

## ABORTION IN PUBLIC INTERNATIONAL LAW AND COMPARATIVE PERSPECTIVES: APPROACHES AND CHALLENGES

### *El aborto en el derecho internacional público y la perspectiva comparada: enfoques y retos*

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**Abstract:** *This article will map and analyze the main trends that public international law, comparative law and transnational perspectives have followed when approaching the issue of abortion. It will examine the way in which the legal argumentation and interpretation is constructed, the approximations and criteria legal scholars, legislators and courts have adopted in selecting the points of comparison, as well as the varied subjects, rights and social values that enter under scrutiny when coping with this matter. It will do so under the main referential framework of international human rights law and doctrine, as an approach through which academic outlooks, legislative positions and practical instances regarding abortion can be studied, considering the universal values and objectives which serve as the foundation of such rights.*

**Keywords:** *Abortion, international law, comparative perspective, human rights, women's rights*

**Resumen:** *En este artículo se realizará una proyección y un análisis de las principales tendencias que el derecho internacional público, el derecho comparado y las perspectivas transnacionales han seguido al abordar el tema del aborto. Examinará la forma en que se construye la argumentación e interpretación jurídica, las aproximaciones y criterios que los juristas, legisladores y tribunales han adoptado al seleccionar los puntos de comparación, así como los variados temas, derechos y valores sociales que entran en escrutinio cuando se hace frente a este asunto. Lo hará primordialmente bajo el marco referencial del derecho internacional de los derechos humanos, como un enfoque a través del cual las posturas académicas, las instancias legislativas y las visiones prácticas sobre el aborto pueden estudiarse, teniendo en cuenta los valores y objetivos universales que sirven de fundamento a tales derechos.*

**Palabras clave:** *aborto, derecho internacional público, perspectiva comparada, derechos humanos, derechos de las mujeres*

### **I. Introduction**

From a review of the way in which academics construct international legal analysis and comparative and transnational examinations of the law, it can be observed that there are different

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approaches, methodologies and prioritizations being carried out. Some scholars analyze public international law directly considering the classical sources of treaties, custom and general principles of law, as well as jurisprudence and doctrine influencing international law-making; others deal with the question of diverse national, regional or local legislations relating to a specific branch of law or thematic issue; and even others review the similarities and divergences between various national Constitutions and legal systems. Some scholars look at distinct legal systems coexisting in a same country (i.e. common law and civil law) or different legislations within a federal or decentralized legal structure; and others examine different legal traditions, schools of thought, means of legal reasoning, modes of practice, forms of interpretation, or legal linguistics.

This article will map and analyze the main trends international law, comparative law and transnational perspectives have followed when approaching the issue of abortion, the way in which the legal argumentation and interpretation is constructed, the approximations and criteria legal scholars, legislators and courts have adopted in selecting the points of comparison, as well as the varied subjects and rights that enter under scrutiny when coping with this matter. It will do so under the central referential framework of international human rights law and doctrine.

In carrying out this examination, not only the work of international, transnational and comparative legal academics and practitioners is considered, but also an exercise of comparison itself is performed in an attempt to deepen the understanding of the way in which different international and national jurisdictions have dealt with this sensitive topic.

## ***II. International and transnational legal analysis on abortion***

### ***1. Sources, contents and methodologies***

The legal academic writing on issues concerning abortion is generally carried out through constitutional analysis, that is, the critical study of the normative provisions of a set of Constitutions (or legislations of a fundamental order), on the one hand, or of the judicial decisions of Supreme Courts, Constitutional Courts or other similar bodies with competences of constitutional interpretation, on the other; or lastly, a combination of both of these juridical phenomena. This can be done by means of analyzing Supreme Court cases or legislations related to different states within a federal system as in the United States<sup>1</sup>, Mexico<sup>2</sup> or Switzerland<sup>3</sup>, or as is most frequently

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<sup>1</sup> SHAPIRO, Ian (editor, 2007), *Abortion: the Supreme Court decisions, 1965-2007*, Imprint Indianapolis, Hackett Publishing Co., 3rd edition, U.S.A.; and Taub, Nadine (1989), "Time limits of abortion", in *Reproductive Laws for the 1990s*, Sherrill Cohen and Nadine Taub (editors), Human Press, Clifton, New Jersey, USA, pp. 129-153.

<sup>2</sup> *La Suprema Corte de Justicia y el derecho a la vida*, Instituto Nacional de Ciencias Penales, México, 2002.

<sup>3</sup> ESER, Albin and Hans-Georg Koch (2005), *Abortion and the Law. From International Comparison to Legal Policy*, T.M.C. Asser Press, The Hague, The Netherlands, p. 278.

done, through comparing different national constitutions or legislations<sup>4</sup>, as well as judicial decisions of diverse Constitutional Courts, in the form of constitutional comparative law<sup>5</sup>.

As early as 1976, a few years after the benchmark decision of *Roe v. Wade* by the U.S.A. Supreme Court, there was work being done on assembling different constitutional sentences concerning the issue of abortion, although only a literal reproduction (and translation) was provided of such resolutions, without a legal analysis as to their meanings or possible implications and therefore only useful for informative purposes<sup>6</sup>.

International and comparative law has been carried out not only by legal scholars, but also by courts themselves, legislators, non-governmental organizations and international human rights bodies. Specifically regarding abortion, some tribunals have employed aversive constitutionalism, that is, contrasting another court's decision with its argumentation regarding the same subject, but only to point out the first's incorrect or inadequate legal approach and reaffirm its own position, for example, as the English High Court has done with respect to the US Supreme Court's resolutions on abortion<sup>7</sup>.

## **2. Abortion and International Human Rights Law**

In the case of the analysis international human rights law has articulated on the issue of abortion, we do not face a strict comparison in the sense of confronting two legal phenomena which stand at the same hierarchical level, but rather a similar exercise of scrutiny between a national, regional or local law, legal practice or judicial decision, and its compatibility (or not) with an international set of norms as a point of reference.

This type of comparison allows the development of conclusions concerning the validity or not of such laws and decisions with the international legal human rights framework. The sources for this type of analysis are the recommendations, conclusions, and jurisprudence of the monitoring bodies established precisely by international human rights treaties, within the United Nations (UN) system, like the Committee of Human Rights (who reviews the International Covenant on Civil and Political Rights)<sup>8</sup>, the Committee for the Elimination of Discrimination Against Women (who reviews the International Covenant for the Elimination of Discrimination Against Women, CEDAW), and the Committee of Economic, Social and Cultural Rights

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<sup>4</sup> See, e.g. VALDÉS DÍAZ, Caridad del Carmen (2012), "Del derecho a la vida y los derechos sexuales y reproductivos, ¿configuración armónica o lucha de contrarios?", en *Rev. IUS, Revista del Instituto de Ciencias Jurídicas de Puebla*, México, vol.6, n.29, pp.216-239.

<sup>5</sup> See, e.g. RUBIO MARÍN (2014), "Abortion in Portugal: New Trends in European Constitutionalism", in Cook, Rebecca J. Joanna N. Erdman, and Bernard M. Dicken (editors), *Abortion Law in Transnational Perspective: Cases and Controversies*, University of Pennsylvania Press, pp. 36-55. This book has also been published in Spanish as COOK, Rebecca J. Joanna N. Erdman y Bernard M. Dickens, (editores, 2016), *El aborto en el derecho transnacional: casos y controversias*, Fondo de Cultura Económica/Centro de Investigación y Docencia Económicas, México.

<sup>6</sup> *L'aborto nelle sentenze delle Corte Costituzionale. USA, Austria, Francia e Repubblica Federale Tedesca*, Quaderni della Giurisprudenza Costituzionale, Dott. A. Giuffrè Editore, Milano, 1976.

<sup>7</sup> See the explanation of aversive constitutionalism in the analysis of *R. (on the application of Axon) v. Secretary of State for Health and Another* [2006], E.W.H.C., 37 (Admin.), in ERDMAN, Joanna N., "Moral Authority in English and American Abortion Law", in SUSAN H. Williams (editor, 2009), *Constituting Equality: Gender Equality and Comparative Constitutional Law*, Cambridge University Press, Cambridge, pp. 107-109.

<sup>8</sup> See, e.g., UN Human Rights Committee, Communication 1153/2003, *K.L. v. Perú*, Decision of 17 November 2005, U.N. Doc. CCPR/C/85/D/1153/2003; Communication N°1608/2007, *L.M.R. v. Argentina*, Decision of 28 April 2011, U.N. Doc. CCPR/C/101/D/1608/2007.

(who reviews the International Covenant on such rights)<sup>9</sup>, which through their supervision of countries from all regions of the world and legal traditions, have attained a very wide geographic, thematic and subjective scope that equips them with rich hermeneutic tools and parameters for distinctions.

For instance, in a case concerning the Americas, *L.C. v. Peru*, of 2011, the CEDAW Committee recommended that as part of structural reparations for violence against women, legislation is required to provide women and girls who become pregnant as a consequence of rape, with the choice of safe and legal abortion<sup>10</sup>, although broader measures could have determined as a State violation the non-facilitation of abortions for women in such cases or even forcing them to give birth to babies product of rape.

Such a stance was later adopted in a recent position adopted by CEDAW Committee regarding the European context. In its 2017 Concluding Observations on Ireland, the CEDAW Committee determined that Ireland's specific provisions on abortion (only allowing it in cases of risk to the life of the mother) violate women's human rights, and decided that legalisation of abortion in Ireland was required in order to conform to the legally binding standards of the Convention<sup>11</sup>.

Precisely a contemporary example (produced at the time of writing this text) of the impact of international human rights law on national jurisdictions and legal procedures<sup>12</sup>, can be found in the current discussion in Ireland on the constitutional amendment to legalise abortion, based in part on the international pressure resulting from jurisprudence of UN human rights bodies requiring Ireland to do so<sup>13</sup>. Indeed, on January 29, 2018, the Irish government announced that it will hold a referendum on the provision of the Constitution which limits abortion access. In terms of comparative law, Ireland has one of the most restrictive abortion law regimes in the world, only allowing abortion in cases of risk to a woman's life (thus barring it for victims of rape, schoolgirls, or women faced with fatal fetal diagnoses –except in cases where there was risk to such woman or girl's life). The proposed amendments include decriminalization of abortion (to reduce the chilling and stigmatic effect that criminal law has on provision of health care to all pregnant women), robust, evidence-based sex education, free access to contraception, equal access to high standards of obstetric care regardless of geography or socio-economic status, and

<sup>9</sup> UN CESCR, General Comment No. 20: 'Non-discrimination in economic, social and cultural rights' (2009), para. 20 (concluding the notion of the prohibited ground "sex" has evolved considerably to cover not only physiological characteristics but also the social construction of gender stereotypes, prejudices and expected roles, which have created obstacles to the equal fulfilment of economic, social and cultural rights), and para. 35 (recognizing "other status" as including differential treatment on grounds of economic and social situation, which can lead to unequal access to health care services).

<sup>10</sup> See UN CEDAW Committee, *L.C. v. Peru*, Communication No. 22/2009, U.N. Doc. CEDAW/C/50/D/22/2009, 2011.

<sup>11</sup> See UN CEDAW Committee, 'Concluding observations on the combined sixth and seventh periodic reports of Ireland', UN Doc. CEDAW/C/IRL/CO/6-7, 9 March 2017.

<sup>12</sup> For this type of analysis, see, e.g. Rebouché, Rachel (2016), 'Abortion Rights as Human Rights', in Social and Legal Studies, Special Issue: 'Regulating Abortion: Dissensus and the Politics of Rights', Guest Editors: Siobhán Mullally and Claire Murray, Vol. 25, Issue 6, December 2016, pp. 765–782, on the impact of international human rights law on the development of rights related to abortion, particularly on the relationship between human rights discourses and abortion access in jurisdictions with under-resourced health systems.

<sup>13</sup> In addition to the CEDAW case referred to above, see the previous case by the UN Human Rights Committee, *Amanda Jane Mellet v. Ireland*, CCPR/C/116/D/2324/2013, Views adopted on 31 March, 2016, published 17 November, 2016 (concluding a violation by the State regarding its legislation prohibiting abortion in circumstances of fatal fetal impairments and the consequent imperative need to travel abroad to get an abortion practiced due to such cause).

improvements to counselling and support facilities surrounding pregnancy and abortion. The government in announcing the referendum also announced that the Minister for Health will prepare legislation on abortion access, which includes a 12-week 'on request' period for abortion access<sup>14</sup>.

Thus, UN human rights mechanisms provide the comparativist studying the issue of abortion (and other related topics, such as conscientious objection by medical personnel) with the advantage of permitting her or him a review of a broad range of national jurisdictions, as varied, for example, as Peru, Colombia, Morocco, Sudan, Senegal, Poland, Luxembourg, Croatia and Italy.

The same contrasting exercise has been carried out by scholars, but looking at the regional human rights levels; or also through an examination of different national court decisions or parliamentary legislations, as in the case of Canada, Germany, Hungary, the United Kingdom and the US, always with the perspective of analyzing these legal expressions from the standpoint of international human rights law<sup>15</sup>.

In terms of human rights law at the regional level, in the European context the European Court of Human Rights (ECtHR) has constructed jurisprudence on the subject of abortion contrasting the national law and practice relevant to each case, with existing international human rights standards<sup>16</sup>. Of the several cases addressed, let us provide an illustrative example. In 2003 the ECtHR decided *Tysiak v. Poland*, which dealt with the case of a Polish woman who was gravely visually impaired and was denied an abortion under the argument of the protection of her physical health (even though legally she was entitled to practice the abortion). As a result, when giving birth, she became nearly blind and was officially declared to be significantly disabled. She needed continuous care and assistance in her everyday life. She had also been informed that her condition was not reversible. The loss of her eyesight produced a devastating effect on her capability to take care of her children and also on her facility to work, all of which the Court concluded resulted in a State responsibility for the violation of Mrs. Tysiak's rights<sup>17</sup>.

Also related to international human rights law, in incorporating the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the English High Court has ruled issues on abortion using the terminology of rights and adopting a human rights-based approach. As has been pointed out, "[t]his rights-based framing is significant from a comparative constitutional perspective. By resolving the case through a set of competing rights and state interests, the Court adopted a conventional constitutional framing of abortion"<sup>18</sup>.

Similarly, in the Inter-American system of human rights, as well as in some other regional bodies, abortion has been addressed through legislation, judicial decisions and research on the subject<sup>19</sup>.

The position of the Inter-American Commission and the Inter-American Court of Human Rights regarding abortion have been reviewed from the standpoint of the rights involved in

<sup>14</sup> See, e.g. ReproHealthLaw blog (2018), 'Irish Government announces referendum on abortion' by Christina Zampas, Reproductive Health Law Fellow at Reprohealthlaw, 31 January 2018.

<sup>15</sup> See COOK, Rebecca J. and DICKENS, Bernard (1999), "Human Rights and Abortion Laws", in *International Journal of Gynecology and Obstetrics*, vol. 65, pp. 81-87.

<sup>16</sup> For an integral analysis, see PUPPINCK, Grégor (2013), "Abortion and the European Convention on Human Rights", in *Irish Journal of Legal Studies*, Vol 3 (2).

<sup>17</sup> For further details, see ECtHR, *Case of Tysiak v. Poland* (Application no. 5410/03), JUDGMENT, 20 March 2007.

<sup>18</sup> ERDMAN, Joanna N. *op. cit.* p. 108.

<sup>19</sup> Regarding decisions related to abortion by African regional courts, see *Mehar Singh Bansel v. R.*, (1959) E.A.L.R. 813 (East African Court of Appeal, and *R. v. Edgal, Idike and Ojugwu*, (1938) W.A.C.A. 133 (West African Court

this issue, and the advancements and setbacks in the region in the last twenty years. From the paradigmatic case by the Inter-American Commission on Human Rights of *Paulina Ramírez v. México*—on the denial by State health and law enforcement official to perform a legally permitted abortion to a girl, who was pregnant as a result from rape—, to the case of *Artavia Murillo et al v. Costa Rica*, in 2012, concerning the Inter-American Court’s conclusion that an absolute ban on in vitro fertilization constituted gender discrimination as a result of stereotypes regarding fertility-, the Inter-American system of human rights has developed and reaffirmed its position regarding an integral approach to abortion that considers respect for women and prenatal life, access to abortion rights, as well as a clearer and more precise definition of the State’s human rights obligations on this issue<sup>20</sup>.

A similar approach of legal analysis using the international human rights framework was performed for example, in the examination done by the Supreme Court of Colombia in 2006 in its resolution regarding the validity of the decriminalization of abortion in specific conditions, viewing this legal amendment from a human rights perspective<sup>21</sup>. In this case, the Court used international human rights law to interpret and give content to women’s rights, and not only incorporate, but also politically legitimate, these international norms within their national system through the theory of the ‘block of constitutionality’ considered valid by the maximum judicial body in charge of constitutional interpretation in Colombia.

Because of these developments, this is a very interesting moment to carry out comparative work with respect to Latin American countries, some of which are currently adopting legislation on this matter, which is usually not included in comparative legal studies<sup>22</sup>. Recent scholarly work edited by Rebecca Cook, Joanna N. Erdman and Bernard Dickens in *Abortion Law in Transnational Perspective: Cases and Controversies*, is an exception to this. Indeed, the editors recognize that while the United States and Western Europe may have been the vanguard of abortion law reform in the latter half of the twentieth century, Central and South America are

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of Appeal).

<sup>20</sup> For further analysis, see Méndez, Juan (2000), “Sistema Interamericano de protección de los derechos humanos y los derechos de la niñez”, Documento del Instituto Interamericano de Derechos Humanos, Costa Rica, in [http://www.iidh.ed.cr/comunidades/ombudsnet/docs/doctrina/doc\\_iidh\\_proteccion/sininez.html](http://www.iidh.ed.cr/comunidades/ombudsnet/docs/doctrina/doc_iidh_proteccion/sininez.html); and for cases by the Inter-American Commission on Human Rights, see *Paulina Ramírez v. México*, Case 161-02, Report No. 21/07, Inter-Am. C.H.R. (2007); *White and Potter v. United States (Baby Boy)*, Case 2141, Report No. 3/81, OAS/Ser.L/V/II.54, doc. 9 rev. Inter-Am. C.H.R. (1981); *X and XX v. Colombia*, MC-270/09, Inter-Am. C.H.R. (2011); and on the position by the Inter-American Court of Human Rights, see, e.g., *ARTAVIA Murillo et al v. Costa Rica*, 2012, paras. 294-301.

<sup>21</sup> See UNDURRAGA, Verónica and COOK, Rebecca J. “Constitutional Incorporation of International and Comparative Human Rights Law: The Colombian Constitutional Court Decision C-355/2006”, in WILLIAMS Susan H. (editor), *Constituting Equality: Gender Equality and Comparative Constitutional Law*, op. cit., pp. 215-231.

<sup>22</sup> There are few studies, for instance, on the case of Nicaragua, where criminal legislation was adopted in 2007 to establish a total ban on abortion, including in situations where continued pregnancy risks the life or health of the woman or girl, and when the pregnancy is the result of rape. The high level of teenage pregnancies in Nicaragua means that many of those affected by the revised laws are girls under 18. See Amnesty International, *The total abortion ban in Nicaragua: Women’s lives and health endangered, medical professionals criminalized*, AMR 43/001/2009, 27 July 2009. Regarding the effects of this ban and the indifference of the Supreme Court in relation to the legal appeals presented before it, see HUMAN RIGHTS WATCH (2017), ‘Nicaragua: Abortion Ban Threatens Health and Lives. Women, Providers Describe Fear and Stigma’, 31 July 2017, available at <https://www.hrw.org/news/2017/07/31/nicaragua-abortion-ban-threatens-health-and-lives>

proving to be laboratories of thought and innovation in the twenty-first century, as are particular countries in Africa and Asia<sup>23</sup>.

The legal development in these regions also crosses two main issues important for international and comparative law, as well as for political science, namely, transition or consolidation of democracy in these countries and how the abortion issue has been or may be subjected to referendum or similar forms of majoritarian expression or decision; and the way the debate and the law is developing in federal systems, in which -as has happened in other federal states such as the US-, one federal entity adopts a liberal regulation on abortion, whereas others maintain its illegality or even strengthen the restrictions, including through criminal sanctions. This represents a very relevant challenge in terms of legal harmonization and the right to equality before the law, as well as concerning the compliance of the State as a whole with international human rights obligations<sup>24</sup>.

Regarding federal States, analysis has also been carried out in the arena of the relationship between abortion and human rights within the US context -viewed both from international human rights law in general and from the moral and legal theory behind it-, and questioning on that basis the proper role of the US Supreme Court in adjudicating controversies in the issue of state laws banning abortion (as well as in the issues of death penalty and policies denying the benefit of law to same-sex unions)<sup>25</sup>.

Research proves that other comparative law studies are in the middle between a review from the perspective of international human rights law and the study of national jurisdictions in a more traditional comparative manner. In such instances, a limited number of national situations on abortion are legally assessed, in comparison, for example, with abortion in the legal

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<sup>23</sup> See the "Introduction" by the editors in Cook, Rebecca J. Joanna N. Erdman, and Bernard M. Dicken (editors, 2014), *Abortion Law in Transnational Perspective: Cases and Controversies*, University of Pennsylvania Press, USA, pp. 1-10.

<sup>24</sup> In the case of Mexico, for example, in 2007 the Mexico City legislature decriminalized abortion within the first 12 weeks after conception, and as a backlash, many states (out of the 32 federal entities -31 states and Mexico City-) approved harsher reforms to their local constitutions. On the basis of such reforms, the right to life is protected since the moment of conception and from that moment on, the conceived is considered a person for all legal effects, thereby making it impossible for those local legislatures to carry out similar criminal reforms liberalizing abortion law as in Mexico City (although in some cases, the local constitution itself provides for exceptions of criminal responsibility when it comes to the general permitted conditions of abortion: resulting from rape or incest, risk of fetal abnormality or risk to the mother's life). Many of these reforms at the state levels were triggered as a hostile response to the Mexico City liberalization, which has raised great concern for women's rights among various sectors and NGOs. However, some of these reforms have been repealed through decisions of the Supreme Court (at the federal level); see a timeline of the judicial cases on the issue before the Mexican Supreme Court at Grupo de Información en Reproducción Elegida (GIRE) <https://gire.org.mx/consultations/linea-del-tiempo/>; and chart of the legal position on abortion in the 32 federative entities in Mexico (updated to 2017) at 'Clínicas de Aborto en México DF: Todo lo que debes saber sobre el aborto legal', available at <https://www.clinicas-aborto.com.mx/legislacion/leyes-del-aborto-en-cada-estado-de-mexico/>

<sup>25</sup> PERRY, Michael, J. (2009), *Constitutional Rights, Moral Controversy and the Supreme Court*, Cambridge University Press, USA.

order of the European Union and under the European Convention on Human Rights and Fundamental Freedoms, and international law more generally<sup>26</sup>.

In this context, the importance of international human rights law and comparative constitutionalism in the academic teaching of sexual and reproductive rights has also been highlighted as a fundamental tool for adequate and integrated legal analysis concerning these rights<sup>27</sup>.

### 3. *Traditional comparative law and abortion*

Turning to the more usual form of comparative law, there are cases of analysis regarding abortion that have contrasted the legal positions adopted in two countries only, for example, the United Kingdom and the United States of America (UK and USA), both of common law tradition. Apart from the examination of the legislative differences and similarities between the two, historically also the political climate surrounding the legislative reforms has been studied, as well as the groups expressing support and opposition and the parliamentary process leading to the adoption of the 1967 British Abortion Act, on the one hand, and the legislative changes in some US states and the relevant Supreme Court decisions, on the other<sup>28</sup>.

Others have dealt with a wider contrast of the legislations and judicial decisions of “major constitutional courts in the Western world”, both from common and civil law traditions, looking at the history of the emergence of the abortion issue (teachings of the Roman Catholic Church, the social changes leading up to the abortion debate, abortion as a political issue and the legalization of abortion); the fundamental values involved in the abortion decision, phrased in terms of rights; the constitutional protection of such values; and the explanation for the differences in constitutional interpretation (extending from the constitutional texts themselves and their legal history, to the judiciary versus the legislature in a democratic regime, the jurisdictional and political context of abortion decisions and the social philosophies informing those decisions)<sup>29</sup>. Large studies of wide-ranging groups of countries have looked at abortion and divorce law, with

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<sup>26</sup> See, e.g., KINGSTON, James and Anthony Whelan (1997), *Abortion and the law*, Round Hall Sweet and Maxwell, USA.

<sup>27</sup> Davis, Martha F. and Bethany Withers (2009), “Reproductive Rights in the Legal Academy: A New Role for Transnational Law”, Working Paper No. 33-2009, Northeastern University School of Law, May 2009; and EUROPEAN PARLIAMENT (2016), *Sexual and reproductive health and rights*, European Union, Brussels, a study by the Women’s Rights and Gender Equality Committee (FEMM) of the European Parliament to explore and update knowledge on the provision of sexual education and reproductive rights in the European Union. See also more generally AMNESTY INTERNATIONAL, “¿Es la educación sexual un derecho humano?”, Red de Escuelas por los Derechos Humanos, Amnistía Internacional, España, disponible en <https://redescuelas.es.amnesty.org/materiales-para-el-profesorado/mi-cuerpo-mis-derechos/es-la-educacion-sexual-un-derecho-humano/> For practical examples on how this is already being carried out in different universities, see, e.g. the LLM course on ‘Sexual and Reproductive Rights in Africa’ (including the modules of ‘International Human Rights law relevant to sexual and reproductive rights in Africa’, and ‘Using human rights principles to realise sexual and reproductive health rights claims’), in the 2017 curriculum of the University of Pretoria, South Africa, at <http://www.chr.up.ac.za/index.php/curriculum.html>; or the course on ‘Reproductive Rights and Justice’ included in 2016 at Harvard Law School, at <http://hls.harvard.edu/academics/curriculum/catalog/default.aspx?o=69222>.

<sup>28</sup> FRANCOME, Colin (1984), *Abortion Freedom: a Worldwide Movement*, London, Boston, Allen & Unwin, at pp. 78-127.

<sup>29</sup> NIJSTEN, Machteld (1990), *Abortion and Constitutional Law. A Comparative European-American Study*, European University Institute, Florence.

special attention to the related topics of the legal treatment of dependency and public support for maternity and child-raising<sup>30</sup>.

Another range of studies with regards to abortion has reviewed the differences between legislations of a great scope of countries and their implications for abortion in practice. In this category, probably one of the most broad-ranging comparative analysis is done in *Abortion and the Law. From International Comparison to Legal Policy*, which firstly offers a comparative legal cross-section, containing a recount of the central framework on abortion (social and historical developments, including different religious visions on the issue), a detailed comparison of legal regulations (in a wide series of matters, such as basic regulatory models –from total prohibition, to indication, time-limit, or combined models–, consent, procedural prerequisites, special role of the physician, and permissible and impermissible termination of pregnancy, among others) and statistics on the termination of pregnancy (including the relationship to the respective regulatory model and counseling system, crime statistics, and judicial statistics and trends in prosecution); and secondly presents some concluding reflections from a legal policy perspective<sup>31</sup>.

The methodology applied in said study is interesting because the analysis was built upon: 1) an international survey intending to cover countries from all continents, based on country or regional reports prepared by internal and external legal scholars (from the Max Planck Institute and other institutions, respectively), that cover a total of 64 countries; 2) a number of empirical-criminological implementation studies; and 3) an assessment of legal policy. The book concludes with a series of guiding principles for regulation and policy and a “third way” paradigm, the “discourse model”, by which the decision to terminate the pregnancy must rest on “the pregnant woman: autonomous yet bound by an obligatory weighing-up process”<sup>32</sup>. In this sense, the analysis is not only transnational and comparative as such, rather –on the basis of the extensive material examined–, it is inductive in character and holistic in its scope insofar as it draws conclusions and offers concrete proposals and orientative guidelines for legal policy in general.

#### **4. Interdisciplinarity as relevant for international and transnational law on abortion**

Although marginally important for the study of international and comparative law, it is also relevant to mention some approaches to the topic of abortion that are not strictly legal, but have a relationship to legal regulation and practice, such as those regarding criminal aspects which, for example, deal with abortion from an econometric point of view and analyze the assertions of the possible links between the legalization of abortion and the decreasing of crime<sup>33</sup>.

Other studies analyze the issue from a more socio-economic perspective. For example, one review compares the statistics of maternal deaths due to unsafe abortions in contrast with other causes of death (such as the reported deaths by terrorist attacks), to illustrate that despite the large number of deaths of women owing to the first reason, there has been scarce political attention paid to the matter from this outlook. It considers the evidence of 82 countries covering

<sup>30</sup> See, e.g. GLENDON, Mary Ann (1987), *Abortion and Divorce in Western Law*, Harvard University Press.

<sup>31</sup> ESER, Albin and Hans-Georg Koch (2005), *Abortion and the Law. From International Comparison to Legal Policy*, T.M.C. Asser Press, The Hague, The Netherlands.

<sup>32</sup> *Ibid.* For the methodology employed, see Preface, pp. VI-IX. For the resulting ten maxims and guiding principles proposed by the authors as orientation for their suggested regulation and legal policy, see pp. 296-299. As to the proposed concept of autonomy of the pregnant woman, see pp. 267-270.

<sup>33</sup> JOYCE, Theodore, J. (2009), *Abortion and Crime: a Review*, Working Paper 15098, NBER Working Paper Series, National Bureau of Economic Research, Cambridge, MA, USA, June 2009, available at <http://www.nber.org/papers/w15098>

over 90 per cent of the women in the world, and shows that unsafe abortion is largely a problem of poverty and, through many case studies and examples, presents the argument for profound changes in policy and education worldwide<sup>34</sup>. The factual data of the situation in each country, as well as the policy proposals presented by the report, of course bear direct implications for the making and implementation of the law.

Some analyses have carried out comparative studies of legal phenomena, but from perspectives other than the legal one, for example, a contrasting review between Court decisions of different states within the US, but from the viewpoint of moral and political philosophy<sup>35</sup>.

In any case, the common denominator of international and comparative legal studies on abortion is that they deal with the involved subjects from the lens of their greater or lesser relevance for different laws or legal systems, as well as the rights that are recognized and guaranteed in favor of said subjects.

### ***III. Subjects and rights in international and transnational legal analysis on abortion***

#### ***1. Subjects involved***

With respect to the subjects that are analyzed by legal scholarship on the issue of abortion, it can be observed that the general tendency is to consider the pregnant woman, the fetus, the State, the medical profession and in some cases, the husband of the pregnant woman or father of the unborn child.

However, a special mention should be made of the case of abortions with respect to young women, which generally do not enjoy an equal stand as adult women or women with the legal personality to carry out certain actions without parental involvement. For example, let us think of cases concerning very young women (also denominated girl children<sup>36</sup>), usually under 16, in the UK and the USA. As has been noted in a comparative legal analysis, the shared characteristic between English and American abortion law is the consideration of moral authority. Both legal systems and their constitutional courts, however, *seek to protect a state interest in prenatal life by entrusting decision-making about young women's abortion care to third parties: the family, the court, and the medical profession. Neither constitutional approach vests moral authority in young women themselves*<sup>37</sup>. To this respect, Joanna N. Erdman argues that young women (or girl children) are *denied moral authority on a feminine-gendered assumption of their under-*

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<sup>34</sup> FRANCOME, Colin and Marcel Vekemans (2007), *Abortion-A Worldwide Perspective*, International Planned Parenthood Federation, Middlesex University Press.

<sup>35</sup> ORENTLICHER, David (2001), *Matters of Life and Death: Making Moral Theory Work in Medical Ethics and the Law*, Princeton University Press, Princeton and Oxford.

<sup>36</sup> ALTHOUGH Joanna N. Erdman uses the term "young women", the term "girl child" may more applicable, at least in some cases, considering the UN Convention on the Rights of the Child that states: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier". Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990, art. 1.

<sup>37</sup> ERDMAN, Joanna N., *op. cit.* p. 109.

*developed capacity to engage in moral decision-making. The family, the court, and the medical profession are granted moral authority by virtue of their masculine-gendered identity*<sup>38</sup>.

In this sense, it is interesting to note that in relation to the 2007 reforms in Mexico City on decriminalization of abortion during the first 12 weeks after conception, which were challenged as unconstitutional by two federal institutions before the Mexican Supreme Court, the Court affirmed that there is no constitutional obligation for the local legislator to establish a special regime when she who wishes to carry out an abortion is under the age of full legal personality<sup>39</sup>, and thus eliminated any particular restrictions or limitations for the girl child to exercise her right of access to an abortion during the mentioned time limit.

Another subject who deserves a specific mention and who usually appears marginally regulated is the husband of the pregnant woman or father of the unborn. In the case of abortion, the role of the man as a subject of rights or obligations is mentioned in different conditions. Rarely, a concurrent right of the husband or father of the child for the termination of the pregnancy is required, as in Japan or Turkey, which evidently may affect the woman's autonomy in a negative way. Another set of countries expressly rejects this full or concurrent right of the father in the decision-making process, such as the UK, Italy, Austria, India, South Africa, Australia and the USA<sup>40</sup>.

However, another legal possibility is the practice of a hearing, whereby instead of granting the husband or father a concurrent decision-making right that is equal to that of the pregnant woman, the husband or father should be allowed to participate in the counseling and evaluation process, as long as the pregnant woman agrees, with the objective of either permitting his interests to be taken into account or involve him in the development of a feasible alternative to termination, as in the Federal Republic of Germany or the Netherlands (in which not only the man, but also close relatives, are allowed to participate in the counseling process, in addition to professional counselors), and to a lesser extent, the opportunity for the husband or the father to 'express himself' as foreseen in the legislations of Italy, Finland France and Hungary<sup>41</sup>.

## **2. Rights involved**

In the issue of the legal positions on abortion, there are various interests that fall under legal and judicial scrutiny, that of prenatal or unborn life, that of the preservation of women's lives, their health, and that of the interests of the family, which in some cases is composed by existing dependant children.

Although there are varied interests at stake, the debate and regulation on rights related to abortion seems to be divided in the consideration of fundamental, constitutional or human rights, on one level, and on another, rights with regards to abortion, but that are derived from, or dependent of, other fundamental rights.

In studying the legal practice, it can be observed that in the case of the US, for example, the judicial stand of the Supreme Court on abortion is framed in terms of the constitutional rights to personal liberty and privacy of women. In the case of the UK, the right of women to access

<sup>38</sup> *Ibid.* pp. 127-128.

<sup>39</sup> *Acción de inconstitucionalidad 146/2007 y su acumulada 147/2007. Promoventes: Comisión Nacional de los Derechos Humanos y Procuraduría General de la República*, Suprema Corte de Justicia de la Nación, México, 2008, p. 190, in [http://www.equidad.scjn.gob.mx/spip.php?page=ficha\\_biblioteca&id\\_article=111](http://www.equidad.scjn.gob.mx/spip.php?page=ficha_biblioteca&id_article=111)

<sup>40</sup> ESER, Albin and Hans-Georg Koch, *op. cit.* pp. 93-94.

<sup>41</sup> *Ibid.*, pp. 94-95.

a safe medical abortion, through an indication-based model that requires having gone through medical consultation, is thus attached to the broader fundamental right to health care as judged by medical authority<sup>42</sup>.

In this sense, there are different ways in which Constitutional Courts address the issue of conflicting, and sometimes mutually exclusive rights, interests, or even Constitutional rights as embodying 'objective value decisions', as the German Federal Constitutional Court held in the seventies. These courts have given different weight and moral and social value to certain rights, be it the right to dignity of the unborn, as in unified Germany (1993, following the 1975 decision), or the right to life of the unborn, as in Poland (1997), or on the other side, the right to privacy of women, as has been mentioned in the case of the US (1973 and 1992), and the right to liberty and freedom of conscience or religion of women, as in Canada (1988 and 1989)<sup>43</sup>.

What does seem to be the shared view in many of the analyzed cases is that there is no clear Constitutional basis to regulate abortion through criminal means, even in the cases in which a very strong emphasis is placed on the State's duty to protect the unborn and there is an open rejection of a voluntaristic approach by which the legislator would have a right to decide when life begins and ends according to his or her will (as in the Polish case).

This raises questions that go beyond judicial control, given that Constitutional courts are not responsible for addressing the need of adopting a holistic position that covers education, promotion of full and informed consent on contraceptives, and if the case may be, on abortion and pregnancy. It is not clear which of all the judicial decisions facilitates more the construction of new social visions of gender, by which men, society in general, and the law, respect and value women's autonomy and rights, the fetus is considered worthy of some type of protection, and at the same time the exercise of decisions that involve men and women are recognized in a differentiated way, but as a shared responsibility.

Of course, the debate on rights is not isolated, but rather relates closely to the subject that is being prioritized in the legal argumentation, be it the woman or the fetus (considered legally either as a person or as a patient), or alternatively, the subject of the unit of "woman-fetus", or the symbiotic "duality in unity", not looked at as counterparts<sup>44</sup>. This crosscutting relationship between subjects and rights is also set against the scenario of the type of criminal, social, demographic and gender policy the State itself wishes to promote and implement.

In any case, the valid interest of the State in prenatal life, as has been mentioned, can be promoted and protected (at least up until a certain time limit, usually that of viability), through other non-coercive means different than criminal law, and in many cases, more effective. What does seem clear from international and comparative law is that the State is unable to carry out any action or exercise any right relating to prenatal life if it is not deferring its capacities to another subject, be it the woman herself, and in many cases, a scheme which combines the wish of the woman with the consultative involvement of the medical profession, as is proposed by the

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<sup>42</sup> ERDMAN, Joanna N. *op. cit.* p. 114.

<sup>43</sup> For a detailed account of these cases and decisions, see DORSEN, Norman, *et. al.* (2003), *Excerpts from Comparative Constitutionalism: cases and materials*, American Casebook Series, Thomson West, pp. 526-551. See also Eser, Albin and Hans-George Koch, *op. cit.* pp. 34-40.

<sup>44</sup> See GOLDSTEIN, Robert D. (1988), *Mother-Love and Abortion: A Legal Interpretation*, University of California Press, U.S.A. pp. x, 1-2; Eser, Albin and Hans-George Koch, *op. cit.* p. 296.

indication model, or the combined indication/time-limit model, which together represent the regulatory systems followed by most countries<sup>45</sup>.

### **3. Some reflections and questions on subjects, rights and social values**

The fact that men are not so often regulated as relevant legal subjects in the case of abortion, or in some cases, their intervention is explicitly prohibited, is understandable because it is the women's rights movement that has greatly opened the way for academic reflection on the issue of abortion. In this context, the objective has been precisely to attain State recognition and guarantee of women's rights with regard to decisions on their own sexuality and reproduction, and to empower women –many of them living under violence, fear, and socio-economic deprivation- in relation to men and the broader social environment, with the appropriate legal and institutional protections.

As such, men have seldom been explored in international and comparative law on abortion. Further study could thus be conducted towards the specific ethical dimensions and responsibilities of the husband, the father, and men at large, that could (or could not) also be taken into account by the law (as they have in some of the legal systems mentioned above). In terms of justice and gender equality, apart from the ultimate respect of the woman's autonomy, does the husband/father have any obligations or rights in relation to the woman, the unborn child, the State or the medical profession, when dealing with abortion?<sup>46</sup>

The women rights movement has questioned, among other aspects, the traditional role placed or imposed on women concerning their sole family and social functions as caretakers. Given that one of the aims of reevaluating these social constructions has been to foster and guarantee equality in relationships between women and men, it can be pointed out that the man should play a much more active function in relation to the pregnancy, birth and raising of the child, if the woman decides to have it. And this decision, although autonomous, is based on contextual factors, such as the legal status of abortion in the place of residence of the woman (although studies have demonstrated that this has minor influence), her socio-economic situation, her access to health services, her age, her religious or conscientious beliefs, her personal, educational or professional conditions, and the circumstances surrounding her relationship with the man with whom she got pregnant -which may also have a bearing on the economic situation the potential mother is facing<sup>47</sup>.

In this context, just as a hypothesis for further exploration, in the case of countries that do not regulate any intervention of the husband or father, could it be possible that the model of absolute individual autonomy of women, in searching to attain the legitimate and necessary goal of women's exercise of sexual and reproductive rights, has also indirectly helped to perpe-

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<sup>45</sup> ESER, Albin and Hans-George Koch, *op. cit.*, pp. 46-62, and descriptive charts of countries' legal regulations on pp. 63-68.

<sup>46</sup> In this respect, there has been an observation that the legal framework related to health in Mexico does not properly take into account the reproductive rights of women or of men, given that it is based on a strategy of population control and poverty reduction and not on an examination of the State's position regarding the scope of the right to life, as well as the rights of people concerning sexual and reproductive liberty; see Commentary of Luz Nuñez Camacho, in Laveaga, Gerardo and Lujambio, Alberto (coordinators, 2007), *El Derecho Penal a juicio. Diccionario crítico*, Instituto Nacional de Ciencias Penales, Mexico, p. 22.

<sup>47</sup> On the jurisprudence of the European Court of Human Rights that touches on the father's (and grandparents') rights in relation to abortion/the unborn, see PUPPINCK, Grégor, "Abortion and the European Convention on Human Rights", *op. cit.*

tuates a certain social idea that men are totally detached from the pregnancy and the pregnant woman, and that their actions concerning sexuality have no consequences, or at least none that are taken into account by the law? As referred to above, the element of the hearing of the husband's or father's opinion in the decision-making process of abortion has been considered by some national legal instruments. Still, this is a delicate matter that, if and when carried out, has to be done so with sufficient guarantees for the women's autonomy and with adequate legal and institutional safeguards to protect women's right to live free from violence (including that possibly stemming from the woman's partner/husband, or other male relatives).

Indeed, under international human rights law, national systems that included the husband/father's consultative and/or decision-making rights in the abortion decision, would have to consider the significant risks for women's sexual and reproductive autonomy, hard-gained and in many places not yet conquered and much needed. It does seem valid, though, to recall that law may help to reflect and often to shape social values, and therefore, it appears to be worth analyzing, through a gendered lens, if it can play a role in redefining the conducts expected of men in relation to abortion and reproductive issues in general, without losing the rights of women as the central agents of the decision on abortion.

This question could also bring us to the reflection of the conducts expected of women, today or in the future, in relation to abortion in developed societies with significant evolution of women's rights and independence, or in the case of individual women with meaningful personal and economic autonomy. Are poor women in underdeveloped or developing societies socially and ethically expected to exercise their rights in the same way as the former women? Does this have any relationship to the way in which rights, social security and health care are legally structured?

Another issue that may arise with the growing legal approval of same-sex unions or marriages is that of abortion of one of the members of a lesbian couple. Even though presumably the same rules would apply for the pregnant woman, if we analyze the issue from a gendered perspective, we may possibly find the wife or non-pregnant partner to be a victim of prejudice and historical and social exclusion regarding her own autonomy and decision-making processes. Would she require the same legal treatment than the husband or father of the unborn?

This article suggests that such questions pave the road for complementing future research and scholarly international, transnational and comparative legal work on the subject.

Following this train of thought, it is possible that concepts that have been developed by legal scholars (and to some extent reflected in certain legislations), such as that of autonomy of the woman through a weighing-up process (as opposed to disconnected autonomy)<sup>48</sup>, involved perspective (rather than detached perspective)<sup>49</sup>, or that of a dyadic relationship of woman-fetus and mother-infant (which rejects absolute individualism and separateness)<sup>50</sup>, may contribute to surpass the classical debate of fetal rights versus maternal autonomy in unmovable terms, as well as to help re-construct the social role of men as responsible subjects in issues concerning sexuality, sexual contraception, and reproduction, as well as caretakers, not only of a child her-

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<sup>48</sup> ESER, Albin and Hans-Georg Koch, *op. cit.* pp. 94-95.

<sup>49</sup> ERDMAN, Joanna N., *op. cit.* p. 126.

<sup>50</sup> See GOLDSTEIN, Robert D. (1988), *Mother-Love and Abortion: A Legal Interpretation*, University of California Press, U.S.A. especially pp. 47-89 and on this last page, a passing reference to men, and pp. 96-100.

self, but as present and supportive actors in women's decisions relating to their motherhood as a whole and ongoing process.

At forty years after the first legal considerations on abortion, these are some proposed lines of study that may be further explored and contribute to shed some light on the review of this still very controversial and challenging issue.

#### **IV. Conclusions**

In comparing what international, transnational and comparative legal scholars do and how they do it, it is possible to draw some concluding observations.

In general, the debate on the subjects and rights involved in abortion is not presented in absolute terms. Rather, there is an attempt to make visible all the implications concerned, as well as the particular circumstances of each setting and the way they impact rights in a differentiated way.

In order to do this, few studies remain in the strictly formal terrain; the persons carrying out comparative law usually rely on other disciplines and sources of information and analysis to better understand and interpret the issues under observation. These range from highlighting the ethical dimension of the questions, to their historical context, the socio-economic facts surrounding them, the medical and psychological aspects, and the empirical-criminological data related to the analyzed legal situation.

International Human Rights Law has become in the last twenty years a growing and referential source of transnational and comparative law on abortion. Because of increasing transnational legal analysis, rapidly flowing global production and exchange of information, and more developed and far-reaching social research, there is a tendency to compare a larger number of countries at a time, and not limit the examination to two or three national jurisdictions, as it was in the eighties and nineties of the last century.

This also has to do with the fact that there are more and more States that have reformed or are reforming their legislations to modify their position on abortion. Therefore, the selection process and follow-up of the objects of comparison have become more complex, but at the same time deeper and more significant in the conclusions they may generate.

In this context, constitutional and legal amendments of the last years in Latin America, as well as judicial decisions and scholarly work, particularly in feminist analysis, have converted this region in an interesting and highly relevant laboratory for international and comparative academic research and legal exchange. Similar reflections can be made regarding recent reforms in the Asian and African landscapes.

There are a wide variety of actors carrying out comparative legal analysis on abortion, from legal scholars, to courts, legislatures, international organizations and NGOs, in a different way than what occurs with a highly technical legal domain, as could be financial or investment law, for example. This important level of social participation also includes individual women or groups of women as some of the main agenda-setters.

Some international and comparative perspectives adopt a more original and creative stance than others, by looking at specific laws, judicial decisions, or legal policies through a gendered lens, or proposing different or reviewed modes of analysis and conceptual approaches, such as

those mentioned in relation to autonomy and integrated models for dealing with the issue of abortion.

Recent happenings, such as the referendum on the ‘constitutionalisation’ of abortion which will be held in Ireland in the coming weeks of 2018, demonstrate transformational shifts in long held positions on the issue and open a ground-breaking moment for international and comparative studies on the issue. As analyzed, the referendum will center on the provision of the Constitution which limits abortion access, and it was prompted in great part by the positions and jurisprudence of UN and European human rights bodies. As a result, the proposed amendments include decriminalization of abortion, evidence-based sex education, free access to contraception, equal access to high standards of obstetric care regardless of geography or socio-economic status, and improvements to counselling and support facilities surrounding pregnancy and abortion.

There is thus a contemporary trend, historically increasing, to utilize International Human Rights Law and the scholarship and doctrine developed thereby, as a central reference to frame the transnational, comparative and national approaches to abortion. Indeed, the reviewed legislative, judicial and practical positions adopted on abortion reflect a growing application of international human rights through giving due consideration to the broader political processes and the universal value of human dignity which serve as their foundation.

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