



# The Protection of the Human Right to Life in the Republic of Argentina – The Guarantee of the Enforceability of the Whole System of Human Rights

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## I. Introduction

*“Every person is born free and equal to others in dignity and rights...”*

*“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status...”*

Universal Declaration of Human Rights

On December 10, 1948, the United Nations’ General Assembly passed the Universal Declaration of Human Rights, acknowledging the rights to equality and non-discrimination in its two first articles. It was a historic moment pervaded by deep sensitivity due to the injustices suffered after World War II, and there was a growing consciousness of the need to guarantee, for future generations, a minimum respect of those rights that were considered essential, based on the acknowledgement of the dignity inherent to all members of the human family.

As a matter of fact, human dignity was the Declaration’s essential pillar, and the ultimate foundation in acknowledging every human right. Pursuant to the nations’ consensus, the aim was not to *grant* rights, but to *acknowledge* pre-existing rights that every person is owed for being such.

The right to life was acknowledged by the Declaration, together with the right to freedom and personal safety (Art. 3). However, this right must be coupled

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with the rights to equality and non-discrimination (Art. 1 and 2), so that it can be effectively protected.

The states thus have the responsibility of respecting and guaranteeing human rights, in particular, the human right to life without discrimination, since it is the most fundamental of rights and no other right can exist without it. This is not an arbitrarily imposed duty, but every state's essential and primary mission.

This paper analyzes the legal framework for the right to life in the Republic of Argentina, which reflects the importance of its acknowledgement and respect without discrimination, not only because of its essential character and transcendental nature, but also because the personal freedom of every man and woman living in a democratic state, under the rule of law, depends upon the legal guarantee of its enjoyment and exercise.

## II. The Human Right to Life

### A. Political and Legal Organization of the Republic of Argentina as a Democratic State of Law

A democratic state under the rule of law is a state that subordinates its exercise of power to the provisions of the legal system, thereby ensuring its inhabitants an environment respecting the law, and guaranteeing compliance with legal rights.

Such a state establishes and respects the rights considered essential and founded on human dignity.

In this context, and considering man as the foundation and end of its political and legal organization, the Argentine State has adopted the federal, republican and representative form of government.<sup>2</sup> This means that a *federal form of state* has been established, characterized by the territorial decentralization of power and the existence of relatively self-governing regions—called provinces—that delegate part of their powers to the federal government;<sup>3</sup> and a *republican*

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<sup>2</sup> In accordance with Article 1 of the National Constitution.

<sup>3</sup> Article 121 of the National Constitution establishes that the provinces keep for themselves all the powers not delegated to the federal government and the ones they have expressly reserved through special pacts at the moment of incorporation. Among the reserved powers is the right to enact their own provincial constitution ensuring administration of justice, municipal form of government and primary education (Art. 5 of the National Constitution). On the other hand, among the powers conferred upon the federal government is the power of the National Congress to pass the substantive legislation, (i.e. the Civil, Criminal, Mining, and Labor and Social Security Codes. Art. 75, Par. 12 of the National Constitution).



*form of government*, which acknowledges the power that the people have to govern through their elected representatives and other authorities.<sup>4</sup>

Furthermore, Argentina has acknowledged the National Constitution as the State's supreme law, which means that every lower law or regulation has to be adapted to it.<sup>5</sup>

However, in 1994, an amendment granted some international treaties on human rights a place in the hierarchy of laws equivalent to that of the Constitution, modifying the concept of supremacy and giving birth to the so-called "federal constitutionality block".<sup>6</sup> Article 75, Par. 22 of the Constitution lists the international treaties that were considered to be at the same hierarchical level as the Constitution:

- American Declaration of the Rights and Duties of Man;
- Universal Declaration of Human Rights;
- American Convention on Human Rights;
- International Covenant on Economic, Social and Cultural Rights;
- International Covenant on Civil and Political Rights and its Optional Protocol;
- Convention on the Prevention and Punishment of the Crime of Genocide;
- International Convention on the Elimination of All Forms of Racial Discrimination;
- Convention on the Elimination of All Forms of Discrimination Against Women;

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4 In accordance with Art. 22 of the National Constitution. The republican form of government is also characterized by the division of powers, the responsibility of public officers, the temporary nature of the terms of office, the public character of the actions carried out by the government, the people's election of their leaders, and the equality before the law.

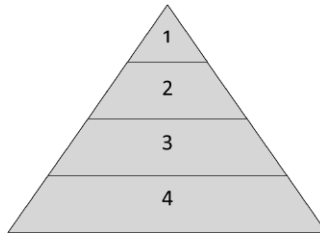
5 Article 31 of the National Constitution establishes that the Constitution, the national acts thereby passed by the Congress and the treaties with foreign powers are the supreme law of the Nation.

Even though a literal interpretation of this article can lead to infer that the Constitution as well as the national legislation and the international treaties are all at the same level, the expert and judicial interpretations understand that the National Constitution is on top of the legislative pyramid, followed by the international treaties and, at the end, the national legislation.

6 Germán J. BIDART CAMPOS, *Compendio de Derecho Constitucional*, Ediar, Buenos Aires, 2004, p. 25.

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Convention on the Rights of the Child.

As a result, the Argentine legislative pyramid can be organized recognizing the National Constitution and international treaties on human rights (listed in Art. 75 Par. 22) as the supreme law;<sup>7</sup> then, the international treaties signed with other nations and with international organizations, as well as the agreements entered into with the Vatican and passed by the Congress;<sup>8</sup> the national laws are in an inferior level, and, below these are the provincial rules, following following the order established by each province.



1. National Constitution; International Treaties on Human Rights mentioned in Art. 75, Par. 22 of the National Constitution; and other International Treaties on Human Rights with constitutional hierarchy granted by the National Congress.
2. International Treaties and Agreements entered into with the Vatican.
3. National Acts.
4. Provincial Acts.

It is important to note that the legal hierarchy in a state identifies the values

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7 The last part of Art. 75, Par. 22. establishes that the National Congress has the capacity to grant constitutional hierarchy to other international treaties on human rights not listed therein, provided that two thirds of the total members in each Chamber vote in favor of their incorporation. In this regard, Act N° 25778, passed by the Congress in August 2003, granted constitutional hierarchy to the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* (adopted by the United Nations General Assembly on November 26th, 1968).

8 According to Art. 75, Par. 22 of the National Constitution, international treaties and agreements are at a higher level than the national laws.



on which it is founded and built. Thus, a state that acknowledges and promotes mankind's most fundamental and inherent rights as its ultimate goal is certain to protect other legal rights acknowledged as well.

### **B. The Human Right to Life in the National Legislation and in International Treaties**

The human right to life is the fundamental right *par excellence*, though to be terminologically accurate, we should speak of "the right to have one's life protected by the law".<sup>9</sup>

In the first place, this right is founded on the very existence of the life of each human being; therefore, it should logically be protected at all times while this existence persists (i.e. from the moment of conception to the person's death).<sup>10</sup>

In the second place, this right does not admit degrees: a person either is or is not entitled to this right; and for that reason there cannot be exceptions to the acknowledgement of this right.

Finally, the right to have one's life protected enjoys certain pre-eminence over to the rest of the basic human rights. This is so because, without life, no other "right" can be enjoyed, or once the right to life is violated, the rest of the human rights are irrelevant.<sup>11</sup>

#### **The Protection of the Human Right to Life in the National Constitution:**

##### **• Before the 1994 Amendment**

In its text prior to the 1994 amendment, the Argentine Constitution did not include, among its provisions, a rule expressly acknowledging the right to life.

However, it has been recognized that the right to life is the first natural right guaranteed by the Constitution; said right is implicitly covered by Art. 33, which

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9 Translated from the original: Carlos I. MASSINI CORREAS, "El derecho a la vida como derecho humano", ED, 1998, Vol. 175, p. 803.

10 From the biological point of view, conception begins with the union of the ovum and the spermatozoid during the insemination stage. The union of these two gametes gives rise to a new being who has received the parents' genetic code. Ricardo Leopoldo SCHWARCZ, Carlos Alberto DUVERGES, Angel Gonzalo DIAZ, and Ricardo Horacio FESCINA, *Obstetricia*, Ed. El Ateneo, 5th edition, 2001, p. 9; William F. GANONG, *Fisiología médica*, Ed. El Manual Moderno, 20th edition, 2006, p. 388.

11 Carlos I. MASSINI CORREAS, "El derecho a la vida como derecho humano", ED, 1998, Vol. 175, p. 802-815.

establishes the existence of non-enumerated rights,<sup>12</sup> as well as in Art. 29, which expressly sets forth that it is not allowed to grant special powers by which “the lives” of Argentines are left to the whim of any government or person.<sup>13</sup>

In this regard, the following jurisprudential rulings stand out:

<p><b>Year: 1980</b></p> <p>National Supreme Court of Justice.</p> <p>“Saguir and Dib, Claudia Graciela.”<sup>14</sup></p>	<p>In a case in which the parents of a minor sought judicial authorization for the minor to make an organ donation, the Court expressly stated that “What is mainly at stake here is the right to life, the person’s first natural right, preceding every positive legislation, and obviously acknowledged and guaranteed by the National Constitution and the laws”.</p>
<p><b>Year: 1989</b></p> <p>National Supreme Court of Justice.</p> <p>“Amante, Leonor and others, v. Asociación Mutual Transporte Automotor (A.M.T.A.) y other.”<sup>15</sup></p>	<p>On the occasion of deciding on a person’s death caused by a heart attack, after having been denied the requested medical services in a clinic owned by the defendant (a medical insurance company) on the grounds that the affiliate had forgotten his medical card, the Court reaffirmed that life is an essential right, pre-existing every legal system.</p> <p>The Court expressly stated that “since the essential rights to life and human dignity—which pre-exist every positive legal system —were involved, indifferent or superficial behaviors cannot be allowed or legitimized”.</p>

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12 Article 33 of the National Constitution establishes that “The declarations, rights and guarantees enumerated in this Constitution shall not be understood as the denial of other rights and guarantees not mentioned herein, since they stem from the principle of people’s sovereignty and from the republican form of government”.

13 The first part of Art. 29 establishes that “The following powers cannot be granted by the National Congress to the President or by the Provincial Legislatures to the Governors: special powers, submission or supremacy whereby the life, honor or wealth of the Argentine people are left at the mercy of governments or any individual”.

14 Translated from Rulings by the Supreme Court, 302:1284, 8th Paragraph.

15 Translated from Rulings by the Supreme Court: 312: 1953.



<p><b>Year: 1991</b></p> <p>Mar del Plata Criminal Court N° 3</p> <p>“Navas, Leandro J. v. Instituto de Obra Médico Asistencia”.<sup>16</sup></p>	<p>In paragraph N° 9, the court stated that “the right to health is a corollary of the right to life and is implicitly acknowledged within the unmentioned and guaranteed rights in Art. 33 of the National Constitution. That means that any violation of said right is considered unconstitutional (...) On the other hand, the right to life and its corollary right to protection of health are directly related to the founding principle of dignity inherent to every human being, which is the support and goal of the rest of ‘human rights’”.</p>
<p><b>Year: 2002</b></p> <p>National Supreme Court of Justice.</p> <p>“Portal de Belén– Asociación Civil sin Fines de Lucro v. the Ministry of Health and Social Welfare”.<sup>17</sup></p>	<p>Although this ruling is subsequent to the 1994 constitutional amendment, it is important to mention it in this part of the paper because it proves that the highest court is consistent in its arguments; it states that “the man is the axis and core of every legal system, and in being an end himself—regardless of his transcendental nature—his essence cannot be violated and is a fundamental value with regard to which every other value has an instrumental character”.</p>

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16 Act N° 1991–D, 79.

17 Translated from Rulings by the Supreme Court, 325: 292, concurring votes.

Moreover, experts in national law have also acknowledged the constitutional protection of the right to life:

Germán Bidart Campos <sup>18</sup>	“The Argentine Constitution does not have an express rule on the right to life, though nobody denies—especially when considering the Supreme Court’s legal precedents—that it is included among the implicit or non–enumerated rights in Art. 33”. <sup>19</sup>
Nestor Pedro Sagüés <sup>20</sup>	“By stating that there exist tacit—or non–enumerated—rights in addition to the ones expressly stated in the constitutional text, article 33 is referring—according to the 1860 constituents intentions—to the natural rights [among which is the right to life] of men, peoples and societies prior to any positive constitution, and said constitutions cannot fail to acknowledge such rights”. <sup>21</sup>

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18 Argentine jurist and thinker (December 9, 1927 – September 3, 2004). Lawyer graduated from Universidad de Buenos Aires (UBA) in 1949, and Law and Social Sciences PhD, graduated from the same institution. He was one of the consultants in the 1994 Convención Nacional Constituyente (National Constituent Convention), in charge of amending the Argentine constitution. He is internationally known, and was appointed Doctor Honoris Causa by Universidad de San Martín de Porres de Lima (Peru, 1986), Distinguished Professor by Universidad Nacional Autónoma de México (Mexico City, 1987), Honorary Professor by Universidad Mayor de San Marcos de Lima (Peru), Honorary Professor by Universidad de ICA (Peru), Honorary Professor by Universidad de Arequipa (Peru). Member of the Academia Interamericana de Derecho Internacional y Comparado (Inter–American Academy of International and Comparative Law). Former Dean of the School of Law of Universidad Católica Argentina (UCA) between 1962 and 1967, academic vice–chancellor of UCA between 1986 and 1990, and senior lecturer of Constitutional Law and Political Law at Universidad de Buenos Aires. Illustrious citizen of the City of Buenos Aires (2003).

19 Translated from the original: Germán BIDART CAMPOS, “Tratado elemental de Derecho Constitucional”, Ediar, Buenos Aires, 1991, Vol. III, p. 177.

20 Head of the Department of Constitutional Law at the Universidad de Buenos Aires and the Pontificia Universidad Católica Argentina. Law PhD by Universidad de Madrid, and Legal and Social Sciences PhD by Universidad del Litoral. President of the Instituto Iberoamericano de Derecho Procesal Constitucional (Latin American Institute of Constitutional Procedure Law). Former president of Asociación Argentina de Derecho Constitucional (Argentine Association of Constitutional Law) (2005–2007).

21 Translated from the original: Nestor Pedro SAGÜES, “Elementos de derecho constitucional”,





### • After the 1994 Amendment

Even though both expert legal opinion and legal precedents have acknowledged the right to life as implicitly established by the Constitution, the 1994 Constitutional Amendment cleared any doubts by embracing several international treaties—within the constitutional hierarchy—which expressly make reference to said right.

Some of these treaties are listed below:

Declaration of the Rights and Duties of Man	Article 1 states that “Every human being has the right to life, liberty and the security of his person”.
Universal Declaration of Human Rights	Article 3 states that “Every human being has the right to life, liberty and the security of his person”.
American Convention on Human Rights	Article 1.2 dictates that “‘person’ means every human being” and Art. 4.1 establishes that “Every person has the right to have his life respected. This right shall be protected by law, in general, from the moment of conception. 2. No one shall be arbitrarily deprived of his life”.
International Covenant on Civil and Political Rights	Article 6 stipulates that “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”.
Convention on the Rights of the Child	Article 1 states that child means “Every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”. Art. 2, Par. 1 states that “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s (...) birth or other status”. In this regard, art. 6 establishes that “1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child”.
National Act N° 23849	It is important to point out that, by passing Act N° 23849, Argentina enacted the Convention and issued an interpreting declaration in which it stated that “child means every human being from the moment of conception until the age of eighteen years”. This interpreting declaration also is part of the constitutional hierarchy, as art. 75, Par. 22 requires. <sup>22</sup>

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3rd edition, Vol. I, Editorial Astrea, Buenos Aires, 2001, p. 164.

22 According to the constituents, “the conditions for the Treaties to be in force” (mentioned in

The constitutional amendment also modified the text of some articles which refer to the protection of the right to life. The new paragraph 23 of article 75 implicitly acknowledges that the right to life starts at the moment of conception of the human being in the womb, by establishing that one of the powers of the Congress is to dictate of a special and comprehensive social security regime for “protecting the defenseless child from pregnancy”. In other words, the state’s duty to protect the unborn child’s life is thus explicitly established.<sup>23</sup>

**The Protection of the Human Right to Life in the Provincial Constitutions and in the National Legislation:** Both the Argentine National Civil Code and some Provincial Constitutions have expressly acknowledged the right to life by means of different provisions.

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Art. 75 par. 22 of the Constitution) refer to the extent to which Argentina has consented to said Treaties. That means that the treaties are effective for the Argentine State only under the terms established by the law passing them and under the terms of the reservations and interpreting declarations made at the moment at which the Executive Power makes the deposit. In accordance with Rodolfo C. BARRA, a 1994 constitutional amendment constituent, cited by Alberto B. BIANCHI in “Una reflexión sobre el llamado ‘control de convencionalidad,’” *La Ley*, 2010–E, p. 426.

23 A clear example of this duty of the State is materialized in the *Asignación por Embarazo* (Allowance for Pregnancy), created through Resolution N° 235/2011, issued by the *Administración Nacional de la Seguridad Social* (Social Security Administrative Bureau). This allowance provides an economic assistance to unemployed women who lack medical insurance and who are in their twelfth week of pregnancy until the child’s birth.



The Constitutions of: San Juan, 1996; Jujuy, 1986; La Rioja, 1986; Mendoza, 1916; Río Negro, 1988.	These constitutions have established the inhabitants' right to defend their lives and the state's duty to protect them. <sup>24</sup>
The Constitutions of: Córdoba, 1987; Salta, 1998; Tucumán, 2006; Formosa, 2003; Tierra del Fuego, 1991; Chubut, 1994; Catamarca, 1966; Chaco, 1957; San Luis, 1962; Santiago del Estero, 2005; Entre Ríos, 2008.	These legal instruments explicitly state that life begins at the moment of conception. <sup>25</sup>  For example, art. 4 of the Constitution of the Province of Córdoba states that "the person's life from his conception, as well as his dignity and his physical and moral integrity are inviolable".
Constitution of the Province of Buenos Aires, 1994	This constitution provides for an extended protection, since its Art. 12, Par. 1 states that every person has the right to life "as from the moment of conception until his natural death".
National Civil Code	In Art. 63, the Civil Code states that "'unborn' means every person who has not yet been born, but has already been conceived in the womb;" the code writer included a note to said article, in which he explained that the unborn is not a future person, since he already exists in his mother's womb. Article 70 states that "a person's existence begins at the moment of conception in the womb".

After briefly reviewing the provisions in national and international legislations dealing with the right to life, it can be concluded that, in the Argentine democratic system, not only is the protection of the human life expressly stated, but also its respect has been the Constitution's primary and fundamental goal.

Even before signing and ratifying international treaties, Argentina was already guaranteeing the right to life by acknowledging it as the first natural right existing before any positive legislation.

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24 Art. 15 and 22 of the Constitution of San Juan; Art. 19 of the Constitution of Jujuy; Art 19. of the Constitution La Rioja; Art. 8 of the Constitution of Mendoza; Art. 16 of the Constitution of Río Negro.

25 Art. 10 of the Constitution of Salta; Art. 40 of the Constitution of Tucumán; Art. 5 of the Constitution of Formosa; Art. 14, Par. 1 of the Constitution of Tierra del Fuego; Art. 18 of the Constitution of Chubut; Art. 65, III, 1 of the Constitution of Catamarca; Art. 15, Par. 1

### C. A Good Decision by the Supreme Court, Though with Questionable Nuances

*“Sánchez Elvira Berta v. the National Ministry of Justice and Human Rights”*<sup>26</sup>

During the last state of siege in Argentina, after the 1979 coup d’état, there were many victims who died or forcibly disappeared, and who were arbitrarily imprisoned by the security forces. As a consequence, through Act N° 24411, the Argentine State agreed to pay a compensation to those who were victims of such crimes before December 10, 1983.<sup>27</sup>

In this context, Ms. Elvira Berta Sánchez filed a procedure before the National Ministry of Justice and Human Rights claiming the compensation stated by law, since her daughter, Ana María del Carmen Pérez, a victim of homicide committed by the security forces, was in her last month of pregnancy.

The Ministry of Justice considered that she was entitled to said benefit for being the deceased woman’s mother, though not for being the unborn’s grandmother. The Ministry understood that, according to Article 54, Par. 1 and Articles 63, 70 and 74 of the Civil Code, the unborn did not acquire rights which could be transferred to his heirs.<sup>28</sup>

The National Court of Appeals with jurisdiction on Federal Administrative matters—in a second litigation—also rejected the request based on similar reasoning. After this, the appeal was filed before the Supreme Court on May 27, 2007.

Unlike the decisions made by lower courts, the Supreme Court recognized Ms. Elvira Sánchez’s right, and approved the compensation request, since it considered that the action provided for in Act N° 24411 was not a hereditary right. Ms. Elvira Sánchez was not inheriting a right from her grandchild, which,

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of the Constitution of Chaco; Art. 13 of the Constitution of San Luis; Art. 16, Par. 1 of the Constitution of Santiago del Estero; Art. 16 of the Constitution of Entre Ríos.

26 Translated from Rulings by the Supreme Court: 330: 2304.

27 On March 24, 1976, the then Argentine president Isabel Perón was arrested, and the Junta de Comandantes (Commanders Board) took over; this board’s members were Lieutenant General Jorge Rafael Videla, Admiral Eduardo Emilio Massera and Brigadier General Orlando R. Agosti. This episode set the beginning of the self-named “Proceso de Reorganización Nacional” (National Reorganization Process), which lasted until December 10, 1983.

28 Through the articles mentioned, the Civil Code acknowledges the unborn’s existence as a person and, therefore, as an individual entitled to rights from the moment of conception. However, regarding the property rights that the unborn can acquire, the Civil Code states



as a legal matter, depended upon his live birth; on the contrary, Act N° 24441 was acknowledging a right properly belonging to the grandmother herself. Therefore, Ms. Elvira Sánchez was actually entitled to compensation for her grandchild's death, on the grounds that it was her own—not an inherited—right.

#### **The Positive Aspects of the Decision:**

- The Supreme Court clearly recognized the existence of a human being from the moment of conception. In fact, in this litigation, the unborn's right to life had not been discussed,<sup>29</sup> since the debate was rather centered in whether or not the grandmother was entitled to request the legal compensation in question.
- The exact words were: “the right to life is the human beings' first natural right, preceding every positive legislation, and guaranteed by the National Constitution; this right is present from the moment of conception and is reaffirmed by the incorporation of international treaties with constitutional hierarchy”.<sup>30</sup>
- Moreover, discussing the right—either hereditary or personal—of someone who seeks to be compensated for the death of a relative, implies the acknowledgement of the existence of the deceased person.
- In this case, the Supreme Court acknowledged the existence of the unborn child, thus compensating the grandmother, as provided for by law, for the death caused, without making any distinction between born and unborn children.

#### **An Important Negative Aspect:**

- Just as we have stressed the correctness of the decision made by the Supreme Court, which explicitly acknowledged the existence of life in the womb from the moment of conception, we must also question the

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that they are irrevocably acquired upon his live birth. This means that the rights can be transferred to the heirs once said rights have been acquired by the child who is born alive.

<sup>29</sup> Said right had already been acknowledged by the Court in 2002, in the case “Portal de Belén– Asociación Civil sin Fines de Lucro v. the Ministry of Health and Social Welfare”. Rulings by the Supreme Court: 325: 292.

<sup>30</sup> Translated from the report in Spanish written by Dr. Ricardo O. Bausset, substitute Prosecutor.

reference to the “legal personality” theory (*Teoría de la Personalidad*) in the majority opinion.<sup>31</sup>

- Judges Lorenzetti, Fayt, Petracchi, Maqueda and Argibay argued that legal personality “is not a natural quality, or something that exists or may exist before any legal system and independent from it: it is a purely legal quality”.<sup>32</sup> This means that, according to this understanding of legal personality, a person as a subject entitled to rights and liable to obligations is a mere legal construct, rather than legal recognition of reality, ie, the human nature of the subject.
- This view disregards the right to legal personality as a human right, which is explicitly acknowledged by the American Convention on Human Rights, “Pact of San José”. Article 1.2 of this Convention expressly establishes that “‘person’ means every human being”, and Art. 3 states that “Every person has the right to recognition as a person before the law”.
- Moreover, one of the most eminent writers on Civil Law in Argentina states that “a legal system cannot fail to ‘acknowledge’—please note the word ‘acknowledge’—that every man has the quality of a legal person or subject of law. Since law is not an independent discipline, but rather an instrumental and auxiliary one at the service of human purposes (...), it cannot fail to acknowledge men’s quality as legal persons, whatever their status or race.”<sup>33</sup>
- Unfortunately, history has proved how dangerous it can be to consider legal personality as a merely legal construction, disregarding its ontological reality. A very sad example has been the Nazi totalitarian model, which caused so much harm to humanity that it was necessary to declare equal and inalienable rights to which every human being is entitled, founded on the acknowledgment of dignity inherent to men.<sup>34</sup>

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31 Judges Lorenzetti, Fayt, Petracchi, Maqueda and Argibay.

32 Paragraph 10.

33 Translated from the original in Spanish: Jorge J. LLAMBIAS, *Tratado de Derecho Civil, Parte General*, Vol. I, 18th Ed., Abeledo Perrot, Buenos Aires, 1999, p. 221. Jorge J. Llambías is one of the most influencing jurists in Argentina, especially in Civil Law matters. He has published several books, among which are: “*Tratado de Derecho Civil*”, “*Código Civil Anotado*”, “*Estudios de la Reforma al Código Civil Ley 17.711*”, “*Estudio sobre la mora en las obligaciones*”, “*Efectos de la nulidad y de la anulación de los Actos Jurídicos*”, “*Manual de Obligaciones*”. He has also written several papers published in national legal journals.

34 Cfr. Preamble to the Universal Declaration of Human Rights.



### III. Criminalization of Abortion: The Logical Consequence of the Acknowledgement of the Right to Life from the Moment of Conception

#### A. National Legal Situation

The undeniable importance of life as a legally essential right and its necessary protection are clearly reflected in the classification of different behaviors that make an attempt on life as criminal offenses.

Indeed, the Criminal Code's Chapter I, Title I, Part II, titled "Crimes against Life", regulates said crimes, classifying the crime of abortion in particular in Sections 85 to 88.

Though not defined by the Argentine legislation, abortion is understood as the fetus's induced death, regardless of whether or not it has been expelled from the maternal uterus.<sup>35</sup> Therefore, the legal interest protected is the fetus's life, which, in spite of developing itself inside the mother's womb, deserves protection independent from hers.<sup>36</sup>

This regulation, which protects human life from the moment of conception, is in line with the fact that the Argentine legal system also acknowledges the existence of a human being from that exact moment.<sup>37</sup> However, the issue becomes controversial when analyzing the scope of Section 86 of the Criminal Code, which provides for the circumstances of non-punishable abortions.

#### Non-Punishable Abortions—Section 86 of the Criminal Code

Section 86 of the Criminal Code establishes that any abortion performed by a qualified medical doctor with the pregnant woman's consent is non-punishable:	<ol style="list-style-type: none"><li>1) when performed to avoid a threat to the mother's life or health and when this threat cannot be avoided by any other means. (Therapeutic abortion).</li><li>2) when the pregnancy is a consequence of rape or of sexual assault against an idiotic or insane woman. In this case, the legal representative's consent to perform the abortion is required. (Eugenic abortion).</li></ol>
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In accordance with the Argentine Criminal Code, a crime is non-punishable when the legitimacy of an "absolving excuse" is established. This excuse implies that, even when a criminal act is committed, the legislators have decided not to

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35 Cfr. Ricardo NUÑEZ, *Tratado de Derecho Penal*, Vol. III, Editorial Lerner, Córdoba-Buenos Aires, 1977, p. 161.

36 *Ibid.*, p. 160.

37 Article 70 of the Civil Code explicitly establishes that the lives of human beings begin with their conception in the maternal uterus.

apply the punishment corresponding to said crime.<sup>38</sup>

The above mentioned section states that abortion “is non-punishable” when performed under the conditions therein established. Of course, in order for this absolving excuse to work correctly, the crime should, logically, have been committed first, since there can be no judgment of a crime until after the crime has been committed. Therefore, none of the above circumstances can be considered “allowed” abortions or even an alleged “right to abortion”. Rather, they are “decisions not to prosecute” the crime of abortion in certain circumstances.

### **“Therapeutic” Abortion**

The “necessary”<sup>39</sup> or “therapeutic” abortion is provided for in Sect. 86, Par. 1 of the Criminal Code. It is characterized by the apparent conflict between two equally protected legal interests: the mother’s life and the fetus’s life.

Section 86, Par. 1 states that “Any abortion performed by a qualified medical doctor with the pregnant woman’s consent is non-punishable so long as it is aimed to avoid a threat to the mother’s life or health, and said threat cannot be avoided by any other means”.

As is clear in the text above, the already mentioned absolving excuse has the following strict requirements: a) the pregnant woman’s consent, b) a qualified doctor performing the abortion, c) a threat to the mother’s life or health, d) the impossibility of avoiding said threat by any other means. Those requirements must occur simultaneously for the punishment provided for by the law not to be applied.

The first two requirements are not very difficult to interpret. According to legal experts’ opinion, the required consent must be express, since alleged or tacit consent is not accepted.<sup>40</sup> Regarding the second condition, a qualified professional is a medical doctor who has obtained his university degree; this provision excludes other professionals of the healing arts, even when they are professionally capable of determining the existence of a threatening situation and of acting accordingly.<sup>41</sup>

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38 An example of a non-punishable crime is when children steal money from their parents, which according to Sect. 185, Par. 1 of the Criminal Code, is not punished. However, it is important to mention that the fact that said crime is non-punishable does not make it a right to steal under said circumstances.

39 Sebastian SOLER, *Derecho Penal Argentino*, Vol. III, Editorial Tea, Buenos Aires, 1992, p. 111.

40 Edgardo Alberto DONNA, *Derecho Penal: Parte Especial*, 3rd ed. Sect., Vol. I, Editorial Rubinzal-Culzoni, Santa Fe, 2007, p. 199.

41 Carlos CREUS, Jorge Eduardo BUOMPADRE, *Derecho Penal: Parte Especial*, 7th updated edition, Vol. I, Editorial Astrea, Buenos Aires, 2007, p. 66.





However, it is very important to analyze carefully the two other requirements: the existence of threat to the mother's life or health, and the lack of any other suitable means to prevent said threat.

Unlike the requirements for other criminal categories, the law does not explicitly require that the threat to the mother's health be serious,<sup>42</sup> though that does not mean that the absolving excuse freely applies to any insignificant or unimportant threat of damage.<sup>43</sup>

This is so because the two requirements—the threat to the pregnant woman's life or health and the fact that said threat cannot be avoided through any other means—need to be interpreted together.

The question is: which are the threats that, considering the current advances in medicine, cannot be prevented through less harmful means that do not affect the unborn's life?

Usually, the following diseases are considered to be affected by pregnancy, either because it aggravates them or because it makes their treatment more difficult: cancer, tuberculosis, kidney, respiratory or heart failure, pregnancy hypertension, or preclampsia.<sup>44</sup> Furthermore, it has been claimed that the law does not require that the woman's condition necessarily be a physical or organic one, and that psychic damage—including some mental diseases such as serious depression, the mother's tendency to suicide, etc.—is also considered one of such conditions.<sup>45</sup>

The truth is that advances in medical science have almost eradicated the

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42 Section 142, Par. 3 of the Criminal Code establishes that serious damage to the victim's health or physical integrity constitutes an aggravating circumstance of the crime of unlawful deprivation of freedom.

43 Ricardo NUÑEZ, *Tratado de Derecho Penal*, Vol. III, Editorial Lerner, Córdoba-Buenos Aires, 1977, p. 341.

44 Under the strict abortion laws that became standard in the late nineteenth century, abortions were permitted where necessary to save the life of a pregnant woman. At the time these laws were adopted, there were in fact many indications for life-saving abortions, such as tuberculosis, cardiovascular and renal disease, and the so-called pernicious vomiting of pregnancy. Cfr. Mary Ann GLENDON, *Abortion and Divorce in Western Law*, (Cambridge, Massachusetts: Harvard University Press, 1987), p.11.

45 Edgardo Alberto DONNA, *Derecho Penal: Parte Especial*, 3 updated edition, Vol. I, Editorial Rubinzal-Culzoni, Santa Fe, 2007, p. 209.

46 By the 1960s, however, advances in medicine meant that it was only a rare case where the pregnant woman's life could be said to be at stake. Fewer and fewer abortions were being

circumstances in which this absolving excuse can apply.<sup>46</sup> As a result, medical science has succeeded in allowing the gestating woman to continue with her pregnancy until the child's birth, and survive after labor. Nowadays, specialized health centers have made it possible to keep alive babies who have been gestated for only six months and who weigh 600 grams.<sup>47</sup>

In this regard, the Academia Nacional de Medicina (Medicine National Academy) has maintained that "considering that the technological advances in human reproduction help fight against perinatal mortality by saving sick newborns and fetuses, it becomes absurd to destroy healthy embryos and fetuses". The Academy has also stated that "deliberately terminating an incipient human life is unacceptable [and that] this action goes against medicine itself, since any doctor's only mission is to protect and promote human life, not to destroy it (...)"<sup>48</sup>

As regards psychological damage as a justifying cause, it is worth noting that abortion is never the suitable therapy for treating such conditions, and there always exists the option of psychological or psychiatric therapy.<sup>49</sup>

Regarding the effectiveness of this absolving excuse, it has already been stated that its logical and legal nature requires that criminal behavior has already occurred, which means that it is not valid to affirm that this is an alleged right to abortion (in the future).

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performed to preserve the woman's life or even physical health. Cfr. Mary Ann GLENDON, *Abortion and Divorce in Western Law*, (Cambridge, Massachusetts: Harvard University Press, 1987), p.12.

47 In the last 15 years, premature babies neonatal mortality in developed countries has dropped dramatically. Between 1990 and 2000, premature babies of less than 30 weeks of gestation and between 600 and 900 grams survived. Cfr. FUSTIÑANA, MARIANI, JENIK, LUPO, *Neonatología Práctica*, 4th edition, Editorial Médica Panamericana, Buenos Aires, 2009, p. 224 and 289.

48 Translated from the original in Spanish: Declaration approved by the Academic Plenary Committee of the Academia Nacional de Medicina de Buenos Aires, during its private session on July 28, 1994, published as a paid announcement in the newspapers *La Nación* and *Clarín* on August 4, 1994. <http://www.acamedbai.org.ar/pagina/academia/declarac.htm>

49 Modern psychiatric therapy has made it possible to carry a mentally ill woman's pregnancy to full term. Furthermore, in the event an abortion is performed, the cure is more serious than the disease. According to a study by the English Royal College of Obstetricians, 59% of women who abort are more likely to suffer serious and permanent psychiatric conditions. Cfr. José María PARDO SÁENZ, *Bioética práctica al alcance de todos*, Ediciones RIALP, Madrid, 2004, p. 86.



Despite the foregoing, some Court decisions and legal experts' opinions have misinterpreted the absolving excuse's nature as circumstances of necessity or even self-defense.

Self-defense is a "justifying cause" (that is, it provides a legal justification for an action about to be taken) and is defined as a necessary and rational reaction to an imminent and unprovoked aggression. Therefore, in order for this justifying cause to be operative, the following circumstances must occur: a) an unlawful attack –not provoked by the victim –; and b) a rational need to resort to the method used for preventing or repelling such attack (Sect. 34, Par. 6, Subpar. 1 of the Criminal Code). Likewise, necessity is a justifying cause to which any person who performs an action classified as a crime may resort; necessity, permits someone to cause damage to a legal interest, when this damage is considered necessary in order to protect a superior legal interest that is in danger of being destroyed, or eliminated. (Sect. 34, Par. 3 of the Criminal Code).<sup>50</sup>

However, as mentioned before, Sect. 86, Par. 1 of the Criminal Code does not provide for circumstances of necessity or self-defense, and, therefore, abortion is not properly a subject thereof.

Indeed, the threat to the mother's life or health is not caused by an unlawful attack by the fetus, nor is death imminent (justifying abortion as a last resort, due to the lack of less harmful means, to save the mother's life or health). More specifically, "necessity" requires that the harm caused be less damaging than the imminent harm to be prevented, a condition not satisfied when a "therapeutic abortion" is performed, since it cannot be validly argued that the fetus's death is "less damaging". On the contrary, the two lives are analogous legal interests. According to Argentine legislation, the mother's and the fetus's lives have the same legal value and thus deserve to be equally protected.

### **"Eugenic" Abortion**

Paragraph 2 of Section 86 of the Criminal Code establishes that "Any abortion performed by a qualified medical doctor with the pregnant woman's consent is non-punishable (...) if the pregnancy is a consequence of rape or of sexual assault against an idiotic or insane woman. In this case, the legal representative's consent to perform the abortion is required".

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50 Cfr. Edgardo RIGHI, *Derecho Penal: Parte General*, 1st ed., Editorial Lexis Nexis, Buenos Aires, 2008, p. 270 and 281. One example of this can be throwing the goods in a ship in order to prevent it from sinking due to excess weight.

A eugenic abortion is performed in order to prevent a being with serious physical and/or mental disability from being born.<sup>51</sup>

Legal experts have discussed the scope of this legal category and have questioned whether or not the so-called “sentimental abortion” falls within this category; “sentimental abortion” is one performed on a non-disabled woman whose pregnancy is the result of rape.

This provision’s precedent is a 1916 Swiss bill. For illustration purposes, we have transcribed some paragraphs of the report prepared by the Committee which drafted the Argentine Criminal Code, so as to clarify the controversy.

The Committee expressly states: “For the first time, (...) legislation legitimizes abortion for eugenic purposes, so as to prevent an idiotic or deranged woman, or a woman whose pregnancy is the result of incest, from giving birth to an abnormal or degenerate being. (...) This topic is very interesting and discussing it in this paper could take many pages, since it would require us go into the realm of eugenics, which, for some members of this committee, is of extreme importance, and its ramifications should be of deep and intense interest to legislators, teachers, sociologists and jurists in our country. Criminal science [should apply the principles of eugenics] so as to fight against the increase of crimes in a more efficient way”.<sup>52</sup>

It becomes clear that this legal category is justified by the preponderance that the legislators gave to the eugenic purpose over the fetus’s life. This means that the sentimental abortion—the one committed by a mentally healthy woman who conceived after having been raped—is not provided for by Section 86, Par. 2.<sup>53</sup> In order for this legal category to apply, the woman who has been raped or

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51 Oscar Alberto ESTRELLA, Roberto GODOY LEMOS, Código Penal: Parte especial. De los delitos en particular. Análisis doctrinario. Jurisprudencia seleccionada, Vol. I, Editorial Hammurabi, Buenos Aires, 1995, p. 159.

52 Translated from the original in Spanish: Diario de sesiones de la Cámara de Senadores del Congreso Nacional, 43 meeting of the 31st regular session, September 23, 1920, reading of the report by the National Senate Committee on Codes, p. 958, signed on September 26, 1919, by J. V. González, E. Del Valle Ibarlucea, P. A. Garro. Quoted by Francisco JUNYENT BAS and Candelaria DEL CERRO, “Aborto y Derecho a la Vida”, Academia Nacional de Derecho y Ciencias Sociales de Córdoba, p. 5.

53 Ricardo NUÑEZ, Tratado de Derecho Penal, Vol. III, Editorial Lerner, Córdoba–Buenos Aires, 1977, p. 390–391.



sexually assaulted must be idiotic or insane. Otherwise, this legal category is not applicable.<sup>54</sup>

Therefore, the absolving excuse is effective when the following requirements are met: a) pregnancy is the consequence of rape or sexual assault, b) the pregnant woman is mentally handicapped, and c) abortion is practiced with the consent of the woman's legal representative.

Now it seems evident that such a provision makes no sense whatsoever; that it cannot be considered effective in the light of the international treaties that expressly acknowledge the right to life from the moment of conception; that the purpose of preserving "racial purity" is offensive to all modern peoples and does not justify the death of an innocent being, especially when considering that such a cruel action goes against any meaningful understanding of human rights.

## **B. Amendment Bills for the National Congress's Consideration**

### **I. Bills for Amending the Argentine Criminal Code**

#### **I.1. Criminal Code Draft Bill:**

In 2004, a Commission for drafting the Bill for the Amendment and Comprehensive Update of the Criminal Code was created (Resolutions N° 303/04 and N° 136/05, issued by the Ministry of Justice and Human Rights); the Draft Bill final text was filed in 2006.

As regards abortion, the Draft Bill substantially modifies the current legislation. In order to make this clearer, the relevant sections in the Draft Bill are transcribed below:

"Section 92: Any abortion performed by a medical doctor with the woman's consent is non-punishable in the following circumstances: a) when performed to avoid a threat to the mother's life or physical or psychosocial health and when this threat cannot be avoided by any other means; b) when pregnancy is a consequence of rape. In the case of a minor or a woman of unsound mind, her legal representative's consent shall be required".

"Section 93: No punishment shall apply to any woman who has an abortion performed on her, with her consent and within the initial THREE (3) months after conception. No punishment shall apply to any medical doctor who performs an abortion with the woman's consent, within the initial THREE (3) months after conception and after informing her about the consequences of abortion and the reasons for preserving the fetus's life".

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54 Carlos CREUS, Jorge Eduardo BUOMPADRE, *Derecho Penal: Parte Especial*, 7th updated edition, Vol. I, Editorial Astrea, Buenos Aires, 2007, p. 68.

In other words, the bill introduces the following amendments:

- a) Decriminalization of any abortion performed during the initial three months of gestation, the only requirement being the woman's informed consent.
- b) Incorporation of "sentimental abortion" by authorizing the elimination of the fetus resulting from rape, without any time restriction.
- c) Incorporation of threat to the woman's psychosocial health as an absolving excuse.

This Draft Bill can be criticized because of its overtly unconstitutional content.

This amendment coarsely violates all provisions established by the international treaties to which Argentina has granted constitutional hierarchy. These treaties explicitly recognize that each human being—especially the child—is a person from the moment of conception, and they demand his comprehensive protection from that moment.<sup>55</sup>

It is therefore convenient to review some provisions set forth by the international treaties mentioned and then to analyze the Draft Bill in the light of said international rules:

- Firstly, it is important to quote the American Convention on Human Rights, which establishes in Art. 1.2 that "Every human being is a person" and, in Art. 4.1, that "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. 2. No one shall be arbitrarily deprived of his life".

The first conclusion drawn is that the American Convention makes no distinction whatsoever among human beings. On the contrary, it expressly establishes that "every human being is a person".

It is beyond the objective of this work to give an extensive biological explanation of the moment when human life begins. However, it is enough to mention that, in the scientific community, the fact that the beginning of life takes place at the moment of fecundation is indisputable.<sup>56</sup> Consequently, from the moment of conception, "every

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55 Art. 1 of the American Declaration of the Rights and Duties of Man; Art. 3 of the Universal Declaration of Human Rights; Art. 1.2 and Art. 4 of the American Convention on Human Rights, Art. 6.1 of the International Covenant on Civil and Political Rights; Art. 1 and 6 of the Convention on the Rights of the Child and its interpretative declaration.

56 Cfr. Ricardo Leopoldo SCHWARCZ, Carlos Alberto DUVERGES, Angel Gonzalo DIAZ, Ricardo

human being” is “a person”, and “every person has the right to have his life respected”.

In some legal experts’ opinion, the expression “in general”, included in the first part of Art. 4, entails an authorization for ignoring the unborn’s right to life; nevertheless, an interpretation of this kind would contradict the comprehensive content of the article, which, as a matter of fact, acknowledges that “every person” is entitled to this right.

Furthermore, the second part of the article establishes that “no one shall be arbitrarily deprived of his life”. The Inter-American Court of Human Rights understands that every act that deprives any human being of a right granted by said Convention is arbitrary when the person has no participation whatsoever in the actions that originate said deprivation;<sup>57</sup> and it is impossible to validly prove that the person to be born participates in or is responsible for or guilty of the deprivation of his right to life.

- What the Convention on the Rights of the Child establishes in Art. 6 is even clearer: “1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child”. In this regard, and according to the interpreting declaration issued by Argentina for this treaty, the legislation of this country considers that a child is every human being from the moment of conception, until the age of eighteen years.<sup>58</sup>

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Horacio FESCINA, *Obstetricia*, El Ateneo, 5th Edition, 2001, p. 9. William F. GANONG, *Fisiología médica*, Editorial El Manual Moderno, 20th Edition, 2006, p. 388. Moreover, the Academia Nacional de Medicina de Buenos Aires (National Academy of Medicine of Buenos Aires) has claimed that “at the moment of fecundation, the union of the female and male pronucleus results in a new being that has its own chromosomal individuality and its progenitors’ genetic load”. Translated from the original in Spanish: Declaration approved by the Academic Plenary Committee of the Academia Nacional de Medicina de Buenos Aires, during its private session on July 28, 1994, published as a paid announcement in the newspapers *La Nación* and *Clarín* on April 8, 1994. <http://www.acamedbai.org.ar/pagina/academia/declarac.htm>

57 Cfr. IACHR, Series C, N° 16, p. 22 and 33; IACHR, Series C, N° 35, p. 26 and 27; IACHR, Series C, N° 63, p. 59 and 60; IACHR, Series A, N° 4, p. 21; IACHR, Series C, N° 74; IACHR, Series C, N° 94, paragraphs 13, 104 and 106; cited in José Alejandro CONSIGLI, “Es inconstitucional un Proyecto de Ley de abortos no punibles”, letter addressed to the National Deputies, Buenos Aires, June 2007, p. 6.

58 Please see footnote N° 22.

On the other hand, the Convention on the Rights of the Child itself voids the possibility of resorting to the child's birth or any condition that his parents may have, as grounds for discrimination to annul or ignore the rights acknowledged by the Convention. The Convention explicitly establishes in Art. 2 Par. 1 that "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction, without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's (...) birth or other status".

It is then obvious that the provisions set forth in the Draft Bill mentioned could not become a law without violating the international and constitutional rules.

This does not entail the denial of women's right to privacy or intimacy, or raped women's right to dignity. In addition, it is not the aim of this work to disregard the existence of eventual psychological suffering which the mother may undergo for carrying an unwanted pregnancy to term. Women—as the human beings they are—are entitled to all human rights set forth in international legal instruments. Both born and unborn human beings are entitled to identical rights; therefore, it is necessary to try to reconcile them when they seem to be at conflict.

It should be clear that there are not enough grounds to disregard the unborn's human right to life, especially when considering that women's human rights would suffer a merely temporary limitation, while abortion would entail suppressing or destroying the unborn, who is owner of equal rights.

## **I.2. Other Bills for Amending the Argentine Criminal Code**

### **a. Voluntary Termination of Pregnancy and Annulment of Sect. 85 Par. 2 and Sect. 86 and 88 of the Criminal Code of Argentina**

This bill is one of the most recent legislative attempts to modify the criminal legislation on abortion. It was filed by the *Campaña Nacional por el Derecho al Aborto Legal, Seguro y Gratuito* (National Campaign for the Right to Legal, Safe and Free Abortion) on March 16, 2010, before the National Chamber of Deputies, under record N° 0998-D-2010.

This bill also aims to acknowledge every woman's "right to decide on the voluntary termination of pregnancy during the first twelve weeks of pregnancy" (Sect. 1). Moreover, this bill intends to add the "sentimental abortion" as an absolving excuse; this kind of abortion applies when pregnancy is a consequence of rape (Sect. 3, item a) or there exists a serious fetal malformation (Sect. 3, item c), ensuring free access to





abortion through the services of the public health system. The only requirement is the mother's informed consent. Neither the father's consent nor previous judicial authorization is needed. In order for the consent to be valid, the mother must be fourteen (14) years of age or older, thus disregarding the civil legislation in force related to a person's legal capacity, and generating noticeable incoherence. In this regard, the age of 18 years is required, for example, to be a blood donor, which is a practice clearly less complex, less risky and with fewer consequences than abortion, which not only is highly risky for the mother's health, but also entails making a decision about the unborn's life.

### **b. Anencephaly Bill**

This bill, dated August 30, 2010, filed under record N° 5593-D-01, attempts to incorporate a new paragraph in Art. 86 of the Criminal Code; said paragraph "authorizes any woman with an anencephalic pregnancy to exercise the right to choose whether to carry her pregnancy to term after diagnosis has been determined" (Sect. 1).

Although we should not ignore the immense suffering of a mother who carries in her womb a life with no possibilities of surviving after birth, the anticipated destruction of that life as a solution seems quite arguable. Killing a person, irrespective of his degree of development and the estimated time of his existence, involves a deep disregard for life and for every human being's dignity. This is so because the duration of an anencephalic person's lifetime affects neither his human nature, nor, consequently, the legal protection he deserves.

## **II. Bills for Regulating Section 86 of the Argentine Criminal Code**

As expressed before, Section 86 of the Criminal Code regulates two circumstances considered non-punishable abortion: "therapeutic" abortion and "eugenic" abortion. This does not mean that they are "allowed" abortions, or that we are faced with a "right to abortion;" however, it does mean that they are "absolving excuses" according to which the legislators decide not to apply a punishment in a specific case.

Even so, bills aimed to "regulate" section 86 of the Criminal Code have been filed before the National Congress and some provincial Legislatures, based on the argument that abortion is a right that requires regulation in order to guarantee its effective exercise.

### **General Characteristics of the Bills Mentioned:**

- a) They establish that every health care center, either public, private or

owned by medical insurance companies, are bound to perform non-punishable abortions.

- b) They regulate the cases allegedly covered by Sect. 86 of the Criminal Code:
  - Threat to woman's life or integral health (Par. 1)
  - Pregnancy as the result of rape (Par. 2)
  - Pregnancy as the result of sexual assault against an idiotic or insane woman (Par. 2)
- c) They include the woman's physical, psychic and/or social health as part of her integral health.
- d) They assume that, unlike other cases of pregnancy, the woman's psychic health is threatened in the case of pregnancy resulting from rape, or in the case of non-viable fetus.
- e) In the cases of rape, they establish that a judicial or police report and the forensic surgeon's certificate are required.
- f) They require that there be informed consent (i.e. that the professional assisting the woman provide her with information regarding the specific medical examinations and treatments, the important associated risks, and the probabilities of successful recovery). They also establish that the practitioner advice about other assistance or treatment options, should there be any.
- g) Another requirement is that consent must be granted by the pregnant woman or her legal representative if she were disabled.
- h) The minimum age required is 14 or 18 years, depending on each bill.
- i) They do not demand a judicial or administrative authority's intervention or authorization in any case.
- j) They provide for conscientious objection, which can be expressed by any person, either the medical doctors or any Health Care System worker. This objection must be expressed at the moment the doctor or health worker begins working at the corresponding health care center.
- k) They establish that the health care center's authorities must plan to immediately substitute others for the doctors who have expressed their conscientious objection.

**Some Comments on the above "Regulations":**

- a) This kind of regulations not only turn a criminal behavior into an alleged right (to abortion), but also force every institution in the health care system to make use of their material and human resources to perform said practices.
- b) Under the excuse of "regulating" the Criminal Code, they actually amend it. For example, these bills eliminate the requirement that the threat to

the gestating woman's life "cannot be avoided by any other means",<sup>59</sup> making abortion a "choice" of pregnant women, instead of a last resort as the Criminal Code requires.<sup>60</sup>

- c) These bills make a broad interpretation of the word "health" mentioned in Section 86 of the Criminal Code. This provision states that abortion is non-punishable when it is aimed "to avoid a threat to the mother's life or health". These bills define "health" as not only physical health but also psychic or even the so-called "social health" (abortion for economic reasons).
- d) These Bills provide for the so-called "sentimental abortion" (i.e. the abortion performed on a woman whose pregnancy is the result of rape). This also entails an amendment to the Criminal Code since Sect. 86 Par. 2 only provides for the eugenic abortion, already dealt with above.
- e) Regarding the woman's minimum age to validly consent to abortion, it is completely illogical that a 14-year-old minor can decide on the fate of the person that she is carrying in her womb, regardless of the circumstances that make abortion admissible. According to the Argentine civil law, the legal maturity is reached at the age of 18 years, and until then, the person is not capable of performing certain actions which are of much less importance than abortion. For example, minors cannot vote, or purchase alcoholic beverages, or drive, or travel abroad without their parents' consent, or be organ donors, etc. The contradiction here is obvious.
- f) Finally, a criticism to the way in which bills are passed or still debated by the provincial Legislatures is also relevant.<sup>61</sup> According to Art. 75, Par. 12 of the Argentine National Constitution, the only organ empowered to regulate fundamental rights is the National Congress; therefore, a provincial Legislature cannot create rights, such as the alleged "right to abortion", nor can it limit or even eliminate them, which is what these bills are doing with the right to life.

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59 Section 86, Par. 1 of the Argentine Criminal Code.

60 One can see that abortion is not a "last resort" in these bills when one sees that abortion is only one of several options ("other assistance or treatment options") that the doctor, when obtaining the woman's "informed consent", is required to discuss.

61 Nowadays, regulations on non-punishable abortion have been passed in the Province of Buenos Aires, through Resolution N° 304/07; in the Province of Neuquén, through Resolution N° 1380/07; in the province of Chubut, through Act XV N° 14; in the Autonomous City of Buenos Aires, through Resolution N°1174/07; and in the Province of Salta, through Resolution N° 215/12.

### **Technical Guidelines for Comprehensive Assistance of Non-Punishable Abortions**

A document called “Technical Guidelines for Comprehensive Assistance of Non-Punishable Abortions” is currently in force; its distribution was passed on July 12, 2010, by the Argentine Ministry of Health, through Resolution N° 1184/10, within the framework of the National Program on Responsible Procreation and Sexual Health. A similar document was passed in 2007 by Mr. Ginés González García, the then Minister of Health of Argentina. These guidelines deserve the same criticism made before, since not only do they regulate the “cases permitted” by the Argentine Criminal Code, but also increase the number of circumstances in which abortion, including sentimental abortion, is permitted.<sup>62</sup>

#### **C. A Very Important Jurisprudential Precedent**

In 2000, the National Supreme Court of Justice established a precedent of great importance in the case known as “Portal de Belén”.<sup>63</sup>

In this case, the non-profit organization called “Portal de Belén” filed an amparo<sup>64</sup> action against the Ministry of Health and Social Welfare, with the purpose of reversing the authorization to distribute the drug called “Inmediat”, produced by Laboratorios Gador S.A., and of forbidding its production, distribution and marketing, on account of the abortion-inducing effect caused by said “emergency contraception” pill. The claim was based on the fact that the right to life is constitutionally acknowledged.

The claim was successful in the first instance, though the State appealed before the Federal Chamber of Appeals of Córdoba, which reversed the ruling.

By means of an extraordinary remedy, the case was filed before the Argentine Supreme Court of Justice, which instructed—by a majority of five to four votes—that the National State annul the authorization in question, forbidding the production, distribution and marketing of the drug called “Inmediat”.

The ruling was based on three core arguments: a) human life begins with the ovum’s fertilization; b) one of the pill’s effects is abortion; c) the right to life is the first natural right, prior to every positive law and guaranteed by the National Constitution.

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62 Guía Técnica para la Atención Integral de los Abortos No Punibles, National Ministry of Health, in charge of Minister Juan Luis Manzur, Buenos Aires, 2010, p. 16.

63 Translated from Rulings by the Supreme Court: 316: 479.

64 Amparo is a legal action brought for the prompt protection and remedy of a violated constitutional right. A similar action is called “constitutional tutelage action” in Colombia



- a) In the first place, the Supreme Court explicitly decided on the beginning of life by stating, in paragraph 4, that “the moment at which the twenty–three paternal chromosomes join the twenty–three maternal chromosomes is the moment when the whole genetic information necessary to determine each of the new individual’s innate qualities is gathered”.<sup>65</sup>
- b) Regarding the drug’s abortion–inducing effect, the Supreme Court states—by explaining how the drug works—that the pill not only delays or suspends ovulation and alters the spermatozoid and/or the ovum’s tubal transportation in the Fallopian tube—effects which inhibit fertilization and, thus, are not abortion–inducing—but also alters the endometrial tissue, causing an asynchronous endometrium maturation which inhibits the fertilized egg implantation. The Supreme Court understood that the latter effect “is a real and imminent threat to life—an essential legal interest—which cannot be remedied afterwards”.<sup>66</sup>
- c) Finally, by quoting international treaties that contain specific provisions protecting the human being’s right to life from the moment of conception,<sup>67</sup> and following the pro hominem principle—which underlies the whole of human rights law—to interpret said treaties,<sup>68</sup> the Court concluded that “man is the axis and core of every legal system, and in being an end in itself—regardless of his transcendental nature—his essence cannot be violated and is a fundamental value with regard to which every other value has an instrumental character”.<sup>69</sup>

#### **D. An Unprecedented Ruling by the Supreme Court of Justice**

On March 13, 2012, the Supreme Court of Justice of Argentina confirmed

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(please see footnote N° 11 in the Colombian report), and “protection remedy” in Chile (please see footnote N°23 in the Chilean report).

65 Translated from the original in Spanish: Domingo M. BASSO, *Nacer y Morir con Dignidad*, Estudios de Bioética Contemporánea C.M.C, Buenos Aires, 1989, p. 83, 84 and its quotes.

66 Translated from Paragraph 9.

67 Paragraph 14, Art. 14.1 of the Universal Declaration of Human Rights; Art. 6.1 of the Convention on the Rights of the Child; Sect. 2 of Act N° 23849; Art. 75, Par. 22 of the National Constitution; Sect. 70 and 63 of the Civil Code.

68 Paragraph 11.

69 Translated from Paragraph 12.

the ruling by the Provincial Court of Chubut, which had authorized an abortion for a 14-year-old girl who had been raped. In doing so, the Court distanced itself from its own precedents and the national and international laws that regulate this matter.

The Court held that this was a case of “non-punishable abortion” regulated by Section 86, Par. 2 of the Criminal Code. In other words, the Court held that said section exempted from punishment abortions practiced not only on disabled women who have been raped, but on any woman who has been raped.<sup>70</sup>

Four general arguments can be identified in the Court’s ruling:

1. The meaning of constitutional rules and international treaties left to decision by UN bodies
2. The Argentine State’s potential international liability
3. Legal principles understood in a pro-abortion manner
4. Non-punishable abortion taken as a synonym for a “right to abortion”

### **1. The meaning of constitutional rules and international treaties left to the decision by UN bodies**

Throughout this paper we have mentioned and analyzed the provisions that protect the right to life from the moment of conception, both in the National Constitution as well as the international treaties on human rights. However, it is striking how the Court simply ignored the meaning of these provisions as established by precedent and/or plain meaning. Instead, the Court treated the interpretations of the treaty bodies as if they were authoritative, and binding, interpretations, giving these, in truth, non-binding comments of more significance than the express protection of the right to life which, as mentioned before, is explicitly established by international law.<sup>71</sup>

### **2. The Argentine State’s potential international liability**

Throughout the ruling, the Supreme Court expressed its concern regarding

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70 Please see refer to the discussion about the scope of Section 86, Par. 2 of the Criminal Code in this paper.

71 The Court makes reference to the interpretation made by the United Nation’s Committee of Human Rights with regard to the International Covenant on Civil and Political Rights (paragraph 12); the Inter-American Commission on Human Rights with regard to the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights (paragraph 10); and the Committee on the Rights of the Child with regard to the Convention on the Rights of the Child (paragraph 13). In said interpretations, the



the Argentine State's potential international liability if the criminal code is not interpreted broadly.<sup>72</sup> The Court explicitly mentions the final observations made by the Committee of Human Rights and by the Committee of the Rights of the Child, which condemn the "limited interpretation of the access to non-punishable abortions".<sup>73</sup>

However, it must be noted that this argument is unpersuasive because under no circumstances do the recommendations made by international bodies provide a basis for the state's liability. States are only committed to respecting the provisions in international treaties, not the treaty bodies' opinions or interpretations.

### 3. Legal principles

Perhaps more striking is the fact that the Court had resorted to the principles of equality and prohibition of discrimination, human dignity, legality, and the pro hominem principle to set the foundations for its ruling.

The Court only applies the principle of equality and non-discrimination regarding women who have been victims of rape, concluding that there is unjustified discrimination if only women who suffer from a mental disorder are allowed to have an abortion practiced.<sup>74</sup> However, it disregards the fact that this principle is applicable to "every member of the human race".<sup>75</sup> Article 2 of the Universal Declaration of Human Rights expressly states that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, [such as] birth." Therefore, disregarding the unborn's right to life, based on the fact that he has not been born yet, is a clear case of arbitrary discrimination.

Surprising as it may seem, the Court also appeals to "human dignity" to justify its decision, stating that this principle "establishes that people are an end

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committees mentioned deviate from the express wording of the treaties, ignoring any legal protection to the unborn.

72 Paragraphs 6, 7 and 26.

73 Paragraphs 6 and 12. In paragraph 13, the Court states that "the Committee of the Rights of the Child has established that the States Parties –those which do not provide for abortions in cases of pregnancies resulting from rape– shall amend their legal rules including such case; and regarding our country, which does provide for said case, has expressed its concern about the restrictive interpretation of Section 86 of the Criminal Code."

74 Paragraph 15.

75 Preamble to the Universal Declaration of Human Rights.

in themselves and proscribes that they be treated as a means”.<sup>76</sup> However, it does not refer to the unborn when it mentions the dignity of human beings, thus fully ignoring all of their rights.

Finally, the Court resorts to the principle of legality and the pro hominem principle.<sup>77</sup> Regarding the former, we have mentioned above that, far from respecting what the law explicitly states, the Court has disregarded its provisions, making use of interpretations by treaty bodies that do not bind the Argentine State. With regard to the pro hominem principle, the Court even disregarded its own rulings, since that same principle was referred to in the Portal de Belén ruling discussed above, which guaranteed the comprehensive protection of the unborn’s rights.<sup>78</sup>

#### 4. Non-punishable abortion taken as a synonym for a “right to abortion”

Finally, the Court confuses the legal nature of the absolving excuse provided for in Section 86 of the Criminal Code,<sup>79</sup> and mentions a “right to terminate pregnancy” in the cases provided for therein.<sup>80</sup> In other words, it interprets that there is a “right to abortion” in all cases of pregnancies resulting from rape.<sup>81</sup>

As a logical consequence, the Court concluded that any judicial authorization to have an abortion was unnecessary. Therefore, according to the Court, the woman’s sworn statement that she has been raped is sufficient to obtain an abortion. The Court thus “urges the national and provincial authorities to implement and make effective (...) hospital protocols that specifically permit non-punishable abortions”.<sup>82</sup>

In conclusion, it is clear that in this case the Court has been far from resolving a specific case –whose subject matter became moot since the abortion had already occurred– but instead has arrogated legislative powers, intending to change the scope of the legal provisions in force.

Despite the fact that the Supreme Court of Justice is the country’s highest court, its rulings do not have a general effect –*erga omnes*– but they only apply

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76 Paragraph 16.

77 Paragraph 17.

78 Please see “A Very Important Jurisprudential Precedent” in this paper.

79 Please see “Non-Punishable Abortions – Section 86 of the Criminal Code” in this paper.

80 The Court uses the word “right” in paragraphs 18, 19, 23, 24, 28, 29 and 31.

81 Please see footnote N° 38.

82 Paragraph 29. Regarding the nature and validity of these hospital protocols, please see “Amendment Bills for the National Congress’s Consideration. II. Bills for Regulating Section 86 of the Argentine Criminal Code” in this paper.





to the specific case. Therefore, no inferior court is compelled to respect or bound by such court decision, and can thus decide differently direction in similar cases in the future. However, what is of greatest concern is that this decision may mark the beginning of pro-abortion judicial activism by the Argentine Supreme Court.

### **E. Non-Governmental Organizations Pursuing the Decriminalization of Abortion**

Some of the organizations that seek and work to decriminalize abortion in Argentina are the following:

- ***Campaña Nacional por el derecho al aborto legal, seguro y gratuito* (National Campaign for the Right to Legal, Safe and Free Abortion)**

This campaign is one of the most powerful and further-reaching, seeking to decriminalize abortion in Argentina. It is a national alliance comprising several organizations.<sup>83</sup> They defend an alleged right to abortion under the slogan “Sexual education for deciding, contraceptives for avoiding abortion, legal abortion for avoiding death”. Its objective is to include said “right” within the list of sexual and reproductive rights, as well as to achieve the latter’s acknowledgment as human rights.

This campaign started to work on May 28, 2005—on the International Day of Action for Women’s Health—by collecting signatures of people who were in favor of the decriminalization of abortion. It begins every year on May 28, and finishes on September 28 or November 25. A national plenary is organized—setting the venue in a different place throughout the country every year—to establish the annual action plan. Its agenda includes organizing cultural activities, drafting a bill to decriminalize and legalize abortion in the entire nation, and controlling the implementation of provisions on non-punishable abortion currently in force, among other activities.<sup>84</sup>

- ***Consortio Nacional de Derechos Reproductivos y Sexuales* or *CoNDeRS* (National Consortium of Sexual and Reproductive Rights)**

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83 Vid. [www.abortolegal.com.ar](http://www.abortolegal.com.ar)

84 Beatriz KOHEN, Emelina ALONSO, Mariela AISENSTEIN, Micaela FINOLLI, Alejandro SEGARRA, *La exigibilidad de los derechos sexuales y reproductivos*, Asociación por los Derechos Civiles, 1st edition, Buenos Aires, 2008, p. 26.

The CoNDeRS is made up of different organizations that aim to monitor the actions provided for in the National Act on Responsible Procreation and Sexual Health, defending the guarantee of sexual and reproductive rights from a gender-oriented viewpoint.<sup>85</sup> Said act includes the provincial acts that regulate the cases of non-punishable abortion, as well as the ministerial resolutions regarding “emergency contraception”.<sup>86</sup> All these acts are criticized in this paper for being unconstitutional.<sup>87</sup>

• ***Asociación por los Derechos Civiles (Association for Civil Rights)***

In 2008, Asociación por los Derechos Civiles drafted a document on the enforceability of “sexual and reproductive rights” in Argentina, based on an agreement entered into with the CoNDeRS. In said document, sexual and reproductive rights are defined as an integral and indissoluble part of human rights, guaranteed by international treaties and conventions.<sup>88</sup>

Some of the sexual and reproductive rights listed are the following: the right to life and survival; to privacy; to freedom and security; to highest level possible of good health; to family planning and to deciding on the number of children; to non-discrimination; to life free from violence; to information and education; to the benefits of scientific advances; to receiving and providing information and to freedom of thought; not to be subjected to cruel, inhuman or degrading treatment; to freedom of thought and religion.

While the former rights are recognized in human rights treaties, the Asociación interprets them to include rape victims’ right not to be forced to carry an unwanted pregnancy and/or maternity, the right to “emergency

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85 Vid. [www.conders.org.ar](http://www.conders.org.ar)

86 Hormonal “Emergency Contraception” Resolution N° 232/2007, issued by the National Ministry of Health.

87 See the provincial acts that regulate the cases of non-punishable abortion under the title “Bills for Regulating Section 86 of the Argentine Criminal Code” above, and the ministerial resolutions regarding “emergency contraception” under the title “Sexual Health, Reproductive Health and the Right to Life. Considerations about their Debate in the National and International Legislation” below.

88 Beatriz KOHEN, Emelina ALONSO, Mariela AISENSTEIN, Micaela FINOLI, Alejandro SEGARRA, *La exigibilidad de los derechos sexuales y reproductivos*, Asociación por los Derechos Civiles, 1st edition, Buenos Aires, 2008, p. 11.

contraception”, legal abortion and tubal ligation.<sup>89</sup> It is worth mentioning that none of these alleged rights are mentioned in international treaties.<sup>90</sup>

- ***Lesbianas y Feministas por la descriminalización del aborto* (Lesbians and Feminists in Favor of the Decriminalization of Abortion)**

In 2010, the organization called *Lesbianas y Feministas por la Descriminalización del Aborto* published a sort of manual titled “*Todo lo que querés saber sobre cómo hacerse un aborto con pastillas*” (“Everything you want to know about how to have an abortion induced by pills”).<sup>91</sup> This book describes the steps to an “easy, cheap, safe and ‘home-made’” abortion—according to its cover—thus violating every Argentine law forbidding abortion and classifying it as a crime in the Argentine legal system.

The method advocated is chemical abortion by the consumption of misoprostol, a drug that causes uterus contraction so that the embryo is expelled.<sup>92</sup> The manual explains how to use misoprostol, where to buy it, and what its effects are; the information in this manual is not provided by medical doctors or experts. That means not only that the national legal system’s provisions are violated, but also that the lives and health of women who follow the recommendations in this manual are put at risk.<sup>93</sup>

#### **F. The Same Statistical Data, Different Readings**

There are two arguments commonly used by those who seek the decriminalization of abortion. One of them stresses the number of abortions performed in our country, concluding that its legalization is necessary; and the other one stresses the rates of maternal death caused by the so-called “unsafe abortion”, concluding that many deaths would be avoided if this practice were legalized. We will now analyze said statements in order to determine their strength.

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89 Ibid., p. 14.

90 See “Reproductive Health in International Instruments on Human Rights” in this paper.

91 *Todo lo que querés saber sobre cómo hacerse un aborto con pastillas*, El Colectivo, 1st edition, Buenos Aires, 2010.

92 Ibid.

93 Page 8 of this manual expressly reads that “the information in this book has been collected by us, who are not medical doctors. We are lesbians and feminist women, trained to provide the information that appears in these pages”.

### 1) Argentine Annual Abortion Rate

Not only is it a fallacy to conclude that it is necessary to legalize a criminal behavior because it is frequent, but also it is important to note that the statistics cited on the number of abortions practiced in Argentina each year lack scientific support.

The document *Guía Técnica para la Atención Integral de los Abortos No Punibles*, published by the National Ministry of Health, states that “the existing data about the number of abortions performed in Argentina is not accurate, since it is an illegal practice. The most recent estimates indicate that 460,000 abortions are induced per year<sup>94</sup>. The only available information is the number of hospital admissions in public health centers in the country following abortion complications—it is not specified whether these are miscarriages or induced abortions—and it represents only a fraction of the total number of abortions annually practiced”.<sup>94</sup>

Note II, to which the document refers, explains that the figures of induced abortions result from the application of two methods: the method based on hospital discharges following abortion complications, and the residual method.<sup>95</sup> Below are some comments on these methods.

**Method Based on Hospital Discharges:** Through this method, a total number of abortions is obtained by multiplying the number of hospital discharges (according to the statistics by the Ministry of Health) by a coefficient to correct the final result, since it is assumed that not all abortions need hospital admission.

The calculation of the multiplying coefficient was based on a survey to “key informants”, such as reproductive health service providers and other health care professionals, accounting for induced abortions that are not recorded in hospital statistics. This survey investigates the kind of regular abortion providers, techniques used, probabilities of having complications as well as the probabilities of having to hospitalize women who have complications.<sup>96</sup>

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94 *Guía Técnica para la Atención Integral de los Abortos No Punibles*, National Ministry of Health, in charge of Minister Juan Luis Manzur, Buenos Aires, 2010, p. 15.

95 Note II reads: “the figures are the result of the estimates calculated by Dr. Pantelides and Silvia Mario, BA, on induced abortions, by using the method based on hospital discharges following abortion complications (Singh, S. and Wulf, D.: “Niveles estimados de aborto inducido en seis países latinoamericanos”, in *International Family Planning Perspectives*, special edition, 1994); and they are also the average value of the range estimated through the residual method (Bongaarts, J.: “A Framework for the analysis of the proximate determinants of fertility”, in *Population and Development Review*, vol. 4, N° 1, 1978)”. *Ibid.*, 15.

96 Silvia MARIO, Edith PANTELIDES, “Estimación de la magnitud del aborto inducido en la Argentina” CEPAL, *Population Notes* N° 87, p. 99 <http://www.eclac.cl/publicaciones/>

Considering the “subjective” character of the multiplier used, the fragility of the statistics resulting from the application of such method becomes obvious.<sup>97</sup> The researchers themselves admit this subjectivity by stating that “the multiplier calculation is, therefore, based on the respondents’ knowledge and perception acquired in their direct work experience”.<sup>98</sup> The only official and objective piece of data is the one referring to the quantity of hospital discharges, while the multiplier created was based on personal interviews and subjective data, which detracts from the scientific validity of the intended final number of abortions.<sup>99</sup>

**Residual Method:** This method calculates the rates of the proximate determinants of fertility, measuring the effect that each of them has on potential fertility, based on a total fertility rate in a specific historical moment and a specific society.<sup>100</sup>

The indicators considered as determinants of potential fertility are: marriage, the use of contraceptives, induced abortion and post-partum infertility. In other words, the calculation is based on the number of children a fertile woman could have throughout her life, and the cases in which the woman has no sexual intercourse, aborts, uses a contraceptive method or is sterile after labor are reduced by applying said total fertility rate. After isolating the variables, we can conclude that the rate of induced abortions is the result of the division between the total fertility rate and the other factors. With this method, we obtain the total abortion rate corresponding to the average number of abortions that a woman would have by the time her fertility period ends.

This method’s results are not accurate either. The authors themselves admit that the average used to calculate the potential fertility rate influences the abortion coefficient calculations as a residue. It is therefore a rough approximation.<sup>101</sup> Finally, they conclude that “the abortion estimates obtained through the residual method might be overrated”.<sup>102</sup>

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xml/1/36501/lcg2405-P\_4.pdf

97 Jorge Nicolás LAFFERRIERE, “Informe Técnico: Análisis del informe de Human Rights Watch: ‘¿Derecho o Ficción? La Argentina no rinde cuentas en materia de salud reproductiva,’” Centro de Bioética Persona y Familia, 2010, p. 5.

98 Translated from Silvia MARIO, Edith PANTELIDES, p. 105.

99 Jorge Nicolás LAFFERRIERE, p. 7.

100 Silvia MARIO, Edith PANTELIDES, p. 106.

101 Silvia MARIO, Edith PANTELIDES, p. 110.

102 Silvia MARIO, Edith PANTELIDES, p. 112.

It can thus be argued that the “reasonableness” of the statistics on abortion based on these methods “is questionable—to say the least—and thus cannot be used by the National Congress to take legislative measures regarding such a sensitive issue”,<sup>103</sup> nor can they support the alleged legalization of abortion.

**2) Rate of Maternal Mortality Caused by So-Called “Unsafe Abortions”**

Those who intend to decriminalize abortion also argue that the fact that it is illegal leads to it being practiced under unsafe conditions, thus increasing the maternal mortality rate. Their conclusion is that unsafe abortion is one of the most important causes of maternal death, and they add that legalizing abortion would guarantee its practice under optimum medical and health conditions.

The truth is that the information refutes this statement. The National Ministry of Health published the following statistics:

**Maternal deaths according to their causes and the deceased women’s age groups. Total in the country. Years: 2006 and 2007**

Maternal deaths according to their causes and the deceased women's age groups. Total in the country. Years: 2006 and 2007										
Age Groups	2006					2007				
	Live Births Total	Maternal Deaths				Live Births Total	Maternal Deaths			
		Total	Abortions	Direct Obstetrics Causes	Indirect Obstetrics Causes		Total	Abortions	Direct Obstetrics Causes	Indirect Obstetrics Causes
Total	696,451	333	93	176	64	700,792	306	74	152	80
Less than 15 years	2,766	5	1	4	-	2,841	4	-	2	2
15 to 19	103,885	33	7	19	7	106,720	32	10	16	6
20 to 24	174,342	45	13	20	12	174,679	58	20	21	17
25 to 29	176,931	79	28	40	11	175,632	63	19	25	19
30 to 34	139,003	81	19	40	22	139,393	74	12	42	20
35 to 39	73,177	62	18	36	8	73,532	50	7	30	13
40 to 44	19,866	27	7	16	4	19,879	22	5	15	2
45 and older	1,488	1	-	1	-	1,497	2	-	1	1
Unspecified Age	-	-	-	-	-	6,619	1	1	-	-

Source: National Ministry of Health. Health Statistics and Information Office (Dirección de Estadísticas e Información de Salud or DEIS).

As shown in the chart, in 2006, the maternal death total was 333, 93 of which were caused by abortion, and in 2007, the total was 306, 74 of which corresponded to abortion. In order to better understand the real incidence of abortion as a maternal death cause, it is important to bear in mind that women

103 Translated from Jorge Nicolás LAFFERRIERE, p. 7



deaths in 2007 totaled 149,698, most of which were caused by circulatory system diseases (47,879), tumors (27,818) and respiratory system diseases (24,253).<sup>104</sup> This shows that abortion is far from being the main cause of death.

This does not mean that the State should disregard its duty to reduce the maternal mortality rate—since every life lost entails an irreparable loss—. However, it is important to correctly analyze the data on maternity rate, so as to find true solutions to reach said goal.

Indeed, the objective data proves that legalizing abortion is not the appropriate solution. The reasons are, in the first place, that abortion itself already entails a threat to the mother, i.e. there are no “safe” abortions.<sup>105</sup> And, in the second place, the World Health Organization itself has recognized that “the hospital structure is the most important variable to determine the risk of maternal death. The availability of essential obstetric care, active emergencies and experts play a very important role in preventing these deaths”.<sup>106</sup>

The foregoing proves that the solution—far from being the legalization of abortion—includes improvements to medical services and in woman’s “health conditions”, with greater and better assistance to pregnant women, and with greater and better protection to the unborn.

The state is then bound to provide the appropriate maternal health care services, and to guarantee that every woman has access to said services, on equal terms and without discrimination of any sort.

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104 Jorge Nicolás LAFFERRIERE, p. 8.

105 The Academia Nacional de Medicina de Buenos Aires explicitly stated that “illegal abortions greatest morbimortality is used as an argument to promote its legalization”. It should be noted that, even though maternal morbimortality is greater in illegal abortions, it is not exclusive to them, since the damages caused are also inherent to said medical proceeding, due to the ungodly and artificial termination of pregnancy”. Translated from the original in Spanish: Declaration approved by the Academic Plenary Committee of the Academia Nacional de Medicina de Buenos Aires, during its private session on July 28, 1994, published as a paid announcement in the newspapers La Nación and Clarín on April 8, 1994. <http://www.acamedbai.org.ar/pagina/academia/declarac.htm>

106 Silvina RAMOS, Ariel KAROLINSKI, Mairana ROMERO & Raúl MERCER for the Maternal Mortality in Argentina Study Groupe, “A comprehensive assessment of maternal death in Argentina: translating multicentre collaborative research into action”, Bulletin of the World Health Organization, July 2007, 85 (7), p. 620, cited by Jorge Nicolás LAFFERRIERE, p. 9.

### G. Legislative Proposal: “Act on the Comprehensive Protection of the Human Rights of Pregnant Women and Children to be Born”

The National Chamber of Deputies has fostered a bill called “Regime on the Comprehensive Protection of the Human Rights of Pregnant Women and Children to be Born”, File N° 8516—D—2010. This bill was taken from the Iniciativa Popular (Popular Proposal) “*Protección Integral de la Familia*” (Family Comprehensive Protection)<sup>107</sup> fostered by Red Federal de Familias (Families Federal Network).<sup>108</sup>

This bill aims to protect both the unborn and the pregnant woman. This proposal offers a comprehensive solution which takes into consideration the rights of all the individuals involved, and acknowledges the value of every human being’s life and dignity as the core aspects to be protected, and thus the axis of the entire legislation. Its arguments are based on the effectiveness of and the need to promote, human rights, beginning with the most fundamental of all, the right to life, which is acknowledged by several international treaties and protected by the national legislation and jurisprudence.

#### Characteristics of the Bill:

**Scope of the Protection Guarantee:** This bill intends to provide for the protection of pregnant women and unborn children; the latter are defined as every human being from the moment of conception or fertilization of the ovum to their birth.

**Best Interest of the Child:** It establishes the best interest of the child as the guiding principle ensuring the full compliance with the rights acknowledged to them, which, in case of conflict, prevail over other rights

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107 This bill is made up of four parts, which are translated below: Title I “Minimum Budgets for Family and Life Comprehensive Protection. Argentine Family Policy Principles;” Title II “Regime for Large Family Acknowledgement and Special Protection;” Title III “Comprehensive Protection of Pregnant Women’s and the Unborn’s Rights;” Title IV “Complementary Provisions”.

108 Red Federal de Familias is a network of institutions, organizations and people working and sharing the same worldview, without losing their autonomy. This worldview includes a) the respect and protection of human life in every development stage, from conception to death; b) the natural structure of family founded on a man and a woman’s marriage, open to life transmission; c) parents’ original rights and duties to educate their children according to their moral and religious convictions; d) ensuring and promoting common welfare as a duty of leaders as well as the people. <http://www.redfederaldefamilias.org/>



equally acknowledged. As stated, this principle is an interpretation of the provisions of the Convention on the Rights of the Child that states, in Art. 3 par. 1, that “in all actions concerning children (...) the best interests of the child shall be a primary consideration”.

**Rights and Guarantees:** This bill acknowledges that every child is entitled to the inherent right to life as the first human right, which is the source and origin of every other right. Likewise, it acknowledges his right to equality of opportunities and to be protected against any kind of discrimination based on the child’s genetic heritage, stage of development, or physical, biological or other characteristics; it also considers that classifying unborn children as “wanted” or “unwanted” is especially discriminatory.

**A Choice for Pregnancies Resulting from a Crime against Sexual Integrity:**

It proposes that the woman who gets pregnant as a consequence of a crime against her sexual integrity is entitled to a special allowance, from the moment of conception and throughout the entire gestation period. Moreover, this bill proposes that said allowance be paid until the child reaches the age of 18 years, in case his mother decides to take on his upbringing and education. Otherwise, it provides for the implementation of measures tending to favor adoption or custody by a family, in which case this family would be entitled to such special allowance.

**Comprehensive Protection System:** The proposed system is made up of every national, provincial or municipal organization aiming to assist, promote and protect the rights of pregnant women and unborn children. It includes the creation of a Center of Assistance to Pregnant Women, made up of interdisciplinary and specialized staff. This Center would work in every public hospital and its purpose would be to advise and support women carrying problematic pregnancies, or in a situation of psychophysical, social or economic risk. Some of the system’s basic services include (i) providing direct assistance 24 hours a day, especially to pregnant women who are facing problems; (ii) advising and providing information about public and private support, to carry the pregnancy to term; (iii) following up with each case; (iv) providing special assistance to pregnant adolescents; and, depending on each case, (v) offering special services that include free medical, psychological and legal assistance, support to find a job and a nursery for their children, accommodation in women’s emergency shelters, baby care kits, materials and food, etc. Finally, it provides for a Universal Allowance for Unborn Children, consisting in a monthly monetary benefit that does not require pay-back, to be paid to the mother throughout her pregnancy.

### Conclusion

On September 30, 2010, the Academic Plenary Committee of the Academia Nacional de Medicina stated that “in the face of some recent expressions in favor of the legalization of abortion (...) [this academy] wants to remind everyone that (...) the Argentine health care system needs proposals that look after and protect the mother and her child, and their lives. **Medical science’s duty is to save both of them; nothing good can happen to society when death is chosen as a solution.** If illegal abortion is a health problem, then the authorities must take better measures aimed to prevent it and cure its consequences, without violating the fundamental human right to life (...)”.<sup>109</sup>

Thus, through the unrestricted acknowledgment of human rights and based on policies of respect to human dignity and promotion of family and life, this bill—which is currently subject to review by the National Congress—offers comprehensive solutions and prevents problematic situations, becoming an alternative that protects the rights of every individual involved, while being framed within the fundamental principles that are the inspiration of the Argentine legal system.

## IV. Sexual Health, Reproductive Health and the Right to Life. Considerations about their Debate in National and International Laws

### a. Governmental Programs: Brief Review of the National Legislation

Argentine national legislation regulating matters of sexual and reproductive health and education will be briefly presented in this chapter, in an effort to disentangle the actual scope of its provisions.

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109 [http://www.acamedbai.org.ar/pagina/academia/declarac.htm#La\\_ética\\_y\\_el\\_juramento\\_médico\\_defienden\\_al\\_niño\\_por\\_nacer\\_y\\_toda\\_vida\\_](http://www.acamedbai.org.ar/pagina/academia/declarac.htm#La_ética_y_el_juramento_médico_defienden_al_niño_por_nacer_y_toda_vida_)



<p>National Act N° 25673</p> <p>National Program on Responsible Procreation and Sexual Health</p>	<p>By passing this act, the “Programa Nacional de Salud Sexual y Procreación Responsable” (National Program on Responsible Procreation and Sexual Health) was created, within the scope of the National Ministry of Health. This act establishes that its implementation be entrusted to the provincial governments, after they sign an agreement with the National Government, which is in charge of providing technical guidance and advice, assigning resources, transferring supplies and training the staff.</p> <p><b>Objectives:</b> The objectives mentioned are: a) to reach the highest level of responsible procreation and sexual health, so as to make decisions not influenced by discrimination, coercion or violence; b) to reduce the maternal and child mortality and morbidity; c) to prevent unwanted pregnancies; d) to promote adolescents’ sexual health; e) to help with the prevention and early detection of sexually transmitted diseases, HIV/AIDS and genital and mammary pathologies; f) to ensure that the entire population has access to information, guidance, methods and services relating to responsible procreation and sexual health; g) to foster the participation of women in the decision-making related to their responsible procreation and sexual health.</p> <p><b>Suggested Assistance Model for Reaching the Objectives:</b> The planned assistance model is based on the implementation of a control system for early detection of sexually transmitted diseases, as well as for prescribing and supplying contraceptive methods. These methods shall be reversible, non abortion-inducing and temporary, respecting the user’s criteria or convictions, unless there is a specific medical contraindication and the person has been previously advised of the advantages and disadvantages of natural methods and the ones approved by the ANMAT.<sup>110</sup></p> <p><b>Institutional Conscientious Objection:</b> This act establishes that private denominational institutions providing health care services are allowed to be exempt from supplying contraceptive methods.</p>
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110 Administración Nacional de Medicamentos, Alimentos y Tecnología Médica (Medicine, Food and Medical Technology National Bureau).

<p>Decree N° 1282/2003</p> <p>Decree Regulating Act N° 25673</p>	<p>In 2003, the Decree regulating the National Program on Responsible Procreation and Sexual Health was passed.</p> <p><b>Implementation Authority:</b> The National Ministry of Health was thereby appointed the implementation authority in charge of technical advice for Provincial Programs, mainly focusing on the organization of activities for providing information and guidance about contraceptive methods and elements, and their distribution, as well as controlling and evaluating the program’s development.</p> <p><b>Reproductive Health:</b> This decree defines reproductive health as a general status of physical, mental and social welfare, and not only as the mere absence of diseases or ailment.<sup>111</sup></p> <p><b>Parental Authority:</b> The decree states that the act does not intend to substitute the advice and sexual education that parents want to give their minor sons and daughters; instead, its aim is to accompany them in the exercise of their parental authority. In fact, it recognizes that parents’ mission in their children’s sexual education is to guide, suggest and accompany them.</p> <p><b>Contraceptive Methods and Products:</b> It identifies natural and artificial methods.</p> <p><b>Natural Methods:</b> These are the methods that entail periodic abstinence, and that need to be especially well–explained.</p> <p><b>Artificial Methods:</b> In this regard, it establishes that every contraceptive method be reversible, non abortion–inducing and temporary; the ANMAT’s duty is to report on the approval or suspension of said methods and products to the Ministry of Health every six months.</p> <p><b>Individual Conscientious Objection:</b> It establishes legal protection for the conscientious objectors’ right to be exempted from the National Program on Responsible Procreation and Sexual Health, both in public and private institutions.</p>
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111 This definition coincides with the one provided in the 1946 Constitution of the World Health Organization.



<p>National Act N° 26130</p> <p>Regime for Surgical Contraception Operations</p>	<p>Passed in 2006, this act establishes that every person of age is entitled to have a “tubal ligation” or “vas deferens ligation or vasectomy;” said surgical practices were thereby added to the National Program on Responsible Procreation and Sexual Health” as a family planning and/or contraceptive method.</p> <p><b>Informed Consent:</b> The petitioner’s informed consent is absolutely required, and neither the spouse or cohabitant’s consent, nor a judicial authorization, is required, except for the cases involving a person whose legal incapacity has been judicially determined. The intervening medical doctor shall provide information about: a) the nature and implications that the surgical practice has on health; b) the existence of other, non–surgical, authorized contraceptive alternatives; and c) the characteristics of the surgical proceeding, its probability of being reversed if requested, and the risks and consequences it entails.</p> <p><b>Free Services:</b> It establishes that these operations be performed free of charge to the petitioner in public health institutions.</p> <p><b>Conscientious Objection:</b> It establishes that every person, either a medical doctor or a Health Care System worker, is entitled to the right to resort to conscientious objection, without any adverse labor consequences. (The hospital is required to provide for the substitutions).</p>
<p>Resolution 232/2007, issued by the Ministry of Health.</p> <p>Incorporation of the Hormonal “Emergency Contraception” (HEC) as a hormonal contraceptive method</p>	<p>This resolution by the National Ministry of Health is part of the National Program on Responsible Procreation and Sexual Health.</p> <p>It instructs that the Hormonal Emergency Contraceptive (HEC) be included in the Compulsory Medical Program (<i>Programa Médico Obligatorio or PMO</i>) as a hormonal contraceptive method.</p> <p>It provides for 100% cover of:</p> <p>LEVONORGESTREL, 1.5 mg pills, one–pill blister.</p> <p>LEVONORGESTREL, 0.75 mg pills, two–pill blister.</p>

### What is the real scope of the legal provisions mentioned?

#### • Contraceptive Methods that Do Not Induce Abortion

The national legislation expressly establishes that the methods provided for by the National Program on Responsible Procreation and Sexual Health shall be “reversible, non abortion-inducing and temporary”. This provision simply respects what the Argentine legal system establishes by forbidding all kinds of abortion. It thus reinforces the principle that establishes that abortion shall be considered neither a sexual and reproductive right nor a family planning method.

#### • Concept of Reproductive Health

We cannot fail to recognize that the concept of health has evolved over the time, and its scope has been broadened. This is reflected in the fact that so-called “reproductive health” has been included in its definition; this reproductive health, at least according to leftist advocates, in turn includes the so-called reproductive rights, sexual rights, reproductive freedom and responsible procreation.<sup>112</sup>

However, when a wider scope is claimed for this right, new limits are also necessary. The concept of a right to privacy—which can be stretched so as to be unrecognizable—is actually limited by the existence of others, especially by the unborn.

In this regard, one of the most important Argentine constitutionalists has maintained that “sexual options, the procreation method, family planning and many other things have two sides: the first one needs to be guaranteed and refers to the self-referential behavior which does not cause any prejudice to third parties, to the public order, or to the public morals, and that, in being confined to private life, is exempt from the judges’ authority (according to Art. 19 of the National Constitution); however, the other side prevents the State from embracing pro-abortion policies, fostering genetic manipulation, imposing birth controls, etc., on account of the duty to protect life as a constitutional interest”. This writer also states that, it is “really difficult to reconcile both sides of the matter (...) however, it is necessary to make an effort to find, in each case, the interpretation that best harmonizes with the axiological system of the Constitution, where life and health are at the forefront, even from the initial moment of fertilization”.<sup>113</sup>

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112 Germán BIDART CAMPOS, “Lo viejo y lo nuevo en el derecho a la salud: entre 1853 y 2003”, *La Ley*, 2003 – C, p. 1235.

113 *Ibid.*, p. 1235.

We can then conclude that the right to health is neither absolute nor unlimited. Just like all other rights acknowledged by the Argentine legal system, the right to health must be exercised within the boundaries set by good faith and morals, without affecting other people's rights.<sup>114</sup>

#### • Interference and Subjugation of Parental Authority

Regulatory Decree N° 1282/2003 regulates matters that exclusively concern the circle of family freedom and privacy, even though it states that Act N° 25673 does not intend to replace the advice and sexual education that parents want to give their minor sons and daughters, but aims to assist them in the exercise of their parental authority.

In this sense, by ratifying the Convention on the Rights of the Child through Act N° 23849, the Argentine State expressly stated that “in accordance with ethical and moral principles, the matters related to family planning concern parents and cannot be delegated; the states are bound to (...) take appropriate measures for guiding parents and for educating on responsible paternity”.<sup>115</sup> Also, the Universal Declaration of Human Rights states that “parents have a prior right to choose the kind of education that shall be given to their children”.<sup>116</sup> It thus becomes clear that, as far as reproductive health is concerned, state action must be limited. The intervention of the national or provincial states can only be justified when the minor's health is compromised because his parents have not met their duties, or have exercised them in an abusive manner, or the child is left unprotected.<sup>117</sup>

On the other hand, the American Convention on Human Rights identifies the family as the natural and fundamental group unit of society, entitled to protection by society and the State.<sup>118</sup> This implies that family is the first and irreplaceable

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114 In accordance with Article 19 of the National Constitution and Article 1071 of the Argentine Civil Code.

115 Translated from the original in Spanish: Interpreting declaration filed by Argentina when ratifying the Convention on the Rights of the Child, regarding Art. 24, Par. f), which establishes that the State must “develop preventive health care, guidance for parents and family planning education and services”.

116 Universal Declaration of Human Rights, Art. 26.3.

117 Catalina Elsa ARIAS DE RONCHIETTO, “Un tribunal que Honró su Fuero. Nota a Fallo Ejemplar del Tribunal de Instancia Única del Fuero de Familia N° 2, San Isidro. ‘A y otros c/Municipalidad de Vicente López s/Amparo’ (expte. 6623), 27 de septiembre de 2001”, RFC 2002, Editorial Dike Mza., Revista 51, p. 61.

118 Article 17.1 of the American Convention on Human Rights.

education agent, and the state's task is to respect such function, protecting and fostering family as a natural institution and the basic cell in society.

• **Importance of Acknowledging the Right to Conscientious Objection**

The right to conscientious objection is acknowledged in Act N° 25673, and its regulating Decree, as well as in Act N° 26130. This explicit acknowledgment in the framework of the National Program on Responsible Procreation and Sexual Health is of great importance since the program provides legal protection to those who do not consent to this Program based on personal convictions.

It is a primary right to which every individual is entitled, and is founded on the respect for individual freedom; its legal foundation is found in articles 14 and 33 of the National Constitution and the international conventions, which expressly acknowledge the freedom of thought.<sup>119</sup> On the other hand, some former Justices of the Supreme National Court have considered it a natural and inviolable right owned by the human beings, consisting in “the right not to comply with a rule or order that violates an individual's personal convictions”.<sup>120</sup>

In this regard, and on the occasion of the enactment of Act N° 418 on Responsible Procreation and Reproductive Health by the Legislature of the City of Buenos Aires, the *Academia Nacional de Medicina* stated that “the conscientious objection is a pacific and apolitical statement by which a doctor may or may not perform an action legally allowed, though that does not mean that he is rejecting the person or abandoning his patient, [thus acting] in accordance with ethics and scientific knowledge”.<sup>121</sup>

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119 Freedom of thought and religion is explicitly acknowledged in Art. 18 of the Universal Declaration of Human Rights; Art. 12 of the American Convention on Human Rights; Art. 18 of the International Covenant on Civil and Political Rights; all of which are legal instruments that enjoy constitutional hierarchy, as set forth in Art. 75, Par. 22 of the Argentine National Constitution.

120 Dissenting votes by Judges CAVAGNA MARTÍNEZ and BOGGIANO, in the case called “Bahamondez, Marcelo” (April 6th, 1993), La Ley 1993-D, 130; cited by Ana Lía BERCAITZ DE BOGGIANO, “La Objeción de conciencia como ejercicio legítimo de las libertades de pensamiento, conciencia y religión”, La Ley 1995, Vol. B, p. 1287.

121 Translated from the original in Spanish: Academia Nacional de Medicina, Declaration approved by the Academic Plenary Committee, during its session on September 28, 2000 28 de septiembre de 2000. <http://www.acamedbai.org.ar/pagina/academia/declarac.htm#> While carrying out their duties. Said plenary also added that Act N° 418 “binds doctors to prescribe contraceptive methods – some of which are considered to induce abortion – to





It is especially important to point out that, while Act N° 25673 provides for institutional conscientious objection, the regulating Decree expressly provides for individual conscientious objection, thus correcting the omission in the national act and including both circumstances as part of the Argentine legal framework.

Regarding Act N° 26130 on surgical contraception, and the ministerial Resolution by which the hormonal “emergency contraception” was incorporated, the individual and/or the institutional conscientious objection apply, since both the act and the resolution are part of the National Program.

A noteworthy example of the acknowledgment of this right is Resolution N° 004405, issued by the Ministry of Health of the Province of Buenos Aires.<sup>122</sup> In this case, the Ministry resolved the request filed by the General Director and Medical Director of *Hospital Universitario Austral*, asking not to apply the National Program on Responsible Procreation and Sexual Health. By means of this resolution, the right to conscientious objection to the practices provided for in the National Act on Reproductive Health was sustained. The authorities who requested that the program not to be applied were acting on behalf of Asociación Civil de Estudios Superiores (ACES), owner of said hospital, and on behalf of the company Valido S.A., owner of Clínica Ángelus of the city of San Isidro. Said resolution granted the request based on the following circumstances: (i) the institutional ideal in favor of the culture of life and against the distribution of contraceptive drugs or devices, against surgical interventions that destroy organs without any therapeutic need, and against artificial contraception; and (ii) the fact that Universidad Austral, Hospital Universitario Austral and its Clinic are corporate works of the apostolate of the Opus Dei Prelature, belonging to the Catholic Church and, therefore, opposing the practices mentioned above.

#### • Unconstitutionality of Hormonal “Emergency Contraception”

We have already referred in this paper to the ruling of the case called “Portal de Belén–Asociación Civil sin Fines de Lucro c/ Ministerio de Salud y Acción Social de la Nación s/ amparo”<sup>123</sup> (an amparo proceeding filed by the non–profit organization Portal de Belén against the Argentine Ministry of Health and Social Welfare), in

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women in fertile age, including adolescents, even without their parents’ knowledge. (...) [and that] the Academia Nacional de Medicina ratifies its opinion (...) regarding the person’s right to life from the moment of conception, and rejects any method that terminates pregnancy”.

122 Resolution N° 004405, issued on November 26, 2008, by Dr. Claudio Zin, Minister of Health of the Province of Buenos Aires.

123 See “A Very Important Jurisprudential Precedent” in this paper.

which the National Supreme Court instructed that the authorization for the drug “Inmediat”, by Laboratorios Gador S.A., be ineffective, and forbade its production, distribution and marketing. The Court also presented some brief reasoning that supported its decision and that led to the statement that “every method that prevents implantation from occurring should be considered abortion-inducing”.<sup>124</sup>

We can thus wonder whether this jurisprudential decision can be considered to have an expansive effect, forcing the Public Administration to adjust to it in other similar cases.

The Hormonal “Emergency Contraception”, also known as “morning-after pill”, is a so-called interceptive agent, which acts by suspending or delaying ovulation, or by preventing the conceived embryo from implanting.<sup>125</sup> The Court has considered this last effect as “a real and imminent threat to life—an essential legal interest—which cannot be remedied afterwards”.<sup>126</sup> This means that the Court expressly established that this drug induces abortion and, as a consequence, instructed its prohibition.

Even though a judicial decision affects only the parties involved in the specific case, the right to life has distinctive notes that justify searching for a different solution. The irreparable damage that this kind of drug may cause proves that it is necessary that the Court’s rulings on this matter have an expansive effect and bind the Public Administration to comply with such decision in every other similar case.<sup>127</sup>

In addition, the Public Administration shall comply with the legal provisions of superior hierarchy which expressly protect life from the moment of conception, by virtue of the principle of lawfulness – this means that every action or rule must be compatible with the Constitution and with every rule inferior to the supreme law but superior to the administrative regulations within the Federal Law hierarchy.<sup>128</sup>

124 Translated from Rulings by the Supreme Court: 316: 479, 10 paragraph.

125 Report by the Bioethics Department, School of Biomedicine, Universidad Austral (August 10, 2000), p. 17.

126 Translated from Rulings by the Supreme Court: 316: 479, paragraph 10.

127 C. Ignacio de CASAS, “El sometimiento de la Administración al Orden Jurídico. Notas a partir del caso Portal de Belén”, *La Revista del Foro de Cuyo*, April 2004 monthly supplement, p. 12.

128 C. Ignacio de CASAS, “El sometimiento de la Administración al Orden Jurídico. Notas a partir del caso Portal de Belén”, *La Revista del Foro de Cuyo*, April 2004 monthly supplement, p. 6.

We can then conclude that Resolution N° 232/2007, issued by the National Ministry of Health, by means of which the Hormonal “Emergency Contraception” was included as a hormonal contraceptive method, is overtly unconstitutional because it violates the provisions in the National Constitution and international treaties that enjoy constitutional hierarchy, which expressly acknowledge and protect the right to life from the moment of conception,<sup>129</sup> and because it disregards the Supreme Court of Justice’s decision in the ruling mentioned.

#### **b. Reproductive Health in International Instruments on Human Rights**

Although the right to health is a human right acknowledged by several international treaties, none of them mentions or acknowledges *reproductive health* as a fundamental human right.

In this sense, Art. 25, Par. 1 of the Universal Declaration of Human Rights establishes that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services...”, and Art. XI of the American Declaration of the Rights and Duties of Man establishes that “every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care (...)”.

It can be seen that the wording of the international treaties makes no reference to the concept of “reproductive health”. This concept was developed afterwards, mainly after the World Conferences on Women<sup>130</sup> and the World Conference on Population and Development.<sup>131</sup> The latter, in particular, established a direct connection between peoples’ development and population growth, and included the reproductive rights as essential elements in the planned strategies.

We should now wonder about the scope of the conclusions drawn within the framework of these Conferences, and whether they bind the states.

In the first place, it is important to clarify that these kinds of documents are

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129 Art. 1 of the American Declaration of the Rights and Duties of Man; Art. 3 of the Universal Declaration of Human Rights; Art. 1.2 and Art. 4 of the American Convention on Human Rights, Art. 6.1 of the International Covenant on Civil and Political Rights; Art. 1 and 6 of the Convention on the Rights of the Child and its interpretative declaration.

130 Framed within the United Nations’ framework, four World Conferences on Women have been convened (Mexico, 1975; Copenhagen, 1980; Nairobi, 1985; and Beijing, 1995) with the purpose of promoting women’s advance in both public as well as private spheres.

131 The International Conference on Population and Development was held in Cairo, on September 5 to 13, 1994.

not international treaties. The states are not bound to blindly comply with these conferences' recommendations; quite to the contrary, they are generic action plans, always subordinate to each country's National Constitution and legislation. Each state is fully sovereign and has the right to address its issues without any foreign interference, according to the principle of non-intervention.

Irrespective of the foregoing, it is important to consider some points that confirm the states' sovereign powers, in particular, those of the Argentine State.

First, it is worth noting that the Conference on Population and Development itself, in paragraph 8.25 of its Report, establishes that "in no case should abortion be promoted as a method of family planning", and that "any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process". This clearly shows that the Report itself establishes that each state has exclusive authority to regulate on this matter.<sup>132</sup>

Second, it should be mentioned that Argentina made a reservation as to the interpretation of the Declaration and Platform for Action of the IV World Conference on Women. In said reservation, Argentina states that "no reference in these documents to the right to control on matters relating to sexuality, including sexual and reproductive health, shall be interpreted as limiting the right to life or abrogating the crime of abortion as a birth control method or an instrument of population policies". The reservation further reads that "no proposal made in these documents shall be interpreted as justifying female or male infertility programs as adjustment variables aimed to eradicate poverty".<sup>133</sup>

Likewise, regarding parents' role in every reproductive health program, the Argentine reservation mentions that "no definition or recommendation in these documents shall weaken parents' primary responsibility in their children's education, including the education about sex-related issues, which the states should interpret according to the provisions of the Convention on the Rights of the Child".<sup>134</sup>

It can thus be concluded that each state has the exclusive authority to regulate everything related to so-called sexual and reproductive rights. This does not mean that the recommendations made by international bodies or the documents issued by International Conferences shall be completely disregarded;

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132 The same provision was passed by the Report of the IV World Conference on Women, in paragraph 106, item k).

133 <http://www.mujer.gov.ar/decl3.htm>

134 *Ibid.*.



however, these will always be subordinated to each country's legal system, and under no circumstances will they compromise the state's international responsibility.

## V. Conclusion

As mentioned before in this paper, the Argentine State is a democratic state of law, and as such, it subordinates its actions to the provisions in its legal system, acknowledging the National Constitution and the international treaties on human rights enjoying identical hierarchy as the supreme law, announcing in them the country's essential values.

Indeed, every nation's goals should be focused on human rights, since their acknowledgment, respect and promotion heavily depend on the fact that every human life's dignity must be effectively guaranteed.

The human right to life has been expressly provided for in numerous international treaties and its acknowledgment has been the result of a deep understanding of human reality: without life, there is no man, and without man, there are no rights or state.

Therefore, the very nature of things sets a relation of pre-eminence and subordination. Man is the axis and end of every legal system and the state's duty is to respect its legal provisions, ensuring the enjoyment of fundamental human rights to the maximum extent possible.

Moreover, this respect for human rights shall be guaranteed to every human being. This is the reason why, in the last instance, the right to equality and non-discrimination guarantees that the state will not subjugate the rights belonging to every human being.

Therefore, this is not about defending the right to life solely because of its pre-eminent character; it is also about guaranteeing all the rights to which every human being is entitled.

From the moment a state is allowed to arbitrarily discriminate against a group of people in order to deny an expressly acknowledged human right, the consequences affect not only said group of people, but also every human being living in that state. If a state violates its own legal system as the supreme law, it stops being a state of law and, therefore, any and every arbitrary violation becomes feasible.

Throughout this paper, we have discussed the legal framework of the right to life as a fundamental human right. It has thus been maintained that "every human being is a person, and that every person has the right to have his life respected".

Since the right to life is a human right and, as such, it must be respected without discrimination of any kind, then any arbitrary distinction distorting this right's effectiveness cannot be possible. Otherwise, we would cease to live in a democratic state of law, effectively subordinated to its legal system, protecting mankind as its essential end, ensuring that the fundamental rights are respected without discrimination of any sort, guaranteeing the enforceability of all the rights of every human being.