Gender in constitutional discourses on abortion: 
Looking at Spain from a comparative perspective

Abstract
In as far as the regulation of abortion deals with issues like how and to what extent 
can women’s capacity to gestate and give birth be controlled, and by whom, any 
discourse on abortion necessarily reflects a construction of women’s citizenship, 
ence of gender. The question is, which is the ruling construction? Behind meta-legal 
discourses that focus on human life and public power’s duty to protect it there lies the 
modern construction of gender that articulates women’s passive citizenship within the 
State. This is also true of confrontational discourses that construct women and the foetus as potential adversaries. Both discourses are traditional in continental Europe. 
Yet they are being superseded by an understanding of abortion from the perspective 
of women’s active citizenship. Spanish Organic Act 2/2010 stands as part of this 
trend. Not surprisingly, governmental attempts to reinstate women’s passive 
citizenship in this matter have met stark resistance.

Keywords
Abortion, right to life, gender, citizenship, autonomy, conflict of rights.

I. Introduction: abortion and gender

The following pages attempt to draw a picture of legal discourses on abortion from a gender perspective. They attempt to tease out the gender features of these discourses, on the assumption that they all rely on a specific construction of women’s citizenship within a given socio-legal community, i.e. on a specific construction of gender. This is so to the extent that the regulation of abortion regulates women’s capacity to gestate and give birth, offering a solution that can range between turning this capacity into a legal obligation to carry pregnancy to term and granting women direct control over it. The focus will be on the gender features of the discourses on abortion developed within the Spanish legal order since Spain’s transition to democracy and on their evolution to date. To this end, I will first look into traditional abortion discourses in continental Europe, as framed by the German Federal Constitutional Court and as received in Spain. These, as we shall see, are made out by a combination of meta-legal and confrontational arguments, both of which, I will argue, are profoundly gendered (II). I will then look into the evolution towards more self-referential, relational and gender-deconstructive legal discourses on abortion in
Europe (III), into how these influenced the passing of Spain’s Organic Act 2/2010, 3 March, on Sexual and Reproductive Health and the Voluntary Interruption of Pregnancy and into current discussions on abortion legislation in Spain (IV). I will conclude with some reflections on how abortion discourses could be shaped in line with the deconstruction of gender (V). Before undertaking this analysis, some reflections on the connection between the regulation of abortion and gender are in order.

The connection between abortion and gender is most apparent in legal discourses that approach abortion in self-referential terms, in line with modern post-transcendental legal thinking and its self-referential understanding of human beings as legal subjects (Habermas, 2003: 23-29). Regarded in this light, abortion is usually approached from the position of women as democratic citizens and right-holders. Unborn human life is thought to deserve protection to the extent that the socio-legal community has a “compelling interest” in it and this interest is coherent with its constitutional tenets, notably with women’s democratic citizenship. Such is the approach adopted by the United States Supreme Court in Roe v. Wade (410 U.S. 113, 22 January 1973).

The gender dimension of discourses on abortion is often eclipsed, however, by discourses that focus on our self-understanding as human beings. It is eclipsed, more specifically, by metaphysical or otherwise meta-legal discourses that focus on the beginning of human life and the protection it deserves. Meta-legal arguments on abortion entail two problems. First, they place abortion discourses beyond the law’s grasp, couching it in terms that appear to be non-negotiable for the law and that sit uncomfortably with modern (post-metaphysical) legal arguments. This explains why decades of abortion debates have not provided reliable parameters for the legal regulation of new challenges in bioethics, such as euthanasia, eugenics or surrogate motherhood. It explains why “all attempts to describe early human life in terms that are neutral with respect to world-views, that is, not prejudging, and thus acceptable for all citizens of a secular society, have failed” (Habermas, 2003: 31). Indeed, arguments that appeal to metaphysical, theological or scientific grounds to sustain the
legal obligation to protect (innocent) human life are uncompromising, in particular arguments that defend that all (innocent) human life deserves equal protection. They differ on the point at which human life begins. At one end are those who argue that human life begins at birth (Singer, 1993; Tooley, 2009); at the other are those who argue that it begins with conception – or with nidation (Finnis, 1991; Wolf-Devine & Devine, 2009). Some of the latter argue that abortion amounts to murder, based on all human life’s equal worth, whilst others concede that foetuses deserve less protection than (born) legal persons, thus allowing for some analytical flexibility to ponder the relative weight of the protection due to the foetus and the pregnant woman’s rights. This is the traditional approach in continental Europe.

A second problem with meta-legal arguments is that they rest on the modern “sex-gender system” (Rubin, 1975: 159). They take for granted the dichotomous gendered citizenship model that sustains modern States. Here male (active) citizenship was defined by the ideals of independence, rationality, individuality and participation in the public spheres of politics and work and was regarded as the normative model (Marshall, 1963). Every expression of dependency, irrationality, emotions, relations or care was displaced towards female (passive) citizenship by means of a (hetero)sexual fraternal contract (Landes, 1988: 158; Pateman, 1988; Wittig, 1992). Regarded as the anomaly, passive citizenship infantilised and subjected women to the rule of men and/or a male State through the “care/control paradigm” (Joseph, 2003: 159), hence to the heteronomy of norms designed by and for others. This modern sex-gender system is at the core of non-negotiable meta-legal discourses on abortion that rely on the worth on unborn life and women’s natural destiny to care for it, that articulate the State’s duty to protect the former and enforce the latter even against women’s (unnatural, irresponsible, misguided) resistance. It also informs discourses that defend women’s right or freedom to abort as a result of balancing it against the protection foetuses deserve.

These discourses are drafted, moreover, in confrontational terms. They construct the foetus and the pregnant woman as isolated, self-sufficient beings whose relationship poses potential dangers to the individuality of both, and then see rights as
instruments to solve conflicts between the two. As Carol Gilligan (1982) spelled out, such confrontational approaches are typically male. They are also profoundly counterfactual. Real people are not isolated and self-sufficient, but entrenched in complex relational networks (Minow, 1990; Eisler 2012: 1-29), all of which – voluntary and involuntary, structural and accessory, inevitable and fortuitous – contribute to shaping our identity in diverse and often contradictory ways. Rather than being in opposition to their relationships, individuals and relationships reciprocally define each other. In this light, individual identities become dynamic, the result of a constant creative process of (re)invention (Nedelsky, 2012: 158-159); they become, in a performative logic (Butler 1990), the combination of their relational roles, “the personality they present themselves as” (Luhmann, 1965: 69-70).

This is not to deny individuals’ autonomy. It is to acknowledge that autonomy is shaped, not in isolation and against our relational networks, but from within and through them, though also against specific relationships. Indeed, every relationship offers a different perspective on ourselves, thus providing a critical standpoint to assess others and their roles in shaping our self-knowledge. Thus regarded, autonomy becomes our capacity to adopt “reflexive role-distance” with respect to any relationship (Benhabib, 1992: 73), to contemplate ourselves critically from the perspective of one/some of our relationships, to turn our critical observations into action and to alternate our standpoint, so that any relationship can be the object of scrutiny from the perspective of any other. This makes autonomy relational and dynamic (Meyers, 2004; Nedelsky, 2012), the result of an on-going dialogue among the relationships to which we are part.

Women’s real-life abortion decisions are profoundly relational. They are not based on calculations as to whose entitlements are stronger, theirs or those of the foetus. They rather turn around the pregnant woman’s relational context, around the question of whether or not a (new) mother-child relationship could be integrated in it and at what cost to existing relationships (Gilligan, 1982: 70-105). Confrontational legal approaches to abortion are thus as male as they are counterfactual in their
design. In the following pages, I will delve into the gender features of both meta-legal and confrontational approaches to abortion in the continental European tradition.

II. Traditional abortion discourses in continental Europe. The gender of metaphysics and conflict

By contrast to the United States’ tradition, where abortion is regarded as a constitutional right (see Sanger in this issue), though subject to increasing qualifications and restrictions, the continental European legal tradition regards abortion as a crime. This is based on the belief that unborn human life is under the natural protection of the pregnant woman and, failing this, the State. Decriminalising abortion under certain circumstances is here an exception, justified by the existence of a conflict between the protection due to unborn human life and the pregnant woman’s entitlements. This discourse’s basic tenets inform the first abortion decision of the German Federal Constitutional Court in 1975, a decision that influenced legal discourses on abortion in Europe and that set the ground for the Spanish legislation and Constitutional Court’s position on the matter.

The German Influence

In 1975, the German Federal Constitutional Court decided on the constitutionality of a Criminal Code amendment passed in 1974. The amendment decriminalised abortions performed during the first twelve gestation weeks, subject to the requirement that the pregnant woman went through medical and social counselling aimed at explaining the means and services the welfare State placed at her disposal. The amendment also decriminalised abortion in cases of malformations in the foetus during the first twenty-two gestation weeks (eugenic abortion) and at any stage during pregnancy if the pregnant woman’s life or health were at risk (therapeutic abortion). The German Court ruled exceptions based on foetal abnormality and on risk to the life/health of the woman as constitutional and pointed at two possible further ones: ethical and social abortion, in cases of rape and exceptional social difficulties, respectively. Yet it declared the decriminalisation of abortions within the first 12 weeks of pregnancy unconstitutional because it did not sufficiently protect the unborn (BVerfGE 39, 1, 25 February 1975).
This decision followed three interlocking lines of discourse. The first one centred on meta-legal considerations concerning the importance of human existence and worth as offered by biology, anthropology, medicine, psychology, sociology, politics, morality and theology (BVerfGE 39, 1, par. C). From this the Court concluded that the constitutional right to life (“All –Jeder- have a right to life and physical integrity”, Article 2.2 of the Basic Law –henceforth BL) embraces unborn life. Unborn life, it declared, is of equal worth as born life –it is of equal human dignity, Article 1.1 BL (par. C.I.2). Nature, it continued, has placed the protection of the unborn in the hands of the woman who gestates it (“the mother” –par. C.II.2). Should she refuse to fulfil her natural duties, however, then the duty to protect falls on the State. This leads to the second line of argument, which purported to solve conflicts between the State’s commitment to protecting unborn life and women’s rights. Exceptionally, said the Court, the former must give way to the latter, notably when the women’s life or health is in danger. It can also exceptionally give way when pregnancy and motherhood impose a burden on the free development of her personality (Article 2.1 BL) that goes beyond nature’s requirements. This allows for eugenic abortion if practiced during the first twenty-two weeks and could also allow for ethical or social abortion within a reasonable time frame –the Court pointed to twelve weeks (par. C.III.3). Now a third interlocking line of argument, centred on women’s nature, destiny and duties, comes to the surface. Beyond those exceptions, the Court said, the State must compel pregnant women to forsake “unlimited pleasure” (par. C.III.3) and assume “the natural sacrifices and duties of motherhood” (par. D.III.2). It can decide to do so by criminalising any deviation from these duties or by preventative means aimed at re-establishing women’s natural inclination to care for the life they gestate. Crucial is that the law makes clear its commitment to protecting human life and to establishing the difference between moral “right” and “wrong”, that abortion remains a (tolerated) “wrong” and is not approved of as a “right” (par. D.II.2). The regulation of a time-frame decriminalisation of abortion was not deemed to satisfy these requirements.
Gender thus colluded with a meta-legal discourse to frame a constitutional discourse on abortion centred on the foetus, not the pregnant woman. The decision was couched, furthermore, in a male-style confrontational logic that constructs pregnant women and unborn life as potential enemies in a zero-sum game, thus further removing the legal discourse on abortion from women’s reality. It is with this decision in mind that Spain passed its first democratic law on abortion.

*Spanish Legal Framework prior to 2010*

Until 1985 abortion was prosecuted as a crime in Spain except where pregnancy and/or birth endangered the pregnant woman’s life. Organic Act 9/1985, 5 July, amended the Criminal Code to introduce three exceptions to the criminalisation of abortion (Section 417bis): an ethical exception (during the first twelve gestation weeks, provided rape had been reported to the police), a eugenic exception (during the first twenty-two gestation weeks, provided serious mental or physical disabilities in the foetus were previously certified by a medical report) and a therapeutic exception (any time during pregnancy). Fifty-four members of parliament brought Section 417bis before the Constitutional Court, on the grounds that it violated a series of constitutional provisions, notably the right to life (Article 15 of the Spanish Constitution—henceforth SC), the State’s duty to protect children (Article 39.2 SC) and its duty to provide for the physically and mentally disabled (Article 49 SC).

The Constitutional Court’s decision STC 53/1985, 11 April, faced these challenges by focusing on human life as constitutionally protected (Article 15). Although only legal persons, i.e. born human beings (Section 30 of the Civil Code), can be right holders (FJ 6), said the Court, constitutional rights have a normative dimension that goes beyond individual entitlements. In the case of Article 15, this imposes on the State the duty to protect human life in all its developmental stages, including the unborn. This is, it said, “not only a condition for life outside the maternal protection, but also a moment in the development of (human) life itself” (FJ 5)”. The State must both refrain “from interrupting or hindering the natural gestation process” and establish “a legal system for the defence of life that presupposes an effective protection thereof” (FJ 7). Moreover, said the Court, the right to life

“constitutes the essential and principal fundamental right, the real and genuine basis without which the remaining rights would have no possible existence” (FJ 3), and is inextricably linked to human dignity (Article 10 SC) as the basis of all rights. As a result, the State may (at times the Court suggests that it must) go to further lengths to protect human life than to protect other rights.

When facing the three instances of legalised abortion, the Court confronted the State’s duty to protect human life with pregnant women’s constitutional entitlements: her dignity and the free development of her personality (Article 10), her physical and moral integrity (Article 15), her freedom of ideas and beliefs (Article 16) and her right to privacy (Article 18) (FJ 8). Never did the Court consider that abortion could be a woman’s right. Nor did it openly explore whether the Constitution demands that under certain circumstances abortion go unpunished, but only whether this outcome is constitutionally permitted in the three exceptions under consideration. Yet the Court was somewhat ambiguous on this point and at times appeared to regard the exceptions as constitutional demands (see especially FJ 11). In any case, the question was not whether the State may waive all protection of the unborn in these instances, but whether it may “protect fundamental rights using techniques that exclude criminal punishment” (FJ 9). Note that the Court was not asked to examine other forms of protection, hence at times assumed that without criminal law the foetus remained unprotected. Still, the Court said, there are singular or exceptional cases where “(r)esorting to the maximum constriction –criminal penalty- in order to impose in these exceptional cases the conduct that is required in normal cases would be inappropriate” (ibid.).

Therapeutic abortion was declared constitutional based on the pregnant woman’s right to life and health. So was ethical abortion, based on pregnant women’s personal dignity, physical and moral integrity and privacy, in terms that pointed at ethical abortion as a constitutional demand rather than a mere possibility (FJ 11b). In both cases the Court couched its analysis in the language of conflict. Interestingly, the Court abandoned its confrontational approach in the context of eugenic abortion, where it developed a more complex relational discourse. Without referring to any
This passage could be read as a warning that those who knowingly decide to give birth to a disabled child do so at their own risk and costs. Yet it could also be read as introducing a preventative approach to abortion, as it indirectly connects eugenic abortion to the deficiencies of the welfare State. Indeed, instead of connecting the notion of “unreasonable demands” with women’s nature and the moral duties derived thereof, as the German Constitutional Court had done, it linked it to the insufficiency of State provisions to assist parents, most particularly mothers. The implication could be that the more the State provides support for parents of children with disabilities, the more difficult it becomes to justify eugenic abortion. Yet this also brings forth the relational dimension of responsibilities emanating from pregnancy and birth, as well as the State’s duty to attend to this relational dimension as part of its commitment towards human life. The Court thus seems to be opening the door to the possibility of channelling these duties, not through criminal law, but through social provisions that help to shape the relational framework within which abortion is decided. It seems to be opening the door to an approach to abortion that is not punitive but preventative, that is not transcendental and confrontational but self-referential, that takes women’s active citizenship seriously and that embraces abortion in its socio-relational dimension. This approach soon started to gain ground in continental Europe. Again, the German Constitutional Court played a central role in its articulation.

III. A new European approach: the socio-relational dimension of abortion

On 27 June 1992, reunified Germany passed a new federal Act on abortion with a view to harmonising existing legislation in former West and East Germany. This Act introduced a time-frame system that decriminalised abortions practiced during the first twelve gestation weeks, provided the pregnant woman had gone through a
counselling process at least three days prior to the abortion.\(^x\) The Federal Constitutional Court was called upon to examine the constitutionality of this Act. In its second decision on this matter (*BVerfGE* 88, 203, 28 May 1993), this Court reminded us of the State’s duty to protect human life, of the connection between human life and dignity, of the foetus as a unique and individual form of human life since conception (par. D.I.1) and of the State’s duty to protect it, even against the pregnant woman (again “the mother”), if necessary. Only exceptionally could this duty give way to the pregnant woman’s constitutional rights: to life, health, physical integrity, dignity, or to the free development of her personality (Articles 1 and 2 BL) (par. D.I.2c.a.a).

Pregnancy, the Court now added, unites two lives in one (it entails a “duality in unity”) in ways that go beyond the need for mutual respect to entail long-term responsibilities beyond pregnancy and birth (par. D.I.2c.bb). In the context of this special bond, criminal law should be the last resort in the protection of the unborn (par. D.I.2c.dd). The law may resort instead to preventative measures, notably counselling geared to informing women of the ways in which the socio-legal context reduces the difficulties involved in pregnancy, birth and motherhood and that facilitates the conciliation of family life and work\(^{xi}\) (par. D.I.3). Without turning legally practiced abortion into a moral “right”, this reasoning allowed the law to tolerate it provided counselling was sufficiently protective of the foetus (par. D.I.2c.dd). As it turned out, the Court considered the regulation of counselling insufficiently protective, i.e. insufficiently geared towards persuading women to carry pregnancy to term. It thus prescribed additional protective measures, such as informing women of the foetus’ right to life; involving social agents, such as the Churches, that can persuade women to bring pregnancy to term; pondering whether to involve close relatives and/or partners, depending on their expected support for pregnancy; allowing for a second counselling when the woman seems psychologically fragile; or introducing a reflection period (par. D.IV.1-2).

In gender terms, the Court’s discourse was ambiguous. On the one hand, it was heavily loaded with moral considerations based on the modern construction of
gender, such as women’s nature, maternal duties or the essential wrongness of abortion. On the other, it questioned this construction, as it pointed towards a relational approach to abortion, regarded as a social problem, and granted women the last word on the matter. This latter line of reasoning is becoming widespread in Europe. In most continental European countries abortion is now legal if practiced during an initial period that ranges between the first ten and eighteen gestation weeks, usually subject to a prior information/counselling process for the pregnant woman. This approach, also endorsed by the European Parliament, has been sustained by other Constitutional Courts in Europe: the Austrian Constitutional Court (Decision of 11 October 1974), the French Constitutional Counsel (Decision N. 2001-446 DC, 27 June) and the Portuguese Constitutional Court (Agreement N. 75/2010, 23 February). This latter Court’s decision clearly spells out this line of argument and thus deserves closer attention.

The Portuguese Constitutional Court decided on the constitutionality of Act 16/2007, 17 April, which decriminalised abortion during the first ten gestation weeks, provided pregnant women go through counselling at least three days before. In line with the continental European tradition, this Court took the perspective of the State’s constitutional duties towards the foetus. Yet in line also with the second abortion decision of the German Constitutional Court, it embraced a relational view of pregnancy, regarded as a “duality in unity” the nature of which evolves. As it does, so do the State’s duties towards the foetus (par. 11.4.8), which become more stringent as pregnancy develops (par. 11.4.11). Based on this, it was considered constitutional not to resort to criminal law in relation to early term abortion, when the unity between the foetus and the pregnant woman is at its strongest and prevails over their duality. During that time, the Court said, abortion is a personal and existential inner problem for the pregnant woman, who both provokes and suffers it. Threatening her with criminal punishment would then be inefficient (par. 11.4.8), even counterproductive, as shown by the failure of criminal strategies against abortion. It makes more sense to try to protect the foetus through the pregnant woman rather than against her, to harmonise her interests with the State’s interest in protecting unborn life rather than opposing both (par. 11.4.9). The Court moved away from the European tradition that
regards pregnant women who consider abortion as either selfish and irresponsible, or too weak or ignorant to know their own good (par. 11.6). It compelled us to regard them as valid interlocutors, as active citizens who face a decision that has long-term life implications and that must be taken “from within a network of interlocking, concurring and often irreconcilable responsibilities and obligations” (par. 11.4.10 - my translation; the paragraph includes references to Dworkin, 1993: 58, and Gilligan, 1982: 58-60). It compelled us to regard the decision to abort, not as a symptom of irresponsibility, but a sign that women take family responsibilities very seriously (Jaggar, 2009: 170). A preventative approach, concluded this Court, can influence the decision of at least those women who are as yet undecided – in practical terms, it noted, the only women that matter (par. 11.4.10).

The Portuguese Constitutional Court thus upheld the constitutionality of Act 16/2007. It did so although the counselling process this Act designed was not explicitly geared to persuading women to carry their pregnancy to term (par. 11.8 y 11.9). The law, said the Court, can legitimately trust the persuasive force of an objective counselling process where women are informed of the rights and benefits at their disposal (par. 11.4.17), without ideological or moral pressure (par. 11.9). The burden of protecting unborn human life thus lies with the design of a welfare State sufficiently protective of pregnancy, birth and motherhood. In freeing itself from moral preconceptions, the Portuguese Court thus approached abortion from beyond the modern construction of gender, women’s passive citizenship and the care/control paradigm. It assumed instead a self-referential, relational approach to abortion that places women’s active citizenship at its centre. Passed about a week before the Spanish Organic Act 2/2010 on abortion, the Portuguese decision anticipated the spirit of this Act.

The application of abortion law in Spain after STC 53/1985 created great insecurity amongst women and doctors. Therapeutic abortion, which could be performed at any time during pregnancy, was interpreted in wide and flexible terms to allow for the protection of pregnant women’s mental or psychological health. Around 96% of legal
Abortions were performed under this exception, mostly within the first 12 gestation weeks (around 87% of all legal abortions). Yet there was no clear ruling on how wide this exception was or on the timeframe of its application. Both women and doctors faced criminal prosecution if abortion was practiced outside the legal boundaries and requirements. Doctors could be punished with one to three years’ imprisonment and a prohibition to work as a health professional of any kind in a public or private health centre for one to six years. Women could be punished with six-month to one-year imprisonment or with a fine (Section 145 Criminal Code). Criminal prosecutions against doctors and also, though more rarely, against women, did take place, mostly against late-term abortions performed under the mental health exception. Actions were also taken against health centres. According to the Decree 2409/1986, 21 November, health centres that practiced illegal abortions face administrative fines and possibly closure. Many public health centres preferred not to run the risk, hence opted for not providing abortion services. Add to this the lack of statutory regulation of doctors’ constitutional right to conscientious objection (STC 53/1985, FJ 14) and the result was a staggering number of abortions performed in private centres (around 97%).

The number of abortions performed in public health centres varied, furthermore, among Autonomous Communities –Spain’s politically autonomous regions. Health in Spain is a decentralised service. The 17 Autonomous Communities are thus responsible for authorising public and private health centres to perform abortions, and for making a list of the authorised health centres available to the public. This created important regional disparities, at a time when abortion was not recognised as a right and there was no legal ground to make it available in all the Spanish territory. There are also important regional disparities in the availability of public funding for abortion. In principle, legal abortions were subsidised in public health centres, although Madrid and Catalonia only subsidised it for low-income women. Admittedly, some private health centres operate with public funding, as part of a Network of Hospitals for Public Use (Red Hospitalaria de Utilización Pública - RHUP). Indeed, most abortions covered by public funding in Spain are carried out in private health centres belonging to the RHUP Network. In Spain’s decentralised
health system, however, the RHUP works on a regional basis, as does the decision to authorise a health centre to practice abortions. The result is that the number of publicly funded abortions varied greatly depending on the Autonomous Community.\textsuperscript{xvi}

Demands increased for a clearer regulation of abortion, one that would regulate doctors’ conscientious objection, that would make abortion equally funded in all the country and would not create areas of uncertainty. Legal uncertainties were regarded as cause for the privatisation of abortions and the growth of abortion as business, as well as for making doctors and women vulnerable to criminal prosecution. Demands also increased for abortion to be regulated as a right. There was, above all, a concern to reduce abortion rates, which continued to rise steadily during the 1990s and 2000s with a slight decline in 2009 (11.78 per 1,000 women in 2008, 11.41 in 2009, as opposed to 6.00 in 1998). This is so despite legal and policy measures aimed at supporting maternity and birth, such as a paid maternity and paternity leave (16 weeks for working mothers, 10 of which can be transferred to or shared with working fathers, and 13 days for working fathers, with extensions in case of multiple or premature births), nursing time during work for parents of babies under nine months, leave to care for children under eight and other policies supporting conciliation of family life and work, such as the promotion of flexible working hours for parents. Despite such measures, reality continues to make it hard for mothers to build a professional life.\textsuperscript{xvii} Abortion rates reflect this reality.

Organic Act 2/2010, 3 March, changed Spanish abortion legislation and adopted a double preventative strategy.\textsuperscript{xviii} Its aim is first and foremost to prevent unwanted pregnancies through sexual education. In the case of pregnancy, there is a statutory right to abort during the first fourteen gestation weeks, provided abortion is preceded by a counselling process, followed by at least three days’ reflection period (Section 17). The preventative character of the new legislation is played out in this process. This requires that regional health authorities or authorised health centres inform pregnant women who solicit abortion of the medical and legal conditions under which abortion can be performed, but also of their rights and the benefits at
their disposal both in the event of an abortion and if pregnancy is carried to term, as well as of the medical, psychological and social implications attached to both options. After the fourteenth week, abortion remains a crime, subject to a therapeutic exception, where the life or health of the pregnant woman is at risk, and to a eugenic exception, where the foetus has serious malformations. Both exceptions apply until the twenty-second gestation week, with no time limit where foetal malformations are incompatible with life. These exceptions require two medical reports and, in this latter case, the conformity of a clinical committee.

During the first fourteen gestation weeks, Organic Act 2/2010 thus grants women a statutory right to abort (Section 18). It also recognises doctors’ right to conscientious objection, provided they refer women to a different doctor or health centre in time (Section 19). During that initial period, the Act thus abandons the confrontation between the foetus and the pregnant woman and the attempt to protect the one against the other’s interests, to embrace instead the deep connection between the two. The Act’s strategy to protect unborn life is to make motherhood an attractive option for pregnant women, to make the State responsible for creating the right socio-economic conditions for motherhood and for making these conditions known to women. The Act thus aims to protect unborn life while embracing women’s autonomy, hence active citizenship. Indeed, the Act lays the decision to interrupt pregnancy exclusively upon women. This is so from the age of sixteen, in line with Act 41/2002, 14 November, on patients’ autonomy (Section 9). Women between sixteen and eighteen years of age, however, must inform a legal guardian (at least one parent), except where they allege that this would cause grave conflict, abandonment, violence or other forms of mistreatment within the family. Whether or not this requirement is met is a medical decision (Organic Act 2/2010, Section 13.4; see also Decree 825/2010, 25 June, Section 8).

There remain, however, some causes for caution. While women must be informed of their rights and benefits in a standardised and confidential manner, through a closed envelope (Section 17.2), information on the medical, psychological and social consequences attached to their options must be delivered personally by
doctors and adjusted to each woman’s personal circumstances (Section 17.4), once again in line with Act 41/2002 (Sections 4 and 10). Moreover, this information is not required to be neutral, as it was in the original Draft Bill; to be sure, it is not explicitly aimed at preventing abortion (Section 17.5 explicitly requires it to be objective), yet preventing abortion is undoubtedly its ultimate purpose. After all, the counselling process is key to satisfying the State’s constitutional duty to protect unborn human life. This arouses concern that counselling can become a channel for meta-legal considerations on women’s natural duties, as well as for assumptions about women’s incapacity to make their own life decisions responsibly without State’s input, hence about women’s passive citizenship, and for the care/control paradigmxx. This is the more so the less responsible, the less autonomous and the more vulnerable women appear to be in the public imagination, which could open the door to covert discrimination of women belonging to some social groups. Much depends on how seriously doctors take both women’s active citizenship and the relational dimension of pregnancy and abortion. It also depends on how seriously the State takes its duty to create socio-economic conditions that make abortion a less frequent option –something Spain’s current economic recession and political conservative turn do not appear to promote.

The Spanish Constitutional Court has been asked to examine the conformity of this new time-frame preventative approach with Article 15 SC. A decision on the Act is pending. To the extent that the 1985 and 2010 Organic Acts on abortion endorse radically different approaches to abortion –punitive and preventative, respectively-, STC 53/1985 would appear to offer little guidance. Nonetheless, the Court’s preventative reflections on the social and relational dimension of pregnancy and parenthood and on the State’s responsibilities towards both, developed in the context of eugenic abortion (STC 53/1985, FJ 11), seem to support the constitutionality of Organic Act 2/2010. So do, as set out above, the Decisions reached by Constitutional Courts in neighbouring countries. Yet the Constitutional Court’s current conservative majority, and the fact that a conservative Catholic Justice will act as the Decision’s spokesman, would suggest that we should be cautious in our expectations.
Meanwhile, after a short increase in 2011 (12.44 for every 1000 pregnancies), the number of abortions resumed in 2012 the declining trend started in 2009 (12.01 for every 1000 pregnancies). Along with this has come an increase in the number of public health centres that perform abortions (from 49 in 2010 to 67 in 2012), whilst the number of private clinics declines (from 97 in 2010 to 88 in 2012), although seven Autonomous Communities, together with Ceuta and Melilla, still rely on agreements with private clinics. These encouraging data notwithstanding, Spain’s conservative Popular Party included the abrogation of Organic Act 2/2010 in its platform for the 2011 general election. Once in Government, it produced a Draft Bill on abortion reintroducing the punitive regulation in force in Spain between 1985 and 2010, this time without the eugenic exception. This could only be sustained indirectly, through the therapeutic exception, designed to protect pregnant women’s physical and mental health during the first twenty-two gestation weeks (or later if foetal anomalies incompatible with life were discovered after that period). Other than in ethical abortions, authorised in cases of reported rape during the first twelve gestation weeks, women’s legal access to abortion was thus placed in the hands of doctors. In cases of illegal abortion it would also be doctors, not women, who could be held criminally responsible. Indeed, in line with the most recent discourses of the United States Supreme Court, the new Draft Bill sought justification through the victimisation of women, making “structural violence” and “social pressure” responsible for women’s decision to abort, in the logic of the care/control paradigm. Women, the Government claimed, need the State’s assistance and protection against unwanted abortions. Although it certainly has its supporters within the far right and the Catholic Church, this return to women’s infantilisation and passive citizenship met with stark social and political contestation in Spain and beyond, even within the ranks of the Popular Party. As a result of this, the Draft Bill has been withdrawn and its main advocate, the Minister of Justice, has resigned.

V. Coming full circle: gender and discourses on abortion

Every regulation of abortion has strong gender implications. Meta-legal discourses rely on assumptions deeply entrenched in the modern construction of gender: about women’s nature, natural duties to care and natural need for tutelage in the face of
own moral weakness. The same applies to confrontational discourses that oppose the interests of the foetus and the pregnant woman and that are both counterfactual in their assumptions and male-biased in their analytical tools. It is both counterfactual and male-biased to isolate the pregnant woman and the foetus as separate individuals and confront them as potential enemies, instead of embracing their essential interconnection and the need to protect the one through the other. It is also counterfactual and male-biased to look at pregnancy in isolation from its social, economic and legal contexts, to ignore how a woman’s position in these contexts conditions her relationship to the foetus and her future motherhood. The result is a distorted view of abortion that misses its social and gendered reality (Gilligan, 1982; García Pascual, 2006), and that makes a dialogue between the law and that reality impossible, thus placing women in a position of helpless heteronomy (Jaggar, 2009: 164).

The alternative is a self-referential regulation of abortion that rests on the tenets of democratic citizenship and that contemplates abortion from a relational perspective that does not antagonise unborn life and women’s autonomy. A relational approach to abortion consistent with both women’s active citizenship and the State’s constitutional obligations towards the unborn would make the decision to abort rely entirely on women before the foetus is viable. After that, pregnant women would be allowed to give birth prematurely, so that the State can take direct care of the foetus. A relational approach to abortion must be, moreover, a relational approach to pregnancy and parenthood. In order for their choice to be truly autonomous, women must have enough meaningful options available to them (Raz, 1986: 373). This includes the possibility of saying No to an unwanted pregnancy, but also of saying Yes to it. The State’s efforts to protect unborn life must thus be geared towards creating a legal and socio-economic context where pregnancy and motherhood are meaningful options within women’s relationship networks, where the (personal, professional, financial and emotional) cost of pregnancy and parenthood does not rest primarily on women, but is more widely shared: by men and by society at large. The Spanish Organic Act 2/2010 took an important step in this direction.
The current Government’s Draft Bill abrogating this Organic Act brought back abortion discourses centred on metaphysical considerations about human life, women’s nature and the artificial confrontation of the foetus and the woman who gestates it. It thus carried the dangers attached to a reinstatement of women’s image as passive citizens. It should be noted that Organic Act 2/2010 is part of a package of legal reforms, implemented during the last decade, aimed at enhancing women’s active citizenship. The conservative Draft Bill on abortion was thus part of a wider tour-de-force on the definition of gender and women’s citizenship. After its withdrawal, this tour-de-force has been moved onto the Constitutional Court. The denouement of this chapter in the history of abortion regulation in Spain remains yet to be written.

**Cases cited**


Decision of the German Constitutional Court 39 BVerfGE, 1 (1975).

Decision of the Spanish Constitutional Court STC 53/1985, 11 April.


Agreement of the Portuguese Constitutional Court N. 75/2010, 23 February.

**References**


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1. On the tension between modernity’s self-referential nature resulting from its break with the transcendental and its universal aspirations, see MacIntyre, 1985: 36-50.


3. They are, in Habermas’ terms, arguments about the dignity of human life, not just about human dignity as legally defined (Habermas, 2003: 29-37; see also MacIntyre, 1985: 8-10).


5. See Dworkin’s distinction between “derivative” and “detached” objections to abortion (1993: 11).

6. See *Casey* (505 U.S. 833, esp. 882) and *Carhart* (550 U.S. 124).

7. Translations of fragments of this decision are all mine.


9. After Decision 53/1985, Article 417bis of the Criminal Code was amended (see italics) to require that legal abortion be carried out by a Doctor or under a Doctor’s direction in an authorised public or private health centre with the woman’s explicit consent, except in emergency cases; that a medical report written by a specialist in the area, who must be different from the Doctor who will carry out the abortion, certifies that therapeutic abortion is necessary in order to avoid seriously endangering the pregnant woman’s life or health, except in emergency cases; and that two different medical specialists from authorised public or private health centres, who must be different from the Doctor who will practice the abortion or under whose direction the abortion will be carried out, certify that the foetus is likely to be born with serious mental or physical disabilities.

10. The Title of the Act is telling: *Act for the protection of unborn developing life, for the promotion of a more children-friendly society, for the assistance of pregnant women in situations of conflict and for the regulation of the interruption of pregnancy* –my translation.

11. See the dissenting votes of Justices von Brunneck and Simonen to this Court’s 1975 decision (*BVerGE* 39.1, B.II.2b).
As an alternative, abortion is legal during this initial period if pregnancy provokes in the pregnant woman a ‘state of distress’, as in Belgium, France and Switzerland; based on broad medical and social grounds, including mental or psychological grounds, as in Cyprus, Finland, Iceland, Italy and the United Kingdom (here during the first twenty-four weeks); or in grave crisis situations, as in Hungary. The exceptions are Poland, where the regulation of abortion does not refer to risk to the mental health of the pregnant woman, Ireland, where abortion is allowed only to save the pregnant woman’s life, and Malta, where abortion is forbidden in all cases (see Abortion Legislation in Europe (9th edition, 2012), published by International Planned Parenthood Federation European Network in www.ippfen.org -last visited on 20 January 2014).


Unless otherwise stated, data are provided by the Ministry of Health –IVE 2011 (http://www.msc.es/profesionales/saludPublica/prevPromocion/embrazo/home.htm#datos - accessed 18 August 2013).

As of 2010, on the top of the list was Catalonia with 34 authorised health centres, followed by Valencia with 22 and Andalusia with 19. At the other side of the spectrum were Castilla-León with 3, Aragón, Extremadura, Castilla-La Mancha with 2 and La Rioja with 1. Until 2012 Navarra had no health centre authorised to perform abortions in Navarra. Navarra’s health services referred women to authorised health centres in nearby Communities and covered medical and travel expenses as part of a policy to keep Navarra an “abortion-free” region. Navarra now has one private authorised health centre. Ceuta and Melilla still have non authorised health centres. See Asociación pro Derechos Civiles, Económicos y Sociales –ADECES (http://www.adeces.org/area/%20sanidad.htm - last accessed 15 February 2014).

According to data provided by Autonomous Communities, in 2007 only 28% of abortions performed in Spain were covered with public funding (only 2.08% were performed in a public health centre). Andalusia, well at the head, funded 73.6% of all abortions carried out in its territory, while in all other Autonomous Communities that percentage drops dramatically.

The current economic crisis is also having a greater impact on women than on men. For details, see “El empleo de las mujeres en cifras” (Women’s employment in numbers), in http://www.ugt.es/actualidad/2013/marzo/a06032013.html - accessed 18 August 2013.

In September 2009, Government also made the morning-after pill available without prescription at approximately €18. In Andalucía, Aragón, Baleares, Cantabria, Cataluña, Extremadura, Galicia, Navarra, Basque Country and some municipalities in Madrid it is delivered free of charge.

According to Section 16, the clinical committee is composed by two gynaecologists or experts in pre-natal diagnosis and by a paediatrician, selected by regional Public Health Authorities for at least one year. The pregnant woman can select one member. Each Autonomous Community must have at least one clinical committee in at least one public health centre. See also Decreé 825/2010, 25 June, Section 2.

See in this regard the dissenting opinions of Justices Stevens y Blackmun in Casey (505 U.S. 833, 918-919, 938).


It is the case of Aragón, Castilla-La Mancha, Castilla-León, Extremadura, Murcia and Navarra. Ade: http://www.eaci.gob, where no public or private health centre now performs abortions and women have to be directed to nearby Communities (as happens in Ceuta and Melilla) –see Asociación pro Derechos Civiles, Económicos y Sociales –ADECÉS (http://www.adeces.org/area/%20sanidad.htm - last accessed 15 February 2014).

The risk must be certified by two medical reports (only one if the woman’s mental health is at risk because of certified foetal anomalies incompatible with life) issued by two different specialists not working in the clinic where the abortion will be performed

See Casey (505 U.S. 833, esp. 882); Carhart (550 U.S. 124, esp. 159).
Such arguments were resorted to by the Minister of Justice to justify the abortion reform in Congress on 7 March 2012.

The Draft Bill has been condemned by Mikael Gustafsson, chairman of the European Parliament’s committee on women’s rights and gender equality.

Sally Sheldon (1993) has identified three stereotypes about women in abortion discourses: women as minors, women as victims and women as mothers.

Recent Spanish Acts touching on gender matters include Act 30/2003, of 13 October, on gender mainstreaming; Organic Act 1/2004, of 28 December, against gender violence; Act 13/2005, of 1 July, regulating same-sex marriage; Act 14/2006, of 26 May, on assisted reproduction; Act 39/2006, of 14 December, on the promotion of personal autonomy and assistance to people in a situation of dependency; Act 3/2007, of 15 March, regulating the rectification of one’s sexual identity in the civil Registry; Organic Act 3/2007, of 22 March, on effective equality between women and men, implementing gender equality in a variety of areas (Rodríguez Ruiz, 2010).