Criminalisation under scrutiny: how constitutional courts are changing their narrative by using public health evidence in abortion cases

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Abstract: This article explains how the strategic use of public health evidence, showing that criminalisation of abortion does not result in lower abortion rates, is changing the way judges are confronting constitutional challenges to abortion regulations. The state may have a legitimate interest – and in some legal systems, a duty – to protect prenatal life. Nevertheless, courts are upholding regulations liberalising abortion and declaring criminalisation regimes unconstitutional. This is possible given that lower abortion rates are not achieved through criminalisation, but through preventive policies. In addition, courts uphold liberalisation when the infringement of women’s rights resulting from criminalisation outweighs its purported benefits. This new legal narrative has been developed during the last decades by a series of court decisions in Europe and Latin America, and may prove useful for legal advocacy in some countries in Africa. The narrative combines the use of an analytical framework called the proportionality principle with an interpretation of constitutional rights that draws from gender-sensitive international human rights standards and factual evidence about the effects of criminalisation on women’s lives and health. DOI: 10.1080/26410397.2019.1620552

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Introduction

Efforts to decriminalise abortion in countries with restrictive laws frequently face constitutional challenges in courts. Typically, legal advocates must convince judges that regulations allowing for legal abortions are not against the constitutional provision guaranteeing the right to life. At the same time, advocates affirm the woman’s right to legal abortion on other constitutional grounds, such as the preservation of her own life and health, personal autonomy, privacy, and equality. For too long, the framing of the legal argument as an abstract clash of absolutes between the life of the unborn and the rights of the pregnant woman has been detrimental to women, as illustrated by the examples provided in Box 1. On the one hand, this type of framing does not do justice to the complex reality of abortion, sometimes stigmatising women as individualistic and uncar ing. On the other hand, it presents judges with a false dichotomy that is not only too simplistic, but also misguided. This approach has begun to change, however, and a new narrative is taking shape, with its different elements discernible in a group of European and Latin-American abortion court decisions. This new narrative comes with its own methodological framing, the proportionality principle,1–4 which encourages judges to consider and reflect on evidence and new arguments concerning abortion that have been commonly disregarded in the legal debate. Once these considerations are included and given proper weight in the judicial analysis, the result supports non-criminal approaches to abortion regulations.
The traditional narrative

Box 1: The traditional framing of the legal argument as a clash between the life of the unborn and the rights of the pregnant woman is changing

In 1997, the Colombian Constitutional Court held that a reduced punishment for a woman who committed abortion after being raped was constitutional, but that there could be no exceptions to abortion criminalisation. The Court denied that the criminalisation of abortion in cases of rape was an infringement on the dignity of women, but added that even if it were, such dignity right could never trump over the life of the unborn. After nine years, the same Court decriminalised abortion under three circumstances, including rape.

In 2000, the Supreme Court of Costa Rica held that in vitro fertilisation violated the life provision of the Constitution because many embryos were lost during the procedure. Costa Rica was later condemned by the Inter-American Court of Human Rights for violating the prospective parents’ rights under the Inter-American Convention of Human Rights.

In 2008, the Chilean Constitutional Court blocked the public distribution of emergency contraception. Although the Court recognised that there was no evidence of the abortive nature of emergency contraception, it held that the fertilised egg is a person under the Constitution, and that the right to life of the unborn should be protected even against an uncertain risk. The decision was ignored by the legislator and the drug was distributed. The Court changed its doctrine on the personhood of the unborn, when it ruled on the constitutionality of abortion in 2017.

In its traditional form, it is common that the defence of strict criminalisation for abortion is based on the assertion of the constitutional right to life from the moment of conception. According to this view, considering the embryo a rights holder is deemed to be the only means to ensure the full recognition of its dignity as a human being. For example, Oxford emeritus professor and legal philosopher John Finnis, whose writings are widely cited by conservative Catholic law professors in Latin America, defends the position that, to ensure the fundamental equality and dignity of persons, every human being, including those lacking actual or potential capacities, such as the non-viable foetus, should be deemed inherently a bearer of rights. Similarly, in Chile, law professor Hernán Corral affirms that the only way to avoid arbitrariness in the legal definition of who counts as a person is to recognise legal personhood to all members of the Homo Sapiens species, from the moment of conception.

From this perspective, the woman also has rights under the constitution, but the right to life trumps all other rights, because it has a higher rank or because it is the precondition for the existence of all those rights, since no rights can exist without a holder.

This simple but compelling narrative seems hard to assail at first sight. Even for judges who generally believe that rights are not absolute, it is very difficult not to give priority to the right to life when it collides with other rights or interests, such as the pregnant woman’s autonomy or health. Life does not seem to allow for graduation. The life of the unborn cannot be restricted just a little; the unborn either lives or dies. On the other hand, the woman’s rights (with the exception of her own right to life) allow to be limited in different degrees. A rigid hierarchy of rights tends to make judges think that there is very little accommodation available between the conflicting interests.

However, the fierce defence of unborn life would only be consistent if at the same time it could be shown that criminalisation of abortion results in fewer abortions. This is not the case. There is strong evidence proving that criminalisation of abortion does not lower abortion rates and that it drives women to more dangerous clandestine procedures. Someone who has a real commitment to foetal life and life generally, would not rationally choose an ineffective means of protection, particularly if this means putting women’s lives and health in jeopardy, as criminalisation of abortion does. Unfortunately, things are not that straightforward. Law, and criminal law in particular, has a poor record of attending to the reality of women’s lives, and also to considerations of effectiveness of penalties.

Many theoretical, abstract, and decontextualised discourses enjoy primacy, something that feminist lawyers have to challenge when taking public health evidence and women’s experiences of abortion to courts. One example was seen in the Chilean constitutional debate on abortion which gave little attention to the reality of women’s lives, contrasting with the priority given to hearing public health, sociological and anthropological evidence over purely legal arguments in Brazil. Regarding abortion, resistance to these multiple perspectives, and the insistence on criminalising
abortion in the face of its ineffectiveness, suggests that the underlying rationale against legalisation is not – or at least not only – the protection of the constitutional right to life, but something less articulated and more difficult to grasp. Abortion is a ground fraught with intense emotions and entrenched convictions. A person’s stance on abortion is shaped by upbringing, connected to religious beliefs regarding the role human agency plays in shaping or controlling destiny, and to conceptions on gender relations and the place of women in society. More often than not, a person’s position on abortion is an assertion of identity and a defence of a world view.24 The judiciary is not immune to these factors, and good evidence and sound legal arguments have for a long time faced serious barriers when it comes to making judges reconsider their deeply held views.

However, it is also true that what Latin-American feminists call the “social decriminalisation of abortion” – the process by which society becomes uncomfortable with the idea of sending women to jail and stigmatising them for having an abortion – eventually reaches the judges too. When it does, there is a window of opportunity for advocates, who should be able to present judges with a different legal framework and a narrative that would allow them to issue less dichotomic, more contextualised and balanced decisions. Advocates have seized these opportunities and used the proportionality framework to include empirical evidence in legal arguments for decriminalisation, for example, in Chile,20 Argentina,21 and Brazil.22

The origins of the new narrative

My research has identified the gradual development of a different legal narrative that has made it possible for courts in Europe and Latin America to include evidence-based and balanced reasoning into their abortion decisions.23,24 I believe that advocates in other jurisdictions, including African countries, may find this approach useful and may be inspired to adapt and refine it. After Latin-America and Europe, Africa is the region with the third highest population of Catholics.25 More than 170 million Catholics live in sub-Saharan Africa, where the number of Christians is projected to double between 2010 and 2050.26 Catholic Christianity states that life originates at conception; accordingly, abortion is almost entirely prohibited.27 Catholic religious authorities in Africa have opposed liberalisation of abortion, using the same constitutional arguments based on the right to life of the unborn that Catholic lawyers have used globally.28,29 At a time when morality politics is on the rise in Africa,30 African legal advocates for liberalisation of abortion may consider looking at this new narrative to confront legal strategies that respond to a global conservative religious discourse.

The origin of this new model can be traced to the German Constitutional Court 1975 and 1993 decisions on abortion.31,32 The narrative has been further developed by several courts that have built upon the German and each other’s decisions, including the Spanish,33 Colombian,6 Slovak,34 Portuguese,35 Brazilian,36 and Chilean10 constitutional courts, as well as the Mexican Supreme Court.37 Neither the German court nor any other has made a flawless or even a full application of the proportionality analysis, and their decisions differ on the extent to which they uphold decriminalisation. However, each of them has contributed one or more ideas to building the narrative below.

In contrast to the 1973 Roe v. Wade decision where the US Supreme Court held that the unborn is not a holder of the right to life and so it is not protected under the US Constitution,38 the German Court held that, under the German Federal Constitution, the state has an obligation to protect unborn life as a constitutional value and to do it effectively. For the German Court to hold that life is a constitutional value was enough ground for protection, and did not enter into the tricky question of the personhood of the unborn. The German Court also acknowledged that the law cannot exact excessive sacrifices from pregnant women, without violating their dignity and autonomy. In its first decision, the Court considered that decriminalising abortion during the first weeks of pregnancy would not comply with the duty to protect the value of unborn life, and that only those cases in which continuing with the pregnancy would be “too much to demand” (non-exactable) from women should not be considered crimes. Eighteen years later, in a second decision, the Court held that criminal punishment applicable to women in early pregnancy had not been demonstrated to lower abortion rates and that the state was failing to fulfil its duty to sufficiently protect unborn life. Considering that, the Court said that the legislature could replace criminalisation for more effective means of prevention of abortion, including
counselling, but most importantly, economic and social support for women who choose to have the child.

Four elements present in the German decisions have proved important for the development of the new narrative on abortion. First, the German decisions recognise the constitutional value of prenatal life. This recognition allows people from more religious or communitarian backgrounds to find their beliefs represented by the decision. The fact that the Court talked about the life of the unborn as a constitutional value unexpectedly opened a window for other courts, such as the Spanish, Colombian, Slovak, Portuguese, and Chilean constitutional courts, which began to distinguish between the categories of constitutional rights (only born persons have a right to life) and constitutional values. Most of those courts took a further step, by affirming that the state has a duty not to violate people’s rights that is generally stronger than the duty to protect values, thus in general giving priority to the rights of the pregnant woman over the value of unborn life, at least when the criminalisation of abortion would seriously infringe upon those rights. By recognising the worth of prenatal life, and affirming a constitutional duty to protect it, while at the same time acknowledging the priority of the rights of the woman, judges have found a way out of the all-or-nothing scenario, and have been able to prevent the rise of embittered antagonism in their communities.

Second, the German Court, by introducing the requirement that the duty to protect the unborn is a duty of effective protection, denaturalised the notion that criminal law is effective per se, and advanced the idea that courts may accept or think of means to protect prenatal life other than criminalising women. The Mexican Supreme Court, for example, boldly affirmed that unless the Constitution or human rights treaties explicitly require criminalisation of some behaviour, the legislature has the freedom to choose the means by which it will comply with constitutional duties to protect. More important, the language of effectiveness has helped to introduce talk in court about evidence on abortion incidence, causes of abortion, and the real consequences of criminalisation. The Brazilian Constitutional Court, for example, affirmed in one case that criminalising abortion during the first stage of pregnancy is unconstitutional because it is dubious that criminalisation is an adequate means to protect the life of the unborn, as it does not have a relevant impact on the number of abortions taking place in the country. The Court also added that criminalisation deprives women from accessing abortion in public health services, increasing the number of injuries, mutilations and deaths women suffer in consequence.

Third, the concept of “non-exactability” (referring to something that is too great a burden to be required from a person), used by the German Court to set a limit to what the state can demand from a woman when pursuing the aim to protect unborn life, has evolved together with society’s increasing recognition of women’s dignity and autonomy. In 1975, only exceptional hardship due to pregnancy would have justified relieving a woman from what the German Court at that time considered a maternal duty imposed on women by nature. With time, courts have understood that biology is not a reason to ask women for sacrifices that are much more demanding than what is normally asked from a man or from anyone in other contexts. Also, there is a growing awareness of the fact that it is impossible to respect women’s autonomy when it is the state that decides when the threshold of non-exactability is crossed. It is women who must determine if they can bear pregnancy and child-rearing. As the Colombian Constitutional Court said,

“[a] woman’s right to dignity prohibits her treatment as a mere instrument for reproduction, and her consent is therefore essential to the fundamental, life-changing decision to give birth to another person.” (para. VI.10.1)²

Finally, in its 1993 decision, the German Court acknowledged the futility of the state’s efforts to prevent women from terminating their pregnancies by using the threat of criminal law, and decided that the state must pursue its aim by “working with the woman” and not against her. Although this argument focused on the protection of unborn life and not on women’s rights, it is of extraordinary importance, as it dismantled the analogy of abortion as homicide, and the woman as a criminal (no one would invite an assassin to protect their victim), and also because the argument pointed to the social and economic causes of abortion, strengthening the fact that it is not only the woman who is responsible for protecting life, but the whole community that must create the necessary conditions for motherhood.
The contribution of international human rights law

International human rights law is another key piece adding to the development of the new narrative. International courts, the Inter-American Commission on Human Rights and the UN monitoring bodies have issued decisions and recommendations on abortion offering comparatively progressive and gender-sensitive interpretations of human rights such as the right to life, liberty, personal integrity, the right to be free from torture and cruel, inhumane and degrading treatment, the right to health and information, the right to equality, and other rights. These standards are being taken by national courts not only when they apply international law in their decisions, but also in their interpretation of domestic constitutional rights. In addition, the World Health Organization’s production or use of public health evidence on the consequences of abortion and its human rights-based technical and policy guidelines on abortion have become authorised sources judges can build on to prove that criminalisation is an ineffective means to protect unborn life, and that any protection of prenatal life must be compatible with the respect and protection of girls’ and women’s rights.

The framework of proportionality

The way these elements fit within the framework of proportionality is explained further in this section. The proportionality principle is an analytical framework that is widely and increasingly used by national and international courts to determine whether a statute infringes on a fundamental right enshrined in constitutions or human right treaties. The principle has been used in a range of situations unrelated to abortion. The principle is compounded by three consecutive tests: suitability, necessity and strict proportionality. To pass the constitutional examination, the statute must surmount all of these tests. If one test fails, the statute is unconstitutional and it is not necessary to continue with the others. The suitability test is met when the intervention is appropriate as contributing to a constitutionally legitimate aim. The necessity test is a least-restrictive means test, according to which the legislature should prefer, among those measures that are equally or more conducive to the objective, the least intrusive on the fundamental right being affected. And finally, according to the strict proportionality test, the benefits obtained by restricting rights in order to reach the legitimate aim should compensate the sacrifices imposed on the restricted rights’ holders.

Proportionality analysis may help to overcome the abstract and intuitive decision-making on abortion that has been highly detrimental to women by unreflectively assuming the effectiveness of criminalisation in protecting unborn life. Such decision-making is prone to apply gender stereotypes that result in the invisibility or underestimation of the effects on women’s rights that criminalisation entails. As a methodological framework, proportionality analysis allows judges to think not only about the importance of the protection of the unborn life, but also about the actual effectiveness of the law in providing such protection. It also brings into the legal discussion important empirical data produced by public health studies regarding evidence on the causes of abortion, on the best practices to lower abortion rates and on the effect of criminalisation on abortion decisions. Additionally, proportionality analysis allows judges to consider alternative means of protection that are different from criminalisation, and induces them to pay attention and name the restrictions to women’s rights that the protection of the unborn involves. This analysis promotes refined descriptions of the beneficial and adverse effects of regulations on constitutional rights and values with a better balance of interests involved. Proportionality involves a step-by-step description of the partial decisions supporting the final holding of a case. It is likely to improve on a balanced consideration of all relevant arguments, thus curbing the common tendency of abortion judgments to be one-sided and insufficiently justified.

The first test: suitability

The criminalisation of women who undergo abortions is typically justified by affirming that making abortion a crime is necessary to protect prenatal life. The protection of prenatal life is a legitimate aim that the state can pursue, and under some constitutions, an aim that the state must pursue, as is the case with the German, the Chilean and several Latin-American constitutions. However, when reviewing the constitutionality of a statute criminalising abortion, the first thing judges must do is to verify that the protection of the unborn is the real objective behind criminalisation, and not a retroactive, made-up justification. By reading
the legislative records containing the history of the law, judges may come to realise that often, the real objective behind criminalisation of abortion in their countries was not the protection of prenatal life, but the legal entrenchment of a moral or religious view, the reinforcement of gender stereotypes regarding maternity, the pursuance of demographic goals not respectful of individual rights, or other political aims that are illegitimate under their national constitutions or human rights treaties (Box 2). For example, the now common paternalistic justification for criminalisation of abortion based on the need to protect women from a decision that they will later regret would be an illegitimate aim because it is grounded on the stereotypes that women lack the capacity to make autonomous decisions.\(^{43,44}\) This is especially true when these criminal laws are old and endorse an understanding of gender roles that are incompatible with current constitutional obligations regarding women’s equality rights.

**Box 2:** The objective behind the criminalisation of abortion is not always the protection of prenatal life

When the Chilean Congress enacted the current penal code in 1874,\(^{45}\) it used the Spanish Code of 1848 as a model for the rules on abortion, but instead of including abortion under the title of crimes against persons, together with homicide, infanticide and assault, as the Spanish Code did, Chilean legislators decided to include abortion under the title of crimes and offences against the order of families and public morality, a decision that suggests that the main aim of criminalisation was not the protection of the right to life of the foetus. Source: Código Penal de Chile. Available from: https://www.leychile.cl/Navegar?idNorma=1984\(^{45}\)

If the real aim of the law is the protection of prenatal life, the judge must ask the state for evidence that criminalisation is a suitable means to advance the protection of unborn life. As courts know, rights can only be limited to protect other rights or to pursue a compelling state interest to the benefit of the community. And as the German Court said, the means of protection of unborn life must be effective. Symbolic protection does not qualify under the suitability test.

This is where public health evidence fits into the legal argument. Advocates for decriminalisation can use the strong and compelling evidence that shows that there is no causal connection between criminalisation and lower abortion rates. There is, however, a strong correlation between criminalisation and the increase of maternal mortality and morbidity.

If criminalisation of abortion is not a suitable means to protect unborn life, courts can and should declare that criminalisation does not meet the first test of the proportionality principle and hold that the law is unconstitutional because it affects women’s rights without providing any legitimate justification.

**The second test: necessity**

Only where the court can confirm that the aim of criminalisation is the protection of unborn life, and that criminalisation does have some impact in lowering abortion rates, would it be required to apply the test of necessity. Under this test, the court must determine if criminalisation is the least-restrictive means on the rights of the pregnant woman affected by criminalisation, among all measures that are equally or more conducive to the objective of protecting prenatal life. The least-restrictive means requirement does not only have a constitutional foundation; it is also an application of an old principle of criminal law, the *ultima ratio* principle. The *ultima ratio* principle states that the threat of criminal punishment must be the last resource for the legislator to invoke, and only when it is clear that other means would not be able to advance the aim sought and criminal law would. As stated by the Colombian Constitutional Court:

“the criminalisation of conducts must only be used as an ultima ratio, when other measures are not effectively suitable to achieve an adequate protection (...) therefore, the use of criminal law is limited to the lack or insufficiency of other means to guarantee the effective protection of the life of the unborn.”

(para. VI.5)\(^{51}\)

At the time abortion was criminalised in most countries, evidence about how to decrease abortion rates did not exist. Nowadays, there is ample accumulated knowledge about the ways in which abortion can be prevented. For example, the states with the lowest rates of abortion offer sexual education, efficient and acceptable contraception, and access to reproductive health services. Those states take care of pregnant women’s medical, nutritional and mental health needs; provide for maternity and parental leave, and daycare; they forbid
discrimination against pregnant girls and women in schools and at work, prevent violence against women, and foster more egalitarian gender relationships. To prevent abortion, it is necessary to end stigma around women’s sexuality and reproduction so that women can trust the state and be confident in asking for services and options when they have an unplanned pregnancy and need to know what their options are. Associated criminalisation and stigma make women run away from the state, so that the state loses the possibility of protecting unborn life that women would be willing to keep should they have adequate medical care and social support. The experience of several countries that have achieved the lowest global rates of abortion by abandoning criminalisation of abortion during the first weeks of pregnancy is that they benefit by replacing criminalisation with preventive regimes, while putting courts on solid footing to demand serious evidence from the state under this test if the state insists on the need of criminalisation to protect prenatal life. If the state cannot pass the test, the court must declare the criminal law unconstitutional for unnecessarily infringing the rights of women under the constitution.

The third test: strict proportionality
This third test must only be conducted if a court finds that criminalisation passes the suitability and necessity tests. The strict proportionality test requires that the benefits obtained by restricting women’s constitutional rights in order to reach the legitimate aim of protecting unborn life compensate the sacrifices imposed on women. The idea behind it is that the more intensive the intrusion on a right, the stronger must be the reasons that support such intrusion.

It is common for courts supporting criminalisation to skip the suitability and necessity test, taking for granted the efficacy and efficiency of criminalisation to protect unborn life. These courts focus on the complete loss of individual foetal life resulting from an abortion and compare this loss with the restrictions on women’s rights imposed by criminalisation, which they described as temporal and partial limitations. As indicated earlier, it is wrong to make this balance without previously asking whether criminalisation works or if there is a better alternative means of protecting prenatal life. Also, this description of the balancing fails to assess the impact of criminalisation and forced maternity on women’s lives.

Before referring to women’s assessment of that experience, however, it is important to come back here to the distinction explained above between the categories of constitutional rights and constitutional values, as it becomes important under this test. As generally understood by the courts that apply this distinction, the woman is the holder of constitutional rights, while the foetus is not. Unborn life is a constitutional value that increases its protection as the pregnancy advances. Although rights are not absolute and do not always trump values, these courts give some more weight to rights in the balancing.¹ For example, the Colombian Constitutional Court, held that:

“[w]hile it is true that the legal system gives protection to the fetus, it does not do so to the same degree or with the same intensity that it gives to the human person (…).” (para. VI.5)⁶

and the Portuguese Court adds an important consideration to the balancing when it says that,

“[a]s a value worthy of protection that is independent from the personal interest of someone, human life is not bound to an ‘all or nothing’ protective logic that would reject gradations of ‘more or less’.” (para 11.4.11)⁵

Forced maternity imposed by criminalisation is frequently experienced by women as such an unbearable situation that they are not deterred by risks to their lives, health or freedom, and resort to abortion despite its being illegal. This is the concrete measure of the intensity of the sacrifices imposed upon women by criminalisation. Criminalisation is not a relevant factor in lowering abortion rates because for women in some circumstances continuing a pregnancy is more threatening than risking their own lives. Trying to escape their fate, women die and become seriously sick as a consequence of unsafe abortions.⁴ At a global level, between 22,800 and 31,000 women die unnecessarily each year as a consequence of unsafe abortion.⁴⁶ Morbidity is a much more common consequence than mortality. Complications include haemorrhage, sepsis, peritonitis, and trauma to the cervix, vagina, uterus, and

¹Courts give more weight to rights than to values because constitutional rights are entitlements that individuals need to have in order to live with dignity. Values on the other hand are a statement of things a community cares about deeply, as for example, a clean environment or public security.
abdominal organs. Advocates use this evidence in court by translating the health consequences of unsafe abortion into the language of human rights, and into constitutional and legal rights violations with the help of the standards and interpretation of treaty provisions made by international courts, human rights monitoring bodies and courts around the world.

As the status of women as recognised by society improves, an argument that has reinforced this new narrative and become common in contemporary decisions on abortion is the one that affirms that criminalisation violates the pregnant woman’s dignity. According to Kant, to respect the dignity of persons requires respect for autonomy. Courts increasingly are using Kant’s idea of dignity to say that the woman cannot be considered only an instrument for procreation, a means to achieve an end, however valuable that end may be. When the law disregards the woman’s will, takes hold of her body and decides how it should be used, it instrumentalises her and violates her dignity. The appearance of this argument is especially interesting for two reasons. First, because it rescues the concept of dignity that, in the context of abortion, was fully associated with the dignity of prenatal life, and second, because dignity regains, for this particular context of abortion, its association with the idea of autonomy, which is its primary meaning in the broader realm of law. When recognising the dignity of women, courts make women visible as full subjects of law. This evolution, which marks another breaking point in the development of the new model of judicial review of abortion legislation based on proportionality, is expressed in the words of the Portuguese Court:

“the axiological weight of the principle of human dignity does not fall on the side of intrauterine life, exclusively. It also falls on the constitutional legal position of the woman.” (para. 11.4.11)  

The criminalisation of abortion also implies affecting women’s right to equality with men. When legislators choose to make abortion a criminal offence, they concentrate the burdens and the costs of protection of prenatal life only on women. It is obviously easier for the state to criminalise the women who carry the pregnancy than to adopt measures such as the prevention of unwanted pregnancies and the creation of better conditions for motherhood and child-rearing. Taking such preventive measures and social support would distribute at least some of the cost of the protection of unborn life onto the rest of society. The process of approving those measures would make transparent the real value society puts on its commitment to protect unborn life. Criminalisation deeply affects gender equality, and the effect is harder on the most vulnerable groups of women, such as teenagers and poorer women, who experience more unwanted pregnancies, and who must turn to the state for health care and contraception. This burden does not only fall on women and their individual rights, but it also implies deep sacrifices for the collective social interest of having the principle of equality as a basis for our political communities.

**Conclusion**

Valuing prenatal life should no longer imply criminalising women when they undergo abortions. The protection of unborn life does not need to be done at the expense of women’s constitutional rights. On the contrary, the evidence suggests that the lowest rates of abortion can be achieved by meeting the need for sexual and reproductive services, giving economic and social support, and creating conditions for gender equality. The proportionality analysis, when applied to judicial review of abortion legislation, allows judges to think not only about the importance of the protection of prenatal life, as they have done in the past, but also about the actual effectiveness of the law to provide such protection. The proportionality analysis encourages judges to make decisions based on relevant public health evidence, and to consider which legal regime would secure a fairer social distribution of burdens associated with the community’s pledge to prenatal life. Increasingly, courts around the world are holding that it is unconstitutional for the state to use the threat of criminalisation that would restrict women’s rights to dignity, autonomy, privacy and equality.

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Résumé

Cet article explique comment l’utilisation stratégique de données de santé publique qui montrent que la pénalisation de l’avortement n’aboutit pas à une diminution du taux d’avortement change la manière dont les juges traitent les recours constitutionnels relatifs à la réglementation sur l’avortement. L’État peut avoir un intérêt légitime à protéger la vie prégnante – et même, dans certains systèmes juridiques, en avoir l’obligation. Néanmoins, les tribunaux reconnaissent les réglementations qui libéralisent l’avortement et déclarent inconstitutionnels les régimes qui pénalisent l’interruption de grossesse. C’est possible car la réduction du taux d’avortement est obtenue non par la pénalisation, mais par des politiques préventives. De plus, les tribunaux défendent la libéralisation quand la violation des droits des femmes dépasse ses prétendus avantages. Cette nouvelle perspective a été élaborée au cours de la dernière décennie par une série de décisions de tribunaux en Europe et en Amérique latine et elle peut se révéler utile pour le plaidoyer juridique dans certains pays d’Afrique. L’approche associe

Resumen

Este artículo explica cómo el uso estratégico de la evidencia en salud pública, que muestra que la penalización del aborto no disminuye las tasas de aborto, está cambiando la manera en que jueces confrontan los recursos de inconstitucionalidad de las normas sobre aborto. El Estado podría tener interés legítimo -y en algunos sistemas jurídicos, el deber- de proteger la vida prenatal. No obstante, las cortes están defendiendo normas que liberalizan el aborto y declarando los regímenes de penalización inconstitucionales. Esto es posible dado que la disminución de las tasas de aborto no se logra por medio de la penalización sino de políticas preventivas. Además, las cortes defienden la liberalización cuando la infracción de los derechos de las mujeres como consecuencia de la penalización es mayor que sus supuestos beneficios. Esta nueva narrativa jurídica ha sido desarrollada en las últimas décadas por una serie de decisiones judiciales en Europa y Latinoamérica, y puede resultar útil para la promoción y defensa de la despenalización del aborto en algunos países africanos. La narrativa combina el uso
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l'utilisation d'un cadre analytique, appelé principe de proportionnalité, à l'interprétation des droits constitutionnels qui découle des normes relatives aux droits de l'homme internationaux sensibles tenant compte des sexospécificités et des données factuelles sur les effets de la pénalisation de l'avortement sur la vie et la santé des femmes.

de un marco analítico llamado principio de proporcionalidad con una interpretación de los derechos constitucionales que acoge estándares internacionales de derechos humanos con perspectiva de género, y se basa en evidencia empírica sobre los efectos de la penalización en la vida y en la salud de las mujeres.