; Drake and Jaksic 1999). The newly installed regime has not only failed to strengthen the development of civil society, but its very existence has made previous forms of organization and mobilization obsolete. (Ríos Tobar 2003a)

The institutional analysis required for this research must therefore incorporate these changes at the macro level of the institutional environment and rethink in which way feminist praxis has evolved. This is closely related with Waylen's focus on structure and agency and the importance of formal and informal institutions that the next chapter will discuss.

## **Conclusion**

This chapter has reviewed the main literature available on EC, SRHR, women's movements, gender and politics and gender and the state as related to Latin America and Chile in particular.

There is an increasing interest in the literature regarding the role of alliances for the effectiveness of advocacy efforts to promote SRHR. The literature has started looking at the role of doctors and medicine as an institution in these debates. This recalls Htun's argument on the importance of elite issue networks in policy-making.

In the case of the judicialisation process, the role of lawyers and doctors seems particularly relevant. There is, however, a void in the literature regarding the details on the way in which these and other actors, including feminists, enter alliances and organise at the local level to promote a SRHR agenda. By looking at EC in the context of judicialisation processes, we can determine to which extent these actors succeed in being influential for policy-making through alliance building. This research therefore raises the question on the role of actors and alliances and elite issue networks during the EC process in Chile.

The literature is concerned by the extent to which women's movements and feminists are present as political actors in post-transition settings. Following the concept of "feminist organizing" and the ever-evolving feminist praxis, this research seeks to look at feminist participation within the context of policy-making processes where multiple actors are involved and interact. In doing so it pays attention to the internal dynamics of the feminist movement and asks whether the issues that seem to cause much division amongst the feminist movement worldwide are also present in the case of Chile, and how this affects their capacity to influence policy-making around SRHR.

The development of the literature on gender and the state has led to an increasing focus on institutions. In the case of SRHR issues, and more particularly EC, there is an increasing interest in these issues from a legal perspective due to the increasing judicialisation of SRHR in the continent and worldwide. This leads to new questions regarding the type of institutions involved in the judicialisation of EC, making Chile and the EC policy process particularly relevant as a case study.

The literature finally reveals a lack of feminist and gendered political analysis on EC compared to the available literature on abortion, as well as gender and the state. This

research attempts to fill this void. Given the increasing importance and relevance of the more institutional approaches for a gendered political analysis of change, this research provides new empirical material for debate.

The next chapter presents the conceptual and methodological frameworks, introducing the ever-growing literature on feminist political science and judicialisation, which I believe are the most adequate for the analysis in my research and builds on the literature reviewed in this chapter.

### CHAPTER 3: Conceptual Framework and Methodology

*How did formal and informal institutions influence the EC policy process, in particular during the judicialisation process? How did actors see their ideas reflected or ignored during the policy process? What was the impact of ten years of legal and political battles for the distribution of EC on feminists and other civil society groups? What do we learn about their capacity to mobilise and the efficacy of women's and feminist networks trying to influence the SRHR agenda in Chile? How did the presence of a feminist and first female president impact on the outcomes of the policy process?*

The research questions guiding my thesis require taking a closer look at the literature explaining the role played by actors, ideas and institutions in the policy process, with particular attention to the judiciary. I am therefore particularly interested in the growing literature on Feminist Institutionalism (FI), its concern with transitions and the state, as well as the literature on judicialisation, preoccupied with the increasing politicisation of judicial processes and institutions.

The aim of this chapter is to define the conceptual framework I consider appropriate for analysing the EC policy process by explaining the different theories, concepts and empirical work available, as well as the most relevant variables for my analysis coming out of these works. The thesis' analysis draws from a FI framework and therefore the first part of the chapter engages with the main concepts coming out of the literature on New Institutionalism (NI) and FI. It then examines the concepts linked to the literature on policy process and judicialisation. The second part of the chapter presents the methodology used and the challenges faced during the research process. It explains the research design, which included semi-structured open-ended interviews based on a non-probabilistic purposive sample to reach saturation (see App. 1). The interviews were

prepared following Sabatier's Advocacy Coalition Framework analysis, complemented by a press review and when possible by participant observation and the review and analysis of archival documents.

### **Institutionalism: New and Feminist**

In recent years, there has been a great deal of debate among feminists in political science concerning the role and eventual necessity for feminist political science (FPS) to engage with NI (Driscoll and Krook 2009; Gatens 1998; Kenny and Mackay 2009; Krook and MacKay 2011; Kulawik 2009; Lovenduski 2008; Mackay et al. 2011; Mackay et al. 2009; Waylen 2009).

Feminist scholars have evidenced that FPS and NI overlap on a series of core topics: the interaction between social actors and institutions; the interplay between formal rules and informal practices; the concern with gender neutral analysis of norms and values; and the need to focus on power asymmetries. But these links or relationships have neither been easy nor obvious. Institutionalism for a long time was considered limited and dominated by rational choice theory (Burnham et al. 2008; Peters 2005).

However, institutionalism, like any other school of thought, has evolved through its own constant internal critical revision, producing new and different strands within it. This renewal movement that brought about NI seems to provide feminists with new entry-points into the wider political science discipline and the study of gender and politics. In fact some authors argue that if feminists want to make an impact, engaging with dominant political theories is not only a matter of choice but also a necessity (Gatens 1998).

## **New Institutionalism**

New Institutionalism puts institutions at the centre of power analysis. The main concern for feminist political scientists has then been whether NI needs a gender concept and in that case which and why (Krook and Mackay 2011). The answer has been positive and FI has established itself as a new variant of research within NI (Mackay et al. 2011).

It is generally agreed that NI is composed of three main strands: a) Historical Institutionalism; b) Societal Institutionalism; and, most recently, c) Discursive Institutionalism (Peters 2005: 2). These new components are born from the intention of scholars to respond to the shortcomings of the behavioural and rational choice approaches in old institutionalism, in particular their focus on individual behaviour as independent from institutions (Burnham et al. 2008: 25; Peters 2005: 1).

What the three strands of NI have in common is their concern with a specific kind of institution – that is, political institutions (Lowndes and Roberts 2013: 4). If we accept the notion that politics is power, and power is present beyond formal institutions and government organisations, then we understand that political institutions are about how different sets of formal and informal rules and norms that dictate our lives maintain and reproduce specific power dynamics (Lowndes and Roberts 2013: 4-5). This is where NI and FI overlap: FI is interested in unveiling the way gender norms operate within and outside institutions and in this way explain how institutional processes construct and maintain gender power dynamics, and how we can gender change.

According to Lowndes and Roberts, since the early 2000s there has been a progressive process of convergence and consolidation to define institutions among these three strands of NI (2013: 40), especially around key concepts such as rules, practices and

narratives which are the three modes of institutional constraint on actors' behaviour (2013: 46). *Rules* can be formally written, for example as laws, regulations, protocols, etc. The study of laws and constitutions remains extremely important for institutionalists since "the enduring importance of formal rules in structural behaviour remains" (Lowndes and Roberts 2013: 55). Yet for NI the informal aspects of their enforcement or creation matter just as much as their content:

... the proper subject matter of third phase institutionalism is the specific combination of formal and informal mechanisms that constrain political behaviour in different settings, and which may be both the object and the subject of attempts at change (however imperfect). (Lowndes and Roberts 2013)

*Practices* are the close companions of rules. They often complement each other, although "these are often not formally recorded or officially sanctioned" and their mode of transmission is through "demonstration". For NI these are political conducts, but it is important, however, not to confuse practices with values or culture (Lowndes and Roberts 2013: 57-62).

Finally, *narratives* are "stories" developed by institutions which embody values, ideas and power, and are transmitted via the spoken word (Lowndes and Roberts 2013: 63). Narratives secure compliance by "establishing as 'taken-for-granted' certain framing devices, explanatory categories and normative understandings" and in this way secure institutional stability over time (Lowndes and Roberts 2013: 64). In the case of Chile one could say that the institution of "consensus" set by Concertación and the opposition became a crucial narrative for public policy.

### **Feminist Institutionalism**

The study of political activity from a gender perspective has represented important challenges for the political science establishment. Feminist scholars emphasise the use

of “‘gender’ as an analytical category, expanding existing definitions of ‘politics’, and generating insights that may be used to pursue some degree of political change” (Driscoll and Krook 2008: 4), while rational choice theorists would tend to focus on:

... connecting micro-level interactions to macro-level processes and events, paying attention to how individuals make choices within constraints and often in relation to projections about the probable actions of others. (Ferejohn 2002 cited in Driscoll and Krook 2009: 239)

By using gender as a central pillar of their analysis, feminists shift the focus from biological sex and break the binary relationship between the social construct of men and women, replacing in this way the exclusive concern on women by a deeper understanding of femininities and masculinities (Childs and Krook 2006a cited in Driscoll and Krook 2008: 5).

NI increased its focus on the role of actors and their influence on institutions, and in this way brought power back to the centre of its analysis. As explained by Joni Lovenduski:

... feminists use institutionalist approaches to answer questions about power inequalities in public life. When feminists adopt institutionalist research strategies that include gender, they seek to illuminate and change the status of women. (2011: vii)

Therefore feminists consider that political institutions, just like gender norms, are human made, and therefore there are no gender-neutral institutions, rather institutions have “gendered effects” on human relations (Mackay 2011: 181-182). In other words, institutions matter because they:

... are the rules that structure political and social life... Political institutions express and necessarily contain a normative element – the norms, principles, and ideas that hold a given institutional structure together and provide the ‘compass’ for the assessments of attempts at change. This order consists of collectively constructed values and principles that are protected and maintained by accepted rules of the game. (Lovenduski 2011: viii)

This recalls Connell's gender regimes, which are the "historically produced state of play in gender relations within an institution" (1990: 523). It implies looking not only at the state and its external structure but also the internal ones. This is why feminists "confer an equal status on formal and informal institutions", recognising that both are gendered and it is in their interaction that political outcomes are shaped (Mackay 2011: 183).

Feminist scholars have highlighted that institutionalism can benefit from feminist analysis for it "can show that assumptions central to rational actor versions of institutional design unwittingly obscure the specificity of women's social situation" (Gatens 1998: 2). This has led feminist political scientists to propose a "Gendered Institutionalism" framework of analysis (GI), focusing both on processes and outcomes for a better understanding of the role of institutions for women's rights and substantive representation (Franceschet 2011).

GI has also expanded the scope of NI by demonstrating that one cannot only look at political institutions. Rather one must also take into account the interconnections between political and non-political institutions by "looking at how political rules, practices and narratives interact with those institutions that structure wider social and economic life" such as "institutionalized practices and narratives about caring responsibilities" which originate in the domestic arena and influence the "development and interpretation of political institutions" (Lowndes and Roberts 2013: 165).

### **Women's agency and Feminist Institutionalism**

Another important aspect of a feminist and gendered approach to institutional analysis is that feminist literature has highlighted the way women are not passive recipients of policy-making and state decisions, but active political subjects with agency. As stated by Mackay, women show agency:

... as institutional and extra-institutional actors working in, through and against state and political institutions to effect social and political change, but they exercise their agency within institutional, cultural, and discursive constraints. There is a need to take in account multiple forms of rationality (around interests, norms, and cognition) and complex forms of agency and structure. (2011: 190)

Thus we observe an overlap between NI and FI since both attribute a special importance to the role of informal institutions. Gatens explains that, like NI, “feminist theories argue that individuals are formed in culture through various institutions, governed by norms, which constrain forms of behaviour and restrict options for action” (1998: 3). Both NI and FI stress “the agency of social actors, as well as the structures within which they act”, and “understand institutions to be the historical outcome of past human action” (Gatens 1998: 3). This means ideas and actors matter for the analysis of policy processes and outcomes. This brings back the focus on the interaction of “structure and agency” (Waylen 2007: 38) and requires mapping out the different actors and ideas involved in a specific policy process.

### **Historical and Discursive Feminists Institutionalisms**

Feminist scholars have been debating the need for a feminist strand of institutionalism and what it should look like. Emerging from these discussions are two dominant lines of thinking within FI – Feminist Historical Institutionalism (FHI) and Feminist Discursive Institutionalism (FDI).

Probably the main example of FHI is Georgina Waylen’s *Engendering Transitions: Women’s Mobilization Institutions and Gender* (2007). Waylen considers that HI can serve as an important tool for feminist political scientists trying to explain how and why institutional change occurs (2009: 2). In Waylen’s opinion:

... HI approaches can solve some of the problems that currently hamper feminist political analysis in answering some big questions such as how certain institutions

and regimes are gendered, how they came into being, and how change can come about as well as understanding the relationship between different actors and the institutional context. (2009: 246)

One concern with HI is that it is perceived to be biased towards structures and institutional continuity (Waylen 2009). However, this can also represent an opportunity because “the importance of developmental pathways mean that institutions are not always replaced and redesigned... institutions are reconfigured and evolve as a result of endogenous factors” (Waylen 2009: 5). By using the HI and a path-dependent lens, we unveil patterns of political change and continuity (Mazur and McBride 2010), and we bring the analysis of actors and institutions together, acknowledge the strategic motivations of actors, and can therefore make visible the way in which “structures limit actor’s choices at ‘choice points’ or critical junctures... emphasizing the ways in which institutions operate not just as constraints but also as strategic resources for actors” (Waylen 2009: 5).

Discursive institutionalism (DI) is another strand of analysis feminist scholars are considering in their discussions. The importance of DI for feminists is that “through the lens of discourse, problems are no longer taken as given but perceived as a result of interpretation” (Kulawik 2009: 266). Kulawik considers “[b]oth historical institutionalism and discourse analysis have merits and limitations, and both perspectives complement each other and offer solutions to their respective deficiencies” (Kulawik 2009: 262). In fact, both HI and DI “research designs start from real-world puzzles and are problem-driven rather than aiming at a general theory” (Thelen 1999; Torfing 2005 cited in Kulawik 2009: 263).

As we have seen, feminist scholars working in the field of FI are reclaiming a gender neutral strand of political science and their space within policy-making studies, where feminist policy-making studies and their concern with a gendered analysis of policy-making are simply not recognised (Lombardo, Meier, and Verloo 2011). Mackay et al. (2011) highlight the way in which NI conceptions of both structure and agency are often limited, and remain an ongoing debate in the field. Power remains at the core of any gender analysis, and feminist notions of agency refute any static notion of power relations whether on the actors' side or the structures and institutions.

Recent research on EC in the US shows how the different strands of FI can contribute to looking at the same problem and explaining gender change (Haussman 2013). Haussman in fact shows how the concepts of *fixing*, *bending*, *shrinking* and *stretching* used by FDI scholars Lombardo et al. (2009),<sup>16</sup> “line up well with some of the gradual historical institutional models of Streeck, Thelen and Hacker” (Haussman 2013: 12).

Finally FI introduces an important question: how do we explain gender change? In the same way that NI aims to explain Institutional Change, the aim of FI is to explain gender change as a key component of our understanding of institutional change. Most NI literature has focused on the persistence of institutions and the difficulty for change (Mackay et al. 2011: 577). Yet change happens and its analysis can be done in different ways depending on which end of the institutional analysis we are in. As argued by Mazur and McBride:

... gendering institutional analysis is complex and multifaceted. It ranges from bringing in gender-specific institutions as objects of analysis, to posing gendered

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<sup>16</sup> The authors explain how specific concepts are discursively built and how their original meaning is broadened, reduced or fixed affecting the initial intention behind them. For more information, see Lombardo et al. 2009.

institutions as drivers and outcomes, to examining how institutions affect feminists' engagements with the state, to testing theories of institutional change with gendered political process over time. (2010: 220)

Waylen (2013) also argues that bringing gender into the analysis of change allows us to understand why institutional change does not always happen, in particular since the informal role of institutions is often ignored.

### **Informal institutions: The definition challenge**

The most recent work by Chappell and Waylen (2013) engages with NI's concern with informal institutions, and more specifically the impact of gender norms and practices in the interaction between formal and informal institutions. These authors have highlighted the difficulty faced by political scientists to define what an informal institution is. Yet they strongly believe that adding "a gender power dimension to NI reveals not only who has the power to make institutional design decisions but also why some unexpected outcomes occur and why some reforms are more difficult to achieve than others" (2013: 600).

For Chappell and Waylen, whether formal or informal, an institution will have a gendered effect (2013: 606) because of their interaction with a wider set of rules, meaning that the institutional environment in which formal and informal rules work matters. Moreover, actors who work with these rules also produce a gendered impact, whether "rule-makers, breakers or shapers" (2013: 606).

In the gendered analysis of institutions and actors we must also remember that "informal institutions and gender norms, and the hierarchical relations in which they exist, are not 'wiped out' by changes in formal rules" (Chappell and Waylen 2013). Therefore for this research one could ask if the passing of a bill to resolve the impasse

of the judicialisation process on EC was enough to produce a major gender change in the country or, if this was not enough, considering the power of gender norms and informal rules in practice.

### **Sabatier and the Advocacy Coalition Framework**

Feminist scholars (Chappell 2006; Connell 1990; Driscoll and Krook 2009; Kenney 1996; Kenny 2007; L. Krook and MacKay 2011; Lovenduski 1998, 2011; F. Mackay, Kenny, and Chappell 2011) have criticised mainstream institutionalism for its lack of focus on agency and gender regimes, and therefore for not paying enough attention to the role of both formal and informal actors, different power locations to advance their interests and further substantive representation.

This research uses Sabatier's Advocacy Coalitions Framework (ACF) (1999), which brings to the centre of policy analysis, not only the wider institutional frame in which policy-making happens, but also the role and influence of a series of actors. Sabatier's framework emphasises actors' diversity and capacity to join forces to promote policy change (Sabatier 1988). Sabatier and Jenkins-Smith (1999) argue that the best manner to understand policy change is to look at the "policy sub-system" affecting the policy change. This means going beyond the governmental institution involved in the policy to broaden the analysis and include:

... those actors from a variety of public and private organizations who are actively concerned with a policy problem or issue... actors at various levels of government active in policy formulation and implementation as well as journalists, researchers, and policy analysts who play important roles in the generation, dissemination, and evaluation of policy ideas. (Sabatier and Jenkins-Smith 1993: 146)

Although part of the rational model used in most theories looking at the policy process, the ACF allows for the expansion of the "institutional" and "top-down" focus on actors

affecting the policy process to include a bottom-up and more diverse set of actors. It allows for different sorts of interest groups to be accounted for as part of the coalitions influencing the policy process, as well as actors at all levels of government active in the policy formulation and implementation (Sabatier and Jenkins-Smith 1999: 119).

The AFC works with the premise that in order to understand the process of policy change, one must use a perspective of a decade or more (Jenkins-Smith and Sabatier 2008: 178). Sabatier's focus on a policy over time to allow for advocacy coalitions' work and initiatives to evolve seems particularly relevant to analyse how the actors of the EC policy process converged at the different stages of the 14-year policy process and how they reacted to the transforming political, economic and social conditions affecting their institutional environment.

Advocacy coalitions within the policy sub-system are composed of actors (individual or institutional) who share a set of "normative and causal beliefs" and "engage in nontrivial degree of coordinated activity over time" (Sabatier and Jenkins-Smith 1999: 120). But what really binds together this set of actors is what Sabatier and Jenkins-Smith define as the "belief system", which is composed of two levels of closeness: the first is the *deep core* or "the basic ontological and normative beliefs... very resistant to change – akin to a religious conversion"; and the second is the *policy core beliefs*, "which represent a coalition's basic normative commitments and causal perceptions across and entire policy domain or subsystem. They include fundamental value priorities... and its principal causes and strategies for realizing core values" and as the authors explain, this is the real "glue of coalitions because they represent basic normative and empirical commitments within the domain of specialization of policy elites" (1999: 121-122).

As policy core beliefs “are less rigidly held” and may evolve over time as a product of the external changes in the socio-economic environment in which the policy subsystem evolves, they are also assumed “to be more readily adjusted in light of new data, new experience, or changing strategic considerations” (Sabatier and Jenkins-Smith 1999: 122). These “cores” are the level of closeness in beliefs shared by people in advocacy coalitions, where some will share deep core “views on society” and others will only share more pragmatic beliefs at the implementation level of the “policy advocacy”. This emphasis on the belief systems of advocacy coalitions allows for a deeper analysis and understanding of why some policy advocates form stronger or weaker coalitions with differentiated success in the policy process. I find this framework useful for the analysis of the policy for the distribution of EC, since as I will show, there are deeply embedded worldviews in each camp involved in the policy process between 2000 and 2010.

### **Judicialisation**

The judicialisation of politics in Latin America – defined as the increasing political role played by courts in democracies – is a phenomenon that has attracted much attention in the last decade (Couso and Hilbink 2011; Couso et al. 2010a, 2010b; Couso 2004; Kapiszewski and Taylor 2008; Sieder et al. 2005).

Indeed, as highlighted by Sieder et al., there has been a change “in the nature and character of judicial involvement in political matters since the 1980s and ever greater recourse to the courts is now a marked feature on the region’s contemporary democracies” (2005: 1). The authors also highlight that this is related “to a process by which a diverse range of political and social actors increasingly perceive advantage in invoking legal strategies and resorting to courts to advance their interests” (2005: 1), thus:

... the judicialization of politics is not only about judicial review. A broader definition of judicialization encompasses the increased presence of judicial processes and courts rulings in political and social life, the increasing resolution of political, social, or state-society conflicts in the courts. (2005: 1)

Judicialisation literature, although originating from the sociology of law, is also strongly influenced by HI and NI and the need to give more attention to the role played by the interaction between informal and formal rules of the game, practices and narratives, as well as unveiling the role of formal and informal actors through the analysis of power dynamics not visible to the naked eye. The legal and judicial arenas present the researcher with key spaces to study the way in which norms and actors interact within specific institutional environments. The role of judges and courts is just as important as the impact of the written law.

Processes of judicialisation are in fact studied from different lenses including the literature on democratisation, governance and accountability, and citizens' participation. The process of judicialisation can be activated from the top-down by rulers, or from the bottom-up by and from society, as well as sometimes "from abroad" (Sieder et al. 2005: 4-5). As Domingo explains, in the case of judicialisation due to "rulers relinquishing law-making power to judges", it allows for "horizontal accountability" mechanisms to be activated (2005: 23).

Moreover, the judicialisation of politics is also linked to the increasing level of judicial activism in a country and is closely related to the transfer of difficult issues from the political sphere to the judicial arena. As explained by Sieder et al., "judicial activism can lead to a judicialization of politics – when lawmaking and policy implementation is increasingly displaced from the executive and congressional branches toward the judiciary" and this can be initiated by a range of actors, including "opposition parties,

particularly those in a minority within legislatures, who may use the legal route to try to block certain policies, for example by appealing against the constitutionality of a particular government initiative” (2005: 5-6).

*Judicial activism*, which is defined by Epp as the process by which a constitutional court “creates or expands a host of new constitutional rights” (Epp 1998: 2), is strongly linked to the role of judges and the dominant political environment in which courts and judges have to rule. As Domingo argues:

... the decision to invoke judges’ oversight functions (or to abide by their rulings) by political actors may not be motivated by a genuine commitment to limited government, but may instead be the outcome of short-term strategies responding to electoral pressures, to a legitimacy crisis or to the attempt to delegate unpopular decision making on political and social matters to courts. (2005: 24)

An important aspect of the judicialisation process and its positive impact for the advancement of people’s rights is the role of courts in judicial review, particularly constitutional review. The courts’ more proactive or passive attitude towards judicial review seems to depend on their historical evolution and role within the state’s structure (Couso 2011). Epp also emphasises that rights consciousness is not enough for a rights revolution, rather the growth of support structures for legal mobilization – including material resources to access professional legal expertise is a key factor in this process – together with litigation strategies by social actors (1998, 25, 43). This implies the active role of civil society groups and movements with the support of lawyers and the access to resources and knowledge to access the courts.

### **The judicialisation of politics in Chile**

Couso (2005) argues that the judicialisation of Chilean politics has resulted in the “Rights Revolution that Never Was”. By this he means that once democracy returned,

Chilean courts did not actively engage in the creation or expansion of rights through their powers for constitutional review.<sup>17</sup> This was despite the fact that Chile counted on a strong judiciary and legal culture as well as the resources and support structures for legal mobilisation linked to the presence of lawyers in the defence of human rights and the presence of many NGOs and public interest lawyers. This is surprising considering that this could have represented a radical change in the power and role of the courts:

Through this veto power courts can block policy initiatives, and depending on the degree of leadership and activism of the courts, they can contribute to the development of policy initiatives that have been ignored by the political process. (Couso 2005: 107)

On the other hand, the literature that has analysed the historical evolution of the judiciary and its institutions in Chile highlights that from very early on the creation of the judiciary responded to the economic interests of the elite (Faundez 2007: 8) and therefore never played a progressive role for citizens' rights. Hilbrink goes further and asserts that focusing on the period 1964-1994, the courts played a role that she defines as consistently illiberal under both democratic and authoritarian regimes (2003: 65). Hilbrink adds:

Chilean leaders constructed the judiciary to serve more as "ballasts for the executive" than as a defense against the abuse of citizens' rights (Adelman 1992:292), and Chilean judges have generally been true to this role. (2003: 86)

Couso (2010) argues that there has been an important transformation of the constitutional discourse in Latin America, and this cultural shift could explain the judicialisation of politics, including in Chile where legal scholarship has called for a move from a formalist attitude toward legal interpretation to one where human rights

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<sup>17</sup> For Couso: "The power given to courts to enforce the constitutionality of legislation and administrative acts, including the ability to declare them void when they are deemed to violate the constitution, constitutes one of the most significant developments in the political structure of constitutional democracies in recent years" (2011: 71).

provision of the Constitution – including international human rights standards – can be invoked by judges. The hope is that this change in ideology could lead the “legal elite to respond to demands of individuals and groups attempting to use the courts to further their policy preferences (Couso 2010: 158). This matters because such cultural change could represent a crucial change in the access to justice by different social groups including women and feminists. This legal progressive shift would represent a unique opportunity for women’s social mobilisation in defence of their rights, as well as for the status of international law and frameworks on women’s rights within the Chilean justice system.

### **Linking EC with judicialisation and Feminist Institutionalism**

From the literature review, we know that there has been important research regarding women’s reproductive rights in Chile, in particular abortion, and the way women’s movements have actively promoted those rights via legal initiatives, how the state has historically dealt with the issue, and how parties have also addressed the issue (Blofield and Haas 2005; Blofield 2006; Haas 2006, 2010; Htun 2003; Macaulay 2006). However, none of this research looks specifically at the judicial system and the role of the courts, since the EC issue is the first reproductive debate to be dealt with in the courts.

If one accepts the notion of gender regimes established by O’Connell (1987) to define the way in which a certain gender order prevails within institutions, then the role and personal beliefs of actors can be considered part of the informal institutions, while their legal decisions and laws surrounding them can be considered as the formal ones. But in a context where judicialisation has been identified as a new trend and constitutional

adjudication has been brought forward as a way to expand citizens' rights, one must question the gendered nature of the legal framework as well as the judiciary.

Feminists have not paid significant attention to the constitutional/legal arena compared to the electoral and state/bureaucratic arena (Waylen 2006). However, looking at the judicial power within the state and its institutions from a feminist perspective matters, since we know that "constitutional engineering" represents an important step for democratisation and participation of citizens, in particular women (Waylen 2006). For feminists in particular this represents a new area of focus since:

... constitutions lie at the core of the institutional structure and legal system of a state and define the relationships between the state and its citizens as well as among the citizens themselves, they play an important role in codifying gender rights. (Waylen 2006: 1210)

In Chile, the transition to democracy was done through the acceptance of democratic parties of the authoritarian Constitution of 1980, which contained many undemocratic enclaves. Of those, one was particularly gendered – the introduction of the "right to life of the unborn" in the Constitution, which was eventually matched by the last-minute derogation of the right to abortion in the health code by the military. These changes were made in the context of many other constitutional reforms included in the pact made between the military and newly elected civilian government in order to reinstate democracy in the country.

Constitutions, however, may only be a starting point and other laws and policies may be required to ensure women's effective access and claim to their rights. There is a belief that a "culture of rights and a judicial system that facilitates legal challenges, for example through the presence of feminist judges and sufficient resources" are just as important (Waylen 2006: 1220). This is why a FI approach must look beyond formal

institutions and outcomes to also examine the processes and ideas that prevailed in a specific policy process and judicial battle.

Courts and transitions therefore matter, especially in a post-authoritarian context. Courts respond to the institutional environment, through which judges who have the power to interpret the law and rule on specific matters, and this involves the legal culture and institutional environment as much as their own beliefs. They will probably respond in a gendered manner to the advancement and promotion of women's reproductive rights if both laws and the legal culture are shaped by a gendered understanding of rights.

### **Methodology and data collection**

As FI scholars have explained, if the political environment and policy process behind any policy-making initiative are gendered, the outcomes of that policy will also be gendered. This is why it is so important to gender the methods with which we research in order to unveil the hidden power differentials and gender power dynamics. This poses specific challenges for the choice of methods and data collection. As some authors have recently explained, the main obstacle one faces is that “[i]nformal rules and practices are notoriously difficult to unravel and research” (Chappell and Waylen 2013: 600). This is particularly difficult for political scientists who have to venture out of their “comfort zone” to adopt new adequate methodological approaches coming from other disciplines, while facing issues of confidentiality and access to uncover links between formal and informal rules (Chappell and Waylen 2013).

### **Subjects and rationale**

The first methodological concern for this research was the rationale for the selection of the research subjects. By “subjects” I understand the participants whether individuals and, or, organisations that are crucial to carry out the study (Rudestam 2007: 89). The

research had to take into account the different set of actors and spaces behind the legal and political processes that surrounded the public policy to distribute EC. Primary and secondary materials related to the organisations and institutions involved in the policy process were also included in the research plan, as well as a review of the press for fact-checking and to help the mapping out of actors and institutions.

This research used Sabatier's Advocacy Coalition Framework (ACF) to map the actors of the EC public policy process and in this way bring actors and their beliefs to the centre of policy analysis (see Chs 5 and 6). The AFC emphasises actors' diversity and their capacity to join forces to promote policy change (Sabatier 1988). This means people should be the primary source of information and the diversity of the subjects should guide the selection of participants as well. The research thus started by mapping out the policy sub-systems affecting the policy surrounding the distribution of EC in Chile, thereby attempting to give a clear overview of the way these policy sub-systems varied and evolved over the 14 years since EC was first discussed.

This was particularly important for this research since the diversity of actors and their spatial locations in the political arena varied over time and this may not seem obvious at first glance. I paid particular attention to the power differentials that may be hidden behind "formal" institutional rules and discourses affecting reproductive autonomy. These power differentials are seen within the context of the post-transition in Chile keeping in mind the accounts that feminist political scientists have provided of the gendered regime change from a historical institutionalism perspective (Waylen 2008).

Finally, the AFC is useful for the analysis of EC policy, considering the strong set of beliefs that guided the actors involved. These "cores" are the level of closeness in convictions shared by people in advocacy coalitions, where some will share deep core

“views on society” and others will only share more pragmatic beliefs at the implementation level of the “policy advocacy”. This emphasis on the belief systems of advocacy coalitions allows for a deeper analysis and understanding of why some policy advocates form stronger or weaker coalitions with differentiated success in the policy process. This allowed the mapping of a restricted number of people within each advocacy coalition, and belonging to a wide range of institutions.

### **Sampling**

The research used a non-probabilistic purposive sampling in line with the results provided by the mapping of the advocacy coalitions trying to give a clear overview of the way these policy sub-systems varied and evolved over 14 years. This included policy-makers, parliamentarians, members of feminist and biomedical NGOs, autonomous feminists, scientists and academics, owners of pharmacies and pharmaceutical companies, journalists, judges and lawyers at the Constitutional Tribunal, members of the Church and lawyers linked to religious movements.

I started by identifying and giving priority to those participants who could know and recommend additional potential participants in order to produce a *snowball effect*.<sup>18</sup> This had the “boomerang” effect of validating my mapping of the advocacy coalition, giving me the confidence that my purposive sampling was going in the right direction. Moreover, as explained by Beamer, when dealing with informal policy networks, this way of proceeding permits to shed some light on actors one could not have identified otherwise; this evolving process eventually completes the sample (2014: 91).

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<sup>18</sup> “Snowball sampling” has been defined in different manners since the terminology was first used (Handcock and Gile 2011). Here I use the concept of snowball sampling to refer to the non-probabilistic selection of initial participants who are asked to identify other participants and in this way permit access to hard-to-reach populations or simplify access to a tight network of people.

In the context of Chilean society, with a small elite and even smaller policy advocacy coalitions, and considering the highly politicised environment surrounding EC, it was important to ensure that the initial interviews would open the door to other participants while providing me with a trusted profile in front of potential interviewees. I was well aware that some people might feel suspicious of the fact that they were being contacted by a Chilean researcher who was not linked to any local organisation. During an electoral year, it was important not to let any potential subject think that I was a journalist in disguise.

The appropriate number of participants was the result of a *saturation*<sup>19</sup> effect and consistent with the mapping of the advocacy coalitions. Thanks to the mapping, I had an initial idea of how many people were important and relevant for the research, and as the interviews progressed they covered most overarching themes and topics needed for the study. I reached what I determined a saturation point at around 32 people when it was clear that additional interviews were not contributing additional insights and the gathered information became repetitive.

I also took into account that 2009 was a difficult year for interviews due to the political context of an electoral year. Later, in 2011, 2012 and 2014, after reviewing the material I had gathered during my fieldwork, I had the opportunity to interview five more people who I thought could provide additional information. I did this during my vacations and through personal contacts. This gave me a larger pool of participants on whose views I was able to draw conclusions.

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<sup>19</sup> The concept of “saturation” has been at the centre of debates and it is hard to find clear guidelines on how to estimate the size of samples, in particular for non-probabilistic sampling (Guest 2006). I have used a similar definition to Guest et al., which they define as “the point in data collection and analysis when new information produces little or no change to the codebook” and in which one reaches a sense of “thematic exhaustion” (2006: 65, 78).

### **Instrumentation/measures**

I opted for a qualitative methods approach when I realised my research would require focusing on both formal and informal actors and formal and informal institutions. This resulted in a research approach primarily based on interviews, supported by the review of primary and secondary source materials.

Following the rationale of the sampling and the objectives of my research, I decided the more appropriate tools were semi-structured and open-ended interviews. These types of interviews are common in political science, with elite interviews<sup>20</sup> being the most common type (Leech 2006). Aderbach and Rockman have explained that elite interviews are particularly useful if one is interested in a subject's political attitude, values, and beliefs (2002: 673). As argued by Lynch:

Well-conducted interviews give access to information about respondents' experiences and motivations that may not be available in the public or documentary record; they allow us to understand opinions and thought processes... (2013: 37)

Yet it is important to bear in mind the challenges posed by open-ended interviews. The researcher must have the flexibility and the capacity to work through "active listening" due to the conversational nature of the interview process. This in concrete terms means that the "interviewer 'allows the interviewee the freedom to talk and ascribe meanings' while bearing in mind the broader aims of the project" (Noaks and Wincup 2004: 80 cited in Silverman 2011: 110).

Some people are concerned with the flexibility given by semi-structured interviews, for example in the lack of order or sequence of questions, as well as their openness. But the

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<sup>20</sup> For the purpose of this research, the term elite refers to people in key positions of power and influence, either within government or other state institutions, academia, the Church, NGOs, etc.

“rambling” that can ensue from using open-ended questions can also result in a rewarding final product. Indeed, despite taking more time and demanding high levels of attention from the interviewer, the flexibility, together with the “conversational flow and depth of response can outweigh the disadvantages of inconsistent ordering” (Aderbach and Rockman 2002: 674).

Moreover, since an interview is a process in which both sides are actively participating and shaping the outcome of the encounter, it is therefore collaboratively produced and interviewers have an active participant’s role (Rapley 2004 cited in Silverman 2011: 112). Thus, the product resulting from an interview process is “a particular *representation or account* of an individual’s views or opinions” (Byrne 2004: 182 cited in Silverman 2011: 117). The use of open-ended questions provides respondents with the freedom to express these representations in their own terms and thus can increase the validity of their answers, as well as make more educated respondents more comfortable to articulate their views in the case of elite interviews (Aderbach and Rockman 2002: 674).

Feminists have highlighted how excluded groups, including women, have seen their voices and experiences silenced by quantitative approaches often perceived as scientifically more “objective” (Epstein Jayaratne and Stewart 2008: 51-52). This thesis follows FI’s premises and is interested in showing how feminists engaged and were actors of this policy process and needed to record their account of the events.

Due to the heterogeneous nature of the advocacy coalitions, I was also aware that some of the interviews would be elite interviews and in other cases I would need to use a more general approach, composed of key informant interviews mixed with participant observation techniques. Indeed, many feminist organisations and advocates that come

from grassroots movements are often more comfortable in group interviews with their colleagues and with a more informal approach to interviewing. I was lucky to be invited to many events organised by feminist groups and NGOs as well as other organisations and individuals working on SRHR, including Parliamentary sessions on EC and the protests staged against the Contraloría by feminists. During these events where I was an active participant I recorded most data through written notes, during and after informal exchanges with the attendants. When possible I used video or audio recording, trying to remain as non-invasive as possible in my role as observer.

Finally the interviews followed a semi-structured form guided by a general outline made of a list of 10 topics that needed to be covered in every interview, which I identified as key to collecting the information relevant for my research question (see App. 2).

This interview plan allowed me to keep a consistent general structure among interviews, even if I adapted the opening questions and their content according to the specific characteristics of the subject (individuals, NGOs, lawyers, doctors, politicians, feminists, etc.). What remained fully consistent was my initial presentation and the description of my work, as well as the recurrent request to tape and offer to give confidentiality if the interviewees wanted it. Most interviews started with general introductory questions giving space for the interviewee to lead on the subject – also known as “Grand Tour” questions (Leech 2006). Additionally I used the topics list to provide me with planned prompts to intervene at key moments during the interview to either go more in-depth or shift the conversation to an area not being covered spontaneously by the participant.

### **Other materials**

The initial research of materials was done by carrying out a press review of articles covering the EC policy legal and political battles between 1998 and 2010 (see ‘Other Data’ section). The documents’ revision then focused on the collected materials obtained via interviews and visits to organisations. The press review was done before and during fieldwork, via internet and through the collection of local newspapers. It provided a key background context to the issue, and helped with the mapping of key actors and potential interviewees.

### **Timeframe and procedures**

I collected most primary source materials for my research over the five-month period I spent in Chile between March and July 2009. I tried to be as thorough as possible in my data collection of the coverage of the policy from 2000-2010. However, because the work on EC at the medical level had started back in 1996, my interviews with key actors on this aspect of the issue tried to cover that four-year gap as well.

While in Chile I was mostly based in Santiago, the capital, but had the opportunity to travel frequently to Valparaíso where the Congress is located. As Chile is a country with a highly centralised economic and political system, I did not need to travel more than this. In fact most subjects and organisations offered to meet either in Valparaíso or Santiago.

I was also hosted by the institution where I did my undergraduate degree, the Institute of Political Science (ISP) at the Pontificia Universidad Católica de Chile. The ISP’s director was kind enough to extend an invitation to me as visiting researcher there, which granted me open access to the university’s libraries in Santiago, the opportunity

for informal chats with academics and increased my credibility to approach potential interviewees.

### **The interview process**

I interviewed 37 actors belonging to the different advocacy coalitions (see Chs 5 and 6) involved in the EC policy process including government officials, former ministers, Parliamentarians, one judge at the Constitutional Tribunal, feminists in NGOs and part of the wider movement, doctors working on reproductive medicine in universities and NGOs, as well as lawyers and academics involved in the judicial processes on both sides of the issue (see App. 1). Whenever it was possible I taped the interviews using a small, non-intimidating recorder. I also took written notes that were supplemented by my own personal notes immediately after the end of the meeting to record atmosphere, personal impressions as well as comments that might have been made off the record. Thirty-five out of 37 interviewees agreed to be taped. The interviews varied between 45 minutes and two hours.

### **Communication with interviewees**

Despite using contacts to get access to key initial participants, all participants were contacted via a formal email stating the purpose of my research and letting them know I was a PhD student from London University. As these initial emails were often not successful I had to follow-up via a new email and, or telephone call stating my relation to a person both I and the potential subject knew. This approach via personal recommendation worked the best, confirming my decision to work through a snowball process. Interviewees were often generous and spontaneously offered to put me in touch with other people they considered to be key actors in the process.

Despite the efforts to approach people in a sensitive and professional manner, I faced a strong sense of suspicion from the conservative actors belonging to the anti-EC advocacy coalition. Most of them requested to be kept anonymous. Despite using my contacts in high positions within academia it was almost impossible to obtain an interview with most judges at the Constitutional Court and conservative Parliamentarians. This could be explained by the fact that the press had suddenly become very keen on covering the EC debate and in part by the overlap of my fieldwork with the beginning of the presidential electoral campaign, where Concertación's candidate, Eduardo Frei (PDC), tried to position himself as progressive by putting abortion and EC on the electoral agenda.

In general, anti-EC advocacy members, whether in politics, members of the Church or independent professionals, behaved in a defensive manner when approached. A key lawyer I eventually managed to interview immediately asked me as I entered his office: "How did you track me down? I am normally very discreet." The second time I was in his corporate office he refused to be taped. Others showed a sense of curiosity, which opened the doors of key interviewees in high positions. A member of the Catholic Church told me: "Of course I am curious and I am willing to give one hour of my time when a young Chilean woman studying in London, doing a PhD while she could be doing other things wants to interview me."

Finally some refusals were more direct and aggressive in their tone, bordering on rudeness. A female Parliamentarian sent the following reply to my formal email requesting an interview (see App. 3 for full exchange of correspondence):

Estoy en total desacuerdo con la promoción de los Derechos Reproductivos.  
Incluyen El Aborto y estoy por "LA VIDA".

This email was an exception yet I found it very informative about the feelings the issue was provoking in the conservative advocacy coalition. From thereon I was more careful and strategic when contacting key informants, relying more heavily on personal referrals to bring down the barriers of suspicion that I was facing.

### **Limitations of the methods and interview process**

My research presents a limitation in my analysis concerning conservative positions on EC considering that most subjects in the anti-EC advocacy coalition who declined or ignored the interview requests came from the conservative sector. I was unable to obtain an interview with most Constitutional Tribunal judges; however, the one judge who spoke to me played a crucial role in the process and ruling of EC, which I believe compensates for the absence of the others. Also, it was easy for him to speak about his colleagues and people who supported and shared his views since there are only seven of them. I therefore tracked any form of scholarly article, interview in the press and official opinions regarding the ruling (including all official documents by the Constitutional Tribunal) to get a fuller picture of the other judges' worldviews and beliefs. In the final stages of the research I had the opportunity to speak with two lawyers who were closely involved in the legal process within government or the Constitutional Tribunal who helped me triangulate much of the information.

Something similar happened with one of the lawyers who led the conservative lobby against EC who did not reply. Nonetheless I was able to speak to one of his fellow co-petitioners at the Constitutional Tribunal who explained both their positions on the EC issue. The senior official of the Church I was able to interview also gave a clear view of the Church's beliefs and *modus operandi* on this matter,

since he was the “in charge” for this agenda during the whole process. I used these interviews to triangulate the written information I had found and the key elements coming from the interviews of other members. Although it is impossible to establish full certainty on their beliefs and views, I am confident that I did everything in my power to avoid the bias of unreliability of the information obtained and was able to reach the adequate saturation point in my interview process. I believe the saturation point would have been similar had I had the opportunity to speak to more conservative actors since the main topics coming out of the interviews with conservative actors were similar to those topics present in the interviews with the pro-SRHR actors.

### **Positioning myself as a researcher**

As discussed above, there are specific challenges to conducting research on sensitive topics, and both the political context and the way in which a researcher is perceived can affect access to information. If we accept that power is present at every stage of the research process it is extremely important to position oneself.

In carrying out my research I paid particular attention to the positioning of my roles as both researcher and feminist, as well as being Chilean carrying out research within my own society, while being resident abroad. As I mentioned previously, it was difficult to escape the gaze of my interlocutors and their questioning me back during our encounters. This is something I expected since as some authors have highlighted:

Power shapes the process of the interview research from beginning to end, from the initial formulation of the research question to the final dissemination of results.  
(MacLean 2013: 67)

Abortion and SRHR are sensitive topics to discuss when the interviewee may hold particularly strong views on these topics. Both feminists and Catholics approached the

debate in a passionate manner, in which I sometimes felt I was wearing an activist hat, and at other times a researcher hat, allowing me to look in a detached manner at the work of people I strongly agreed or disagreed with.

As explained by MacLean: “Even if not completely objective or neutral, the researcher’s theoretical and often comparative perspective as an outsider is also quite valuable” (2013: 71). Therefore, I always tried to be as open as possible on my research and never refused to answer any questions, even personal ones regarding my background. Most importantly I never hid when confronted with the question that I was a feminist and had previously worked in NGOs defending SRHR. Often, luckily, these questions came at the end of interviews and my interviewees found it amusing or actually provided further information. Also, I always offered and sometimes received a spontaneous demand to see the final product of my research by the informants. I kept a record of this and plan to share this thesis with them once it is finalised.

### **The “chameleon” dilemma**

Following Sidney Tarrow’s views on the interview process with political actors, I saw “my respondents as both informants and participants” within the communication sharing process and also within their own changing identities according to the role played in the policy process (Little 2008). Tarrow suggests that “the social scientist needs to find a way of being engaged with his or her informants or participants in an interactive way” (Little 2008), which to me was translated in the use of my “multiple identities” during the interview process, leaving most of the control and methods for interviews to the analysis process.

I tried to approach my interviews with an open mind knowing that due to cultural practices specific to Chile, an adequate time to introduce myself and to allow some

rambling was necessary. I was right in doing so since this was crucial to allow the interviewee to relax before the interview itself. In some cases, however, this only happened after I was asked many questions about myself, about studying and living abroad, about my family including trying to make connections (non-existent) between my last name and people some interviewees knew. This type of screening and power relations is probably something a foreign researcher would not face, and it meant that I needed to be prepared to have a standard speech for each category of interviewees. If they were academic, talking about academia in the UK was key, and if NGO and activists, my own past working in those spaces and activist identity was useful.

This happened mostly during elite interviews where the power balance between the interviewee and me was often in their favour. This also translated in them telling me where and when to meet, changing dates or cancelling at the last minute, interrupting the interview to take a phone call or asking me to stop the recording of our conversations to make some comments off the record. The situation was totally different with activists and members of NGOs and social movements. They often offered me flexibility and time for my interviews and were open to my presence in a more relaxed manner establishing a horizontal relationship.

In order to compensate for the power differentials in these different interview settings, I modified my dress code accordingly as well as my body language and speech pattern. With elites I dressed formally, spoke in a very formal language referring to theoretical concepts they were keen to engage with, and I also shook their hand. In contrast, with other interviewees, my dress code was more casual, I would kiss people on the cheek to greet them and I would use a more colloquial language to engage. Often these interviewees also chose more casual places to meet such as cafes and public spaces,

which allowed us to walk, or sit comfortably and have a more casual chat. With the youngest interviewees it was hard to conduct a “formal” interview since they considered my open and casual behaviour essential to being able to trust me.

Finally, I also discovered that being a female and “young”<sup>21</sup> researcher put me in a very paternalistic power differential with male elite interviewees who spoke to me as they would have with their daughters or grand-daughters. This translated into something common in Chilean society called “mijiteo”, where the elder person addresses you as “mijita”, which is a colloquialism derived from the contraction of “mi hijita” (my daughter) and reinforces their alleged wisdom and knowledge over yours. It also happened on numerous occasions with some female interviewees, in which case it took a maternalistic and more protective tone. This was something I mostly used to my advantage, letting them carry on treating me as if I was naïve, which allowed space to ask questions they would not have answered so easily otherwise.

### **Other data**

The data I collected also covers a wide range of sources and materials: government documents and declarations, NGO publications and communications, press releases and public statements by the Catholic Church, legal documents and judicial records, audio-visual materials from conferences and symposia, newspaper articles, my own pictures and videos from events. I felt extremely lucky to be met with great generosity by most people I met. I rarely left an office empty-handed.

I carried out a press review of the issues of abortion and EC from 1996 until 2010 mostly through printed press and more recently digital and radio media. The four main

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<sup>21</sup> This in Chile means generally under 40 years old.

newspapers I used were the far-right conservative *El Mercurio* and *La Segunda*,<sup>22</sup> the centre-right *La Tercera*, and because Chile does not have a left-wing publication with a wide circulation, I opted to use the government-funded *La Nación*, which in my opinion better reflected the Concertación views on most political events. It should be noted that the majority of the printed press is in the hands of just two financial conglomerates in Chile: the first is the Edwards family, representing generally the views of the far-right and known for being close to the Church; and COPESA, which is considered a slightly more liberal right-wing sympathiser. I also reviewed audio-visual materials such as talk shows and television interviews with key characters involved in the EC debates and legal and political processes. I transcribed their declarations and opinions in videos (five) and radio interviews (three) when I found it necessary to use them as evidence.

In order to complement my interviews and press review, I also attended some meetings of feminist groups and conferences as a way to use participatory observation in a triangulation exercise. This approach was adopted to create a better and more relaxed rapport with the subject. It also allowed me to listen more in detail to the debates affecting feminist groups. This was done both in Santiago and Valparaíso. Among the meetings I attended was one regarding the use of an anonymous mobile phone line providing advice on abortion to women. These meetings allowed me not only to meet different leaders and organisations but also to interact with feminists of all ages and backgrounds. In July 2009, I was invited by contacts from the women's movement to join a caravan of buses rented by APROFA to take people from Santiago to the Congress in Valparaíso to attend the session on the Fertility Bill. I am most thankful to the people who allowed me to attend such an interesting and lively historic event.

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<sup>22</sup> This is a paper printed in the afternoons that targets civil servants, politicians and policy-makers and has an open conservative agenda.

I mostly focused on the interaction of all advocacy groups and within the same coalitions. Therefore I often tried to triangulate information given by different actors belonging to the coalitions. Chapters 5 to 8 are based primarily on the interviews and their analysis. I traced the origins and evolution of the policy process through the combination of the analysis of the interviews and other primary source materials.

Finally, it was important for me to document the processes I witnessed through more intimate materials. I used personal photography and video to record events and talks I found essential to capture for my analysis. I strongly felt I needed to immerse myself in the spirit of the debates to fully understand the complexity of the political and cultural struggle that was taking place in Chile at the time of my fieldwork, which coincided with a crucial electoral year.

### **Data analysis**

The open-ended interviews I conducted were analysed taking into account the 10 themes I used as a pattern for all interviews. I transcribed all interviews, as well as all personal notes taken during my fieldwork. During this initial process I took note of all the emerging themes coming from the interviews and informants' answers, while connecting them with the main topics I had established for the interview process. I proceeded to select the main ideas coming from the recurrent themes from which I coded the themes and searched for any emerging patterns.

I did not use any software for this part of the work, preferring to use a pen and paper coding process, which provided a more direct contact with the material, hand-written notes and the possibility to keep control over the process. This was time-consuming but also rewarding and stimulating. With other materials, such as press materials, I carefully categorised the articles according to topics and actors involved to trace the timeline and

map the main events and actors behind the policy process. Visual and audio materials were all interviews so once transcribed they were treated like the main data set of interviews.

The analysis process was done over different stages, starting with an initial analysis during the fieldwork to identify the main themes coming out from the interviews and to start establishing the amount of interviews needed (“saturation” process). Once back in London the transcription time was consuming but allowed me to immerse myself to analyse carefully the answers received from the interviewees. The advantage of taping is that not only was the information available but also the tones and figures of speech used by the interviewees to communicate the meaning they assigned to the topics were addressed.

Although Sabatier’s ACF was useful for grouping people’s views as advocacies and gain new insights into the policy process and the nature of the advocacy coalitions, as well as the relational aspects of actors interactions and their power dynamics, I needed to go back to FI to gain more analytical insights into the role of formal and informal institutions in shaping the policy process.

## **CHAPTER 4: Sexual and Reproductive Health in Chile since the 1960s: Actors and Institutions**

Using a HI approach, this chapter reviews the evolution of reproductive health initiatives in Chile since the 1960s. In doing so, it aims to identify the level of presence or absence and influence of women's and feminist groups in policy debates around the provision of reproductive health services in Chile over the last century, and more particularly since the 1960s. HI pays particular attention to critical junctures and long-term processes to make visible the importance of institutions for policy-making. The chapter thus focuses on the creation of family planning policies and services in the 1960s and 1970s and the institutions and actors involved in the field since then. It then looks at the impact of the dictatorship on these policies with the aim of identifying the institutions and policy actors who have played a major role in advancing women's sexual and reproductive health in the decades prior to Chile's return to democracy.

The discussion briefly reviews the initiatives taken by the left-wing governments between the 1930s and 1950s to respond to the needs for better maternal and infant healthcare. The chapter then turns its attention to the 1960s health initiatives by the Christian Democrat government of Frei Montalv, which first introduced family planning services, supported by the medical profession and policy-makers and tacitly by the Church. The chapter then contrasts the international and national contexts of the 1970s and 1980s under Allende and Pinochet's dictatorship, which affected the continuity of family planning. The chapter shows that socialist and authoritarian governments reproduced patriarchal structures while ignoring women's rights in their initiatives to provide fertility control services, although one can identify a few incipient progressive initiatives under Allende. More importantly, women's health movements and women's rights discourses on health can be traced to the years of struggle against the dictatorship.

Finally the chapter analyses the transition to democracy and the role played by the 1980 Constitution in setting the new rules of the game for any initiative regarding SRHR.

This chapter argues that the circles of scholars, specialists, practitioners, activists and policy-makers working currently on SRHR issues are overall the same since the 1960s. The institutions framing the work and debates on SRHR, including the role of medicine on SRHR policies, the importance of religion, and the formal institutional environment created by the 1980 Constitution on women's rights and the criminalisation of abortion, have also remained influential, reinforcing the rules of the game for those wanting to promote a progressive agenda for SRHR and women's rights.

### **Sexual and reproductive health in Chile in the first half of the 20<sup>th</sup> century**

Public policies and the provision of sexual and reproductive health services in the early 1900s were strongly influenced by positivist approaches to social policy, including eugenics and hygienist visions of sanitary services. The importance of emerging scientific methods and techniques to produce policies from the state – and their promise to give humans control for the first time over natural phenomena they had no control over previously – gave a prominent role to professionals such as doctors, lawyers and scientists in policy-making (Htun 2003). Women's bodies and reproductive health, and in particular contraception, family planning and abortion, were at the centre of health policy debates.

Positivism and its followers benefited from the fact that from the end of the 19<sup>th</sup> century, but especially during the 20<sup>th</sup> century, the state started to play an “increasingly significant role in the ordering of social economic life [...] through law, social welfare, and economic and social policy, as well as through attempts to regulate the norms of public culture” (Molyneux 2000: 36-37). Health in particular was one of the areas of

human life where the state played an increasingly influential role over the last century. This often resulted in top-down approaches to public policies with included almost no participation of women. Women therefore at the turn of the century “were becoming the objects of state regulation” (Molyneux 2000: 49).

Abortion in Chile was introduced within the Criminal Code in 1875. Chile’s 1875 abortion law applied not only to women seeking or having an abortion, but also to doctors performing them. Doctor’s liability was only modified by President Ibañez’s reform of the Health Code in 1931, which introduced the criminal exemption for doctors performing abortions to save a mother’s life (Htun 2003). This created the possibility of therapeutic abortion in Chile, which remained legal until 1989.

In Chile, between 1900 and 1950 the first state health institutions were formed. In 1924 President Alessandri created the first *Ministerio de Higiene, Asistencia y Previsión Social* (Ministry of Hygiene, Assistance and Social Provision) (Arellano 1985: 28). In 1938, the Frente Popular governments launched prevention health services for the workers, followed in 1952 by the Servicio Nacional de Salud (SNS), Chile’s first National Health Service extending healthcare coverage to the whole family as a way to protect mothers and children (Arellano 1985: 31).

Frente Popular governments were committed to improving the health of workers and the poorest sectors of society, and in particular women and children, even if this did not challenge the patriarchal structures affecting women, and actually reinforced the image of a “woman worker and mother” (Roseblatt 2000b). In fact, the new sexual and political morality of the Frente Popular governments was reinforced by the centrality of the family in the socialist discourse against capitalism, which they saw as the major threat to that unit by not giving the means to workers to take care of their families’

material needs (Roseblatt 2000b: 209). In doing so, leftists thus neutralised women's opposition to male dominance and "re-encoded patriarchy as capitalism" (Roseblatt 2000b: 209).

The creation of the new state health institutions marked a milestone in the way women and feminists could engage with the state in the future regarding their health needs. Women now faced a more coordinated set of policies and policy-makers behind decisions regarding their bodies and health. In fact, in 1935, the first organised group advocating for the regulation of fertility and equality of women in Chile, the *Movimiento Pro Emancipación de las Mujeres de Chile* (MEMCH), was born.

MEMCH quickly became a visible and active feminist militant force gathering women of all social strata (Jiles 1994: 131) and was an active supporter of the Frente Popular's campaign from 1936 to 1938 (Rojas Mira 1994: 192). Thus from very early on, MEMCH demanded that women be freed from the burden of forced pregnancy through a wider access to free contraception and a legal framework allowing abortion in specific cases within the state's health system (Jiles 1994: 131).

MEMCH lobbied the minister in charge of health issues at the time – Salvador Allende – through letters asking the authorities to urgently intervene on behalf of the "proletarian mother and child" (Maira Vargas, Santana Nazarit, & Molina Sáez, 2008: 19). Initially MEMCH did not question the model put in place by the Frente Popular, which saw women primarily as "mother-workers" and kept linking children's care to women's reproductive rights as workers (Roseblatt 2000a: 81). MEMCH in its letters openly requested "the recognition and legalisation of abortion to be practised scientifically" (Antología del MEMCH cited in Maira Vargas et al. 2008: 19), which

was maybe the first official demand by women to widen the right to therapeutic abortion to legalise abortion due to socio-economic reasons and mental health.

Together with the SNS, the Frente Popular also created important social protection packages, which included family/child benefits and unemployment benefits as well as maternity benefits (Arellano 1985: 32). This can be considered a success for a very persistent feminist lobby at the time. The feminist movement through MEMCH played a major role in lobbying for better healthcare for women as well as social protection of women workers and their children. Albeit not challenging dominant gender roles, they demanded the right to maternity benefit and paid maternity leave to be extended to women working in agriculture (Rojas Mira 1994: 194). On the other hand, despite having the backing of the SNS, no steps were taken to respond to MEMCH's demands for birth control advice and services (Rojas Mira 1994: 195), nor was there a change in the abortion law.

Since the end of the 19<sup>th</sup> century, access to contraceptive methods in Chile had been minimal and had led to high rates of abortions. Social policy discourses rarely had women's interests and rights in mind when considering the control of reproductive health, reinforcing already existent gender norms. The creation of the SNS was therefore one of the landmarks for women's reproductive healthcare, at a time when the main health issues were related to mother-child healthcare (MINSAL et al. 2006: 6). Health authorities in Chile dealt with the incredibly high numbers of abortions for many years showing that abortion was not a taboo within the medical arena. By 1960 abortion became a major public health priority that policy-makers had to face.

### **1960s: The Christian Democrats and the birth of family planning**

The 1960s marked a break from the previous decades in many ways. The first was the growing concern for social issues as the rural–urban migration started to pose new problems regarding the living conditions of the population. This was also a period of consolidation of the growing demands of left-wing and working-class sectors through a reordering of the political system, which included the birth of the *Partido Demócrata Cristiano* (the Christian Democracy Party (PDC)) and many other movements with strong emphasis on social justice and the social doctrine of the Catholic Church.

The 1960s also marked an increase for the first time in women registered to vote, reaching 63.2%. Women played an important role in giving the PDC and Eduardo Frei victory in the elections of 1964 (Rojas Mira 1994). This increasingly growing political activity and influence of the female vote had an unprecedented impact on politicians (Rojas Mira 1994: 186). As explained by Rojas Mira, “once women constituted themselves as an electoral power, political parties started to pay attention to them, and the daily problems they experienced became public policies” (Rojas Mira 1994: 186). Most parties “took up the woman’s issue” and “abortion and family planning – until then relegated to the private sphere – became issues of social relevance” (Rojas Mira 1994: 186).

As indicated by MINSAL, “at the beginning of the 60s, maternal mortality and in particular, mortality due to abortion, was still high, causing around 35 to 40% of all maternal deaths” (2006: 13). In hospitals almost half of all patients in maternity wards were women receiving post-abortion care (Mardones S. et al. 2008). Abortion being illegal, it was impossible for them to seek help in hospitals after suffering from backstreet and home-made abortions. This explains why the 1960s marks the

commencement of new initiatives regarding reproductive health and women's reproductive rights, which 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" (Casas 2004: 429).

International events, such as the creation of the International Planned Parenthood Federation (IPPF) (1952) and the Third International Conference on Family Planning (1952), as well as the US international aid initiatives at the time concerning birth control and poverty reduction, created a new global context for family planning. In 1962, prior to the Fourth Conference on Family Planning in which Chile participated, the IPPF had requested the Chilean government to provide a report on the practice of fertility control in Chile (Rojas Mira 1994).

The report clearly stated that since the 1930s influential female doctors took the initiative to introduce many methods in key health services although at a small scale (Rojas Mira 1994: 195). Another unit of doctors working on these issues had also worked on contraceptive technology over the 1950s, focusing mostly on the development of hormonal contraception but also on the very early versions of IUDs (intrauterine devices). Moreover, many doctors in private practice were prescribing contraceptive methods on a regular basis (Rojas Mira 1994). So despite the fact that the SNS had no official policy on birth control or family planning, the initiatives especially by doctors were growing.

### **Family planning and the birth of APROFA**

According to Rojas Mira (1994) it was due to this important medical expertise and the presence of a well-established health system together with the possible arrival of the Christian Democrats to power, that Chile was perceived by the US as a perfect

laboratory to implement a pilot programme to make family planning a formal state policy with a wide outreach for its population. The US, via its aid programme Alliance for Progress, and the IPPF would provide important financial and technical support to both the Chilean and its own national health system (Rojas Mira 1994).

Although Chile did not have overpopulation issues, the idea of introducing birth control was quickly accepted by policy-makers.<sup>23</sup> This is how in 1964, when Frei Montalva and the PDC came to power, the *Asociación Chilena de Protección de la Familia* (APROFA) was created “by a small, private association of health providers”, and would later become the local family planning association to join the International Planned Parenthood Association (IPPF) (Casas Becerra 2004: 430-431).

Since its creation the APROFA would work very closely with the SNS and its technical division to implement a widespread programme of fertility control in the country (Jiles 1994: 132-133). In the mid-1960s, APROFA played a key role in presenting the numbers and studies on the impact of abortion on the high level of maternal mortality in Chile, helping to make the case for tackling what was considered an epidemic at the time. It was the APROFA that in 1964 reported that 70,000 women had been hospitalised for infections arising from abortion (APROFA 1987: 4 cited in Rojas Mira 1994: 197).

In 1967, the Ministry’s Family Planning Policy, after identifying the need to reduce morbimortality due to unsafe abortion in the population, decided to incorporate fertility control initiatives to programmes of mother-to-child care, trying to uphold each family’s right to “have only the number of children that can be raised in a

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<sup>23</sup> Interview with Gloria Maira, well-known feminist, coordinator at Red contra la violencia 06.04.09.

comprehensive manner...][guaranteeing the respect of people's conscience and their dignity" (MINSAL et al. 2006: 7).

### **The Catholic Church and the Christian Democrats**

Considering the conflict that EC caused in Chile over the last 15 years, it is surprising to observe that in the 1960s there was almost no resistance to the implementation of the rather vanguard family planning policy. In spite of representing a Catholic electorate, the Christian Democrats were able to put in place the most progressive and far-reaching policy of fertility control the country had known until then. Even the APROFA was established without challenge, confirming the PDC's historical and privileged relationship with the hierarchy of the Catholic Church. There was almost no public debate on the topic because most decisive conversations took place privately between health officials and the bishops over a series of meetings (Mardones et al. 2008).

Abortion was so widespread that it represented a major challenge for the newly created national health system, leaving little space for any opposition.<sup>24</sup> Cardinal Silva Henríquez would have told the Christian Democrats at the time "to go ahead" and "not to worry".<sup>25</sup> The Cardinal, known for his open-minded attitude and commitment to social issues discussed and negotiated the issue directly with Francisco Mardones – director of the SNS at the time (Mardones et al. 2008) – confirming his support of the government's family planning policy which the Church considered a lesser evil (Rojas Mira 1994: 209).

Without opposition from the Church family planning programmes could be rolled out more easily, and taking advantage of the increasing presence of the health system across

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<sup>24</sup> *Ibid.*

<sup>25</sup> Interview with Teresa Valdés, well-known feminist, director of Observatorio de Género, 17.06.09.

the country, the APROFA assumed a strategic role in the training of doctors and “midwives around the country” on contraception and birth control.<sup>26</sup> According to Galán the APROFA joined the IPPF and in this way was “able to receive IUDs and the pill”, which it “then provided free of cost to the national health system to implement its contraception programme”.<sup>27</sup> APROFA wanted to ensure “that the IUDs and pills were distributed free of cost to the population who really needed it, and that this was done ethically”.<sup>28</sup>

Midwives thus played a key role in making contraception available in as many places as possible in the country. As Galán explained, doctors were not always present in remote regions of the country since the SNS had only just started its greatest geographical expansion, however most communities were assigned midwives who “were trusted by women”.<sup>29</sup>

This close technical and advisory support role given to the APROFA was essential for reaching out to people and health professionals in an indirect manner from the SNS. However, the family planning programme was created and maintained outside government, since the private and independent position of APROFA is what guaranteed the arrival of free contraceptive methods to the country via the IPPF. This independence also allowed APROFA to do things the government could not have done out of fear of appearing to be interfering in an ideological manner and changing the deeply-rooted traditional gender structures of Chilean society.

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<sup>26</sup> Interview with Dr Guillermo Galán, former President of APROFA, 24.06.09.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

This was the case with medical students, who often only received a fraction of the education on contraception that midwives were receiving.<sup>30</sup> During this time, it was APROFA that trained most young doctors in public hospitals to learn to insert and remove the IUDs before they were sent out to different regions of the country. In this manner the government did not need to make changes to the curricula of faculties of medicine to include family planning.<sup>31</sup>

So although the government had the support of the Church, the “deal” seems to have been to keep family planning within a targeted group and to use a very technical approach. For doctors, more than the idea of giving women control over their lives, their greatest concern was making sexual and reproductive health a priority topic for the whole population and reducing the amount of deaths due to abortion. Women therefore remained the target of family planning policies even if there was an attempt to address sexuality and reproduction within the couple, letting couples decide when, how many and how often to have children. Despite this, women’s early and unwanted pregnancies remained at the centre of attention of the medical profession combining family planning with mother–infant healthcare.

### **The Vatican and contraception**

At the end of the 1960s Chile was not impervious to international influences and ideas and many were following the sexual and reproductive health debates taking place in Europe, including the campaigns of women’s movements for the right to abortion. Contraception was openly discussed in *Paula*, a progressive publication on women’s issues at the time (Vergara 1967). But a whole new international context would start to

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<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

take shape regarding reproductive and sexual issues with the publication in 1968 of the Vatican's *Encyclical Humana Vitae*. The Encyclical came to reaffirm the official and most conservative teachings of the Church on abortion and contraception.

In 1968, four years after the government had launched its family planning programme, some sectors of the Church would voice their concern about the access of young adolescents to contraception. At the time, Chile was the only country besides Canada where the contraceptive pill could be bought without prescription (Cot 2001: 2). Despite these isolated debates, the Church in Chile did not carry out a negative campaign on the government's policy.

Nonetheless, since the Encyclical was addressed not only to individuals within the Church but also Catholic governments, the PDC declared, through its coordinator for family planning Dr Lucía López quoted in *Paula* that year, that the encyclical was “not an obligation for those non-Catholic”, and that the SNS being a state institution it would respect all beliefs, adding: “... the policy has always been applied from a health perspective and specifically to avoid a great number of abortions” (*Revista Paula*, No.17, Agosto 1968 cited in Cot 2001: 4).

This secular and progressive declaration reinforced the health policy rationale and exploited the divisions within the Church that was composed then of many groups with different theological positions. When the *Encyclical Humana Vitae* was published, it was not accepted unanimously within the Church. The Jesuits, who were then a very influential group within the Catholic hierarchy, openly declared they did not consider the Encyclical infallible (Pieper 2009: 87-89). The Jesuits became the most outspoken group sustaining this vision because they “supported a due regulation of births,

especially in developing countries” and also considered issues of “poverty, lack of resources and the possibility to give a decent place in the world to a child” (Cot 2001).

### **The Unidad Popular (UP): Allende, the doctor and the socialist**

The arrival of Salvador Allende to power in 1970 led to important changes for health policies in the country. Being a doctor, Allende from very early on not only cared about the coverage of health policies but also the quality of the care provided and the labour conditions of health workers (Jiles 1994). According to Pieper, “as president, Allende continued to believe that health care represented a basic human right. He promised to reorganize public health in conjunction with his administration’s reorganizing the capitalist system” (Pieper 2009: 121).

Allende and the UP were keen to appeal to women after the success the Christian Democrats had had capturing the female vote. Allende campaigned with promises targeting women, including:

... to expand protections for Chilean mothers, promote women’s education, and defend the rights of female workers. Women were called upon to become protagonists in the struggle for social change, assume leadership roles, and enter the workforce. (Tinsman 2002: 212)

Tinsman explains that the “tension between the UP’s goal to empower women and its claim to defend the Chilean family surfaced in its approach to birth control and sex education” (2002: 221). On the one hand, they promoted knowledge and access to the methods “to counteract the sexual hypocrisy and coercion of bourgeois capitalism”, trying to distance themselves from the Christian Democrats’ focus on maternal–infant health, while on the other they built on the existing policies left by the previous administration (Tinsman 2002: 221). In fact, the UP policies maintained the Christian Democrats’ family planning focus on the well-being of women and couples while

declaring family planning to be a right for women (Jiles 1994; Pieper 2009). And although the UP did not challenge the fact that the use of contraceptives by women was still dependent on the husband's consent (Tinsman 2002), it introduced the notion of "integral health", bringing together all reproductive health services (Rojas Mira 1994: 205).

Allende's Health Director, Infante, made very clear that the coverage of family planning would be extended to all women of fertile age, but unlike the previous government it did not aim to reduce the number of children per family (Rojas Mira 1994: 205). It also progressively incorporated the provision of reproductive services to single and adolescent women, including "a candid sex education program for youths, and a tolerance of abortion" (Tinsman 2002: 229).

Sexual education received much attention since it was part of a "much broader and more ambitious effort to link all education to revolutionary liberation", which translated the UP's conviction that the new socialist society they wanted to build required "profound cultural transformation, and they saw education as the chief engine for such change" (Tinsman 2002: 229). Showing institutional learning, this initiative was the product of working closely with APROFA, and through the new format of health initiatives carried out at the community level it became an important vehicle to address many issues, including abortion (Rojas Mira 1994). The idea was that between 1972 and 1974, 30,000 community leaders would be trained to be able to promote "responsible parenting" (Rojas Mira 1994: 208). The sexual education initiative also included for the first time the idea of allowing couples to separate sexuality and reproduction, having the potential of making a great impact on the way people lived their sexuality, especially women with access to the pill.

In the middle of the Cold War years, however, the UP faced many pressures from abroad due to its commitment to the “Chilean way to socialism” via democratic elections. The US openly boycotted the UP’s economy, including family planning aid leading to some wanting to cut all ties with the US. Pieper explains that “disagreements over birth control pitted political leaders against health officials on the highest levels”, and APROFA’s head Benjamín Viel, “a personal friend of President Allende”, using his international contacts tried “to prevent foreign donors, who began to consider Chile an unreliable ally under the new government, from cutting off supplies” (2009: 107).

The supplies eventually stopped arriving and APROFA found itself with “a shortage of hormonal contraception”.<sup>32</sup> The contraceptive methods of many women were affected by this situation but “IUDs were still available” as scientists in Chile had been producing them.<sup>33</sup> As explained by Galán:

... midwives already knew how to use the IUD and so in that period the use of IUDs increases and even us on the eastern side of Santiago [richest areas] we had 75% of our female users on IUDs and only 25% on the pill.<sup>34</sup>

The disputes over Allende’s handling of family planning reflected a strong confrontation between the power that the scientific and biomedical lobby had acquired over the years and the ideological power that politics had achieved in the early 1970s. Although Allende had appointed a few key specialists on population issues to strategic positions in government<sup>35</sup> showing his willingness to continue the work on family planning in the country, eventually some of these experts, such as Viel, left the country

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<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> Allende appointed Mario Requena as chief planning officer, Aníbal Faúndes as adviser to the ministry’s Mother-Child program and Carlos Concha as Mother-Child program director (Pieper 2009: 107).

dissatisfied with the UP government's weak commitment to family planning (Pieper 2009).<sup>36</sup>

As illustrated above, the UP wanted to tackle abortion through sexual education and the wellbeing approach of health services to women. Nevertheless the government also made clear its intention to legalise abortion in order to put an end to the business made from backstreet abortions and clandestine abortions with doctors in private clinics (Rojas Mira 1994: 207). One of the most surprising elements of this frank approach to abortion was also the support that the Hospital Barros Luco, a pioneer in contraceptive issues, received to start a programme of menstrual regulation, abortion induction using Rivanol and "curettage" for those women for whom contraception had not worked (Rojas Mira 1994: 207). The programme was led by Dr Faúndes, adviser to the ministry's Mother-Child programme, confirming that the UP government had an open abortion policy and in fact "significantly curtailed its criminal prosecution" (Tinsman 2002: 227).

By the end of the UP, Hospital Barros Luco was providing legal abortion on demand to women within the first 12 weeks of pregnancy (Montebruno and Delgado 2003). Allegedly, in the last six months of the UP government, the staff had performed 3,000 legal and free abortions thanks to the "Máquina", the first suction or vacuum system machine for safe abortions used in Chile (Montebruno and Delgado 2003). Women from all social backgrounds, and from all over the country came to the hospital, which generally served a working-class population. Although no legal reform had been passed, the hospital staff was committed to providing this service to women, and had been approved to do this in a general assembly that took place in March 1973, exactly six

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<sup>36</sup> Viel left to join the IPPF in New York (Pieper 2009:107).

months before the Coup that would put an end to the UP government (Montebruno and Delgado 2003).

Despite these progressive reproductive health policies, Pieper (2009) sustains that although Allende referred to women's rights in speeches, in the end he also replicated patriarchal models. He mixed patriarchal views with socialist beliefs that women's participation in the revolution would liberate them, although the leader of that revolution would remain the male worker (2009: 113). Allende's government proposed "a number of policy changes for the benefit of women – and their families" of which the most "extensive proposal was the foundation of the Ministerio de la Familia (Family Ministry)" in 1971 that unfortunately "stalled" in Congress (Pieper 2009: 113-114). For Pieper, "despite this proposal's failure, it revealed Allende's goal of increasing legal equality between women and men in the family" and showed that:

Through the Family Ministry, Allende hoped to secure the rights of single mothers and their children, acknowledging the double standard that judged men and women's moral behaviors differently. (Pieper 2009: 113-114)

Although the record of the UP was mixed, it did give continuity to reproductive and sexual health policies despite a wider international context unfavourable to the UP's ideological position. As the government could not finish their plans for a community health approach or develop their pioneer work on abortion to more hospitals around the capital and the country, we will probably never know the real impact the UP could have had on women's sexual and reproductive rights beyond healthcare.

### **The Coup, the military and population: The end of an era for family planning and women's reproductive health**

The Coup in September of 1973 put a violent end to Allende's Unidad Popular government and its "Chilean way to socialism", replacing its popular and participatory

democracy with a drastic and bloody repression to impose the military's doctrine of national security. On the day of the Coup and the following days all government offices and hospitals were raided and taken over by the military. Many doctors and UP officials were persecuted, arrested, disappeared or exiled, including Aníbal Faúndes who was head of the abortion programme at Hospital Barros Luco.<sup>37</sup>

The Coup also represented a departure from the emancipatory reproductive health policies put in place by the Frei and Allende administrations. In the aftermath of the Coup many policy documents of the previous government were seized and destroyed. Among those was the policy on sexual education prepared by the Ministry of Education of the UP. This resulted in the loss of policy-making knowledge and from 1973 until almost 1993 no major steps were taken on sexual education which, like most sexual and reproductive issues, remained untouched (Radio Universidad de Chile 2005).

From the beginning the Junta's doctrine of national security defined family planning and birth control as a threat both to society and the family by putting the country at risk by reducing its population. In the narrative established by the Junta, women were considered the guarantors of morality of the motherland, responsible for the preservation of traditional institutions, in particular the family (Grau 1997: 259). The agenda on reproductive health and access to birth control methods was therefore important to the military dictatorship, and has been described as a "quintessential expression of patriarchy" (Valenzuela 1986 cited in Ríos Tobar 2003: 130). The Junta had a clear vision of a gender order they wanted to impose, and for this they needed to

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<sup>37</sup> Dr Faúndes travelled to the United States to a conference on September 13, after spending the Coup and the following day at the Hospital Barros Luco. While abroad he was declared dangerous and was not allowed to go back to Chile until 1984 (Montebruno and Delgado 2003).

reinforce institutions such as the traditional Catholic family and the dependent role of women who were to be defined by motherhood (Ríos Tobar 2003).

The Junta started pursuing an open policy of pro-natalism and, among their first measures in 1974, the military regime ordered an expert commission to evaluate the policies on family planning – the *Comisión Nacional de Planificación Familiar y Paternidad Responsable* (Pieper 2009: 136 fn 9). The commission included military experts but also civilian experts, including members of APROFA. In 1979, the planning agency *Oficina de Planificación Nacional* (ODEPLAN), published a document in which it openly criticised the family planning or birth control policies carried out during previous governments, with a particular focus on the free distribution of contraception to poor women (Grau 1997). Based on this, ODEPLAN published new guidelines for the Ministry of Health and for its work in service provision (Grau 1997).

The publication of this report and the new position of the military regime regarding family planning started to be supported in the media by Catholic conservative voices referring to the teachings of the Church, which at the time was shifting its focus on morality and the sanctity of life (Grau 1997a). The Church, despite welcoming the ODEPLAN guidelines, expressed its regret that the use and distribution of IUDs was not banned since they considered IUDs to be abortive (Grau 1997).

Between 1979 and 1985, the regime followed a “pro-natalist population policy and obstructed physicians’ delivery of family-planning” while private doctors no longer made contraceptives available to women (Pieper 2009: 143). Yet according to Galán,

“when the military government comes to power... we suddenly started receiving all types of contraception methods again”.<sup>38</sup>

### **APROFA and the military**

As a direct consequence of the ODEPLAN's guidelines during the 17-year-long dictatorship, and in particular in the 1980s, APROFA operated in a very limited manner. Rolf Behncke, Pinochet's advisor on population and family protection issues, openly accused APROFA and the SNS of not complying with the regime's guidelines by distributing and refusing to remove women's IUDs, which in his view were abortive (Grau D. 1997b).

Despite APROFA's low profile, Mónica Madariaga, Minister of Justice of Pinochet tried on different occasions to close APROFA, albeit without success.<sup>39</sup> APROFA was accused of being responsible for the reduction of Chile's population and supporting foreign interests.<sup>40</sup> As explained by Dr Galán, the junta wanted “the Chilean population to increase” because of potential conflicts with Argentina, Peru, and Bolivia, and they needed “more arms to carry weapons”, and thus declared “the family planning programme is over” while “doctors were forbidden to make any publicity on family planning or to promote sterilisation”.<sup>41</sup> Yet they could not stop the programme “because women already knew about it!”:

Women had... appropriated that knowledge about contraception... knew that if they gave birth they could ask for the IUD"... women gave each other advice on the IUD despite the absence of any open promotion, and that is why Madariaga...

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<sup>38</sup> *Op. cit.* 26.

<sup>39</sup> *Ibid.*

<sup>40</sup> APROFA was accused by the military regime of responding to the imperialist interests of the government of the United States or private interests of transnational pharmaceutical companies (Grau 1997a).

<sup>41</sup> *Op. cit.* 26.

could not close APROFA. Because APROFA was still providing the Ministry with contraceptives.<sup>42</sup>

### **Women and the barriers to access family planning**

The dictatorship provided unexpected spaces for women to start questioning “their life conditions, their historical invisibility as political actors, and the dictatorship’s ideological project” (Ríos Tobar 2003: 130). Pieper highlights how it is under dictatorship that we observe a move from mother’s rights to women’s rights within the women’s movement and feminist discourses, producing “unexpected debates on gender and sexuality allowing women to contest the uncompromising, top-down traditional model of gender relations that the military aimed to impose” (2009: 136).

The progressive feminisation of poverty (Barrientos 1993) led to an increasing opposition to the military regime with a gendered face. Women in fact started running “soup kitchens, collective shopping groups, and workshops, and arose largely in the poblaciones and poor neighbourhoods” and these groups “later provided a vehicle for more political forms of organisation by women” (Barrientos 1993: 38).

After 1979 healthcare faced significant cuts in its budget,<sup>43</sup> which were followed by a profound restructuring of the health system, especially at the primary care level. This was in line with the policies implemented within the health sector “aimed at reducing the role of the state, expanding the private sector in provision and financing” (Gideon 2007: 241). The decentralisation of primary healthcare and its municipalisation resulted in the impoverishment of the health services and a substantial decrease in the quality of care, especially for family planning services which were not considered a priority and

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<sup>42</sup> *Ibid.*

<sup>43</sup> The expenditure on health went down from 3.21% of GDP in 1974 to 2.6% in 1980, and 2.33% in 1987 (Miranda 1994 cited in Gideon 2007: 242).

fell “at the bottom of the list” after emergency care and maternal–child assistance (Pieper 2009: 143).

With “fewer health-care personnel available, women seeking information on family planning often returned from health-care centers without having any of their questions and concerns addressed” (Pieper 2009: 143). Women from popular sectors started to face serious problems accessing birth control methods; some of them had their IUDs removed without consent by doctors who supported the views of the regime. At the community level, in women’s centres, poor women were told to stop using birth control, and the pill and IUDs were singled out as going against religious and moral norms (Pieper 2009: 142). In addition to these restrictions to access reproductive health, the military decided to enforce for the first time the laws regarding abortion, making it very risky for doctors and nurses to treat patients who arrived into emergency rooms and forcing them to denounce them if they suspected abortions were self-induced, leading to an increase in the number of poor women jailed over the years (CRLP and Reproductivos 1998).

During the 1980s popular movements started defining their problems outside the ideology of motherhood, albeit with an emphasis on a class-based analysis and often with the help of the church (Pieper 2009: 157). As explained by Pieper, “self-help strategies through collective organizing, and the critique of the double oppression through dictatorship and patriarchy also shaped the mobilization of poor women” (Pieper 2009: 157).

During this period, as women’s groups were growing in force to oppose the regime and mobilise, in particular at the grassroots level, organisations such as APROFA were not involved in that process. Women’s rights groups perceived the work of APROFA and

other policy-makers negatively, creating a distance between the biomedical lobby and the women's movement. For Galán this was partially explained by the fact that in order to be able to continue to carry out its work the APROFA had claimed "to respect the country's legal status on abortion".<sup>44</sup> They worked hard to criticise the military regime's policies on family planning in policy circles and through the press (Grau 1997b) but mostly because of the impact these had for the "modernization agenda" promoted by the Junta (Pieper 2009: 148). APROFA used the case of teenage pregnancy as a flag for their campaign which was considered by health officials from the perspective of children born to teenage mothers and the social and economic impact on them (Pieper 2009). This confirmed the way mother-child understandings of health were still strongly engrained amongst policy-makers.

Hence the discourse between the biomedical lobby and women's groups were far apart. APROFA's behaviour responded to a clear strategy of institutional survival in a hostile political context while women were launching a deeper critique of the regime's social and economic model through their understanding of women's rights. Women's distrust of the medical profession also had to do with the numbers of doctors who supported the regime's pro-natalist and ultra-catholic views, and participated in the removal of IUDs in women who had not given their consent, forcing them to become pregnant (Pieper 2009: 142). The amount of cases of violation of women's privacy and reproductive rights were never fully reported but were enough to be considered more than anecdotes (Pieper 2009: 142) and alarmed women from the poorest sections of society. This had

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<sup>44</sup> *Op. cit.* 26.

the negative impact of keeping women away from any healthcare services, affecting their overall physical and mental health.<sup>45</sup>

### **The changing role of the Church during the dictatorship**

The Church went through important changes during the seventeen years of dictatorship. Cardinal Silva Henríquez was still at the head of the Church in the initial years of the dictatorship, from where he led the resistance for the defence of human rights which gave the Church a unique position of legitimacy and trust within Chilean society (Blofield 2006). Silva Henríquez became a very controversial figure due to his outspoken stance against the regime's violence and persecution of opponents to the regimes. He founded the *Vicaría de la Solidaridad*, which protected many opponents and had direct confrontations with Pinochet. The ultra-conservative elite in Chile nicknamed Silva Henríquez the "red priest" (Thumala 2007).

The Vatican under John Paul II considered that the Chilean Church was being too militant and politically involved and put pressure on Silva Henríquez to resign, which he eventually did in 1983. At the time John Paul II had started to replace key members of the hierarchy in many places around Latin America with more conservative characters (Thumala 2007). Silva Henríquez's successor Cardinal Fresno was a well-known conservative. This change to the hierarchy of the Church during the 1980s coincided with the rise of the Opus Dei within the Chilean Church, but also through the presence of Catholic fundamentalists in government, such as Jaime Guzmán, the closest advisor to Pinochet.

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<sup>45</sup> *Ibid.*

Since the 1970s, the appearance of the Opus Dei and other elitist movements such as the Legionnaires of Christ and Schoenstatt has been crucial to define the ethos of the Chilean elite and to establish the new relationship of the upper classes with the Church (Thumala 2007: 33-36). In this way the elite has reclaimed and redefined Catholicism in line with their beliefs (Thumala 2007: 36). This new Catholic elite has played a crucial role in modifying the social and political structures of Chilean society by permeating all spheres of power in the private and public sector, and using institutions such as universities to prepare the new young leaders under their ethos.

### **The religious elite and the 1980 Constitution**

The role of this elite was evident during the construction of the most important institutional legacy of the military dictatorship: the 1980 Constitution. The Constitution was the most ambitious project to change the rules of the game within the country and create a new institutional framework for Chile's future political system. The process of changing the Constitution was a meticulous one in which conservative and Catholic forces greatly influenced the reform's content and language. The Constitution was built with the aim of maintaining a certain hegemony of conservative forces which has prevailed since then:

... the 1980 Constitution was preceded and shaped by a revived natural law discourse rooted in a conservative version of Catholic doctrines. [...] Relying on natural law ideology, a group of conservative lawyers was able not only to radically transform the Chilean legal order during the Pinochet dictatorship (1973-1990), but also has been able to maintain its hegemony over constitutional norms, even after losing power in 1990... (Muñoz León 2014: 129)

With regard to women's rights and reproductive rights, for the first time in Chilean constitutional history the 1980 Constitution included an explicit mention of the right to life (Muñoz León 2014: 130), reflecting how the most conservative Catholic ideology

had permeated the Junta. As explained by Muñoz León, this may have been “consistent with the official Catholic position proclaimed in Paul VI’s *Of Human Life*, but a paradoxical innovation coming from a murderous dictatorship” (Muñoz León 2014: 130). This also raised the paradox of a dictatorial regime that wanted to appear modern yet was still strongly grounded in the most conservative religious teachings of the Church.

The real meaning of the inclusion of the “right to life” in the constitution became evident when three months before leaving power in 1989, the Junta passed a package of constitutional reforms negotiated with the opposition. The right to abortion was erased from the Sanitary Code (*Código Sanitario*) that had been in place since 1931. Abortion was perceived as “a dangerous opening through which left-wing political sectors could legislate a complete liberalization of abortion laws” (Haas 2010: 125). In this way abortion became illegal under any circumstances.

The inclusion of the right to life in the Constitution, with the subsequent derogation of the right to abortion (albeit limited since 1931), can therefore be considered the gendered authoritarian enclave of the transition to democracy and a direct result of the same conservative lobby that shaped the 1980 Constitution. Jaime Guzmán himself was known for his views against abortion even when the life of the mother was a stake.

Haas argues that the “criminalization of abortion by the military government was made possible because policy reform was not subject to democratic debate” and it has not been decriminalised in democracy due “to the successful reframing of the issue by political conservatives” (2010: 124). This is because “once the military government outlawed abortion on moral grounds, this became the default political frame for the issue” (Haas 2010: 124).

### **The early 1990s democratic governments: Women's rights, SERNAM and the international conferences**

Both Patricio Aylwin (1990-1994) and Eduardo Frei Ruíz Tagle (1994-1998) had an important role to play in rebuilding a democratic society in Chile after 17 years of dictatorship. The women's movement that emerged under dictatorship and fought for democracy tried very hard to influence the transition process as the re-emergence of political parties became evident. Abortion and divorce were among the first issues they raised after the plebiscite in the electoral campaign, yet parties identified abortion in particular as a politically "dangerous" issue, leading to much tension with the most conservative factions within Concertación.

### **The Church in democracy**

The Church established itself as a key political player in the transition to democracy (Blofield 2006) thanks to the courageous work of its most progressive members who defended human rights. Moreover, the Church played an important role supporting the demands of social movements, including *pobladoras*' demands for social justice under the military regime (Drogus 1994). The Church often financed grassroots organisations that mobilised against the Pinochet regime (Barrientos 1993). Yet all these efforts coming from the progressive wing of the Church benefited the conservative hierarchy put in place after the resignation of Silva Henríquez. This had an important impact on the relation this new conservative Church established with civil society and the political elite in democracy.

### **The Christian Democrats**

As discussed previously, the Christian Democrats are historically linked to the Catholic Church. They maintained this close relationship under dictatorship despite the changes that brought a more conservative hierarchy of the Church controlled by elitist groups.

Back in democracy, the more progressive Catholic factions of the PDC, as well as many left-wing politicians, felt a strong loyalty and debt to the Church because of the role it played in the protection of human rights. Through the work of the *Vicaría de la Solidaridad*, the Church saved the lives of many politicians who were now officials and leaders of the centre-left government coalition Concertación (Shepard 2000: 117).

During the years of dictatorship many political leaders, particularly from PDC and UDI, were educated in elite universities where the Church had a great influence.<sup>46</sup> Back in democracy and reflecting the importance given by the new Church's new hierarchy to morality discourses (Thumala 2007), these same leaders from very early on censored the issues referring to sexuality and reproduction. This was in sharp contrast to the progressive Catholic views of the 1960s, which allowed the distribution of birth control for example.

The “politics of consensus” was a trademark of the bottom-line negotiation of the DC to join the Concertación in order to maintain a status quo (Franceschet 2010). This developed a democracy “*de los acuerdos*” (agreements) which has been based on the use of informal institutions to set the rules of the game and their sanctions (Siavelis 2006). It also involved a minimalist agenda on women's rights which did not upset the Church, thus excluding major reforms to SRHR (Guzmán and Seibert 2010).

### **Feminists in democracy: SRHR and SERNAM**

Feminists and the women's movement secured an important guarantee for a gender agenda in the newly-built democratic institutional framework through the inclusion of

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<sup>46</sup> During the 1960s the Pontifical Catholic University was strongly under the influence of the Christian Democracy and progressive Catholic groups following the Social Doctrine of the Church. They were quickly displaced after the Coup by the far-right Gremialismo movement of Jaime Guzmán, which later gave birth to the UDI.

most of its political agenda's demands by the government of Patricio Aylwin (Valdés and Fernández 2006: 11). Probably the most visible gain was the creation of SERNAM – the *Servicio Nacional de la Mujer* – which in the 1990s quickly became one of the most important women's machineries worldwide (Valdés and Fernández 2006: 12). However its very existence was questioned by conservatives and the influence of Christian Democrats in shaping SERNAM limited its scope from the outset (Macaulay 2006). SERNAM's mandate specifically ruled out sexual and reproductive rights to avoid breaking the consensus of the newly-built ruling coalition, and this led to self-censorship on these issues (Macaulay 2006).

The creation of SERNAM was not just that of a Ministry, it was the first time women and feminists were officially represented within the state and policy arena. SERNAM came to alter the institutional context in which the women's movement had to act to see its demands acknowledged (Franceschet 2003). In fact, unlike the previous decades where women were never the main interlocutors with the state on policies affecting them, this time women entered the public space ready to engage with the state from a women's rights' perspective. This was possible due not only to the solid gender critique of state policies born under dictatorship, but also because of the “empowerment triangle” composed by the women's movement, femocrats and political women (Valdés and Fernández 2006: 13).

Indeed, women from the women's movements went on to occupy different positions in society as Parliamentarians and civil servants while others remained in NGOs that would work closely with SERNAM or at the grassroots level. Initiatives like “Grupo Iniciativa” that coordinated the preparation for women's rights' NGOs for the Beijing Conference in conjunction with SERNAM are a good example of the new engagement

of the women's movement and feminists with the state. Women's organisations and feminists both from civil society and political parties in Chile joined the government delegation to all the major UN conferences of the 1990s. These transnational interactions at the United Nations opened up new arenas for dialogue and debate among civil society delegates, including on SRHR. However, new ideas, in particular those regarding women's rights and human rights, were met by fierce resistance. Htun explains that "the greater embrace of principles of individual rights and citizen equality produced a tension with models of family life and gender relations upheld by religious doctrine, patriarchal traditions, and conservative and nationalist movements" (2003: 2). This was the case with the ratification of the Beijing Platform of Action by the Congress in Chile due to the concern of conservatives on the follow-up implementation to the CEDAW, considered a way to legalise abortion.

### **Abortion**

Because SERNAM gave priority to the insertion of women in the labour force and domestic violence while excluding SRHR, these issues would start to be postponed within state policies affecting the work of the women's and feminist movement. Although feminists made a conscious decision not to fight for the right to abortion in order to help their parties maintain the political consensus, the SRHR agenda was high on their priorities.

Since the return to democracy there have been legal initiatives to try to reverse the dictatorship's legacy on abortion (M. Blofield 2006, 2008; Haas 2010). Some have tried to reduce the penalties considered by the law, but none have successfully brought the issue to Parliament to be officially discussed and reverted. In fact, most bills on the topic have stalled; all attempts for legal reform have been "unmitigated failures" (2010:

119). This has left a challenge for feminists to “reframe abortion as an issue of public health, women’s equality and human rights” (Haas 2010: 124).

Most issues regarding women’s sexual and reproductive rights fell into the agenda of MINSAL or the Ministry of Education (MINEDUC), where feminists and left-wing parties did not have the same amount of influence they had in SERNAM. During the Aylwin and Frei administrations, MINEDUC would often be controlled by Christian Democrats where all the initiatives to create a programme on sexual education within the school curriculum was met by fierce resistance and not a single initiative had been successful (Shepard 2006). As for MINSAL, the expertise in the Ministry would give priority to doctors over civil society groups, and biomedical groups would have a closer relationship with the Ministry.

Interestingly MINSAL, from the early days of Concertación, reverted to the pre-1973 focus for the provision of family planning to women and couples, reflecting the enduring institutional memory of policy-makers. In 1990, through its Maternal Health program, MINSAL started producing posters targeting women and couples and encouraging them to attend primary healthcare centres to obtain contraception, including IUDs, the pill and condoms (Jiles 1994). However, sterilisation remained under the same norms from 1975, requiring the consent of the husband for women to undergo the surgery (Jiles 1994).

### **APROFA and the new SRHR advocates**

In 1990 the old civil society actors like APROFA were rapidly joined in their work on sexual and reproductive issues by new biomedical research and advocacy groups such as ICIMER and CORSAPS. As Chile had ceased to be considered a priority country at the international level to receive free contraception, the APROFA during these years

lost part of its influence and close ties with the state. It went through reorganisation after many years of working in a limited manner under the dictatorship, to become independent and continue to support the work on SRHR in the country by expanding its discourse to SRHR.<sup>47</sup> This had the effect of opening the door for more interaction with women's groups and coalition-building efforts after many years of self-sufficient behaviour by the organisation.<sup>48</sup>

## **Conclusion**

This chapter has reviewed the evolution of the policies regarding reproductive and sexual health in Chile since the 1960s. It has shown how women have mostly been considered in their role as mothers by policy-makers working on reproductive health issues. The family planning initiatives in the 1960s responded more to foreign influences than national demand, and certainly not women's demands. Due to the high rate of abortions and deaths in the 1960s and 1970s, it was easier to make the case for family planning programmes. Although both the Christian Democrat and UP governments targeted women in slightly different roles, none of them developed the distribution of family planning as a means to break the mould of traditional gender roles. The UP had some more progressive reproductive health policies providing easier access to abortion services and sexual education.

The strong biomedical groups involved both in the research and implementation levels of the family planning policy since the 1960s, such as APROFA, which re-emerged through institutional memory once back in democracy, remain crucial players in the field of SRHR.

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<sup>47</sup> *Op.cit* 26.

<sup>48</sup> *Ibid.*

The silence of the Church on reproductive health issues and its tacit complicity in the initial stages of the implementation of family planning contrasts with the 1980s, when the Church's hierarchy changed, produced a new and more conservative discourse on women's roles and morality. This directly affected the debates on abortion as well as the ethics of the use and distribution of contraception. The Church and the Catholic elite (including lawyers and doctors) played a key role in the dismantling of SRHR policies during the dictatorship and supporting the creation of a new institutional framework in the form of the 1980 Constitution. The Constitution set the new "rules of the game" by reinforcing a specific gender regime in which abortion and women's sexual and reproductive rights do not exist as such. This legacy was reinforced through the politics of consensus.

The consensus rule is probably the most important informal institution in Chilean politics that favoured conservative forces over progressive ones. It triggered and maintained self-censorship on many policy issues within Concertación and within the women's movement, namely regarding abortion. Most importantly it prevented the inclusion of a SRHR agenda within SERNAM, which has weakened and limited the efforts of the women's movement on those issues.

Despite the early presence of feminist movements putting forward demands for women's rights, family-planning initiatives have remained a prerogative of the medical profession and biomedical organisations. These actors and institutions have had a privileged influence over this policy field and preferential access to key policy-makers, raising questions on their capacity to work in alliances with women's groups and vice versa. The institutional framework in which feminists have had to monitor women's

rights since then has been a great impediment to the advancement of their agenda. This is particularly true for SRHR as will be discussed in the next chapters.

## **CHAPTER 5: Mapping the Anti-SRHR Advocacy Coalition – the actors and internal evolution of the coalition over 10 years**

Using Sabatier's Advocacy Coalition Framework, this chapter and the next attempt to show that in order to understand the role of actors and institutions involved in the EC policy process in Chile, the diversity of supporters within each of these coalitions needs to be unveiled and the ties linking them explored. In this way we obtain a clearer picture of how competing visions on EC and SRHR influence public debates.

Feminist scholars have highlighted the importance of the “substantive representation” of women in politics, which involves looking beyond the formal or “descriptive” representation of women's interest and evaluating how the issues that women and feminists advance are taken on board by representatives other than those elected. Looking at the actors influencing a policy process is key to such analysis since women's interest can be represented beyond the electoral sphere (Weldon 2002 cited in Mazur 2009: 332). The introduction of women's issues during debates before a policy or a law highlighting women's perspectives can itself be seen as a representation (Celis 2009). This reminds us of the importance of the “framing” of gender issues because – this process is the result of people's values and beliefs and it is often at this stage that a policy becomes gendered and political (Bacchi 2001).

Moreover, the way elites use gender ideology to affect public opinion on specific policies matters because it structures public opinions, and can affect the way in which a policy process evolves, including on issues not directly linked to gender (Winter 2005). This recalls Htun's (2003) focus on the role of *elite issue networks* in policy-making.

On the other hand, feminist and non-feminist analyses of the policy process have also highlighted the importance of belief systems and values of actors in advocating for an issue (Abrar, Lovenduski, and Margetts 2000; P. Sabatier and Jenkins-Smith 1993). There seems to be a consensus on the need to broaden the “scope beyond political elites and interest groups to include social movements and newly politicised grassroots activists” to see “change as produced by networks of insiders and outsiders rather than exclusively caused by elites in formal positions” (Kenney 2003: 179). This is particularly important for evaluating the impact of feminist policy efforts. Abrar et al. highlight the need to overcome traditional and “formal policy-making roles”, because when “an approach that focuses on the impact of ideas on policy change is used, a different picture emerges, one of feminist driven change” (2000: 239).

People’s belief systems and values matter at both the level of policy framing and advocacy. Advocacy requires the capacity to build alliances and accept compromise in order to obtain sufficient influence to shape the agenda-setting and policy-making process. Celis defines “good” substantive representation as representation that “implies recognizing diversity and ideological conflict regarding women’s interests and gendered perspectives” (Celis 2009: 95).

This chapter proposes that the Anti-SRHR Advocacy Coalition that challenged the distribution of EC is a tight network, working with a strong belief system founded in the most traditional Catholic doctrine promoted by the Vatican. Fundamentalist groups such as the Opus Dei, Legionnaires of Christ, and Schoenstatt count on important economic resources (Thumala 2007) and are therefore extremely active and influential in Chile (Blofield 2006). More importantly, however, their belief system has a clear and unquestioning gendered view on women’s roles and rights, often framed in essentialist

characteristics such as motherhood, guiding the way these advocacy coalition members frame ideas and advocate against reproductive freedom. This gives these actors a unique advantage when imposing the terms of the debate on EC and challenging its distribution.

The terms anti- and pro-SRHR are used because the actors advocating in favour or against EC are the same actors who over the years have enabled or impeded advances on the wider SRHR agenda in Chile. In fact these same actors generally have been, and often still are, involved in the discussions regarding adolescents' rights to sexual education, sexual rights, and the increasingly visible agenda on bio-ethics. They therefore actively engage with a wider agenda on SRHR that encompasses EC.

### **The belief-system of the Anti-SRHR Advocacy Coalition**

The main actors of the Anti-SRHR Advocacy Coalition are a wide and influential network with overlapping interests and beliefs. The coalition's strength is derived from the closeness within a tight network of people brought together by religion and class as most of them belong to a certain elite. In this coalition there is a single and simple understanding of the notions of life – seen as starting from the moment of conception – and therefore the perception of abortion as homicide, all based on the teachings of the Catholic Church.

These beliefs are set within a wider belief system regarding notions of society and family, and in particular gender roles, where motherhood is a mandatory role for women. Moreover Catholic beliefs match politically conservative views around gender and society. As Haas explains:

The Church's arguments in defense of its traditional perspective on the family, women, and sexuality have over time come to echo much of the Right's logic on

these issues. The discourse of both the Church and the Right emphasizes the destabilization of society and the moral chaos that ensues if traditional norms of sexual behavior or gender roles are liberalized. (1999: 43)

The main sets of actors within the Anti-SRHR are: a) Church and faith-based organisations (FBOs); b) academia (Catholic universities); c) media; d) professional individuals; and e) conservative parties. Blofield (2006) argues that these actors have an undoubted socio-economic advantage, but the evidence shows that their strength also comes from their disciplined and orchestrated *modus operandi* and praxis of politics. This is based on a clear and acknowledged set of beliefs where the “deep core” and “policy core” are strongly linked due to the homogeneity and closeness of the actors involved in the advocacy coalition.

Characters and roles are well defined within the advocacy coalition, with many actors functioning in a coordinated manner while appearing to act independently. As Dides explains:

... the strategies used by different groups have focused on the media and mass communication means, education, research, influencing parliamentarians (lobby), intervening in public policies; in addition they have focused on strategies for internal coordination, support and alliances among groups. (2006: 104)

This means that the coalition is highly effective at obtaining political support to move forward its political agenda.

### **The Church**

The pillar or “core” of the belief system of the Anti-SRHR Advocacy Coalition resides within Catholic doctrine regarding women’s rights, SRHR issues, the right to life, and current debates on bioethics. Dides argues:

The presence of conservative sectors of the Catholic Church in the debates surrounding sexuality and reproduction has become stronger over the last couple of

years. This is not particular to Chile. It is part of processes happening at the regional and global levels. (Dides 2006: 67)<sup>49</sup>

The Pontifical Academy Pro Vita<sup>50</sup> established the Church's opposition to the use of EC in 2000, and called on doctors and pharmacists to become "conscientious objectors" against the distribution of the drug, defining its use and effects as "chemical abortion" (La Segunda 2000). In 2007, pharmacists played a key role by opposing the commercialisation of EC based on their alleged conscientious objection as business owners (see Ch. 7).

The hierarchy of the Catholic Church in Chile is visible through its Episcopal Conference, the institution bringing together all Bishops in the country. The Conference, a key player in politics, was particularly vocal against EC. For instance, when the Bachelet administration announced the distribution of EC in 2006, it published a harsh declaration reminding politicians who were persecuted during Pinochet's dictatorship of a moral debt, since the Church had protected their human rights and their right to life when they were in danger (see Ch. 8).

Since the return to democracy the Church has been granted special treatment by Concertación governments because of this. As explained by a High Official of the Church, the "minister of SEGPRES meets with the permanent committee of the Conference once a month, for breakfast, where diverse issues are addressed".<sup>51</sup> This is a political privilege many civil society organisations do not have, particularly feminists or women's groups.

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<sup>49</sup> Researcher's translation.

<sup>50</sup> The Pontifical Academy Pro Vita (Pro Life) was founded by Pope John Paul II, and "exists for the promotion and defence of human life, especially regarding bioethics as it regards Christian morality" (Pontifical Academy for Life 2011).

<sup>51</sup> Interview with senior official of the Catholic Church, 17.07.09.

The leadership of the Church is aware of its social influence and power and has a sense of entitlement to its political and social role society. For the hierarchy, the “Catholic Church has won its moral authority” not only through its historical role in favour of social justice and human rights in Chile, but also through contributions in academic work and research.<sup>52</sup> Yet, the hierarchy of the Church with which Concertación governments have had to engage, is a conservative hierarchy, benefiting from the reputation it earned through its social engagements of the 1960s, 1970s and especially the 1980s (Haas 1999). The Church in Chile was not always as conservative and militant on SRHR issues (see Ch. 4) but, as argued by Haas, it “has found a kindred spirit in the political Right”, and “ironically... locating its main support among those political elements that were the most supportive of the dictatorship and are most ambivalent about the virtues of the democratic process” (Haas 1999: 43).

Thumala (2007) has shown how the case of Chile contradicts the notion that in modern societies religion will be less influential. Rather it provides good examples of how elite Catholic groups such as Opus Dei, Legionnaires of Christ and to a certain extent Schoenstatt have shaped and guided the renewal of a Catholic ethos in Chilean society, in particular among its socio-economic elite (Thumala 2007).

The Church has an ambivalent relationship with politicians. The High Official interviewed emphasised that the Church “does not feel represented by any party” and “maintains its freedom”<sup>53</sup> while acknowledging having direct communication channels with politicians:

... whether it [the church] has political influence, I believe that indirectly yes, it does [...] when a congressman calls me to ask for information regarding a research

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<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

study that I have carried out for five years, and that I send it to him that evidently has a political weight.<sup>54</sup>

### **The new faith-based organisations (FBOs)**

The Catholic Church today has a diversified organisational composition, which grants it a strong presence and influence in Chilean society. It is the founder and manager of a wide network of NGOs working on diverse issues, from poverty to street children, the elderly to single mothers.<sup>55</sup> With the privatisation of education the Church has also become one of the main providers for primary and secondary education increasing its presence in society in this way and progressively replacing the secular state (Blofield 2006).

Over the last fifteen years, coinciding with the beginning of the policy initiatives to distribute EC, new types of faith-based organisations have appeared, most of them linked with ultra-Catholic groups. It is important to consider the close ties and institutional affiliations between these groups that initially may not seem connected. It is in the background of these actors that we measure the widespread influence of the Catholic Church.

These organisations are often internet-based, and resulting from one person or a small group's initiative. Their aim is to carry out advocacy, influence legislative processes, or to influence public opinion. This was the case of *Centro Juvenil AGES* – the student organisation founded at the Opus Dei Universidad de Los Andes (ULA) which was

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<sup>54</sup> *Ibid.*

<sup>55</sup> Institutions such as the *Hogar de Cristo* (the largest FBO in Chile founded by the Jesuits) and *María Ayuda* (dedicated to preventing single mothers from aborting and to give children up for adoption) all are well endowed through private funds. The public opinion has a positive image of these FBO's work due to their high visibility and sophisticated marketing campaigns.

created with the specific aim of bringing the case of EC to court in 2001, supported by an expert lawyer and law professor from ULA (see Ch. 7).

AGES secured the support of other relatively unknown organisations in order to initiate the court case that launched the series of legal and political battles that took place between 2001 and 2005 (see Ch. 7), including *Investigación, Formación y Estudio sobre la Mujer* (ISFEM) (Institute for the Research, Training and Studies on Women), *Centro Internacional para el Estudio de la Vida Humana* (International Centre for the Study of Human Life), *el Movimiento Mundial de Madres* (Worldwide Mothers' Movement), *la Agrupación Nacional por la Vida-Antuquillen* (Antuquillen National Pro-Life Organisation), and *Frente por la Vida y la Acción Solidaria* (Pro-Life and Solidarity Action Front).<sup>56</sup>

The evidence shows that many of these web-based organisations became extremely effective in their use of new internet-based communication technologies, using the web as a tool not only to disseminate information and opinions, but also to mobilise and organise people. A good example of this is the prominence achieved by certain organisations publicly involved against EC during Bachelet's administration – *Muévete Chile* (Move Chile!), *Acción Familia* (Family Action), *ACONOR* (Organised Consumers' Association), and *Red por la Vida y la Familia* (Pro-Life and Pro-Family Network). While the accusations against EC under Bachelet were led by politicians, these FBOs took on the role of informal “speakers” on behalf of the Anti-SRHR Advocacy Coalition.

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<sup>56</sup> Casas (2008) explains that many of these organisations were legally established under the same address as the one legally recorded for AGES.

Of all these groups, *Acción Familia* (Family Action) served as the main umbrella organisation for the work of all the other groups over the last ten years. They actively participated from the beginning and voiced their resistance to the government's policy plans at every stage of the policy process, but their stance on reproductive issues was also tinted by strong far-right conservative political views. In 2004, in their press release to right-wing newspaper *La Segunda*, *Acción Familia* declared:

The ruling has reaffirmed the unquestionable coming into force of the principle that sustains a right to life from conception, and in this way hinders the incessant attempts by Socialists supporting the legalisation of abortion in the country.<sup>57</sup>

*Acción Familia* was so influential and well connected that it was invited to Congress by conservative politicians in August 2009 to express its views on the initiative by Bachelet and her government to pass a Law on Fertility regulation. The group denounced the government's bill initiative (*Acción Familia* 2009) on the following grounds:

1. The bill is based on ideological reasons, inspired by a new understanding of human rights, which opens the door for "sexual and reproductive rights", and reintroduces the SRHR Bill based on those rights.
2. The bill is not scientific or medical and contradicts the ruling of the Constitutional Tribunal by trying to reinstate an administrative procedure already discarded.
3. If the ideological assumptions of the bill are accepted, not only will the distribution of the so-called 'next-morning pill' be legalised, but principles leading to the posterior legalisation of practices against morality will also be accepted, such as free abortion and homosexual unions.

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<sup>57</sup> Researcher's translation. This declaration was made in the context of the short-lived victory on 2004 that put a halt to the distribution of EC (see Ch. 7).

Here the direct connection between these types of advocacy organisations and the main Catholic opposition to SRHR in general can be observed, along with their clear awareness of SRHR initiatives launched by the pro-SRHR lobby and feminist organisations. Also, we observe a clear set of conservative beliefs linked to far-right parties in the country.

These groups' advocacy work was facilitated by the fact that they divided the work among themselves to target different audiences. Groups such as *Muévete Chile* targeted a youth/student audience.<sup>58</sup> It was led by active university students who, as part of their mission, also train new students via a “School for Catholic Leaders” (*Escuela de Líderes Católicos*). They openly called for a boycott against pharmaceutical groups distributing EC, supporting other Catholic consumers' organisations such as ACONOR (Guzman, Seibert, and Staab 2010). But in particular, under the government of Bachelet, they extended their presence and outreach to other cities such as Viña del Mar and Concepción where Catholic student groups are well organised through conservative movements and can rely on the support of other Catholic universities such as *Universidad Católica de la Santísima Concepción* and *Pontificia Universidad Católica de Valparaíso*.

In 2007, taking advantage of Bachelet's visit to the Vatican, *Muévete Chile* wrote to the Pope to denounce the EC policy proposal (Red por la Vida 2007). It produced a mapping of all politicians and organisations supporting the pro-SRHR advocacy nationally and internationally where they denounced the “gender ideology” behind this initiative (Muévete Chile 2010), and in 2009, before the Parliamentary and Presidential

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<sup>58</sup> See ¿Qué es y qué hace Muévete Chile?, available at <https://www.youtube.com/watch?v=6kmvCS5U8qw>.

elections, they produced a table classifying each politician according to their stand on abortion, EC and gay marriage, showing the sophisticated and well-informed training these youth leaders received within the Anti-SRHR Advocacy Coalition (Muévete Chile 2009b).

The third group, *ACONOR*, was mostly active at the end of the Lagos administration and beginning of the Bachelet administration, and intervened when the campaign against EC started targeting pharmaceutical companies producing the drug. One of its founders is the same student that founded AGES (Casas Becerra 2008). In messages targeting international pharmaceutical companies producing the EC drug, ACONOR threatened them with legal action if they started distributing the drug in Chile (see Ch. 7). This was a new type of advocacy and lobbying tactic by Chilean standards, and responded more to what could be considered American models of consumer organisations.

Finally, *Red por la Vida y la Familia* (Pro-Life and Family Network) is an organisation that defines its mission as “channelling and coordinating all pro-life work in Chile; informing on all activities undertaken, as well as all institutions and actors participating” (Red por la Vida y la Familia 2010b). On its website this organisation provides not only information on the topics they defend but also a list of “anti-life” groups dealing with these issues.<sup>59</sup> In this sense, *Red por la Vida y la Familia* played an important communication role and targeted newspapers to make their opinions more visible, keeping its audience alert and informed on all issues affecting the right to life.

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<sup>59</sup> These include international organisations, INGOs working on SRHR, as well as feminist and women’s groups advocating for women’s rights (Red por la Vida y la Familia 2010a).

As can be seen, the anti-EC advocacy opposing EC was varied but highly coordinated in their policy advocacy actions, or “glued” at the core policy level. As Sabatier and Jenkins-Smith state, effective advocacy coalitions are tied by a common set of beliefs, which in this case was a Catholic understanding of the right to life and an opposition to women’s rights and “gender” as the base to produce public policy.

### **The Catholic universities**

Academic work and research is probably one of the most important sources of influence for the Catholic Church. Through universities the Church carries out early recruitment of followers and supporters among those who will probably become the intellectual and economic elite of the country. The Pontifical Catholic University of Chile (PUC) is the oldest Catholic academic institution in the country directly linked to the Vatican and has always been perceived as the rival to the state-owned and secular *Universidad de Chile*. But with the privatisation of education under the military regime, many private universities were founded by the Church, including *Universidad de los Andes* (ULA), which belongs to the Opus Dei.<sup>60</sup>

In Chile, besides the Opus Dei, two other important congregations are very active, working particularly with youth – the Legionnaires of Christ, and Schoenstatt (Thumala 2007). All these movements are known to operate in elitist circles, reaching out to the youth of middle-class and upper-class families through school or parishes. Opus Dei tends to focus on university students and young professional circles. There is a strong link between the business elite of Chile and the more elitist movements in the Church

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<sup>60</sup> ULA was founded in May 1990 as the country was starting its transition to democracy. Other Catholic universities include the *Universidad Santo Tomás*, *Universidad Alberto Hurtado*, *Universidad Católica Raúl Silva Henríquez*.

(Thumala 2007). It was in fact a mix of lawyers and doctors from PUC and ULA<sup>61</sup> that supported the accusations against EC in the courts and the Constitutional Tribunal (see Chs 7 and 8).

Sabatier and Jenkins-Smith have highlighted that “scientists are not necessarily ‘neutral’ or ‘policy-indifferent’; instead, they are often members of coalitions” (1999: 128). Therefore it was crucial for the anti-SRHR lobby to include/recruit scientists who would be able to oppose the pro-SRHR advocacy coalition in court on scientific grounds regarding the action mechanisms of EC to support their position that the drug was abortive.

Among the medical professionals involved in the anti-SRHR advocacy, one can highlight the public interventions of: Dr Patricio Ventura-Juncá, member of the governing council of the Pontifical Academy for Life and Director of the Centre of Bioethics at the Medical School at PUC; Dr Fernando Orrego Vicuña, former Head of Department at the Medical School of ULA; as well as Dr Patricio Mena,<sup>62</sup> Emeritus Professor and President of the Ethics Committee of the Medical School at ULA.<sup>63</sup>

The first two physicians were particularly proactive and visible in the media, notably through television interviews and letters to the editor in newspapers, while the third participated in the campaign via scientific articles (Mena 2005) to oppose the results of

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<sup>61</sup> PUC is the most influential Catholic university in Chile. ULA, thanks to its vast resources, has progressively started competing for students as well as research and teaching staff with PUC. Competition has been particularly strong in two specific departments – the Law faculty and the School of Medicine – two key areas of influence of the Catholic lobby in society.

<sup>62</sup> Dr Mena was also part of the initial group of actors that brought the first case against EC to court.

<sup>63</sup> At the medical school of ULA contraception is not part of the curriculum for doctors, following the strict Catholic doctrine’s prohibition regarding the use of contraceptive methods. Therefore, many of the young graduated doctors of ULA, including obstetricians and gynaecologists, need to gain this knowledge elsewhere after leaving university. Interview with Dr Horacio Croxatto, co-founder of ICMER and former researcher at PUC, 07.07.09.

research carried out by Dr Horacio Croxatto (see Ch. 6) showing that EC was not abortive. In an interview in the news on the Catholic channel *Canal 13*, Ventura Juncá emphasised the scientific credentials of these professionals declaring that EC:

... is primarily a scientific issue. I come here basically as a scientist. I have won three projects on the beginning of life, and have been the coordinator of a group of highly competent and distinguished researchers in the fields of biology, reproduction, philosophy and also evidence-based medicine. [...] We have had an exchange of letter in a scientific journal, the main one on these issues, Contraception, in which one of the articles in which a well-known Chilean researcher participates – Dr Croxatto – tries to prove the hypothesis that EC does not have an impact on implantation, and is not abortive. [...] the researchers replied in a an honest and clear manner that their proofs were not consistent. They could not conclude that the pill was not abortive. (Muévete Chile 2009a)

PUC did everything in its power to counter Croxatto's arguments – as in the quote above – in the media and scientific circles, especially after he was forced to resign from his researcher position by the university's authorities in 2004 for his views on abortion and his research on EC. Both Croxatto and Díaz highlighted the strength of this ideological battle which at times felt like a personal attack on Croxatto<sup>64</sup> (see Ch. 6).

PUC has many advanced studies and research centres to its name, including the *Centro de Bioética* (Bioethics Centre) that led the technical and medical arguments against EC during the judicial processes. The work on bioethics is crucial to understanding the role of the Church in influencing the agenda on abortion and the “right to life”, as well as its opposition to the wider agenda on both gender and SRHR.

Most arguments related to the right to life and the role of religion in society within bioethics debates are summarised in a publication by the PUC regarding “Ethical

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<sup>64</sup> *Ibid.*; interview with Dr Soledad Díaz, Director of ICIMER, 18.01.11.

Dilemmas for the 21<sup>st</sup> century”, in which Archbishop Fernando Chomalí – the representative of the Church’s opposition to EC – outlines the importance for the Church as “mother and teacher” to guide science in the ethical dilemmas affecting modern societies (Chomalí 2005). The rivalry between religion and science – that is, between the Catholic Church and secular scientists – on reproductive issues, underpinned the ten years of legal and political battles for the distribution of EC. This is a historical rivalry that extends beyond the access to contraception to include new fertility technologies and IVF, as well as research on the human genome and cloning. As explained by Chomalí, the Church’s views are that secularism has led to an increasing selfishness and individualistic behaviour in society, and therefore “[s]cience must be impregnated with wisdom” (2005: 28).

Chomalí was a key actor in this policy process since he occupied numerous positions that provided him progressively with more influence on both public and politico-judicial debates. Before becoming Archbishop, he was a researcher and professor at the PUC Bioethics Centre during the judicial challenges under the Lagos administration. In June 2006, as the Bachelet administration announced the distribution EC through the national health system, Chomalí was named Auxiliary Bishop of Santiago by Benedict XVI, putting him in a leading position during the judicial case at the Constitutional Tribunal.<sup>65</sup> This was not a minor position since his role was to ensure all the Church’s organisations around the country understood and supported the Church’s official refusal of EC.

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<sup>65</sup> Chomalí, as well as Juan de Dios Vial (former Vice-Chancellor of PUC), were both ordinary members of the Pontifical Academy for Life at the time of this research. Chomalí, who joined the Academy in 2007, has since become a member of the Academy’s governing council, replacing Dr Patricio Ventura-Juncá.

Regarding EC, Chomalí, while still at the PUC Bioethics Centre, published a document where he openly challenged: a) EC as a real means of contraception; b) the drug as having a therapeutic function; c) the legitimacy of health authorities to distribute it; and d) a new government culture by which social debates were being replaced by policies enforced through decrees (Chomalí 2007). These four lines of arguments were adopted and sustained in a strict manner by all the members of the anti-SRHR coalition up until the end of the process (see Chs 6 and 7).

The official position of the Church was as follows:

... it is now evident that both EC and abortion are fruits of a same plant. Its objective is that if it does not avoid ovulation or fertilisation, it avoids the implantation and prevents a human being from living. The distribution of this drug makes it explicit that the objective of having sexual relations without the intention to procreate, justifies the possibility of eliminating the life of an innocent human being in its early days. This is unacceptable from a moral point of view, given that every human being, from the very beginning of life, is endowed with such dignity as well as the right for its life to be respected, which makes this unviable. The existence of a drug that allows the elimination of human lives endorsed by the state, is equivalent to denying the principle that all human beings are equal.[...]Denying such fundamental equality is opening the door to a new form of discrimination of people, based on the categories of wanted and unwanted. (Chomali 2007: 7-8)<sup>66</sup>

It is likely due to his visible work and constant opposition to EC, and also due to his well-known close relationship with Opus Dei, that the Pope ordained Chomalí the Archbishop of Santiago on May 2011, although the nomination was not requested by the Church (Ramírez 2006). This is the highest position of the Chilean Church after the Cardinal, and it shows the importance currently given to bioethics within the Catholic dogma and the most conservative circles in the Vatican.

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<sup>66</sup> Researcher's translation.

### **Independent professionals**

A particularity of the processes of advocacy against EC is that these actors want to appear to act independently.<sup>67</sup> These individuals are often professionals and/or academics, who sometimes also work independently in the private sector. It is interesting to observe that many of them are lawyers in a country where policy-making has given lawyers a unique influence in politics and policy-making regarding contentious moral issues and women's rights (Htun 2003).

Lawyer R, Francisco Chahuán and Jorge Reyes, initiators of the first series of judicial battles, as well as the judge at the Constitutional Tribunal, appeared to be advocating against EC on personal grounds and following the Catholic precepts from their personal religious convictions. They supported the legal work of groups wanting to challenge EC, all the while avoiding mentioning their respective institutions<sup>68</sup> or referring to the Church.

All of them being lawyers, they showed no apparent relationship to parties or the Church, even if Chahuán subsequently became a well-known member of the more “liberal” right-wing party *Renovación Nacional* (RN), and Reyes worked as close advisor to Chahuán (Casas Becerra 2008: 3) and Senator Bombal (UDI). The two lawyers interviewed seemed particularly keen to stress their independence. This could be easily explained by the fact that many Opus Dei members strongly believe that their individual duty as Catholics is to express their faith through their work.

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<sup>67</sup> Interviews with Lawyer R, 15.06.09/18.06.09 and Judge F, member of the Constitutional Tribunal, 10.07.09.

<sup>68</sup> ULA and the Universidad Santo Tomás.

This was also a strategy to present the opposition to EC as coming from diverse social groups rather than solely the Church itself, and thereby gain legitimacy. Although the Church is politically active and recognised as a political interlocutor in the country, it is careful not to appear to be directly influencing politics as Chile is defined as a secular state.

The Church official interviewed also ratified the lawyer and judge's answers, arguing that the Church was not part of the initiators of the court case against EC. When asked about the relationship between the Church and the groups challenging EC, he clearly stated "none", and added that the Church was merely appreciative of the individual work of good Catholics:

... we ask them [the lawyers] that whatever they decide to do, it should ultimately be truthful.[...] one's religious beliefs obviously gives one the impulse to behave in a different manner than if one did not believe.[...]they feel they have a moral duty as Catholics to help us, to help the Catholic Church, with their experience as well as knowledge, but from the secular sphere.[...] do I feel myself represented by what he [the lawyer] says? Of course, and I support him. But he does not represent the Catholic Church when he goes to the Tribunal, and in fact the Catholic Church has never actively participated nor presented a law suit or claim, nothing. What the Church has done through its universities is presenting reports because we are citizens. As Chilean I have a national identity card, so does Cardinal Errázuriz and all the Chilean Bishops, ultimately, let's say, we are part of Chilean society.<sup>69</sup>

This shows that all actors within the anti-SRHR advocacy know each other and have clearly defined areas of work and advocacy. Each group has its role and the church does not need to intervene. Interestingly, most of the independent professionals acting in the coalition perceive the politicians supporting their cause as highly unreliable. They

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<sup>69</sup> *Op. cit.* 51.

argued that they knew that the logic of politics often forces politicians to “compromise” on their values and therefore this made their work all the more relevant.<sup>70</sup> Therefore these individuals see themselves as guardians of the “*deep core*” and interact with the most political arm of the coalition on a specific base as needed by their tactics.<sup>71</sup>

### **Politicians and political parties**

Party affiliation and political involvement of civil servants and some state institutions can provide a way to understand the “gendered dynamics” of parties which affect the advancement of the women’s rights agenda (Macaulay 2006). We must therefore look at the role of politicians and policy-makers in different branches and levels within the executive. A distinction must, however, be made between career civil servants in lower rank positions – whose primary role is ensuring the continuity of policies and practices within the state – and high level officials who are politically appointed by the government in place (such as ministers). The second group holds much more power and therefore are under more pressure from political forces and disputes within and outside government.

During both the Lagos and Bachelet administrations, we see confirmation of the idea that reproductive issues “engender heated public controversies that crosscut political cleavages and internally divide political parties” (Burns 2005 cited in Engeli 2009: 65). The anti-SRHR advocacy is not located in a single or specific party, in the same way that the pro-SRHR advocates (see Ch. 6) do not fall within straightforward party lines. As this research shows, on different occasions during the EC policy process, politicians from the same parties and same coalitions behaved in opposing ways due to personal

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<sup>70</sup> *Op. cit.* 67.

<sup>71</sup> *Ibid.*

beliefs on reproductive issues, in particular due to religious values, as well as electoral reasons. Therefore the possibility of potential allies existing within right-wing and conservative parties cannot be automatically dismissed; in the same manner, left-wing parties are not to be automatically considered supporters of progressive initiatives on SRHR. This echoes recent literature focusing on Europe (Engeli 2009); although in some specific cases, it has been said that the presence of left-wing parties in power can be allies, as happened in Spain (Blofield 2006).

Moreover the evidence also confirms previous research by Casas (2008) showing that there is cross-party presence of supporters of this coalition at different levels of state agencies as well as in Parliament and local governments. A clear distinction must be made between party members serving as civil servants, and elected representatives. Party members serving as civil servants played a substantial role during the Lagos administration, although elected representatives were also present at key electoral moments during his administration – mayors in particular. Nevertheless, elected representatives and political parties were particularly visible and active during Bachelet's term when they became main actors of the public and legal debates on the policy, while civil servants (although less visible) remained crucial supporters for the Pro-SRHR Advocacy Coalition. This is due to the Lagos administration facing a series of judicial battles, while Bachelet faced an open political confrontation that took the form of a court case at the Constitutional Tribunal, ending in Parliament with a bill to ensure the legality of the distribution of EC.

### **The power and influence of conservative media**

In its first stage (2005-2010), the opposition to EC relied on a few devoted individuals from conservative sectors of civil society, such as Chahuán, Reyes and Romero and

their allies in the initial legal challenge. Through an analysis of the press, one sees that electoral moments shape the way politicians get on board or distance themselves from such a contentious issue. In 2001, as the first legal challenge was set to reach the Supreme Court, suddenly politicians' declarations to the media increased. In fact, in 2001, the legal battle was happening in parallel to the electoral race for parliamentary elections taking place in December that year. Chahuán and Reyes remained the public speakers of the anti-SRHR advocacy coalition, with a clear objective to lead on the attack against politicians on the left of the centre accusing President Lagos of politicising the issue for electoral purposes (La Segunda 2001a).

### **EC becomes the focus of the editors of the conservative press**

The conservative newspapers *La Segunda* and *El Mercurio* widely covered the controversy surrounding EC between the months of August and December. In October, *El Mercurio* highlighted how the issues were dividing the governing coalition, splitting it into two camps in view of the coming elections, something right-wing parties were seeking to exploit. According to the same newspaper, left-wing parties PS and PPD wanted to use the “pill” as part of their wider “progressive agenda”, while Christian Democrats preferred not to debate these issues in pre-electoral times (Agüero 2001). This reflects the ongoing rivalry between the two main confessional parties in Chile, *Unión Demócrata Independiente* (UDI) and *Partido Demócrata Cristiano* (PDC) (also known as *Democracia Cristiana*).

At the end of the 1990s, the PDC started suffering a steady decline in its electoral vote, which was intensified between 2001 and 2005 (Morales and Poveda 2007). For some, UDI started to undermine the PDC by competing for the Catholic and popular vote (Huneus 2003 cited in Morales and Poveda 2007). Therefore in view of future

elections it was crucial for UDI to divide Concertación parties and to attract the Catholic vote by publicly challenging Christian Democrats to make explicit their willingness to follow the Episcopal Conference's position on EC.

Interestingly, two of the main PDC leaders – Gabriel Valdés and former President Patricio Aylwin – confirmed the tension within their party as they expressed different point of views on the matter. The first supported the distribution of the drug and was openly critical of the ruling of the Supreme Court, while the second said that if the pill was in fact abortive, he supported the 2001 decision by the Supreme Court (El Mercurio 2001a; La Segunda 2001b). This not only confirms that parties are split by moral debates and in particular SRHR, but it also indicates that parties are neither closed or uniform institutions, and therefore are constantly evolving as a response to inputs from the political environment or policy sub-system.

After the 2001 election, between 2002 and 2003, due to the legal nature of the process – involving mostly government health authorities and pharmaceutical companies, and due to the technical knowledge required – the EC debate became less visible in the media. The conservative press – particularly the conservative newspapers *El Mercurio* and *La Segunda* – decided to focus on abortion, a debate they tried to put on the political agenda mostly through editorial and opinion pieces. *El Mercurio* published an article on *The Convention on the Rights of the Child (CRC) +10* entitled “Alarm for Pro-abortion Legislation”, and another piece on the case of a woman with an unviable pregnancy entitled “Gladys Pavez, an Excuse to Debate Abortion”, to which it gave a full spread in its weekend magazine entitled “The Right to be Born. When a Child Won't Survive: Waiting for Katherine” (Pérez Ferrada 2002).

In this same period, civil servants' influence increased as in 2003, as Bachelet stepped down as Minister of Health to become Minister of Defence. She was replaced by Dr Pedro García, a well-known Christian Democrat who, although openly Catholic and against abortion, seemed open to distributing EC to victims of sexual violence and supported the validity of scientific evidence showing that EC was not abortive, in particular Dr Croxatto's research (El Mercurio 2004). Speaking of his beliefs he declared to *El Mercurio*:

I am here as a Minister of the State. I am not representing a party or a faith. [I need] to see the problem in a global manner. [...] I hope when I get to the Final Judgement... I also fitted IUDs protecting myself on a series of studies showing they are not abortive. I know I am in contradiction with the teachings of the Church on this, and I do not deny this troubles me, but I also know that there are situations in which... A woman who has been victim of rape has been hurt in a dreadful manner [...] I respect the Church's position but I also have to respect that human being that was created to God's image and likeness and who stands in front of me, terrified to be pregnant as a consequence of a rape. I had to deal with many victims of rape... (El Mercurio 2004)

Thus, in 2004, García belonged to those members of the PDC who stood by the government's position on EC and backed the revision of the Fertility Norms within MINSAL, supported by civil society organisations belonging to the pro-SRHR advocacy coalition.

In 2004, the government turned to mayors for backup as the campaign for municipal elections approached and the courts ruled against the government's decision to make EC available to victims of sexual violence. Elected politicians at the local level were called for support by both advocacy camps, but the Church made sure to publicly call on all Catholic mayors to uphold Catholic values (La Segunda Internet 2004c). The legal implication of the tribunals' decisions was also worsened by some mayors' decision –

many of them UDI members – not to distribute EC in their primary healthcare centres, openly defying the government. The government responded to this by giving the Minister of Health, Pedro García, the task of threatening mayors with legal and administrative sanctions if EC was not distributed to victims of sexual violence in primary healthcare centres (La Segunda Internet 2004a; La Segunda 2004).

UDI and RN mayors led the concerted opposition to the government's policy, accusing the government of behaving like a "hidden dictatorship" (Espinosa V. 2004). The Church declared that "law isn't above God's will" (La Segunda Internet 2004b; La Segunda 2004). In retaliation, far-right UDI Congress members also reacted to the threats of Pedro García. Anticipating the importance of the presidential race of 2005 for García's Christian Democrat party along with the concern of its leaders with electoral results, they demanded that PDC presidential candidate, Soledad Alvear, "clearly and categorically stated her opinion regarding the distribution of the abortive next-day pill in her government" (La Segunda 2004).

But surprisingly with the upcoming elections, for the first time, the debate also started creating divisions within the right-wing UD–RN alliance (Espinosa 2004). In fact not all politicians, in particular Parliamentarians and mayors, agreed with the way UDI had mobilised against the reproductive health policy and had hinted at their intention to use the Constitutional Tribunal to question the constitutionality of the measure. RN members, in particular those who were doctors by profession, felt this was not an agreed coalition position and started voicing their concerns or differences in order to highlight their liberal values showing the complexity of belief systems within coalitions and for people occupying public positions.

### **The “pill” and Lagos: Protecting the consensus within Concertación**

The 2005 presidential election was particularly important because it saw, for the first time in Chile’s history, two female candidates running for office: Soledad Alvear (DC) and Michelle Bachelet (PS). In March 2005, the MINSAL was ready to publish the Fertility Norms. However, in an unexpected turn of events, Minister García – who had previously declared his support for the distribution of EC to all women and not just victims of sexual violence (El Mercurio 2004) – denied he had authorised the publication of the norms provoking the hardest impasse to EC distribution (see Ch. 7).

The candidacy of Alvear, representative of the most conservative factions at the head of the PDC, was at the root of García’s decision. The PDC wanted to protect their candidate (see Ch. 7). Lagos was strategically forced to accept and back García’s retraction personally in the press, and sacked the Under-Secretary – a PS member – due to the agreements made within the Concertación conglomerate in view of the 2005 elections (see Ch. 7).

This was the strongest blow for the policy behind the revision of the Fertility Norms and the distribution of EC since 2000. According to Mariana Aylwin, the PDC succeeded in “putting a halt” to any discussion about EC during the electoral campaign period, which was causing much concern and debate within the party due to its “uncertain electoral impact”.<sup>72</sup>

Luckily the PDC-PS breakdown within Concertación was in some way diverted by the favourable Supreme Court ruling for EC in December 2005. Thanks to the low profile of the García impasse in March 2005, the government was able to strategically move the

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<sup>72</sup> Interview with Mariana Aylwin, former Minister of Education and Deputy, and Coordinator of the Programmatic Congress of the PDC in 2008, 05.06.09.

legal case to a more favourable court of appeals that year, securing a legal victory (see Ch. 7).

### **Conservative politicians and EC under Bachelet**

As Ch. 8 discusses, the election of Bachelet provoked a great deal of concern among conservative sectors in Chilean society and in particular among the anti-SRHR advocacy coalition since she was the Minister who had introduced EC (Sierra and Hola 2006).

With the support of members of Parliament the anti-SRHR groups started a new legal challenge at the Constitutional Tribunal (see Ch. 8). Elected politicians therefore immediately became important and visible actors of both the anti-SRHR and pro-SRHR coalitions. Led and represented by the same independent professionals and lawyers involved in the court cases since 2000, the Anti-SRHR Advocacy Coalition secured the backing of 32 Parliamentarians who signed their petition allowing them to resort to the Constitutional Tribunal (see Ch. 7). The deputies who signed the petition were all members of the two right-wing parties, with a majority of UDI members. Not only did the majority of conservative politicians support the opposition to EC but many also belonged to the “Network of Pro-Life Parliamentarians”, composed of 61 members of Parliament, including half of the PDC deputies in Parliament<sup>73</sup> (Red por la Vida y la Familia 2006). This clearly shows how deep the *crosscutting* effect of SRHR issues can be for parties affecting the composition of advocacy coalitions and their “policy core” cohesion, something also observed within the pro-EC coalition (see Ch. 6).

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<sup>73</sup> Thirteen out of the 20 PDC elected representatives in the Chamber of Deputies joined the “pro-life bench”, as well as one member of the PRSD.

### **“Consensus” versus Concertación**

Although the most conservative sectors of the PDC – who had requested a summit on all contentious and moral issues within Concertación since early 2006 (Salinas 2006) – Christian Democrats did not sign the petition that allowed the appeal at the Constitutional Tribunal against Bachelet. DC knew this would break the “consensus” – the glue that kept the coalition together since 1989. Instead as a sign of disapproval and protest, the most conservative sectors within DC that led the party at the time threatened Concertación with breaking the government coalition (El Mercurio - Editorial 2006; Montalva 2007).

The distrust of the PDC positions on SRHR and EC within Concertación’s progressive parties PS and PPD, led its militants to strategise to avoid the veto power PDC politician could have to block EC. As Laura Albornoz (PDC) – then Minister of SERNAM – explained, the socialist Soledad Barría, then Minister of Health, had informed her of the launch of the Fertility Norms “only the day before”.<sup>74</sup> For Albornoz, this was because Barría “probably feared” that Albornoz would otherwise have informed her party of MINSAL’s intentions. Albornoz commented with a humorous tone:

But there is no doubt that the notification by the Minister of Health responded to the instructions by the President to avoid this happening [that DC would be informed], and that I should be informed since this would affect women and that was part of my mandate.<sup>75</sup>

Barría also confirmed that she had informed Albornoz of the launch of the norms only the day before as a strategy. She added that following the same logic she only visited

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<sup>74</sup> Interview with Laura Albornoz, former Minister of SERNAM of Michelle Bachelet, 2006-2010, 17.01.11.

<sup>75</sup> *Ibid.*

Bishop Goic, Vice-President of the Episcopal Conference, on the same morning of the launch, albeit in his home outside the capital. Barria stated: “I did it at the very last minute to avoid them telling me I could not do so!”<sup>76</sup>

As shown, the policy for EC represented a challenge to the internal agreements, as well as to the interpretation more conservative sectors within the coalition had of the belief system that kept the coalition together and acting as one in the political arena. However, EC came to challenge these assumptions, dividing Concertación parties and forcing its members to play strategic games with each other to ensure the implementation of contentious policies.

Alvear, a presidential candidate in 2005, categorically refused the distribution of EC to adolescents without parental or guardians’ consent. She used identical language to Cardenal Errázuriz in her declarations to the press (Contreras 2006) confirming her close allegiance to the church (see Ch. 7). Patricio Walker, a DC deputy and Concertación speaker in Parliament, went as far as supporting the right to conscientious objection by pharmacy owners refusing to sell EC despite MINSAL’s guidelines, provoking ire among his left-wing Concertación peers in Parliament who questioned his position as Speaker of the Chamber (La Segunda Internet 2007; Terra 2008).

During the first two years of the Bachelet administration it was therefore clear that Concertación was being targeted by the opposition through their centrist ally, PDC, which was already experiencing major political divisions amongst its factions on internal issues. UDI in the meantime maintained a concerted and structured way of operating in Parliament, in courts and in declarations to the press. Nonetheless this

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<sup>76</sup> Interview with Soledad Barria, former Minister of Health under Bachelet 2006-2008, 24.01.11.

changed in 2007 as a second charge against the President was brought for review at the Constitutional Tribunal.

### **The Constitutional Tribunal ruling and the municipal elections**

Early 2008 marked the beginning of a new electoral year, this time for municipal elections, while the Constitutional Tribunal had not yet ruled on the constitutional status of the Fertility Norms launched by MINSAL. It was in this political climate that right-wing politicians progressively started to dissociate themselves from most conservative positions against EC.

When the Constitutional Tribunal made public its decision against the government policy, the social uproar took most politicians by surprise. The demonstrations by civil society and thousands of citizens supporting the distribution of EC (see Ch. 9) had a crucial political impact and sent an important warning in an electoral year to the mayors and members of Parliament.

This produced tension at the policy belief level of the anti-SRHR coalition. While UDI politicians such as Deputy Kast, the leader of the Anti-SRHR Advocacy Coalition in Parliament, called on authorities to accept the ruling of the Constitutional Tribunal and respect the law (La Segunda Internet 2008b), Alvear, then President of the DC, called on the government and the Minister of Health to take the case and discussion surrounding EC to Congress for a wider political debate (La Segunda Internet 2008a).

### **Mayors and the pill: The power of local elections**

At the local level mayors became the first line of the electoral and moral battles supporting or opposing EC after the government called on mayors to distribute the drug in primary healthcare services (see Ch. 9).

UDI was unable to maintain discipline among its mayors. In a rather low-income municipality of the capital Santiago, UDI mayor Hasbún opted to publicly support the distribution of EC to capture the support of its electorate, although emphasising it would be for cases of emergency (La Segunda Internet 2008c). Other UDI mayors had opted to do the same, although at the national level internal divisions were seen in all parties, including those on the left.<sup>77</sup>

### **The 2009 presidential elections: The instrumental value of SRHR and Bachelet's gender equality agenda**

It was 2009 that proved to be the most important moment for both advocacy coalitions as the presidential race started early that year as Frei – the PDC and Concertación presidential candidate – made clear in March his willingness to put up for discussion the issue of therapeutic abortion. This was despite the fact that PDC members had not reached consensus on the topic of therapeutic abortion. In the months previous to the announcement of Frei's candidacy, recognising the value of Bachelet's legacy on gender equality debates, progressive members of the party and in particular gender advisors were brought to his campaign team.<sup>78</sup> By including therapeutic abortion the strategy was obviously to push the right-wing and liberal candidate Sebastian Piñera to pronounce himself on these issues, and show that his coalition was much more conservative, in particular his UDI allies.

In parallel to the 2009 presidential elections, Parliamentary elections were also due to take place. Candidates therefore used the political battle and debates surrounding the distribution of EC to their own advantage and that of their parties. Capturing the youth

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<sup>77</sup> Interview with Paulina Reinoso, lawyer at Chilean Association of Municipalities, member of the PDC, and gender advisor of Eduardo Frei's electoral campaign, 18.05.09.

<sup>78</sup> *Op. cit.* 77, and interview with Dr María Isabel Matamala, gender advisor at MINSAL 2006-2010, 02.04.09.

and women's votes was crucial since they could make the difference. Chapter 8 discusses how in 2008 feminist groups played an important role in putting candidates on the spot regarding their stance on EC, dividing the right-wing "Alianza" and showing internal divisions in its parties as well.

### **The power of doctors in reproductive issues: Science reclaims its predominance over religion**

In 2008, the ruling of the Constitutional Tribunal against the distribution of EC gave doctors a central position as opinion leaders regarding the debate on SRHR. Bachelet had to introduce a bill to counter the ensuing decision by the *Contraloría* to prevent mayors from distributing EC (see Ch. 9), reaffirming the Constitutional Tribunal's ruling. During the bill process doctors within UDI, RN and PDC joined their colleagues on the left, creating a wider "medical bench" in Parliament. For RN politicians, it was particularly important to dissociate themselves from ultra-Catholic and conservative positions since their presidential candidate, Sebastián Piñera, wanted to appeal to a younger centrist, secular and liberal electorate. This was the same electorate Frei and Concertación were trying to lure.

Sebastian Piñera granted freedom of action to all the Parliamentary members of his "Coalition for Change", in a clear attempt to appear liberal and open-minded in his presidential campaign, as well as to not further restrict his fellow party members. Karla Rubilar (RN) and colleague Osvaldo Palma (RN) who had previously joined their Concertación peers to call upon conservative sectors to stop the "terror campaign" against EC (Cooperativa 2006) became the visible face of the more liberal option within the "Coalition for Change".

But the biggest surprise came from UDI as Juan Lobos, the doctor who had originally signed the conservative petition to appeal at the Constitutional Tribunal, and had since withdrawn his support for the initiative to act in conscience as a doctor, declared that EC could be used “without fear” and that this was an issue of equity in the access to health (La Segunda Internet 2009). This led several UDI members to vote against their party in Congress (La Nación 2009f). This not only changed the image of UDI as being a united and monolithic party, but it also challenged the leadership of UDI Parliamentarians such as Kast, who since 2006 had maintained a close relationship with the Anti-SRHR Advocacy Coalition, and its civil society members.

All right-wing doctors insisted on preventing the issue from becoming an ideological one “between goods and bads, progressives and reactionaries” (La Segunda Internet 2009). Doctors’ opinions on this and the electoral climate allowed for more Parliamentarians within RN and UDI, as well as PDC, to change their minds and become “*arrepentidos*” (repentants) (La Nación 2009c). The votes of UDI repentants permitted to pass the Law on Regulation of Fertility sponsored by Bachelet (La Nación 2009d).

## **Conclusion**

This chapter has reviewed the main actors that compose the Anti-SRHR Advocacy Coalition. It has shown how the composition of this advocacy coalition and the concerted actions of its members, with well-defined roles as well as a clear core and policy beliefs made them especially effective and influential for almost ten years of the policy process. The advocacy coalition’s influence and cohesion were only altered during specific electoral periods under both Lagos and Bachelet administrations,

although the clearest breakdown happened after 2008 with the ruling of the Constitutional Tribunal and the Fertility Bill initiative of 2009.

Despite having a clear belief system based on the Catholic doctrine as well as the resources and the Church's know-how and lobby groups, especially members of the Opus Dei, the coalition failed to block Bachelet's policy for the distribution of EC once the issue reached the public domain and in particular Congress. The strength of this advocacy coalition seems to have resided in the tight network of elite actors acting in a private manner and through courts.

The role of political parties through civil servants was particularly visible during the Lagos administration although they also influenced the agenda and policy strategies under Bachelet. The role played by the Health Ministers, Bachelet (PS) and García (PDC), as well as Barriá (PS), strongly influenced the policy process showing the gendered dynamics of party politics in government.

Members of Parliament focused on short-term gains and those who were doctors by profession weakened the policy core of the coalition, something the government and its political allies exploited to their advantage. Doctors as a professional body and opinion leaders put their identity close to science before religion, provoking the divisions within their parties. The tacit ethical rules of medicine as a discipline, and the sanctions attached to it, meant that even some of the conservative doctors could not ignore evidence-based data and were under pressure from their peers. This was particularly visible with UDI maintaining its internal discipline until almost the very end. PDC instead suffered from disputes on the EC policy both internally and within Concertación for more than 10 years. This demonstrates that the policy core of a coalition matters, and that it is susceptible to changes in the policy sub-system.

Although until 2008 the conservative Anti-SRHR Advocacy Coalition managed to frame the issue of EC as abortion and set the discussion in terms of the Catholic doctrine, in particular by not referring to or by blocking any mention of women's rights, the government managed to pierce its policy core by strategically reframing the policy after 2008 in view of upcoming elections. The new understanding of EC as a gender and class issue together with citizens' uproar over their freedom to choose strategically changed the policy sub-system. This and the electoral impact of the reframing brought doctors in Parliament onto the pro-SRHR side. Both framing and timing of a policy process then affected the policy core of the Anti-SRHR Advocacy Coalition.

The different election processes – municipal, parliamentary, presidential – and their timeframe between 2008 and 2009 permitted the government to maintain the issue high on the political agenda while dividing the anti-SRHR coalition by using the divisive power of the debate within conservative and right-wing parties and alliances.

Finally, the Anti-SRHR Advocacy Coalition failed in its efforts to maintain the Church and its doctrine as “mother and teacher” of science and society once the issue was in the public domain.

## **CHAPTER 6: Mapping the Pro-SRHR Advocacy Coalition: The actors and the evolution of the coalition since the SRHR Bill**

The previous chapter presented the actors and belief-system of the Anti-SRHR Advocacy Coalition, and showed how these actors, whether individuals or organisations, come together through their shared conservative views on women's rights based on the teachings of the Catholic Church. This chapter presents the actors and belief-system of the Pro-SRHR Advocacy Coalition that also gathers a range of actors and organisations who share specific worldviews on gender equality and reproduction.

The belief system of this coalition is less homogenous than the one uniting the Anti-SRHR Advocacy Coalition, due to the diversity of its members. The Pro-SRHR Advocacy Coalition unites doctors, scientists, lawyers and social science researchers often based at universities, thinktanks or biomedical NGOs, all working within a SRHR framework. It also includes feminist and political thinktanks working on equality and social policy in particular health and gender issues. The state, the engine of the policy behind the distribution of EC, is the main agent for defending it through the executive. The president's cabinet, MINSAL and to a certain extent SERNAM, are all part of the pro-SRHR coalition.

This chapter shows that these actors face more difficulty in coming together at the *policy core* level. In fact, their opinion on strategies to influence the agenda on these issues, the arguments to be advanced and the timing for advocacy and lobbying vary immensely. There is a clear tension between feminists who perceive SRHR as their agenda and as coming from long-fought feminist battles, and doctors, lawyers, biomedical and social policy NGOs whose primary aim is to advance the SRHR agenda in government policies, even if this only leads to gradual change. For feminists, on the

other hand, SRHR remain a set of issues that are part of a symbolic struggle that defines their movement and requires structural changes, and this makes them suspicious of any initiative coming from outside the core of their networks and movement.

The chapter shows that the generational breach within the feminist network and its internal power struggles are the main barriers preventing feminists from sustaining strategic and effective advocacy on reproductive issues. Due to a historic tradition in health policy (see Ch. 4), doctors and lawyers tend to rally behind the most technical aspect of the advocacy work. They usually benefit from direct channels of communication with the health authorities while feminists have more of a tense relationship both with the government and other institutions such as political parties

The second section of the chapter discusses an important initiative led by the feminist movement in the early 2000s, the SRHR Bill, whose process already brought together the same actors involved in the EC policy process. The chapter shows how during that policy process, the dynamics and conflicts between feminists and biomedical groups, as well as with government and politicians are similar to those that took place during the defence of EC.

### **Doctors and the biomedical NGOs**

Chapter 4 discussed the importance that the medical profession has historically had for public health initiatives and in particular reproductive and sexual health. Two main organisations positioned themselves as key players in these fields – APROFA, and ICMER. Both organisations became the main engines in civil society for the defence of EC throughout the 10-year series of judicial and political battles.

## ICMER

It was ICIMER and in particular the work of the current Director, Dr Soledad Díaz that brought the issue of EC to the attention of health policy-makers in 1996. ICIMER is a not-for-profit organisation founded in 1985, working on reproductive and sexual health, human reproduction and maternal–child health.

Most importantly ICIMER has become renowned for its high-quality research on reproductive health issues and family planning methods, including the development and international defence of first and second generation contraceptive implants (ICMER 2014). In many of its research initiatives ICIMER has collaborated with internationally renowned health and reproductive-health specialist organisations such as the Population Council, Family Health International and the World Health Organisation (ICMER 2014).

Hence, it is not a surprise that ICIMER with its international credentials took the initiative to introduce EC as a new contraception method and led the strategic efforts to do so. After all EC has become a “global reproductive health technology” which has faced global opposition to its distribution (Foster and Wynn 2012).

ICMER anticipated the fierce debates to come and the organised opposition this new reproductive technology could face in the existing Chilean political and cultural contexts and set out to create alliances within civil society to create a favourable environment to distribute EC (see Ch. 7).

In 2002, ICIMER, APROFA and other civil society groups set up the Chilean Emergency Contraception Consortium (CECC), a national section of the Latin

American Consortium for Emergency Contraception (CLAE in Spanish).<sup>79</sup> The CECC brought together a wide range of actors including health, research and women's organisations, academic institutions, as well as service delivery agencies.<sup>80</sup>

It was this group that carried out much of the advocacy and information dissemination initiatives to increase awareness on the use and benefits of EC. They organised training courses with health professionals, lawyers, social scientists and journalists in parallel to their work to update the MINSAL's "Fertility Guidelines".<sup>81</sup> This group as part of the CLAE gained knowledge from the shared experiences with other regional consortia on the judicial and political attacks EC had been suffering all over the continent.

The acknowledged research tradition and impact of the work of ICIMER meant that MINSAL trusted the organisation to carry out the revision of the Norms and it naturally led the CECC. Moreover, with their solid credentials, its researchers, Dr Horacio Croxatto and Dr Soledad Díaz, were the obvious choice to lead the scientific support for the defence of EC. They presented the evidence-based arguments against the allegations sustaining that EC was abortive.

Until 2006, Croxatto was professor at the Pontifical University of Chile while also holding the chair of ICIMER, but the Church authorities requested to the PUC that he resign after he publicly criticised a bill to increase the sanction in cases of abortions in Chile presented by UDI MP, Hernán Larraín. He made his opinion public through "an

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<sup>79</sup> *Op. cit.* 64. Some of the organisations that participated in the initial EC introduction efforts included ICIMER, *Corporación de Salud y Políticas Sociales*, *Foro Abierto de Derechos Sexuales y Reproductivos*, *Instituto de la Mujer*, *Centro de Medicina Reproductiva y Desarrollo Integral del Adolescente*, and *Asociación Chilena de Protección de la Familia*.

<sup>80</sup> *Ibid.*

<sup>81</sup> Interview with Verónica Schiappacasse, Director of Prosalud and former member of ICIMER, 17.06.09.

expert's opinion letter from ICMER to Parliament which was subsequently reproduced by the conservative newspaper *El Mercurio*" (Tolerancia Cero 2009). Since Croxatto was ICMER's chair at the time "he was singled out",<sup>82</sup> but resigned only a few years later "as his research on the effects of EC on female monkeys clearly started demonstrating that EC was not abortive and the PUC felt uneasy with his scientific evidence" (Tolerancia Cero 2009).

Croxatto briefly joined the Opus Dei when he was a student at the PUC during the 60s, and was therefore aware of the influence of the most conservative groups of the Catholic Church within the PUC.<sup>83</sup> He explained that he had left PUC as he felt the "dogmatic framework of the doctrine of the Church was too strong within the university".<sup>84</sup> Díaz also declared she once "had been an active Catholic militant",<sup>85</sup> and had started working "on these issues of sexual and reproductive health... because I believe in women's rights and people's freedom. And we must find the means and spaces to let people exert their freedoms, which are very few".<sup>86</sup>

Díaz, who led the strategy to advocate and lobby for the distribution of EC, had worked closely with Croxatto at PUC and left "because of the emergency contraception issue"<sup>87</sup> at the same time as he did. She explained that "after working 40 years at the Catholic University" they had a strategic advantage – they knew the conservative scientific opposition they would face in the courts well, since "in the biomedical arena we all know each other".<sup>88</sup> Díaz and Croxatto founded ICMER, and maintained a close

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<sup>82</sup> *Op. cit.* 64.

<sup>83</sup> *Op. cit.* 63.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Op. cit.* 64.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

relationship after he left. This meant the Pro-SRHR Advocacy Coalition could count on a world-class expert on reproductive health methods.

Croxatto argued that “none of the people from the PUC” who tried to contradict his findings “was a specialist and were all driven by their Catholic beliefs”.<sup>89</sup> Their strategy “aimed at raising a doubt in the public opinion by lying and misinterpreting or ignoring the existing evidence showing that it was not abortive”.<sup>90</sup> For him the Anti-SRHR Advocacy Coalition was made up of “fundamentalists, who thought they could start a Catholic crusade against sexual and reproductive rights by opposing EC, which was a lost cause since in the 1960s when people started using birth control”.<sup>91</sup> The way in which they linked EC to abortion without any scientific evidence was in his opinion a shrewd and “effective strategy”, since “saying ‘The pill is abortive’ was a soundbite easy to believe for mainstream public opinion”.<sup>92</sup>

Croxatto and the ultra-conservative scientists trying to undermine his work debated most of the time through professional elite networks and in newspapers. This often kept the scientific arguments away from mass communication channels with a few exceptions. Interviewed on television right before the EC Bill was approved in Congress, he was challenged by a conservative journalist on the fact that there were two sides of the story scientifically speaking and this led the judges of the TC to rule against EC and evoke a possible “doubt”. He energetically responded: “No sir, we presented evidence based on hard data. The others presented conjectures, which is not the same” (Tolerancia Cero 2009).

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<sup>89</sup> *Op. cit.* 63.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

ICMER was thus aware that the battle in the courts was only one side of the strategic effort to support EC. The government's backing and political commitment was equally important, particularly in order to reframe the issue as a right. Díaz as a doctor had strong connections with government health officials, which she carefully maintained and used, in particular once Bachelet – a doctor herself – became president. Yet, the authorities only sought scientific advice on the matter reluctantly during the legal actions in the courts (see following chapters). Croxatto was invited only twice to MINSAL during the 10-year-long political and judicial battles surrounding EC.<sup>93</sup>

Díaz was also well known among the advocacy coalition actors. She and Verónica Shicappacasse were very active within the Consultation Council, the formal space created by the state and MINSAL for the participation of civil society. From there ICIMER constantly monitored the advances of the EC bill despite the lack of responsiveness from public officials.<sup>94</sup> This led them to confront the authorities at different stages on the progress made on the EC policy, in particular for its implementation after the Norms were approved:

... we always asked to the Consultive Council “listen here you have a President that is fully backing SRHR since she was a Minister, that supports these Norms, who is brave and published them, and you do not react to this. Why?” There was a period of time, between the moment when the Norms were launched and the ruling, when MINSAL did nothing. It did not disseminate the Norms, train professionals, or continue to distribute EC although it was legal. It was as if they were paralysed [...] This said, MINSAL was more supportive because SERNAM has done nothing.<sup>95</sup>

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<sup>93</sup> *Ibid.*

<sup>94</sup> *Op. cit.* 81.

<sup>95</sup> *Ibid.*

Díaz also maintained a close relationship with the international networks working on these issues and facing similar issues elsewhere in Latin America. This helped her in the slow and hard process of building alliances that could play a key role for the advocacy and lobby pro-EC, despite the lack of a wider strategy and resources from civil society.<sup>96</sup>

## **APROFA**

After experiencing problems with funding and the downsize of its programmes over the 1980s (see Ch. 4), in the late 2000s APROFA as the Chilean section of the International Planned Parenthood Federation (IPPF), entered another phase of transition towards the “rights-based work IPPF was carrying out as internationally defined in their advocacy strategy”.<sup>97</sup> This was “not an easy shift” for an organisation that had spent decades under the medical influence surrounding family planning and maternal health discourses.<sup>98</sup>

According to APROFA’s former Executive Director, before 2001 APROFA “had not worked closely with other actors like ICIMER or the feminist movement”.<sup>99</sup> In fact, it was only after “taking stock of its limited capacity for political influence” that APROFA developed a strategy to “progressively increase its actions through coalitions with other civil society actors”.<sup>100</sup> Two events provoked this decision: the first was the frustrated attempt to publish the Fertility Norms under Lagos, and the decision by his Health Minister to block the work APROFA and ICIMER had done for more than three years. APROFA realised that it needed stronger presence in the policy process to protect

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<sup>96</sup> *Ibid.*

<sup>97</sup> Interview with Juan Bastías, former Policy Officer at APROFA, 03.07.09.

<sup>98</sup> Interview with Zulema Contreras, former Executive Director at APROFA, 11.06.09.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

and promote its work. The second event was the SRHR Bill initiative that took place in the early 2000s and which was never discussed in Congress despite the wide support, in which APROFA also participated (Ch. 6).<sup>101</sup>

During the EC process that started in 2006, APROFA was therefore keen to be part of alliances and worked closely with ICMER and feminist organisations, joining the feminist and civil-society *Movimiento por la Anticoncepción de Emergencia* (Movement Pro-EC). However, the relationship with other organisations, especially feminist ones, proved tense since feminists did not work with a step-by-step approach for change (see Ch. 9), an approach preferred by biomedical NGOs.<sup>102</sup>

An important aspect of the work done by the NGOs involved in the advocacy coalition was their own internal accountability systems, which are generally “towards their donors and funded programmes”.<sup>103</sup> According to Bastías, during the challenge to EC under Bachelet APROFA worked through alliances,<sup>104</sup> but feminists wanted to retain control of the process (see Ch. 9) and some felt “uncomfortable with his presence because he was a man”.<sup>105</sup> Bastías explained that “being there as representative of a biomedical organisation was complicated! I attended meetings with feminists where you had 20, 30, 40 women, and there was no chair for me. They assumed that because I was a man I was patriarchal”.<sup>106</sup>

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<sup>101</sup> *Ibid.*

<sup>102</sup> *Op. cit.* 97, 98.

<sup>103</sup> *Op. cit.* 97.

<sup>104</sup> *Ibid.*

<sup>105</sup> Bastías *Ibid.*, and interview with Antonella Caiozzi, young feminist, 11.07.09.

<sup>106</sup> *Op. cit.* 97.

APROFA also faced internal tensions, especially regarding “the rights-based approach set by the IPPF for its affiliates”.<sup>107</sup> APROFA, at the time of the EC policy under Bachelet, was preparing scoping work on the liberalisation of abortion in Chile “in line with the objectives of the IPPF worldwide”, which included working for the legalisation of abortion.<sup>108</sup> However, since historically APROFA “had been close to the Christian Democrat Party, that project and anything that could put their institutional reputation in a difficult position was discarded, and the research on abortion was stopped”.<sup>109</sup>

### **Academia and social science organisations**

Academics from universities and social science organisations, such as the lawyer Lidia Casas and social scientist Claudia Dides, were crucial in the work of the pro-SRHR advocacy coalition.

Lidia Casas is the most prominent lawyer working on sexual and reproductive rights from a women’s rights perspective in Chile. She got involved with the EC legal process in 2001 and was part of the litigation team until the very end. Casas played a crucial role in coordinating the litigation strategy from civil society that was joined “at specific moments by a lawyer from APROFA”.<sup>110</sup> Like Soledad Díaz, Casas maintained close links to the CLAE in which she frequently presented the legal aspects and efforts made in Chile to distribute EC. Casas also worked hard with Soledad Díaz to try to get the UNFPA support and advice on the legal and scientific aspects of EC to the government, which were not considered by the legal teams at the Moneda.<sup>111</sup>

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<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> *Op. cit.* 81, and interview with Lidia Casas, lawyer in charge of the defense of the EC since 2001, and law professor at the Human Rights Centre, Universidad Diego Portales, 01.06.09.

<sup>111</sup> Casas, *Ibid.*

Claudia Dides, former gender coordinator at FLACSO, was also a long-standing member of the pro-EC lobby. She had joined the policy process from the beginning in 2000 while she worked for CORSAPS. Although Casas and Dides highlighted their feminist beliefs as drivers of their work, they are not formally considered part of the feminist movement. This did not stop them from carrying out the work on EC from a women's rights perspective, trying to influence the state from the public policy field.

Explaining the origins of the work on EC, Dides said:

So this starts in 2000... EC was mainly introduced by biomedical organisations. The medical world. With the help of some people who consider ourselves feminists but were not part of the [existing] groups, we were not among the autonomous, nor members of political parties, or the women's movement in Chile; in fact we worked within the Sexual and Reproductive Health and Rights Forum. But we had great differences and we left the forum. There is an important breakdown there... because we had decided then to start the project on the SRHR Bill.

Thus, these independent professional actors maintain close ties to the rest of the advocacy coalition's actors and institutions. Their work is well known and they are considered main players in the field, including by feminists, despite not belonging officially to any network, collective or NGO linked to the feminist movement.

### **The feminist and women's movements**

Marcela Ríos Tobar has shown that the women's movement in Chile has suffered from both “decentralization and organizational diversification”, which was accompanied by “thematic diversification and specialization” (Ríos Tobar 2009a). Ewig and Ferree (2013) suggest looking at “feminist organizing” to better determine the level of influence of feminists. During fieldwork it was difficult to refer to a homogeneous feminist movement since the feminist activities one could observe were the result of small groups and networks of feminists sometimes operating in an independent manner.

Rather than a movement, feminists appeared as a wide network of organisations divided by location, age, type of work, size and resources. Most of the organisations that have been studied in Chile over the last two decades regarding feminism and the state in Chile belong to the circle of the “*históricas*”, or the most established feminist organisations, many of them NGOs and thinktanks monopolising most of the funding available for gender equality work because of their professional skills.

At the time of the EC policy under Bachelet, feminist organising was happening via networks composed of a series of new “*colectivos*” populated mainly by young feminists who used artistic expression as a way to put forward a feminist discourse in the public space. Others were “*colectivos*” of young feminist professionals working from within academia and who were linked to other intellectual groups such as the *Colectiva Mujeres Públicas*.<sup>112</sup> There was also a strong regional division, mostly between the feminist networks from Valparaíso (cultural) and Concepción (politically driven on the radical side) and networks of the capital Santiago, where the leadership is still in the hands of the “*históricas*” (historical founders of the feminist movement) and the “*institucionales*” working in NGOs.<sup>113</sup>

The composition of the feminist networks was causing significant difficulties for feminists trying to join a wider advocacy coalition and have some impact. Indeed, the fact that there is no structure or hierarchy among feminist subjects within the network(s) meant that other actors considered them to be poorly organised and divided. At the time of this research, the feminist movement had met for the last time in 2005. The tension between the regional organisations and those in the capital – where most of the political

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<sup>112</sup> Interview with Patricia Zamora, young feminist member of *Colectiva feminista mujeres públicas*, 09.07.09.

<sup>113</sup> *Op. cit.* 105, 112, and Interview with *Católicas por el Derecho a Decidir*, 08.04.09.

and economic power is concentrated – was visible. The generational divide also became visible, with older feminists being accused of still being attached to second wave feminism, while many of the new youth-led movements identified with third wave feminism and wanted to look at the SRHR agenda beyond just reproductive rights to address issues of sexual rights and sexual diversity.<sup>114</sup>

Young feminists work with a strong deconstructivist view on gender relations as being different from a women's rights issue only (which some "*historicas*" still uphold) and are less resistant than their older compañeras to working with men (see Ch. 9).<sup>115</sup> Many of their movements are cultural and often linked with literature and theatre, as well as visual arts.<sup>116</sup> Some are based in universities, although there are many groups with a strong commitment to social justice coming from the poorest and more populous neighbourhoods of the main cities in the country.<sup>117</sup> They also are also often professionals whose militancy is not linked to NGOs or women's organisations, giving them independence because they "do not live out of feminism".<sup>118</sup> As Caiozzi explained:

... we have a different identity, we do not work in feminism, for them [older feminists], feminism is their work, it's their personal identity, their militancy, their ideology, it's everything. We have jobs and lives. [...]Feminism is one of our identities, but it is not everything, it is important of course but we also do other things.<sup>119</sup>

Many young feminists felt angry that, while during the process that led to the mobilisation of people marching throughout the country to demand the right to EC they

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<sup>114</sup> *Op. cit.* 105, 112.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Op. cit.* 105.

<sup>117</sup> *Op. cit.* 105, 112.

<sup>118</sup> *Op. cit.* 112.

<sup>119</sup> *Op. cit.* 105.

were included and given space, once the issues of visibility in the media started they were pushed aside, particularly since they felt they led the social networks and ICT campaigning with new ideas and skills that older feminists did not have (see Ch. 9). This marked an important breakdown of trust within the feminist movement. Patricia Zamora pointed to the fact that “this breakdown was something many feminist leaders belonging to the *históricas* and *institucionales* acknowledged”.<sup>120</sup>

Indeed, this was something that came up many times during the interviews with the more established leaders of the feminist movement. Gloria Maira strongly opposed the idea that young feminists were keen on “generational renewal” declaring “one does not retire from feminism!”<sup>121</sup> This feeling was present among many of the leaders I interviewed, albeit also crossed with a sense of guilt and responsibility from some of them who regretted the internal disputes the movement suffered.<sup>122</sup> Teresa Valdés explained that during the mobilisation “the leadership of that movement entered the classic tension [where] some sectors want to control everything and are not open to alliances; they are not open to give up leadership, and to make the necessary transformations for that”, adding:

That is unfortunately a classic case of tension within the women’s movement where some of its leaders say: “this thing is mine”, “it is not theirs”. Right? And the whole thing is dismantled. So the amount of people who stopped attending the meetings [...] and I stopped attending too.<sup>123</sup>

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<sup>120</sup> *Op. cit.* 112.

<sup>121</sup> *Op. cit.* 23.

<sup>122</sup> *Op. cit.* 25, and Adriana Gómez, well-known feminist, Communications’ Officer at RSMLAC, 01.04.09.

<sup>123</sup> *Op. cit.* 25.

## Politicians and Parliamentarians

Most of the interviewees agreed that the political parties were not important players during the policy process behind EC, at least not directly, with the exception of the conservative UDI.<sup>124</sup> Instead, parties were more influential through civil servants (see Chs 5 and 7). Zulema Contreras explained that they never saw the parties as such – “they are isolated voices, parties have influence within the ministries where you find a lot of [people speaking of] ‘my institution’, ‘my brand’, ‘my people’”.<sup>125</sup> For Dides, parties appeared in the press throughout the 10 years of political debates, yet their presence was limited to statements to the press and their opportunistic appearance at the “*Pildorazo*” march in 2008 (see Ch. 9).<sup>126</sup> Schiappacasse emphasised that “more than parties it is people within parties” who provided their support. As EC became a headline in the press there were “statements by the chairs of parties”, and the movement “held press conferences where you had the all the presidents of the parties against the petition, or against the ruling” but most initiatives were supported only “by a few Parliamentarians”.<sup>127</sup> Schiappacasse explained:

... we always know we can count with María Antonieta Saa, Adriana Muñoz, and they are able to unite [other parliamentarians] [...] with the petition by the UDI against the Norms, María Antonieta Saa became part of the process with the support of around forty parliamentarians supporting the Norms, so there you had a big movement [...] Parliamentarians from almost every party. [...] EC I believe went beyond party lines; it was beyond political banners, so that so that I even heard UDI parliamentarians and mayors saying they agreed with the morning-after pill.<sup>128</sup>

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<sup>124</sup> *Op. cit.* 26, 64, 81, 97, 98, 110, and Interview with Claudia Dides, gender advisor at FLACSO, former member of CORSAPS, 12.05.09.

<sup>125</sup> *Op. cit.* 98.

<sup>126</sup> Dides, *op. cit.* 124.

<sup>127</sup> *Op. cit.* 81.

<sup>128</sup> *Ibid.*

Visible support of EC by politicians was diffuse and did not reappear until late into public support of the issue, and especially during electoral years (see Chs 7 and 9). Contreras explains that because the politics of the policy were left to civil servants representing their parties within government, “the inclusion of civil society in the policy process was done according to their rules and priorities”.<sup>129</sup> In fact the meetings and agreements between health authorities and civil society “were not binding, freeing civil servants from any accountability”.<sup>130</sup> This was the case with the posters episode that ICMER faced after Minister García blocked the Fertility Norms (see Ch. 7), when no one gave direct responses to either Díaz or Schiappacasse on the location of those lost dissemination materials.<sup>131</sup>

Some of the interviewees also complained about the way in which MINSAL under Bachelet placed a former member of the feminist movement from the Gender Unit to play gatekeeper towards the Minister, in particular with the biomedical organisations and their lawyers.<sup>132</sup> This presence institutionalised the historical mistrust that feminists had towards medically-led initiatives, making the work of the pro-SRHR advocacy coalition tense and riddled with small disputes between these two sets of actors (see Chs 7, 8 and 9).

When EC became a key electoral issue, the short-lived Pro-EC movement secured an important victory as it targeted the mayors before the municipal elections of 2008 (see Ch. 9). The movement put pressure on candidates to make their views on EC public and

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<sup>129</sup> *Op. cit.* 98.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Op. cit.* 81.

<sup>132</sup> *Op. cit.* 98, 110.

its distribution within the local primary healthcare system.<sup>133</sup> Together with the *Pildorazo* march of April 2008 these were two main victories for the movement, which unfortunately dissolved quickly (see Ch. 9). Some interviewees explained that the movement lacked strategic planning to assign each member specific roles and be more effective in lobbying and advocacy, and that the internal disputes among feminists led biomedical organisations to leave the movement (see Ch. 9).<sup>134</sup>

However, the role of politicians was crucial once the President reacted to the ruling of the TC by sponsoring the Fertility Bill by the state. Here the “emblematic” female politicians named by my interviewees, María Antonieta Saa and Adriana Muñoz, became the face of the legislative defence of the bill to secure its approval at all stages within Congress. Together with the executive’s support via SERNAM and MINSAL and their respective ministers, the Fertility Bill was given urgency status by the President and was quickly discussed and approved in Congress (see Ch. 9).

### **The *Ley Marco de Derechos Sexuales y Reproductivos* (SRHR Bill)**

*“Our society is not open to dialogue on the daily realities that involve affection, desire, and the sexuality of men and women of all ages.” – Claudia Dides (2002: 182)*

During the UN international conferences of the 1990s, the Chilean government invited representatives from political parties as well as members of civil society organisations to join its official delegation. The Chilean delegation to Beijing included around 60

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<sup>133</sup> *Op. cit.* 81.

<sup>134</sup> *Op. cit.* 81, 98.

women from this sector.<sup>135</sup> This initiative opened a series of opportunities for collaboration among these actors over the years to come.

This special relationship proved particularly crucial in starting to build strategies and coalitions to ensure the implementation of the international commitments taken by the Chilean government, and in order to advance women's rights. It was at this time that the *Grupo Iniciativa*, a broad NGO network, was formed as an umbrella organisation for many women and feminist organisations in the build-up to the Beijing conference (Franceschet 2003: 32). Beijing provided the space for these organisations to publish a document setting out their expectations regarding women's status and what needed to be done to achieve this new status for Chilean women (Grupo de Iniciativa Chile 1994). Their work influenced the first talks on SRHR not only in Chile but also internationally (Solimano 1994).

Among the ideas coming out of those international conferences, the *Ley Marco de Derechos Sexuales y Reproductivos* (Saa et al. 2000) – or SRHR Bill – marks a unique example of participatory initiative by civil society to take legal action to promote a framework to ensure the sexual and reproductive rights of all Chileans (Dides 2002: 181).<sup>136</sup> As Dr Matamala explained, the initiative stemmed from those organisations who attended the Hague Forum on the Implementation of the Cairo Program of Action in September 1999, where the “group was constituted” after speaking with “Fanny Pollarolo who at the time was a deputy[...] and civil society worked for a year, in a participatory way, elaborating this project”.<sup>137</sup>

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<sup>135</sup> *Op. cit.* 72.

<sup>136</sup> The draft process of the bill and the consensus building as well as the outreach work started in June or July 1999 and culminated in August 2000 (Dides 2002: 181).

<sup>137</sup> Matamala, *Op. cit.* 78.

For feminists and the women's movement, the bill still represents a unique effort, in the history for the fight for SRHR in Chile, particularly because the initiative was born within the women's movement that worked in a coordinated way, strategising and negotiating to obtain the support from politicians to introduce the bill. The bill was often mentioned during the interviews. Matamala said that the alliance "stemmed from the [women's] movement" and "led to a consensus with Parliamentarians which made it their duty to introduce it in Congress [...] a milestone in the history of sexual and reproductive rights in our country".<sup>138</sup>

Indeed since the early 1990s women had begun interacting with the historical medical argumentations prevalent in reproduction and maternal health debates within ministries and their public policies. Most policies targeted "women as mothers and as a way to prevent and reduce their children's problems, without considering them as subjects, or making completely visible the risks affecting their health and the importance to widen their decision-making capacity over their sexual and reproductive lives" (Solimano 1994: 9).

The concept of SRHR needed to be disseminated and developed (Gysling 1993; T. Valdés and Busto 1994), and this was done almost "from scratch" (T. Valdés and Busto 1994). Valdés and Gysling from early on pointed at the challenge to put women's point of view and gender disparities at the centre of the debates (Solimano 1994: 8).

For feminists at the time it was crucial to start positioning SRHR as feminist concepts on the political agenda and they saw in these international agreements a starting point to hold the Chilean government accountable. Matamala explained that in the early 2000s

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<sup>138</sup> *Ibid.*

women's organisations felt they needed "to be more on the offensive on those issues that were not yet on the agenda":

... we still did not speak of sexual and reproductive health, we spoke of maternal health, sexual and reproductive rights were in some way recognised but not fully; MINEDUC did not allow you to speak about them, neither did SERNAM, and this explained that there was this urge to enable the incorporation of new concepts. And I think that was extremely important.<sup>139</sup>

This is how, in 1999, the SRHR Bill project came to the front of the agenda and feminists decided to support the initial idea of Fanny Pollarolo<sup>140</sup> introducing a bill in Congress:

... Fanny who as a deputy was interested in these issues, we all together summoned the other organizations who were very active in the defence of women's rights – and more specifically sexual and reproductive rights, to give a report of what had taken place in The Hague [...] Fanny took advantage of the occasion to [...] and extended the invitation to participate and the [health] "Forum" accepted the invitation getting involved from the start.<sup>141</sup>

The SRHR Bill has a special value for feminists because "this was done in absolute autonomy, without establishing a dependency or subordination let's say from medical criteria and rather this is built from and by civil society and legislators".<sup>142</sup>

One of the strengths of the process was the presence in the "core working group" of civil society actors – also named "*Grupo de Trabajo Palacio Ariztía*"<sup>143</sup> (Dides 2002: 181) – of policy actors such as research centres, and NGOs in the social and biomedical

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<sup>139</sup> *Ibid.*

<sup>140</sup> Fanny Pollarolo was a Deputy for the Socialist Party from 1994-1998 and 1998-2002, covering both the Frei and Lagos administration.

<sup>141</sup> Interview with Josefina Hurtado, Director of Conspirando, 16.04.09.

<sup>142</sup> *Op. cit.* 78.

<sup>143</sup> This name comes from the name of the building of the former Congress in Santiago – *Palacio Ariztía* – where most deputies meet when they are in the capital.

sciences including FLACSO, CORSAPS, ICMER. Some of these organisations were also part of the wider feminist initiative of the time, the *Grupo Iniciativa Mujeres*, whose main strategy was “to monitor state actions and to lobby the state to fulfil commitments to women that are embodied in international agreements”, including SRHR (Franceschet 2003: 33). The issue therefore was legitimised as a concern of the women’s movement as a whole.

The SRHR Bill was a year-long process during which, after initially working with a small number of actors from civil society, the Foro and Pollarolo, the “working group”, slowly started extending their invitation to a wider network of feminist NGOs to make this process an inclusive and bottom-up one. The idea was that these organisations would gain ownership of the process over time and make it their own priority, potentially including it as part of their strategic plan.<sup>144</sup>

Dides explained that the SRHR Bill initiative had three main aims. The first was to create a cultural shift in the notion of citizenship by introducing sexual and reproductive rights as part of people’s entitlements as citizens. This included having the possibility as right bearers to position new issues affecting sexuality and reproduction on the public agenda giving them visibility. The second was to consolidate and mobilise individuals and organisations working on SRHR, in order to develop their collective capacity around these issues. And the third was to produce a legal initiative for the introduction of a bill on sexual and reproductive rights in Parliament (Dides 2002: 183).

As Hurtado explained, there was a clear strategy of inclusion and information diffusion for more buying-in for the bill initiative. This included a solid strategy to have an

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<sup>144</sup> *Op. cit.* 141.

impact on different regions throughout country. The strategy was in fact divided in three main lines of action: 1) try to reach out to the scientific community, and gain support from visible and well-known members of that community; 2) have a strong communication and diffusion strategy, allowing the integration of these new organisations, especially from other regions; and 3) a strong emphasis on lobbying parliamentary representatives at the regional level.<sup>145</sup> Thanks to the Cairo processes, the Foro Red was able to secure financial support from UNFPA and the Ford Foundation.<sup>146</sup> This helped to achieve many of the goals set by the core group behind the strategy and bill initiative, although not all organisations achieved their expectations in terms of commitment, nor did they manage to put in place as many outreach and lobby activities as desired, nor always secure the support needed for their success.<sup>147</sup>

The SRHR Bill not only obtained wide support across civil society but also across the spectrum of political parties, thanks to the early engagement of Fanny Pollarolo as well as the clear intention of the women's movement strategy to obtain political backing to position the issue. As explained by Hurtado:

We looked for and had the intention for this project to get backing by a wide range of political parties and with representatives from all political positions [...] we always looked for this project to be backed by all political strands. And we did particularly well with Renovación Nacional.<sup>148</sup>

One important aspect of the political and advocacy process surrounding the SRHR Bill was certainly the presence of key allies inside Parliament, namely feminist politicians sensitive to the issue. According to Mariana Aylwin, the issues surrounding SRHR

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<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

were, and have remained more appealing to female politicians than to male politicians.<sup>149</sup> She felt these types of sensitive issues, including divorce, and violence against women, have always been promoted by female politicians in Parliament:

... between 1994 and 1998 there was a group of us women, and were very super powerful in putting these issues on the agenda. There was María Antonieta Saa, Fanny Pollarolo, Martita Werner, myself, and I truly think that this was a topic set by us women.<sup>150</sup>

This is not to say that some men or right-wing politicians did not support these issues. In fact, two of them – Carlos Ominami (PS) and Osvaldo Palma (RN) – both influential figures<sup>151</sup> within their parties, were key actors throughout the SRHR Bill process, participating and moving the agenda forward. Lily Pérez (RN) is another right-wing female politician cited by many interviewees. She actively participated and supported Pollarolo and the women's movement during the year-long preparation process of the SRHR Bill. This was sustained, permanent and targeted work in alliance, including frequent meetings of all these actors.<sup>152</sup>

One possible reason that could explain the wide support for the bill is that the most controversial issue in reproductive rights – abortion – was simply left out before the project even started. After all, feminists had left the abortion issue and debate aside since 1990 with the arrival of the Concertación to power in order not to jeopardise the chances of the Concertación gaining power in the transition to democracy (Htun 2003). This poses problems for building alliances since, as explained by Shepard, this “self-

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<sup>149</sup> *Op. cit.* 72.

<sup>150</sup> *Ibid.*

<sup>151</sup> Their sensibility could come from the fact that the first lived in exile for long in France where he was exposed to debates around sexuality and reproduction including abortion, and the second is a doctor by profession.

<sup>152</sup> Gómez, *op. cit.* 122.

censorship among women's NGOs in Chile in the case of divorce operates even more strongly in the case of abortion advocacy, and so some of the major women's NGOs are not willing to join the Forum<sup>153</sup> or its campaigns" (Shepard 2006: 25).

Secondly, it was clear that any motion on abortion would have killed the initiative before reaching Congress due to the pressure of the Church and Conservative groups, especially after the experience of Deputy Adriana Muñoz who lost her parliamentary re-election in 1993 for trying to restore the right to therapeutic abortion in Congress in 1991.<sup>154</sup> As for other politicians, the electoral cost was simply too high. This meant that politicians would have stayed away from the bill for image and electoral reasons.

The year-long working process of the bill, although participative and inclusive, was not without tensions and issues.<sup>155</sup> Trying to work from a core group while expanding the process to a wider network, from the capital to other regions meant the "*grupo ampliado*" and the "core group" sometimes had difficulties coordinating the initiatives and meeting each other's expectations.<sup>156</sup>

Trusting politicians, and maintaining a strong, fluid relationship was also part of the process. But, for many, leaving abortion aside was felt to limit the scope of their work and the SRHR Bill from the start. Dides argues that this pre-made "deal" or agreement to exclude the issue of abortion, simply contradicted the spirit of consensus and open participation the SRHR Bill was trying to promote in its vision of a citizenship

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<sup>153</sup> This refers to the Open Forum on Sexual and Reproductive Health and Rights.

<sup>154</sup> Adriana Muñoz was stigmatised in the press and by conservative groups after her initiative (that included the support and signature of other four fellow party-members). Among the opposition were many members of the Concertación's other party, the PDC. Her party in fact did not show any public support. Many consider this led to her losing the parliamentary re-election in 1993 (Haas 2006).

<sup>155</sup> *Op. cit.* 141.

<sup>156</sup> *Ibid.*

empowered to engage and challenge political, social and cultural barriers on the topics affecting people's lives (2002: 185).

Among politicians, opponents of abortion were, and still are, to be found across the political spectrum, but within the Concertación the PDC has long been known for having the most conservative members on these issues due to their historic proximity with the Church. However, it was not the only party. Camilo Escalona – then president of the Socialist Party – was also openly anti-abortion.<sup>157</sup> According to Adriana Gómez, María Antonieta Saa “did not, and still does not, want to talk openly about abortion”.<sup>158</sup>

The SRHR Bill was officially registered in the Chamber of Deputies on 19 October 2000 (Saa et al. 2000), with the support of 10 deputies, eight of whom belonged to five different parties, and two independents (see App. 5). It entered the Health Commission that same day. Unfortunately, the bill was quickly stuck in the legislative process and remained in that situation for eight years, until July 2008, when it was be quickly modified and reintroduced to Parliament by Maria Antonieta Saa, taking advantage of the political situation surrounding the EC debate, without success (see Ch. 9).

The scope of the original SRHR Bill was more than just to ensure the recognition of sexual and reproductive rights and health; it was also to produce a constitutional reform and constitutional guarantee for sexual and reproductive rights (Espinosa 2006), and by doing so establish sexual and reproductive rights as human rights. This was new for Chilean legislation because it implied that the bill would not only promote and guarantee freedom and autonomy but also equality and the principle of no-discrimination, leading to responsibilities and sanctions to be assumed by the Chilean

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<sup>157</sup> *Op. cit.* 122.

<sup>158</sup> *Ibid.*

state in numerous international human rights' treaties<sup>159</sup> (Dides 2002: 187-188). As expressed by Dides, legally-speaking the SRHR Bill was quite ambitious:

The implementation of this project will make it possible to set a milestone in the legislative history of the country, in that it seeks to express and conjugate the diversity of actors and realities involved in the experience and practice of sexuality and reproduction, promoting the agreement between civil society and the state as set in international agreements and covenants the Chilean government has subscribed to. (2002: 183)

Yet, there was little or no interest or motivation in the Chamber of Deputies to move the SRHR Bill forward and since the project did not have the executive's support, it was not granted urgency. According to Mariana Aylwin, the SRHR Bill – due to the nature of the topics addressed and the political environment with a strong Catholic Church and conservative forces – simply needed the executive's approval. She saw the process as similar to that of the divorce law under Lagos to highlight the importance of the executive's backing:

... the divorce law was passed when the government came on board. It is as simple as that, and as long as the government is not on board it will not be approved. And the government was not on board then because in the end it does not want to have bad relations with the Church. Because the political committee which is only composed by men [...] does not consider the issue as relevant...<sup>160</sup>

Haas highlights the increase in Chile's legislative proposals since 1995 and how the numerous issues that are considered to be core preoccupations of the women's and feminist movements have slowly permeated political debates and been at the origin of legislative initiatives (2006: 204). An important point regarding legislative proposals,

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<sup>159</sup> This includes Teheran 1968, Bucharest 1974, Vienna 1993, Cairo 1994, Beijing 1995 as well as the Covenant on Civil and Political Rights.

<sup>160</sup> *Op.cit.* 72.

however, is that the success rate of those initiatives by law-makers and that of the executive (both have legislative initiative rights under Chilean law) shows that between 1990 and 2001 the executive had a much higher success rate than Parliamentarians,<sup>161</sup> confirming the opinion of Aylwin on the bill.

According to Haas, the executive's greater success can be explained both by the incentives present in the institutional bargaining power given to both the executive and Congress under Chile's constitution and to the over-representation of conservative parties who benefitted from the electoral structure legacy of the dictatorship. So in fact, both the rigidity and bias of Chile's political institutions affected the outcomes of policy-making (Haas 2006: 205).

Rigidity and bias also affect the way in which the legislative agenda and the priorities the executive has to make compete for initiatives. In 2000, when the SRHR Bill was submitted to Congress, Lagos had just assumed office as President and Bachelet as Minister of Health. Lagos had arrived to power trying to push his own agenda, which included two main initiatives: the divorce law; and the AUGE Plan – the most important reforms to the Chilean Health System since 1990.<sup>162</sup> This plan was far from popular with all sectors of the Concertación, which meant Lagos had to maintain a high level of discipline in his ranks (Sierra and Hola 2006).

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<sup>161</sup> In fact, Haas shows that the *Servicio Nacional de la Mujer* (SERNAM), the women's machinery, although having presented only nine projects over the 1990-2001 period, had a success rate of eight out of nine. Parliamentary initiatives instead, while having originated 38 congressional bills only had success on eight occasions (Haas 2006: 204).

<sup>162</sup> Plan AUGE (*Acceso Universal con Garantías Explícitas en Salud*), is a plan for “universal access to health based on explicit commitments” by the government to provide free and expedite medical attention and treatment for a determined number of diseases considered the most common and most pressing ailments in the population (Ministerio de Salud de Chile 2014).

The AUGE health reform included important legal reforms and Bachelet was responsible for one of them: the “*Ley sobre derechos y deberes de los pacientes*” (Law on the Rights and Duties of Patients), which was introduced to Congress on 12 June 2001. This proved to be a controversial piece of legislation since many conservative politicians saw it as a disguised plan to pass the right to euthanasia. This piece of legislation and EC won Bachelet a reputation among conservative groups as a hard “radical” threat to Catholic and conservative values (Sierra and Hola 2006).

In April 2001, aware of the political barriers for the Bill, and as part of the monitoring commitments taken with the “*Grupo Ampliado*”, deputies Pollarolo and Saa met with the Minister Secretary General of the Presidency under Lagos, and requested the “*urgencia*” motion from the executive for the bill (El Mercurio 2001b, 2001c). Nonetheless, nothing happened, and Bachelet, who was Minister of Health at the time, remained cautious in public declarations, even if she did acknowledge the positive intent behind the initiative (El Mercurio 2001b).

This could be explained by the fact that 2001 also saw two new important and polemical reproductive rights’ issues – voluntary sterilisation and EC – appear on the political agenda and in public opinion, fuelling the ire of conservative groups, the Church and some Parliamentarians within Lagos’ own coalition (Dides 2002: 189). Both issues were part of the government’s programme and the direct responsibility of Bachelet. Resolution No. 2326, which came to modify the existing regulation and guidelines of the health services on voluntary male and female sterilisation, was announced by Bachelet at MINSAL in November 2000 (Ministerio de Salud de Chile 2000). The “offensive” on EC, as many of the interviewees qualified it, started to get much of the attention since it was a well-coordinated and solidly built legal action against the

distribution of EC by the national health system, as well as its private distributors such as family planning groups and pharmacies (see Ch. 7).

During this process, feminists and women's organisations began to have their first major disagreements with other SRHR advocates on how to proceed. First, the competing legal initiatives and new policies affecting women's rights forced the different members of the "*grupo ampliado*", from autonomous feminists to NGOs and research centres, to refocus their forces elsewhere to respond to the strategic challenges being posed by the conservative lobby (C. Dides 2002).

Secondly, biomedical and social science's organisations realised that the work to move the bill forward required much engagement with politicians, something feminists did not always agree with. In order to have an impact they felt it was important to work in a more technical manner to provide solid arguments and create stable lobby channels with politicians. Dides explained that the bill process made them "realise that without arguments and evidence it was impossible to negotiate with political parties" and so:

... CORSAPS, APROFA, the Bioethics centre, and ICMER, started to think our fight is built on arguments, on the discourses based on different paradigms. Unlike the women's movement... this was also a political issue, they had more a discourse of demands, of demonstrations [...] but they lacked the arguments. So we decided to start working more closely with political parties through parliamentarians.<sup>163</sup>

This way of operating – that is, building alliances with political parties and specific Parliamentarians through the provision of technical knowledge – is something that was very much present at the time of the EC policy process. Biomedical and social science

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<sup>163</sup> Dides, *op. cit.* 124.

organisations provided the key arguments to help politicians lobby for EC. This led to a closer relationship with specific politicians and policy-makers during both the legal and political battles (see following chapters).

In March 2004, MINSAL announced the free distribution of EC to victims of sexual violence, accelerating the series of judicial challenges (see Ch. 7). The SRHR Bill was therefore competing for political support with both the EC process and the divorce law. Passed in 2004, the divorce law became the symbol of the incipient detachment by the government and the Concertación from the direct influence of the Church. There was an open offensive of the Church on the law. But, supported by polls suggesting that at least 80% of Chileans backed the legalisation of divorce, the PDC played a critical role in unlocking the debate and political process which had been a core concern and agenda item for other Concertación parties, in particular President Lagos' party, the Socialist Party.

As shown, the work of SRHR advocates and the women's movement on the SRHR Bill was directly affected by the legislative agenda of the government. The competing agendas between government branches affected the priority given to projects and the way authorities committed their support to them. Civil society organisations were under pressure during these competing initiatives to provide the necessary manpower to have an impact.

By 2005, the SRHR Bill was still stagnating in Congress. Therefore when Bachelet entered the presidential race, it was perceived as a window of opportunity for the women's movement, feminists and female deputies who lobbied her from early on to make sure she included the SRHR Bill in her manifesto, which she did.

Considering the participatory and consensual nature of the bill, and since abortion was a censored demand under the consensus rule, having the SRHR Bill in the presidential programme seemed to many of the bill's supporters to be the best compromise that could be achieved. Unfortunately, the hopes of pushing the bill through Congress quickly failed, mostly due to the different political challenges Bachelet had to face from the beginning of her administration. Among these very sensitive issues were the new conservative challenges on the policy for the distribution of EC.

In 2009, according to Matamala, the SRHR Bill sponsors outside and within government, had requested at least three times for President Bachelet to give the SRHR Bill an “urgency” legal status, but were still waiting to get an answer from the President's office.<sup>164</sup> Gómez explained that despite the pressure and follow-up on the SRHR Bill to obtain its urgency, the usual response by the Minister Secretary of the Presidency under Bachelet, José Antonio Viera-Gallo,<sup>165</sup> was “you have to do your lobby with the PDC, I suggest directly with the presidential candidate Frei, or Soledad Alvear...”<sup>166</sup>

In 2008, “the April 22nd mobilisations provided an opportunity” and Saa and Casas decided to reactivate the SRHR Bill, provoking mixed reactions among members of the feminist movement who “knew this would happen, that there would be a reaction from the parties especially those closer... more committed to these issues”.<sup>167</sup>

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<sup>164</sup> *Op. cit.* 78.

<sup>165</sup> Viera-Gallo, a preeminent socialist militant since the time of Allende, when persecuted after the Coup of 1973, found refuge in the Apostolic Nunciature, where Angelo Sodano (former Vatican Secretary of State and currently Dean of the College of Cardinals) helped him to fly into exile to Rome. In an interview as newly appointed member of the Constitutional Tribunal he spoke of his close relationship with the Church (Poder360 2010).

<sup>166</sup> *Op. cit.* 122.

<sup>167</sup> *Op. cit.* 141.

Yet Saa's initiative was received with caution by feminists. Hurtado explained that "at first there was suspicion to see how far she will go and take risks", to see "if it was only a spur of the moment", then after new conversations "we decide to make the effort and support Antonieta. There were a few press conferences, and other initiatives in the street and at the Palacio Ariztía... and the movement for the defence of emergency contraception included some of this".<sup>168</sup>

Despite these efforts the bill was not discussed in Congress. In 2009, the Bachelet government put all its effort in pushing forward the Fertility Law that put an end to the EC saga. Laura Albornoz said the SRHR Bill "was too generic" and it still raised concerns amongst "some that it could open the door to other contraceptive methods such as abortion"<sup>169</sup>, despite the fact that the SRHR Bill had been written to discard this issue.

## **Conclusion**

This chapter has mapped out the Pro-SRHR Advocacy Coalition, and looked at the actors involved in the process behind the defence of the EC policy between 2000 and 2010. Biomedical organisations, and the doctors and lawyers and professionals linked to them, are all united by a great commitment to sexual and reproductive freedoms. These actors first worked with feminists on these issues through the SRHR Bill, which happened in parallel to the judicial and political battles on EC under Lagos. They experienced the frustrations of seeing how the competing agendas in the legislature and the executive hindered the SRHR Bill progress. Feminists and SRHR advocates were both affected by this experience and the political process surrounding it. Biomedical

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<sup>168</sup> *Ibid.*

<sup>169</sup> *Op. cit.* 74.

organisations and social science organisations took a conscious decision to become more professional in the lobby they carry out with politicians which led them in a different direction from the more militant work of the women's movement and women's organisations. This explains how, despite sharing the same core values on sexual and reproductive rights, in practice these groups have struggled to work in a concerted manner to promote SRHR along other civil society actors.

The chapter also discussed the difficulties feminists face due to important internal divisions. There is an important divide between generations of feminists, made visible by the tensions and disputes that led to the dismantlement of the Movement Pro-EC at the end of 2008. Moreover, feminists felt Bachelet had a debt towards the movement at the beginning of her administration through the bill for SRHR. This explains why they did not immediately engage with the EC policy that they did not consider a direct result of their agenda, while biomedical groups led that side of the work. We observe therefore a preference for the legislative versus the step-by-step policy channels to advance the SRHR agenda between these two groups.

Both the SRHR advocates and feminists have faced the weight of the "consensus" rule in the way their projects, the SRHR Bill and the Fertility Norms were stopped owing to internal tensions within the governing coalition. In fact, Concertación did not act automatically as a champion of SRHR. The political world has been divided since 2000 by the issues surrounding sexual and reproductive health. The participation in favour of EC or the SRHR Bill was more the result of individual initiatives by Parliamentarians; similarly, politicians progressively supported EC as the issue gained an electoral profile.

## **CHAPTER 7: The Judicialisation of EC under Ricardo Lagos (2000-2005)**

This chapter uses the literature on judicialisation and FI to analyse the legal battles that surrounded the legalisation of EC in Chile between 1998 and 2005. The aim is to show the gendered impact of different institutions on the women's movement and civil society organisations that have mainstreamed sexual and reproductive rights in Chile since the early 1990s. By doing so, it evaluates the weight of feminist discourses in these debates, as well as on the way SRHR is addressed by government institutions, tribunals, judges and other civil society actors.

The policy initiative to distribute EC by Bachelet, who was then Lagos's Minister of Health, faced two strands of opposition: the political one, led by conservatives within Concertación itself; and the legal one, organised by a strong and well-connected conservative lobby made of individuals and NGOs linked to the Catholic Church. A strong resistance to the EC policy as health policy through an ideologically-driven campaign can be seen in both political battles. Although they seem to be independent from each other, one observes in the discourses used by conservative actors that the two fronts of opposition are linked by the Catholic doctrine and its views on sexuality and reproduction.

The political battle against EC, however, was strongly influenced by the power of the "consensus rule" that kept the Concertación parties together and which demanded that no contentious issue should be addressed (see Ch. 4). This required a self-censorship within government regarding reproductive issues, including EC. This chapter shows how this was executed by replacing progressive policy-makers with more conservative

ones whose mission was to keep the status quo. For Lagos, this was particularly important at the end of his six years in government as the new electoral process started.

The chapter highlights how from lower courts up to the Supreme Court, we observe the key role played by judges and legal strategies to uphold the conservative narrative that EC is abortive. Here the shaping of the anti-EC advocacy coalition and the pro-EC coalition, together with their respective roles and strategies, was key to the legal process that took place between 2001 and 2005 and that set the ground for the judicialisation of the issue that lasted more than ten years.

The chapter also introduces and analyses the use of the market as a gendered institution by the conservative campaign to target pharmacies and pharmaceutical companies selling or producing EC. This campaign overlaps with the Lagos and Bachelet administration, showing the intensity of the conservative lobby. The literature has highlighted the importance of the economic power of the conservative lobby to influence reproductive health initiatives (M. Blofield 2006). The chapter explains that this existing power advantage is reinforced by the capacity of conservative groups to make the best use of all institutions where they have power and influence. This includes not only the market, but also the courts where they benefit from the post-authoritarian institutional framework limiting reproductive rights that has been in place since 1989.

### **The origins of the policy and the political opposition to the Fertility Norms**

The origins of EC as a reproductive health policy are linked to an initiative at the end of the 1990s to review the internal protocols regarding fertility issues within the Ministry of Health (MINSAL). The initiative did not come from within MINSAL, however, but from civil society through the lobby of SRHR advocates. In 1996, Dr Soledad Díaz,

Director of the Instituto Chileno de Medicina Reproductiva (ICMER),<sup>170</sup> considered it was time to revise MINSAL's "*Normas Nacionales sobre Regulación de la Fertilidad*" (Fertility Norms), the existing guidelines for the regulation on fertility, to put them in line with international standards and in particular women's reproductive rights.<sup>171</sup>

The Norms thus were a technical initiative stemming from the biomedical lobby rather than the women's movement; this recalls the historic importance of the medical profession in matters of reproductive health in Chile (see Ch. 4). At the time Díaz and ICMER decided to introduce EC as a public policy considering the poor state of adolescents' reproductive health and rights in Chile, as well as the high rates of teenage pregnancy in a country where abortion is still not legal (Dides 2006: 36).

In a strategic move to ensure an effective lobby, ICMER invited APROFA to collaborate on the project, and together they convinced MINSAL to pursue this work.<sup>172</sup> A Fertility Norms "working group" was formed to conduct exploratory research on the receptiveness and acceptability of EC in Chilean society with stakeholders (ICMER 1999). The positive results of the initial research opened the path to a strategy for its introduction and the legal and policy changes needed according to the state of sexual and reproductive rights at the time (Dides 2006: 36). Díaz explained that from the beginning SRHR advocates gave priority to alliance building:

... the most adequate strategy was to establish a network with all the other NGOs working on SRHR, as well as a network between academics and researchers that

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<sup>170</sup> ICIMER, the Chilean Institute for Reproductive Medicine, is an NGO carrying out research on reproductive medicine and health, as well as doing advocacy and dissemination of information on these issues.

<sup>171</sup> *Op. cit.* 26.

<sup>172</sup> *Ibid.*

could become advocates and explain this contraceptive method, and include journalists who could inform the authorities and start lobbying the authorities.<sup>173</sup>

ICMER forged an alliance with CORSAPS (Health and Social Policy Corporation) – to develop joint advocacy campaign targeting health authorities, sensitising them to the need to introduce EC as part of a policy to prevent unwanted pregnancies and abortion (Dides 2006: 37). The alliances eventually expanded to include NGOs working on women's rights and adolescents' reproductive health and rights, such as the *Instituto de la Mujer*, the *Foro Abierto de Derechos Sexuales y Reproductivos*, CEMERA and other NGOs and academic groups (CLAE 2004).

One of the first goals of the strategy set by Díaz was to lobby for the distribution of EC in cases of sexual violence. This started in 1996 because “EC was not distributed to women victims of sexual violence [...] a violation to women's rights big as the Everest”, and “all groups invited to discuss the acceptability set as first priority women who had been raped”.<sup>174</sup> Díaz therefore drafted a new “protocol for the prevention of pregnancies and STDs after a rape” which she sent to “40 key policy-makers within government, from different ministries and departments, including health, justice, SERNAM, and the Service of Forensic Medicine”, yet “only three people replied”.<sup>175</sup>

ICMER's advocacy strategy and lobbying eventually paid off since MINSAL's *Protocol for the Intervention in Cases of Sexual Violence in Emergency Services* (Protocol on Sexual Violence) was published in 1998 (Dides 2006: 37). The protocol included the main demands made by the biomedical institutions, and in particular the provision of EC for girl victims of sexual violence. Yet, this same success was at the

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<sup>173</sup> *Op. cit.* 64.

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.*

origin of the rise of the conservative opposition at the political level and their monitoring of public policies on reproductive health.

Not long after the publication of these guidelines, the document which was already printed and distributed was amended with an erratum by the PDC Minister of Health, who simply erased EC and denied having been aware of its inclusion in the document beforehand (Dides 2006: 37). Díaz argued that the Minister had “received a call from a representative of the Ethics Committee of the Pontifical Catholic University” opposing the measure, and thus decided to act according to his personal religious beliefs.<sup>176</sup> Interestingly, there was no public debate on this incident despite the irregularity of the final decision (Meirik 2001).

This was the first of a series of frustrated attempts by the group of SRHR advocates to make EC available while facing strong conservative pressure on health authorities prior to the legal and political battles that took place over the next decade. This episode also represents the beginning of a sophisticated strategy to promote EC since ICIMER realised that they needed to pursue parallel strategies:

... it was obvious that within the government one group would oppose this, a group in power positions and close to the Christian Democracy which was vulnerable to the Church’s influence. So we decided to use another road. Dr Croxatto and I contacted a local pharmaceutical company to obtain the drug authorisation. Since we could not move forward via the authorities, we would try to move forward making the drug available. This was a strategy that had come out of the scoping research on the acceptability.<sup>177</sup>

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<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid.*

This process would start the judicialisation of the distribution of EC that happened in parallel to the political struggles for the Fertility Norms.

### **The Fertility Norms and the political opposition to EC**

In 2000, with the election of Lagos and the appointment of Bachelet at the head of MINSAL, many thought the conditions were right to push for the revision of the existing Fertility Norms and introduce the distribution of EC. For Matamala “Lagos did not give much importance [...] to SRHR, it’s the Ministry, when Michelle became Minister, she put SRHR and EC on the agenda”<sup>178</sup> and opened the space for SRHR advocates, namely ICMER and APROFA, to work on the revision of the Norms. According to Galán the “work was a long process” and Díaz “undertook the review of the scientific aspects”, including the latest research available to which she had access through her links with the WHO”.<sup>179</sup> Díaz and Galán worked closely with Castro – MINSAL’s Chief of the Women’s Health Programme – to draft and publish the Norms.<sup>180</sup>

However, when the time came to seek support for the official approval of the Norms, Bachelet had left MINSAL to become Minister of Defence, and the balance of power between political forces within MINSAL had changed. The new Minister of Health Pedro García, a gynaecologist and Christian Democrat, was well known for his Catholic beliefs. Galán explained they needed García’s signature and went to see him:

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<sup>178</sup> *Op. cit.* 78.

<sup>179</sup> *Op. cit.* 26.

<sup>180</sup> *Ibid.*

... and at that point he said “I find it great, and I will approve it as long as you take out EC and the chapter on the confidentiality for the delivery of contraception to adolescents”.<sup>181</sup>

Díaz explained that as they told the Minister they “would not accept to remove those sections”, he replied: “I do not have to ask for your approval, because the Ministry’s norms are published by the Ministry anyway it wants to.”<sup>182</sup> Galán argued that this pushed APROFA and ICMER to “register the norms under copyright to insure they could not be modified”.<sup>183</sup> Schiappacasse argued that this was driven by a real “fear that the Ministry would publish the norms as its own work while taking out the whole section on EC, especially after... the ‘erratum’”.<sup>184</sup> The copyright protected the Norms and forced MINSAL “to adapt the document if they wanted to publish it”<sup>185</sup> and was a “tool for negotiation with the Ministry”.<sup>186</sup>

From a civil society perspective, the relationship with García after Bachelet was a difficult one. Díaz explained that Bachelet had given civil society organisations all her support:

... [Bachelet] was deeply involved in the registration process of EC, she was the one who authorised it [...] we had plenty of contact with her as Minister of Health and she engaged with all the data, with the studies, she is a nerd... she read the documents, read the publications on the mechanisms of action, so it was truly her... she was on top of it.<sup>187</sup>

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<sup>181</sup> *Ibid.*

<sup>182</sup> *Op. cit.* 64.

<sup>183</sup> *Op. cit.* 26.

<sup>184</sup> *Op. cit.* 81.

<sup>185</sup> *Ibid.*

<sup>186</sup> *Op. cit.* 64.

<sup>187</sup> *Ibid.*

Bachelet had also created thematic working groups<sup>188</sup> through which women's organisations and biomedical groups shared knowledge and information regarding the Fertility Norms. According to Schiappacasse they often met with Infante, and Castro and the Norms were "distributed for feedback" and they were fully "approved by health professionals, midwives and doctors, as well as the [women's] movement", thus it "was very democratic".<sup>189</sup> SRHR advocates held meetings with the women's movement when they realised the "launching of the Norms was taking longer than expected [and] we asked the Under-Secretary and Castro to make an announcement".<sup>190</sup>

At the end of January 2005, the Norms eventually received backing from the Minister and EC was included in the final document. But as the Norms were on the verge of being published, a political and communicational incident put a halt to the process. On 8 March 2005, during an event for International Women's Day, the Under-Secretary of Health, Infante, was asked by a journalist whether the norms would make EC more available. Infante answered that EC from then on was to be considered "like any other contraception method" and would be "available not only to victims of rape but any woman who had unprotected sex and is at risk of having an unwanted pregnancy" (Radio Cooperativa 2005b).

After the statement García immediately requested for Lagos to remove Infante from his position, to which he agreed and Infante resigned. This case received much media attention since no one expected that such a short public statement could create a controversy and be sanctioned so quickly. Clearly, the President was keen to avoid any

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<sup>188</sup> The working groups served as an open space for the participation of civil society that was created under a "*Decreto exento*" by Lagos and Bachelet when she became Minister of Health. *Op. cit.* 81.

<sup>189</sup> *Ibid.*

<sup>190</sup> *Ibid.*

political spillage from this public declaration and prevent the more conservative members of Concertación from raising their voices and criticisms in an electoral year.

This was a perfect example of how the “consensus rule” was applied in practice within the government and how such an institution had clear sanctions attached. During the research interviews, when asked what had happened, some interviewees saw García as simply a Christian Democrat,<sup>191</sup> or simply a conservative Catholic “who must have spoken to the Bishop before this”.<sup>192</sup> For Adriana Gómez, García’s reaction was just another example of the PDC being a barrier to any initiative affecting the sexual and reproductive rights agenda.<sup>193</sup> As for Josefina Hurtado, this was the reflection of the predominant self-censorship applied by the government on these issues to prevent conflicts within Concertación:

And this means that some sectors within the Concertación parties, are more Catholic than the Pope and resort to self-censorship to avoid problems in other issues.<sup>194</sup>

Schiappacasse denounced the “self-censorship, because it was Lagos himself who publicly announced that this was not true, removed the Under-Secretary and disavowed the Norms”.<sup>195</sup> She added that “the Norms had been approved for months” but the government had always wanted to launch them in a “low profile manner, because they had already had a bad experience with the norms on violence [...] The idea was to send

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<sup>191</sup> *Op. cit.* 122.

<sup>192</sup> *Op. cit.* 26.

<sup>193</sup> *Op. cit.* 122.

<sup>194</sup> *Op. cit.* 141.

<sup>195</sup> *Op. cit.* 81.

it to health services and heads of health departments and medical staff via internal channels and then once they were launched start the trainings and dissemination”.<sup>196</sup>

Infante summarised what happened behind doors as the clear result of electoral politics. In March of that year, Bachelet (PS) had announced that she would run as one of the internal presidential candidates of the Concertación against Soledad Alvear (PDC)<sup>197</sup> (*El Periodista* 2005), and so there was:

... a very strong internal debate between the Christian Democrats and the more progressive parties [...] PS and the PPD. In this debate the Christian Democrats accuse the PS-PPD bloc of having set this up [Infante’s announcement] and premeditated it, and [implied] that what is behind all this, is the intention to put the Christian Democrat candidate [Soledad Alvear] “on the spot” [...] so the Christian Democrat world interpreted this public declaration [...] as if I was part of a conspiracy of the PS-PPD sectors [...] and in this way kick-start the debate on the values’ agenda [...] and they requested from the President my ousting [...] he always warned us that we were ‘fuses’ – obviously he opted to take me out because in that way he was able to ease the situation, and Minister García [...] showed a detachment which I admire and would not have managed myself, and declared that there had never been an agreement to make [the norms] available...<sup>198</sup>

Castro, a PDC member, added that Infante had left on vacation and “when he came back he did not realise how the political environment around the electoral race had evolved over that month with the pre-candidacies”,<sup>199</sup> thus was caught in the party rivalries within Concertación and the consensus rule. Castro confirmed the PDC’s concerted decision to:

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<sup>196</sup> *Ibid.*

<sup>197</sup> Soledad Alvear is a historic member of the PDC and well known for belonging to the most conservative and Catholic wing of her party.

<sup>198</sup> Interview with Dr. Antonio Infante, former Under-Secretary of Health under Ricardo Lagos, 2000-2005, 23.06.09.

<sup>199</sup> Interview with Dr René Castro, Head of the Women’s Health Department, MINSAL, under Ricardo Lagos and Michelle Bachelet, 21.07.09.

... protect or safeguard the candidacy or pre-candidacy of Soledad Alvear and of course [...] the rumour is that the pressure by the Christian Democrats must have been so strong that the President had to let Infante go.<sup>200</sup>

After Infante's resignation the relationship between García and the biomedical NGOs and women's groups working on the Norms deteriorated. García told them "there will be no more talk about EC in this government, [wait] until the next".<sup>201</sup> ICIMER and APROFA had long debates on whether "to denounce the Minister was lying, or to shut up".<sup>202</sup> What annoyed feminists and research and biomedical associations alike was first, the "denial of the work done on the Norms through the working group on sexuality" as well as the "disappearance of ten thousand posters" ICIMER had sent to print as part of the campaign to disseminate the information on EC.<sup>203</sup> ICIMER paid for them with "a foreign grant" and with "the approval of MINSAL [...] which accepted to keep them in its depot".<sup>204</sup> At the time of this research the issue was still unresolved and the biomedical advocates had not been given any formal explanation from MINSAL under the Bachelet administration.<sup>205</sup>

Hence, as can be seen in the middle of a much disputed electoral year, issues affecting women's rights, were at the centre of political deals to keep Concertación united. The commitment to women's rights the government may have had at the time was subordinated to the logic of political survival, and to the threat of sanction imposed by the "consensus rule".

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<sup>200</sup> *Ibid.*

<sup>201</sup> *Op. cit.* 81.

<sup>202</sup> *Ibid.*

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid.*

<sup>205</sup> *Ibid., op. cit.* 78.

In fact, by 2005, important issues had gained priority in Concertación's political agenda: first, the Constitutional Reforms that Lagos had negotiated with the opposition (see Chs 5, 6 and 8) meant he needed a united front to ensure that Concertación would count them as part of their legacy; secondly, Concertación needed a solid candidate to run for president and by dropping the publication of the Norms and ousting Infante, Lagos wanted to keep Bachelet free of controversy before the presidential race. Finally, Lagos needed to complete the legislative agenda set for his mandate. Besides the Constitutional Reforms, in July 2005 he was able to pass the "*Ley de Filiación*" (Radio Cooperativa 2005a), which required much negotiation and lobbying with the Church and conservative sectors. In November, Lagos also tried to introduce a presidential veto into the "*proyecto ley de genóma humano*" (human genome), which had been introduced in 1997 and threatened to restrict people's access to reproductive technologies. The Church and conservative forces, including the same ones involved in the legal battles against EC, were all mobilised around the issue (Teletrece Internet 2005).

Under Lagos, thus, the political battle for the Norms was strategically detached from the parallel process put in place to legalise EC and to allow its distribution in pharmacies. These efforts resulted in the judicialisation of the issue, which took the form of different judicial challenges against the drug.

### **The first judicial battles against EC**

March 2001 marks the beginning of the first series of judicial initiatives that underlined the debates and controversy surrounding the distribution of EC in Chile for the next decade. This first stage, which coincides with the Lagos administration, was played out in the regular courts, but as the issue slowly evolved into a more ideological quarrel, the

case was brought twice in four years to the Supreme Court. These episodes show how the different judicial institutions played an important role in advancing or hindering the distribution of EC depending on the ideological influence of the courts. They also show the evolution of the conservative offensive and the subsequent defence by the state and SRHR advocates.

### **EC part I (2001): The birth of a visible and militant conservative lobby**

In 1998, Díaz and ICMER decided to establish a second strategy to promote EC, and in this way avoid the formal party power struggles affecting policymaking. Following one of the findings that transpired from the scoping research carried out on the distribution and acceptability of EC in Chile, ICMER invited the pharmaceutical company Silesia to apply for the license to distribute EC.<sup>206</sup> But as soon as the government and the *Instituto de Salud Pública* (ISP) (Institute of Public Health) authorised one brand of EC, they faced a strong and organised conservative opposition.

In March 2001, Bachelet – then Minister of Health – announced that MINSAL was considering allowing the distribution of EC through the national health system after its due legal authorisation by the authorities. It was then that a group of NGOs decided to present a “*recurso de protección*”<sup>207</sup> against the legal authorisation of *Postinal*, the first authorised brand of EC to be produced in Chile by the ISP.<sup>208</sup>

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<sup>206</sup> *Op. cit.* 64.

<sup>207</sup> A “*recurso de protección*” is a constitutional action “that enables an applicant to challenge a regulation that is alleged to violate a constitutional right” (Melzi 2005: 263).

<sup>208</sup> The ISP is an autonomous medical authority within MINSAL, responsible for insuring the quality of goods and services provided within the public health system and in public health initiatives, including the authorisation of all drugs (Instituto de Salud Pública de Chile).

### **The actors**

The first in a series of judicial challenges against EC were brought forward by students belonging to the Opus Dei ULA organisation under the name of AGES; their aim was to judicially challenge the validity and legality of the authorisation and distribution of EC in Chile. AGES was supported by Alejandro Romero, law professor at ULA.

However, there were more than students behind this first judicial initiative in front of the Court of Appeals. Indeed, the actors behind the petition were quite diverse in their profiles and political affiliations. Some of them were linked to the right-wing opposition, while others were close to parties belonging to the government coalition, namely the PDC (Casas Becerra 2008: 3).

The case was brought to court by Sara Philippi Izquierdo on behalf of ISFEM, Patricio Mena González on behalf of the International Centre for Human Life, Elizabeth Bunster Chacón on behalf of the World Movement of Mothers, Francisco Chahuán on behalf of the NGO *Frente por la vida y la acción solidaria*, Juan Jara Opazo on behalf of the *Centro Juvenil AGES*, and Gonzalo Patricio García Palominos on behalf of the *Movimiento Nacional por la Vida “Antü-Küyen”* (see App. 4).

There was a clear and concerted strategy from early on, trying not only to fight on the public policy front but also to have an impact on the commercial interests of pharmaceutical corporations. The judicial claim brought about by these conservative and pro-life groups and individuals had two main targets – Bachelet and the ISP. It aimed to put a halt on the initiative to distribute EC and to revoke its inclusion in the national registry of drugs due to the alleged abortifacient effect of EC. Jara Opazo, García Palominos and Chahuán, however, also brought the legal claim against the

pharmaceutical company *Laboratorio Médico Silesia S.A* that produced the first brand of EC in Chile, Postinal.

The defendants' case was made up of the government through Bachelet, the Director of the ISP, and the lawyer representing the pharmaceutical company Silesia. Women's organisations and biomedical NGOs as well as party militants also joined the defence of EC (Casas and Contesse 2006: 15). The main NGOs involved included APROFA and ICMER, and the feminist organisations *Instituto de la Mujer* and *Corporación la Morada*.

### **Abortion as the core issue of the petition and the strategies of both petitioners and respondents**

From the beginning it was key for the conservative anti-EC lobby to set the parameters of the debate by imposing their discourse on the links between abortion and EC. By doing so, they knew they had an important legal advantage, which was the right to life of the unborn, which had been included in the 1980 Constitution. Thus, the case against EC had an important constitutional component, and the tactics behind this first legal requirement were based on a three-pronged action to: a) impede the distribution of EC; b) declare EC's main component, Levonorgestrel, illegal; and c) give public recognition to the right to life of the unborn (Casas and Contesse 2006: 9). The petition stated:

... against the Institute of Public Health and the minister of Health, and [...] against the Medical Laboratory Silesia S.A.[...] on behalf of those yet to be born in Chile, of their mothers and fathers, and especially on behalf of all women, potential victims, for their right to life, that the petitioners consider threatened by the arbitrary and illegal initiative of the health authorities, who accepted to process and then authorise the commercialisation of the drug Postinal [...] Requesting the constitutional illegality of the drug Levonorgestrel to be established, and the right to life of the unborn to be upheld from the moment of conception... (Corte de Apelaciones de Santiago 1 2001)

The language used in this introductory paragraph of the initial petition shows the ideological commitment that pro-life groups felt to speak on behalf of all society, especially the unborn and women who in their eyes were victims of public policies forcing them to get abortions. The appeal on the grounds of unconstitutionality was based on the alleged abortive action of the drug Postinal, and the defence of the right to life contained in the Chilean Constitution, as well as the American Convention on Human Rights, thus referring to both national and international law (Casas and Contesse 2006: 11; IIHD 2008: 48).

The conservative lobby therefore responded to the fear that the legalisation of EC was an indirect means of making abortion legal in the country. What is more, the motivation of this legal action by organisations was also presented as an individual initiative by the petitioners, showing that these individuals had so deep a belief that they needed to intervene in person:

... [the petitioners] Sustain their appeal on the fact that the mentioned drug, which has been authorised under the form of a pill of 0.75 mg., contains the drug named Levonorgestrel [...] which is abortive and aims to prevent unwanted pregnancies [...] The petitioners consider the legal action they have undertaken legitimate in that it is coherent with the ends pursued by each of the organisations they represent, although they also act on their own behalf. (Corte de Apelaciones de Santiago 1 2001)

In March 2001 the *Corte de Apelaciones* (Court of Appeal) agreed to review the case. The petitioners used mostly experts' opinions provided by doctors working at ULA and PUC to support their claims in front of the judges, showing their links with the Catholic institutions and doctrine (Casas and Contesse 2006: 10). Since the penal code does not contain a definition of abortion most of the petitioners' argumentation tried to make the case for an understanding of abortion as the destruction of the product of conception

independently from the gestation stage the product is at. By doing so they could argue that the pill was having an impact on the product of the gestation and therefore threatened its survival and development (Casas and Contesse 2006: 7), these are generally the arguments advanced by the Catholic Church.

The distribution and legal regulation of EC according to Casas and Contesse lacked the full political support of the ruling coalition despite being the public policy of MINSAL (Casas and Contesse 2006: 7). This was reflected in the way in which the defence of EC was built. Díaz argued:

... after these three years [working on EC] we knew where the opposition lied and all the resources it could deploy. We trusted [the government] to have a good litigation. Yet the lawyer who represented the ISP refused to medicalise the issue [...] Lidia Casas, Claudia Dides and I had been working for a while on this and therefore were convinced that the focal point would be the action mechanism [...] and luckily based on the scoping research we had studied the mechanisms. So when the debate started in 2001 we had [scientific] evidence.<sup>209</sup>

Casas and Díaz insisted that it was important for the defence “to address the mechanisms of action, and include international legal instruments including those on reproductive rights” but the government’s lawyers replied these “were not relevant” for the argumentation.<sup>210</sup>

Both MINSAL and the director of the ISP did not feel comfortable defending the introduction of the drug in terms of SRHR, leaving that responsibility to civil society (Casas and Contesse 2006: 12). Instead, the state focused on the presentation of technical arguments to support technical decisions that nobody could question. The

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<sup>209</sup> *Op. cit.* 64

<sup>210</sup> *Op. cit.* 110.

government's language thus remained as far away as possible from the rhetoric of women's rights to favour a language that was "politically correct and conservative" (Casas and Contesse 2006: 12). Even Bachelet underlined the importance for MINSAL to keep a role as a public health institution trying to provide solutions for the whole population in matters of public health (Casas and Contesse 2006: 12).

We observe that state and health officials were therefore acting in line with the tradition of health authorities that had historically treated reproductive and sexual issues as public health concerns rather than people's or women's rights (see Ch. 4). Quoting the then director of the ISP, Casas and Contesse explain that the government, including its more progressive factions, had a utilitarian approach since its concern was to maintain the unity of the government coalition, and to not upset the Church (2006: 12-13). If that meant ignoring SRHR and women's rights, that was a price the government was clearly ready to pay. It ensured that any success could only bring a victory on the technical and political front and not to women's rights (Casas and Contesse 2006: 13).

In order to maintain its position as a public health authority, the technical defence of the government worked exclusively from technical and medical arguments, and only when faced with the dilemma of treating the unborn did they take a stand refusing the idea that an unborn can be considered a person. The defence also spent much time explaining that in order to be an abortion there must be a pregnancy, and therefore, since the EC operates at the ovulation stage it cannot be abortive (Casas and Contesse 2006: 13). They also spent much time insisting that the tribunals needed to focus more on establishing whether the government's policy violated any superior law rather than entering moral and philosophical debates on the beginning of life, which is outside the judges' competence (Casas and Contesse 2006: 14).

The presentation and defence of women's rights and people's sexual and reproductive rights were left to civil society organisations that argued from this position and defended the right to physical and mental health of women, as well as their access to scientific advances.<sup>211</sup> While the conservative lobby insisted on talking about the right to life and the beginning of life, for the socialist party respondents this judicial action went against modernity and was an attack on freedom of conscience, which is guaranteed by the Constitution (Casas and Contesse 2006: 15).

The case was eventually dismissed by the judges after they resolved that no social organisation could claim the right to speak and claim in the name of all unborn, and this was based on the understanding that the constitutional appeal (*recurso de protección*) did not have a general or popular character attached to it, but rather an individual one. Through this decision the court confirmed the legality of the commercialisation of Postinal (Casas and Contesse 2006: 16).

### **The second appeal**

In May 2001, however, the Court of Appeal refused to ratify the petitioner's appeal stating that the "recurso de protección" requires the existence of a "specific person or entity" as petitioner, and therefore the different groups appealing on behalf of the unborn, their parents, and the possible women victims of EC, did not qualify as petitioners (Corte de Apelaciones de Santiago 1 2001).

On 30 August, the petitioners decided to appeal to the Supreme Court, which surprisingly decided to accept their petition granting them procedural legitimacy, and ruled in their favour, producing an unexpected outcome. This could be explained by the

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<sup>211</sup> *Ibid.* and *op. cit.* 64.

fact that in Chilean law, the doctrine of *stare decisis* – or binding precedent – does not apply. Previous rulings are only a “reference” body of jurisprudence to provide a new case with a framework, but in no case may they determine the outcome of a new case (Bascuñan 2004: 44).

The petitioners’ presentation was the same as in the previous judicial stages, and still had as its main goal to revoke the ISP’s authorisation for commercialisation of the drug Postinal, granted in March 2001. But surprisingly, the Supreme Court’s justification in accepting the case went beyond the effect of the drugs to actually enter the debate regarding the rights of the unborn and the real effects of the drug Levonorgestrel on the uterus walls, possibly affecting or not the implantation of the egg. The court argued that “the unborn – no matter the stage of its pre-natal development – has a right to life, meaning, it had the right to be born, since the constitutional norm did not make any distinctions”, and therefore “preventing the implantation of a fertilised egg was in the light of all constitutional and legal norms and conventions a synonym of abortion which is penalised as a crime” (IIHD 2008: 51).

This shows a clear bias and dismissal by the judges of the defence’s scientific arguments and their insistence on the necessity to first establish that abortion is an interruption of pregnancy, which does not start until the egg is implanted in the wall of the uterus. It also ignores scientific evidence presented regarding the lack of effectiveness of EC once the implantation of the egg has started, and the absence therefore of any risks for pregnancy (IIHD 2008: 50).

It could be argued that the judges’ ruling reflected a way of interpreting the law that followed a very conservative notion of life and one extremely close to the Catholic credo. For Bascuñan (2004), purely from a legal point of view within Chilean law, the

foundations of the court's ruling on the eligibility of the petitioners to appear in court (which had previously been refused), the extension of the "*recurso de protección*" to a collective action (also previously denied), as well as the interpretation of the right to life being extended to a "right to life of the unborn irrespective of its gestational stage", are all highly questionable.

Bascuñan criticises many details of the court's lack of precision in its final ruling including how in the same sentence the court recognises a right of the foetus as a person while also pointing out that the unborn acquires all its attributes and rights as a person at birth (2004: 48).

Everything seems to indicate that the Supreme Court's handling of the appeal rested on dogmatic and conservative views, as well as questionable legal procedures. By using a definition of life as starting at the moment of fertilisation or "conception", while ignoring scientific evidence arguing the opposite, the court established that the alleged effects of a drug after conception made it abortive (Casas and Contesse 2006: 17-18).

The court's ruling even went as far as to pronounce a judgement on scientific matters, arguing that possible variations in the uterus' wall lining due to the effects of the drug also interrupted the development of a life with "a unique genetic profile", giving it yet again a status of person (Casas and Contesse 2006: 18-19). To support its claim of the defence of life from conception, the Supreme Court referred to the San José Pact using international law, albeit this legal instrument does not provide the backup for the argument in the way the court was presenting it, nor did it establish an equivalence between the right to life of a person and that of the unborn (Bascuñán 2004: 73-74).

What most surprised the public and actors of the judicial battle was that, before the Supreme Court made its ruling public, the government unexpectedly passed a second authorisation by the ISP for a new EC drug called Postinor-2, made by the pharmaceutical company Grünenthal. This short-circuited the court's ruling and annulled any policy and legal repercussions. For Lawyer R, "it was clear that someone had warned the government of the outcome of the appeal to the Supreme Court",<sup>212</sup> and since the ruling only applied to the first drug that had been authorised by the ISP – Postinal – the government was able to distribute the new drug without any problem.

### **EC part II (2002-2005)**

By approving a second drug produced by a different pharmaceutical company despite the ruling of the Supreme Court, not only had the government cleverly avoided any major impact on its policy, it had also managed to neutralise the judicial victory of the anti-EC lobby.

This is why immediately after the ruling of 2001, the petitioners tried to ask for it to be expanded to include the newly approved EC drug, Postinor-2. They considered that this new drug was identical to the first one, both in its components and effects. The Supreme Court, however, referred the case back to the Court of Appeal. The same court that had originally rejected the anti-EC petition decided that the new appeal could not be accepted, based on the previous judicial rulings and that the effects of the Supreme Court's ruling in 2001 could not be extended to challenge the authorisation for the distribution of Postinor-2 (Casas and Contesse 2006: 22). This decision was also appealed by the petitioners in front of the Supreme Court that had ruled in their favour

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<sup>212</sup> *Op. cit.* 67.

on Postinal, but this time the Supreme Court confirmed the decision of the Court of Appeals and did not extend its sentence to Postinor-2 (Casas and Contesse 2006: 22).

In January 2002, two new legal actions were initiated by the anti-EC lobby, this time involving the Comptroller General (*Contraloría General de la República*),<sup>213</sup> the body in charge of auditing and monitoring the legal aspects of all actions by the civil service. The petitioners brought a case to the Contraloría against the ISP for bad practice in its authorisation of a second brand of EC right before the Supreme Court's ruling. The second action – this time based on a consumer's rights perspective – intended to target a number of pharmacies in one municipality (borough) of Santiago which were selling Postinor-2. Nevertheless, since Chilean consumer law “has a clause against the misuse of this type of action”<sup>214</sup> – which establishes that local police courts are accountable and responsible for dealing with this type of issue – the pro-life petitioners quickly abandoned their legal action. They realised that this could open multiple cases in different municipalities around the country for which they did not have the legal capacity to respond to (Casas and Contesse 2006: 24).

The Contraloría, however, had to rule on the first case, since it directly supervises the ISP, but found the ISP had all the authorisations and power to extend licences based on technical decisions. As for the second license extended to Postinor-2, they saw no apparent irregular conduct by the ISP allowing them to “sustain that the ISP's behaviour was against the Law” (Casas and Contesse 2006: 24).

At the end of 2002, the youth organisation AGES, which had been involved in the case against Postinal, was led once again by Jara and Romero from ULA, seeking to start

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<sup>213</sup> See <http://www.contraloria.cl>.

<sup>214</sup> *Op. cit.* 110.

new legal action that would allow the involvement of more actors than previously through a petition of *nulidad de derecho público*. The case was based on the outcomes of the 2001 Supreme Court's ruling, and it was filed on the grounds of the unconstitutional and illegal actions of the ISP in the approval of Postinor-2 (Casas and Contesse 2006: 26).

This time the participation of civil society organisations, in particular women's organisations, was not straightforward. Casas explained that she had to insist many times in front of the judge to accept the eligibility of these groups but the judge kept refusing "without any reason". According to Casas, Romero was arguing that since "they had no chance" of winning, women's groups could not be included, and was pretending not to know women had been previously involved in order to avoid collective actions.<sup>215</sup> For Casas, this showed "how easy it was to manipulate a court".<sup>216</sup>

The new case emphasised the way in which the ISP abused its functions and power by approving Postinor-2 but overall their arguments closely resembled those presented at the case of Postinal.<sup>217</sup> The government's defence in the first instance focused on trying to question whether AGES could really be representing the women and people they claimed to be representing. It went on to present similar technical and scientific arguments to those used during the first series of legal actions (Casas and Contesse 2006: 24), arguing that EC did not violate any rights granted by the Constitution.

During this legal action the lack of understanding of the potential gendered impact of the issue at stake by government lawyers and the gendered-blind litigation brought

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<sup>215</sup> *Ibid.*

<sup>216</sup> *Ibid.*

<sup>217</sup> *Ibid.*

forward was patent. For instance, the ISP maintained that life started at conception until birth, contradicting the previous positions held by the government as well as the Chilean civil code (Casas and Contesse 2006: 29). Casas highlighted that the relation between SRHR advocates and the government's lawyers over the different judicial battles was not always smooth. The prominent lawyers hired by the government were not specialists in SRHR and often made mistakes in the arguments used by not taking in consideration the suggestions put forward by civil society actors and SRHR organisations.<sup>218</sup>

The incorporation and participation of civil society, through the organisations and individuals who were able to be part of the process as authorised by the court, was therefore difficult. The absence of concern with gender issues and women's rights from the government and their defence put an important amount of responsibility on these actors' shoulders. In all of their interventions submitted in writing, they confirmed and argued that EC is not abortive and is safe.<sup>219</sup> They highlighted the right to choose for women, coming from a strong sexual and reproductive rights legal foundation, and that EC was part of the Norms and, since this was a technical matter, the ISP was suited to decide on the authorisation for the commercialisation of Postinor-2 (Casas and Contesse 2006: 24).

Despite the obvious procedural barriers to their contribution in the litigation process, these individuals and NGOs found the space to argue from a women's rights perspective, referring to the right to choose, the right to health, the right to freedom of conscience and to access scientific development; they also referred to the international frameworks supporting those rights. SRHR advocates, in particular biomedical NGOs

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<sup>218</sup> *Ibid.*

<sup>219</sup> *Ibid.*

and researchers, also emphasised the lack of scientific evidence regarding the effects of EC on the uterus lining, and therefore insisted that it could not be affirmed that EC was abortive (Casas and Contesse 2006: 30).

The ruling in this case came out in June 2004, two months after the announcement by the Minister of SERNAM that the government would distribute the pill free of charge in primary care centres at municipal level for victims of sexual violence.<sup>220</sup> Casas explained that this was “a strong shock [sic] up for the relationship between MINSAL and SERNAM and after that the EC case speeded up”.<sup>221</sup>

The court ruled against the ISP and the distribution of Postinor-2, insisting on the abortive effect of EC. Once again the role of the judges and their beliefs was at the centre of the debate, despite the fact that it is generally agreed that courts are not to rule on scientific matters. The female judge who delivered the ruling pointed to the lack of scientific agreement on the effects of EC in the lining of the uterus as a way of supporting her decision. By doing so, she openly extended her legal knowledge and expertise to scientific matters.

Lidia Casas explained that the whole legal process with this judge had been marked by irregularities and arbitrary decisions regarding the participation of the parties, but also deadlines for submission of support materials and experts’ testimonies.<sup>222</sup> She declared:

We had told the ISP lawyers something strange was happening and from then on neither they nor we had access to the case file [...] we never knew what was happening [...] she had a peculiar way to set the deadlines, and so the ISP missed

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<sup>220</sup> This was part of the announcement on the publication and dissemination of the new guidelines for the care and attention to victims of violence (MINSAL, 2004).

<sup>221</sup> *Op. cit.* 110.

<sup>222</sup> *Ibid.*

the opportunity to request the experts' reports. [...] She named the experts and she pronounced sentence before the experts submitted their reports. Apparently she had spoken to some of the experts, something that is unusual. The reports were only available after the ruling, and the most interesting thing is that out of five only one report said EC was abortive. All the others say they cannot demonstrate what the petitioners are arguing...<sup>223</sup>

Additional irregularities happened after the case was closed. The judge “who at this point had no legal authority to continue to decide anything” accepted a petition “by the lawyer from ULA” asking her “to send an order of requisition of all the EC products available in the National Health Systems [...]because the government had already bought the drugs for the victims of sexual violence”.<sup>224</sup> Casas showed much frustration with the lack of transparency and amount of irregularities civil society and the government faced. Although she was not able to prove that the judge was under pressure, this seems to be a plausible explanation to such erratic behaviour by a judge, together with possible close connections with conservative groups.<sup>225</sup>

These events coincided with the process to publish the new guidelines for the care of victims of sexual violence earlier that year. It was SERNAM's Minister Pérez who announced the decision to launch the guidelines in April 2004 during a public event. According to my interviewees, this was because Pérez was committed to the work on EC and after that MINSAL “felt under pressure and published the norms”.<sup>226</sup> This of course created significant tension since Minister García had been delaying the approval of the Norms, and conditioning their publication to the removal of EC from the

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<sup>223</sup> *Ibid.*

<sup>224</sup> *Ibid.*

<sup>225</sup> *Ibid.*

<sup>226</sup> *Op. cit.* 64.

document. This shows how the confrontation between progressive and conservative forces within the government coalition had become tangible.

In May 2004, Fundación21, a thinktank close to the President's party, published a poll showing that 82% of respondents said they supported the government's decision to distribute EC at the municipal and primary health care level. Another 86% of respondents said they would recommend EC to a female relative in the case of rape and most respondents thought the government's main argument justifying their decision to distribute EC in terms of public health was correct (Fundación Chile 21 2004). Public opinion was therefore behind the government on this issue. But the legal challenges in court and the political disputes from within the Concertación by the PDC reflected the formal and informal power of the conservative elite and the Catholic Church. It showed concerted action on both fronts by political and civil society actors holding conservative views. It also showed that self-censorship on these issues by the government was the result of political calculus as a strategy for survival for Concertación and a general lack of concern with the gendered impact of their decisions.

After the ruling against the government, the case was eventually brought to the Court of Appeal by the ISP and the authorities to reverse the previous judgement. NGOs and government officials feared it would jeopardise the government's wider policy on reproductive health.<sup>227</sup> Thus, for the litigation the government hired prominent lawyers including Davor Harasic.<sup>228</sup> Casas explained that this is when the relationship between women's groups and biomedical organisations started deteriorating since the appeal had

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<sup>227</sup> *Op. cit.* 110.

<sup>228</sup> Davor Harasic, a procedural law expert, is also well known for working with the Chilean chapter of Transparency International, and for leading the anti-corruption commission founded by Bachelet in 2006. He was also the lawyer of the litigation at the Constitutional Tribunal.

“a limited number of days to be accepted”, and the lawyers of ICMER and APROFA, including Casas, had to work intensely “to prepare the appeal”<sup>229</sup>:

... there was a breakdown with the other [women’s organisations] because we were fully secluded trying to get the appeal ready.[...]while we worked we watched the news and everyone was out there speaking of what they were doing [...] you heard a female lawyer that you had never seen saying “we are appealing this case”, and we were thinking that she did not even know the case!<sup>230</sup>

As explained by Casas she sustained “a long conversation with Díaz because she felt exhausted” and had the impression that whenever “there was an opportunity to be on TV then everyone was supportive but when we had to do the work we were very few”.<sup>231</sup>

In December 2004, as the Lagos administration was entering its last year in power and Bachelet was about to become the Concertación’s candidate for the presidential race, the Court of Appeal finally reversed the previous ruling, confirming the opinions given in 2001 regarding the ineligibility of the pro-life petitioners to bring the cases to court. Most importantly, the court declared that it was not up to courts and tribunals to resolve philosophical, religious or moral disputes and rather that this should be left to society to deal with (Casas and Contesse 2006: 33). For Lidia Casas, this last legal opinion is extremely important since this distinction between the role of judges and lawyers on scientific matters would be constantly overrun in judicial actions that followed,<sup>232</sup> in particular with the Constitutional Tribunal under Bachelet.

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<sup>229</sup> *Op. cit.* 110.

<sup>230</sup> *Ibid.*

<sup>231</sup> *Ibid.*

<sup>232</sup> *Ibid.*

This last decision clearly favoured the government but it did not take long for the pro-life lobby to appeal to the Supreme Court, through a new “*recurso de casación*”. After the 2001 ruling this was the second time the Supreme Court was asked to decide on the future of the government’s reproductive health policy. The conservative lobby’s preparation of this new judicial challenge took place after Infante was sacked and the electoral race had started.

The Supreme Court ruled in November 2005, as Lagos was leaving office and elections were to be held. The court ruled that the petitioners had not proved their claim, that EC was abortive and therefore ruled in favour of the government. This was a crucial element of the legal ruling, because the principle that those bringing a case to court should prove their accusations was not respected in the subsequent court battles.

In its ruling the Supreme Court also referred to the way in which the issue had been handled by the lower courts, pointing out that at that stage it had been resolved using general principles, which did not apply through a “*recurso de casación*” like the one the court was ruling on (Casas and Contesse 2006: 36). Based on all this, it denied the illegality and constitutional violation of EC and gave a major victory to the government. Lawyer R explained that the anti-EC lobby was very disappointed with the sentence, but mostly because “this happened with a majority of Catholic judges!”<sup>233</sup>

### **Pharmaceutical companies under pressure**

In January 2006, and in direct response to the Supreme Court’s favourable verdict on EC and its commercialisation, the same students’ group that brought the first case to court in 2001, AGES, decided to start a new judicial offensive, this time against the

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<sup>233</sup> *Op. cit.* 67.

pharmaceutical companies producing EC: Grünenthal, maker of Postinor-2; and Recalcine, maker of TACE. AGES was once again advised by Alejandro Romero from ULA, who had substantial experience dealing with corporate litigations (Morales 2006).

The case was finally only brought against Grünenthal as the government was distributing their product Postinor-2, and not TACE which had been legalised subsequently (Morales 2006). The main argument to challenge the distribution of Postinor-2 then was the possible effect of levonorgestrel on the implantation of the fertilised egg in a woman's uterus, which was interpreted as having an abortive effect. This was based on information obtained from the US Food and Drugs Administration via the bioethics centre of the PUC.<sup>234</sup> The accusation was also based on the information provided by Grünenthal's own informational leaflet for users of Postinor-2, where the company acknowledged a possible risk for the "implantation",<sup>235</sup> an argument used in 2004 in the sentence in favour of the conservative lobby.

The new offensive, surprisingly, proved highly effective with Grünenthal. Despite holding the legal authorisation to distribute Postinor-2 from the ISP, the pharmaceutical company decided to renounce this authorisation because the new owner of the company felt that other drug companies would back off from its distribution due to the fear of judicial actions (Casas and Contesse 2006).

Lawyer R explained he and his fellow anti-EC campaigners were particularly proud of the tactics and judicial strategy to threaten pharmaceutical companies. In fact he was aware that by introducing his petition during the early days of January – the beginning of the summer vacation time in Chile and as the presidential election was taking place –

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<sup>234</sup> *Op. cit.* 51.

<sup>235</sup> Lawyer R, *op. cit.* 67.

the firm would be taken by surprise “and the lawyers made a mistake”.<sup>236</sup> Grünenthal’s lawyers did not react in time and allegedly left for their vacation and only on February 15 did they call announcing they would withdraw Postinor-2 from the market and renounce its distribution license. For Lawyer R the lawyers of Grünenthal “were given enough time to think about it” and “translate” the necessary documents, “but they did not take it seriously” and “a few lost their jobs!”<sup>237</sup>

According to Lawyer R, the real reason behind Grünenthal’s decision to withdraw from selling the EC pill, and to put an end to its contract with a Hungarian company in charge of producing Postinor-2, was that Grünenthal wanted “to avoid an economic disaster”<sup>238</sup> after so many years of legal action against the drug. Grünenthal “feared that this product could create problems for its other products”, especially because “[we] threatened [Grünenthal] with a possible boycott of its other drugs by doctors”.<sup>239</sup> Pro-life doctors belonging to well-known medical faculties and institutions had in fact been supporting the argument regarding a “doubt” on the effect of the pill through the media as well (ACI 2004).

This point of view was shared by Casas, who pointed out that Grünenthal this time would have had to fight alone since the legal action was only directed at them and not the government.<sup>240</sup> It was then clear that the pressure on the pharmaceutical companies was also part of the conservative campaigning around EC. According to Lawyer R, after

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<sup>236</sup> *Ibid.*

<sup>237</sup> *Ibid.*

<sup>238</sup> *Ibid.*

<sup>239</sup> *Ibid.*

<sup>240</sup> *Op. cit.* 110.

this episode no other laboratory had tried to produce the drug in Chile, which he considered a success.<sup>241</sup>

Yet Grunenthal's decision to stop producing Postinor-2 had no major impact since at the time the government had already approved TACE.<sup>242</sup> Moreover, in 2005, the government had bought 30,000 doses of EC for the planned massive distribution needed according to the government's fertility guidelines, producing a large stock in MINSAL's depot (Casas Becerra 2008: 5). Grünenthal's withdrawal on the other hand created a natural monopoly, increasing the price of the drug, which almost reached US\$18, a high price for the local consumer (Casas Becerra 2008: 2005).

For Lidia Casas, during this episode between 2005 and the beginning of 2006, there was constant pressure from the pro-life lobby on private companies against the commercialisation of EC.<sup>243</sup> This is a very important aspect of the influence these conservative groups have in Chile since they are closely linked to the economic and social elite. The pressure exerted by the conservative lobby on pharmaceutical companies and pharmacies worsened the already existing difficulty in accessing EC in pharmacies.

The pressure increased in March 2005 when the government included EC as part of the "*Formulario Nacional*", the national registry listing the drugs that pharmacies across the country must keep in stock by law (Casas Becerra 2008: 6). With this measure the government displayed its two-pronged strategy to make EC available: first, ensuring that it would be available in pharmacies through the "*Formulario*"; and secondly, to

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<sup>241</sup> *Op. cit.* 67.

<sup>242</sup> Made by Gynopharm.

<sup>243</sup> *Op. cit.* 110.

make it available free of charge in the national health system via the Norms. The conservative lobby thus decided to fight back on both fronts.

In January 2007, the process at the Constitutional Tribunal had already started, and Minister Barría declared there had unfortunately been “social pressure by some opinion powers which has resulted in that [EC] has almost disappeared from pharmacies”, highlighting in this way the seriousness of the issue (La Nación 2007a).

In order to unlock the situation, that same month – and just a few days before Bachelet announced her decision to pass a decree to support the Norms (see Ch. 8) – APROFA applied for a license to import “Optinor”, its own brand of EC (La Nación 2007b). This was a deliberate action planned to counteract the conservative lobby as it could not pressurise an NGO dedicated to the defence of SRHR and with a long history distributing and providing contraception in the country in the same way it had with private companies. APROFA, however, was only granted a provisional permit to import 50,000 doses of EC from the Indian pharmaceutical company ICON, providing a more affordable option of EC than pharmacies at 5,000 CLP (approx. US\$10) (Colegio Médico 2007).

The direct threats of legal action against the pharmaceuticals became evident when the pharmaceutical company ICON received a letter signed by the consumer’s association ACONOR, mentioning the abortive effect of the pill and explaining how this matter had already been judicially sentenced in Chile, and that the company was therefore exposing itself to be brought to court if they insisted on selling their product in Chile. In the letter the conservative groups behind the legal threat referred to the Supreme Court’s ruling of 2001, which ruled against the government, but deliberately ignored the sentence of 2005 that reverted this thereby allowing the distribution of EC. Moreover, they explicitly

used Grünenthal's withdrawal from the market as an example of what could happen to them (Casas 2008: 6-7).

ICON alerted APROFA, which informed the other SRHR advocates and organisations. They realised ACONOR was an ad-hoc entity created to start a campaign of dissuasion against the corporations and its legal address was the same as one of the petitioner's against Grünenthal, and AGES' founder Juan Jara Opazo (Casas 2008: 6).

### **The campaign against pharmacies**

The aggressive "threats" campaign of the pro-life groups did not limit itself to the pharmaceutical companies. As explained by Barriá:

... pressure groups forced its [EC] removal from pharmacies, pharmaceutical companies stopped selling it, we had to go abroad to import the pill to make sure it was available to women. I truly think this was a small showcase of the level ferocity ultra-conservative groups can reach in our country.<sup>244</sup>

Using the market, a new campaign was directed against the distributors of EC. As a reaction to the government's decision to make EC a mandatory drug to be kept in stock in all pharmacies, ACONOR targeted the main pharmacy chains of Chile which control 90% of the market (Casas 2008: 8). The pro-life campaign once again operated via letters showing a clear attempt at threatening businesses in a legal as well as a moral manner, stating:

The purpose of this letter is to warn you ahead of time, that we are gathering the evidence to start a suit [...] against all pharmacy chains that will take part in such flagrant infraction to consumers' rights [...] in order to avoid incurring the costs of starting a suit for compensation for false advertising and costly public campaigns to warn consumers [...] we request that you abstain from continuing to be a part of this illegal act. (ACONOR 2007)

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<sup>244</sup> *Op. cit.* 76.

Between 2001 and 2006, pharmacies had sold EC, but in 2007 there was an important change in behaviour that confirmed the power of the direct campaign pro-life groups were sustaining. The government realised there was a problem buying EC in pharmacies when women who generally used private health services started going to public health services to obtain EC (Casas 2008: 8). There was also the fact that once the government reacted to this reality and decided to become the main supplier of EC in the country – buying more doses of the Colombian brand, Postday, through MINSAL's National Supply Centre (CENABAST) – pharmacies still refused to buy EC for their stocks (Casas 2008: 8).

Lawyer R openly spoke about the letters, and emphasised that he considered them key in the lobby to dissuade pharmacies and pharmaceutical companies that the government was thinking of attracting to work in Chile, threatening them with the risk of being brought to court or boycott.<sup>245</sup> This argument is very effective for companies trying to make profits and who perceive law suits as a financial loss to their business. The letter's episode shows how a tight network of highly-skilled people were working on different fronts through legal actions trying to block the governments' initiative and also efforts from pro-choice supporters and organisations such as APROFA to make EC widely available for women.

At the end of 2007, as the government was in the middle of new judiciary actions started by the same pro-life groups at the Constitutional Tribunal, MINSAL and the government decided to put an end to the commercial boycott of EC using the most powerful tool they had – law enforcement. MINSAL imposed harsh fines of 33 million CLP (US\$66,000) on pharmacies that did not comply with the law that made it

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<sup>245</sup> *Op. cit.* 67.

mandatory for them to have EC in stock (Morales 2007). In case of further disobedience they were warned that the fines would double, or they would be brought to court. Pharmacy owners replied invoking their right to “conscientious objection”, opening a new battle field between the Concertación and the right-wing opposition, but most importantly also between the most conservative elements of Concertación, namely the DC and the more progressive left-wing members supporting Bachelet.

Patricio Walker (PDC), President of the Deputies Chamber at the time, called to respect the conscience of everyone (La Segunda 2007c), while the government’s speaker, Ricardo Lagos Weber, emphasised the pharmacies’ duty to comply with the law. It was symbolic that Walker would lead this battle since, in an interview with *El Mercurio* earlier that same year, he had declared that 2006 had probably been the “worst year of Concertación” (Montalva 2007), accusing many left-wing party members to have provoked the PDC with sensitive issues including euthanasia, EC and a bill on therapeutic abortion introduced by PS and PPD deputies, which Walker personally censored, declaring the mere act of debating it as unconstitutional (Radio Cooperativa 2006a).

The support to pharmacies also came from the conservative thinktank *Libertad y Desarrollo* – close to UDI – who declared that the government’s fines set “a negative precedent related to any economic activity more or less related to health issues” and added that businesses could only be “forced by laws and not regulations” (La Segunda 2007d). For *Libertad y Desarrollo*, by fining the three main pharmacy chains, the state was “violating the freedom of action and conscience” since it had no right to “impose on pharmacies to sell any product” (La Segunda 2007d).

The Catholic Church also reacted through Cardinal Alejandro Goic who openly condemned the government's enforcement of the fines on pharmacies. Speaking to the media he used a similar language as the conservative politicians and thinktanks while declaring that "no one can force me by law to act against my own conscience, and if I have any doubt that this pill may be abortive I cannot contribute to wrong-doing" (La Segunda 2007a). To which Bachelet herself had to reply publicly that her role as President was to provide all the conditions to "guarantee citizens' individual freedoms" and that "in democracy no one could force anyone to do anything, and therefore no one was violating someone else's conscience" (La Segunda 2007a).

All conservative actors in this dispute followed the argument of "conscientious objection" in a concerted manner. According to Casas and Dides, the use of "normative language with such power of moral persuasion regarding human rights" – and the invocation of conscientious objection "in order to not carry out one's professional duties" – reflects the tension emanating from the appearance of new technologies and scientific discoveries, in particular regarding reproduction, which come to challenge conservative and religious views on these issues (2007: 205).

Casas and Dides highlight the implications of the use of conscientious objection for policy implementation and service delivery, explaining that what is important in any case is that in what could be perceived as a zero sum game, user's and citizens' rights must be protected (2007: 205). The authors explain that the objection involves "the regulation of the exemption to fulfil a fundamental legal obligation, normally derived from labour relations or civil service (work contract or civil servant status); it is directed to public institutions and to individuals and is always related to a personal obligation" (2007: 205).

However, in the case of the pharmacies, the objection was raised by owners of private businesses, based on personal religious views despite its repercussions for citizen's rights in practice. In Chile the objection took the form of civil disobedience from the private sector, moving a whole discussion that would normally take place within the private sphere of individuals or within the state apparatus into the wider public domain and with the support of the Church. The disobedience was sustained on entrepreneurial freedom, and the private religious perspective of company's owners. For a brief period the case of the pharmacies brought a whole new understanding to the debates around secularism and private responsibilities in Chile, challenging the legal ground of public policies launched by the state when applied to the private sector.

The government's strategy eventually paid off. In the end only one of the three companies fined persisted in their position (La Segunda 2007e). The two others requested a meeting with Soledad Barría, the Minister of Health, to solve the matter. During that meeting it was agreed that both companies would now comply with the legal obligations they had, and surprisingly when asked why they had not complied until then, no moral or religious reference was made.<sup>246</sup> The answers provided instead pointed at problems in the supply chain of the companies producing EC (La Segunda 2007e).

This change in attitude indicates a fear of negative publicity and the possible economic costs for the companies. The conservative newspaper *El Mercurio* qualified the government's strategy as a successful "checkmate" whereby the companies only had two options in the short-term – selling the pill or facing bankruptcy as a product of the

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<sup>246</sup> The owner of one of the companies is a well-known entrepreneur belonging to the Opus Dei.

multiple fines (El Mercurio 2007).<sup>247</sup> In any case, it was a victory for Bachelet and Barría, and the progressive sectors of Concertación, as this deflated the tension that had been building up between the private sector and the State, reminding the wealthy conservative elite in the private sector that the State would use all its power to enforce the law.

## **Conclusion**

This chapter has reviewed the political and legal battles that affected the distribution of EC during the Lagos administration. It has been shown that from its beginning EC was an initiative by SRHR advocates working in biomedical organisations, some of them historically renowned such as APROFA, and some new such as ICIMER. The influence of international discourses on SRHR and women's rights was at the heart of these policy initiatives, yet in the political and judicial processes these concerns took a secondary position as the Lagos government defended its actions in a technical and legalistic manner rather than using these instances to promote women's rights.

The conservative lobby leading the anti-EC offensive on the other hand had a clear ideological agenda in which they wanted to maintain the status quo on the understanding of the right to life included in the 1980 Constitution and the illegal status of abortion. In the discursive battle surrounding EC, the conservative lobby also openly questioned the existing scientific evidence following a strategy to allow judges to consider the lack of certainty as a way to dismiss the scientific evidence presented to them. The judges during this process showed that their personal beliefs played an important role in the way they ruled and considered the evidence presented to them. The extension of their legal knowledge to making rulings on scientific matters opened the

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<sup>247</sup> The fines were quickly multiplied by the number of branches of each company violating the law.

space for a new informal way for conservative actors in the judicial system to oppose any advances on the reproductive rights front.

Biomedical groups and feminist organisations, although they knew each other well and worked together in the first stage, eventually parted in a tense manner due to perceptions of lack of commitment by biomedical advocates. The judicialisation of an issue had clear effects on the participation of feminist advocates since they did not have the technical knowledge of doctors and lawyers. There was therefore a direct impact on the alliance building among civil society actors on reproductive rights issues. There were also tensions between government officials and biomedical groups as the state through the government seemed to always defend EC from its own interests and state rationality, rather than linking the issue to women's rights and gender equality.

Throughout the four years in which EC was challenged legally, the political debates surrounding it were constantly linked to the politics of consensus among politicians. The role of the PDC within Concertación proved to be ambivalent showing the importance of this informal rule of "consensus". The rule was particularly applied in the political battle that took place against the publication of the Fertility Norms, and the sacking of the Under-Secretary of Health for mentioning them. The weight of electoral politics showed the limited commitment by the President with the issue. He favoured maintaining a good relationship with the PDC over the defence of the Fertility Norms. The role of the judges during this process was also crucial. There were specific episodes marked by irregularities, which were used by the anti-SRHR lobby to advance its own interests. Meanwhile biomedical groups and feminists within their organisations carried out the legal and scientific work to support the government's registry for EC.

Although the drug was challenged through its distribution and sale via consumers' organisations, we know that these were the same actors behind the legal and political challenges. The use of the market, however, was something extremely effective since we know the conservative forces in Chile also hold much economic power in Chile. Yet despite their sophisticated campaign and the support of the Church through the press for the case of "conscientious objection", we observe that the Bachelet administration was prepared to face this type of challenge and showed a strong political will to stop this boycott to EC by directly targeting the owners of pharmacies with expensive fines and a communicational campaign through the press. This political commitment by Bachelet herself became patent with the challenge at the Constitutional Tribunal that is discussed in the following two chapters.

## **CHAPTER 8: Emergency contraception under Michelle Bachelet – the President, women and the Constitutional Tribunal**

This chapter analyses the political and judicial processes that surrounded the distribution of EC in Chile under the Bachelet administration as it reached the Constitutional Tribunal. The chapter shows how the strength and tenacity of the conservative and anti-EC lobby only increased with the arrival of Bachelet.

Focusing on the policy and judicial processes and institutions involved, as well as on the actors and their advocacy strategy and tactics, the chapter argues that the EC judicial processes were connected by the conservative opposition's use of EC and contraception as a way to indirectly oppose any changes to the status of abortion in Chile. This responds to the historical opposition to family planning by conservative groups and the Church since the dictatorship years (see Ch. 4). By framing EC as abortive, the conservative lobby tried to shift the debate to morality and initiate a discursive battle to maintain the status quo on reproductive rights linked to the 1980 Constitution, favoured by the powerful impact of the “consensus” rule applied to politics since 1989. This was visible in the sophisticated legal and political strategy that brought EC to the Constitutional Tribunal.

Using the literature on judicialisation, the analysis focuses on the power of the Constitutional Tribunal as a post-authoritarian institutional legacy, and how it is a reflection of the weaknesses of Chile's democratic institutions and political system since the return to democracy. In doing so it explores the role played by the court and its judges, and the impact of their beliefs within the TC as a post-authoritarian institution. According to Barros, the TC is the institution with the highest influence in the Chilean political system because it positions itself as a referee between the three state powers in

disputes over constitutional matters (2002: 234). This has led over the last decades to a strong judicialisation of politics in Chile, where the courts, including the TC have tended to rule in a very conservative manner maintaining the status quo (Couso and Hilbink 2009: 1). Although in 2008 the TC played a key role “determining a number of hot-button policy issues” (Couso and Hilbink 2009: 2), it would maintain its conservative mandate when ruling on the distribution of EC. Therefore the gendered nature of the transition to democracy and the origins of the TC in the 1980 Constitution are discussed to explain the gendered impact of the judicialisation.

Recently it has been said that feminists had little to do with Bachelet’s arrival to power and that their high level of internal division affected their political impact (Ríos Tobar 2009: 22-23). This research confirms that feminist groups as political actors played a limited role during the legal process to defend the EC policy while feminist individuals in key power positions, including Bachelet, provided a crucial support to the issue. The power of feminists as a movement at the time of the research was clearly diminished. This and the fact that the legal process gave priority to actors belonging to “elite networks” (Htun 2003) possessing technical skills such as scientific and legal knowledge explains the lack of impact and visibility of feminists during the process.

The chapter therefore highlights how the work for the legal defence of EC was led by the government supported by the biomedical NGOs and thinktanks that historically have been involved in SRHR and were given a role as technical advisers. Here, feminists within NGOs, research centres and government played key roles through their professional work to advance the EC agenda.

Finally, the evidence discussed in this chapter indicates that what made the most significant difference in advancing the EC policy was the concerted strategy set by

Bachelet and her government ministers. Bachelet's personal commitment to the issue and her determination to intervene at crucial moments and push it through while constantly providing her ministers with support and access was a defining factor for the success of the policy.

### **Bachelet comes to power: Alarm bells for the conservative lobby**

Bachelet became president after winning the second round of the elections on 16 January 2006. The anxiety and concern of conservative factions of Chilean society did not take long to manifest. Within her own coalition, the PDC made their expectations very clear before and after supporting her.

On the day before her election, Adolfo Zaldívar, president of the PDC, gave an interview to the conservative newspaper *El Mercurio*. He highlighted the PDC's confidence that Bachelet would win and the importance of this as a historic moment. Yet, regarding the values' agenda he declared:

... the DC will support Michelle Bachelet through our values and principles... We will make our voice heard on these issues, we are in politics because of our values. She [Bachelet] has been clear: no to abortion, yes to life, from conception to death. Regarding EC we can discuss if it is abortive or not. She has been clear that marriage is the union of a man and a woman [...] Michelle has a secularist view of life and is very tolerant. In practice, with her own life experience, with her gestures and attitudes, she has shown love for her neighbour in a more Christian manner than many Christians. (Correa 2006)

In a similar tone, the day before she took office on 6 March 2006, *El Mercurio* published an interview with one of the bishops recently appointed by the Vatican (Pérez 2006). When asked whether Bachelet represented a threat to the Church he said "Mrs. Bachelet is open to dialogue" and therefore there was no reason for conflict since the country had "a Congress and things are reached through consensus" (Pérez 2006). He

added that he also admired former President Lagos because “he sustained that in the same way he opposed torture, he also opposed abortion” (Pérez 2006).

Thus from the beginning the Church voiced its concerns and sent a message to the new government via the press. The symbol of a female president was clearly a worrying novelty and the conservative lobby and the Church felt they needed to put abortion on the political agenda. More importantly, the Church seemed to imply they were direct partners of the political “consensus” rule. This is because the institution of “consensus” (see Ch. 4) also included a status quo on women’s reproductive rights as part of the prevalent conservative and Catholic gender regime in the country.

This is illustrative of the positions that would be sustained by the anti-SRHR lobby throughout Bachelet’s presidency, and that this research found during the interviews. Concern would often arise as politicians within the Bachelet government, or the more progressive parties of the Concertación, brought up issues considered as sources of tension in the political arena since 1989 – namely women’s rights and sexual and reproductive rights.

When Bachelet was elected the Concertación had been in power for 16 years and “Bachelet inherited a consensus that was starting to show wear” (Borzutzky and Weeks 2010: 12). It is not surprising then that one of the greatest challenges to Bachelet’s decision to implement the EC policy came from the Concertación’s own ranks, as the more Catholic factions of the DC openly opposed the President’s initiative. The Christian Democrats and the right-wing conservative opposition clearly stated that they considered this policy as breaking the “consensus” that had allowed them to remain a political coalition for so long. This shows that from the beginning the opposition to EC was cutting across the political spectrum and party lines.

Bachelet also faced new challenges such as a shorter presidential term which made any legal reform very difficult, and there were growing signs of discontent and social conflict in the country (Borzutzky and Weeks 2010: 13). Yet, despite the numerous criticism and open challenges to her decision, unlike Lagos Bachelet remained committed to change, and fearless of the pressure from the Church and conservative lobby. Not only did she take the decision of pushing forward the EC policy, but she also imposed a parity measure within her own government distributing the ministerial and sub-ministerial positions on a 50-50% base between men and women (Valdés 2010: 11). Her commitment to women's rights and women's reproductive health is probably better illustrated in her choice of Minister of Health, Soledad Barría, an old friend and fellow doctor, supporter of the right to abortion and passionate defender of the EC.

### **The Constitutional Tribunal**

We know from the literature on judicialisation that Chile has a “politically cautious” and “change-averse judiciary” (Huneus 2010: 119). In fact Chilean courts are known for shying away from “constitutional review”,<sup>248</sup> which interestingly was introduced under the military regime through the 1980 Constitution (Couso 2004). According to Javier Couso this was likely a survival strategy due to the historic evolution of the judiciary and its institutional learning deriving from its historic role within the check and balance order (Couso 2004). This resulted in weak legitimacy for judicial review at the beginning of the democratic transition (Couso 2004), since the TC was granted the power to “rule on whether individuals and political parties represented a threat to the institutions and functioning of democracy” (Heiss and Navia 2007: 166). Moreover the

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<sup>248</sup> For the purposes of this thesis, “constitutional review” is understood as the process through which specific courts – often constitutional courts – hold governments accountable through their power to review the actions of the legislature and the executive.

members of the Constitutional Tribunal were then partially appointed by the military who had secured their presence in democracy through the National Security Council (Heiss and Navia 2007: 167).

The Constitutional Tribunal was strongly shaped by the 1980 Constitution which was conceived as a guardian of Pinochet's conservative regime (Couso 2004). The Constitution was shaped by lawyers who "employed natural law arguments to both support and steer the political and legal transformations sought by the Junta", including for the first time in Chile's constitutional history "an explicit mention of the right to life", which confirms the way in which Catholic principles were then translated into legislation (Muñoz León 2014: 130).

The TC was included in 2005 as part of the main constitutional reforms negotiated by Lagos and Concertación with the opposition in order to remove most authoritarian enclaves inherited through the 1980 Constitution (Fuentes 2006: 21). These reforms included not only the composition of the tribunal but also its functions, which included an expanded availability for constitutional review and in particular affecting individual freedoms (Fuentes 2006: 21) also known as the "writ of non-applicability" (Couso Salas and Coddou MacManus 2010).<sup>249</sup> By introducing these changes Lagos and the Concertación were hoping to change the rules of the democratic game and the nature of its institutions.

The nature of Chile's Constitutional Tribunal is similar to that of many constitutional courts around the world which are "typically delegated 'enormous discretionary

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<sup>249</sup> The writ of inapplicability was previously a type of legal action vested in the Supreme Court (Couso Salas and Coddou MacManus 2010). During the 1990s the courts almost systematically refused to take on constitutional review cases against government action (Couso 2004).

authority' to provide a check on government power" (Stone Sweet 2000: 96 cited in Carroll and Tiede 2012: 85), often letting them determine the applicability of laws according to constitutional principles, which provides them with "quasi-legislative functions" (Carroll and Tiede 2012: 85). In fact courts may "aggressively check government authority or exercise their accountability function more selectively or deferentially" (Scribner 2010: 73). As explained by Scribner:

The TC is a quintessential agent of horizontal accountability – its purpose is to resolve constitutional conflicts regarding the limits of legislation and executive power and, until constitutional reforms in 2005, its jurisdiction was accessed exclusively by the other branches of power. (2010: 73)

Therefore a new power of the TC was to accept cases presented by citizens, leading one to expect some expansion of constitutional rights via review. These new powers together with the previously granted power for pre-emptive control of bills and decrees, granted the TC strongly controlled power in constitutional supremacy cases (Couso Salas and Coddou MacManus 2010). This should have represented a departure from the historical tendency of the courts to retreat from using its constitutional review powers and contribute more to building democracy and upholding human rights. Couso has warned, however, that the presence of a "consolidated democracy, constitutes a necessary condition for the proper introduction of judicial review" (2004: 89) confirming in this way that the judicialisation of politics might not always be positive for democracy if the right conditions are not given (Sieder et al. 2005: 2).

Recently it has been argued that the TC de facto has legislative power and that its rulings are final, so that neither Congress nor the President can reverse its decisions, presenting serious challenges to the Chilean democratic regime (Mac-clure 2011: 172). In her analysis of the doctrine of the Constitutional Tribunal through its rulings between

1990 and 2005, Scribner highlights how “the TC has shifted the balance of power in the policy-making process and augmented its influence within the political system” (2010: 71). Scribner’s analysis is centred on conflicts affecting the separation of powers within the state, also known as “law vs. decree controversies” (2010: 73). Scribner explains that “[t]hese cases concern the reach of presidential decree power and are referred to the TC by legislators (primarily by opposition parties)” and “constitutional conflicts are undeniably political as policy disputes (usually economic) are judicialized and elevated to fundamental constitutional questions about the separation of powers” (2010: 73). Moreover “law vs. decree referrals feature starkly competing constitutional interpretations of legislative authority (law making power) and executive authority (decree-making power)” (2010: 73).

Accepting a case of law vs. decree for constitutional review is therefore a political decision. After the reforms of 2005 it had to be expected that the right-wing and conservative opposition would use this form of judicial challenge with political ends more frequently, since the reforms included the elimination of another key institution of the post-authoritarian legacy – the designated senators, whose designation by the leaving military regime:

... gave the political heirs of the regime control over the senate, which forced the new democratic government (la Concertación de Partidos por la Democracia to negotiate every piece of legislation it wanted to pass with the opposition. (Couso 2011: 1534)

As Couso (2011) explains, this is why the TC showed “deference” to the other political and elected powers for so long, making it unnecessary for the opposition to seek favourable judicial adjudication to win political disputes. After 2005 then, the TC increased its political power due to its a posteriori control of the constitutionality of

legislation while many of its judges remained close to the military regime legacy and the Catholic Church (see Table 1 below). In Chile after the reforms of 2005, the TC increased its members from seven to 10.<sup>250</sup> All judges are appointed and cannot be removed during their terms. Officially the TC is not accountable to anyone. According to the Constitution the judges of the Constitutional Tribunal are appointed in the following manner: three by the President; three by the Supreme Court (from its own judges); two by the Senate; and two others by the Senate but nominated by Parliament. They are nominated for nine years. Hence out of 10, only four members are scrutinised publicly and appointed by elected bodies. The other six members remain at the discretion of the president who, albeit elected, takes a personal political decision in the appointments. The TC that reviewed the EC policy, since the case was brought to the court in 2006 and the constitutional reforms had been approved in 2005, included some members that had been appointed prior to the reforms, as shown in Table 1 below.

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<sup>250</sup> Before the 2005 reforms the composition was: three appointees by the Supreme Court; one by the President; one by the Senate; and two by the National Security Council.

**Table 1: Judges of the Constitutional Tribunal ruling on EC case**

Names	Year	Appointed by:
Enrique Navarro Beltrán	2006-2012	Supreme Court
Francisco Fernández Fredes	2006-2015	Supreme Court
Hernán Vodanovic Schnake	2006-2015	Senate
Jorge Correa Sutil	2006-2009	President (Lagos)
José Luis Cea Egaña	<b>2002-2010</b>	National Security Council
Juan Colombo Campbell	<b>2005-2010</b>	National Security Council
Marcelo Venegas Palacios	2006-2013	Senate
Mario Fernández Baeza	2006-2011	Senate
Marisol Peña Torres	2006-2009 (and 2009-2016)	Supreme Court
Raúl Bertelsen Repetto	2006-2015 (and 1997-2005)	Senate

Most judges were appointed in 2006 or ratified in their positions that year, with two of them named before 2006. Their profiles came to the attention of the public as the EC controversy became the centre of attention of the media and public opinion. In the middle of the controversy the conservative newspaper *El Mercurio* published a report with the biographies of the judges showing the strong presence of conservatives among them (El Mercurio 2006) (see Table 2 below).

**Table 2: Judges of the Constitutional Tribunal 2006-2009**

- **José Luis Cea** was Professor of Law at the Pontifical Catholic University, close to the Christian Democratic Party and was well known for being close to Catholic organisations.
- **Raúl Bertelsen** was the former Dean of the Opus Dei Universidad de Los Andes, and was closely involved in the writing of the 1980 Constitution. He was also well known for being a member of the Opus Dei and having close ties with the extreme-right party UDI.
- **Juan Colombo Campbell** was Professor of Law at Universidad the Chile and had been working at the TC since 1980 as a lawyer, and was eventually appointed by the National Security Council.
- **Jorge Correa**, former Christian Democrat and law scholar on the other hand was named by Ricardo Lagos after serving as Sub-secretary of the Interior.
- **Francisco Fernández** was a former member of the Socialist Party, which he renounced to become judge at the TC.
- **Mario Fernández**, another former Christian Democrat who renounced his militancy after serving as Minister of Defense of Ricardo Lagos, well known for his Catholic beliefs and ties within the DC.
- **Enrique Navarro** had family ties with the Supreme Court and was the sibling of a former Sub-secretary of Justice of the military regime.
- **Marisol Peña**, the only female member, was also a Law Professor at the Pontifical Catholic University with close ties to the military institutions with whom she worked closely on defense issues.
- **Marcelo Venegas** was close to the most conservative leaders of Renovación Nacional and part of the right-wing thinktank Instituto Libertad. He had also worked in the Pinochet government.
- **Hernán Vodanovic**, a former socialist senator, with long militancy in the PS, but also with close friendships with DC leaders.

Table 2 shows that in this male-dominated TC the presence of conservative values was obvious though the profile of most its members, with the exception of the few socialist sympathisers. In fact the appointment of the conservative judge Bertelsen was the result of negotiations at the end of the Lagos administration to secure the appointment of

Vodanovic, a socialist (Muñoz León 2014: 154). Yet it is in the process dealing with the constitutional accusation against Bachelet that it can be seen how this conservative influence manifested itself in the actions of the tribunal.

### **EC is back: “Caution” is the new name of the game**

In March 2006, only two weeks after Michelle Bachelet had officially assumed the presidency, Barría, the Minister of Health, announced the government’s intention to ensure the universal distribution of the EC in line with their electoral promises and government plan. The main argument used to justify the move was the need to fight the socio-economic inequity in the access to the drug. In order to explain the government’s motivation and reaffirm their stance, the Minister declared, “this is not a values’ issue. The pill is not abortive and is already being sold in pharmacies” (La Nación 2006b).

The announcement happened exactly one year after Dr Infante was sacked by Lagos after his declaration regarding the free distribution of EC in 2005 (see Ch. 7). Initially, there was a confusing reaction by the President’s cabinet who acted as if Barría’s announcement had taken them by surprise. The Minister Secretary General, Lagos Weber, called Barría to a meeting and just five hours after the first announcement they both called a press conference where she de facto retracted from the earlier announcement, saying that although the distribution of EC was in the President’s agenda as well as in her government’s programme there was no set timeframe yet to implement the policy because it was not the main priority (La Tercera 2006c).

Barría insisted that she was not retracting from the announcement, and Lagos Weber supported this position clarifying that the EC distribution policy would not be implemented in the short term since Bachelet’s government had other public health policy priorities (Radio Cooperativa 2006b). The government thus felt the need to

reaffirm its commitment to the “consensus rule” presumably to reassure the PDC, and through its speaker declared:

All the projects that we will send will come out of the government’s programme.  
But, also, we will insure that these do not affect in any way the essence of any of the political parties within Concertación. (Yañez 2006)

This episode illustrates the existing tensions within the governing coalition and the careful approach the government was taking in moving forward on the EC policy. Lagos Weber and Barría knew that the most conservative factions within the Concertación – probably the PDC under the Catholic Church’s influence – were watching and could oppose the policy. Some sectors of the media close to conservative institutions targeted public officials to hold them accountable for their commitment to the consensus in front of the public. Barría explained that as soon as she was appointed Minister “the first thing that appeared in the press was a challenge to me for being, it did not say abortionist, but supporter of abortion. I was leaving on vacation when a journalist from an important newspaper called me to ask about the abortion issue... a real harassment... wherever I went!”<sup>251</sup>

Therefore any faux pas could put a halt to the EC distribution by MINSAL, which represented a high political cost in the early weeks of the Bachelet government.<sup>252</sup> In fact in the first months of the administration the government announced a significant number of new initiatives potentially making the government more cautious in the way it handled public communications.<sup>253</sup> Bachelet’s government wanted to avoid any

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<sup>251</sup> *Op. cit.* 76.

<sup>252</sup> *Ibid.*

<sup>253</sup> Bachelet had made some announcements on the rise of pensions and the government did not want any distractions or polemic issues on the public agenda that could provide the opposition with arguments to provoke a crisis (La Tercera 2006c).

scandal that could upset the Church, which was a key ally on social policy issues high on Bachelet's agenda (La Tercera 2006c).

This cautious “step-by-step” approach with the media was a way for the President's cabinet to protect Barría as well as the EC policy,<sup>254</sup> showing a coordinated action between the executive's branches from the beginning. Barría, Díaz and Albornoz all agreed that the President trusted and delegated this work to her ministers.<sup>255</sup> Albornoz highlighted that “the President was involved in the debate and was concerned by the evolution of the debate on the pill, and she directly did follow-up on these issues”,<sup>256</sup> while Barría explained that Bachelet “knew about the announcement” and “she never had a doubt about this”:

It had been discussed by the government... and she was so worried about the administrative procedures' issue because she had been Minister of Health too and they mattered to her. She was always supporting us and present... Absolutely committed, completely!<sup>257</sup>

Civil society actors, in particular feminists and the biomedical groups, were all optimistic since the Norms were part of the President's programme. Díaz declared once she became elected President Bachelet told her “give me a hundred days and the norms will be out!”<sup>258</sup>

Despite the careful steps taken by the government, the expected ferocious opposition by the conservative forces quickly emerged. The reactions in the newspaper were immediate both in favour and against EC. For the following week EC was constantly in

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<sup>254</sup> *Op. cit.* 76.

<sup>255</sup> *Op. cit.* 76, and interviews with Francisco Díaz, former Chief Adviser for Public Policy of Michelle Bachelet, 2006-2010, 27.07.12 and Laura Albornoz, *op.cit.* 74.

<sup>256</sup> Albornoz, *Ibid.*

<sup>257</sup> *Op. cit.* 76.

<sup>258</sup> *Op. cit.* 64.

the press. *El Mercurio* published a report on Bachelet and her initiatives entitled “The Revenge of Doctor Bachelet” in its weekend edition, stating:

Since she became Minister of Health, two obsessions wandered in the mind of Michelle Bachelet: distributing massively the “morning-after pill” and regulating the so-called “dignified death”. These were the proposals that the doctor tried to include as priorities in the health policy agenda of President Lagos. (Sierra and Hola 2006).

This report not only singled out Bachelet for pushing forward a personal agenda, it also emphasised the way in which Bachelet was not as cautious as Lagos in trying to avoid clashes with the Church. The newspaper sustained that with the way having been “paved” by her liberal predecessor; she could now push a whole agenda on issues not addressed under the previous administration (Sierra and Hola 2006). Thus, via the press, the conservative lobby was sending a warning to the government not to ignore the sacrosanct rule of consensus dictating Chilean politics that favoured their value system through the prevailing gender regime in place.

### **EC on the bench**

The strategic initial retraction by Minister Barría on the EC policy proved effective in avoiding attracting attention or public opposition to the government’s work on EC for the first semester of 2006. This allowed Barría on 1 September to make public her decision to officially promulgate the *Normas Nacionales sobre Regulación de la Fertilidad* (Norms) via *Resolución Exenta No 584 del Ministerio de Salud*.

### **The framing of the policy**

Htun and Weldon (2010) have argued that policy change is determined by the nature of an issue more than its framing. They argue that the more doctrinal and class-based the issues are the more opposition they will face, and the success or failure of actors’

strategies is shaped by the political and institutional environment in a policy change initiative takes place.

Following this classification EC seemed to be a particularly challenging issue because its links to the abortion debate made it doctrinal, and since it required the funding from the state for its distribution free of cost through the health system, it was also a class-based issue.

Indeed, the Fertility Norms and the distribution of EC were presented from the beginning as a public health priority. Barría declared to the press that at the centre of this argument one found a health policy concerned with the impact of teenage pregnancy that disproportionately affects the lives of poorer young women and girls (La Tercera 2006d, 2006e). MINSAL statistics showed “the inequality in the access between municipalites” and that a great number of new pregnancies in Chile were happening to girls and young women below 20 years old. Girls from wealthier backgrounds had disproportionate access to EC compared to girls in more deprived areas of the capital:

... We had a brutal inequality in teenage pregnancy, out of 100 pregnant women, 20.3 were below 20 years old in the Pintana, and only 2.3 in Vitacura. And every year another 35,000 young girls became pregnant. 35,000! A whole city!<sup>259</sup>

Therefore Minister Barría and the President’s cabinet working with a clear understanding of the gender differentiated impact of this health policy established a clear communication strategy in which the defence of the Norms and the inclusion of EC for all women above 14-years old were to be understood as a measure to tackle inequality. For Barría this was also a way to defend the capacity of the decision of

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<sup>259</sup> *Op. cit.* 76.

women.<sup>260</sup> This line of argument was adopted as the official communication message within government and the President's cabinet, and SERNAM followed the same line of defence.<sup>261</sup>

However, with the legal challenge at the Constitutional Tribunal new lines of argumentation appeared. The opposition's focus on refuting adolescents' right to access EC and their right to confidentiality in health services contained in the Norms, shifted the focus to the alleged abortive effect of EC, reframing the issue as highly doctrinal. This put the government in a defensive position where they suddenly had to justify that EC was not abortive, rather than the petitioners proving that it was. The new framing used at the TC favoured the conservative agenda, threatening the progressive health policy views of the government.

More importantly this had the effect of displacing any arguments regarding women's sexual and reproductive rights or the impact of the policy on the women affected by it. This partly explains the gender-blind approach of the constitutional review made evident by the reticence of judges and lawyers to uphold women's reproductive rights and the deliberate decision to not refer to the existing body of international and regional legal instruments available. The debate at the TC was quickly reduced to scientific and technical debates in the hands of lawyers and doctors while feminist groups were excluded *ab initio*.

The constitutional review had one additional key concern for the government's defence team, which was that this constitutional review challenge was weakening the state's historic capacity to dictate and implement health policies through the legislative

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<sup>260</sup> *Ibid.*

<sup>261</sup> Diaz and Albornoz, *op. cit.* 254.

prerogatives of the executive such as a *resolución exenta*.<sup>262</sup> Francisco Díaz, who then worked at SEGPRES, emphasised that the decision was “first to defend the MINSAL’s prerogative to dictate these type of norms”, to “have the flexibility to regulate the different matters of public health through decrees” and thus “there is a decision [by the government] to protect itself”. And “second you have the firm decision by the President and MINSAL to continue to promote the morning-after pill” knowing that if they lost they “would push through other means”.<sup>263</sup>

Barría confirmed this organisational perspective, explaining that “for us as public health institution this was complicated”.<sup>264</sup> The government thus had a double reason to fight at the TC, but gave priority in the court case to its power to make public policies over other aspects because they knew they could promote EC through other means. Although in line with the historic role played by public health authorities in the country, this reasoning from a state’s perspective caused much tension with civil society’s SRHR advocates who felt women’s rights were not on the government’s agenda, affecting the work carried out in alliance to defend EC.

## **2006: The first petition to the Constitutional Tribunal**

Despite their success under Lagos in pressuring pharmaceutical companies to withdraw from the market, the conservative lobby decided to plan for a new legal action to stop the effective distribution of EC by the state. This was motivated, according to Lawyer R, by their perception that since the Supreme Court’s ruling, there had been a “void of power and political influence on the issue within political parties” who had no longer

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<sup>262</sup> *Op. cit.* 76.

<sup>263</sup> Díaz, *op. cit.* 254.

<sup>264</sup> *Op. cit.* 76.

been involved with EC anymore thus allowing the government to carry on working on the Norms.<sup>265</sup>

The *resolución exenta* (exempt resolution), the legal administrative measure used by the government, was supposed to allow MINSAL to implement a public policy and be exempt from the overview by the Contraloría, the institution in charge of checking that all state actions comply with the constitution and laws of the country. Exempt resolutions have been historically used by MINSAL to promote its public policies, in particular reproductive health policies since the 1960s.<sup>266</sup> Yet this time it was at the centre of a judicial dispute between the legislative and the executive in a good example of constitutional review of a decree by the TC.

According to its mandate, the TC could not consider a dispute over a “technical norm” unless requested by a quarter of the Parliament members or the President during the legislative process or days after a norm had been approved (Mac-clure 2011: 180). This is why in September 2006, and at the request of 31 members of Parliament<sup>267</sup> mobilised by conservative Deputy José Antonio Kast (UDI), the TC accepted the petition to look into the matter after a divided decision vote (six-to-four), stating their concern with the substance of the *resolución exenta* (Casas Becerra 2008: 22).

For Lawyer G, the TC’s decision to accept to review the case was “an ideological decision” because they “wanted to engage with the heart of the matter”.<sup>268</sup> Yet Judge F justified the TC’s decision based on the fact that the *resolución exenta* had the potential

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<sup>265</sup> Lawyer R, *op. cit.* 67.

<sup>266</sup> *Op. cit.* 76.

<sup>267</sup> The Constitutional Tribunal’s rules establish that the signatures of at least a quarter of the members of either the Chamber of Deputies or the Senate are required for a constitutional revision request to be accepted by the tribunal.

<sup>268</sup> Interview with Lawyer G, former member of legal division of SEGPRES, 03.03.14.

to affect constitutional rights – such as the right of parents to educate their children and the right to life – which is what the conservative lobby argued. Deliberately ignoring the historic use of exempt resolutions in health policies he argued that the government’s motivations behind using a *resolución exenta* was strategic since the “constitution does not allow the Constitutional Tribunal to deal with ‘resolutions’. It has to deal with decrees”. He added, “you can try to disguise a law as a decree but it will be a law. And the Tribunal decided that it could deal with the issue”.<sup>269</sup>

Thus, the TC argued the content was equivalent to that of a bill. In this way the TC was able to legally justify its intervention and de facto put a halt to the implementation of the Norms and the distribution of EC, showing the real political power and motivation of the tribunal. The government therefore was given no option but to obtain a presidential decree.

### **The role of judges and their beliefs**

During both this first judicial episode at the TC against the *resolución* and the following episode dealing with the *Decreto*, the role and beliefs of the judges became visibly important to the way the judges ruled and their decisions could affect the outcomes of a constitutional review. This conflictive situation caught the attention of the press, scholars and actors involved in the policy. The pro-EC camp denounced irregularities regarding the procedures of the tribunal, including the judges’s partiality and the application of personal beliefs in their ruling.<sup>270</sup>

Judge F deliberately ignored the fact that the *resolución exenta* was the administrative procedure historically used by MINSAL for its policies, and insisted on a political

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<sup>269</sup> Judge F, *op. cit.* 67.

<sup>270</sup> *Op. cit.* 110.

reading of its use as a strategy by the government to avoid public scrutiny and pass the Fertility Norms in a low-profile manner.<sup>271</sup> Arguably, Judge F was right in that MINSAL wanted to pre-empt any possible destabilising measure to the announcement considering the aggressive reaction the policy to distribute EC had prompted only a few months before, yet the use of the *resolución* according to both Soledad Barría and Francisco Díaz remained MINSAL's regular channel to launch any set of new norms<sup>272</sup> since the "law grants MINSAL the capacity to regulate the different health policies via decrees".<sup>273</sup>

Judge F acknowledged that the use of the *resolución* annoyed him on a personal level because he considered that the government should have sent a bill to Parliament to discuss the issue:

... I have been part of the Concertación's DNA since its creation. So this is what really annoyed me! [...] It was said here that this is an essential issue for the women of Chile and the poor. Well then, why wasn't this same claim not expressed in the means chosen to resolve the matter? [...] [the government chose] a clandestine way [...] this norm was inserted in the middle of an enormous booklet...<sup>274</sup>

The anger of Judge F was evident. He felt the government was trying to do things in an underhanded way, which he considered unacceptable. Yet his views on the EC case seemed to result more from his personal convictions. He openly declared himself a practicing Catholic who applied his faith to all the spheres of his life and in particular his work, and this included EC:

... in relation to our dilemma [...] I opted for a pro-life criteria, pro-human, my criteria was pro-life. [...] So here I'd rather put up with all I have to endure but not

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<sup>271</sup> Judge F, *op. cit.* 67.

<sup>272</sup> *Op. cit.* 76, 254.

<sup>273</sup> Díaz, *op. cit.* 254.

<sup>274</sup> Judge F, *op. cit.* 67.

let a baby get killed. [...] That is my point! Do not kill a baby. Because I have that obligation, the Constitution orders she has to be protected.<sup>275</sup>

The importance of religious beliefs and the close relationship of some judges with institutions linked to the Catholic Church was a recurrent issue during the constitutional case at the TC, especially during the second accusation.

### **2007: Bachelet and the *Decreto Supremo***

The ruling of the TC on 14 January 2007 was a defeat for MINSAL. The TC ruled that the government needed to issue a *Decreto Supremo* or “Supreme Decree” if the Fertility Norms were to be approved. For this Minister Barría needed the President’s signature, which required Bachelet to put all her political power and commitment behind the issue. That same day the government announced its intentions to send a *Decreto Supremo*. Barría emphasised that the President “was strongly committed to the issue. Immediately she took the decision when the ruling was announced that a decree had to be sent, within half an hour she announced the decree”.<sup>276</sup>

The move was immediately qualified as being the result of “the ideology of confrontation” or the wilful behaviour of government (*capricho*) by the right-wing opposition (Solinas 2007) who threatened to challenge the decree at the TC if this happened.

Meanwhile the announcement was received as proof of Bachelet’s courage and commitment by civil society and her Ministers, who during the interviews conducted as

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<sup>275</sup> *Ibid.*

<sup>276</sup> *Op. cit.* 76.

part of this research affirmed that she “went for it” (“La Michelle se la jugó”),<sup>277</sup> confirming once again the President’s unconditional support for EC. As explained by Schiappacasse:

... regarding the Norms, the president went for it. She signed a Supreme Decree, she fought at the TC. Maybe she did not choose the best lawyers, the best advisors... But she went for it.<sup>278</sup>

For Barriá this was particularly true because “for governments, constitutional accusations are not just another accusation”. And in this case, the constitutional challenge:

... was a complex issue from a health policy perspective [...] health policies had always been adopted via resolutions by the ministry and not through laws. So the fact that the tribunal said that from now on these had to be done through law decrees, which have a different logic, makes the work of the Ministry of Health more difficult.<sup>279</sup>

Bachelet signed the *Decreto Supremo Reglamentario No48/2007 del Ministerio de Salud* on 30 January, starting the second phase of the judicial battle in front of the Constitutional Tribunal.

### **The new petition**

In order to request the Constitutional Tribunal to review the constitutionality of the Decreto Supremo the conservative lobby needed once more the signatures of at least one third of the members of Parliament. It was José Antonio Kast (see App. 6), member of the UDI and a well-known member of the elite Catholic movement Schoenstatt, who took the lead in Parliament and collected the signatures of 36 of his fellow MPs. The

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<sup>277</sup> *Op. cit.* 25, 76, 81, 110, 254: “se la jugó” is an expression meaning “she went for it” despite the opposition and risks.

<sup>278</sup> *Op. cit.* 81.

<sup>279</sup> *Op. cit.* 76.

signatures included 33 male and three female MPs, most of them members of the far-right UDI but also some RN members (see App. 6).

A key difference between the 2006 petition and this challenge was that this time the conservative forces made public a clear agenda against SRHR and not only EC. The anti-SRHR agenda was visible in the extension of the legal challenge to other contraception methods besides EC (Casas 2008: 22), to include IUDs (intrauterine devices using copper or levonorgestrel), as well as most common hormonal contraception containing levonorgestrel that could allow the use of the “Yuzpe Method”.<sup>280</sup> If successful the petition would ban 75% of the most common contraceptive methods used by the majority of Chilean women. The petitioners also questioned the capacity of medical professionals to provide the adequate counselling and contraception services to youth without the consent of their parents (Casas 2008: 23), challenging the sexual and reproductive rights of adolescents.

The petitioners’ demand had three main components:

1. to declare hormonal contraception and IUDs unconstitutional for having an abortive effect based on the presence of its levonorgestrel component;
2. to declare the government’s policy to distribute EC to adolescents unconstitutional because it was challenging parents’ preferential right and duty to educate their children; and
3. to recognise that EC has an abortive effect and violates the constitutional right to life, making the Fertility Norms unconstitutional too.

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<sup>280</sup> This method consists in combining regular hormonal contraceptive pills in a certain dose that produces the same effect as a dose of EC.

According to Judge F, of the three above-mentioned grounds for the accusation, the TC immediately decided it would only consider the third for constitutional revision. The first was not accepted because the contraceptive methods included in the demand had been authorised 40 years ago and the TC would not review a sentence that had already been passed. As for the right to education the TC ruled that the Norms did not interfere with parent's choices on how to educate their children nor did they limit their right to do so.<sup>281</sup> The TC therefore decided to centre all its attention on the alleged accusation of "violation to the right to life".<sup>282</sup>

An important aspect of this new legal challenge at the TC is that this was "one of the first cases in which the Constitutional Tribunal opened its doors to civil society" both in favour and against the pill who although "technically not official part of the case [they] attended the hearings".<sup>283</sup>

Indeed in an "unprecedented manner, several organisations and women requested to be part of the case" (Casas Becerra 2008: 23). Yet in the case of feminist organisations the "Tribunal did not grant these petitioners the status of party", making their participation very difficult while mostly experts' opinions were favoured during the hearings. Casas explains that the tribunal listened "to presentations and defence statements by members of Congress in favour of the National Norms" and "physicians also presented scientific evidence in favour and against the legal claim (2008: 23). This exclusion represented a great blow for feminists who felt distanced from the legal process and defence of EC.

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<sup>281</sup> Judge F, *op. cit.* 67.

<sup>282</sup> *Ibid.*

<sup>283</sup> *Op. cit.* 267.

### **The TC accepts to review the Supreme Decree**

Referring to Bachelet's decision to go ahead via Decreto Supremo, Judge F sustained that the government "by sending the decree the government knew it would be challenged" because "the resolution had already been contested". And although the decree could not be declared unconstitutional by the Contraloría, it could now be legally reviewed by the TC, giving a new opportunity to the opposition to impeach Bachelet's decision. This is something the conservative lobby had also counted on. Judge F considered the government was "trying to spark a conflict" because it "felt it could win since it had popular support":

... they throw this knowing this will cause a conflict [...] via the media, not a judicial one [...] After all, what were we [the TC judges] accused of?: 'these gentlemen are meddling with the bedroom affairs of the Chilean citizens'.<sup>284</sup>

As explained by lawyer G, the legal defence team of SEGPRES saw the tribunal's decision as a political move since the TC:

... requested that we promulgated the supreme decree but it did not request that we modify the content, it requested to modify the legal instrument. Yet, the Tribunal declared itself competent to review it. [...] It wanted to engage with the content.<sup>285</sup>

Aware of this the executive decided to carry on, counting on the fact that the President gave all her support and all the Ministers involved were coordinated legally. Albornoza praised the "determination of President Bachelet not to step down from the issue", adding:

... the President was able to manifest in an explicit manner the government's wishes [...] we had a presidential cabinet in favour, but also the explicit wishes of

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<sup>284</sup> Judge F, *op. cit.* 67.

<sup>285</sup> *Op. cit.* 267.

the President to at least guarantee this right, or these norms to ensure the state could comply with its obligation.<sup>286</sup>

Bachelet's former advisor, Francisco Díaz, and former ministers, Soledad Barría (MINSAL) and Laura Albornoz (SERNAM), all agreed that the government had a legal strategy that considered the implications and possible outcomes each legal step could have politically.<sup>287</sup> Barría explained:

...when these things of so much relevance happen a government creates possible scenarios. You work on these things [...] in fact the [Supreme] decree came out very fast [...] because we worked with different scenarios.<sup>288</sup>

The government also knew that there was increasing popular support as the court case evolved and the media kept giving it coverage. Díaz sustained:

We knew the opposition would be strong. But we had a double feeling: first that this was correct [...] on the other hand there was the political consideration that the majority of the citizens were in favour of the morning-after pill. Therefore we could not allow ourselves to be captive of maybe respectable but conservative positions by some organised groups. Thus, we made the decision to move forward, and confront people from our own coalition.<sup>289</sup>

Both sides therefore carried out similar political calculus, counting on specific judges as possible allies within the TC. Once the TC accepted the new petition by the conservative lobby the position of each judge on the matter was quickly established, or as Lawyer P explained: "It was clear who would vote in favour and who would vote against it."<sup>290</sup> A majority of the judges were against EC leaving those holding more

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<sup>286</sup> Albornoz, *op. cit.* 74.

<sup>287</sup> *Op. cit.* 76, 254.

<sup>288</sup> Díaz, *op. cit.* 254.

<sup>289</sup> *Ibid.*

<sup>290</sup> Interview with Lawyer P, former lawyer of the Constitutional Tribunal, 18.12.12.

progressive and moderate opinions on the policy in the minority to establish a fair debate.<sup>291</sup>

Although the TC's decision to focus on determining whether EC was abortive or not confirmed the presence of strong champions of natural law constitutionalism within the TC wanting to uphold the teachings of the Catholic Church, in particular its pro-life stance (Muñoz León 2014: 133), it also opened up a space to review scientific evidence, which was perceived by the more centrist judges as a chance to express more moderate views and influence a final vote.<sup>292</sup>

This interestingly was a good mirror of the “consensual” politics present in the political arena. By looking at the composition of the TC and the profile of its judges (see Tables 1 and 2 above) one sees that the former party members of the PDC and PS were outnumbered by the more categorical pro-life opinions among their peers.

### **The recusals' controversy**

One of the first great causes of concern for the pro-EC lobby was the uncertainty of counting on impartial judges to ensure proper procedure of the judicial process, which could subsequently affect the outcome. The TC rules establish that if any of the ministers has previously emitted a legal opinion publicly or ruled on the matter submitted for discussion, and considers his impartiality could be affected, the judge must inform the rest of the tribunal, at which point it is up to the rest of the ministers to decide on the need to disqualify the minister or not – a process known as “*implicancia*” (Tribunal Constitucional n.d.).

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<sup>291</sup> *Ibid.*

<sup>292</sup> *Ibid.*

This is why the government, a group of Concertación senators and the SRHR lobby argued in favour of disqualifying two of its ministers, Bertelsen and Navarro (Casas 2007; La Nación 2008c). Both judges were accused of having previously issued their opinions on the EC matter. Bertelsen, the former head of ULA, together with Navarro had worked on an amicus brief on EC presented by AGES during the judicial process on the legality of EC in 2004. As indicated by Muñoz León, the “amicus was highly partisan, describing the distribution of the pill as ‘an assault on the Constitution’” (Muñoz León 2014: 153).

While Navarro acknowledged there might have been grounds to disqualify him, Bertelsen did not and reaffirmed his belief that he could be impartial leaving the final decision in the hands of the tribunal (Tribunal Constitucional 2007). The TC decided to accept Navarro’s auto-withdrawal, but considered that Bertelsen was qualified to remain part of the tribunal in this case (El Mostrador 2008; La Nación 2007c; La Tercera 2008b; Tribunal Constitucional 2007). The decision was the result of a divided vote, where Judges Cea, Colombo, Fernández Baeza, Venegas, and Peña refused Bertelsen’s recusal, and Correa, Vodanovic and Fernández Fredes voted in favour (La Nación 2007c; Tribunal Constitucional 2007).

According to Lawyer P, when the issue first reached the TC “the majority of the tribunal wanted to vote against the pill... they knew Bertelsen was a card against the pill” and “need him to secure a majority vote”.<sup>293</sup> But this was likely also due to the profile of Bertelsen who was an influential and renowned scholar with close ties to conservative political groups and religious groups, namely the Opus Dei (Muñoz León 2014: 154). Not only had he helped to draft the Constitution of 1980 but he also had

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<sup>293</sup> *Op. cit.* 289.

maintained strong political ties that secured his re-appointment to the TC in 2006. As argued by Muñoz León, “Bertelsen’s religious and academic affiliations reflect the hegemony of natural law constitutionalism in the legal system” (Muñoz León 2014: 155) and in particular within the post-authoritarian TC the principles emanating from the Catholic doctrine.

The decision sent a terrible message regarding the judges’ impartiality within the TC. As Couso argues, the TC having been invisible to the public for so long, this case gave the institution a bad reputation since the TC judges are the only judges in the Chilean judiciary who cannot be held accountable, while their rulings are unchallengeable; consequently they need to maintain an impeccable behaviour to guarantee the impartiality principle in the delivery of justice (Expansiva 2008). Not respecting this principle has a direct impact on the legitimacy of the sentence (Contesse Singh 2007: 394).

Yet, according to Judge F, all legal procedures had been respected since the rules of the TC regarding the “*implicancia*” were clear: first, only the judges affected or members of the TC could bring up a case of “*implicancia*”, leaving any part external to the TC out of the debate and decision; secondly, only the TC could decide if a judge’s self-implication, or nomination by someone else was acceptable.<sup>294</sup> According to Judge F, it was not the external pressure that brought about the two cases of “*implicancia*” – Navarro came forward on his own and Bertelsen, who denied the accusation, was nominated by a fellow-judge he preferred not to mention.<sup>295</sup> Judge F argued he did not understand why the TC accepted Navarro’s dismissal and not Bertelsen’s. Personally he

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<sup>294</sup> Judge F, *op. cit.* 67.

<sup>295</sup> *Ibid.*

considered that since the report on which both judges had worked was not the “exact” same matter none of the judges should have been disqualified.<sup>296</sup>

Although following a logical argument, Judge F was clearly omitting the importance for the TC to have a transparent image in the way they proceed and most of all to ensure the basic principle of impartiality. If anything, his opinion gave the impression that the TC does in fact work in an opaque and hermetic manner, not accepting or taking seriously any request by the parts involved, and where the judges are spared from accountability regarding the judicial processes they undertake.

### **Constitutional justice as a first and last resort**

The second important issue that arose during the pleading Casas made in front of the TC was that the TC was accepting to review a case that was clearly linked to the series of judicial challenges initiated by the same petitioners in 2001, including some deputies (Casas 2007). This was essentially a critique on the use of the TC as a “last resort” judicial instance, making the judicial institutions more vulnerable and allowing politically motivated cases to bypass the usual rules established within the judicial system. But despite her plea, the TC accepted to rule on the petitioner’s demand to review the alleged violation to the right to life by the Norms based on EC’s alleged abortive effect.

Together with the cases of “implicancia”, these were not minor issues that mattered only for transparency and formal impartiality – it mattered for the results of the sentence due to its effect on the political power balance within the TC. Although the tribunal’s judges must renounce any political links and affiliations before assuming their position, their

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<sup>296</sup> *Ibid.*

political sensitivity is publicly known. It was public information that the tribunal that ruled on the Decreto Supremo was composed of six conservative sympathisers (Venegas, Bertelsen, Peña, Cea, Colombo and Navarro), two centrists or moderates (former PDC members Fernández Baeza and Correa who could vote either way), and finally two left-wing/socialist sympathisers (Vodavonic and Fernández Fredes).

The loss of two votes would have left the conservatives with only four certain votes against EC. But with only the loss of Navarro, the TC had nine judges left. This allowed the final sentence to be backed by a 5-4 vote where Fernández Baeza in a move that took everyone by surprise joined the conservative vote. Because the TC must always have clear majority on a final vote for its sentence to be valid, if Bertelsen had been excluded then only eight judges would have remained and, according to Judge F, without Bertelsen the score would have been a , annulling the case and refusing the petitioners' demand. This would have granted the government and President Bachelet a major political victory over the Church and its conservative lobby.

### **The conservative lobby and the Constitutional Tribunal**

The new challenge brought to the TC revealed powerful connections the different actors had within the anti-EC advocacy coalition. Scholars, politicians and judges within the conservative lobby exerted power and influence by working in a coordinated manner using the same line of Catholic arguments on the right to life. Yet the relationship between these different actors started to experience some tension as the judicial case became openly political and the actors were increasingly under the media spotlight.

The many episodes and processes leading to the decision of the government to send a Decreto Supremo was closely followed by Lawyer R who had challenged EC over the last decade. He had also helped the deputies who had brought the initial case to the

Constitutional Tribunal. This time Lawyer R worked closely with the ultra-conservative lawyer Jorge Reyes (see App. 4) who was close to key far-right UDI MPs. Both lawyers worked on the petition for the group of Parliamentarians who agreed to challenge the Decreto Supremo at the Constitutional Tribunal.<sup>297</sup> Yet, during the interviews, Lawyer R did not want to appear to be close to Reyes or anybody else for that matter. He sustained:

Sometimes it is better to keep a low profile, and I like to fight battles from the trenches [...] of course we know each other and we have called each other in specific moments but we have not acted in the same instances.<sup>298</sup>

Lawyer R insisted that he was moved only by his faith and had no political affiliation. He emphasised that he worked “on his own” and “from his own convictions”. For him EC was “like a missile. You don’t see who dies [...] It’s more massive”.<sup>299</sup>

Reyes, who is considered the visible face of the pro-life movement in Chile for the past decade also emphasised that he worked independently in the media:

I do not belong to any movement, only to the Catholic Church, totally lay and regular. Not to *Fiducia* nor *Opus* nor *Acción Familia*. I know them, I respect them very much, but there are many things in their methodology that we have discussed internally and that I do not agree with. [...] I have never even joined a political party.

Yet, Lawyer R considered Reyes more of a militant on these issues because Reyes maintained a closer relationship with the UDI. He emphasised that politicians, including conservative ones, could not be trusted since they were ready to sell their Catholic moral principles at any moment for some votes. He criticised both the UDI and PDC

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<sup>297</sup> Lawyer R, *op. cit.* 67.

<sup>298</sup> *Ibid.*

<sup>299</sup> *Ibid.*

“because they don’t take a clear stance and they don’t dare to defend the right to life as they truly should if they are Christians”.<sup>300</sup>

It was Reyes who saw the strategic opportunity to appeal to the TC, as he knew they could count on his political links to secure the support of members of Parliament. As explained by Lawyer G, the strategy to bring EC to the TC was later used in a crucial case against the Bachelet during the controversy of Transantiago.<sup>301</sup> Despite its close political ties, Reyes also publicly denounced the “unacceptable opportunism” of leaders of the UDI who progressively tried to disassociate themselves from the EC case as polls showed public opinion to be strongly in favour of its distribution (Aravena B. 2008).

Lawyer R also explained that, although he had worked with Reyes on the petition for the TC, he had questioned Reyes on the necessity to add all the other forms of contraception in the request. Lawyer R allegedly “did not consider this necessary” since most other methods had been legally approved in the 1960s and were “*materia juzgada*” (a closed case), and from his moral beliefs they represented “less maliciousness”.<sup>302</sup> Reyes motivations were based on the belief that the Fertility Norms were a way to promote abortion through contraceptive methods. On the day of the final sentence by the TC he declared to the press:

... we will firmly oppose abortion in Chile... the copper-T is abortive. And if it is demonstrated from a medical perspective, we will initiate legal actions against the authorities, because they are accomplices of abortion. (La Tercera 2008a)

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<sup>300</sup> *Ibid.*

<sup>301</sup> For more on Transantiago and the political implications of the failed implementation of this transportation reform, see Navia (2008).

<sup>302</sup> Lawyer R, *op. cit.* 67.

This declaration shares the view held by Judge F who stated that he always saw the EC case as a “first step for the debate on the abortion law, whoever becomes president”.<sup>303</sup>

### **The Catholic Church**

The active influence of the Catholic Church on the TC during the whole process against EC was clear although not necessarily visible. Its hierarchy played a big role in public announcements and in the relation with the media, but it was not officially represented in front of the TC. The Church did not need to be directly involved since it could count on a wide network of institutions and individuals to make its voice heard.

Romero and Reyes who led the case, specialists in constitutional law and procedural law respectively, as well as the doctors who presented scientific arguments during the hearings such as Ventura Juncá and Mena, were linked to the Church’s main academic institutions ULA and PUC. Throughout the judicial process the PUC Bioethics Centre provided key information to the anti-EC coalition. The Catholic lobby was thus prepared and strategically organised and made use of all its ties to the political world through the presence of renowned figures from the PDC and UDI,<sup>304</sup> such as Patricio Zapata (see App. 4) and José Antonio Kast.

Bishop Chomalí, who was the Catholic Church’s appointee for the EC battle, attended some of the tribunal’s hearings as a “guest” of some of the TC judges. This deeply annoyed women’ groups and other civil society actors who saw his presence as a direct intervention in the legal process but also showed the important role of institutions in the process. As explained by Dides:

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<sup>303</sup> Judge F, *op. cit.* 67.

<sup>304</sup> Díaz, *op. cit.* 254.

... when we were at the Constitutional Tribunal the three big institutions were in front and we had to sit behind, we were the only women. There you had Chomali with his cross: The Church; The lawyers, the Tribunal; Science and the doctors. It was not the women seated in front, so that is very symbolic.<sup>305</sup>

The acceptance by the TC – or at least of its most conservative members – to review the issue, was without any doubt a direct consequence of the Church’s Episcopal Declaration that month, which was the most aggressive and harsh in content and vocabulary ever published since the return to democracy (Comité Permanente de la Conferencia Episcopal de Chile 2006). In it the Catholic Church, through its Cardinal and bishops, accused the government of promoting public policies that were “reminiscent of the policies established by totalitarian regimes where the State expects to regulate the private lives of people according to authoritarian principles lacking any consensus” (Comité Permanente 2006). The Church also reminded politicians that it was raising its voice in favour of the “dignity of life”, in the same way it had done “at a time when the life of political opponents was persecuted and threatened”, referring to their support for left-wing politicians during the political persecution of Pinochet’s dictatorship (Comité Permanente 2006).

What could be considered a low blow and aggressive blackmailing by the Church was openly divulged via the press and given a wide coverage. This declaration had a direct impact on Judge F who emphasised that when he voted against the government he had acted according to the principles raised in the Episcopal Declaration.<sup>306</sup>

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<sup>305</sup> *Op. cit.* 124.

<sup>306</sup> Judge F, *op. cit.* 67.

### **The politicians opposing and supporting EC**

It is difficult to categorise the defence of and opposition to EC according to party lines. Not all members of the governing Concertación agreed with its distribution, and many key figures of the opposition showed their support. Doctors in particular played a key role across parties.

Although most MPs who were openly against EC came from the opposition they were also joined by some members of the Concertación, mostly Christian Democrats linked to the Opus Dei or other elite Catholic groups. Many of them were members of the “*bancada por la vida*” (“pro-life benchers”) an alliance between UDI, RN and PRSD, DC Parliamentarians. For Deputy Saa (PPD), ally of the feminist movement, this organised and concerted space gave these Parliamentarians a strong advantage over their more progressive colleagues in Parliament:

There is a militant conservatism [in civil society] which has its equivalent in Parliament [...] they manage to form an active group here. And it is not just the UDI because you have Deputy Olivares who was Christian Democrat and now is part of the PRI, and Deputy Sabag who is a Christian Democrat and belongs to the Opus Dei. So you have the creation of a militant group here.<sup>307</sup>

These same politicians were also active across key commissions such as the Health or Family Commissions where feminist or progressive voices often found themselves in a minority when defending initiatives to reintroduce the debate on therapeutic abortion but also most matters on sexuality and reproduction. Saa declared, “lately the conservatives have appropriated our [family] commission”.<sup>308</sup>

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<sup>307</sup> Interview with María Antonieta Saa (PPD), a well-known feminist politician and member of Parliament, 03.06.09.

<sup>308</sup> *Ibid.*

Yet the conservative opposition was not exempt from its own dissensions. Many Parliamentarians as well as mayors, mostly from Renovación Nacional (the more liberal right-wing party), manifested their disagreement with their coalition and supported the government's initiative with some conditions, but overall broke the ranks from the conservative coalition. High profile politicians such as Lily Perez (RN), Osvaldo Palma (RN), Karla Rubilar (RN) (La Segunda 2007b), all expressed their liberal views on the matter stating that medical reasons were to be taken in consideration, despite the fact that "Carlos Larraín the [RN] president is a very conservative person".<sup>309</sup> Palma and Rubilar, both of them doctors, made their opinion that EC was not abortive public and often joined forces with fellow Concertación deputies as part of the "medical bench".

Juan Lobos (UDI) became the most prominent dissension in the conservative camp when he came out "publicly as a doctor" to withdraw his signature from the conservative petition to the TC which included "all contraception methods, and as a doctor he realised this was too much".<sup>310</sup> The case of Lobos caused much controversy among the medical establishment in Parliament and the executive, as well as in civil society. Barriá explained that what surprised her "most about the challenge brought to the Constitutional Tribunal" was the "fact that those right-wing deputies who were doctors signed without reading", "they did not know what they were signing and that Juan Lobos told me that it was not true he had signed against the IUDs".<sup>311</sup>

Thus the presence of doctors and the importance of medicine as an informal institution was key during these debates where doctors were judged by their peers and sanctioned for going against scientific evidence and medical ethics.

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<sup>309</sup> *Ibid.*

<sup>310</sup> *Ibid.*

<sup>311</sup> *Ibid.*

### **The reaction of PDC within and outside government**

Alvear – who since her defeat by Bachelet for the presidential race had become the PDC's President – openly opposed the government's decision to publish the Fertility Norms and to distribute EC to teenagers above the age of 14. She declared to the press that on this matter she considered that “the government had taken the easy way out” and that “she personally would not have liked to see her own kids become sexually active at age 14” (La Tercera 2006b), leading her party to publish a harsh declaration that contained extremely conservative language, and evidently mirrored the Catholic Church's position on the EC debate. The declaration highlighted that “women's freedom was expressed in the right to take a pregnancy to term”, and emphasised the argument on “legitimate doubt” regarding the abortive effect of EC and showed a concern with fertility rates in the country (La Nación 2006a).

This harsh stand by the Christian Democrats was a clear depiction of the deep divisions the Concertación and government coalition were suffering between its most conservative and most progressive members. PPD and PS politicians came forward strongly supporting Bachelet and Barría, making the case for individual freedom and equality. Furthermore, those deputies who were doctors by profession and belonging to the “medical bench”, came forward together with doctors from the opposition, mostly RN, to support EC. This would become more frequent as the judicial battles reached key stages, and would contribute to making the divisions on moral grounds within the opposition Alianza more visible (La Segunda 2006c). The confrontation through the press then became a window for most Parliamentarians to showcase their support to the President and her cabinet, but also to publicly position themselves in support of or against SRHR.

Within government Albornoz, Minister of SERNAM, and Velasco, Minister of the Interior, both Christian Democrats, stepped forward in defence of the government's EC policy, openly distancing themselves from their party's public position. Albornoz said the Church's declaration had to be read and considered with respect, yet "it is the government that makes the decisions and has to govern" (La Tercera 2007), while Velasco added that "the government does not impose conducts but it gives people choices... we have to take responsibility for the reality of our society" (La Tercera 2006f). There was an obvious attempt by the Bachelet administration to put an end to the public display of crossed messages and aggressions on these issues, damaging the image of unity of the Concertación.

The highly ideological confrontation between the government and the Church was creating cross-party divisions on these issues. The PDC held its Fifth Ideological Congress in 2007 and gender issues, including abortion and the pill were high on the agenda. Both topics were brought up by Albornoz, as well as people linked to SERNAM and some female members working in grassroots organisations of the PDC.<sup>312</sup> In the final document there is an explicit approval of the distribution of EC and tackling the issue of abortion, yet the language remains conservative and somewhat blurry, stating that for the PDC the "defence of life" must "contemplate the strengthening of the family and programmes of sexual education", therefore "the focus on abortion is not enough" and "inequality is not resolved exclusively through the access without restriction to contraceptive methods" (PDC 2007: 2). Hence, referring to the PDC's support for family planning policies in place since the 1960s, it stated:

We support the rapid access of women in fertile age to methods that allow them to regulate their maternity but, at the same time and without violating the individual

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<sup>312</sup> Albornoz, *op. cit.* 74.

conscience of each woman, the progressive diminution in the use of methods that could interfere with the embryonic development, such as IUDs and post-coital pills. (PDC 2007)

During this process the youth of the party in particular felt cast aside by the leadership and according to Reinoso “there was a debate on the issue and the conclusions were in favour of the distribution of the pill”, but Alvear the party leader declared the distribution of EC “in the case of adolescents they had to be in company of their parents”.<sup>313</sup> Aylwin, coordinator of the Congress, confirmed that the discussions in the commission working on these issues focused on the “role of parents, and you could find very conservative positions” but she thought they “managed to adopt a common position and pushed the boundaries”, although the PDC “remains strongly influenced by the Church on these issues”.<sup>314</sup>

### **The mayors: Opposition and support for EC at the implementation level**

With health policies being autonomous at the local level in Chile and emergency and primary healthcare centres depending on municipalities, mayors became key political actors during the court case at the TC from 2006 onwards (Casas 2008: 18-22). From early on the press widely covered how EC had become a political symbol for mayors belonging to the opposition as well as the Concertación (La Segunda 2006a, 2006g, 2006h; La Tercera 2006a). The conservative opposition was led by mayors from important and populous boroughs of Santiago, as well as from other important cities around the country (La Segunda 2006h). Mayors used the press to voice their concerns and became vocal in confronting each other in support of or against the government (La Segunda 2006f, 2006h; La Tercera 2006a).

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<sup>313</sup> *Op. cit.* 77.

<sup>314</sup> *Op. cit.* 72.

Both the opposition and Concertación referred to the use of judicial channels to defend their point of view. Deputies from the PPD's medical bench threatened to bring to court municipalities that refused to distribute EC (La Segunda 2006f), while deputies from the cross-party medical bench asked to put a halt to "the terror campaign" initiated by some mayors and opponents to EC (Cooperativa 2006; La Segunda 2006c). This was a direct reaction to the fact that UDI's Pablo Zalaquett (Mayor of Puente Alto) openly refused to distribute EC and, together with Carolina Plaza (Mayor of Huechuraba),<sup>315</sup> brought the state to court in September 2006. The matter was quickly resolved, but they managed to effectively interrupt the distribution of EC by the government (La Segunda 2006d, 2006e) at a time when the pharmaceutical companies were starting to boycott its sale (see Ch. 7).

The Court of Appeals eventually refused the appeal presented by Pablo Zalaquett (La Segunda 2006b). This whole process, however, reveals the political determination and confidence these individuals and political actors had, indicating they also felt that they were being backed by a strong conservative coalition and media. Most importantly, there is an evident overlap of common arguments and tactics as well as division of labour in the way the conservative lobby organised itself on different fronts.

### **The pro-SRHR lobby and the government's defence of EC**

The early decision by the Constitutional Tribunal to accept to review the case against the Norms, and to not allow women's groups to be official parts in this process led to tension and conflict within the pro-SRHR camp – feminists felt excluded, the government decided to focus on the defence of the prerogative of the state to carry out

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<sup>315</sup> Both are low-income boroughs of the capital Santiago.

public policies, while the SRHR advocates within biomedical NGOs felt the technical work fell on their shoulders.

From the beginning, the legal defence was led by SEGPRES, which as Lawyer G explained is the Ministry in charge of “coordinating the legislative and political work of all ministries [...] and coordinate a political strategy”.<sup>316</sup> MINSAL and SERNAM therefore reported to SEGPRES, which was responsible for the legal documents of the case.<sup>317</sup> As the lawyers of the legal division of SEGPRES do not carry out the defence statements in court, the work was done by a lawyer hired externally, “Harasic who had worked on the the ISP defence”.<sup>318</sup>

According to Schiappacasse, the SEGPRES dismissed any offer of help during the first petition against the exempt resolution, and concentrated all channels of information and legal work.<sup>319</sup> According to Casas, the government “never thought they would have to litigate” despite the fact that this first chapter at the TC was “the more complex”.<sup>320</sup> Lawyer G explained that although “this case had a particular relevance” because “in the long run our concern was that this type of resolutions could not be challenged at the Constitutional Tribunal” because “the ministries pass a thousand of these resolutions each year” and the government wanted to ensure that “the authority MINSAL has to pass such resolutions without the intervention of the Constitutional Tribunal was respected”.<sup>321</sup>

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<sup>316</sup> *Op. cit.* 268.

<sup>317</sup> *Ibid.*

<sup>318</sup> *Ibid.*

<sup>319</sup> *Op. cit.* 81.

<sup>320</sup> *Op. cit.* 110.

<sup>321</sup> *Op. cit.* 268.

The logic of the government and that of the SRHR advocates were therefore very different from the outset. Although state lawyers included the argument that “the Constitution did not forbid abortion” in the litigation, they had first an institutional concern to defend the prerogatives the executive has to carry out public policy, while the biomedical groups were concerned with EC itself and the arguments to challenge its distribution. For some time the lawyers representing the biomedical groups chased the government without success.<sup>322</sup> In fact, the biomedical and feminist NGOs working on these issues and who participated actively in the MINSAL’s “*Consejo consultivo*” initially couldn’t do more than inquire via the consejo about any progress.<sup>323</sup>

After the challenge to the Supreme Decree was presented, Casas analysed the composition of the TC and realised that “they had the composition which allowed them to win. And two members had to be disqualified” through an accusation for recusal. Casas “started ringing persistently the lawyers who were in charge of the defence of this case in La Moneda” but “they never returned a single call”.<sup>324</sup> She tried personal contacts to reach SEGPRES’s Minister Veloso without success. Therefore she called Deputy Saa, to inquire about the case, who explained Concertación politicians “had instructions from the Minister of Health to let things calm down”.<sup>325</sup>

Casas and Díaz decided then to meet with Saa and explain that there was an “active and strong strategy of litigation and the case would be lost” unless “progressive members of Parliament... took a decision”.<sup>326</sup> The biomedical organisation then decided “to lobby

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<sup>322</sup> *Op. cit.* 81, 110.

<sup>323</sup> *Op. cit.* 81.

<sup>324</sup> *Op. cit.* 110.

<sup>325</sup> *Ibid.*

<sup>326</sup> *Ibid.*

intensively to speak to Minister Viera Gallo and see what they were doing on the defence of EC”.<sup>327</sup>

Casas and Díaz were eventually able to meet with the Minister and Head of the Legal Department of SEGPRES in a “meeting arranged by Deputy Saa”, where the government showed them their “defence document that was almost finished”:

Soledad looked at it, and she couldn’t believe her eyes, she told them they were not presenting properly the biomedical arguments, and told them “you can’t submit this, I will look at it and send it back”.

According to Schiappacasse, the government’s defence engaged with the debate regarding when life and pregnancy start, when it was “very clear [that] here you have no foetus, no embryo, nothing!”, and what mattered was arguing that “this is a contraceptive method that does not even affect fertilisation” and defending “the action mechanism which has been proved by science which was the position sustained by ICIMER”.<sup>328</sup>

After the meeting, government officials saw the urgency to work strategically and in a concerted manner. This new legal challenge in front of the Constitutional Tribunal brought about a new episode in civil society’s legal and political activism. In order to face the complex new challenge the NGOs working in social and biomedical sciences created a new working group composed of FLACSO, APROFA and ICIMER. A strategy to face the legal challenge from civil society was designed, and it was decided that the challenge would be tackled through a three-pronged approach involving one lawyer per organisation to maximise their impact and representation power and visibility.<sup>329</sup>

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<sup>327</sup> *Ibid.*

<sup>328</sup> *Op. cit.* 81.

<sup>329</sup> *Op. cit.* 110.

Furthermore, since the two main issues brought to court were the mechanisms of action of EC and the right of parents to determine the access of adolescents to contraception, it was agreed ICMER would focus on the hard scientific arguments in favour of EC, with Díaz and Croxatto leading on that arena, and APROFA, represented by Casas together with Dr Galán, would focus on denouncing the inequity of access to contraception methods for adolescents and the violation of their rights (APROFA 2010).

But as Casas pointed out, as the three NGOs had all been involved in the previous legal battles, by then they were running out of energy and lacked funding. Moreover, when they most needed some strong backup to keep the morale high, communication with the government started failing.<sup>330</sup> Despite being at the forefront of the defence of a government policy, the working group had trouble accessing the authorities. Casas explained they “were not able to have a dialogue with the Minister of Health. We did not have access to speak to her. This was very different when Bachelet held that position”.<sup>331</sup> This was allegedly due to the fact that Minister Barría’s gender advisor, “a longstanding member of the feminist movement, who did not think much of these technical or biomedical organisations [...] stopped the communication channel with the Minister”.<sup>332</sup> For Casas this was the result of a longstanding rivalry between feminist organisations and more technical and biomedical NGOs working on these issues.

Allegedly, the advisor to the Health Minister like other members of the feminist movement disagreed since the early 2000s with Díaz, ICMER, and APROFA’s progressive approach to lobby for the reinstatement of the right to abortion by working

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<sup>330</sup> *Ibid.*

<sup>331</sup> *Ibid.*

<sup>332</sup> *Ibid.*

first on therapeutic abortion.<sup>333</sup> This is a position considered not feminist enough by some sectors of the feminist movement who consider it as settling for the minimum rather than fighting for abortion as a right. Díaz was aware of this tension and argued that Chile “in matters of sexual and reproductive rights, faced a stepladder”, thus “we must ensure each step”. She added that “strategically I do not believe it is adequate to ask for everything because we won’t get it”, thus:

We must consolidate each stage [...] it is a more pragmatic approach, from a public health perspective, not only a rights one. If you take a rights’ perspective it is everything. But if you take a public health perspective you put priorities in context [...] this process has taught me that things are much slower, and power is exerted in many ways.<sup>334</sup>

Gómez pointed at the “intensification of public policies” under Bachelet as a main factor of exclusion of women’s organisations.<sup>335</sup> But in the case of EC, the nature of the policy was also part of the reason why the women’s movement had reacted somewhat late. She sustained:

EC and abortion have been parallel processes. And this caused more problems than anything else. The attention required to defend the EC and contraceptive methods finally demobilised the abortion issue. It was a cost we accepted responsibility for but it was very high.<sup>336</sup>

This situation worried Casas and the other SRHR advocates supporting the litigation efforts because from their previous experiences defending EC for the last seven years, they knew how aggressive the pro-life lobby would be and therefore access to the authorities was key. The tension between the NGOs and feminists or women’s organisations would not decrease since while the legal process in front of the TC was

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<sup>333</sup> *Ibid.*

<sup>334</sup> *Op. cit.* 64.

<sup>335</sup> *Op. cit.* 122.

<sup>336</sup> *Ibid.*

taking place feminist and women's organisations were perceived as being very slow to react and provide support to the working group doing the legal work.

Casas, Schiappacasse and Dides all agreed how late feminists came on board during the judicial battles. Casas explained that “during the series of hearings at the TC there was no visible mobilisation outside the court”:

... the women's movement was so absent that [...] the second day we presented, Monseñor Chomalí [the Bishop] was sat in the first row looking at all the Ministers with his huge crucifix. And outside you see no one [...] feminist organisations did not realise the magnitude of what was coming. And only when it [the sentence] becomes imminent [...] they organise this massive thing that culminates with the march of around ten thousand people.”<sup>337</sup>

The leaders of the feminist movement acknowledged this but tried to justify it explaining their lack of resources and limited numbers, both problems affecting their capacity to mobilise. As explained by Gómez, “the lack of leadership in the women's movement and the lack of resources made the movement be reactive”.<sup>338</sup>

They also pointed at the government's own absence in explaining to the public and women what was at stake if the EC was banned by the TC. Despite the request from feminists to create a public awareness campaign the government remained silent, and feminist organisations felt that this responsibility was thrown at them. Gloria Maira argued “it was left to us, as usual”, in the beginning it was hard because “we were five or 10, and we were doing this information work face-to-face with pamphlets [and] people looked at us as if we were crazy!”:

... we started mobilising in front of the Constitutional Tribunal. The first day there were five of us, the second day ten, then twenty and this was like a snowball until

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<sup>337</sup> *Op. cit.* 110.

<sup>338</sup> *Op. cit.* 122.

we closed the street [in front of the TC], there were three hundred of us by then... what changed was the public outrage about this.<sup>339</sup>

In the meantime, government officials had been working on their own without communicating clearly with civil society about their intentions. According to Casas, who openly complained about the governments' lack of transparency, the government's lawyers did not count on the necessary knowledge on SRHR to defend EC. Dides argued that the government "lacked seriousness" and "the lawyers had no idea of these issues, they even used arguments in line with pro-life groups". Thus the SRHR advocates "felt very little support at the Constitutional Tribunal by the government and the Concertación".<sup>340</sup>

Therefore, it was not until civil society was able to have access to the documents that they rectified much of the content, adding progressive language including references to international legal instruments protecting SRHR.<sup>341</sup> Casas argued that communication with the government's lawyers improved in the last steps of the judicial procedure, during public hearings in front of the TC.<sup>342</sup>

The frustration of the biomedical institutions is understandable, especially because they had technical knowledge that gave them a strong advantage over the women's movement and the more activist discourse to advocate on these issues. On the other hand, NGO lawyers had strong legal expertise on the issue within national and international frameworks that could prove challenging for the government's lawyers. Moreover, because they had been involved with the Norms since its beginnings, the

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<sup>339</sup> *Op. cit.* 23.

<sup>340</sup> *Op. cit.* 124.

<sup>341</sup> *Ibid.*

<sup>342</sup> *Op. cit.* 110.

NGOs held a valuable amount of accumulated knowledge on the arguments and tactics that were likely to be used against them.

The feminist movement also felt some level of detachment from biomedical NGOs dating from the 90s when they worked together on the SRHR Bill and had many differences of opinions. As discussed in Ch. 6, this led to biomedical NGOs focusing more on gradual reforms while politically lobbying using their technical skills, especially within MINSAL, where there is a history of collaboration. They opted for specialising in these issues beyond simple advocacy work.<sup>343</sup> Feminists on the other hand had preferred their relation and historic link with SERNAM to push their agenda, despite often facing barriers and disappointments.

However, because the feminist movement arguably saw EC initially as a distraction from the work on abortion, they were late to get on board. Leaders of the feminist movement openly complained referring to the way in which work on the SRHR Bill had never received the promised support of Bachelet's administration. As Gómez explained:

... it is an undeniable fact that the SRHR bill is in the programme of the Bachelet government. [...] we feel betrayed because the Bachelet government was a hope, it raised expectations among women's organisations. And many issues have been resolved positively it is true, in particular around labour issues, which is where you see more advances, issues such as crèches, nurseries...all less controversial of course!<sup>344</sup>

Despite the lack of direct involvement in the legal process, the women's movement and feminist organisations would play a crucial role in the mass demonstration after the TC's sentence in 2008.

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<sup>343</sup> *Op. cit.* 124.

<sup>344</sup> *Op. cit.* 122.

## Conclusion

This chapter analysed the judicial process and political confrontation that took place at the Constitutional Tribunal, and the role played by different sets of actors and advocacy coalitions, and in particular the judges. It showed that the petitioners at the TC were the same actors involved in the EC saga since 2001, and were therefore not isolated civilians fighting from personal convictions as most of them tried to sustain.

The chapter has shown the way in which two post-authoritarian institutions of the Chilean political system – the Constitutional Tribunal and the “consensus” rule – had the power and influence to limit the advancement of women’s right, in particular their reproductive rights. These are good examples of how formal and informal institutions interact. The decision by conservative forces to appeal to the Constitutional Tribunal – after the ruling of the Supreme Court which is the last decision-making court in Chile’s judiciary – was a political and strategic one. The conservative lobby wanted to resort to the Constitutional Tribunal to reinforce the status quo on reproductive rights moved by a conviction that the result of this political strategy could be favourable. This due to the weight of conservative forces and the controversial institutional framework of the TC within Chile’s democratic political system.

The importance of informal institutions was visible throughout the judicial process in the action of the judges. The nature and functioning of the tribunal makes it an opaque institution where judges are not accountable for their decisions. This created an ambiance of distrust from civil society actors and reinforced the political struggle initiated by members of Congress.

The exclusion of women's groups as party in the judicial process affected their relationship with other civil society actors, but most importantly this decision reinforced the signal that the debate on EC was not a women's rights issue. It affected the way in which the defence was built, and the way in which the government lawyers communicated and cooperated with biomedical organisations. It also favoured the strategy followed by the government to protect its own capacity to create policies on reproductive issues, leaving women's rights aside while strengthening the public policy arguments.

Doctors and SRHR advocates maintained close links with the executive even if the legal teams of the government did not always listen to them and their experience from the previous judicial challenges on EC. Yet the biomedical groups succeeded in the end as the government incorporated their scientific arguments. Biomedical groups, and in particular the work of Díaz and Casas, were strongly influenced by a commitment to SRHR.

The conservative lobby intervened at different stages in a concerted manner, often working on parallel processes and challenges in courts or against private businesses. The Church despite being highly visible in the media clearly favoured the strategy of letting Catholic institutions and individuals challenge the government policies while maintaining a formal distance with politics. Nonetheless the content of the discourses and arguments used both by politicians and conservative groups in the media and the courts, reveal the deep and pervasive impact of the Church's influence and teachings among a certain elite. This opposition to EC was based on the battle against abortion and women's bodily autonomy.

Finally, Bachelet and her personal commitment were decisive to overcome the legal challenges posed by the tribunal. Bachelet was skilful in making her own government and coalition carry the flag of sexual and reproductive issues. She incorporated the feminist and biomedical agenda on EC and SRHR, and by appointing key ministers such as Soledad Barría she was able to push her agenda. While she did not necessarily appear personally at all stages of the political and judicial battles she granted a constant support to her ministers maintaining a sustained communication with them.

## **CHAPTER 9: The Constitutional Tribunal's ruling – from the courts to the streets and all the way to Congress**

This final chapter analyses the ruling of the TC against EC, and discusses its gendered impact. The chapter focuses on the different reactions to the ruling and the role of civil society and the state in overcoming the legal impasse resulting from the ruling. In doing so it pays particular attention to the way the executive sought a political way out for its policy through legislative means, while both feminists and the SRHR lobby were key players in the creation of the Movement for the Defence of EC, bringing about a mobilisation on reproductive issues previously unseen in democracy. It also looks into the role played by politicians in Congress and discourses surrounding the approval of the Fertility Bill.

Following the literature on judicialisation and its emphasis on understanding the role judges can have on the political use of the courts and the impact of their decisions, this chapter argues that the ruling of the Constitutional Tribunal was highly ideological. It responded to the ultra-conservative views of the judges that the policy for the distribution of EC was the first step towards the legalisation of abortion. The judges used their power to reaffirm their beliefs regarding the Constitution's protection of the unborn, going as far as granting it legal rights. This was possible due to the Constitutional Tribunal's post-authoritarian institutional legacy. Its conservative judges responded to the expectations of the anti-SRHR lobby that brought the case to this specific court because of its conservative profile and power to counteract the power of the executive.

The literature on women's movements in Chile has highlighted their weakness and lack of visibility since the return to democracy. This chapter discusses the shortcomings of

the women's movement and the feminist movement despite their crucial role in the creation of the Movement for the Defence of EC and the mass mobilisation of 22 April 2008, also known as the "*Pildorazo*". Using the concept of "feminist organising" (Ewig and Ferree 2013), the chapter analyses how the convergence of young and old feminists, as well as SRHR advocates, permitted the inclusion of a wider array of social actors and social movements that mobilised under the banner of the Freedom to Choose for All. It shows how internal weaknesses of the feminist movement and in particular intergenerational tensions explain why this successful movement was short lived.

The success of bills regarding gender equality is directly related to the support of the executive and SERNAM (Haas 2010). This chapter argues that the role played by Bachelet and her strategic inclusion of SERNAM in the process of drafting and passing a bill to grant the state the right to produce public policies on reproductive issues were key to its eventual success in Congress. This was a deeply political decision, showing the President's conviction and resolution to see the EC policy through before the end of her mandate and as part of her legacy. Bachelet and the government reframed the discourse surrounding EC, moving the debate away from a values issue and towards an inequality and women's rights issue. The constant commitment to reproductive rights provided a political atmosphere that lifted politicians' fears around EC. Finally, the presence of doctors in politics represented an informal institution that permitted an easier progress, both during the legal battle at the Constitutional Tribunal and in Congress. Politicians who were also doctors became vocal about their support for the President's policy and EC, granting their political support to pass the Fertility Bill.

### **The Constitutional Tribunal's ruling**

On 2 April 2008 – three weeks before the official date set for the ruling – the news that the TC had ruled against President Bachelet's Decreto Supremo reached the media and the supporters of the EC policy. Lidia Casas explained there was a leak from the Constitutional Tribunal regarding the ruling against the government and “you had many rumours going around, and in March *El Mercurio* rang me to tell me ‘you’ve lost’, and they wanted an interview”.<sup>345</sup>

This judgment by the TC has been the study of many scholars, in particular from the legal studies arena (Beca Frei 2008; Bordalí Salamanca and Zuñiga Añazco 2009; Macclure 2011; Muñoz León 2014; Nogueira Alcalá 2008; Vivanco Martínez 2008) as well as the medical arena (Ugarte 2008). Most scholars agree that the ruling represents a milestone in legal terms particularly with regards to the role of the TC and constitutional disputes. It is also considered as “the most controversial ruling of the Chilean Constitutional Tribunal since its reestablishment in 1980” (Muñoz León 2014: 158).

The text of the ruling is a confirmation that, despite many hearings and experts pleading in front of the tribunal, the judges of the TC had decided to agree with conservative and non-scientific arguments aiming to link EC to abortion. The position of the tribunal stated that the arguments brought forward by doctors on both sides, “whether in favour or against the ‘morning-after pill’... are equivalent in that both sides sustain with similar vigour and conviction, their specific point of view” (Tribunal Constitucional 2010: 353). However, the TC added that there was no equivalence between the

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<sup>345</sup> *Op. cit.* 110.

arguments on both sides since the implications of one set of arguments could lead to a unconstitutional result (Tribunal Constitucional 2010: 353).

Thus, quoting the report by PUC's Centre for Applied Law and Ethics establishing the meaning of the principle of "*duda razonable*" or reasonable doubt, the TC sustained:

Therefore, the doubt – which is reasonable, since this judging body cannot question the reasoning of those who are experts in medical sciences, implies [...] a possible infringement to the Fundamental Charter. (Tribunal Constitucional 2010: 353)

Through this ruling the TC entered a new legal arena giving the product of fertilisation the status of persona. By giving the status of persona to an embryo or product of fertilisation (*nasciturus*), it was granting it a right to life, and therefore all norms affecting the possible development of the embryo had to be declared unconstitutional (Bordalí and Zuñiga 2009: 177).

Bordalí and Zuñiga point to the fact that in many countries with constitutional courts, these are never given review power over administrative norms. This is to avoid tribunals assuming a form of "superpower", as is the case in Chile (2009: 176). Moreover, the authors highlight that the revision of Decretos Supremos has generally been an initiative of the political opposition showing that "far from discussing if they affect citizens' concrete rights or interests" it "appears as a mere instrument of political struggle between government and opposition" (2009: 176).

This political power of the TC was evident in the manner in which it required the President to send a *Decreto Supremo*. It was also evident in the way the judges agreed to look exclusively into the right to life and how it was affected by EC, which the petitioners' sustained was abortive. In this way, they avoided creating wider controversy

with a ruling that could have forbidden all forms of contraception available to women and impede the government to put in place health policies affecting adolescents.

Moreover, the common principle in law that requires that petitioners prove their claims was simply not respected in this case (Beca Frei 2008). On the contrary, it was up to the defendants – the government with the support of the SRHR advocates – to prove that EC was not abortive. Instead of demanding that the petitioners show alternative research, the TC allowed them to use methodology disputes to question the validity of scientific research accumulated over more than 10 years. As Croxatto mentioned, one of the arguments used against his studies was that the tests were carried out on animals, knowing well that most drug test trials that have an ethical conflict cannot be carried out on humans.<sup>346</sup> Moreover, generally tests on animals are considered sufficient to confirm the suitability of drugs to be used on humans.<sup>347</sup>

The defence was asked to prove at 100% – “a certainty that does not exist in the sciences” – that the EC would not have any impact on the product of fertilisation.<sup>348</sup> No matter the amount of scientific information that the pro-SRHR lobby provided, the ruling clearly shows that the judges gave preference to the Catholic conservative notions of “life from conception” and the right to life of the *nasciturus* as a *persona*. The ruling talks significantly about the starting point of life in order to determine if it starts with fertilisation or later at the implantation stage (Beca Frei 2008).

Finally, arguably one of the most important aspects of the political content and use of the information to produce a ruling by the TC resides in its own legal arguments, as well

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<sup>346</sup> *Op. cit.* 63.

<sup>347</sup> *Ibid.*

<sup>348</sup> *Op. cit.* 26, 198.

as lack of references to human rights and the link with the conservative and authoritarian legacy of the Constitution. As explained by Nogueira Alcalá, the way in which the TC argued in favour of the right to life raised questions as to whether it is given such a central role in the constitutional system or if it was trying to establish a hierarchy among rights, which “from a human rights perspective is highly questionable, since they all stem from human dignity and must be optimised and not one cancelling the other” (2008: 371). The author also highlighted that the TC made too many references to the “*Comisión Ortúzar*” – the constitutional commission of the dictatorship – but little reference to the democratic institutional framework of the time (2008: 371).

The political bias of the ruling was also obvious in its failure to incorporate women’s rights. For Bordalí and Zuñiga, the ruling showed a deficit in its human rights component, particularly when it treated women as rights’ bearers; instead of granting women with rights of their own and analysing the conflict of interest between the woman and the nasciturus, it focused on the barriers to the nasciturus’ right to life (2009: 177). For the authors, the omission of all mention of women’s rights was not a casual one. It was done purposefully to maintain the status quo of traditional roles predominant in Chilean social and cultural norms (2009: 179).

From the right to protect people’s private lives to the right to physical integrity and health and equality, none was referred to, and the CEDAW (Convention for the Elimination of all Forms of Discrimination Against Women) was simply ignored. This was clearly due to longstanding resistance from conservative sectors in Chile who were afraid that if they ratify CEDAW’s Optional Protocol they would open the door to abortion as a right (Bordalí and Zuñiga 2009: 180).

### **The *Pildorazo* and the Fertility Bill**

Despite all the legal details and repercussions of the TC ruling, for the public the most immediate and visible consequence of the TC ruling was that the government would not be able to distribute EC free of charge to women above the age of 14 through its national health system. In addition, it created a legal and political conundrum – while the distribution of EC free of charge by the health authorities was illegal, its commercialisation for a higher price in pharmacies remained within the law. This directly reinforced the inequality in access between poor and richer women. This situation provoked an unforeseen wave of vehement reactions and protests by politicians, public servants, civil society organisation and unions alike. On the morning following the ruling hundreds of people, predominantly women belonging to NGOs and civil society organisations, protested in front of the TC and later submitted a letter to the President rejecting the ruling (La Segunda 2008e). The protests ended in clashes between the police and the protesters, with many people arrested (La Segunda 2008e).

The President immediately ordered ministers to “start looking for options to reverse the ruling” (La Segunda 2008d). The government quickly reacted and came up with its own interpretation on the application of the ruling, which they determined affected the national health system but not the distribution of EC at the municipal level.

Minister Barría declared she was relieved that at least the main contraception methods available in the country remained untouched, adding “we are more relaxed but not satisfied” (La Segunda 2008a). She added that in order to solve the legal impasse the government was considering: a) including the pill in a new bill which could be the SRHR Bill; b) appealing in front of the TC; or c) looking into a constitutional reform that could allow the inclusion of EC and its free distribution within the national health

system (El Mercurio 2008). The Church through Msgr. Chomalí declared the efforts to revert the ruling of the TC was “a sign that in Chile there are people who want to make abortion legal” (La Segunda 2008b).

Through its declarations the authorities started the process of reframing the policy and the language of inequality began permeating its messages. The government’s speaker declared “this is not only an issue about people’s freedoms... it is also an issue of obscene inequality... a decision applauded by the Right, where a woman with money gets the pill, and a woman without money doesn’t” (La Segunda 2008d). Politicians from all parties appeared in the media stating their refusal of the TC’s decision. Members of the PDC declared the ruling was “an unforgivable mistake... [...] aberrant, inconsistent and hypocritical resolution. The Tribunal rules in favour of inequity” (La Nación 2008a). Members of the Socialist Party bench in Parliament even declared they would take the case to the Inter-American Court of Human Rights (ICHR) (La Segunda 2008c). The government itself suggested that a group from civil society should consider doing so using previous jurisprudence whereby women’s groups had already applied for their reproductive rights (El Mercurio 2008). At the time of fieldwork, civil society organisations were preparing the case to be brought to the ICHR in case there was no other solution nationally.<sup>349</sup>

The attention of the media and public opinion suddenly focused on the TC judges as politicians and accused them of interfering with people’s private lives. For the Concertación, the blame fell on Mario Fernández, the former PDC Minister of Defence under Lagos, and personal friend of Alvear. Politicians on the left and from his own party accused him of treason and also asked for sanctions. The youth section of the PDC

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<sup>349</sup> *Op. cit.* 26, 82, 111, 125, and interview with Paulina Vidal, feminist and SRHR advocate 11.05.09.

asked for the suspension of his militancy, even if Fernández had renounced it before joining the TC (El Mercurio 2008).

### **The Movement for the Defence of EC**

While feminists were pushed aside during the judicial challenge by the Constitutional Tribunal, they became key players as the women's movement mobilised to create the *Movimiento para la Defensa de la Anticoncepción*<sup>350</sup> (Movement for the Defence of EC).

The Movimiento was born among what Gloria Maira called “las de siempre” (the usual ones) – that is, well-established NGOs whose leaders are considered part of the *feministas históricas*, including the *Red Chilena Contra la Violencia Doméstica y Sexual*, the *Red de Salud de Mujeres Latinoamericanas y del Caribe*, the *Foro Red de Salud y Derechos Sexuales y Reproductivos*, and the *Movimiento pro Emancipación de la Mujer Chilena* (MEMCH).<sup>351</sup> But the *históricas* were also supported by *las jóvenes*, smaller organisations and individuals linked to young feminists' networks that played a crucial role.

As Maira explained:

the young feminists of the Movement were in charge of organising other young people; they forged alliances with student unions, political collectives and the youth of the Concertación parties. They also worked on the inclusion of technology (email, distribution lists, blogs and webpages) for mobilisation and political action. Meanwhile, the organisations working on reproductive health were in charge of relations with the unions and institutions specialised in health, such as the Confusam,<sup>352</sup> the Union of Midwives, the Medical Association, Cembra<sup>353</sup> and

<sup>350</sup> <http://movimientoanticoncepcion.blogspot.co.uk/>

<sup>351</sup> *Op. cit.* 23.

<sup>352</sup> *Confederación Nacional de Funcionarios de Salud Municipalizada.*

<sup>353</sup> *Centro de Medicina Reproductiva y Desarrollo Integral del Adolescente* (Universidad de Chile).

the Chilean Association of Gynaecology and Obstetrics, among others.” (2010: 134)

As Antonella Caiozzi, a young feminist, explained, the women’s movement had started organising at the end of March after initial leaks and rumours indicating the ruling of the TC could be negative, although feminists reacted late:

... someone sent an email [saying] “People, this is serious”... nobody had done a follow up of the issue and suddenly someone realised [...] and these are people who work on these issues in NGOs, who get paid for doing this, a sort of remunerated feminism [...] the issue just popped out like that “listen this is getting bad, these idiots want to forbid even the [copper]T” [...] and there was a moment of panic and a ton of emails started circulating...<sup>354</sup>

The first public success was the mobilisation of around 500 people in front of the Constitutional Tribunal to protest against the ruling (La Segunda 2008e), followed by other stunts such as the symbolic closing of the tribunal with a lock (La Nación 2008d) (see App. 7) and the mass apostasy letters “with the signatures of 500 people throughout Chile, 400 in Santiago, that we submitted to the Bishop to cancel our baptism, to be considered apostates”.<sup>355</sup> Slowly the movement started gathering more and more support from different individual actors and organisations, including university students’ federations, unions and politicians. As explained by Caiozzi, this “was an issue that summoned more people than just the feminists, which is not the case with abortion for example”.<sup>356</sup>

As the movement grew, young feminists, many of them from the former “*coordinadora de las feministas jóvenes*” played “an increasingly leading role, beyond the initial call,

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<sup>354</sup> *Op. cit.* 105.

<sup>355</sup> *Op. cit.* 112.

<sup>356</sup> *Op. cit.* 105.

as a way to widen the movement and make it something not exclusively feminist”.<sup>357</sup> The *Colectiva feminista mujeres públicas*<sup>358</sup> participated in the activities of 8 March with the *feministas institucionales* or feminists NGOs, and decided to join after “a conversation regarding the ruling, [feeling that] we needed to protest and mobilise civil society”.<sup>359</sup>

The idea was that a protest would be organised for 22 April when the TC was initially expected to announce its ruling. The Movimiento for several weeks was able to maintain people mobilised through the use of new information and communication technologies as a “new form of political action” (Flores 2009), including social networks. Patricia Zamora explained that young feminists were able to provide such crucial support because:

... we have great management and administrative skills, because we have formal training, a solid training [...] this was an important factor in the success of the 22 April mobilisations, [...] we and Natalia Flores from the Observatorio de Género introduced the idea of using the ICTs for social agitation, and therefore we managed to make the issue visible, and encourage the formation of groups at the national level that remained mobilised [...] and the climax of all this was the march in support of EC...<sup>360</sup>

### **The march of 22 April: The *Píldorazo***<sup>361</sup>

«¡Alerta! ¡Alerta ciudadana! ¡Ahora los jueces se meten en tu cama ! »<sup>362</sup>

« ¡Nosotras parimos. Nosotras decidimos ! »<sup>363</sup>

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<sup>357</sup> *Ibid.*

<sup>358</sup> *Op. cit.* 112; the colectiva was born within the Department of Social Sciences of the Universidad de Chile and brought together sociologists, anthropologists, lawyers, midwives, historians. It was composed of around 20 people, see <http://colectivamujerespublicas.blogspot.com/>

<sup>359</sup> *Op. cit.* 112.

<sup>360</sup> *Ibid.*

<sup>361</sup> This is the way the press nicknamed the unexpected impact and turnover of the mobilisation. See App. 7.

<sup>362</sup> “Alert! Citizen’s alert! Now the judges are getting in your bed!”

<sup>363</sup> “We give birth, we decide!”

« ¡Chilenas, chilenos, salgan a marchar, para que sus hijas no tengan que abortar ! »<sup>364</sup>

« !Ahora, ahora, ahora quieren vida, cuando en la dictadura mataban con la DINA ! »<sup>365</sup>

– Chants of protestors during the 22 April demonstration

On 22 April 2008 between 15-20,000 people<sup>366</sup> marched through the Alameda – the main avenue of Santiago – as well as in other provincial cities of Chile, to protest against the ruling by the Constitutional Tribunal. The march ended in a rally of citizens in front of La Moneda – the presidential palace – where protestors voiced their opposition to the TC’s ruling.

This was a massive march by Chilean standards, and the biggest mobilisation for feminists since the return to democracy, which surprised civil society groups, as much as government and political bodies, by its amplitude and by the diversity among its participants. People of all ages, class, gender and social backgrounds joined the march.

The march represented for the Movimiento and young feminists a “crucial moment gathering the greatest number of people” and not only “grassroots, or feminist networks... you had student federations, members of political parties... people from other social movements, and in that process we the young feminists played a key role through our university networks and people”.<sup>367</sup> The members of the Colectiva Mujeres Públicas had:

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<sup>364</sup> “Chilean women and men, come out and march so that your daughter won’t have to abort.”

<sup>365</sup> “Now?! Now you want life, when under the dictatorship you killed with the DINA (secret police of Pinochet).”

<sup>366</sup> This was almost three times the number of people that marched against “femicides” on 22 November the year before.

<sup>367</sup> *Op. cit.* 105.

... grassroots links within the Universidad de Chile [and] the student's movement leadership [...] and summoned the militants within the University and there was support from the Law and Chemistry Department who mobilised a great contingent of people...<sup>368</sup>

Moreover, this march was “the first mass demonstration that people nationwide joined in favour of a profoundly feminist demand, which is a demand for sexual and reproductive rights and the battle flag was the freedom to choose”.<sup>369</sup> The march for feminists had a symbolic and political impact in that it expanded “beyond what you could imagine... and the success was that we managed to generate a discourse, change the social discourse regarding the issue, we made it visible, more powerful”.<sup>370</sup> It also has to be seen “in the context of the march of the Pinguinos”,<sup>371</sup> since in the last months “there was a great sense of social excitement” leading to “a greater disposition to demonstrate”.<sup>372</sup>

Yet despite the success of the march and the mobilisation of so many people the Movimiento had a short life undermined by tensions, rivalries and power struggles. The first tensions were related to the issue of visibility, ownership and deciding who gets to stand “behind the banner”. The relationship with politicians was a main obstacle because, according to Adriana Gómez there were no “consistent working alliances” and those parties that participated “jump[ed] on board because they knew something was coming, a successful mass mobilisation of citizens”. In fact during “the press

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<sup>368</sup> *Op. cit.* 112

<sup>369</sup> *Ibid.*

<sup>370</sup> *Op. cit.* 105.

<sup>371</sup> This was the massive demonstration organised by secondary schools' students which represents for many the return of social movements in Chile.

<sup>372</sup> Interview with Moisés Russo, youth SRHR activist of APROFA/IPPF, 23.06.09.

conferences, and during the march they wanted to be in the front row”, taking “electoral advantage of the movement in a utilitarian manner [...] to get a picture”.<sup>373</sup>

Gloria Maira highlighted the importance of and the difficulties “to secure the centre stage position of women and sustain the feminist discourse” during this process. She explained that the concern was:

... to maintain the autonomy of the Movement from political parties and their attempt to make of the citizens’ mobilisation a pro-Concertación rally [...] From the movement we reached agreements to insure that the centre stage was reserved for women and the citizens’ profile of the social mobilisation. (2010: 135)

Deputy Saa acknowledged these tensions but was also critical of the way in which the movement operates and the fact that feminists and “The Movement pro-EC [...] should have capitalised on the march”:

It should have continued, but they are absent. I know it is hard, it is exhausting, But you don’t see them continuing, their attitude over time is [...] as if they are discouraged. But they – civil society – should have capitalised on it. [...] But they also fear us [female politicians] They are afraid that we will take credit for things [done by] civil society, so then you have these contradictions [...] even on violence issues they don’t want us to join the marches...<sup>374</sup>

The fights for prominence among leaders of the Movement were also perceived negatively by the SRHR advocates, who were disappointed by the internal fights and the opportunism of politicians. Claudia Dides explained that for her the march “was a very sad moment and at the same time a very happy one”, because “as we joined we saw how the old [feminists] were fighting for the banner in front”. She also felt SRHR advocates had been ignored:

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<sup>373</sup> *Op. cit.* 122.

<sup>374</sup> *Op. cit.* 307.

... and nobody called us – the ones who wrote, the ones who had spoken to the press... so it was hard to observe how people fought [...] you saw how politicians started to appear [...] the communists who have never cared about EC [...] the PPD and the PDC, all trying to squeeze in [...] simple opportunism [...] on the other hand so many young people and that made us feel good, made us happy, we could say this was [...] an issue people cared about, an issue that was on the agenda but with little participation from the parties...<sup>375</sup>

Casas declared that Díaz “who is the key actor that triggered all this process, was never even invited to be among the women who initiated the march”, adding: “She and her team were at the end [of the march] like any other citizen.” Meanwhile:

... you saw all these feminist organisations fighting; they fought with politicians [...] they did not want the *políticas* at the front, even though those *políticas* were the ones who had obtained the signatures of 49 deputies [in favour of EC].<sup>376</sup>

Many of my interviewees pointed at internal issues of the movement as an explanation for its shortcomings. Some highlighted the “reactive” nature of the movement.<sup>377</sup> “We are reactive, we don’t put forward proposals”, said Adriana Gómez, adding: “We are ideological actors, we have all the ideology, but we are not political, we are not political actors. The movement lacks political incidence.”<sup>378</sup>

For Gómez this was a failure related to lack of financial means “that would allow us to be more structured and become more institutionalised [...] It is also difficult to be a leader when you don’t have a salary. It is hard to go and protest on the streets if you don’t have the means for transportation”.<sup>379</sup> Josefina Hurtado argued in a similar line that the short lifespan of the Movement was “an impulse and a ‘letting go’, and it has to

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<sup>375</sup> *Op. cit.* 124.

<sup>376</sup> *Op. cit.* 110.

<sup>377</sup> *Op. cit.* 122, 124.

<sup>378</sup> *Op. cit.* 122.

<sup>379</sup> *Ibid.*

do with capacities but also current leadership”.<sup>380</sup> Gómez agreed that the feminist movement was missing “internal leaderships... there is a crisis of leadership”. Yet Hurtado insisted that the Movement was born because there still are:

... leaders within women’s organisations who still believe [...] that something can be done together and have an impact, but you also have the sensation of so much effort for little success. So these are spaces that get exhausted [...] we thought we could sustain it but then each one goes back to their daily reality of work and lives, and it gets dissolved.<sup>381</sup>

By early 2009 the Movement was no longer active. Leaders of the Movement and the SRHR lobby all pointed to the internal disputes that happened before and after the mobilisation of 22 April. The first was a break-up between old feminists and young feminists and the second with the SRHR advocates.

Despite being considered the “engine of the movement” young feminists left after several “arguments over who gets to be in the spotlight [...] and the arguments could last a whole meeting”.<sup>382</sup> Some thought the problem was that the old leaders “do not recognise that the strength that this movement had to mobilise people to march was the result of the strategies by the young feminists to use technology, something the older members are not familiar with”.<sup>383</sup> For Zamora, the problem lay in the fact that the practices of old leaders were “vertical” or top-down, which provoked much “elbowing between the organisations and tensions during the coordination”.<sup>384</sup> Moreover, as explained by Caiozzi, the old leaders:

... have some trouble with the inclusion of men on these issues [...] with the idea of compromise on issues related to the body [...] the main thing is that there is an

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<sup>380</sup> *Op. cit.* 141.

<sup>381</sup> *Ibid.*

<sup>382</sup> *Op. cit.* 81.

<sup>383</sup> *Ibid.*

<sup>384</sup> *Op. cit.* 112.

issue of struggle for prominence where they are not ready to compromise, it has to do with egos beyond any political consideration [...] It is also understandable, because these are people who have worked on these issues all their lives, and when things like this happen they feel they have the right to be in the front, they effectively do. But sometimes this goes against the objectives pursued [...] egos diminish you, weaken you...<sup>385</sup>

Zulema Contreras highlighted how older feminists “did not understand that they started the movement but after the ruling it did not belong to them anymore” and by “excluding the youngest feminists and the incorporation of new topics [such as sexual diversity/inclusion of men] the result was a “*viejocracia*” (female gerontocracy)”, because some people “want to retire doing this”.<sup>386</sup>

Generational conflicts thus represented a unique challenge for feminists. This was “a pending debate” for the feminist movement according to Maira:

... some youth groups [...] speak of generational change within feminism. There is no generational change in feminism! This is not a job where you retire and go home! [...] the debate is about the power distribution among feminists [...] this is a pending debate! But as for generational change, I told them “you can forget it! I am not retiring!”<sup>387</sup>

For Bastías, the link of older feminists with NGOs and donors affect their way of building alliances, because the young feminists “know what they want, [...] and are ready to go for it. Instead the older leadership, since they belong to international networks, [...] the issue is the competition for resources and preservation of status”.<sup>388</sup>

Teresa Valdés added:

The leadership of that movement entered in the classic tensions among my dear friends from certain sectors who want to control it all and do not open up to

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<sup>385</sup> *Op. cit.* 105.

<sup>386</sup> *Op. cit.* 98.

<sup>387</sup> *Op. cit.* 23.

<sup>388</sup> *Op. cit.* 97.

alliances, don't relinquish power to transform things [...] This is unfortunately a classic display of the tension issues within the women's movement where some leaders say "this is mine, not theirs". And everything crumbles.<sup>389</sup>

Thus young feminists felt there was a lack of recognition for their work and the fact that they had come up with the slogan "For the freedom to choose"<sup>390</sup> that rallied so many people on 22 April. Zamora explained that the "top-down" relation with old feminists was at the origin of a malaise since young feminists considered they "joined that space as comrades, as equals, but when it came to taking decisions, old feminists had a vision of movement-building we did not understand [...] we felt disrespected [...] we are no one's labourers!" Thus they left even "if the cost was to break the movement".<sup>391</sup>

After the departure of the young feminist groups, the Movement was still receiving emails and messages from its supporters,<sup>392</sup> but the "digital campaign was interrupted"<sup>393</sup> since it was these young leaders who held the accounts of most social media networks and tools.

The dispute between young and old feminists went beyond the organisational aspects of the Movement – it was also about ideological differences as to whether feminist praxis was based on a focus on women or gender equality, and the inclusion of men. Zamora explained that there was "a fight regarding whether this was a women's and feminist mobilisation or from society in general", adding:

We as a colectiva considered that it was vital for the strategy that the call to protest was as society in general, that we as feminists did not need to appear as the great mobilisers, especially because there is a great resistance to feminism in society...

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<sup>389</sup> *Op. cit.* 25.

<sup>390</sup> *Op. cit.* 105.

<sup>391</sup> *Op. cit.* 112.

<sup>392</sup> *Op. cit.* 81.

<sup>393</sup> *Op. cit.* 98.

We preferred to empower the social mobilisation calling out to men and women saying that this was for the right to choose of men and women...<sup>394</sup>

Biomedical organisations and other SRHR advocates also lost patience with the internal disputes of the women's movement. Schiappacasse explained that she “stopped attending the meetings” because she felt she “had given enough time and [...] I could not continue to attend meetings where we never reached agreement and went nowhere”.<sup>395</sup> She added that there was the intention to keep the momentum for the Movimiento but this was not possible because when young feminists left “there was a breakdown”:

... after the ruling we knew it would disappear and we wanted the movement to become pro-choice, but that was too wide, it went much beyond the right to access [contraception] methods and included for example abortion. Many organisations left. Because abortion is not an issue that many organisations have on their agenda [...] Abortion still divides.<sup>396</sup>

It became evident with the experience within the Movement that the work of “alliance-building is a challenge” and the “more classic and historic movements need an upgrade”.<sup>397</sup> Contreras argued that “feminist demands want to reach very high in one day. And there are many internal power struggles”, they have “a short-term vision”, and “fight for resources and see each other as enemies”.<sup>398</sup> This was particularly true regarding the positioning of organisations on abortion because “supporting therapeutic abortion “is considered being lukewarm, feminists only recognise the total right to free

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<sup>394</sup> *Op. cit.* 112.

<sup>395</sup> *Op. cit.* 81.

<sup>396</sup> *Ibid.*

<sup>397</sup> *Op. cit.* 98.

<sup>398</sup> *Ibid.*

abortion”.<sup>399</sup> Schiappacasse highlighted that the demands of feminists and biomedical organisations are often at odds since:

... many of us and our organisations consider that this like a stepladder, you have to go up step by step. You cannot think that abortion will be decriminalised or legalised for all women and under any circumstances. We just managed to get EC! Let’s go step by step! Let’s first secure therapeutic abortion for specific cases [...] So there’s always been conflict, which is understandable. You should expect the Foro and Red de Mujeres to want the total right to abortion.<sup>400</sup>

Juan Bastías who represented APROFA within the Movimiento explained that the participation of the biomedical organisation and his presence as a man were also sources of tension:

There was something whenever we had to negotiate, the idea of appearing next to APROFA posed a problem for some organisations, and in particular for the feminist movement. [...] Something to do with APROFA, with the medical side, with the institution, with the political positioning of APROFA made the alliance-building very complicated.<sup>401</sup>

Schiappacasse considered that the “great conflict is that the oldest feminists want to continue to work with women for women, and younger feminists want to include men. Because they think it is a job and a fight they both have to give”.<sup>402</sup> Zamora explained that “there is an internal issue within feminism regarding working with men, to which we, as a colectiva, always answer that we work for gender equity and we will keep working with men as many times as necessary, because for us this is no impediment”.<sup>403</sup> She also highlighted that during the meetings Juan Bastía “could not

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<sup>399</sup> *Ibid.*

<sup>400</sup> *Op. cit.* 81.

<sup>401</sup> *Op. cit.* 97.

<sup>402</sup> *Op. cit.* 81.

<sup>403</sup> *Op. cit.* 112.

even raise his hand”, and was never allowed in the core working group “made of Gloria Maira, Claudia Pascual, Adriana Gómez, Rosa Yañez and Rosa Ferrán”.<sup>404</sup>

Thus as can be seen the social movement that had provoked so much change in the perception of public opinion on SRHR and gender issues and women’s rights, suffered from serious internal conflicts that impeded its sustainability over time.

### **The aftermath of the ruling and the march**

Such was the intensity of the debates and social outrage regarding the distribution of EC that Bachelet included the issue as a key component of her speech on the state of the nation on 21 May, declaring:

My constitutional responsibility consists in insuring that exercise of the freedom to decide happens in conditions of equality [...] This is why in the debated case of the morning-after pill and in respect of the decision by the relevant judicial institutions; I will ensure equality is applied as far as my competences allow me to. The drug is available for those needing it in each municipality. It will be up to each mayor to decide whether to make it available to citizens. They will decide if they make the decision for people or they let people decide. Let the country be the judge. (SEGPRES 2008: 53)

This speech showed Bachelet’s determination to make EC available. One of the main concerns was that the legal interpretation of the ruling was only applicable to the national health system depending on MINSAL. This meant the pill would still be available at the local level in each emergency and primary healthcare centre of the municipalities. This interpretation of the ruling and the extension of the law put many mayors in an uncomfortable position since the elections were coming up shortly and EC played a major role in the electoral debates.

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<sup>404</sup> *Ibid.*; both Claudia Pascual and Gloria Maira are now at the head of SERNAM, as Minister and sub-Director respectively.

### **Feminists and the mayors**

In 2008, a year of municipal elections, the attention of the media turned to mayors and local authorities as many politicians and the government itself warned then that the pill “could contaminate the municipal elections” (La Segunda 2008f).

Many feminists and SRHR advocates left the Movement and started working with the National Association of Municipalities of Chile (ACHM) to support the government’s contention that EC could be distributed at the local level. At the time of the TC ruling, the ACHM was led by a PPD mayor who was personally in favour of the distribution of EC and who decided that the association needed to “collaborate with those local authorities who wanted to distribute it [EC]”, in particular to clarify the legal status of the distribution.<sup>405</sup> Shortly before the municipal elections, feminists working with the ACHM were given “a stand at the [ACHM] Conference” and were able to evaluate the mayors’ position in relation to EC, and realised “there was a lack of information, some were convinced they would continue to distribute it, others were waiting for the Contraloría’s decision”.<sup>406</sup>

The ACHM first carried out a scoping review of the reality of distribution of EC at the local level, which indicated that around 70% of the local authorities were distributing the drug. Following this positive initial result the ACHM and FLACSO launched wider research including 320 out of 345<sup>407</sup> municipalities in the country. As explained by Reinoso, the result showed that the “majority of the municipalities only provides EC in

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<sup>405</sup> *Op. cit.* 77.

<sup>406</sup> *Op. cit.* 81.

<sup>407</sup> Only 320 were considered since 25 of the municipalities did not have a municipal health system and therefore depended from the national health system, which automatically disqualified them for providing EC.

cases of rape, and does not provide it as a method as a free request by users”<sup>408</sup> therefore more work needed to be done to insure EC’s free distribution.

Feminists and the ACHM kept working intensively, anticipating the political weight of the rulings by the TC. The Contraloría was asked to clarify the matter in 2008 but did not immediately give an answer. Mayors at the time were therefore concerned that “they would commit an infraction that the Contraloría would then sanction”.<sup>409</sup> As explained by Reinoso “this happened during the municipal electoral period, all the mayors that were candidates became cautious”.<sup>410</sup> It quickly became clear that:

... there is fear, and the distribution or no distribution happens across party lines. I mean you have parties within Concertación, [people] within the PPD, the PS, the PDC and the Alianza that distribute it, and you see that the same parties [...] do not distribute it.<sup>411</sup>

This would be something that the women’s movement would in fact use that year to maintain the issue of the pill high on the agenda. Many organisations of the women’s movement decided to carry out a campaign indicating to voters what their mayors thought of EC. Based on the polls published by *Corporación Humanas* (2008) right before the elections, 64% of women declared they would not vote for a candidate that is against the distribution of EC, and 69% said they would not vote for a candidate that was against the right to abortion to save the life of a mother.

### **The Contraloría**

In 2009 the abortion issue reappeared on the agenda with the impending ruling by the Contraloría (General Comptroller) regarding whether the applicability of the TC ruling

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<sup>408</sup> *Op. cit.* 77; only 100 municipalities had services for emergency primary care (SAPU) and were therefore distributing EC in cases of sexual violence.

<sup>409</sup> *Ibid.*

<sup>410</sup> *Ibid.*

<sup>411</sup> *Ibid.*

also applied to municipalities. The Contraloría is an autonomous branch of the executive granted audit power over the executive's initiatives by the Constitution, to check their legal validity.<sup>412</sup> It therefore holds much political power. Its General Comptroller at this time, Ramiro Mendoza, was known as a right-wing sympathiser who taught law at Universidad de Los Andes (El Mercurio Online 2007), which led many to think that it was not a coincidence the EC case was brought to him for audit. Feminist and biomedical groups organised protests outside the Contraloría to pressure the Comptroller (see App. 7).

On 18 June 2009, the Contraloría announced its decision that extended the TC ruling to municipalities (La Segunda 2009a). Most importantly, it also extended the ruling to private or public institutions that maintained any contract with the national health system. This meant that NGOs such as ICMER and APROFA, as well as private clinics would have to stop EC distribution. The ruling created a worse situation than expected, clearly making it evident that only women who could afford to get a doctor's prescription would be able to buy EC in pharmacies.

The social uproar to the news was such that, on the very same day the Contraloría ruled, all presidential candidates spoke against the ruling and condemned the legal situation and socio-economic injustice created by the ruling. The language of inequality once again appeared as the leitmotiv – Carolina Tohá, the government's speaker, declared it was “particularly painful” that “wealthier people can continue to buy the pill in pharmacies, while the distribution through the national public health system is forbidden” (La Nación 2009b).

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<sup>412</sup> It is led by a General Comptroller designated by the President with the approval of three fifths of the senate. It has increasingly become a political actor due to its capacity to hold the executive branches, both organisations and individuals, accountable for their actions.

While Eduardo Frei qualified the repercussions of the Contraloría's decision as "odious and cruel discrimination", Sebastián Piñera declared the decision was "absurd" and "The majority of the deputies of the Alliance will support my position which is to allow the distribution of the pill, leaving it to each person's freedom of conscience" (El Mercurio 2009; La Nación 2009e). Piñera was under pressure to demonstrate as the candidate of the right that he was a liberal man despite being allied to the same groups that were linked to the Church and had led the country to this legal impasse. All candidates, including Piñera who was facing internal pressure from the UDI, gave their support to the government's initiative to send a bill to congress to not only re-establish the legality of EC but also ensure the right of the state to lead on reproduction and fertility health policies (La Segunda 2009b).

### **SERNAM and the Fertility Bill**

The speed with which the bill was brought forward was the obvious result of the preparation over the last months by the government to an imminent negative decision on EC. Although more than a year had passed since the TC ruling, it was obvious that the President had made sure the government had options to react once the matter was resolved. The responsibility of seeing the bill through fell to SERNAM's Minister Alborno who said SERNAM had already started participating in the fight to reframe the EC policy as a problem of inequality that brought "popular support for the government's stand":

... we managed to refute a political argument [...] used by the Right and the Church, which was "that there are issues that are the exclusive domain of families" [...] we refuted it with another principle above that one which is the inequity that

produced on poorer young girls, this was a fight of political arguments not technical ones.<sup>413</sup>

Albornoz explained that the work was quick and coordinated because “on gender issues, the women [Ministers] had a direct access to the President”, and this was particularly strong with SERNAM. But the bill also received a strong political support since Albornoz was “called to integrate the Frei commando for everything in relation to therapeutic abortion” for the electoral campaign.<sup>414</sup> This was perceived with distrust from the SRHR advocates and feminists. Matamala argued:

What happened for the PDC to change its attitude? Because Frei continues to say he is a Catholic [...] the Minister of SERNAM is a Christian Democrat and she has never wanted to discuss SRHR with civil society. Civil society does not want to hear of her anymore...<sup>415</sup>

Soledad Díaz also emphasised that “unlike Cecilia Pérez before her”, Albornoz initially:

... was less committed to these issues, her interests were elsewhere, in other areas, that are more important like labour issues [...] She really got on board the issue of the bill [...] this last year of the government she was very committed to the issue.<sup>416</sup>

In fact, many feminist activists were present next to SERNAM’s Minister at the announcement of the bill sent to Congress by the President. This despite the fact that since early 2009 there was a lack of visibility of the feminist movement in the media.

The conservative lobby’s reaction took the form of strong declarations by the UDI leaders and the Church against the Fertility Law prepared by the Bachelet cabinet. This obviously produced tension within the right-wing coalition supporting Piñera. UDI

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<sup>413</sup> Albornoz, *op. cit.* 254.

<sup>414</sup> *Op. cit.* 78.

<sup>415</sup> *Ibid.*

<sup>416</sup> *Op. cit.* 64.

Parliamentarians gave strong declarations in interviews with the press speaking of “ideological imposition” by the government with the aim of destabilising Piñera’s candidacy (La Nación 2009a). The declarations of the Church would also remain frequent and along the same line as the UDI.

### **Congress, doctors and the Fertility Bill**

Finally, on 30 June 2009, Bachelet signed the Fertility Bill to be sent to Congress, and gave it a “*suma urgencia*” or urgency status for its quick revision by legislators. On 13 July, the Health Commission with the vote of all deputies belonging to the Concertación, but most importantly with the support of Juan Lobos (UDI) and Karla Rubilar (RN) belonging to the Alianza – both of them doctors by profession – approved the bill. This allowed the vote to take place in the Chamber of Deputies on 15 July.

Outside Congress, the Church and the UDI had also mobilised their supporters – mostly young boys, likely students from Catholic schools and universities (see App. 7). The gender, class and age bias of the pro-lobby was evident. The session that day was one of the most agitated the deputies had attended in a long time; the pro-EC and anti-EC groups spent at least an hour chanting and demonstrating outside Parliament before entering. As the session started there was a great deal of confusion in the balconies overlooking the Chamber of Deputies. The police separated the two camps in two different sectors trying to avoid any direct confrontation at the demand of UDI deputies.

After many speeches by deputies in favour of the pill mostly on the left, with a few Christian Democrats opposing the President’s initiative, the most surprising support to the pill came from the deputies belonging to RN, many of them as doctors. Osvaldo Palma declared:

... the problem is not the EC pill; it is much more than that. What we are discussing is the freedom to choose, the non-discrimination, the right of women, the right of families, the right to choose freely and informed when and how many children one wants and can have; the right to decide on something as personal and intimate as their bodies, their free self-determination, their sexual freedom.[...] This is a medical and people's rights' issue. It seems to me that this discussion should never have been brought to Congress [...] On the other hand, with what right some call themselves "pro-life", as if those of us who do not think like them were "pro death". No one is against life!" (Biblioteca del Congreso 2010: 97)

The most tense moment in the Chamber occurred as Deputy Karla Rubilar (RN) spoke and declared passionately: "I am a doctor, I am a Renovación Nacional deputy and I prescribe the morning-after pill" (Biblioteca del Congreso 2010). Her intervention was met by a violent outburst by from the anti-EC supporters, mostly young men in their teens who shouted at her "Asesina!" ("Murderer!"), and the session had to be interrupted (Biblioteca del Congreso 2010: 119).

Kast who had led the group of deputies who brought the judicial case to the Constitutional Tribunal, displayed many empty boxes of drugs in his hands and declared:

We are told that it is essential to have access to the pill. Aren't there any other types of contraception methods? Don't other methods to regulate fertility exist that are not abortive by any chance? Here I have dozens of contraception pills, vaginal rings that women should know and use, condoms that are also used. In addition you have contraceptive implants for people who do not know them; contraceptive injections, spermicides and natural methods." (Biblioteca del Congreso 2010: 92)

Ignoring once again all scientific evidence on reproductive health, as well as the fact that EC was just one method among many within the Fertility Norms, Kast insisted that EC was a "hormonal bomb", that its use "increases the number of abortions and pregnancies in the adolescent population", and also led to more "venereal diseases

because condoms are not used” (Biblioteca del Congreso 2010: 92). He also made a direct attack on Dr Croxatto’s scientific credentials, declaring “no one has mentioned that he is also in favour of abortion until the eighth week of gestation” (Biblioteca del Congreso 2010: 93).

Deputy Cristi (UDI) suggested that the President’s use of “urgency” was “ideological, almost a whim by the government” probably to fulfil promises made “behind the back” of the Congress “to international organisations” (Biblioteca del Congreso 2010: 131). Deputy Sabag (PDC), a member of Opus Dei, accused his own coalition declaring that the “pluralism of the Concertación is betrayed” (Biblioteca del Congreso 2010: 102).

After this discursive confrontation, the final vote took place in the middle of a display of images of foetuses by conservative UDI deputies, opposed by Chilean flags and many more placards from the Concertación deputies supporting the right of women to choose, such as “Free Access to the Pill!”, “I vote for the right to choose”, “The decision is ours”, “This is the Chile I like” (see App. 7). When the vote was finally cast – with 73 votes in favour, 34 against and three abstentions – it was met with screams of happiness on one side and of anger on the other, a reflection of the strong feelings people had accumulated over the last weeks and over the last year in this final stage of the EC saga. Deputies Saa and Muñoz, the most renowned feminists in Congress, lifted a placard stating “No to discrimination, the pill now!”, saluting the feminists and women’s groups in the audience as they chanted (see App. 7).

The vote of the EC Bill was more than the approval of a health policy. It was the symbol of the crumbling of the formal and informal institutions behind the consensus, and its gendered agenda. That day progressive Concertación Parliamentarians were able to vote freely because the threat of sanction maintained by the “consensus rule” was

absent. As pointed out by René Castro, EC was important “because in the end it breaks the monolithic cohesion of the Right, and curiously managed to put Concertación in line. [...] the debate on the pill was resolved in two weeks but after eight years”.<sup>417</sup>

The long judicialisation of the distribution of EC – an initiative considered essential by a large section of the population – had obviously taken its toll on politicians who considered themselves progressive but who had followed the “consensus”. Whether the vote was more genuine than merely being the opportunity to appear in the media in the middle of the electoral year is obviously difficult to judge, but the vote in the Chamber that day clearly gave many Parliamentarians the opportunity to vote on one of the most controversial pieces of legislation in the last couple of years, even if this was far from being the most progressive piece of legislation on SRHR – after all the SRHR Bill remained untouched in some filing cabinet.

After the approval of the Chamber of Deputies, the bill had to be approved by the Senate and its commission of health. As the elections approached, the end of 2009 saw a long process in which at each stage of the debates and legal procedures to pronounce the law, the Church and the UDI tried to disrupt the bill’s approval by all means. The law had to be sent back to the TC for its approval. This time, however, the pressure on the TC was higher due to the participation of the UDI in Sebastián Piñera’s campaign and which represented the possibility for the conservatives to get back to power for the first time since 1988. But it was also an institutional change in Chilean politics since “the consensus that was reached in Parliament, was something new for the Constitutional

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<sup>417</sup> *Op. cit.* 199.

Tribunal too. Now they could not argue there was any reasonable doubt when almost two thirds of Parliament had voted in the Chamber”.<sup>418</sup>

Mario Fernández was in fact the only judge who once again voted against the bill. Fernández had nothing to lose and felt no pressure to do otherwise since his former coalition had the upper hand in the political process of the bill. This shows the political component of the initial TC ruling, which was possible as long as the TC was not under the media spotlight and the political environment allowed it. Therefore the real independence and impartiality of its judges can truly be questioned.

## **Conclusion**

The Ruling of the Constitutional Tribunal was deeply ideological. It was a final attempt by the judges to maintain the status quo on reproductive issues in place since 1989. This was done by imposing their interpretation of Chile’s Constitution as a guarantor of the right to life of the unborn. There was a clear concern among the judges that EC was just the first chapter in a strategy to legalise abortion, and therefore they had to stop its distribution. The legal procedures and the justification of the judges to give their verdict has been established as irregular by most specialists in constitutional law, including the deliberate attempt by the judges to ignore women’s rights, and in particular all international instruments that could refer to SRHR. Although the legal process was focused on the scientific debates regarding the effects of EC, the ruling of the judges openly ignored most of the scientific evidence produced over the past two decades presented to them. Instead it used the politically charged tool of “reasonable doubt” to enter a scientific debate rather than a legal one.

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<sup>418</sup> *Ibid.*

Until the ruling, the impact of the women's movement was minimal since the court refuted their eligibility to participate. Nevertheless, the women's movement and feminists played a crucial role in the *Pildorazo*, and the creation of the Movement Pro-EC. Unfortunately, the divisions within the women's and feminist movements, particularly between young and older feminists, but also with the SRHR advocates, put an end to one of the greatest mobilisations called by feminists in democracy. Feminists were visibly able to influence a political debate for women's rights at a crucial time in history, and in particular to convey the urgency of the issue. Despite the clear presence of dynamic feminist organising, feminists were not able to keep the Movement alive, and did not capitalise on the political gains of the march.

The Bachelet government won the discursive battle to reframe EC as a public health priority, highlighting the social injustice and inequality it represented for poor women and youth. In doing so the government managed to dissipate the weight of the pro-life arguments and lift the "consensus rule" that maintained a censorship on reproductive issues. Women's rights became more visible towards the end of the policy process and feminists and civil society marched under the banner of the "Freedom to choose for all" showing how Chilean society had started embracing more liberal principles. It was this reframing of the issue that permitted to lift the strong self-censorship that had surrounded reproductive issues in Chile since 1989.

Bachelet navigated the political process in a strategic manner by letting the formal institutional process follow its due course. She included SERNAM at a key moment taking advantage of the electoral politics in 2009, and was able to easily pass the final bill to distribute EC. The President and her cabinet worked in a coordinated manner pushing for the fast approval of the bill in Congress. Albeit neither perfect nor fully

comprehensive and progressive, the bill ensured the protection of the historical capacity of the state to produce and implement policies for public health while securing the right of women to access EC. Despite the obvious direct attacks on her for supporting a more progressive agenda, Bachelet saw her policy through and in doing so managed to include both the feminist and biomedical actors who had fought so hard for it.

Through the legal and political battles behind the distribution of EC, Chilean society was able to start a debate on abortion and the non-existent right to choose. This was possible thanks to the work of feminists within biomedical and social science groups, their medical allies within government, and the final push by doctors who are members of Parliament from across the party spectrum. This in many ways followed the longstanding tradition of SRHR initiatives born in the medical circles (see Ch. 4). The role of doctors in Chilean politics, including Bachelet, and in particular in the field of SRHR, is a great demonstration of an informal institution at work and affecting women's rights.

## **CHAPTER 10: Conclusions**

### **Linking institutions, the policy process and feminist activism on SRHR**

This thesis began with the aim of establishing the role played by institutions on policy processes and feminist efforts to advance sexual and reproductive rights. The fieldwork of this research included five months in Chile mapping out the actors of the EC policy process and trying to speak to them to determine the extent to which the advocacy coalitions had influenced the policy process for more than ten years. The immediate findings revealed the disarticulation of the feminist movement and the importance that the courts and judges had had in the process, in particular in the late stages at the Constitutional Tribunal.

The politicisation of the courts, also known as the judicialisation process, had clearly extended to the field of sexual and reproductive rights. This gave conservative actors and institutions a greater influence in the process, drastically limiting the access of the feminist movement to the justice system. The weakness of the feminist lobby was confirmed during my interviews, in the meetings I attended as a participatory observant and through the press review I carried out. This forced me to think beyond the policy process to give a greater role to the weight of institutions.

At the time of fieldwork, feminist literature on gender and politics had started to engage with new institutionalism in a more direct manner. Feminist Institutionalism provided the appropriate lens to look at this policy process and in particular to understand the strength and limitations of the feminist lobby. The existing work on judicialisation in Latin America provided a stronger understanding of the importance of looking at the politicisation of the courts and the role of judges to unveil the gendered nature of judicial rulings and their impact. Finally it was clear during my field research that the

role of Bachelet proved to be key to advancing women's reproductive rights. The institutional weight of having a female president committed to reproductive issues during the whole policy process confirmed the power of the presidency in Chilean politics described in the literature.

In order to bring to light the role played by institutions in the EC policy process and feminist efforts to promote women's sexual and reproductive rights, the thesis was guided by these research sub-questions: *How did formal and informal institutions influence the EC policy process, in particular during the judicialisation process? How did actors see their ideas reflected or ignored during the policy process? What was the impact of ten years of legal and political battles for the distribution of EC on feminists and other civil society groups? What do we learn about their capacity to mobilise and the efficacy of women and feminist networks trying to influence the SRHR agenda in Chile? How did the presence of a feminist and first female president impact on the outcomes of the policy process?*

This thesis has argued that institutional constraints set by the unfinished democratisation process of the electoral and political representation system affect the way in which women and feminists are able to position their issues on the wider political agenda. This is particularly true for sensitive issues falling into deep ethical and moral debates such as SRHR. As explained throughout the chapters, these institutional constraints are both formal and informal.

Chapter 4 showed how the military dictatorship created a unique and enduring constitutional framework which was maintained in democracy by the formal acceptance of the 1980 Constitution, but also through the informal institution of the "consensus" that centre-left governments applied to policy-making and legal initiatives. This

framework had a direct impact on the SRHR agenda in democracy since women's sexual and reproductive rights have been captives of the consensus, which has impeded any effort to reintroduce women's right to abortion. Concertación has simply not wanted to bring up difficult issues that could affect their relationship with the Church, particularly SRHR.

However, this self-censorship has not only applied to parties, it has also affected social movements and in particular the feminist movement. Despite many feminists having a double militancy as members of a political party as well as of the women's movement, or women's NGOs, they have rarely been able to raise SRHR issues within those parties more sympathetic to their agenda. The SRHR Bill initiative (discussed in Ch.6) shows how the exclusion of abortion from the bill briefly permitted advances and a greater participation of politicians from across the political spectrum. Yet for over 20 years the movement itself has failed to agree on how to confront SRHR issues with one voice in the public and political arenas. Abortion and SRHR were in fact NGO-ised, limiting until recently the discussions on these issues to an elite group of feminists and organisations working on health policies. These are topics where feminists also have competed against the influence of biomedical NGOs, limiting their capacity for alliance building as shown in Chs 6, 7 8 and 9. Biomedical groups and feminists share the "core" beliefs on SRHR and abortion, yet differ profoundly at the "policy core level" on the type of strategies to follow especially regarding the dilemma between full or incremental demands on SRHR.

This research has shown how the consensus was a perfect example of the gendered impact that an informal institution can have on a policy process. Chapter 7 discussed how in 2004 after the departure of Bachelet from MINSAL, the new minister gave the

order to put a halt to the publication of the Fertility Norms and requested the resignation of the policy-maker in charge of the Norms. Many consider that the consensus rule was crumbling by the end of the Lagos administration, and this could explain why conservative actors felt it was important to use the power available to try to block initiatives they found threatening. Bachelet's election also represented a major threat for the defenders of the status quo protected by the consensus, and those same conservative actors obviously felt they would lose control over policies affecting sexuality and reproduction. This shift in perceptions by actors within the governing coalition and the opposition was obvious in the statements to the press before and in the first weeks of Bachelet's arrival to power.

What is more, the thesis has shown the way in which the weight of the enduring consensus led to the judicialisation of sexual and reproductive rights. Conservative actors found in the courts the perfect way to avoid the spotlight of an open political battle while advancing their strategies in a friendly institutional environment. The emergency contraception debate, policy development and ensuing political process within the Chilean legal and judicial systems all showed how the rigidity of the political system forced civil society groups to interact with the executive in new spheres, from lower courts to the supreme and constitutional courts. In the case of the opposition, the aim was to counter the power of an initiative backed by the executive and presidency; for the pro-EC coalition, it was to open new ways to distribute EC and avoid political vetoes within government. This is because the consensus discouraged any progressive party to become the champion for women's and sexual and reproductive rights, while the opposition had a clear agenda to maintain the status quo and benefitted from the consensus.

The conservative opposition to SRHR was a cross-party issue. It would take the Constitutional Tribunal's ruling ten years into the policy process to see that the support to EC and SRHR was also to be found across party lines. This then confirmed the difficulty for all political actors to engage with SRHR issues within the Chilean political system due to the power of the sanctions attached to the informal and formal rules of the game, which were eventually lifted during the approval of the Fertility Bill (Ch. 9). Clearly political parties did not engage with EC until the very end, once they perceived that the political cost of doing so had diminished and the executive backed the bill in Congress.

The findings of this research also show how the post-authoritarian institutional legacy disproportionately benefited the smaller yet more powerful, cohesive and strategic conservative groups in civil society, most of them close to the Catholic Church. Members of these groups tend to be highly-educated professionals, many of them lawyers who know their way around institutional rules, including how to lobby judges and politicians in key positions. In fact this research has highlighted the existence of a clear and visible judicial strategy by the conservative lobby that benefitted from their close access to institutions linked to the Catholic Church, including universities and research centres in their crusade against EC. This gave the conservative actors the upper hand to lobby and carry out advocacy on reproductive issues to influence public opinion.

Furthermore, the thesis also highlights the role of gatekeepers played by formal institutions created to maintain the status quo, as was the case of the Constitutional Tribunal. Chapters 7, 8 and 9 established the importance of informal institutions visible in the role played by judges ruling from personal beliefs and gendered views on

reproduction and women's roles while ignoring international treaties on women's rights. In the case of the Constitutional Tribunal, this was possible due to the nature of the institution itself, which under the military regime was given a great power of oversight while making judges unaccountable for their actions. Similarly, the thesis showed how the internal rules and procedures of the Constitutional Tribunal became a powerful set of invisible rules of the game providing judges with opportunities to remain unaccountable. This was mainly discernible in the case of the judges involved in the recusal controversy at the TC.

This policy process was also shaped by the use of a new institution against SRHR – the market. Conservative groups were keen to use the market as a tool to maintain the gender status quo in their threats to pharmaceutical companies and pharmacies.

### **Emergency contraception and feminists**

Inherent to the analysis of the judicialisation process in this thesis was the impact the political and judicial processes had on the feminist movement. The EC debates, policy application and consequent political process within the legal and judicial systems reveal that a lack of leadership and cohesion among feminist groups has left the issue to be defended by a small number of advocates for sexual and reproductive rights in the courts. The SRHR advocates, coming mostly from the biomedical NGOs and research centres working on reproductive issues, had to face a sometimes reluctant executive, wary of the different tactics of the conservative opposition and its possible political and electoral consequences for the government. The feminist movement was left to watch most of the judicial process affecting EC from “the bench” while other SRHR advocates took centre stage of the litigation in defence of EC.

The lack of strength and visibility of feminists observed during the EC legal and judicial processes is explained by a lack of leadership as well as a lack of consensus on how to promote SRHR, in particular regarding abortion, and also that EC was initially perceived as a distraction from “real” feminist work. Chapter 6 highlighted that there has never been a consensus on abortion amongst feminists and it was difficult for feminist networks to come up with a unique and coherent discourse as one movement when EC was linked to the abortion debate.

This thesis consequently maintains distance from previous arguments advanced by other authors linking the feminist movement’s weakness mostly to a lack of resources and funding. This research has unveiled the complexity of the relationship between feminist networks and favoured a focus on their internal dynamics as suggested by Ríos Tobar (2003a), to evaluate their capacity to organise and build alliances. In this sense, it highlights the importance of the generational divide between the “*historicas*” – mostly second wave feminists who fought the dictatorship – and younger feminists organised in “*colectivos*”, who maintain a strong sense of autonomy.

The generational divide within the feminist movement became evident during the build-up towards the 2008 march in favour of EC. As explained in Chs 6 and 9, the feminist movement benefitted from the work done by young autonomous feminists from professional “*colectivos*” who used their personal networks to build alliances with other social actors including student unions, workers’ unions, youth sections within parties and so on. These young feminists not only provided their skills in the use of new internet and communication technologies which proved crucial to rally thousands of people around the country, they also provided the movement with a deep understanding

of the new political environment and ways to communicate with different sets of actors in society permitting key alliance-building opportunities.

What made their intervention so effective was the way in which they understood how Chilean society had changed to become more liberal and rallied people under the notion of “freedom to choose” for all genders. Paradoxically, this historical success for the defence of women’s rights produced tensions within the movement, as older members potentially felt threatened and tried to retain control of the process by pushing out these young leaders. This led to a breakdown between *Viejas* and *Jóvenes*, widening the gap between generations of feminists.

As described in Chs 6 and 9, young feminists saw their relation with feminism and activism as part of their multiple identities rather than work, seems to be the main explanation for their different political engagement during the EC process. Their capacity to build relations and alliances with diverse social actors was also determined by them not being tied to specific NGOs and so they did not feel the need to showcase their work as a way to report to funders. Younger feminists are truly politically engaged and see their work as part of a collective effort, not an organisational or individual effort. They are also freer from the ghost of the mobilisations of the 1980s, allowing them to redefine the sort of movement they want to create.

The *Jóvenes* not only relate in a different manner with discourses on sexuality and reproduction by following postmodern and queer theories, they also have a different understanding from the *Históricas* regarding feminist praxis. In fact, they put gender rather than a women-only focus at the centre of their analysis and praxis, and favour the inclusion of men as feminist allies. This research argues that this makes evident the presence of a third wave of feminists within Chilean feminism that has been sidelined

by the historic leaders of the movement who have not understood the nature of the new feminist engagement. Furthermore, this could explain the internal tensions the movement is experiencing at a time when youth are leading the rebirth of social movements in Chile. This is a topic for future research.

The feminist movement's ability to mobilise and create alliances with other actors in civil society remains a great concern for the evolution of the movement and its capacity to have an impact on Chilean politics. In this sense, the *Pildorazo*, the mass protest in support of EC policy called by the feminists and their allies in 2008, was a key moment for the movement that had not experienced this level of social mobilisation under their banners since the early 1990s. Hence, one could argue that there was a pre-*Pildorazo* and a post-*Pildorazo* effect, especially for young feminists who did not experience the 1980s' repression by the military regime.

There is, however, something to be said regarding the way we look at feminist praxis and mobilisation. This thesis engages and agrees with Ríos Tobar (Ríos Tobar, Godoy, and Guerrero 2003; Ríos Tobar 2009a, 2009c) who has described the feminist movement in Chile as weakened and scattered. Yet this thesis also considers that looking at feminist impact through the exclusive lens of movements might not give the most accurate account of feminist presence in politics in Chile. There is no doubt that feminists suffer from important internal divisions. Yet by using Ewig and Ferree's concept of feminist organising (2013) we obtain a different picture. Feminists were present all along the policy process and in different spaces, albeit through weak alliances. One could add the key role played by those feminists working in biomedical and social science organisations that initiated and led the work on EC. It would also include the constant involvement of feminists in politics, such as Ministers, policy-

makers, and Parliamentarians. And it could incorporate the crucial work done by many men who supported the EC policy along the way from a feminist perspective. There is therefore a necessity to reconsider the lenses through which we look at the impact of feminists in policy-making.

### **Bachelet – the President and the person**

Finally, this thesis has shown that Bachelet's access to the highest position of power as President, while being a feminist politician and doctor, provided civil society with new opportunities to advance their agendas on reproductive health and rights. Previously, as Minister of Health under Lagos, Bachelet had opened key spaces of dialogue with the feminist and women's organisations beyond the *Servicio Nacional de la Mujer* (SERNAM). They provided important support for gender issues, yet some feminist advocates considered them tokenistic, state-led spaces and quickly abandoned them.

Bachelet was also able to secure the support of her political coalition in crucial moments to advance the debate on the distribution of emergency contraception and used the electoral race of 2009 to her advantage, letting the opposition become, in the eyes of the public, a barrier to achieve social and economic justice for women and young girls.

Bachelet's longstanding political career in the socialist party as well as her previous experience as Minister of Health and Defence, undoubtedly gave her a deep understanding of the formal and informal political rules and sanctions of the political game. She was therefore able as President to navigate the norms from government and in the interaction with parties, as well as the legislative and judicial powers. Her "parity" system and appointment of feminist advocates to key positions in government allowed her to pursue her agenda while resisting political pressure and opposition. She tried to honour most of her commitments to the feminist agenda to which she personally

adhered, especially while working at MINSAL. Yet she also demonstrated a great sense of political pragmatism by moving forward the agendas that needed her presidential backing. This for instance resulted in the SRHR Bill being set aside in order to control the political environment and opposition to implement EC and the Fertility Norms.

The emergency contraception debate, policy implementation and consequent judicial and political battles confirmed the importance of “presidentialism” in Chile – which grants many policy and legal initiative prerogatives to a president – as well as the capacity of leadership and commitment coming from a president. Having a female president with strong feminist and secular ideas, but who is also a doctor, was an opportunity to produce cultural, social, economic and political changes for the advancement of women’s rights.

### **Engaging with the literature**

This study established itself within the Feminist Institutional analysis of the gendered aspects of institutions and their functioning. The research has highlighted the informal role played by judges within the judiciary and how their role was strongly gendered. In this sense the power balance between feminist organisations and the judiciary was always unequal, the formal institutions of the judiciary granting the judges much gender-neutral unaccountability to produce their rulings.

The formal presence of the President in the legal and political battles shows the formal and informal face of the role of a president and its personal attributes. While Bachelet was cautious to never appear to be leading on the EC agenda, likely as a tactic to protect the EC policy efforts, she was a constant support within government to her ministers but also to organisations such as ICMER whose director she knew well. They were both doctors and had worked together when Bachelet was Minister of Health.

Similarly, the Church as an institution exploited all the formal and informal channels of influence it had available, and was able to count on key support throughout the political and judicial processes. Reinforcing the consensus rule was clearly its first priority since the gendered nature of the consensus maintained the status quo on the societal vision of the Church on SRHR.

Htun (2003) highlighted in her work that the nature of the issues advocated by feminists explains the level of resistance faced and the space for reforms or policy-making. It is therefore important to analyse gender issues separately. This research confirms the importance of the nature of gender issues. From the beginning EC was considered contentious and provoked strong opposition confirming the challenge feminists face since the transition to redefine SRHR as issues of equality and human rights (Haas, 2010). Even though this research agrees with Htun on the need to look at gender issues separately, it shows that EC was contentious because the conservative lobby won the discourse battle initially by linking it to abortion. Over the next 10 years EC was never separated from the abortion debate, forcing public health officials and the government to seek new ways to reframe EC to counteract this narrative.

Yet, because historically Chile had had a successful experience in framing difficult issues as public health priorities, the institutional memory of MINSAL brought back the discourse on EC as a public health policy and helped to reframe it in public opinion. More importantly, thanks to the success of the feminist efforts behind the Movement Pro-EC, Bachelet's policy-makers were able to reframe EC shifting the discourse battle to equality and women's rights, making it in this sense a priority for the social justice agenda. Here the research engages with Htun and Weldon's (2010) framework for sex equality policies, and the importance given to the "doctrinal" nature of an issue over its

framing. Although their framework helps us to understand the initial level of opposition an issue can face according to the specific perception of its doctrinal and class-based component, this research shows that it is in the discourse battle and reframing of a policy that the advancement of gender issues lies, as long as this is part of strategic planning by advocates of gender issues.

In the case of EC, the institutional environment affecting the policy shifted from one administration to the other. This was strongly influenced by the progressive loss of importance of the consensus rule for the Concertación, provoking therefore a strong response by the conservative lobby and the Church. As was discussed throughout the chapters, the conservative lobby was linked to the economic elite of the country. Yet, in the case of EC, their power resided more in access to different institutions in a formal or informal manner and their capacity to influence from the inside to maintain the status quo.

Here this research differs from Blofield's (2006) point of view that gives more importance to the economic power of the elites. This research shows that although class and economic inequality dimensions are still very present, they seem insufficient to explain the power of some actors over others within institutions such as the judiciary. Moreover, EC not only addressed the issue of class but also individual liberties affecting both the middle and upper class, as much as the working class, and had also a generational dimension absent in Blofield's analysis.

The conservative construction of a new political system for Chile contained in the 1980 Constitution gave unique power to the conservative forces within the judicial, executive and legislative powers. Their economic power played an important role in their attempt

to threaten pharmaceutical companies and pharmacies trying to distribute EC, but their real impact was palpable in the ruling of the Constitutional Tribunal against EC.

The judicialisation of EC was therefore a direct result of the political environment and institutions involved. The way civil society actors, in particular biomedical organisations, strategised to carefully promote the distribution of EC via the political approval of the Norms, while also working closely with pharmaceutical companies for the licensing of the drug, shows a clear understanding of the difficulties and barriers to the advancement of SRHR in the country. The creation of strategic alliances proved to be an effective strategy for EC. However, despite all efforts to mobilise and get the necessary buy-in for the policy, the institutional framework of the Chilean political system and the institutional environment surrounding SRHR proved to be harder to overcome.

Here, the thesis seeks to contribute to the wider Feminist Institutionalism literature by analysing the Chilean case within the Latin American context. While much has been said on the Colombian successful initiative to legalise abortion (Cook 2007; Reuterswaerd et al. 2011), and the progressive ruling by the Constitutional Tribunal, this thesis shows the importance of looking at institutions within a historic and local context. It agrees with the work of Reuterswaerd et al. (2011) who argue for the need to focus more on judicial processes as key players in gender policy reforms.

We know that the rules of the game that create institutions are gendered, therefore the way in which judicial institutions operate and the impact of their decisions reflects a certain gender regime. Thus one cannot assume that the same type of judicial institution in different places can play the same role in the advancement of gender policy reforms. Rather, the institutional environment – as well as the weight of the original rules of the

game that created an institution and set its attributes – matter and need to be explored with more attention. Unlike Colombia, Chile had a very conservative Constitutional Tribunal because of the influence of the 1980 Constitution in its mandate. Colombia's Constitutional Tribunal and Constitution are more recent institutions, both of them results of the democratic process of a national constitutional assembly and elections in the early 1990s. As discussed in this thesis, Chile's Constitutional Tribunal and Constitution are legacies of the dictatorship, and of a deeply gendered transition (Waylen 2007, 2010). One could argue that the ruling by the TC was a confirmation of Couso's (2005) idea of the rights' revolution that never was – in this case the lost chance for a women's rights revolution.

This thesis therefore highlights the role of Bachelet in the final positive gender outcome for the EC policy. Like her predecessors, she faced a conservative institutional environment. Siavelis has argued that the presence of informal institutions in politics is related to “the inability of actors to solve problems or effect change within the context of informal institutions” (2006: 51) giving much power to consensus and “behind-closed-door” agreements between the elite in Chile's political system. Thus, that Bachelet was able and willing to use all her formal power as President to face the judicialisation process, and defend a difficult policy such as the distribution of EC, demonstrates both a political and personal commitment to the issue.

### **Reflection on the methodology**

The methodology chosen for this research was committed to applying a gender lens to the methods chosen to research political processes and agents that form the subject of this research, including the Advocacy Coalition Framework. The stage of mapping the actors was crucial for this research since mapping required looking at all available

information – from interviews to printed materials such as the press – to identify those who had played a significant role in the EC policy process. Some of the actors interviewed in the research were not visible through the first mapping exercise carried out from the UK. It was once in Chile when I could speak to key feminist actors in well-known NGOs and within government that I was able to identify the young feminists and the policy advocates in NGOs who made such a difference for the work of the pro-EC Movement, and their understanding of gender equality and SRHR. In this research, gendering the research methods came to mean identifying the power struggles amongst the actors involved to create or impede such important gender policy change, and analysing the impact this had on policy as part of a wider agenda for gender equality. It also meant prioritising the spending of time with feminist groups and advocates, as well as SRHR advocates at events where all these actors met. Only by becoming a participant observer was I able to see and understand some of the conflicts and tensions that made the pro-SRHR advocacy coalition stronger or weaker at different stages of the policy process.

This focus helps to explain an obvious shortcoming of this research process, which is the lack of access to the conservative actors and organisations opposing EC. Having more access to these actors could have cast more light on the motivations and interactions between the actors of the anti-SRHR advocacy, together with their political means to influence the policy process. It would also have shed light on the internal divisions and tensions within a coalition that for almost nine years retained its ideological cohesion. It would have been particularly useful to interview politicians, especially those who were also the doctors who dissented from opposing the EC Bill. At the end of my research some timid voices within the Church also began to manifest their

dissent but there was no time to explore this. Access to conservative actors would be essential for extending and amplifying the research covered in this work.

Finally the timeframe in which the research was conducted became a crucial factor in the limitations of the methodology applied, since the political tension caused by the electoral process in 2009 affected the interviews as much as the speed of the changes in the policy process. Therefore timing is something that needs to be addressed in the research planning of any work focusing on policy processes.

### **Future research**

In Latin America there is relatively little research on the judicial processes involving EC in different countries and their impact on feminist initiatives for the advancement of women's rights, in particular SRHR. The judicial and political battles behind the distribution of EC in Chile mirror strategies and political initiatives that have also taken place elsewhere in Latin America (Argentina, Peru) and North America (US, Canada). As the present research is based on one case study, there is still much scope to further explore the importance of judicial processes in the region in comparative perspective. Also, since EC and abortion are constantly linked by conservative groups opposing the progression of SRHR initiatives, it would be interesting to explore if elsewhere in Latin America the framing of these issues or their nature have had an important impact for gender policy reforms.

Finally, this research has examined the role of feminists and SRHR advocates in these political and judicial processes to promote EC. There is a need to further explore how the alliances between these two groups of actors have evolved in response to the coordinated offensive against women's SRHR in the continent by the Catholic and Evangelical Church, and the conservative groups linked to these religious institutions.

There is much to be learned from the successful experiences in the region for both women's movements and the feminist praxis, as well as for biomedical SRHR advocates. The international dimension of these debates provides an excellent background to look more in depth at epistemic communities as well as at the impact of the diasporic experiences of those, for example, who have lived abroad or in exile and once back in their countries apply knowledge and promote ideas that they acquired somewhere other than their country of origin.

## Appendices

Appendix 1: Table of interviewees

Interviewee		Interview						
Name	Category (Advocacy Coalition /Occupation/Role*)	Status (CIP /Conducted in Person)/Locatio n)	Source (Referred by Interviewee (RBI)/ Referred by Personal Contact (RBPC)/ Sample Selection (SS))	Format (semi-structured (SS)/ open-ended (OE)/ Participant observation (PO) / conference (Conf))	Length	Recording (audio (A) / written notes (WN) /other /skype)	Transcript/Conf identity (transcript available (TA) or confidentiality requested (CR))	Date (DD.MM.YY)
1. Adriana Gómez	Feminist Activist	CIP/ At NGO	RBPC		40 mins & 45 mins	A & WN	TA	01.04.09
2. Lawyer R	Constitutional Lawyer / Anti- EC Coalition	CIP/ At workplace	SS		20 mins & 60 mins	WN	CR	15.06.09/18.06.09
3. Antonella Caiozzi	Feminist Activist	CIP/ In a café	RBI		1h01 min	A & WN	TA	11.07.09
4. Camila Maturana	Feminist Activist - NGO	CIP/ At NGO	SS		47 mins	A & WN	TA	19.05.09
5. Católicas por el Derecho a Decidir	Feminist Activist - NGO	CIP/ home	SS		1h42 mins	A & WN	TA	08.04.09
6. Claudia Dides	Feminist Scholar - Think Tank	CIP/ workplace	SS		57 mins	A & WN	TA	12.05.09
7. Antonio Infante	Former Ministry of Health Bureaucrat	CIP/ home	RBI		59 mins	A & WN	TA	23.06.09
8. Guillermo Galán (Dr)	SRHR Advocate and Practitioner	CIP workplace	RBI		50 mins	A & WN	TA	24.06.09

Interviewee		Interview						
Name	Category (Advocacy Coalition /Occupation/Role*)	Status (CIP (Conducted in Person)/Locatio n)	Source (Referred by Interviewee (RBI)/ Referred by Personal Contact (RBPC)/ Sample Selection (SS))	Format (semi-structured (SS)/ open-ended (OE)/ Participant observation (PO) / conference (Conf))	Length	Recording (audio (A) / written notes (WN) /other /skype)	Transcript/Conf identity (transcript available (TA) or confidentiality requested (CR))	Date (DD.MM.YY)
9. Horacio Croxatto (Dr)	SRHR Researcher and Advocate	CIP / workplace	RBI		40 mins	A & WN	TA	07.07.09
10. Soledad Diaz (Dr)	SRHR Researcher/Advocate and NGO Practitioner	CIP / workplace	SS		1h20 mins	A & WN	TA	18.01.11
11. Fulvio Rossi	Left-Wing Member of Parliament (PS)	CIP/ Parliament	RBI		35 mins	A & WN	TA	07.07.09
12. Gloria Maira	Feminist Activist - NGO	CIP/ home	RBPC		1h38 mins	A & WN	TA	06.04.09
13. Josefina Hurtado	Feminist Activist - NGO	CIP / workplace	RBPC		45 mins	A & WN	TA	16.04.09
14. Juan Bastias	SRHR Practitioner	CIP / park	RBI		1 hour	A & WN	TA	03.07.09
15. Laura Albornoz	Former SERNAM Minister	CIP / workplace	RBPC		1h53 mins	A & WN	TA	17.01.11
16. Lidia Casas	Feminist Legal Scholar	CIP / workplace	RBI		58 mins	A & WN	TA	01.06.09

Interviewee		Interview						
Name	Category (Advocacy Coalition /Occupation/Role*)	Status (CIP /Conducted in Person)/Locatio n)	Source (Referred by Interviewee (RBI)/ Referred by Personal Contact (RBPC)/ Sample Selection (SS))	Format (semi-structured (SS)/ open-ended (OE)/ Participant observation (PO) / conference (Conf))	Length	Recording (audio (A) / written notes (WN) /other /skype)	Transcript/Conf identiality (transcript available (TA) or confidentiality requested (CR))	Date (DD.MM.YY)
17. Luis Conejeros	Journalist - Communications Adviser PDC	CIP / workplace	RBPC		1h04 mins	A & WN	TA	10.06.09
18. Maria Antonieta Saa	Left-Wing Member of Parliament (PPD)	CIP / Parliament	RBI		45mins	A & WN	TA	03.06.09
19. Maria Isabel Matamala	Feminist and Ministry of Health Bureaucrat	CIP / workplace	RBI		1h16 mins	A & WN	TA	02.04.09
20. Mariana Aylwin	Former Minister and Politician (DC)	CIP / workplace	RBPC		45 mins	A & WN	TA	05.06.09
21. Lawyer F	Constitutional Tribunal Judge	CIP / workplace	RBPC		2h10 mins	A & WN	CR	10.07.09
22. Moisés Russo	SRHR Activist	CIP / café	RBI		45 mins	A & WN	TA	23.06.09
23. Church Official	Church	CIP / workplace	SS		52 mins	A & WN	CR	17.07.09
24. Lawyer P	Constitutional Tribunal Lawyer	CIP / via skype	RBPC		1h12 mins	A & WN	CR	18.12.12

Interviewee		Interview						
Name	Category (Advocacy Coalition /Occupation/Role*)	Status (CIP /Conducted in Person)/Locatio n)	Source (Referred by Interviewee (RBI)/ Referred by Personal Contact (RBPC)/ Sample Selection (SS)	Format (semi-structured (SS)/ open-ended (OE)/ Participant observation (PO) / conference (Conf))	Length	Recording (audio (A) / written notes (WN) /other /skype)	Transcript/Conf identiality (transcript available (TA) or confidentiality requested (CR))	Date (DD.MM.YY)
25. Patricia Zamora	Feminist Activist	CIP / workplace	RBI		55 mins	A & WN	TA	09.07.09
26. Paulina Reinoso	Feminist Activist NGO	CIP / workplace	RBI		50 mins	A & WN	TA	18.05.09
27. Paulina Vidal	Feminist Scholar	CIP / workplace	RBI		53 mins	A & WN	TA	11.05.09
28. René Castro	Civil servant - Ministry of Health	CIP / workplace	RBI		1h01 mins	A & WN	TA	21.07.09
29. Rosa Ferrada	Feminist Activist - NGO - SRHR	CIP / workplace	RBI		1h10 mins	A & WN	TA	08.06.09
30. Rosa Yañez	Feminist Activist - NGO - Women's Rights	CIP / workplace	RBI		1h23 mins	A & WN	TA	02.06.09
31. Soledad Barria	Former Minister of Health	CIP / workplace	SS		1h11 mins	A & WN	TA	24.01.11
32. Teresa Maffei	Civil servant and Feminist - Ministry of Planification (MIDEPLAN)	CIP / workplace	RBPC		53mins	A & WN	TA	29.05.2009

Interviewee			Interview					
Name	Category (Advocacy Coalition /Occupation/Role*)	Status (CIP (Conducted in Person)/Locatio n)	Source (Referred by Interviewee (RBI)/ Referred by Personal Contact (RBPC)/ Sample Selection (SS))	Format (semi-structured (SS)/ open-ended (OE)/ Participant observation (PO) / conference (Conf))	Length	Recording (audio (A) / written notes (WN) /other /skype)	Transcript/Conf identiality (transcript available (TA) or confidentiality requested (CR))	Date (DD.MM.YY)
33. Teresa Valdés	Feminist Activist NGO	CIP / workplace	RBI		1h04 mins	A & WN	TA	17.06.09
34. Verónica Schiappacasse	Feminist and SRHR Practitioner	CIP / workplace	RBI		1h31 mins	A & WN	TA	17.06.09
35. Zulema Contreras	SRHR Practitioner	CIP / café	RBI		1h	WN	TA	11.06.09
36. Francisco Diaz	Former Chief Adviser for Public Policy - SEGPRES	CIP / via skype	RBPC/RBI		44 mins	A & WN	CR / asked to revh 20.07.12	
37. Lawyer G	Former Lawyer - SEGPRES	CIP / café	RBPC		1h03 mins	A & WN	CR / asked to revh 03.03.14	

## **Appendix 2: Topics for interviews and sample of interview questions**

### **Topic list**

- Political parties and their position vis-à-vis EC
- NGOs participation (and role)
- Church (role and activities)
- Judicial process (description, actors and impact)
- Political strategies (of actors/organisations/institutions)
- Power and influence (forms and manifestation)
- Spaces of power and resistance
- Alliances
- Concertación (and its practices)
- President and government (Bachelet v Lagos)

### **Example of interview questions to civil society actors (feminists and biomedical groups)**

- Tell me what was the origin or the political intention behind the decision to promote emergency contraception under the Lagos administration?
- Who were the main actors during those years?
- What would you say was the role of parties on this issue?
- Which methods of influence do the different actors have?
- What was the strategy to advance the issue of EC?
- What was the role of the medical establishment during this process?
- How is the EC policy process related to the issue abortion and the agenda on SRHR?
- How was the relationship among the actors involved in the policy process?
- What role did feminists play during the policy and judicialisation processes?
- Could you describe the way in which the legal defence at the Constitutional Tribunal took place?
- How was the relation with the State and with MINSAL more precisely?
- What would you say was the role of Michelle Bachelet during the judicialisation process?
- What would you say was the role of SERNAM?
- When did the parties have a strong influence?



### Appendix 3: Email in response to my request for an interview by Conservative MP

#### Presentación y posible entrevista para investigación de doctorado

3 messages

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**Carmen Sepulveda** <Carmen.SepulvedaZelaya@sas.ac.uk>

Tue, Jun 2, 2009 at  
9:41 PM

To: macristi@congreso.cl

Estimada Diputada Cristi:

Mi nombre es Carmen Gloria Sepúlveda Zelaya, soy estudiante de doctorado en ciencia política y me permito dirigirme a Ud. en el cuadro de mi investigación de doctorado.

Soy candidata al PhD en el Institute for the Study of the Americas (ex ILAS), de la Universidad de Londres. Soy cientista política de formación, graduada de la Pontificia Universidad Católica de Chile, y cuento además con MPhil en Development Studies, del Institute of Development Studies de la Universidad de Sussex. Actualmente, me encuentro como investigadora en visita del Instituto de Ciencia Política de la Pontificia Universidad Católica de Chile.

Le escribo ya que me encuentro en Chile por unos meses, para llevar a cabo mi investigación de terreno hasta Julio próximo. En mi proyecto doctoral estoy interesada en investigar como ha progresado la agenda de los derechos reproductivos en Chile, y más específicamente en qué modo los partidos políticos y sus miembros han moldeado y/o influenciado la agenda y debates que rodean estos derechos desde el gobierno de Ricardo Lagos. Esto incluye iniciativas como la Ley Marco de Derechos Sexuales y Reproductivos, así como también el más reciente proceso jurídico-legal entorno a la contracepción de emergencia.

Es por esto que me gustaría tener la oportunidad de conocer y entrevistar a los diferentes actores que se han visto envueltos y afectados por las iniciativas políticas y legales que tocan a los derechos reproductivos en Chile. Dado a su cargo actual como Diputada de la República y Presidente de la Comisión Familia, además de su larga trayectoria como miembro de Renovación Nacional es que me pareció esencial contactarla.

Me gustaría por lo tanto saber si Ud. tendría tiempo para fijar una entrevista conmigo y así conversar un poco acerca del trabajo que Ud. ha llevado a cabo en estos temas durante sus cargos legislativos y como militante y dirigente político. Al contar yo con una agenda más flexible sin duda que la suya, estoy a su disposición y a la espera de su respuesta. No tengo problema con desplazarme a Valparaíso si es necesario. No dude en escribirme si tiene cualquier duda o pregunta.

Muchas gracias de antemano por su preocupación y tiempo.

Atentamente,

Carmen Gloria Sepúlveda Z.

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Carmen Gloria Sepúlveda Zelaya  
PhD Candidate  
Institute for the Study of the Americas  
School of Advanced Study  
University of London

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**H.D. María A. Cristi** <macristi@congreso.cl>

Mon, Jun 8, 2009 at 11:07 PM

Reply-To: macristi@congreso.cl

To: [carmensepulvedaphd@gmail.com](mailto:carmensepulvedaphd@gmail.com)

Estoy en total desacuerdo con la promoción de los Derechos Reproductivos. Incluyen El Aborto y estoy por "LA VIDA".

-----Mensaje original-----

De: [carmensepulvedaphd@gmail.com](mailto:carmensepulvedaphd@gmail.com)

[mailto:[carmensepulvedaphd@gmail.com](mailto:carmensepulvedaphd@gmail.com)] En nombre de Carmen Sepulveda

Enviado el: Martes, 02 de Junio de 2009 16:42

Para: [macristi@congreso.cl](mailto:macristi@congreso.cl)

Asunto: Presentación y posible entrevista para investigación de doctorado

[Quoted text hidden]

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**Carmen G. Sepulveda Zelaya** <carmensepulvedaphd@googlemail.com>

Tue, Jun 9, 2009 at  
3:01 PM

Reply-To: carmensepulvedaphd@googlemail.com

To: macristi@congreso.cl

Bcc: [angelicasz@gmail.com](mailto:angelicasz@gmail.com)

Estimada Diputada Cristi:

Muchas gracias por su respuesta. Quizás no logré expresar bien el fin de mi investigación académica. Mi interés desde la ciencia política es ver como un tema que causa mucha tensión por estar dentro de la agenda valórica es tratado dentro de las políticas públicas, y cómo los partidos y sus miembros reaccionan frente a tales iniciativas. Por ser esta una investigación de doctorado, el uso de terminología como derechos reproductivos se refiere al modo en el cual el tema es tratado dentro de la literatura. Entiendo que mucha gente se opone a esta terminología pero es justamente por eso que me hubiese gustado poder conversar con Ud. más tranquilamente acerca de cuales son sus motivaciones, en su función parlamentaria, para aliarse con otros parlamentarios que se declaran a favor de la vida frente a estos temas de reproducción. Me permito escribirle nuevamente ya que tras entrevistar a María Antonieta Saa y Mariana Aylwin, se me sugirió que sería importante contar con su opinión y recoger su experiencia política. He estado tratando de entrar en contacto con parlamentarios de todos los sectores políticos para conversar estos temas ya que mi análisis es sobre políticas públicas e iniciativas legislativas.

Espero que esto aclare un poco más el tema de mi investigación y la motivación tras mi esfuerzo para contactarla. Me gustaría pedirle nuevamente, y respetuosamente, que por favor considere darme una entrevista si su agenda lo permite. No dude en escribirme si tiene cualquier pregunta adicional.

Muchas gracias de antemano por su consideración.

Atentamente,

Carmen Gloria Sepúlveda Zelaya

Carmen Gloria Sepúlveda Zelaya  
PhD Candidate  
Institute for the Study of the Americas  
School of Advanced Study

University of London

2009/6/9 H.D. María A. Cristi <[macristi@congreso.cl](mailto:macristi@congreso.cl)>:

[Quoted text hidden]

[carmensepulvedaphd@gmail.com](mailto:carmensepulvedaphd@gmail.com)

#### **Appendix 4: Conservative organisations and individuals behind the court cases against EC**

**Sara Philippi Izquierdo** – a well-known pro-life campaigner, with a longstanding participation in Catholic social and charity initiatives – is also the founder of ISFEM, “*Investigación, Formación y Estudio sobre la Mujer*”, a pro-life NGO dedicated to promote the presence of female conservative voices in the debates around abortion, the right to life and the family, and whose work has included monitoring the work done by feminists on sexual and reproductive rights. See <http://www.isfem.cl/>, last visited 02/06/10.

**Dr Patricio Mena** is part of the pro-life medical foundation “Porta Vitae”, a network of specialists in gynaecology, obstetrics and paediatrics who claim to have found together with their families the a special vocation to “realize a synthesis between science, faith and family life”. See [http://portavitae.cl/index.php?option=com\\_content&task=view&id=48&Itemid=17](http://portavitae.cl/index.php?option=com_content&task=view&id=48&Itemid=17), last visited June 2, 2010. He also was part of the Chilean experts who in 2002 took part in the Second International Congress “For Life and the Family” hosted by the Pontifical Catholic University in Santiago and the pro-life network “*Anónimos por la vida*” (an institution dedicated to prevent women from seeking an abortion and instead convince them to carry the pregnancy to term, see <http://www.anonimosporlavida.cl/>) (El Mercurio 2002b).

**E. Bunster Chacón** is also a founding member of the Catholic Church’s NGO “*Proyecto Esperanza*” (Project Hope) created with the aim to provide spiritual support to those women and men “suffering from a post-abortion syndrome”. The project was supported by the Bishop of San Bernardo, Juan Ignacio González Errázuriz, one of the most conservative bishops of the Chilean Church, member of the Opus Dei. González Errázuriz is well known for considering the use of any contraception method a sin and to deny women the baptism of their children unless they have their IUDs removed. He has also publicly supported political candidates who were against the EC pill in municipal elections. The lawyer in charge of processing this demand against the EC pill – Jorge Reyes – was also made the legal representative of this NGO (La Nación 2008b). See also “*Proyecto Esperanza*” (Proyecto Esperanza). *The World Movement of Mothers*

with its headquarters in France and which has UN status has long been identified as a right-wing conservative and anti-abortion group (Druelle 2000: 4).

**Francisco Chahuán** was head of the NGO “Front for Life and Solidarity Actions” from 2000 to 2004. A descendant of an influential Christian Palestinian immigrant family, Francisco Chahuán studied law at the University of Valparaíso and is well known for having conservative religious views. He has been a permanent member of the right-wing party Renovación Nacional, since the early 1990s; he was one of the party’s youth and then regional leaders. He eventually became deputy in 2005 and senator in 2009. Chahuán was head of the NGO “Front for Life and Solidarity Actions” from 2000 to 2004.

**Juan Jara Opazo** was then a student of Law at the Universidad de los Andes, an institution belonging to the Opus Dei and created the AGES youth group for the purpose of this legal action. Jara Opazo was also vice-president of the youth section of the far-right and ultra-conservative Unión Demócrata Independiente (UDI) (El Mercurio 2002a). He became deputy in 2009 as an independent for the Christian humanist movement of Chile but with the support of Sebastián Piñera’s “Coalition for Change”. See Movimiento Humanista Cristiano, at <http://mhcchile.cl/web/>, last visited June 3, 2010.

**Gonzalo Patricio García Palominos** was then a young militant close to the Christian Democrat Party that belongs to the Concertación government coalition (Casas Becerra 2008). The *Movimiento Nacional por la Vida “Antü-Küyen”* seems to have been an ad hoc creation for the judicial challenge since there is no trace of its existence or activities elsewhere.

**Alejandro Romero** is a Law professor at Universidad de los Andes where he teaches Procedural Law. He also works at a corporate law firm. He was behind the judicial challenges against EC since 2001. He provided the key support to the students behind AGES to bring the cases against EC, pharmaceutical companies and pharmacies.

**Jorge Reyes** – who had been part of all the judicial challenges since 2001 and been a flag bearer for anti-choice groups – is famous for having brought to the Supreme Court the case that tried to forbid the screening of Martin Scorsese’s film “The Last

Temptation of Christ”, one of the most controversial cases on censorship in Chile since the return to democracy. The case reached the Inter-American Court of Human Rights that condemned the Chilean State and Supreme Court’s decision to censor the film in 2001. See Inter-American Court of Human Rights, Sentence, Caso “*La Última Tentación de Cristo*” (*Olmedo Bustos y otros*) Vs. Chile (5 February 2001), available at [http://www.corteidh.or.cr/docs/casos/articulos/Seriec\\_73\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/Seriec_73_esp.pdf), last visited June 18, 2010. He was the advisor of former UDI Senator Carlos Bombal for 14 years (Urzúa and Vasquez 2008).

**José Antonio Kast** is a longstanding member of UDI. Kast’s father, Miguel Kast, was a well-known economist belonging to the “Chicago Boys” group of technocrats who carried out the economic reforms under the dictatorship of Augusto Pinochet. He was also a famous university leader at the Pontifical Catholic University, part of the Catholic elitist Schoenstatt movement, and the “gremialista” ultra-conservative political movement led by Jaime Guzmán from the Opus Dei, who would become the main civilian advisor to Pinochet.

**Patricio Zapata** is a renowned Constitutional Lawyer, who teaches at the PUC, worked with many officials in the Aylwin administration, as well as with PDC representatives in Parliament, and was actively involved in the accusation against EC at the TC. He was advocating the conservative position in universities at the time (Universia 2008).

**Appendix 5: List of Deputies that supported the SRHR Bill (2000)**

<i>Name</i>	<i>Region represented</i>	<i>District number</i>	<i>Party affiliation</i>
Isabel Allende Bussi	RM Región Metropolitana	N°29	PS
Gabriel Ascencio Mansilla	X Región de los Lagos	N°58	PDC
Rosa González Román	I Región de Tarapacá	N°1	Independent
Carlos Abel Jarpa Wevar	VIII Región del Bío Bío	N°41	PRSD
Víctor Jeame Barrauto	VIII Región del Bío Bío	N°43	PPD
Jaime Mulet Martínez	III Región de Atacama	N°6	PDC
Osvaldo Palma Flores	VII Región del Maule	N°39	RN
Fanny Pollarolo Villa	II Región de Antofagasta	N°3	PS
Marina Prochelle Aguilar	X Región de los Lagos	N°55	Independent
María Antonieta Saa Díaz	RM Región Metropolitana	N°17	PPD

**Appendix 6: List of Deputies who petitioned the TC against the “Decreto Supremo” (2007)**

1	Claudio Alvarado	UDI
2	Gonzalo Arenas	UDI
3	Ramón Barros	UDI
4	Eugenio Bauer	UDI
5	Sergio Bobadilla	UDI
6	Alberto Cardemil	INDEP/exRn
7	Sergio Correa	UDI
8	María Angélica Cristi	UDI
9	Francisco Chahuán	RN
10	Roberto del Mastro	RN
11	Andrés Egaña	UDI
12	Enrique Estay	UDI
13	Marcelo Forni	UDI
14	Pablo Galilea	RN
15	René García	RN
16	Alejandro García-H	UDI

17	Javier Hernández	UDI
18	Amelia Herrera	RN
19	José Kast	UDI
20	Juan Lobos	UDI
21	Rosauro Martínez	RN
22	Juan Masferrer	UDI
23	Patricio Melero	UDI
24	Cristián Monckeberg	RN
25	Nicolás Monckeberg	RN
26	Iván Norambuena	UDI
27	Carlos Recondo	UDI
28	Roberto Sepúlveda	RN
29	Marisol Turres	UDI
30	Jorge Ulloa	UDI
31	Gonzalo Uriarte	UDI
32	Ignacio Urrutia	UDI
33	Alfonso Vargas	RN
34	Germán Verdugo	RN

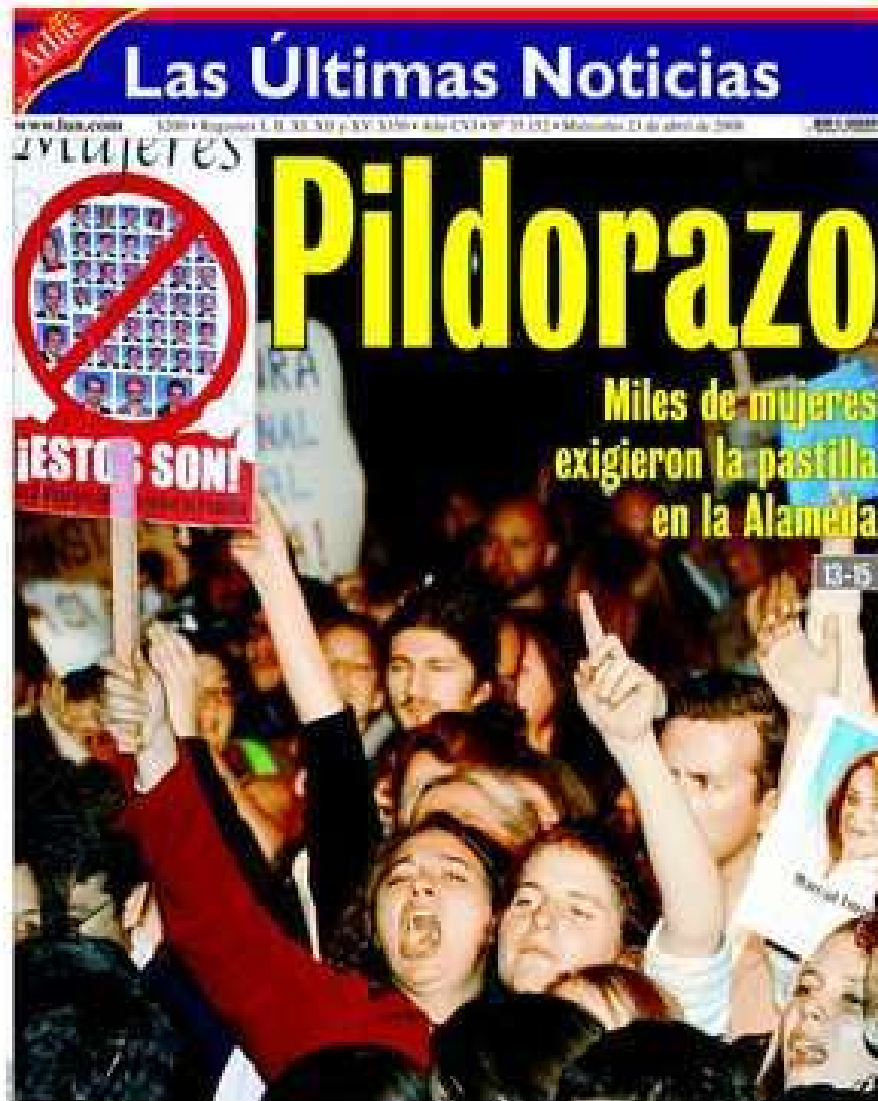
35	Gastón Von Müllenbrock	UDI
36	Felipe Ward	UDI

## Appendix 7: Pictures and oother vvisual ssupporting mmaterials

*Demonstrations in front of Contraloría and MINSAL (Santiago, June 2009)*



*PÍLDORAZO, Headline in Las Últimas Noticias (3 April 2008)*



*Demonstrations in front of the Constitutional Tribunal (April 2008 )*



*Pictures of Demonstrations and Parliament Session on EC (Valparaíso, July 2009)*







*Graffiti in Valparaíso (June 2009)*



*Posters and advocacy materials from feminist organisations*



## Píldoras de Utilidad Pública

¿Necesitas tomar la "píldora del día después"?

¿No tienes la receta? ¿No te la venden en la farmacia? ¿No te la dan en el consultorio?

El mismo efecto de la "píldora del día después" lo logras con píldoras anticonceptivas de uso regular en las siguientes dosis:

NOMBRE	1ª DOSIS	2ª DOSIS
		12 horas después de la primera dosis
Anovulatorios Microdosis	4 píldoras	4 píldoras
Microgynon	4 píldoras	4 píldoras
Anulette	4 píldoras	4 píldoras
Nordette	4 píldoras	4 píldoras
Norvetal	4 píldoras	4 píldoras

Las píldoras de emergencia o del día después se deben tomar antes de que hayan transcurrido 5 días o 120 horas desde la relación sexual no protegida. **Mientras antes se tomen son más eficaces.** Las píldoras de emergencia no se deben usar como método habitual, no protegen del VIH/SIDA, ni de las infecciones de transmisión sexual (ITS).

**¡POR LA LIBERTAD DE DECIDIR!**  
**Movimiento por la Defensa de la Anticoncepción**



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