

Defending the Human Right to Life in Latin America

Translated from the Spanish

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Defending the Human Right to Life
in Latin America

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Introduction – Human Rights and the Right to Life

By William L. Saunders, Senior Vice President and Senior Counsel¹

It seems intuitively simple: unless you are alive, there is no practical way to claim—to insist upon, to assert—any other right. If you no longer exist, you cannot speak or protest or file a lawsuit (or hug your child or help someone in need). Thus, the right to life—the right not to be arbitrarily killed—*necessarily* is the prerequisite to, the foundation of, every other kind of right. There can be nothing recognized and respected in society, and in the courts, as “human rights” unless the most basic human right—the right to life—is respected.



However, though this would seem to be simple intuition, easily—and therefore, widely—grasped, the fact is that, in today’s world, it isn’t. That is, many people support “human rights” but, at the same time, self-identify as “pro-choice”, which *necessarily* means they support the recognition in the law of a right to abortion, that is, the right of some human beings to kill other human beings for no other reason than they wish to do so. That is the very definition of *arbitrary* killing. Holding these two positions entails a logical contradiction: the right of all human beings to life is supported, except for those who are not yet born. But how can it be that the youngest, the smallest, the most defenseless are subject to legalized violence while the older, the bigger, the more powerful human beings are not—in fact, *cannot* legally be—subject to the lethal violence of another?

There is here, as noted, a contradiction. What explains it? Can it be that it matters—in some way that has moral purchase upon our hearts—that the state has legalized the killings? Or that the mother authorizes it? This can be answered with another question – would it matter to our unstinting opposition to slavery that someone chose to be a slave? The answer, I suggest, that we would all agree upon is no, it would not matter; slavery is always and everywhere wrong, and it is wrong because it reduces a human being to property, to the status of an object; it

¹ Doctor of Law (JD), Harvard Law School, 1981

deprives him of his inherent human dignity, something of which no one—not even himself—may deprive him. In other words, it violates his human rights. Whether or not, it is “legal”, it is wrong. Whether or not, the mother—or anyone else—authorizes it, it is wrong. It is wrong because it reduces the unborn human being to the status of an object that has no legal protection. But human rights are either for all human beings or they are for none. Either human rights are for human beings, or they are arbitrary legal constructs, applied to some but not all, at the whim of the powerful.

To be “pro-life” is to be “pro-human rights”, and the reverse is true as well: to be “pro-human rights” means one must be “pro-life”.

Many nations in Latin America understand this fact better than do those in North America. Neither Canada nor the United States grasps this elementary truth; thus, abortion is legalized in those countries, throughout pregnancy, for any reason whatsoever. Despite the laws and the courts and the police and the democratic elections in those countries, they ignore the most basic human right.

However, Latin America understands the unity of human rights and understands it deeply. In many nations—Honduras and Chile, for instance—abortion is forbidden. In many of those nations—Paraguay, for example—the state is legally obligated both to secure the right to life of the child and to assist the family or mother against economic or social conditions that could lead to abortion—as-a-solution to despair. Latin American countries refuse to make a false choice between the mother and the unborn child, understanding that both are human beings and every human being has human rights, and there is no contradiction in that.

Americans United for Life works—and has worked for over 40 years—in the United States to secure the most basic human right. It has sought to roll back “the right to abortion” which the U.S. Supreme Court created ab initio in several cases such as *Roe v Wade*. AUL has sought, in many ways, to secure legal recognition of this basic unity of human rights, which Latin America seems to grasp intuitively. The world should emulate Latin America, and that is one reason why we have sponsored this study to document the sturdy commitment to the human right to life that characterizes Latin American law and culture.

However, another reason we have sponsored this study is that the very pro-life culture of Latin America is under assault from the forces of the culture of death. They are constantly working to undermine legal protection for the unborn in Latin America. Oftentimes they do so by invoking “legal rights”, or “human rights”, that do not exist. They claim interpretations of international human rights treaties that are incoherent and self-contradictory. However, in order to stop them from undermining true human rights, their aims and activities must be exposed “to the light of day”. Doing so is another aim of this book.

Finally, and ultimately, this book aims to describe, and illustrate, the



foundation stone of a culture of life. A culture of life is a culture that recognizes and respects true human rights, one that does not pit one human being against another but comes to the assistance of all. In its laws, Latin America is closer to that ideal than any other continent. It is in the sincere wish that it will move ever closer—and never retreat—that this book has been commissioned.

The greatest cause in the world is the cause of human rights. Let Latin America lead the way!



Overview – Latin America Reaffirms its Commitment to Life

By M. Laura Farfán Bertrán, Lawyer & Project Coordinator¹

Every legal system reflects the interests and values that a certain society or state considers essential and Latin American nations are not an exception. The weight of social and cultural values shared by these peoples has always been reflected in their legislation.

In this regard, these nations have always acknowledged the right to life as the first of all rights, and have fully adhered to the principles established in international instruments of human rights affirming this perspective, not only meeting the demands in a specific historical moment, but mainly responding to their own history and identity, characterized by a long tradition of respect for life.²

Latin American nations have penalized abortion and strictly regulated its exceptions,³ and this publication is a good picture of this prevailing reality of



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2 The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Universal Declaration of the Rights of the Child and the International Covenant on the Rights of the Child at a world level, and the American Declaration of the Rights and Duties of Man and the American Convention of Human Rights at a regional level, have expressly acknowledged that every person is entitled to the right to life. However, Latin American nations had acknowledged the right to life long before ratifying these international treaties.

3 Chile, Honduras, El Salvador, Nicaragua and the Dominican Republic, for example, do not provide for any case of “allowed” abortion, while most of the countries provide for very few exceptions. The exceptions usually provided are based on the threat to the mother’s life or health, or pregnancies resulting from rape or incest. Some of these countries are Antigua and Barbuda, Argentina, Belize, Bolivia, Brazil, Colombia, Costa Rica, Ecuador,

the entire continent. Chile and Honduras are two of the countries that forbid all kinds of abortion, Argentina and Paraguay provide for very restrictive exceptions, and Mexico—with a federal system of government—has legalized abortion in the Federal District only (the rest of the Mexican Federal States permit abortion only in limited cases). This publication describes their national and international laws and obligations, as well as the most relevant judicial and administrative decisions.

Also included is an analysis of two special cases: the 2006/2010 judicial activist decisions by the Constitutional Court of Colombia “legalizing” abortion (quite exceptional rulings, out of line with the rest of Latin America, and probably illegitimate under the Columbian constitution), and the impact of abortion in the last presidential elections in Brazil, the largest nation in Latin America.

Thus, although this publication does not examine abortion laws in all Latin American countries, the analysis of the ones chosen illustrates why Latin America is defined as a “pro-life” continent, that is, a continent where most nation’s laws forbid most kinds of abortion, but also a continent where pro-abortion forces work, through courts and legislatures, to try to undermine the commitment to human life.

It is therefore essential that these countries continue this pro-life path, progressively improving the legislation in force, adapting it to new realities and necessities –either by including further aspects of the right to life or by reinforcing the laws already established– and improving the conditions necessary to ensure the effective enjoyment of the right to life.

According to data provided by the Economic Commission for Latin America and the Caribbean (ECLAC), in 2002, the number of Latin Americans living in poverty reached 220 million, representing 43.4 % of the entire population,⁴ and, to date, it is still the region with greatest income inequalities in the world.⁵

These inequalities are strongly used as propaganda in favor of the legalization of abortion. Pro-abortion forces argue that the penalization of abortion actually criminalizes poverty, since only women with scarce economic resources would be subjected to “unsafe” clandestine practices, thus increasing maternal mortality

Granada, Guatemala, Haiti, Jamaica, Mexico, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela. Cuba and Puerto Rico are the only two countries that had legalized abortion.

4 <http://www.eclac.org/cgi-bin/getProd.asp?xml=/prensa/noticias/comunicados/4/12984/P12984.xml&xsl=/prensa/tpl/p6f.xsl>

5 <http://www.eclac.cl/cgi-bin/getProd.asp?xml=/publicaciones/xml/1/39991/P39991.xml&xsl=/tpl/p9f.xsl&base=/tpl/top-bottom.xsl>



rates. In other words, those who advocate in favor of “legal abortion” consider that poverty, clandestine abortions and maternal mortality are necessarily related, and offer abortion as the most adequate solution to those problems.⁶

However, two important realities must be pointed out here.

In the first place, high rates of maternal mortality are not related to the illegality of abortion, but are due to other causes, such as the lack of timely and effective access to maternal health services.

In this regard, the World Bank has calculated that, if every woman had access to medical services to address their complications during pregnancy, especially access to obstetric emergency care, 74% of women could be saved.⁷

The Inter-American Commission of Human Rights (IACHR) has expressed that in Peru, 74% of women in rural areas give birth at home without qualified professional care, as do 90% of women in indigenous communities, even though one of the factors recognized internationally as associated with reducing maternal morbidity and mortality is whether childbirth is attended by qualified personnel. In Bolivia, a country with the highest maternal mortality rate in the Andean region (290), the rate of maternal mortality varies significantly depending on geographic region (high plateau, valleys, or tablelands) and depending on place of residence (urban or rural), with obstetrical complications, hemorrhage, and infections being the main causes of maternal mortality.⁸

This shows that high rates of maternal mortality are not related to the criminalization of abortion, and the experience of countries like Honduras and Chile, two countries profiled herein, confirm this point. As a matter of fact, rates of maternal mortality in these countries have been reduced even while their

6 For instance, the International Planned Parenthood Federation has stated, in its publication titled “Death and Denial: Unsafe Abortion and Poverty”, that “millions of women have no access to reproductive health services; many more have little or no control in choosing whether to become pregnant. As a result, every year, some 19 million women have no other choice than to have an unsafe abortion. Many of these women will die as a result; many more are permanently injured. Nearly all the women who die or are injured are poor and live in poor countries”. http://www.ippfwhr.org/sites/default/files/files/Death_Denial_Sp_0.pdf

7 WAGSTAFF, A. and M. CLAESON, 2004 *The Millennium Development Goals for Health: Rising to the Challenges*. Washington DC: The World Bank, cited by the Inter-American Commission of Human Rights, *Access to Maternal Health Care from a Human Rights Perspective*, Organization of American States, Washington DC, 2010, p. 3.

8 Inter-American Commission of Human Rights, *Access to Maternal Health Care from a Human Rights Perspective*, Organization of American States, Washington DC, 2010, p. 3 and 5.

criminal laws against abortion were strengthened, revoking all cases of “allowed” abortion.⁹

In the second place, and related to what has been presented above, it should be noted that under no circumstances does the solution to problems related to maternity in situations of poverty lie in the legalization of abortion. On the contrary, each nation must evaluate the best way of assisting women facing problematic pregnancies, guaranteeing the accessibility to basic services, in pursuit of a comprehensive protection that ensures that women and their children, born and unborn, are fully assisted in their needs.¹⁰

Finally, it is important to denounce the fact that nowadays Latin American states are attacked and pressured by national and international organizations that promote the legalization of abortion. These organizations assert that Latin American laws violate treaties on human rights.¹¹

This is obviously a self-contradictory and incoherent position, since the right

9 Honduras has reported a 40% decrease approximately of maternal mortality from 1990 to date (Please see the article corresponding to Honduras in this publication) and Chile now has the highest standard of maternal health in Latin America, and is the second country—after Canada—with the lowest maternal mortality rate: 18.8 per 100,000 live births. As a matter of fact, the maternal mortality rate in Chile decreased from 293.7 per 100,000 live births in 1962 to 18.2 per 100,000 live births in 2007. These figures reflect a 93.8 % total decrease of maternal mortality rate in that period of time. It is worth noting that the complete prohibition of abortion in Chile occurred in 1989, without affecting the tendency of progressive reduction of said mortality rate. <http://es.scribd.com/doc/63446440/Aborto-y-mortalidad-materna-en-Chile-Presentacion-del-Dr-Koch-ante-Senado-2011>

10 That means that each state must analyze the conveniences of guaranteeing this protection by means of direct governmental services or by means of private service providers, encouraged and favored by tax exemptions or other ways of promotion, the state in that case having a subsidiary participation. However, regardless of the method that each state chooses to protect maternity, it is undeniable that this protection is an essential duty, which must be effectively fulfilled in order to ensure the right to life of the most vulnerable ones, i.e. the unborn. In this regard, some legislative guidelines are hereby proposed in this publication, in pursuit of the above objective.

11 Amnesty International is one of the organizations that has put a lot of pressure on governments. For example, it has asserted that the complete prohibition of abortion in Nicaragua is a “serious deviation from the government’s commitment to improve social equality, and has serious consequences on the protection of women’s and girls’ human rights”. Please visit <http://www.amnestyusa.org/pdfs/amr430012009spa.pdf>.



to life has been expressly protected in several treaties and declarations, none of which acknowledges—either expressly or implicitly—a right to abortion.

In this regard, it has to be mentioned that the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), though having several provisions to protect pregnant women and the unborn, has a Committee that has improperly questioned the validity of laws that forbid or criminalize abortion, urging nations to review their national legislation in this matter in order to enact new laws permitting the “termination of pregnancy”.¹²

That is why in this publication¹³ a governmental interpretation of CEDAW and its Optional Protocol is proposed so as to ensure that the national legal systems are not subjugated by recommendations made by international organizations which, lacking legal powers and popular support, nevertheless intend to impose pro-abortion changes to the laws.

Indeed, one of the chief purposes of this book is to provide suggestions to politicians and citizens in Latin America seeking to strengthen pro-life protections. Those suggestions appear in the following chapter of this book, “Legislative Guidelines for Latin America”.

In this way—and adhering to the principle of national sovereignty, which recognizes the right of every state to reject any arbitrary foreign interference, as the starting point—Latin American countries will continue following their historical tradition, protecting their legal systems, gradually increasing the legal recognition of the right to life, and making the enjoyment of this right—the first human right—fully effective in practice. In this way, Latin American states can continue to ensure, even more effectively, that every person enjoys fundamental rights, beginning with the first right of all, the human right to life.

12 In its periodic reports, the Committee of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has criticized several countries such as Chile, Paraguay and Mexico for having restrictive laws in this matter. Please see the article corresponding to each country in this publication. This Committee has also criticized the State of Belize. Please visit http://www.un.org/womenwatch/daw/cedaw/cedaw25years/content/spanish/CONCLUDING_COMMENTS/Belize/Belize-CO-1-2.pdf.

13 See the section on model laws herein.



Legislation Guidelines for Latin America

As will be shown in this book, Latin America is a continent that has fulfilled the commitment to life. Long before having been recognized in international treaties, the human right to life had been acknowledged in Latin America's laws, responding to the demands of human dignity.

However, as time goes on, this commitment to life suggests new challenges. Therefore this book suggests, in what follows, some guidelines that Latin American legislators might consider in order to keep advancing the cause of life.

I. General Guidelines to a Constitutional Amendment

II. Prohibition of Hormonal “Emergency Contraception”

III. Rights Acknowledgement

- A. Comprehensive Protection of Pregnant Women and Unborn Children
- B. Protection of Women with Problematic Pregnancies
- C. The Right to Information
- D. Burial of the Unborn

IV. Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol

I. General Guidelines to a Constitutional Amendment

Most Latin American Constitutions were drafted during the 19th century, and were characterized by the establishment of the principle of division of powers, of limitations on state power, and of the acknowledgment of a set of rights and individual constitutional guarantees to freedom, equality, and property that also acted as limits to the state. None of these constitutions originally mentioned the right to life.

However, it has always been understood that the right to life was implicitly included in the constitutions, and this understanding was later confirmed by ratification of international treaties of human rights that explicitly stated this right.¹ Nowadays, there is no doubt that the national constitutions have effectively protected the right to life, even though they do not mention—with few exceptions—

¹ See discussion in the Overview section

the moment when such protection begins.²

On account of the existing consensus regarding the legal protection of life, and considering that the Constitution of each state is its main hierarchical law and expresses its fundamental values, legislators should consider amending their constitutions so that the right to life is explicitly and categorically acknowledged from the moment of conception.

In this sense, the new constitutional text could consider the following:

- That every person has the inherent right to life.
- That every human being is considered a person from the moment of conception.
- That this right shall be guaranteed at all times, without discrimination of any kind.
- That every child needs special care due to his physical and mental immaturity.
- That pregnant women must be specially protected. For this purpose, the state shall take positive measures to ensure women's as well as the unborn's well-being.

II. Prohibition of Hormonal “Emergency Contraception”

Hormonal “emergency contraception” (HEC) has not been treated the same way in the laws of the various Latin American countries. Some countries, such as Argentina, Chile and Mexico, have included it in their national health programs, while other countries, such as Paraguay and Honduras, have not expressly authorized or forbidden it.³

Taking into account the right to life from the moment of conception and the fact that this kind of drugs prevents implantation (i.e. they cause the death of the existing human being), the legislators in each state could take into consideration certain legislative guidelines to forbid and regulate it, providing, among other things, for the following:

2 An exception is Paraguay. Please see the report on Paraguay herein where we referred to the 1992 Paraguayan constitutional amendment, by which the right to life was acknowledged, and its legal protection was thereby guaranteed, in general, from the moment of conception (Art. 4).

3 In order to better understand the situation of hormonal “emergency contraception” in each country, please see the chapter corresponding to each country in this book.



- The complete prohibition to manufacture, distribute and/or sell any drug that directly or indirectly causes the death of human embryos, either by inhibiting their implantation in the uterus or in any manner terminating pregnancy after implantation.
- The incorporation, in the Criminal Code, of a criminal category that punishes every person who manufactures, sells, supplies or distributes drugs that cause the effects described above.
- The incorporation, in the Criminal Code, of a criminal category that punishes every government officer who authorizes such drugs' manufacture, sale, supply or distribution.
- The incorporation, in the Criminal Code, of temporary disqualification if the offender is a public officer or a health professional.
- The recognition of a special civil action for women who have consumed drugs whose abortion-inducing effect has been concealed, or whose label has been altered, for the purpose of compensating them for their material and/or moral sufferings; in these cases, the existence of moral suffering is to be presumed.⁴

III. Rights Acknowledgement⁵

A. Comprehensive Protection of Pregnant Women and Unborn Children

For the purposes of comprehensively protecting the rights of pregnant women and unborn children, a state may wish to create a system that unites public policies on these matters.

In this regard, legislators should consider designing a “*Sistema Nacional de Protección Integral de la Mujer Embarazada y del Niño por Nacer*” (National

4 Moral damages are designed to compensate and alleviate the physical suffering, mental anguish, fright, serious anxiety, wounded feelings, moral shock, social humiliation, and similar harm unjustly caused to a person. In this case, it would be an economic compensation for the psychological damage caused by the unwanted–death of a child, due to the consumption of these drugs.

5 No language used in this section should be interpreted as to include an alleged right to abortion.

System of Comprehensive Protection to Pregnant Women and Unborn Children),⁶ which might be in charge of unifying and promoting the public policies that provide for pregnant women's situation in labor, education, social, health and any other fields in which their rights are particularly involved.

Likewise, legislators could also provide for the creation of an *Ombudsman for Unborn Children* as an institution especially created with the aim of protecting their rights, especially when these rights are in tension with the mother's rights.⁷

General Guidelines:

1. System of Comprehensive Protection of Pregnant Women and Unborn Children. General Characteristics:

- The purpose of this system should be to comprehensively protect the rights of pregnant women and of the unborn person, so as to ensure the full, effective and permanent exercise and enjoyment of the rights acknowledged by the national legal system and the international treaties in which the nation is a state party.
- The state bodies' public policies shall guarantee the full exercise of the rights of pregnant women and unborn children.
- This system should ensure pregnant women's rights to have complete information about plans, programs and actions created and developed to benefit them, in particular those related to social security and public, labor and educational health.

2. Ombudsman for Unborn Children. General Characteristics:

The purpose of an Ombudsman for Unborn Children would be to look after the protection and promotion of their rights. For these purposes, "unborn child" means every natural person from the moment of conception until his birth.

Some of the powers that can be acknowledged to the Ombudsman are:

- To have at his disposal all public resources that he shall need to

⁶ Said system can be framed within the scope of the National Executive Power.

⁷ For example, the necessary intervention of the Ombudsman for Unborn Children in every situation where a case of non-punishable abortion is applicable may be provided for.



- effectively defend unborn children's lives, physical integrity and rights.
- To foster judicial and extrajudicial measures—at his own initiative or at a party's request—in every legal process in which an unborn child has interests legally guarded.
 - To defend and represent in trial—either as plaintiffs or defendants—the unborn children when their interests conflict with their parents'—no matter whether the latter are themselves minors or adults—or to exercise their rights.
 - To investigate all kinds of criminal reports affecting unborn children's health, lives and development, as well as any unlawful activity tending to cause illegal abortions.
 - To demand the protection of unborn children, either at his own initiative, at the request of one of the parties or a third party, and in any instance provided for by the international system of protection of human rights.
 - To initiate actions with a view to the application of punishments for offenses committed against the rules on the protection of the unborn.
 - To address—for the purposes of his investigations—Public Entities to warn them, to make recommendations, to remind them of their legal and functional duties, and to make proposals for taking new measures.
 - To report to the competent authorities⁸ about any delay caused by the Judges or the Courts' Clerks, which might be seriously detrimental to the legitimate interests of those whom he represents.
 - To supervise public and private entities devoted to assisting pregnant women, especially those in charge of providing health services. He shall report any irregularities that may threaten or violate unborn children's rights.

B. Protection of Women with Problematic Pregnancies

According to data provided by the Economic Commission for Latin America and the Caribbean (ECLAC), in 2002 the number of Latin Americans living in poverty reached 220 million, representing 43.4 % of the population.⁹

⁸ In accordance with each state's legislation.

⁹ <http://www.eclac.org/cgi-bin/getProd.asp?xml=/prensa/noticias/comunicados/4/12984/P12984.xml&xsl=/prensa/tpl/p6f.xsl>

The way in which this reality is referred to by those who advocate in favor of “legal abortion”, identifying poverty, clandestine abortions and maternal mortality as realities that are necessarily related, and offering abortion as the most adequate solution to those problems, has already been questioned.¹⁰

However, the opposite has been proven: the effective access to health services and to services that provide solutions to problems proper to maternity are the effective means to ensure safe pregnancies and the protection of both women and their unborn children.

Therefore, legislators should take account of the creation of a system of special protection for women with problematic pregnancies.

State Protection System. General Guidelines.

- The System of State Protection would be made up of every organization and entity that plans, coordinates, guides, executes or supervises public policies, either state or privately managed, on matters concerning public health.¹¹
- Within the framework of the System of Protection, a Center of Assistance to Pregnant Women might be created in every hospital, either state or privately managed. The purpose of this Center of Assistance would be to advise and support women carrying problematic pregnancies, and/or in situations of psychophysical, social or economic risk.
- These Centers of Assistance to Pregnant Women would be made up of medical professionals specialized in gynecology and obstetrics, neonatology and psychiatry, and of psychologists and social workers.
- Such Centers of Assistance might offer the following services:
 - Providing direct assistance 24 hours a day, especially to pregnant women who are facing problems, advising them so as to overcome any conflicts that may arise during pregnancy.
 - Providing information about public and private support to pregnant women who are facing problems to carry their pregnancies to term.
 - Following up with each case and referring to the existing support that each patient needs.
 - Providing special assistance to pregnant adolescents: education on maternity, psychological support, special attendance regimes in school centers, etc.

¹⁰ See discussion in the Overview section

¹¹ Private entities would be free to choose to participate in the System on a voluntary basis.



- Depending on the country's laws, providing the following assistance: free pregnancy tests, 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, food, infant formula, cereals, etc.
- These tasks and functions could be performed by private institutions as well.

C. The Right to Information

As stated before, one of the most important ways to prevent abortions entails the concrete support offered to pregnant women, assisting them to fulfill their needs, and ensuring a state of protection that allows them to live their maternity free from unnecessary risks. It is also very important, though, that every pregnant woman is assured the effective access to information, and that she is aware of the broad protection the law grants her, in labor matters, as well as in family, care, and health services matters, so she can resort to them if needed.

It would be also important to provide for the creation of a specialized information system for cases of women with problematic pregnancies. In such cases, the intention is to provide women with as much relevant information as possible. In this regard, this system of information would be complimentary to the System for the Protection of Women with Problematic Pregnancies and the Centers of Assistance to Pregnant Women mentioned herein, made up of medical professionals, psychologists and social workers, and which purpose is to advise and support women carrying problematic pregnancies.

1. Pregnant Women's Right to Information

If a woman is notified of her pregnancy, either in a public or private health institution, she is entitled to be informed, at the same time, of her rights, in accordance with national and local laws in force.

The following is information that could be included:

- Rights that protect pregnant women in labor matters.
- Rights provided for in the country's social security regime.
- Right to free health services (applicable in those countries which have recognized these services as a legal right).
- A comprehensive list of agencies offering health services, describing the services of prenatal care, labor and neonatal care, as well the contact information for each of them.
- A free phone number available 24 hours a day, where women can receive

information about the agencies, the location and the services offered.

- Any other information that the competent authority deems necessary to include.

2. Information for Women with Problematic Pregnancies

In cases of problematic pregnancies, the health professional should report the fact to a competent authority,¹² who, aside from the information detailed above, may also inform about the following:

- The existence of medical alternatives to support pregnancy as well as social support and the possibility of adoption services.
- The consequences and risks associated with abortion, including risks of infection, hemorrhage, cervical perforation or uterine rupture, risks for future pregnancies, breast cancer risk, and potential psychological effects.
- The illegality of forced abortion (i.e. it should be expressly stated that a third party forcing a woman to have an abortion is illegal), pursuant to each country's provisions.

The information shall be confidentially provided to women, and everything said between them and the professional assisting them shall be protected by the doctor–patient privilege, always bearing in mind that the purpose is, at all times, to protect women's and unborn children's health.

3. Public Education Campaigns

The National Ministry of Health, together with the Ministry of Education, can work together to publish up–to–date informational materials; the publication shall be in Spanish and in the languages of the country's native ethnic group.

The informational materials may consist of printed and audiovisual brochures, or any other means that the corresponding authority deems appropriate.

The materials should meet the following characteristics:

- Geographical arrangement.
- Printed with typography that is big enough to be clearly legible.

The materials' content should be the following:

- Information about the public and private service agencies available to

12 The Centers of Assistance to Pregnant Women may be designated competent authority. Please see "Protection of Women with Problematic Pregnancies".



assist women during their pregnancies and labor, including, among others, adoption agencies.

- A description of the services that such agencies offer, their phone numbers and addresses, information about the available medical advantages available with regard to prenatal care, labor and neonatal care.
- A free phone number available 24 hours a day, where women can receive information about the agencies, the services they offer;
- A list of the father's duty with regard to the child, during pregnancy, labor and after delivery, including though not limited, to his economic assistance obligation.
- Potential anatomical and physiological characteristics of unborn children, from conception until the full term of pregnancy, including, among other things, color photographs of the child to be born. The description shall deal with the child's brain and heart functioning, appendages and internal organs during the child's development stages, and his chances of survival. A real-size photograph—or reproduction—of unborn children may also be included.
- Objective information about the immediate and long-term medical risks usually related to abortion, including, though not limited to, the risks of infection, hemorrhage, cervical perforation or uterine rupture, risks for future pregnancies, breast cancer risk, and potential adverse psychological effects associated with abortion.
- Description of the legislation that provides for the illegality of forced abortion.
- In cases of audiovisual means, an unborn's four-dimensional ultrasonography, showing the child's gestating age between four and five weeks, six and eight weeks, and all the months that follow until birth.

4. Regulation of Informed Consent. General Guidelines.

Whenever an abortion that is not punished by criminal law is performed, the woman's previous voluntary and informed consent must be granted.

It is vital to know if this consent has been granted since, if this pre-requisite is missing, this practice is illegal.

D. Burial of the Unborn

When mentioning the existence of a person, there is no need to make any distinction between born and unborn since the existence of a human being is acknowledged from the moment of conception. That means that no arbitrary discrimination based on birth can be made in order to deny rights acknowledged to every human being by virtue of being such. This is extended to the way a person is treated upon his death.

In this regard, we can see an unjustified discrimination in countries where the person who dies after his birth is treated differently from the person who dies in his mother's womb, since his family does not have the possibility of burying him.

Indeed, in some countries the unborn fetuses are treated as "residue" or "waste", despite being humans. In many cases, their families are not informed about the destination of the fetuses' remains, and the latter are used for scientific purposes, without the parents' authorization.

Therefore, legislators may well consider the possibility that parents whose children die before being born have the right to request their children's remains from the corresponding hospital so they are decently laid to rest.

General Guidelines:

- Health institutions located within the national territory¹³ and medical doctors, obstetricians or other health professionals assisting delivery are required to inform the parents or legal guardians of the possibility of burying the unborn person who dies in the maternal uterus, regardless of the gestating moment when death occurs.
- Health professionals are bound to issue a fetal death certificate when requested by the interested parties, and they cannot decline to do so based on the fetus' or embryo's height, weight or gestating stage.
- When the interested party requests the fetus's remains for burying him, the health establishment and health professionals shall be compelled to meet the interested party's request.
- Fetal remains may be used for research or medical training purposes provided that the parents or legal guardians freely express this in writing.
- If a person who dies in his mother's womb is not taken by his parents or

¹³ This provision can be adapted to each state depending on the federal, provincial or municipal competence in this matter.



legal guardians, or if the fetal remains were not granted for research and medical training purposes, the health establishments shall be bound to treat him as any other deceased person, without failing to comply with the legal provisions in force.

- Public cemeteries located in the state's territory¹⁴ shall have an appropriate place where unborn children who die in the maternal uterus can be buried.
- Regarding public burial, cost shall be waived for the parents and assumed by the state.

IV. Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol

In their Preambles, the Convention on the Elimination of All Forms of Discrimination Against Women, as well as its Optional Protocol, have affirmed their conformity with the provisions of the United Nations Charter, the Universal Declaration of Human Rights and several International Covenants on Human Rights.

These documents have by express terms affirmed the dignity and value of human beings, and the principle of non-discrimination. In other words, they have reiterated the equality of all human beings in dignity and rights and that every person is entitled to all the rights and liberties declared by the Universal Declaration of Human Rights, without distinctions of any kind.

In particular, the Convention considered—and rejected—the possibility of maternity being a reason for discriminating against women, and thus includes several provisions, providing legal protection to both women and their unborn children. In this regard, it is worth noting some of these provisions:

- In its Preamble, the Convention acknowledges the “social significance of maternity” and establishes that “the role of women in procreation should not be a basis for discrimination”.
- In article 4.2, it states that “Adoption by States Parties of special measures (...) aimed at protecting maternity shall not be considered discriminatory”.
- Article 5.2 establishes that States Parties shall take all appropriate measures so as to “ensure that family education includes a proper understanding of maternity as a social function and (...) that the

14 Ibid.

interest of the children is the primordial consideration in all cases”.

- Article 11.2 states that “in order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work”, States Parties shall take appropriate measures tending (i) to prohibit dismissal on the grounds of pregnancy, (ii) to introduce maternity leave with pay, (iii) to encourage the provision of social services, and (iv) to provide special protection to women during pregnancy in types of work proved to be harmful to them.
- Article 12.2 establishes that “States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation”.

Upon reading the provisions discussed above, it becomes evident that the Convention was intended both to protect pregnant women, preventing maternity from becoming a cause of discrimination, and to provide legal protection to the unborn.

Pursuing the same objectives, the Convention created a Committee to examine the progress made by States Parties in the application of the Convention. State Parties thus commit themselves to file a report before the UN General Secretariat on the legislative, judicial, administrative and other measures taken in order to make the Convention’s provisions effective. The Committee is in charge of examining these reports.¹⁵

However, the truth is that this Committee has breached its authority and powers several times. It has, for example, questioned the validity of laws that forbid or criminalize abortion, urging nations to review their national legislation in this matter, in order to enact new laws permitting the “termination of pregnancy” and the distribution of so-called emergency contraceptive methods.¹⁶

It should be remembered that the Convention does not mention “sexual and reproductive rights” anywhere, or a “right” to abortion; on the contrary, the Convention abounds with provisions intended to protect maternity.¹⁷

Despite the fact that article 16.1 e) is used by those supporting abortion to

15 Pursuant to Art. 18.1 of the Convention.

16 Please see the articles about Chile, Paraguay and Mexico in this book, to view the detailed content of the recommendations made by the Committee to each country.

17 It should also be noted that there is no international treaty that makes reference to sexual and reproductive rights.



argue that, under the Convention, an alleged right to abortion exists, this article simply establishes that men and women have “the same rights to decide freely and responsibly on the number and spacing of their children”, (i.e. this article gives equal rights on “decid[ing]...the number and spacing of...children”, and cannot fairly be interpreted as providing for a right to abortion).¹⁸

Based on the foregoing, ratifying the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women is not a sensible move, since such Protocol grants greater powers to the Committee, authorizing it to receive communications (complaints) filed by a person or a group of people—who must be within the jurisdiction of a State Party—who claim to be victims of the violation by a State Party of any of the rights listed in the Convention.¹⁹

In this regard, the states may consider the following:

With regard to the Convention:

- Modifying the ratifying instrument and making an interpreting declaration regarding articles 12.2 and 16.1 e) of the Convention. Such declaration may read as follows:

“Services ‘relating to pregnancy, confinement and the post–natal period,’ as well as the ‘adequate nutrition during pregnancy and lactation’ mentioned in **article 12.2** of the Convention shall be interpreted as benefiting both the pregnant woman and her unborn child”.

“The right to decide freely and responsibly on the number and spacing of their children, mentioned in **article 16.1 e)** shall not be interpreted as including abortion—in any of its forms—as a method of family planning, for it is not a right stated in the Convention, either expressly or implicitly”.

18 This alleged right to abortion is neither mentioned in the Convention nor included in the World Conferences on Women or the World Conference on Population and Development. 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”. Please visit http://www.unfpa.org.py/download/pdf_cairo.pdf. The same provision was passed by the Report of the IV World Conference on Women, in paragraph 106, item k). Please visit <http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20S.pdf>

19 In accordance with article 2 of the Convention’s Optional Protocol.

With regard to the Optional Protocol:

- Nations should not ratify the Optional Protocol to the Convention.
- In the case the state deems it appropriate to ratify the Protocol, the recommendation is to make an interpreting declaration in the following terms:

“Neither article 2 nor any other article shall be interpreted to mean that the ‘rights listed in this Convention’ include, under any circumstances, abortion in any of its forms, since it is not a right expressly listed or implied in the Convention”.

“This declaration is not affected by the prohibition established in article 17 of the Protocol, since its legal nature is not that of a reservation but of an interpreting declaration”.

- In the case one of the states has ratified the Convention or the Protocol, the recommendation is to repeal it or to modify the ratifying instrument, adding the interpreting declaration suggested in the case above.



United Mexican States

Diana Ortiz Trujillo¹

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I. Introduction

“... the right to life does not exist, or better, life is not a right. Nobody has the right to life – every human being is alive... and that’s it! A very different thing is that, stemming from that pre-legal reality, the Constitutions acknowledge the right to protection of health, to protection of our physical integrity, to an appropriate environment, to food, to self-defense, etc. Thus, as Joseph Raz states, life is an assumption that will let us have access to everything valuable and to exercise all our rights”³

The right to life is usually used to refer to that primary and essential right without which no other right could exist. More specifically, with regard to this right, the Inter-American Court of Human Rights has stated that it is a “fundamental right, and its exercise is a prerequisite for exercising every other right. If it is not respected, all other rights are meaningless. By virtue of the fundamental character of the right to life, any approach restricting it is inadmissible”.⁴ This

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3 Translation from the original: Francisco VAZQUEZ GÓMEZ BISOGNO, “El voto de minoría a favor de la vida. Un relato de las incongruencias de la sentencia mayoritaria que constitucionalizó el aborto en México”, in Victor Manuel MONTOYA RIVERO and Diana ORTIZ TRUJILLO, “En defensa de la vida: un voto de minoría sobresaliente. Homenaje al Ministro Sergio Salvador Aguirre Anguiano, Premio Ramón Sánchez Medal 2010”, Mexican Commission on Human Rights, NPO, México, 2010, 177.

4 Case “Niños de la Calle (Villagrán Morales y otros) contra Guatemala”, Ruling of November 19, 1999, Set C, N° 63, Par. 144.

means that the value of life is so important that it is granted a certain supremacy over the rest of the rights acknowledged by the positive legal system.

Then the question is whether it is correct to speak of “the right to life”. If life is a necessary assumption for the existence of any other right, the commonly used terminology seems wrong. It is not a right *per se*, but a pre-legal reality, with a fundamental value universally acknowledged. If there is no life, there is no right owner and, therefore, no right to life.

However, regardless of the pertinent terminological details regarding the expression “right to life”, the truth is that there is consensus as to its meaning, the importance of the value of life, and consequently, the need to protect it in law.

This chapter will describe the current state of the protection of this *right* in the United Mexican States at a legislative national level, as well as the international commitments and the jurisprudential development.

II. The Right to Life

A. Political and Legal Organization of Mexico

The Mexican form of government is that of a representative, democratic and federal republic, made up of a Federal District and states united in a Federation, remaining autonomous in everything related to their domestic regime.

The parts that make up the Federation are the States of Aguascalientes, Baja California, Baja California Sur, Campeche, Coahuila, Colima, Chiapas, Chihuahua, Durango, Guanajuato, Guerrero, Hidalgo, Jalisco, México, Michoacán, Morelos, Nayarit, Nuevo León, Oaxaca, Puebla, Querétaro, Quintana Roo, San Luis Potosi, Sinaloa, Sonora, Tabasco, Tamaulipas, Tlaxcala, Veracruz, Yucatán, Zacatecas and the Federal District.

The national sovereignty originally lies in the people, who always have the inalienable right to alter or change the form of government. The sovereignty is exercised by means of the Powers of the Union, which are divided into Executive, Legislative and Judicial; the jurisdictions of these powers and the states’ domestic regimes are provided for by the Federal Constitution and the State Constitutions, which cannot contravene the Federal Pact⁵ under any circumstances.

The City of Mexico, Federal District, is the seat of the Powers of the Union. The Legislative Power rests in the General Congress, consisting of two Chambers: the Deputies’ Chamber and the Senate (Art. 50 of the Constitution); the Executive Power rests in only one individual named President of the United Mexican States

5 Federal Constitution of Mexico.

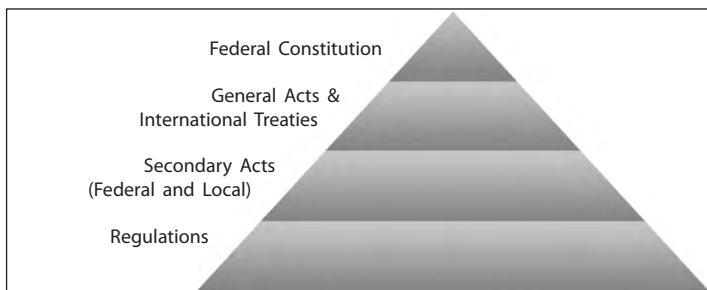


(Art. 80 of the Constitution); and the Judicial Power rests in the Supreme Court of Justice, the Electoral Tribunal (Tribunal Electoral), the Circuit Bench and Unitary Tribunals (Tribunales Colegiados y Unitarios de Circuito) and the District Courts (Juzgados de Distrito) (Art. 94 of the Constitution).

With regard to the states, article 116 of the Federal Constitution establishes their organization, respecting the tripartite principle of the division of powers. Article 115 of the Constitution establishes that the form of government of the states—for the purposes of their domestic regime—shall be republican, representative and popular, and their territorial division and political organization shall be the free Municipality.

Article 133 of the Federal Constitution sets forth the hierarchy of laws, stating that the Federal Constitution, the laws issued by the Union's Congress emanating from the Constitution, and the international treaties that are in accordance with the Constitution, signed by the President of the Republic and passed by the Congress, shall be the Union's Supreme Rule.

In this regard, the Supreme Court of Justice of Mexico has maintained that, in accordance with the mentioned rule, the principle of constitutional supremacy governs the Mexican legal system; according to this principle, the Federal Constitution is in the apex of the rules pyramid and, immediately below it are the international treaties and general acts, which are issued upon constitutional clauses compelling the legislator to pass them.⁶



6 Cfr. Thesis by the Plenary of the Supreme Court of Justice of the nation, identified as P. VIII/2007, published in the *Semanario Judicial de la Federación* (Weekly Judicial Publication of the Federation), vol. XXV, April 2007, p. 6. General acts are, for example, the General Act on Health, the Federal Act on Labor, the General Act on Education. General Acts are those whose creation and/or existence stem directly from an article of the General Constitution of the Republic. The Constitution thereby establishes very specific bases to be provided for and respected by general acts; the latter's provisions affect the three levels of government: federal, state and municipal.

Thus, the Constitution, the international treaties and the general acts are the Supreme Rule of Mexico, constituting a general superior legal body. Below this general superior legal body or constitutional block are the secondary acts—either federal or local—the regulations and the circular letters.

B. The Role and the Content of International Treaties Signed by Mexico

Mexico, by a decision of the President, with the Senate’s approval, has entered into several. The binding force of said treaties is dependent upon their due publication in the Official Gazette of the Federation (i.e. in the official journal).

Some of those treaties are:

- American Convention of Human Rights, published in the Official Gazette of the Federation on May 7, 1981.
- International Covenant on Civil and Political Rights, published in the Official Gazette of the Federation on May 20, 1981.
- Convention on the Rights of the Child, published in the Official Gazette of the Federation on January 25, 1991.

American Convention of Human Rights

Article 4.1 of the treaty establishes 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. No one shall be arbitrarily deprived of his life”.

It should be noted that, on March 24, 1981, the Organization of American States’ General Secretariat received an instrument—which included an Interpreting Declaration—by which the Mexican State adhered to the Pact of San José under the following terms:

“Regarding article 4.1, it is considered that the expression ‘in general’ does not bind the states to adopt or keep in force the legislation protecting life ‘from the moment of conception,’ since this matter is reserved to the states dominion.

On the other hand, the Government of Mexico maintains that article 12.3 comprises the limitation that establishes that every religious legal proceeding shall take place in the temples, as set forth by the Political Constitution of the United Mexican States”.



Also, on April 9, 2002, the Mexican Government notified the Organization of American States' General Secretariat of its intention to partially take back the reservation and interpreting declarations, keeping only the Interpreting Declaration related to the following conditions:

“Interpreting Declaration

Regarding article 4.1, it is considered that the expression ‘in general’ does not bind the states to adopt or keep in force the legislation protecting life ‘from the moment of conception,’ since this matter is reserved to the states dominion”.

Additionally the Vienna Convention on the Law of Treaties establishes, on the one hand, that a state cannot formulate a reservation and/or interpreting declaration that is incompatible with the object and purpose of the treaty (art. 19, par. c), and, on the other hand, that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (art. 31, par. 1).

Therefore, the interpreting declaration mentioned can be considered to be completely invalid, since an interpretation made in good faith and in accordance with the ordinary meaning to be given to the terms of the American Convention proves that it protects life from the moment of conception. Indeed, article 4.1 expressly states that life shall be protected “from the moment of conception;” thus, an interpretation that goes against its express wording contradicts its object and purpose.

Moreover, article 31, par. 2 of the Vienna Convention on the Law of Treaties establishes that its preamble is part of the context that shall be taken into account for the purpose of the interpretation of treaties. In this regard, the Preamble of the American Convention of Human Rights reaffirms the intention to guarantee to the maximum extent possible all human rights acknowledged to every man, regardless of him being a national of a certain state; thus, if a state restricts this right, it violates this Treaty. The Preamble of the American Convention establishes the following:

“Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man;

Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection

in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states;

Considering that these principles have been set forth in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope;

Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights; and

Considering that the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters, ...”

Finally, article 29, par. a) of the American Convention of Human Rights establishes that “no provision of this Convention shall be interpreted as permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein”. This means that the very text of article 4.1 of the Convention does not support a restrictive interpretation of the right to life acknowledged therein, or an interpretation that completely denies it.

However, the Mexican Supreme Court of Justice has not addressed the validity or otherwise of said Declaration.

On the other hand, article 5.1 of the Pact of San José protects the person’s physical integrity:

“Every person has the right to have his physical, mental, and moral integrity respected”.

International Covenant on Civil and Political Rights

Article 6.1 of this Covenant establishes that:

“The right to life is inherent in the human beings. This right shall be protected by law. No one shall be arbitrarily deprived of his life”.



Convention on the Rights of the Child

It is especially worth referring to the provisions set forth in articles 1, 2 and 6 of this Convention:

“Article 1. For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under according to the law applicable to the child, majority is attained earlier”.

“Article 2. 1) 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 race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members”.

“Article 6. 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”.

Moreover, in this regard, the Convention preamble establishes the following:

“Bearing in mind that, as indicated in the Declaration of the Rights of the Child, ‘the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.’”

The connection between the Convention text and its preamble derives from the application of the Vienna Convention on the Law of Treaties—to which Mexico is a State Party—since the latter, in its article 31.2, states that for the purpose of the interpretation of a treaty, its preamble shall be considered part of the text.

As is clear from the statements above, the Convention on the Rights of the Child, including its preamble, establishes that every child has the inherent right to life and, due to his physical and mental immaturity, needs special legal protection and safeguards, without making any distinction between born and unborn children. Indeed, the Convention expressly points out that said protection covers every child, “before as well as after birth”.

International Treaties in the Light of the Latest Constitutional Amendment

On June 10, 2011, one of the most important amendments since 1917 was published in the Official Gazette of the Federation, changing the name of Title I, Chapter I of the Constitution to “On Human Rights and Their Guarantees”.

The most significant changes introduced by the amendment were:

- The constitutionalization of the human rights acknowledged in international treaties of which the Mexican State is a State Party (art. 1). It is important to mention that what was included in the Constitution were the human rights, not the international treaties.⁷ As a matter of fact, as mentioned before, the Mexican Constitution is the Supreme Law of the United Mexican States, as established in article 133 of said document. No legislation—in the broad sense of the word, which includes international treaties—is above the Federal Constitution (i.e. not even the international commitments undertaken by the Mexican State have, at a national level, a superior hierarchy than the constitutional provisions).

Despite the foregoing and according to the Mexican Constitution’s text in force, human rights acknowledged in international treaties are part of the constitutional text and must be interpreted in accordance with the provisions contained in the Constitution. However, an international treaty’s provisions which do not refer to a human right are not part of the Mexican Constitution.

- The constitutionalization of the pro hominem principle, which establishes that human rights shall be interpreted and construed in the way that better favors human beings.⁸
- The express acknowledgment of the right to life. In this regard, article 29 of the Federal Constitution reads: “No decree shall restrict or suspend the exercise of the rights to non-discrimination, to recognition

7 The current wording of article 1.1 reads: “In the United Mexican States, every person shall be entitled to the human rights acknowledged by this Constitution and the International Treaties of which the Mexican State is part, as well as to the guarantees that protect them; the exercise of said guarantees shall not be restricted or suspended, except in the cases and under the circumstances established by this Constitution”.

8 The current wording of article 1 reads: “the standards relating to human rights shall be interpreted in accordance with this Constitution and the International Treaties dealing with this matter, always favoring the person’s widest protection”.



as a person before the law, to life, to personal integrity, to family protection, to a name, to the nationality; the rights of childhood; the political rights; the freedom of thought, conscience and religion; the principle of legality and retroactivity; the prohibition of death penalty; the prohibition of slavery and servitude; the prohibition of forced disappearance and torture; or the essential judicial guarantees to protect such rights”.

All in all, the 2011 constitutional amendment incorporated into the Constitution the protection of every human being’s right to life, and reinforced the amendments to the local Constitutions, which will be mentioned below. The Mexican Constitution also returns to a natural law position, by which the Constituent and/or the Amending Power of the Constitution “acknowledges”—instead of “grants”—the human rights referred to by the constitution and protected by the international treaties.

In this regard, it should be mentioned that no international treaty establishing human rights has ever left the human being—born or otherwise—unprotected. For example, no treaty grants a right to abortion.

III. The Right to Life and Abortion

It is clear—according to what has been analyzed above—that Mexico protects the human right to life as a fundamental right, acknowledging it in several international treaties, and in its Constitution.

However, the way criminal law protects this right—particularly by punishing the crime of abortion as a violation to the unborn’s right to life—varies from one state to the other, and has been modified by different legislative amendments.

Below we will analyze the different justifying excuses provided for by each state, as well as the peculiar situation of the Federal District, which, in 2007, incorporated the “voluntary abortion” within the first twelve weeks of gestation as a case of permitted abortion.

A. The Creation of Legal Excuses Absolving the Crime of Abortion

As mentioned before, Mexico is a federal state. This is the reason why the powers to regulate criminal law fall on the federative states, in their respective scopes of jurisdiction. This means that each state has full authority to regulate this matter.

Nonetheless, the Federal Criminal Code still contains some provisions

relating to abortion,⁹ which were applicable in the federal territories and the Federal District. However, these provisions are almost irrelevant, since nowadays said federal territories no longer exist and the Federal District is empowered to legislate on abortion through its Legislative Assembly.¹⁰

Regarding the situation in each state, abortions practiced at any time during the gestation period are punished by the Criminal Codes of 31 federative entities in Mexico. The exception is the Federal District where abortion is punished after the twelfth week of pregnancy, unless it is performed without the woman's consent, in which case it is punished at all times. However, there are absolving excuses varying in their range and sense, depending on each state. Said absolving excuses acquit and exempt some cases of abortion that would be otherwise punishable.

Those exceptions—which are not justifications but acquittals¹¹—take place when abortion is caused by the woman's negligence, or it is considered a “therapeutic” or “eugenic” abortion, or pregnancy is the result of rape or non-consensual artificial insemination, or when the abortion is performed for economic reasons.

i. Abortion Caused by the Woman's Negligent Conduct

Abortion caused by the pregnant woman's negligent conduct is not punished in: Aguascalientes, Baja California (Sect. 136, Criminal Code), Baja

9 Sections 329 to 334 of the Federal Criminal Code punish abortion, though no punishment is applied when abortion is caused by the woman's negligence or guilt, or when pregnancy is the result of a rape, or when the woman's life is at risk.

10 The last two federal territories disappeared on October 8, 1974, when Quintana Roo and Baja California Sur became autonomous Federal States. Regarding the Federal District, in 1997 the Legislative Assembly of the Federal District started to function, having its own, autonomous legislative jurisdictions. There are, however, special cases in which the Federal Criminal Code still applies; for example, when there are boats subjected to the federal jurisdiction.

11 There is a fundamental difference between the “justification causal” and the “acquittal causal” of a crime. The “justification causal” determines that there is no crime, since there is no unlawful or unjust conduct. Usually, such is the case of the self-defense that results in the death of the attacker. The “acquittal causal,” on the other hand, is based on the premise that the crime actually occurs since there is typical, unlawful and guilty conduct; however, for one reason or another, the law decides not to punish the crime's author. It can be seen that the difference between them lies in the fact that the “justification causal” does not accept a crime, while the “acquittal causal” recognizes that a crime has occurred but exempts it of the corresponding punishment.



California Sur (Sect. 252), Campeche (Sect. 298), Coahuila (Sect. 361), Colima (Sect. 190), Chiapas (Sect. 136), Chihuahua (Sect. 219), Federal District (Sect. 148), Durango (Sect. 352), Guanajuato (Sect. 163), Guerrero (Sect. 121), Hidalgo (Sect. 158), Jalisco (Sect. 229), Mexico (Sect. 251), Michoacán (Sect. 290), Morelos (Sect. 119), Nayarit (Sect. 338), Nuevo León (Sect. 331), Oaxaca (Sect. 316), Puebla (Sect. 343), Querétaro (Sect. 142), Quintana Roo (Sect. 97), San Luis Potosí (Sect. 130), Sinaloa (Sect. 158), Sonora (Sect. 270), Tabasco (Sect. 136), Tamaulipas (Sect. 361), Tlaxcala (Sect. 279), Veracruz (Sect. 154), Yucatán (Sect. 393) and Zacatecas (Sect. 312).

Morelos requires that the pregnant woman's conduct be "noticeably" negligent (Sect. 119, Criminal Code).

Morelos justifies this provision by asserting that the moral suffering the woman experiences as a result of the abortion is considered sufficient as a substitute for government imposed punishment.

ii "Therapeutic" Abortion

Therapeutic abortion (as defined pursuant to the various state laws discussed below) is not considered a non-punishable abortion in the States of Guanajuato, Guerrero and Querétaro.

The rest of the states do provide for it, so long as the decision to perform the abortion is supported by the opinion of the doctor assisting the woman. (The practitioner is also instructed to consult another doctor if possible.)

Some states require that there be *serious death risk*: Aguascalientes (Sect. 9), and Quintana Roo (Sect. 97, Criminal Code); while other states require that there be *death risk*: Baja California (Sect. 136), Campeche (Sect. 299), Coahuila (Sect. 361), Colima, Chiapas, Chihuahua, Durango, México, Morelos (Sect. 119, Criminal Code), Oaxaca (Sect. 316), Puebla (Sect. 343), San Luis Potosí (Sect. 130), Sinaloa (Sect. 158, Criminal Code), Sonora (Sect. 270), Tabasco (Sect. 136), Veracruz (Sect. 154), and Yucatán (Sect. 393).

On the other hand, the states that add, in addition to the existence of *risk of death*, *the risk of seriously affecting the woman's health* are Baja California Sur, Federal District, Hidalgo (Sect. 158), Jalisco, Michoacán (Sect. 291), Nayarit (Sect. 339), Tamaulipas (Sect. 361), Nuevo León (Sect. 331), Tlaxcala (Sect. 280) and Zacatecas (Sect. 313).

However, the criteria of "risk to woman's health" turns out to be somewhat problematic. The threat of "seriously affecting the woman's health" leads to various interpretations since the concept of "health" may include many situations. Due to this inaccuracy, the practice can lead to broadening the scope of the exception, allowing the performance of abortions based on "social" or "emotional" health reasons; in

fact, every abortion could be classified within this category. Requiring the doctor's opinion may somewhat counteract this excess, though only to a limited extent.

iii. Abortion in Cases of Pregnancy Resulting from Rape

Regarding abortion in cases of pregnancy resulting from rape, some states authorize it without further requirements. Such is the case of the States of Campeche (Sect. 298), Federal District (Sect. 148), Durango (Sect. 352), Guanajuato (Sect. 163), Jalisco (Sect. 229), Mexico (Sect. 251), Michoacán (Sect. 290), Morelos (Sect. 119), Nayarit (Sect. 338), Nuevo León (Sect. 331), Puebla (Sect. 343), Querétaro (Sect. 142), San Luis Potosí (Sect. 130), Sinaloa (Sect. 158), Sonora (Sect. 269), Tabasco (Sect. 136), Tamaulipas (Sect. 361), Tlaxcala (Sect. 279), Yucatán (Sect. 393), Zacatecas (Sect. 312).

Other states have temporal requirements. For example, the State of Hidalgo (Sect. 158) requires that the pregnancy has not reached the 75th day, while others require that this period be 90 days or 3 months, such as Coahuila (Sect. 361), Colima (Sect. 190), Chiapas (Sect. 136 bis), Chihuahua (Sect. 219), Oaxaca (Sect. 316), and Quintana Roo (Sect. 97).

As to proving that rape occurred, some states demand that a criminal proceeding be initiated, like Aguascalientes (Sect. 9). Others maintain that neither a judicial ruling nor the initiation of a criminal proceeding is necessary, and that the "verification of the facts", which can be carried out by the corresponding administrative authority, is enough. Such is the case in the States of Baja California (Sect. 136), Guerrero (Sect. 121), Hidalgo (Sect. 158), San Luis Potosí (Sect. 130), and Tabasco (Sect. 136). In Quintana Roo, on the other hand, reporting of the crime is required (Sect. 97).

Finally, the following States require authorization by the administrative authority or a judge prior to the abortion: Aguascalientes (Sect. 9), Baja California (Sect. 136), Baja California Sur (Sect. 252), Guerrero (Sect. 121), and Hidalgo (Sect. 158).

iv. Abortion in cases of Pregnancy Resulting from Non-Voluntary Insemination

In Baja California Sur (Sect. 252), Chihuahua (Sect. 219), Colima (Sect. 190), Federal District (Sect. 148), Guerrero (Sect. 121), Morelos (Sect. 119), San Luis Potosí (Sect. 130), Tabasco (Sect. 136), and Veracruz (Sect. 154), abortion is not punished when it aims to terminate a pregnancy caused by unauthorized artificial insemination.

Chihuahua (Sect. 219) and Veracruz (Sect. 154) require, in addition, that the pregnancy be no greater than 90 days.



v. “Eugenic” Abortion

Eugenic abortion (as defined in the various state laws discussed below)¹² is accepted in the States of Baja California Sur (Sect. 252), Coahuila (Sect. 361), Colima (Sect. 190), Chiapas (Sect. 136 bis), Chihuahua (Sect. 148), Guerrero (Sect. 121), Mexico (Sect. 251), Morelos (Sect. 119), Oaxaca (Sect. 316), Puebla (Sect. 343), Quintana Roo (Sect. 97), Veracruz (Sect. 154), and Yucatán (Sect. 393).

In some of these states, abortion can be practiced when undefined and subjective “serious eugenic causes” are genetically present, without any further requirements. Such is the case of Oaxaca (Sect. 316), and Puebla (Sect. 343).

Other states require that there be genetic or congenital disorders that cause serious physical or mental defects: Baja California Sur (Sect. 252), Coahuila (Sect. 361), Colima (Sect. 190), Chiapas (Sect. 136 bis), Guerrero (Sect. 121), Mexico (Sect. 251), Morelos (Sect. 119), Quintana Roo (Sect. 97), Veracruz (Sect. 154), and Yucatán (Sect. 393).

Finally, the Federal District (Sect. 148) requires that these genetic defects put the unborn’s survival at risk.

However, the existence of this exception to abortion prohibitions is an expression of ideas typical of totalitarian regimes, as it represents an overt violation to the right to life. As a matter of fact, one may well ask, how can a person’s deprivation of life be justified by “serious eugenic causes”, or proven mental deficiencies, or the risk of survival after birth? There is no satisfactory justification. “Human rights” entail that a person be considered an end in itself, and not a mere means. Thus, the unborns’ lives have an inherent value, which is not altered by the presence of “eugenic deficiencies” or low survival probabilities. Therefore, a state that fails to protect said person is seriously failing to comply with its duty of protecting human beings, which should generate international consequences.

In this sense, and by signing the Convention on the Rights of the Child, Mexico undertook to adopt all the measures necessary to make the rights of the children effective.¹³ However, this kind of “acquittal” does not guarantee the unborn’s right to life, as Mexico is required to.

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

13 The first part of Article 4 of the Convention on the Rights of the Child expressly establishes that the “States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention”.

vi. Abortion for Economic Reasons

The State of Yucatán establishes that abortion for *serious and justified economic reasons* shall not be criminally punished, provided that the pregnant woman has at least three children who have already been born (Sect. 393).

The lack of economic resources of the family in which the child would live cannot be a justification for suppressing a life. There are several solutions to situations of economic needs, ranging from social welfare regimes to placing the child to adoption. What a state cannot legally do is to leave the child conceived in poverty unprotected, only because he was conceived under said circumstances.

B. The Decriminalization of Abortion in the Federal District within the First Twelve Weeks of Pregnancy

The legislation of the Federal District deserves to be analyzed alone, since it is the only state that has decriminalized abortion within the initial twelve weeks of pregnancy.

Indeed, on April 24, 2007, the Legislative Assembly of the Federal District passed an act that provides for the so-called “voluntary abortion”, published in the Official Gazette of the Federal District on April 26, 2007, enforceable since April 27, 2007.¹⁴

This act amended sections 144 to 147 of the Criminal Code as well as the Act on Health of the Federal District.

The former text of section 144 of the Criminal Code defined abortion as “the death of the product of conception, anytime during pregnancy”. The terminology used was clear in stating that the legally protected interest was the unborn’s life from the moment of conception (i.e. the “death” of the “product of conception” was punished). Now, after the amendment, the crime of abortion is defined as the “termination of pregnancy after the twelfth week of gestation”. This means that not only the concept of abortion is modified, –considering the death of the child before the initial twelve weeks of gestation is no longer a criminal conduct– but also the legally protected interest has changed. The text has moved from the “death” of the unborn, to the “termination of pregnancy”, which seems to mean that the interest intended to be protected is not the “gestating life” any more, but rather the “woman’s pregnancy”.

14 This amendment was questioned at a judicial level, by means of two actions of unconstitutionality (146/2007 and 147/2007) filed before the Supreme Court of Justice of Mexico. Please see “Legal Precedents Relating to Cases of Non-Punishable Abortions” in this paper.



This means that abortion practiced during the initial three weeks of pregnancy is not considered a crime, so long as it is performed with the pregnant woman's consent, since section 146 of the Criminal Code of the Federal District penalizes as "forced abortion" the one performed at any time of pregnancy without the woman's consent.

"Section 146. Forced abortion is the termination of pregnancy performed at any time without the pregnant woman's consent. For the purposes of this section, any person who causes an abortion through any means without the woman's consent shall be punished with five to eight years' imprisonment. Should the abortion be coerced through physical or moral violence, the punishment shall be eight to ten years' imprisonment".

This means that:

- a) Voluntary abortion is not a crime if practiced within the first twelve weeks of gestation.
- b) According to section 148 of the Criminal Code, abortions practiced after the twelve weeks are justified in the following circumstances:¹⁵
 - When pregnancy is the result of rape or non-consensual artificial insemination
 - When a pregnant woman's health may be seriously affected
 - When there are genetic or congenital defects that may cause physical or mental harm, or even threaten the unborn's survival
 - When the pregnant woman acts in a negligent manner.
- c) When abortion is performed without the pregnant woman's consent ("forced abortion"). In this case, abortion is considered a crime at all times.

By means of the Federal District Criminal Code amendments—by which abortion was decriminalized—the Act on Health Care of the Federal District was also amended, establishing that health care services "shall provide information to any woman who requests to terminate her pregnancy, as stated in the last paragraph of Section 148 of the Federal District Criminal Code" (Sect. 16 Bis, Par. 8). Said information is related to "the proceedings, risks, consequences and effects; as well as existing support and alternatives, so pregnant women can make a free, well-informed and responsible decision" (Sect. 148 of the Criminal Code).

¹⁵ Please see "The Creation of Legal Excuses Absolving the Crime of Abortion" in this paper.

After this act was passed, changes were also made to the “*Lineamientos Generales de Organización y Operación de los Servicios de Salud para la Interrupción Legal del Embarazo en el Distrito Federal*” (“General Guidelines of Health Care Services’ Organization and Operation for the Legal Termination of Pregnancy in the Federal District”), previously included in Circular Letter GDFSSDF/01/06. In this sense, some precautions were established. One of them concerns the informed consent, which requires that pregnant women who request the legal interruption of their pregnancies express their consent in writing, after receiving objective, sufficient and understandable information about the procedures, risks and consequences of abortion (guideline 3, II). Counseling was also regulated, and it was established as a compulsory procedure (guideline 3, IV). Finally, a medical report was also included as a requirement, so as to certify the gestational age of the fetus, and thus, to corroborate that it is within the first twelve weeks.¹⁶ It also regulates the facilities in which this service can be offered, authorizing the medical and surgical procedures necessary to perform an abortion.¹⁷

However, it must be emphasized that this situation seriously violates the unborn’s inherent human right to life. Article 4.1 of the American Convention of Human Rights—in force in Mexico since 1981—establishes 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. No one shall be arbitrarily deprived of his life”.

The right to life exists from the moment of conception. Thus, the rules that do not protect it whatsoever during the first twelve weeks of pregnancy seriously violate it. The state has failed to fulfill its duty regarding the protection and maximization of human rights acknowledged by international standards, especially when considering that, by virtue of the *pro hominem* principle, they must be interpreted and exercised in the widest and most favorable way possible, as established in article 1 of the Constitution.

In this regard, one must note the appalling (and legally incoherent) statement made by Luz Patricia Mejía,¹⁸ this past July 14, 2011, in the public hearing in the Argentine National Congress regarding the debate on the legalization of abortion. She maintained that legalizing abortion does not contradict human rights, alleging that “the Convention makes reference to the general protection of the right to life from the moment of conception”, which “does not prohibit” the legalized

¹⁶ Cfr. amendments to guidelines 3, 4 bis and 5.

¹⁷ Cfr. amendment to guidelines 12 and 14, respectively.

¹⁸ Special relator of women’s rights in Argentina, Bolivia and Ecuador; former president of the Inter-American Commission on Human Rights of the Organization of American States.



abortion. In the Criminal Legislation Committee meeting, Mejía even claimed that: “The Inter-American Commission on Human Rights of the OAS does not claim that legal abortion is prohibited by the Pact of San Jose [American Convention on Human Rights]”.

Of course, despite Mejía’s claims, Mexico is bound by the international treaties signed by the President of the Republic and passed by the Senate, not by a mere opinion. Moreover, it is the Inter-American Court, not the Commission, the one empowered to interpret the Convention’s provisions,¹⁹ and the Inter-American Court has not yet pronounced any ruling or opinion in this regard.

The criterion referred to by Mejía—when alleging that legal abortion does not violate article 4.1 of the Pact of San José, which protects every person’s life, because said right is protected by law and, in general, from the moment of conception—is illogical and senseless. When considering that article 1.2 of the Convention defines “person” as “every human being”, it cannot be validly argued that “legal” abortion—which entails depriving a human being of his life—does not violate the right to life which this Convention acknowledges to every person.²⁰

To Mexico, the scope of the right to life after the constitutional amendment mentioned is clear. Indeed, article 1 of the Constitution now establishes:

“In the United Mexican States, every person shall enjoy the human rights acknowledged by this Constitution and by the international treaties to which the Mexican State is a party (...)

(...) rules relating to human rights shall be interpreted in accordance with this Constitution and with the international treaties on human rights ensuring the widest protection possible to every person.

Every authority, within his competences, is bound to promote, respect, protect and ensure human rights in accordance with the principles of universality, (...) and progressivity (...)

All kinds of discrimination based on (...) any other [cause] that threatens human dignity and aims to annul or reduce a person’s rights and freedoms are hereby prohibited”.

We can thus conclude that the amendment to the Federal District Criminal Code overtly threatens the right to life acknowledged not only by the Federal

19 Article 62.3 and 64.1 of the American Convention of Human Rights.

20 To read about the interpretation of article 4.1 of the American Convention, please see “The Role and the Content of International Treaties Signed by Mexico” in this paper.

Constitution, but also by the international treaties ratified by Mexico, in particular, the American Convention of Human Rights.

C. Legal Precedents Relating to Cases of Non-Punishable Abortions

On two occasions, the Supreme Court of Justice of the Nation decided the constitutionality of acts amending the criminal legislation on abortion in the Federal District. These rulings took place: (i) in 2002, to amend sections 332 and 334 of the Federal District Criminal Code, known as “Robles Act;” (ii) in 2007, to amend sections 144 and 147 of the Federal District Criminal Code, already mentioned.

i. Objection to the So-Called “Robles Act”

On August 24, 2000, an amendment aiming to include so-called “eugenic abortion” as a case of non-punishable abortion was published in the Official Gazette of the Federal District. Indeed, this amendment—known as “Robles Act”²¹—established that abortion would be non-punishable “when the product of conception has congenital or genetic defects”.

In January 2002, some members of the Legislative Assembly of the Federal District promoted an unconstitutionality action (10/2000) before the Supreme Court of Justice with the purpose of objecting the act mentioned.

Based on the consideration of several rules of international law and the Constitution, the Court’s ruling stated that the Constitution protects human life from the moment of conception.

The Court maintained that “the Constitution (...) protects every individual’s right to life, since said rule considers it a fundamental right, without which neither the existence nor the exercise of any other right would be possible”.²²

It also claimed that “upon examining the provisions of the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights,... which application is compulsory as established by Article 133 of the National Constitution, it becomes clear that they establish, first, the protection of the child’s life before as well as after his birth; second, the protection of the

21 The amendment has been named after the then-Chief Minister of the Capital City: Rosario Robles.

22 Translated from the original: Legal precedent identified as P.J. 13/2002, by the Plenary of the National Supreme Court of Justice, published in the *Semanario Judicial de la Federación y su Gaceta* (Weekly Judicial Publication of the Federation and its Gazette), volume XV, February 2002, p. 589.



right to life as a right inherent to every human being. [Moreover,] after studying the Federal Criminal Code and the Federal District Criminal Code, as well as the Federal Civil Code and the Federal District Civil Code, it can be noted, on the one hand, that they provide for the protection of human life –from its physiological gestation– as a legal interest, since they consider the unborn as a living being and they punish those who cause his death, and on the other hand, that the product of conception is protected from that moment and can be appointed heir or done. [It was thus finally concluded that] the protection of the product of conception's right to life stems from the Political Constitution of the United Mexican States as well as the international treaties and the federal and local acts".²³

However, the ruling did not pronounce the unconstitutionality of the Robles Act, since the Court decided that the classification of abortion as a criminal act had not been modified. In the Court's opinion, what the Act had done was to create an "absolving excuse", preventing the crime from being punished: even if the legal view that abortion was a crime remained unchanged, there was, in the legislature's opinion, a reason for not punishing the crime.

ii. Objection to the Decriminalization of Abortion within the First Twelve Weeks of Pregnancy

As mentioned before, the 2007 amendment to the Federal District Criminal Code decriminalized abortion within the first twelve weeks of gestation, provided that the pregnant woman consents to it, though any abortion practiced without the woman's consent remains punished (section 146 of the Federal District Criminal Code).²⁴

Both the President of the National Committee of Human Rights and the Public Prosecutor of the Republic separately filed proceedings challenging the constitutionality of the amendment.

Said unconstitutionality proceedings were processed under file number 146/2007 and its appendix 147/2007, and were decided by a majority of eight to three votes, by the Plenary of the Supreme Court of Justice of Mexico on August

23 Translated from the original: Legal precedent identified as P.J. 14/2002, by the Plenary of the National Supreme Court of Justice, published in the *Semanario Judicial de la Federación y su Gaceta* (Weekly Judicial Publication of the Federation and its Gazette), volume XV, February 2002, p. 588.

24 Please see "The Decriminalization of Abortion in the Federal District within the Initial Twelve Weeks of Pregnancy" in this paper.

25, 26, 27 and 28, 2008, stating that the legal provision were constitutional.²⁵

Nonetheless, the majority did not agree on the reasons for the decision; instead, each of them based his vote on different reasons. Moreover, the final text of the sentence did not include the arguments of the majority, but published only the arguments of the judge in charge of drafting it, who said that the right to life was not protected by the Mexican Constitution.²⁶ This consideration was not shared by the other judges.²⁷

Legal experts have referred to this “majority” as a “false majority”. For example, the expert Francisco Vázquez-Gómez Bisogno stated that “the arguments swelling the ruling that the majority of the Supreme Court of Justice of the Nation approved, is not shared by said majority, to the extent that each of the ministers (judges), in order to put forward their reasons for constitutionalizing abortion, issued their own concurring votes in which they made their own viewpoints clear”.²⁸

25 The majority was reached by the votes of the Ministers Cossío Díaz, Luna Ramos, Franco González Salas, Góngora Pimentel, Gudiño Pelayo, Valls Hernández, Sánchez Cordero de García Villegas and Silva Meza. On the other hand, the Ministers who voted in favor of the unconstitutionality of the decriminalization of abortion were Judges Sergio Salvador Aguirre Anguiano—the speaking Judge—Guillermo I. Ortiz Mayagoitia and Mariano Azuela Guitrón.

26 The wording of the sentence was in charge of Judge José Ramón Cossío Díaz.

27 As a matter of fact, Judge Juan N. Silva Meza himself, who was part of the majority, in his concurring opinion questioned the binding force of the decision by stating that: “... Affirming that the right to life is not constitutionally protected was not an opinion supported by the majority of the members of the Plenary Tribunal that voted in favor of the constitutionality of the challenged rules. Rather than said judgment is contrary to the majority’s consensus, which considered that the right to life is acknowledged, though implicitly, at a constitutional level. Including this issue in the ruling without the majority’s support to this opinion may eventually cast doubt on the decision’s binding force...”. Translation of the concurring opinion by the Minister Juan N. Silva Meza with regard to the ruling pronounced in the unconstitutionality proceeding 146/2007 and its appendix 147/2007, p. 3, quoted by Francisco VAZQUEZ GÓMEZ BISOGNO, “El voto de minoría a favor de la vida. Un relato de las incongruencias de la sentencia mayoritaria que constitucionalizó el aborto en México”, in Victor Manuel MONTOYA RIVERO and Diana ORTIZ TRUJILLO, “En defensa de la vida: un voto de minoría sobresaliente. Homenaje al Ministro Sergio Salvador Aguirre Anguiano, Premio Ramón Sánchez Medal 2010”, Mexican Committee on Human Rights, NPO, Mexico, 2010, p. 189.

28 Francisco VAZQUEZ GÓMEZ BISOGNO, “El voto de minoría a favor de la vida. Un relato de las incongruencias de la sentencia mayoritaria que constitucionalizó el aborto en México”, in Victor Manuel MONTOYA RIVERO and Diana ORTIZ TRUJILLO, “En defensa de la vida:



Thus it appears to be the case that the case-laws 13/2002 and 14/2002 previously approved,²⁹ which acknowledge and defend life from the moment of conception, and which consider that the National Constitution effectively protects the right to life, were not interrupted but, on the contrary, are still in force and fully binding.³⁰ This is quite clear when one understands that, in order to interrupt them, it is necessary that a determination be made by the Supreme Court of Justice establishing that they do not meet the criterion. That did not happen. Thus they have not been overruled by the Court.

Another aspect of the decision that has been effectively criticized is that the majority “contradicted itself, both in considering that the value of the life of the conceived does not stem from the Constitution since there is no provision expressly protecting it, and in accepting, despite the foregoing, that women are entitled to the right to self-determining their bodies when the Constitution does not expressly contain said right either; that is, the majority rejects that the protection of life be implicitly stated in the Constitution, but accepts the existence of a right—to which it grants a value axiologically greater than the conceived’s life—which the ‘majority’ found to be implicitly stated”.³¹

Based on the previous facts, it can be concluded that, although the Mexican Supreme Court of Justice did not decide that the amendment to the Federal District Criminal Code was unconstitutional, it is still valid to criticize it for the lack of complete and coherent published opinion.³² Despite this decision, there is no doubt that rulings 13/2002 and 14/2002—by which it was decided that the right to life is protected by the Constitution—have not been modified, all of which is confirmed by the latest constitutional amendment which expressly acknowledges it.³³

D. Reactions of the Local Constitutions

After the Supreme Court of Justice decided on the unconstitutionality proceedings 146/2007 and 147/2007 above mentioned, a national movement

un voto de minoría sobresaliente. Homenaje al Ministro Sergio Salvador Aguirre Anguiano, Premio Ramón Sánchez Medal 2010”, Mexican Commission on Human Rights, NPO, México, 2010, 186.

29 Please see Footnotes N° 22 and 23 in this paper.

30 *Ibid.*, p. 193.

31 *Ibid.*, p. 194.

32 *Ibid.*, p. 215.

33 In accordance with article 29 of the Federal Constitution.

Baja California	Article 7 of the State Constitution establishes that “this fundamental rule protects the right to life by stating that, from the moment an individual is conceived, he is protected by the law and is considered born for all the corresponding legal effects, until his natural or non-induced death.”
Chihuahua	Article 5 of the State Constitution establishes that “every human being has the right to have his life legally protected from the moment of conception.”
Durango	Article 1 of the State Constitution establishes that “the State of Durango acknowledges, protects and guarantees every human being’s right to life, by expressly stating that, from the moment of fertilization, he is protected by the law and is considered born for all legal purposes, until his natural death, saving the exceptions provided by the law.”
Guanajuato	Article 1 of the State Constitution establishes that “For the purposes of this Constitution and the laws originating herefrom, a person is every human being from the moment of conception until his natural death.”
Oaxaca	Article 12 of the State Constitution establishes that “From the moment of fertilization, every human being is protected by the law and is considered born for all legal purposes until his natural death.”
San Luis Potosí	Article 16 of the State Constitution establishes that the State of San Luis Potosí acknowledges human life as the foundation for every right to which the human beings are entitled, and thus respects and protects him from the moment his conception begins.”
Yucatán	Article 1 of the State Constitution establishes that “the State of Yucatán acknowledges, protects and guarantees every human being’s right to life, by expressly stating that, from the moment of fertilization, he is protected by the law and is considered born for all legal purposes, until his natural death, regardless of the exemption of responsibility provided for by the Criminal Code of the State of Yucatán.”

began to emerge, through which the legislatures of the different states started to amend their local constitutions to shield the right to life, expressly recognizing its protection from the moment of conception.

The states currently protecting the right to life from the moment of conception



in their local constitutions are Baja California, Campeche, Chiapas, Chihuahua, Colima, Durango, Guanajuato, Jalisco, Morelos, Nayarit, Oaxaca, Puebla, Querétaro, Quintana Roo, San Luis Potosí, Sonora, Veracruz and Yucatán. For the purpose of illustration in the next page are the texts of some of the local constitutions.

It is worth noting that, from September 26 to September 29, 2011, the Supreme Court of Justice of Mexico—in Full Session—solved the unconstitutionality proceedings identified as 11/2009 and 62/2009.

The 11/2009 proceeding was filed by the Prosecutor for Human Rights and Citizens' Protection of the State of Baja California, who challenged the validity of article 7, par. 1 of said state's Constitution. The 62/2009 proceeding, on the other hand, was filed by Deputies of the 59th Legislature of the Congress of the State of San Luis Potosí, who challenged the validity of article 16 of said state's Political Constitution.

After several days of debate, on September 28, 2011, the Plenary Tribunal rejected the unconstitutionality proceeding filed against article 7 of the Political Constitution of the State of Baja California and, on September 29, the Court dismissed the proceeding challenging article 16 of the Political Constitution of the State of San Luis Potosí.

The result was that seven judges voted in favor of the proceedings claiming the unconstitutionality of the provisions mentioned³⁴ and 4 against these proceedings.³⁵ The proceeding was thus dismissed on the grounds that the minimum required to pronounce the unconstitutionality of the provision challenged is 8 votes.

Therefore, the minority Judges understood that the provisions of the State of Baja California and San Luis Potosí were not contrary to the Mexican Federal Constitution since the latter protects the right to life from the moment of conception, and does not acknowledge or grant an alleged right to abortion.

In this regard, Judge Pardo Rebolledo stated that articles 4 and 23, Section A, Subsections V and XV, and Section B, Subsection I of the Mexican Constitution do protect the unborn's right to life, and that said protection does not apply to pregnant women only, since these Subsections makes a distinction between, "...on the one hand, (...) the greatest guarantee to protect workers' health and

34 Judges Olga María del Carmen Sánchez Cordero Davila, Arturo Zaldivar Lelo de Larrea, José Ramón Cossio Díaz, Luis María Aguilar Morales, Sergio Armando Valls Hernández, and Juan N. Silva Meza.

35 Judges Margarita Beatriz Luna Ramos, Guillermo I. Ortíz Mayagoitia, Sergio Salvador Aguirre Anguiano and Jorge Mario Pardo Rebolledo.

lives; and, on the other hand, the product of conception in the cases of pregnant women”³⁶.

The result of these unconstitutional proceedings is particularly important, since it has allowed to maintain the power of Federal States to protect the right to life from the moment of conception in their constitutions.

E. The Role of International Human Rights Treaty Bodies

On several occasions, some of the international human rights bodies have made suggestions to Mexico that are contrary to the appropriate protection of the unborn child’s right to life.

The Committee on the Elimination of Discrimination against Women and the Office of the United Nations High Commissioner for Human Rights have suggested that abortion be legalized in Mexico.

In the final observations of the 2006 report about Mexico, the CEDAW Committee requested that the country reconcile the legislation on abortion at the federal and state levels, as well as apply a broad strategy that includes the effective accessibility to safe abortion services under the circumstances provided for by the law and to a wide range of emergency contraceptive methods.³⁷

Later, the Office of the United Nations High Commissioner for Human Rights in Mexico updated Chapter 5 of the diagnosis on the situation of human rights in Mexico, which refers to women.³⁸ Said document pointed out that the integrity of a secular state is a basic foundation to respect the sexual and reproductive rights, stating that there have been important advances in this regard, such as including the “emergency contraception” and expanding the cases in which abortion is not punished in the Federal District, Morelos and Baja California.

36 Judge Pardo Rebolledo’s interpretation is especially relevant since, when the 146/2007 and 147/2007 unconstitutional proceedings were solved against the amendments decriminalizing abortion until the twelfth week of gestation in the Federal District, some majority Judges (such as José Ramón Cossío) stated that the protection granted by articles 4 and 23, Section A, Subsections V and XV, and Section B, Subsection XI of the Federal Constitution only applies to pregnant women, thus considering the product of conception merely as a constitutionally protected interest.

37 Cfr. Sixth Periodic Report on Mexico (CEDAW/C/MEX/6) in sessions 751 and 752, held on August 17, 2006.

38 Cfr. Office of the United Nations High Commissioner for Human Rights in Mexico, *Diagnóstico sobre la situación de los derechos humanos en México*, Iprint, Mexico, 2003.



However, there is no national constitutional provision in Mexico that subjects the domestic constitutional standards to international standards and to international bodies interpretation of the domestic standards. This makes the above recommendations non-binding.

F. Non-Governmental Organizations Pursuing the Decriminalization of Abortion

Some non-governmental organizations or institutions that openly pursue the decriminalization of abortion publicly stand out in Mexico.

One of them is the **Grupo de Información en Reproducción Elegida, A.C.** or GIRE (Group of Information about Chosen Reproduction, NPO).³⁹ This group is in favor of abortion. It seeks the legalization of abortion throughout the Republic, as per the Federal District Criminal Code which decriminalizes abortion within the initial twelve weeks of pregnancy, and allows different types of abortion after said period, such as therapeutic abortion—in cases of death risk or of seriously affecting the woman's health—eugenic abortion, and abortion in case of pregnancy resulting from rape or non-consensual artificial insemination.

Another organization is **Católicas por el Derecho a Decidir, A.C.** (Catholics in Favor of the Right to Decide, NPO).⁴⁰ The organization's mission reads that, among other things, it supports “every woman's right to decide on how to solve an unwanted pregnancy”, since it alleges that “the decriminalization of abortion saves lives, particularly the lives of women with scarce recourses”. The organization was founded in 1994, and is currently present in Mexico, Argentina, Bolivia, Brazil, Colombia, Chile, El Salvador, Nicaragua, Paraguay and Spain. This institution organizes workshops and conferences; promotes “reproductive rights”, which include abortion; and works online with other national and international organizations.

IV. The Right to Life and Reproductive Health Programs

A. Description of the Legislation in Force

The Mexican reproductive health system is regulating the standards at different hierarchical levels. Article 4 of the **National Constitution** indicates that: “Every person's right to freely and responsibly decide on the number and frequency of their children's births”.

39 www.gire.org.mx

40 www.catolicasmexico.org

This article has been, at the same time, further specified by the **General Act on Population**,⁴¹ which in Section 3, Par. 2, establishes that the Secretariat of the Interior shall be in charge of taking and promoting legal measures for carrying out “family planning programs” through the educational and public health services available. The Secretariat of Interior is required to control said programs and the ones organized by private institutions so they are carried out fully respecting the fundamental rights of men and preserving the dignity of families. All this should be done in pursuit of the explicit goal of “rationally regulating and establishing population growth, as well as making a better use of the human and natural resources in the country”.

In addition, the **General Act on Health**,⁴² in force in the entire Republic, states that every person has the right to have his health protected. Section 27 includes family planning as part of the basic health services, and article 67 establishes that family planning is considered a priority, and shall include “educational information and guidance” for adolescents, young people and adults, about the “inconvenience of a pregnancy before the age of 20 years”, as well as a the “convenience of spacing out and reducing the number of pregnancies by means of the correct contraceptive information”. Among the benefits related to family planning services, the act also includes the distribution of supplies used for family planning (Sect. 68, Par. V). Finally, the act states that the Secretariat of Health is granted jurisdiction to complement the bases of family planning established by the Population National Council.⁴³ The mission of the Secretariat of Health is, in particular, to establish the standards to evaluate contraceptive methods and prepare educational programs appropriate for the national educational system (Sect. 69).

B. Content of the National Programs on Reproductive Health

Framed within the legal context mentioned, the Secretariat on Health prepared the 2007–2012 National Health Program, called “For a Healthy Mexico: Building Alliances for Better Health” (“*Por un México sano: construyendo alianzas para una mejor salud*”, Secretariat on Health, Mexico, Federal District, 2007). One of the program strategies is to “reinforce and incorporate the actions promoting

41 Published in the Official Gazette of the Federation on January 7, 1974. Its latest amendment was published on May 25, 2011.

42 Published in the Official Gazette of the Federation on January 7, 1984. Its latest amendment was published on June 10, 2011.

43 The Population National Council is in charge of the country’s demographic planning, according to section 5 of the National Act on Population.



health, and disease–prevention and control” (Strategy 2), one of its action items being “the promotion of responsible sexual and reproductive health” (Action item 2.7).

The program explains the importance of responsible sexual activity, which should be the axis of a national policy on family planning. Some of the measures to be taken are the organization of campaigns promoting the use of condoms, the spread of information aiming to increase to 75% the proportion of women in fertility age using contraceptive methods, and the reduction of adolescent fertility rate to 58 births every 1,000 women between 15 and 19 years of age.

Previously, as an appendix to the 2001–2006 National Program on Health, the “*Programa de Acción: Salud Reproductiva*” (“Action Program: Reproductive Health”) was prepared. In said documents, it was asserted that unwanted pregnancies, unsafe abortions and sexually transmitted diseases have become a public health problem affecting a greater number of adolescents; it was claimed this situation demands efforts from multiple sectors with a comprehensive focus, to immediately meet the need for sexual and reproductive health. For such purposes, the goal established was to decrease the incidence of “unwanted pregnancies”, induced abortions and sexually transmitted diseases among people between said ages, as well as the unsatisfied demand for family planning services, by systematically offering contraceptive methods and reliable and timely information.

Finally, the National Council on Gender Equity and Reproductive Health focuses, as part of its programs for the 2007–2012 period, on family planning and contraception, and sexual and reproductive health for adolescents. It states its general objective is to “Help the Mexican population to enjoy a satisfactory, healthy and free–from–risk sexual and reproductive life, through quality services on family planning and contraception, fully respecting their rights and free choice”.

It is worth noting that none of the rules mentioned makes reference to abortion as a method of family planning or birth control.

C. Regulating the Offer of Family Planning and “Emergency Contraception” Services

The Mexican Official Rule (NOM) on Family Planning Services (NOM 005–SSA2–1993) standardizes the criteria of family planning services offer in the entire nation. Among the actions it establishes is to provide adolescents and young people with contraceptives.

The NOM eliminates the restrictions of age as to the use of any temporal contraceptive methods, among which are the hormonal contraceptive and the intrauterine device. On January 21, 2004, the NOM was modified to explicitly include the post–coitus hormonal contraceptives—the “emergency”

contraceptives—which are described as the “method that women can use during the three days following unprotected coitus, with the purpose of avoiding an unwanted pregnancy” (Item 5.3).

The NOM emphasizes the importance of counseling and of informed consent which the medical doctor shall offer as part of the contraceptive services and in the cases required.

When considering that the right to life is a human right recognized for every person from the moment of conception, the NOM provision instructing the health care services to provide with post-coitus hormonal contraceptives to any person requesting them becomes questionable. This is so inasmuch as the NOM would be allowing possible abortion by preventing the fertilized ovum—which already is an unborn person—from implanting in the woman’s uterus.

In this regard, the 2007 amendment to the Federal District Criminal Code becomes particularly relevant. Indeed, this amendment not only modified the concept of abortion contained in section 144—defining it as “the termination of pregnancy after the twelfth week of pregnancy”—but also defined “pregnancy”.

Section 144 defined pregnancy as “the part of the process of human reproduction beginning with the embryo’s implantation in the endometrium”. This definition becomes important regarding “emergency contraception”, since abortions practiced with pills that inhibit the implantation of a fertilized ovum is not considered a crime in this context, even when the woman does not consent to it.

If abortion is “the termination of pregnancy”, and pregnancy begins with the “embryo’s implantation in the endometrium”, any previous termination does not fit the criminal type of abortion and, therefore, is exempt from punishment.

This provision is questionable not only because it violates a conceived human being’s right to life, but also because women are deprived of protection, since abortions performed under said conditions without their express consent are not legally punished whatsoever.



Honduras

Ligia M. De Jesús¹

I. Protection of Prenatal Life in Honduras: a Token of Central America's Strong Pro-Life Identity

Both the Honduran Constitution and other national norms, recognize the rights of the unborn child, considering him as a human person and granting him the legal protection he deserves as such.

Article 67 of the Constitution of the Republic of Honduras establishes that “the one who is about to be born, shall be considered born for anything that favors him within the limits established by law”, recognizing the fundamental value of the unborn child's life, his existence as a person and his patent state of defenselessness requiring special protection by the state.

Furthermore, the Constitution establishes that the right to life is inviolable and that this right belongs to all, without any distinction due to race, color, sex, religion, economic standing, health, or any other condition (article 60). Articles 61 and 65 also guarantee the inviolability of the right to life.

In addition, the Code of Childhood and Adolescence, in article 12 recognizes that the life of every person begins from the moment of conception: “Every human being has the right to life from the moment of its conception. The state will protect this right by means of the adoption of measures necessary to protect pregnancy, birth and later development of the person, so that they are carried out in conditions compatible with human dignity”. Also, article 13 establishes the obligation of the state to provide “specialized healthcare and, where necessary, food support for mother and child, in the prenatal, natal, and postnatal stage”.

For civil law purposes, like obtaining of a birth certificate or being the recipient of testamentary inheritance, article 51 of the Civil Code does not recognize the child as a legal person until birth.

However, for purposes of fundamental rights, like the right to life, the human being is recognized as a person from the moment of conception and abortion is penalized at any moment during pregnancy, according to the Code of Childhood

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and Adolescence and the current Criminal Code. In the same manner, the Criminal Code, in article 153, permits alimony for sexual assault victims and “the conceived” as a result thereof.

March 25 has been declared as the “Day of the Unborn Child” by Legislative Decree 267–2005. This holiday is celebrated every year in the National Congress.

There are reliable statistics by WHO regarding the fact that Honduras has reported a decrease of approximately 40% of its maternal mortality rate since 1990. This remarkable accomplishment from a public health perspective was achieved without legalizing abortion, as several international organizations recommended, but through an increase in the number of health professionals in rural areas, such as medical doctors (52%), skilled birth attendants and an overall greater availability of basic health services.²

The latter demonstrates that the greatest necessity in poor countries in the region regarding maternal health is for improvement of basic health services and obstetric care and not legalization of abortion. In addition, the fact that Honduras increased its penalty for abortion, removed legal exceptions permitting it, and granted greater legal protection for the unborn child illustrates that the existence of pro-life legislation is compatible with the reduction of high maternal mortality rates and may even contribute to the same, contrary to assertions by abortion lobbies that pro-life legislation increases maternal mortality.

A. Political and Legal Organization

The Republic of Honduras has existed as such since 1821. Its form of government is republican, democratic, and representative.³ It is exercised through three state powers: Legislative, Executive, and Judicial, complementary and independent and without relations of subordination.

The current Constitution dates back to January 1982. It establishes that the human person is the supreme end of society and of the state and the dignity of the human person is inviolable. In article 3 it establishes that family, marriage, motherhood and childhood are under the protection of the state.

The legislative process in the country takes place as follows:⁴

1. Legislative Initiative: congressmen and congresswomen, President, Secretaries of State (ministers), the Supreme Court and the National

2 The World Bank, *Reducing Maternal Mortality* 51–62 (Marjorie A. Koblinsky ed. 2003).

3 Honduran Constitution, Article 4

4 <http://www.congreso.gob.hn/proceso-legislativo/proceso-de-formacion-de-ley>

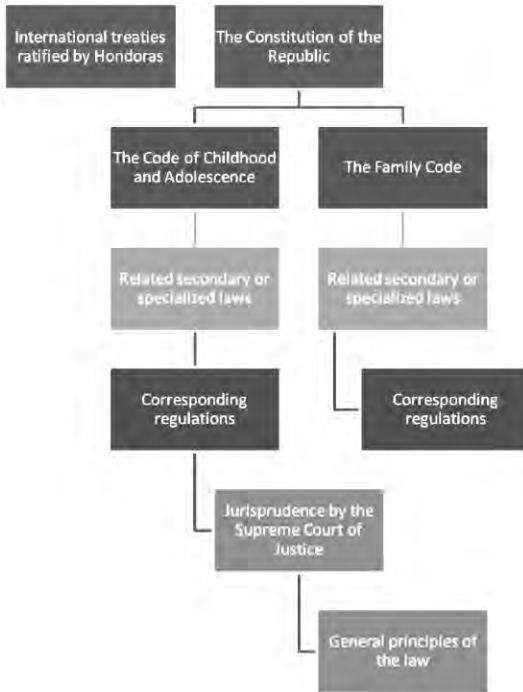


Electoral Tribunal (the latter, solely on matters of its jurisdiction) may propose legislation according to the Constitution.

2. Bills of Law include an exposition of the alleged need for the legislation and a draft Legislative Decree containing the proposed norm.
3. Once introduced, a Bill is delegated to a legislative commission.
4. If the bill involves the reform or derogation of articles contained in any Codes of the Republic, the commission needs to obtain an opinion from the Supreme Court of Justice prior to its approval.
5. The commission issues a recommendation on the approval of the proposed bill.
6. The bill is submitted for debate before Congress plenary.
7. The bill may be approved in 3 debates carried in the course of 3 different days, unless Congress votes in favor of approving the bill in a single debate.
8. When discussion is exhausted, Congress may approve the bill by simple majority rule (half plus one).
9. The Congress' president and secretaries issue a legislative decree approving the bill and submit it to the Executive branch for approval and promulgation within 3 days.
10. The President of the Republic can ratify the approved bill, return it to Congress for reconsideration or exercise his constitutional right to veto it.
11. The promulgation consists of publication in the official newspaper, La Gaceta, which renders a law effective and obligatory.

The hierarchy of Honduran law applicable to the unborn child can be illustrated as shown in the following Diagram.

The structure of the Judiciary in Honduras can be illustrated as shown in the next page:⁵

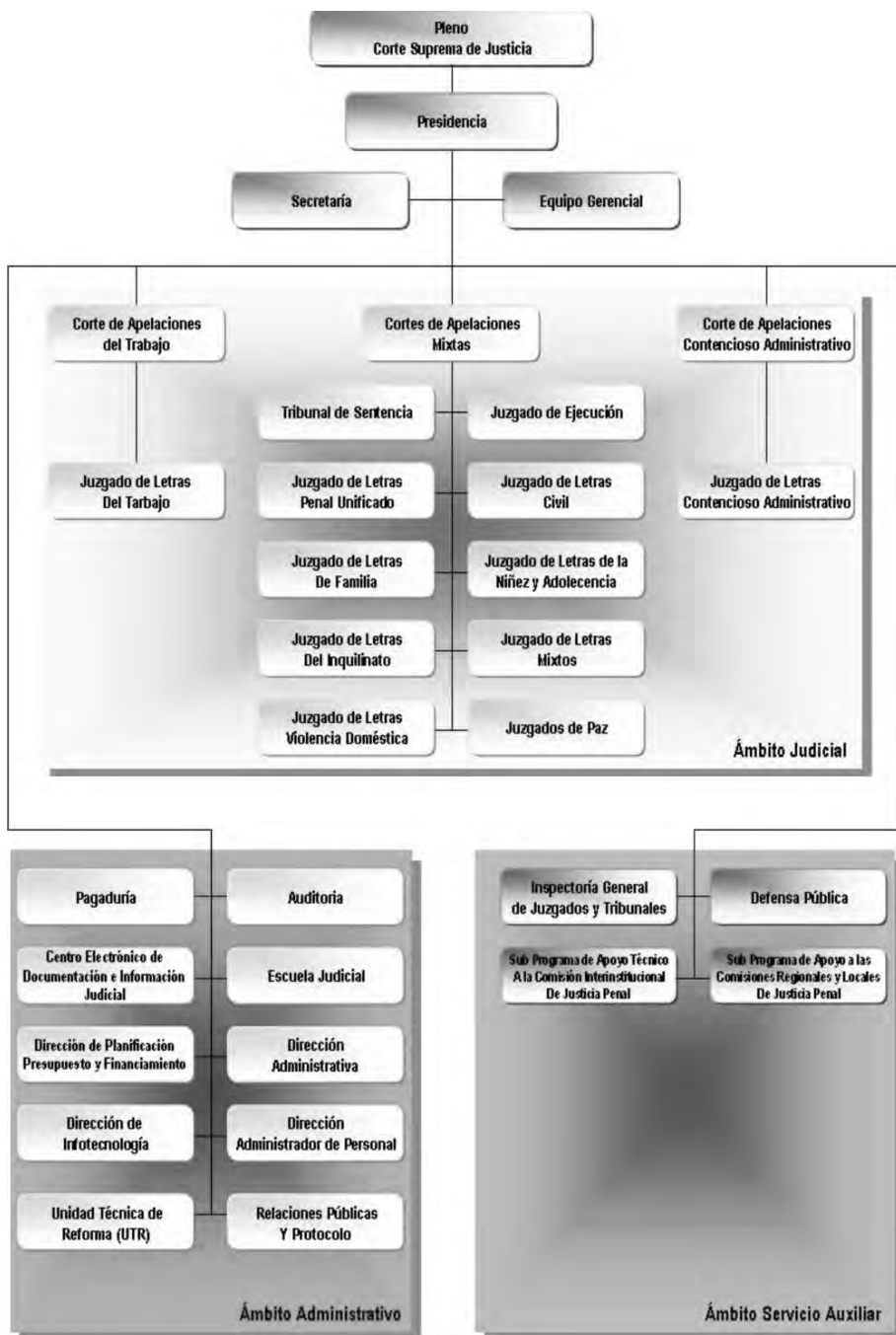


B. Legal Protection of the Unborn Child in National Laws and Honduran Declarations in International Conferences

Both the Honduran Constitution and other national norms, recognize the rights of the unborn child, considering him as a human person and granting him the legal protection he deserves as such.

Article 67 of the Constitution of the Republic of Honduras establishes that “the one who is about to be born, shall be considered born for anything that favors him within the limits established by law”, recognizing the fundamental

5 Source: <http://www.poderjudicial.gob.hn/>



value of the unborn child's life, his existence as a person and his patent state of defenselessness requiring special protection by the state.

Furthermore, the Constitution establishes that the right to life is inviolable and that this right belongs to all, without any distinction due to race, color, sex, religion, economic standing, health, or any other condition (article 60). Articles 61 and 65 also guarantee the inviolability of the right to life.

In addition, the Code of Childhood and Adolescence, in article 12 recognizes that the life of every person begins from the moment of conception: "Every human being has the right to life from the moment of its conception. The state will protect this right by means of the adoption of measures necessary to protect pregnancy, birth and later development of the person, so that they are carried out in conditions compatible with human dignity". Also, article 13 establishes the obligation of the state to provide "specialized healthcare and, where necessary, food support for mother and child, in the prenatal, natal, and postnatal stage".

For civil law purposes, like obtaining of a birth certificate or being the recipient of testamentary inheritance, article 51 of the Civil Code does not recognize the child as a legal person until birth.

However, for purposes of fundamental rights, like the right to life, the human being is recognized as a person from the moment of conception and abortion is penalized at any moment during pregnancy, according to the Code of Childhood and Adolescence and the current Criminal Code. In the same manner, the Criminal Code, in article 153, permits alimony for sexual assault victims and "the conceived" as a result thereof.

March 25 has been declared as the "Day of the Unborn Child" by Legislative Decree 267-2005. This holiday is celebrated every year in the National Congress.

In addition, various international instruments adopted by Honduras affirm the need to protect the life of the unborn child, such as the Convention on the Rights of the Child and the American Convention on Human Rights of 1969, which establishes in article 4, paragraph 1: "Every human has the right to have their life respected. This right shall be protected by the law, and in general, from the moment of conception. Nobody can be deprived of life arbitrarily".

Equally, the Declaration on the Rights of the Child, signed by Honduras, proclaims that childhood has rights to care and special assistance and "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth", which the Convention on the Rights of the Child, ratified by Honduras, reaffirms in its preamble.

At the international level, Honduras has had an active role in favor of life



and the family in the international conferences of Beijing and Cairo,⁶ where the Honduran delegation made specific declarations on the interpretation of words like “reproductive rights”, among others, affirming that in no case would it include abortion or interruption of pregnancy.

At the International Conference on Population and Development, held in Cairo, Egypt in 1994, the Representative from Honduras formulated a declaration expressing that by virtue of its national laws and the American Convention on Human Rights, it would accept “the concepts of ‘family planning, ‘sexual health’, ‘reproductive health’, ‘maternity without risk’, ‘regulation of fertility’, ‘reproductive rights’ and ‘sexual rights’, when those did not include abortion. Honduras does not accept these as arbitrary actions nor as regulation of fertility or as population control”.⁷

Equally, at the International Conference on Women, held in Beijing, China in 1995, the Honduran delegation declared that on the basis of its national laws protecting the unborn and on the basis of the American Convention on Human Rights, the government “reaffirms that every person has a right to life from the moment of conception, based on moral principles, ethics, religious principles, and cultural reasons that should govern humanity collectively. In this sense, Honduras shares concepts relative to reproductive health, sexual health, and family planning in the Platform of Action, always, and when it does not include abortion or abortion as a method of planning”.⁸

C. Full Abortion Ban and Criminalization of Abortion in Honduras

In Honduras, intentional and procured abortion is punishable under any circumstance. Currently, no legal exceptions to abortion exist in Honduran law.

The latest amendments to the Criminal Code of Honduras categorize abortion as a crime against life and bodily integrity, in the following words:

“Abortion is the death of a human being at any time during pregnancy or during birth.

Whoever intentionally causes an abortion shall be punished: 1) with three (3) to six (6) years imprisonment if the woman consented to it; 2)

6 Fourth World Conference on Women, Beijing, China (September 4–15, 1995) and International Conference on Population and Development, Cairo, Egypt (September, 1994).

7 Available at http://www.unfpa.org/py/download/pdf_cairo.pdf

8 See <http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20S.pdf>

with six (6) to eight (8) years of imprisonment if the agent worked without the mother's consent and without using violence or intimidation; and 3) with eight (8) to ten (10) years of imprisonment if the agent used violence, intimidation, or deceit".⁹

Sanctions

Any individual, whether they are a health professional or not, can be subject to criminal responsibility for the crime of abortion, in accordance with article 126 of the Criminal Code. However, article 127 provides for additional civil penalties for health personnel who cooperate with an abortion: "The penalties referred to in the previous article will be imposed and a fine of fifteen thousand (L. 15,000.00) to thirty thousand Lempiras (L. 30,000.00)¹⁰ imposed upon the doctor who, abusing his profession causes or cooperates in an abortion. The same penalties shall apply to those who practice medicine, paramedics, nurses, or midwives who commit or participate in abortion".¹¹

Likewise the law provides for sanctions for the mother who aborts her unborn child. Article 128 of the Criminal Code establishes that "the woman who produces her abortion or consents for another to cause it will be sanctioned with 3 to 6 years imprisonment". The previous Code of 1985 established a lesser penalty: "the woman who produces or consents to her abortion will be penalized with 2 to 3 years imprisonment".¹²

The Criminal Code also punishes abortion that occurs as a result of other acts of violence against women. Article 132 indicates "whoever causes an abortion through acts of violence, even unintentionally, while being aware of the victim's state of pregnancy, will be sanctioned with 4 to 6 years imprisonment". The 1985 Code established a lesser penalty: "whomever causes an abortion through acts of violence, even if unintentionally, while knowing the victim's state of pregnancy, will be sanctioned with 1 to 2 years imprisonment."¹³

9 See article 126 of current Criminal Code, reformed through Decree 191-96 of October 31, 1996. The reforms were later published in the official journal *La Gaceta* on February 8, 1997 and became effective 20 days after its publication, on February 28, 1997.

10 The equivalent of around \$700 to \$1500 U.S. dollars.

11 Reformed through Decree 191-96 of October 31, 1996.

12 See article 128, Criminal Code of 1985, Decree n. 144-83. Available at http://www.oas.org/juridico/MLA/sp/hnd/sp_hnd-int-text-cp.pdf

13 See article 132, Criminal Code of 1985, Decree n. 144-83. Available at http://www.oas.org/juridico/MLA/sp/hnd/sp_hnd-int-text-cp.pdf



In addition, the new Criminal Procedure Code of Honduras, in article 25, stipulates that the crime may be subject to public prosecution, meaning without an individual's particular intervention through a complaint or lawsuit, the prosecutor's office may prosecute offenders at its own initiative.

However article 28 enables the prosecutor's office to place limits in prosecuting a crime when the applicable penalty does not exceed 5 years, public interest is minimally affected and the offender's level of dangerousness is minor, according to his or her background or personal circumstances. For this reason, the actual prosecution of voluntary abortion by law enforcement authorities has been relatively weak. Still, judicial discretion does not apply to all forms of abortion, since article 445 of the aforementioned code provides that crimes with penalties of over 5 years imprisonment are considered "serious", such as forced abortion.

Elimination of Exceptions to Legal Abortion

The last Criminal Code reforms, approved through decree number 191-96, eliminated a mitigating factor to criminal abortion known as *honoris causa* abortion, an antiquated disposition eliminated in the 1996 reform. The said article established that

"when a woman provokes her abortion or consents for another to cause it in order to hide her dishonor, she will be subject to 6 months to 1 year imprisonment".¹⁴

In addition derogated provisions in the former criminal code, articles 130 and 131, allowed for legal abortion in cases of rape, where the mother was mentally disabled or a minor under 15 years of age. It also allowed for therapeutic abortion and eugenic abortion, that is, the abortion aimed at "preventing the birth of a potentially defective being".¹⁵

14 See article 129, Criminal Code of 1985, Decree n. 144-83. Available at http://www.oas.org/juridico/MLA/sp/hnd/sp_hnd-int-text-cp.pdf

15 See article 130 (derogated): "The abortion practiced on a woman in order to eliminate, without her consent, the product of sexual assault, will be sanctioned with one to six years imprisonment. When performed with her husband or partner's consent, the consent of her parents or tutor when she was affected by mental illness or incomplete psychological development, all will be exempted from penalty.

Article 131 (derogated): "The abortion performed by a medical doctor with a woman's consent and the consent of the individuals mentioned in the previous article to save her life

However, those articles had never become effective because they were declared unconstitutional and derogated by the National Congress before their entry into force in 1985, during a period of *vacatio legis*, through decree number 13–85 of February 13, 1985, which stated:

“Given that article 130 and 131 of the Criminal Code that would become effective on March 13 of the current year are unconstitutional, because they flagrantly violate constitutional guarantees contained in articles 65, 67, and 68 of the Republic’s Constitution;

Given that the National Congress may, among others, create decree, interpret reform and derogate law;

Therefore

Decreets: Article 1– to derogate article 130 and 131 of the Criminal Code volume 2, specialized section, title 1, crimes against life and bodily integrity, chapter 2, abortion. Article 2– this decree will be published in the Official Journal “La Gaceta” and become effective on March 13, 1985”.¹⁶

Since then, all exceptions to criminal abortion were abolished in the Honduran Criminal Code, that is, all cases of legal abortion.

Subsidies

The State of Honduras does not subsidize induced abortion. For instance, the Social Security regulations provide in article 81 that

“no subsidies will be paid in cases of intentionally provoked abortion”.

Conscientious Objection

The Public Servants Code of Ethics, article 32, establishes a right to conscientious objection for public servants: “public servants are ensured an individual right to conscientious objection as a fundamental right, integral to

or to the benefit of her seriously affected state of health or threat to it caused by gestation, or that carried out to prevent the birth of a potentially defective being will not be penalized”.

¹⁶ Decree available at <http://www.angelfire.com/ca5/mas/HON/PEN/REF/r01.html>. Some of the constitutional articles that motivated the derogations of both articles were:

Article 65: “The right to life is inviolable”.

Article 68: “Everyone has a right to have his physical, psychic and moral integrity respected. No one shall be subject to torture nor cruel, inhumane or degrading treatment or penalty. [...]”



the right to freedom, respect for physical and moral integrity and the right to religious freedom”.

No such protections currently exist for employees in the private sector.

Pharmacological Abortion

The Ministry of Health initiated the “Emergency Contraception” Program in the year 2002, with the launching of the Handbook on regulations and procedures of integral healthcare for women. Chapter 6, specifically, denominated Regulations on “emergency contraception” is relevant here.

On April 2, 2009, the National Congress approved decree 54–2009, prohibiting the use of “emergency contraception” in the following terms:

“Article 1.– to forbid the promotion, use and any policy or program related to “emergency contraception”, as well as its distribution and sale in pharmacies, drugstores or through any other means.

Article 2. To forbid the dissemination of “emergency contraception” formulas through any means”.

However, former President Manuel Zelaya vetoed the legislative decree, returning it to the National Congress alleging its unconstitutionality. Honduran law provides that when the President’s veto to a legislative decree is given under reasons of unconstitutionality, the Supreme Court’s opinion must be heard before a new debate can begin in Congress. For that reason, the National Congress submitted decree 54–2009 to the Constitutional Chamber of the Supreme Court on May 20, 2009 for its verdict. Once the Chamber submits an opinion to the Congress plenary, the latter will debate it anew. Up to May 2011, the Constitutional Chamber had not yet issued an opinion on the matter.

Given the lack of response from the Supreme Court, the Health Minister, on October 24, 2009, issued Executive Agreement 2744 banning “emergency contraception” under the same terms as the legislative decree. The ban is thus effective in practice, but Congress awaits a final opinion from the Supreme Court.

D. Non-Governmental Organizations and Political Advocacy

The Catholic Church has strongly promoted the unborn child’s right to life for decades in Honduras.¹⁷ In 1984, the Honduran Bishops’ Conference issued a pastoral statement, where it supported the unborn child’s legal protection

17 Honduran Catholic Bishops Conference, Declaration on Abortion, January 19, 1974.

from abortion.¹⁸ In it, the Conference denounced the partial decriminalization of abortion in the 1985 Criminal Code, particularly its legalization of abortion where the mother's health or life is endangered, abortion where a congenital disease has been detected in the fetus, and abortion upon rape.

The Church condemned these exceptions and emphasized Church teaching in this regard. The Bishops explained that fetal disability or malformation was not a legitimate justification for abortion, since disabled children also enjoyed an inalienable right to life and possess equal dignity as human beings. Regarding "therapeutic abortion", they showed skepticism about the frequency of dramatic situations in which a choice between the fetus's or the mother's life must be made, given current advancements in modern medicine. They qualified medical or surgical interventions directed to intentionally terminate the child's life as "homicide". In addition, they condemned sexual assault as a sinful act, and expressed that the wrong perpetrated against the woman victimized by rape cannot be erased with a worse action.¹⁹

The Church's moral opposition had a significant influence on the adoption of the last reforms to the Criminal Code and the Code of Childhood and Adolescence, where former proposals favored clauses creating a pregnant young woman's right to abortion. These actions were based on article 67 of the Constitution, which establishes that the unborn will be considered born for everything that favors them within limits established by law.

As part of its life-promoting social activities, the Church provides a wide range of public health services, particularly in rural areas of the country. The Women's Ministry coordinates its work with the Health Ministry in providing medical consultations for mothers and children in rural communities, working with health personnel and health centers, emphasizing preventive medicine and community health (through the Health Ministry and the Health Vicariate of the Archdiocese). Other organizations affiliated to the Catholic Church work with women's and couples' sexual health, such as RENAFE-MOB, a center that instructs couples on natural regulation of fertility or Billings ovulation method, the Missionary Pontifical Works, the Aragua Clinic located in the village of Zambrano, which gives medical attention, health education and first aid drugs free of charge to women in the community.²⁰

18 Pastoral Declaration of the Honduran Catholic Bishops Conference on the Unborn's right to life, May 3, 1984.

19 Honduran Catholic Bishops Conference, Declaration on Abortion, January 19, 1974.

20 Ligia M. De Jesús, *La Iglesia Católica y los Derechos de la Mujer en Honduras* (The Catholic



Likewise, the Church's Social Ministry, Caritas, educates women of rural and marginal urban areas on cervical cancer prevention through periodic gynecological exams, on the importance of prenatal check-ups and natural methods of spacing pregnancies. In health centers, Caritas works in coordination with health care personnel, nurses and auxiliaries that help with patient care and statistics collection.

On the other hand, there are several non-governmental organizations, both national and international, that promote ideological agendas contrary to the natural family and the traditional values of Honduran people. Their efforts seek to achieve legalization of abortion, and other leftist causes, rejecting moral formation of children and adolescents.

One of their most recent initiatives was the surreptitious introduction of "emergency contraception" into the Honduran pharmaceutical market, promoted among adolescents and young women by the Health Ministry along with the Honduran Association for Family Planning (ASHONPLAFA), a national affiliate of the International Planned Parenthood Federation (IPPF) and Marie Stopes Honduras.

Another initiative has been the lobbying campaign currently directed by UNFPA and other pro-abortion NGOs in the National Congress in favor of the approval of the Optional Protocol to CEDAW. The Convention on the Eradication of Discrimination against Women (CEDAW) was ratified by Honduras through decree number 979 of July, 14 1980 by the military junta government at the time. The CEDAW Committee has exerted pressures over at least 58 nations, ordering them to legalize abortion according to the Convention, even though the treaty's text does not mention the word "abortion".

In August 2007, in the 14th round of ordinary sessions of the CEDAW committee in New York, where Honduras presented its report regarding compliance with the Convention, the CEDAW committee harshly criticized the country for its "pro-life laws", indicating to them that the total prohibition of abortion constituted "a crime".²¹ Commission member Silvia Pimentel argued that even though often times the reason that women look for an abortion is not because their life is in danger ("therapeutic abortion"), she didn't understand the position of Honduras in prohibiting abortion and "of putting the interests of a fetus above those of the woman"; she had to be reminded of the text of articles 65 and 67 in the Honduran

Church and Women's Rights in Honduras), Graduate program on Human Rights thesis, Universidad Nacional Autónoma de Honduras (2000).

21 News story available at http://www.c-fam.org/publications/id.525/pub_detail.asp

constitution. Another committee member, Heisoo Shin, a militant pro-abortion activist, indicated that women and girls were dying in Honduras “due to unsafe abortions”. She added that full abortion bans that prohibit abortion even in cases of rape or incest, or when pregnancy endangers a mother’s health allowed women to die, constituted a “crime that must be combated”.²²

Pro-life NGOs in Honduras

- Pro Life Committee of Honduras (Comité Pro Vida de Honduras), Tegucigalpa headquarters. President: Michelle Zacapa.
- Pro Life Committee of Honduras (Comité Pro Vida de Honduras), Comayagua headquarters. President: Marcela Alfaro-Stengel.

The Pro-life Committee of Honduras is a non-profit organization that defends human life from conception to natural death. It denounces abortion as contrary to the right to life and the dignity of the human person according to Catholic and Christian morals. The organization has carried out advocacy activities regarding Criminal Code reform, denouncing attempts to de-criminalize and accept abortion as a legitimate and legal practice. Its activities include education and promotion of the pro-life message in schools in urban and rural areas in Tegucigalpa, the capital city and in Comayagua, as well as in universities, credit union organizations, unions, law enforcement agencies, prisons, religious centers, and others through training courses, seminaries, conferences, congresses, informational stands, etc.

Pro Life also offers counseling and spiritual support for women with unwanted pregnancies or crisis pregnancies and provides assistance with material resources. Such assistance may include shelter, food, clothing or work, so that they may financially support their babies. Given that most women considering abortions are teenage mothers, minors who have been rejected by their families or boyfriends, and given social prejudices, they are offered shelter in a special home called “Donde María” where they stay both before and after pregnancy.

Pro Life also delivers at its offices and at public hospitals in the capital city baskets equipped with baby clothing, diapers and products for new mothers. On March 25 of every year, Pro Life publicly celebrates the day of the unborn child and holds a special Mass at the Cathedral Church, where special prayers are also offered for pregnant women and women who cannot become pregnant.

22 Ibid..



Pro-abortion NGOs in Honduras

- Women's Rights Center (Centro de Derechos de la Mujer, CDM)
- Marie Stopes Honduras
- Womens' Studies Center (Centro de Estudios de la Mujer – CEM–H) Studies and Actions for Development of Honduras (Centro de Estudios y Acción para el Desarrollo de Honduras, CESADEH)
- Young Women's Network, (Red de Mujeres Jóvenes, REDMUJ)
- Population Development Action (Acciones para el Desarrollo Poblacional, ADP)
- Adult Women's Network (Red de Mujeres Adultas, REDMUCR)
- University Women's Collective (Colectivo de Mujeres Universitarias, COFEMUN)
- Women's World March, Honduran National Committee
- Socialist Women's Movement, Las Lolos (Movimiento de Mujeres Socialistas, LAS LOLAS)
- Women's Population Commission (Comisión de Mujer Pobladora)
- Women's Convergence of Honduras (Convergencia de Mujeres de Honduras)
- Center for Prevention, Treatment and Rehabilitation of Tortured Victims (Centro de Prevención Tratamiento y Rehabilitación de Víctimas de la Tortura, CPTRT).

Unfortunately several international aid agencies, such as USAID, as well as UN agencies, such as UNFPA and PAHO (Pan American Health Organization), have also promoted the legalization of abortion in Honduras, both through political advocacy and development projects.

In addition, several national government agencies, such as the National Institute for Women (INAM), the Honduran Association for Family Planning, the Human Rights Defense Committee and the National Human Rights Commissioner, promote the recognition of abortion as a human right.

E. Statistics

Due to institutional fragility of the National Statistics Institute, there are no available official statistics on abortion in the country. The Pan American Health Organization (PAHO)²³ confirms the lack of available information.²⁴

23 Regional Office of the World Health Organization

24 PAHO, Regional Health Observatory, Country Statistics. Available at <http://new.paho.org/>

Nongovernmental pro-abortion lobbies have estimated high abortion rates in the country; however these have not been officially corroborated.²⁵ There are, however, reliable statistics by WHO regarding the fact that Honduras has reported a decrease of approximately 40% of its maternal mortality rate since 1990. This remarkable accomplishment from a public health perspective was achieved without legalizing abortion, as several international organizations recommended, but through an increase in the number of health professionals in rural areas, such as medical doctors (52%), skilled birth attendants and an overall greater availability of basic health services.²⁶

The latter demonstrates that the greatest necessity in poor countries in the region regarding maternal health is for improvement of basic health services and obstetric care and not legalization of abortion. In addition, the fact that Honduras increased its penalty for abortion, removed legal exceptions permitting it, and granted greater legal protection for the unborn child illustrates that the existence of pro-life legislation is compatible with the reduction of high maternal mortality rates and may even contribute to the same, contrary to assertions by abortion lobbies that pro-life legislation increases maternal mortality.

II. Reproductive Health Legislation

Sexual and Reproductive Health

Currently there is no reproductive health law in the country, in spite of several attempts by sexual and reproductive rights NGOs to get such legislation approved. There are, however, several reproductive health policies approved by the Executive:

- National Sexual and Reproductive Health Policy (financed by UNDP and directed by the Health Ministry):²⁷ the document diagnoses the sexual and reproductive health situation in Honduras in 2010 and establishes general guidelines and conceptual frameworks as well as sexual and

hq/index.php?option=com_content&task=blogcategory&id=2471&Itemid=2408

25 See CLADEM, Comparative study of legal regulation of abortion in Latin America and the Caribbean, September, 2009. Available at www.cladem.org

26 The World Bank, Reducing Maternal Mortality 51–62 (Marjorie A. Koblinsky ed. 2003).

27 National Policy on Sexual and Reproductive Health, General Bureau for Management of Population Risks, Department of Maternal/Child Health, National Commission for Healthy Motherhood (1999).



reproductive health principles. The said framework and principles emphasize family planning and information on human sexuality as well as maternal child health and the “prevention of abortion and treatment of its complications”.²⁸ It does not, however, contemplate abortion as a practice that should be legalized. The principles enumerated among their lines of action also indicate an emphasis on women’s health during labor, pregnancy, post-partum and integral health”.²⁹

- National Women’s Policy and II Gender Equality Plan (2010–2022), National Institute for Women, approved by the Health Ministry:³⁰ this long document essentially consists in a political agenda of the Honduran feminist movement, represented by the governmental institution known as the National Institute for Women (INAM). The document emphasizes the need to increase political participation quotas for feminists in government and decentralized agencies. It also stresses the importance of sexual and reproductive rights and refers to the existing abortion ban in the country’s criminal system as a threat to women’s security.³¹ Despite acknowledging that there are no current official statistics on abortion in the country, the document affirms voluntary abortion is the second largest cause of hospitalization after delivery since the 1980s, which they base on estimates by CLADEM, CDM and the Ministry of Health.³² The document establishes the promotion of sexual and reproductive rights as a strategic objective (policy number 6) through public information programs on responsible sexuality, including the promotion of the female condom and other contraceptives through the Health Secretariat.³³
- Maternal Child Health Policy (National Institute for Women): this document by INAM from the year 2002 mentions the main causes of maternal mortality in the country being uterine hemorrhage, hypertension disorders and sepsis during labor or post-partum, and do not mention abortion among the primary factors, perhaps because at the time, the maternal mortality argument was not proposed as a justification for legalization of abortion.³⁴

28 National Policy on Sexual and Reproductive Health at 17.

29 National Policy on Sexual and Reproductive Health at 24–26.

30 Approved by Executive Decree n. PCM-028-2010, La Gaceta journal, July 6, 2010.

31 *Id.* at 41.

32 *Id.*

33 *Id.* at 45

34 National Policy for Maternal/ Child Health, Social Bureau, Health Ministry at 10.

Among its main guidelines, it includes the goal of ensuring availability of contraceptives and applying a gender perspective to everything related to sexual and reproductive rights.³⁵ Ideologically neutral guidelines included in the document are the promotion of breastfeeding and skilled prenatal care, as well as care during labor and post-partum.

- Handbook on regulations and procedures on women's integral health (Health Ministry, 1999):³⁶ this handbook, approved through ministerial agreement number 0966 of April 13, 1999, was prepared by international organizations and the Population Counsel, an NGO that promotes population control. The handbook aims at giving general guidelines to healthcare personnel on women's reproductive health, in order to contribute to the reduction of maternal morbidity and mortality. The document contains typical rhetoric on reproductive rights commonly used by international organizations and reproductive rights NGOs. Throughout, the document also provides for other benign regulations on prenatal care, labor and post-partum care, as well as lactation among mothers.

The implementation of the above policies remains very weak in practice due to the lack of resources by the government agencies charged with their execution.

35 *Id.*, at 16– 18.

36 Health Ministry, Bureau of Population Risks, Department of Maternal/ Child Health, Women's care unit (technical assistance by PAHO/WHO, USAID and the Population Council), Handbook on Norms and Procedures of Integral Care for Women, Tegucigalpa, 1999.



Colombia

Between False Assertions and Flaws in Argumentation: The So-Called “Abortion Case” in the Colombian Constitutional Court

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I. Introduction

On May 10 2006, after a judicial process lasting for several months and involving six different complaints³ and two requests to dismiss the case for lack of jurisdiction,⁴ the Constitutional Court of Colombia declared the conditional constitutionality of Article 122 of the Criminal Code,⁵ covering the crime of consensual abortion, holding that the punishment stated in such Article

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3 In chronological order, the complaints were filed by: Mónica Roa (April 14, 2005), Javier Oswaldo Sabogal and Óscar Fabio Ojeda Gómez (admitted on May 27, 2005), Mónica Roa, Pablo Jaramillo Valencia and Marcela Abadía Cubillos, Juana Dávila Sáenz and Laura Porras Santillana (these complaints were filed in December 2005 and, on December 14, 2005, the Constitutional Court announced that they would be analyzed together).

4 These are ruling C-1299 (2005), by means of which the Constitutional Court abstained from pronouncing a fundamental ruling regarding the complaint filed by Mónica Roa in April 2005, and ruling C-1300 (2005), by which the Court dismissed the complaint filed by Javier Oswaldo Sabogal and Óscar Fabio Ojeda for lack of jurisdiction. The arguments cited were procedural defects in the first case, and complaint substantial ineptitude in the second case.

5 Act 599, Article 122 (2000) of the Criminal Code:

“Any woman who has an abortion practiced, or lets another person practice an abortion on her, shall face one (1) to three (3) years in prison.

Any person who performs an abortion on a woman with her consent shall receive the same punishment”.

was unconstitutional when the “termination of pregnancy” was performed in any of the three factual circumstances as follow: (i) The imminent danger to the pregnant woman’s life or health; or (ii) any “malformation incompatible with the extrauterine life” present in the unborn; or (iii) the pregnancy being the result of an action that constitutes criminal carnal penetration by violence or abuse, or nonconsensual artificial insemination or fertilized ovum transfer. Similarly, the Court pronounced the unconstitutionality of the expression “or in a woman under 14 years of age” in Article 123 of the Criminal Code⁶—which classifies nonconsensual abortion—and of the entirety of Article 124⁷—which governs the circumstances mitigating the punishment, and eventual non-application of the punishment, for the crime of abortion which provides for the same factual suppositions that the Court excluded as punishable in Article 122—.

This case—as almost all other cases of this kind—remained the center of public debate during the months of trial and even after that, since the four-month delay—from the rendering of the ruling until its official publication – led to numerous speculations about the scope of the decision.⁸

6 Act 599, Article 123 (2000) of the Criminal Code:

“Any person who performs an abortion on a woman without her consent or on a woman under fourteen years of age shall face four (4) to ten (10) years in prison”.

7 Act 599, Article 124 (2000) of the Criminal Code:

“The punishment for the crime of abortion shall be reduced to three quarters when the pregnancy is the result of the criminal action of nonconsensual and abusive carnal penetration, or nonconsensual artificial insemination or fertilized ovum transfer.

Paragraph: In the events mentioned in the previous subsection, when the abortion is performed under special, abnormal motivating conditions, the judicial officer may not apply the punishment if it is not necessary in that specific case”.

8 Between April 14, 2005 and May 10, 2006, the two main opinion newspapers in Colombia—*El Tiempo* and *Revista Semana*—published 460 press articles, editorials and readers’ letters regarding the case. Between May 11 and December 31, 413 other pieces were published. Moreover, during the trial, 1081 legal interventions were filed, some of which were filed by groups of up to 180 people, which has never seen before in the history of Colombian case law. The previous facts do not include the interventions sent by minors and the more than 400 thousand signatures of citizens sent to the Court as a sign of opposition to the plaintiffs’ claims.



II. The Arguments of the Parties

The arguments posed by the plaintiffs in favor of the decriminalization of abortion can be basically summarized as follows:

1. The *unborn's* life certainly is a legally protected interest but does not have the nature of a right.
2. Banning abortion in all cases violates the basic rights to life, free development of the personality, sexual and reproductive freedom, dignity, health, equality, protection against cruel, inhuman and degrading treatments, and state commitments as regards Human Rights.
3. Banning "therapeutic abortion" imposes an excessive burden on women, who are forced to sacrifice their life and health by continuing with a pregnancy that, as a matter of fact, is risky even for the unborn.
4. Banning abortion in those cases in which a malformation incompatible with the extrauterine life of the unborn produces an excessive burden on women in favor of a gestating life with no future. Otherwise, pregnant women are forced to deal with the traumatic experience of giving birth to a "monstrous creature", thus subjecting them to humiliation and contempt.
5. Banning abortion in cases of sexual violence adds further suffering to the already tragic situation of raped women, making their suffering even greater. More specifically, the rape is perpetuated by obliging women to be the mothers of their rapist's child. Not only does this violate women's dignity but it also ignores the state's duty to fight sexual violence, especially in a situation such as the national conflict in Colombia in which rape and other ways of sexual violence have been used as weapons.
6. Ignoring the actual consent granted by women under fourteen years of age to an abortion and, therefore, considering all abortions practiced on women under fourteen as nonconsensual, seriously violates the right of girls, who, instead of being preferentially protected by the state, are forced to continue a pregnancy to birth for which they are neither physically nor psychologically prepared.
7. Banning abortion under all circumstances overlooks the recommendations and policies by the Committee on the Elimination of Discrimination against Women and, consequently, overlooks some binding sources of international law that, in dealing with human rights, are understood as linked to the Constitution, in accordance to article 93 of the Constitution of Colombia considering they are binding interpretations of an international human rights treaty signed by Colombia.

8. Banning abortion under all circumstances perpetuates a patriarchal and misogynist ideology that degrades women to the point of considering them mainly as living wombs, and imposes on them the social role of being mothers.
9. The Court is not obliged by any previous jurisprudential criterion insofar as there is no formal or material *res judicata* on these points, and the legal, social and cultural circumstances have changed significantly over the last decades.

On the other hand, defenders of the law argued that:

1. Article 11 of the Political Constitution of Colombia sets forth the absolute protection of the right to life regardless of age, degree of physical development, health, feasibility for life after born, or circumstances of conception. The mandates in the Universal Declaration of Human Rights, the American Convention on Human Rights (Pact of San Jose) and the U.N. Convention on the Rights of the Child are of the same tenor.
2. Truly acknowledging the principle of respect for human dignity as a basic mainstay in the legal system is only logical within a framework of an absolute understanding of dignity, that is, by acknowledging the intrinsic value and inviolability of every human being and by acknowledging existence as a human being as the foundation of rights. Article 94 of the Political Constitution of Colombia means that fundamental rights are not only the ones specifically mentioned in its provisions, but also all other rights inherent to a human being (i.e. an ontological criterion is resorted to as a foundation for those rights). Therefore, rights apply not to human beings with certain characteristics, but to every person for the mere fact of being human.
3. From the very moment of conception, the unborn is an individual of the human race, different from its mother, on whom it depends only accidentally (environmental dependence). Moreover, it is widely accepted by the scientific community that a being formed by the union of an ovum and a spermatozoid is an organism genetically different from its parents and clearly belonging to the human race.
4. Accepting that the unborn has rights but of less importance than the mother's means applying a discriminatory criterion to fundamental rights, to which, by definition, everyone is entitled.
5. Accepting "therapeutic abortion" entails discrimination based on age and physical development, in favor of the strongest individual; accepting



“abortion on account of malformations” entails making the quality of life a determinative criterion of human rights, thus discriminating against the weakest individual; and accepting abortion in cases of rape entails transferring the rapist’s punishment and guilt to the unborn child; moreover, it is not a true remedy, since the death of the unborn does not “erase” the past rape.

6. In any case, the Constitutional Court had already pronounced fundamental rulings regarding abortion in four specific cases, and, despite some of those decisions having been decided while another Criminal Code was in effect, material *res judicata* is in force, as long as the provisions are practically identical.

III. Review of the Opinion of the Majority in the Constitutional Court⁹

In essence, the Constitutional Court accepted the arguments by the plaintiffs, except for the claim that the recommendations by the CEDAW committee were obligatory and part of the Colombian Constitution, though the court noted it was still compulsory for the court to consider them when reaching its decision.

As regards its jurisdiction in rendering judgment on a topic specifically dealt with in four decisions, and incidentally on other eight occasions, the Court considered there was no formal *res judicata* insofar as the provisions, though being almost identical in their wording, were not parts of the same set of regulations —because a new Criminal Code was adopted—nor did they refer to the same subject matter, for the rules presented subtle variations in their texts and slight changes in measuring the punishment. On the other hand, the Court referred to the theory of the “Living Constitution” to justify its detachment from the *ratio decidendi* of previous judgments, thereby employing the questionable thesis that what was constitutional ten years ago had stopped being so at the moment the new ruling was pronounced. In the Court’s opinion, a gradual and clear variation had been taking place in the Court’s criteria. In reality, the reader should understand this statement as the consequence of the change of magistrates in the Supreme Court, most of whom are now in favor of abortion.

Regarding the fundamental issue, the Court resorted to an “equitable” criterion by which, apparently, it was admitted that all stances were right. Thus,

⁹ The decision is in Ruling C-355 (2006), with a joint paper by the magistrates Jaime Araújo and Clara I. Vargas.

it considered that, as a general rule, penalization of abortion is justified insofar as the life of the unborn, though not exactly a right, is an interest legally protected by the state (in the following section we will go over this crucial aspect in the ruling). However, the Court held, the general protection of the *unborn's* life cannot be given such prominence that it results in severely ignoring the fundamental rights of women which, unlike the purported rights of the unborn, are genuine rights and not just expectations. In a sense, the Court's argument was founded on an alleged "scientific doubt" as to when human life starts, which then generated legal uncertainty regarding the moment in which the right to life begins. According to the Court, the balance between fetal and women's rights is disrupted in cases concerning sexual violence, danger to the woman's health or life, and malformation incompatible with the extrauterine life of the unborn, and to pretend otherwise seriously violates the rights of women who, pursuant to the plaintiffs' opinion, are degraded to the point of being considered "living wombs". The Court specially insisted that abortion was a necessary measure to remedy raped women's dignity and a measure of protection against crimes of sexual violence – a clear example of a fallacious and unreasonable conclusion.¹⁰

The Court also suggested in its *obiter dicta* that abortion was a fundamental right of women and declared, *ultra petita*, the inadmissibility of institutional conscientious objection.

It is necessary to highlight the inappropriate legal conduct by the Court, which took more than four months from rendering the judgment until its official publication –something completely unusual in other countries' justice systems–. During that period of time, the court, in effect, pronounced its judgment in press releases on several occasions and in a confusing way, contrary to the regulations. This situation was aggravated by the fact that the press releases' content and the interventions by the magistrates in the media were inconsistent, due to the

10 The fallacy in question refers to the unreasonable conclusion or *ignoratio elenchi* mentioned.

It occurs when the conclusion drawn from a certain reasoning does not necessarily stem from the premises alluded. The Court's reasoning in this case was fallacious inasmuch as it goes as follows: Raped women's dignity must be remedied; therefore, abortion should be decriminalized in cases of rape. The argumentative flaw lies in this "leap" in proving the facts. Indeed, in order to conclude that the decriminalization of abortion in cases of sexual violence arises from the need to remedy raped women's dignity, it is first necessary to prove that abortion is an effective means to achieve said purpose. Proving so was never considered by the Court, which simply assumed that abortion was truly and undoubtedly capable of remedying raped women.



majority judges' trend to "expand" on the decision's content—inaccessible at that time to the public—on every occasion.

In this sense, it is worth noting that—as can be seen in the dissenting opinions of the magistrates Monroy and Escobar, as well as Tafur, and in the session minutes—the judges who wrote the majority opinion introduced elements to its text after pronouncing judgment, which were never discussed in the Plenary Chamber.¹¹ The most noticeable issue was the inadmissibility of institutional conscientious objection against abortion.

The ruling in favor of the plaintiffs required that the Court use various argumentation "strategies" to justify its failure to follow the four prior constitutionality rulings directly related to the illegality of abortion¹² and to at least eight other judgments¹³ which acknowledged that the unborn was entitled to rights and which dealt with the issue of the moment at which an entity has the right to be recognized as a person before the law in the Colombian legal

11 The Constitutional Court of Colombia is made up by a Plenary Chamber, and several Chambers of Constitutional Tutelage Selection and Constitutional Tutelage Review:

Plenary Chamber (*Sala Plena*): it is made up of nine magistrates in charge of ruling actions relating to unconstitutionality ("C" Rulings), and all matters related to constitutional tutelage (Unifying Rulings or "SU" Rulings).

Constitutional Tutelage Selection Chamber (*Sala de Selección de Tutelas*): it is made up of two magistrates in charge of deciding what case files relating to the protection of a constitutional right will be analyzed by the Constitutional Tutelage Review Chamber.

Constitutional Tutelage Review Chamber (*Sala de Revisión de Tutelas*): it is made up of three magistrates in charge of the tutelage actions selected to be examined ("T" Rulings), pronounced by the different judicial reports.

A **constitutional tutelage action** is a mechanism of protection of fundamental constitutional rights that can be filed before any judge, who shall immediately take all measures he deems necessary to restore the right that has been deprived by means of illegal actions, and to ensure the victim's adequate protection. The Constitutional Court (through its Constitutional Tutelage Selection Chamber and its Constitutional Tutelage Review Chamber) is responsible for reviewing the judgments made by all the judges and courts of the Republic when they have decided any tutelage action. A similar action is called "amparo" in Argentina (see footnote N° 64 in the Argentinean report), and "protection remedy" in Chile (see footnote N°23 in the Chilean report).

12 Specifically, the rulings are C-133 (1994), C-013 (1997), C-591 (1997) and C-647 (2001).

13 Rulings T-223 (1998), T-377 (1998), T-727 (2005), T-639 (2005), T-128 (2005), T-872 (2004), T-501 (2004), T-063 (2004),

system. The Court decided to ignore the main arguments that supported the previous decisions altogether, grounded on the briefly and quickly outlined idea that there exist numerous answers explaining the beginning of human life, “the evaluation of which is not incumbent on the Constitutional Court”¹⁴. The Court also stated—without any support for this assertion—that, since biological “life” and the legally-protected “right to life” were not the same, the Court was free to analyze the constitutionality of the laws challenged. (If the “life” of the unborn and “right to life” were the same thing legally, the Court would have been unable to do so).¹⁵ Finally, it presented a careful selection of passages from dissenting opinions in previous constitutional decisions, as support for an alleged “new conception of abortion in Colombia”.¹⁶

A key aspect in the fallacious argumentation of ruling C-355 (2006) is the defective exercise of “weighting of rights”, by which the magistrates tried to measure two “realities” previously labeled as essentially different: the pregnant women’s “right to freedom” against the constitutionally protected “*unborn’s* welfare” (not necessarily a “right” yet)¹⁷. Although at times the Court tries to present the unborn’s life as a right, it always reminds us that it is a “developing life”, contrasting with the pregnant women’s “already developed life”¹⁸. It also stated without hesitation that there is no equivalence between the “mother’s rights to life and health and safeguarding the fetus”, and then reiterated the unconstitutionality of the measures that protect the unborn¹⁹.

Also, the Court weighted rights based on selected foreign jurisprudence that supported the decriminalization of abortion (not even referring to any

14 Ruling C-355 (2006), paragraph 5.

15 Cf. *Ibid.*

16 An in-depth analysis of the argumentation game played by the Court in this judgment can be seen in Mora Restrepo, Gabriel, *Justicia constitucional y arbitrariedad de los jueces. Teoría de la legitimidad en la argumentación de las sentencias constitucionales*, Buenos Aires, Marcial Pons, 2009, esp. p. 155–214.

17 As a matter of fact, the Court notes that the “starting point” of its constitutionality judgment is its “statement contained in section four of this decision, relating to the fact that the unborn’s life is a constitutionally protected interest” (Ruling C-355 (2006), paragraph 10.1). The implications of labeling the *unborn’s* life as “an interest” and not as “a right” go further than mere semantics, as can be seen in the successive reasons provided by the Court in said ruling.

18 This argument is expressly stated by the Court in Ruling C-355 (2006), paragraph 10.1.

19 Cf. *Ibid.*



opposing precedents), and it granted legal value to the *suggestions* made by international Human Rights surveillance and monitoring bodies (such as the CEDAW Committee), and *non-jurisdictional* pronouncements made by entities like the Inter-American Commission on Human Rights. They are, of course, *non-binding reasons* but, in the majority judges' opinion, become the most conclusive reasoning necessary to reach the final result in exercising the weighting of rights: the pervalence of women's rights and the consequent sacrifice of the unborn's life.

IV. The Magical Leap from the “Decriminalization” of Abortion to the “Fundamental Right to Abortion”

Besides its impact on public opinion, Ruling C-355 (2006) has symbolized an inevitable milestone in the history of judicial precedents in Colombia and Latin America. The judgment is part of a process of “liberalization of gender policy” in the region's countries and, it was planned as such by the international NGO *Women's Link Worldwide*, which directly promoted and sponsored the claim for abortion. In fact, the organization chose Colombia as a strategic country in the region because it has a constitutional court prone to “political activity” and for being one of the most influential constitutional courts in the Latin-American world.

Ruling C-355 (2006) has immensely influenced later developments of state policy on abortion. Since the pronouncement of this judgment, several supposed “developments” of legal precedent have taken place, among which it is worth mentioning the incorporation of abortion in the Compulsory Health Plan (supposedly by virtue of having been recognized as a fundamental right), the inadmissibility of judicial officers' and institutional conscientious objections, and the punishment to all public and private institutions that refuse to perform an abortion.²⁰

A significant case was Ruling T-585 (2010),²¹ by which the Eighth Chamber of the Constitutional Court, held that, based on ruling C-355 (2006) on abortion decriminalization, a true and “undeniable” *fundamental right to abortion* or a *fundamental right to the voluntary interruption of pregnancy* has been established in Colombia.²²

20 See, for example, Ruling T-388 (2009), M. P. Humberto Sierra.

21 M. P. Humberto Sierra.

22 Cf. Ruling T-585 (2010), *passim*.

In this ruling there are several elements that are of particular importance from the point of view of legitimacy; that is, they demonstrate a tendency to ideologize constitutional rulings in debatable cases like abortion.

One of said defects is related to the public knowledge of the ruling, which was published by the media before being duly published and notified by the Constitutional Court.²³ Another element is the obvious leap from decriminalizing of abortion (and thus of its exceptional nature, pursuant to the cases specifically allowed in 2006) to establishing abortion as an alleged fundamental right by the Constitutional Tutelage Review Chamber²⁴ – in opposition to the Plenary Chamber’s judicial precedents, which have a superior legal value. It is still surprising that the so-called “undeniable” character of the right to abortion, mentioned in the ruling, had to be “explained” and “supported” by the Chamber on no less than twenty-two occasions while the ruling was being written. This had to be explained, of course, because the alleged undeniable character of the right to abortion had not been even supported briefly or implicitly by the Court in its 2006 ruling.

The Court’s analysis in Ruling T-585 (2010) was based on the premise that the Court had established the right to reproductive self-determination as a fundamental right in 2006. However, that was not what the Court held in 2006. Rather the Court’s ruling in 2006 was limited to forced pregnancies and involuntary sterilizations and contraceptive methods imposed without consent as violations of laws and treaties on human rights. Furthermore, though the Court did refer to the 1994 International Conference on Population and Development in Cairo, the reference therein to reproductive rights was only regarding their freedom to decide on the number and spacing of their children. Thus, in fact, at no point did any of the sources mentioned by the Court state that “reproductive self-determination” is an aspect of a so-called “fundamental right to abortion.” (Moreover, this understanding of “reproductive health” has been confirmed at the international level. For example, the European Parliament has expressly stated that in no case does the Cairo conference support, suggest, establish or determine that reproductive health includes abortion).²⁵

23 Indeed, the ruling was published online by *Diario El Tiempo*, on Friday, December 3, 2010, at 10.05 p.m. For more information about this and other decisive aspects of Ruling T-585 (2010), please see “Motion for Dismissal”, filed by the Public Prosecutor, on December 13, 2010 (available from: <http://www.procuraduria.gov.co/descargas/131210comunicacion.pdf>).

24 One of the three chambers that make up the Constitutional Court of Colombia. See footnote N° 11.

25 European Parliament, December 4, 2003: Oral Question (H-0794/03) for Question Time at



In addition, in Ruling C-355 (2006), the Court did not equate reproductive self-determination with the so-called “fundamental right” to abortion. On the contrary, it stated that “no order to decriminalize abortion or to prohibit criminal regulations by national legislators is implied” from “the constitutional and international rules” analyzed in regard to women’s fundamental rights.²⁶

In addition, Ruling T-585 (2010) instructs health care entities to implement a “quick diagnosis protocol” if (i) doctors speculate that the mother’s physical and mental health is in danger or (ii) the mother claims the same. Said instruction is preceded by the false assertion by the Court that the lack of such a protocol in the past meant that the right to abortion could not be realized.²⁷ On the contrary, the case file does not show proof of the patient’s having requested the health care entities to practice an abortion before the legal proceeding, nor is there medical evidence of a threat to life related to the pregnancy.²⁸ Furthermore, once the Constitutional Tutelage action²⁹ was filed, the judge of original jurisdiction ordered that a medical examination be performed, and the Instituto de Medicina Legal (Legal Medicine Institute) concluded that the patient enjoyed good health in general—thus, not meeting at least one of the legal requirements to have access to abortion—though the Institute still advised an “examination by a gynecologist”. Following this advice, the judge ordered a new examination by a gynecologist-obstetrician, who stated that the patient “does not have at the moment” any disease that “puts her life at imminent risk as established by the law to interrupt the pregnancy”.³⁰

Finally, another significant point is that the author of the majority

the part-session in December 2003 pursuant to Rule 43 of the Rules of Procedure by Dana Scallon to the Council. In the written record of that session, one reads: Posselt (PPE-DE): “Does the term ‘reproductive health’ include the promotion of abortion, yes or no?” - Antonione, Council: “No”.

26 Ruling C-355 (2006), paragraph 7, in fine.

27 Cf. Judgment T-585 (2010), No. II-30.

28 The “Motion for Dismissal”, filed by the Public Prosecutor (p. 26 and subsequent pages), states that the Constitutional Court may have “altered” the evidence in the case file, since it was confirmed that a medical prescription stated “threat of abortion”—referring to the patients medical records—instead of “request of ‘abortion’”, as transcribed by the Court. The Prosecutor confirms the foregoing by having a phone conversation with the case treating doctor herself, as can be read in the motion (cf. p. 27).

29 See footnote N° 11.

30 Cf. *Ibid.*, p. 15.

opinion in the case knew that the woman had aborted outside the health system,³¹ which means she had aborted illegally (i.e., she was not covered by the three exceptions permitted in the 2006 court decision). Thus, in the Public Prosecutor's opinion the judgment condones criminal behavior.³²

V. Conclusion

Both the decision and the procedure followed by the Court when deliberating, writing and publishing Ruling C-355 (2006) give rise to several legal objections, which, in turn, amount to being ground for nullity requests to the Court, however unsuccessful. Beyond doubt, the most serious of all defects, which represents an obvious judicial fraud, was adding a paragraph about the inadmissibility of institutional conscientious objection while writing the judgment—four months after making the decision in the Plenary Chamber—this being an aspect that was not debated by the judges and, therefore, not put to the vote. The fact that this occurred is confirmed by the official Court Records as well as by the assertions of the dissenting judges.³³ It is also worth noting that, based on this paragraph, the Court has been developing its legal precedents in order to annul the right to conscientious objection, not only for institutions—public or private—but also for judicial officers.

Similarly, the way a Constitutional Tutelage Review Chamber³⁴ treated

31 Cf. Judgment T-585 (2010), N° I-17.

32 Cf. "Motion for Dismissal", cit., esp p. 26 and 65.

33 Indeed, in their joint dissenting opinions to Ruling C-355 (2006), magistrates Monroy and Escobar state: "We want to make it clear that the reason [for dissenting with the ruling] refers exclusively to the issues discussed and decided upon in the Plenary Chamber, and not to the other issues (such as the inadmissibility of institutional conscientious objection or the immediate application of the ruling without a previous regulation) that were not defined within the deliberations that led to the ruling pronouncement, as can be confirmed by the corresponding records". Also, magistrate Tafur states the following: "this dissenting opinion only contains aspects included in said paper and, therefore, were not elements that the Plenary Chamber should have analyzed or debated, such as the elements related to very important issues having special incidence like the inadmissibility of institutional conscientious objection or the immediate entry into force and legal effect of the ruling, without action by a constitutionally competent body, which is the usual course and should have been followed here".

34 See footnote N° 11.



abortion in Ruling T-585 (2010) four years after a contrary ruling denotes not only a lack of commitment and respect towards jurisprudential precedent, but is also a clear, unjustified exercise of judicial activism, which leads to the conclusion that, in cases like abortion, there seems to be definite “ideological impositions” or “political agendas” at work. Moving from the decriminalization of abortion in three particular circumstances to its alleged character as a fundamental right, by altering the facts and overlooking the possible crimes committed by the plaintiff, leads to the conclusion that in cases like the current one, it is not possible to find a rational criteria in the rulings, which succumb to the arbitrariness of those who hold absolute power.³⁵

35 Two recent decisions by the Court should be noted. First, in February 2012, the Plenary Chamber rejected the request to annul the ruling filed by the General Prosecutor of Colombia, holding that Ruling T-585 (2010) was in accordance with the decision of 2006 (“if the fundamental right to reproductive self-determination comprises the voluntary termination of pregnancy, then the latter is also fundamental.”) The second decision was Ruling R-841 (2011), published on February 26, 2012. In this ruling, the Court states that abortions can be practiced at any time during the gestating period, even during the 9th month of pregnancy. The ruling states that one of the factors to be considered is “her desire” to have an abortion. This final remark—making preeminent “[the woman’s] desire”—seems to indicate that in the future, the Court will accept fewer requirements that limit abortion, and demonstrates the judges’ growing disrespect for human life.



Brazil

The Impact and Importance of Abortion in the Last Presidential Elections: A Commentary

Carlos Alberto Di Franco¹

As in most Latin American countries, abortion is considered a crime in Brazil, as provided for in section 124 of the Criminal Code, which classifies it as a *crime against life*.²

However, as in the rest of Latin American countries too, the pressure to legalize this practice reemerges from time to time.

Nonetheless, Brazil has strongly resisted changes to its legislation in this matter. A clear example of this is the situation lived during the October 2010 presidential elections, when the Brazilian population showed a strong rejection of the declarations made by the then-candidate, Dilma Rousseff.

The looming threat of a second ballot during the presidential elections³ motivated the then-president Lula da Silva to support his official candidate, Dilma Rousseff, against “the wave of rumors going round among Catholics and Evangelists”.

It was not just a rumor: Dilma Rousseff had specifically expressed in two interviews – one in the newspaper of São Paulo and the other one in Marie Claire magazine in 2007 – that she was in favor of legalizing abortion. Her exact words were: “I believe that abortion should be decriminalized. It is absurd that abortion is punishable in Brazil”.

Nevertheless, what is important are not the politicians’ statements, but the

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2 Section 128 of the Criminal Code authorizes abortion in cases in which the mother’s life cannot be saved by any other means, or when pregnancy is the result of rape, in which case no police report of the sexual crime suffered is required.

3 The Workers’ Party candidate to president, Dilma Rousseff, received 46.9% of the votes in the first round, instead 50%, which is the minimum required to win an election in the first round.

facts; it is not really important what the President—or his official candidate—says, but what he did and will probably do.

In this regard, it must be noted that Dilma Rousseff's statements paralleled statements and actions by Lula da Silva's government, his party and candidates have shown to be in favor of loosening restrictions on abortion on several occasions:

- In April 2005, in the report about the Treaty on Civil and Political Rights, presented by Brazil before the Human Rights Committee, the government of the then-president Luiz Inácio Lula da Silva committed itself to legalize abortion.⁴
- In August 2005, the mentioned government presented before the Committee on the Elimination of Discrimination Against Women of the United Nations (UN), a document in which abortion is said to be one of women's "human rights".
- In September 2005, Lula da Silva's government filed before the Congress, through the Special Secretary for Women's Policies, a substitute for Bill 1135/91 as a result of the work done by the Tripartite Committee. This substitute aimed to legalize any abortion performed until the ninth month of pregnancy for any reason, as under the bill, abortion is decriminalized by eliminating all articles in the Criminal Code penalizing it.
- In September 2007, in the Workers' Party (WP)⁵ program, the issue of decriminalization of abortion was raised, and it was proposed that the public health system provide medical care in all cases. In this way, the WP became the first party in Brazil to adopt a pro-abortion program.
- In September 2009, the WP expelled both Luiz Henrique and Alfonso Bassuma for being against abortion legalization.
- In February 2010, in its Fourth National Congress, the WP expressed its unconditional support for the 3rd National Program of Human Rights (PNDH3, acronym for Programa Nacional de Direitos Humanos),⁶ and for Decree 7.037/09 (December 21st, 2009), signed by President Lula da Silva and the then-Minister of Administration, Dilma Rousseff, reaffirming abortion decriminalization.⁷ In this Congress, the then-Minister of

4 [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/571409ec0ae191d6c125703c00449ebd/\\$FILE/G0541021.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/571409ec0ae191d6c125703c00449ebd/$FILE/G0541021.pdf) , paragraph 42.

5 Lula da Silva's and Dilma Rousseff's political party.

6 <http://portal.mj.gov.br/sedh/pndh3/pndh3.pdf>

7 http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2009/Decreto/D7037.htm



Administration was praised for being the official WP candidate for president of Brazil.

- In June 2010, the leaders of the WP and the leaders of the party of allies boycotted the creation of the Consumer Price Index (IPC – Índice de Preços ao Consumidor), so that the sources financing international organizations for the promotion and legalization of abortion were not investigated.

The foregoing proves that abortion legalization has been a priority for the WP, a fact that was admitted by the party during the first ballot.

However, Brazilian people reacted against those who attempted to impose—against society and in the name of “democracy”—the exclusion of the first fundamental human right: the right to life. Rousseff’s statements about the decriminalization of abortion strongly impacted the Brazilian population, who firmly rejected them and caused the current president to worry about her victory during the second ballot.⁸

Datafolha’s⁹ latest research spoke for itself: more than 68% of Brazilians are against abortion.¹⁰

Therefore, legalizing abortion would be, at the present time, a clearly antidemocratic action. Despite the emotional marketing campaigns in favor of abortion, it is difficult to understand how we could possibly achieve a fairer and more decent life—for adults—at the expense of others’ death: the death of the unborn.

Despite what has been mentioned before, the results of 2010 elections favored Dilma Rousseff, who, after making public her opinion about abortion, felt obliged to retract her statements and remove the discussion of the act on interruption of pregnancy from her agenda. Moreover, the WP’s Communication Secretary, André Vargas, stated in public that including the decriminalization of abortion in the party’s electoral program “was a mistake”.¹¹

8 <http://g1.globo.com/especiais/eleicoes-2010/noticia/2010/10/saiba-o-que-dilma-serra-e-marina-ja-disseram-sobre-o-aborto.html>

9 Datafolha Grupo Folha da Manhã is a research institute which conducts public opinion polls and produces national statistics. Please visit: <http://datafolha.folha.uol.com.br/sobre/historico.php>

10 http://datafolha.folha.uol.com.br/po/ver_po.php?session=558

11 <http://noticias.terra.com.ar/internacionales/pt-busca-suprimir-apoyo-a-aborto-para-evitar-choque-con-iglesias,b757bff6c0c7b210VgnVCM20000099f154d0RCRD.html>

Only President Dilma Rousseff's actions during her term of office will prove whether she will heed the will of the majority of the Brazilians who support the right to life.



Paraguay

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I. Introduction

Dignity and life have an essential value universally acknowledged, though not always equally protected. This is mainly the consequence of the fact that, underlying every legal system, is a certain understanding of mankind and their dignity.

This is why knowing the philosophical, cultural and legal understandings reflected in legislation, and how they influence defense and promotion of life is so important.

This paper will deeply analyze the following two areas in which legal development is intimately linked to the understanding each nation has about human dignity: (1) the protection of the right to life in general and (2) the issue of abortion in particular.

However, before doing so, we may say, in summary, (1) that acknowledging the dignity of every human being is an essential axiom of the Paraguayan Constitution and, therefore, of every local positive law; and (2) the right to life is

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the first right stated in the National Constitution. In article 4, it establishes that: “The right to life is inherent to each human being. In general, it is protected from the moment of conception”.

This article aims to be a tool that, combining an analysis of legislation and jurisprudence, serves as a guide for legislators, politicians, the media, young people and, in general, every person interested in defending the right to life in Paraguay.

II. Legislation Guaranteeing Human Dignity

A. Political and Legal Organization

The 1992 National Constitution establishes that the Republic of Paraguay is a unitary, indivisible, and decentralized social state, subject to the rule of law, as set forth by its National Constitution and legislation. The form of government adopted is the representative, participative and pluralist democracy, its foundation being the acknowledgement of human dignity.

This means that the State of Paraguay is unitary and the decentralization is minimal, mainly for administrative, and barely for political, purposes, since it acknowledges the autonomous character of Departments and Municipalities. The legislative power rests in the National Congress.

Article 137 of the National Constitution establishes the following clear and indisputable hierarchical order of the Paraguayan positive law:

1. National Constitution.
2. International treaties, conventions and agreements enacted and acknowledged.
3. Acts passed by the Congress.
4. Other, lower-ranked administrative regulations.

B. The Legal Worldview of Dignity and Life in Paraguay

Acknowledging the dignity of every human being is an essential axiom of the Paraguayan Constitution and, therefore, of every local positive law.

The preamble and article 1 of the Constitution already established the “acknowledgement of human dignity” as the foundation for the form of government adopted. That means that, from the very beginning, the Paraguayan law recognizes that human beings, simply for being such, are entitled to inalienable rights.

In this regard, the right to life is the first right stated in the National Constitution. In article 4, it establishes that:



“The right to life is inherent to each human being. In general, it is protected from the moment of conception. The death penalty is hereby abolished. The state shall protect every person’s physical and psychic integrity as well as their honor and reputation. Legislation shall ensure to each person his freedom to consent a research on his own body, only for scientific and medical purposes”.³

In this way, the 1992 constitutional amendment expressly incorporated the right to life to its dogmatic part, using almost the same wording as the American Convention of Human Rights.⁴

It should also be mentioned that the National Constitution establishes that the rights of children prevail over other rights in case of conflict, and that by “children” it should be understood every person from their conception until the age of 18 years.⁵ That means that, in the event of conflict between the unborn child’s right to life and any other right claimed by a third party (including the woman’s “reproductive rights”), the former shall prevail over the latter.

As article 54 of the National Constitution states:

“In case of conflict, the rights prevailing are the children’s rights”.

C. International Instruments in Force

Paraguay is a signatory to most of the international instruments on human rights, both at global and regional levels. Some of the main instruments regarding the right to life are the ones presented below:

International Covenant on Civil and Political Rights (ICCPR): Signed on November 26, 1966 in the UN, passed by Act N° 5/92, effective as from September 10, 1992.

American Convention on Human Rights, Pact of San José (ACHR): Signed by Paraguay on February 2, 1971, passed by Act N° 1/89, effective as from March 26, 1993.

3 Art. 4 of the National Constitution of Paraguay.

4 Article 4.1 of the American Convention of Human Rights establishes 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. No one shall be arbitrarily deprived of his life”.

5 Section 3, Act N° 2169/03.

United Nations' Convention on the Rights of the Child (CRC): Signed by Paraguay on April 4, 1990, passed by Act N° 57/90, effective as from October 26, 1990.

The following provisions from the instruments above are worth noting:

International Covenant on Civil and Political Rights

“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”.⁶

American Convention on Human Rights

“For the purposes of this Convention, ‘person’ means every human being”.⁷

“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. No one shall be arbitrarily deprived of his life”.⁸

United Nations Convention on the Rights of the Child

“For the purposes of the present Convention, a child means every human being below the age of eighteen years unless according to the law applicable to the child, majority is attained earlier”.⁹

“States Parties recognize that every child has the inherent right to life”.¹⁰

The Convention on the Rights of the Child (CRC) considers that a child is every human being under the age of 18 years; however, since the National Constitution grants the right to life from the moment of conception, the definition of “child” in the Paraguayan law is completed, resulting in “every human being from the moment of conception until the age of 18 years”.

As mentioned before, international treaties are infra-constitutional (which means that, in case of contradiction, the Constitution shall prevail) and supralegal (which means that the national law shall be adjusted to the provisions set forth in such documents). However, most human rights acknowledged by international

6 Art. 6, ICCPR.

7 Art. 1.2, ACHR.

8 Art. 4, ACHR.

9 Art. 1, CRC.

10 Art. 6.1, CRC.



legal instruments have been stated in the National Constitution after the 1992 amendment.¹¹

It should also be noted that there are no records of the Republic of Paraguay having expressed reservations about the above mentioned international instruments. This confirms the fact that domestic legislation is in full accordance with international legislation, which expressly acknowledges that every person has the inherent right to life. Therefore, Paraguay is bound to respect and ensure the enforceability of this right.

D. Domestic Legislation

Below are the provisions regarding the right to life, stipulated by the domestic laws enacted by the National Congress:

- Civil Code (Act N° 1183/85).
- Health Code (Act N° 836/80).
- Childhood and Adolescence Code (Act N° 1680/01).
- Criminal Code (Act N° 1160/97, amended by Act N° 3440/08).

National Civil Code

Section 28 of the Civil Code recognizes that every physical person—from the moment of conception—has legal capacity to receive property as gifts, inheritance or legacy. This provision confirms that in the Paraguayan legal system a person is such from the moment of conception and, therefore, entitled to rights.

Health Code

Passed in 1980, the Health Code acknowledges that the condition of being a human and a child begins from the moment of conception.

The Health Code, passed by Act N° 836/80, states that:

“The parents have the obligation and the right to protect their as well as their children’s health from the moment when gestation begins”.¹²

“The State, on the other hand, shall sanitarily protect and help the child from his conception until he reaches the legal age”.¹³

11 The right to life was thus expressly incorporated to article 4 of the Constitution.

12 Sect. 21, Health Code.

13 Sect. 22, Health Code.

Childhood and Adolescence Code

This protective rule about childhood and adolescence acknowledges the condition of being a person from the conception, and ensures the protection of the unborn child. This is presented in section 10:

“The protection of unborn children is exercised by assisting pregnant women from the moment of their children’s conception until forty-five days after the birth. This assistance is mandatory for the parent and, in their absence, for those on whom the subsidiary responsibility lies, as established by this Code”.

Criminal Code

Section 109 of the Paraguayan Criminal Code, amended by Act N° 3440/80, establishes the following:

“1. The person who murders (intentionally kills) a fetus shall be imprisoned for up to five years. The attempt to murder shall also be punished.

2. The punishment shall be increased up to eight years if the author of the crime:

- a. acted without the pregnant woman’s consent; or
- b. put, through their intervention, the pregnant woman’s life at risk or caused her serious injuries.

3. If the pregnant woman performed the criminal act, either by herself or by letting another person do it, the imprisonment shall not be greater than two years. In this case, an unsuccessful attempt shall not be punished. When establishing the punishment, it shall be considered if the state has failed in its duty to protect the child, under the constitutional provisions.

4. Indirectly causing the death of the fetus is not against the law, provided that—according to the doctor’s scientific knowledge and expertise—his death was necessary to protect the mother’s life”.

The Criminal Code classifies abortion as a crime, the fetus’s life being the interest legally protected.

This Code—after the enactment of Act N° 3440/08 amending it—defines the *fetus* as “the human being’s embryo until the birth”.¹⁴ Act N° 3440/08 thus partially

14 Sect. 14, par.1°, subpar. 18, Criminal Code.



amended the regime provided for in sections 349 to 353 of the 1914 Criminal Code—also in force in the 1997 Criminal Code—which did not define abortion or the person to be born, but simply used the terms without further specification.

By classifying the conduct of “the person who murders a fetus” and by considering fetus “the human being’s embryo until the birth”, what is not clearly defined is the legal situation of the person before being an embryo, since some medical definitions consider that the “embryo’s” existence begins on the fourteenth day of gestation. However, despite the terminology used to describe the embryo’s different development stages, the medical science does not question the fact that human life begins with the union of an ovum and a spermatozoid (fertilization).¹⁵ Therefore, it should be considered that the Criminal Code protects human beings from that moment (i.e. from the moment of fertilization).

The basic class of acts is punished with imprisonment up to five (5) years. However, the punishment can be increased up to eight (8) years if the pregnant woman does not consent to criminal action or her life is put at risk or she is caused serious injuries.

If the pregnant woman performs the abortion herself, the time in prison is reduced (up to two (2) years), while the mere (unsuccessful) attempt is not punished.

The Criminal Code only contemplates one case of non-punishable abortion: when the death of the fetus is indirectly caused in an attempt to protect the mother’s life from serious danger. The word “indirectly” should be noted here, since the legislature is not using it to make reference to the possibility of choosing between the mother’s or the child’s lives, but is referring to the unintended (even if foreseen) death of the child, as a consequence of a risky operation or other extremely delicate situation.

E. Life, the Paramount Right Pursuant to the Paraguayan Courts’ Jurisprudence

The Paraguayan Courts’ jurisprudence has always decided in favor of the

15 “The main consequences of fertilization are that: (1) The diploid number of chromosomes (2n) is restored, (2) The embryo’s sex can be determined by the spermatozoid’s x or y chromosome, (3) The species variability is expressed by means of the combination of male and female chromosomes, (4) The ovum’s metabolism becomes active, and (5) The segmentation begins”. EYNARD, VALENTICH, ROVASIO, *Histología y Embriología del ser humano, bases celulares y moleculares*, 4 Edition, Editorial Médica Panamericana, Buenos Aires, 2009, p. 145.

supremacy of the right to life. This is established by the Supreme Court of Justice in several judgments¹⁶ in which it states that:

“Among the fundamental values in our body of rules, freedom is, **after the right to life**, the base that underlies all rights protected by Law...”¹⁷

“**After the right to life**, the human beings’ most highly prized interest is their freedom...”¹⁸

“The convicted shall be set free since freedom is, **after the right to life**, the base that underlies all rights protected by Law, and the constituent has provided them with the highest guarantees effectively in force”.¹⁹

“Among the fundamental values in our body of rules, freedom is, **after the right to life**, the base that underlies all rights protected by Law; this means that the constituents, consistent with their philosophical stance that the rights that make up human dignity are the ones that justify the creation of the state, logically and ontologically preceded by said rights, have sought to provide them with the highest guarantees effectively in force”.²⁰

Such statements prove that the Supreme Court of Paraguay has made its position very clear: the right to life is the first and the highest of all rights, being even more important than freedom.

Even though there is no case-law from the criminal jurisdiction about abortion in particular, there are rulings that protect the unborn. For instance, the

16 This has also been pointed out by the lower courts. The Criminal Court of Appeals of Asunción has affirmed that “life is the highest legal interest that the State must acknowledge, since without it, there is absolute negotiation of the right; this is the reason why its protection is the most important one”. “Martín Fabian Duarte Rojas v. IPS” Criminal Court of Appeals of Asunción, Chamber 4. Agreement and Ruling N° 1, February 5, 2009. Voted by Emiliano Rolón Fernández.

17 Proceeding in the trial called “General habeas corpus in favor of the minors confined to the institution for young offenders ‘Panchito López.’” Supreme Court of Justice of Paraguay. Supporting minister: Oscar Paciello. Agreement and Ruling N° 562, December 23, 1993.

18 “Agustín Brizuela Sánchez and Santiago Higinio Alcaraz requesting habeas corpus”. Supreme Court of Justice of Paraguay. Supporting judge: Wildo Rienzi Galeano. Agreement and Ruling N° 416, June 20, 2002.

19 “Remedying habeas corpus filed in favor of Mr. Aldo René Ibarra Cubilla”. Supreme Court of Justice of Paraguay, Criminal Chamber. Agreement and Ruling N° 1, January 5, 2010.

20 “Stroessner, Gustavo Adolfo requesting Habeas corpus”. Supreme Court of Justice of Paraguay, Criminal Chamber. Agreement and Ruling N° 712, December 5, 2000.



Supreme Court has maintained that:

“The habeas corpus proceeding deserves to be approved and the arrest awaiting trial should be substituted with house arrest since the medical reports attached to this case prove that the **defendant is pregnant, and her life and the fetus’s life are at risk; thus it is imperative to safeguard their lives** and to take into account that the care the petitioner needs cannot be provided in the Penitentiary where she is currently confined”.²¹

As seen above, the Paraguayan Courts have clearly stated their stance by affirming the supremacy of the right to life, emphasizing its supreme importance, and holding that said protection also applies to the unborn. This has never been subjected to debate or dissent at the judicial level.

F. Legislative Bills to be Considered by the National Congress

Regarding the right to life, the main bill that the National Congress is analyzing is the one on “Sexual, Reproductive and Mother’s Perinatal Health”, filed for the second time by Senator Carlos Filizzola,²² in August 2008.

It should be mentioned that the same Bill was filed in 2005, though with slight differences, and after debates and public hearings, the Plenary Congress rejected it by an overwhelming majority.

The current Bill is awaiting judgment by the Senate’s Advisory Committees: Equity, Gender and Social Development; Treasury, Budget and Accounts; Legislation, Codification, Justice and Labor; and Public Health, Social Security, Prevention and Fight against Drug Trafficking. Through November 2010, no judgment was rendered; however, it has already been subjected to a Public Hearing, where it was again widely repudiated.

This bill has been questioned mainly because of the ambiguous concept of “reproductive health” used. Said ambiguity arises from the scope this term has allegedly been given in international conferences²³—such as the Fourth World

21 “Remedying habeas corpus filed in favor of Ms. Liliana Verón”. Supreme Court of Justice of Paraguay, Criminal Chamber. Agreement and Ruling N° 4, January 8, 2010.

22 Senator elected in 2003, and reelected for the 2008–2013 term of office. He leads the *Partido País Solidario* (Party for a Country of Solidarity), adhering to the democratic socialism ideology.

23 “The ABC’s of an International Right to Abortion”, *The Human Life Review*, Summer 2010.

Conference on Women in Beijing (1995)—in which the termination of pregnancy is sometimes included.²⁴

Questions have also been raised about section 12, par. c, since it grants women the right to “freely make decisions during pregnancy”, without specifying the scope and limits to the alleged right.

With regard to this and other bills, the Paraguayan Senate issued a Declaration on December 17, 2009, suggested by Senator Roger Caballero,²⁵ in which both Congressional Chambers were exhorted to reject every bill containing articles that make an attempt on life and the family.

Although said Declaration is not binding, it reflects the stance of the majority political groups of the Republic of Paraguay.

III. Abortion

A. Regime Protecting the Right to Life

The extent of national legislation on abortion, the ratification of global and regional international treaties (with their consequent complaint, protection and control mechanisms), as well as the various recommendations on abortion that the Paraguayan State has received from international bodies, must all be analyzed and considered here in order to fully assess the true extent of the regime protecting the right to life in Paraguay.

Some of the legal considerations are briefly presented below, respecting the hierarchical order established in Art. 137 of the National Constitution:²⁶

http://www.humanlifereview.com/index.php?option=com_content&view=article&id=113:the-abcs-of-an-international-right-to-abortion&catid=52:2010-summer

24 In the City of New York, on June 5–9, 2000, in the extraordinary period of sessions of the United Nations’ General Assembly, the Fourth World Conference on Women renewed its commitment to the goals set in the 1995 Beijing Conference. Since then, it has been known as Beijing +5. The Beijing Declaration and Platform of Action define a set of strategic goals and explain the measures that the State must adopt in order to eliminate the obstacles holding up women’s advancement. Among said obstacles allegedly is the lack of accessibility to contraceptive methods, including abortion.

25 National Senator for the Party *Partido Unión Nacional de Ciudadanos Éticos* (UNACE – National Union of Ethical Citizens).

26 See *supra* the hierarchical order of the Paraguayan legal rules.



• International Instruments of Legal Protection

The human right to life has been expressly acknowledged in several international treaties that establish that the state's duty is to guarantee its effective enforceability.

Paraguay, in being a signatory to those treaties, has undertaken to respect this right without any restrictions, and to the maximum extent possible, based on the *pro hominem* principle ruling the interpretation of every human right.

In this regard, articles 3, 6, 25 and 30 of the **Universal Declaration of Human Rights**, and article 6.1 of the **International Covenant on Civil and Political Rights**, acknowledge that, in accordance with the principles stated in the United Nations Charter, “the right to life is inherent to human beings”.

The **Convention on the Elimination of All Forms of Discrimination Against Women** (CEDAW) also provides for the protection of the unborn. It establishes in article 12, par. 1 that “States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care”, and in par. 2, that “the States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services when necessary, as well as adequate nutrition during pregnancy and lactation”. It can thus be interpreted that the Convention's purpose is to ensure to women accessibility to health services on equal terms as men, especially recognizing and protecting pregnant women and their unborn children.²⁷

The **Declaration of the Rights of the Child**,²⁸ in paragraph 3 of its Preamble establishes that, due to their physical and mental immaturity, children need special safeguards and care, including appropriate legal protection, before and after birth. Article 4 establishes that “the child shall be entitled to grow and develop in health; to this end, special care and protection shall be provided both to him and to his mother, including adequate pre-natal and post-natal care”.

Furthermore, the **Convention on the Rights of the Child**²⁹ in article 6 states that the “States Parties recognize that every child has the inherent right to life”,

27 Despite the fact that some people have intended to interpret this article—as well as article 16, par. 1, e), which provides for women's right “to decide freely and responsibly on the number and spacing of their children”—as recognizing women's sexual and reproductive rights, including an alleged right to abortion, the truth is that the Convention does not mention any of these anywhere. Please see “B. Maternal Mortality: Alleged Ineffectiveness of Abortion Penalization” in this paper.

28 Passed by the United Nations' General Assembly on November 20th, 1959.

29 Passed by the United Nations' General Assembly on November 20th, 1989.

defining the child in article 1 as “every human being below the age of eighteen years”, though not specifying the moment when childhood begins. This has raised the question about whether said moment begins with the birth, the conception or some other instance in between the other two.³⁰ The truth is that Paraguay specifically recognizes that the child is each person from conception to adulthood³¹ that is why, there is no doubt about the scope of the right to life recognized by the Republic of Paraguay: every child, from the moment of conception until the age of 18 years, has the inherent right to life.

In a 1982 General Observation on the right to life, the United Nations’ **Human Rights Committee** (formed pursuant to the provisions of the ICCPR) affirmed that said right has too frequently been construed in a restrictive manner: “The expression ‘the right to life is inherent to human beings’ cannot be interpreted in a restrictive manner and the protection of this right requires that the states adopt positive measures. In this regard, the Committee considers that it would be appropriate that the State Parties take all possible measures to reduce child mortality and to increase life expectancy, especially by taking measures to eliminate malnutrition and epidemics”.³²

Regarding the regional international instruments on human rights, article 4.1 of the **American Convention on Human Rights** expressly states 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”.

• **National Legislation: Penalization of Abortion**

It has been mentioned before that the Civil, Health, and Childhood and Adolescence Codes unequivocally protect the human life as from the moment of conception. And this protection is strengthened through the criminal law, by classifying abortion as a crime.

Pursuant to Section 109 of the Criminal Code, amended by Act N° 3440/2008, in force since July 16th, 2009, “the person who murders a fetus shall be imprisoned

30 There are opinions that understand that the reason why the Convention states nothing about the beginning of life is because that issue would have been a threat to the universal ratification of the Convention. Rachel Hodgkin and Peter Newell. Implementation Handbook for the Convention on the Rights of the Child. UNICEF. 2004.

31 In accordance with the Civil, Health, and Childhood and Adolescence Codes mentioned before.

32 Human Rights Committee, General Observation 6, 1982, HRI/GEN/1/Rev.7, paragraph 5.



for up to five years, the attempt also being punishable”.³³ It also states that the punishment can be increased up to eight years when the author “acted without the pregnant woman’s consent; or when his intervention put the pregnant woman’s life at risk or caused her serious injuries”.

Regarding the mitigating situations, said article establishes that “if the pregnant woman performed the criminal act, either by herself or by letting another person do it, the imprisonment shall not be greater than two years. In this case, an unsuccessful attempt shall not be punished. When establishing the punishment, it shall be especially considering whether the act was motivated by the lack of child’s support guaranteed by the Constitution”.

The Code punishes all kinds of abortion, but mentions “the lack of support guaranteed to children by the Constitution” as a possible mitigating situation. Is it then possible to say that there are mitigating circumstances based on social and/or economic reasons? The constitutional principle of Child Protection, referred to by the article, implies that the state shall have plans and programs to assist those families in situations of social disadvantage, extreme poverty, and/or neglect, particularly programs that prevent abandonment, malnutrition, violence, abuse, and child and adolescent traffic and/or exploitation, and finally, sexual and reproductive health plans to prevent unwanted pregnancies. If the state fails in its duty, an abortion is still penalized, though the judge hearing the case, may consider this in mitigation.

Paragraph 4 of Sect. 109 of the Criminal Code incorporates the legal type of “indirect death due to necessity during labor”—though not using the same words—which occurs when the fetus dies as a result of the medical intervention which, based on the doctor’s scientific knowledge and expertise, is necessary so as to protect the mother’s life. The legislation establishes that the doctor who acts in such a manner is not performing an unlawful action.

Regarding chemical abortion, the Criminal Code does not classify it as a special crime. Neither is there in Paraguay any official judgments issued by the competent authorities regarding the effects of certain emergency contraceptives. According to what has been mentioned above, and considering that abortion is an unlawful practice, it would seem logical that no drug whose abortion-inducing effect is still to be determined can be offered as part of the services provided by health care public or private institutions.

33 According to Sect. 26 of the Criminal Code, the attempt occurs when the author makes the decision to carry out a punishable action by means of acts that, in representing the action, immediately precede the purpose of the executed action classified as a crime.

Abortion in Paraguay may be reported as a crime for subsequent prosecution. In some cases, some clandestine private abortion clinics have been dismantled by the authorities. The information about such clinics has been provided by public health centers which assist women –usually in very serious conditions and with their lives at risk– who have had incomplete abortions performed in said private clinics.

Further, there is no case-law about cases of non-punishable abortion (indirect abortion).

B. High Rates of Maternal Mortality: Alleged Ineffectiveness of Abortion Penalization

The CEDAW³⁴ Committee, in its 15 period of sessions,³⁵ received the report by the Republic of Paraguay, which reads as follows: “The country has one of the highest mother mortality rates in Latin America, with abortion being the second cause of death”. The Committee has expressed its concern about abortion performed under insanitary conditions, and recommended that the state revise the penalization of abortion in the country.

The questions is (i) whether the CEDAW Committee is empowered to make recommendations of this kind, and (ii) whether the decriminalization of abortion is a truly effective measure to avoid maternal mortality.

With regard to the first question, there is no doubt that the CEDAW’s Committee lacks the necessary powers to make recommendations that entail not only a threat to the unborn’s right to life (which is expressly acknowledged by international treaties and the Paraguayan domestic legislation), but also an unjustified interference in matters that are exclusive to each State, by virtue of the principle of national sovereignty.

Furthermore, although the Convention recognized that the Committee is empowered to assess the reports that each state presents before the United Nations’ General Secretariat regarding the progresses made in the application of the Convention,³⁶ there is no reference to abortion in its text. On the contrary, the lives and health pregnant women and their unborn children are thereby protected.³⁷

34 Convention on the Elimination of All Forms of Discrimination Against Women.

35 Concluding Observations: Paraguay: CEDAW. 15 Period of Sessions. January 15 to February 2, 1996. Supplement N° 38 (A/51/38).

36 Pursuant to article 18 of the CEDAW Convention.

37 As mentioned before, article 12, par. 2 of the Convention establishes that “States Parties



Regarding the second question, the decriminalization of abortion must also be rejected as an effective means to reduce maternal mortality rate. In a country where 40% of the population live under poverty (their monthly income not exceeding USD 50) and 19% of the population live under extreme poverty (their monthly income not exceeding USD 15); where 250,000 people are illiterate; where population density is low and the number of inhabitants is average; where there is a high degree of social inequity and the government is inefficient; intending to reduce maternal mortality by decriminalizing abortion means taking an ineffective measure which will not reduce maternal mortality. On the contrary, it seems that improvements and greater accessibility to health services, without any kind of discrimination, are the viable means of reducing maternal mortality.

Maternal Mortality per Year According to their Causes (Ratio Registered Per 100,000 Live Births)

CAUSES	2000		2001		2002		2003		2004		2005		2006		2007		2008		2009	
	N°	Rate	N°	Rate	N°	Rate	N°	Rate	N°	Rate	N°	Rate	N°	Rate	N°	Rate	N°	Rate	N°	Rate
1. Abortion (O00-O07)	35	40.7	32	38.1	39	43.3	36	41.5	35	34.7	37	35.0	31	30.4	33	34.4	25	25.1	23	22.5
2. Toxemia (O10-O16)	37	43.0	20	23.8	27	30.0	32	36.9	31	30.7	27	25.5	29	28.4	33	34.4	20	20.1	25	24.5
3. Bleeding (O20; O44-O46; O67; O72)	22	25.6	33	39.3	48	53.3	28	32.3	36	35.6	26	24.6	27	26.4	25	26.1	28	28.1	21	20.6
4. Sepsis (O75.3; O85)	15	17.4	22	26.2	19	21.1	16	18.4	21	20.8	15	14.2	8	7.8	9	9.4	10	10.0	8	7.8
5. Obstetrical Tetanus (A34)	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
6. AIDS (B20-B24)	0	0.0	2	2.4	0	0.0	0	0.0	1	1.0	0	0.0	1	1.0	1	1.0	0	0.0	0	0.0
7. Other Complications during Pregnancy, Labor and Post-natal (O21-O29; O30-O43; O47-O48; O60-O66; O68-O71; O73-O75; O86-O92; O95-O99)	32	37.2	25	29.8	31	34.4	39	45.0	31	30.7	31	29.3	28	27.4	21	21.9	34	34.1	51	49.9
GENERAL TOTAL	141	164	134	159.7	164	182.1	151	174.1	155	153.5	136	128.5	124	121.4	122	127.3	117	117.4	128	125.3

NOTE: Data corresponding to the deceased's place of residence

- LIVE BIRTHS IN 2000 = 86,000
- LIVE BIRTHS IN 2001 = 83,919
- LIVE BIRTHS IN 2002 = 90,085
- LIVE BIRTHS IN 2003 = 86,739
- LIVE BIRTHS IN 2004 = 101,000
- LIVE BIRTHS IN 2005 = 105,808
- LIVE BIRTHS IN 2006 = 102,109
- LIVE BIRTHS IN 2007 = 95,862
- LIVE BIRTHS IN 2008 = 99,688
- LIVE BIRTHS IN 2009 = 102,162

Source: Vital Statistics Data Sub-System (Sub-Sistema de Información de las Estadísticas Vitales – SSIEV). Biostatistics Office. MSPyBS.

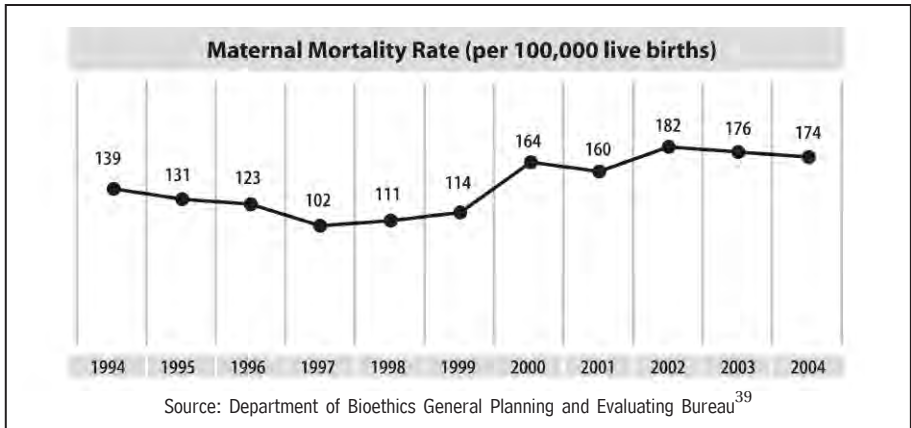
shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation”.

In this regard, the World Bank has calculated that, if every woman had access to medical services to assist their complications during pregnancy and confinement, especially to obstetric emergency care, 74% of women could be saved.³⁸

Moreover, in accordance with the statistics provided by the *Ministerio de Salud Pública y Bienestar Social* (MSPyBS – Ministry of Public Health and Social Welfare), the main causes of maternal mortality in Paraguay are toxemia, bleeding and other pregnancy, labor and postnatal complications.

This proves that it is essential to improve health care services so as to avoid every maternal death, as well as to support pregnant women whose health is at risk so that they find viable alternatives and avoid abortion.

Some Indicators



Maternal mortality recorded in Paraguay in 1999 was 114.4 per 100,000 live births, which meant a 23.8% reduction as compared to 1990, 20% of such deaths being adolescents.

In 2000, 2001 and 2002, by implementing an audit of maternal deaths, the recorded rates were 164, 160.7 and 182.1 per 100,000 live births respectively.

Maternal mortality rates present significant variations depending on the

38 WAGSTAFF, A. and M. CLAESON, 2004 The Millennium Developments Goals for Health: Rising to the Challenges. Washington DC: The World Bank, cited by the Inter-American Commission of Human Rights, *Access to Maternal Health Care from a Human Rights Perspective*, Organization of American States, Washington DC, 2010, p. 3.

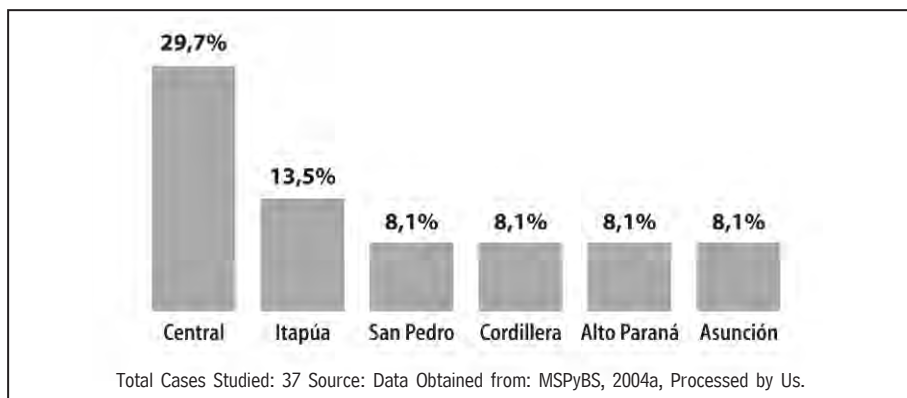
39 Edgar Giménez Caballero. Viceminister of Health. “La salud en los procesos de integración”. October 24 and 25, 2008.



different regions.⁴⁰ Thus, the percentages can be observed depending on the place of residence.

According to the Ministry of Public Health and Social Welfare, the causes of maternal death in Paraguay are related to the difficulty to access to health care services – 46% due to the delay in arriving at the health center, 23% to the services' inefficiency, and 31% to a complete lack of assistance (deaths thus occurring in women's homes).⁴¹

Percentages depending on the place of residence

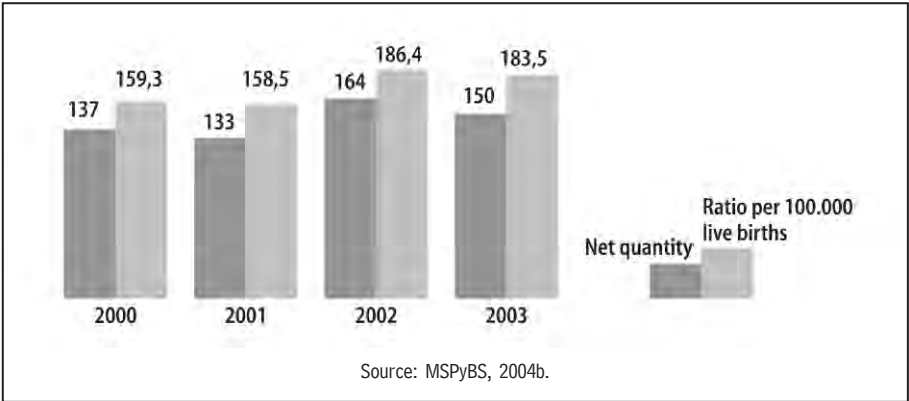


40 "Latin America and the Caribbean are characterized as regions with great diversity in terms of both economic development level and geographic distribution as well as disparities between countries and within countries with respect to access to maternal health services. As a result, 50% of maternal deaths are concentrated in the poorest 20% of the region while only 5% of such deaths are found in the richest 20%". Inter-American Commission of Human Rights, *Access to Maternal Health Care from a Human Rights Perspective*, Organization of American States, Washington DC, 2010, p. 3.

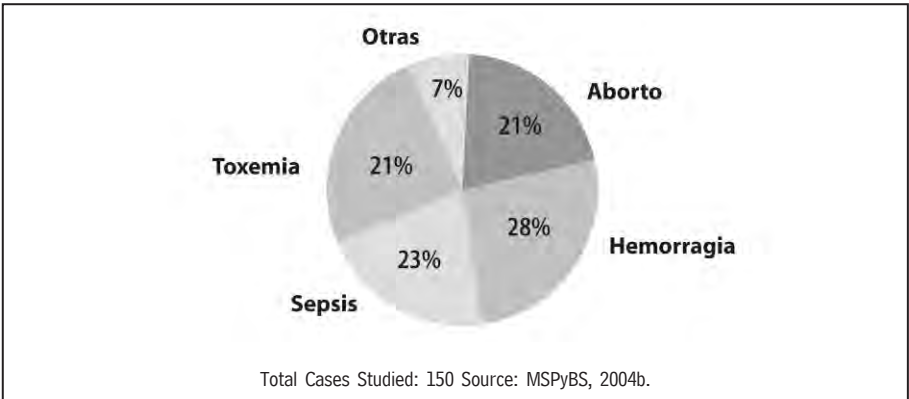
41 A similar situation can be seen in other countries of the region. The Inter-American Commission of Human Rights (IACHR) has expressed that in Peru, 74% of women in rural areas give birth at home without qualified professional care, compared to 90% of women in indigenous communities, even though one of the factors recognized internationally as associated with reducing maternal morbidity and mortality is childbirth attended by qualified personnel. In Bolivia, a country with the highest maternal mortality rate in the Andean region (290), the rate of maternal mortality varies significantly depending on geographic region (high plateau, valleys, or tablelands) and depending on place of residence (urban or rural), with obstetrical complications, hemorrhage, and infections being the principal causes of maternal mortality. Cfr. Inter-American Commission of Human Rights, *Access to Maternal Health Care from a Human Rights Perspective*, Organization of American States, Washington DC, 2010, p. 4.

We can once again affirm that this means that the maternal mortality problem is mainly associated with the inadequate health care system, reflected in the lack of timely access to health care assistance and to proper treatments.

Maternal Mortality between 2000 and 2003

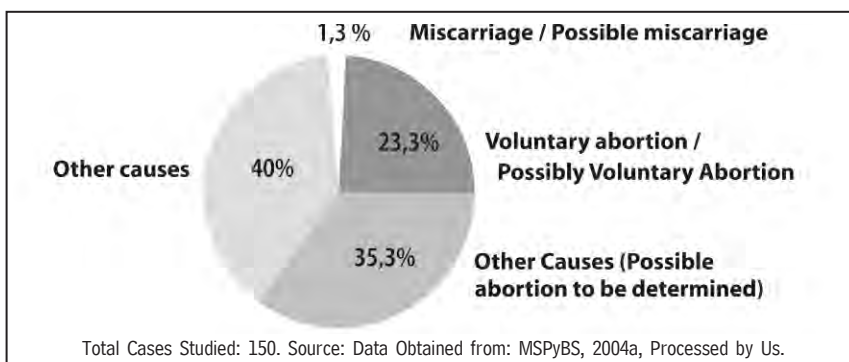
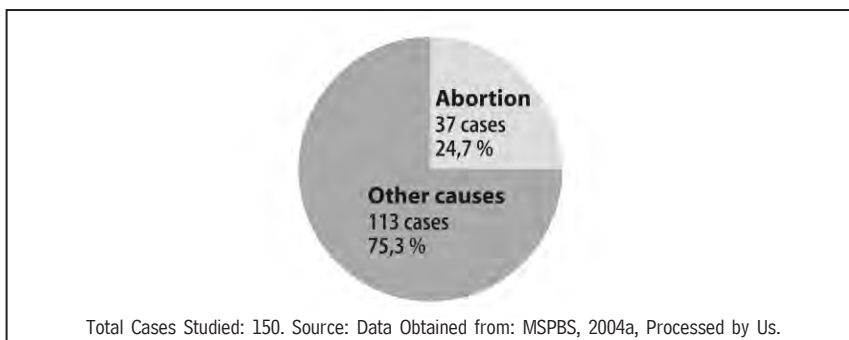


Maternal Death According to their Causes

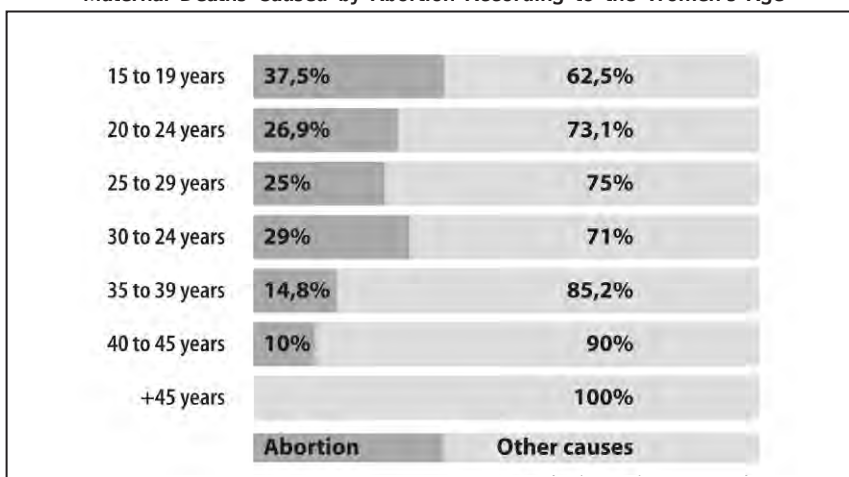




Abortion as a Cause of Maternal Death



Maternal Deaths Caused by Abortion According to the Women's Age



Based on the charts above, it becomes clear that the maternal deaths caused by abortion affect mainly young women and adolescents. Such data should be

taken into account when planning government policies to support and protect pregnant women.

It should also be noted that high rates of maternal mortality in adolescents do not occur only in cases of abortion. On the contrary, pregnant adolescents have between two and five times more risks of maternal mortality than women of 20 years of age or more.⁴²

Considering the indicators mentioned and, in particular, the reading by the Ministry of Public Health and Social Welfare of Paraguay, which coincides with that by the World Bank, regarding the importance of improving maternal health services as an essential measure to reduce maternal mortality rates; and considering that said improvement is stated as one of the Millennium Development Goals,⁴³ it can be concluded that the solution to reduce mortality rates and to prevent every avoidable death does not lie in an alleged legalization of abortion.

In this regard, the Inter-American Commission of Human Rights has considered that the states shall implement measures related to (i) the elimination of barriers to have access to medical and emergency obstetric services, and to pre- and post-natal assistance; (ii) investment in more resources to make effective the accessibility to maternal health services, especially for indigenous women as well as for those living in poverty or in rural areas; and (iii) the education of users of health services available, among others.⁴⁴

IV. Threats and Potential Action Channels to Decriminalize and/or Legalize Abortion

As shown previously, abortion is illegal in all the ways specified by the Criminal Code, and an action must to be specified by the Code in order to be considered a crime. Nevertheless, there are situations not regulated by legislation that could lead to the decriminalization of abortion:

- One is by the courts being asked to hold as “non-punishable” abortions

42 Inter-American Commission of Human Rights, *Access to Maternal Health Care from a Human Rights Perspective*, Organization of American States, Washington DC, 2010, p. 6.

43 Please visit <http://www.un.org/spanish/millenniumgoals/maternal.shtml>

44 Inter-American Commission of Human Rights, *Access to Maternal Health Care from a Human Rights Perspective*, Organization of American States, Washington DC, 2010, p. 7.



performed by a woman or a group of people.

- The other channel is the administrative channel, by which cases not legally regulated could be permitted by resolutions or health assistance protocols. An example of this could be an Official Rule on Sexual and Reproductive Health, by which “emergency contraception” could be offered. As explained before, Paraguay does not have this kind of regulations, nor are there provisions about chemical abortion or “emergency contraception”. However, there are, as a matter of fact, groups of pressure that intend to include it as part of public policies. That is why it is essential to regulate this matter with provisions that –in accordance with all the Paraguayan legal system that protects life from conception and prohibits abortion in all its forms– expressly prohibits “emergency contraception”.



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

María Laura Farfán Bertrán¹

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.² 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;³ and a *republican*

² In accordance with Article 1 of the National Constitution.

³ 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.⁴

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.⁵

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".⁶ 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;

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.

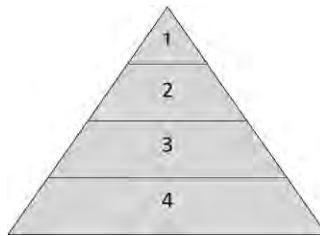
5 Article 31 of the National Constitution establishes that the Constitution, the national acts thereby passed by the Congress and the treaties with foreign powers are the supreme law of the Nation.

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;⁷ 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;⁸ 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

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”.⁹

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).¹⁰

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.¹¹

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

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,¹² 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.¹³

In this regard, the following jurisprudential rulings stand out:

<p>Year: 1980</p> <p>National Supreme Court of Justice.</p> <p>“Saguir and Dib, Claudia Graciela.”¹⁴</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>Year: 1989</p> <p>National Supreme Court of Justice.</p> <p>“Amante, Leonor and others, v. Asociación Mutual Transporte Automotor (A.M.T.A.) y other.”¹⁵</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>

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>Year: 1991</p> <p>Mar del Plata Criminal Court N° 3</p> <p>“Navas, Leandro J. v. Instituto de Obra Médico Asistencia”.¹⁶</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>Year: 2002</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”.¹⁷</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>

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 ¹⁸	“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”. ¹⁹
Nestor Pedro Sagüés ²⁰	“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”. ²¹

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. ²²

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.²³

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.

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. ²⁴
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. ²⁵ 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.

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”*²⁶

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, 1983.²⁷

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.²⁸

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,

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,²⁹ 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”.³⁰
- 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

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.

²⁹ 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.

³⁰ 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.³¹

- 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”.³² 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.”³³
- 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.³⁴

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.³⁵ 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.³⁶

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.³⁷ 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

<p>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:</p>	<ol style="list-style-type: none"> 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). 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).
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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

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.³⁸

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”³⁹ 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.⁴⁰ 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.⁴¹

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,⁴² though that does not mean that the absolving excuse freely applies to any insignificant or unimportant threat of damage.⁴³

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.⁴⁴ 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.⁴⁵

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

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.⁴⁶ 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.⁴⁷

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 (...)"⁴⁸

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.⁴⁹

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).

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).⁵⁰

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".

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.⁵¹

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”.⁵²

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. 2.⁵³ In order for this legal category to apply, the woman who has been raped or

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.⁵⁴

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".

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.⁵⁵

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.⁵⁶ Consequently, from the moment of conception, "every

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;⁵⁷ 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.⁵⁸

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",⁵⁹ making abortion a "choice" of pregnant women, instead of a last resort as the Criminal Code requires.⁶⁰

- 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.⁶¹ 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.

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.⁶²

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”.⁶³

In this case, the non-profit organization called “Portal de Belén” filed an amparo⁶⁴ 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.

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”.⁶⁵
- 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”.⁶⁶
- c) Finally, by quoting international treaties that contain specific provisions protecting the human being’s right to life from the moment of conception,⁶⁷ and following the pro hominem principle—which underlies the whole of human rights law—to interpret said treaties,⁶⁸ 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”.⁶⁹

D. An Unprecedented Ruling by the Supreme Court of Justice

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

(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.⁷⁰

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.⁷¹

2. The Argentine State’s potential international liability

Throughout the ruling, the Supreme Court expressed its concern regarding

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.⁷² 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".⁷³

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.⁷⁴ However, it disregards the fact that this principle is applicable to "every member of the human race".⁷⁵ 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

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”.⁷⁶ 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.⁷⁷ 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.⁷⁸

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,⁷⁹ and mentions a “right to terminate pregnancy” in the cases provided for therein.⁸⁰ In other words, it interprets that there is a “right to abortion” in all cases of pregnancies resulting from rape.⁸¹

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”.⁸²

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

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.⁸³ 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.⁸⁴

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

83 Vid. 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.⁸⁵ Said act includes the provincial acts that regulate the cases of non-punishable abortion, as well as the ministerial resolutions regarding “emergency contraception”.⁸⁶ All these acts are criticized in this paper for being unconstitutional.⁸⁷

• ***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.⁸⁸

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

85 Vid. 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.⁸⁹ It is worth mentioning that none of these alleged rights are mentioned in international treaties.⁹⁰

- ***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”).⁹¹ 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.⁹² 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.⁹³

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.

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 year⁹⁴. 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”.⁹⁴

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.⁹⁵ 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.⁹⁶

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.⁹⁷ 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”.⁹⁸ 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.⁹⁹

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.¹⁰⁰

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.¹⁰¹ Finally, they conclude that “the abortion estimates obtained through the residual method might be overrated”.¹⁰²

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”,¹⁰³ 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).¹⁰⁴ 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.¹⁰⁵ 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”.¹⁰⁶

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.

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)¹⁰⁷ fostered by Red Federal de Familias (Families Federal Network).¹⁰⁸

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

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 (...)”.¹⁰⁹

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.

109 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>Objectives: 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>Suggested Assistance Model for Reaching the Objectives: 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.¹¹⁰</p> <p>Institutional Conscientious Objection: 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>Implementation Authority: 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>Reproductive Health: 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.¹¹¹</p> <p>Parental Authority: 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>Contraceptive Methods and Products: It identifies natural and artificial methods.</p> <p>Natural Methods: These are the methods that entail periodic abstinence, and that need to be especially well–explained.</p> <p>Artificial Methods: 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>Individual Conscientious Objection: 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>Informed Consent: 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>Free Services: It establishes that these operations be performed free of charge to the petitioner in public health institutions.</p> <p>Conscientious Objection: 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.¹¹²

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”.¹¹³

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.¹¹⁴

• 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”.¹¹⁵ 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”.¹¹⁶ 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.¹¹⁷

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.¹¹⁸ This implies that family is the first and irreplaceable

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.¹¹⁹ 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”.¹²⁰

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”.¹²¹

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.¹²² 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”¹²³ (an amparo proceeding filed by the non–profit organization Portal de Belén against the Argentine Ministry of Health and Social Welfare), in

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”.¹²⁴

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.¹²⁵ The Court has considered this last effect as “a real and imminent threat to life—an essential legal interest—which cannot be remedied afterwards”.¹²⁶ 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.¹²⁷

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.¹²⁸

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,¹²⁹ 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 Women¹³⁰ and the World Conference on Population and Development.¹³¹ 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

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.¹³²

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".¹³³

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".¹³⁴

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;

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.



I. Chile: A Privileged but Fragile Context

This paper aims to reflect the political, legislative and factual situation in Chile regarding the protection of the right to life, the reality of abortion, and the context of reproductive health. Thus, the goal is to provide relevant information for the social, academic and political actors that intend to know about and act on these topics, which, beyond doubt, are decisive in the foundations that guide Latin-American development.

In this context, Chile presents quite a unique and special scene, since it is one of the six countries in the world that forbid abortion under all circumstances. So-called “emergency contraception” has been strongly resisted, and only recently legislated under very restrictive terms. The CEDAW optional protocol has also been strongly resisted, and has not received sufficient support by the Congress for approval. Finally, the majority of the population usually rejects public policies and/or bills that threaten helpless groups’ lives, such as the children to be born and the elderly.

Despite the foregoing, the immense pressure put by international organizations and the irresistible temptation of some groups to “be similar to developed countries” sustain a risk, usually dormant, of eventually attacking human dignity, especially the right to life. Becoming aware of this and having the necessary information and tools to influence political decision-making are fundamental necessities for Chile to continue being proof of the possibility of combining economic growth, technological advances, and human rights protection.

¹ J.D., Pontifical Catholic University of Chile and executive director of the organization IdeaPaís (www.ideapais.cl). He wrote this paper with the support of Raquel Fuenzalida, student at the Pontifical Catholic University Law School. Hernán Corral Talciani, former Dean and Professor at Universidad de los Andes, also collaborated in this paper. He is the author of the chapter titled “Protection of the Life of the Conceived Unborn Child in the Chilean Law”.

II. General Right to Life

A. Political and Legal Organization

A.1. Political Organization of the State of Chile

Chile is a unitary state,² which means that the administration, legislation and jurisdiction of the courts of justice have legal authority in all the territory of the Republic. The Republic is also territorially and administratively divided into fifteen regions, which are, in turn, divided into provinces, and these into communes. The exercise of the executive power is then deconcentrated by the President's delegation of powers to the regional official at a regional level, and then to the Governors at a provincial level; and decentralized by the autonomous and independent exercise of the Communal Mayors, elected by the people.



The Chilean Political System is that of a republican democracy, according to Article 4 of the Constitution.

Thus, the democratic character finds its expression in the periodic elections of executive authorities (President of the Republic and Mayors) and legislative authorities (Senators and Deputies). These authorities are elected by all the citizens entitled to vote and registered in the electoral poll.

The republican features are reflected in (i) the responsible exercise of power, which comprises the authorities' regular responsibility, insomuch as they are citizens subject to the rule of the civil and criminal law, their administrative responsibility for crimes committed when acting as public officers, and, in some cases, their political responsibility when violating some assumptions directly established by the Constitution;³ and (ii) in the exercise of power limited both

² Art. 3 of the Constitution.

³ Art. 52, N° 2 of the Political Constitution of the Republic.



in form,⁴ especially relating to the fundamental rights emanating from human nature,⁵ as well as in its term.⁶

The form of government is the presidential Republic, characterized by a strong president,⁷ which several mechanisms try to restrain.⁸

Regarding the Legislative Power,⁹ it is important to note that there are two chambers: (i) the Chamber of Deputies, made up of 120 members democratically

4 Art. 7 of the Constitution establishes the principle of legality, by which the bodies of the State shall subject their creation and exercise to the Constitution and the Acts, therefore becoming an essential pillar of the Chilean *Estado de Derecho* (Rule of Law).

5 Art. 5 of the Constitution.

6 The President's term of office is four years; the Senators', eight years; the Deputies', four years; and the Mayors', four years. Except for the president, the rest of the authorities mentioned can be reelected *ad infinitum*.

7 This is particularly stated in the special powers granted to the President of the Republic (Art. 32 of the Constitution), which almost exceed all the bodies of the State.

8 The first one is the constitutional control, exercised by the Constitutional Court (Art. 93). Its powers are: A. Regarding the Legislative Power: A.1) the preventive and mandatory constitutional control of the organic and interpretative laws and international treaties that deal with said matters, A.2) the preventive and optional control regarding constitutional matters that may arise from a bill or negotiation of an international treaty, A.3) the repressive control of the law in force, which enforcement may be unconstitutional. B. Regarding the President: the control of the constitutionality of the supreme decrees, C. Regarding the Judicial Power: the constitutional control of the *auto acordados* (Supreme Court legal acts relating to how courts should proceed in the knowledge of certain actions). The second mechanism of control is the political control, mainly exercised by the National Congress by means of the procedures of *acusación constitucional* ("constitutional accusation" a procedure by which charges are brought against the authorities mentioned in the Constitution –the President, a Minister, a Governor, etc.), ministerial interrogation by the Congress, and the creation of investigating committees. (Chamber of Deputies: Art. 52; Senate: Art. 53). The third control is the judicial control, executed by the courts of justice. The fourth and last control is the administrative control, exercised by the General Comptrollership of the Republic, especially through the procedure of *toma de razón* (a previous, general and mandatory legal control performed by the General Comptrollership of the Republic) of the acts performed by a governmental authority. (The General Comptrollership serves as a financial "watchdog" over the use of national funds).

9 See Articles 46 and subsequent of the Constitution.

elected, based on a territorial representation criterion,¹⁰ primarily in charge of supervising the bodies of the Administration; and (ii) the Senate, made up of 48 members democratically elected, and based on a regional criterion,¹¹ in charge of the legislative review, among other responsibilities. Regarding the Parliament, the Chilean electoral system is binominal, which means that the two seats in each constituency or district are occupied by the candidates of the two majority parties (one seat for each party). However, when a party doubles the second one in votes, the former occupies both seats. This aims at strengthening a system consisting of two large political conglomerations. Nowadays this phenomenon is materialized by opposition between the *Coalición por el Cambio*¹² and the *Concertación*.¹³

Finally, with regard to the Judicial Power,¹⁴ it is territorially organized into judges of first instance at a communal level, and Courts of Appeal at a regional level, which are the bodies that review the rulings pronounced by the judges

10 The basis for organization is 60 districts distributed by means of quantitative and communal criteria; two deputies per district are elected.

11 The organization is based on 24 constituencies, some of which represent an entire region (such is the case of the First Region of Tarapacá), or parts of a region (such as the Metropolitan Region which is divided into the East and West constituency). Two senators per constituency are elected.

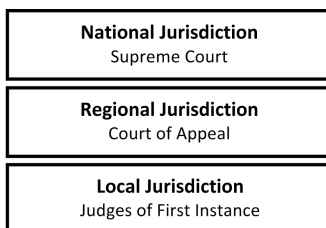
12 The *Coalición por el Cambio* (Coalition for Change) is an electoral, presidential and parliamentary coalition, created in 2009 to support followers of that year's candidate to president Sebastián Piñera, and upon his victory, is now considered a *pro-government* coalition. It is made up of the parties of the political coalition *Alianza por Chile* (Alliance for Chile): the *Unión Demócrata Independiente* or UDI (Independent Democrat Union) and the *Renovación Nacional* or RN (National Renewal); and the political movements *ChilePrimero* or CH1 (ChileFirst), *Norte Grande* (Big North) and *Movimiento Humanista Cristiano* or MHC (Humanist Christian Movement). (*El Mercurio*, May 6, 2009).

13 The *Concertación de Partidos por la Democracia* (Concert of Parties for Democracy) is a coalition of center-left political parties that governed Chile from March 11 1990 to March 11 2010, currently being the party opposing the *Coalición por el Cambio*. It was founded in 1988 as *Concertación de Partidos por el No* (Coalition of Parties for No), uniting the sectors opposing Augusto Pinochet, who was defeated by the *Concertación de Partidos por el No* in the national plebiscite in October that year. It is made up of the following parties: *Demócrata Cristiano* or DC (Christian Democrat), *Por la Democracia* or PPD (For Democracy), *Radical Social Demócrata* or PRSD (Social Democratic Radical Party) and *Partido Socialista* or PS (Socialist Party).

14 See Articles 76 and subsequent of the Constitution.



of first instance. The Supreme Court of the Republic is the head of the judicial system, and has jurisdiction in the entire nation and, by means of appeals in the high court, has the power, in form and substance, to annul and amend the rulings pronounced by lower courts when procedural or substantive defects are present. This aims to make uniform the administration of justice, protecting the guarantee of equality before the law. Moreover, it should be noted that the Constitutional Court has the authority, through preventive controls and controls *a posteriori*, to ensure the rule of constitution at legislative and judicial levels.



A.2. Legal Organization of the State of Chile

Chile has a system of Rule of Constitutional Law, which means that the exercise of power by the authorities and the exercise of rights by the citizens are subject to the rule of a legal system, which main law is the 1980 Political Constitution and its subsequent amendments.

Briefly stated, and only for the purpose of explaining the regulation related to the right to life presented below, the main regulating instruments in Chile, in order of importance, are the following:

- i. Political Constitution of the Republic (1980), characterized by the following features: (i) a significant dogmatic richness, inspired by the natural law school which predominated in the constituent committee, finding its main expression in Chapter I: “The Basis of Unconstitutionality”. The following paragraphs are worth noting: Art. 1, Par. 1, which states that a person is born free and equal to all others in dignity and rights; Art. 1, Par. 4, which sets forth the principle of the state helpfulness towards the human beings and establishes the common welfare as its goal; and Art. 5, Par. 2, which sets the respect and the promotion of the fundamental rights emanating from human nature as the limit to sovereignty. (ii) legal tools that make effective the extensive catalog of rights contained in it, some of them being the protection remedy (Art. 20) and the “nulidad de

derecho público” remedy,¹⁵ (Art. 7). And (iii) the supremacy claim not only in its organization and rules (since it is the law to which all other laws are subject), but also in its practice, which is reflected in Art. 6, in several actions and mechanisms that guarantee its effectiveness before the lower courts and the Constitutional Court; and in the range of topics that are protected by establishing the constitutionally protected rights in Art. 19.

The Constitution is accompanied by other sets of rules that make up the so-called “constitutional block”, among which are several complementary laws, international treaties on human rights, acknowledged by Chile and currently in force, and the constitutional rulings pronounced by the jurisdictional bodies before mentioned, that have set the sense and scope of the constitutional rules.

- ii. The Laws. Although all laws’ legal force is equally important, they can be classified as follows, depending on the quorum necessary for approval: 2.a) laws that construe the Constitution: the quorum must be 3/5 of the members in office; 2.b) organic constitutional laws: the quorum must be 4/7 of the members in office; 2.c) qualified quorum laws: they must obtain an absolute majority; 2.d.) ordinary laws: a simple majority must be obtained.¹⁶ It should also be noted that the matters regulated by law are explicitly stated in the Constitution (Art. 63).
- iii. The International Treaties. Their legal scope is a topic not always pacifically discussed in Chile. The controversy originated after the amendment introduced in the second part of Paragraph 2, in Article 5 of the Constitution, which states that “(...) It is the duty of the bodies of the state to respect and promote said rights [the fundamental rights that emanate from human nature], guaranteed by this Constitution, as well as

15 The enactment by which an act performed by a governmental authority is deprived from its legal effects, on the grounds that a requirement for validity is missing.

16 A high quorum must be obtained for construing laws because they restrict the absolute character of the fundamental law; for organic constitutional laws, because they are constitutional rules as far as they institutionally elaborate on the Constitution; and for qualified quorum laws, because the elector considered its topics as being relevant. It should also be noted that the absolute majority is half plus one of the members in office; and the simple majority is the majority of the members that are present, as long as at least a third of the members in office is present.



the international treaties in force and acknowledged by Chile”.¹⁷ As from that moment, various stances regarding the legal scope of international treaties have arisen. This is decisively relevant regarding their effects, amendments and prevalence in case their content and the domestic legislation contradict each other.¹⁸

The question was raised by the Chilean Constitutional Court in 2002, after 35 deputies filed a request related to the constitutionality of the Rome Statue, creating the International Criminal Court.¹⁹ It was finally decided that the international treaties regulating human rights are infra-constitutional—which means that, in case of contradiction, the Constitution shall prevail, unless the constitution is amended—and supralegal – which means that the law shall be adjusted to the provisions set forth in such documents, especially regarding the guarantees and the rights that may be regulated.

iv. The Authority to Regulate. It consists of the various rules not issued by the Parliament but mandated by the President of the Republic. Some of these rules are identified below:

- The Executive Orders. They are rules issued by the President that immediately acquire the value of a law; they are issued during a government’s terms of office in which the National Congress is not working as normal.
- The Law-Ranking Decrees. They are rules issued by the President of the Republic to regulate specific matters, upon express delegation of said power by the Congress.²⁰ They have the binding force of a law.

17 Constitutional Amendment Act N° 18,825 (1989).

18 Would it be appropriate to file a protection remedy to guard a human right set forth in an international document? If the treaties have a constitutional value, why are they subjected to controls of constitutionality? Would it be possible to amend the Constitution by this means, disregarding the strict proceeding established in it?

19 To see the ruling, please visit http://www.scielo.cl/scielo.php?pid=S0718-00122002000100033&script=sci_arttext

20 The constitution distinguishes two kinds of authority to regulate: a) the authority to execute: by enforcement of the law (Art. 4), and b) autonomous authority: the president’s empowerment by the congress to issue law-ranking decrees regarding matters provided for by the Constitution (Art. 32, Item 3). The Constitution intended to set forth a “maximum legal dominion” (i.e. a limit to the fields that the law regulates), by indicating the matters that the laws regulate in Art. 63: the matters regulated by the organic laws; the matters

- The Regulations. They are general rules issued by the Administration and regulate certain factual assumptions and/or complement what other regulating instruments establish. They are ranked below the Law.
- The Simple Decrees. They are special rule issued by the Administration; should the President of the Republic pronounce them, the name they receive is Supreme Decree.

Finally, the judicial rulings pronounced by the courts of justice shall be applicable only to the parties in the case,²¹ with the exception of the rulings pronounced by the Constitutional Court, in which case the general effect shall be the one stated in Articles 93 and 94 of the Constitution.

B. International Treaties and National Legislation

Now that we have made a general review of the political and legal structures of the State of Chile, the way in which the different regulating instruments make reference to the right of life should be closely examined.

The first element we should analyze is the Political Constitution of the Republic. As mentioned before, its inspiration was in Christian philosophy and in the school of natural law, which means that the Chilean Constitution relies on unrestricted respect for human dignity and the fundamental rights emanating from human nature. Article 1 states that “All and every person are born free and equal

that, according to the Constitution, shall be regulated by the law; the matters related to the labor, trade union, pension and social security legal regimes; public honors; the matters that empower the State to enter into credit agreements or engage in any other activity that may compromise the State credit or sell its goods; the matters related to the political and administrative division of the country; the laws initiated by the president himself/herself; pardon; declaration of war; the laws that set forth the basis of the processes of acts performed by governmental authorities. Article 63 does restrict these limits, and adds that “All other general and mandatory rule that regulates the fundamental basis of a legal system” are also matters regulated by the law.

With regard to the authority to execute, there exist several theories about its extension: a) absolute legal reservation: the law shall regulate in detail, not leaving discretionary power to the administration, b) relative legal reservation: discretionary power is fundamental in order to establish rules, and c) neutral legal reservation: the regulatory authority may complement, regulate and operate in collaboration with the law, though not creating elements in a new rule.

21 Sect. 3 of the Chilean Civil Code.



to others in dignity and rights”, specifying that the expression “are born” implies that every person is protected by the Law from the very beginning of his life. Then paragraph 4 of the same article establishes that the state is at the person’s service and its purpose is to achieve the person’s welfare by fully respecting the rights and guarantees set forth by the Constitution. Article 5, paragraph 2 reinforces the foregoing by stating that the fundamental rights emanating from human nature are an unavoidable limit to state sovereignty; this is necessarily complemented by Art. 19, paragraph 1, which acknowledges that every person is entitled to the right to life and to physical and psychic integrity.

Upon a close analysis of Art. 19, Par. 1, the following conclusions can be drawn: (i) the Constitution protects every person, an assertion that establishes the supremacy of the person over the state for being ontologically superior and chronologically pre-existent; and (ii) the right of the person to be born is expressly protected, which, though having raised a significant controversy in the Constituent Committee,²² turns out to be novel and extremely significant.

There exist other constitutional guarantees set forth in Art. 19 of the Constitution, which are closely related to the right to life (so much so that they are usually referred to when a protection remedy is filed);²³ said constitutional guarantees are the right to live in an environment free from contamination (Art. 19, Par. 8), the right to protection of health (Art. 19, Par 9), and the right to social security (Art. 19, Par. 18).

Paragraph 26 in Art. 19 of the Constitution deserves a note itself: “(...) the legal rules that regulate or complement the constitutional guarantees or that limit

22 Some of the commissioners (Guzmán, mainly) considered that drafting an explicit punishment for abortion in the Constitution was necessary. Others were doubtful as to some abortion assumptions, such as the alleged “therapeutic abortion” or the abortion claimed in cases of rape. The controversy could not be resolved, leading to the text currently in force. Please see the Official Minutes of the Committee of the New Constitution Studies (*Actas oficiales de la Comisión de Estudios de la Nueva Constitución*), session 89, paragraph I, page 18.

23 It is a legal action that can be filed before the Court of Appeals, which shall immediately take all measures it deems necessary to restore the right that has been deprived by means of illegal actions, and to ensure the victim’s adequate protection. It is a legal action that can be filed before the Court of Appeals, which shall immediately take all measures it deems necessary to restore the right that has been deprived by means of illegal actions, and to ensure the victim’s adequate protection. A similar action is called “amparo” in Argentina (see footnote N° 64 in the Argentinean report), and “constitutional tutelage action” in Colombia (see footnote N°11 in the Colombian report).

those guarantees by constitutional mandate shall not affect the rights' essence nor impose conditions, taxes or requirements that prevent them from being freely exercised". It has been interpreted that this guarantee is addressed to the legislators and the State Administration, rather than to the citizens. The underlying premise in this article is the permanent existence of conflicts of rights that the law must solve by regulating, complementing or limiting their exercise. The article mentioned limits the extent of such regulation, not allowing it to affect the *essence* of the rights regulated or to impose conditions that prevent them from being freely exercised. The Constitutional Court has stated that "a right's essence is affected when it is deprived of that which is inherent to it, leaving it unrecognizable, and when it is prevented from being 'freely exercised' in the following cases: a) when the legislators subject it to requirements that are impossible to meet, b) when the legislators analyze it beyond reason, c) when the legislators deprive it of legal protection".

It is also necessary to mention the legal instruments that make a very important reference to the right to life.

We should start by mentioning the Civil Code, which sets forth the moments when the legal existence of a person begins and ends. Section 74 of the Civil Code states that life begins when the person is born, that moment being when it is fully separated from his mother. Thus, the "doctrine of vitality" is embraced—what defines the moment in question is the proof that the fetus has had an independent life—usually by means of hydrostatic medical expert's reports. It should also be mentioned that the majority doctrine considers that this is only relevant for pecuniary effects, mainly relating to inheritance issues – which is confirmed by Section 77 of the Civil Code; it does not aim to define the natural existence of a person. Moreover, Section 76 contains an irrebuttable presumption (i.e. no proof of the contrary is admitted), which establishes that the moment of conception is no more than 300 and no less than 180 full days, counted from the midnight of the day when the birth begins.

Finally, regarding the end of a person's legal existence, the Civil Code only points out in Section 78 that "the existence of a person ends with his natural death", not specifying when that assumption is verified; also, it only regulates the requirements and the proceeding of the death presumption statute, issued when a person is missing.

Then, the Criminal Code classifies the different variants of the crime of homicide in Part II, Article VIII, titled "Crimes and Offences Against the Person", Sections 390–394. Moreover, Act N° 20,480 has incorporated the institution of femicide, which entails a greater punishment if the crime consists in a woman being killed by her partner.



Finally, Act N° 19,451 regulating organ transplant and donation (1996) becomes very important for it is the only legal instrument that details the moment when a person's natural death occurs. Section 11 of this act identifies it as the "total and irreversible abolition of all the encephalic functions, which shall be confirmed by the certain diagnosis of the cause of the problem, according to certain clinical parameters corroborated by the corresponding proofs and examinations. The regulations shall at least consider that the person whose encephalic death is being declared presents the following conditions: 1. No voluntary movement for an hour; 2. Apnea after three minutes disconnected to the ventilator; and 3. Lack of brainstem reflexes. In these cases, the death certificate issued by a medical doctor shall be accompanied by a document proving the preceding facts that led to the confirmation of death". This act, despite its clearly special character, has corrected the omission in Section 78 of the Civil Code.

Now we will refer to the international treaties signed by Chile, indicating their legal status and briefly mentioning the way in which they govern issues related to the right to life, always remembering that the treaties' rank is infra-constitutional and supralegal, as explained above.²⁴

- i. **International Covenant on Civil and Political Rights**, enacted by Decree N° 778, on April 29, 1989, by the Ministry of Foreign Affairs. The signing states undertake to make all the appropriate changes to their legislations for the treaty to be effective. Article 6 stands out for being in full accordance with the 1980 Constitution, which means that nothing was added to the fundamental law.²⁵
- ii. **International Covenant on Economic, Social and Cultural Rights**, enacted by Decree N° 326, in 1989, by the Ministry of Foreign Affairs. This treaty is important considering the provisions in Article 9,²⁶ in full accordance with the right to social security already provided for in the Constitution;

24 For more details on specific treaties and/or enactment decrees, please visit http://www.leychile.cl/Consulta/buscador_tratados. To review the human rights treaties signed and acknowledge by Chile, please visit <http://www.unhchr.ch/tbs/doc.nsf/newhvstatusbycountry?OpenView&Start=1&Count=250&Expand=35#35>

25 Article 6 of the ICCPR expressly establishes that the right to life is inherent to the human being and that it is protected by the law. It also establishes that no one shall ever be arbitrarily deprived of life. (Par. 1).

26 Art. 9: The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

and in Article 10, which establishes that the family, and specially the pregnant woman, receive protection particularly under labor law.

iii. **American Convention on Human Rights, “Pact of San José”**, enacted by Decree N° 873, in 1989, by the Ministry of Foreign Affairs. This document is of fundamental importance and is referred to in various actions and rulings relating to the protection of the right to life and, in particular, the protection of the unborn. Article 4, Paragraph 1 is essential since it considered the moment of conception to be that in which human life—and, therefore, its constitutional protection—begins.²⁷ Thus, the document expands the rule provided for in Art. 19, Sect. 1, Par. 2 of the Constitution, which states that “the law protects the life of the unborn”, not specifying the moment when its existence begins.

iv. **The Convention on the Elimination of All Forms of Discrimination Against Women (UN)**, enacted by Decree N° 789, on December 9, 1989, by the Ministry of Foreign Affairs. This document is also of fundamental importance since, apart from the provisions for the elimination of all forms of discrimination against women, some groups seeking recognition of an alleged right to abortion, have tried to protect the sexual and reproductive’s rights, sexual autonomy, and the “right to abortion” as an integral part of the document.

However, the Convention clearly states that its purpose is to ensure that women enjoy all human rights acknowledged, without discrimination based on sex, and there is no provision mentioning the rights mentioned above and allegedly protected.

The ones who support the idea that sexual and reproductive rights—including the alleged right to abortion—are part of the Convention, base its argument on article 12 and article 16, par. 1, subpar. e) of it; however, it should be clear that the purpose of these articles is to acknowledge, on a basis of equality of men and women, that every woman—especially the pregnant woman—is entitled to the right to health care services.²⁸

27 Art. 4.1. “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. No one shall be arbitrarily deprived of his life”. It should be noticed, however, that the expression *in general* that the Convention uses in this article has led many people to maintain that, as a matter of fact, it is not an accurate statement regarding the moment in which life begins, but an institution for constituents and legislators to detail the assumptions and exceptions to that general rule.

28 Article 12 of the Convention expressly states: “1. States Parties shall take all appropriate



The fact that the CEDAW's Committee's²⁹ reports include recommendations that go beyond its powers is also questionable. One of the duties undertaken by the States Parties is to periodically report on the legislative, judicial, administrative and any other measures taken in order to make the Convention's provisions effective.³⁰ The Committee evaluates those reports to then render a critical judgment, and makes comments and recommendations. We would like to analyze item 282 of the 2004 examination, which states verbatim: "In its notes on the preceding report, the Committee made reference to the inadequate acknowledgement and protection of women's reproductive rights and to the existence of laws that forbid and punish all kinds of abortion, which affects women's health, leads to an increase in mortality related to maternity, and causes more suffering when women are imprisoned for violating these laws. This committee urges the state to review its legislation related to abortion with the aim of amending it so as to provide abortions under safe conditions and to allow the termination of pregnancies for therapeutic or women's health-related reasons, including women's mental health; and to eliminate the obligation of reporting cases of abortion – an obligation imposed on health care professionals and law enforcement agencies, which apply criminal punishments to those women". Item 285 is also revealing in stating that "as regards abortion, the current government has not yet considered decriminalizing it, claiming that the conditions for opening a public discussion about this issue are still not appropriate, not even with regard to the therapeutic abortion, which existed in Chile

measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. 2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation".

Article 16, par. 1, subpar. e) establishes that "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights".

29 The Committee's creation is established in Art. 17 of the Convention.

30 Pursuant to Art. 18 of the Convention.

until 1989, when it was abolished by the military government. The firm resistance by the conservative media, religious groups that oppose abortion altogether, and the political parties that share this stance to analyzing a phenomenon that affects thousands of women has had a strong effect on public opinion during the last decades”.³¹

These recommendations by the CEDAW committee deserve at least some brief comments. First, it is obvious that, behind the concepts of “sexual rights” or “reproductive health”, certain practices that go against human dignity are hidden. If there were any doubt, the Committee makes it explicitly clear by expressly calling for the decriminalization of abortion. Second, expressions like “the conservative media” and “the religious groups that oppose abortion altogether” clearly show that the Committee does not intend to be a legal institution administering justice, but rather a tool at the service of anti-life ideologies imposed coercively by international treaties. Interference by a treaty monitoring body in domestic policy affairs is not only peculiar, but also without legal foundation. Finally, it must be remembered by the reader that this same strategy (of misinterpreting the meaning of treaties and placing improper demands on signatory states by treaty monitoring bodies) has been the mechanism used for spreading abortion and similar methods of family planning throughout the continent.

On January 23, 2001, the Government started a Bill in order to approve the Optional Protocol by Message N° 282–343 (Bill in Bulletin N° 2667–10). The protocol grants the Committee the jurisdiction to decide on requests and communications filed before it regarding the degree of the state’s compliance with the Convention; these requests and communications can be filed not only by the state, but also by every individual or collective person who considers that the rights contained in said international document have been violated. This way the Committee can investigate and make recommendations to the State Parties. It is also intended to put the CEDAW’s optional protocol on the same level of human rights international treaties, with all the consequences it entails.

Nowadays, this Bill is in the second constitutional procedure, in the Senate’s International Affairs Committee. The fact that the optional

31 For more details on the Committee Examination based on the 2004 Chilean report, please visit <http://www.eclac.org/mujer/noticias/noticias/2/27332/Informe%20CEDAW%2006.%20Version%20no%20editada.pdf>



protocol has not been passed clearly proves that Chile has not decided to abrogate its national sovereignty in favor of the CEDAW's Committee. However, the pressure to pass the protocol re-emerges from time to time.

- v. **Convention on the Rights of the Child**, enacted by Supreme Decree N° 830, on August 14th, 1990, by the Ministry of Foreign Affairs. Following the same logic as in the treaty mentioned above, the State of Chile has undertaken the obligation of adjusting its domestic legislation and public policies to the mandates of the Convention, as well as periodically reporting its progress in the implementation of the measures it sets forth. Article 6, which mentions the “inherent right to life”, simply echoes what the Chilean Constitution already establishes.

Upon consideration of the facts presented above, it can be concluded that the Chilean Constitution is in full agreement with the protection of the right to life as provided for by the international treaties, all of which binds that national state to continue reaffirming its commitment to respect and ensure this fundamental human right.

C. Details by the Courts of Justice

It is interesting to analyze the Chilean courts' decisions on matters relating to the protection of the right to life:

Conceptualization of the Term “Life”

With regard to the conceptualization of the term “life”, the Chilean Constitutional Court Ruling, Case Record N° 220 (August 13th, 1995), on the Transplant Act, indirectly suggests that the term “life” should be defined by the medical sciences. What is actually defined is the term “death”, indirectly delimiting the concept of life. There are no records either in the constitutional or in the ordinary jurisprudence of a clear, accurate definition of the term, but it is obvious that the practice has been to refer to the interpretation by medical experts on these matters.

Determination of the Beginning of Life and its Legal Protection

The beginning of life and its subsequent protection were determined for the first time in the Constitutional Court Ruling on the Supreme Decree that regulates the distribution of the Morning-After Pill (Case Record N° 740). It stated that every person is entitled to the right to life from his conception, since that is the moment when the individual's existence begins, having all the genetic information necessary for his development and being completely

distinct from his father and mother, thus, that individual can be recognized as a person before the law. The Court also held that the protection of the right to life from the moment of conception was guaranteed by the American Convention on Human Rights as well.

This was also acknowledged by the Supreme Court on August 30, 2001, on appeal to the Protection Remedy, Case Record N° 2186–2001 (Postinol Case). The Court pointed out that “the unborn has the right to life, regardless of its pre–natal stage of development—for the law does not distinguish between those stages—which means that he has the right to be born and become a person” (Paragraph 17).

The Right to Life and the Clash of Rights

In cases where rights clash, the jurisprudence of the Courts has tended to organize them into a hierarchy and to consider the right to life as superior with regard to the rest. Therefore, it can be stated that any limitation to this right is inconceivable. Such have been the precedents of the courts in the following cases:

The Right to Life and the Right to Property

The Constitutional Court has privileged the right to live over the property in several occasions. One example is the Catalytic Case, Case Record N° 325 by the Constitutional Court, (June 26, 2001), and the ruling of the case concerning the Mandatory Control of the Law on Rules Adapting the Legal System to the Criminal Procedure Amendment, Case Record N° 349 (April 30, 2002).

The Right to Life and the Freedom of Religion

The clash between the right to life and the freedom of religion usually occurs when Jehovah’s Witnesses go to health care centers, since their religion does not allow them to be given blood transfusions, even in extreme situations. The Court of Appeals of Copiapó, ruling on the protection remedy Case N° 18640–2002 (March 24, 1992), stated that, in cases like this, the right to life predominates over the freedom of religion, without any disrespect to the latter. This ruling was confirmed by the Supreme Court on May 5, 1992, (Case N° 3569–2002). Likewise, the Court of Appeals and the Supreme Court have pronounced similar rulings on several cases.³²

32 Case N° 1030–1995 (October 2nd, 1995), Case N° 332–2000 (January 11, 2001), Case N° 39–2002.



The Right to Life and the Right to Strike

In the case “Rozas Vial, Fernando and others, against Ponce and Parish Priest of San Roque” (Case N° 167-p), the Court of Appeals was confronted with a conflict in which a group of people intended to “exercise” their right to life by using the hunger strike as a means for pressuring certain authorities. In that case, five university students started a hunger strike to call for the return of some of their classmates who had been expelled from the University of Chile for allegedly political reasons. The Court of Appeals heard the case for it considered that the strikers were making an attempt on their own lives, and instructed them to put an end to the strike. The Court stated that “the strikers’ attempt against their lives and physical integrity is an illegal and unlawful act that, though not punishable by the law, infringes the entire social and legal systems (...). Being part of the natural law, the right to life is that by which no one can make an attempt against our lives – this certainly does not mean that we have full dominion over our lives so as to destroy them if we wanted to, but empowers us to demand that others do not violate it (...). As a matter of fact, to have “dominion” necessarily entails a relation between an individual and an object separate from him, while the human being and his life are identical” (Paragraph 10).³³

D. Protection of the Life of the Conceived Unborn Child in the Chilean Law

Civil Protection of the Life of the Conceived

The life and health of the conceived or, as the Roman law expresses it: “the one to be born” (*nasciturus*), has been provided for from the dawn of the Republic. The Civil Code (1855), written by Andrés Bello, clearly established that “the law protects the life of the unborn” (Section 75 of the Civil Code).

As a consequence, the same legal rule grants broad powers to the judge to adopt, at his own initiative or upon the request of any person, “all the directions that he may deem convenient to protect the existence of the unborn, as long as it is believed that said existence is at risk”.

This rule should be associated to the powers that the Act of the Family

33 This was also acknowledged in other cases. Case N° 2268-91, Case N° 2839-95, a 2292-2002 protection remedy. It has only been dismissed in case record N° 1525-96, where the court stated that the strikers’ lives were not at risk.

Courts grants the judges of that jurisdiction regarding the adoption of protection measures in favor of the children whose rights are severely violated or threatened (Act N° 19968, Section 8, Par. 8), specifying that by “children” it should be understood “every human being that has not reached the 14 years of age” (Act N° 19968, Section 16, Par. 3).

The acknowledgment of the right to life originates from the fact that the Civil Code states that “a person is every individual belonging to the human race, regardless of age...” (Sect. 55). The embryo is an individual and belongs to the human race, thus it should be considered a person without regard to its chronological development (age).

Penal Protection of the Life of the Conceived

The life of the conceived is equally protected by the criminal law which punishes every person who archly causes an abortion (Sect. 342 of the Criminal Code). The punishment for a woman who causes her own abortion or agrees to have another person cause her abortion shall be reduced if she did so to hide her dishonor (Sect. 344 of the Criminal Code). The woman can also have her responsibility excused or reduced by resorting to general exemptions and mitigating circumstances acknowledged by the Criminal Code, such as “irresistible forces or insurmountable fear” (Sect. 10, Par. 9 of the Criminal Code).

If the doctor, on the other hand, caused or cooperated with the abortion, he shall have his punishment aggravated compared to that of the woman (Sect. 345 of the Criminal Code).

There are no exceptions to this criminal protection. So-called “therapeutic abortion” was annulled and replaced by the rule of the Health Code, which forbids “any action directly aimed to cause an abortion” (Sect. 119 of the Health Code).

Therapeutic actions practiced in favor of the mother’s health but that result in the death of the fetus are not considered abortions, since they do not comply with the requirements to be such (doctrine of the double effect or indirect intention).

The penal protection of life and integrity from the moment of conception was complemented by passage of the so-called Act N° 20120 on the Human Genome (September 29th, 2006). Section 1 of said legal instrument explicitly states: “this act aims to protect the human beings’ lives from their conception, as well as their physical and psychic integrity, and their genetic variety and identity, with regard to biomedical scientific research and its clinical applications”.

Several specific consequences of the protection of the unborn arise from this act. Cloning human beings is forbidden and entails a criminal punishment, regardless of the purpose or the technique used (Sect. 5 and 17); this means that the prohibition applies not only to so-called reproductive cloning, but also to the



wrongly-called therapeutic cloning, which involves the deliberate destruction of embryos. It also establishes that under no circumstances shall human embryos be destroyed so as to obtain stem cells in order to create tissues and organs (Sect. 6). The act also states that “a scientific research shall not be carried out if there are precedents suggesting that there is risk of destruction, death or serious and lasting bodily injuries to a human being” (Sect. 10, Par. 2).

Constitutional Protection

Article 19 of the Political Constitution (1980) states that the Constitution guarantees certain fundamental rights to “every person”, some of these rights being the person’s right to life and physical and psychic integrity, specifying that the law shall specially protect the life of the conceived human being: “the law protects the life of the unborn” (Art. 19, Par. 1 of the Constitution).

This way, the law has provided for the applicability of the protection remedy³⁴ in order to reestablish the rule of the law in case the right to life is deprived, disturbed or threatened by arbitrary and illegal actions or omissions (Art. 20 of the Constitution). An example of this is the “Carabantes Cárcamo” case (Court of Appeals of Santiago, November 4th, 1991, in *Revista de Derecho y Jurisprudencia*, Volume 88, Section 5, p. 340), in which it was decided that the creature to be born deserves protection if his life is at risk when the mother refuses blood transfusions.

The 1999 constitutional amendment (Act N° 19611) intended to specifically state the equality between men and women. As a result the expression “every man” was replaced by “every person”—the expression used in Art. 1 of the Constitution—and the rest of the text remained unchanged: “are born free and equal to others in dignity and rights”. The former statement links the word “person” with the verb “are born” which might have led to misunderstanding the Constitution, in Article 1, to say it is the human being that has been born—or from the moment he is born—who is a person (with dignity and rights).

Fortunately, this was noticed in time for the Plenary Congress, in exercise of its function of derived constituent power, to restate the constitutional personality of the conceived human being by means of an explicit explanation. Several legislators took the floor and stressed that the change in stating that every person is born free cannot be understood as weakening the right to life of the unborn (Deputy Cristi, Deputy Elgueta, Senator Díez, Deputy José García, Deputy Krauss, Senator Urenda, Senator Zaldívar), nor as “ignoring, suppressing or mitigating the

34 See footnote n° 23.

acknowledgment of the constitutional personality corresponding to men as well as women from the very moment of conception” (Deputy Guzmán, Senator Larraín, Deputy Luksic, Deputy Pérez).³⁵

The Constitutional protection for the conceived’s life and health is reaffirmed in Art. 5, Par. 2 of the Constitution, which sets forth that the duty of the bodies of the state is to respect and promote the fundamental rights that emanate from human nature, guaranteed by the Constitution, as well as “the international treaties in force and acknowledged by Chile”. One of the treaties acknowledged by Chile is the American Convention on Human Rights, also known as “Pact of San José” (Official Gazette Publication: January 5, 1991), which solemnly states that “every person has the right to have his life respected” and that “this right shall be protected by law and, in general, from the moment of conception” (Art. 4.1). It also establishes that every human being has the right to recognition as a person before the law (Art. 3, with relation to Art. 1.2).

Moreover, the International Covenant on Civil and Political Rights (Official Gazette Publication: April 29, 1989) establishes that “Every human being has the inherent right to life”. The expression “human being” clearly refers to every individual of the human race.

Finally, the Convention of the Rights of the Child (Official Gazette Publication: September 27th, 1990), emphatically states that, for its purposes, “a child means every human being below the age of eighteen years...” (Art. 1). This definition includes the *nascituri* since, according to said Convention, “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth*” (Preamble) (emphasis added for this paper).

The center of the debate about the Morning–After Pill has been whether it induces abortion or not. Some people have argued that it does not induce abortion for it does not terminate the pregnancy, which they view as starting with the fertilized ovum’s implantation in the uterus. However, that does not seem to be sustained by the Chilean legislation. In Chile, it has always been understood that the individual susceptible of the crime of abortion is the unborn child from the very moment of fertilization. There is clear evidence of that in the Records of the Criminal Code Drafting Committee: “from the moment the fetus’s existence begins, it contains the germ of a man, and the person who destroys it shall be accused of an extremely serious crime” (Proceedings of the 159th Session). The

35 Cfr. Plenary Congress Session, May 15, 1999, *Senate Session Journal (Diario de Sesiones del Senado)*, p. 4037–4066.



specialists in criminal law emphatically say so. Raimundo del Río, for example, used to teach that “technically, the crime of abortion is committed by a woman who consumes an abortion-inducing substance the day after the fertilization...”,³⁶ an opinion echoed by Alfredo Etcheberry³⁷ and Gustavo Labatut.³⁸

The other point of view says that the morning-after pill does not prevent implantation from occurring, which makes it only a contraceptive and not an abortion-inducing substance. This has been subjected to a judicial discussion.

First, the Supreme Court, in ruling dated August 30, 2001, regarding a protection remedy filed against the Public Health Service resolution authorizing the sale of the morning-after pill, stated that “the right to life is the essence of human rights, since without life, the law does not exist” (Par. 15), and that the unborn individual owns the right to life (Par. 17). The act performed by the Health Care Service was thus pronounced illegal. A new resolution by the Public Health Service then authorized the same drug, though with another trade name, and a legal action to nullify said resolution was filed; however, although the ruling in first instance accepted the original claim for considering that the human embryo’s life and physical integrity were seriously threatened, the Supreme Court of Santiago (a regional court) decided that there was not enough evidence of the anti-implantation effects produced by the drug, that such issue is an unresolved medical-biological problem (Par. 16) and that, therefore, the resolution of the issue depended on medical authorities rather than courts. The National Supreme Court declined to review the facts.

Upon the pronouncement of a supreme decree by the president approving rules on fertility and authorizing the distribution of the morning-after pill by public health centers, a group of deputies requested that the Constitutional Court decide on its effects on the right to life. By its ruling of April 18, 2008, the Court pronounced the unconstitutionality of said item, taking into account that “due to the embryo’s peculiarity, it can be considered, from its conception, a unique being, entitled to the protection of its right from the same moment; also, it cannot be subsumed in another entity or manipulated without affecting the substantial dignity it already enjoys for being a person” (Par. 51). After this, the Court stated that “the reasonable doubt raised regarding whether the ‘morning-after pill,’ compulsorily distributed in the institutions that make up the Health Care Network of the Health Care Services National System, can terminate the embryo’s life by

36 DEL RIO, Raimundo: *Derecho Penal*; Santiago, 1935, Vol. III, p. 182.

37 ETCHEBERRY, Alfredo: *Derecho penal*; Santiago, 1965, Vol. III, p. 89–90.

38 LABAUT, Gustavo: *Derecho penal*; Santiago, 1983, Vol. III, p. 126–90.

preventing its implantation in the female endometrium also raises a doubt about potentially affecting the right to life of an individual who is already a person from his conception under the conditions guaranteed by Article 19, Par. 1 of the Constitution. According to the previous reasoning, the above mentioned doubt should privilege the interpretation that favors ‘the person’s’ right to life over any other interpretation involving the invalidation of such right” (April 18, 2008, Case N° 740–07).

Advocates of the morning–after pill, supported by the Government of Ms. Michelle Bachelet, filed a bill to authorize the so–called emergency contraceptives. Finally, the Congress passed Act N° 20418 on January 28, 2010, on information, guidance and services as regards fertility regulation. Although many people claim that the morning–after pill’s public and private distribution has been allowed (the legislators did not request Constitutional Court review on this point of the act), the truth is that, in accordance with Article 4, the act only makes reference to contraceptives that do not induce an abortion. The exact wording of the act is: “In any case, any method whose main purpose or direct effect is to induce an abortion shall not be considered a contraceptive nor shall it be part of the public policy as regards fertility regulation” (Art. 4). If one of the possible purposes of the morning–after pill is to cause an abortion (i.e. the death of a conceived human being)—as we believe it is and is confirmed by the international manufacturing laboratories themselves – then the pill is not legally authorized and the prior doctrine established by the Constitutional Court is still in force.

III. Abortion in Chile

A. Rules Prohibiting Abortion and Bills Intending to Have it Approved

This analysis should begin by noting –once again– that in Chile abortion is prohibited under all circumstances. The main legislative instruments related to abortion are analyzed below, followed by the description of the constitutional and legislative bills that aim to decriminalize abortion.

Article 19, Par. 1, Subpar. 2 of the **Political Constitution** states that “the law protects the life of the unborn”. The apparent lack of clarity in explicitly prohibiting abortion has led some people to state that the political Code, in accordance with its general spirit, intends to entrust to the legislator to determine the way in which it is reasonably appropriate to put such protection into practice. Other people, on the other hand, point out that the constitution could authorize the inclusion of exceptional situations in which abortion should be considered legal. It is thus necessary to bring up what has been mentioned before regarding the expression “are born” in Article 1, Par. 1 of the Constitution, which, in saying



that every person *is born* free and equal in dignity and rights, is referring not to the birth but to the beginning of its existence. Despite the foregoing, the scope of said expression has also caused a certain amount of controversy.³⁹

Section 75 of the **Civil Code** repeats said idea, imposing on the judge the duty to adopt all directions that he may deem convenient to protect the life of the unborn, in the event it is believed that its life is at risk. The Civil Code then states that the punishment of a mother who intends to affect the fetus's life or health shall be postponed until the birth. Moreover, it is also relevant to mention here the irrebuttable presumption regarding the conception date set forth in Section 76 of said legal instrument.

Sections 342 to 345 of the **Criminal Code** make reference to several situations leading to the crime of abortion, setting different punishments depending on the circumstances under which the abortion is performed: with or without the woman's consent; with or without violence; by a professional doctor.⁴⁰ Since the law does not define what an abortion is, the concept has been subjected to jurisprudential interpretation; the best definition is "to kill the embryo or fetus". Furthermore, Section 342 punishes any person who "archly" causes an abortion, which has raised a debate about whether the characteristic conduct must be defined as direct fraud or may also be negligent – which is also important regarding indirect abortion, occurring when applying the double effect principle.

The **Health Code** refers to abortion in Sections 50 and 119. The first one instructs the civil registry officers to immediately report to the health care authorities the deaths caused by abortions, while the second one establishes that no action intended to cause an abortion can be performed. The latter is especially important since its wording meets the requirements set forth in Act 18826 (1989), which not only amends the former act that left room for abortion in therapeutic cases, but also helps construe the scope of paragraph 1 in Article 19 of the Constitution.

To expand the list even more, some other regulations should also be mentioned: the 2003 **Decree N° 216 by the Ministry of Health**, which modified the General Act of Cemeteries allowing burial of the mortal remains of a fetus and the issuance of a fetal death certificate by a doctor, and instructing the clinics

39 Nonetheless, it should be noted that said article was amended in 1999 through Act N° 19611, substituting the expression "men" with "person;" and, after said amendment, several Senators requested to have it explicitly stated that the word "person" refers to the unborn as well, a clarification finally stated in the proceedings, to keep reliable records of the act.

40 The punishments range between 541 days to 5 years. The maximum punishment applies to both the woman and the professional doctor who performs the abortion.

and hospitals to hand over the fetal remains, without further distinctions; and **Act N° 20357** on crime against humanity, in its Section 5, Par. 4, forbids forcing a woman, by means of violence or threats, to perform an abortion or have an abortion performed on her.

There is, thus, plenty of evidence showing that Chilean legislation unanimously forbids any kind of abortion. However, there exist several constitutional and legal amendment bills that aim to alter this *status quo*, either by decriminalizing certain conduct currently punishable, or by referring to certain issues related to abortion. There are other bills that aim to reinforce the existing prohibition as well.

Some of the most relevant bills are mentioned below.

- i. Bill amending Sect. 119 of the Health Code, to reinstate the therapeutic abortion. (Bulletin N° 6420–11, March 19, 2009). It is in the Chamber of Deputies' Health Committee, in the first constitutional procedure. Similar bills have been filed before, but have not prospered.
- ii. Bill protecting the woman's life when the pregnancy is terminated in the cases the bill provides for. It aims to reinstate "therapeutic abortion" in cases of fetal malformations or rape (Bulletin N° 4845–11, January 18, 2007).
- iii. Bill decriminalizing the termination of pregnancy for medical reasons. It legalizes both indirect and therapeutic abortion (Bulletin N° 7373–07, December 15, 2010). What is interesting about this bill is that it was filed by Senator Matthei, current Ministry of Labor and an activist of the Independent Democrat Union. It is in the first constitutional procedure, its debate not being urgent.
- iv. Bill decriminalizing eugenic abortion, abortion in case of rape, among others (Bulletin N° 7391–07, December 21, 2010). It has been filed by the legislators of the party Concertación in response to the previous bill. It is in the first constitutional procedure, its debate not being urgent.
- v. Bill establishing a master act on health and reproductive sexual rights. It aims to organically regulate abortion as part of women's sexual autonomy prerogatives. It involves the decriminalization of certain types of abortion, a prohibition on doctors reporting their patients' abortions, and the recognition of sexual and reproductive rights under Art. 19 of the Constitution (Bulletin N° 5933–11, July 1, 2008). It is in the first constitutional procedure, its debate not being urgent. This bill is particularly relevant because it uses ambiguous language and is based on international anti-life agendas—always arguing "the importance of catching up with the world" and "the duty to comply with international commitments"—which causes it to receive greater support by the



- members of the parliament, which means pro-life legislators must be sure that the scope of the concepts used are specified.
- vi. Constitutional reform bill, requiring a higher quorum for decriminalizing abortion (Bulletin N° 4121-07, March 22, 2006). It is in the first constitutional procedure, its debate not being urgent. The truth is that, due to the quorum needed to pass bills of this nature, it is presented more as a political rather than a strictly legislative action.
 - vii. Bill amending the Criminal and Health Codes provisions, aiming to specify the actions that constitute the abortion type (Bulletin N° 4447-11, August 22, 2006). It is relevant because it aims to improve the current lack of clarity regarding the scope of the crime of abortion, though critics say this bill goes beyond the criminal code. It is in the first constitutional procedure, its debate not being urgent.

It can be seen that, even though there are several bills related to abortion, they will not gain relevance unless the Government decides to speed up their processing. In that regard, the government of President Sebastián Piñera and the *Coalición por el Cambio* (pro-governmental) are not of only one opinion about the issue, as is reflected in the fact that one of the recent bills was supported by a Senator of the pro-government party. Nevertheless, it is worth acknowledging that most of the pro-government deputies and senators, together with some others from the party *Democracia Cristiana*, refuse to include abortion in the proposed legislation because it would go against the right to life. In this setting, there should not be great innovations regarding either increasing or moderating the punishment for abortion during the current government's term of office.

However, three potential threats should be noted: (i) The first one is that the international treaties and foreign committees' resolutions—particularly the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)—have paved the way for the inclusion of abortion in Chile, with the excuse of complying with the international standards of sexual autonomy and reproductive rights. By means of those arguments, several members of the parliament who are reluctant to decriminalize abortion cannot see that, in practice, said instruments eventually lead to it. (ii) Second, if the latest parliamentary debates and voting sessions, specially the one in which the so-called morning-after pill was introduced in the legal system,⁴¹ are analyzed, it is possible to hypothesize that the trend is moving toward the legalization of abortion in Chile, sooner

41 The current situation of the “emergency contraception” in Chile will be detailed below.

than later. (iii) Finally, it is interesting to examine that the polls, though still not conclusive, have shown results in favor of apparently “moderate” kinds of abortion, such as the so-called therapeutic abortion and/or abortion in case of rape.

B. Legal Precedents: The Highest Courts in Chile Confirm the Rejection of Abortion Under All Circumstances

The most important controversies regarding abortion have not been usually related to cases of explicit abortion, but rather to conflicts associated with “emergency contraception”. Below are five cases that have had the greatest impact, either because of their repercussions in the public debate, or for establishing legislative and/or jurisdictional precedents.⁴²

The reader will see that the rulings follow a sequence and that, after some contradictory rulings by the Court, the uniform criterion used is that of rejecting “emergency contraception”, reinforcing the protection of the unborn’s life.⁴³

Sara Philippi Izquierdo and others v. Public Health Institute, Ministry of Health and the laboratory “Laboratorio Médico Silesia S.A”. (Supreme Court, August 30th, 2001, Case Record N° 2186–01).

The plaintiff filed a protection remedy provided for in Art. 19, Par. 1 and 26 of the Political Constitution, demanding to declare illegal the decision by the the Public Health Institute, through administrative resolution N° 2141 (2001), authorizing the distribution and marketing of the drug “Postinal”. In first instance, the Court of Appeals of Santiago rejected the constitutional action arguing that the complaining parties lacked the legal capacity to represent the unborn in court.⁴⁴ In second instance, the Supreme Court accepted the case and issued the remedy since it considered that one of the effects of the drug Levonorgestrel could be causing an abortion, making an attempt on the unborn’s life, who is acknowledged as a person (Par. 17), and on the woman’s physical and psychic integrity (Par. 9). This is of great importance, because for the first time the Chilean highest jurisdictional court protects the unborn against potential risks caused by the effects of a medicine.

Regardless of the Court’s decision in said ruling, the Public Health Institute

42 All the jurisprudence has been extracted from the *Revista de Estudios Parlamentarios* HEMICICLO, N° 2, 2010.

43 Regardless of this jurisprudential sequence, Act N° 20418, which expressly regulates hormonal “emergency contraception”, was published in 2010, putting an end to this judicial controversy. Please see “Sexual Education and Reproductive Health” in this paper.

44 Court of Appeals of Santiago, in ruling of May 28, 2001, Par. 9, 10 and 11.



moved forward and registered, by means of Resolution N° 7224 of August 24, 2001, the drug “Postinor 2”, which has the same components of the first one, though a different name.⁴⁵

Centro Juvenil AGES v. the Public Health Institute of Chile (Supreme Court, ruling of November 28, 2005, Case Resolution N° 1039–5).

Based on Resolution N° 7224 (mentioned in the previous paragraph), the *Centro Juvenil AGES* filed a legal action for the nullity of the resolution (“nulidad de derecho público” remedy), provided for in Art. 7 of the Constitution, arguing that the Public Health Institute had not respected the Constitution and the law by putting at risk the unborn’s life. The action was accepted in the first instance,⁴⁶ but then rejected by the Court of Appeals.⁴⁷ The petitioner filed an appeal to quash the judgment before the Supreme Court, which pronounced judgment on November 8, 2005, confirming the judgment of the Court of Appeals. The decision’s conclusions are interesting. The Court considered that the appellant has the responsibility to prove that the drug can, in fact, produce the risk of abortion in the pregnant person, which, in the judiciary’s opinion, only generates a doubt and not the certainty required. The Court then affirmed that the law instructs the Public Health Institute to register the medicine required by the population, and to control the quality of said medicine, all duties that, in the Court’s opinion, were fulfilled in accordance with the technical task assigned to the Institute – this seems to mean that the Institute is more competent than the Court to decide about medical issues.

In this regard, four points should be mentioned:

- First, the main conclusion in the ruling is questionable, since, in expressly pronouncing against the Supreme Court ruling on a similar matter —analyzed above—it raises deep doubts in the national legal field.⁴⁸

45 The plaintiffs then recognized that it was not possible to extend the scope of the ruling to all the drugs with similar composition, but only to the one directly appealed, because their appeal was centered on the name used.

46 Ruling by the 20 Civil Court of Santiago, pronounced on June 30, 2004. The judgment is based on the fact that the Supreme Court’s ruling instructing that the registration of the drug “Postinal” be cancelled shall be extended to all medicine containing the same component.

47 Ruling by the 9 Chamber of the Court of Appeals of Santiago, pronounced on December 10, 2004. The first instance ruling was reversed, on the grounds that the court does not have jurisdiction over scientific controversies still under discussion.

48 Antonio Bascañán Rodríguez en “Después de la Píldora”. Anuario de Derechos humanos

- Second, it is evident that the courts of justice are not meant to settle doubts in others fields. However, the fact that there might be a doubt does not release the judge from the duty of making a decision. In this particular case, the judge should have made a decision taking into account the national legal system that protects life since conception, and also that the "biological doubt" involves the possibility that this drug may cause an abortion. In that sense, it seems more appropriate the ruling that will be referred later.⁴⁹
- Third, the reference to the appellant's responsibility to provide proofs seems unfortunate, since even uncertainty is enough to create a risk completely incompatible with the constitutional protection of the unborn and with the *pro hominem* principle, by virtue of which the alternative to be chosen is always the one that better protects the persons' life and integrity (in this case, it is obvious that the risk that Levonorgestrel might eventually cause should be avoided).
- And finally, although it is true that the law instructs certain health agencies to decide on the feasibility of certain pharmacological policies, it is also true that the Constitution sets forth mechanisms that let citizens contest such decisions in the event they find them to be unfair or detrimental to their rights. Arguing that the mere fact that the law grants certain powers to an agency is enough to justify all decisions made by it, would mean affirming a discretionary power that neither the law nor the Constitution intended. Indeed, if things were as the Supreme Court pretends in this ruling, an action—especially an action for nullity under article 7—that the Constitution clears against the State Administration would be futile.

Ruling by the Constitutional Court of Chile, based on the request regarding the Exempt Resolution⁵⁰ by the Ministry of Health which establishes the "National Rules Regulating Fertility" (January 11, 2007).⁵¹

On September 1, 2006, the Ministry of Health, by means of Exempt Resolution

2006, pág. 235–244

49 Vid. infra.

50 A resolution is exempt when the law or the General Comptrollership of the Republic pronounce it. The exempt resolutions do not require the usual legal control as to their legality and constitutionality.

51 Please see the ruling in <http://www.tribunalconstitucional.cl/index.php/sentencias/download/pdf/108>



N° 584, set forth the “National Rules Regulating Fertility”, establishing the compulsory distribution of “emergency contraception” pills, with Levonorgestrel as one of its components, in public health institutions; these pills could even be distributed to minors without their parents’ and/or guardians’ consent or knowledge.

This decision gave rise to a request for a protection remedy, rejected by the Court of Appeals of Santiago in ruling of November 17, 2006,⁵² arguing that the protection remedy is not a mechanism for imposing moral or religious convictions regarding decisions that do not affect the persons’ rights (Par. 4).

Then, on September 30, 2006, 31 deputies requested the Constitutional Court’s intervention to declare the unconstitutionality of said Exempt Resolution, by enforcement of Art. 93, Par. 1, Subpar. 16 of the Constitution.⁵³ The arguments claimed that the legal form chosen by the Ministry of Health to decide on this issue was not the appropriate one, since, for being exempt, it avoided the control by the General Comptrollership of the Republic and the Constitutional Court, and substantively, that the decision could put the unborn’s life at risk and contravene the parents’ right to choose how to educate their children.

Therefore, after an extended discussion in both the courts and the media, the Constitutional Court accepted the plea based only on the formal elements, and not deciding on the substance of the issue. This means that the Court only pronounced the unconstitutionality of the Exempt Resolution, which it considered that, as a Regulation, it had to be rendered by the President of the Republic and be subjected to the controls established by the Constitution. Thus, the above mentioned regulation did not become effective, and the Court did not decide on the substance of the issue.

52 Case Zalaquett, Lagos and Catalán against Minister Soledad Barría, Case Record N° 4693–06. The Court of Appeals’ ruling is appealed but the remedy is dismissed by the later Constitutional Court decision.

53 Article 93, Par. 1, Subpar. 16 establishes that the Constitutional Court shall have the authority to decide on the constitutionality of supreme decrees—regardless of the defect invoked—including the decrees pronounced by the President of the Republic in exercising his statutory autonomous power regarding matters that could be reserved to the law as established in Art. 63.

Ruling by the Constitutional Court of Chile, based on the request regarding the Regulatory Supreme Decree about the “National Rules Regulating Fertility” (April 18, 2008)⁵⁴

In response to the ruling described in the paragraph above, the Government, through its Ministry of Health, rendered the Regulatory Supreme Decree N° 48 on February 3, 2007, establishing the “National Rules Regulating Fertility”, which regulated the same issues included in the resolution that had been declared unconstitutional.

On March 5, 2007, a group of deputies, based on the foregoing and acting by enforcement of Art. 93, Par. 1, Subpar. 16 of the Political Constitution, requested once again the Constitutional Court’s intervention, on the grounds that the mass distribution of drugs which main component is Levonorgestrel through the health public system goes against Art. 19, Par. 1, Subpar. 2 of the Constitution, since it puts the unborn’s life at risk.

After months of discussion in both the courts and the media, the Constitutional Court accepted the plea and stated that the parts of the Regulatory Supreme Decree referring to the distribution of the so-called “Morning-After Pill” were unconstitutional.

The Constitutional Court began by specifying the scope of the ruling, maintaining that, due to the plea’s content and the powers granted by the Constitution, its effects can be extended only to the public health systems.⁵⁵

If we analyze the substance of the issue, the Court’s reasoning can be summarized in the following elements. First, it is confirmed that there actually is contradictory proof regarding the drug’s effects in the fertilization process and the later implantation of the fertilized ovum in the uterus, which raises a scientific doubt. Second, it is confirmed that the Chilean Constitution, in accordance with the content of Articles 1, 5 and 19, Par. 1, Subpar. 2,⁵⁶ largely

54 To read the full ruling, please visit <http://jurisprudencia.vlex.cl/vid/-58941744>.

55 This meant that, although the petitioners required that the ruling be equally effective in all cases and complied with in good faith, the drugs were distributed through the decentralized municipal systems and the private health system.

56 Article 1: “Every person is born free and equal to others in dignity and rights”.

Article 5: Paragraph two: The limits to the exercise of sovereignty are the respect of the fundamental rights emanating from human nature. The duty of bodies of the State is to respect and promote said rights, guaranteed by this Constitution, as well as the international treaties acknowledged by Chile and currently in force.

Article 19, Par. 1, Subpar. 2: The law protects the life of the person to be born.



considers that the unborn's life is constitutionally protected from the moment of conception (Paragraph 49). Finally, in this context the Court echoes the *pro hominem* principle, by virtue of which the alternative to be chosen is always the one that better safeguards and encourages the protection of human beings' rights (Paragraphs 65 and subsequent). It can then be concluded that the most coherent way of facing the doubtful factual assumption raised by the drug in question is to avoid any potential risk to the human being, and thus to forbid the distribution of the "Morning-After Pill" in the public health systems.

Report N° 31356 by the General Comptrollership of the Republic, based on the scope of the ruling by the Constitutional Court of Chile (June 16, 2009).⁵⁷

As mentioned before, the effects of the Constitutional Court's ruling pointed out in the previous paragraph were not obeyed as the petitioners would have expected. The municipal health care centers and the private pharmacies continued distributing the so-called "morning-after pill".

In the face of this situation, the Chilean Association of Municipalities and the lawyer Jorge Reyes, on behalf of pro-life groups, filed a request before the General Comptrollership of the Republic, asking it to declare the binding character of the ruling in question with which every health organization must comply.⁵⁸

The General Comptrollership of the Republic, as stated in the Report N° 31356, considered that the municipal surgeries, in being part of the public health system, have to exercise their powers within the legal framework in force. Therefore, it determined that the ruling affects every institution of the public health system, so distribution of the drug in question is forbidden in all of them. Nonetheless, it noted that the comptroller does not have jurisdiction over private clinics and institutions, which means that it cannot decide on issues related to them.

Conclusion

To sum up, after a long process, it can be seen how the highest jurisdictional bodies in the country have, in most cases, decided against the distribution of the

57 <http://www.contraloria.cl/LegisJuri/DictamenesGeneralesMunicipales.nsf/FrameSetConsultaWebAnonima?OpenFrameset>

58 The General Comptrollership of the Republic is an autonomous state body, established by the Constitution; its function is, among others, to exercise the control of legality of the acts performed by the governmental authorities. In this context, this body has the authority to intervene.

so-called “morning-after pill;” we can thus conclude that, at least in this regard, the permanent stance has been to reject any risk and kind of abortion, and to strengthen the protection of the unborn’s right to life.

However, this matter has been finally solved through the legislative means, which proves once again that these issues are discussed more on political than on strictly legal grounds.⁵⁹

C. Current Context: Organizations Involved and State of the Issue

In Chile, abortion is a topic that creates great controversy, not only in groups and organizations advocating the decriminalization of abortion, but also in many other groups encouraging respect for the life of the unborn child and the prohibition of abortion.

As regards the first group, the following are the most significant organizations:⁶⁰

- i. *Acción AG* is an association of non-governmental organizations that—on their own words—encourage the full exercise of citizenship, participation, and economic, social and cultural rights. This group has launched cultural and social campaigns, such as the “*Campaña Tengo Derecho a Decidir*” (“I have the right to choose” Campaign), which included videos and pamphlets. *Acción AG* also publishes articles and reports, and lobbies for their cause at the municipal government and the parliament.⁶¹
- ii. *Asociación Chilena de Protección de la Familia* or APROFA (Chilean Association for the Protection of the Family),⁶² an International Planned Parenthood Federation⁶³ subsidiary in Chile, fosters—in their own words—

59 See footnote n° 43.

60 Due to space limitations, the following organizations have been omitted: *Católicas por el Derecho a decidir* (Catholic Women for the Right to Decide: www.cddchile.cl); *Centro de Estudios para el Desarrollo de la Mujer* or CEDEM (Center of Studies for the Development of Women: www.cedem.cl); *Movimiento Conspirando* (Conspirando Movement: www.conspirando.cl); *Fundación Ideas* (Ideas Foundation: www.ideas.cl); among others.

61 Vid. www.accionag.cl. Many of the member organizations’ objective is, among others, to encourage the decriminalization of abortion.

62 Vid. www.aprofa.cl.

63 Planned Parenthood Federation is the organization with the greatest world network to foster family planning and reproductive rights. According to the information provided on their webpage, this organization gathers over 180 countries with subsidiaries or links that allow them to spread their perspective about sexuality all over the world. Conf. <http://www.ippf.org>.



- birth control and family planning, mainly through the development of studies, the management of health centers and the creation of a plan for educating and training about sexuality-related issues. This association has actively participated in the debate about the morning-after pill in Chile.
- iii. *Instituto Chileno de Medicina Reproductiva* or ICMER (Chilean Institute of Reproductive Medicine)⁶⁴ is an organization that fosters reproductive health rights and sexual rights among the population by means of rendering medical services, developing studies and research, providing medicines such as emergency contraceptives (it is one of the major importers in Chile), organizing training programs and other services. Dr. Horacio Croxatto, one of the directors, was one of the supporters of introducing Levonorgestrel in public health centers and is a recurrent defender of abortion on TV programs and public debates.
 - iv. The organization *Corporación Humanas*⁶⁵ is devoted to monitoring and observing public policies related to gender and sexuality, among other activities. Lorena Fries, its former president—and current director of the Human Rights Institute—has been part of several publications⁶⁶ and interviews⁶⁷ in which she supports the decriminalization of abortion in Chile. Throughout her career, she has been an active participant in the negotiations for including the CEDAW's Protocol within the domestic legislation.
 - v. *Centro de Medicina Reproductiva y Desarrollo Integral del Adolescente* or CEMERA (Center of Reproductive Medicine and teenagers' comprehensive development)⁶⁸ consists of an academic unit of the University of Chile, and their mission—according to their self-definition—is to improve the academic quality and the services provided in the field of sexual and reproductive health. It develops research, maintains clinics, and carries out training programs about sexual health, and actively participates in parliamentary debates.
 - vi. Center *La Morada* is—according to their self-definition—a feminist

org/en/What-we-do/

64 Vid. www.icmer.org.

65 Vid. www.humanas.cl

66 Vid. “publicaciones” section at www.humanas.cl.

67 <http://www.clam.org.br/publique/cgi/cgilua.exe/sys/start.htm?inford=4643&sid=51>

68 Vid. www.cemera.cl

association working to expand women's rights.⁶⁹ This organization is devoted to radio broadcasting the development of activist campaigns and the coordination of networks.

Regarding the groups encouraging the respect for life and the preservation of the prohibition of abortion, the following are the most outstanding ones:⁷⁰

- i. *Red por la Vida y la Familia* (Network for Life and Family)⁷¹ is a forum, gathering organizations and people who work for the defense of human life. They coordinate strategies, publish reports, participate in parliamentary debates and organize advertising campaigns.
- ii. ISFEM⁷² is a non-governmental organization devoted to research, training and studies about topics related to women. They develop studies presented at governmental, parliamentary and international levels. This organization also organizes campaigns and activities seeking to foster respect for human dignity.
- iii. *Fundación Mirada Más Humana* (A More Humane View Foundation)⁷³ is a non-governmental organization trying to instill a more humane perspective in society. It stands out for its capacity to organize mass events (especially, a pro-life rock concert called Rock for Life) and advertising videos.
- iv. *Muévete Chile* (Move, Chile!)⁷⁴ is a movement that encourages the participation of young people, the respect for the dignity of human beings, and the respect for life. Their main activities are to develop advertising campaigns and activism via the worldwide web, to spread ideas through different technological media, and to create networks.
- v. *Fundación Chile Unido* (Chile United Foundation)⁷⁵ is devoted to the study and dissemination of social and cultural values that genuinely promote

69 Vid. www.lamorada.cl.

70 Due to space limitations, the mentioning of the following organizations, devoted to encouraging and protecting the rights to life and to safeguarding the unborn children, have been omitted: *Fundación San José* (www.fundacionsanjose.cl), *Siempre por la Vida* (www.siempreporlavida.cl), *Gente Nueva* (<http://gentenueva.cl/sitio/>), *IdeaPaís* (www.ideapais.cl), among others.

71 Vid. www.redprovida.com.

72 Vid. www.isfem.cl

73 Vid. www.miradamashumana.org

74 Vid. www.muevetechile.org

75 Vid. www.chileunido.cl



human progress. They have publications and conduct public opinion studies, and manage programs such as *Acoge una Vida* (Shelter a Life), by means of which mothers who might consider abortion receive support.

In this context, the decriminalization of abortion is an issue always present in public debate, awaiting some occasion that allows it to be realized. The fact that Chile is one of the few countries in the world that still has legislation penalizing abortion in all cases is generating great tension among different national and international organizations.

Those who encourage the decriminalization of abortion have resorted to strategies that are generally replicas of previous experiences in other countries. These strategies are: 1) elevating the topic of abortion in the media as a public health problem, alleging high figures on clandestine abortion and maternal death rate; 2) defending *modernity*, contending that the absence of sexual and reproductive rights demonstrates the lack of progress in Chile; 3) cloaking their true ideas with advocacy of more “moderate” types of abortion (such as therapeutic abortion or abortion in case of rape) in order to gradually expand the margin of what is allowed; 4) give more importance to speech on women’s sexual autonomy and their right to decide on their bodies; 5) arguing that there is lack of equality between women with scarce resources and wealthy women as regards access to “safe” abortions performed by health professionals.

On the other side, the groups in favor of life back their ideas by mentioning: 1) the protection provided by the current legislation; 2) the existence of constitutional and judiciary rulings in favor of their stances; and 3) the importance of the right to life as the fundamental core of any society that wants to perpetuate itself in the future.

Without prejudice to the foregoing, it is important to point that the organizations in favor of establishing abortion are generally better organized and have a larger number of affiliated or sub-groups and greater international support than their counterparts. Furthermore, many times pro-life groups’ strategies do not find their way out of the mere opposition to contrary approaches, when what public opinion actually demands is an agenda with varied proposals explaining how safeguarding life, strengthening motherhood and fostering a society more generous with the underprivileged (like pregnant young women, mothers who abort or elderly people bearing oppressive loneliness) are essential for genuine human development.

At the level of political parties, the topic of abortion divides both political coalitions and individual groups.

Although it seems that most legislators from *Coalición por el Cambio*⁷⁶ seem to be against establishing abortion—which is evidenced by the support given to a demand to the Constitutional Court based on the debate about the so called “Morning–After Pill”—the fact that legislators of the majority party (UDI) have stated their willingness to sponsor legislative bills to decriminalize abortion⁷⁷ is symptomatic of an increasing tendency within Chilean conservatives. In other words, they are gradually convincing themselves that negotiating some issues, such as respect for life, is a reasonable way of enlarging their electoral base. Besides, there are already several political, parliamentary and municipal authorities who openly claim to be in favor of different types of abortion. However, it is still true that the President of the Republic and the presidents of two pro–government parties have claimed that innovations on this issue will not be considered, at least during the current term of office.

On the side of the coalition called *Concertación*,⁷⁸ a majority of the members show a tendency in favor of decriminalizing different types of abortion, such as therapeutic abortion, eugenic abortion and abortion in case of rape.

When debating topics like these, there is clear evidence of the difference between a “progressive” group (*PS–PPD–PRSD*) and *Democracia Cristiana*, which, in spite of being the majority party in this coalition, has been gradually making their stance more flexible. Consequently, it is expected that most authorities belonging to these parties would support projects in favor of decriminalizing abortion in any of the cases already mentioned.

PRI and the left–wing parties deserve to be mentioned separately. *PRI*⁷⁹ is a centrist party with parliamentary representation and has a confusing stance regarding this topic, since some of its leaders seem to agree with the decriminalization of abortion while others would probably not support an idea like that. Instead, all left–wing parties, such as *PRO*, led by the former candidate for president, Marcos Enríquez–Ominami, *MAS*, led by Senator Andrés Navarro, and

76 See footnote N° 12.

77 Vid. *supra*: bill to decriminalize the termination of a pregnancy (Bulletin N° 7373–07, December 15, 2010).

78 See footnote N° 13.

79 *PRI* was born with the fusion of the regional parties *Alianza Nacional de los Independientes* or *ANI* (National Alliance of Independents) and *Partido de Acción Regionalista* or *PAR* (Regionalist Action Party), which work in three Southern regions and three Northern regions. Vid. [http://www.pricentro.cl/index.php?option=com_content&view=article&id=123&Itemid=110\(28–mayo–2011\)](http://www.pricentro.cl/index.php?option=com_content&view=article&id=123&Itemid=110(28–mayo–2011))



Partido Comunista (Communist Party), which at present has three representatives in the Chamber of Deputies, are very likely to support any bill encouraging the decriminalization of abortion.

Finally, if we analyze the opinion polls about abortion, the majority of the population claims to be in favor of decriminalizing abortion in those cases when the mother's life is at risk.⁸⁰ It is not evident yet if the public opinion is capable of distinguishing between what is called *therapeutic abortion*, necessarily involving a positive action to end the life of the fetus, and what is called *indirect abortion* or *treatment with fetal risk*, where the work of the professional is exclusively aimed at preserving the life of both the mother and the child, admitting the possibility that the fetus may die as a non-desired effect.

D. Statistics: Little Significant Information

It is very difficult to obtain reliable statistics about the number of abortions performed in Chile. It is exactly because abortion is forbidden that it is only possible to have access to data about miscarriages occurring in health care centers, or abortions of women involved in criminal proceedings. Therefore, any figure regarding the quantity of abortions practiced is based on speculation as to the number of clandestine abortions performed.

By means of a widely distributed publication, the *Asociación Chilena de Protección de la Familia* or APROFA (Chilean Association of Family Protection) states that the number of clandestine abortions is close to 160,000 a year, a figure usually referred to by organizations that promote the decriminalization of abortion, emphasizing the mother's health risk, the existence of a serious but unregulated reality, and the existence of a public health problem behind those numbers.⁸¹

On the other hand, Jorge Reyes has disputed those figures, maintaining that the only reliable statistics are the ones provided by the *Instituto Nacional*

80 According to the latest National Opinion Poll of the National Youth Institute (Encuesta Nacional del Instituto Nacional de la Juventud), which is the most representative evidence inside this age group, most young people are in favor of therapeutic abortion (http://intranet.injuv.gob.cl/cedoc/6_encuesta/cap_19.pdf). On the other hand, in its latest opinion poll, FLACSO gets to the conclusion that over 60% of Chileans is in favor of different types of abortion. (http://www.flacso.cl/extension_despliegue.php?extension_id=846&page=1).

81 Please see Asociación Chilena de Protección de la Familia (APROFA): *Aborto en Chile: Argumentos y testimonios para su despenalización en situaciones calificadas*; February 2010 copy, available in http://issuu.com/doc-aprofa/docs/aborto_en_chile. The 160,000 clandestine abortions mentioning is on page 23.

de Estadísticas or INE (National Institute of Statistics), based on an average of 34,000 annual deaths registered in hospitals, out of which two thirds correspond to miscarriages. In this regard, Reyes shows that supporters of abortion multiply such figure by six or seven, getting the exaggerated number widely spread with propagandist purposes; if such a figure were true, it would mean that, in Chile, for every three children that are born, two others die in an abortion. If such were the case, Chile would easily outdistance other countries which legalize and promote abortion, sometimes even with state funds, which is very unlikely.⁸²

IV. Reproductive Health Legislation

The reproductive health legislation and issues associated with it are scattered in different regulating instruments. The most relevant regulations are mentioned hereunder, especially the ones that refer to “emergency contraception” (EC).

In this sense, it can be observed that EC was included in the first place for the emergency assistance to victims of sexual violence, and ended to be accepted for all cases through Act N° 20418, in 2010. This Act is especially questionable since the Chilean courts have expressly declared the unconstitutionality of such provisions, under the argument that this kind of drugs threatens the life of the unborn.⁸³ However, this act is currently in force, until its constitutionality is challenged.

Health Code: The Health Code consists of the systematization of all the regulations associated with the development of the Chilean public and private health activities. According to the subject being developed, we highlight the state protection to women and child during pregnancy (section 16); gratuitousness in attention of state services (section 17) and responsibility of the National Health Service regarding the fight against venereal diseases (section 38). It should be mentioned that most of the associated regulations are found in lower level regulations and rules which implement the general principles stated in the code.

Rules and clinical guidelines for assisting Victims of Sexual Violence in emergency rooms (Ministry of Health, April 2004): In April 2004, the Ministry of Health issued a new regulation for the emergency assistance to victims of

82 Cf. http://www.redprovida.com/index.php?option=com_content&task=view&id=1829&Itemid=75 to read the letter published on March 25th, 2009, in *Diario el Mercurio*.

83 See, “Legal Precedents: The Highest Courts in Chile Confirm the Rejection of Abortion Under All Circumstances”



sexual violence, incorporating adult and young raped women care, and providing information about “emergency contraception” (EC). (It is important to point out that, upon announcing these rules, the public health network was provided with 35,000 doses of Postinor 2.) The rule states that, when a victim of violence or sexual abuse is taken to an emergency room, they are exercising their right to receive assistance by a health professional or technician. The assistance always aims, in the first place, to recognize, diagnose and adequately treat the symptoms and injuries, in order to reduce the distress and after-effects of the violence suffered. At the same time, the rule establishes that the attorney general acknowledges some specific rights of the victims, some of which are: to be assisted, to be treated in a humane manner, to report the crime, to be informed of their rights and the way to exercise them, to demand protection, to obtain remedy, to be heard, to file an accusation, to participate in the process, to claim.

Regarding treatment, the regulation describes some specific aspects of the interventions aimed to prevent or minimize the pathological or unwanted consequences of violence or abuse. Particularly, it makes reference to pregnancy prevention after a rape: “(...) she has the right to be properly informed that there exists an effective and safe way to prevent a unwanted pregnancy; in the case the woman already has an intrauterine device or uses the hormonal contraception at the moment of the rape, she must still be informed of this treatment, even if the risk of failure is minimum. The professionals who refuse to prescribe these preventive treatments should not assist the victims of rape. In such case, the treating professional shall refer the victim to another professional, since even providing information and advice could lead the victim to make a certain decision”. Furthermore, it is stated that the EC and/or the Yuzpe regime⁸⁴ shall be provided as viable alternatives in this treatment.

National Rules Regulating Fertility (Exempt Resolution N° 584, Ministry of Health, September 2006): In 2006, a new scenario arose as a result of the incorporation of the EC in the new “National Rules Regulating Fertility”. The aim of these rules was to “regulate the quality and accessibility to these services, so as to achieve the decade’s Health Goals, especially to continue decreasing the maternal mortality by reducing the number of unwanted and highly risky pregnancies, to correct inequities in sexual and reproductive health, and to meet the population’s expectations”.

84 The Yuzpe regime is a method of “emergency contraception” that combines estrogen and progesterone hormones.

Basically, this legal instrument sets the general principles, requirements and bases of the development and treatment of sexual and reproductive health in Chile, establishing conditions and obligations with which the institutions and workers providing health assistance in these fields shall comply. Said rules—based on the World Health Organization’s Medical Criteria of Eligibility and Recommendations about Selected Practices for the use of contraceptives—also regulate the guidance, advice and supply or placement of a contraceptive method and of the surgical procedure to avoid pregnancy. This document caused great controversy and involved various requirements and case-laws, which have been referred to before.⁸⁵

Act 20418, which established rules regarding the information, guidance and services relating to fertility regulation; it also authorizes that contraceptive methods—among which are the emergency contraceptives—be provided to the population by the Public Health System (Published January 28, 2010): According to this legal text, every person is entitled to receive information and guidance as regards fertility regulation in a clear, understandable, comprehensive and, if necessary, confidential manner. This right includes free guidance on affective and sexual life, according to each person’s beliefs and education.

The regulations also state that the bodies of the State Administration having jurisdiction over this matter (the System of the Health Services’ National Assistance Network: accident and emergency centers, public hospitals, municipal surgeries, etc.) shall make available to the population the duly authorized contraceptive methods, both hormonal and non-hormonal. In case the person requesting the emergency hormonal contraceptive method (“morning after pill”) is younger than 14 years of age, the doctor or physician, from either the public or private health system, shall provide the medicine and afterwards report to the father, mother or adult in charge indicated by the minor.

The legal dispute about “emergency contraception”⁸⁶ was thus solved by the implementation of an act, which, by the way, generated much discomfort, since it contradicted what had been ruled by the Chilean highest bodies of the original jurisdiction, constitutional and administrative justice, as mentioned before.⁸⁷

85 See, “Legal Precedents: The Highest Courts in Chile Confirm the Rejection of Abortion Under All Circumstances”

86 See, “Legal Precedents: The Highest Courts in Chile Confirm the Rejection of Abortion Under All Circumstances”

87 Ibid..