

# Abortion and Human Rights in Central America

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## **Abstract**

This essay aims to show that the nations of Central America must create access to safe and legal abortion as well as promote a political dialogue on the subject that is based on reason and science, rather than religion. Not only does prohibiting abortion constitute a violation of women's human rights, but, based on international human rights law as well as the minimum duties of civil ethics, failing in to provide such access or dialogue would mean failing to meet the standards of a legitimate democratic state.

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## Introduction

Complete bans of abortion constitute human rights violations, specifically of the human rights of pregnant women. In fact, there are no robust arguments from either the legal or ethical perspective to justify such bans. This is not simply my opinion. The doctrine and jurisprudence of the Inter-American Court of Human Rights, the European and the African human rights systems, and the human rights system of the United Nations, all maintain that the absolute criminalization of abortion is an irrational excess that lacks a basis within the international law of human rights. And, reports from the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW) <sup>1</sup> and the United Nations Human Rights Commission,<sup>2</sup> all argue that the absolute criminalization of abortion constitutes an arbitrary obstruction of the fundamental rights of women.

I argue that in a mature democracy (the product of what Rawls refers to as a well-ordered society<sup>3</sup>), the Legislative Branch is obligated to amend or repeal any unjust or illegitimate legal norm, especially those rules that violates its people's human rights. And, because of the serious nature of the obligation to uphold human rights, public opinion should not determine how legislatures act in this area, but rather, the facts about the issue, evidence and argumentation. As such, even if the legislative reform needed to amend a human rights violation is unpopular, members of Congress must approve it. Therefore, I argue that Central American Legislative bodies

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<sup>1</sup> Convention on the Elimination of All Forms of Discrimination against Women

<sup>2</sup> See the conclusions that the Committee of CEDAW has published from Honduras (2016), Guatemala (2015), Costa Rica (2017), El Salvador (2017) y and that 2009 Amnesty International published about the prohibition of abortion in Nicaragua.

<sup>3</sup> As J. Mandle and D. Reidy state in *The Cambridge Rawls Lexicon*: "A deeply ingrained ideal of democratic regimes is that a just and well-ordered society is one that treats its members as autonomous agents, "respecting their wish to give priority to their liberty to revise and change their ends, their responsibility for their fundamental interests and ends, their autonomy, even if, as members of particular associations, some may decide to yield much of this responsibility to others."

must overturn their laws criminalizing and punishing abortion both as an ethical imperative and to maintain their claims of being mature democracies.

**The Legal Context of Abortion in Central America**

Let us begin by understanding what is going on in Central American penal codes as they relate to abortion. In all Central American countries, abortion is a crime punishable by imprisonment. In Honduras, El Salvador and Nicaragua, there are no exceptions to these laws; abortion is always criminal and punishable. In Costa Rica and Guatemala, there is an exception when the abortion is performed to protect the health or save the life of a pregnant woman (therapeutic abortion), but this exemption is applied in a non-transparent manner, without accountability by doctors, and in the absence of a mechanism or protocol to ensure that this choice is offered to all the women who require it and guaranteeing that the women are the only ones who make the final decision.

The following table summarizes the status of abortion legislation in this region.

Table 1

*Abortion-Related Legislation in Central America*

<b>Country</b>	<b>Legislation the Penalizes Abortion</b>
Nicaragua	Penal Code of Nicaragua  CHAPTER V  Of Abortion  Art. 162.- The one that causes the death of a fetus in the womb or through abortion,

	<p>will be reprimanded to 3 to 6 years in prison, if this occurred without the consent of the woman or if she is under 16 years old; and with a prison term of 1 to 4 years if it is done with the woman's consent.</p> <p>The woman who has given consent for the abortion, will suffer the penalty of 1 to 4 years of prison.</p> <p>In the case where violence, intimidation, threats, or dishonesty were employed to perform the abortion in the first case, or, in order to obtain consent in the second case, then the penalty will be imposed in its maximum duration, respectively.</p> <p>When as a result of abortion, or of abortive practices carried out on a woman not on tape, believing her pregnant, or using inappropriate means to produce the abortion, the death of the woman will result, the penalty of 6 to 10 years of</p>
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	<p>imprisonment will be imposed; If any injury results, the penalty will be 4 to 10 years in prison.</p> <p>If the agent habitually devotes himself to the practice of abortions, the penalty in its maximum duration will be applied in each case.</p> <p>Physicians, Surgeons, Apothecaries or Midwives who abort any woman, with or without the woman's consent, will suffer the penalty of five (5) to ten (10) years of imprisonment, plus the accessory of special disqualification.</p> <p>Art.163.- If the offense was committed to hide the dishonor of the woman, either by herself or by third parties with the consent of the woman, the penalty shall be imprisonment of one to two years. If the death of the woman occurs, the penalty will be three to six years in prison.</p>
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Honduras	<p>Penal Code</p> <p>CHAPTER II</p> <p>ABORTION</p> <p>ARTICULE 126. Abortion is the death of a human being at any moment of pregnancy or during labor. Whoever intentionally causes an abortion will be punished as follows:</p> <ol style="list-style-type: none"><li>1. With 3 to 6 years of imprisonment the woman consented</li><li>2. With 6-8 years of imprisonment if the agent acted without the mother's consent and if they did not employ violence or intimidation;</li><li>3. With eight (8) to ten (10) years of imprisonment if the agent uses violence, intimidation or deception.</li></ol>

	<p>ARTICLE 127. The penalties indicated in the previous article shall be imposed and the penalty of fifteen thousand (L.15,000.00) to thirty thousand (L.30,000.00) Lempiras to the doctor who, abusing his profession, causes or cooperates in the abortion.</p> <p>The same sanctions will apply to medical practitioners, paramedics, nurses, midwives or midwives who commit or participate in the abortion commission.</p> <p>ARTICLE 128. The woman who brings about her own abortion or consents to another person performing it, will face 3-6 years in prison.</p>
<p>El Salvador</p>	<p>Art. 135.- If the abortion is committed by a doctor, pharmacist or by persons who carry out auxiliary activities of said professions, when they dedicate themselves to said practice, they shall be punished with imprisonment of six to twelve years. In addition, the penalty of special</p>

	<p>disqualification for the exercise of the profession or activity for the same period shall be imposed.</p> <p>INDUCTION OR HELP ABORTION</p> <p>Art. 136.- Anyone who induces a woman or facilitates the economic or other means for an abortion to be performed, shall be punished with imprisonment of two to five years. If the person who helps or induces the abortion is the parent, the sanction will be increased by one third of the maximum penalty indicated in the preceding paragraph.</p>
<p>Guatemala</p>	<p>ARTICLE 139.- Attempt and miscarriage. The attempt of the woman to cause her own abortion and her own wrongful abortion, are impunity. Wrongful miscarriage verified by another person will be punished with imprisonment of one to</p>



	<p>three years, provided that such person has prior knowledge of the pregnancy.</p> <p>ARTICLE 140.- Specific aggravation.</p> <p>The doctor who, abusing his profession causes the abortion or cooperate in it, will be sanctioned with the penalties indicated in article 135, with a fine of five hundred to three thousand quetzales, with disqualification for the exercise of his profession from two to five years. The same sanctions will be applied, where appropriate, to the practitioners or persons with sanitary title, without prejudice to what is related to the contest of crimes.</p>
<p>Costa Rica</p>	<p>Penal Code</p> <p>SECTION II</p> <p>Abortion</p> <p>ARTICLE 118.- Abortion, with or without consent, that causes the death of a fetus will be punished:</p>

1) With a prison sentence of three to ten years if it was done without the consent of the woman or if she is under fifteen years of age. This penalty will be two to eight years, if the fetus (\*) had reached six months of intrauterine life;

(\*) Note: In the wording of paragraph 1 of Article 118 it is evident the lack of the adverb of "no" negation to make sense of its objective. The way it appears in the original text lacks logic, because the penalty is less for a more serious event. Note that the subsection below does contain the indicated adverb.

2) With one to three years of imprisonment if it was done with the woman's consent. This penalti will be six months to two years if the fetus had not yet reached six months in utero. In these cases, the penalty will be higher if it results in the death of the woman.

ARTICLE 19.- Procured abortion.

The woman who consents or causes her own abortion will be reprimanded with imprisonment of one to three years. This penalty will be from six months to two years, if the fetus had not reached six months in utero.

ARTICLE 120.- Abortion honoris causa.

If the abortion has been committed to hide the dishonor of the woman, either by herself or by third parties with the consent of the former, the penalty will be three months to two years in prison.

ARTICLE 121.- Abortion with impunity.

The abortion practiced with the consent of the woman by a doctor or by an authorized obstetrician is not punishable, when it was not possible the intervention of the first, if it was done in order to avoid a danger to

	<p>the life or health of the mother and this has not been avoided by other means.</p> <p>ARTICLE 122.- Wrongful abortion</p> <p>It will be punished with a fine of sixty to one hundred and twenty days, whichever is the cause of an abortion.</p>
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As shown in the table above, Central American laws on abortion are highly restrictive, causing a situation incompatible with the minimum criteria of respect and protection of women's human rights to physical and mental health, personal freedom and life. El Salvador is the country that has shown the most legal harassment towards women, reaching the unprecedented extreme of condemning women who had spontaneous abortions to 30 years in prison (Januwalla, 2016) (Center for Reproductive Rights, 2014)

Under both right- and left-wing governments, Central American countries have maintained the same position regarding the criminalization of abortion. They have adopted the positions of the ultraconservative social groups and the Catholic and evangelical religious hierarchies, while ignoring the voices of the feminist social movements, human rights advocates, the binding resolutions of the Inter-American Court of Human Rights, the observations of the CEDAW, the

UN Human Rights Committee, and the Special Rapporteurships, among other institutions. This shows that there is a disproportionate weight of the conservative sectors of a religious nature in the parliamentary processes and in the management of the Executive branch.

### **Human Rights as the Baseline for Legislative Debate**

A fundamental legal and ethical premise of democracy that Central American countries seem to be ignoring is that public opinion repudiating abortion is irrelevant. This is not to say that citizens cannot exercise their political rights or have the liberty to express their opinions – clearly this is false. Instead, what I am saying is that, from a legal perspective, the obligation to uphold fundamental freedoms is not subject to the authorization of the majority. If complete bans of abortion violate human rights, the legislature must act, regardless of public opinion (in the same way as they would have to act to protect the human rights of people of color or LBGT folks regardless of public opinion).

In addition to the above, in strong and legitimate democracies, members of Congress are bound to legislate in adherence to both the legal system of their countries and international law on human rights. And, this implies that they must submit the law-making process to the international human rights guidelines and standards. If, in any given case, a member of Congress finds him or herself in a moral conflict, because what is being discuss implies something morally unacceptable in their particular cosmology/religion, she or he has the responsibility to, at least, not hinder the discussion procedure. This member of Congress may express her/his position on the matter under discussion, but if it is about the elaboration of a rule or reform aimed at amending a denial of a human right, her/his obligation will be, at least, not to encumber the parliamentary process.

And, let us be clear, as I have already shown, international human rights dictates are clear that criminalizing abortion is a human rights violation. Parliamentary ethics and legal obligations

directly demand adherence to the highest international standards on human rights, respect for the basic liberties of every citizen and commitment to the core values of pluralism and democracy. So, the principles of parliamentary ethics<sup>4</sup> require legislators to not use their position of power to legislate according to their particular interests, to impose their beliefs or those of their social group or to obstruct the correct procedure of parliamentary debate. (Chávez Hernández, 2006) Beyond this, the book *Human Rights: Manual for Parliamentarians*, published by the Office of the United Nations High Commissioner for Human Rights, in 2016, for example, states:

*International human rights bodies have repeatedly expressed their concern about the link between carrying out an abortion under conditions of risk and maternal mortality rates, which affects the enjoyment by women of their right to life. Most international human rights law, including article 6 of the ICCPR and article 2 of the ECHR, has been interpreted with the expectation that the right to life begins at the moment of birth. In fact, in the history of negotiations of many treaties and declarations, of international and regional jurisprudence and of a large part of legal analysis it is indicated that the right to life, as explained in detail in international human rights instruments, does not It is meant to be applied before the birth of a human being. The denial of a pregnant woman's right to make an informed and independent decision on abortion violates or poses a threat to a wide range of human rights. International human rights bodies have characterized the laws that typify abortion as discriminatory and as a barrier to women's access to health care (see, for example, General Comment No. 22 of the CESCR Committee). Although Article 4 of the ACHR stipulates that the right to life is protected "in general, from the moment of conception", the regional human rights monitoring bodies of the Americas have underlined that this protection is not absolute. The Inter-American Court, in particular, has determined that embryos do not constitute persons under the ACHR, so they cannot be granted an absolute right to life. Most international and regional human rights bodies have established that any prenatal protection must be consistent with the mother's right to life, physical integrity, health and privacy, as well as to the principles of equality and equality. nondiscrimination". (p.138)*

Similarly, the Committee on Economic, Social and Cultural Rights of the UN said in a May 2016 report on the right to sexual and reproductive health:

*"28. The realization of women's rights and gender equality, both in legislation and in practice, requires the repeal or modification of discriminatory laws, policies and practices*

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<sup>4</sup> Also see *Background Study: Professional and Ethical Standards for Parliamentarians*, published in 2012 by ODIHR (Office for Democratic Institutions and Human Rights) and the manual *Common Principles for Support to Parliaments*, published by IPU (Inter-Parliamentary Union), in 2014

*in the area of sexual and reproductive health. It is necessary to eliminate all obstacles to women's access to comprehensive services, goods, education and information on sexual and reproductive health. In order to reduce maternal mortality and morbidity rates, emergency obstetric care and skilled attendance at deliveries are needed, particularly in rural and remote areas, and preventive measures for abortions at risk. The prevention of unwanted pregnancies and unsafe abortion requires States to adopt legal and policy measures to guarantee access to affordable, safe and effective contraceptives to all people and comprehensive education about sexuality, in particular for the teenagers; liberalize the restrictive laws of abortion; ensure women's and girls' access to safe abortion services and quality post-abortion care, especially by training health service providers; and respect the right of women to make autonomous decisions about their sexual and reproductive health "(p.8)*

In other words, a state policy aimed at protecting both gender equality and the right to health of women requires the integration of various strategies to 1) avoid unwanted pregnancies through timely access to sexual education and contraceptive methods, 2) protect the health of pregnant women and 3) ensure access to safe abortion. Given this, we must counteract the false idea permeating Central American (and other) societies that deems abortion as a mere act of frivolity or of women's irresponsibility to show it as the human right that it is to try reducing the number of abortions, they can promote all those effective strategies to avoid unwanted pregnancies, which are based on scientific evidence and are coherent with the human rights framework. The criminalization of abortion is not one of those strategies. Therefore, in matters of abortion where absolute criminalization is in force, it is crucial to eliminate that obstacle, which constitutes a violation of the human rights of women.

### **The Case of Artavia Murillo and Its Implications for Central American Abortion Laws**

Now, one does not have to take my word for it – the international legal framework to which all of these Central American nations choose to belong supports these same positions. According to their regulations and agreements, all the states that make up the OAS must incorporate the doctrine and jurisprudence that comes from the Inter-American Court of Human Rights in the interpretation and production of legal regulations. One such doctrine was expressed in the Court's

judgment against the Costa Rican State in the Artavia Murillo case, which put forth an extensive and detailed analysis of the arguments usually used by those who insist on defending the absolute criminalization of abortion. Therefore, all States in the OAS are bound by their ruling.

In Table 2, we find excerpts of the reasons refuting arguments criminalizing abortion. The central elements for the subject in question are highlighted in bold.

*Table 1.*

<p>1</p>	<p>Systematic interpretation of the American Convention and the American Declaration</p>
<p>Paragraphs 222-223 P. 68-69</p>	<p>The expression “complete person” is utilized in numerous articles of the American Convention and the American Declaration. <b>Upon analysis of all of these articles, it is not factual to maintain that an embryo be given and could exercise the rights given to it in each of these articles.</b></p> <p>Also, taking into account what has already been pointed out in the sense that the conception only occurs within the woman's body (supra paragraphs 186 and 187), it can be concluded with respect to Article 4.1 of the Convention that the direct object of protection is fundamentally the pregnant woman, since the defense of the unborn is essentially done through the protection of women, as is clear from Article 15.3.a) of the Protocol of San Salvador, which obliges States Parties to "grant special attention and assistance to the mother before and during a reasonable period after delivery, "and of Article VII of the American Declaration, which establishes the right of a pregnant woman to protection, care and special aids.</p>



	<p>Therefore, the Court concludes that the historical and systematic interpretation of the existing antecedents in the Inter-American System, confirms that it is not appropriate to grant the status of person to the embryo.</p>
<p>2  Paragraph 224 P. 69</p>	<p>Regarding the State's argument that "the Universal Declaration of Human Rights [...] protects the human being from [...] the moment of the union of the ovule and the sperm," the Court considers that, according to the preparatory work of said instrument, the term "born" was used precisely to exclude the unborn from the rights enshrined in the Declaration. The drafters expressly rejected the idea of eliminating such a term, so that the resulting text expresses with full intention that the rights embodied in the Declaration are "inherent from the moment of birth". Therefore, the expression "human being", used in the Universal Declaration of Human Rights, has not been understood in the sense of including the unborn.</p>
<p>3  Paragraph 226 P. 70</p>	<p>Neither in its General Comment No. 6 (right to life) nor in its General Comment No. 17 (Children's Rights), the Human Rights Committee has ruled on the right to life of the unborn. On the contrary, in its concluding observations on State reports, the Human Rights Committee has indicated that the right to life of the mother is violated when laws that restrict access to abortion force women to resort to abortion insecure, exposing her to death. These decisions allow us to affirm that there is no absolute protection of</p>

	<p>prenatal or embryo life from the ICCPR (International Covenant on Civil and Political Rights).</p>
<p>4  Paragraph 227 P. 71</p>	<p>The reports of the Committee on the Elimination of Discrimination Against Women (hereinafter referred to as the "CEDAW" Committee) make it clear that the fundamental principles of equality and non-discrimination require privileging the rights of pregnant women over the interest in protecting life in formation. In this regard, in the case L.C. vs. In Peru, the Committee found the State guilty of violating the rights of a girl who was denied a transcendental surgical intervention on the pretext of being pregnant, privileging the fetus over the health of the mother. Since the continuation of the pregnancy represented a serious danger to the physical and mental health of the girl, the Committee concluded that denying her a therapeutic abortion and postponing the surgical intervention constituted gender discrimination and a violation of her right to health and non-discrimination. The Committee also expressed its concern about the potential that anti-abortion laws have to violate women's right to life and health. The Committee has established that the absolute prohibition of abortion, as well as its penalization under certain circumstances, violates the provisions of the CEDAW.</p>
<p>5  Paragraph 233</p>	<p>The Committee for the Rights of Children has not issued any observation from which one could deduce the existence of pre-natal human rights.</p>

<p>P. 72</p>	
<p>6</p>	<p>In the Paton vs. Case United Kingdom of 1980, which dealt with an alleged violation of Article 2 of the ECHR (European Convention on Human Rights) to the detriment of the unborn by abortion practiced by the will of the mother in accordance with national laws, the European Rights Commission Humans</p>
<p>Paragraph 236 P. 73</p>	<p>argued that the terms in which the ECHR is drafted "tend to corroborate the assessment that [Article 2] does not include the unborn". He added that recognizing an absolute right to prenatal life would be "contrary to the object and purpose of the Convention." He pointed out that "[t] he life of the fetus is intimately linked to that of the pregnant woman and cannot be considered apart from her. If article 2 included the fetus and its protection was, in the absence of a limitation, understood as absolute, abortion would have to be considered prohibited even when the continuation of the pregnancy presents a serious danger to the life of the pregnant woman. This would mean that 'the life in formation' of the fetus would be considered of greater value than the life of the pregnant woman ". Also, in Cases R.H. V. Norway (1992) and Boso v. Italy (2002), which dealt with the alleged violation of the right to life to the detriment of the unborn by the existence of permissive state laws against abortion, the Commission confirmed its position.</p>

<p>7</p>	<p>in the Case Vo. V. France, in which the petitioner had to undergo a therapeutic abortion because of the danger to her health caused by inadequate medical treatment, the European Court said that:</p>
<p>Paragraphs 237 P. 73</p>	<p>Unlike Article 4 of the American Convention on Human Rights, which states that the right to life must be protected "in general, from the moment of conception", Article 2 of the Convention is silent regarding temporal limitations of the right to life and, in particular, it does not define "all" [...] whose "life" is protected by the Convention. The Court has not determined the</p>
	<p>problem of the "beginning" of "the right of every person to life" within the meaning of the provision and whether the unborn has that right to life. "[...]</p> <p>The problem of when the right to life begins comes within a margin of appreciation that the Court generally considers that States should enjoy in that area despite the evolutive interpretation of the Convention, a "living instrument that must be interpreted in the light of Today's conditions "[...] The reasons for that conclusion are, first of all, that the problem that this protection has not been resolved within most of the States parties, in France in particular, where it is a matter of debate [...] and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life. [...]</p> <p>At the European level, the Court notes that there is no consensus as to the nature and status of the embryo and / or fetus [...], even though they have received some protection in light of scientific progress and the potential</p>

	<p>consequences of research within genetic engineering, assisted medical procreation or experimentation with embryos. The more, it can be considered that the States agree that the embryo / fetus is part of the human race. The potentiality of this being and its ability to become a person - enjoying protection under civil law, in addition, in many States, such as, for example, France, in the context of the laws of succession and gifts, and also in the United Kingdom [...] - requires protection in the name of human dignity, without making it a "person" with the "right to life" for the purposes of article 2. [...]</p>
<p>8  Paragraph 244 P. 75-76</p>	<p>C.2.e) Conclusion on the systematic interpretation</p> <p>The Court concludes that the Constitutional Chamber relied on Article 4 of the American Convention, Article 3 of the Universal Declaration, Article 6 of the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the Declaration of the Rights of the Child. Rights of the Child of 1959. <b>However, none of these articles or treaties can sustain that the embryo can be considered a person under the terms of article 4 of the Convention. Nor is it possible to draw this conclusion from the preparatory work or from a systematic interpretation of the rights enshrined in the American Convention or in the American Declaration.</b></p>
<p>9</p>	

<p>Paragraph 258 P. 81</p>	<p>The antecedents that have been analyzed so far allow us to infer that the purpose of Article 4.1 of the Convention is to safeguard the right to life without implying the denial of other rights protected by the Convention. In that sense, the clause "in general" has the object and purpose of allowing that, in the face of a conflict of rights, it is possible to invoke exceptions to the protection of the right to life from conception. <b>In other words, the object and purpose of Article 4.1 of the Convention is that the right to life is not understood as an absolute right, whose alleged protection can justify the total denial of other rights.</b></p>
<p>10 Paragraph 259 P. 81</p>	<p><b>Consequently, the argument of the State in the sense that its constitutional norms grant greater protection of the right to life is not admissible and, consequently, this right should be fully enforced. On the contrary, this view denies the existence of rights that may be subject to disproportionate restrictions under a defense of the absolute protection of the right to life, which would be contrary to the protection of human rights, an aspect that constitutes the object and purpose of the treaty. That is, in application of the most favorable principle of interpretation, the alleged "broader protection" in the domestic sphere cannot allow or justify the suppression of the enjoyment and exercise of the rights and freedoms recognized in the Convention or limit them to a greater extent than the one planned in it.</b></p>

<p>11</p>	<p><b>In this regard, the Court considers that other judgments in comparative constitutional law seek to make an adequate balance of possible rights in conflict and, therefore, constitute an important reference to interpret the scope of the clause "in general, from the conception" established in article 4.1 of the Convention. The following is an allusion to some jurisprudential examples in which a legitimate interest in protecting prenatal life is recognized, but where said interest is differentiated from the ownership of the right to life, emphasizing that any attempt to protect said interest must be harmonized with the fundamental rights of other people, especially the mother.</b></p>
<p>Paragraph 260 P. 82</p>	
<p>12</p>	<p>At the European level, for example, <b>the Constitutional Court of Germany, stressing the general duty of the State to protect the unborn, has established that "[t] he protection of life, [...] is not in such an absolute degree that it enjoys without any exception of prevalence over all other legal rights, "and that" [t] he fundamental rights of women [...] subsist in the face of the right to life of the nasciturus and consequently have to be protected. " Constitutional Court of Spain, "[t] he protection that the Constitution dispenses to the 'nasciturus' [...] does not mean that such protection must be of an absolute nature."</b></p>
<p>Paragraph 261 P. 82</p>	
<p>13</p>	<p>For its part, in the region, the Supreme Court of Justice of the United States has stated that "[t] he reason and logic that a State, at a certain moment,</p>

protects other interests [...] such as, for example, the potential human life ", **which should be weighted with the personal privacy of the woman** -which cannot be understood as an absolute right- and" other circumstances and values ". On the other hand, according to the Constitutional Court of Colombia, "[t]he Congress has the right to adopt the appropriate measures to comply with the duty to protect life ... this does not mean that all those that it dictates with said purpose are justified. , because despite its constitutional relevance, life does not have the character of a value or a right of an absolute nature and must be weighed with the other values, principles and constitutional rights ". The Supreme Court of Justice of the Nation of Argentina has indicated that neither the American Declaration nor the American Convention derives any mandate by which it is necessary to interpret, in a restrictive manner, the scope of the criminal norms that allow abortion in certain circumstances. , "inasmuch as the pertinent norms of these instruments were expressly delimited in their formulation so that they would not derive the invalidity of an abortion case" such as the one foreseen in the Argentine Penal Code, In a similar sense, the Supreme Court of Justice of The Nation of Mexico declared that, from the fact that life is a necessary condition of the existence of other rights, it cannot be validly concluded that life should be considered as more valuable than any of those other rights.



The arguments revealed through these excerpts from the Artavia Murillo judgment clearly show that, within the framework of the doctrine and jurisprudence of international human rights law:

1. There is no rational basis to the claim that the absolute legal prohibition of abortion is legitimate in a democratic State, that is part of the Inter-American Human Rights System and the UN. It is not possible to derive from any official and current human rights instrument, in any of the international systems, that the total prohibition of abortion is consistent with the respect and duty of guarantee of the States regarding the human rights of women.

2. The embryo, fetus or nasciturus, depending on the chosen nomenclature, can enjoy the moral consideration, but it is neither subject of rights nor is it a person. Neither it is entitled to special protection nor to receive more protections or rights than the pregnant woman. The State must protect the rights to life and health of pregnant women, who wish to receive this protection from an exercise of their will and freedom.

3. The Inter-American Court of Human Rights, the body that ultimately interprets the American Convention on Human Rights, understands the obligations of the State, pursuant to Article 4.1<sup>5</sup> of said Convention,<sup>6</sup> as compatible with public policies for access to safe abortion, at least in certain circumstances, as guaranteed by several States parties (including Mexico, Colombia, Argentina, Chile, Uruguay, Brazil, USA, among others)

4. States that totally impede access to safe abortion are violating women's and girls' rights to life, personal integrity, personal liberty, equality before the law.

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<sup>5</sup> Article 4.1 puts it this way: "Every person has rights with respect to her or his life. This right will be protected by the law and, in general, from the moment of conception. Nobody can be arbitrarily deprived of life."

<sup>6</sup> For an extensive analysis of the evolutionary interpretation of Article 4.1 of the American Convention on Human Rights, see the article "Interpretation of Article 4.1 of the American Convention of the Protection of Human Rights, Judgment of the Inter-American Court of Human Rights, case of Artavia Murillo et al. (FIV) vs Costa Rica," by Ingrid Brena, published in 2014 by *The Mexican Journal of Constitutional Rights*.

In accordance with the principles that should govern the functioning of a democratic, pluralist State, these premises should constitute the point of departure for public discussion about state obligations around abortion, including the necessary revision of legal norms that penalize it. That is to say that, in the scope of the parliamentary debate, one cannot return to a discussion where the validity or the binding nature of these affirmations is questioned.

Of course, I am not saying that there can be no discussion of these matters. To the contrary, these ideas can (and should) be freely debated and contested in other social spaces where it is possible to generate analysis and discussion. Despite this, though, we must understand that countries belonging to the Inter-American Human Rights System must comply with the jurisprudence it has produced in the matter of human rights, including abortion. Not only the law but also the principles of progressivity, non-regressivity, and conventionality control, demand it.

And, the system has clearly ruled with respect to Costa Rica in this case. The observations received by the Costa Rican State, from the CEDAW Committee in 2011 include the need to adopt -at least- the following measures:

- Develop clear medical guidelines for access to legal abortion and disseminate them widely among health professionals and the general public.
- Review the law related to abortion to evaluate those circumstances under which the termination of a pregnancy could be allowed, such in cases of incest or rape.
- Facilitate the availability and access of women to the most technologically advanced contraceptives.

And, the CEDAW Committee, the Committee on Economic, Social and Cultural Rights and the Committee against Torture have all stated that any form of coercion or obstacle in limiting access to a safe abortion (whether of an economic nature, the obligation of waiting periods for

reconsidering the decision, the mandatory psychological advice, conscientious objection without adequate control and the requirement of authorization from a third party to carry out the procedure) may constitute practices that result in a violation of women's human rights and the girls. All Central American nations are bound to follow these dictates.

### **Debating about Abortion in Central America**

Although various narratives, including antagonistic ones, circulate in the Central American public sphere there is not a serious political debate about abortion in these countries. The *sine qua non* condition for a debate is argumentation. This implies that those who participate in a debate put forth arguments and reasons defending their positions, commit to express those positions in the most rigorous way while simultaneously listening to the arguments of others (including those who may disagree with them), and are willing to accept the argument that is better supported. Each participant in a debate can refute the arguments that she/he considers wrong or false, offering reasons and evidence; that is, counter-argumentation. Based on this description, debate is an exercise in collective reasoning, not a boxing ring. Fallacies, falsehoods, signs of aggression and violence are not allowed. Ideas circulate and the process of debating, if carried out with transparency and adherence to civic ethics, culminates by eliminating arguments that are poorly constructed or sustained on false premises. Following the notion of deliberative democracy (Habermas, 1996.), in the context of a robust democracy, public debate is the fundamental pillar on which the legitimacy of norms is based. At the same time, respect for fundamental rights is the deontological guide that all people must follow, in their exercise of citizenship.

Habermas himself brings this up in relation to abortion, the diversity of beliefs and identities and the conditions of legitimacy to establish a legal norm in this regard, and reflects the following

*“Is there only one correct answer to the abortion question, for example? At this stage of the debate, both sides in this dispute appear to have good, perhaps even equally good, arguments. For the time being, therefore, the issue remains undecided. But insofar as what is at issue is in fact a moral matter in the strict sense, we must proceed from the assumption that in the long run it could be decided one way or the other on the basis of good reasons. However, a fortiori the possibility cannot be excluded that abortion is a problem that cannot be resolved from the moral point of view at all. From this point of view, what we seek is a way of regulating our communal life that is equally good for all. But it might transpire that descriptions of the problem of abortion are always inextricably interwoven with individual self-descriptions of persons and groups, and thus with their identities and life projects. Where an internal connection of this sort exists, the question must be formulated differently, specifically, in ethical terms. Then it would be answered differently depending on context, tradition, and ideals of life. It follows, therefore, that the moral question, properly speaking, would first arise at the more general level of the legitimate ordering of coexisting forms of life. Then the question would be how the integrity and the coexistence of ways of life and worldviews that generate different ethical conceptions of abortion can be secured **under conditions of equal rights**. In other cases, it is possible to deduce from the inconclusive outcome of practical discourses that the problems under consideration and the issues in need of regulation do not involve generalizable interests at all; then one should not look for moral solutions but instead for fair compromises”.* (Habermas, 2001. pp. 59-60)

Based on the above, I submit that in a pluralistic and democratic society, various moral assessments about abortion coexist. And, given this, the State must ensure that, first of all, the equality of rights between those who are subject of law, that is, individuals, are protected. The political commitment in a deliberative democracy does not depend on the existence of a prior moral consensus, but on the respect -from the difference of worldviews- of the set of fundamental rights of those who are recognized as moral subjects.

This echoes the Spanish philosopher Adela Cortina, who says:

*“It is from dialogue how just solutions can be reached; a rule is fair if all those affected by it can give their consent after a dialogue held in the conditions closest to symmetry, a dialogue in which those affected have brought their interests to light transparently and are willing to give for just the final result, the one that satisfies universalizable interests”* (Cortina, 2013. P 42)

These conditions are not currently met in Central America with respect to abortion. In fact, the state of the abortion discussion in Central America illustrates the failure in the aspiration for a rational and reasoned dialogue, which is so essential to the foundation for participation and democratic construction of political life. In Central America right now, sadly, there is no exchange of reasons, no exchange of arguments, no genuine listening to the other side, and no willingness on the part of many to concede when their arguments are weak because from the conservative sectors the position on abortion is increasingly fundamentalist, going so far as to refer to abortion, using words like "murder" or "death penalty."<sup>7</sup> The groups that call themselves "pro-life" have dominated the public circulation of discourses on abortion in the Central American region, but they have done so without offering reasonable arguments. Although on some occasions the neo-fundamentalist / neo-integrationists Catholic groups seem to provide acceptable reasons, their rhetorical strategies are aimed at placing affirmations of maxims in the debate, which can only be accepted by those who share this religious worldview. They do not start from principles that can be universalizable or adopted as part of a secular ethic. For example, they begin from the assertion that an embryo or a fetus is a person with rights, whose life must be protected above the life of the pregnant woman. But these moral considerations are only valid on the basis of religious precepts and, as such, will only be accepted by those who share the moral maxims that inspire such sacrificial ethics. They cannot be extrapolated to the rest of the population, much less serve as a basis for the establishment of compulsory compliance laws for all people. So, people are expressing views but not actually engaging in debate.

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<sup>7</sup> For example, in Costa Rica, the "pro-life" activist Alexandra Loría Beeche, has said in the press that the decree that would regularize non-punishable abortion is a norm that "would allow killing sick children", to refer to fetuses with malformations incompatible with extrauterine life. (Zúñiga, 2017)

The inflexibility that characterizes the position of these self-proclaimed “pro-life” groups even leads them to demonstrate against the decriminalization of abortion in cases where the life of the pregnant woman is in danger (known as "therapeutic abortion"). Moral positions like this illustrate patterns of behavior that are known as maximum ethics. Cortina and Martínez (2013) put the point this way:

"The ethics of justice or minimum ethics are concerned only with the universalizable dimension of the moral phenomenon, that is, those duties of justice that are required of any rational being and that, ultimately, only make minimum demands. The ethics of happiness, on the contrary, try to offer ideals of good life, in which the set of goods that men can enjoy are presented hierarchically to produce the greatest possible happiness. They are, therefore, ethical maxims, which advise following their model, invite us to take it as an orientation for conduct, but cannot demand that it be followed, because happiness is a matter of advice and invitation, not of demand "(p. 118)

Using religiously-grounded principles or morals promote these ethics of maximums and, as a result, make it impossible to build a minimum civic ethic -in the context of a democratic society. Civic ethics, within the framework of a social, democratic, plural, and human rights-based state, calls for the exercise of citizenship, based on a minimum of common justice agreements. From this perspective, adopting the moral precepts of a certain religious system as the basis from which to establish the common minimums of a civic ethic and the guide decision-making in the public sphere would be undemocratic and authoritarian, since it would force the whole of society to comply with mandates that do not arise from the debate and the socially constructed agreement.

## **Conclusion**

The dynamics of public discussion and civic debate are delineated by the rules of legitimate democracies, international law, and various schools of Western philosophical thought. Based on these, public debates should be based on the most robust and rigorous scientific or technical evidence of the subject under discussion along with secular ethical principles that do not require participants to adhere to specific ideology. Every participant in the debate should express her/his

ideas in a way that allows the rest of the people to understand the meaning of what they want to honestly communicate.

If we really understand these guidelines, we see that they are not being followed in Central America with respect to abortion. If they were, we would take human rights as the ethical basis for the discussion and combined with empirical realities facing women, we would see that what should be under discussion in most Central American countries is the normative procedure needed for lifting the legal obstacles that prevent access to safe abortion, at the very minimum, in certain extreme situations. In addition, it would be clear that these countries (as democratic states) are obligated to limit the political power of religious conservatism, which in Central America has caused a series of obstacles not only in terms of abortion, but also in access to sex education, contraceptive methods and reproductive justice. To not do these things would call these countries' identities as legitimate, mature, democracies that respect human rights into serious question.

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