

Building a judicial narrative for Latin-America based on the “non-demandability” argument in abortion cases.

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Introduction

In this paper I share some thoughts built upon the comparative reading of judicial decisions dealing with the constitutionality of abortion laws. The decisions in question hold that there are situations when women should not face the threat of criminal prosecution for discontinuing their pregnancy (I will call this the “non-demandability” argument). This coincidence, which from one point of view simply reflects common sense or the application of a basic standard of justice, becomes an interesting field of research when we take into account the very different institutional and cultural contexts in which these judicial decisions are taken and the different framings and conceptions about rights applied in these decisions.¹

The non-demandability argument present in these decisions varies in its extension, place, and form.

By *extension*, I mean how restrictively or broadly the courts apply the argument. For example, the Costa Rican Supreme Court restricted it only to therapeutic abortions when the woman’s health is in danger, while the Colombian Constitutional Court applied it also to cases of rape, non consented artificial insemination and serious malformation of the fetus, and the U.S. Supreme Court extended it to any abortion performed before viability.

¹ Las sentencias nacionales a que hace referencia este trabajo son los dos fallos más relevantes sobre aborto dictados por la Corte Suprema de Estados Unidos: Roe de 1973 y Casey, de 1992, las dos decisiones más relevantes del Tribunal Constitucional alemán de 1975 y 1993, la sentencia del Tribunal Constitucional español de 1985, la sentencia Attorney General v. X, de la Corte Suprema de Irlanda, de 1992, la decisión de la Corte Suprema de Costa Rica, de 2004, el fallo del Tribunal Constitucional de Colombia de 2006, la sentencia de la Corte Suprema de México, de 2008 y la sentencia del Tribunal Constitucional de Portugal, de 2010. En el ámbito internacional, se estudiaron las sentencias de la Corte Europea de Derechos Humanos¹ porque no hay decisiones sobre aborto de la Corte Interamericana de Derechos Humanos. Este trabajo asume que las sentencias de la Corte Europea servirán de referente persuasivo para el momento en que la Corte Interamericana deba resolver un caso de aborto.

By *place*, I refer to how the argument works in two possible judicial settings. For example, the Colombian Constitutional Court was asked to decide whether regulations criminalizing abortion in some circumstances violate constitutional rights of women, while the Portuguese Constitutional Court had to rule on whether the decriminalization of abortion during the first weeks of pregnancy violates the constitutional protection on unborn life.

By *form* I mean the way in which the court justifies the non-demandability argument. Form will vary according to the different conceptions of rights courts have (for example, whether rights are conceived as negative rights only or as positive rights too), according to whether the respective constitution protects rights only or also values or constitutional objective goods, and according to the approach courts have on constitutional conflict resolution (categorical or balancing approach).

Regardless of the variations on extension, place and form affecting the non-demandability argument, there is a string of decisions including the two German ones (1975 and 1993) and the Spanish (1985), Colombian (2006), and Portuguese (2010) ones, in which the non-demandability argument has gradually begun to find a place in the application of the proportionality principle. My impression is that this chain of decisions provides a pattern that Latin-American judges could follow in the judicial review of criminal abortion laws in their countries.

The paper explores the possibility of using the non-demandability argument in the region and the benefits and difficulties that the application of the proportionality principle would pose in developing the argument. The matter is relevant because most of Latin-American countries have very restrictive abortion regimes, which criminalize abortion in every circumstance or make very few exceptions.² Constitutional courts in the region are being

² Los países que tienen el aborto prohibido en toda circunstancia o sólo contemplan la excepción terapéutica para preservar la vida de la mujer son: Chile, República Dominicana, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Venezuela. Adicionalmente a la indicación terapéutica por peligro de muerte aceptan también el aborto en casos de peligro para la salud física de la mujer, Argentina, Bolivia, Costa Rica, Ecuador, Perú y Uruguay. Además de estos casos, acepta la indicación terapéutica para preservar la salud mental de la mujer, Colombia. Brasil, Panamá, Bolivia, Ecuador y Uruguay tienen excepciones en caso de violación (en algunos casos también de incesto y en otros solo de violación restringida a mujeres con discapacidad mental). Panamá y Colombia admiten el aborto en caso de impedimento fetal. Cuba y el Distrito Federal de México tienen el aborto despenalizado durante las primeras semanas del embarazo.

asked to judicially review abortion statutes, and they will be increasingly required to do so by human rights advocates targeting statutes criminalizing abortion (as occurred in Colombia) and by “pro-life” groups seeking repeal of legal provisions decriminalizing abortion under certain conditions or time limits (the case in Mexico). Latin-American courts appear unprepared to decide these cases.

The paper is divided into three parts. In the first part, I refer to some of the legal arguments commonly put forward in favor of the criminalization of abortion in Latin America. Additionally, I identify some preconceptions and sources of moral concern that I believe predispose judges against decriminalization of abortion, as well as some theoretical challenges that judges find difficult to deal with in these cases. These preconceptions, moral complications and challenges are usually only implicit in the decisions, although their influence may well be more decisive in the outcome of the cases than the arguments the courts explicitly make. In the second part, I briefly refer to the comparative models that a Latin American court willing to accept the non-demandability argument would be required to consider, and explain why I believe that the jurisprudential line of the German/Spanish/Colombian/Portuguese decisions would be more appealing to such a court than the Roe/Casey model. I also refer to some difficulties associated to the European/Colombian model. In the third part I offer the broad outlines of a potential judicial narrative that Latin-American courts could adopt, following the jurisprudential line inaugurated by the German Court, which accommodates the non-demandability argument in the application of the proportionality principle.

Fuente: Center for Reproductive Rights, Fact Sheet: The World’s Abortion Laws, 2009 (información corregida por la autora tomando en cuenta reformas posteriores la fecha de publicación de este documento).

FIRST PART

1. The explicit argument: the fetus as the holder of the constitutional right to life

The defense of strict criminalization for abortion is based, in practice, on the assertion that the fetus possesses the right to life from the moment of conception. This right is grounded on naturalist arguments, in both a biological vein (the fetus is an individual of the *Homo Sapiens* species) and in a philosophical vein (the fetus is a moral person, in the words of Boetius, “an individual substance of rational nature”), and also on a pragmatic argument stating that giving the fetus’s life the status of a subjective constitutional right is the only way to guarantee its greatest protection, because this would prevent discretionary decisions by those already born regarding the times and conditions necessary to acknowledge the fetus’s humanity. This would be the way to assure the full recognition of the dignity of the fetus as a human being.

The advocates of this position add that the right to life trumps all other rights, because it has a higher rank or because is the precondition for the existence of other rights. They conclude that no balancing is possible between the right to life of the fetus and other rights or legal interests; or that any balancing exercise will always result in the primacy of the fetus’ life.

2. Moral concerns: life and trade offs

Even for judges who generally believe that rights cannot be absolute, it is very difficult not to give priority to the right to life when it collides with other rights or interests. Life does not allow for gradation. In the context of abortion, this may make judges think that there is very little room for accommodation between the conflicting interests, for you cannot restrict the life of the unborn just a little, yet you can only partially restrict women’s rights.

Moreover, some constitutions, such as the Chilean, following the German model, have an express provision which forbids that restrictions to rights affect the “core” of the right or its “essential content.” Any restriction to the right to life would amount to an unconstitutional

restriction under this requirement because every restriction would completely eliminate the entire content of the right. Unless these kinds of provisions are interpreted less literally, the right to life becomes absolute.

In my opinion, however, this fierce defense of unborn life is contradictory in an important aspect. Despite well-established evidence that criminalization does not lower abortion rates but rather pushes the practice underground,³ judges and legal scholars continue to justify criminalization with the argument that it protects the constitutional right to life of the fetus. The defense of criminalization in these circumstances becomes the defense of the right to life of those fetuses that would die under a regime where abortion is legal, but it does not extend to the defense of the fetuses that are currently dying as a consequence of illegal abortions. If the legal interest that is claimed to be protected is the lives of fetuses as holders of rights, how can it be more acceptable for 100,000 fetuses to die in clandestine abortions than for the same 100,000 to die in legal abortions? Considering that the main concern is supposed to be the protection of unborn life, one should conclude that, implicitly, the life of a fetus killed in an illegal abortion is not being given the same value as the life of a fetus killed in a legal abortion. Since this explanation is not consistent with the right to life argument, it is necessary to explore what other thoughts or ideas are influencing people who defend criminalization.

A factor that I believe weighs heavily on the conscience of judges has to do with the way we speak about life. Common discourse about life is framed in absolute terms. When there is a natural tragedy, for example, we hear our politicians say that no effort or expense is too great when lives are at stake. Life is incommensurable.

³ GRIMES, David A. et al. Unsafe abortion: the preventable pandemic. The Lancet, 368(9550):1908-1919, 25 de noviembre de 2006; World Health Organization, Journal Paper, Sexual and Reproductive Health 4, 2005. ALAN GUTTMACHER INSTITUTE. Sharing Responsibility: Women, Society and Abortion Worldwide. [En línea] Abortion, Reports, junio, 1999,. <<http://www.guttmacher.org/pubs/sharing.pdf>> [Consulta: 30 de agosto de 2010]. ALAN GUTTMACHER INSTITUTE. Facts on induced abortion worldwide. [En línea] Abortion, Fact Sheets, octubre, 2009. <http://www.guttmacher.org/pubs/fb_IAW.html> [Consulta: 9 de septiembre de 2010]; MARSTON, Cicely y CLELAND, John. Relationships Between Contraception and Abortion: A Review of the Evidence. International Family Planning Perspectives 29(1):6-13, marzo, 2003; SEDGH, Gilda et al. Induced Abortion: estimated rates and trends worldwide. The Lancet, 370(9595):1338-1345, 13 de octubre de 2007; BERER, Marge. National laws and unsafe abortion: the parameters of change. Reproductive Health Matters 12:1-8, 2004.

However, it is difficult to make sense of this discourse in the face of our practices. Despite our declarations, it is simply not true that we treat life as an incommensurable value. The problem is that we do not have a common discourse to justify that reality. We welcome the news that the speed limit in highways is increased even though we know that more people will die as a consequence. And although we prohibit emergency contraception because there is no conclusive proof that it does not block eggs from attaching to the uterus, at the same time we passively accept the death of thousands of embryos which occur during *in vitro* fertilization procedures. If we live in relative peace with our contradictory practices, it is not because we have a moral theory that justifies them, but because we perform what Paul Kahn calls an exercise of “acoustic separation,” which consists in only hearing one form of discourse at a time. If our commitments become occasionally incompatible, instead of abandoning one of them, we cabin them in their own place and deal with them separately instead of confronting the discord.⁴

The striking incongruence of our discourse and practices made me think about what makes us treat life in one way or another; sometimes as incommensurable, and other times as subject to trade-offs with other values. In the abortion context, at least, I have found two factors that seem relevant.

The first is the level of concreteness with which we imagine the fetus. The individual fetus’s life is likely to be treated as incommensurable, while the statistical fetus’s life is likely to be treated as commensurable and its value subject to be balanced against other values.

The second is the degree of the State’s involvement regarding the fetus’s destiny. One reason that may explain why judges feel uneasy when they have to uphold a statute liberalizing abortion is that they see themselves as more involved in a life or death decision regarding fetuses than when they uphold a statute criminalizing abortion.

The fetus under a criminal regime is the statistical fetus and there is no direct involvement of the state in the destiny of the fetuses that are illegally aborted. The knowledge judges or

⁴ KAHN, Paul W. Controlando la violencia: separación acústica, conmemoraciones y chivos expiatorios. [En línea] SELA 2007: Law and Culture. San Juan, Puerto Rico, 12 a 15 de junio de 2007, p.2
<http://www.law.yale.edu/documents/pdf/sela/PaulKahn_Spanish.pdf> [Consulta: 3 de octubre de 2010].

other state officials may have about the number of illegal abortions that take place when abortion is criminalized always refer to statistical fetuses that are not known to the state (at least not before the abortion is performed). The woman concerned and her accomplices are involved in illegal abortions; the State does not play a role in them.

On the contrary, preventive policies, when they include counseling, information requirements, or official assessment of the compliance of requirements for abortion, not only identify the woman who aborts, thus making the fetus more concrete, but also imply that the state knows that a concrete fetus will be aborted and does nothing to prevent it; furthermore, it actually contributes to it by providing women with the necessary authorization or preconditions to have the procedure performed.

A related concern that judges may have relates to the respect of the dignity of individual fetuses. I will give an example.

The German Constitutional Court was twice asked to review the constitutionality of statutes that would replace criminalization of abortion during the first period of pregnancy by a preventive approach that the legislature estimated would be more effective in lowering the existing rate of abortion. In its 1993 decision on abortion, the Court said that “*(t)he duty to protect unborn life relates to an individual life not to human life generally*”⁵ and in the same line, in its 1973 decision said that “*(t)he weighting in bulk of life against life which leads to the allowance of the destruction of a supposedly smaller number in the interest of the preservation of an allegedly larger number is not reconcilable with the obligation of an individual protection of each single concrete life.*”⁶

The underlying concern of the German Court, as shown in these quotations, is the allegedly utilitarian nature of preventive policies against abortion. A statute that deals with the losses and gains of lives in an aggregative way (“*in bulk*”) would not be respectful of the deontological ethic upon which human rights are founded.

⁵ TRIBUNAL CONSTITUCIONAL FEDERAL. ALEMANIA. Sentencia de 28 de mayo de 1993. BVerfG, 2 BvF 2/90 of 05/28/1993. [En línea] Bundesverfassungsgericht, english versión. <http://www.bverfg.de/entscheidungen/fs19930528_2bvf000290en.html> [Consulta: 23 de noviembre de 2010].

⁶ TRIBUNAL CONSTITUCIONAL FEDERAL. ALEMANIA. Sentencia de 25 de febrero de 1975. Traducción en: JONAS, Robert E. y GORBY, John D. West German abortion decisión: a contrast to Roe v. Wade. John Marshall Journal of Practice and Procedure. 9(3):605-684, 1976, sección D.II.2.b), pp. 655.

The point that I want make here is: those who share the German Court's concern see attempts to decriminalize abortion both as a departure from a regime that they assume is respectful of a deontological right-based ethic and as the acceptance of a utilitarian logic that may violate the rights and human dignity of the fetus.

To clarify my point, let us remember that, roughly speaking, deontological theories oppose consequentialist theories (utilitarianism is one kind of consequentialist theory) and hold that some choices cannot be justified by their effects, that no matter how morally good their consequences, some choices are morally forbidden. So, in this case, the Court is saying that even if you could save more fetuses by legalizing abortion you cannot do it because it is wrong to sacrifice some fetuses to save others. The court is applying what it is called a right-based deontological theory, centered on the rights of the victims.

I think the German Court and authors that follow this line of reasoning are mistaken when they say that preventive policies are incompatible with the respect of constitutional rights, due to their alleged utilitarian nature. I believe they are mistaken because preventive abortion regimes do not require the sacrifice of the legally aborted fetuses to succeed in saving a greater number of fetuses that would otherwise be aborted under a criminalization regime. If counseling, information, or waiting period requirements make women decide to continue their pregnancy, it would make the preventive regime more successful, not less. The applicable analogy in this case is not that of the healthy man that is killed at the hospital to save the lives of five sick patients. This case is similar to the trolley case in which the driver of a runaway trolley will kill five workers unless diverted to a side track where one worker is standing. Saving these 5 persons does not require killing of the worker, because if that person standing on the secondary track were not there, the 5 persons on the main track would have been saved all the same.

I think the German Court made two false assumptions that led it to the mistaken notion that preventive policies are utilitarian and do not respect rights, and that criminalization respects deontological constraints posed by the respect of rights.

The first false assumption is that, from its assertion that preventive regimes are utilitarian, it fallaciously deduced that criminalization, the alternative to preventive regimes, is grounded

on a deontological ethics and is for that reason morally acceptable. Even if it were true that preventive regimes are utilitarian (which it is not the case), there is a *non-sequitur* in the reasoning. It just doesn't follow that criminalization is respectful of rights. Actually, Justices Rupp-von Brunneck and Simon in their minority vote to the 1973 German decision criticized the majority decision saying that by compelling the legislature to retain the penal provision, it leaves unborn life without the protection which would be preserved by the repeal of the penal sanction and through suitable counseling.⁷

The second flaw in the reasoning of the German court resulted from assuming that criminalization was respectful of deontological ethics according to other kinds of deontological theories, this time not theories based on the victim (not centered on rights) but based on the rightfulness of the intent or the actions of the agent. According to these deontological theories, doing something wrong is worse than allowing it to happen, and you may accept the wrong coming from your actions if your intention was good, even if you foresee its bad consequences. A more active involvement in abortion, such as that required by the counseling model, is seen as worse than simply knowing that abortions are being performed somewhere and allowing them to happen.

What is the problem of this argument, in the context of the judicial review of criminal law on abortion? The protection of the virtue of state officials is a different interest from the protection of the life of the unborn, so the court would need to set the record straight and acknowledge that some problems posed by criminalization do not regard the protection of the fetus, but rather the State's involvement in acts that are considered contrary to a particular conception of morality. And the protection of certain moral conceptions might not be a legitimate objective for the State to pursue; or at least not one as compelling as the protection of life.

⁷ "The legislature's decision to forgo penal sanctions which could possibly prevent abortions in a probable small number of cases, conceivably to save other life in a greater number of cases, cannot be dismissed with the comment that it would be a "lump sum weighing of life against life," which would be incompatible with the constitutional duty of protection of each individual unborn life. With this argumentation the majority closes its mind in a manner difficult to understand to the fact that it is itself doing that for which it reproaches the legislature. This is so because the majority requires, for its part, for constitutional reasons an accounting from the legislature by compelling it through a requirement to retain the penal provision to leave such unborn life without TRIBUNAL CONSTITUCIONAL FEDERAL. ALEMANIA. Sentencia de 25 de febrero de 1975. 39 BVerfGE I (1975), opinión disidente de los jueces Rupp von Brünneck y Simon, Op. Cit., sección B. I.4.b), p. 679.

How can this discussion help us to understand the apparent indifference of pro-life people regarding the death of illegally aborted fetuses?

I believe it shows that concerns that are born out of agent-centered ethical positions are confused with, or disguised, as arguments based on rights. In constitutional decisions, judicial reasoning in favor of criminalization always takes the form of arguments based on rights. However, I perceive that the underlying rationale has more to do with a concern about the virtue of the agent and, more specifically, about not involving agents in actions that would taint their own virtue (including that of the judges themselves). There is nothing strange about this considering that objections to decriminalization are normally brought forward by Catholic judges and that for Catholic doctrine the main concern is the virtue of the agent, who must not do evil (Catholic doctrine is not based on rights, but on a conception of the good).

A related discussion concerns the personhood of the fetus. Most pro-life people assert that fetuses are persons and not objects and it is common for courts to think that the constitutionality of abortion can be settled simply by deciding on this issue of categorization. However, this is a very simplistic approach to the main discussion. Practically no one argues that the fetus is an object; and even if the fetus is considered as much a person as other human beings, the question remains: Is our commitment to the preservation of its life as strong as the one we show to the survivors of natural tragedies, or is it as weak as the one demonstrated for victims of highway accidents, or does it lie somewhere in between these extremes?

David Strauss says that our moral theories cannot adequately deal with difficult cases, such as those posed by fetuses or people living in a state of permanent unconsciousness.⁸ In my opinion, the problem is not limited to a few difficult cases (and for this reason the problem is not resolved by presenting the difficult case as in truth an easy one by saying, for example, that the fetus is a person or, on the contrary, that it is not a person). The difference between difficult and easy cases is that difficult cases are difficult because we cannot resort to acoustic separation. We do not know what the appropriate moral discourse would be. But this moment of hesitation only highlights the inadequacy of our moral

⁸ STRAUSS, David A. Abortion, Toleration and Moral Uncertainty. *The Supreme Court Review*, 1992, p.8.

theories and how they fail to account for all of our moral practices, and not just certain exceptional cases.

What is the importance of these considerations for the purposes of this paper? It seems to me that they enable us to understand that asserting the right to life of the fetus is inconsistent with choosing abortion regulations that do not reflect a similar concern for the protection of all fetuses, both those legally aborted and those aborted illegally. I think it also puts the supporters of strict criminalization in the situation of having to explain how their position is compatible with a discourse based on rights, or of having to accept that criminalization is not different from a preventive approach in that they both involve the death of some fetuses as an unavoidable component of the regimes.

3. Judges' representations of the pregnant woman

In most constitutional decisions on abortion there is recognition of the “sui generis” situation of the pregnant woman. The German court calls it “a duality in a unity.” This situation becomes a complication for law because it is almost the only case in which the conflict of interests involves an alleged holder of rights or interests who is inside the body of another holder of rights.

This common recognition raises very different and sometimes contradictory responses from courts. I am convinced that these different representations of pregnancy that judges have are a decisive factor in the outcome of judicial decisions.

a. The law has sometimes established a special duty of the pregnant woman with respect to the fetus on the basis of her biological relationship with the fetus. For instance, this idea is present in the first German abortion decision where the constitutional court calls us not to forget that “*Developing life itself is entrusted by nature in the first place to the protection of the mother. To reawaken and, if required, to strengthen the maternal duty to*

*protect, where it is lost, should be the principal goal of the endeavors of the state for the protection of life.”*⁹

However, this is a controversial idea. The clearest position against it was exposed by Justice O'Connor, in *Casey*. In her opinion, it is not legitimate to create special duties for women just because they are the ones who become pregnant or based on historical or cultural ideas about motherhood built upon women's biological reality. It is the woman who defines herself in exercise of her autonomy:

The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.¹⁰

b. A second interesting point about how law behaves towards the pregnant woman relates to the power the woman has over the fetus, as the fetus depends on her to remain alive.

The German Constitutional Court admits that the power of law to convince the woman to exercise her maternal duty is very limited. This finding leads the Court to accept the legislative option to adopt a system of protection of unborn life that prioritizes efforts to work *with* pregnant women, trying to convince them to carry their pregnancies to term by offering support and strengthening their sense of responsibility. A different strategy – criminal prosecution – would make state protection of prenatal life ineffective, because pregnancies cannot be detected by the state (they are not apparent and can be concealed) during the period when most abortions are performed:

⁹ TRIBUNAL CONSTITUCIONAL FEDERAL. ALEMANIA. Sentencia de 25 de febrero de 1975. Op. cit., p. 644.

¹⁰ CORTE SUPREMA. ESTADOS UNIDOS. *Planned Parenthood of Southeastern Pa. v. Casey*. Op. cit. Opinión de la jueza O'Connor.

[C]onstitutional law does not object to the legislature's choice of a protection concept which is based on the assumption – at least in the early phase of pregnancy – that effective protection of unborn human life is only possible with the support of the mother. Only she and those initiated by her know at this stage of the pregnancy about the new life which still belongs to her alone and which is fully dependent on her. The secrecy pertaining to the unborn, its helplessness and dependence and its unique link to its mother would appear to justify the view that the state's chances of protecting it are better if it works together with the mother.¹¹

In striking opposition to this reaction of the German Court, recognizing and assuming the power of the pregnant woman who controls the relationship with the being living in her womb, is the representation of pregnancy that appears in the following quotation from the minority vote of Monroy Cabra and Escobar Gil to the Colombian 2006 decision on abortion. Here the woman is deprived of all power and of the possibility to be responsible for her fetus. The rhetorical move is very interesting in the way it presents the relationship between the woman and the fetus. The latter appears as the living being (the woman is equated with objects) and the relationship is contingent, replaceable, and merely instrumental.

The decision from which we depart seems to confuse the ontological dependence of the fetus with the atmospheric dependence that it may have under some circumstances with her mother, with another woman or with some kind of artificial environment created by man. In effect, given that it has been fully proved that human life may begin outside the maternal womb (in vitro fertilization) and may develop partially in artificial environments, such as incubators, or in feminine bodies other than the one of the genetic mother, it must be concluded that although there is some dependence of the embryo on the mother, this is no more than a dependence regarding the environment, which does not differ from the dependence that born children have on the atmosphere or on food.¹²

¹¹ TRIBUNAL CONSTITUCIONAL FEDERAL. ALEMANIA. Sentencia de 28 de mayo de 1993. Op. cit., párrafo 183.

¹² CORTE CONSTITUCIONAL. COLOMBIA. Sentencia C-355/2006. Op. cit., voto minoría Monroy Cabra y Escobar Gil.

This excerpt comes from judges who believed in the constitutionality of strict criminalization of abortion. The emphasis on the separation of the fetus and the woman and the complete emotional detachment between the two reinforces the idea that the woman has no role to play in deciding the destiny of the fetus (the State does not need to work together with the woman to protect the fetus, it can force her) and it also strengthens the analogy between abortion and murder, with unrelated victims and perpetrators. The relationship of the woman and the fetus, under this view is a source of danger to the fetus, and for this reason it must be minimized.

On the contrary, the Constitutional Court of Portugal stresses the union of the woman and the fetus, not accepting separation of perpetrator and victim:

The singularity of the conflict and the sources of danger of injury explain the failure of criminal instruments. Given the drafting of the legal provision, the problem arises when abortion is made with the consent of the pregnant woman. In this case, in which the separateness of the perpetrator and the victim disappears, the threat of criminal punishment loses the efficiency it normally has, to resolve an “inner” existential conflict that takes place in the personal sphere of someone who provokes and suffers the injury at the same time. The numbers are there as a clear proof.¹³

c. Certainly, the most important legal consequence of the *sui generis* condition of pregnancy, of this “duality in unity,” relates to the categorization of the conduct resulting from the duty to keep a pregnancy. The German, Spanish, Colombian and Portuguese decisions explicitly refer to this point. The prohibition of killing which extends to every person, for the pregnant woman does not only involve the duty to refrain from acting, but also a positive obligation of a very intensive nature. The intensity of the restriction works as a normative constraint and in some circumstances makes the law declare that the duty to carry a pregnancy to term is non-demandable:

[The criterion of exactability] irrespective of the fact that the woman’s involvement in a pregnancy termination is not to be regarded under the criminal law as an omission – is justified because the prohibition on pregnancy termination, due to the unique relationship between mother and child, is not

¹³ TRIBUNAL CONSTITUCIONAL. PORTUGAL. Acórdão n° 75/2010, Processos n° 733/07 e 1186/07. Op. cit., párrafo 11.4.8

limited to a woman's duty not to injure another person's rights. Instead, the prohibition contains a duty of an intensive nature, affecting the women's very existence, a duty to carry and bear the child as well as a further duty to act on behalf of, look after and be responsible for the child such latter duty being an ongoing duty lasting after the birth ...¹⁴

It might be said that the consequences produced by the interruption of pregnancy are of a more serious nature. But this conclusion only justifies the recognition of more weight to the interest of pregnancy continuation in the balancing process. It does not allow for abandoning the search for solutions that would require a minimal compromise and for disregarding the value of the constitutional position of the woman. Specially, considering that for her, the respect of prenatal life does not translate into an omission; in letting the natural process of pregnancy to continue without interferences, but it also translates, after the birth and for long years, into permanent duties of support and care for another person, which is a burden over her existential sphere.¹⁵

The nature of this positive obligation, affecting the woman's very existence, may be so severe under some circumstances that the duty to keep a pregnancy becomes non-demandable.

Looking ahead at the burdens associated with those duties, it can be seen that in individual cases, severe, and under some circumstances, also life threatening conflict situations can arise in the particular psychological state in which expectant mothers often find themselves during the early phase of a pregnancy. In these conflict situations protection of the woman becomes so essential that the legal order –irrespective of any other duties based on moral or religious views- cannot demand that the woman must under all circumstances allow the right to life of the unborn precedence.¹⁶

Even a decision as different from the jurisprudential line started by the German Constitutional Court as the 2004 Costa Rican Supreme Court abortion decision can be read this way. For this court, the special relationship of dependence between the woman and the fetus justifies the legislator's decision to punish abortion less severely than other crimes against life and to punish different types of abortion differently (including excepting from

¹⁴ TRIBUNAL CONSTITUCIONAL FEDERAL. ALEMANIA. Sentencia de 28 de mayo de 1993. Op. cit., párrafo 159.

¹⁵ TRIBUNAL CONSTITUCIONAL. PORTUGAL. Acórdão nº 75/2010, Processos nº 733/07 e 1186/07. Op. cit., párrafo 11.4.11.

¹⁶ TRIBUNAL CONSTITUCIONAL FEDERAL. ALEMANIA. Sentencia de 28 de mayo de 1993. Op. cit., párrafo 159.

punishment abortion when the woman's health is in danger), *even* when according to the same court's jurisprudence, every person has a the right to life from conception to death.¹⁷

d. The special situation of the pregnant woman has also led judges and authors criticize the insufficiency and inadequacy of *legal theory* in its representation of pregnancy. The following quotes reflect that kind of criticism:

Constitutionally speaking the unique comparative problem raised by joined twosomeness cannot be dealt with by **simply juxtaposing** the embryo and the woman. The woman's **own** constitutional position is co-determined by her responsibility for another life because she carries such life within her. In saying so we do not rule out that the other life with its own human dignity **also** "stands opposite" the woman. These **two** findings taken together make evident what is so special about the balance which has to be achieved between the woman's position under the Basic Law and the duty of protection.¹⁸

As far as we are concerned, the image of joined twosomeness is not simply the description of an actual state of affairs, but in truth reflects the woman's constitutional status.¹⁹

The term joined twosomeness can be understood as a terminological approach to the right way of comprehending a unique fundamental rights situation. The natural developmental aspect of pregnancy encaptured in the term should be understood in terms of fundamental rights theory ...²⁰

According to these quotes from the minority opinion of the second German decision, it would not be enough to say that the protection of the fetus is more burdensome for the woman than it is for a man. It would not be a matter of degree in the intensity of the burden. What it is being said is that the relationship between the pregnant woman and the fetus is different in *quality* from the one that a third person might have and that this difference must be reflected in the theory of rights to be applied.

I think that those who advocate strict criminalization of abortion in Latin America are likely to have a representation of the woman as "the gray area surrounding the fetus on the

¹⁷CORTE SUPREMA. COSTA RICA. 17 de marzo de 2004, San José, Costa Rica. Res 2004 – 02792, párrafos V y VI.

¹⁸TRIBUNAL CONSTITUCIONAL FEDERAL. ALEMANIA. Sentencia de 28 de mayo de 1993. Op. cit., párrafo 380 (destacados en el original).

¹⁹Ibid., párrafo 384.

²⁰Ibid., párrafo 387.

ultrasound.”²¹ An eloquent example is the decision of the Chilean Constitutional Court which held that regulations allowing for distribution of emergency contraception at public health services were unconstitutional based on the *possible* risk to the right to life of the fertilized ovum before implantation. The decision, which is very long, did not examine the relationship between access to emergency contraception and the woman’s rights to health, autonomy, privacy, equality, among others, and how the ban on emergency contraception could affect those rights. Women’s rights are alluded indirectly, only, *after* the Court had declared the measures unconstitutional, when it is admitted that “*this court is aware of the evident impact that the holding affirming the unconstitutionality with universal effects will produce in a matter that also has very strong emotional implications for people, which are, no doubt about it, fully respectable.*”²² In other words, the restrictions of the rights of women were deprived of all legal relevance, by referring to them as no more than an emotional impact.

Legalization of abortion is usually linked to a representation of women that is difficult to accept by Latin American conservatives: a woman who makes her own definition of herself, who can decide whether to accept or decline motherhood, and who has the last word regarding the destiny of the fetus.

4. The protection of unborn life and criminal law as *ultima ratio*.

In Latin America, lawyers learn that the use of criminal law is only justified as an *ultima ratio*, when the legal interest cannot be protected by other suitable means that would be less intrusive and do not affect people’s constitutional rights as much.

However, a very pervasive idea among Latin-American judges is that when the rights or interests to be protected are very valuable, the state must use the criminal law.

“In our constitutional system the state must establish a social order that guarantees fundamental human rights, which must be protected by law, and as *ultima ratio*, by criminal law, as it happens with the life of every human being

²¹ [Cita a MacKinnon pendiente](#)

²² TRIBUNAL CONSTITUCIONAL. CHILE. Sentencia Rol 740-07-CDS, de 18 de abril de 2008, considerando 70.

... it is not up to the discretion of the ordinary legislature to punish or not punish the conducts that threaten the minimum essential values of society, for example ... abortion. When the legal interest protected is essential it must be protected by criminal law.”²³

In this quote, it is exclusively the essential nature of the value protected that legitimizes the use of criminal punishment. There is no assessment of the degree of effective protection that criminal law would bring *vis-a-vis* alternative means. The idea behind this conception of the principle of *ultima ratio* is that there is a continuum of means of protection that would range from the less invasive (meaning the less effective) to the more invasive (meaning the most effective), and that along this continuum one has to arrange interests in order of importance, in such a way that the most important interests become protected by the most invasive/effective means: criminal law.

This reasoning is flawed. There is no necessary relation between the invasiveness of a means and its efficacy. It is probably the case that the laws that provided for paid maternity leave to housemaids and those which created public child care centers in Chile are much more effective in preventing abortions than the threat of criminal law. Criminal law may be effective in deterring some crimes, but its efficacy is not an intrinsic condition of criminal law, but rather depends on the kind of conduct that the law mandates in each case. Most criminal laws require people to abstain from doing such things as killing, stealing, battering, etc. In the case of criminal laws punishing abortion, the woman is required to perform highly demanding positive duties related to pregnancy and child rearing. This point is key to understanding why criminal punishment has proved ineffective in deterring women from aborting.

5. The addressees of the duty to protect unborn life.

The addressees of constitutional norms are state powers and agencies. The constitutional recognition of rights implies for the State the duty to respect and protect those rights. The

²³ CORTE SUPREMA. MÉXICO, 28.08.2008, acción de inconstitucionalidad 146/2007 y su acumulada 147/2007. Voto de minoría de ministros Aguirre, Azuela, Ortiz, p. 131-132.

obligation to protect may contain the duty to enact legislation that would create further duties addressed to individuals in order to prevent them from violating the rights of others. Only occasionally do constitutions explicitly require the enactment of criminal legislation. Usually, the legislator is free to choose the means to protect a constitutional right.

However, Latin American lawyers and judges commonly take the constitutional mandate to protect life as an instruction on the unlawfulness of abortion and the need to criminalize it. By doing this, the freedom of the legislator is curtailed and it is understood that the only way to comply with the duty to protect unborn life is through the complete criminalization of abortion. In practice, the Constitution is read as if it was a criminal code.

This position is reinforced in Chile by a unique understanding of the *Drittwirkung* German doctrine. Many authors assert that constitutional rules are not only addressed to the State, but also to individuals. In this way, these authors believe that the duty to protect unborn life is imposed directly on individuals, among them obviously on women, who comply with this duty by going on with their pregnancies.

One of the many problems of this interpretation of the constitution, especially if combined with the understanding of *ultima ratio* referred to above, is that it results in States' considering that they fully comply with their duty to protect life if they take the most drastic approach towards abortion, which is strict criminalization. If after doing so abortion rates remain outrageously high, this problem is attributed to the failure of individuals, women in particular, to comply with their own obligation to protect unborn life.

In these cases punishment is used as a means to reaffirm the validity of a rule of behavior (not to kill the fetus) that is violated by the commission of a crime, which confirms the presumption that the constitutional norms protecting fundamental rights are addressed not to the State but to individuals. It is difficult to imagine how the violation of rules by individuals could be understood as questioning of the validity of a constitutional rule, when such a rule is actually addressed to the State.²⁴

²⁴ BASCUÑÁN RODRÍGUEZ, Antonio. Derechos fundamentales y derecho penal. Revista de Estudios de la Justicia. (9):47-74, 2007.

In the context of criminal prosecution of abortion this is an important issue, because strict criminalization is not conducive to achieving the purpose that allegedly justifies it, which is the protection of the fetus. For criminal prosecution to play a role in the protection of unborn life it would be necessary for the State to have knowledge of the existence of pregnancies in risk of being aborted, to be able to take measures to prevent abortions in such cases, and, finally, to apply the punishment to the crime. None of these three conditions can be met in our societies. There is enough evidence to show that, when abortion is criminalized, women needing an abortion hide their pregnancies from the State and resort to clandestine abortions, which are very difficult to prosecute because they are done in secrecy and with the complicity of all concerned, and because current abortion methods (particularly pharmacological abortion) have transformed abortion into a private act.

Unless the State applies, together with the threat of punishment, totalitarian policies such as those implemented by Ceaucescu in Romania during the 80s, who obliged all fertile women to undergo monthly gynecological examinations with the purpose of identifying and monitoring pregnancies and assure that they were brought to term,²⁵ it is impossible for the State to prevent abortions by means of criminalization.

But there is an even more important issue, which is the social viability of effective prosecution. In my opinion, the Latin American situation is the same as the one described by the Portuguese Court when it said that the efficacy of criminalization depends on an effective use of the punitive power of the State, and that society itself does not provide support to the application of punishment to more women:

The numbers are there for an eloquent proof. Criminalization applied during all stages of pregnancy has not prevented the practice of abortion on a large scale, frequently under conditions that violate the woman's dignity and jeopardize the physical and psychological integrity (or even the life) of the woman ... the efficiency of criminalization results, in this as in any other field, primarily from the effective exercise of the punitive powers of the State. In what concerns us now, only the effective prosecution and trial, in significant numbers, of the authors of the crime of abortion, would eventually result in factor that could

²⁵ BACHMAN, Ronald D. (ed.) Demographic policy. En su: Romania: A Country Study. [En línea] Washington, GPO for the U.S. Library of Congress, 1989. <<http://countrystudies.us/romania/37.htm>> [Consulta: 21 de octubre de 2010].

control the practice. What we now verify, year after year, is the extreme rarity of convictions for this reason ... and when exceptionally this happens, the social reaction is more of uneasiness than of applause. This fact, and the passiveness of the social mechanisms of control, prove that the importance of the value affected and the gravity of the damage do not come accompanied, as it would be normal (but for the special conflicting context of the damaging act) by a strong feeling of repudiation. This shows that from a social point of view this action is not considered a crime. We do not see a significant social movement advocating for the change of this state of affairs, fighting for the effective prosecution and punishment of a larger number of offenders. The examination of reality and the assessment regarding the omission of punishment depending, as it should be, on its relative efficacy, should not disregard a consideration on the empirical reality of social life. A minimum of consistency requires that one does not validate a discourse for criminalization of abortion that would extend to the whole gestational period including its earliest stage. It is impossible to expect that criminalization create an “atmosphere” that would favor a decision to maintain a pregnancy. And this conclusion is neither hypothetical nor a more or less fallible diagnosis about the future. It is a clear verdict based on incontrovertible data gathered from past experience, since that was the existing regime, already proven in its application.²⁶

This lack of a social and political atmosphere supporting the prosecution of abortion is also perceived by those who advocate strict criminalization, for they repeatedly claim that what they seek is not the punishment of women; rather they demand that criminalization stand as a way for society to express that abortion is a crime. They thus justify the existence of criminalization against women in terms of the expressive (symbolic) function of the law.²⁷

The problem of justifying criminalization for its expressive function, even when it is assumed that the State cannot carry out its role in protecting life through the exercise of its power to prosecute, is that the costs associated with enforcing the rule that mandates fetuses

²⁶ TRIBUNAL CONSTITUCIONAL. PORTUGAL. Marzo de 2010, Acórdão n° 75/2010, Diário da República, 2.ª série – N°60-26. [En línea]
<<http://www.tribunalconstitucional.pt/tc/acordaos/20100075.html>> [Consulta: 27 de septiembre de 2010]

²⁷ En una entrevista, el abogado Jorge Reyes, quien ha sido el representante del movimiento “pro-vida” en muchas de las acciones judiciales sobre anticoncepción de emergencia en Chile señaló: “... *creo que condenar a una mujer por aborto es un error. Esto no significa despenalizar el aborto, que es un crimen. Pero el tratamiento hacia esa mujer debiera ser diferente: si ella aborta es porque está enfrentada a una situación extrema. Mi propuesta es que a estas mujeres, en vez de condenarlas, debiera ofrecérseles un tratamiento paliativo de rehabilitación, un proceso de acompañamiento como el del Proyecto Esperanza u otro similar para reparar su dolor y que esto no le vuelva a suceder*”. [En línea]
<http://www.paula.cl/blog/dossier/2011/02/05/aborto-la-condena-y-la-acogida/> [Consulta: 15 de mayo de 2011]

not be killed are exclusively imposed on women, who as individual citizens are not the primary addressees of the duty to protect constitutional rights or values.

SECOND PART

Comparative models Latin-American courts might look to

The two main models that Latin-American courts could look at are the Roe/Casey model of the U.S. Supreme Court and the one created by the German Constitutional Court in its 1975 decision and reinforced in its 1993 decision, which has been followed, among other countries, by the Constitutional Courts of Spain and Portugal in Europe and the Colombian Constitutional Court in Latin-America. In this part of the paper I explain why I believe that the courts of the region would probably favor the European model when asked to decide on the constitutionality of abortion laws.

1. The U.S. model: a categorical methodology of conflict resolution and unborn life as a state interest

The U.S. Supreme Court held that the fetus does not have a constitutional right to life. Unborn life may be a state interest and be protected in that quality.

By doing this, the Court decided on the comparative weight of the woman's interests *vis-a-vis* unborn life, at least *prima facie*. The woman is the holder of constitutional rights and, for that reason her rights weigh more than a mere state interest, unless the latter becomes compelling.

Also, the Court left little doubt regarding the relevant question presented in the judicial review of abortion laws. If only the woman's rights have constitutional status, the question will always be whether the law violated her rights and never whether the law violated the fetus's rights, as might have happened had the Court considered the fetus the holder of the

right to life. And finally, by considering unborn life a state interest, this life does not require individual protection, as does one granted constitutional right to life. There might be a better general protection of unborn life without having to reach each fetus individually.

There are two reasons why I believe this model will not be followed by Latin American Courts. On the one hand, to give unborn life the status of a state interest seems somewhat artificial and *ad hoc*. State interests are usually communal interests and some effort is needed to conceive fetal life as a general interest. Also, for many people in the region (judges included) the fetus has some kind of intrinsic worth that is not well captured by the category of state interest. It is true that a state interest may become compelling and then it would trump over the woman's rights. However, this all or nothing solution may be too categorical for many. This could be the reason why the US Supreme Court in *Casey* created the "undue burden test" that allows for more balancing, maintaining the categorical nature of the solution, by keeping the rule that the duty to continue a pregnancy is not demandable before viability, and even after if the woman's health is in danger.

On the other hand, the U.S. model may be resisted in Latin-America because it implies a representation of the pregnant woman that is at odds with the conservative gender ideology prevalent in the region, as explained in the previous section.

2. The European model: proportionality and unborn life as a constitutional value

The German Constitutional Court in its 1975 decision held that life was protected under the Constitution in a two-sided aspect: as a subjective right and also as an objective value (or good). The Court said that it was not necessary to decide whether the fetus is a holder of a subjective right to life, because its life was protected as an objective value all the same. As an objective value, the Court gave unborn life a weight that is the same or very similar as that of the life of those already born. This idea of the double dimension of constitutional protection of rights is taken up by the Spanish Constitutional Court in its 1985 decision, with one difference. In this case the Court said that unborn life was protected as a value or objective good under the Spanish Constitution and expressly ruled that the fetus was not a holder of the right to life. In the year 2006, the Colombian Constitutional Court followed

the path of the Spanish Court and declared that under the Colombian Constitution the life of the fetus was protected as an objective good. It also added something that is important and that was only implicit in the Spanish decision: that unborn life, as an objective good, weighs less than born life, which is a constitutional right. The Portuguese Constitutional Court, in its 2010 decision, following this jurisprudential reasoning, also held that life as an objective good should be given less weight than life as a subjective constitutional right, at least *prima facie*.

The 1975 German decision introduced the concept of non-demandability applied to the duty to keep a pregnancy. Although it declared that in situations where fetal life comes into conflict with the rights of the woman, unborn life must be given priority, it held that there are exceptional cases in which keeping the pregnancy becomes such an intensive burden that the law cannot demand this duty from the woman and must consider abortion lawful. In this decision the Court enumerated the situations that would make abortion lawful. In its second decision of 1993, the Court reiterated the non-demandability criterion, but it gave the woman the power to decide whether the duty to keep the pregnancy is too burdensome, and hence non-demandable, and made abortion not punishable during the first period of gestation. The Spanish Court followed closely the 1975 German decision²⁸ and after that the Colombian Constitutional Court, making express application of the proportionality principle, declared that the duty to keep a pregnancy was non-demandable at least in three situations that would create excessive burdens for the woman, and for that reason should be considered illegitimate restrictions to the woman's rights and a violation of the proportionality principle. The Portuguese Constitutional Court applied the proportionality principle more methodically in the judicial review of a law that decriminalized abortion during the first weeks of gestation.

I believe this model could be more attractive for Latin-American courts. The idea of unborn life as an objective constitutional value or good may be introduced as a possible interpretation of the life provision of the majority of the region's constitutions. It is a status that grants unborn life a protection greater than the status of a state interest. Unborn life,

²⁸ Producto de una reciente reforma legislativa, actualmente España tiene un régimen de plazos, en que el aborto está despenalizado durante las primeras catorce semanas del embarazo. *Ley Orgánica 2/2010, de 3 de marzo, de salud sexual y reproductiva y de la interrupción voluntaria del embarazo*.

considered a constitutional value, gains weight, but at the same time allows the legislator some flexibility to decide on the ways in which it is to be protected and avoids the problems associated with the requirement of individual protection of life. The legislator may give a general protection to unborn life.

The application of the proportionality principle should not raise objections, since it is fairly standard methodology in constitutional judicial work in the continental tradition. This tradition, and more specifically its development in Spain, is perceived as closer to Latin America than the U.S. tradition. The fact that Colombia has already followed this path makes it even more familiar.

Giving constitutional status to unborn life may bring some comfort to those seeking a strong and public recognition of the intrinsic value of life in all its different stages. However, it also raises several theoretical problems and opens a number of questions that may confuse judges deciding on the constitutionality of abortion regulations.

Is there any difference in the weight that should be given to a constitutional value (or good) *vis-a-vis* the weight that should be given to a constitutional right? May the judicial review of a legal provision refer to alleged violations of a constitutional value (or good) in the same way it refers to the violation of constitutional rights? If so, is it possible to consider the restriction of the rights of the pregnant woman an appropriate means to protect unborn life? Wouldn't this invert the role of rights in our constitutional systems?

One should also take into consideration that the solution proposed by this model is only applicable in countries with constitutions recognizing values or constitutional goods as a category distinct from individual rights, and where values (or goods) and rights are sources of positive duties for the state. This is the case of many European and Latin American countries. The difference between the United States and countries where unborn life is a constitutional value is that in the U.S. the protection of unborn life is *permitted* by the Constitution, but it is never *required*, whereas in these other countries there is an affirmative constitutional *duty* to protect unborn life.

An important matter to be considered is how the application of proportionality and the non-demandability argument change according to the question presented to the court. There are two possible questions:

- a) Whether a statute criminalizing abortion to protect unborn life violates constitutional rights of women (U.S. 1973, Colombia 2006).
- b) Whether a statute (partially) decriminalizing abortion violates unborn life as a value or good. (Germany 1975 and 1993, Spain 1985 and Portugal 2010).

In the first group of cases, where what it is contested as unconstitutional is the repressive nature of the statute, the Constitution is affirmed as the normative standard that would set limits for the legislature to *prohibit* abortion. On the contrary, in the second group of cases, where what it is contested is the permissive nature of the statute, the constitution is affirmed as the normative framework that would set limits for the legislature to *permit* abortion.

This brings into the discussion the question of the constitutional legitimacy of the use of criminal punishment for the protection of unborn life. The German Court ruled that the protection of unborn life required the use of criminal punishment. This way of justifying the use of criminal law inverts the standard liberal justification for the use of punishment.²⁹ Under the liberal conception, the Constitution protects rights *from* the use of criminal law. Under the new justification, the constitution protects rights or values *through* the use of criminal law. Judicial review also changes its role. It does not only have to check whether the conduct of the state violates rights, but also if the state protects rights or values sufficiently by complying with its affirmative duties. In the face of a conflict between the negative criterion (requiring the limitation of the use of punishment) and the positive criterion (requiring the use of punishment) judges have to do a balancing exercise.

One may think that as far as such balancing becomes part of the proportionality methodology and the exercise of punishment passes the tests of adequacy, necessity and

²⁹ BASCUÑÁN RODRÍGUEZ, Antonio. Derechos fundamentales y derecho penal. Revista de Estudios de la Justicia. (9):47-74, 2007, pp. 46 y ss.

strict proportionality, rights would be properly safe from illegitimate restrictions. This is what the Colombian Court did in its 2006 decision.³⁰

However, we must remember that in the Colombian case, the Court was asked to decide whether the criminalization of abortion violated women's rights (negative rights against illegitimate intrusions of the State) and not whether decriminalization left unborn life unprotected. This is the reason why it was easy for the Court to examine the conditions for the legitimate use of punishment as part of its judicial review of the abortion statute. In this case the life of the unborn was the interest protected by the contested statute and not the constitutional right or value threatened by the statute.

It becomes much more difficult for courts to address the legitimacy of the use of punishment when the life of the unborn is placed as the constitutional right or value that is allegedly violated by the contested statute, as it happened in the German, Spanish and Portuguese cases. In this event, the judges can still do the balancing, but the preferential treatment that negative rights as defense rights have historically had is lost. Under the liberal paradigm it is the restrictions of rights that has to be justified. Under this new scheme, the restrictions of negative rights are evaluated in their condition of "means" to protect a constitutional legitimate aim (the protection of unborn life). The question will then be whether these means are adequate, necessary and proportional to the achievement of that objective.

This reversal is particularly detrimental to fundamental rights when the interest protected by the criminal statute is not a constitutional right, but only a value that the judge infers from the wording of the constitutional text.

In my opinion, the decision of the Portuguese Constitutional Court solves this problem correctly. It considered unborn life an objective value and not a subjective right and deduces from this distinction that its weight must be less, at least *prima facie*, than the

³⁰ "(t)he legislature ... must respect the constitutional rights of persons, which are the foundation and the limit of the punishing authority of the State. They are the foundation, because the *ius puniendi* must be oriented to make these rights and values effective. And limit, because the criminal policy of the State cannot disregard the rights and dignity of persons. Thus, the Court has understood that ... (the) essential core of rights and the criteria of reasonability, proportionality and strict legality are substantive limits to the ordinary exercise of this state authority ..."

weight of a right. This means that the judicial review examining the compliance of the duty to protect unborn life and the requirement of assuring a minimum of protection cannot – in practice – turn into the creation of a right to life for the fetus. The way to make sure that this will not happen is to give more abstract weight to the rights of the woman when the strict proportionality requirement is applied with the purpose of deciding on the legitimacy of the restrictions of these constitutional rights.

A basic question that courts following this model must answer is whether the affirmative duty to protect unborn life contains the obligation to criminalize abortion. The German Constitutional Court answered that it does, unless it could be proved that other suitable means besides criminalization could provide equal protection. In my opinion, this decision is wrong. I believe that the Portuguese Court gave a better answer when it declared that it is a mistake to assume the legitimacy of criminal law, that it is necessary to prove the efficacy of criminal intervention, and that its efficacy can neither be presumed nor deducted from the fact that other means are not efficient.

Taking into consideration the autonomous nature of the necessity principle and that it is essential to articulate the prohibition of the protective regime with the proportionality principle, it is methodologically flawed to presume the legitimacy of the criminal intervention unless it can be proven that there is another available alternative means that is less intrusive and equally or more efficient. By doing this the reasoning is inverted and the burden of justification is placed presuming as the *departure* point one that cannot be but the hypothetical point of *arrival*.³¹

Knowing that criminal punishment is the most intrusive instrument and for that reason any other less intrusive instrument should be given priority in its application, the use of criminal punishment cannot result from the potential dissatisfaction produced by other instruments of protection. Any assumption must be avoided in this matter, so criminal intervention cannot escape a positive

³¹ TRIBUNAL CONSTITUCIONAL. PORTUGAL. Marzo de 2010, Acórdão nº 75/2010, Diário da República, 2.ª série – Nº60-26. [En línea] <<http://www.tribunalconstitucional.pt/tc/acordaos/20100075.html>> [Consulta: 27 de septiembre de 2010]

examination of its own efficiency, because the efficiency of criminal law cannot be automatically deducted from the inefficiency of other means.³²

THIRD PART

In this third part, I develop the general lines of a possible judicial narrative which Latin-American courts might adopt, in keeping with the jurisprudence inaugurated by the German Constitutional Court and developed by its Spanish, Colombian and Portuguese counterparts, and which integrates the non-demandability argument into the framework provided by application of the proportionality principle.

I believe proposing this line of reasoning has certain advantages in a judicial context such as that of Latin America, in which judges share the beliefs and fears I described in the first part of this text. It has the advantage of proposing an orderly method, according to which judges must answer a sequence of questions and where the evaluation of the aim's legitimacy, and, above all, of the suitability and the necessity for criminal punishment in order to reach the aim, come before the balancing implied in the strict proportionality test. On the subject of abortion, there are powerful reasons to conclude that criminal punishment is not an adequate means for the protection of unborn life (at least in early abortion, or in abortion implying excessive burdens). Furthermore, this methodology allows for the consideration of the rights of women and the different ways in which these are affected by penal sanctions, while the traditional approach of the courts regarding these matters does not. Finally, it is a method which permits the introduction of empirical evidence, which is particularly relevant in this field.

When facing challenges to a law penalizing abortion in any and all circumstances, or allowing for it only in very restricted exceptions, the court should analyze the legitimacy of restricting women's constitutional rights. In so doing, it should analyze whether the

³² TRIBUNAL CONSTITUCIONAL. PORTUGAL. Marzo de 2010, Acórdão nº 75/2010, Diário da República, 2.ª série – Nº60-26. [En línea]
<<http://www.tribunalconstitucional.pt/tc/acordaos/20100075.html>> [Consulta: 27 de septiembre de 2010]

criminal provisions **have** a legitimate aim; and, if that is so, whether the restriction of the pregnant woman's rights meets the requirements of being suitable, necessary, and strictly proportional.

Legitimate aim

The first question the court must ask itself is whether the restriction of those rights is based on an objective which, within the existing constitutional system, is legitimate. The protection of unborn life is a legitimate aim, particularly if the Constitution establishes it explicitly, as the Chilean Constitution does. In the more common cases where national constitutions contain only a general guarantee of the right to life, not mentioning its application to unborn life, courts could follow the argumentation applied by the German, Spanish, Colombian and Portuguese constitutional courts, which infer from such a guarantee the existence of a mandate for legislature to protect unborn life, not as a subjective right but as an objective good protected by the constitution. The Chilean constitutional court could do the same, on the basis of an interpretation of the constitutional clause establishing that "law will protect unborn life", a phrase which does not specify what is the status of the unborn life thus protected, and opens the possibility of it being considered an objective value which is constitutionally protected.

However, on many occasions, the wording of abortion statutes reveal that criminal punishment does not have as its sole or main objective the protection of unborn life. For example, it may be argued that one objective of criminal punishment is the protection of the agent's virtue, in such cases as the law only excludes criminal punishment in cases where requirements for the application of the double-effect doctrine are met. This objective requires an independent review of its legitimacy.

In Chile, and in many other countries in the region, the abortion of an unviable fetus is criminally punishable. In such cases, it is necessary to ask whether the aim is to protect life in the uterus as such, or whether such life is protected in order that birth and subsequent independent life are made possible. (It should be remembered that one of the arguments for the priority granted to the life of the fetus vs. the pregnant woman's rights is that life is the

substratum required for exercising other rights later on.) If the objective is the protection of unborn life in order to make birth and subsequent exercise of other rights possible, it would not be a legitimate aim to make the abortion of an unviable fetus a crime.

It is also common for Latin American criminal law to contemplate greater punishment for the pregnant woman who undergoes an abortion and lesser punishment for the third party (including the male parent) who causes an abortion with the woman's consent. On some occasions, the legislative debate which leads to the legal provision shows that the woman undergoing an abortion is subject to more severe reproach than third parties. Such facts may make clear that there is another aim underlying the establishment of criminal liability: reinforcing the maternal role women are supposed to play. In my view, this would not be a legitimate aim. The same applies to the protection of family honor or the paternalistic idea that criminal punishment for abortion is justified in order to prevent the woman from suffering the consequences of a wrong decision (such as, for instance, post-abortion syndrome). Neither of these would be legitimate aims.

It is sometimes argued that criminal punishment for abortion aims at the instauration of a culture that respects human life and human dignity. This objective is undoubtedly legitimate. In this regard, as in the case of the aim of protecting unborn life, it should be necessary to determine whether criminal punishment is appropriate and necessary for reaching those ideals, and if so, whether the benefits that would derive from reaching them through criminal punishment would compensate for the sacrifices imposed by such a measure.

If the court were unable to find a legitimate aim to uphold criminal liability for abortion, it should declare criminal provisions unconstitutional.

The suitability test

To meet the requirement of suitability, any infringement of fundamental rights must be appropriate as regards its contribution to the constitutionally legitimate aim. If

criminalization of abortion is justified by the objective of protecting unborn life, the implicit restriction on the rights of women will only be legitimate if the application of punishment is suitable for the protection of the unborn. The legislature must be able to justify, through studies and empirical evidence, that criminalization is associated to a reduction in abortion rates.

In this stage, how we consider unborn life is important. If the fetus is considered to have a subjective right to life (if the individual protection of every fetus is required), reviewing suitability should aim not only at proving that criminalization reduces abortion rates, but also at making possible actions involving the defense or protection of the individual fetus (for instance, the defense of the fetus by third parties).

When considering the suitability of the measure, it is necessary to acknowledge that existing legal regimes in most Latin American countries are among the strictest in the sphere of criminal punishment for abortion, and that even so abortion rates are among the highest in the world. It is difficult to believe that the effectiveness of criminalization could be improved by means of stricter prosecution of such a crime, if up to the present such prosecution has not been sustained either by political will or by the actions of those implicated in the system; even those who defend the current regimes do not actively seek punishment for women who undergo abortions. This, plus the evidence contained in world public health reports indicating a lack of empirical correlation between criminalization and a reduction in abortion rates, merits consideration when reviewing suitability.

The Latin American situation in my opinion is not, in this regard, different from those reviewed, for example, by constitutional courts in Germany and in Portugal, who decided that strict punishment of abortion as a crime was not suitable for the protection of unborn life, and that the legislature could opt for a preventive regime considered more effective for meeting this aim.

As regards the suitability of inflicting criminal punishment on abortion in order to bring about a culture that respects human life and human dignity, especially for those who are most vulnerable, I agree with Dworkin when he says there is no evidence other than mere speculation for saying that admitting abortion reduces respect for human life. As this

author says, abortion is permitted in many European countries during the first three months of pregnancy, and these societies usually are less violent, and more respectful of human life, than other communities in which abortion is forbidden.³³ There are also different views about what it is to respect human life and human dignity; to suppose that abortion always contradicts these values is to adopt only one of these views, the one that holds that respect for life comes from the idea that each life is part of a divine plan or the order of nature – that either God or nature has been invested in each life, thus making it intrinsically valuable. According to other views, abortion is sometimes justified precisely out of respect for human life and its dignity. It is more coherent to think, again with Dworkin, that a culture which respects human life and its dignity would be attained under any view if measures were taken to ensure people would treat abortion decisions as morally important issues, and acknowledge that intrinsic values are involved and require decisions based on reflection and responsibility.³⁴

If provisions that penalize abortion in every circumstance do not meet the suitability requirement, they should be declared unconstitutional, and there should be no further review of necessity, which is analyzed all the same in the next paragraphs.

The necessity test

In cases where measures for legally punishing abortions passed the suitability test, it would be necessary, in order to determine if restrictions imposed on women's rights are constitutional, to review the issue of necessity; that is, to ask whether there are other means equally or more conducive to the same objective, and less intrusive on the fundamental right being affected. If such means existed, the legislature should prefer them. To determine whether they exist, all trustworthy background material and studies on the causes of abortion, the ways of preventing it, and the best practices in comparative law, should be, among other sources, examined. The fact that some of the countries having the lowest

³³ DWORKIN, Ronald. *Life's dominion. An argument about abortion, euthanasia, and individual freedom*. New York, Vintage Books, 1994, 115.

³⁴ *Ibid.*, 150.

abortion rates in the world do not penalize abortion in the early months of pregnancy should be taken fully into account by the legislature or the courts, in order to identify and consider these alternative means of protection.

It is also important to consider that existing scientific evidence about the correlation between the efficient use of contraceptives and the reduction in abortion rates is much more trustworthy than those reports which associate strict criminal punishment with the reduction of abortion rates.³⁵

Furthermore, it is also important to consider that abortion is a very difficult crime to detect. In practice, as seen in those cases which come before the judicial system, it is detected only when the woman concerned has suffered health complications and has had to undergo treatment in a public hospital. As a result, the application of the punitive measures is necessarily selective and generates discrimination, affecting a much greater proportion of poor young women, those that suffer complications because they abort using more dangerous procedures or during later stages of pregnancy. In order to avoid such discrimination in criminal prosecution, it would be necessary for the government to implement a general system for monitoring pregnancies in all women, and for controlling their actions in order to detect behavior indicating the intention of terminating pregnancy. Such a system, regardless of its prohibitive cost, would be unthinkable in a free society. This implies that the problem of insufficient and selective application of criminal law in the case of abortion, and its deleterious effects on the right to equality, is structural, one associated with the use of *ius puniendi* in the case of abortion.

When reviewing the issue of necessity, one should not make the mistake of supposing that criminalization is more effective only because it is the more intrusive measure. On the contrary, and precisely because it is intrusive, the use of criminal punishment is only justified as *ultima ratio*, and the burden of the proof for its necessity (as opposed to that of alternative measures) should fall on the State.

³⁵ MARSTON, Cicely y CLELAND, John. Relationships Between Contraception and Abortion: A Review of the Evidence. International Family Planning Perspectives 29(1):6-13, marzo, 2003.

If criminalization does not meet the requirement of being a necessary measure for attaining the objective of protecting unborn life, the court should declare it unconstitutional.

The strict proportionality test

Finally, if the court were to decide criminalization is a suitable and necessary measure for the protection of unborn life, the test of strict proportionality would come into the analysis.

According to the strict proportionality requirement, the benefits obtained by restricting rights in order to reach the legitimate aim should compensate the sacrifices imposed on those having those rights and on society. The purpose of this test is to determine which interest should be foremost: the constitutional right affected by the norm or the interest protected by the statutory goal. This consideration takes into account the relative weight of both interests within the constitutional system.

At this level of analysis it becomes relevant to determine what is the status of the fetus in the constitution, for *prima facie* the weight of a constitutionally protected interest is different if it is a subjective right (as in Ireland or Costa Rica) or an objective value or good (as in Spain, Colombia and Portugal), or simply the interest of the state, without constitutional protection (as in the United States). If, as formerly proposed, unborn life is defined as an objective value or good, the woman's rights would *prima facie* have priority over unborn life.

Naturally, this is still an unrefined approach, for it remains necessary to consider how and to what degree the pregnant woman's rights are affected by the application of the criminal provision. In brief, the more effective, probable, far-reaching, and durable the restriction of the right, the greater the weight assigned to the sacrifice implied in this restriction. On the other hand, the more effective, probable, far-reaching, and durable the benefit obtained by reaching the aim, the greater the weight assigned to the latter.

This requires considering how the rights of the pregnant woman are affected by forcing her to continue pregnancy under threat of criminal punishment. In cases where continued pregnancy endangers the life or the physical and/or mental integrity of the woman, the

degree to which her rights are affected should be deemed intense, as these are individual interests which have always been highly regarded by law, so much so that, in the cases where they are affected, as in the case of the obligation to provide help that are present in many of our laws, this obligation ceases to exist when it entails harm for the person who would provide the help. While criminal law enforces the duty of solidarity, as in the case of providing help or in the case of the state of necessity, it never imposes duties of sacrifice in such a degree that it would involve harm to physical integrity or to life.

In cases where pregnancy endangers life or personal integrity, the threat of punishment also denies women access to the health services necessary to avoid such dangers. The criminalization of therapeutic abortion is the only case in which a procedure necessary to restore health is deemed a crime and thus prohibited. Clearly, this involves severely affecting the right to healthcare guaranteed by most Latin American constitutions. Men are not subject to any equivalent situation that deprives them of treatment and healthcare, and this means inflicting a more severe harm to the right to equality in the access to health benefits.

In hypothetical cases where pregnancy affects women's right to life, personal integrity and access to healthcare, other interests, those of autonomy and self-determination, are also intensely affected: the woman cannot decide for herself if she wishes to run the risks entailed by the pregnancy, cannot choose to defend her own life, her health or her integrity when faced with a threat. Moreover, because she must place her personal integrity at risk, she must also take on, while obeying a mandate coming from without, the physical and psychological impact on herself and her quality of life, which may certainly impair her own personal plans. Autonomy is also affected in all other hypothetical cases of abortion criminalization, but the intensity of the impact will depend on the specific circumstances to be analyzed. Additionally, it is important to consider that, in the different experience of different real women, the most intense effect is not always perceived in terms of the circumstances considered criteria for abortion (therapeutic reasons, or rape, or unviability of the fetus). This has become evident in states that have decided to forgo regimes based on criteria for abortion in favor of other regimes based on time frames.

Liberty of conscience may also be considered affected, considering that the banning of abortion, especially when upheld even if the woman's life is endangered, is based solely on a specific religious belief (which supposes the obligation to respect a divine plan which should not be interfered with). Such a provision incorporated in criminal law affects the liberty of conscience of those who do not share the creed. The respect of the right to liberty of conscience implies that the law should abstain from forcing a person, when her own conscience indicates that it is up to her to accept or reject the risk to her own life and health. Liberty of conscience may also be seen as affected in another sense proposed by Dworkin. People's beliefs regarding the value of life, even if they have no traditionally religious content, take the place of religious beliefs when they refer to issues central to religious thought, when they include deep convictions which shape moral personality and influence opinions related to life and death, and when they guide the main decisions on how to face each person's life.³⁶ The use of coercion on individuals, when it affects conscience in such a profound sphere, should be considered an intense restriction of rights.

Comparative law has pointed out repeatedly that imposing upon a woman the duty of carrying a pregnancy to term in order to protect unborn life affects her autonomy insofar as it ignores her own capacity as a moral agent to establish aims and values, to make decisions using her own reason and her other faculties, to decide and to act in accordance with her own judgments. When established law takes hold of a woman's body and decides how it should be used, this implies an instrumentalization of that body which may also affect the right to be treated with dignity in the Kantian sense. The more intense this instrumentalization, as when it implies risk to the woman's life or harm to her integrity, the more such an action can be considered cruel, inhuman, or degrading.

Finally, the criminalization of abortion for women in order to protect unborn life implies affecting women's right to equality with men. By opting for criminalization, legislatures place and concentrate the burden of protection on women. Obviously, this is done because the fetus is within the woman's body and thus it is easier for the State to act directly on a woman, forbidding her to interrupt the pregnancy; it is harder to adopt more indirect measures such as the prevention of unwanted pregnancies and the creation of incentives

³⁶ DWORKIN, Ronald. *Life's dominion. An argument about abortion, euthanasia, and individual freedom*. Nueva York, Vintage Books, 1994, 154-155.

(such as social services) for carrying the pregnancies to term. Such preventive measures and such incentives would distribute at least some of the costs of the protection of unborn life on to the rest of society. Therefore, legislatures, when choosing to make abortion a criminal offense, concentrate the burdens and the costs (physical, mental, symbolic, economic and of loss in autonomy) only on women. This deeply affects gender equality, and the affectation is very much harder on the more vulnerable groups of women, such as teenagers and poorer women, where unwanted pregnancies are more common, and who must turn to the State for health care and contraception. The effects of this do not only fall on women and their individual rights, but also imply a great sacrifice in terms of the collective social interest of using the principle of equality as a basis for political community.

Another argument for considering this infringement of collective rights and interests as intense is that it encompasses a great number of rights whose enjoyment and exercise are also necessary for women to access other rights not directly affected by the criminalization of abortion. Also, the sole existence of criminal provisions makes such affectation real and highly probable: women with pregnancies implying risk to their life and health have no access to the therapeutic care necessary for their recovery; the autonomy and freedom of conscience of pregnant women are affected, and the right of women to equality in general is affected. Finally, these rights are affected over a long period, especially health rights, in cases where there is permanent damage; as well as the right to equality and autonomy regarding plans and projects for a woman's life. Some women experience more short-term effects (generally linked to the nine-month pregnancy period or to the time where illness shows symptoms) of varying intensity in each specific case.

These are the sacrifices imposed both on the women affected by the limitation of their rights and on society itself. When applying the test of strict proportionality, it is at this stage necessary to compare the weight of the benefits obtained by the restriction of rights in order to attain the legitimate aim against the weight of these sacrifices, and thus ultimately decide whether the benefits actually compensate for the sacrifices.

The benefit to be obtained by creating and applying norms that make abortion a crime is the protection of unborn life. The specific aim is to obtain the lowest possible abortion rates

(entirely avoiding abortion should be considered an impossible aim, as there is no society which has succeeded in eradicating the practice).

In order to determine the value of the benefit of criminalization in the protection of unborn life, it is necessary to compare, through a theoretical exercise, abortion rates under regimes that make abortion a crime and abortion rates that might be attained in the same country with alternative regimes. This exercise has an element of speculation, but the body of research available and the comparative study of national experiences of the effects of different policies on the reduction of abortion make it perfectly possible to evaluate the quality of the background material on which the legislature is basing whatever regime it supports. In the Latin American milieu, where support for criminalization is not usually accompanied by any background research to prove its effectiveness, there is not even an opportunity for the objection that the courts are not the more appropriate instances for evaluating public policies.