



Legal report commissioned by Democrats ▶ Alternatives to exempt women and professional

# Abortion could be decriminalized if the mother's life was at risk

De Montalvo clarifies that the practice would continue to be illegal, but under certain circumstances exceptions could be made

The adviser states that protection of the woman received prior advice

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Voluntary termination of pregnancy could be decriminalized if the mother's life was at risk without a legal offense. In this way, both the woman and the professional who performed the abortion would be exempt from criminal liability, as the state "understands the situation the mother is going through and understands [her decision], renouncing the sentence, but without approving the abortion". This is one of the conclusions drawn from the report that the Democratic Parliamentary Group commissioned in April last year from the Government's expert and adviser on various matters, Federico de Montalvo, who considers that «it is not possible to legally justify abortion, although in certain circumstances no other behavior may be required. « And as Montalvo himself acknowledges, very close to the Catholic Church, "if life in formation is worth the closer the birth, at the beginning of the pregnancy we can give more priority at the interest of the pregnant women". This, however, only lasts until 14 weeks of conception, because once this period has passed, «the valuation of the interests at stake changes, life in training becoming preeminent».

After a thorough analysis of the Constitution and the Penal Code, de Montalvo points out that while Article 8 of the Magna Carta states that establishing a mechanism that protects life in all its phases is a duty of the public authorities, «it does not express literally how this protection should be obtained, nor does it explicitly demand that the criminal classification of certain conducts be resorted to". Nor does it

say that this duty is achieved «only through the criminalization of women's conduct», which confirms that the protection of the unborn does not necessarily entail an obligation of criminal law to punish women who abort. Moreover, arguments can be put forward to justify the impunity of the woman who undergoes an illegal abortion, since the protection of any legal good is done by providing a set of guarantees [...] and it can be concluded that punishing the woman is not an adequate guarantee to protect [her] life [or that of the fetus]". In this sense, de Montalvo admits that the decision to have an abortion is «a consequence of the anguish caused by a pregnancy that the woman believes can frustrate essential aspects of

**The expert believes that the Constitution does not express «literally» how to protect life in all its phases**

her life», given that in most cases it is a «true personal drama» and, therefore, «it is reasonable for the legislature to bow to suppress a punishment.» In addition, it is unlikely that any threat of conviction will deter a woman from her decision to have an abortion, but in any case, the only thing that can be done is to put her in a situation "even more difficult to develop her project of life". Thus, «it does not seem very correct to lead the pregnant woman to exclusion, discrimination or fear», nor would it be justified to replace the criminal penalty with an economic sanction, as this would not be «equitable» because its real impact would depend on the economic level of the affected.



▶ The demonstration in favor of the right to abortion, on November 25th last year.

level of the affected.

**ILLEGALITY REMAINS** // However, de Montalvo asks not to confuse decriminalization with legalization, because the first - which would be his proposal - continues to be punished by law, but in certain circumstances and with the fulfillment of certain requirements exceptions are allowed. In fact, this was the task of Democrats: to find a mechanism that does not eliminate or legalize abortion, but that exempts from criminal or sanctioning consequences both women who practice it voluntarily and the health personnel who perform it or who report it to Justice. Thus, de Montalvo be-

lieves that constitutional problems should not be raised «if the protection of the life of the nasciturus is strengthened», with mechanisms such as prior and mandatory advice to pregnant women, offering them the existing alternatives in the system to the voluntary interruption or by transmitting clinical information on the possible risks and sequelae of the intervention". But this model is an obvious invasion of women's privacy, which should expose (even against their will) their personal conflict in front of strangers appointed by law. However, de Montalvo believes that the harm to a woman's privacy «does not seem excessive» if her dignity is guaran-

teed at all times, so that no pressure (ethical or religious) could be exerted against her that would condition her final decision.

Ultimately, it would be a matter of «replacing criminal protection in cases where there is a moral conflict for the pregnant woman, with a non-criminal protection in which counseling would be the instrument of protection of life» of the unborn, as required by the Andorran constitutional framework. In a gesture to show that this practice would «fit» in the Principality and that it is widespread in the most developed countries, de Montalvo refers to the German Penal Code - where until March this year it

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could only be aborted after having received this compulsory training, a law of the Nazi era - which stipulated at the time of writing the report that "counseling is at the service of the protection of she continues her pregnancy and opens up new perspectives on a life with her child. However, the professor says that this «foundation» would be «favorable» in the fight against «the unfortunate number of abortions in the medium and long term.»

The 54-page report also covers the punishable of abortions performed outside the Principality. Article 8 of the Penal Code, in its first section, states that the law applies to offenses attempted or committed in the national territory, as well as to related or indivisible offenses attempted or committed abroad. However, paragraph 4 specifies that the offense abroad can only be prosecuted if it also involves a crime in the State where it was committed, if the sentence has not been served or if there has been a prior complaint to the Public Prosecutor's Office. Taking the first requirement, and knowing that in both Spain and France abortion is legal in any case, de Montalvo states that if an Andorran woman terminates her pregnancy in any of the neighboring territories does not commit any crime under the laws of her country.

De Montalvo completes his study with 10 points of conclusion, in which he recalls that, although Article 8 of the Constitution proclaims the protection of life in all phases, it does not follow that the one who is going to be born is the holder of the right to life. Nor is the so-called «gradualist conception» of life impeded, nor is the criminal route imposed, «being able to achieve the protection [of the fetus]» in other ways. In this protection, previous advice adapted to women is used, which must be accompanied by a socio-economic aid plan if it is decided to carry out the pregnancy, although, if you choose to have an abortion, both she and the professional who performs the intervention will have no criminal responsibility, as this would increase their vulnerability, especially in the most disadvantaged women. In addition, he points out that criminal punishment often endangers a woman's life or health and insists that abortion in a country where it is legal does not involve committing any crime in Andorra. ≡

## Conclusions

**1** Article 8 of the Constitution proclaims the full protection of life in all its phases, which is a reinforced model of protection for those who must be born from gestation to birth.

**2** It does not necessarily follow from Article 8 that the person to be born is the holder of the right to life, being able to guarantee protection at all stages by recognizing it with a higher constitutional value.

**3** Nor is it impossible to accept the gradualist conception of life, insofar as it implies that the one who is to be born is subject in its evolution to significant biological changes.

**4** The requirement of protection for the unborn does not impose, as the only and exclusive mechanism, the criminal route, and this protection can be obtained through alternative means.

**5** Among the ways of protection is the previous advice aimed at the mother, offering the option of continuing the pregnancy and receiving socio-economic aid.

**6** The protection of the unborn child does not require that the woman who performs an abortion with her consent be criminally punished.

**7** Not only does criminal punishment not guarantee the protection of the unborn, but it also increases the vulnerability of women, especially the most disadvantaged.

**8** Criminal punishment usually puts a woman's life or health at risk, both in terms of a 'clandestine' abortion and the fear of possible complications.

**9** Prior counseling should exempt the woman from criminal liability, but also the professional who performs the abortion, according to the code of good conduct.

**10** Any woman of Andorran nationality who has an abortion in a country where it is legal cannot be convicted by the justice of her country.



▶▶ Hitting the buttocks was a method of abortion in the Middle Ages because it was believed that the embryo would come off.

## Before Christ

From ancient Egypt to the present day, voluntary interruption pregnancy has been a common practice, despite moral doubts

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Abortion, from the Latin abortus, is, according to the World Health Organization (WHO), the termination of pregnancy before fetal viability. This viability is defined by the length of the pregnancy or the weight and / or length of the fetus, which is usually viable at 28 weeks of gestation, so the ethical debate about abortion always revolves around the same question: When does a person begin to exist? From minute zero of conception, when is it already in human form or from the moment of birth?

This dilemma is not new, it goes back to antiquity. Civilizations as varied as Shennong's China (2700 BC), Ancient Egypt, which in 1500 BC drew up one of the first medical treatises in history - the Ebers Papyrus - which included abortion, classical Greece - Plato and Aristotle wrote it down - or the Roman Empire was already practicing voluntary termination of pregnancy through herbs, sharp tools, or even brute force. The Book of Exodus of the Old Testament also contemplated: in texts 21, 22 and 23 it is specified that if a man strikes a pregnant woman, but does not cause her injury, only a fine will be imposed, but if the blow involves the death of the fetus, he will pay for it with his own life. However, more modern later translations specify that the conviction will only materialize if the fetus is human-shaped. Also, in the middle of the second century, Tertullian maintains that the soul and the body are inseparable elements created by God from the moment of fertilization, although abortion is a «necessary cruelty» when the li-

fe of the mother is in danger. In a similar vein, in the Middle Ages, the Church Fathers, staunch advocates of immediate animation, clashed with St. Thomas, a supporter of successive or delayed animation. St. Thomas, considered one of the great theologians of history, elaborated his studies taking into account the scarce biological knowledge of the time, and was convinced that up to 40 days of fertilization in the case of men, and 80 in the case of women, souls did not begin to take shape, which differentiated a formed fetus from an unformed one. This note is important because while the destruction of a formed fetus incurred a canonical penalty

### The PS and feminists are the only ones advocating legalization in the three basic assumptions

called homicide, in the second, despite being a sin and therefore a crime, the penalty was less severe. In addition, in the Middle Ages, the treatment of abortion varied according to the conditions of the pregnant woman, considering three assumptions: the method used, fetal growth and the intention of the mother. And in the case of poor women it was tolerated without remorse.

In any case, the ethical dilemma has survived to the present day, and while there are countries that consider abortion a fundamental right of any woman without explanation or exception, there are those who either do not accept it or do so under certain pre-established legal cri-

teria. It has been talked about in Andorra for years, although it was not until the last legislature that the Government and the parliamentary groups decided to start addressing it timidly. Part of this approach is the report commissioned by the Democratic Parliamentary Group to Professor Federico de Montalvo, which states that the conflict lies in «how to articulate a criminal prohibition with the compassion that many consider deserving a woman who is in a situation almost easier»

The Social Democratic Party (PS) and feminist organizations are the only ones that have so far dared to openly defend legal abortion, at least in the three basic cases (that the pregnancy is the result of a rape, that there is malformation of the fetus or that there is a risk to the health or life of the mother), while the French coprince, Emmanuel Macron, has stated on several occasions on the issue without hindrance. Especially memorable is his first (and only) official visit to the country, in which he stated that it is the Andorrans through their vote who must resolve the conflict, and the moment when he called for the incorporation of abortion in the Charter of Fundamental Rights of the European Union (EU) last January, just when the Council of the EU held the presidency and captained the association agreement of the Principality. The Episcopal Co-Prince, Joan-Enric Vives, for his part, is limited to avoiding the debate and asking to protect the family in all its phases, and therefore Andorra is, together with the Vatican City and Malta, the only country of Europe in which abortion cannot be aborted. ≡