

ABORTION: ELEMENTS FOR DEBATE

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Abstract

This paper identifies four elements that should be part of an abortion debate aimed at generating dialogue between the participants, rather than creating rigid positions that prevent understanding the complexity of this issue. These elements are the importance of the body, pregnancy as a unique phenomenon of social interaction, value of the *nasciturus* and consideration of social factors related to structures of oppression.

Key words: *abortion, structures of oppression, nasciturus, pregnancy, body.*

I. INTRODUCTION

During the last decades, abortion has been much discussed in political philosophy, law and social sciences in general.

The debate is still open, mainly because countries are still discussing which one is the proper legal system to regulate this issue. A good example of this is the case of Chile, where therapeutic abortion was regulated in the Health Code between 1931 and 1989. During said year, which coincided with the end of the military dictatorship, the latter invalidated the regulation, banning abortion except in those cases where an interruption was justified under the doctrine of double effect.¹ It was not until 2015 and 2017 that the National Congress discussed a bill concerning decriminalization of voluntary interruption of pregnancy on three grounds (life endangerment, non-viable fetus and rape), which was approved in late 2017.² Another relevant example is the case of Ireland, where a referendum was held in 2018, in which the option to legalize the interruption of pregnancy won. Furthermore, these days, they are discussing a bill proposing a 12-week limit. This long history of debates on abortion is interesting, since it gives us a more complex picture of this issue, which started as a discussion on the legal status of the *nasciturus*, or on women's control of their bodies, all of which gave rise to new elements for debate.

Considering this historical discussion, and having been part of the team of

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1 Bascuñán (2004).

2 Ley N° 21.030, published on September 23rd, 2017, which decriminalized voluntary interruption of pregnancy on three grounds.

professionals that worked on the bill on decriminalization of voluntary interruption of pregnancy on three grounds in Chile (hereinafter, the bill on three grounds), I have identified four elements that I believe should be part of a discussion on abortion, since they provide a comprehensive insight into one of the most challenging debates in social sciences. Taking these four elements into account when discussing abortion helps to end the heinous radicalization that often characterizes this debate, in which certain counterparts are not only incapable of properly interpreting the arguments of those having a different opinion, but they usually scorn and radicalize them, preventing productive, respectful and rational dialogue. Thus, I believe that, taken together, these four elements help overcome several barriers hindering understanding of an issue which must necessarily be discussed.

First, the analysis focuses on the importance of the human body and protection thereof, both from the perspective of political philosophy and from a legal approach, an aspect that is certainly part of the discussion on abortion.

The analysis then focuses on the unique and complex phenomenon of pregnancy, where the development and subsequent subsistence of the *nasciturus* clearly depends on the permanent connection with a woman. No human social relationship shares the characteristics of a pregnancy. Thus, ignoring this factor keeps us from understanding the actual dimension of abortion. Pregnancy and its specific characteristics are key to differentiate the bioethical debate on abortion from others such as cloning or assisted reproduction techniques.

Thirdly, we analyze the phenomenon of pregnancy and the importance of the *nasciturus*. In this sense, regardless of personal religious beliefs on this matter, this paper supports the idea that the *nasciturus* is certainly important. Foundations of political philosophy and rulings of Constitutional Courts on this matter have been examined for this purpose.

Fourthly, this paper suggests that social factors potentially affecting a woman's decision to abort must be taken into account. In this regard, a specific example of social phenomena that often directly affect a woman's decision to abort will be examined.

I believe that linking the aforementioned factors as key elements for the discussion on abortion is more beneficial than just having a comprehensive overview of this phenomenon. For example, abortion is often discussed by focusing only on the *nasciturus*, its ontological reality, its legal status or on the legal concept of "person". By analyzing the specific characteristics of pregnancy as a unique social phenomenon, we include women in the discussion, bringing them out of the shadows and evaluating their role in this discussion. Women must be the center of this debate. Otherwise, it makes no sense at all. Thus, understanding the importance of the *nasciturus* will lead us to understand that the decision to abort is not just a woman's decision concerning her body. It is a complex decision that often involves a crucial life experience that she will carry for life.

Including the impact of social factors into this discussion is essential, since they allow us to understand that the debate on abortion cannot be out of step with reality. It cannot be a mere discussion on the value of human life versus an ideal woman's

development potential. On the contrary, this discussion affects real women, of all social conditions and from all countries; women with different social realities, but who often face similar challenges. Violence, limited access to jobs, undertaking household chores and caring for children and elders, is -unfortunately and painfully- a reality for many women. In this sense, by analyzing the structures of oppression, we are able to link the discussion to a tangible reality. Likewise, social factors relevant to the discussion on abortion prove that this is not a discussion concerning “private” life and inherent to a particular pregnant woman only. This is a discussion on the way we relate with each other and build a country’s political, social and cultural foundations, and thus, all of us must take action in this matter. Due to the social factors at stake, abortion is often an expression of a society that isolates and ignores women and children. In other words, as long as we keep thinking of this discussion as a merely private matter, we will not be capable of asking ourselves what led a woman to abort, and we will be incapable of eliminating social factors that often influence said decision.

II. IMPORTANCE AND PROTECTION OF THE BODY

The importance of the human body is essential to the debate on abortion. When discussing this matter, we often hear catchphrases like “my body is my own, and I can do whatever I want with it”.

The importance and protection of the human body is not only relevant to the discussion on abortion, but it is a key aspect of several political theories. Without due respect and protection of the human body, we would hardly be able to organize socially and politically under a system ensuring minimum conditions of respect for human beings.

An example of this is John Rawls’s *Theory of Justice*, a text that is relevant to contemporary political philosophy.

In his book titled *A Theory of Justice*, Rawls proposes a basic social structure consisting in a well-ordered society. This scheme is based on the notion of impartial justice. It is an analytical model, according to which people hypothetically choose principles of justice that must govern key social institutions under the veil of ignorance. This veil of ignorance implies that people ignore significant information that could negatively affect a cooperation scheme for choosing the principles of justice. For example, people are ignorant of what social position they occupy and of their fortune in the distribution of natural assets and abilities, such as strength and intelligence. Principles of justice are chosen under an original position, to which rational, equal persons aimed at promoting their interests agree. This are only some of the factors proposed by Rawls for this hypothetic exercise to be effective.³

Rawls explains that under the aforementioned circumstances, people with limited information on their particular real conditions would chose the following two principles of justice:

3 RAWLS (2006).

First: Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

Second: Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of all, (b) attached to offices and positions open to all.⁴

Concerning the discussion on abortion, we are interested in the first principle, which prevails in Rawls's lexical priority, i.e., the first principle will always be applied before the second principle.

Rawls claims that the first principle consists of basic liberties, such as political liberty, freedom of speech, freedom of thought and personal freedom, which would include freedom from psychological oppression, physical assault and dismemberment (which should be understood as integrity of the person).

This proves that for Rawls, the human body was of such significance that it was protected under the first principle of justice. In this regard, and concerning Rawls's lexical priority, human physical integrity is important, and thus, it cannot be sacrificed, i.e., it cannot be violated in pursuit of greater economic or social benefits.

Martha Nussbaum is another political philosopher for whom the body is important. In her opinion, any social organization interested in providing people with quality of life should take the body into account.

The way this author treats the body is interesting for two reasons. Nussbaum claims that no social contract theory includes people with serious and rare physical and mental disabilities within the group of people called to choose the basic political principles. Hence, people with the aforementioned disabilities are simply not part of society, other citizens do not treat them as equals and they have no say, since they are beyond the classical notion of contractualism, in which the existence of mutual benefits and reciprocity between those signing a social contract is a basic moral concept. Nussbaum explains that this is the problem of Rawls's notion of a well-ordered society, since in his book "Political Liberalism", said author explicitly states that the original position assumes that physical and mental capabilities are normal, thus accentuating the problem concerning the exclusion of people with disabilities.⁵

Nussbaum's first approach to the body -which acknowledges its diversity and dismisses the classical notion that idealizes human capabilities- is relevant to this paper, since it provides the perspective of political philosophy, reminding us that there are several conceptions of the human body, all of which should be analyzed in the context of social justice. More specifically, it allows including in the debate not only populations as diverse as people with disabilities, but also the natural interaction and dependence between women's bodies and the *nasciturus* during pregnancy.

4 RAWLS (2006), pp. 67-68.

5 NUSSBAUM (2012).

Not only does Nussbaum stress the importance of including people with disabilities in those theories aimed at defining principles of justice for a political society, but she also proposes an alternative approach to issues of basic justice. This approach is closely linked to Rawls's principles of justice, discussed above. Nussbaum herself believes that her own work is an extension of Rawls' theory, but with certain differences that allow solving problems that have no place in Rawls's well-ordered society. This alternative is the "human capabilities" approach, which makes a comparative assessment of people's quality of life, including social justice issues as well. This capabilities approach is based on human dignity; treating persons as ends in themselves and not as means, thus following the Kantian conception of dignity. To achieve this, we must identify those essential elements of human life (involving basic rights) which concern not only the relationship between income and wealth, but other fundamental aspects such as life aspirations and race and gender relations. In this regard, Nussbaum's theory addresses two critical elements. On the one hand, her theory dismisses those theories that assess people's satisfaction in terms of average utility, since they are a shortsighted approach of people's quality of life. The author is also emphatic in pointing out that an assessment of people's expectations or preferences must take into account the existence of "adaptive preferences", which are personal preferences often determined or influenced by unjust social contexts. Hence, assessing satisfaction thereof can lead to status quo. In short, and according to the author "resources are not a good indicator of welfare, since human beings have different resource requirements, and they have different abilities to convert resources into functioning".⁶

In light of the foregoing, Nussbaum proposed a list of 10 capabilities essential for a dignified human life. The three first capabilities listed by the author are life, bodily health, bodily integrity (the latter understood as the possibility to go from one place to another, be protected from violent attacks -including sexual assault and domestic violence- and having the opportunity for sexual satisfaction and reproductive freedom of choice). In this regard, Nussbaum's human capabilities approach would be consistent with Rawls's well-ordered society, since a social organization aimed at promoting human development must necessarily take into account the importance of protecting bodily integrity thereof, regardless of whether they are part of the basic liberties included in the first principle of justice or of the capabilities that enhance their quality of life.

The way political philosophy treats bodily protection is linked to public discussions on this matter. It reminds me of what happened outside the Chilean Constitutional Court when the constitutionality of the bill that regulated the interruption of pregnancy on three grounds, mentioned above, was analyzed. On the one hand, there was this group of women praying around an empty cradle located over a Chilean flag, whereas another group of young women lifted their shirts, with slogans such as "don't mess with my body" written on their bodies. The works of Rawls and Nussbaum prove that these young women's demands for the right over their bodies concern not only the

6 NUSSBAUM (2012), p. 87.

discussion on abortion, but they are a core principle of any contemporary democratic constitutional order (even in classical literature, since it also relates to Locke's law of nature, due to the way in which it values human life and health).

As will be discussed below, despite the relevance and due protection of women's bodies, reducing the discussion on abortion to this single factor limits the discussion too narrowly. This, since continuing or ending a pregnancy not only concerns the use of women's bodies, but this conflict also involves a spiritual dimension on said woman's life. This conflict concerns the manner in which she wants to live her life, project it and include this conflict in it. Said dimension concerns a life plan that involves her values, beliefs and principles. Limiting the discussion on abortion to the body makes it impossible to illustrate said complexity.

For political philosophy, the importance of human body is based on the Law. For example, article 5 of the American Convention on Human Rights, also known as Pact of San José, provides the right to personal integrity, stating, among other things, that:

Every person has the right to have his or her physical, mental, and moral integrity respected.

No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person (...).

There is a common recognition of the right to integrity of the person, and thus, it is repeated in many constitutions in different countries.

There are many rulings of the Inter-American Court of Human Rights on the protection of physical integrity as an expression of the right to integrity of the person. This article will analyze a case from late 2016, known as *I.V. vs. Bolivia*. This decision is relevant to this paper because it concerns violation of human rights in a case of forced sterilization. Thus, it relates to pregnancy, as the affected woman shall no longer be able to get pregnant.

In 2000, the woman (hereinafter identified as I.V.) was admitted in a public hospital in Bolivia, where she had tubal ligation surgery without her consent, which led to permanent, non-consensual and irrevocable loss of her reproductive function. The woman was admitted in said hospital for a 38-week pregnancy, and, failing to realize that she had undergone C-section (which he should have realized), the treating physician decided to perform a new C-section, where he also performed tubal ligation. The affected woman said that she did not become aware of this situation until the resident doctor visited her a few days after surgery. I.V. claimed that this non-consensual surgery violated her bodily and mental integrity, her right to a violence-free, discrimination, access to information, private and family life.

There are two interesting elements in this ruling. The first concerns the protection of the human body itself, and the second concerns the connection between the body and the principle of autonomy.

As for the first element, the affected woman argued that her integrity had been violated in three dimensions: bodily, mental and moral integrity. This, since not only did she lose her reproductive function, but said surgery made her feel violated and traumatized for no longer being “a whole woman”. Furthermore, she claimed that said action was a form of torture and cruel and degrading treatment.

The Court explained that historically, the protection against torture concerned interrogations aimed at finding out if someone had committed a crime, but said forms of control and domain are increasingly taking over other contexts, including the current situation of health facilities. It also stated that the personal characteristics of the person subject to these forms of control and ill-treatment must be taken into account to evaluate whether or not the integrity of the person was violated. In this case, the Court concluded that forced sterilization is a cruel, inhuman and degrading treatment, since the woman’s reproductive organs were affected, and she also suffered severe psychological injury, among others.

As for the second element, the ruling’s position on the role of consent was very interesting, since the State claims that the woman gave her consent, given that she allegedly verbally agreed to this unexpected surgery performed after the C-section, which she outright denied, claiming that she only became aware of the situation a few days after surgery.

The Court said that article 11 of the Convention protects human dignity, one of the most fundamental values of humans as rational beings. This involves recognition of the principle of personal autonomy, “on the understanding that all individuals must be treated as equals, since they are ends in themselves, according to their intentions, will and personal life decisions”.⁷ According to the Court, this autonomy or recognition of human dignity enables self-determination, which implies being able to freely choose the options and circumstances that give meaning to their existence, and it is defined according to their convictions and personal choices. In this regard, the Court also states that respect for personal autonomy prohibits state actions aimed at using human beings as instruments, i.e., turning them into means for purposes other than their choices on their personal life, body and comprehensive development of their personality, within the limits set by the Convention. In this sense, protection of the body, or bodily integrity, is not only relevant to protect the physical integrity thereof, it is also important because the decisions on our own bodies are an expression of the principle of autonomy, which allows us orienting our lives according to our most deep convictions and values.⁸

In short, regarding the protection of human dignity, the principle of autonomy and the protection of privacy, the Court concluded that performing tubal ligation on I.V. without providing her with full, proper and comprehensible information for her to freely express her consent, was a violation of her rights, since said surgery

7 *I.V. v. Bolivia* (2016), p. 149.

8 This idea once again relates to the Kantian notion of dignity as an exercise of autonomy, present in Nussbaum’s work, mentioned above.

“affected her body, led to a permanent loss of her reproductive capacity and violated her right to make her own choices regarding her sexual and reproductive health”.⁹

The role of consent is relevant to the discussion on abortion. In public debate, many people question women’s power to decide on their pregnancy. In specific cases (like those recently regulated in Chile), women are allegedly in shock due to the complicated circumstances under which the pregnancy develops (life endangerment, non-viable fetus and rape), and hence, they cannot make a decision on this matter. On the other hand, upon a time-limit system that permits unrestricted abortion, women are allegedly under intense social pressure, which also breaks their will.

Both positions share an important point, since they claim that women are often under pressure from their environment to abort (this will be discussed below, when analyzing the relevance of social factors). The truth is, however, that said factors do not break women’s will or their decision-making capacity. To emphasize this point, we must bear in mind the argument in the ruling of the Chilean Constitutional Court, when analyzing the bill on three grounds. When discussing non-viable fetus, the Court gave its opinion on women’s decision-making power, stating that,

Women are to decide whether to continue with the pregnancy, regardless of the pathology of the embryo or fetus (which will necessarily lead to its death), or to end with this situation and interrupt the pregnancy. Why should the judge, husband or doctor decide instead of women? While women are pregnant, they are capable of entering into contracts and agreements, they are accountable to the law, they can keep on working or studying, be a candidate and vote. For all these events, they are not deemed as having this temporary interdiction.¹⁰

Having analyzed the Works of Rawls and Nussbaum, and the regulation and rulings of the Inter-American Court of Human Rights, we cannot but conclude that the protection of human body is not only an interest exclusive to the discussion on abortion, but it is also a basic interest on which our social and political order is based. Hence, bearing in mind that women’s bodies and the use thereof are important is essential to face this debate. In this regard, women’s historic demand for the right to control their own bodies is essential to the discussion on abortion. The following elements in this paper on notions for a debate on abortion evidence that the protection of the body is in fact important, but it alone is not sufficient to understand the full dimension of this discussion.

III. PREGNANCY AS A UNIQUE SOCIAL PHENOMENON

Analyzing pregnancy in itself, as a unique phenomenon where two human beings interact, where there is a dependence and connection unlike any other relationship existing in a particular society, is also essential.

9 *I.V. v. Bolivia* (2016), p. 235.

10 *TC Rol.Nº 3729-17* (2017), para 99°.

When analyzing the peculiarities of pregnancy, the classical article of Judith Jarvis Thomson titled “A Defense of Abortion” necessarily comes into mind. In an original way, this author tries to describe pregnancy to those who have not experienced it, for them to dimension its effects. This immediately rules out the idea that giving the fetus the legal status of person should imply an absolute ban on abortion.

This author invites us to do a mental exercise consisting in imagining that one day, you wake up in our bed connected to a famous unconscious violinist. He has been found to have kidney ailment, and the Society of Music Lovers has investigated all medical alternatives to keep him alive, and it has come to the conclusion that he will only remain alive if attached to you, since you alone have the right blood type to help him. Therefore, they have kidnapped you and he was plugged into your body so that your kidneys help him. The director of the hospital is sorry that nobody asked your opinion before the violinist was plugged into you, but that this is an irreversible situation, since the musician would die if unattached. Hence, both persons must remain attached in order for the violinist to survive. The director also tells you it is only for nine months, after which the violinist will be able to survive independently.¹¹

The author wonders whether forcing that person to remain attached to the violinist for 9 months is morally right, regardless of the fact that the person is aware that the effects after those 9 months will be positive, since the violinist will be able to survive independently. Thomson suggests that the lack of consent of the person to which the violinist was attached is not decisive for this debate, or else only rape-related pregnancies would fall within this example. Said dependency can even be evaluated in the case of life endangerment. In this second case, she wonders what would happen if a woman gets pregnant and is later diagnosed with a heart condition that puts her life at risk. Would you deny her the possibility of ending said connection just because she previously consented to it? In order for her mental exercise to be clearer, she suggests that we once again imagine that we are attached to the violinist, but now, not only must he be attached to us for nine months in order for him to survive: we ourselves could die in a month if we remain attached. Thompson’s description of pregnancy is realistic, since the fetus is fully dependent on the mother, and thus, ending said attachment would necessarily lead to the death of the *nasciturus*. In this regard, it is a clear example of a unique and indisputable fact (no other form of social interaction between two human beings involves such a total and absolute level of dependency).

Several rulings of Constitutional Courts have been based on Thompson’s theory of pregnancy when regulating abortion. For example, according to the abovementioned ruling of the Chilean Constitutional Court “pregnancy is a temporary condition, inherent to women, often voluntary, of a highly personal nature, involving women’s bodies. Pregnancy involves women’s bodily and mental integrity, since, among other things, the fetus occupies their bodies and leads to physical and physiological transformations”.¹²

11 THOMSON (1971).

12 *TC Rol.N° 3729-17* (2017).

However, although I agree with the author's description of pregnancy, I believe it is not sufficient, since it only describes it as an interaction of bodies (which in fact happens), failing to refer to the emotional aspect involved in it.

Pregnancy is not just the fetus's total attachment to and dependence on a woman's body. Pregnancies can also involve dreams, maternal feelings, feelings of love and grief and the idea of a different life. These aspects can even be part of a discussion on abortion. Hence, describing pregnancy as the dependence on women's bodies is not sufficient to describe this phenomenon.

An analysis on pregnancy must necessarily involve the emotional aspects of said process. Otherwise, it will be unable to understand the vital complexity of a woman's decision to abort.

In Chile, the discussion on voluntary interruption of pregnancy concerned critical life situations, through which we became familiar with the life experiences of women that had been in those situations regulated by law (life endangerment, non-viable fetus and rape). These women often referred to the emotional dimension of pregnancy.¹³

This complex emotional interaction with the *nasciturus* is often noticed by the medical teams that make such a diagnosis. According to a female doctor specializing in clinical genetics and cytogenetics

prenatal diagnosis of congenital malformations is often followed by mourning for the loss of the expected or desired son or daughter, and it involves a change in circumstances for which women and couples are usually not prepared.¹⁴

These cases urge us to broaden our view of the violinist case. Concerning non-viable fetus, the attachment to the violinist is transformed, since we will probably face situations in which pregnancy was wanted, and the crisis relating to it concerns the existence of a diagnosis that the *nasciturus* will not survive outside the womb. Thus, the violinist is not an alien, it is not just an attached body. For that woman, the violinist could represent the baby she looks forward to meeting and sharing her life

13 In public hearings held during the legislative debate, women that aborted on the grounds of non-viable fetus gave their testimony. There was this woman who read to the Senators part of a diary that she kept during her pregnancy, including the notes that she wrote after she received the diagnosis that her fetus was not viable:

We are sad. I don't think there's anything sadder than this. Well I guess this is what miscarriage feels like, but know I am not even sure about that. All I can say is that this will probably or most certainly end up in a miscarriage, or the baby will die shortly after birth.

And our illusion of becoming parents goes down the drain. At least for a while. And all those arrangements we are doing, and the little book of memories, and the song we wrote with Vicho, and my prenatal yoga, my knitting, all of it comes crashing down on me (Valdivieso). I would like to thank Francisca González and Ignacia Valdivieso for their brave testimonies in the discussion held during 2016 in Chile's Senate Health Commission. Available at Boletín N° 9.895.11, (https://www.camara.cl/pley/pley_detalle.aspx?prmID=10315&prmBoletin=9895-11).

14 ASTETE ROMÁN (2016).

with, and the diagnosis not only destroys said illusion, it also forces the woman to go over said attachment. This emotional dimension of the process must be considered as potentially inherent to a pregnancy, it cannot be excluded from the analysis.

In this regard, the information available on sexual abuse in Chile also urges us to transform the violinist. In cases of rape, the lack of initial consent (mentioned in Thomson's paper) is not the only relevant factor, but also the fact that said lack of consent follows prior and probably repeated sexual abuse within the household, usually by the father, grandfather, brother, partner, or family friend, against a woman, who—in light of the age statistics of victims of sexual assault resulting in rape—is actually a child.

During the processing of the Chilean law on decriminalization of abortion, Doctor Andrea Huneus explained that about 66% of the victims of rape resulting in pregnancy are under age, and 92% of rapes are committed by family members or acquaintances.¹⁵ Regarding Thompson's example, this means that the attachment to the violinist is not just any attachment. It follows a long history of sexual violence. In this scenario, the girl victim of abuse is not quite aware of it. The violinist is no longer a third party, a foreign body that has been attached to her (as we already explained, in Thomson's work, the violinist represents the fetus), but the visible face of this abuse, often involving a family relationship in which the rapist is the father or brother of the pregnant girl.

These cases, which are mere examples, prove that pregnancy necessarily involves bodily interaction and dependency, but it can also include an emotional dimension that turns it into a unique phenomenon. Hence, both elements must be present when analyzing this particular interaction.

IV. IMPORTANCE OF THE *NASCITURUS*

So far, we have analyzed the importance of the protection of the human body, and the unique social phenomenon of pregnancy.

Below, we will examine arguments that illustrate the importance of the *nasciturus* and the protection it deserves. Unlike the two previous arguments, this one poses three specific challenges.

First, its particularity is that religious arguments that question regulations allowing abortion on certain grounds are often based on it. In public debate, these religious arguments lead to radical positions that prevent dialogue between people with different opinions.

Secondly, and regardless of those religious arguments on the importance of the *nasciturus*, this point poses an additional challenge: it is used as sufficient grounds to ban abortion, no matter the circumstances under which the pregnancy occurred. Although it clearly and undoubtedly recognizes the importance of the *nasciturus*, and

15 HUNEUS (2016).

the need to protect it, this does not mean that abortion must necessarily be banned, regardless of the circumstances under which the pregnancy occurred. As professor Verónica Undurraga explained on several occasions when analyzing the discussion on this matter in Germany and Portugal, the protection of the *nasciturus* is an issue that must be promoted with the participation of women, not against them. A total ban would imply the existence of a system that punishes women who abort, regardless of their circumstances, i.e., a design built against women.¹⁶

Thirdly, this issue often leads to the discussion on the origin of a new human being, which often implies a debate involving law, political philosophy and biology.

After discussing the challenges involved in this third point in our analysis, we will present the moral and constitutional arguments for the importance of the *nasciturus* and for the right to legal protection thereof. We believe refraining from religious arguments is important, since it promotes further dialogue on this matter. This, since sharing the same notions does not imply that we must share the same religion, and hence, different arguments can potentially be accepted in a modern society based on the recognition of multiple belief and life plans. To hold such a discussion, we will intentionally use papers that do not consider the *nasciturus* as a person, since for those that do give the *nasciturus* such a status, the dignity thereof must certainly be recognized and protected.

Although in his book titled “Life’s Dominion: An Argument About Abortion, Euthanasia and Individual Freedom”, the American philosopher Ronald Dworkin argues that a fetus is not a person, he still analyzes the value of human life from a moral perspective. This analysis is conducted within the constitutional debate over abortion in the United States. In this particular case, bearing in mind the decision in the *Roe vs. Wade* case, where the Supreme Court of the United States declared that outlawing abortion in the interest of protecting fetal life, during the first two trimesters, was unconstitutional. Dworkin himself highlighted the fact that this decision was given in a country where religion still plays an important role in people’s lives and has great impact in public debate, despite the separation between Church and State. It is also a country where the debate on abortion is a “battle” between pro-life and pro-choice movements. In light of this, Dworkin questions polarized positions on the value of the *nasciturus*, some of which see the *nasciturus* as a moral being, an unborn child from the moment of conception, whereas others see it as a simple set of cells with a genetic code.¹⁷ In this regard, the author argues that human life is sacred, but he makes clear that this argument has no religious implications, but rather relates to life’s intrinsic value. This means that we should not remain indifferent to the fetus’s destiny, and hence, any interruption of pregnancy is a serious moral decision.

Although human life is sacred, Dworkin admits that quality of life is a factor that should not be forgotten, since the value of life does not increase (life extension is not positive per se). The importance of quality of life leads to a new debate on the

16 UNDURRAGA (2013).

17 DWORKIN (1994).

elements that make life valuable. On the one hand, some people believe human life is sacred due to its natural elements. According to this position, the biological aspect of life would be relevant. On the other hand, some believe that it is sacred due to human beings' contribution. In their opinion, life is only sacred and valuable if there has been an investment in elements such as education, care, etc. Dworkin claims that this debate is truly important, and that it is especially connected to spiritual aspects of life. Thus, the State should limit itself to promoting the debate, letting people decide if the sanctity of life depends on natural or human factors, a decision that will be based on personal conscience and convictions.¹⁸

Dworkin's theory of the value of life and his argument that we are not indifferent to the fetus's destiny shows us that recognizing the importance of the *nasciturus* is relevant to the discussion on abortion. However, and although this paper benefits from this argument, we must also bear in mind that this author's position generates undeniable internal tension, since it leads to the question on what the limits to said human factor are, and on whether radicalizing said factor and ignoring all biological elements is possible.

As for constitutional arguments, if we examine several decisions from other countries where the relevant constitutional courts have ruled on regulations permitting abortion (either time-limit regulations or those permitting abortion on certain grounds), all of them have analyzed the status of the *nasciturus* and have raised different arguments for the importance thereof.

The decision of the German Constitutional Court in 1975 is a good example of a ruling that expressly values the life of the *nasciturus*. The German Constitutional Court has issued two rulings on regulations permitting abortion. The first of them was issued when performing an abstract control of rules of a preventive nature. It examined an amendment to the Criminal Code, setting a time-limit system involving mandatory counselling. Said bill was declared unconstitutional due to the terms under which it regulated the issue. Thus, the Bundestag passed a new law, setting a system of broad legal grounds, justifying abortion in case of life-endangerment, or a serious threat to the woman's physical or mental health, including embryopathy and ethic, criminological and social circumstances.¹⁹

This court declared that the constitutional right to life protects the life of the *nasciturus* growing in the womb as an independent legal right. As for the grounds for said protection, it stated that human life is the most important constitutional value, since it is the vital basis for human dignity and the value on which all the other fundamental rights are based. The German Court's arguments show that the *nasciturus* must have a specific relevance in the discussion on this matter, and that we cannot be indifferent to its existence. This is complemented with an evaluation of pregnancy as a phenomenon that may involve a burden that cannot be imposed on women in certain exceptional cases, in which case the obligation to continue the pregnancy would affect the woman's autonomy, thus entailing a bigger burden than the one

18 DWORKIN (1994).

19 BASCUÑÁN (2000), p. 227.

inherent to a pregnancy. This argument was once again raised in 1992, when the Bundestag approved a 12-week time limit system with mandatory counselling as grounds to justify consensual abortion.²⁰ The decision of the Constitutional Court of Spain, of 1985, is also in favor of the importance of the *nasciturus*. In said country, 54 deputies requested that the Constitutional Court declared unconstitutional a bill that regulated a system of legal grounds, according to which abortion was not a crime under the following circumstances: therapeutic abortion, which includes risk to woman's life and health; abortion following rape, and eugenic abortion in those cases where the *nasciturus* has serious physical or mental deficiencies.²¹

The Court dismissed the requirement, thus ratifying that a system of legal grounds was constitutional (years later, the constitutionality of a time-limit system was also confirmed). At that time, it stated that the right to life has a physical and a moral aspect, and that "it is the projection of a more important constitutional value—human life—and it is the essential and core fundamental right, since it is the ontological foundation of all other rights. Furthermore, the constitutional right to human dignity is closely related to the right to life".²² Continuing said argument, it stated that if the Constitution protects life in such a manner, it cannot be left unprotected at a stage where life itself is developing, i.e., during pregnancy. Hence, the Court concluded that the life of the *nasciturus* is the fundamental value of human life, and thus, it is a legal asset protected by the constitution.

As for the decisions of Latin American constitutional courts, we can mention the decision issued in Colombia, in 2006, on a claim seeking that the total ban of abortion in Colombia, and the relevant penalties arising from said prohibition, be declared unconstitutional, since they violated the right to equal treatment and to self-determination, the right to life, to health and to integrity, freedom from cruel, inhuman and degrading treatment, and the obligations under international human rights law. As for human life, the Court stated that the Colombian Constitution provides that it has multiple functions, since human life is a fundamental value and right, and thus, it is protected by the constitution and it is also a fundamental subjective right.²³ As for the constitutional duty to protect the *nasciturus*, the rulings ratified it, but the Court stated that said duty does not arise from the *nasciturus*'s status of person (since it lacks said status), but from the recognition of the value of life. Finally, it stated that this implies that,

the life of the *nasciturus* is an asset protected by the Constitution and hence, the lawmaker is bound to adopt measures to protect it. In fact, our constitutional law does not regulate the interruption of pregnancy as a private matter exclusive to the pregnant woman, and thus inherent to the exercise of her right to freely develop her personality.²⁴

20 BASCUÑÁN (2000), p. 227.

21 See *STC 53/1985*.

22 *STC 53/1985*, para 3°.

23 *TC Colombia C-355/06* (2006).

24 *TC Colombia C-355/06* (2006), para 10.1.

Thus, although the *nasciturus* is not entitled to a subjective right, the Colombian Constitutional Court admits that it has certain value and that it must be protected. Hence, the discussion on abortion is not deemed as women's mere exercise of rights.

This analysis on the importance of the *nasciturus* is important, since it urges us to admit that, although the pregnant woman's position is relevant, and the legal system must hence consider it as an essential factor to regulate abortion, it is not the only key aspect to understand the depth of this discussion: the situation of the *nasciturus* is also important.

These dogmatic and constitutional positions on the importance of the *nasciturus* and on the recognition of its value and legal protection, are based on foreign laws permitting abortion. Hence, all systems have specific elements that confirm the importance of the *nasciturus*, on which this protection is based. For example, in general, the application of legal systems regulating abortion has certain limits, such as setting a time-limit for abortion, which usually ranges from 12 to 14 weeks, and exceptionally, 24 weeks. Setting grounds or motives to interrupt pregnancy are also limits aimed at protecting the *nasciturus*. Grounds are usually regulated in comparative law. Those with a strong presence in Latin America are health and life endangerment, non-viable fetus and rape. Finally, they also include legal institutions such as mandatory counselling.

Thus, upon reviewing several regulations permitting abortion under different legal grounds, we may conclude that all of them have elements evidencing a protection to the *nasciturus* and importance thereof.

V. RELEVANCE OF SOCIAL FACTORS

A final key element that must always be present when discussing abortion is the impact of social factors on the decision whether to continue or interrupt a pregnancy

The debate on abortion is often seen as inherent to people's private lives, and thus, to the pregnant woman. Historically, this way of recognizing women in private life was important at a time where women were totally invisible. From a legal perspective, it is mainly based on the decision in the *Roe vs. Wade* Case in the United States, which constituted a milestone in the discussion on abortion, analyzed above. This decision permits abortion due to the fact that women's reproductive autonomy is part of their private life. Hence, it is protected by the constitutional right to privacy, which, despite not being expressly regulated in the US Constitution, is contained in the first, fourth, fifth, ninth and fourteenth amendments.²⁵

Although we have analyzed women's leading role in this debate, reducing this discussion to a merely private aspect prevents us from fully understanding the complexity of this matter. These motivations are often linked to social structures of oppression. A debate on abortion should focus on said structures. An individualistic approach, based on women's private life, cannot identify and question this social environment, and thus, the status quo and regime of oppression on women continues.

²⁵ *Roe v. Wade* 410 U.S. 113 (1973).

Oppression can be defined in many ways. This paper is based on Iris Marion Young's idea of oppression, who states that oppression is a form of social injustice, consisting in institutional constraints on self-development. Self-development is the process by which a person's abilities are developed and experiences are expressed. In this regard, oppression not only comes from tyrannical forces, but also from limitations set by social, political, cultural and economic structures. Oppression can thus be conscious, when it comes from a deliberate action, or unconscious, when it comes from habits or behaviors we consider normal, which origin or impact on third parties are often questioned. Young explains that oppression has five faces, or manifestations, such as marginalization, violence and cultural imperialism.²⁶

How are structures of oppression and abortion related?

There are many examples of this connection and of how an abortion may be a response to structures of oppression affecting women. For this purpose, we will use a limitation related to what the author calls "cultural imperialism" as an example.

Historically, the relationship between women and professional development has not been easy. Political philosophy has analyzed the fact that, for a long time, women's work was limited to domestic tasks, or to private life, where they were expected to support their partner and family. When women began to work beyond the domestic sphere, people assumed that their characteristics made them eligible for caring for others.²⁷ Regarding distribution of functions, men have always been deemed suitable to perform work requiring intellectual abilities. Culturally, men are deemed as rational, cold, unemotional and disciplined individuals, thus having all characteristics of a professional. Opposite to this, women are considered to be emotional and incapable of distancing themselves from their personal interests. In other words, men allegedly have something that makes them capable of taking more responsibilities and jobs with greater social value. These stereotypes still exist. Hence, modern societies usually expect that women who intend to make a career act as men, imitating the latter's habits and the way they relate with others, forgetting their femininity.²⁸ This discussion is not just a theory, it is a reality in our society. Proof of this stronger presence of men in the professional field is the little or no presence of women in the boards of major companies, politics or in key positions in law firms. It is not that men are better prepared, but rather a manifestation of stereotypes.

According to Iris Marion Young, the fact that women are expected to behave as men to be accepted in the professional world is a form of oppression, which is also a manifestation of cultural imperialism. She explains that to achieve professional success, women are expected to adopt values, manners and experiences of a dominant group (i.e., men).

26 YOUNG (1990). The five faces of oppression identified by Marion Young are exploitation, marginalization, violence, cultural imperialism and powerlessness.

27 YOUNG (2007).

28 YOUNG (1990).

Women can indeed adapt themselves or dissimulate many elements to satisfy this masculine stereotype and get easier access to the professional world, but there is a key aspect that belongs to women only: pregnancy. Pregnancy is a fundamental difference between men and women. Thus, women are deemed as different, which creates tension. Pregnancy can hence limit professional possibilities and constrain women to the domestic sphere. The possibility of an abortion originates here, as an alternative for women, since their professional or economic stability will no longer be at risk.

Addressing this type of oppression is essential. According to the National Institute of Statistics, based on the census of 2017, in 41.6% of Chilean families, women are the head of the household.²⁹ In turn, the Gender Report of UNDP states that the wage gap between men and women is still high. According to it, “women’s wage ranges between a minimum of 73% and a maximum of 97% compared to men’s wages”.³⁰ This allows us to conclude that women’s economic stability is a relevant factor. The economic stability of more than one-third of all Chilean families depends on said income. Hence, for many women, abortion would be a means to ensure economic stability. Furthermore, wage gaps and limited job opportunities do not only take place in the professional field. According to the report of the UNDP, they also take place in other occupations, which proves that women do not have a wide range of job opportunities. Hence, the possibility of losing a job or occupation in a precarious or vulnerable situation carries a higher risk in the case of women.

In short, this example illustrates the fact that the decision to end a pregnancy is often related to social structures and stereotypes that have a particular effect on women. In this regard, abortion is not just personal or private, but rather a reflection of a system of social structures, and of oppression, all of which affect women.

Including social factors into the discussion on abortion has multiple consequences.

First, it leads to consider that the discussion on abortion necessarily takes place in less than ideal conditions, and that society is not perfect, especially when addressing women’s devaluation or underestimation, despite the fact that institutions can indeed improve women’s situation, as we have seen in several gender discussions. Secondly, it supports the idea that pregnancy is not a problem *per se*, there are several circumstances that are problematic for women and thus for pregnancy and motherhood.

Thirdly, social circumstances or structures of oppression should be deemed as relevant to the existence of a legal system that does not punish women that chose to abort. From this perspective, we cannot force women to defy those systems that constrain them and threaten them with jail if they end a pregnancy. In practice, the result of this is that the effects of structures of oppression still affect them. This is where Verónica Undurraga’s opinion, analyzed above, regains relevance: abortion must be prevented with the participation of women, not against them.

29 CENSUS, 2017. Available at <https://resultados.censo2017.cl>.

30 UNDP (2010).

CONCLUSION

The ideas in this paper aim to provide tools to discuss abortion from a comprehensive approach. For this, I identified four elements that are essential for a discussion where the participants' ideas are taken into account, free from prejudice, stereotypes or caricatures, based on mutual respect. Otherwise, opinions are ridiculed and radicalized, thus preventing productive dialogue.

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