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¿To Liberalize or Criminalize?

A Comparative Case Study on Changes in Abortion
Legislation in Colombia and Nicaragua

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Abstract

In this thesis I investigate the recent changes in abortion legislation in Colombia (liberalization) and Nicaragua (criminalization). By making a comparative case study I intend to find the factor(s) that could explain the different directions in legislation, given that both countries are of great similarity (location, religion, history, and political culture). The analysis made is based on John Kingdon's theories, thus the streams of processes (Problems, Policies and Politics), the Participants (inside and outside the government), and the Window of Opportunity are examined. As a complement the role of civil society as an agenda setter is studied further.

I discover that there were great similarities between the two countries; the initiators in both cases got through their proposals, participants within government had most of the power and a change in national mood was critical to enact changes in legislation. However, to reach my objective, this thesis shows that both processes were of very different nature; the Colombian legislation change was made through a judicial process ignoring the political sphere, whereas the Nicaraguan was a result of an immensely politicized debate in the context of national elections.

Key words: Abortion legislation, policy change, civil society, Colombia, Nicaragua

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1 Introduction

1.1 Presentation

26% of the world's people reside in a country where abortion is generally prohibited. With the exception of Cuba, Guyana and Puerto Rico, the world's most restrictive abortion legislations are to be found in Latin America. (Center for Reproductive Rights 2008 [a]) In most Latin American nations, abortion is available only exceptionally, so as to save the pregnant woman's life, preserve her health, or in the case of incest or rape (Kane 2008: 361). These hard legal constraints are the major reason to high figures of unsafe abortions; each year 4.1 million abortions are carried out in Latin America and the Caribbean, out of which 3.9 million are considered to be unsafe (Sedgh et al. 2007: 1342).

In 2006 Colombia, located in northern South America, made changes in the abortion legislation that lightened the earlier total prohibition. The new change was comprised by a decriminalization of "therapeutic" abortion, which is most often carried out when the pregnant woman's life is in risk or if the fetus is gravely impaired. (Human Rights Watch 2007). As of May 10th that year abortion is thus legal in those cases, and additionally in the context of rape (Kane 2008: 366). Until the decriminalization, Colombia was one of three countries in Latin America that prohibited abortion under all circumstances (along with El Salvador and Chile). Abortion was categorized as a crime against life and personal integrity, and both the woman and the performer of the abortion could be sentenced to imprisonment for one to three years (Women of the World 1997: 77). Because of this about 300 000 to 400 000 annual illegal abortions were carried out in the country. Between 1980 and 1990 complications connected to these illegal abortions was the second cause of maternal mortality. (Ceaser 2006: 1645)

Nicaragua, located in Central America, had during 1893-2006 a Penal Code that criminalized all abortions, with an exception for those carried out for therapeutic reasons. In the Nicaraguan case "therapeutic" was never defined; it was to be scientifically determined by at least three physicians with no guidelines from the law. Additionally the abortion was to be performed with the consent of the spouse or closest relative of the woman. (McNaughton et al. 2005: 19) Access to legal abortion was thus practically non-existent; in 2005 only six therapeutic abortions were provided by the Ministry of Health (Kane 2008: 364).

On October 26th of 2006 the Nicaraguan parliament passed a prohibition of therapeutic abortion without a single opposing vote (some parliamentarians put down their votes). This meant that the only allowed version of abortion became

prohibited, making it impossible for women to terminate a pregnancy and giving grave punishments for those who do so anyway. According to the legislation doctors performing the procedure face up to 6 years in jail while the women who abort front 4 years of imprisonment. (Replogle 2007: 15) The new ban has made doctors and other health-care providers unwilling to perform treatments that might result in abortion, such as treatment of hemorrhaging, in fear of the penalties that could follow (Kane 2008: 364).

Both Colombia and Nicaragua have similar historical pasts; they were both under the colonial influence of Spain for centuries and the politics that followed independence were greatly influenced by this and characterized by a battle between conservatives and liberals. Also in both countries the Catholic Church has close historic ties to the governments and is still the most influential religious and social tradition (Kane 2008: 363). It is therefore inevitable to wonder: How can legislation differ so widely in countries so alike? What explanations are there to this puzzle? In this thesis I wish to find answers to these questions, and therefore I will now go on with formulating my research question.

1.2 Question Formulation

My interest in this thesis is put on the different outcomes of legislation in the chosen countries. Why is it that Nicaragua decided to ban all possibilities for abortion shortly after Colombia abolished the same prohibition?

The question I will try to answer is as follows:

What factors can explain the different outcomes in abortion legislation in Colombia and Nicaragua?

1.3 Statement of Purpose

As understood from my research question, I am interested in finding explanatory factors for the different results in abortion legislation. My aim is therefore to generate greater understanding on the subject in question.

It is of great importance to, in an early stage of my research, mention that there are limitations to my study, therefore my ambition is not to find generalizations concerning the topic of abortion. I do not wish to find patterns that could explain similar actions in other parts of the world; my intentions are purely to make an in depth study that can give explanations to and a further understanding of these particular cases.

I am fully aware that the analysis might generate greater understanding of processes of legislation change in the context of abortion; however this is not to be seen as the main objective of my thesis.

1.4 Disposition

This thesis is divided into five main chapters. The first chapter has focused on the preparatory work, such as aspiring for a greater knowledge of the case and revealing a research question and aim of thesis etc. Chapter two is purely methodological and aims to explain the methods that will be used throughout this paper in order to build an understanding of the nature of the thesis. In chapter three the foundation of the theoretical frame will be laid by thoroughly defining the theories and concepts that will be used in the analytical process. Chapter four is divided into two sections, the analysis of the legislation change in Colombia and the analysis of Nicaragua in order to make the study easier to follow. The results from this investigation will be further discussed in chapter five which encompasses a comparison of the results and the major conclusions and discussion of the thesis.

2 Method

2.1 Indirect Method of Difference

When the objects studied have many similar features but differ in some specific aspect a study of the differences is of great interest. The method most convenient for this kind of research is the indirect method of difference elaborated by John Stuart Mill. This method is mainly used in a theory developing study; two similar cases with different results are compared and if one can find the trivial factor that leads to the difference a theory can be elaborated. (Esaiasson et al. 2003: 128) A method that is closely connected to and actually derives from the method of difference is the Most Similar Design (MSD). It seeks to compare political systems or countries that share a “host of common features in an effort to neutralize some differences while highlighting others”. (Landman 2003: 29) The countries that are chosen for comparison are to be as similar as possible in e.g. history, culture, political institutions etc., so as to “clearly rule out such common factors as explanations for the particular difference of interest to us” (Hague & Harrop 2004: 82). In my investigation I will be using these methods, utilizing the term given by Mill.

When using the indirect method of difference, problems can naturally come up. How can I be sure that there is only one explanatory factor to the divergence studied? If the riddle in question is made up or influenced by more than one factor, is it not possible that wrong conclusions are drawn? (Esaiasson et al. 2003: 129) Since I have chosen a theoretical frame that will be used as a basis in the analysis, these matters should not be of concern. Theory development can be seen as both the generation of new hypotheses as well as the testing of existing ones. (George & Bennett 2004: 6) This shortly means that my investigation will be of a more theory testing character, such as a Discipline Configurative study, which basically means that I will use existing theories to analyze the empirical data available. The theoretical frame in question will be revealed and discussed in the forthcoming chapter.

But first I am to demonstrate that Colombia and Nicaragua are indeed very similar countries. In order to do this I have chosen the following criteria: (i) location, (ii) religion, (iii) history, and (iv) political culture.

(i) Location is to me the most important decisive factor considering these two countries. Both are located in Latin America, closely to each other with only two countries in between. This makes it more relevant and interesting to study these

two instead of for example Colombia and Poland that have similar abortion legislations but are in other context of much divergence (Center for Reproductive Rights 2008 [b]).

(ii) The criterion of religion is of importance since the social and religious life in both Nicaragua and Colombia has been dominated strongly by the Catholic Church. In Nicaragua 72.9% of the population consists of Roman Catholics and in Colombia the scores are even higher with 90% belonging to the Catholic Church. (Freedom House 2006 [a] [b]) Religion has also been an influential factor in the elaboration of the political culture of the whole of Latin America, utterly present in these two countries (Kane 2008: 363).

(iii) As mentioned in the presentation, both countries were Spanish colonies until the early 19th century, which affected both political and ethnic compositions. Both countries have had turbulent pasts, civil war raged in Nicaragua during the 1980's and in Colombia the conflict is still intense. Also the historical hemispheric dominion of the US has influenced the structure and development of the political system and its institutions (e.g. presidentialism, etc). Thus the historical aspects are an additional factor that has affected the last criterion of political culture.

(iv) Both countries have had a strong political dominion by conservatives and liberals throughout history and the political culture has been dominated by men. The Catholic Church's composition has thus worked as a guideline to the political sphere. In this specific point it could also be relevant to incorporate the countries' Freedom House ratings, since both share the Partly Free rating with equal scores concerning political rights (3) and civil liberties (3) (Freedom House 2008).

I have chosen to look at these specific criteria because they are to this case the most relevant. One could argue that other aspects are to be taken into account, which could show differences between these countries. For example international influence: the US has had a notable role in the fight against narcotics in Colombia and led during the 1990's the so called "war on drugs" giving significant support to the Colombian military (Stokes 2005: 1ff). In Nicaragua the US was indeed supportive of guerrilla movements in the 1980's, however the American influence in the country is today non-existent. Economic growth is also a factor of difference between the countries, Nicaragua having one of the poorest economies of Latin America, while Colombia has a steady growth pace and one of highest economic growth rates of the continent (CIA 2009).

Nevertheless, although there are obvious differences between the countries, I do not think that they are of such relevance so as to affect the outcome of abortion policy drastically. What is essential is that these countries are more alike than different on a basic level i.e. location, history, religion, and political culture, which is what the indirect method of difference (and MSD) requires and which I have accounted for above.

2.2 Comparative Case Study

Comparing countries is a basic aspect of political science, since it gives an opportunity to study variations and the causal relations that lead to these deviations (Lundquist 1993: 102). The technique of comparing is often used in time (one case is studied within a time span) or in space (several cases are compared against each other) (*ibid.* 101). Within comparative studies one can also choose between studying countries that are very different from each other or very similar to each other. As already explained, the countries chosen in this thesis are alike within several aspects.

When doing an in depth study, focused on one case, less generalizing qualitative methods are more fitting, in contrast to quantitative methods that are generally used when aiming for representative generalizations. As mentioned earlier, generalization is not what I am aiming at or for that matter interested in, thus the research in this thesis will be mainly of qualitative nature. Qualitative methods seek not only to identify traits and attributes of the object of study; they also seek to understand them. Therefore it is necessary to focus on a small number of countries, so as to gain the widest knowledge and make conclusions that are better informed by the contextual specificities of the country under examination. (Landman 2003: 19 & 35)

It is not that my ontological and epistemological grounds firmly dismiss the quantitative large-N studies, both methods do hold on to the goal of making inferences from available evidence (*ibid.* 20). However it is mainly that my personal liking and interest lies in studying the unique and peculiar in order to explain and understand. A case study research is hence more suitable when closely examining causal mechanisms in the context of individual cases; the understanding that I am aiming for cannot be received from statistical studies of quantifiable data. (Lundquist 1993: 104-5) Case studies are also often strong where statistical methods are weak; the conceptual validity is stronger since concepts can be refined over a smaller number of cases, whereas quantitative research “run[s] the risk of ‘conceptual stretching’ by lumping together dissimilar cases to get a larger sample” (George & Bennett 2004: 19).

Although the cases that have caught my interest are in two different countries, which could be seen as two different cases and could lead to a questioning of the use of the term case study, the actual focus of my investigation will be on the processes leading to changes in abortion legislation. According to George and Bennett a case is “a phenomenon of scientific interest the investigator chooses to study with the aim of developing a theory regarding the causes of similarities or differences among [cases]” (2004: 17-18). Therefore a case study is not a study on an actual historical event itself, rather on a “well-defined aspect of a historical event” (*ibid.* 18). This means that the case of my investigation is *not* the two countries, but the phenomenon of difference witnessed in the changes in abortion legislation in the countries. Also case study methods do not necessarily have to refer to the study of single cases, but “include both within-case analysis of single cases and comparisons of a small amount of cases”. George and Bennett argue

further that there is a “growing consensus that the strongest means of drawing inferences is the use of a combination of within-case analysis and cross-case comparisons within a single study or research program” (*ibid.* 18). Basically this is what I will be doing in my analysis and results; looking at a phenomenon within two countries and comparing them to each other.

2.3 Material

Since I do not have the resources needed, such as time nor money, to make a full-fledged case study on the actual location, my research material will be of secondary character. I have therefore established some ground rules in the search of information in order to guarantee accuracy and relevance to the subject.

First of all I have looked for as updated material as possible in order to gain the most updated knowledge of the cases in question. Therefore large parts of my material are gathered from articles published in scholarly journals related to the specific scientific field of political science and reproductive rights. Some articles might thus originate from a health journal while most have been written by full-blooded political scientists.

Secondly the articles and books that I chose were to be written by well-known scholars issued by renowned publishers. The material concerning the theoretical part has therefore been collected from political science books that are either written by, or refer to, John W. Kingdon. Also scholars in the area of civil society have been examined as a complement to Kingdon.

I have also, in my research process, searched for scholars that are often mentioned in the context of abortion and reproductive rights in Latin America. Karen Kampwirth, Mala Htun, and Gillian Kane are some of the names that will be cited regularly throughout this thesis. Also well-known electronic references connected to the topic will be used.

A general problem I encountered during my research was the lack of information about the cases (the changes are fairly recent), mostly about Colombia. This is due to the fact that most of the political science works that have been written about the country are focused upon the existing internal conflict. I have therefore relied upon different organizations' homepages and interviews (also available on the internet) of central actors in the Colombian abortion legalization. In the Nicaraguan case there were not as big difficulties finding information since there has been a lively debate both within the country and abroad after the decision to ban abortion; thus there are plenty of reports, academic texts etc. to be acquainted with. In the research work I have aspired for an objective knowledge of the legislation processes and factors behind them; therefore a critical eye has been used in the search for material, so as to heighten the reliability of this thesis.

3 Theory

In order to find an answer to my research question and perform the analysis needed, it is time to state my choice of theory. Since I am interested in studying the differences in the legislation making of the countries in question, the theoretical approach must concern these matters.

Here I will discuss two theoretical approaches that are of much help in the analytical process of policy and legislation changes. John W. Kingdon discusses how decision making processes are elaborated thus his theoretical frame is convenient to use and will be a major guideline in my case study.

In addition civil society and the role and impact it can have on the politics and development of a country will be applied. This aspect is of much interest since it could reveal information that is not touched upon in Kingdon's theorizing.

3.1 Kingdon's Decision Making Processes

The theoretical frame developed by John W. Kingdon has a starting point in the American context. In order to explain the making of public policy Kingdon studies the governmental areas of the US with a strong focus on the Presidential post, Congress and Senate. However, this is not to be seen as a straitjacket to the analysis; mainly because Kingdon's work investigates the process behind public policy making, his theory is well-suited for other contexts as well.

The logic of Kingdon's theoretical approach is traced back to the Garbage Can theory that was constructed by Michael Cohen, James March and Johan Olsen. In his reconstruction, Kingdon aims to draw generalizations, creating a theory on agenda setting, one that is used frequently by political science scholars (Johnson 2003: 51 & 53). The aim of Kingdon's theorizing in *Agendas, Alternatives and Public Policies* is to explain "why some subjects rise on the governmental agendas while other subjects are neglected" (2003: 196).

A question that emerges here and that is of great relevance for the continuation of the research is that of what the agenda actually is. The concept of agenda is one that has many definitions. For example one scholar might define it as the attention different matters get in the political debate, while another scholar could say: "A particular organizational structure is, in effect, the organization's agenda" (Asp and Hammond in Hinnfors 1995: 61) How agenda is defined and what meaning one gives to it, is therefore influenced by the subject of study. Since this research is of political science and I am interested in the agenda as something political and governmental the definition I will use is strongly emphasized by Kingdon's own definition. The agenda is therefore "the list of subjects or problems to which

governmental officials [...] are paying serious attention at any given time” (Kingdon 2003: 3). Important to notice is also that there are both governmental agendas and decision agendas. Basically an agenda goes from being governmental to the decision agenda when it is up for an active decision (*ibid.* 4).

Kingdon also establishes that there are three streams of processes by which the agenda setting is affected: problems, policies and politics. “The combination of the streams, as well as their separate development, is key to understanding the agenda change” (*ibid.* 179). When these three processes converge, agenda changes are made and thus new public policies are born. Kingdon’s theory implies therefore that agendas are set because of good timing and are in fact results of coincidences; the logic is that the streams of processes are relatively independent of each other (Johnson 2003: 56).

The three processes mentioned will be discussed next in short passages followed by discussions on the Participants in public policy making and the Window of Opportunity.

3.1.1 The Three Streams of Processes

Problems

In order to make a change in the agenda that will later become a policy change, a problem must be noticed. Problems are by definition conditions that someone should do something about. When a condition is defined as a problem, it has better chances of rising to the agenda; if something should be done, a change must occur. (Kingdon 2003: 109 & 198)

According to Kingdon there are given mechanisms that bring problems to the attention of government officials (*ibid.* 113). Problems are always pressing in on the system; however a crisis or a major event might force people in and around government to focus on the problem and take action accordingly (*ibid.* 16-17).

Also changes in widely respected indicators might result in new focus on a certain problem (*ibid.* 17). An indicator can simply show that there exists a condition; it is therefore of great importance that the change in it is of large magnitude, so as to catch the attention of officials (*ibid.* 197). If the changes in the indicators have chaotic consequences, government officials must intervene.

Feedback from governmental staff or the people, through for example a setback in election polls, might also lead to a stronger focus on a specific problem.

Policies

The second stream of process is of a more technical character, given that the actors partaking in the policy stream are often academic specialists within given areas. The policy stream basically refers to the generation of policy proposals that could solve future problems within different areas. (Kingdon 2003: 17) These proposals are constructed in advance and capable of being implemented when needed to (*ibid.* 143). The policy process makes sure that the solutions to problems are available before an actual problem comes to the attention of government officials. (Hinnfors 1995: 45)

The policy community, constituted by specialists, has an endless amount of ideas and alternatives. Their job is to work on the alternatives so that they are available for adoption, which will later lead to a high placement on the governmental agenda, which also further increases the chances for placement on the decision agenda. (Kingdon 2003: 144)

Politics

The last of the processes that have an effect on the agenda are the political processes. These flow along according to their own dynamics and their own rules, independently of the recognition of problems or the development of policy proposals (Kingdon 2003: 162). Kingdon uses the term political with a narrower definition than the one used habitually in political science; hence political is used with stress on the electoral, partisan or pressure group aspects of politics. (*ibid.* 145) Therefore swings in the national mood, public opinion, election results and changes of administration all constitute the developments in the political sphere that are powerful agenda setters. (*ibid.* 198)

In this stream participants try to build consensus; the promoters of specific policies can achieve support for their alternatives, which could affect actors with influence in the decision making process (*ibid.* 163 & 199). A high degree of consensus achieved between the participants in the political stream leads to a greater chance for a change to occur; consensus is often reached by negotiation and bargaining (Johnson 2003: 54).

3.1.2 Participants

To understand the setting of the agenda, the participants in this process must be identified. Participants are basically the players of the game and do not constitute a stream as the former points, but are “conceptually different from” the processes (Johnson 2003: 53). Since the streams are independent from each other, participants usually choose to specialize in one or another stream of process to a degree (Kingdon 2003: 197).

Participants can exist both inside the government and outside of it.

Inside the Government

Inside the government we find all officials that have been either chosen through elections or appointed by someone that has been elected by the people. The participants inside the government are consequently the President and his closest staff, civil servants and Congress. According to Kingdon elected officials are of greater importance than other actors since they have the power of government, but also the support of the citizens; the administration and prominent members of Parliament/Congress are powerful agenda setters, mainly because of the influence they have within the governmental sphere. (*ibid.* 199)

All these participants have special roles and objectives within the decision making process. Some of these actors are motivated by party interests while others, such as career personnel, are simply doing their job.

According to Kingdon's studies, the President is the most powerful actor, however the president may be able to dominate and determine the policy agenda, but he is unable to control the alternatives proposed and considered by others and therefore powerless to determine the final outcome (*ibid.* 23-24).

Outside the Government

The participants without formal government positions include interest groups, researchers, academics, consultants, media, parties, mass public etc. (Kingdon 2003: 45) Although these participants do not have the power to make alterations such as legislation changes, actors outside of government are important for the alternatives that are elaborated. They have also importance in the pushing of changes, by for example gathering interest inside and outside government for their amendments. One of these participants is of greater interest in this thesis:

Interest groups

These exist outside the government and are constituted by business and industry groups, but also providers of special services, professional or practitioner groups, consumers, organized labor etc. The activity of these can sometimes affect the agenda; other times affect the alternatives considered by policy makers. They can e.g. promote new agenda items, advocate certain proposals or function in a blocking method. (*ibid.* 47ff)

Pressure from these interest groups does indeed have impact on the government's agenda; by mobilizing forces the attention of officials can be grasped. However Kingdon argues that "it is difficult to assign responsibility for the emergence of agenda items solely to interest groups [...] [since] issues generally emerge to a status of serious governmental consideration from a complex of factors, not simply interest group pressure" (2003: 49).

3.1.3 Window of Opportunity

The window of opportunity is basically the opening of an opportunity for advocates to push through their solutions to a problem acknowledged by all actors. It can also be an opportunity to receive attention to the special problem advocates have been presenting. Thus, when a window opens changes in the agenda can be made (Hinnfors 1995: 45).

This window can be opened due to various reasons and they do not stay open for long, which means that the participants who want to make use of this opportunity must act rapidly (Kingdon 2003: 169 & 175). As mentioned earlier, proposals are hence already well prepared and suitable for the problem in question. (Hinnfors 1995: 45)

In order for a proposal to reach the decision agenda, the three streams of processes mentioned earlier must be joined together, which opens a window of opportunity. However, changes in the political stream are central to the opening of windows since there is a need for a little push to get the attention of people in government. A change in the administration, focusing events that make a new

problem successfully capture the attention of government officials are all factors that can lead to this opening (Kingdon 2003: 168). Elections could thus be seen as the change with greatest impact on the windows; characters in authority can change, which could implicate changes in policy orientation. Also coalitions between political actors and/or actors of importance outside of the government are built during campaigns and can thus affect the agenda when cabinets are changed. These coalitions are important to politicians while in office since the support gained during elections must be maintained, hence changes in the agenda can occur according to the interests of the actors behind the coalitions.

A group of participants that often makes use of the window of opportunity are the Policy Entrepreneurs. These are advocates of certain policies that willingly invest their resources (economical and social) in the promotion of their position (Kingdon 2003: 179). Policy entrepreneurs are usually driven by personal incentives and can thus be found both inside and outside of government; their specific location is not as important as their determination to make their cause heard (Johnson 2003: 55).

In Kingdon's studies one could nearly always point out a particular person or small group of persons that were central in moving a subject up on the agenda and into position of enactment. These were thus identified as the policy entrepreneurs. (Kingdon 2003: 180) It is important to note that entrepreneurs are often waiting for a policy window to open; they have developed their ideas and proposals in advance so as to rush through the window when it finally opens. Hence, to a policy entrepreneur any crisis is seized as an opportunity, trying to make their proposals part of the new solutions to come. (*ibid.* 181-182)

3.2 Civil Society

As noted in the passage above, participants of the different processes are to be studied in order to understand the importance actors in society play in the elaboration of new policies. Therefore I think it is important to focus on this point and add to the theory a passage on civil society as a participant outside the government. I believe that both Colombia and Nicaragua are, in this context, very special countries to look at. Both are what we consider democracies, though very fragile ones. The roles that civil society plays in the consolidation of democracy are therefore of great use in this thesis.

Civil society is a very broad term which includes different kinds of organized activities (Boussard 2003: 81). According to Boussard, civil society organizations must be concerned with public ends and act within the public sphere in order to be considered part of the civil society. This means further that networks at household and family levels cannot be taken into account when studying the civil society. (2003: 81) What we basically describe as civil society is the space between state and the individual (Grugel 2002: 93). Civil society is thus: "all the voluntarily formed non-profit collectivities that seek to promote or to protect an interest and that are part neither of the state nor of the family sphere" (Boussard 2003: 81).

According to Boussard civil society has four different roles in society. I will go through each component so as to reach greater understanding on the subject; however only the first one (agenda setter) will be explained more thoroughly and will partake in the analysis because of its greater relevance to my research.

3.2.1 Agenda Setter

“Civil society can contribute to democratic development by its agenda setting function or its capacity to act as a policy initiator” (Boussard 2003: 223). Civil society can also have implications for the performance of the democratic regime and for example draw attention to democratic deficits, e.g. lack of transparency in public administration. (*ibid.* 102) It can check and limit the abuse of state authority (Diamond 1999: 241) and also serve democracy by structuring new channels for articulating and representing interests; thus generating debate, something necessary for a democratic system to survive and consolidate (*ibid.* 243).

Also civil society can be, in some cases, the only actor that can challenge the authorities and represent the opinions and demands from society and consequently set priorities of agendas accordingly. Civil society can thus raise specific issues that other actors are unwilling to put on the political agenda. (Boussard 2003: 102-3 & 223)

3.2.2 Educator

By educating citizens on the democratic system they inhabit, democratic values and knowledge is established. (Boussard 2003: 103 & Diamond 1999: 243) This in turn results in deepened democracy and consolidation of the democratic system.

3.2.3 Counterpart

Civil society’s counterpart role is about participation, by e.g. forming coalitions with the political society in order to strengthen or act as a compliment to the government. The counterpart role also includes monitoring the political by being a “watchdog” of the state. (Boussard 2003: 104 & Diamond 1999: 248)

3.2.4 Source of New Alternatives

Civil society can work as an alternative to political parties and become an actor with a heavy popular base when there is a lack of pluralism in society. Thus new parties could start emerging from civil society organizations.

4 Analysis

Before starting with the analysis it must be made clear that the theories I will use could be used in various ways. For example an analysis focusing on the central actors of the decision making processes could have given an in-depth knowledge of the relevance of the actors in question. However it has come to my attention that not only actors are of influence during policy making, and it is therefore important to show that there were several aspects that led to the different outcomes in legislation in both countries. Participants inside and outside of government will be taken into account, but so will the Streams of Processes and the Window of Opportunity.

Also it is to be noted that public policies, which are studied by Kingdon, are not the same as legislation changes. Public policies can lead to new legislations but the connection is not self-evident. In this thesis I will therefore use the theory on public policy making in the sphere of legislation changes.

In order to facilitate the analysis, this chapter is divided into what could be called two separate case studies. I will thereafter, in the next coming chapter, discuss the results and inferences this thesis shows.

4.1 Colombia

4.1.1 Streams of Processes

Problem

The Colombian legislation change occurred in connection to the national elections of May 28th 2006. Until this change, no Latin American country had made abortion liberalizations since the 1940s (Htun 2003: 6). The process in Colombia originated from a two-year campaign, which was built on three decades of work by organized women's movements, challenging the constitutionality of the abortion law (Kane 2008: 366).

Thus a condition had existed for many years; the ban on all abortions was part of the Colombian Penal Code which categorized an abortion as a crime against life. This condition had therefore been recognized as a problem by forces outside the government much earlier than by actors inside government. The problem finally came to the attention of government officials after a lawsuit was filed by attorney and human rights activist Monica Roa, triggering off the process of questioning the constitutionality of the law. (Ceaser 2006: 1645)

Policies

Alternatives to the former law were developed, as said earlier, years ahead of the actual legislation change. Domestic women's movements had tried unsuccessfully to capture the attention of government officials a long time in advance. According to Kingdon, this is what policy entrepreneurs do.

There were no other alternatives or proposals elaborated by other prominent actors, such as the Catholic Church, however these showed strong support for the legislation that existed. This was illustrated by endless attempts to shift the discourse into a religious dilemma by calling abortion a moral problem, not an issue of health (BBC News 2006 [a], Ceaser 2006: 1645, Kane 2006: 366).

It was not until Women's Link Worldwide, an international human rights organization that works non-profitably to ensure that gender equality exists worldwide (Women's Link Worldwide 2008), took the lead in organizing a campaign that the matter seriously went into the decision agenda. Suffice it to say that the organization, composed by academic experts (an important characteristic of the actors in the policy stream), had elaborated a proposal that was capable of being implemented when needed to, a critical criterion for the proposal to gain success in the policy stream (Kingdon 2003: 143).

Politics

Looking at the political stream in Colombia during the period the lawsuit was filed and processed, we can see that the political climate was favorable for changes. According to Monica Roa, the most prominent actor in the process, significant changes had occurred in Colombian politics. In an interview made in July 2005, Roa explains why she thought the Colombian political and social climate was ready for a change in abortion legislation:

The likelihood of passing a new abortion law is higher now than at any other point in Colombian history [...]. Legal precedent, international law, and societal attitudes towards abortion all appear to be working in favor of protecting the lives of Colombian women. In the past 10 years two relevant legal developments have occurred that make this challenge viable and irrefutable. On one hand the Colombian constitutional court has recognized the legal value of international human rights arguments and has used them to solve constitutional challenges in other areas. On the other hand the international human rights arguments that frame illegal abortion as a violation of women's rights have become clearer and stronger. I am only putting those two together.

(Challenging Abortion Law 2005)

National surveys of that period showed that a majority of the Colombians supported the decriminalization of abortion for certain reasons, which showed that the Colombian national mood had changed. Thus there existed a favorable legal, political and social climate (Kane 2008: 367).

Another political aspect worth of mentioning is the fact that Colombia was, at the time of the law reform (May 2006), preparing for national elections. Since

electoral politics could be seen as a window of opportunity one could think this applies in this case. However, the process of challenging the law was purely judicial; therefore electoral candidates and actors inside the government, such as government officials, were not able to influence the outcome.

4.1.2 Participants

Outside the Government

As mentioned earlier participants outside the government have usually no power to make alterations such as legislation changes. However they do have great importance in the elaboration of the alternatives presented to the actors of influence. The prominent actors that are identified in Colombia are the civil society, who was a major contributor to the alternatives developed, and the interest groups within it, that made a legal change possible.

Civil Society

In the Colombian case, civil society played an important role. Women's movements had for a long time, organized in feminist networks and organizations concerned with sexual politics, in order to make a change in the abortion debate and legislation (Linton 2006: 145).

The civil society of Colombia, with the support of international movements, was the only actor that challenged authorities and aimed for an agenda change. The civil society made thus successfully use of its agenda setter function and became the most important actor in the change of legislation.

Interest groups

Within the civil society, there were specific actors that took the lead in the campaign for changing the abortion legislation. In this case the international interest group (with its roots in Colombia) Women's Link Worldwide, together with the rest of the civil society of Colombia, pushed for a change by gathering interest inside and outside government for their amendments and finding a new path for legislation change: challenging the constitutionality of the former Penal Code. This interest group is therefore to be seen as the policy entrepreneur and initiator in the Colombian context of abortion legislation.

Inside the Government

As mentioned earlier, participants in government, such as the president, his staff and parliamentarians, had little to say in the abortion law reform of Colombia. This obviously does not mean that the actors of great influence stood by quietly: e.g. President Alvaro Uribe warned at least on one occasion against easing the abortion ban (BBC News 2006 [a]).

However there were other actors inside the government that played the leading parts in the Colombian abortion reform: the members of the Constitutional Court¹.

Almost ten years prior to the abortion law reform (1997), the Constitutional Court was divided into hardliners and soft liners regarding abortion legislation. The soft liners started to express disagreement with the legality of the fetus as an individual with fundamental rights. These opened new levels of discussion and motivated the media and public opinion to participate more in the debate concerning this subject. (Posada 1997: 147-8) This led to a discussion based on judicial terms, stepping away from the official religious language that had earlier characterized the debate. (*ibid.* 148 & Kane 2006: 367)

Also it was the members of the Constitutional Court that voted against the constitutionality of the former abortion law. With the votes 5-3, the Constitutional Court agreed that the abortion law needed changes in order to respect the Colombian constitution and therefore abortion in cases of rape, when the pregnancy endangers the woman's life and when the fetus has severe malformation, was legalized. (BBC News 2006 [a] & Ceasar 2006: 1645)

4.1.3 Window of Opportunity

The convergence of the three streams is not very clear to the eye in this case study, mainly because the governmental agenda never changed. However a problem was recognized, policies had been elaborated and the political stream was going through changes; thus a window of opportunity was indeed opened.

"In 2005, Monica Roa judged that legal precedent, international law, and societal attitudes towards abortion had created an opening for rescinding Colombia's comprehensive abortion ban. She also judged that the country's Constitutional Court presented the most viable vehicle for reform, for several reasons." (Kane 2008: 366-7). Changes in the composition of the Constitutional Court, such as the admittance of the first female judge and other progressive judges, indicated a new sentiment considering the issue of abortion. These changes within the nation and specifically within the Constitutional Court opened up an opportunity to make alterations in the legislation. Thus these shifts are to be considered as the window of opportunity in the Colombian case.

Also the fact that there exists a Constitutional Court, where every citizen is allowed to challenge the constitutionality of laws, reforms and referendums etc, enabled an opportunity to rise. (Corte Constitucional de Colombia 2008)

According to Carlos Gaviria, senator and presidential candidate of the left-wing party PDA² in the 2006 elections, the "new" constitution, established in 1991, opened up new functions and possibilities for civilians in society. (Linton

¹ The nine magistrates that comprise the Constitutional Court are appointed by the Senate for periods of eight years. Since the Senate is constituted by elected representatives, the Constitutional Court is located inside the government. (Corte Constitucional de Colombia 2008)

² PDA= Pólo Democrático Alternativo

2006: 160) This new constitution introduced the Constitutional Court, which has after its beginning been the most vital part of the Colombian politics, and comprises therefore the precedent needed for a window of opportunity to open up (*ibid.* 146).

4.2 Nicaragua

4.2.1 Streams of Processes

Problem

In the year 2000 the Catholic Church, with the support from conservative forces, wanted a policy change regarding abortion after a case, where a nine-year-old girl was raped and impregnated, awoke a fierce debate. (McNaughton et al. 2005: 19) The matter came into the public attention since the doctors who were to decide if the girl was allowed a therapeutic abortion could not agree on the matter. The girl went through an abortion, but was, along with all responsible for the procedure, excommunicated by the church. (Kampwirth 2006: 74) This incident was one major event or mechanism that brought the problem into attention, and although no alterations were done to the abortion legislation at this time, the problem continued to press on the system until it eventually was attended to and recognized by actors of importance during the electoral campaign of 2006. (Replogle 2007: 16)

Policies

Catholic doctrine has constituted the historical backdrop for law and policy making on women's rights, marriage and abortion in Latin America. (Htun 2003: 31) The importance of the Catholic Church in public policy has therefore always been of great character in the Nicaraguan context (*ibid.* 30). Alternatives and proposals for changes in legislation, which included the total ban of abortion, had been made in advance by the Catholic Church and conservative groups. These kept on pressing for their proposal of agenda change, and gathering support both inside and outside of government until they succeeded in altering the agenda. The participants of greatest impact on the policies were not of academic expertise, which most often is the case in the policy stream. However, since the abortion debate was built on religious grounds, the Church could indeed partake as an expert.

Politics

As mentioned in the theoretical part, participants try to build consensus in the political stream, especially when there are changes occurring in the politics of the country. In Nicaragua these changes were constituted by the presidential elections that were held in November 2006.

The promoters of anti-abortion laws tried to affect actors with influence during the electoral campaign and achieved thus support for their alternatives. Out of the four presidential candidates, three supported and encouraged a change in legislation. Therefore, abortion and a possible change in policy concerning abortion became severely politicized and the discussion dominated the electoral campaigns and debates. (Kane 2008: 365)

The political climate was fierce during this period in time. Demonstrations were held regularly pro and against abortion and both sides were aggressive towards each other. (BBC News 2006 [b] & Replogle 2007: 16) A swing in the national mood could explain why the forces against abortion became so strong in this matter.

4.2.2 Participants

Outside the Government

As mentioned earlier already in 2000 reforms to the Penal Code were proposed and a lively public debate arose (Replogle 2007: 16). Conservative groups proposed eliminating therapeutic abortion, while women's rights activist and obstetricians defended it. (McNaughton et al. 2005: 19) However, at this point, the actors outside of the government, such as the Catholic Church, did not succeed in achieving the needed support and the Penal Code remained intact.

In 2006 the image was another; the conservative, anti-feminist movements had spread with strong linkages to the Catholic Church, which had merged with the Evangelist Church in the fight against abortion. (Kampwirth 2006: 85) As in the case of Colombia, civil society and interest groups played important roles in the process of agenda setting and later the changing of legislation.

Civil Society

As a legacy of the Sandinista era, where large amounts of people were mobilized into different social movements, the Nicaraguan civil society has been a great force to reckon with in the political context of the country. (Kampwirth 2006: 75, Booth & Richards 2006: *passim*) However by the year of the criminalization of abortion, civil society was divided into those in favor of and those against abortion.

Also the feminist movement, which was the largest and most effective of the Nicaraguan social movements, was divided. Disagreement about how to organize (in language and symbolism) against pro-life groups damaged the movement in addition to personality clashes within. (Kampwirth 2008: 128) Some women argued that therapeutic abortion was to be defended by "positive messages", such as marches and vigils dressed in white and carrying candles. However other women began portraying the opposition as murderers, women-killers and march around with messages such as "don't vote for a rapist". (*ibid.* 127) Also division within the members so as to what degree of liberalization was to be supported weakened the earlier so strong women's movement. Some members considered

therapeutic abortion to be the maximum demand while others wanted full legalization of abortion. (*ibid.* 128)

Although the Nicaraguan women's movements succeeded in mobilizing support from international reproductive rights and human rights communities, the conservative and religious bloc became too strong. (Kane 2008: 364)

Thus the civil society of Nicaragua, in this case comprised by all the social movements and supporters of them, failed in using its agenda setter function and influencing the policy making processes, mainly because of a failure to unify and build consensus within.

Interest groups

I have chosen to identify the Catholic Church as an interest group since it is an organized group that exists outside of government. Along with the conservative forces that mobilized in various organizations during the period in time, the Catholic Church acted as the policy entrepreneur, putting both money and time into their cause and waiting for the window of opportunity to open in order to act.

The Catholic Church demanded a change in legislation and entered a partnership with the Evangelical Church in support of a legislation outlawing abortion for any reason (Kane 2008: 364). This coalition became indeed so strong that it laid the ground for a change in policy. By organizing a massive rally, they gathered the interest needed, both inside and outside of government, to make a legislation change. Obviously they did not have the legal power so as to change a law by themselves, but they did successfully shift the discourse from the feminist framing of abortion as an issue of health, democracy, and individual rights, to an explicitly religious agenda in the context of electoral politics. (*ibid.* 365)

Inside the Government

Actors inside the government, particularly parliamentarians from the two dominant parties (PLC and FSLN³) supported the legislation change. Both parties were competing for seats in the forthcoming election and needed the support that would be achieved if favoring the Catholic Church's stance. Therefore the Parliament responded immediately by fast-tracking the proposed legislation, a device primarily reserved for national emergencies, shortening the process of legislation change to days instead of months. (Kane 2008: 365)

The women's movements were unable to gain the support of actors inside the government, simply because there was no motivation, such as party interest, amongst them. Also the fact that the last decade's public policies have been characterized and shaped by antifeminism, perhaps as a response to the growing number of women organizing not only in different movements but also autonomously, weakened the feminist and women's movements. (Kampwirth 2004: 48)

³ PLC= Partido Liberal Constitucionalista (Constitutional Liberation Party), right-wing
FSLN= Frente Sandinista de Liberación Nacional (Sandinista National Liberation Front), left-wing

4.2.3 Window of Opportunity

The window of opportunity in Nicaragua was given during the electoral campaign. As mentioned earlier, the abortion ban was passed two weeks before national elections, and the abortion debate gained strong foothold in the electoral contest.

The elections were characterized by a tight race between the front-runners, which inevitably gave questions that could cause tensions, such as the issue of abortion legislation, great importance in the electoral debate. The two major churches, Catholic and Evangelical, joined together and launched a campaign that successfully gained the attention of the presidential candidates, out of which the majority wanted the support of the Catholic Church as it is a great opinion setter in Nicaragua. (Kane 2008: 365 & BBC News 2006 [b]) The tight race was therefore an opening of an opportunity, in which the churches successfully captured the attention of actors with influence in the matter and could thus pass through their proposal.

The Catholic Church made sure a problem was recognized, they had a policy proposal developed and the political stream of Nicaragua favored their actions, thus making use of the window of opportunity.

5 Results

By now it should be well-known that my aim in this thesis was to find the factor(s) that could explain why legislation changes during the same period in time were so different in outcome in the two countries chosen. By applying different theories to the actual cases of Colombia and Nicaragua I hoped to find insights of great interest, such that could help me reach my objective.

As perceived from the analysis, both cases are of great difference and also of major complexity, due to the diverse nature of the processes. Since the Colombian decision making process was not political, as Kingdon's studies assume, but judicial the application of the theory used was more difficult in that case study. The change that was made was not in the agenda of the government, but directly in the legislation of the country. However I did achieve some further understanding on the matter.

In both countries a debate concerning abortion policies had existed for a long time. In Colombia the debate concerned whether the total ban of abortion was legitimate, while the Nicaraguan debate was concerned with the moral implications of allowing therapeutic abortion. Thus the problem had been recognized early and mainly by forces outside the government in both countries who later made actors inside the government aware of it by pushing hard for their propositions.

Both countries have also in common the fact that the initiators of the change were also the ones that succeeded in getting their proposals to enactment. The analysis showed that the ones that started the processes had both in advance achieved the support needed and gained more through their campaigns. Also the streams of processes all coincided in both cases, which led directly to the opening of a window of opportunity. In both cases the policy entrepreneurs made use of this opening by pushing through their proposals. This basically reinforces Kingdon's theory that policy entrepreneurs make all the preparatory work in advance and lie in wait for a window of opportunity to open; the policy initiators in both Colombia and Nicaragua waited until the "perfect moment" came i.e. the window of opportunity.

The analysis also showed that the major participants in the policy streams in both cases were interest groups acting as policy entrepreneurs, thus influencing the alternatives contemplated. In Colombia Women's Link Worldwide constituted the interest group that led a campaign for the decriminalization of abortion by challenging the existing law. In Nicaragua the Catholic Church put down effort and resources in order to eliminate therapeutic abortion in the context of elections. However participants inside the government were the actors with the actual power to make the changes possible. In Colombia the Constitutional Court ruled the former abortion law unconstitutional, thus legalizing abortion for therapeutic

reasons. In Nicaragua it was the parliament that voted for the passing of the ban with no votes against this decision. Thus this thesis strengthens Kingdon's theory; actors outside of government can only affect the alternatives taken into consideration; it is the participants inside of the government that actually make the changes in agenda or legislation. Nevertheless actors outside of government can make sure policy changes will occur by achieving support for their amendments inside the government, seen in both cases. Also we see that some kind of change in the national mood was critical for a change to occur. In Colombia a progressive sentiment had grown among the people and within the political establishments, while in Nicaragua the conservative opinion became dominant both within the political and the social sphere. Thus my findings support and give more knowledge about the theory developed by Kingdon; we can see that it can be applied not only to the development of new public policies but also to the changing of legislation. Also the role that civil society plays in the process of making new legislation was studied further and gave us additional insights of the great opinion and agenda setter civil society works as.

5.1 Discussion

So what was the main difference between the two countries' legislation processes and the answer to my research question?

As established earlier the greatest difference in the results is that both processes are of different nature. It was only in Nicaragua that the initiators indeed made primarily a change in the agenda, which was rapidly made into a legislation change, following Kingdon's theoretical predictions. In Colombia, on the other hand, the change was made passing through neither the governmental agenda nor the decision agenda; it was made into a problem of legal character. The Colombian reform was thus made through a judicial process, decreasing the political nature of the matter, while the reality in Nicaragua was the opposite; a debate rose and became heavily politicized in the context of national elections. Obviously, and as accounted for above, the religious society in both countries has a powerful status within politics, however only in Nicaragua, did the Catholic Church, aided by the Evangelical Church, indeed become a prominent actor.

This could be seen as an indicator on the importance of the discussions and debates held in both countries. The advocates of decriminalizing abortion in Colombia used the concepts of human rights and health-concerns connected to illegal abortions thus separating the issue from religion. They pointed out to the actual fact that the abortion law neglected the human rights given by the Colombian Constitution. Thus they constructed a legal complexity within the existing abortion law that was to be dealt with. In contrast the Nicaraguan debate was strongly dominated by issues of morality and values, strongly emphasizing the Church's standpoint. The women's movements of Nicaragua tried to depoliticize the debate and bring it down to a factual discussion but failed; other forces were of greater impact. This was probably the result of the immense

disorganization within the women's movements, which shows the importance of acting as a strong and unified civil society in order to affect politicians, legislators, and reach consensus in society; as was the case in Colombia.

One could also discuss the importance of legal possibilities in the countries under scrutiny; in Nicaragua there were no prospects to make a change similar to that in Colombia. An example of this is the constitutional challenge to the new abortion law, one very alike the Colombian one, that was launched in the beginning of 2007 by the Nicaraguan Center for Human Rights, a coalition of Nicaraguan organizations from the human rights, women's rights and medical communities (Women's e-news 2007). In contrast to the Colombian procedural, this was not a successful campaign; the Supreme Court ignored the challenge and approved the new abortion ban. It could thus be argued that the legal precedents, political climate and national mood in Nicaragua are not alike the Colombian, thus a change towards liberalization of abortion similar to the Colombian is hard to accomplish.

Another interesting insight fortified by this thesis is that gender-related policy changes within government come about only when they coincide with party interests, which both cases explicitly show. According to Htun and Jones women's alliances are significantly weakened and thus legislation giving women benefits is not enacted when party interests contradict these strategic gender interests, in this case abortion (2002: 49). In Colombia abortion was never up on the political agenda, thus confirming that no party had an interest in the question. In Nicaragua three out of four presidential candidates showed interest in the abolition of therapeutic abortion and thus a change in legislation did occur. This piece of information is indeed very interesting and could perhaps lead to further research within other areas of gender-related policy e.g. other reproductive policy issues, divorce laws, etc.

With this thesis in mind I think it would be interesting to try to find the underlying reasons to why the Colombian society was more prone to make liberalizing changes in their abortion legislation. Could there be a correlation between the democratic level of the country and the liberalization of abortion legislation? How is that measured in these two cases, given that both are rated as partly free by Freedom House, and thus struggle with undemocratic forces within the nations?

As perceived from this discussion my investigation gave answers to some questions. However there seem to be yet many questions unanswered, especially in the context of gender-related policy. Hopefully more research could be done in this complex area of study as there is more than enough to start with and hopefully also a necessity for it.

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