

How to Protect Abortion Access During Constitutional Reform

June 2011

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This letter can be excerpted or paraphrased in a communication to a committee or other authority charged with shaping a constitution.	
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This letter was written to the President of the Dominican Republic to express concern over protections for the right to life at conception in the draft constitution.	

Introduction

This toolkit is designed to help reproductive rights advocates participate in national constitutional reform processes. Increasingly, opponents of reproductive rights use protections for the right to life to create barriers to women's access to abortion, contraception and assisted reproduction. Such barriers are put in place through amendments to current constitutions, litigation at national courts and during constitutional reform. While this tool focuses on constitutional reform processes, it may be useful for advocates facing constitutional amendments or engaging in litigation.

Constitutions detail fundamental principles of government, including protections for human rights, and provide political and legal stability for a country. A constitution is normally supreme law, superseding laws made by the legislature. Although government officials can initiate constitutional reform to serve political ends, constitutions are designed to remain in force over time and to be difficult to change. Legislative bodies are not legally entitled to change provisions that are put in constitutions through regular lawmaking processes.

Constitutional restrictions on abortion impede women's access to safe abortion care and are the most long-lasting of any legal vehicle. Preventing such restrictions should be a top priority for reproductive rights advocates, wherever constitutional reform is happening.

Anti-abortion advocates have succeeded in their efforts to restrict abortion access through constitutional processes in several countries and states. Often these advocates are political insiders who quietly insert restrictive provisions during the drafting process. Particularly where a constitution is being revised primarily to address political or governance issues, anti-abortion advocates have been able to restrict abortion without drawing attention, such as in Kenya. **At a minimum, reproductive rights advocates must be diligent followers of the constitutional process to ensure that women's rights are not restricted for years to come.**

The most common tactic of anti-abortion advocates is to introduce rights for persons before birth—or at “conception”—into the constitution. **Constitutions should protect the right to life, without modification, in accordance with international human rights law.**

Why constitutions should not recognize the right to life before birth

Constitutional drafters aim to create a document that will be a source of stability for a nation. **Drafters must strive to enshrine principles that are both inclusive of those held by a nation's people and unchanging through time.** Abortion is typically more appropriately addressed by legislatures. Protection for the right to life before birth does not represent a universal principle

There is no consensus among religious, scientific and philosophical doctrine on when life begins and therefore should be constitutionally or legally protected. In the 1973 U.S. Supreme Court ruling of *Roe v. Wade*, which legalized abortion for American women, the Court acknowledged that the question of when a fetus is a person is not possible to answer. The drafter of the decision, Justice Harry Blackmun wrote:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.¹

Within scientific and medical communities, there is consensus that two cells coming together is the beginning of a new biological life, but there is none on the issue of when personhood is conferred upon an embryo or fetus.² Likewise, philosophers have divergent views.³

Religious perspectives

The Catholic Church is arguably the body most demanding of full rights for embryonic and fetal life at all stages. Though it condemns abortion, the Vatican has acknowledged that it does not know when the fetus becomes a person and has never declared that its position on abortion is infallible. Catholic teaching also urges members of the church to follow their consciences when faced with conflict over the moral teachings of the church.⁴

The issue of when life is worthy of protection has changed over time for the Catholic Church. It was not until 1965, in a decree by the Second Vatican Council, that the Catholic Church adopted the recent doctrine that life must be protected from conception. Prior to this, apart from a short period in the 16th century, the Catholic Church maintained that abortion was not a sin until the fetus was “ensouled,” at some point in fetal development.⁵

1 *Roe v. Wade*, 410 U.S. 113 (1973).

2 Caplan A., Marino T. 2007. The role of Scientists in the beginning-of-life debate, a 25-year retrospective. *Perspectives in Biology and Medicine*, 50:603-605 citing Human Life Bill. 1982. p. 8. Hearings before the Subcommittee on Separation of Powers of the Committee on the Judiciary, U.S. Senate, 97th Congress S. 158, serial no. J-97-18. Washington, DC: GPO.

3 DeGrazia D. 2003. Identity, killing, and the boundaries of our existence. *Philosophy & Public Affairs*, 21:413-419.

4 Pope Paul VI. 1965. Declaration on religious freedom dignitatis humanae on the right of the person and of communities to social and civil freedom in matters religious promulgated by his Holiness Pope Paul VI. 7, http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat_ii_decl_19651207_dignitatis-humanae_en.html; Catholics for Choice. The Truth about Catholics and Abortion. <http://www.catholicsforchoice.org/documents/TruthaboutCatholicsandAbortion.pdf>.

5 Catholics for Choice. 1996. Abortion and Catholic thought: the little-told history. *Conscience*. http://www.catholicsforchoice.org/pubs/cfc_archive/articles/TheHistoryofAbortion.asp.

Other Christian faiths—including Lutheran, Methodist and Episcopalian—support legal abortion.⁶ Baptist and Presbyterian doctrines recognize the freedom of individuals to decide on the issue of abortion. The Jewish faith holds a range of views on abortion, including supporting the procedure when the woman would suffer from psychological and emotional harm.⁷ Generally, Islam allows abortion until “ensoulment”—when the fetus acquires a soul—which is believed to happen at some point between 40 and 120 days into the pregnancy, depending on the Muslim sect. Other interpretations of the Koran allow abortion where the woman’s life or health is in danger or if the continued pregnancy would harm existing children.⁸

Belief in the need to protect life before birth will not endure over time

The inclusion of broad principles that represent a general consensus ensures that a constitution will endure over time. Constitutions contain principles that serve as a basis for governance and must encompass principles that will be relevant into the future (the U.S. Constitution, for example, was completed in 1787). **Protection for the right to life before birth does not allow law to conform to changing views on issues such as abortion. Such protection has no place in a constitution.** Since 1994, 28 countries around the world have loosened legal restrictions on abortion, while only three have restricted their laws.

Constitutions can allow for protection of the fetus through judicial interpretation without giving it the full status of a person. Judicial interpretation can account for shifting views on issues such as the rights of the fetus vis-à-vis a woman’s reproductive rights. In 1975 and in 1993, the German Federal Constitutional Court interpreted the right to life to include fetal life, but that this right must be balanced with a pregnant woman’s right to self-determination.⁹ In the U.S. Supreme Court decision of *Roe v. Wade* (1973) the U.S. Supreme Court legalized abortion, while recognizing that the fetus derives some degree of protection from the Constitution.

6 Presbyterian Church (USA). 1970. Minutes of the 182nd general Assembly. United Presbyterian Church in the U.S.A.; Evangelical Lutheran Church in America. 1991. Social statement on abortion, adopted at the second biennial Churchwide Assembly of the Evangelical Lutheran Church in America; Religious Coalition for Reproductive Choice. 2008. We affirm religious organizations support reproductive choice. http://www.rcrc.org/pdf/We_affirm.pdf.

7 Religious Coalition for Reproductive Choice. 2008. We Affirm Religious Organizations Support Reproductive Choice. http://www.rcrc.org/pdf/We_affirm.pdf.

8 Hessini L. 2007. Abortion and Islam: policies and practice in the Middle East and North Africa . *Reproductive Health Matters*,15(29): 75-84.

9 Rieger H. 1993. Opinion of the Federal Constitutional Court on abortion. *Deutsche Medizinische Wochenschrift*. 118(31):1127-30.

International human rights and the right to life

International and regional human rights treaties do not recognize the right to life before birth. Below is a discussion of major human rights treaties and how they address the right to life.

The Universal Declaration on Human Rights (1948) provides in Article 1, “All human beings are *born* free and equal in dignity and rights.”¹⁰ The language of the treaty was specifically chosen to apply rights to persons once they are born. As the language of the treaty was being negotiated, an amendment was proposed to include the right to life before birth but the amendment was overwhelmingly rejected.¹¹

The International Covenant on Civil and Political Rights (1976) protects the right to life in Article 6. As with negotiations on the language of the Universal Declaration on Human Rights, an amendment to protect life before birth was offered and rejected. The Committee overseeing the treaty has recognized the right to abortion and linked it with the right to life of a pregnant woman. In general Comment 28 on Article 3 on the equal rights of men and women, the Committee called upon States Parties, “when reporting on the right to life protected by article 6,” to inform the committee of “any measures taken by the State to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions.” The Human Rights Committee has also recognized the right to abortion through concluding observations and jurisprudence.¹²

The preamble of the **Convention on the Elimination of All Forms of Discrimination Against Women (1981)** notes the UDHR proclamation that “all human beings are born free and equal in dignity and rights.” The Committee overseeing the treaty has also recognized that women’s rights include access to safe abortion. General Recommendation 24 on Health states, “When possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion” and the Committee has repeatedly recommended that states that are party to the treaty take measures to increase access to safe abortion.¹³

The Convention on the Rights of the Child (1990) protects the right to life of children after birth under Article 6, which recognizes “that every child has the inherent right to life.”¹⁴ The preamble of the treaty states “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 includes support for pregnant women but not legal protections for fetuses.¹⁵ That the treaty does not protect life before birth is supported by the Committee on the Rights of the Child’s interpretation of the treaty to include the right to safe abortion. In General Comment 4, the Committee urges states parties “to develop and implement programmes that provide access to sexual and reproductive health services, including family planning,

10 UN General Assembly. 1948. Universal Declaration of Human Rights. Resolution 217A (III), U.N. Doc A/810 at 71.

11 Copelon R, Zampas C, Brusie E, deVore J. 2006. Human rights begin at birth: International law and the claim of fetal rights. *Reproductive Health Matters*, 13(26): 120-129.

12 K.L. v. Peru. 2005. Comm. No. 1153/2003: Peru, 22/11/2005, U.N. Doc.CCPR/C/85/D/1153/2003.

13 UN Committee on the Elimination of Discrimination Against Women. 1999. General Recommendation 24: Women and Health (20th Session) para. 31(c).

14 UN Convention on the Rights of the Child. 1989. *United Nations, Treaty Series* 1577 (1989) p. 3.

15 Copelon R, Zampas C, Brusie E, deVore J. 2006. Human rights begin at birth: international law and the claim of fetal rights. *Reproductive Health Matters*, 13(26): 120-129.

contraception and safe abortion services ...”¹⁶ In reviewing states’ compliance with the treaty, the Committee has expressed concern with high rates of unsafe abortion and has asked governments to review restrictive abortion laws.

Regional human rights instruments likewise protect the right to life after birth. The **European Convention on the Protection of Human Rights** bases its protection for the right to life on the Universal Declaration on Human Rights. The European Court of Human Rights, in its jurisprudence, has repeatedly denied the right to life of fetuses.¹⁷

The American Convention on Human Rights is the only international human rights instrument to mention the right to life before birth, protecting the right to life “*in general*, from the moment of conception.” The InterAmerican Commission on Human Rights has refused to afford the right to life to a fetus, referring to the American Declaration on the Rights and Duties of Man, which, like the UDHR, protects rights after birth and emphasizing the clause, “in general” to be a limit on the right to life before birth.¹⁸

The African Charter on Human and People’s Rights does not afford rights before birth and the Protocol on the Rights of Women in Africa explicitly protects the right to abortion. Article 14 of the Protocol requires states parties to “protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.”¹⁹

16 UN Committee on the Rights of the Child. 2003. General Comment No. 4, Adolescent health and development in the context of the Convention on the Rights of the Child, U.N. Doc. CRC/GC/2003/4, para. 31.

17 Copelon R, Zampas C, Brusie E, deVore J. 2006. Human rights begin at birth: International law and the claim of fetal rights. *Reproductive Health Matters*, 13(26): 120-129.

18 Copelon R, Zampas C, Brusie E, deVore J. 2006. Human rights begin at birth: international law and the claim of fetal rights. *Reproductive Health Matters*, 13(26): 120-129; Baby Boy. 1981. Case 2141, Inter-American Convention on Human Rights 25/OEA/ser. L./V.II.54, Doc 9 Rev.1.

19 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. 2000. Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6, art. 14.

The right to life and reproductive rights in constitutions worldwide

Protection of life before birth in national constitutions is rare. Of approximately 200 countries in the world, only 15 recognize the right to life before birth and only four mention abortion explicitly. Of these 19:

- **Two constitutions provide that life is worthy of protection before birth** (Czech Republic and Slovakia).
- **Thirteen constitutions protect life before birth** (Andorra, Chile, Ecuador, El Salvador, Equatorial Guinea, Guatemala, Honduras, Ireland, Madagascar, Paraguay, Peru, the Philippines and Venezuela).
- **Four constitutions prohibit abortion except as provided by law** (Kenya, Northern Mariana Islands, Uganda and Zambia).
- **Two constitutions stipulate when abortion is allowed** (Swaziland and Kenya).

Forty-five countries have constitutions that contain provisions that protect rights around family and reproduction.

- **Twenty-seven constitutions protect the right of persons to “found a family.”**
- **Twelve constitutions protect the right to decide on the number and spacing of children, to procreate or make decisions about reproduction** (Colombia, Guatemala, Ecuador, Indonesia, Mexico, Macedonia, Paraguay, Peru, Serbia, Slovenia, South Africa and Venezuela). These rights were first protected in the Final Act of the International Conference on Human Rights held in Teheran in 1968 and have since been reiterated in other international agreements, including the 1994 Programme of Action of the International Conference on Population and Development and in the Convention on the Elimination of All Forms of Discrimination Against Women.
- **Five constitutions protect the right to family planning** (Brazil, China, Ethiopia, Portugal and Turkey).

The right to abortion is guaranteed in the constitutions of the United States and Canada, under court decisions in these two countries. In the 1973 decision of *Roe v. Wade*, the U.S. Supreme Court found that the right to privacy in the constitution extended to the right to abortion.²⁰ A Texas State Law restricting abortion was therefore ruled unconstitutional. In Canada, in the 1988 decision of *R. v. Morgentaler*, the Supreme Court of Canada struck down the restrictive abortion law on the grounds that it violated a woman’s security of person under the Canadian Charter on Rights and Freedoms.²¹ Since the Morgentaler ruling, Canada has had no abortion law.

20 *Roe v. Wade*, 410 U.S. 113 (1973).

21 *R. v. Morgentaler*, 1 S.C.R. 30 (1988).

Potential consequences of constitutional protection of life at conception

If a constitution protects the right to life at conception, the right to life of a fetus could outweigh the right to life of a woman, particularly where the woman faces only a *risk* to her life. A court could find that the certain death of a fetus should be protected over the potential death of a pregnant woman. Consequently, the protection of life at conception can jeopardize women’s access to abortion and access to some types of contraception.

The definition of “conception” itself is too unclear to be included in constitutions. Health and medical authorities—including the World Health Organization, the Ethical Committee of The International Federation of Gynecology and Obstetrics (FIGO), the American College of Obstetrics and Gynecology and the National Institutes of Health—have defined conception as the point at which a fertilized ovum is implanted into the wall of the uterus.²² However, older medical sources, the Vatican and interest groups working to restrict abortion define conception as beginning at fertilization.²³ The Vatican states in a Declaration on Induced Abortion that “From the time that the ovum is fertilized, a new life is begun... the life of a new human being with his own growth.”²⁴ Determining the moment of fertilization is problematic as fertilization has no widely accepted biological or medical marker.

Abortion

The protection of life at any stage before birth in a country’s constitution can hinder women’s access to abortion, even when her life is at risk. Of the 15 countries with constitutions that explicitly protect life at various stages before birth, 10 have separate laws that ban abortion, though in some countries allowances could be made judicially for risk to a woman’s life. Even where abortion is not criminalized, protection for life before birth in the constitution can lead providers and women to believe that they could be criminally punished for abortion and dissuade them from providing or seeking the service.

In Ireland, the Eighth Amendment of the Constitution, which protects the right to life of the unborn, was used by the Attorney General to deny an adolescent access to abortion even though her life was at risk. Though the Irish Supreme Court eventually overturned the ruling, the Irish High Court had held that the Eighth Amendment would prevent a 14-year old rape victim from traveling to England for an abortion, although she was at risk of suicide due to the pregnancy.²⁵

22 World Health Organization. 2001. *Definitions and indicators in family planning maternal and child health and reproductive health used in the WHO regional office for Europe*. Geneva: WHO. <http://test.cp.euro.who.int/document/e68459.pdf>; The International Federation of Gynecology and Obstetrics Committee for the Ethical Aspects of Human Reproduction and Women’s Health. 2003. *FIGO definition of pregnancy, Recommendations on Ethical Issues in Obstetrics and Gynecology*. London: FIGO. p. 43.

23 Moore K. L. 1988. *Essentials of Human Embryology*. Toronto: B.C. Decker Inc. p.2

24 Sacred Congregation for the Doctrine of the Faith. 1974. Declaration on Procured Abortion, 12-13: AAS 66, 738.

25 AG v. X (1992) IESC 1.

Contraception, biomedical research and assisted reproduction

Constitutional protection of life at conception could create a barrier to access to contraception. Intra-uterine devices (IUDs), emergency contraception and other hormonal contraception—including pills, hormonal IUDs, implants and injectables—could be found to violate a fertilized egg’s right to life. These contraceptive methods prevent pregnancy by preventing ovulation or fertilization. Activists working to restrict abortion also claim that IUDs and emergency contraception can prevent implantation of a fertilized egg.

Activists and government officials who wish to restrict access to contraception would be aided by constitutional protection for the right to life at conception. A lawsuit could be brought claiming that under the constitution, IUDs, emergency contraception and other hormonal contraception violate the right to life. Such a provision strengthens the work of activists who oppose the use of contraception.

Activists’ efforts to restrict contraception have been successful. In the Philippines, where the Constitution protects the life of the unborn at conception, this provision was used in efforts to oppose a bill that would mandate family planning services in state hospitals. As a result, Manila City banned distribution of contraceptives through its public health system.²⁶ In Argentina, in 2003, a provincial judge ruled in favor of a conservative Catholic organization, and banned oral contraceptives and IUDs because of their “abortive properties.”²⁷ A constitutional provision protecting the right to life at conception would give decisions such as these a strong legal basis, in spite of their lack of scientific evidence.

Constitutional protection of a fertilized egg could also be a basis for opponents working to restrict groundbreaking research using fetal stem cells and access to assisted reproduction. For example, in 2000 the Costa Rica Supreme Court upheld a law banning in vitro fertilization, ruling that life begins at conception under the Constitution. The decision of the Supreme Court was subsequently challenged at the Inter-American Commission on Human Rights.²⁸

26 Bernas JG. 2008. Church, Constitution and the RH bill. *Philippine Daily Inquirer*, 13 Oct.. http://opinion.inquirer.net/inquireropinion/columns/view/20081013-166086/Church%2C_Constitution_and_the_RH_bill

27 Argentine contraceptive ban ‘absurd.’ 2003. *BBC News*, 24 May. <http://news.bbc.co.uk/2/hi/americas/2935556.stm>

28 Inter-American Commission on Human Rights. 2010. Report No. 156/10 Petition 1368-04 Admissibility. Daniel Gerado Gomez, Aida Marcela Garetia et Al. v. Costa Rica.

How reproductive rights advocates can influence constitutional reform

The process for constitutional reform varies from country to country and determines who has the power to make decisions about the content of the final document. Below is an explanation of possible steps in the process, with suggestions for advocacy opportunities. Advocates should learn about their country's specific process, preferably from like-minded actors and allies participating in the reform.

Constitutional reform may start with the **legislature** passing an act to set up the legal framework for constitutional review. Such an act designates the steps of the review process and the composition of decisionmaking bodies. Advocates may be able to engage with legislators to shape the process to best allow the protection of reproductive rights and prevent opportunities for undue influence from activists working to restrict women's rights.

Often a **constitutional commission** or **committee of experts** is charged with initial drafting of a constitution. This body may be appointed by the cabinet or by members of the legislature. If possible, advocates can work to ensure that like-minded allies are members of the commission or committee. Once the body is formed, advocates should learn the names of the members of the committee and their likely position on family planning and abortion, taking note of appointees who may be especially hostile, such as leaders of the Catholic Church. Advocates should cultivate relationships with committee members—or identify allies who have existing relationships—to educate and influence members and learn from them about the drafting process.

Even friendly actors involved in the constitutional process may be genuinely unaware of the consequences of seemingly harmless provisions that protect the right to life before birth. Advocates must examine and discuss the potential impact of draft provisions on women's reproductive rights.

Draft constitutions are often sent from the drafters to another body, such as a **committee of legislators**, for approval and changes, which is an opportunity for harmful provisions to be added. Advocacy with such a committee can also consist of identifying and mapping members, educating them and cultivating relationships through events or meetings with legislators or their staff. Constituents who are represented by legislators on the committee can be especially effective advocates. There may be formal opportunities for civil society to interact with decisionmakers during this stage, through formal submissions or speaking opportunities about the issues they would like to see addressed in the constitution. Advocates can also work with the media to ensure non-biased coverage of abortion.

In some contexts, constitutions require final approval from the **public**, through a referendum or plebiscite. The public may have an opportunity to vote to approve or reject the draft constitution in its entirety. Reproductive rights advocates can educate the public about the contents of the constitution by activating grassroots and community activists and doing public education campaigns, especially where opponents are doing the same. Working with the media at all levels is important and can include reaching communities through local language radio broadcasts. A public referendum may be an opportunity to form a coalition of women's and human rights organizations to prevent a poor outcome.

It is critical for advocates to remain vigilant **throughout the entire drafting and approval process**. Advocates should be aware of multiple tactics taken by opponents of reproductive rights such as legal challenges to derail the process. In addition, by involving actors from multiple sectors—including lawyers, medical providers and

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human rights activists—advocates can expand their arguments to address a range of issues and secure the support of a greater number of decisionmakers. International organizations can provide technical assistance in advocacy or addressing tactics from opponents but can cause backlash if they are seen in the forefront of activities.

Appendix 1: Sample letter #1

To XX:

I submit this letter to XX to express my strong opposition to Section XX of the Proposed Draft Constitution of XX. The intent behind both of these provisions is to restrict abortion in XX. However, the inclusion of these provisions compromises the integrity of the draft constitutions. The protection of life before birth conflicts with international human rights law and the fundamental rights and freedoms enshrined in the draft constitutions themselves. A provision restricting abortion in the Constitution would undermine any efforts by the XX Parliament to advance the law on the issue, to be in line with international consensus and human rights.

The right to life must not be protected before birth in the XX Constitution, to be consistent with international law and most constitutions of the world. The Universal Declaration of Human Rights (UDHR) begins with the statement, “All human beings are born free and equal in dignity and rights” (Art.1). Human rights treaties to which XX is a party protect the right to life after birth. The history of the negotiations (*travaux préparatoires*) of the UDHR indicate that “born” was used intentionally to exclude any application of human rights before birth. Similarly, the records of negotiations of the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child show that attempts to protect life before birth during the writing of the treaty were rejected. The preamble of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) recognizes that “all human beings are born free and equal in dignity and rights.” To conform with international human rights law, the XX constitution must not protect life before birth.

A restriction on abortion would contradict sections X and X of the draft constitution, which guarantees freedom from discrimination based on sex and guarantees the right to equal treatment for women and men, including equal opportunities in political, economic, cultural and social activities. Restrictions on abortion discriminate against women by prohibiting a health care service only women need. When abortion is legally restricted, women resort to unsafe providers and face complications, thereby increasing rates of maternal mortality and morbidity.¹ Where women’s reproductive choices are limited by restrictions on abortion, their opportunities in political, economic, cultural and social activities are also limited, contrary to section X of the draft. The committees that oversee CEDAW and the ICCPR have recognized that by restricting abortion governments discriminate against women.²

Section X of the draft constitution establishes that state and religion shall be separate and that the state shall treat all religions equally. The protection of life before birth would conflict with Section X as the religions practiced in X have differing views on when life begins. By protecting life at conception, the draft constitution conforms to one religion’s perspective on when life begins, while ignoring the perspectives of other religions in X.

Increasingly, international bodies and legislatures are taking action to lessen legal restrictions on abortion,

1 Sedgh G, Henshaw S, Singh S, Åhman E, Shah IH. 2007. Induced abortion: rates and trends worldwide. *Lancet*, 370: 1338–45.

2 UN Committee on the Elimination of Discrimination Against Women. 2000. General Recommendation 24: Women and Health (20th Session 1999), para. 31(c); UN Human Rights Committee. 2000. General Comment No. 28: Equality of rights Sess., para. 10, U.N. Doc. CCPR/C/21/Rev.1/Add.10, para. 10.

recognizing the need to save women's lives and protect women's human rights. By adding restrictions on abortion to the constitution, the X parliament would be unable to properly consider this issue on its own. In 1994, 179 government signatories to the Programme of Action of the International Conference on Population and Development (ICPD) agreed that "all governments and relevant intergovernmental and non-governmental organizations are urged to strengthen their commitment to women's health, to deal with the health impact of unsafe abortion as a major public health concern..."³ The Platform for Action of the 1995 Fourth World Conference on Women at Beijing reaffirmed the ICPD Programme of Action and called upon governments to "review laws containing punitive measures against women who have undergone illegal abortions."⁴ United Nations Human Rights authorities have identified the human rights implications of unsafe abortion and the need for governments to review their restrictive abortion laws. Since 1998, 16 countries around the world have loosened legal restrictions on abortion.⁵

As it stands, the draft constitution is antithetical to human rights, equality and the separation of state and religion. The right to life cannot be protected before birth if the X Constitution is to be consistent with its own provisions and the international human rights standards to which it has committed. The issue of abortion should remain with the X Parliament and must not be addressed in the constitution.

Sincerely,

XX

3 United Nations. 1994. Report of the International Conference on Population and Development, Document A/Conf. 171/13, para. 8.25.

4 United Nations. 1995. Report of the Fourth World Conference on Women, Document A/Conf. 177/20.

5 Boland R, Katzive L. 2008. Developments in laws on induced Abortion : 1998-2007. *Journal of International Family Planning Perspectives*,34: 110-120.

Appendix 2: Sample letter #2

Doctor Leonel Antonio Fernández Reyna
Presidente de la República Dominicana

Dr. Reynaldo Pared Pérez
Presidente de la Asamblea Nacional Revisora

Dr. Julio Cesar Valentín
Vicepresidente de la Asamblea Nacional Revisora

Ing. Miguel Vargas Maldonado
Presidente

Partido Revolucionario Dominicano
Dr. Federico Antun Batlle

Presidente
Partido Revolucionario Social Cristiano

July 29, 2009

Honorable President of the Dominican Republic:

We, the undersigned national, regional and international organizations and networks express our deepest concern with regard to the negative impact the adoption of Article 30 will have on the health and rights of women in the Dominican Republic if it is voted into law. Article 30 was approved on April 21, 2009 by the Dominican National Congress in the first reading of the modification of the national constitution.

The adoption of the article, which would establish the right to life from the moment of conception, could lay a legal basis for criminalizing certain contraceptives such as the Intrauterine Device (IUD) and emergency contraception. Moreover, approval of Article 30 will make it more difficult to modify the penal code to allow decriminalization of abortion, even abortions performed for risk to the life and health of the woman, or when a pregnancy is the result of rape or incest. The introduction of the constitutional amendment Article 30 is widely understood to bolster efforts to criminalize abortion and contraception.¹

The passage of this constitutional measure will represent a regression in ensuring fundamental human rights such as the right to life, the right to health, the right not to be subjected to inhuman and degrading treatment and the right not to be subjected to discrimination on the ground of sex.

As a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Dominican Republic has ignored its obligations towards women's health and rights for over a decade. In 1998 the CEDAW committee wrote in its concluding observations:

The Committee expresses deep concern with respect to the high rate of maternal mortality which is caused, as is noted in the report, by toxemia, haemorrhages during childbirth and clandestine

¹ Amnesty International. 2009. Dominican Republic: Constitutional and penal reforms should enhance women's rights, not limit them. *Amnesty International*, 4 April. http://www.amnesty.org.uk/news_details.asp?NewsID=18243

abortions; the Committee also notes that toxæmia may be caused by induced abortions. The high rate of maternal mortality, in conjunction with the fact that abortions in the Dominican Republic are absolutely and under all circumstances illegal, cause very great concern to the Committee and draws attention to the implications of the situation for women's enjoyment of the right to life."²

The Dominican Republic could further distance itself from its CEDAW obligations if Article 30 is approved in the second reading.

The protection of the right to life at conception conflicts with international human rights law and the fundamental rights and freedoms enshrined in the draft Dominican constitution. Around the world, international bodies and legislatures are increasingly taking action to lessen legal restrictions on abortion, recognizing the imperative to save women's lives and protect women's human rights. A provision protecting the right to life from conception at the constitutional level could undermine future efforts by the Dominican Congress to adopt legislation that conforms to international consensus and human rights documents.

The protection of life at any stage before birth in a country's constitution can hinder women's access to abortion, even when her life is at risk. Of the 13 countries with constitutions that protect life at various stages before birth, ten totally ban all abortion. Under the terms of Article 30, existing criminal sanctions against health professionals, who are entrusted with an ethical and moral responsibility to save lives, would be reinforced. This means doctors would be subject to legal and criminal sanctions if they performed lifesaving abortions for pregnant women suffering from illnesses that imperil their lives. The overwhelming majority of national constitutions and international human rights instruments protect the right to life *after* a person has been born.

The United Nations Human Rights Monitoring Bodies have interpreted the rights to life, health and non-discrimination, and the right to freedom from cruel, inhuman and degrading treatment or punishment, as requiring state parties to allow access to abortion where necessary to protect the woman's health. These bodies have continually advised state parties to amend national laws on abortion to permit abortion where necessary to protect the woman's life or health.³

The Universal Declaration of Human Rights (UDHR) begins with the statement, "All human beings are born free and equal in dignity and rights" (Art.1). Human rights treaties to which the Dominican Republic is a party protect the right to life after birth. The history of the negotiations (*travaux préparatoires*) of the UDHR indicates that "born" was used intentionally to exclude any application of human rights before birth. Similarly, the records of negotiations of the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child show that attempts to recognize the right to life before birth during the writing of the treaty were rejected. The preamble of the Convention on the

2 Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Dominican Republic, 14/05/1998, UN Doc. A/53/38/Rev.1, Para 337.

3 United Nations Human Rights authorities have identified the human rights implications of unsafe abortion and the need for governments to review their restrictive abortion laws. In addition, in 1994, 179 government signatories to the Programme of Action of the International Conference on Population and Development (ICPD) agreed that "all governments and relevant intergovernmental and non-governmental organizations are urged to strengthen their commitment to women's health, to deal with the health impact of unsafe abortion as a major public health concern..." The Platform for Action of the 1995 Fourth World Conference on Women at Beijing reaffirmed the ICPD Programme of Action and called upon governments to "review laws containing punitive measures against women who have undergone illegal abortions."

Elimination of All Forms of Discrimination Against Women (CEDAW) also recognizes that “all human beings are born free and equal in dignity and rights.”⁴

In addition to contravening international human rights law, Article 30 will also contravene the wishes of the overwhelming majority of Dominican people. A July 22, 2009 poll by Gallup-Hoy found that 79.8% of respondents believe that a woman should be allowed to terminate a pregnancy if her life is in danger. Moreover, the majority of Dominican citizens, 73%, believe that abortion should not be addressed in the constitution but rather through the penal or the health codes.⁵

We respectfully ask you to give serious consideration to the above issues during your deliberations of the constitutional reforms in the second reading. The constitution must guarantee the full range of human rights for women and girls. There cannot be a regression in these rights.

The Dominican Government must take all necessary measures to ensure that safe and legal abortion services are accessible without unreasonable restrictions to all adolescents and women who require it in cases of pregnancy resulting from rape or incest and in circumstances where continuation of pregnancy would put the health or life of the woman or adolescent at risk.⁶

To conform to international human rights law and be in line with most constitutions of the world, the constitution of the Dominican Republic must not recognize the right to life before birth.

We, therefore, respectfully but firmly recommend that the language which protects life from conception be removed from Article 30 of the draft constitution. The language protecting life in the current Dominican constitution is in accordance with international human rights law; we recommend preserving that language.

4 The committees of experts that oversee CEDAW and the ICCPR have recognized that by restricting abortion, governments discriminate against women. The Committee overseeing the Convention on the Elimination of All Forms of Discrimination against Women in General Recommendation 24 states, “When possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion.” The Human Rights Committee issued General Comment 28 on Article 3, the equal rights of men and women, calling upon States Parties, “when reporting on the right to life protected by article 6,” to inform the committee of “any measures taken by the State to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions.

5 Gallup-Hoy E. 2009. Mayoría: el aborto es inmoral pero aceptaría por salvar a la madre. *Hoy Digital*, 22 July. <http://www.hoy.com.do/el-pais/2009/7/22/286351/Mayoria-el-aborto-es-inmoral-pero-aceptaria-por-salvar-a-la-madre>

6 Amnesty International. 2009. Dominican Republic: Constitutional and penal reforms should enhance women’s rights, not limit them. *Amnesty International*, 4 April.

How to Protect Abortion Access During Constitutional Reform

