

## Notes on the situation of abortion in the region

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### Some starting points:

There is no doubt that one of the issues that generates more controversy in the Latin American region is that of women's freedom or autonomy to decide about unwanted pregnancies. In other words, the debate in question poses the question of whether or not abortion should continue being considered a felony. These debates repeat themselves with more or less similar arguments both in the micro spaces as well as in the macro spaces of social life; eternal discussions at the family dinner table, at the office, among the young and the not-so-young, in parliaments, at the Health and Women's Ministries, in the women's movements and in some other social movements, and of course, in the communications mass media, whether due to some bill, to a close case, to a public policy or to some scandalous or emblematic deed, capable of being capitalized by one of the already known postures.

The first big gap appears in the distances we can observe between what is being discussed and the arguments utilized to defend certain positions, and the concrete practices - behavior that indeed is common to us in many fields, but that turns out to be especially divergent or contradictory when we talk about sexuality or reproduction<sup>2</sup>. A relatively recent study on abortion in Peru<sup>3</sup>, performed by the Centro de la Mujer Peruana Flora Tristán (Flora Tristán, Peruvian Women's Center) and Pathfinder International, informs that approximately 410,000 clandestine abortions a year are performed, i.e. more than 1,000 abortions per day, which means that in spite of it being a felony, the need or desire to have it overwhelmingly transcends the limit of penal sanction and is not in line with what is stated in the discourse. On the other hand, the reiterated public proposal of various Ministries of Health of the region related to combating maternal mortality until its eradication, without proposing de-penalization or legalization of abortion, evidences this double-standard

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<sup>2</sup> This is a hypothesis picked up from Bonnie Shepard, expressed in her work: The "double discourse" on the sexual rights and reproductive rights in Latin America: the abyss between the public policies and private acts.

<sup>3</sup> "Clandestine abortion in Peru: New evidences", Delicia Ferrando, Power Point presentation, Lima 2003.

with which people intend to confront a problem. If these types of contradictions are maintained, it shall not be easy to advance in the solution of these problems.

The second gap, scandalous and brutally discriminatory, which favors the double-standard thesis, is that for many years all of us, men and women, have known that penal repression only affects poorer women. They are the ones who die or become infertile, go to jail or have to bribe so as not to be denounced. The circuits for those of us that can afford them are well known; with sufficient money this operation is fast and safe (at least in terms of access to the service).

The third gap is marked by the absence of true laicism in the Latin American States; the separation between State and Church is formal, and has been acknowledged for quite a long time in our Constitutions; however, the basis of legislation or public policy keep on finding support in particular beliefs that pretend to be universally valid. Therefore, they continue imposing on the citizenry a state of affairs that corresponds to the ideas of a group of believers, violating the rights and liberties of the non-believers or of those persons that profess other creeds. They are attempting against the freedom of conscience, but in matters that concern sexuality and/or reproduction, it does not appear as a problem. The political class mostly continues understanding them as private affairs that correspond to morals and not to rights. Therefore, albeit it is necessary to know previously about the male and female candidates' positions regarding certain "important" matters such as, for example, those of an economic nature, the ones referred to sexual rights or to reproductive rights do not need prior positioning and are normally left to the particular conscience of each member of Congress.

Nevertheless, what is there behind so much blindness? What clouds the vision and maintains a drama that affects only certain persons vis-à-vis a situation that for many years now has known of proven solutions and answers in other countries of the planet? A first reason, probably one found at the core, is the ethical, juridical and political tutelage still applied to women; their status as persons capable of discerning and of having autonomy in their decisions does not manage to be totally convincing in these times of our republican life. The argument of life (of the defense of intra-uterine life) turns out to be an excuse, an element that is part of a necessary, although fallacious, argumentative structure. If we examine once and again the value truly granted to life by the defenders of these postures, we shall be able to verify their enormous

inconsistency. This struggle of visions and political positions creates a synthesis in the abortion figure; only in this way is it possible to explain the dogmatism and ferocity with which the detractors of women's autonomy and real freedom defend their positions.

***The argumentative struggle:***

The general framework of this dispute centers, in the first place, on the scope of the visions that regarding democracy are handled by the various political actors, whether traditional or emergent. Liberty, equality and solidarity for men and women alike? The old motto of the French Revolution (which certainly was not thought having women in mind) is an unfulfilled promise in all our Latin American democracies. However, there are several questions that underlie these emancipating concepts of the 18<sup>th</sup> Century and turn into challenges to keep on building and therein really lays the core of the dispute: what do we understand by equality? What do we understand by liberty? What are their real scopes? The dimensions of these concepts cannot be analyzed apart from the power asymmetries that are born and reproduced in our societies: asymmetries on account of socioeconomic condition, ethnic/racial origin, age, sexual orientation and gender. These are the ones acknowledged as the ones that stand out the most and give testimony of the outcome of the struggle for visibilization of these structuring forms of discrimination in our societies.

In the identification of the arguments utilized by those opposing the liberalization of abortion we basically find:

- a) The idea of a Superior Being -read as God- that grants life and only He (i.e. somebody who is above human beings) can define its ending. This dogma must be understood as the central sign of the transition we are historically living, from the belief in a cosmos organized by a divine entity, to the critical and anxiety-ridden assumption of a notion of liberty and modernity, in which human beings become "owners of our own destiny" individuals.
- b) The reinforcement of the maternal role as an idea/argument that has as its objective neutralizing the autonomy and the extension of this condition of women as subjects of rights.
- c) The defense of the conceived as holder of rights, more properly as subject, pretending to equal the rights of women with those of the conceived, and as

a strategy to put a hold on the liberalizing advances regarding women's autonomy and freedom. In this sense, reproductive autonomy becomes the last symbolic and political bastion in this struggle.

- d) The reinforcement of a sexuality and reproduction regulated by the strict canons of marriage and the heterosexual family as the cornerstones of the preservation of a notion of social order and synonymous of well-being and happiness. In this way the bond is tightened between sexuality and reproduction.

This argumentative battery, sustained with more or fewer shades since a long time ago by the conservative sectors of our societies, allied in a particular way to the Catholic Church's hierarchies, has had a strong comeback -as the result of the advancements developed in the fields of sexuality and reproduction, in particular at the international conferences of the United Nations- which is expressed in a visible manner in the alliance of US politics with the Vatican State.

The global gag rule, which is reinstated in 2001 and that precludes organizations from developing actions aimed at working with information, services, legislation and public policies related to abortion, under penalty of losing the US funds for family planning<sup>4</sup>, as well as the set of policies aimed at undermining the health and the rights of women and girls and the exercise of a sexuality different to the heterosexual and reproductive pattern, are good examples of how the current US Administration is acting. "These policies, supported by a Congress controlled by the Republican Party are eroding the health, sexual rights and reproductive rights in four ways:

- Limiting or withdrawing financing for effective programs that are considered incompatible with the conservative values.
- Creating new sources of financing or channeling existing funds through organizations or programs that promote a radically conservative political agenda, without any consideration whatsoever for scientific and public health criteria.
- Censoring information, advocacy and research on integral-health strategies, and

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<sup>4</sup> The global implications of the US national and international policies on sexuality, Françoise Girard, p. 2 IWGSSP Working Paper, N° 1, June 2004.

- Trying to go back on prior international covenants and intending to dilute the new agreements that advance health, sexual rights and reproductive rights.”<sup>5</sup>

“Due to the strong connections among the Bush Administration, the extreme right and the religious conservative groups, the agenda pursued is an extensive and integral attack on sexual rights and gender equality, and not only a concern on issues circumscribed to abortion or gay marriages.”<sup>6</sup> However, in relation to abortion it is presenting a discourse so distorted and dogmatic as the one formulated on the abortion law of partial birth, in which President Bush referred to “children only a few centimeters from birth” when he was speaking about pre-viable fetuses.<sup>7</sup> This fallacious discourse, together with the war policies and the almost total abandonment of progressive positions on the part of the Democratic Congressional representation, has made it difficult for national activists to call attention to Bush’s policies until lately. It is even harder for the activists abroad to discern the scope of US policy on sexuality for their own work, their sources of financing and their political situation”.<sup>8</sup>

The importance and effects of the US policy, much to our regret, has serious consequences in our region as a result of the political and economic dependency in which we find ourselves in, and as a product of the strong connections of certain US ultraconservative leaderships with the political elites of most of our States. By the same token, the Vatican State utilizes its institutional structure, networks and influences both in the local hierarchies of the Catholic Church as well as within the politician class -which in general takes good care of its close relationships and image before the Church- to achieve its objectives of moral tutelage, particularly in those issues related to sexuality and reproduction, contributing to limit its democratic development from a rights’ approach.

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<sup>5</sup> Bush’s other war: attack on health and the sexual rights and reproductive rights of women, International Women’s Health Coalition.

<sup>6</sup> The global implications of the US national and international policies on sexuality, Françoise Girard, p. 4 IWGSSP Working Paper, N° 1, June 2004.

<sup>7</sup> On November 5, 2003, President Bush signed the law that prohibits partial births. To date the State of Nebraska and judges from New York and San Francisco have questioned the constitutionality of the law, since it does not contain a clause to protect women’s health.

<sup>8</sup> The global implications of the US national and international policies on sexuality, Françoise Girard, pp. 4 and 5.

### **Regional Summary:**

In this section I shall present the main findings in matters of legislation and public policy contributed by a summary performed by CLADEM for the 1995 - 2000 period, updated later up to 2002 on the situation of sexual rights and reproductive rights in 14 countries of our region.<sup>9</sup> This within the context of the boost to the Campaign for an Inter-American Convention on the sexual rights and reproductive rights.<sup>10</sup> Next, we are adding new updated information<sup>11</sup> in relation to laws, legislative proposals, administrative norms and jurisprudential decisions of certain relevance, which help us understand better the changes and/or movements around the issue, which as we have suggested, must not be analyzed separately from the sexual and reproductive local and international policies.

Abortion is an issue broadly and traditionally addressed by the penal legislation. Its incorporation into public policies is, however, quite more recent. The information collected on this issue in the national diagnoses performed in 2001 and currently updated, allows us to propose the following:

- a) Even though in some cases new assumptions of punishment exemption have been incorporated, such as abortion due to rape, and in others penalties have been reduced, we cannot affirm that a flexibilizing trend exists, one that would open the way towards de-penalization of abortion.
- b) Instead, there is a current of a contrary sign, quite potent, that expresses itself, for example, in a tendency to include the conceived within the right to the protection of life. Argentina, Bolivia, Colombia, Chile, Peru, Ecuador and Honduras (also Guatemala, Costa Rica and Nicaragua) do so in their Constitutions, civil legislation and/or in their minors' or childhood and adolescence codes.

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<sup>9</sup> Regional summary: What remains and what has changed?, Roxana Vásquez and Inés Romero, in *Sexual Rights, Reproductive Rights, Human Rights*, CLADEM, Lima, Peru, 2002. The countries that participated in the study are: Argentina, Bolivia, Brazil, Colombia, Chile, Ecuador, El Salvador, Honduras, Mexico, Panama, Paraguay, Peru, Puerto Rico and Uruguay.

<sup>10</sup> This Campaign is being boosted to date by an ever-increasing group of local organizations, regional networks and campaigns from Latin America and the Caribbean.

<sup>11</sup> I thank Verónica Aparcana for her collaboration on this part of the work.

c) The situation of the regulation of abortion in our countries can be summarized as follows:

- Regarding the non-punishable assumptions:
  - Therapeutic abortion for reasons of life is permitted in ten countries.
  - Therapeutic abortions for health reasons are not punishable in 8 states of Mexico and in six countries.
  - Eugenic abortion is not sanctioned in two countries and in seven Mexican states.
  - Abortion due to rape is not punishable in six countries.

Puerto Rico is the only country that does not penalize abortion and Panama the one who contemplates all the prior assumptions as punishment exception, whilst El Salvador (since 1977), Colombia, Chile and Honduras have opted for penalization under any assumption.

d) Some countries, such as Mexico, Peru and Bolivia, consider abortion as a public health problem, due to the incidence it has as cause of death among women, especially adolescents. The inefficacy of a declaration such as the preceding one is made evident and lacks consistency in the face of situations in which abortion is penalized, because as long as this persists, women shall continue recurring to clandestine abortions.

There are no figures for all countries and neither is there data disaggregated by age, geographical area or socioeconomic sector. Those that exist stem from non-official estimates, because the ones produced by the Ministries of Health are referred to the entries/exits from public hospitals, which only account for legal abortions and very marginally for clandestine abortions. Nevertheless, these estimates can give us an idea of the monstrous magnitude of the problem.

e) In general, the treatment abortion receives in the public policy of our countries has a double meaning. It is assumed as an event to be avoided and as a health problem that needs to be attended. That is the reason why, most of the times it is mentioned, it appears expressed as an objective of the sex education policy, or related to adolescent pregnancy

and, in general, as an issue related to the prevention of pregnancy.

- f) Most of the countries that consider non-punishable assumptions contemplate in their legislations, or as part of their health policy, the rendering of medical attention services for the legal abortions, and in some cases (such as in several states of Brazil), they also propose an integral attention, including psychological care.
- g) The issue of the access conditions to the health services is not only about the legal type barriers, it is also related to the cost of the services. Interruption of pregnancy in cases of rape is attended in at least four states of Brazil totally free and, in general, the police are obliged to inform the victim about the possibility of having an abortion. Only Mexico, Paraguay, Bolivia and Honduras state that attention of abortion -it is understood that only when it is spontaneous or legal- is partially subsidized. Puerto Rico indicates that abortion is only practiced in the private health establishments. The other countries do not inform regarding this issue.
- h) Legislation on injuries to the conceived being has been approved in Colombia, El Salvador, Nicaragua and Peru.

Regarding legislative initiatives it is worthwhile to point out a relative movement, where the most important proposal is undoubtedly that of the Uruguayan feminist movement in a significant alliance effort with other social movements and that proposes, within the framework of the bill to defend reproductive health, the right of every woman to decide over the interruption of pregnancy during the first 12 weeks. On December 10, 2002, the House of Representatives approved said bill with 47 votes in favor, 40 against and 11 absentees. They are waiting the subsequent voting of the Senate.

With a different perspective and with serious restrictions, Provincial Law N° 1044 of the city of Buenos Aires dated July 17, 2003, although it does not permit abortion, it accepts advancing the birth date in cases of pregnancies incompatible with life due to anencephaly, as of the 24<sup>th</sup> week.



On the other hand, we currently have initiatives of laws on the issue in Argentina, Brazil, Peru, Chile, Paraguay and Nicaragua, the latter being a case of deep concern, since in the context of the penal code reform of that country, even though it still maintains therapeutic abortion and has reduced the penalties from 1 to 3 years for women, it has also introduced the legal protection of the "unborn child", sentencing the male and female doctors to 5 to 8 years in prison, absolute disablement for the exercise of medicine and closing of consultation rooms.

In the rest of the countries mentioned, a set of proposals has been presented, some of which have been stopped several years ago; however, the tendency in most of these shows a sign in favor of de-penalization through the system of indications. In all of the cases these refer to the rape and eugenics assumptions. Also, some few initiatives have been identified that propose de-penalization in all the assumptions for women. On the other hand, there are some proposals that formulate as aggravating circumstance the abortion without the woman's consent. Only two proposals of a contrary sign have been identified, one in Chile and the other one in Peru. The first case deals with the introduction of a new type of felony in the Penal Code related to prenatal diagnoses (presented in January 2004), and in the second one, the initiative is aimed at increasing the penalties in the abortion figures contemplated in the Penal Code (presented in August 2004). It is worth noting the ever-present difficulty of accessing reliable and updated information. Finally, the need arises to underscore the fact that within the eugenics abortion assumption, a constant that appears in the legislative initiatives is the exemption of penalty in the cases of anencephaly fetuses. Seemingly, this could be turning into a new crack from where it would be possible to act in a consistent manner, in a context that in a general way is still perceived with many limitations.

Regarding judicial decisions, an interesting movement related to cases of anencephaly fetuses has been reiterated in Brazil and Argentina. Even though in Brazil they are still awaiting the decision of the Federal Supreme Tribunal, and the Argentinean case was about an authorization for the induction of birth due to the advanced state of pregnancy, we can recognize certain encouraging signs geared towards change.

The largest production, however, is observed in the approval of technical norms for the attention of abortion. It is worth highlighting the two administrative norms designed by Brazil's Ministry of Health; the first one

exonerates women whose pregnancy was the result of rape from the registry with the police procedure, and the second one, called *technical norm for the humanized attention of abortion*, which purpose is to offer clinical attention, psychological care and orientation on family planning with the guarantee of confidentiality. On the other hand Colombia, in its sexual and reproductive health national policy, approved in February 2003, establishes as a strategy to strengthen the human resources for the treatment of the birth complications by means of integral strategies that consider biological, psychological and social aspects. Uruguay also approved in August 2004 by means of Ordinance N° 369, norms and clinical guidelines for pre- and post-abortion attention. And Mexico, that within the context of the reform of its General Health Law on January 27, 2004, sets forth that the public health institutions must attend free of charge and under quality conditions the interruption of pregnancy in the assumptions permitted by penal law when the interested woman so requests it. The route of pinpointing through norms of administrative nature, guidelines and procedures tending to guarantee the attention of that which has already been recognized or not sanctioned by law, is an interesting strategy boosted mainly by the feminist movements with actions from within and without the State institutionalism.

In spite of the novelties, abortion continues being a neuralgic point in the issue of women's reproductive rights and a core aspect of the policy of our States, which in most cases tend to continue being bound to ceding vis-à-vis the conservative positions that exert pressure to maintain abortion penalized. Trapped in their own fears and particular interests, the governing classes do not know how to resolve the dilemma: to maintain penalization of abortion and decrease -until it is eliminated- its incidence as a cause of death among women, which is not possible, because it encloses a great contradiction; to develop and/or support proposals that turn into demands from a human rights vision that can strengthen the laicism and plurality of our States, in the face of the risk of losing positions and, more importantly, votes; to assume their obligations to be able to guarantee the strengthening of our democracies and a rights' reasoning in accordance with the political representation and public function they exercise, setting aside their moral particular imperatives.

On the other hand, we cannot forget that the figure of the protection of the conceived being's life can become a real obstacle for de-penalizing abortion and even pushing the trend towards the consolidation of the positions of those that intend to undo the advances achieved so far.

There is still a long road ahead of us, with a lot of work in various fronts and on different levels, in which the strengthening of positions and actions to favor a lay culture -not one of faith- of human rights; democratic, not elitist; plural and not monochord, becomes a top-priority matter.

Lima, April 2005.