Latin america failed law v. micration of ideas

Comparative Law approach to the abortion Decision of the Colombian Constitutional Court

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I. INTRODUCTION

In 2006, a challenge against the articles of the Criminal Code was filed before the Colombian Constitutional Court –hereinafter "the Court"– for the second time in the eighteen years of the Court's short history The challenged provisions of the Criminal Code established abortion as a crime punishable without exception. The decision issued by the Court was considered as "historic" landmark in which the Court decided not to consider abortion as crime in three specific circumstances: (i) when the continuation of the pregnancy presents risks to the life or the health of the woman, as certified by a medical doctor; (ii) when there are serious malformations of the fetus incompatible with life outside the womb, as certified by a medical doctor; and (iii) when the pregnancy is the result of any of the following criminal acts, duly reported to the proper authorities: incest, rape, sexual abuse, or artificial insemination or implantation of a fertilized ovule without the woman's consent[1].

The Court's decision was six hundred pages long, which includes one hundred and forty five pages –together with dissenting opinion– referring to abortion in a comparative law perspective and trying to analyze how other legal systems dealt how to regulate and permit abortion in the first trimester under precise circumstances.

From a comparative law perspective, the Court decision and it references to foreign solutions, bring into discussion the fiction of

[1] Colombian Constitutional Court, Decision C – 355/06

the "Failed law" of Latin America described by Jorge Esquirol[2]. The fiction of "Failed law" is pervasive in Latin America because legislators, seeking to change domestic laws are inevitably looking to foreign legal systems, as a consequence of the incapacity of Latin American judges and legislatures to justify legal change by ideas rooted in their domestic legal regime. Therefore, legal borrowing and implementing legal reform models adopted by both foreign legislatures and courts seem to be a more promising solution to problematic gap between law and society in Latin America.

This gap consists in the traditional exaggeration that since their independence, many Latin American countries have adopted a very formal legal regime[3] in which thousands of legislations are adopted frequently and they remain in the books rather than being applied in practice. The frequent transformation of such laws in the books has traditionally looked towards Europe, in order to borrow new legal ideas. Nevertheless, those legal changes do not create the necessary solutions society needs, because even when Latin America society has stated in each country Constitution –and wants to follow– the same moral values as the European society, societies of Latin America have become different to the European ones; being impossible to pretend look towards Europe arguing Latin America possess the same law and moral values as in Europe[4]. Behind this exaggeration and frequent transformations is the "Failed law" thesis as justification.

Despite the importance of the "Failed law" thesis, which offers one explanation of why Latin American, and in particular, legislatures are obsessed by comparisons, I want to accept in part and partially depart from such thesis. I accept the existence of the gap between law and society –not as an exaggeration[5]– and the necessity to look

[2] Jorge L. Esquirol, *The Failed Law of Latin America*. 56 Am. J. Comp. L. 75 (2008)
[3] Héctor Fix-Zamudio, *Docencia en las facultades de derecho*. 3 Boletín del Colegio de Abogados de México 2 (1973).
[4] Jorge L. Esquirol, *Fictions of Latin American Law*. 1997 Utah L. Rev. 446.
[5] Is not an exaggeration in the sense that the very formal regime adopted by Latin American countries has been the most predominant but the only one; along Latin American legal history in countries as Colombia, attempts have arisen to break with the mentioned homogeneity. *See*, Diego Eduardo López Medina. *El Derecho de los*

towards other countries to find the correct solutions, while I depart in accept the existence of Latin America "Failed Law" idea, first, because it is a mere fiction[6] and; second, because establishes legal borrowing as the solution.

As what I accept is the existence of the mentioned gap and the subsequent necessity to look towards other countries to address such situation. I am also convinced judiciaries play an important role analyzing both law in the books and courts decisions, in order to block up the gap by adopting what they think fits better for society without rolling over it values[7], which at the end is another theory of why the law travels that recently some authors labeled the migration of ideas.[8] Differently from borrowings and legal transplants, the migration of ideas offers an additional explanation to the "Failed law" fiction. From a migration of ideas standpoint, the references made by the Court to the abortion decisions in foreign countries, can be understood as an attempt for strategic change. By using the legitimacy of legal concepts that allowed legal change around the world, concepts such as "privacy", "human dignity" and the "protection of the unborn" can migrate and, thereby, they are used strategically by Colombian judges. The migration of this ideas in the Latin American context allows legal concepts to perform a different role than the one they performed in Germany, US or Ireland by fitting the expectation and managing the tensions around abortion that are peculiar to the Colombian society.

This paper analyzes the recent Court decision on abortion, by comparing it to the United States, Germany and Ireland abortion decisions. The point of this comparison is to show that the Colombian decision can be placed in a continuum from more liberal to more conservative decisions on the abortion scenario. After

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Jueces. 240 (Universidad de los Andes – Legis, 2004). In one the chapters of his book, López Medina mentioned

[6] Jorge L. Esquirol, *The Failed Law of Latin America*. 56 Am. J. Comp. L. 79 (2008)

[7] Dennis O. Lynch, *Hundred Months of Solitude: Myth or Reality in Law and Development?* 223 Am. B. Found Res. J. 226 (1983)

[8] Sujit Choudry, *Migration as a new Metaphor in Comparative Constitutional Law*, in The Migration of Constitutional ideas 448, 1 – 36 (Cambridge University Press ed., 2006).

organizing these decisions along a political spectrum where the Colombian decision is half way between Germany and Ireland, this paper focuses on three additional comparative law insights. First, I underline the main concepts established by the three foreign courts to regulate abortion and mediate with different social tensions in the US, Germany and Ireland. Second, I analyze two Colombian Court abortion decisions, the first one decided in 1994 where the Court held that abortion was not permitted under any circumstance. The second one decided in 2006, where the Court allowed abortion in the first trimester under specific circumstances. Finally, the paper analyze the second Court's decision under both the Failed Law fiction and the Migration of Ideas approach in an attempt to depart from the exaggeration of the gap between law and society in Latin America and the constant need of legal borrowing by legislatures and answer: *what significance, if any, do constitutional practices in other nations, or other international influences, have in the resolution of constitutional issues concerning abortion in Colombia?*

II. (U.S. – GERMANY – IRELAND) ABORTION DECISIONS

Comparative constitutional lawyers[9], analyzing abortion decisions around the world, have focused on the United States well known decisions –*Roe* v. *Wade* and *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*–, in the attempt to compare them with the 1975 and 1993 German decisions of the Federal Constitutional Court. Both courts in the US and Germany reach functionally similar outcomes in allowing a woman to chose to have an abortion under some limited circumstances. However the justification for their decisions appear diametrically opposite insofar that the United States Supreme Court grounds its decision on the notion of privacy and individual liberty, whereas the German Federal Constitutional Court grounds its decision on the notion of human dignity and the role of the welfare state in preserving the decision of each individual. Differently, for other constitutional law authors[10], the analysis of

[9] Mark Tushnet & Vicki C. Jackson, Comparative Constitutional Law: Cases and Materials, 1557 (Foundation Press ed., 2006)

[10] Norman Dorse et al., *Comparative Constitutionalism: Cases and Materials*, 1383 (Thomson West ed., 2003)

abortion constitutional courts goes beyond Germany and United States and they address other courts decisions such as Ireland and Poland. In both countries the constitutional courts decisions are not as "liberal" in outcomes as the United States or Germany, even when there are resemblances in the reasoning of judges to reach different goals, namely the prohibition for a woman to abort under particular circumstances during the first semester.

My paper shows why it is important to place these Western liberal democracies on a spectrum along the more progressive and the more conservative outcome. However, my work is innovative in two respects: First, I show that is a structural similarity in the way ideas migrate from one country to another, even when they perform different functions. Second, I show that the Colombia decision is key to show that Latin America has a different position than Ireland or the United States on the political spectrum and that the migration of ideas happens in Colombia to mediate with different socio-economic tensions than the ones in Germany, US and Ireland.

Thus, some excerpts from the United States, Germany and Ireland decisions –as an overall view–, will be analyze for a further rationalization of the abortion decision in Colombia.

A. Roe v. Wade (1973)

In this decision, the Supreme Court of the United States – hereinafter "the Supreme Court" – decided whether or not, the Texas statutes, which make it a crime to "procure an abortion" except by medical advice for the purpose of saving the life of the mother, are according to the Constitution. For Jane Roe –plaintiff in the litigation–, Texas statute prohibition "abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments[11]."

In a first moment, The Supreme Court gives an historical background of the abortion through the different stages of humanity, in order to

[11] Mark Tushnet & Vicki C. Jackson, Comparative Constitutional Law: Cases and Materials, 1557, 6 (Foundation Press ed., 2006)

conclude abortion is a medical procedure that, "in early pregnancy, that is, prior to the end of the first trimester, although not without risk, is no relatively safe[12]."Consequently, "important state interests in the area of health and medical standards remain. The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient."

Turning the study of the case to the appellant arguments, the Supreme Court begins it asserting "The Constitution does not explicitly mention ay right of privacy… [But] the Court has recognized that the right of personal privacy or a guarantee of certain areas or zones of privacy, does exist under the Constitution[13]."

Nevertheless, "this right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action… is broad enough to encompass a woman's decision whether or not to terminate her pregnancy… the privacy right involved, therefore, cannot be said to be absolute… [We], therefore, conclude that the right of personal privacy includes the abortion decision, but this right is not unqualified and must be considered against important state interest regulation[14]."

In addition, as "the woman right of privacy is no longer sole and any right of privacy she possesses must be measured accordingly,[15]" basically because the State also possess an interest in the health of the mother, which does not happen referring to the unborn. For the Supreme Court – following the arguments of the plaintiff –, the unborn is not included under the definition of "person" provided by the Constitution.
Thus, the Supreme Court established a period of three months – first trimester – in which women can abort without legal consequences, "because of the now-established medical fact that until the end of the first trimester mortality in abortion may be less than mortality in

[12] Ibid., 16
[13] Ibid., 18
[14] Ibid., 18 - 19
[15] Ibid., 21

normal childbirth… [If] the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother[16].”

The Supreme Court reference to a “right of privacy”, which does not appear in the Constitution, comes from *Griswold* v. *Connecticut* and other prior cases, where the Supreme Court dealt with the liberty of the individual and how this it, as a general constitutional phrase can limit the powers of legislatures. Consequently, majority of the individual liberties are not explicitly in the Constitution itself, but can be consider on it by the *penumbra* Constitutional Amendments have. Thus, Justice Goldberg, concurring in *Griswold* v. *Connecticut*, “… [My] conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported both by numerous decisions of this Court, referred to in the Court’s opinion, and by the language and history of the Ninth Amendment.[17]”

In that order of ideas, the Supreme Court argument of the right of privacy woman possess, regarding the Fourteenth Amendment, allows her to abort in the first three months of pregnancy.

B. Planned Parenthood of Southeastern Pennsylvania v. Casey (1992)

In this occasion, the Supreme Court dealt with the challenge of unconstitutional of some requirements contained by the Pennsylvania Abortion Control Act, which established “a woman seeking an abortion give her informed consent prior to the abortion procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed, For a minor to obtain an abortion, the informed consent of one of her parents… unless certain exceptions apply, a married woman seeking an abortion must sign

[16] Ibid., 22 - 23
[17] William Cohen & Jonathan D. Varat, *Constitutional Law: Cases and materials*, 567 (Foundation Press ed., 11, 2001).

her intended statement indicating that she has notified her husband of her intended abortion.[18]"

For the Supreme Court, some problems arrived making the decision, more exactly, determine the exact scope of the right to liberty when "[Neither] the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects[19]," which can conclude in overruling *Roe v. Wade* reasoning.

Nevertheless, for the Supreme Court there is no influential argument to overrule it earlier decisions, even when decisions earlier to *Roe v. Wade* uphold what the Supreme Court held. In the own Supreme Court words, "Because the case before us present no such occasion it could be seen as no response. Because neither the factual underpinnings of Roe's central holding nor our understanding of it has changed… the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973.[20]"

As a result, the Supreme Court did a specific change in what it consider not essential in *Roe v. Wade*, i.e. the trimester framework, which is "a rigid prohibition on all previability regulation aimed at the protection of the fetal life. The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in Roe.[21]"Consequently, the Supreme Court decided to use the undue burden standard, because "is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.[22]"

[18] Tushnet & Vicki C. Jackson, Comparative Constitutional Law: Cases and Materials, 1557, 26 (Foundation Press ed., 2006)
[19] Ibid., 27
[20] Ibid., 34
[21] Ibid., 38
[22] Ibid., 39

According to this new standard, from all the requirements challenged before the Supreme Court, determine if the informant consent and the mandatory 24 hours waiting period constitutionality are the most susceptible issues. Thus, the problem arise trying to answer if "whether the mandatory 24 hours waiting period is nonetheless invalid because in practice it is a substantial obstacle to a woman's choice to terminate her pregnancy[23]," which for the Supreme Court, does not constitutes an undue burden.

C. 1975 German Abortion Decision

In year 1974, German Legislature issued new abortion regulation based in the periodic model, i.e. abortion before the 13th day following the conception is legal, freedom of punishment for the interruption of pregnancy performed by a physician in the first twelve weeks and, the interruption of pregnancy by a physician after twelve in certain circumstances[24]. This provisions –enclosed in the Penal Code–, were challenged by a group of legislators, having as a basis the Basic Law, which in one of it articles "protects the life developing itself in the womb of the mother as an intrinsic legal value.[25]"

For the Federal Constitutional Court –hereinafter "the Federal Court"–, the construction of the constitutional provisions signifies "the protection cannot be limited either to the <<completed>> human being after birth or to the child about to be born which is independently capable of living…. <<everybody>> in the sense of Article 2, Paragraph 2, Sentence 1, of the Basic Law is <<everyone living>>; expressed in another way: every life possessing human individuality; <<everyone>> also includes the yet unborn human being[26]."

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[23] Ibid., 42

[24] (i) in order to avert from the pregnant woman a danger to her life or the danger of a serious impairment to the condition of her health, (ii) the child will suffer from an impairment of its health which cannot be remedie don account of an hereditary disposition or injurious prenatal influences which is so serious that a continuation of the pregnancy cannot be reasonably expected of the pregnant woman; and not more than 22 weeks have elapsed since conception.

[25] Ibid., 114

[26] Mark Tushnet & Vicki C. Jackson, *Comparative Constitutional Law: Cases and Materials*, 1557, 115 (Foundation Press ed., 2006)

Furthermore, for the Federal Court, the notion of human dignity plays an important role determining the unborn status. The concept of human dignity and the right to life are indivisible, only where human life exists, human dignity is presented, acknowledging potential life exists in the unborn and, therefore, human dignity.

Thus, "the interruption of pregnancy irrevocably destroys an existing human life. Abortion is an act of killing… [The] obligation of the state to protect the developing life exists – as shown – against the mother as well.[27]"However, the respect for the unborn life does not mean the woman must sacrifice her own life when in certain circumstances an emergency arise, declaring as unconstitutional the provision allowing abortion before the 13th day of conception.

Perhaps, is important to copy an excerpt of the Federal Court decision, which for comparative purposes is interesting:

"*The regulation encountered in the Fifth Statute to Reform the Penal Law at times is defended with the argument that in other democratic countries of the Western World in recent times penal provisions regulating the interruption of pregnancy has been <<liberalized>> or <<modernized>> in a similar or an even more extensive fashion… [These] considerations cannot influence the decision to be made here… [the] legal standards which are applicable there for the acts of the legislature are essentially different from those of the Federal Republic of Germany. Underlying the Basic Law are principles for the structuring of the state that may be understood only in light of the historical experience and the spiritual-moral confrontation with the previous system of National Socialism… [human] beings possess an inherent worth as individuals in order of creation which uncompromisingly demands unconditional respect for the life of every individual human being, even for the apparently socially <<worthless>>, and which therefore excludes the destruction of such life without legally justifiable grounds.*[28]"

[27] Ibid., 118

[28] Ibid., 123. About this excerpt a comment will be done in the conclusions to this chapter.

D. 1993 German Abortion Decision

After the reunification, a new law was enacted, which stated similar provisions to the ones of the law declared unconstitutional in 1975 by the Federal Tribunal. Thus, practice an abortion during the first 14 days of conception is legal and during the first twelve weeks if the woman goes before a counseling, who authorizes abortion.

For the Federal Court, there is no doubt that the fetus from the moment of implantation possesses human dignity, which signifies he possesses the right to life and, therefore, the state has the duty to protect him. The mentioned protection "required the state to take steps to prevent situations from arising in which a pregnancy would place unreasonable demands on the woman… [which] could render an abortion <<justified>>. Even if abortion in the absence of unreasonable demands were decrimininalized, it would still be an unjustified and lawful action.[29]" So, woman will not be punish under permitted circumstances, even when her action is unlawful.

In addition, the counseling required by the woman during the first twelve weeks of pregnancy –known as "unevaluated abortion"– resulted unconstitutional, because the counseling is not looking towards the protection of the unborn, which is a duty of the state. Hence, medical insurance system must pay only for lawful abortions and exceptionally when woman the woman seeking for an unevaluated an abortion does not have funds to pay for itself.

E. The Attorney General v. X (Ireland)

As a contrast, the Irish experience with abortion can be presented as different in comparison to the United States and Germany. The Irish Constitution, as a consequence of an amendment –known as the Eight Amendment– affirm "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate that right." As a result, abortion in Ireland is not allowed, without exception.

[29] Ibid., 131 - 132

In year 1992, a fourteen year old woman –known during the process as "x"–, was sexually assaulted and made pregnant by the father of a friend. When the woman parents tried to travel to Great Britain for an abortion, the public prosecutor went before the court to get an order barring "x" from leaving the country.

The Supreme Court of Ireland, knowing the case in last instance, dealt with two problems: (i) the travel plans posed a real and imminent danger to the life of the unborn and; (ii) the risk that "x" would commit suicide, as a consequence of her actual status.

Even when the right to travel is recognized by the European Community –which Ireland is a party–," if there were a stark conflict between the right of a mother of an unborn child to travel and the right to life of the unborn child, the right to life would necessarily have to take precedence over the right to travel.[30]"

Considering the second question, secondary problems arose for it solution. The Eight Amendment expresses the equal right to life of mother and unborn; nevertheless, the Oireachtas –i.e. Irish Congress– must pass a law to determine the construction of the Amendment, necessary for the resolution of any individual case. Therefore, construing the mentioned provision, the Supreme Court recognized "the Eighth Amendment refer only to the creation or destruction of life... [If] clarity were needed, that the unborn life was also life within the guarantee of protection. It went further, and expressly spelled out a guarantee of protection of the life of the mother of the unborn life, by guaranteeing her life equality of protection, to dispel any confusion there might have been thought to exist to the effect that the life of the infant in the womb must be saved even if it meant certain death for the mother. The death of a fetus may be the indirect but foreseeable result of an operation undertaken for other reasons. Indeed it is difficult to see how any operation, the sole purpose of which is to save the life of the mother, could be regarded as a direct killing of the fetus, if the unavoidable and inevitable consequences of the efforts to save the mother's life lead to the death of the fetus.[31]"

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[30] Attorney General v. X and Others, Supreme Court of Ireland, 1992 No. 846P
[31] Ibid., 72

"Therefore no recognition of a mother's right of self-determination can be given priority over the protection of the unborn life. The creation of a new life, involving as it does pregnancy, birth and raising the child, necessarily involves some restriction of a mother's freedom but the alternative is the destruction of the unborn life. The termination of pregnancy is not like a visit to the doctor to cure an illness. The State must, in principle, act in accordance with the mother's duty to carry out the pregnancy and, in principle must also outlaw termination of pregnancy.[32]"

The Supreme Court, decided "x" can travel to Great Britain, based on her physical and mental condition, which constituted a risk for both mother and unborn. Therefore, when "there is a real and substantial risk to the life, as distinct from the health, of the mother which can only be avoided by the termination of her pregnancy, such termination is permissible, having regard to the true interpretation of Article 40.3.3 of the Constitution.[33]"

F. Conclusions

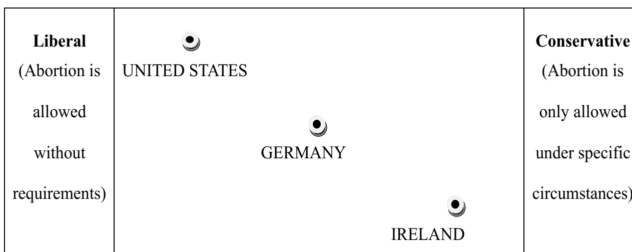
After a brief summary of the abortion decisions from three foreign courts, attempting to focus on the *ratio decidendi* and *decisium* of each one, is possible arrive to different conclusions, which will constitute the basis for the Colombian decision.

First of all –from a functionalism approach–, abortion does not have the same treatment in each country, thereby, the United States is the only which allow the woman to abort during the first three months without conditions. Second, abortion after a specific period –first trimester– is allow when there is a risk for the life of the mother or the unborn, in the three countries[34]. Third, in the three countries there

[32] Ibid., 72
[33] Ibid., 53
[34] Although, in Ireland those three circumstances do not exist, they can be inferred from the "risk for the life of the mother or the unborn" established by U.S. and Germany too. Thus, the three circumstances in the United States and Germany involve the risk for the life of the mother or the unborn, therefore, is possible to conclude in Ireland these three circumstances also exist.

is no doubt the State has an interest in protect the life of the unborn, however, differences arrives in the intensity of such interest. Fourth, Ireland is the only of the countries, where abortion is not permitted under any circumstance on the basis of the liberty woman possesses. Fifth, In the United States the abortion is a legal procedure, while in Ireland and Germany is illegal, even when the State allows it when there is a risk for the life of the mother or the unborn; therefore, the practice is illegal but not punishable. Sixth, only in the United States woman and unborn does not possesses equal rights –i.e. right to life–, because the unborn is not consider a person; on the contrary, Ireland and Germany recognized the same rights on the basis of human dignity[35].

In that order of ideas, the following diagram is useful to understand how in each country abortion is construed. The discussion in comparative constitutional law has always moved towards United States and Germany and their differences. Adding Ireland, the diagram will show United States and Ireland in opposite sides, while Germany in the middle[36].



G. Reference the concept of Human Dignity

Short lines are necessary to explain in a succinct way a concept familiar in majority of the Civil Law countries and –to a certain

[35] Catholic while the other is historical

[36] The United States decisions has been placed in the side of the most liberalized around the world, while Ireland in the conservative side. Comparing these two countries is not possible to place Germany in one of the two sides, because some of the elements do not fit correctly; therefore, is not a mere whim the German position in the diagram.

extent– incomprehensible in Common Law countries. Nonetheless, this idea has been detached by the materialization of Human Rights, which contains this concept of Human Dignity implicit. For the purposes of this paper, how this concept of Human Dignity and the role it played in the decision made by the Federal Court must be track down, basically because it is one of the influences on the Colombian decision.

The only possibility to understand in an accurate way the concept of Human Dignity, can only be made from a philosophical point of view. Metaphysics and it founders –i.e. Aristotle and later St. Thomas Aquinas–, can be useful to understand the concept. Relevant passages from the *Summa Theologiae*[37], shows the correct meaning for the concept, which refers the human being not as a mere object but an "end itself". This same idea was studied by Emmanuel Kant, who found that means dignity has no price[38]. Therefore, all the persons possess human dignity, just for the mere fact of belong to the human specie.

After the end of the Second World War and the victory of the allies, a new project on the German society began with the idea of re-establish the values the "nazi regime" implanted during the war. Thus, German Basic Law enacted in year 1949 – just after the war ended – came up as the new model, opposed to what the Reich did during the Weimar Constitution. After seen all the atrocities committed by the Hitler's regime, it is very understandable that a provision on the inviolability of human dignity heads the text of the German Basic Law.

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[37] 8 *ST* 2-2.102.2: It pertains to those who are established in dignity to govern subjects. Now, to govern is to move some people towards a due goal, just as the naval pilot governs the ship, by steering it to the port. Moreover, every source of movement has some excellence and power over that which is moved [by it]. Hence, it is necessary that in the person established in [a position of] dignity, there is first to be considered the excellence in status with some power over subjects; secondly, there is to be considered the very office of government. By reason of the excellence, *honor* is his due, [honor] being a recognition of someone's excellence. By reason of the governmental role *submission* is owing to him, which consists in a certain compliance whereby someone obeys their commands and repays at one's own level benefits received.

[38] David Kretzmer & Eckart Klein, *The Concept of Human Dignity in Human Rights Discourse*,313, 149 (Kluwer Law International, 2002)

Then, the constitution adopts the view that dignity of man means recognition of the human being as a bearer of rights as a person before the law[39] –which includes the unborn to according to the Federal Court reasoning–.

III. COLOMBIA AND THE ABORTION (THE CONSTITUTIONAL COURT DECISIONS)

The Colombian experience dealing with abortion decisions is completely new in comparison with countries as United States and Germany. The first time the Colombian Constitutional Court decided about constitutionality of abortion was in year 1994.

A. RULING C – 133/94

In this time, the plaintiff challenged the constitutionality of the Criminal Code provision which prohibited abortion. As arguments he stated (i) the unborn is not "person" according to the Civil Code definition, which follows the "Birth Theory" to assert a person exist since the moment he(she) born; (ii) thus, the State has the duty to protect a person, and as the unborn is not included in the category, there is no reason for a provision prohibiting abortion; (iii) Constitution guarantees the freedom of conscience, therefore, the Constitution allows the woman to make voluntarily an abortion, and; (iv) even when Constitution also guarantees freedom of religion, the idea of treat the unborn as person privilege the Catholic Church point of view, which the majority in Colombia follows but is not the only religion.

The Court affirmed the constitutional protection of life extended to the unborn, which is not *stricto sensu* a person, but possess the right to life. Consequently, the Court ruled the Congress has the power to decide the measures to protect human life and, when there is a tension between the rights of the mother and the unborn, Congress and not the Court is the authorize –and adequate– body to design the right criminal policies for these situations.

[39] Ibid., 146

Three justices issued a dissenting opinion, in which they agreed with the majority position concerning the legislature's power to criminalize abortion, but strongly criticized the absolute character of the criminal provision under review, because the provision did not account for the possibility of the cases in which abortion is less damaging alternative for both the mother and the legal system[40].

In the majority of the arguments given by these three justices, some of the ideas of the United States and Germany decisions can be found. Thus, referring to the intrinsic value of life, even when "there is a consensus in consider abortion as morally problematic, which can be justified, according to some say, it can be practice only when powerful reasons exist, among others save mother's life, rape or the unborn has serious malformations problems. Some perspectives –as the one ruled by German constitutional jurisprudence– consider it can also be justified, too, if the burden pregnancy involves to the mother, limits her opportunities up to the point to prevent her of carrying out as human being, attended her social and economic circumstances. Lastly, the doctrine based on the *right of privacy* defence, established by the United States Supreme Court in *Roe v. Wade*, recognized the woman right to choose, through the first trimester of her pregnancy –period's system– if she wants to carry the fetus or abort, without any risk for her life, going to the health service the State offers, with what the woman has the liberty to decide on this moral option.[41]"

B. RULING C – 013/97

Going through an *actio popularis* against a provision of the Criminal Code, which established lower penalties for mother convicted of abortion when pregnancy resulted of rape or unconsentual embryo implantation or artificial insemination? For the plaintiff in this case, the mentioned provision was unconstitutional, because gives to human life a lower value. Again, the Court affirmed Congress as the

[40] Manuel Jose Cepeda, *Judicial Activism in a Violent Context: The Origin, Role and Impact of the Colombian Constitutional Court*, 3 Wash. U. Global Stud. L. Rev., 558 (2004)
[41] Sentencia C – 133/94

responsible to criminalize abortion and determined as constitutional such criminal provision. It must be noted that this decision expressly defined abortion as an action that should be "repudiated", and quoted a number of Papal Encyclicals to support its line of reasoning, a matter expressly disapproved by the dissenting justices[42].

RULING C – 355/06

In year 2000, new justices were elected in the Constitutional Court. This judicial body composed by justices qualified as "experts in the last law theories", made a new decision in year 2006, examining constitutionality of the provisions criminalizing abortion in the new Criminal Code enacted in year 2000. As a result, the Court decided the provisions are constitutional but do not constitute a crime under specific circumstances.

The relevant considerations of the Court – for the purposes of this paper –, can be divided in five main topics as follows: (i) Life seen as a constitutionally relevant value that must be protected by the Colombian State and as distinguished from the "right to life", (ii) The principle and fundamental dignity right as a limit on the legislature's discretion over criminal matters, (iii) The right to free development of the individual as a limit to the legislature's discretion over criminal matters, (iv) Health, life and bodily integrity as limits to the legislature's discretion over criminal matters, and; (v) the issue of abortion in comparative law. Some excerpts from the Court's decision concerning these five topics are important here.

(i) Life seen as a constitutional relevant value that must be protected by the Colombian State and as distinguished from the "right to life"

"…[Although] one of the Congress function is the approval of suitable measures to fulfill the duty to protect life, this does not mean that all of the measures taken with such determination are therefore

[42] Manuel Jose Cepeda, *Judicial Activism in a Violent Context: The Origin, Role and Impact of the Colombian Constitutional Court*, 3 Wash. U. Global Stud. L. Rev., 558 (2004)

justified, because despite of its constitutional relevance, life does not have the relevance of an absolute value or right, and it must be weighed with all of the other constitutional values, principles and rights."

"Within the constitutional norms, life receives different normative treatment. Therefore, is possible to make a distinction between the right to life established in article 11 of the Constitution, and life as a constitutionally protected right. The right to life supposes that there is an entitlement of such right in order for it to be exercised, and that entitlement, as in every single right, is restricted to the human being. On the other hand, protection of life can be predicted even from those who have not yet reached this condition."

"… [According] to the points exposed, life and the right to life are different phenomena. Human life takes place in different stages and is shown in different forms, which at every given time have a different protection by the laws. The legal system does grant protection to the *nasciturus*, but not in the same level and intensity as it does to the human being. This goes to the extent that in most of the legislations there is a higher penalty for infanticide or for homicide than for abortion. The protected right is not identical in these cases and because of that, the legal significance of the social offense determines a different degree of reproach and a proportionally different penalty."

(ii) The principle and fundamental dignity right as a limit on the legislature's discretion over criminal matters

"Despite their different functional nature, the norms that are deduced from the normative statement of human dignity – the constitutional principle of human dignity and the fundamental right to human dignity – agree in what refers to the scope of protected behaviors. As a matter of fact, this Court has stated that in those cases in which human dignity is used argumentatively as a relevant criterion to decide, can be deduced that it protects: (i) the autonomy or possibility of designing a life plan and self – determination according to that plan's characteristics (living at will), (ii) certain

concrete material conditions of existence (living well), (iii) the intangibility of non patrimonial goods, physical and moral integrity (living without humiliations)."

"… [Thus] human dignity assures a scope of autonomy and moral integrity that must be respected by the State and particulars. Regarding women, the scope of protection of human dignity includes both, the decisions related to her life plan, which include reproductive autonomy, and the guaranty of her moral intangibility, which would be concretely evidenced in prohibitions to assign stigmatizing gender roles, or deliberately inflicts moral suffering."

"…[In] those terms, especially regarding its first meaning – human dignity as the protector of a scope of individual autonomy and the possibility of choosing a life plan – the constitutional precedents have understood that it establishes a limit to the legislature's constitutive power in criminal matters."

(iii) The right to free development of the individual as a limit to the legislature's discretion over criminal matters

"As the Constitutional Court has stated, this right condenses the *in nuce* liberty, "because any type of liberty is reduced to it". This right deal with the general right to act, which understands the specific freedom rights established in the Constitution (freedom of religion, of conscience, of expression, of information, of choosing a profession or occupation, economic freedoms, etc.), along with the scope of individual autonomy, which is not protected by any of those rights."

"For a long time, constitutional precedents have identified a scope of conducts protected by the right to free development of the individual, among which it is important to mention the following because of their importance to case under analysis."

"The right to be a mother, or in other words, the right to opt for motherhood as a "life choice," is a decision of the utmost private nature for each woman. Therefore, the Constitution does not allow

the state, the family, the employer or educational institutions to introduce any regulation or policy infringing the right of a woman to choose to be a mother or that interferes with the rightful exercise of motherhood. Any discriminatory or unfavorable treatment of a woman on the basis of special circumstances she might be facing at the time of making the decision of whether to be a mother (for example, at an early age, within marriage or not, with a partner or without one, while working, etc.) is a flagrant violation of the constitutional right to the free development of the individual."

(iv) Health, life and bodily integrity as limits to the legislature's discretion over criminal matters

"The Constitutional Court has mentioned several times that the right to health, even if it is not included as one of the rights the Constitution considers fundamental, it acquires such essence when is connected with the right to life, i.e. when it protection is necessary to preserve the life of a person."

"*Prima facie*, it is not proportionate or reasonable for the Colombian state to obligate a person to sacrifice her or his health in the interest of protecting third parties, even when those interests are also constitutionally relevant."

(v) The issue of abortion in comparative law

"Without pretending to describe foreign legislation or the jurisprudence in other countries, a highlight can be placed on the fact that, even though abortion has been subject to legislative changes in most of the western States, constitutional judges have also pronounced statements regarding the constitutional dimensions of legal norms subject to constitutional control."

"… [However] the legislature's intervention in this subject has not been an obstacle for the abortion to be a matter approached by constitutional tribunals. Only to exemplify this point, the decisions of the U.S. Supreme Court of Justice in 1973, of the German Constitutional Tribunal in 1975 and 1985, and of the Spanish

Constitutional Tribunal in 1985, can be mentioned. This does not intend to be a description of the constitutional laws in these three countries, or their jurisprudential evolution."

"Even though it has not been the only opportunity on which it has dealt with abortion, *Roe vs. Wade* constitutes without a doubt the most well-known case approached by the U.S. Supreme Court on this matter. The controversy took place starting from a lawsuit filed by a citizen that claimed her right to abort, and therefore alleged the unconstitutionality of the norm that criminalized abortion in the state of Texas. In this opportunity the U.S. Supreme Court explicitly recognized the right of pregnant women to abort, being this a right that derives from the right to individual autonomy and intimacy to make decisions that are free from the State or third parties intervention in the individual private sphere (Fourteenth Amendment of the U.S. Constitution)."

"Nonetheless, the Court also recognized that the State has a legitimate interest on the protection of both, women's rights and the potential life of the unborn. As a result, it stated that none of those two interests can be disregarded, but, in every stage of the pregnancy of a woman, both will have different importance."

"… [In] the same order of ideas, two decisions by the German Constitutional Tribunal can be highlighted. On the first decision about abortion (Verdict 39, 1 of 1975), the German Constitutional Tribunal decided that section 218A of the legislation of the Federal German Republic, which decriminalized the practice of abortion during the first three months of pregnancy without the need for the mother to justify herself, was unconstitutional. The constitutional judge argued that the German Constitution protects the life of the unborn as an independent legal interest, which detaches from the affirmation that life and human dignity are supreme and unquestionable values contained in Bonn Fundamental Law. Following these axiological principles, the woman has a duty to take her pregnancy until the birth moment, and the state has the obligation to implement legal mechanisms inclined to protect the life of the fetus. Therefore, it is possible and even desirable for the legislature to impose criminal

sanctions, or others with the same effectiveness, inclined to avoid a reproachable conduct such as abortion.

"However, at the same time as the German Constitutional Tribunal emphatically declared the preeminence of the legal interest in the protection of the unborn over the protection of the right to free development of women, it also admitted that the obligation to take pregnancy until the birth moment exists with the exception of those cases on which it becomes such an extraordinary and oppressive burden that it results reasonably unenforceable. According to the Tribunal, this take place particularly when the woman has special reasons of medical nature (continuing with pregnancy endangers her life or is a serious threat against her health), eugenicist (the fetus will suffer of serious malformations), ethical (the pregnancy is the result of a crime such as rape) or social (serious economical needs of the woman and her family)."

D. SOME COMMENTS ON THE COURT'S RULING C – 355/06

Two dissenting and two concurring opinions were presented in this time at the decision made by the Court. Both dissenting –Rodrigo Escobar Gil and Marco Gerardo Monroy Cabra– argued the rights of the mother cannot have more value than the unborn, even under circumstances constituted as an undue burden for her. For the justices how delivered this idea, the *ratio decidendi* of the previous decision –C 133/94–, had to be follow and, therefore, abortion must be criminalize as the Criminal Code do it, i.e. without giving the woman any possibility to get an abortion.

From the two dissenting opinions, the one from Justice Manuel José Cepeda Espinosa contains a good comparative law analysis. As Cepeda stated, his only purpose in his concurring opinion, was to explain additional reason which led him to share the decision from the majority, in his words, "This reason is based on comparative constitutional jurisprudential law, which served a critical function in defining my position."

Cepeda made a summary of several countries abortion decisions, including –as well as United States, Germany and Ireland– Italy,

France, Portugal, Spain, Canada, Hungary and Poland. Thus, after showing the "status of the art" of abortion in the Western, he concluded: (i) The legal question of abortion must be solved according to the Constitution in force in each country, (ii) None of the decisions concluded the legislature has an absolute competence regulating the abortion matters, (iii) Prohibition of abortion cannot be absolute, (iv) At some stages of pregnancy –not the same for each country– life of the unborn justifies criminalization of abortion, (v) Life of the unborn can be limited to respect the rights of pregnant women, and (vi) Three conditions have been considered solid enough to justify abortion.

IV. FAILED LAW V. MIGRATION OF IDEAS

For many decades, the changing process in most of the Latin American countries has been determined by the idea of an inadequate legal system, as a consequence of the wide rift existing between State law as enacted and the way people behave[43] and the impossibility to make laws enforceable. Therefore, the discourse managed in Latin America –based on the legal system inadequateness– to support an urgent change, moves around the "Latin America Failed Law" idea, which has impregnated the entire society.

The idea of "Failed Law" –for both legislature and judiciary– can only be suppressed by changing the existing laws and looking legal systems abroad. Thus, "borrowing ideas" abroad has been usually the next step used, in this attempt for suppress the stigmatization Latin America gave itself.

Nevertheless, the idea of "borrowing" always signal that positive is being transferred without alteration, which takes attention away from the cases in which one country draws negative implications from another country's experience or from the cases in which ideas are irremediably altered as they moved[44]. Therefore, the Latin American

[43] Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 Fla. L. Rev. 41, 49 (2003).

[44] Lane Scheppel, *The Migration of anti-constitutional ideas: The post-9/11 globalization of Public Law and the International State of Emergency*, in The Migration of Constitutional Ideas 448, 348 (Sujit Choudry ed. 2006)

experience has showed, how each time a process of "borrowing ideas" happen in the region, the gap between law and society increase as a consequence of the change, which –most of the times– goes in the opposite direction it should do it to give solutions. Hence –besides the problem of expect laws will succeed as they did in the country from they were borrowed–, following Jorge Esquirol[45], this "Latin America Failed Law" idea bring –at least– three more consequences: (i) Undermine legitimacy of State law and it institutions; (ii) Keep decisions off the table, and; (iii) Undermines the positions of many Latin American States in hemispheric legal relations.

Emphasizing on this, the process of "borrowing ideas" does not take into account the conditions in which the borrow idea was created, in other words, the issues the legislature tried to regulate passing a law, or the judiciary tried to solve pondering specific rights. Borrow do not take into account neither the context ideas come or the specific problems that need to be solve in the country that is borrowing.

On the other hand, migration of ideas –which occurs at various stages in the life-cycle of modern constitutions[46]–, in opposition to the "borrowing" idea, resist to the initiative of bring without any change the laws of foreign countries and, therefore, the context of the place where the ideas are migrating must be take into account. In other words, borrowing implies both that ideas are positive influence and cannot be subject to modification or –even– adaptation; on the contrary, under migration, the borrowing prohibitions does not apply and the place where ideas are migrating has the discretion to receive them conferring more or less value, or making them fit into the place, according to its institutional, social, historical and cultural

[45] Jorge L. Esquirol, *The Failed Law of Latin America*. 56 Am. J. Comp. L. 75, 77 (2008)
[46] Sujit Choudry, *Migration as a new Metaphor in Comparative Constitutional Law*, in The Migration of Constitutional ideas 448, 1 – 36 (Cambridge University Press ed., 2006). For him three stages in the migration of ideas can take place: (i) The use of foreign law in constitutional interpretation; (ii) The use of foreign constitutions in the process of constitution-making; and, (iii) From the national to the supranational level. Of these three different stages, Colombia has passed over the second one when the 1991 Constitution came into force; migrating ideas basically form the Spanish and German constitutions. In addition, show how the first stage has been used is the purpose of this paper.

context[47]. Migration of ideas – according to the approaches referred here –, might be solution to the "Failed Law" idea Latin America have been carrying for decades, permitting substantial changes only when they are required and not under a functional approach –under– which Latin America must enact laws of those countries where they really work. Nonetheless, is possible to question if this migration approach can make the "Failed Law" idea disappear from many scholars mind.

For Jorge Esquirol –with whom I agree–, the Latin America "Failed Law" idea is nothing more than a mere fiction[48], not because it does not exist but because of the purpose it was conceived, i.e. legal changes. Even when is true that there is a rift between law and society[49], this sole argument is not enough to categorize the law in Latin America as "Failed", especially when this is a problem the majority of Civil Law Family have to deal with as a consequence of establish most of the rules in codes, which with the pass of time require some changes in order to adjust them to the society necessities. Thus, the real problem the "Failed Law" idea possess, consist in the subsequent use of the "borrowing ideas" approach to solve the problem.

Considering the "Failed Law" idea in Latin America does not exist, is a mere fiction or a utopia; migration of ideas approach is the most accurate to answer the "Failed Law" idea and it consequences, .i.e. legal changes – by borrowing ideas – which does not work.

Therefore, answer to "*what significance, if any, do constitutional practices in other nations, or other international influences, have in the resolution of constitutional issues concerning abortion in Colombia?*" is a question that can only be consider regarding the migration of

[47] This second way in which ideas can migrate, resemblance to other of the comparative constitutional law approaches, i.e. contextualism. As Tushnet has defined it, contextualism "emphasizes the fact that constitutional law is deeply embedded in the institutional, doctrinal, social, and cultural contexts of each nation, and that we are likely to go wrong if we try to link about any specific doctrine or institution without appreciating the way it is tightly linked to all the contexts within which it exist". See Mark Tushnet, Weak Courts, Strong Rights, 10 (Princeton University Press ed.,)

[48] Jorge L. Esquirol, *The Failed Law of Latin America*. 56 Am. J. Comp. L. 75, 78 (2008)

[49] See footnote 40

ideas. On the contrary, the use of other ways of doing comparative law, such as the "normative universalism" and "functionalism", are unsuccessful trying to answer to the question, precisely because of the effortless answer they can provide. "The way Colombia solves constitutional issues concerning abortion to the abortion problem differs from the practices around the rest of the world" is the only possible answer form this to ways, which reinforce the idea of "Failed Law" and can open the possibility to "borrow ideas".

In addition, "contextualism" and "expressivism" approaches, even when they are useful answering the question by a deep analysis about to what extent the constitutional experiences are useful in Colombia –i.e. how the social, cultural and religious contexts of the country can limit the influences coming from the outside–, they can be more useful if are study together with the migration of ideas. As a result, from the decision of add to the migration of ideas approach these two –thinking on them as a whole–, a precise comparative law study in which, besides of analyze which ideas migrated –and how they did it– is possible to add the reasons why some ideas tried to migrate but could not do it.

After all, the question previously referred –following this new panorama– goes beyond showing how foreign experiences are useful in Colombia solving abortion issues[50], tries also to analyze how migration of ideas works –including which ideas migrate– in Colombia and it utility solving the consequences "Failed Law" idea has brought, i.e. (i) Undermine legitimacy of State law and it institutions; (ii) Keep decisions off the table, and; (iii) Undermines the positions of many Latin American States in hemispheric legal relations.

A. RULING C- 355/06 AND THE MIGRATION OF IDEAS

After reading the Court decision, one might assume the Court large reference to the issue of abortion in comparative law –an exclusive chapter for it– must have a concrete reason. Thus, the reason to look for can be extracted from Justice Cepeda concurring

[50] As mentioned above, "normative universalism" and "functionalism" are also able to answer the question; nevertheless their scope is lesser compare to the migration of ideas approach and, is not useful for the main purpose of this paper.

opinion, "*Comparative constitutional jurisprudential law shows that when a Constitution, as the Colombian one, contains a Bill of Rights, the legislature is forbidden to adopted absolutist positions, whether if it is to protect the life of the fetus, or to ensure the freedom of women.*" Nevertheless, this statement only find it true context under migration of ideas approach, basically if is take into account "normative universalism" or "functionalism" can arrive to the same Justice Cepeda conclusion, but cannot go beyond it, because under comparative law abortion is regulated in different way in each country and, the Colombian standard is not identical to other country.

Therefore, once the different abortion decisions of three western countries –each one of them giving a different solution to the abortion issues– has been analyzed and is known the substantial changes Colombian Constitutional Court decision made regarding abortion, is possible to establish the ideas that migrated and the significance they had in the decision.

In part three (III) of the present paper, study of ruling C – 355/06 was divided in five main topics, which –excluding the fifth one– contains an idea migrating from United States or Germany, which was essential for the Court decision. The following scheme can be useful to understand the migration.

	UNITED STATES	GERMANY	IRELAND
Life seen as a constitutionally relevant value that must be protected by the Colombian State		✓	✓
The principle and fundamental dignity right as a limit on the legislature's discretion over criminal matters		✓	
The right to free development of the individual as a limit to the legislature's discretion over criminal matters	✓		
Health, life and bodily integrity as limits to the legislature's discretion over criminal matters	✓	✓	✓

Even when the graphic above results explicit on it content and analysis, few comments –or appreciations– for a better comprehension on how constitutional ideas in the abortion case migrated to Colombia are necessary, furthermore, when some critics might be expect of this migration of ideas classification.

First of all, must be recognized that the idea of "life seen as a constitutionally relevant value that must be protected by the Colombian State" might be migrating not only from Germany and Ireland but also from the United States. From the excerpts and analysis of both United States decisions, can be concluded –and even the Supreme Court of the United States made it textually– that the State possess an interest in the protection of the unborn life as it is in Germany and Ireland. Nevertheless, for the Supreme Court of the United States the unborn cannot be consider "person" according to the Constitution and, therefore, the State has a mere interest in the protection of the unborn life when he is viable. On the contrary, Germany and Ireland are more emphatic in the equal protection of mother and unborn right to life by recognizing that wherever life exists, the state must protect it.

This idea –Germany and Ireland– was followed by Colombia, where the Court recognized the unborn must be protected by the State by the sole fact that there is life –without stage of pregnancy distinctions–, even when he does not possess the protection of the constitutional right to life, which can entitled him to enjoy the full protection of other constitutional rights, of which right to life is the basis.

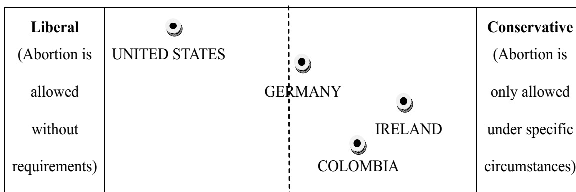
Secondly, the idea of "the principle and fundamental dignity right as a limit on the legislature's discretion over criminal matters", as construed by the Colombian Constitutional Court, do not seem to have a close connection with the German human dignity idea.. Even so, the migration of this idea came years before when the 1991 Constitution was enacted, because one of the constitutional experiences Colombia looked towards in that moment was Germany. Moreover, since year 1992 the Constitutional Court began construing this constitutional right and principle; in a 1992 decision the Court held that "This Constitution shares a new philosophical orientation that places man in the privileged position and is the most effective instrument in service of the dignifying of the human person. This is shown by a

good part of its text, but specially the preamble and articles 1 to 95, which permeate all the national order.[51]" In that order of ideas, the Constitutional Court has been construing the idea human dignity for nineteen years and when the abortion provisions were challenged in year 2006, the Court already has its own construction of human dignity –in the Colombian society–, based on the German idea, been this the reason why identify the migration in the human dignity idea is only possible looking backwards.

V. CONCLUSIÓN

The migration of ideas approach has been useful for Latin America –especially after the creation of Constitutional Courts–, to wipe out the gap between law and society perception, where law and legal ideas borrowed by Europe –mostly– and United States simply because remain in the books and do not apply in practise. Additionally, "hard cases", as abortion, are the perfect example to show how borrowing ideas still not being the path Latin America follows and, on the contrary, migration of ideas allows local judges to pick and choose what they consider as relevant by making ideas fit into Constitution interpretation and better solve the tension in their society.

After the analysis, the first question that arises is where to place Colombia in the comparative law of abortion scenario. The graphic did in the analysis of the United States, Germany and Ireland –this time including Colombia– can help how abortion is regulated nowadays.



When the Colombian Constitutional Court made it decision on abortion in 2006, the main purpose of the judicial elites was to mention the "status of the art" in a vast number of Western countries

[51] Colombian Constitutional Court, Decision T – 414/92

for two reasons. The first one was to find the ideas that were migrating from the US and Europe in order to legitimize their use of foreign law and bring about legal change by using strategically the failed law fiction. Secondly they used the notions of human dignity and privacy by departing from the function of these ideas in Germany or in the US and to address the problems Colombia was facing with abortion at the time, i.e. the subsequent practice of illegal abortions, the stigmatization women suffered when they practiced an abortion, especially in a society with a predominant catholic population. Those problems lead me to ask if the graphic –bearing in mind the problems faced by other constitutional tribunals were not the same that the Colombian Constitutional Court faced– shows the exact scenario and if Colombia is well placed. Answering the question, Justice Cepeda thought:

"*In comparison with the jurisprudence of other constitutional tribunals worldwide, Colombian jurisprudence on abortion, represents an intermediate stance. On the one hand, decisions like the one adopted by the U.S. Supreme Court in Roe v. Wade, recognizing the right of women to choose to carry out an abortion and the qualitative differences between state protection of unborn humans vis-à-vis protection of born persons, represent the most pro-choice position. Other courts have adopted an intermediate stance, such as the German Constitutional Tribunal, for which the fetus receives full state protection. This stance supports the criminalization of abortion, but also admits that, under certain circumstances, the protection of the mother's rights becomes more important than the interest in the fetus' life.*"[52]

Following Cepeda's argument one can find what, from the migration of ideas perspective, Colombia is well placed between Germany and Ireland, because –as have been established before and he remarks–, the ideas of human dignity and equal protection to the life of the mother and the unborn, are the most influential for the Court's decision, even when the Court accepted the mother possess a right of "privacy" based on the right to free development of the individual. Additionally, one important difference exists between Germany,

[52] Manuel Jose Cepeda, *Judicial Activism in a Violent Context: The Origin, Role and Impact of the Colombian Constitutional Court*, 3 Wash. U. Global Stud. L. Rev. 529, 558 (2004)

Colombia and Ireland. In the first one, abortion is not allowed during the first three months if the woman goes to a physician and he authorizes; in Colombia, the requirements to practice an abortion are related with health issues, even when the mother possess the her to free development, which enclose the right of the mother to finish her pregnancy status; consequently, even when Ireland allows abortion for health issues, mother and unborn possess equal rights.

Another –final– aspect to take into account is the middle line in the graphic dividing the countries on the scenario. By this line I tried to create a division in terms of legality of abortion inside the scenario, having the United States as the unique country where this practice is legal during the first three months of pregnancy.

A. Migration of ideas challenges

Even when the structure and further practice –as this paper has shown– of migration of ideas is important to address some of the problems Latin American courts have dealing with "hard cases", judicial behaviour[53] and the perception some judges have about comparative law[54] is probably the main difficult migration of ideas in Latin America.

Nonetheless, society is not changeless and law must evolve as fast as society. Let judges stop thinking about comparative law from a functional approach is, therefore, a first necessary step to banish of Latin America the "Failed Law" thesis.

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[53] See, David Landau, *The Two Discourses in Colombian Constitutional Jurisprudence: A new Approach to modeling Judicial Behavior in Latin America*, 37 Geo. Wash. Int'l. L. Rev. 687 (2005)

[54] Colombian Constitutional Court in decision C – 342/06 noted that, "*although the examination of the mentioned foreign influence helps to understand how a benches regime works, it must be understood and applied inside the current Constitution context. Resort to comparative law is, without a doubt, important in the measure in which it facilitates the comprehension of certain legal institutions; furthermore when we are in a globalized world, in which reciprocal influences between diverse legal systems are more frequent. But not because of this we can forget this is only an auxiliary criterion of interpretation and what is important in constitutional hermeneutic is depart from the text of the Colombian Political Charter and the reality that constitutes the regulation object.*"