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EMERGENCY CONTRACEPTION JURISPRUDENCE IN LATIN AMERICA: CATHOLIC DOCTRINE AND WOMEN'S RIGHTS

By

Fiorella Melzi

A thesis submitted in conformity with the requirements for the degree of

Master of Laws

Graduate Department of Law

University of Toronto

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ABSTRACT

EMERGENCY CONTRACEPTION JURISPRUDENCE IN LATIN AMERICA: CATHOLIC DOCTRINE AND WOMEN'S RIGHTS

Master of Laws

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In this thesis the author analyses legal challenges brought before courts in Chile and Argentina in which the challengers allege that emergency contraception is abortive and therefore a violation of the constitutional right to life of the unborn.

Demonstrating that these courts have focused on a determination of when life begins, as opposed to when life should be legally protected, the author argues that they have based their rulings on Catholic doctrine rather than on scientific evidence. She contrasts these approaches with those taken in similar cases by courts in the United Kingdom, Spain and in international human rights decisions. The author argues that by enforcing religious norms, these courts are jeopardizing the principle of secularity that is fundamental to democracy.

Most importantly, the author demonstrates that these courts have violated women's constitutional rights by ignoring women's rights, concerns and needs, thereby frustrating women's attempts to achieve equality. The author concludes with guidance for judges regarding appropriate reasoning in these cases.

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I INTRODUCTION

In recent years, a debate has emerged in many countries over the legality of the emergency contraceptive pill as a method of family planning. Many health authorities in different countries that have approved the manufacture and distribution of emergency contraceptive pills have faced challenges, particularly from conservatives, who allege that the use of the emergency contraceptive pill is equivalent to having an abortion. Their argument is that this type of emergency contraception serves, in part, to prevent implantation of a fertilized egg in a woman's uterus. This is significant because the Catholic Church holds that what they interchangeably refer to as "conception" or "fertilization", that is to say the moment where the sperm reaches to ovum, represents the moment wherein the rights of the unborn begins to accrue.

Partially because of the deep influence of this Catholic doctrine in Latin America, in many countries such as Colombia, Ecuador, Chile, Argentina and recently Mexico, the legality of the pill's distribution is being challenged. As I will argue in this thesis, these challenges proceed not on the basis of scientific evidence or on the basis of women's health, but rather on the basis of religious Catholic tenets regarding the legal protection of the beginning of life. These tenets are, I will suggest, in conflict with the interests and rights of women who are awaiting this safe and effective contraceptive method that can prevent unwanted pregnancies in a manner which, as I will establish, is not in fact abortive.

Moreover, as I will seek to demonstrate, even when abortion is legally restricted in most Latin American countries, abortion rates remain very high. In this context contrary to the positions taken by the Catholic Church, the introduction of emergency contraception thus lowing risks to women's health and women's lives caused by unsafe and illegal procedures. This consideration is particularly relevant in the contemporary setting where women are still

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far from reaching equality, where achieving reproductive self-determination is still far from near, and where many women remain economically dependent on the state.

This thesis offers a comparative analysis of cases that have reached the Supreme Courts in Chile and Argentina. It also addresses one case in Argentina that is still pending, but which is particularly significant in that it challenges all forms of contraceptives. The thesis will also discuss emergency contraception in Peru. By way of comparison I will compare the approach taken in these countries with the approaches taken in similar cases in the United Kingdom and Spain and in international human rights decisions.

The main aspiration of the thesis is to establish that some of these decisions have violated Constitutional provisions regarding the protection of women, and, in their bids to protect the unborn, have failed to adequately consider women's human rights. Courts, I will demonstrate, have based their decisions on biological and philosophical interpretations on the precise beginnings of "life" rather than relying on evidence which provide certainty on when exactly "life" can be legally protected. An examination of these philosophical interpretations reveals the very significant extent of influence and power the Catholic religion holds over the judiciary. This influence is, I suggest, concerning, and puts what we normally understand as "democracy" at risk.

In the end, this thesis is intended to provide an example for judges as to how to engage in appropriate reasoning in the context of women's reproductive rights.

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II SECTION II – EMERGENCY CONTRACEPTION, DESCRIPTION OF COURT DECISIONS

i) Definition of emergency contraception

The emergency contraceptive pill is a contraceptive method that, if used within 72 hours after unprotected sexual intercourse, prevents pregnancy. According to the World Health Organization, emergency contraception methods are effective and safe for the majority of women who use them, and are, moreover, relatively simple to use.[1] A number of studies have demonstrated that following unprotected intercourse, this type of emergency contraception is highly effective in diminishing the number of unwanted pregnancies without requiring recourse to abortion.[2]

Emergency contraception has been available in an experimental form since the early 1970s[3]. The method utilized has been the "Yuzpe" regime,[4] which consists of combined oral contraceptives containing levonorgestrel and ethinyl estradiol. One dose must be be taken within 72 hours after unprotected intercourse and the second dose 12 hours later. Another method of emergency contraception is a high dose of progestin containing 0.75mgm of levonorgestrel.[5] For this method, one dose must be taken within 72 hours of unprotected sex and another 12 hours later. The levonorgestrel pill is as effective as the Yuzpe regime and has fewer effects.[6]

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[1] WHO, Statement on Emergency Contraception. Fact Sheet No. 244 (June 2000)
[2] International Federation of Gynecology and Obstetrics (FIGO) Committee for the Ethical Aspects of Human Reproduction and Women's Health, "Guidelines in emergency contraception," 77 *Int. J. Gynecol. Obstet.* (2002), 174
[3] R v The Secretary of State for Health [2002] EWHC 610 (Admin) at para. 194.
[4] The name comes from Dr. Yuzpe who developed the method.
[5] *Supra* note 1.
[6] WHO. Improving methods of emergency contraception. *Progress in Reproducive Health Research*, No. 51 (1999) online: WHO <http://www.who.int/reproductive-health/hrp/progress/51/news51_1.en.html>.

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Using either method, the emergency contraceptive pill should be taken as early as possible after unprotected intercourse, preferably within 72 hours, but if this is not possible, it remains effective up to 120 hours after unprotected intercourse. However, the woman should be advised that the longer the delay, the lower the effectiveness of the pill.[7]

There remains a debate over how emergency contraception pills actually achieve their effects. The pills can work by preventing ovulation (release of the ovum), fertilization (when the sperm reaches the ovum) and/or implantation (when fertilized egg attaches to the lining of a woman's uterus).[8]

It is important to understand the timing here. After fertilization takes place the process of implantation of this fertilized egg into the woman's womb begins. The implantation process takes approximately between five days to one week after fertilization.

The key point to keep in mind here is that once the process of implantation has begun, emergency contraception is ineffective and cannot cause abortion if the woman is already pregnant.[9] In other words means that the emergency contraceptive pill cannot cause a fertilized egg which is implanted to "deplant." This is, in fact, the reason why emergency contraception must be taken within 72 hours after intercourse: it must be taken before implantation has begun.[10]

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[7] *Ibid.*
[8] *Supra* note 1.
[9] *Supra* note 1. See also *supra* note 6.
[10] R v The Secretary of State for Health [2002] EWHC 610 (Admin) at para. 13.

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ii) Description of cases brought before courts regarding emergency contraception

a. Cases regarding emergency contraception in Argentina

1. Constitutional action against the emergency contraceptive pill "Imediat"

The NGO "Portal de Belen" presented a Constitutional Challenge before the Court of Appeal of Cordova against the Ministry of Health demanding that it revoke it's authorization for the manufacturing and distribution of the emergency contraceptive pill "Imediat". The NGO alleged the pill had abortive effects on the grounds that it prevented the embryo's implantation in the endometrium, thereby producing "la muerte por aborto de un ser humano ya concebido" [death through abortion of a conceived human being.][11]

This Constitutional Challenge reached the Supreme Court.[12] The Supreme Court held that it was necessary to determine the precise moment when conception takes place, which it determined must either be the moment of fertilization or the moment of implantation of the fertilized egg. The Court's reasoning was that it must clearly define when the right to life began to accrue.

The Supreme Court stated that, at least according to the references before the Court, human life begins when two gametes unite at the moment of fertilization, and from that moment forward, a human being exists. Among the authors mentioned, the Court cited:

- Jean Rostand,[13] who states that a human being exists once an ovule is fertilized and that the human being is "complete" at this stage;
- B. Carlson,[14] who states that pregnancy begins with the fusion of an egg and a sperm; and,

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[11] *Recurso de Amparo, p. 709. XXXVI "Portal de Belen – Asociacion sin Fines de Lucro c/ Ministerio de Salud y Accion Social de la Nacion s/ amparo,"* 5 Mar. 2002 (Attorney General) [My translation].
[12] *Recurso de Amparo, p. 709. XXXVI "Portal de Belen – Asociacion sin Fines de Lucro c/ Ministerio de Salud y Accion Social de la Nacion s/ amparo,"* 5 Mar. 2002 (Supreme Court of Argentina) [my translation].
[13] *Ibid.* at para. 5.

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- T.W. Sadler[15] who states that the development of an individual begins at fertilization.[16]

The Supreme Court furthermore determined that one of the mechanisms through which the emergency contraceptive pill "Imediat" works: altering the endometrial tissue and therefore inhibiting implantation,[17] "constituye una amenaza efectiva e inminente al bien jurídico primordial de la vida que no es susceptible de reparación ulterior" [constitute an effective and imminent threat to the main juridical good of life that is not possible of ultimate reparation.][18]

The Court then went on to conclude, "todo método que impida el anidamiento debería ser considerado como abortivo." [every method which prevents implantation should be considered abortive].[19] In so holding, the Supreme Court stated that because the fundamental right to life was at stake, the constitutional protection should be granted. The Supreme Court also reaffirmed the protection of the right to life, which is established in international treaties on human rights, and which is also protected under Argentine legislation.[20]

The Supreme Court of Argentina placed a great deal of weight on the right to life established in the American Convention on Human Rights, which is described by the Court as protecting the human person's life "from the moment of conception."

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[14] *Ibid.* at para. 6. Referred in Court Decision as Professor and Chief of the Department of Anatomy and Cellular Biology of the University of Michigan, who is cited in Mosby Year Book Inc. 1998 "Human and Developmental Biology.

[15] *Ibid.* at para. 6. Referred in Court Decision as Professor of Cellular and Anatomy at the University of North Carolina, who is cited in Langman's Medical Embriology book.

[16] *Ibid.* at para. 6-7. Other authors mentioned in the Supreme Court Decision are: Jerome Lejeune, referred to as a "celebrity genetist", W.J. Larson referred to as professor of Cellular Biology, Neurobiology and Anatomy at University of Cincinatti; and Salet Georges, referred to as a biologist and mathematician.

[17] *Ibid.* at para. 9.

[18] *Ibid.* at para. 10 [my translation].

[19] *Ibid.*

[20] The Court decisions refers to article 75 (22) of the Argentine Constitution, and articles 70 and 63 of the Argentine Civil Code.

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The Court also relied on article 6.1 on the Convention on the Rights of the Child. This article establishes that "states parties recognize that every child has the inherent right to life." The Supreme Court interpreted this provision as protecting the child from the moment of conception forward, stating: "todo ser humano a partir de la concepción es considerado niño y tiene el derecho intrínseco a la vida" [every human being from conception is considered a child and has the intrinsic right to life].[21]

Regarding the Argentine national legislation, the Court stated that the Civil Code was in concurrence with superior legal norms that protect the life of the unborn from the moment of conception.[22] The Court determined that the Argentine Civil Code states that the existence of the person starts from the moment of conception.[23]

Following this reasoning, in March 2002, the Supreme Court of Argentina[24] ordered the National Administration of Medicines and Medical Techniques to give refuse to give effect to the authorization of the manufacturing, distribution and marketing of the emergency contraceptive pill "Imediat".

It is worth noting that this decision had two dissenting opinions. One was based on procedural considerations.[25] The second dissenting opinion concurred that the procedure chosen was not the correct one. Moreover, this second dissenting opinion stated that insufficient scientific evidence had been presented, and that in this context, the advisable course of action was to present the case before another procedure and not a Constitutional Action[26], where more evidence could be presented.[27]

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[21] *Supra* note 12 at para. 14 [my translation].
[22] Referring to the Argentine Constitution and International Human Rights Treaties
[23] Argentine Civil Code, 1871, Art. 63 [my translation].
[24] *Supra* note 12.
[25] *Supra* note 12.Dissenting opinion of Carlos Fayt and Gustavo A. Bossert.
[26] The Amparo, or Recurso de Proteccion or Constitutional Action, is a process provided for by the Constitution that enables an applicant to challenge a regulation that is alleged to violate a Constitutional right. If the

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2. The Constitutional Action against all contraceptives

The NGO called "25 de Marzo" (March 25th),[28] recently filed a suit, a Constitutional Action, before the same court where the emergency contraceptive pill "Imediat" was challenged. This time, not only was emergency contraception challenged but also *all contraceptives* were challenged on the grounds that they were abortive. This leave to appeal on Constitutional grounds was based on a literal reading of the previous judgment as prohibiting every method of contraception which prevented implantation on the grounds that such methods are abortive.

The writ presented by the plaintiffs to the Court was saturated with religious concepts. It stated that contraceptives contravene the "Law of God, the Natural Law and the protection of the Argentine positive laws which protect the right to life from conception (American Convention of Human Rights and Convention on the Rights of the Child, domestic laws), as well as the common good of the Nation." Regarding Natural Law, the plaintiffs stated that Natural Law establishes that the first and main aim of marriage is procreation of children, and that contraception and abortion are in conflict with the aim.[29]

In May 2003, Judge Cristina Garzon de Larzano ruled that until the case was resolved because of the danger of lives at risk (meaning the lives of the unborn), the leave to appeal

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regulation is found to violate the Constitutional right, the court must order an immediate nullification of the regulation. Because of the nature of this legal process, the only party present is the applicant who alleges the violation. The court only considers the evidence presented by the applicant along with the regulation that is alleged to violate a Constitutional right. This procedure does not allow the presentation of evidence by other interested parties. Thus, in an Amparo concerning emergency contraception, there is no opportunity for other parties to present evidence linking emergency contraception to the furtherance of women's Constitutional rights.

[27] *Supra* note 12. Dissenting opinion of Augusto Cesar Belluscio and Enrique Santiago Petracchi.

[28] It must be mentioned that the date March 25th stands for the commemoration of the "Day of the Unborn" which has been established in many Latin American countries such as Argentina, Chile and Peru – the date fits exactly nine months before Christmas Day which invoke the "Annunciation: when virgin Mary was told that Jesus was conceived.

[29] *Recurso de Amparo presented by "Fundacion 25 de Marzo c/ Ministerio de Salud y Accion Social de la Nacion,"* online: Fundacion 25 de marzo <http://www.fundacion25demarzo.com.ar/contenidos.htm>.

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on Constitutional grounds was granted This order covers all hormonal contraceptives available including the IUD.[30] The case is still pending.[31]

b. Cases regarding emergency contraception in Chile

1. Constitutional challenge against the emergency contraceptive pill "Postinal"

In Chile, the emergency contraceptive pill called "Postinal" containing 0.75 gr. of Levonergestrel was constitutionally challenged by the NGO "Investigación, Formación y Estudio sobre la mujer (ISFEM); "Centro Internacional para la vida humana"; "Movimiento Mundial de Madres"; "Frente por la vida y acción solidaria"; "Movimiento nacional por la vida "Aniü-Küyen" and "Centro Juvenil Ages," through a "Recurso de Protección" [Constitutional Action].[32]

In their constitutional action, the plaintiffs alleged that the pill "Postinal" had abortive effects because it prevented a fertilized ovule from implanting in the woman's uterus thereby causing an abortion in contravention of Chilean criminal law. As such, it was alleged that all products having the same abortive effects should be prohibited. The plaintiffs asked the Court of Appeal to declare the emergency contraceptive pill "Postinal" unconstitutional, to recognize the right to life from the moment of conception and to order the Health Public Institute not to distribute the emergency contraceptive pill.

The Minister of Health – one of the defendants – alleged that the law protects the life of the unborn as established in the Penal Code[33]. However, the Minister also alleged that the emergency contraceptive pill was not abortive because it did not interrupt pregnancy. On the contrary, once the process of fertilization or implantation has begun, the method is

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[30] *Ibid.*
[31] To date, contraceptives are still available in Argentina.
[32] *Recurso de Proteccion, rol 850-200, "Sara Philippi Izquierdo y otros con Laboratorio Chile S.A. y otros,"* 28 May 2001 (8° Court of Appeal of Santiago).
[33] Refers to Art. 342 and following articles of the Argentine Penal Code and Art. 119 of the Sanitory Code.

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ineffective. The Minister also argued that the emergency contraceptive pill prevented and eliminated any chance of induced abortions that occur because of the lack of access, bad use of family planning methods or legitimate mechanisms of contraception.

The Minister of Health added that many contraceptives containing progestine levonorgestrel in a 0.75gr dose are registered and distributed in Chile. These are used in family planning programs, to regulate fertility and are used periodically during the menstrual cycle. In addition all oral contraceptives used in Chile for more than 40 decades employ the same active agents as emergency contraception. The only difference between these forms of contraceptives is their dosage.[34]

The 8o Court of Appeal of Santiago dismissed the case because of the lack of representation with respect to the unborn. In addition the Court established that this case should not have been presented through a Constitutional Action as there was a need to analyze more evidence.[35]

The dissenting opinion of Judge Maria Antonia Morales Villagran argued that the suit should have been allowed as it seeks to ensure the right to life of the unborn from the moment of conception, a right which was threatened by the possible effect the Levonorgestrel drug had with respect to preventing implantation. The Judge also stated that the "plaintiffs had the right" to act on behalf of the unborn given that the right of the "conceptus" or unborn was at stake.

Justice Morales added that the Constitution of Chile recognizes the right to life and imposes the duty to protect that right on the State. As a result the State has the duty to protect

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[34] *Supra* note 33 at para. 2.
[35] *Supra* note 33 at para.10-11.

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the life of the unborn. She relied upon the American Convention on Human Rights, which protects the right of the unborn.[36]

This court decision was appealed. The Supreme Court of Chile in August 30th 2001[37] described the defendants as having distributed "emergency contraception" based on the definitions given by the World Health Organization (WHO) and the International Federation of Gynecology and Obstetrics (FIGO) on pregnancy and abortion. While the Court did not explicitly cite any document produced by these institutions, the Court did state that WHO and FIGO recognized as pregnancy from the moment when a fertilized ovule implants in the lining of the uterus – and that "abortion" referred to ending a pregnancy after implantation has taken place.[38]

The plaintiffs, relying on other scientific evidence, argued that the fertilized egg or the embryo is a cell, and that it is alive with its own unique genetic material, and that from the moment of fertilization forward a human being is in existence: from the moment when the ovule receives the sperm the complete and necessary information is found in the egg and therefore everything is "written to become a man, fully identifiable in nine months."[39]

The plaintiffs also alleged that after fertilization occurs, no other genetic information will enter the fertilized egg.[40] In order to support their position, the plaintiffs described the fact that other countries (which the court decision that does not provide details for) consider

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[36] The Chilean Government has ratified and approved the American Convention on Human Rights by Decree 873 and published on January 5 1991.
[37] *Recurso de Proteccion, rol C.S. 2186-2001, "Sara Philippi Izquierdo y otros con Laboratorio Chile S.A. y otros,"* 30 Aug. 2001 (Supreme Court of Chile).
[38] *Ibid.* at para.11.
[39] *Ibid.* at para.12.
[40] *Ibid.*

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in their legislation the moment of conception as the moment where human life is legally protected.[41]

The Supreme Court then stated that the Court had to determine the moment when the existence of a human being can be or ought to be legitimate and legally recognized. In other words, the court felt bound to determine the precise moment when life can be taken to exist, a moment that they felt corresponds with the moment when constitutional protection arises.[42] Following this statement the Supreme Court held that:

> [e]l derecho a la vida es la esencia de los derechos humanos, pues sin vida no hay derecho. El ser humano tiene derecho la vida y debe estar protegido contra la agresión que atente contra ella y de exigir, además, de conductas positivas para conservarla. [The right to life is the essence of human rights, because without life, there is no right. In addition the human being has the right to life and must be protected against any aggression that would threaten it. Moreover, positive actions to preserve it should be demanded.][43]

The Supreme Court of Chile noted that the guarantee to the right to life and the subsequent protection of the unborn could be found in article 19 of the Chilean Constitution of 1980. Article 19 1) states that "la ley protege la vida del que está por nacer." [the law protects the life of those about to be born.]

Subsequently, the Court reasoned that given that the Constitution does not specify the protection of the unborn in any specific developmental stage, the right to life refers to any stage of pre-natal development without distinction.[44] The Supreme Court also relied on article 5 of the Chilean Constitution which states:

> El ejercicio de la soberanía reconoce como limitación el respeto a los derechos esenciales que emanan de la naturaleza humana. Es deber de los

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[41] *Ibid.*
[42] *Ibid.* at para.14.
[43] *Ibid.* at para.15 [my translation].
[44] *Ibid.* at para.16-17.

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> órganos del Estado respetar y promover tales derechos, garantizados por esta Constitución, así como por los tratados internacionales ratificados por Chile y que se encuentren vigentes. [The exercise of sovereignty recognizes as limits the respect for the essential rights which originate from human nature. In addition, the State's duty is to respect and promote these rights, which are recognized by the Constitution and by international treaties ratified by Chile].[45]

Subsequently the Supreme Court relied on article 4.1 of the American Convention on Human Rights as another source of law for protecting the life of the unborn from the moment of conception.[46]

The Court also relied on the Civil Code which states that a "person" is any individual of the human species regardless of age, sex, ancestry or condition: "son personas todos los individuos de la especie humana, cualquiera que sea su edad, sexo, estirpe o condición."[47] In addition the Court held that if "fertilization" was understood as a continuous process, the fertilized ovule or embryo would therefore be an individual of the human species, and as such, worthy of constitutional and legal protection to reach its full development until birth.[48]

The Court also relied on the provision on the Civil Code that establishes the protection of "the unborn" from the moment conception: "de la epoca del nacimiento se colige la de la concepcion" [from the time of birth the moment of conception is inferred][49].

The Supreme Court, therefore, reasoned that the emergency contraceptive pill "Postinal" had the possible effect of preventing implantation and therefore it would be synonymous with abortion, which is prohibited under criminal law:

> Que cualquiera que hayan sido los fundamentos y consideraciones que tuvieran en vista las autoridades recurridas para autorizar la fabricación y comercialización del medicamento denominado "Postinal" con contenido de

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[45] Constitution of Chile, 1980, Art. 5 [my translation].
[46] *Supra* note 38 at para. 5 and 20.
[47] *Supra* note 38 at para. 18. See also Article 55 of the Constitution of Chile (1980) [my translation].
[48] *Supra* note 38 at para.18.
[49] Constitution of Chile, 1980, Art. 75-76 [my translation].

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> 0,75 mg. de la hormona de síntesis Levonorgestrel, uno de cuyos posibles efectos es el impedir la implantación en el útero materno del huevo ya fecundado, esto es, del embrión, han incurrido en una ilegalidad puesto que tal efecto es a la luz de las disposiciones constitucionales, legales y convencionales analizadas precedentemente, sinónimo de aborto penalizado como delito en el Código Penal y prohibido aún como terapéutico, en el Código Sanitario. [That any of the foundations and considerations the authorities who authorized the elaboration and commercialization of the medicine called "Postinal" had, which contains hormone Levonorgestrel in 0.75 mgs,, have acted illegally as one of its possible effects is to prevent implantation of the fertilized egg, the embryo, in the maternal uterus. In the light of the constitutional, legal and conventional provisions that have been previously analyzed, this is synonymous of abortion, which is penalized in the Penal Code and forbidden even for therapeutic means in the Health Code].[50]

The Court did not mention any specific provision in the Penal Code or in the Health Code, but instead relied only on the Constitutional provisions and the Civil Code, provisions mentioned above, and article 4.1 of the American Convention on Human Rights. The Court subsequently held that Resolution No. 2141, where the Public Health Institute had authorized the drug called "Postinal", was void and of no effect.[51]

There was a minority judgment in this case that argued that a constitutional action was not the best procedure for debating these issues, as more accurate scientific evidence was required for the debate.[52]

2. Another Challenge against the emergency contraceptive pill "Postinor 2"

The group Centro Juvenil Ages filed suit against the Public Health Institute in Chile to declare null an administrative act authorizing the distribution of another emergency contraception pill called Postinor 2.[53] This suit relied on the previous decision made by the Chilean Supreme Court regarding "Postinal" where the distribution of the pill was considered

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[50] *Supra* note 38 at para. 20 [my translation].
[51] The Supreme Court of Chile established that the plaintiffs had a legitimate course of action in their representation of the unborn.
[52] *Supra* note 38. Dissenting Judges Domingo Yurac and Domingo Kokish.
[53] *Juicio de Nulidad de Derecho Publico, fs. 1424 "Centro Juvenil Ages con Instituto de Salud Publica de Chile"*, 30 June 2004 (20th Civil Tribunal of Santiago)

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unconstitutional because it was said to have abortive effects. The plaintiffs relied upon the Chilean Constitution, which protects the right to life, as well as article 4 of the American Convention on Human Rights and the Convention on the Rights of the Child – all without, it is worth noting, mentioning any particular provision.

The decision describes the arguments of the Public Health Institute, the defendant, who explained the process of fertilization as well as how progesterone and estrogen hormones work during women's menstrual cycles. Furthermore, Levonorgestrel was said to be utilized in more than 70% of the contraceptives that were distributed at the international and national level. The defendant also stated that the mechanism through which levonorgestrel prevents pregnancy were twofold: inhibiting ovulation and changing the cervical mucus for preventing the migration of sperm.

Regarding the effects of the emergency contraception, the Public Health Institute stated that current scientific evidence had proved that this form of contraception prevented the union of the sperm and ovule, and by no means affected a fertilized egg. In addition, the Public Health Institute stated that as a civil matter, even if life does begin at the moment of conception, many rights do not accrue until birth. The Public Health Institute went on to say that until an organic and biological connection between the fertilized egg and the woman is established in order to provide nutrients, there was no legally protected individual, in other words, no "unborn."

The defendants also argued that the Chilean Penal law protects life only from the moment of implantation. They cited Juan Bustos Ramirez who argues in his "Manual de Derecho Penal, Parte Especial" that implantation of the fertilized egg provides certainty in

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the development of human life and that an environment that prevented implantation could not be considered legally abortive, because the object of legal protection is not yet existent.[54]

Regarding article 4.1 of the American Convention, the defendants stated that the Baby Boy case of March 6 1981, established a general formula allowing each State to establish the legal moment of conception.[55]

The 20th Civil Tribunal of Santiago reviewed the case. The decision, dated June 30 2004, stated that the Judge would rule the case without reference to any religious conviction and that once the facts and evidence presented before the Tribunal were analyzed, the rule of law would be applied.[56] The Tribunal considered it indispensable to determine the moment from which the life of the unborn was protected, the moment of conception and fertilization, as well as the moment of implantation.

The Tribunal held that to make these determinations, it was necessary to analyze scientific evidence, to review the legal norms, and to apply the law.[57] In order to understand the several medical concepts mentioned above, the Tribunal relied on the reports based on MOSBY Dictionary of Medicine, Nursery and Health Sciences – 5th edition 2000, which offer the following definitions:[58]

- Conception: Beginning of pregnancy, usually considered as the moment when the sperm penetrates the ovule forming a viable zygote.
- Fertilization: Union of masculine and feminine gametes to form a zygote from which an embryo will be developed.

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[54] *Ibid.*
[55] This particular case will be analyzed in another Section.
[56] *Supra* note 54 at para. 9.
[57] *Supra* note 54 at para. 20.
[58] *Supra* note 54 at para. 21.

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- Implantation: Process which consists of the establishment, penetration and implantation of the blastocyst (...)

Abortion: 1. Fetus in an incomplete development that takes place when a pregnancy is interrupted, particularly when its weight is less than 500 gr. 2. The conclusion of pregnancy where the product of conception is expulsed or eliminated in its totality.

Regarding medical science, the Tribunal expressed that there was no consensus on whether the pill had abortive effects. However, the Tribunal reasoned that the technical wording of science had to be adopted according to the meaning given by the experts in order to interpret the Civil Code. The Tribunal said that the protection of the life of the unborn from the moment of conception established in the Civil Code did not mention anything regarding the moment of implantation. However, the Tribunal established that these norms must be adjusted in light of the provisions on the American Convention on Human Rights:

> [p]or cuanto ella ordena que la protección legal que deben dar los Estados partes, de dicha Convención, es desde el momento de la concepción, norma que por lo demás tiene rango Constitucional y Supranacional, en virtud de lo dispuesto en el artículo 5 de nuestra Carta Fundamental. [[b]ecause the legal protection that States Parties members of the Convention must provide, begins from the moment of conception, legal norm which has Constitutional and Supranational status according to article 5 of our Constitution.[59]

Offering similar reasoning to that provided in the Postinal case, the Tribunal referred to the provisions in the Chilean Constitution as well as in the Civil Code regarding the protection of life, and specifically the protection of the right to life of the unborn. The American Convention on Human Rights was interpreted literally as an international document that protects the life of the unborn from the moment of conception. It was

[59] *Supra* note 54 at para. 42 [my translation].

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emphasized that this international document was a supranational document that had a Constitutional status.[60]

The Tribunal also referred to the importance of establishing a judicial presumption because there was no consensus regarding the scientific evidence. The Tribunal relied on the evidence that admitted the possibility that levonorgestrel has some effects on the endometrium.[61] In addition, the Tribunal argued that the medical science tested on animals, which was part of the evidence presented and which would have established that levonorgestrel does not prevent implantation, could not be assumed to apply to humans as well.[62]

The Judge finally stated that there was no doubt that the "biological subject of man" began at fertilization or conception, and that this "subject" was legally protected.

Therefore, by relying on the Constitutional provisions regarding the protection of the right to life of the unborn,[63] on the right to equality before the law,[64] and on the American Convention on Human Rights,[65] the administrative act allowing the distribution of the emergency contraceptive pill was declared void and of no effect.[66]

The decision of the Appeal Court

This case was appealed before the 9o Court of Appeal.[67] The Court of Appeal referred to the importance of determining the effects of the emergency contraception in order to understand how and in what moment such contraception could interrupt the natural cycle

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[60] *Supra* note 54 at para. 40-42.
[61] *Supra* note 54 at para. 47.
[62] *Supra* note 54 at para. 49.
[63] *Supra* note 54 at para. 53.
[64] *Supra* note 54 at para. 53.
[65] *Supra* note 54 at para. 53.
[66] *Supra* note 54 at para. 52-53.
[67] Juicio de Nulidad de Derecho Publico, rol. 4.200-03 (D-6.955-04) "*Centro Juvenil Ages con Instituto de Salud Publica de Chile,*" (9th Court of Appeal of Santiago).

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of pregnancy."[68] The Court described that the 20 Civil Tribunal provided protection to the unborn from the moment of fertilization even though the Tribunal concluded that there was disagreement regarding the emergency contraceptive pill's mechanisms of action.[69]

The Court reasoned that the scientific doubt regarding the mechanisms of action of the contraceptive pill was at the same time, the central issue in dispute in the case, while remaining an "unresolved medical-biological fact."[70] Therefore, the Court held that it could not resolve the case, as such a resolution must be achieved based on certainty and in this case it was not possible to recognize rights or duties which derived from scientific hypothesis which were still in dispute:

> Es por ello que, tanto el momento en que ocurre la concepción así como los efectos que produce en el organismo humano una píldora con determinados componentes químicos como de la que se trata en estos antecedentes, asunto respecto del cual no hay un veredicto científico indubitado, no puede ser resuelto por una sentencia emanada del órgano jurisdiccional, pues en tal caso se estaría reemplazando o arbitrando la verdad científica o la reflexión filosófica, lo que es de su incumbencia, sino que materia que compete a otros órganos del Estado y de la sociedad. [As there is no scientific certainty, [the issue] can not be solved by a decision originated from the judicial branch, because in that event the scientific truth or philosophical analysis would be replaced or even arbitrarily judged. This is not under the court's jurisdiction; it is an issue of jurisdiction which corresponds to other State's entities and of society]. [71]

Therefore, the Court of Appeal overturned the decision of the 20th Civil Tribunal of Santiago and the Public Health Institute was said to be entitled to resolve this issue according to law and to assume the responsibility to guarantee public health.

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[68] *Ibid.* at para. 12.
[69] *Ibid.*
[70] *Ibid.* at para. 15.
[71] *Ibid.* at para. 16 [my translation].

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iii) The experience of emergency contraception in Peru

The emergency contraceptive pill in Peru has not been challenged in courts, but this must not be understood to mean that such a challenge is unlikely. Indeed, a High Level Commission[72] comprised of different members of the society, including the Catholic Church, was established by the former Minister of Health, Alvaro Vidal to evaluate the emergency contraception and its mechanisms of action.

The report produced by this Commission relies on scientific evidence described by the World Health Organization, the International Federation of Gynecology and Obstetrics and the Latin American Federation of Societies of Obstetrics and Gynecology[73] regarding the beginning of pregnancy. These scientific institutions agree that the beginning of pregnancy technically begins with the implantation of the blastocyst in the uterus. They term this moment "conception", which they distinguish from fertilization, which is the union of the ovule and the sperm. These institutions note that many fertilized eggs are never implanted due to any number of physiological factors.[74]

According to the evidence presented to the Commission,[75] the only mechanisms of action of the emergency contraceptive pill are: a) the prevention or delay of ovulation; and, b) the prevention of migration of sperm by thickening the cervical mucus. In consequence, the mechanisms of action of the pill take place before fertilization and as there is no action on the endometrium, the pill is not abortive.

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[72] Eleven from the fourteen members of this Commission designated by Resolucion Suprema No. 007-2003, subscribed the Medical-scientific and legal report that concludes that the oral contraceptive pill has a full legal recognition under the Peruvian Constitution.

[73] In Spanish: Federacion Latinoamericana de Sociedades de Obstetricia y Ginecologia (FLASOG)

[74] Defensoria del Pueblo, "Anticonception Oral de Emergencia" (2003) 78 Serie Informes Defensoriales R.S. No. 007-2003-SA Comision de Alto Nivel at 79.

[75] The evidence presented to this Commission was based on the research done by Dr. Horacio Croxatto, representatives from the Pan American Health Organization, the Peruvian Medical School, women's organizations and doctors especialized in this area who were invited to participate.

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The report goes further in its analysis and refers to what it calls the "Fundamental Principles of Sexual and Reproductive Health":

- Equity – health care according to people's needs and culture, respecting their dignity and avoiding discrimination.
- Universality – the aspiration of fostering healthy citizens with rights, duties and health coverage available for the entire population, with particular regard paid to cultural, geographical and economical accessibility.
- Integrity – the effective integration of promotion, protection and health recovery activities, as well as disease prevention and rehabilitation.
- Solidarity – the promotion of general well being and provision of support to low-income populations.

Taken together, these Principles imply that the debate over the emergency contraception ought not merely focus in the legality of the pill, but also on the impact on women. Other issues regarding women must be also weighed and taken into consideration such as women's rights regarding sexual and reproductive health.

In regards to "conception," the report suggested the term has two contradictory and opposite meanings: 1) the original term, as it has been used for more than 2000 years, referring to implantation; and, 2) the term as it has been used for several decades, referring to fertilization. The report, however, argues that this second definition does not have a scientific basis,[76] but was instead introduced by the Catholic church in order to protect the life of the unborn from the moment of fertilization.

Regarding the Commission's legal analysis, the report relies on the Peruvian Constitution and the people's rights to life, integrity, equity, health, freedom of conscience,

[76] *Supra* note 75.

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freedom of religion, and reproductive freedom. The Peruvian Constitution recognizes the right to life of the person, and notably, recognizes that the "conceptus" or unborn ("concebido") is a subject of rights when those rights favor the unborn.[77] The Commission interpreted the protection of the unborn from the moment of implantation as from that moment there is scientific certainty of the unborn's existence. On the other hand, the report also relies on the General Health Law, Law No. 26842, which establishes the right of the people to choose their contraceptive method of preference, which includes natural methods. The report also mentions the National Population Policy,[78] which promotes and protects free, informed and responsible decision making about the number and spacing of births.

Regarding international human rights documents, the report relies on the right to benefit from scientific progress recognized in article 27 of the Universal Declaration on Human Rights and in article 15 of the International Covenant on Economic, Social and Cultural Rights.[79] Moreover, the report also notes States Parties condemnation of discrimination against women in all its forms and recognizes the importance of the rights of women to decide freely and responsibly on the number and spacing of their children, and to have access to information, education and the means to exercise these rights (article 16 of the Convention on the Elimination of All Forms of Discrimination against Women)[80]. The report also recognizes the right to personal liberty, freedom of conscience and religion and equity

[77] Constitution of Peru 1993, Art 2(1).
[78] Law Decree No. 346, 5 July 1985.
[79] UN, *International Covenant on Economic, Social and Cultural Rights* (New York: UN, 1966), GA Res.2200 (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316, entered into force 3 Jan. 1976, Art 15 (1b).
[80] UN, *Convention on the Elimination of All Forms of Discrimination against Women* (New York: UN, 1979) 34 UN GAOR Suppl. (No. 21) (A/34/46) at 193, UN. Doc. A/Res/34/180, Article 16 (1e).

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before the law under the American Convention of Human Rights[81], the Belem do Para Convention,[82] the Cairo Program of Action and the Beijing Platform.

The report also addressed Peru's obligations with respect to the General Recommendation No. 19 of CEDAW (llth session, 1992), which establishes that State parties should ensure that measures are taken to prevent coercion in regard to fertility and reproduction, and to ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of a lack of appropriate services in regard to fertility control.

The report's analysis in this regard, therefore, goes further than simply inquiring into the precise moment when life is constitutionally protected. The report also addresses women's human rights and the obligations the State has under international human rights law to protect and guarantee these rights. The discussion does not only focus on the rights of the unborn, but insists that such rights must be balanced against women's rights to autonomy and self-determination. As this report eloquently demonstrates, it is not possible to talk about absolute rights of the unborn as though other rights were not also at stake.

Parallel to this debate, some feminist NGOs in 2002 filed an "Acción de Cumplimiento", which is a Constitutional Guarantee recognized in the Peruvian Constitution, before the Civil Court.[83] Constitutional Guarantees are legal actions that taken against an authority or civil servant who is reluctant to comply with legislation. In this case, the legal rule that purported to allow the distribution of emergency contraception existed (Ministerial Resolution 465-99-SA/DM – Family Planning Regulations). Moreover, the plaintiffs previously exhausted other administrative remedies available to require the Ministry of

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[81] Organization of American States (OAS), *American Convention on Human Rights*, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978. Articles 7, 12 and 24.

[82] Organization of American States (OAS), *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* (Convention of Belem do Para), 9 Jun. 1994, online: Inter-American Convention on Human Rights <http://www.cidh.oas.org/women/convention.htm>. Article 4.

[83] This case was decided by the 7th Civil Court of Lima.

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Health to comply with the law. As a result, the Civil Court granted the injunction on July 8th 2004. The Court ordered the Ministry of Health to comply with the distribution and the provision of information regarding the oral contraceptive pill in all public health facilities.

Three years passed until, in 2004, the new Minister of Health, Pilar Mazetti, ordered the distribution of the emergency contraceptive pill in public health facilities.

It must be said that much of what was achieved in Peru was due to the efforts of feminist organizations and local NGOs committed to the promotion of women's human rights and Cairo's Program of Action, as well as the efforts made by the Adjunct Ombudsman for women's rights. This office elaborated a Report on Emergency Contraception,[84] which recommended the distribution of emergency contraception.

The report elaborated by the High Level Commission and the subsequent decision to approve the distribution of the emergency contraceptive pill despite the huge opposition from conservative forces in the government and the Catholic Church, represents landmark in the recognition of women's reproductive rights in Peru.

[84] Defensoria del Pueblo, "Informe Defensorial No. 78: La anticoncepcion oral de emergencia" Resolucion Defensorial No. 040-2003-DP, 2003.

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III SECTION II - ANALYSIS OF COURT DECISIONS

i) Catholic Doctrine and secularity

a. Catholic position on emergency contraception

This idea of considering the unborn as a human person in Latin American jurisprudence on abortion and contraception is inspired mainly by the Catholic Church doctrine. In the words of Jose Hurtado Pozo:

> La Iglesia Católica reforzó su lucha contra el aborto apoyándose simultáneamente en la concepción autónoma de la protección de la vida (basada en su carácter sagrado) y en la concepción derivada de la vida como derecho perteneciente a todo ser por su condición de persona [the Catholic Church reinforced its fight against abortion by simultaneously relying on: the autonomous conception of the protection of life (based on its sacred nature), and on the conception of the right to life that every being has because of their condition of persons].[85]

One central historical reason for the Catholic Church's objection to abortion is a concern about bringing about the death of an unbaptized child. According to Catholic teachings, such a child is condemned to eternal punishment if it dies in original sin without the sacrament of baptism.[86] It is the combination of these teachings with Catholic doctrine regarding the moment when human life begins that leads the Church to adopt strong stances against abortion and abortive contraception. This doctrine extends back to 1869, when Pope Pius IX asserted that a human person existed from the moment of conception.[87]

Of course, the Church has also opposed abortion because abortion was considered evidence of sexual sin; but this objection does not necessarily imply that abortion ought to be

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[85] J. Hurtado Pozo, "Aborto y Constitución" online: University of Fribourg <http://www.unifr.ch/derechopenal/articulos/pdf/HurtadoPozo8.pdf> [my translation].
[86] G. Williams. *The Sanctity of Life and the Criminal Law* (London: Faber and Faber LTD, 1958) at 178.
[87] *Supra* note 86.

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considered homicide.[88] And it is this issue of whether or not abortion and other forms of contraception amount to homicide that is at the heart of much of the jurisprudence that I have been reviewing in this thesis.

Now, it is important to mention that the Catholic doctrine that we are concerned with here, namely the protection of the unborn based on their "right to life", is a relatively recent concept in Church teaching.[89] St. Augustine for example believed that before the embryo had formed into a human shape, abortion ought only to be punishable by a fine. When, however, the embryo had a human form it was considered an animate being, and, in such circumstances, abortion ought to be punishable with death.[90] Some authors, such as Daniel A. Dombrowski and R. Deltete, suggest that Augustine condemned abortion in the later stages of pregnancy on ontological grounds, whereas he condemned abortion in the early stages of pregnancy "on the view that abortion is a perversion of the true function of sex and marriage."[91] In addition, Augustine expressed that, "though there is a point of time in embryonic development at which life came in, no human power could tell when this place was."[92]

St. Thomas Aquinas believed that abortion was not homicide until the fetus was ensouled, and, therefore, a human being.[93] According to Aquinas the fetus is first a vegetative soul, then an animal soul and then, when the body is developed, a rational soul. This is called the theory of "delayed homonization".[94] Aquinas defined the soul as the first

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[88] Catholics for a Free Choice, "Abortion and Catholic Thought: The Little-Told History," online: Catholics for a Free Choice <http://www.catholicsforchoice.org/articles/history.asp>.
[89] *Ibid.*
[90] *Supra* note 87.
[91] D. Dombrowski & R. Deltete. *A Brief, Liberal, Catholic Defense of Abortion.* (Illinois: University of Illinois Press, 2000) at 19.
[92] *Supra* note 87 at 143.
[93] *Supra* note 89.
[94] *Supra* note 89.

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principle of life in those things that live, and he added that life is shown mainly by knowledge and movement.[95] In the common law, from the time of Saint Thomas, life was considered to start not a fixed time after conception but at the moment of "quickening,"[96] which usually occurs about mid-term. In English law for example, abortion before quickening was not a crime until 1803.[97]

It was only in 1869, when Pope Pius IX condemned abortion in all circumstances, that the distinction between "animated" and "inanimate" fetuses was dropped. Years later, the Second Vatican Council specified that: "from the moment of its conception life must be guarded with the greatest care while abortion and infanticide are unspeakable crimes." [98]

b. How Catholic doctrine is having an effect on the cases

The Courts' reasoning in the emergency contraceptive cases is laden with Catholic doctrine regarding the protection of the unborn. I would contend, however, that judicial imposition of Catholic doctrine reflects an intolerance towards and discrimination against persons who profess other religions, who not profess any religion, or who are to be said catholic but who also believe in their right to freedom of conscience.

The right to freedom of thought, conscience and religion is protected in several documents on human rights like in article 18 of the International Covenant on Civil and Political Rights and article 12 of American Convention on Human Rights. Freedom of religion includes freedom from being compelled to comply with laws designed solely or

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[95] *Supra* note 87 at 143.
[96] Quickening is defined as the first time a baby move is felt
[97] *Supra* note 87 at 144.
[98] Pastoral Constitution "Gaudium et Spes" of Paul VI (1965) online: Vatican <http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html>.

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principally to uphold doctrines of religious faith and it includes the freedom to follow one's conscience regarding doctrines of faith one does not hold.[99]

The 1980 Chilean Constitution recognizes in article 4 that "Chile es una república democrática" [Chile is a democratic republic]. In addition the Chilean Constitution protects freedom of conscience, manifestation of all creeds and free exercise of all cults that are not opposed to morals, good customs or public order. [100]

The Argentine Constitution on the one hand establishes that "el Gobierno federal sostiene el culto católico apostólico romano" [the federal Government supports the Roman Catholic Apostolic religion].[101] On the other hand, however, article 14 of the Constitution also establishes the right of every inhabitant of the country "to freely profess his religion." It is important to note that even where the Argentine State establishes that it follows the Catholic doctrine merely as expression of democratic government, such an expression cannot be allowed to discriminate against women on any ground or to fail to recognize their rights. This is a particularly relevant consideration with respect to the judiciary, where the role of the judge is to apply the rule of law independently.

The Peruvian Constitution recognizes the Catholic Church as an important element in the historical, cultural and moral formation of Peru, and offers it collaboration.[102] In addition, the State respects other religious denominations and may establish mechanisms of collaboration with them as well.[103] This means that the Constitution does not have a specific

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[99] Human Rights Watch, *Argentina, Decisions Denied. Women's Access to Contraceptives and Abortion in Argentina* (New York: Human Rights Watch, 2005) at 82.
[100] Constitution of Chile, 1980, Art. 19(6)
[101] Constitution of Argentina, as amended to 1994, Art.2 [my translation].
[102] Constitution of Peru, 1993, Art. 50.
[103] *Ibid.*

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provision that divides Church and State; however, no one denies that the state in Peru remains essentially secular. In addition, the Peruvian political system is a democracy and, therefore, the Peruvian State must be understood as operating in the context of a pluralistic society.[104]

Both the laws and the interpretation of these laws in Peru and Chile must be neutral in relation to any religious doctrine,[105] for such neutrality is the characteristic of a secular state. Secular States are obliged to protect and guarantee equality in societies through neutral policies. As societies become more pluralistic, the state has to recognize these differences in order to achieve equality. By the same token, Argentina's laws and policies should also be neutral given the Constitutional provisions which guarantee the right to freedom of religion and which recognize the principles of democracy. Any legal provisions against these rights would therefore be unconstitutional.

As it was said in the Smeaton decision, where the plaintiff John Smeaton on behalf of Society for the Protection of unborn children challenged the legality of prescribing or supplying emergency contraception on the grounds that emergency contraception amounts in principle to a criminal offense under sections 58 and/or 59 of the offences against the Person Act 1861[106] :

> I sit as a secular judge serving a multi-cultural community on many faiths in which all of us can now take pride, sworn to do justice "to all manner of people". Religion – whatever the particular believer's faith – is no doubt something to be encouraged but it is not the business of government or of the secular courts. So the starting point of the law is an essentially agnostic view of religious beliefs and a tolerant indulgence to religious and cultural diversity. A secular judge must be wary of straying across the well-recognized divide between church and state. It is not for a judge to weigh one religion

[104] Constitution of Peru, Art. 43: "The Republic of Peru is democratic, social, independent and sovereign."
[105] D. Freeman, "Estado laico o Estado liberal?" online: CLADEM <http://www.cladem.org>.
[106] R v The Secretary of State for Health [2002] EWHC 610 (Admin).

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> against another. All are entitled to equal respect, whether in times of peace, or as at present, amidst the clash of arms.[107]

A pluralistic and democratic state should be concerned with the needs of *all* its citizens. Therefore, the distribution of contraceptives nationwide ensuring the State its access and availability free from discrimination in public health facilities so women can exercise fully their citizenship, should be a primary concern.

It is difficult to envision how a pluralist respect for freedom of choice and full exercises of citizenship is compatible with the view, influenced by the Catholic Church, that woman are born merely to give birth that is prevalent in a number of Latin American legal systems, particularly in Chile where such a view is inherent by the criminalization of abortion without providing any exceptions.[108] This is particularly relevant when we take into consideration the fact that the Catholic Church does not recognize men and women as being on an equal footing. An example of this is the discriminatory prohibition of women entering the priesthood and that the Catholic hierarchy is composed of only men for decision making and for interpretations.[109]

Such a view is also reflected in the emergency contraceptive cases where judges in Argentina and Chile forbid the availability of emergency contraception without any consideration of the impact this would have on women's lives. In the words of Susan Baer, "duties and obligations historically carry the odour of inequality, since the duty of care has not been imposed on men and has limited the choice of women to do anything else."[110] Or, as Rebecca Cook puts it, "women's lack of equality "." under laws that deny them reproductive

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[107] *Ibid.* at para. 50.
[108] S. Baer. "Citizenship in Europe and the Construction of Gender by Law in the European Charter of Fundamental Rights" in K. Knop, ed., *Gender and Human Rights*, *supra*, 2003, 83-97
[109] Another example is that the Trinity is always being described as comprised of male figures: the Father, the Son and the Holy Spirit.
[110] *Supra* note 109.

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self-determination in increasingly perceived as a violation not only of human equality but of full citizenship."[111] Forced pregnancy – especially forced pregnancy based on religious views – has, in other words, no place in a democratic community of full citizens.

Of course, the fact that the Catholic religion has a privileged position in many Latin American countries is obvious. Its influence in shaping societies from the Colonial times forward cannot be denied. But while Latin American countries now call themselves secular and pluralistic, the church's influence prevails in many ways. This is why it is important that the State and particularly the judiciary in the cases I have reviewed ought to maintain themselves as secular, rather than adopting Catholic doctrine as public policy, for such an adoption of Catholic doctrine entails an imposition on all citizens of social behavior sanctioned only by a particular religion on everyone. Such an imposition is a form of intolerance and discrimination based on religion.

Perhaps the most distressing example of this kind of discrimination evident in the context of Latin American controversies over contraception is that the Peruvian state actually requested that the Catholic Church make official pronouncements in relation to the emergency contraceptive pill, without making similar requests to other religions. The response from the Catholic Church was, not surprisingly, severe opposition. To communicate this position the Catholic Church has held private meetings with the President. The Church then proceeded to use an extraordinary measure to exert its dominance over Peruvian society: threatening catholic women who take emergency contraception with excommunication. The Church's position in this respect discriminates and judges women by characterizing her as a sinner and a murderer when taking contraceptives.

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[111] R.J. Cook & B.M. Dickens, "Human Rights Dynamics of Abortion Law Reform" (2003) 25 *Human* Rights Quarterly 1 at 43.

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In the face of the overwhelming power of the Catholic Church to prevent women's enjoyment of human rights, the State is obliged to take positive measures to ensure that the church the does not make public policy[112] or threaten women who decide to use emergency contraception as such interference would violate women's freedom of conscience and choice.

One practical measure that could be resorted to by states in this context would be to repeal the tax-exempt status the Catholic Church enjoys when it participates in activities against women's access to contraceptives.

Conclusion

This section has demonstrated how the teachings of Catholic doctrine regarding the beginning of life are not infallible and that there is no deep or historic consensus within the Catholic Church on the determination of the moment when life begins.

Regardless of its content, however, Catholic doctrine must not be imposed by any State or by court decisions because such an imposition contradicts the principle of secularity and would therefore put democracy at risk. Pluralistic and democratic states have the duty to guarantee that women are free to make informed choices from contraceptive options, as well as a duty to ensure that these options are provided based on women's needs and safety considerations, not on the basis of the views of a particular religious organization. Democratic states must, therefore, establish neutral policies that allow every woman to make choices according to their conscience, and they must, furthermore ensure that such choices are respected and fulfilled.

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[112] R. Boston. *Why the religious right is wrong. About Separation of Church & State* (Boston: Prometheus Books, 1993) at 212.

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ii) Courts' use of Scientific Evidence

All of the cases about emergency contraception described in Chapter One have involved determinations that the emergency contraceptive pill has abortive effects because one of its mechanisms of action "could" prevent the implantation of a fertilized egg in the uterus. Furthermore, Courts in these cases have framed the problem as involving the definition of the beginning of human life. By taking such an approach, Courts have failed to accord sufficient attention to the issue of certainty.

According to the World Health Organization, the International Federation of Gynecology and Obstetrics and the Latin American Federation of Societies of Gynecology and Obstetrics, scientifically speaking, pregnancy begins with the implantation of the blastocyst in the uterus. Pregnancy is defined this way:

> Natural human reproduction is a process which involves the production of male and female gametes and their union at fertilization. Pregnancy is that part of the process that commences with the implantation of the conceptus in a woman and ends with either the birth of an infant or an abortion.[113]

The reason for this is that when the implantation process takes place, a hormone called hCG (Human Chorionic Gonadotropin) is secreted by the placenta, and this hormone can be scientifically detected in order to determine pregnancy. Only from that moment forward can the protection of the unborn be guaranteed, as prior to that point there is no certainty that the unborn actually exists. In addition, these institutions describe abortion as the termination of pregnancy.

The Supreme Court of Argentina, in the "Imediat" case went further, establishing that every contraceptive method that prevents implantation should be characterized as abortive. Such reasoning opens the door to the possibility of legal challenges to all available

[113] FIGO Committee Report for the Ethical Aspects of Human Reproduction and Women's Health, 64 *Int. J. Gynecol. Obstet.* (1999) 317-322.

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contraceptive methods – an eventuality that came to pass with the challenge from NGO 25 de Marzo. Such a challenge to the lawfulness of all forms of contraceptives that inhibit the implantation of a fertilized egg, or even that produce effects prior to implantation, would impact all hormonal contraceptives that are currently available to women, such as the pill, the mini pill, the intra-uterine progestogens (IUS), the intra-muscular and sub-dermal progestogens, as well as the intra-uterine devices (IUD).

The Argentine Penal Code criminalizes abortion as follows:

> El que causare un aborto será reprimido:
>
> 1°. con reclusión o prisión de tres a diez años, si obrare sin consentimiento de la mujer. Esta pena podrá elevarse hasta quince años, si el hecho fuere seguido de la muerte de la mujer;
>
> 2°. con reclusión o prisión de uno a cuatro años, si obrare con consentimiento de la mujer. El máximum de la pena se elevara a seis años, si el hecho fuere seguido de la muerte de la mujer.
>
> [Whoever causes an abortion will be punished:
>
> 1°. with imprisonment between three to ten years, if without the woman's consent. This sentence can be raised to fifteen years if the woman's death follows from the procedure
>
> 2°. with imprisonment between one to four years, if with the woman's consent. This sentence can be raised to six years if the woman's death follows the procedure] [114]

In addition, women who provoke their own abortion will be also punished: "Será reprimida con prisión de uno a cuatro años, la mujer que causare su propio aborto o consintiere en que otro se lo causare. La tentativa de la mujer no es punible. [The woman who provokes her own abortion or consents that someone provokes it will be punished with imprisonment between one to four years. An attempt made by the woman is not punished.][115]

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[114] Penal Code of Argentina 1984, Art. 85 [my translation].
[115] *Ibid.* at Art. 88 [my translation].

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However, there is an exception to the rule established by the Argentine Penal Code where the abortion is performed by a medical doctor with the consent of the pregnant woman in two particular situations:

> Incurrirán en las penas establecidas en el artículo anterior y sufrirán, además, inhabilitación especial por doble tiempo que el de la condena, los médicos, cirujanos, parteras o farmacéuticos que abusaren de su ciencia o arte para causar el aborto o cooperaren a causarlo. El aborto practicado por un médico diplomado con el consentimiento de la mujer encinta, no es punible: 1. a fin de evitar un peligro para la vida o la salud de la madre y si este peligro no puede ser evitado por otros miedos; 2. si el embarazo proviene de una violación o de un atentado al pudor cometido sobre una mujer idiota o demente.[116]

> [Doctors, surgeons, midwives or pharmacists who abuse their science or art to cause an abortion or to cooperate to cause an abortion will fall under the rules established in the above article and will be suspended for the double time of the imprisonment. An abortion performed by a certificated doctor with the pregnant woman's consent is not punishable: 1. if performed to avoid a danger to the mother's life or health and if the danger could not have been avoided by any other means; 2. if pregnancy is the result of a rape or an attempt to assault a mentally incompetent woman or a woman suffering from dementia].[117]

It is interesting to note that in this provision an abortion performed where pregnancy is the result of rape would not be punished in the event that the victim is mentally disabled women, but remains punishable with respect to other women.

The Chilean Penal Code penalizes abortion in all circumstances with no exceptions. Article 342 states that:

> El que maliciosamente causare un aborto será castigado: 1.- Con la pena de presidio mayor en su grado mínimo, si ejerciere violencia en la persona de la mujer embarazada. 2.- Con la de presidio menor en su grado máximo, si, aunque no la ejerza, obrare sin consentimiento de la mujer. 3.- Con la de

[116] *Ibid.* at Art.86.
[117] *Ibid* [my translation]..

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> presidio menor en su grado medio, si la mujer consintiere. [Whoever causes an abortion will be punished: 1.- imprisonment for not less than five years and not more than ten years, if violence was exercised on the pregnant woman. 2.- imprisonment for not less than three years and no more than five years, if, even with no violence, it is done without the woman's consent. 3.- imprisonment for not less than 541 days and no more than three years, if the woman consents].[118]

In addition, article 344 establishes that "la mujer que causare su aborto o consintiere que otra persona se lo cause, será castigada con presidio menor en su grado máximo. Si lo hiciere por ocultar su deshonra, incurrirá en la pena de presidio menor en su grado medio." [The woman who causes an abortion or consents to allowing someone to cause an abortion punished with imprisonment for not less than three years and no more than five years. If she does it to hide her dishonor, there will be imprisonment for not less than 541 day and no more than three years].[119] This absolute prohibition means that even when the life of the woman is threatened, resort to abortion remains a criminal act.

In other Latin American countries such as Peru, while abortion is criminalized there is an exception similar to the exception under Argentine law when the life or health of the woman is in danger.[120]

None of these provisions in the respective Penal Codes (including the Peruvian Penal Code), however, establish what is meant by "abortion".

When assessing the aims of these provisions of the criminal law, one ought to be mindful that the object of protection of the misdemeanor of abortion is the fertilized egg once

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[118] Penal Code of Chile 1874, Art. 56 [my translation].
[119] *Ibid.* at Art. 342-345; Penal Code of Chile 1874, Art. 56 [my translation].
[120] Peruvian Penal Code, 1991, Art. 119: "No es punible el aborto practicado por un médico con el consentimiento de la mujer embarazada o de su representante legal, si lo tuviere, cuando es el único medio para salvar la vida de la gestante o para evitar en su salud un mal grave y permanente".

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it has implanted in the endometrium.[121] The reason for this is because it is only from that particular moment on that there is certainty regarding the existence of the unborn.[122]

One commentator in Penal Law Theory, Jose Manuel Valle, has written that "hasta la anidación no puede afirmarse con rotundidad la individualidad de la nueva vida" [it is not possible to affirm the individuality of a new life until implantation].[123] He bases this argument on the fact that the fertilized egg takes 14 days to implant in the maternal womb and that pregnancy cannot start until that moment. He also argues that this process is laden with changes and qualitative mutations where the natural selection suggests that 50% of fertilized ovules can be naturally eliminated. In this context, embryonic development before pregnancy is highly uncertain.[124] According to this author, this uncertainty implied the need for differentiated legal protection:

> Comparto la opinión mayoritaria de que el objeto de tutela en el delito de aborto debe de delimitarse a partir de la anidación del ovulo fecundado en el útero materno, es decir, la cobertura legal de los tipos de aborto abarca al embrión y al feto, pero no al "preembión" o "embrión pre-implantatorio. [I share the majority opinion that the object of protection in abortion must be limited to implanted fertilized eggs in the maternal womb, meaning, the legal coverage of the different legal figures of abortion cover the embryo and the foetus, but not the "pre-embryo."][125]

In addition to this, the fertilized egg before implantation lacks of individuality and there is still uncertainty regarding its embryonic development.[126]

In this regard, it is also important to understand that it is not every time a couple has sexual intercourse without using contraception that a woman becomes pregnant.[127]

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[121] L. Rodriguez Ramos et al. *Derecho Penal Parte Especial I* (Madrid:1998) at 70.
[122] J.M Hurtado Pozo. *Manual de Derecho Penal. Parte Especial 2* (Lima:1994) at 59.
[123] G.Quinteros. *Comentarios a la Parte Especial del Derecho Penal* (Pamplona: Editorial Aranzadi S.A., 1999) at 77 [my translation].
[124] *Ibid.*
[125] *Ibid.* at 78 [my translation].
[126] *Ibid.* at 79.

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Regarding the statement of the Supreme Court of Chile in the "Postinal" case that the fertilized egg is a cell alive with its own unique genetic material that can give rise to a human being, the Court failed to analyze, however, cases where a fertilized egg can divide into two identical daughter cells that may be able to develop separately and be born as identical twins.[128] These cells would have the same genetic material. More significantly, the Court also failed to analyze cases where two fertilized twin ovules end up combining into one, and produce a normal individual.[129] By the same token, the fact that a corpse has a unique and complete genetic code "is not necessarily a characteristic that [produces] moral personality, [other] specific characteristics such as the capacity of conscience or the capacity to feel, may be relevant."[130]

To my mind, all these decisions are lacking in sound reasoning, and can be considered to be paradigms of arbitrariness,[131] in that the reasoning deployed is not based on any evidence. Of course, no one would deny that biologically, two gametes unite at the moment of fertilization. It is an entirely other matter though, to provide legal protection to the product of fertilization based on ethical, moral or religious grounds. Worse, these decisions will have a direct impact on public health policies that will affect the lives of many

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[127] H. Croxatto, "La pildora anticonceptiva de emergencia y la generacion de un nuevo individuo. Reflexion y Liberación,"online: CLAE <http://www.clae.info/index2.html>: From a study that followed one hundred fertile couples that had sexual intercourse several times a month and did not use any kind of contraceptive method, it was observed that 25 of the women became pregnant in the first month, and 25% of the 75 remaining women became pregnant in the second month, and, in successive months the same pattern followed. The explanation for this is that in each month, 50% of the couples experience no fertilization and of the 50% of the fertilizations that do occur, half of them do not lead to pregnancies because the product of fertilization is eliminated spontaneously.

[128] N. Ford *When did I begin? Conception of the human individual in history, philosophy and science* (Cambridge: Cambridge University Press, 1998) at 113.

[129] A. Ruiz Miguel, "El aborto, entre la etica y el derecho" Lecture presented to the Legal Abortion in Mexico Conference for the National Institute of Penal Sciences (Instituto Nacional de Ciencias Penales (INACIPE), 2003 [unpublished]

[130] *Ibid* [my translation].

[131] R. Villanueva, "Notas sobre Interpretacion Juridica (a proposito de la Ley 26260 y la Violencia Familiar)" in *Violencia contra la mujer: Reflexiones desde el Derecho* (Lima, Manuela Ramos, 1996) 93 at. 113.

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individuals, particularly women with few economic resources who depend on the State's health policies.

It is important to point out that "there is nothing which would enable a woman, her doctor or pharmacists to determine which mechanism or combination of mechanisms operates on any individual occasion when the morning-after pill is taken."[132] Many scientists have stated that the exact way or ways in which other contraceptive pills and devices operate are still not fully understood. For example in the Smeaton case, the Honourable Mr. Justice Munby stated: "in everyday practice it is not possible to determine whether in a particular woman the pill is operating to prevent ovulation, conception or implantation."[133] What can be proved, however, is that because "the morning after pill is used before the process of implantation has begun, and because it cannot make an implanted egg de-plant, the morning-after pill cannot as a matter of law bring about a 'miscarriage.'"[134]

The decision of the Appeal Court in the Postinor 2 case against the Public Health Institute in Chile was correct where it established cases can only be resolved within the ambit of the rule of law where certainty is established. The Court of Appeal stated that:

> [s]abido es que el derecho constituye un instrumento limitado, que sólo puede solucionar determinados conflictos de la vida humana y no tiene ni puede tener la pretensión de resolver todas aquellas disputas que se presentan, sea, por ejemplo, en los ámbitos de la filosofía o de la ciencia y, ciertamente, desde luego, mucho menos aquéllos de significación religiosa. [The fact that law is a limited instrument that can only solve determined conflicts of human life is known, and law does not and cannot attempt to solve all the disputes that may arise, for example in the areas of philosophy or science, and certainly less in the area of religion.][135]

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[132] *Supra* note 108 at para. 199(vi).
[133] *Supra* note 108 at para. 199.
[134] *Supra* note 108 at para. 18.
[135] *Supra* note 54 at para. 16 [my translation].

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The law has to be applied when there is certainty on facts. It cannot be applied based on assumptions or interpretations. Nevertheless, the Court of Appeal could have gone further in its reasoning. It could, for instance, have held that the evidence presented by both parties was sufficient to establish the non-abortive effect of the emergency contraceptive pill.[136] In that particular case, there was enough evidence to determine that the Chilean law protects the unborn from the moment of implantation. Because no Constitutional provision or law specifically determines the term "conception" means fertilization, the courts ought to avoid giving the term this definition given the levels of uncertainty involved.

As was stated in the Smeaton case:

> The question of when human life begins as matter or morality, or indeed biology, is not the same as the question of when pregnancy begins for the purposes of the law. Human life may – or may not – begin in a test-tub, but the mere existence of a fertilized egg in test-tube does not make the woman who produced the egg pregnant. The important issue, in law, is when pregnancy begins.[137]

Life is a process, and that is the reason why "even biology and medicine therefore cannot tell us precisely when it is that 'life' in fact 'starts'."[138]

Conclusion

When addressing scientific evidence, courts should rely on evidence that can be scientifically proven in order to provide certainty on the cases and therefore apply the law. The law cannot be applied based on biology, philosophy or religion. By the same token, commentators in Penal Law Theory have clearly established that the provisions of abortion must be understood to protect the unborn from implantation as from that moment there is a determined interest that can be legally protected.

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[136] L. Casas. "La batalla de la Pildora. El acceso a la anticoncepcion de emergencia en America Latina."2005 [unpublished] at. 22.
[137] *Supra* note 108 at para. 267.
[138] *Supra* note 108 at para. 60.

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Current domestic legal provisions in Argentina and Chile protect the life of the unborn from the moment of conception, which has to be understood as beginning at implantation or pregnancy, on the assumption that certainty can be established from that moment forward.

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iii) Interpretation of International Human Rights documents relating to the right to life

Regarding the international documents for the protection of human rights, the Supreme Court of Chile as well as the Supreme Court of Argentina in the decisions I reviewed adopted literal interpretations of article 4.1 of the American Convention on Human Rights which states that: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."[139] As will be analyzed below, the protection of the unborn from the moment of conception established in the Convention is not absolute. In addition, the American Convention on Human Rights does not state that conception means fertilization.

The Supreme Court of Argentina in the "Imediat" case relied on article 6.1 on the Convention on the Rights of the Child to determine that the protection of the unborn begins at the moment of conception. This provision establishes that "states parties recognize that every child has the inherent right to life."[140] As I set out below, there is no evidence, not even in the "travaux preparatoires" of the Convention, suggesting that the protection of the unborn begins the moment of fertilization.

a. The American Convention on Human Rights

The American Convention on Human Rights[141] is the only international human rights instrument that addresses the "unborn child". Article 4.1 of the Convention states that:

> Every person has the right to have his life respected. This right shall be protected by law, and in general, from the moment of conception. (...)[142]

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[139] Organization of American States (OAS), *American Convention on Human Rights*, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978.
[140] UN, *Convention on the Rights of the Child* (New York: UN, 1989), GA Res. 44/25, annex, 44 UN GAOR Suppl. (No. 49) at 167, UN Doc. A/44/49, entered into force 2 Sept. 1990.
[141] *Supra* note 140.
[142] *Supra* note 140.

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Even though the article protects the life of the "unborn," the establishment of the phrase "in general" leaves open the possibility of varying abortion practices. In addition, the words "in general" also suggest that the Convention is not meant to give priority to "unborn life over the life or health of born persons, since protection of prenatal life does not clearly withdraw protection from born persons."[143] In other words, the Convention cannot be interpreted to mean that, where a conflict arises between the rights of women and the rights of the unborn rises, the rights of the latter should necessarily prevail. Such a view would imply that the Convention provides absolute protection to the unborn. This type of absolute protection would undermine women's rights, which are expressly recognized and protected in the Convention. Undermining women's rights in this way would run contrary to the object and purpose of the Convention.

In this regard, attention must be paid to the Convention of Vienna on the Laws of Treaties,[144] which establishes that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[145] It is important to emphasize that the American Convention also established that no provision of the American Convention on Human Rights should be interpreted as permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in the Convention or to restrict them to a greater extent than is provided for.[146] In this context, the object and purpose of the American Convention is to recognize and guarantee both men and women's rights to life, to physical,

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[143] *Supra* note 112 at 25.
[144] UN, *Vienna Convention on the Law of Treaties*, United Nations Treaty Series, 1155 (Vienna: UN, 1969), 331.
[145] *Ibid.* at para 31(1).
[146] *Ibid.* at para. 29.

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to mental and moral integrity, to personal liberty and security, to privacy, to freedom of conscience and thought, to equality before the law, as well to enjoyment of social rights involving health and education. These rights should be addressed by judges confronting cases involving the legality of emergency contraception under the scope of the American Convention where two juridical interests are legally protected: on one hand the right to life of the unborn, and, on the other hand, all the other rights set forth in the Convention offering protection to women.

The American Declaration of the Rights and Duties of Man[147] recognizes women's rights to the preservation of their health and well being, to religious freedom, to protection of private life, and to recognition of juridical personality and civil rights. As article (d) of the American Convention indicates, when interpreting the American Convention, "No provision of this convention shall be interpreted as "." excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."[148]

The Inter American Commission on Human Rights noted in the Baby Boy case[149] that the words "in general" were included in article 4.1 of the American Convention by majority vote in order to permit abortion. The petitioners in the Baby Boy case argued that there had been a violation of Article 1 of the American Declaration of Rights and Duties of Man, which states that: "Every human being has the right to life "."." The petitioners in that

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[147]Approved by the Ninth International Conference of American States, Bogotá, Colombia, 1948)

[148] See also the Advisory Opinion OC-10/89 Inter-American Court of Human Rights (1989) on the Interpretation of the American Declaration of Rights and Duties of Man within the framework of article 64 of the American Convention on Human Rights.

[149] *Christian B. White and Gary K. Potter v. United States of America* (1981), Inter-Am.Comm.H.R No. 2141, *Annual Report of the Inter-American Commission on Human Rights: 1980-81*, OEA/Ser.L/V/II.54/doc.9/rev1.

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case relied on the provisions established in the American Convention. They stated that the "travaux preparatoires"[150] showed the intention of the Conference to include the protection of the right to life from the moment of conception.[151]

The main reason for the Commission's reasoning was that accepting an "absolute right from the moment of conception" would have been incompatible with the laws in many American States permitting abortion in some circumstances. [152] In addition, it was clearly established that "the legal implications of the clause "in general, from the moment of conception" are substantially different from the shorter clause "from the moment of conception:"[153]

> In the light of this history, it is clear that the petitioners' interpretation of the definition given by the American Convention on the right of life is incorrect. The addition of the phrase "in general, from the moment of conception" does not mean that the drafters of the Convention intended to modify the concept of the right to life that prevailed "." when they approved the American Declaration. The legal implications of the clause "in general, from the moment of conception" are substantially different from the shorter clause "from the moment of conception" as appears repeatedly in the petitioners' briefs.[154]

The Committee explained:

> When dealing with the issue of abortion, there are two aspects of the Convention's elaboration of the right to life which stand out. First, the phrase "in general." It was recognized in the drafting sessions in San José that this

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[150] when discussing the draft Declaration at the IX International Conference of American States in 1948 at Bogota.
[151] *Supra* note 149 at para. 18.
[152] *Supra* note 149 at para. 25.
[153] *Supra* note 149 at para. 30. It must be mentioned that the Delegations of Argentina, Brazil, Cuba, United States of America, Mexico, Peru, Uruguay and Venezuela, raised the problem that accepting an absolute concept of the right to life from the moment of conception would conflict with existing laws that permit abortion. See *supra* note 149 at para. 18 (d)(e).
[154] *Supra* note 149 at para. 30.

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> phrase left open the possibility that states parties to a future Convention could include in their domestic legislation "the most diverse cases of abortion.[155]

Regarding the interpretation of the Declaration, the Commission resolved that the legislative history of the Declaration did not support the petitioner's argument, because the Conference faced the suggestion to include the protection of the life of the unborn but decided not to do it:

> With regard to the right to life recognized by the Declaration, it is important to note that the conferees "." rejected language which would have extended that right to the unborn.
>
> The Conference, however, adopted a simple statement of the right to life, without reference to the unborn, and linked it to the liberty and security of the person. Thus it would appear incorrect to read the Declaration as incorporating the notion that the right to life exists from the moment of conception. The conferees faced this question and chose not to adopt language which would clearly have stated that principle.[156]

It is important to mention that the Convention of Vienna on the Law of Treaties also establishes that as supplementary means of interpretation: "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."[157] This was exactly what was done by the Inter American Commission on Human Rights in the Baby Boy case, where the commissioned determined that the words "in general" in the article were intended to permit abortion by reviewing the "travaux preparatoires" of the Convention.

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[155] *Supra* note 149 at para. 14(c).
[156] *Supra* note 149 at para. 14(a).
[157] *Supra* note 145 at para. 32.

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In this way, the Inter American Commission on Human Rights in the Baby Boy decision held that the United States Supreme Court decision, Roe v. Wade[158], complied with Article 4 of the American Convention.[159]

In this regard, the government of Mexico made an interpretative declaration on Article 4 paragraph 1. Mexico stated that the expression "in general" does not constitute an obligation to adopt or maintain legislation protecting life "from the moment of conception", because this was an area within the purview of States.[160]

b. The Convention on the Rights of the Child

The ninth preambular paragraph of the Convention on the Rights of the Child establishes that:

> Bearing in mind that, as indicated in the Declaration of the Rights of the Child, the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.

The Convention on the Rights of the Child establishes in Article 1 that "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." Article 6 (1) of the Convention specifies that, "States Parties recognize that every child has the inherent right to life."

The notion that the Convention on the Rights of the Child protects the right of the unborn is a contested issue. The first draft text of the Convention, which was made by the Polish government, was based on the Declaration on the Rights of the Child. It must be stated that none of the previous documents that recognized the rights of the child, including the

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[158] Roe v. Wade, 410 U.S. 113 (1973).
[159] *Supra* note 149 at para. 18.
[160] S. Tapia, *Principales Declaraciones y Tratados Internacionales de Derechos Humanos ratificados por Mexico* (Mexico: Comision Nacional de Derechos Humanos, 1999) at 296.

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1924 and 1959 Declarations, contained any explicit protection to the unborn child; rather, the protection was given to the "child".[161] In the "travaux preparatoires" for the Convention, it was made clear that the protection of the unborn was not to be included in this document. The reason for its exclusion is simple: not only would its inclusion have conflicted with many countries' domestic provisions that may contain legal provisions on abortion, but also this was a document aspired to wide spread acceptance, which would have been much more restricted had protection extended to the unborn. With respect to this last point, as Philip Alston puts it,

> [w]hile there is no basis for asserting that the notion that human rights inhere in the unborn child has been authoritatively rejected by international human rights law, there has been a consistent pattern of avoiding any explicit recognition of such rights, thereby leaving the matter to be dealt with outside the international legal framework.[162]

The Polish draft referred to Article 10 2) of the International Covenant on Economic, Social and Cultural Rights, which states that "special protection should be accorded to mothers during a reasonable period before and after childbirth." In this first draft, then, the concern related more to the rights of the mother before birth rather than to the fetus.[163]

Regarding the preamble, many people argue that, because the child's protection extends before birth, this protection ought to be understood as being accruing at the moment of conception, and, therefore, protecting the unborn's right to life. Nevertheless, I contend that the preamble ought not to be read as implying that the unborn has protection from the moment of conception; to the contrary, such a reading lacks textual support in the Convention.

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[161] P. Alston, "The Unborn Child and Abortion under the Draft Convention on the Rights of the Child" (1990) 12 Human Rights Quarterly 156.
[162] *Ibid.* at 161.
[163] *Ibid.* at 156.

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As was stated in a decision from the International Court of Justice, "the Preamble of the United Nations Charter constitutes the moral and political basis of the legal provisions" that are included in the text. However, "such considerations are not, in themselves, rules of law."[164] Under that premise, interpreting the preamble to protect the unborn would broaden the limits that articles 1 and 6 of the Convention. Such a reading would, I suggest, be inconsistent. In the place of such an inconsistent reading, I propose that any rights that are accorded to the child before birth ought to be understood as implying only that States are obliged to provide the protections to the fetus that can be realized by taking appropriate measures to guarantee women pre-natal care services and/or adequate health services, or even welfare, as well as education to learn how to raise a child.

As a coda, it is worth noting Argentine State declared upon signing the Convention on the Right of the Child that: "Concerning article 1 of the Convention, the Argentine Republic declares that the article must be interpreted to the effect that a child means every human being from the moment of conception up to the age of eighteen."[165] However, this statement was not reiterated upon ratification of the Convention.[166]

Conclusion

In conclusion, these two international human rights documents cannot be interpreted to provide the unborn with a right to life from the moment of fertilization. In both cases, the protection of life to the unborn from fertilization was not intended in the drafting or ratification of these documents. Interpreting these instruments as providing such protections would run contrary to the object and purpose of both Conventions.

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[164] *Ibid.* at 169.
[165] Argentine State declaration upon signing the Convention on the Right of the Child, online: Convention on the Rights of the Child <http://www.ohchr.org/english/countries/ratification/11.htm#reservations>.
[166] *Supra* note 100.

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iv) **How Courts address the right to life and the interests of the unborn**

With respect to Constitutional provisions regarding the right to life, the Argentine Constitution does not have any provision that literally recognizes the right to life. However, the Constitution has a provision that incorporates several ratified human rights instruments that recognize the right to life. The Argentine Constitution provides that "los tratados y concordatos tienen jerarquía superior a las leyes" [treaties and concordats are hierarchically superior to laws].[167] This means that these international instruments on human rights have a constitutional status and therefore triumph over regular national laws. The Argentine Constitution includes the following international treaties: the American Declaration on Rights and Duties of Man, The Universal Declaration of Human Rights, The American Convention on Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the Optional Protocol, the Convention on the Prevention and Punishment of the Crime of Genocide; the International Convention for the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention on the Rights of the Child.[168]

Chile also recognizes the Constitutional status of international human rights instruments according to a majority doctrinal interpretation. Article 5 of the Chilean Constitution states that "es deber de los órganos del Estado respetar y promover tales derechos, garantizados por esta Constitución, así como por los tratados internacionales ratificados por Chile y que se encuentren vigentes." [It is the duty of the State organs to

[167] Constitution of Argentina, as amended to 1994, Art. 75(22) [my translation].
[168] *Ibid.*

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respect and promote rights guaranteed by the Constitution and by international treaties ratified by Chile currently in force.] In addition, article 19 of the Chilean Constitution establishes the protection of the right to life and, in particular, the protection "del que está por nacer" [of the unborn].[169]

As a matter of regular domestic law, the Argentine Civil Code establishes that "desde la concepcion en el seno materno comienza la existencia de las personas "."", [the existence of the person starts in the maternal womb from conception].[170] Also, the Civil Code states that "son personas por nacer las que no habiendo nacido estan concebidas en el seno materno" [persons to be born are those who have not yet born but who are conceived in the maternal womb].[171]

Along similar lines, the Chilean Civil Code establishes that the protection of "the unborn" begins at conception, stating that "la ley protege la vida del que esta por nacer" [the law protects the life of the unborn] and "de la epoca del nacimiento se colige la de la concepcion, [from the time of birth conception can be inferred].[172] It must be pointed out that this provision in the Chilean Code creates a legal presumption of conception.[173]

The Argentine Civil Code also establishes that "la época de la concepción de los que naciesen vivos, queda fijada en todo el espacio de tiempo comprendido entre el máximum y el mínimum de la duración del embarazo," [the time of conception of those who are born alive, is established between the maximun and minimum length of a pregnancy.][174] The Civil

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[169] Constitution of Chile, 1980, Art. 19(1).
[170] Argentine Civil Code 1871, Art. 70 [my translation].
[171] *Ibid.* Art. 63 [my translation].
[172] Chilean Civil Code 1857, Art. 75-76 [my translation].
[173] Like in the Argentine Civil Code, the Chilean Civil Code utilizes the following formula: no fewer than 180 days and no more than 300 days counted backwards, before midnight of the day the baby is born.
[174] Supra note 170 at Art. 76 [my translation].

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Code defines these limits as 180 days minimum and 300 days maximum.[175] It is interesting to note that the Civil Code refers to the length of a "pregnancy". These provisions should, therefore, have been interpreted as determining pregnancy according to international standards that come from scientific evidence – which is from the moment of implantation - but the Supreme Court of Argentina did not interpret it this way.

It is worth noting that this legal presumption of conception exists in both countries' legislation to determine paternity cases. Courts cannot, I submit, rely on this presumption to establish that the protection of the unborn starts at fertilization because this provision does not indicate that the protection begins at that moment. Indeed, such protection is not remotely connected with the object and purpose of the provision. The purpose of the presumption of paternity is simply to guarantee that the child who is born alive is not deprived of his/her rights, such as the right to a name and the right to child support when there is doubt about paternity.

The 20th Civil Tribunal of Santiago in the "Postinor 2" case, the 8o. Court of Appeal of Santiago, the Supreme Court of Chile in the "Postinal" case and the Supreme Court of Argentina in the "Imediat" case have all interpreted the term "conception" as meaning fertilization. However, none of the provisions in the Chilean or Argentine legislation describe what is understood by the term "conception". Moreover, the precise moment legal protection applies is not set out in any of the Constitutions, or by any international document on human rights. In the place of such constitutional guidance, judges in these cases have based their reasoning on biological definitions made by experts on fertilization and on the definition of conception by Catholic doctrine.

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[175] *Ibid.* Art. 77.

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When courts rely on biological definitions, they often resort to general or medical definitions. According to the Oxford Dictionary[176], the word "conception" means: 1) the act of conceiving or of a child of being conceived; or, 2) the devising of a plan or idea, the way in which something is perceived, a concept, ability to imagine or understand. Moreover, the word "conceive" means: 1) to become pregnant with (a child); or, 2) to devise in the mind, or to imagine. Its origin comes from the Latin word "concipere", which means "take together". The word "conceptus" is described in the dictionary as the embryo during the early stages of pregnancy.

The International Dictionary of Medicine & Biology defines conception as "the act or condition of becoming pregnant; the initiation of pregnancy."[177] It, furthermore, defines pregnancy as "the state of a female from the time of conception until delivery of the products of conception."[178] It is worth mentioning that abortion is defined as "the termination of pregnancy or premature expulsion of the products of conception by any means before fetal viability."[179] Stedman's Medical Dictionary defines conception as "the act of conceiving: the implantation of the blastocyste in the endometrium."[180] Dorlands's Illustrated Medical Dictionary defines conception as the "onset of pregnancy marked by fertilization of an oocyte by a sperm or spermatozoon; formation of a visible zygote."[181]

Although the dictionary definitions are fairly precise, words like *the unborn, human life, human being, person,* are used indistinctively as synonymous in these court decisions – not to mention in many other documents that address the right to life. For example the Supreme Court of Argentina stated that according to the references they relied on, *human life*

[176] *The Concise English Oxford Dictionary*, 2d ed., *s.v.* "conception".
[177] *Supra* note 108 at para. 141.
[178] *Supra* note 108.
[179] *Supra* note 108.
[180] *Supra* note 108 at para. 145.
[181] *Supra* note 108 at para. 147.

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starts when the two gametes unite at the moment of fertilization and from that moment a *human being* exists. The Chilean decision in the Postinal case contended that protection was required from the moment of fertilization on the grounds that *human beings* have the right to life. The Court also relied on the Chilean Civil Code, which states that "son personas todos los individuos de la especie humana, cualquiera sea su edad, sexo, estirpe, o condicion" [*persons* are all individuals of the human species, regardless of age, sex, stock or condition.][182]

However, I submit that judges must be more precise in their use of these words, especially when applying the law, because the terms are presently subject to the judges' own biases or presuppositions. As Rebecca Cook, et al., states:

> Discussion must accordingly be conscious of the imprecision of language, and of opportunities for incidental, accidental and deliberate injection of values into what are presented as objective facts to which ethical, legal and other analysis is applied. Equally, the terms in which analytical questions are asked can, by chance of purpose, predetermine their answers.[183]

In establishing such precision, judges ought to keep in mind that their role is not to discover the "true" meaning of the terms but rather to ascribe a meaning to them,[184]as the Smeaton case states:[185]

> As in the case of death so in the case of life (and indeed so also in the case of motherhood) the concept may mean one thing to a medical man or biologist, another thing to a theologian or ethicist, another thing to a philosopher, and yet another thing to a lawyer. I am competent only to rule on matters of law (...) In the final analysis, life, death and parenthood are, for legal purposes, merely legal constructs which may or may not correspond with biological facts and which, indeed, will not necessarily be applied consistently for all legal purposes.

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[182] Chilean Civil Code 1857, Art. 55 [my translation].
[183] R.J. Cook et al., "The legal status of emergency contraception" 75 *Int'l Journal of Gynecology and Obstetrics* (2001) 185 at 187.
[184] *Supra* note 132 at 106.
[185] *Supra* note 108 at para. 56.

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In this context, then, it is important to note that a *human being* is a biological concept, whereas a *person* is a legal term attached to legal category.[186] This distinction is significant because *human life* "has an intrinsic value at any stage of its evolution."[187] In a Spanish case before the Constitutional Tribunal of Spain, Decision 53/1985, an Amparo[188] was presented by 54 Deputies against a Law Project aimed at reforming some articles in the Penal Code on abortion. Among the main reasons purporting to challenge the Law Project, was the argument that article 15 of the Constitution protects the right to life which states that "todos tienen derecho a la vida" [all have the right to life], includes the protection of the unborn. The Constitutional Tribunal of Spain in this case defined "life" as an undetermined concept:

> [l]a vida humana es un devenir, un proceso que comienza con la gestacion, en el curso de la cual una realidad biologica va tomando corporea y sensitivamente configuración humana [Human life is a process that starts at the moment of pregnancy and which gradually, as a biological reality, configures into human.][189]

If the unborn was to be considered a person like other human persons, with all the duties and rights to which it would be entitled to, then there would not be a need to include a separate statement that literally protects the right to life of the unborn.[190] The provisions in both the Chilean and Argentine legislations establish a different legal approach to the unborn from those which pertain to human persons born alive by recognizing a particular protection

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[186] *Vo v. France* (2004), European Court of Human Rights, Application No. 53924/00, 8 July 2004, online: European Court of Human Rights <http://www.echr.coe.int/echr> at para.62.
[187] *Supra* note 86.
[188] See *supra* note 27 and accompanying text.
[189] *Recurso previo de inconstitucionalidad, Ref. 53/1985, Publication BOE 19850518, BOE num. 119, Register num. 800/1983*, 11 Apr. 1985 (Constitucional Tribunal of Spain) para 6 [my translation].
[190] *Supra* note 86.

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to life and by limiting the enjoyment of many rights to those human persons who are born alive, like for example the right to inheritance.[191]

The Chilean Civil Code also distinguishes the moment of legal existence of the person by stating that "la existencia legal de toda persona principia al nacer, esto es, al separarse completamente de su madre" [the legal existence of every person starts at birth, this means, when separating completely from the mother].[192] Therefore, the unborn is not considered a person. By the same token, the Constitutional Tribunal of Spain in the 53/1985 decision also relied on the importance of birth as the distinguishing moment when the "nasciturus" or unborn will begin as an independent life from the mother and therefore have the fundamental right to life.[193]

Furthermore, when addressing death, the Chilean Civil Code establishes that the creature that dies in the maternal womb before being completely separated from the mother will be deemed to have never existed.[194] The Argentine Civil Code also establishes that if the unborn dies before being completely separated from the maternal womb, it will be considered as if never existed.[195]

It is also important to note that the Chilean and Argentine Penal codes have different sentences for abortion and for homicide. Abortion done with consent has lower sentence than does homicide. As it was analyzed in Section 2.2, the criminal punishment for abortion in Argentina varies between one to fours years when abortion occurs with the consent of the

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[191] The right to inheritance is acquired only until the attainment of legal personality at birth. See, article 77 of the Chilean Civil Code and article 70 of the Argentine Civil Code.
[192] Chilean Civil Code 1857, Art. 74 [my translation].
[193] *Supra* note 189 at para. 6.
[194] Chilean Civil Code 1857, Article 74: "La criatura que muere en el vientre materno, o que perece antes de estar completamente separada de su madre, o que no haya sobrevivido a la separación un momento siquiera, se reputará no haber existido jamás."
[195] Argentine Civil Code 1871, Article 74: "Si muriesen antes de estar completamente separados del seno materno, serán considerados como si no hubieran existido."

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woman. In Chile, the criminal punishment for abortion varies between 541 days and three years if the woman consents. However, the criminal punishment for homicide in Argentina[196] is between not less than 8 years and not more than 25 years and over. In Chile[197] the equivalent penalties are not less than 5 years and not more than 10 years and over. As Jose Manuel Valle puts it:

> Primera conclusión seria, pues, que la Ley Penal tutela con mayor intensidad la vida de la persona que la vida humana en formación. Lo cual debe ser interpretado, a mi juicio, como la consecuencia lógica de una distinta valoración del objeto jurídico correspondiente, bien por no ser el mismo bien jurídico, bien porque, aun admitiéndose un concepto de vida humana que abarque tanto a la de la persona como a la embriológica y fetal, la identidad del interés protegido no impide una diversa valoración antes y después del nacimiento.
>
> [The first conclusion would be then, that Penal Law protects with more intensity the life of the person than the human life in formation. This must be interpreted, in my judgment, as the logical consequence of a different value provided to the legal object protected, because it is not the same juridical good. Likewise, because even if we admit a concept of human life that covers both the person and fetal or embryological life, the identity of the protected interest does not preclude providing a different value before and after birth.][198]

All of this to say, then, that there is distinction between the life of the unborn and the life of persons born alive under Latin American law. There is a different value, and a different set of legal protections, given to these two juridical interests, interests that should not, therefore, be equated.

Jurisprudence from around the world has also challenged the extent of legal protection provided to the unborn.

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[196] Penal Code of Argentina 1984, Art. 79-80.
[197] Penal Code of Chile 1874, Art. 391.
[198] *Supra* note 124 at 77 [my translation].

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For example, the Decision in Roe v. Wade[199] establishes that the Constitution does not define "person." The term person however is said that is used for an application postnatally. No provision in the Constitution "indicates, with any assurance, that it has any possible pre-natal application."[200]

In Paton v United Kingdom[201] the applicant alleged that the 1967 Abortion Act of England and Wales[202] violated article 2 (1) of the European Convention of Human Rights,[203] which protects the life of the unborn. The applicant argued that protection of the unborn fell within the scope of the term "everyone". However, the European Commission on Human Rights stated that this was not the proper interpretation of the term "everyone". Such an interpretation, the Commission held, would be "contrary to the object and purpose of the Convention,"[204] because the general usage of the term and the context in which the term is applied do not support such a reading. However, the European Commission in this case did not decide whether Article 2 covers the foetus at all or whether it recognizes the right to life of the foetus with implied limitations.[205] The Commission decided that the provisions in the 1967 Abortion Act were compatible with the provisions in the European Convention because they interpreted that the provision in the Abortion Act allows abortion within 24 weeks of pregnancy to protect the life and health of the pregnant woman.[206] Such a case "is covered by

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[199] *Supra* note 158.
[200] *Supra* note 158 at. para. IX (a).
[201] Paton v. United Kingdom. (1980), 3 EHRR 408 (European Commission on Human Rights).
[202] The Act was passed on October 27 1967 and came into effect on April 27 1968.
[203] Article 2(1) of the European Convention of Human Rights provides that "Everyone's right to life shall be protected by law."
[204] *Supra* note 201.
[205] *Supra* note 201.
[206] It must be mentioned that the abortion was carried out at the initial stage of pregnancy under section 1 (1) (a) of the Abortion Act 1967 in order "to avert the risk of injury to the physical or mental health of the pregnant woman."

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an implied limitation, protecting the life and health of the pregnant woman at that stage, of the right to life of the foetus".[207]

In the case of Vo v. France[208], a female applicant who had wanted to carry her pregnancy to term had a therapeutic abortion due to medical negligence. She claimed that the act of the doctor had negligently violated the fetus's right to life under Article 2 of the Convention, and that such negligence amounted to "involuntary homicide." According to the applicant, the term "everyone" ("toute personne") in Article 2 of the Convention was to be taken to mean human beings rather than individuals with the attributes of legal personality.[209] The European Court of Human Rights held, by 14 votes to 3, that there has been no violation of Article 2 of the European Convention on Human Rights (right to life).

In this decision, the European Court of Human Rights considered that the issue of when the right to life begins was a question to be decided at national level: firstly, because the issue had not been decided within the majority of States that had ratified the Convention, in particular in France, where the issue has been the subject of public debate; and, secondly, because there was no European consensus on the scientific and legal definition of the beginning of life. However, the Court determined that as a matter of consensus the unborn may be human and thus may enjoy some protection, but that being a human being does not necessarily imply being a person entitled to all the rights born persons have under the European Convention:

> At best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person – enjoying protection under the civil law, moreover, in many States, such as France, in the context of inheritance and

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[207] *Supra* note 201 at para. 23.
[208] *Vo v. France* (2004), European Court of Human Rights, Application No. 53924/00, 8 July 2004, online: European Court of Human Rights <http://www.echr.coe.int/echr>
[209] *Ibid.* at para. 47.

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> gifts, and also in the United Kingdom – require protection in the name of human dignity, without making it a "person" with "the right to life" for the purposes of Article 2.[210]

The separate opinion of Judge Rozakis, joined by Judges Caflish, Fischbach, Lorenzen and Thomassen[211] stated that even if there is a recognized right to life of the unborn, this does not mean that this "form of human life" which belongs to the human race is equivalent to having the right to life of a born child.

This Spanish Constitutionl Tribunal in the 53/1985 decision also reasoned that the "nasciturus" is not entitled *strictu sensu* to the right to life even though the "nasciturus" "es un bien jurídico constitucionalmente protegido" [is a constitutionally protected interest.][212]

Conclusion

In the South African decision Christian Lawyers Association of SA v Minister of Health[213] the plaintiffs framed the issue this way: "the question is not whether the "conceptus" is human but whether it should be given the same legal protection as you and me." In the Latin American context, the unborn or "concebido" has legal protection, but this legal protection has limitations. This protection cannot be equated to the protection given to born persons. A different approach to both protected interests has been demonstrated in both Civil and Penal legislations as well as in international jurisprudence.

When analyzing the rights of the unborn, it must be clear that many of the entitlements which from the right to life that every born person enjoys cannot be included among the legally protected interests of the unborn. This means that even where the unborn

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[210] *Ibid.* at para. 84.
[211] *Ibid.* Separate opinion
[212] *Supra* note 189 *at* para 7.
[213] *Christian Lawyers' Association of South Africa and Others v. Minister of Health and Others,* B. Const. LR Case No. 1629/97 (Transv. Prov. Div.) [1998].

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are understood as having a right to life, this right does not entitle the unborn to the kind of full legal protection that human persons born alive enjoy. The judges' role in the types of cases to which this section has referred, must, I submit, acknowledge and bring greater precision and clarity to these important distinctions with respect to the legal protections of the unborn.

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v) **How courts address the interests and rights of women**

Courts in these cases have focused on determining the moment from which the right to life of the unborn should be protected. Women's interests and rights have not been addressed at all. It would seem that for these Courts, "the protection of human rights from the moment of conception applies to women no less than to a zygote or earlier product of the meeting of sperm and ova."[214]

The only case where a Court mentioned women was in the Postinor 2 case. The judge in first instance in this Chilean case stated that declaring the emergency contraception unconstitutional would guarantee "the right to equality and to physical health of the mother."[215] This Court addressed women not individuals entitled to rights, but as mothers. In other words, the Court's understanding of women was limited to their biological capacity to bear children. The Court interpreted women's rights to equality and to physical health as the avoidance of their suffering by having an abortion when utilizing emergency contraception. Courts have treated women as only carriers of babies,[216] as animals, as it were, whose main role is limited to reproduction. We should ask ourselves what kind of equality Courts have in mind when women's concerns outside this highly constricted role are not even addressed.

a. Applying the Law

Courts have relied heavily on the Constitutional status international human rights treaties have in domestic legal systems to establish protection for the unborn from the moment of conception. The Supreme Court of Chile, for example, established in the Postinor 2 case that the State has the duty to respect and promote essential rights that come from human nature that are recognized in the Chilean Constitution and by international treaties

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[214] *Supra* note 183 at 190.
[215] *Supra* note 54 at para. 48
[216] *Supra* note 183 at 185.

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ratified by Chile.[217] However, these same Courts failed to take into consideration the provisions of other international human rights treaties they have ratified which also have Constitutional hierarchy such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[218] the International Covenant on Economic, Social and Cultural Rights[219] and the International Covenant of Civil and Political Rights.[220]

The International Covenant on Economic, Social and Cultural Rights (ICESCR)[221] recognizes the right of everyone, including women, to the highest attainable standard of physical and mental health,[222] and to the enjoyment of the benefits of scientific progress and its applications.[223] The ICESCR establishes the duty of States Parties to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the Covenant,[224] and guarantees that these rights will be exercised without discrimination of any kind on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[225]

In a similar vein, the International Covenant on Civil and Political Rights (ICCPR)[226] establishes that States Parties should ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the Covenant[227] and guarantees that

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[217] *Supra* note 54 at para. 39.
[218] UN, *Convention on the Elimination of All Forms of Discrimination against Women* (New York: UN, 1979) 34 UN GAOR Suppl. (No. 21) (A/34/46) at 193, UN. Doc. A/Res/34/180; The CEDAW Convention was signed by Argentina and Chile in July 1980. Argentina ratified the Convention 14 Aug. 1985 and Chile ratified the Convention 6 Jan. 1990.
[219] Argentina ratified the ICESCR 8 Nov. 1986 and Chile ratified the ICESCR 3 Jan. 1976.
[220] Argentine ratified the ICCPR 8 Nov. 1986 and Chile ratified the ICCPR 23 Mar. 1976.
[221] UN, *International Covenant on Economic, Social and Cultural Rights* (New York: UN, 1966), GA Res.2200 (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316, entered into force 3 Jan. 1976.
[222] *Ibid.* at Art. 12.
[223] *Ibid.* at Art. 15 (b).
[224] *Ibid.* at Art. 3.
[225] *Ibid.* at Art. 2(2).
[226] UN, *International Covenant on Civil and Political Rights* (New York: UN, 1966), GA Res.2200 (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316, entered into force 23 Mar. 1976.
[227] *Ibid.* at Art. 3.

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these rights will be exercised without discrimination of any kind on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status[228] .

The ICCPR recognizes the inherent right to life of every human being,[229] the right to liberty and security of the person as well as the right to freedom of thought, conscience and religion.[230] Moreover, article 14 states that all persons shall be equal before the courts and tribunals as well as equal before the law and entitled to the equal protection before the law.[231] In addition, no one shall be subjected to arbitrary of unlawful interference with his privacy, family, home.[232]

The Convention on the elimination of all forms of discrimination against Women (CEDAW) defines discrimination against women as:

> [a]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[233]

Argentina's Constitution gives effect to a number of the international obligations with respect to woman's rights in the international instruments noted above. The Constitution, for instance, prohibits any discrimination on grounds of sex through the recognition of international human rights documents such as the Universal Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International

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[228] *Ibid.* at Art. 2(2).
[229] *Ibid.* at Art. 6.
[230] *Ibid.* at Art. 18.
[231] *Ibid.* at Art. 26.
[232] *Ibid.* at Art. 17.
[233] *Supra* note 218 at Art. 1.

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Covenant on Civil and Political Rights, the American Convention on Human Rights and/or the CEDAW Convention.

In addition to the rights recognized in the international documents on human rights, article 8 of the Argentine's Constitution states that: "los ciudadanos de cada provincia gozan de todos los derechos, privilegios e inmunidades inherentes al título de ciudadano" [citizens of each province enjoy all rights, privileges and immunities inherent to the status of citizen.]

Article 42 of the Argentine Constitution states that: "los consumidores y usuarios de bienes y servicios tienen derecho, en la relación de consumo, a la protección de su salud, seguridad e intereses económicos; a una información adecuada y veraz; a la libertad de elección, y a condiciones de trato equitativo y digno" [consumers and users of goods and services have the right, in their relations of consumption, to the protection of their health, security and economic interests, to an adequate and real freedom of choice and to conditions of equal and dignified treatment.]

In other words, the Argentine Constitution also guarantees both men and women the right to enjoy all rights inherent in their condition of citizens as well as the right to their protection of health on equal conditions and a dignified treatment.

Chile has also ratified the international documents on human rights described above. In addition, the Chilean Constitution recognizes that "las personas nacen libres e iguales en dignidad y derechos" [persons are born free and equal in dignity and rights].[234]

Article 1 of constitution also recognizes that:

> El Estado está al servicio de la persona humana y su finalidad es promover el bien común, para lo cual debe contribuir a crear las condiciones sociales que permitan a todos y a cada uno de los integrantes de la comunidad nacional su

[234] Constitution of Chile 1980, Art. 1 [my translation].

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mayor realización espiritual y material posible, con pleno respeto a los derechos y garantías que esta Constitución establece. [The State is at the service of the human person and its goal is to promote common welfare. To this effect, it must contribute to the creation of the social conditions that permit each and every one of the members of the national community to achieve the greatest possible spiritual and material fulfillment, with full respect for the rights and guarantees established by this Constitution.]

Es deber del Estado resguardar la seguridad nacional, dar protección a la población y a la familia, propender al fortalecimiento de ésta, promover la integración armónica de todos los sectores de la Nación y asegurar el derecho de las personas a participar con igualdad de oportunidades en la vida nacional. [It is the duty of the State to safeguard national security, to provide protection for the people and the family, to promote the strengthening of the latter, to further the harmonious integration of all the sectors of the Nation and to ensure everyone the right to participate in the national life with equal opportunities.]

Moreover, Article 19 of the Chilean Constitution guarantees to all persons:

El derecho a la vida y a la integridad física y psíquica de la persona.[The right to life and to the physical and psychological integrity of the persons.]

La igualdad ante la ley. En Chile no hay persona ni grupo privilegiados.(...) Hombres y mujeres son iguales ante la ley. Ni la ley ni autoridad alguna podrán establecer diferencias arbitraries. [Equality before the law. In Chile there are no privileged persons or groups. (...) Men are women are equal before the law. Neither the law nor any authority may establish arbitrary differences.]

La igual protección de la ley en el ejercicio de sus derechos. [Equal protection under the law in the exercise of their rights.]

El respeto y protección a la vida privada y pública y a la honra de la persona y de su familia. [Respect for and protection of private and public life and the honor of the individual and his family.]

La libertad de conciencia, la manifestación de todas las creencias y el ejercicio libre de todos los cultos que no se opongan a la moral, a las buenas costumbres o al orden público. [Freedom of conscience, manifestation of all creeds and the free exercise of all cults that are not opposed to morals, good customs or public order.]

El derecho a la libertad personal y a la seguridad individual. [The right to personal freedom and individual security.]

El derecho a la protección de la salud. El Estado protege el libre e igualitario acceso a las acciones de promoción, protección y recuperación de la salud y de rehabilitación del individuo. [The right to protection of health. The State protects the free and equal access to actions for the promotion, protection and recovery of the health and rehabilitation of the individual.]

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According to Chile's Constitutional provisions, women are free and equal in dignity and rights and in particular enjoy rights to life, to physical and psychological integrity, to equality before the law, to the respect and protection of their private life, to freedom of conscience and religion, to individual security and to health protection.

As should be clear, then, there are many Constitutional provisions that supplement and give effect to international human rights instruments recognizing a rich array of women's rights. These rights are, at the least, deserving of protection equal to that accorded to the rights of men. In this regard, the CEDAW Convention establishes that States Parties shall take, in all fields but with particular emphasis on political, social, economic and cultural fields, all appropriate measures to ensure the full development and advancement of women in order to guarantee them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.[235]

Given the depth and scope of the resources available for the protection of women's rights, it is shocking that the Court decisions I have been discussing have deprived women rights to equality, to reproductive self-determination, to life, to autonomy, to health, to physical and mental integrity and to privacy, without so much as an acknowledgment of the importance of the rights at stake. Women have been discriminated on grounds of sex as their concerns as women regarding contraceptive options have been excluded from any analysis. Such treatment has undermined rendered meaningless rights such as those set out in the CEDAW Convention. Not only does such disregard deny women their ability to exercise their rights as citizens, but also these court decisions place women in a situation where their lives, health, integrity are at risk and where their reproductive self-determination and their

[235] *Supra* note 218 at Art. 3.

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privacy have been practically dismissed. Women's lives are at risk because if they want to end an unwanted pregnancy, they must risk their lives by undergoing illegal abortions. They will risk both their mental and physical health and integrity because carrying a pregnancy always implies a health risk, and if this pregnancy is unwanted, the consequences are more psychologically devastating. This is why their reproductive self-determination and privacy are impaired as well as their citizenship denied because they cannot exercise their rights and the State fails to protect them. In addition, policies that restrain women's exercise of rights like restrictions to access to emergency contraception undermines women's possibility to achieve equality, as their particular needs of women are not properly addressed thus limiting women's choices to reach autonomy.

Susan Baer describes that in the context of discrimination women are subordinated to a system of powers and duties, rights and responsibilities, which "makes women responsible for what they do, what other people do, what happens to them, and what happens to others."[236] In this cases where the State limit women's choices regarding reproduction, women are expected only to bear children.

The Supreme Court of Argentina in the "Imediat" case noted that its views were supported by the Advisory Opinion OC-2/82 of the Inter American Court of Human Rights, where it was established that:

> In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.[237]

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[236] J. A. Baer. *Our lives before the law. Constructing a Feminist Jurisprudence* (Princeton: Princeton University Press, 1999) at 200.

[237] Inter-Am.Ct.H.R. *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75),* Inter-Am. Ct. H.R. (Ser. A) No. 2. Advisory Opinion OC-2/82 of September 24, 1982. Article 29 [my translation].

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Following the reasoning of the Advisory Opinion, Argentina has violated its duty to fulfill the obligations the State has towards women. Such a violation is most clearly evident by the simple fact that despite the Constitutional provisions and international instruments that purport to protect women's rights, in none of the decisions I reviewed did the Judges bother to mention, let alone protect, women's human rights.

Women's concerns and rights have, therefore, been invisible in these Courts' reasoning. Such an absence raises serious questions, not only as to whether or not this case law even recognizes women as autonomous beings, but also as to whether capacity to exercise their right to liberty in many aspects of their lives will ever be protected.

It is also very important to note how some of the judges in these cases have interpreted Constitutional provisions in a flawed manner. Judges have interpreted norms of Constitutional status with reference to regulations of inferior legal status, such as those established in the Civil Code and/or Penal Codes. This is a serious error, given that the entire point of having a Constitution as the main source of legal interpretation is that all other regulations must be interpreted in light of the constitution, rather than the other way around:

> Dado que la Constitución tiene por función el conceder legitimidad el resto del Ordenamiento Jurídico [...] no parece metodológicamente aceptable recurrir a las normas de jerarquía inferior (civiles, penales o administrativas) para precisar el sentido de las disposiciones constitucionales.
>
> [Given that the role of the Constitution is to provide legitimacy to the rest of the Legal Order "." it does not seem methodologically acceptable to go to legal norms of inferior status (civil, penal or administrative) to interpret the meaning of the constitutional provisions]. [238]

Some policies that restrict abortion impose certain kinds of behavior on women that limit the exercise of their rights. One can characterize such restrictions as amounting to forced pregnancies, which was considered cruel and other inhuman treatment by the

[238] P. Laurenzo. *El Aborto No Punible.* (Malaga: Bosch Casa Editorial, 1990), at 13 [my translation].

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Concluding Observations of the Human Rights Committee regarding Peru, when it addressed the criminalization of abortion:

> It is a matter of concern that abortion continues to be subject to criminal penalties, even when pregnancy is the result of rape. Clandestine abortion continues to be the main cause of maternal mortality in Peru.
>
> The Committee once again states that these provisions are incompatible with articles 3 (equal enjoyment of rights), 6 (right to life) and 7 (right to freedom from torture and other cruel, inhuman and degrading treatment or punishment) of the Covenant and recommends that the legislation should be amended to establish exceptions to the prohibition and punishment of abortion.[239]

The General Recommendation on women and health stated: "The obligation to *respect rights* requires States parties to refrain from obstructing action taken by women in pursuit of their health goals."[240] This would mean making the emergency contraceptive pill accessible to every woman who needs it, a contraceptive method that is both effective and safe for women's health.

Our societies still suffer from gender inequality, where the preference for boys is still prevalent, if at times hidden. Both historical and cultural pressures are still so strong among the members of society that they restrict women's ability to exercise their full citizenship:

> The biological burdens of the past have been more or less overcome, the economic barriers are in the process of being overcome, political power is real, but the psychological, sociological and historical barriers are still there. This might be well the most difficult to overcome.[241]

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[239] UN, Human Rights Committee, *Concluding Observations on Peru* (New York: UN, 2000), UN Doc. CCPR/CO/70/PER, para. 20.
[240]UN, Committee on the Elimination of Discrimination against Women, *General Recommendation 24, Women and Health*, (New York: UN, 1999) UN Doc. A/54/38/Rev.1, chapter I, para. 14.
[241] V. L. Bullough. *The Subordinate Sex. A history of Attitudes toward Women.* (Illinois: University of Illinois Press, 1973) at 354.

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It is also important in order for women to achieve equality, that their biological, cultural and social differences be taken into consideration. In this regard, the CEDAW Committee has stated that:

> The Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming under[-]representation of women and a redistribution of resources and power between men and women.[242]

In this context, the existent sex inequality between men and women in many Latin American societies is aggravated by religious doctrine, such as the Catholic doctrine, where the male dominance over women is obvious.[243] Such an aggravation is particularly troubling when the State implicitly adopts this doctrine in its legislation and policies, thereby imposing models of behavior on its citizens that reflect religious views.

The reasoning of some of these courts that have neglected women's rights is can be understood as being implicit in what societies understand as "women" (i.e. mothers). Societies play a determining role in restraining women's enjoyment of their human rights. As such, as a result of strong socialization processes that occur in conservative societies in Latin America, women are themselves sometimes the main barriers that must be overcome. As Vern Bullough state:

> Ordinary people do not think through their reasons for adopting an attitude or even critically survey the attitudes they hold. They acquire their attitudes in

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[242] UN, Committee on the Elimination of Discrimination against Women, *General Recommendation 25, Temporary Special Measures*, (New York: UN, 2004) UN Doc. CEDAW/C/2004/I/WP.1/Rev.1, para. 8.
[243] See *supra* note 110 and accompanying text.

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> the socialization process, most of which occurs in childhood years. This means that those who rear the young hold great power over attitudes, and since women have always had some hand in this activity, they turn out to have been an effective force in creating negative stereotypes about themselves.[244]

b. Social realities women face

The social realities that women face in Latin American countries in the context of unwanted pregnancies – realities which the Courts do not appear to take into account – are very serious. Current statistics suggest that in many Latin American countries illegal abortion practices are continuously increasing, to the point where, in a number of context, they constitute a grave public health issue.

In Argentina, for instance, which has a population of approximately 39 million, of which 27 per cent is under 15 years old, an estimated of 500,000 to 700,000 illegal abortions occur every year. That figure compares to the 700,000 live births in Argentina per year.[245] More troublingly, an estimated 30 per cent of maternal mortality is due to consequences of illegal abortion.[246]

A similar set of stark statistics are available for Chile. The population in Chile is estimated to be 15 million, of which approximately 35 per cent is under 18 years old.[247] Studies regarding illegal abortion provide estimates which vary from 159,000[248] to 200,000 per year.[249]

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[244] *Supra* note 241 at 131.
[245] For more information see online: Rimaweb <http://www.rimaweb.com.ar>.
[246] See Human Rights Watch Report available online: Human Rights Watch <http://www.hrw.org>.
[247] See "Desarrollo Humano Adolescente" available online: Sexualidad Joven <http://www.sexualidadjoven.cl/indicadores/ind_chile.htm>.
[248] V. Schiappacasse et al. *Aborto Clandestino: Una realidad Latinoamericana.* (New York: The Alan Guthmacher Institute,1994); *Chile: Situación de la Salud y los Derechos Sexuales y Reproductivos, Corporación de Salud y Políticas Sociales.* (Santiago: Instituto Chileno de Medicina Reproductiva y Servicio Nacional de la Mujer,2003) at 50.
[249] *Ibid.*

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Or consider the example of Peru, with a population estimated at 27 million for the year 2003, of which 40 per cent is under 18 years old. In Peru an estimated 352,000 illegal abortions are produced every year.[250] Beginning in 1996, the Ministry of Health has recognized that such numbers raise a serious public health issue.[251]

High rates of maternal mortality are an indicator of the many cases where women die as a result of clandestine or even self-induced abortions. Emergency contraception therefore offers women an alternative to risking their lives by undergoing illegal abortion procedures – procedures that are usually performed in poor sanitary conditions. As the Secretary of State noted in the Smeaton case: "there are overwhelmingly strong reasons why it is better to provide emergency contraception than to put more women in the position where they may need to seek an abortion."[252]

The Committee on the Elimination of Discrimination against Women in its document on Argentina called "Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women - Follow-up to the fourth and fifth periodic reports of States parties," of January 29, 2004[253] noted with concern the high maternal mortality rate in Argentina. The document notes that one third of maternal mortality is due to intentional abortion. It furthermore expresses concern that poor women, especially those in the 20 to 34 age group, face substantially greater risks as a result to illegal abortions because these are not performed in public health facilities as they are not

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[250] United Nations Population Fund, *Improving the Quality of Sexual and Reproductive Health* (Lima: UNFPA, 2004).
[251] D. Ferrando. *El Aborto clandestino en el Peru. Hechos y Cifras.* (Lima: Centro de la mujer peruana Flora Tristan, Pathfinder Internacional, 2002) at 3.
[252] *Supra* note 108 at para. 76.
[253] UN, Committee on the Elimination of Discrimination against Women, *Follow-up report to the fifth periodic report of Argentina,*(New York: UN, 2004) UN Doc. CEDAW/C/ARG/5/Add.1.

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legally allowed. In addition poor women lack of economic resources to seek an abortion in the private sector. The Committee provided the following figures:

- 31 per cent of maternal deaths are due to complications from abortion;
- 53 per cent of maternal deaths are due to direct obstetric causes; and,
- 16 per cent of maternal deaths are due to indirect obstetric causes.[254]

With these figures in mind,

> The Committee recommends that the State party should guarantee women's access to health services, including sexual and reproductive health services, and that it should adopt the necessary measures to reduce the high maternal mortality rate.[255]

The Human Rights Committee has expressed similar concerns:

> The Committee is concerned that the criminalization of abortion deters medical professionals from providing this procedure without judicial order, even when they are permitted to do so by law, inter alia, when there are clear health risks for the mother or when pregnancy results from rape of mentally disabled women. The Committee also expresses concern over discriminatory aspects of the laws and policies in force, which result in disproportionate resort to illegal, unsafe abortions by poor and rural women.[256]

In addition, the Committee recommends: "that the State party take measures to give effect to the Reproductive Health and Responsible Procreation Act of July 2000, by which family planning counseling and contraceptives are to be provided, in order to grant women real alternatives."[257]

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[254] *Ibid.*
[255] *Ibid.*
[256] UN, Human Rights Committee, *Concluding observations on Argentina* (New York: UN, 2000) UN. Doc. CCPR/CO.70/ARG, at para. 14.
[257] *Ibid.*

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Another Report of the Committee on the Elimination of Discrimination against Women regarding Chile stated its concern at the inadequate recognition and protection of the reproductive rights of women in Chile:[258]

> The Committee is especially concerned at the laws prohibiting and punishing any form of abortion. This law affects women's health, increases maternal mortality, and causes further suffering when women are imprisoned for violation of the law.[259]

> The Human Rights Committee has also noted that:
> The criminalization of all abortions, without exception, raises serious issues, especially in the light of unrefuted reports that many women undergo illegal abortions that pose a threat to their lives. The legal duty imposed upon health personnel to report on cases of women who have undergone abortions may inhibit women from seeking medical treatment, thereby endangering their lives. The State party is under a duty to take measures to ensure the right to life of all persons, including pregnant women whose pregnancies are terminated. In this regard: The Committee recommends that the law be amended so as to introduce exceptions to the general prohibition of all abortions and to protect the confidentiality of medical information.[260]

In Peru, the report submitted by the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, Paul Hunt, expressed the concern over "the extremely high rates of maternal mortality, the second main cause of which is unsafe abortion."[261]

Among the recommendations presented, he stressed the importance of ensuring access - in particular for poor populations - to a wide range of sexual and reproductive health

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[258] UN, Committee on the Elimination of Discrimination against Women: *Report of the Committee on the Elimination of Discrimination against Women*, Twentieth session (19 January- 5 February 1999) and Twenty-first session (7-25 June 1999), (New York: UN, 1999), 54 UN GAOR Suppl. (No. 38), UN Doc. A/54/38/Rev.1
[259] *Ibid.* at para. 228.
[260] UN, Human Rights Committee, *Concluding observations on Chile* (New York: UN, 1999) UN Doc. CCPR/C/79/Add.104, para. 15.
[261] United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health: Mission to Peru,* (Geneva: UN, 2005), E/CN.4/2005/51/Add.3.

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services, including access to quality services for the management of complications, whether arising from pregnancy, childbirth or abortion. His recommendations took pains to emphasize that punitive legal provisions against women who undergo abortions, as well as against the relevant service providers, should be removed.[262]

The particular situation or underlying conditions each woman experience which leads them to have an abortion have to be analyzed as a public issue that concerns the society as a whole. The statistics suggest that even when abortion is criminalized in these countries it does not stop women from having them. Having an abortion is not an easy decision to make and the fact that women continue to have illegal abortions despite knowing the dangers they face must be seriously addressed.

According to the statistics mentioned above, resort to illegal abortions does not seem to be a matter of choice, but rather a response to punitive measures imposed to women when they are denied their right to decide. It is also a response to the State's failure to meet women's reproductive needs such as the provision of proper counseling, education and contraceptive options. It is also a response to the State's failure to eliminate discrimination against women which includes the protection of women from sexual violence. This language of "decision" is, of course, problematic: it is also inappropriate to talk about "choices" when according to law, women must behave in pre-determined ways imposed by the State which does not provide other options for women to meet their reproductive self-determination that could be safer for their health and according to a real choice.

In addition, the State and the society as a whole, particularly in Latin American countries, do not support women with policies aimed at supporting them throughout pregnancy: there are no subsidies, no living wages and little or no potential for general health

[262] *Ibid.* at para. 72.

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insurance schemes.[263] This is particularly problematic in the case of women with scarce economic resources who depend entirely on the State. As Rachel Roth stated: "What is so troubling about fetal rights claims is that they make women bear almost all the costs, instead of distributing them more evenly across society."[264]

Another important factor to analyze in these cases is the belief that bearing and raising a child is a private matter, a notion which remains prevalent in many societies, particularly in Latin America. In these countries the dichotomy between the public and the private sphere is still too sharply delineated. In such a context, all the moral and physical responsibilities of pregnancy falls exclusively upon women within the private sphere. This situation is worsened when States force women to continue unwanted pregnancies:

> Women cannot attain equality unless this distribution of responsibilities is equalized. The unfair burden women bear cannot be eased unless responsibility can be put somewhere else: on men, on institutions, on government, on society. Responsibility must be human as well as female. It must be collective as well as individual.[265]

Women's decision to take emergency contraception is a private matter, as it is a woman's right to decide whether or not to have children which also involves a woman's right to privacy. These issues concern only to women's conscience and therefore these decisions should be guaranteed and respected by the State. The Smeaton v Secretary of State for Health decision described that:

> Decisions on such intensely private and personal matters as whether or not to use contraceptives, or particular types of contraceptives, are surely matters which ought to be left to the free choice of the individual... personal choice in matters of contraception is part of that "respect for private and family life.[266]

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[263] *Supra* note 236 at 147.
[264] R. Roth. *Making Women Pay. The Hidden Costs of Fetal Rights* (Cornell: Cornell University Press, 2000) at 5.
[265] *Supra* note 236 at 200.
[266] *Supra* note 108 at para. 398.

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However, the right to privacy must not be understood by States as to leave women unprotected. On the contrary, States have the duty to respect, protect and guarantee women' rights to make informed decisions in an autonomous way and to ensure that their needs are met. The State's duty is, therefore, to make available different options of contraception to women so they can have a free choice in order to be owners of their lives. Article 12.1 of the CEDAW Convention establish that: "states parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health-care services, including those related to family planning". In addition, paragraph 13 of the General Recommendation No. 24 made by the Committee on the Elimination on Discrimination against Women establishes that information and education regarding health care implies an obligation to respect, protect and fulfill women's rights to health care.[267]

The General Comment No. 14 made by the Committee on Economic, Social and Cultural Rights on the right to the highest attainable standard of health established:

> [t]he right to health contains both freedoms and entitlements: the freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference (...) and the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.[268]

This means that the right to health implies the recognition of women's individual autonomy in sexual and reproductive matters and the State's duty to guarantee women's choices and to provide the necessary measures to fulfill them.

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[267] *Supra* note 240 at para. 13.
[268] UN, Committee on Economic, Social and Cultural Rights, General Comment No. 14, *The right to the highest attainable standard of health*, (Geneva: UN, 2000) E/C.12/2000/4.

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The availability and distribution of emergency contraception has to be understood as a collective response to the particular needs of women to avoid unwanted pregnancies. As it was established in Smeaton v Secretary of State for Health:

> Government's responsibility is to ensure the medical and pharmaceutical safety of products offered in the market place and the appropriate provision of suitable guidance and advice. Beyond that, as it seems to me, in this as in other areas of medical ethics, respect for the personal autonomy which our law has now come to recognize demands that the choice be left to the individual.[269]

c. The rights of women and the rights of the unborn

The protection given in these cases by the Courts to the unborn is unlimited. There is no attempt to balance the rights of women with the life of the unborn as women are not even addressed in the legal cases. Even in the cases where Courts not limited the availability of emergency contraception, as did the 9th Appeal Court of Chile in the "Postinor 2" case, the grounds have been the lack of scientific evidence, not a concern for women's rights.

The unborn have been recognized as subjects with absolute rights and this absolute recognition of the rights of the unborn in turn violates women's rights. The only conclusion one can draw from the judges' reasoning in these decisions is that they view the lives of the unborn more valuable than lives of women.

The fact that the Chilean Constitution and the Argentine Constitution protect the unborn means that the unborn are legally protected interests. However, this protection must not override the Constitutional protection of women. In the context of emergency contraception, Courts should engage in a two step analysis: Firstly, they should acknowledge that emergency contraception cannot be understood as having abortive effects,

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[269] *Supra* note 108 at para. 397.

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because emergency contraception is only effective prior to implantation. Secondly, if the courts determine that even though emergency contraception does not have abortive effects it does impinge on a legally protected interest of the unborn, then the courts must balance these interests as against the very strong interests and Constitutional rights of women, including the right to life, to physical and mental health, to integrity, to equity, to be free from discrimination, to privacy, to freedom of conscience, to reproductive self-determination and to equal protection before the law would have to be analyzed and balanced. In such a balancing exercise, the words of G. Quinteros should be kept in mind:

> Inevitablemente hay que admitir la preponderancia de la posicion de la mujer en dicho conflicto, tanto porque ella es una persona, como porque la vida del embrion o feto esta dependiendo de de su vida; ello oblige a tener en cuenta como bien juridico preponderante la libertad de la madre. [Inevitably, the preponderance of women's position in this conflict has to be admitted, because she is a person and because life of the embryo or fetus depends on her life. This obliges us to have in mind the main juridical good, which is the liberty of the mother].[270]

The balance of rights between the life of the fetus and rights of women has been addressed in article 40.3.3 of Constitution of Ireland where it was established that:

> The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate that right.[271]

The European Commission of Human Rights in Paton v United Kingdom stated that:

> The "life" of the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant woman. If Article 2 were held to cover the foetus and it protection under this Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would invoke a serious risk to the life of the pregnant woman. This would mean that

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[270] J. Bustos Ramirez. *Manual de Derecho Penal. Parte Especial*, 2nd. ed. (Barcelona: Editorial Aries S.A., 1991) at 44 [my translation].

[271] Article 40.3.3 was effected by the 8th Amendment of the Constitution Act of 1983.

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> the "unborn life" of the foetus would be regarded as being of a higher value than the life of the pregnant woman.[272]

When analyzing the conflict between the unborn and the rights of women, the fact that the life of the unborn depends on the life the woman should be therefore taken into account. One must have in mind the particular and special relationship between the woman and the foetus. Judges cannot ignore the particularity of the female condition which includes a woman's right to reproductive self-determination. This right to reproductive self-determination implies, in turn, a right to decide whether or not to become a mother.[273]

Although the Chilean Constitution and the Argentine Constitution protect the unborn, this protection must not override the Constitutional protection of women. All the rights recognized in the Constitution have limitations. It is important to acknowledge that there are areas of where rights conflict with one another in a manner that requires the establishment of some limits.[274] International human rights treaty bodies like the American Convention on Human Rights do make such an acknowledgement, by declining to recognize an absolute right to the unborn on the grounds that countries have or could have legitimate legislation on abortion. Indeed, recognizing an absolute right to the unborn would undermine women's rights protected in the Convention, and therefore would be incompatible with the provision in article 29 of the Convention, which establishes that no provision on the Convention should be interpreted as permitting to suppress the enjoyment or exercise of the rights and freedoms recognized in the Convention or to restrict them to a greater extent than is provided for.

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[272] *Supra* note 201 at para. 19.
[273] *Supra* note 189 at para. 9.
[274] *Supra* note 270.

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In addition, even when States' laws protect the life of the unborn, exceptions should be established according to the circumstances women face in society.[275] There is, in other words, a need to balance the life of the unborn with women's rights.

The Spanish Court decision on the 53/1985 case offers an excellent explanation for which such a balancing is necessary:

> Se trata de graves conflictos de características singulares, que no pueden contemplarse tan solo desde la perspectiva de los derechos de la mujer o desde la protección de la vida del nasciturus. Ni ésta puede prevalecer incondicionalmente frente a aquellos, ni los derechos de la mujer puede tener primacía absoluta sobre la vida del nasciturus, dado que dicha prevalencia supone la desaparición, en todo caso, de un bien no sólo constitucionalmente protegido, sino que encarna un valor central del ordenamiento constitucional. Por ello, en la medida en que no puede afirmarse de ninguno de ellos su carácter absoluto, el interprete constitucional se ve obligado a ponderar los bienes y derechos en función del supuesto planteado, tratando de armonizarlos si ello es posible o, en caso contrario, precisando las condiciones y requisitos en que podría admitirse la prevalencia de uno de ellos.
>
> [It is a case of serious conflicts of singular characteristics that cannot be addressed from the women's rights perspective or from the protection of the life of the nasciturus. The latter cannot unconditionally prevail over women's rights and women's rights cannot have absolute primacy over the life of the nasciturus because this prevalence would entail the disappearance of a constitutionally protected good, but also of a main value of the constitutional law. This is why, where there can be no affirmations of an absolute character, the constitutional interpreter is obliged to balance the goods and rights (...), trying to harmonize them if it is possible or in any case, determining the conditions and requisites in which the prevalence of one of them could be admitted].[276]

In addition, legal provisions on abortion, such as those found in the Chilean and Argentine Codes, differentiate abortion depending on whether it was realized with the women's consent or without the consent, implying once again that the law does not provide

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[275] Exceptions could include rape, fetal impairment, health risks, risk of death, unwanted artificial insemination and socio-economic reasons.

[276] *Supra* note 189 at para. Fundamento 9 [my translation].

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the unborn with the same value as it does to born human beings. On the contrary the law implicitly values and respects women's liberty to decide.[277]

d. Social implications of the courts' decisions

Another issue that should have been addressed by Courts is the social implications of their decisions. Prohibitions on emergency contraception, as we have seen,[278] can quickly extend to prohibitions on products which may impede, discourage or prevent the natural process at any time after fertilization has started and on product which may work in a way which may impede, discourage or prevent fertilization.[279] Such a wide prohibition would include the IUD, as well as all hormonal contraceptive methods. If the plaintiffs in these cases were correct, then vast numbers of women may be considered guilty of criminal offenses, as would anyone who would administer or supply these contraceptive methods or supply them.[280] This situation would be devastating for the whole society.

Conclusion

Courts in the decisions I have reviewed emphatically failed to provide any attention to women's concerns, perspectives, and – most importantly – Constitutional rights in order to solve the cases. All the constitutional provisions set out above protect, guarantee and recognize women's rights, particularly their rights to life, to physical and mental integrity, to reproductive autonomy and to health. Restrictions on contraceptive methods prima facie violate a number of these rights.

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[277] *Supra* note 270.
[278] An example of this is the Argentine law suit against all contraceptives presented by the NGO 25 de Marzo described in Chapter 1 which is pending solution.
[279] *Supra* note 108 at para. 73.
[280] *Supra* note 108 at para. 221.

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While there may be other rights at play in this context, including possible rights of the unborn,[281] these rights must be balanced against one another, and not treated as absolute rights. In such a balancing exercise, judges cannot interpret legal provisions of inferior legal status as provide meaning to Constitutional provisions, because such an interpretive strategy would violate the rule of Normative Hierarchy. This is particularly relevant in the emergency contraceptive cases, where women's rights are overwhelming recognized in international human rights instruments as well as in the Constitutional provisions, and where national legislation restricting access to emergency contraceptives is based on protecting the "rights" of beings whose existence is neither certain nor determinable. In such cases, the balance ought to weigh quite heavily in favor of women's rights.

[281] For an extensive analysis of the rights of the unborn, see Section III (iv) above.

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IV CONCLUSION

This thesis has demonstrated that courts in Chile and Argentina have relied upon Catholic doctrine in cases involving emergency contraception. This doctrine has led courts to prioritize the protection to the rights of the unborn over the rights of women, thereby seriously jeopardizing women's rights.

This thesis has, moreover, suggested that the key issue that the case law in this area has failed to address adequately is the meaning of the term "unborn." By relying on Catholic doctrine, which defines conception as fertilization, judges have provided legal protection to a non-determinable interest. In doing so they have put at risk the separation of Church and State, leading to a scenario that not only violates the religious rights of those who do not profess Catholic religion, but also violates the principles of neutrality and secularity, which are central to contemporary liberal democratic institutions and processes.

This thesis has also sought to challenge Catholic doctrine in substantive terms. The emergency contraceptive pill has proven to be a safe and effective method of birth control that does not alter a fertilized egg after implantation has occurred in the lining of the uterus. Moreover, implantation is the moment where there is certainty of the existence of the unborn or "concebido" and is, therefore, as this thesis has argued, the only reasonable moment from which the unborn can be the subject of legal protection. Anything that happens before implantation is mere speculation that cannot provide sufficient certainty needed for applying the law.

Moreover, as has been demonstrated in this thesis, a consensus is emerging in international jurisprudence, as well as in many interpretations of provisions of national laws, such as the Chilean and Argentine Civil and Penal Codes, that the legal protection provided to the unborn cannot amount to the right to life that persons born alive enjoy. The legal

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nature of the protection is not based on the unborn's right to life *strictu sensu* but on the legal protection the unborn has for being human life.

More importantly still, from a Constitutional point of view, it is beyond dispute that the rights of women are legally protected. Such rights include the right to life, to health, to physical and mental integrity, to autonomy, to privacy, to liberty, to equality, to reproductive self-determination, to freedom of conscience and religion and to equal protection before the law. These rights must, at the very least, enter into the decision making process when courts analyze emergency contraception.

Beyond simply taking these rights into account, this thesis has proposed that when the rights of the unborn come into conflict with the rights of women, the rights of women must prevail, not only because women enjoy all the constitutional rights accorded to persons, but also because of the particular relationship of dependence that exists between the fetus and a woman.

Regardless of one's position with respect to the appropriate balance between women's rights and the rights of the unborn, however, this thesis has made abundantly clear that the rights of women have not been adequately addressed thus far in Latin American jurisprudence on emergency contraception. In denying women the ability to resort to emergency contraception, courts have limited women's access to safe and effective methods of birth control that would prevent them from having to undergo illegal abortions, with all the risks to their health and lives that such illegal abortions involve. In doing so, the courts have jeopardized women's *de jure* as well as *de facto* equality.

When confronted with case law that jeopardizes women's rights in this way, one cannot help but feel shocked that some judges still think that women are incapable of making their own decisions and instead purport to rule on their behalf. It, moreover, adds insult to

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injury, that courts make such paternalistic rulings without even taking into consideration women's rights or needs. Indeed one cannot help but wonder what kind of democratic legal order these courts want to build when women's concerns are not even considered in cases which deeply affect their interests.

The possibility of resort to other legal orders to address these concerns is, as has been argued throughout the thesis, an important avenue for challenging the lack of respect shown to women's rights under domestic law. As such, international human rights instruments and the decisions of various tribunals which have suggested that the unborn may enjoy some legal protection but not necessarily all the rights afforded to born persons, and the recognition of an obligation to balance competing rights and interests in order to create the conditions in which the rights of women prevail over the rights of the unborn, are all promising.

Nevertheless, questions remain as to why it seems so difficult for international courts to provide clear meaning to controversial terms like the unborn in a manner that prioritizes women's rights. In this regard, it is concerning that even when international courts hold in favor of women's rights in this area, they have thus far stayed away from stating clear judgments that narrowly define the extent of protection of the unborn.

I submit that it is time that international courts take up the role they are intended to play. They have the potential, as normative leaders, to make definitive pronouncements interpreting terms with ambiguous meanings such as the "unborn" in a manner that conforms to the spirit of international human rights, including women's rights.

At the end of the day, one may, I think, reasonably wonder if their failure thus far to do so means that being "politically correct" is more important to these courts than protecting

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women's right to equal treatment and to freedom from external intrusions. Do men are the ones who had to be in this situation for courts to react more definitive?

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