

Note

Sterilization, Gender, and the Law in Costa Rica

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In 1999, the President and the Ministry of Health of Costa Rica issued a decree making contraceptive sterilization available upon demand, with informed consent. This event represented a vantage point from which to consider the evolution of sterilization law in Costa Rica, a project which I had the opportunity to undertake at the Women, Justice, and Gender Program of ILANUD, the United Nations Latin American Institute, in the summer of 2000.

I learned at ILANUD that sterilization rights play a central role in Costa Rican women's reproductive autonomy. There, as in most of the world, women are sterilized at far greater rates than are men. In a 1997 study, for example, 20% of Costa Rican women relied on female sterilization, compared to 1% who relied on their partner being sterilized.¹ This wide and persistent disparity in sterilization rates means that even facially neutral laws regarding sterilization automatically affect more women than men. This greater reliance on female sterilization may stem from ignorance about vasectomy and women's more frequent contact with the healthcare system, but it also reflects the higher physical and sociological burdens that unwanted pregnancies place on women. Such burdens are particularly daunting in a country such as Costa Rica, where abortion is not legally available in most cases. Within this context, the option of sterilization rather than temporary forms of birth control is an

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1. Survey of married women, aged 15-49. Overall rate of contraceptive use was 75%. Total contraceptive use includes sterilization, pill, IUD, condoms, other methods requiring supplies or services (such as injectables and diaphragms; and non-supply methods such as periodic abstinence and folk methods). U.N.D.P., UNITED NATIONS WORLD FERTILITY PATTERNS, U.N. Pub. ST/ESA/SER. A/175, U.N. Sales No. E.99.XIII.4 (1999), available at <<http://www.undp.org/popin/wdtrends/wcu/bwcuplac.htm>>. (Information is from representative national sample survey.)

appealing one to many women who want reliable control over their fertility.

In this Note, I argue that both formal and informal laws regarding sterilization have reflected and created gender status in Costa Rica. Formal laws regulating access, though gender-neutral, have depended on societal conceptions of gender roles, and in turn have shaped those roles. At the same time, *informal* laws—the ways in which courts, agencies, service providers and the public have interpreted and applied laws about sterilization—have diverged sharply from the formal law but have just as powerful an effect on people's lives. Throughout the evolution of sterilization law in Costa Rica, the gendered effects of facially-neutral laws, compounded by highly gendered application and interpretation of the laws, have tightly controlled women's access to this form of contraception. However, advocacy rooted in demands for women's rights and autonomy has led to increased reproductive choice for women.

I begin in Part I by outlining the relevant international human rights norms supporting the right of access to safe, voluntary sterilization and the right not to be sterilized against one's consent. I continue in Part II by describing how the unclear formal law on sterilization before 1988 compromised women's access to this option. In Part III, I describe the 1988 decree which explicitly allowed sterilization for people with a variety of medical conditions. This decree was a step towards clarity but ignored the tie between contraceptive options and women's autonomy. In Part IV, I describe a court case which revealed how gender bias in application of the decree compounded the restrictiveness of the list of medical conditions. In Parts V and VI, I detail the growing frustration in Costa Rica with the effect of the decree on women, and the eventual release of the 1999 decree that granted access to sterilization on demand. I conclude by analyzing the response to the decree and considering factors which continue to compromise the reproductive autonomy of Costa Rican women.

I. STERILIZATION RIGHTS AND INTERNATIONAL LEGAL NORMS

This section draws on the Center for Reproductive Law and Policy's "Women's Reproductive Rights: The International Legal Foundations"² to outline the set of rights established in international law that support the right to choose safe sterilization and the complementary right *not* to be sterilized against one's consent. As the Programme of Action of the International Conference on Population and Development states:

Reproductive rights embrace certain human rights that are already recognized in national laws, international laws, and international human rights documents and other consensus documents. These rights rest on the recognition

2. CRLP Publications, *Women's Reproductive Rights: The International Legal Foundations*, at <<http://www.crlp.org>> (June 12, 2000).

of the basic rights of all couples and individuals to decide freely and responsibly the number, spacing, and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes the right to make decisions concerning reproduction free of discrimination, coercion, and violence, as expressed in human rights documents.³

I begin with a list of relevant conventions and conference documents, and continue with a delineation of key rights and the documents which guarantee them. While citations are given for most documents, I have quoted select sections that are particularly applicable to the question of sterilization. Costa Rica has ratified all of the conventions mentioned; in Costa Rica, international treaties and conventions must be approved by the legislative assembly and, upon approval, have an authority superior to national laws.⁴ As detailed in Parts IV-VI, advocates used many of these rights, along with relevant sections of Costa Rican law, to support the expanded availability of safe sterilization to consenting women and men. In addition, participating in international conferences creates the moral, if not the legal obligation to adhere to the rights assured by the corresponding document.

A. Relevant International Human Rights Documents

1. United Nations

- UDHR—Universal Declaration of Human Rights, adopted and proclaimed by UN General Assembly December 10, 1948

2. Conventions

- CERD—International Convention on the Elimination of All Forms of Racial Discrimination, entered into force January 4, 1969
- CESCR—International Covenant on Economic, Social, and Cultural Rights, entered into force January 3, 1976
- ICCPR—International Covenant on Civil and Political Rights, entered into force March 23, 1976
- CEDAW—Convention on the Elimination of All Forms of Discrimination Against Women, entered into force September 3, 1981
- CAT—Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, entered into force 1987
- CRC—Convention on the Rights of the Child, entered into force

3. *Programme of Action of the International Conference on Population and Development*, U.N. Population Division, Cairo Conference (Oct. 18, 1994), U.N. Doc. A/CONF.171/13 (1994), available at <http://www.crlp.org>. [hereinafter Cairo Convention]

4. Constitución Política de la República de Costa Rica art. 7 (Nov. 7, 1949), available at <http://www.georgetown.edu/pdba/constitutions/costa/costa2.html>. (Modified by Ley No. 4123 May 31, 1968).

September 2, 1990

- BELEM—Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belem do Para), entered into force 1995

3. Conference Documents

- WCHR—World Conference on Human Rights, Vienna Declaration and Programme of Action, June 1993
- ICPD—Programme of Action of the International Conference on Population and Development (Cairo Convention), September 1994
- FWCW—Platform for Action of the Fourth World Conference on Women, September 1995

B. Categories of Rights

1. The right to life, liberty, and security

- UDHR, Article 3
- ICCPR, Articles 6 and 9
- CRC, Articles 6.1 and 6.2
- BELEM, Article 4
- ICPD Programme, Principle 1 and Paragraph 7 (“[Reproductive rights] also includes [couples’ and individuals’] right to make decisions concerning reproduction free of discrimination, coercion, and violence, as expressed in human rights documents. . . .”)
- FWCW Platform, Paragraph 96 (“The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. . . .”)

2. The right not to be subjected to torture or other cruel, inhuman, or degrading punishment or treatment

- UDHR, Article 5
- ICCPR, Article 7
- CRC, Article 37
- CAT (Torture defined as “. . . any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” (emphasis added))
- BELEM, Article 2
- WCHR Programme, Paragraph 56

3. The right to be free from gender discrimination

- UDHR, Article 2
 - CDESCR, Article 2.2
 - ICCPR, Article 2.1
 - CEDAW, Article 1 and Article 3
 - BELEM, Article 6a
 - WCHR Declaration, Principle 1 and Principle 4
 - ICPD Programme, Principle 1 and Principle 4
 - FWCW Platform, Paragraph 214
4. The right to modify customs that discriminate against women
- CEDAW, Article 2 and Article 5 (“States Parties shall take all appropriate measures; (a) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. . . .”)
 - CRC, Article 24.3
 - BELEM, Article 6b and Article 7e
 - WCHR Declaration, Paragraph 18
 - WCHR Programme, Paragraph 38 and Paragraph 49
- FWCW Platform, Paragraph 224
5. The right to health, reproductive health, and family planning
- CERD, Article 5
 - CDESCR, Article 102, Article 12.1 (“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”), Article 12.2
 - CEDAW, Article 10 (“States Parties shall . . . ensure. . . (h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning”), Article 11.3, Article 12.2, Article 14.2
 - CRC, Article 24.1, Article 24.2
 - WCHR Programme, Paragraph 41
 - ICPD Programme, Principle 8 (“States should take all appropriate measures to ensure, on a basis of equality of men and women, universal access to health-care services, including those related to reproductive health care, which includes family planning and sexual health. Reproductive health-care programmes should provide the widest range of services without any form of coercion.”)
 - FWCW Platform, Paragraph 89 (“Women have the right to the enjoyment of the highest attainable standard of physical and mental health. . . . Health is a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity. . . .”), Paragraph 92, Paragraph 267
6. The right to privacy

- ICCPR, Article 17.1
- CRC, Article 16.1 and Article 16.2
- ICPD Programme, Paragraph 7.45
- FWCW Platform, Paragraph 106 (“Governments [should] (f) Redesign health information, services and training for health workers so that they are gender-sensitive and reflect the user’s right to privacy and confidentiality. . . .”), Paragraph 107

7. The right to gender equality in marriage

- UDHR, Article 16.1 (“Men and women of full age, without any limitations due to race, nationality, or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage, and at its dissolution.”)
- CEDAW, Article 16.1
- ICPD Programme, Principle 9

8. The right to decide the number and spacing of children

- CEDAW, Article 16.1 (“States Parties shall . . . ensure, on a basis of equality of men and women. . . (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education, and means to enable them to exercise these rights.”)
- ICPD Programme, Principle 8
- FWCW Platform, Paragraph 223 (“The Fourth World Conference on Women reaffirms that reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing, and timing of their children and to have the information and means to do so.”)

9. The right to be free from sexual assault and exploitation

- CRC, Article 19.1
- BELEM, Article 1, Article 2, Article 3, Article 4, Article 5, Article 6
- WCHR Programme, Paragraph 38

10. The right to enjoy scientific progress and to consent to experimentation

- CESC, Article 15.1
- CCPR, Article 7 (“No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. In particular, no one shall be subjected without his [sic] free consent to medical or scientific experimentation.”)
- WCHR Declaration, Paragraph 11
- FWCW platform, Paragraph 109 (“Governments [should] (h) Provide financial and institutional support for research on safe, effective, affordable and acceptable methods and technologies for the reproductive and sexual health of women and men, including more safe, effective, affordable and acceptable methods for the regulation of

fertility. . . .")

II. BEFORE 1988: AN UNCLEAR LEGAL FRAMEWORK LIMITS WOMEN'S ACCESS

Before 1988, Costa Rican women's right to choose sterilization was compromised by a lack of clarity in Costa Rican law. At the time, sterilization was not formally regulated. However, the Criminal Code contained a section, Article 123, that was generally understood to be applicable to sterilization, without specifically mentioning the procedure:

There will be imposed three to ten years of prison, if an injury causes mental or physical illness, which produces a permanent incapacity to work; the permanent deformity of the face; *the loss of a sense, of an organ, a member, the use of an organ or member, of speech, the capacity to reproduce or to conceive.*⁵

Under this article, doctors who performed sterilizations were theoretically liable to prison terms.

While there are no records of prosecution of physicians under Article 123 for performing sterilizations, its presence stood as a threat of legal action. Article 129 of the same code does limit the application of Article 123:

Injuries which are produced with the consent of the injured, with the goal of improving the health of others, are not punishable.⁶

However, the extent to which Article 129 allowed the use of sterilization to save the life or health of a patient was unclear. Therefore, physicians who performed even therapeutic sterilizations worked in a murky legal environment, in which their professional responsibility to protect the health of their patients conflicted with existing penal law.⁷ There is no quantitative evidence of how many physicians refused to perform sterilizations out of fear of liability, but physicians have repeatedly cited Article 123 as a reason for reluctance.⁸

In the latter decades of the twentieth century, the rate at which sterilizations were performed fluctuated based on access and social context. Despite the unclear legality of the procedure, sterilizations among women in Costa Rica increased from the late 1960s through 1975. A

5. "Código Penal de Costa Rica, Ley No. 4573 Y Sus Reformas" C.P. Titulo I, Sección 1, Artículo 123. 4 de Marzo 1970 (emphasis added). [hereinafter Código Penal].

6. Código Penal, Artículo 129.

7. Comité Medico del Asociación Demografica Costarricense, *Reglamento de Esterilizaciones*, in TEMAS SOCIODEMOGRAFICOS 1988, at 1-2 (Temas Sociodemográficos No. 2, Junio 1988).

8. See *supra* notes 65-67 and accompanying text.

National Family Planning Program initiated in 1968 did not officially classify sterilization as a form of family planning, but sterilization rates among women rose after the social security system (Caja Costarricense de Seguro Social, or CCSS) incorporated the procedure into its regular set of services.⁹ In 1961, 6.4% of women aged 20-50 were sterilized; in 1976, 14.9% had undergone the procedure.¹⁰

However, in the second half of the 1970s, a series of protests and claims of a massive sterilization campaign emerged. Critics of coercive family planning programs decried the use of coercive sterilization as a means of population control in many Latin American countries. While a formal investigation by the Legislative Assembly did not reveal any such campaign in Costa Rica, restrictions were placed on the approval of such operations, and the pace of procedures dropped.

In the late 1970s and early 1980s, the unclear legal situation continued to affect access; rates began to rise again, but not as markedly as they had in the previous decade.¹¹ By 1981 17.3% of women aged 20-50 were sterilized.¹² However, rates fell yet again through the 1980s, as professional medical bodies in Costa Rica again grew concerned about their legal liability for the procedure; and by 1986 this number had dropped to 16.7%.¹³ The Association of Gynecology and Obstetrics proposed formally limiting sterilization to certain cases in which pregnancy could pose a threat to the health or life of a woman. The proposal was supported by the College of Doctors and Surgeons, revised by the Minister of Health, and submitted to the President of Costa Rica. With the legal question still unresolved in 1983, the College of Doctors and Surgeons sent a recommendation to its associates that they abstain from performing sterilizations in order to avoid exposure to legal consequences.¹⁴

III. 1988: A NARROW VIEW OF THE NEED FOR STERILIZATION CHOICE

In 1988, the legal status of sterilization was somewhat clarified when President Oscar Arias Sanchez and the Minister of Health released a decree outlining the precise medical conditions that would justify the use of surgical sterilization.¹⁵ The decree does not, however, describe sterilization

9. Johnny Madrigal Pana, *Esterilización Femenina en Costa Rica: Evolución, Impacto y Determinantes* 87 (1995) (unpublished M.Sc. thesis, City University Rodrigo Facio, Costa Rica) (on file with author).

10. Gomez & McCarthy, *Female Sterilization in Costa Rica*, 13:1 STUDIES IN FAMILY PLANNING 3 (1982), cited in Madrigal Pana, *supra* note 9, at 8-9; Dirección General de Estadística y Censos, ENCUESTA NACIONAL DE FECUNDIDAD 1976, at 96 (Septiembre 1978).

11. Johnny Madrigal Pana, *Reflexiones Sobre Esterilización en Costa Rica*, in ASOCIACIÓN DEMOGRÁFICA COSTARRICENSE 7 (1988).

12. L. Rosero, *Fecundidad y Anticoncepción en Costa Rica, 1981: Resultados de la Segunda Encuesta de Prevalencia Anticonceptiva*, in ASOCIACIÓN DEMOGRÁFICA COSTARRICENSE 58 (1981), cited in Madrigal Pana, *supra* note 9, at 9.

13. Sosa, et. al., *Encuesta Nacional de Fecundidad y Salud 1986*, ASOCIACIÓN DEMOGRÁFICA COSTARRICENSE 38 (1987).

14. Madrigal Pana, *supra* note 11, at 8.

15. Decreto N° 18080-S, in LA GACETA NO. 95 3 May 18, 1988.

as a form of contraception, much less as a procedure with the potential to empower women to control their reproductive lives. Rather, explicitly acknowledging the responsibility of the state for the health of its citizens, the decree states that "Sterilization with therapeutic ends is a form of protecting health."¹⁶

The 1988 regulations, applicable to all doctors who performed the surgery whether in public or private hospitals, established a system in which requests for sterilizations were submitted to Sterilization Committees at every hospital and clinic. The committees operated under the supervision of the Committee on Human Reproduction of the Costa Rica College of Doctors and Surgeons, a private professional society.¹⁷ Every request for a sterilization had to be approved unanimously by a three-member Committee of physicians at that institution; if a vote was split, the request was sent to the Committee on Human Reproduction for a final decision.¹⁸

The body of the decree outlines the precise medical conditions which would justify approval of a sterilization procedure. Divided by medical field (cardiology, endocrinology, psychiatry, etc.), the lists included conditions deemed to make pregnancy risky or to justify the prevention of future pregnancies.¹⁹ Some categories were applicable to both women and men. For example, in addition to certain diseases that affect only women, the subheading of Oncology includes retinoblastoma, prostate cancer, and malignant bone tumors as conditions that would qualify men for sterilization.²⁰ Additionally, certain types of genetic diseases justified sterilization for either women or men. However, for the most part, the conditions applied to women and were based on the risk that a pregnancy would pose to the woman's health or life.

The 1988 decree also outlines the procedures required for obtaining consent to a sterilization. Each request submitted to an institution's Sterilization Committee had to be accompanied by (a) the signatures of *los interesados*, or the interested parties, and (b) the medical justification written by a specialist in the appropriate field or by a doctor charged by the Committee on Human Reproduction with responsibility for cases in that field.²¹ The decree also required the consent of the patient for those over 18 and the consent of parents and/or those exercising parental authority for underage patients. In all cases, it was required that consent be in writing.²²

Note that while this decree legitimated sterilization under certain circumstances, Article 123 of the Penal Code was still in place, potentially equating sterilization with injury. If one didn't accept Article 129's permittal of voluntary sterilizations the decree could have been interpreted

16. Decreto N° 18080-S, *supra* note 15, preface.

17. Decreto N° 18080-S, *supra* note 15, Artículos 1-4.

18. Decreto N° 18080-S, *supra* note 15, Artículo 6.

19. Decreto N° 18080-S, *supra* note 15, Artículo 10.

20. Decreto N° 18080-S, *supra* note 15, Artículo 10.9.b.

21. Decreto N° 18080-S, *supra* note 15, Artículo 5.

22. Decreto N° 18080-S, *supra* note 15, Artículo 12.

as invalid; it was argued by a law student at the time that the President and the Ministry of Health did not have the power to overturn penal law, and that only the legislature could do so.²³ Regardless, Sterilization Committees under the supervision of the Committee on Human Reproduction took charge of the approval process. By 1993, 20.5% of Costa Rican women in relationships were sterilized.²⁴

IV. THE CLADEM CASE: GENDERED APPLICATION OF A GENDER-NEUTRAL DECREE

A case challenging the application of the 1988 decree highlights how women's access to sterilization, already restricted by formal limitations in the decree, was further limited by biased application of the law. The problem stemmed from a gap in the fairly detailed decree. Article 12 stipulated that for mentally healthy patients 18 and over, the only consent required was that of the patient. However, the signature of "los interesados," mentioned in Article 5, went undefined in the decree itself.

In 1991, Rose Mary Madden Arias, representing CLADEM (Latin American Committee for the Defense of Women's Rights), brought a suit claiming that the Sterilization Committees and the Committee on Human Reproduction had interpreted Articles 5 and 12 of the decree in a manner inconsistent with both national and international law. In her demand presented to the Constitutional Hall of the Supreme Court of Justice, Madden stated that the Committees were requiring husbands to authorize sterilizations for married women.²⁵ While Article 12 required only the consent of the patient, Madden said that the committees were interpreting Article 5's "interesados" as including a woman's husband. As her demand stated, this interpretation implied that the husband is like "the owner of the reproductive apparatus of the wife."²⁶

Madden's arguments are rooted in national and international law and in an analysis of gender and power. She outlines the various bodies of law that would invalidate the demand for husband consent, including:

- Article 33 of the Constitution, which establishes equal rights for men and women;
- Article 52 of the Constitution, which establishes equal rights between married people; and
- The U.N. Convention on the Elimination of All Forms of Discrimination Against Women, ratified by Costa Rica, particularly

23. Roberto Solano Coronel, *Aspectos Penales de las Esterilizaciones: Analisis del Reglamento de Esterilizaciones (Decreto Ejecutivo Numero 18080-S) (1989)* (unpublished thesis for a degree in law, Universidad de Costa Rica)(on file with author).

24. Caja Costarricense de Seguro Social, *Encuesta Nacional de Salud Reproductiva: Informe Preliminar*, Departamento de Salud Reproductiva 18 (July 1993), cited in Madrigal Pana, *supra* note 9, at 9.

25. Rose Mary Madden Arias, *Acción de Inconstitucionalidad*, Remesa D3S91, Archivo 165, Juridical Archives, Heredia, Costa Rica (June 21, 1991).

26. *Id.* at 2.

articles which seek to ensure women's equal rights to medical attention and family planning services,²⁷ require that women have full legal capacity,²⁸ and secure for women equal rights in marriage, including the right to freely decide the number and spacing of their children.²⁹

Madden further argues that the spousal permission requirement not only discriminates against women, but risks their very lives:

In countries like ours, where Catholic men or those of other religions consider sterilization a 'sin,' they therefore don't permit them even for reasons of health, socioeconomic conditions, or both. This right should not be within the power of men because it pertains to the bodies, health and lives of women. In many cases, this discrimination translates into the legitimation of the idea that when a woman becomes pregnant, she deserves to die in childbirth. What's more, it denies women access to control over their own bodies, a right which depends on sexual autonomy, physical integrity, and the right to privacy and non-imposition of motherhood.³⁰

Madden also argues that what is meaningful is not giving facially equivalent treatment to both sexes, but giving treatment that leads to equivalent *results*. She notes that men seeking sterilizations are not required to obtain their wives' signatures, and asks, "Could this be because the opinion of the wife on these operations is not equally important, or doesn't have the same legal weight?"³¹ She then argues that because women's equality rests heavily on their ability to choose the number and spacing of their children, even a gender-neutral demand for consent would constitute discrimination.³²

Several medical, governmental, and advocacy groups supported CLADEM's claim. The Office of the Procurador General de la República, the government's attorneys, submitted a brief stating that CLADEM's legal claims were valid, and noting that the practice would constitute discrimination not only between men and women but also between married and unmarried women.³³ A group of physicians submitted a brief in CLADEM's support, stating that "To accept that it is the husband who has the right to decide about sterilization, is to accept that medical judgment, which is supposed to protect the health of human beings, is

27. U.N. Convention on the Elimination of All Forms of Discrimination Against Women, Part III, Article 12. [hereinafter CEDAW].

28. CEDAW, *supra* note 27, Part IV, Article 15(2).

29. CEDAW, *supra* note 27, Article 16.

30. Madden Arias, *supra* note 25, at 6.

31. Madden Arias, *supra* note 25, at 4.

32. Madden Arias, *supra* note 25, at 7.

33. Adrián Vargas Benavides, Procurador General de la República, Opinion, Remesa D3S91, Archivo 165, Juridical Archives, Heredia, Costa Rica 11 (Sept. 24, 1991).

neither valid nor efficient, and that all professional knowledge is disqualified by the ignorance or beliefs of the husband."³⁴ The physicians note the drawbacks of other contraceptive methods for many couples, and argue that the biological process of pregnancy affects only women's bodies and that it is women who suffer from multiparity. In addition, a group of feminist legal scholars (CIFEJ, Circulo de Estudios Feministas Juridicos) submitted a brief supporting CLADEM. They had knowledge of cases in which even unmarried women were required to submit the signature of *any* man "it doesn't matter who"—with their requests.³⁵ Citing the Civil Code's establishment of juridical capacity for all people, they ask, "What interests the Sterilization Committees more, the health and life of women or the maintenance and reproduction of masculine supremacy?"³⁶ Briefs in support of CLADEM were also submitted by the Collective Association for Women Casa de la Mujer Pancha Carrasco, and by La Defensoría de los Derechos Humanos de la Mujer (Defender of Human Rights of Women), part of the Ombudsperson division of the Department of Justice.³⁷

For their part, the College of Doctors and Surgeons claimed that they were not applying a discriminatory interpretation of Article 5 of the decree.³⁸ Madden had made available the testimony of a woman with health problems who was unable to obtain sterilization because her husband would not grant permission due to his membership in the "Rose of Zarón" sect, and a card submitted to CCSS with a woman and her husband's signatures requesting her sterilization.³⁹ Despite these examples, the College denied any responsibility for any spousal permission requirement. On the contrary, the College claimed to agree with Madden's equality arguments, and asserted that "If in some hospital a different interpretation is given, the problem should be focused directly on the respective committee of the hospital which produces the erroneous interpretation."⁴⁰ However, work at these hospitals was conducted under the supervision of the Committee on Human Reproduction of the College itself.

The Court's decision was a technical failure for CLADEM but at least a partial affirmation of women's right to reproductive autonomy. The Court dismissed the action and CLADEM's corresponding request for an injunction, citing a lack of evidence that the Committees had indeed

34. Lisbeth Quesada Tristan et al., *Coadyuvancia*, Remesa D3S91, Archivo 165, Juridical Archives, Heredia, Costa Rica 2 (Oct. 7, 1991).

35. CIFEJ, *Coayudvancia*, Remesa D3S91, Archivo 165, Juridical Archives, Heredia, Costa Rica 2 (Oct. 7, 1991).

36. *Id.* at 4.

37. Madden Arias, *supra* note 25.

38. Raimundo Riggioni Bolaños, *Coordinador del Comité de Reproducción Humana del Colegio de Médicos y Cirujanos*, Respuesta, Remesa D3S91, Archivo 165, Juridical Archives, Heredia, Costa Rica (Oct. 3, 1991).

39. Madden, *supra* note 25, at 9; *see also* *Solicitud de Anticoncepcion Quirurgica Teraputica*, in Madden, *supra* note 25. (this is a sterilization request form, presumably submitted by the College of Doctors and Surgeons, which had a line only for the signature of "la interesada").

40. Bolaños, *supra* note 38, at 3.

applied a discriminatory interpretation.⁴¹ However, noting the importance of therapeutic sterilizations and women's rights, the Court wrote an "interpretación conforme," an opinion on how the 1988 decree should be interpreted consistently with constitutional principles.

Considering only therapeutic and not solely contraceptive sterilizations, the majority held that requiring a husband's signature would indeed violate principles of equality, non-discrimination, liberty, equality in marriage, and the principles embodied in CEDAW, the International Covenant on Civil and Political Rights,⁴² the Covenant on Economic, Social and Cultural Rights,⁴³ and Costa Rica's Law for the Promotion of Women's Social Equality.⁴⁴ The Court holds that the constitutional mandate of full legal capacity for women "does not permit the submission of a woman to the decision of her spouse, nor to any other person, to determine any act of her life, juridically speaking—juridically speaking because while she is free to determine her acts, this is not to say that she cannot or should not voluntarily consider the opinion of her husband in a decision that affects their matrimonial life."⁴⁵ The Court continues with what amounts to a rejection of Madden's claim that requiring spousal permission would have different effects on women and men, arguing that the same principle of liberty would be violated in both cases. However, the Court ultimately concludes that for all women over 18, married, single, divorced, widowed, or in "uniones de hecho" (domestic partnerships), it is unconstitutional to require a partner's permission for a therapeutic sterilization.

Two dissenting judges offer a contrasting view of women's juridical liberty. While they agree that the action should be dismissed, they disagree with the "interpretación conforme." Magistrados Baudrit and Castro argue:

[Marriage is] a consensual and legitimate contract between a man and a woman through which they give and accept the right, which is exclusive (and perpetual for those Catholics who conform to the Canonical Law), to their bodies, for those acts which are required to produce offspring; the association which arises from it is a permanent one (indissoluble for Catholics who conform to Canonical Law) between a man and a woman to produce children.⁴⁶

41. Sala Constitucional de la Corte Suprema de Justicia, Voto No. 2196-92 (Aug. 11, 1992).

42. International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st sess., Supp. No. 16, at 49, U.N. Doc A/6316 (1967) (entry into force Mar. 23, 1976).

43. International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A, U.N. GAOR, 21st sess., Annex, Agenda Item 62, at 7, U.N. Doc. A/6545 (1966) (entry into force Jan. 3, 1976).

44. Ley de Promoción de la Igualdad Social de la Mujer, Ley No. 7142, L.P.I.S.M. (Marzo 1990).

45. Sala Constitucional de la Corte Suprema de Justicia, *supra* note 41.

46. Voto Salvado de los Magistrados Baudrit y Castro, Voto No. 2196-92 (Aug. 11,

To conserve this “reciprocal, exclusive right” to each other’s reproductive faculties, the judges argue, both partners’ assent is required for a sterilization to prolong or save the life “of one of them.” This focus on reciprocity, however, ignores the fact that a therapeutic sterilization would almost invariably be a female sterilization, and that therefore the “right to the other’s reproductive capacities” in question is the man’s right to his wife’s capacity.

V. 1988-1998: GROWING FRUSTRATION WITH GENDER BIAS
IN APPLICATION OF THE DECREE

While the Court’s decision in 1992 officially delegitimized the husband’s permission requirement, gender discrimination persisted in the law and in its application. Overall, the discretion which remained in the hands of the medical profession prevented women from being able to make a fundamental decision about their reproductive health and their lives.

In 1994, the Defensoría de los Habitantes, the government’s Ombudsperson division, reported numerous inequities in the application of the decree. In addition to the persistence of the practice of requiring husbands’ signatures, some physicians were soliciting money in exchange for approving the procedure, or were charging for the procedure when they should not have been. Other physicians improperly told women that they didn’t have enough children yet, even if they satisfied the medical conditions.⁴⁷ Because the physicians were still the ones making the ultimate determination of whether a woman could be sterilized, women in Costa Rica were subject to continued irregularities and limits, even within the restrictive confines of the 1988 decree’s list of medical justifications. Based on these considerations, the Defensoría recommended that women have the right to decide about sterilization themselves.⁴⁸

Through the 1990s, obstacles to free choice of sterilization continued. In 1995 the Defensoría reported continued complaints of irregularities, including improper charging for sterilization procedures.⁴⁹ Ligia Martin of Defensoria de la Mujer reports that women were charged as much as 50,000-120,000 colones.⁵⁰ Data compiled by the Defensoría showed that from 1993 to 1998, the percent of sterilization requests at 17 CCSS hospitals that resulted in approvals and, ultimately, procedures, dropped from 56% to 47%.⁵¹ Furthermore, the Defensoría noted, at the majority of hospitals

1992).

47. 1994 Defensoría de los Habitantes, Informe Anual 99.

48. *Id.*

49. 1995 Defensoría de los Habitantes, Informe Annual 107.

50. Interview with Ligia Martin, Licida, Defensoria de la Mujer, San Jose, Costa Rica (Aug. 16, 2000).

51. Defensoría de la Mujer, Sterilization and Human Rights 7 (1998).

the Sterilization Committees were composed entirely of men.⁵² As for the continued specter of Article 123 of the penal code, the Defensoría argued that Article 129 and the requirements of medical ethics, combined with the fact that no convictions had occurred under 123 for sterilizations, nullified the risk of any legal action against doctors.

Further, as the Defensoría argued, by limiting the definition of health to a defined set of medical conditions, the decree ignored complex social, economic, and mental factors that are affected by reproductive decisions and that, in turn, are crucial factors in women's health and well-being. Even if the decree had been carried out without any corruption or explicit gender discrimination, its inherent limitations violated women's rights to health and well-being as protected by the Beijing Platform for Action⁵³ and the International Conference on Population and Development⁵⁴ (the Cairo Convention). As Maricel Salas of the Agenda Política de Mujeres commented, "The list of illnesses and sufferings, many of them grave, permitted the sterilization for women who were practically on the edge of death; not contemplated were social and human aspects, as important as, for example, income or the familial or social situations of women."⁵⁵

VI. 1999: TOWARDS FORMAL LIBERALIZATION

After years of pressure from La Defensoría and women's rights groups, the Ministry of Health took steps to address the problem of women's access to sterilization. The Ministry convened a workshop on reproductive health and rights in July of 1998, inviting physicians and representatives from the Defensoría. In August another workshop was held, this time including representatives from NGOs. Participants discussed the Defensoría's recommendations for sterilization choice with comprehensive counseling, and heard testimony from women who had had problems obtaining sterilizations despite pressing need.⁵⁶ These steps were taken in response not only to pressure from advocacy groups but to the reality of reproductive health in Costa Rica; a 1997 article reported that 50% of pregnancies in Costa Rica were unwanted, and that 98% of women approved of sterilization.⁵⁷

In September, the Minister of Health also created a Commission to follow up on implementation of the Cairo Convention's promises of reproductive health and rights. Many of the members of this commission also worked on the Reproductive Health Committee. According to feminist activist María Suárez, this timing was important because it

52. *Id.*

53. Beijing Declaration and Platform for Action, U.N. Fourth World Conference on Women, U.N. Doc. A/CONF. 177/20 (1995).

54. Cairo Convention, *supra* note 3.

55. *La Libre Elección está al Gleance de su Mano*, PREGONERA, Apr. 2000.

56. Interview with Ligia Martín, Defensoría de la Mujer, *supra* note 50.

57. Ángela Ávalos Rodríguez, *Avalan más Esterilizaciones*, LA NACIÓN, Mar. 6, 1997, at 8A, (citing Encuesta Nacional de Salud de la República (1993)).

allowed advocates to draw on the principles of reproductive autonomy embodied by that Convention. In addition, the evaluation of the implementation of the Convention provided an international forum for Costa Rican women's groups to advance their arguments about sterilization and women's autonomy.⁵⁸

In 1999 the President and the Minister of Health issued a new decree on sterilization and on reproductive health drawing on the recommendations of the Defensoría and women's rights groups.⁵⁹ Its divergence from prior law is evident from the beginning in the values noted in the introduction of the decree. While the 1988 decree had begun by stating that therapeutic sterilization is a way to protect health, the new decree focuses explicitly on autonomy, reproductive health, and human rights. In addition to the state's responsibility for the health of its citizens, the decree acknowledges:

That the health of the population is a social product and as such is constructed out of the conditions of particular lives, of social groups, and of communities;

That these conceptions of health are supported by conceptions of political, social and environmental human rights, the development of ethics and attention to health;

That our democratic system is based on individual liberty and respect for human rights, and that a democratic society can only grow and develop if every individual has this possibility in every part of life;

That it is the indelegable responsibility of the State of Costa Rica to protect the population's rights to sexual and reproductive health, and to respect and comply with the international commitments made in this area, that recognize the right of all people to control all aspects of their health and, in particular, their reproductive capacity;

That it is the obligation of the State of Costa Rica to respect the principle of autonomy for men and women who have attained the age of majority;

That attention to health and to sickness creates the obligation to strengthen the autonomy and respect the integrity of people to make decisions about their health;

That respect for autonomy and integrity demands, in

58. Telephone Interview with María Suárez Toro, Producer, Feminist International Radio Endeavor, (Aug. 25, 2000).

59. Decreto N° 27913-S, *in* LA GACETA at 28, June 9, 1999.

health services, respectful horizontal interchange of knowledge, through real education and societal participation in health, that make possible a unified and humane construction of the right to health.⁶⁰

These recognitions of the state's responsibility were paralleled by a shift in oversight of sterilizations from the private College of Doctors and Surgeons to the public Ministry of Health. And, while they are written in a gender-neutral format, the association of reproductive choice with personal liberty clearly reflects a consciousness of the importance of reproductive autonomy in women's lives.

The decree also established an Interinstitutional Commission on Reproductive and Sexual Health and Rights (a continuation of the Commission that developed the decree) which meets at least once a month to discuss public policy in that area.⁶¹ The interdisciplinary nature of this Commission, which includes government officials, doctors, nurses, sociologists, anthropologists, NGO representatives, and psychologists, among other professionals, stands in significant contrast to the biomedical focus of the earlier decree. The decree also mandates Counseling on Health and Reproductive and Sexual Rights at all private and public institutions that provide reproductive and sexual health services.⁶² This counseling, created by interdisciplinary teams of experienced professionals of both sexes, is to include information on reproductive rights and contraception appropriate to individuals' needs and beliefs. As Ligia Martín stated, this comprehensive counseling is important because the goal of the decree is not to promote sterilization *per se* but rather to make it available as an option to people who are fully informed about it and other methods.⁶³

Finally, the new decree makes explicit the new informed consent process for sterilizations, which focuses on the patient's understanding and autonomy:

In the case that the selected method for the user is surgical contraception, there should be given a document manifesting informed consent, which includes at least: 1- the person's voluntary agreement to submit to said procedure; 2- that from the information provided in the counseling, the person is aware of the irreversible consequences to the reproductive capacity and recognizes the right to informed consent, and 3- a release from all responsibility of the treating doctor and the institution who operate under the principles and laws of the medical

60. Decreto N°27913-S, *supra* note 60, preface.

61. Decreto N°27913-S, *supra* note 60, Artículos 1-2.

62. Decreto N°27913-S, *supra* note 60, Artículo 4.

63. Interview with Ligia Martín, *supra* note 50.

arts.⁶⁴

There is no mention of medical necessity or of physician permission; all that is required for the provision of sterilization is counseling and informed consent. Furthermore, the decree requires that all counseling recognize individuals' specific needs based on factors including gender, socioeconomic condition, ethnic identity, age, documentation and insurance status.⁶⁵

VII. RESPONSE TO THE NEW DECREE: DOCTORS, THE CHURCH, AND PRO-NATALISM

The release of the decree by no means signaled an end to disagreement over sterilization in Costa Rica. While many lauded the decree as a positive step for reproductive autonomy, others, especially physicians, the church, and pro-natalists, expressed varied concerns about the change in the law.

The College of Physicians and Surgeons was not officially opposed to the substance of the decree, but continued to express concern about Article 123 of the penal code. In June of 1999 the President of the College told a newspaper that he was worried that physicians could still face criminal liability because Article 123 was still in place.⁶⁶ However, as the Defensoría noted, patients are required by the decree to sign a waiver releasing physicians from liability as long as the sterilization is performed within medical standards.⁶⁷ The Procurador confirmed on October 28, 1999 that the decree was legal and constitutional, and that doctors would not face penal liability for performing sterilizations.⁶⁸ Of course, the concerns expressed by physicians may reflect not only legal worries but a reluctance to shift away from a system in which the decision rested in the hands of physicians.

The Catholic Church, a powerful institution in Costa Rica, expressed a more fundamental disagreement with the substance of the decree. Monseñor Roman Arrieta Villalobos, the head of the Church in Costa Rica, argued that sterilization of healthy organs represents a "mutilation."⁶⁹ Allowing an individual to choose it violates the matrimonial pact because it allows one partner to take away the other's right to have children; and poverty will be eliminated not by allowing people to control family size but by redistributing wealth. In addition, he argues, other methods of

64. Decreto N° 27913-S, *supra* note 60, Artículo 5.

65. Decreto N° 27913-S, *supra* note 60, Artículo 6.

66. Marcela Cantero, *Médicos Temen Demandas*, LA REPÚBLICA, June 30, 1999, at 7A (citing Solón Chavarria, President of the Colegio del Médicos y Cirujanos).

67. Note that patients who sign the waiver would, however, still have the right to legal recourse if malpractice occurred. Interview with Ligia Martín, *supra* note 50.

68. Ángela Ávalos Rodríguez, *Más Demanda de Esterilizaciones*, LA NACIÓN, Jan 11, 2000, at 4A.

69. Monseñor Roman Arrieta Villalobos, *Los Pretextos Para la Esterilización*, AL DÍA, Jul. 4, 1999, at 13.

family planning which do not violate natural law exist. Arrieta dismisses arguments in favor of making sterilization available by concluding that:

Many people lack the courage or honesty to show the true reasons that they support sterilization; they are none but to give free rein to their passions and to drink to the last drop from the goblet of pleasure, putting aside any consequences of their acts, such as children in this case. The other reasons are pretexts.⁷⁰

According to María Suárez, the church's opposition led to what was in effect a trade involving women's rights – after releasing the decree against the protests of the church, the government granted the Vatican a “Day of the Unborn.”⁷¹

In another article entitled “Demographic Totalitarianism,” one columnist associated sterilization with abortion and genocide. In an article he argued that the new decree represented a dangerous anti-procreative step, taken ironically, in his view, around the 50th anniversary of the Universal Declaration of Human Rights:

Costa Rica, hand in hand with the gender extremists – those who prefer “gatas” to “gatos” as mascots—is also contributing to the celebration of this 50th anniversary by curing with anti-procreative and irreversible sterilization this new “disease” called fertility.⁷²

These concerns are understandable in light of many developing countries' experiences with coercive population control programs. However, the writer's view is clearly tinged with sexism and with disdain for work that recognizes the particular importance of reproductive autonomy to women. In addition, he overlooks the fact that advocates in many sectors saw Costa Rican women facing the problem of adequate access, not of coercion.

Despite attacks from certain sectors of society, the decree met with strong support. One columnist noted that the high number of new requests for female sterilizations demonstrated the good sense and responsibility of Costa Rican women. He speculated that the lack of a corresponding increase in male requests, perhaps partly attributable to ignorance, stemmed largely from the traditional placement of the burden of unwanted pregnancies on women's shoulders.⁷³ Another writer lauded

70. *Id.*

71. Telephone Interview with María Suárez Toro, Representative of Mujeres por la Salud (Aug. 25, 2000).

72. Enrique Vargas Soto, *Totalitarismo Demográfico: Decreto Sobre Esterilización es Engañoso*, LA NACIÓN, Jul. 16, 1999, at 15A (“Gato” is the Spanish word for cat; “gata” is the female form.).

73. Alejandro Urbina, *¿Padres Solteros?*, LA NACIÓN, Jan. 16, 2000, at 13A.

the reproductive autonomy that the decree granted to both men and women and noted a double standard in the arguments of critics; while they debated the morals and ethics of sterilizations in the public health system, they didn't protest when wealthier women obtained sterilizations privately.⁷⁴ As for fears of population control, Ligia Martín notes that the Ministry of Health is very cognizant of discriminatory use of sterilization in Latin American population policy in the 1970s, and that the Caja Costarricense de Seguro Social, the Defensoría, the College of Doctors and Surgeons, and NGOs are all monitoring the system to prevent such abuses.⁷⁵ And, two recent actions against the constitutionality of the decree have been rejected by the Courts.⁷⁶

While the Defensoría has received fewer complaints on access to sterilization since the release of the decree, hospitals have had trouble meeting the subsequent demand for female sterilizations. According to a July 2000 report in *La Nación*, thousands of women in Costa Rica are on waiting lists at public and private hospitals where there are only enough physicians and resources to perform a limited number of procedures per month.⁷⁷ For example, at the National Hospital for Women (Hospital Nacional de las Mujeres), 5,000 women were on a waiting list to receive the pre-surgery counseling as of July 2000. However, Ligia Martín argues that the surge in demand will level off after the many women who have been denied sterilization in recent years will have obtained the procedure. Xinia Carvajal, Vice Minister of Health and Coordinator of the National Commission on Sexual and Reproductive Health, concurs, commenting that she believes the demand will stabilize over the next few years, and adds that the Commission on Reproductive Health is planning to facilitate options for vasectomy.⁷⁸

VIII. CONCLUSION

In addition to the problems of high demand, the conditions that cause

74. Iris Zamora Zumbado, *Derecho Decidir Sobre Nuestro Cuerpo*, LA REPÚBLICA, Jul. 19, 1999, at 11A.

75. Interview with Ligia Martín, *supra* note 50. The Defensoría has not received any complaints of involuntary sterilization of psychiatric patients, a common problem in sterilization campaigns in other countries. Sterilization of those deemed mentally incompetent to consent can only be performed with the consent of family or other legal guardian. In addition, a Resolution of the General Assembly prohibits the use of sterilization as treatment for mental illness. "Principios para la Protección de los Enfermos Mentales y el Mejoramiento de la Atención de la Salud Mental," Resolución 46/119, Principio 11, Paragraph 12 (Dec. 17, 1991).

76. On August 11, 1999, Sala IV dismissed Eduardo Vargas Rivera's claim that the decree had procedural errors. Ángela Ávalos Rodríguez, *supra* note 68, at 4A. On October 6, 1999, Sala IV rejected Guillermo Malavassi Vargas' claim that the decree violated the right to have a family. William Mendez Garita, *Luz Verde a Esterilizaciones*, LA NACIÓN, Oct. 14, 1999, at 5A. It is important to note, however, that because it is not a law passed by the General Assembly, the decree could theoretically be overturned by this or future Presidents.

77. Ángela Ávalos Rodríguez, *Apuros Por Esterilizaciones*, LA NACIÓN, Jul. 13, 2000, at 8A.

78. *Id.* (citing Xinia Carvajal).

the popularity of sterilization among women in Costa Rica should be critically examined. The extremely high rate of female sterilization as compared to male is troubling, given that vasectomy is simpler and safer. In addition, it is unclear how many women would choose permanent sterilization if they had access to safe and legal abortion or to reliable temporary contraception that they could easily control.

However, given the current situation of Costa Rican women, the decree of 1999 was an important change in making sterilization available in Costa Rica. In a country where women bear the burden of high levels of unwanted pregnancies, the new decree has created an additional option for female reproductive autonomy. Importantly, as María Suárez notes, "Many people thought it was impossible to gain this on the basis of women's right to decide."⁷⁹ Hopefully, the salience of women's rights in the passage of the 1999 decree will set a precedent for continued progress for women's reproductive and sexual health and autonomy in Costa Rica.

79. Telephone Interview with María Suárez Toro, *supra* note 71.