



## Legislation Guidelines for Latin America

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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.

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## **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.<sup>1</sup> 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—

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<sup>1</sup> See discussion in the Overview section

the moment when such protection begins.<sup>2</sup>

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.<sup>3</sup>

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:

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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.<sup>4</sup>

### III. Rights Acknowledgement<sup>5</sup>

#### 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

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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),<sup>6</sup> 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.<sup>7</sup>

### **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

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<sup>6</sup> Said system can be framed within the scope of the National Executive Power.

<sup>7</sup> 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 authorities<sup>8</sup> 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.<sup>9</sup>

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<sup>8</sup> In accordance with each state's legislation.

<sup>9</sup> <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.<sup>10</sup>

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.<sup>11</sup>
- 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.

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<sup>10</sup> See discussion in the Overview section

<sup>11</sup> 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,<sup>12</sup> 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

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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 territory<sup>13</sup> 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

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<sup>13</sup> 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 territory<sup>14</sup> 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

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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.<sup>15</sup>

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.<sup>16</sup>

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.<sup>17</sup>

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

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<sup>15</sup> Pursuant to Art. 18.1 of the Convention.

<sup>16</sup> 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.

<sup>17</sup> 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).<sup>18</sup>

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.<sup>19</sup>

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”.

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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](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.