

Families' laws in Latin America¹

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This paper analyzes the laws of five countries of Latin America (Argentina, Bolivia, Chile, Colombia and Venezuela) but refers also other countries in some cases. Besides, is possible to say that these countries represent in a good way the reality of the sub-region in family laws matters. The laws studied were: 1) those that regulate the relationships among family members and between them and the society and State³. This kind of laws are contained in Civil Codes in some cases and in other conform a specific code or law; 2) those that recognize rights to male and female workers with family responsibilities; and, 4) 3) those designed to protect children and adolescents.⁵

In the other hand, an overlook about laws to prevent and punish the violence against women will be presented.

The law has always defined a relevant role for the families in the societies' performance. This function deals with the care responsibilities that in the fact are fulfilled by women inside the homes.

Generally speaking, is possible to affirm that the families' laws in Latin America assign important functions for families' members. Paradoxically, the labor's laws

¹ This paper summarize the results of a study done for Economic Commission for Latin America and the Caribbean (ECLAC) in 2008 which was up date for this occasion. The study was published like: Marco, Flavia (2009) Legislación comparada en material de familias. Los casos de cinco países de América Latina, Serie Políticas Sociales No 149, Santiago de Chile, CEPAL. LC/L.3102-PISBN-978-92-1-323335-1

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³ The Constitutions of five countries were studied. In addition the specifics laws that regulate family issues: Argentina (*Civil Code* from 1869 with modifications in family matters in 1985, 1987, 1995, 1997 and 2000); Bolivia (Family and Familiar Procedure Code from 2014); Chile (Civil Marriage Law from 2004 and Civil Code from 1857 with modifications in family matters in 1998 -Filiation law-, 2005 and 2008; Colombia (Civil Code from 1873 with several modifications until nowadays); and Venezuela (Protection Families, Maternity, and Paternity Law from 2007, Civil Code from 1982).

⁴ Labor's Codes in five countries, specifically its articles deals with the paternity and maternity rights as well as others care benefits.

⁵ In Argentina the Law for Integral Protection Right's of Children and Adolescents from 2005, in Bolivia Childhood and Adolescence Code from 2014, in Colombia the Childhood and Adolescence Law from 2006, in Chile the Juvenile Law from 1999 with modifications until 2005, and in Venezuela the Law for Child and Adolescent Protection from 1998.

for workers with family responsibilities don't give the facilities to fulfill these obligations.

The laws for protection of children and adolescents have mean a great advance, and appear in this context as the laws with human rights' perspective, which implies that the main responsibility is for the States.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and The Convention on the Rights of the Childs have been crucial in the evolution of families' laws in Latin America. Because of these international conventions, regulations that legitimized abuses of husbands against women, or made a difference between marital and extra-marital childs, have thankfully disappeared. The first one, the CEDAW, and more specifically the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, better known as "Convention of Belen do Para", had a great influence in families' laws and in violence laws.

It is necessary to say that these laws are applicable to all persons who live in the territories of the States. In the cases in which the indigenous practices are legally legitimated, (this is when the indigenous customs and unwritten laws have juridical effects, like Indigenous Autonomies in Bolivia), the national law is mandatory for them too . The indigenous autonomies can regulate other aspects that are not forbidden and use their own authorities for laws application. In specific cases, the law mentions that the indigenous customs are applicable in some special matter.⁶

I. How should the families be, in accordance to the law

So far, it is common to find in Constitutions or laws a phrase like this: "The family is the basic cell of society". It could be true, correct, but the problem is that the sentence refers to a family in singular and puts in hands of this family a lot of responsibilities.

In effect, the laws have traditionally defined the family having in mind the nuclear one, formed by a heterosexual couple and its children, excluding other kinds of families. Although statistics, public policies and even laws, have advanced in the recognition and visibilization of different kinds of families like for example mono-parental families or composed ones (formed by heterosexual couples with kids of former partners). Nevertheless, in many cases, the exclusion of homosexual families persists.

⁶ For example the legal recognition of pre-marital cohabitation in Bolivia

We can know the ideology of the law since its definition of family, and by its principles too. The Argentinean law doesn't define the family. In the recent past it identified its requirements like heterosexuality, but this regulation has changed. The Bolivian law is very new, of late 2014. Precisely, one of the most important changes in it is the recognition of diverse forms of families. In this sense the new law establishes that the families can be founded for legal, consanguinity or emotional relationships. In addition, it establishes that families must have the State's protection in accordance to the Constitution's principles. Here lies a first exclusion, as we will see later.

The Constitution of Chile establishes the family as the core of society and subject of State protection. Its law doesn't give a definition of family but highlights that marriage represents its bedrock. The Colombian Constitution establishes the same principle, but refers to the heterosexual marriage.

The principles that guide the application of laws are the equality, the superior interest of the family upon its members –which in the recent past was used to postpone the interests of women-, respect to diversity, inter-cultural, solidarity and co-responsibility.

II. The marriage

The legal requirements for marriage or divorce are especially relevant, because they deal with the freedom of persons. An example of it is that the heterosexuality represents a requirement for marriage or a cause of nullity and divorce.

As we mentioned before, the Bolivian and Colombian Constitutions refer to the marriage as an heterosexual relationship, excluding homosexuals couples. Although, in the Colombian case, gay couples have some rights obtained by the Constitutional Court way (not embargoing homestead; rights for migrant partner; right to redress for crimes; pensions funds, social security on health and others). In this rights, the Court founded its resolution in the equality rule and not in the family definition of the Constitution. Nevertheless, this Court recently denied the adoption possibility for gay couples, except if one of the members of the couple is the biological father or mother.

In Chile, the civil union was recently legislated. Ecuador and some Mexican states have civil union too. In Argentina, Brazil and Uruguay the equal marriage is a reality since few years ago as well in some Mexican states.

In the recent Bolivian law, the LGTB (lesbian, gays, trans and bisexual) groups made a formal presentation –a bill- to the Legislature, asking for civil union. The

demand was not included in the law. These groups don't ask for equal marriage because the Constitution closed this door, and this is an incredible story: When the Constitution of 2008 was finally approved in Constituent Assembly, the marriage appeared as a union between two spouses. This phrase was obviously not accidental. It was the result of feminists and LGTB groups lobby, pretending the future inclusion of equal marriage in the law. Unfortunately, when the text of new constitution went to the Commission of Grammar, the definition of marriage was changed to the "union between a man and a woman". The power of the president of Assembly and her religious convictions were imposed.

An innovative change in the new Bolivian law is the possibility of collective marriage. This choice was thought for the people who have to wait a long time before having the economic resources available to make the legal paperwork. For cases like these the State nowadays provides a special Civil Register Officer which facilitates the paperwork and reduces its costs.

Other relevant regulation for the rights is the minimal age for marriage. In Argentina in 2009 the age was established in the same way for men and women following the recommendations of the Committee on Child Rights (18 years old for both). In Bolivian case this regulation was recently changed and now we have the same age for boys and girls, which is 18 years old, and exceptionally 16.

In the other hand, the Laws of Bolivia and Venezuela recognize rights and obligations similar for marriage of couples that live together in exclusiveness conditions for a time. At the same time in Colombia the Constitutional Court has recognized widow pensions for women that can prove coexistence for more than five years.

III. The divorce

In most cases of Latin America, divorce has the penalty or exception quality, restricting the freedom of persons. The causes that make possible the divorce are the homosexuality (taken like a misbehavior different to the adultery), abuse, violence, alcoholism, adultery. Besides, the break-up for a long time (more than a year in Venezuela, three years in Argentina and Chile, two years in Bolivia and Colombia) is considered a legal reason.

Only in the new Law of Bolivia and in the Colombian Code the agreement between spouses represents sufficient reason.

In addition, in the Bolivian case a very quick procedure that takes place in front of a notary (not with a court) for cases in which the spouses haven't children or property in common, is recently available.

Other remarkable law is the Chilean one, that ordains that when one of the spouses was no able to keep a job under desired conditions, because of her or his care and domestic non paid work, he or she must be compensated in the divorce process.

As we know, in divorce or break-up, the judges should ordain the children's custody. In this issue the gender bias is visible until now in many cases. The Argentinean law says that with children younger than five years, except for serious causes, safekeeping belongs to the mother. The law of Venezuela has the same prescript, but for children younger than seven years old. The Chilean law ordains that the children stay with the mother, but does not specify ages.

The law obviously considers the mothers as the responsible and the most appropriate for taking care of children. This is unfair because it contributes to maintain the gender roles that represent a huge charge for women. In the other hand is unfair for men too, because the law denies paternity rights.

Nevertheless, it should be highlighted that the Bolivian law contains the shared custody.

Clearly, the laws have experimented a remarkable progress. Although, these laws are still away from reality in several issues. For example, divorce has increased despite restrictions to freedom; fact unions in which a couple lives together have had a raise too, even when they have no legal recognition in several countries (for example in Argentina, Chile and Colombia); and the transnational family contrasts with the legal obligation of living together (in Bolivia, Chile, Colombia and Venezuela).

IV. Family and States Obligations

The families' obligations have direct relationship with the States ones. For example, if the care and assistance of elderly members are families' obligations as the main responsible, or even the exclusive one, the State will have a subsidiary role or even none. As we know, the International Conventions on Human Rights identify the State as guarantor of rights, and the care contains several social rights. Although, in many cases, in Latin America the laws have a weak understanding about this matter.

The Argentinean, Colombian and Chilean laws deal more with procedimental aspects and don't regulate obligations for the States, except to ensure the best interest of children.

In Bolivia, the law defines in general terms the State obligations. Identifies its role as guarantor of families' rights, of their protection, specially those in vulnerability situations and respect to diversity.

The law of Venezuela sets various duties for the government specifically, like to develop sexual and reproductive health programs, nutrition programs for early childhood, support for families, and assisted reproduction services that make possible the paternity and maternity rights.

It is necessary to say that in some cases there are advances at policy level without many legal changes. It is the case of Uruguay, where the families' responsibilities have been relieved through the Care National System. This is an integral initiative composed by various states institutions in health, education, social security, employment and care services areas coordinated by Social Affairs Ministry, and that presents the care as a right that corresponds to State guarantee.

The mentioned policy is the more remarkable case in the region in this issue, and is in progress yet, but it has been sustained during two governmental periods, which is not common. This experience reveals too a kind of making policies, different for example that the more common way in the Andean sub-region. It seems to be an idiosyncrasy issue. In the Andean countries it is common to find a lot of laws, we are constantly legislating, but the problems appear when it is time to fulfill those laws, in many occasions good ones.

Regarding families' obligations, there are too many duties in economic assistance and care. These obligations reach to fathers, mothers, sons, daughters, uncles, aunts, nephews, half-brothers and sisters, brothers and sisters in law, parents in law.

For example, in the Bolivian case, in this topic practically there are no difference between the new law and the old Code. The families' obligations include the satisfaction of needs in health, education, housing and recreation. These obligations belong to mentioned relatives, like in other legislations, and could be demanded in courts.

The Code also provides some obligations for the sons and daughters, like to obey and respect their parents, live with them, and give assistance when they need it. The obligation to live together with the parents is far away from the reality characterized by the migration and families with absent father (a quarter of families in Bolivia, for example).

V. The filiation and paternity recognition

Filiation is very relevant legally because it determines rights and obligations for the parents. In this sense, all the laws dedicate a chapter or a section to paternity recognition. The maternity determination –the biological one- is not always regulated because obviously this is established at the born time.

The laws of Argentina, Bolivia, Colombia and Chile assume that the husband is the father, if the child is born within 300 days after the marriage's dissolution or -up. In the Argentinean, Bolivian and Venezuelan laws the paternity is assumed even in the fact unions (permanent partners that live together).

Maybe the most interesting rule in this area is the filiation "by indication" available in Bolivia and Costa Rica. In the first case, the law changes the charge of the evidence, and the father or mother -generally the last one- can indicate the name of the other parent when enrolling the child in civil register. This progenitor is notified and can present an opposition, but must prove it: in other words, he or she has to demonstrate that he or she is not the parent. This article was thought for diminishing the amount of children without father recognition, but its redaction makes it applicable to both cases.

This aspect was already in the Constitution and the Code ratifies and regulates the issue. The topic was introduced by the women movements in Constituent Assembly, following the good practice of Costa Rica, country that started with this kind of regulation in the region years ago. In the Costa Rican case the difference is that the filiation by indication is available only for women.

Other interesting innovation in the Bolivian law is the possibility to put the maternal last-name in the first place, like in Brazil. In Uruguay there is a bill with this possibility.

VI. Laws about Children and Adolescents Rights

The laws in this matter have appeared or were modified with the impulse of the Convention on the Rights of the Childs and the Recommendations of its Committee. For this reasons all of them have as a guide and an objective the superior interest of children. Maybe in this issue the influence of international instruments is clearer than in others in Latin America.

The most relevant changes include in the first place the elimination of the distinction between illegitimate and legitimate children that existed in all analyzed laws. In second place, the recognition of the child as a right's subject,

which implies a very relevant new perspective that progressively enters in societies.

In the third place, the new laws recognize the rights to live, to health, to have a family, to have a nationality, identity, freedom, dignity, education, to the information, to participate, and that their opinion to be considered. Some cases have more details and develop each right. For example the Bolivian one, the health's right specifies the sexual and reproductive health, the obligation of State to provide free vaccinations, the care to childs with disabilities as an obligation of parents and State, the duty of health prevention programs.

Precisely, the Bolivian Childhood and adolescence Code, which was approved in 2014, is the newest legislation. The previous one was written also with the Convention's principles and the new one was not exempt of debate and controversy, because it changes the age for child work -establishing a lesser age.

In effect, one of the most controversial issues was the age to work, with a lower age than that establishes the International Labor Office (ILO). For this reason the law recognizes the right to protection in work. It permits the child work since 10 years in the case of own account operators and since 12 years old in case of dependent employment. The argument was the need to recognize the reality. In theory the Childhood Defense Office, that belongs to local level governments, is the responsible to register the child work, but in the fact is practically impossible to do it in the case of own account workers, because of the nature of these works and the insufficient institutional capacities.

The families and State are who guarantee and assure the child rights in all cases, and its rights are identified as State priority. As a consequence, in some cases the child should be attended first in public services, including the Courts. Even in some cases, the laws compel governments to establish a privileged assignation in public budget for children's policies.

As another consequence, the States have new obligations as well as new institutions, like Councils, Commissions or Children Defense Offices to fulfill the new laws. Here is maybe one of the most important challenges: the operation of these machineries and its institutional capacities. Of course the bigger challenge is the implementation gap of these laws.

VII. Rights and benefits for workers with family responsibilities

The labor laws should be one of the ways to solve the conflicts between family and employment worlds. In addition, these laws should provide the facilities for

families to fulfill the obligations assigned to them by family laws. Also, the labor laws should represent a model, “the must be” that is the role of Law. Nevertheless, no significant progresses have been made in this regard.

The legislators seem to think that the care responsibilities concern only to the newborn and that the caregivers are the women.

In effect, the measures for workers with family responsibilities are:

- Maternity leave
- Lactation hours for mothers
- Legal obligation of nurseries, in many cases in accordance with the number of female workers employed by the company, which generates an evil incentive for fraud (for example if the law indicates that a company with 20 women has to keep a nursery, the enterprises hire a maximum of 19 women, avoiding the legal obligation). In addition, in many countries this law is not fulfilled at all, and is not an issue of State audit. For example in Bolivia a recent research shown that even the government doesn't fulfill this obligation as an employer.
- Family assignments in money or food, in the most cases for mother workers
- Legal prohibition of ouster for workers mothers during the pregnancy and the subsequent period

Appearing less frequently or exceptionally:

- Paternity leaves (its duration vary depend on the cases, between 2 days in Argentina and 14 days in Uruguay and Venezuela, but the 60% of countries grants no days)
- Legal prohibition of ouster for father workers during the pregnancy and the subsequent period (only in Bolivia and Venezuela)
- License for care of elderly parents (only en Colombia, El Salvador, Honduras and Venezuela)
- Parental licenses, meaning free and paid days that can be used by mothers or fathers depending on them (only available in Chile, Venezuela and Uruguay, and in Nicaragua as a specific case for children with disabilities)

VIII. A look to laws to prevent and punish violence against women

This section is based on the 2013-2014 Annual Report of Gender Equality Observatory of Latin America and Caribbean, which was dedicated to violence against women⁷.

The data of violence against women in Latin America show a dramatic situation, which exists among women of high or low earnings, rural or urban areas, indigenous or non indigenous. Maybe the only factor that represent a difference is the educational level, especially in phisic violence, and above all the post secondary education⁸.

In regard to the laws, it is necessary to say that with the laws to punish the violence against women is the first time that the States enter in the familiar dynamics. Before these laws, the politicians, stakeholders and even the judges used to say that this kind of violence was a private matter, which had to be solved in a private way. The “familiar unity” used to be a very frequent argument too. Nowadays, we have juridical instruments -with imperfections-, but in my opinion the huge challenge is the law’s fulfillment.

Regarding legislation in this issue, Latin America has experimented a great advance following the international conventions and the recommendations of its Committees, Relators and other organisms. As we know, in United Nations framework we have the Declaration on the Elimination of Violence against Women (1993) and of course the CEDAW.

In the Inter American framework we have the Convention on the Prevention, Punishment and Eradication of Violence against Women, known as “Belen do Pará Convention” (1993) ratified by 32 Member States of Latin America and the Caribbean. And certainly, we have the complete package of International Law of Human Rights, because of the indivisibility, universality, interdependence and integrality principles, which were establishes in Vienna Declaration and Programme of Action approved for the World Conference on Human Rights (1993). In addition, the non discrimination principle cuts across the entire

⁷ Gender Equality Observatory. Annual Report 2013-2014. Confronting violence against women. Available in English and Spanish in <http://www.cepal.org/es/publicaciones/37185-observatorio-de-igualdad-de-genero-de-america-latina-y-el-caribe-oig-informe>

⁸ The data’s source can be health and demographic surveys, specific surveys about violence and administrative records. You can find more information in the report mentioned before.

system of human rights, and the violence against women is a way of discrimination, as has been indicated by diverse organisms.

The recommendations and observations provided for treaty committees deliver a route map for unsolved problems, encompassing challenges regarding legal reforms, establishment of effective machineries for investigation of acts of violence, diligence processes for investigation and punishment, budget for agencies for the advance of women and for law's implementation.

The Belén do Pará Convention defines violence against women as “any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere”. Also describes behaviors that constitute manifestations of physical, sexual and psychological violence.

The three types of violence defined encompass all kinds of offences in force and thus provide a comprehensive and exhaustive definition, avoiding a case-based approach. It is also specified that violence against women is violence that occurs “within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse; that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in education institutions, health facilities or any other place and that is perpetrated or condoned by the State or its agents regardless of where it occurs”.

In the sub-region we have two generation of laws. The first one with the laws developed during the 1990s focused in domestic and familiar violence. Despite their problems and the exclusion of other spaces and forms of violence, these specific laws represented a first victory of the feminist movement in Latin America, including changes in main codes.

The second generation of violence's laws is addressed to prevent and punish violence against women, encompassing the manifestations of violence set out in the Belén do Para Convention. Nowadays 10 countries in the sub region have comprehensive legislation for a holistic approach to manifestations of violence against women, process that began in 2007 in the Bolivarian Republic of Venezuela and Mexico. Subsequently, Colombia and Guatemala (2008), Argentina and Costa Rica (2009), El Salvador (2010), Nicaragua (2012), and the Dominican Republic and the Plurinational State of Bolivia (2013) enacted similar legislation.

This kind of comprehensive legislation shares a common approach outlined in

the Belém do Pará Convention, but laws differ in terms of the forms of violence covered, the comprehensive approach (involving the judiciary in a number of capacities or just the criminal justice system) and the position taken on the use of alternative means for conflict resolution. There are also differences in the scope of the law as well as enforcing agencies. Many of these countries have a plan about violence against women to fulfill the law.

Although, despite the clear mandate of Belen do Para Convention⁹ many States yet focus on certain kinds of violence, generally related to domestics or interpersonal relationships, overlooking other types, like sexual harassment at work, in education institutions or in health services, or even perpetrated by State agents.

In this context, blanket legislation that considers all forms of violence against women, its prevention, punishment and eradication in an integral way seems to be the most appropriate answer. Nevertheless, the existence of these laws is not enough. In one hand, we have the challenges related to the laws application including those challenges identified by committees mentioned before. In other hand, there is the tension between the frame of different laws and policies aimed to protect the family and domestic unit, and others aimed to protect women and girls.

In addition to general recommendations, the MECSEVI that is the Mechanism to follow up the Implementation of Belen do Pará Convention, gives specific recommendation to each country, as a result of the examination of national reports.

The recommendations of this body urge the countries of Latin America to:

- Develop better sources of information for proper follow-up and evaluation of the initiatives undertaken in recent years;
- Implement national action plans to combat violence against women in a comprehensive manner allowing for coordination and systematization across sectors;
- Allocate resources for the full implementation of the National Plan for Violence (Plurinational State of Bolivia);
- Develop mechanisms for coordination among the machineries for advancement for women and public entities that produce official statistics (Argentina); to step up efforts to ensure that progress in the policy sphere is fully implemented;

⁹ Even before the adoption of this Convention the CEDAW's Committee had outlined relevant issues to be considered in legal obligations, establishing that the States should consider all forms of gender-based violence.

- Monitor the implementation of protection measures in the justice system and the quality of the judicial system;
- Implement specific measures to ensure respect for the autonomy of and access to justice for rural and indigenous women;
- Take urgent measures to ensure due diligence in investigating, punishing and eradicating violence against women in armed conflict and post-conflict situations, and
- Take measures to eliminate reconciliation mechanisms for cases of violence. The express prohibition of reconciliation, mediation or other procedures that seek out-of-court resolution. Such bans tend to bolster the effectiveness of guaranteed access to justice and so highlight the importance of ensuring that all forms of reconciliation are eliminated, not only in legislation but also in judiciary conduct and practice

IX. Conclusions and some proposals

In families' laws the great conclusion is the contrast between the huge responsibility assigned by law (to families' members) and the few facilities delivered to fulfill these obligations. In the other hand, the contrast between the huge intervention of States in topics like marriage or divorce and its little intervention in families protection and care necessities.

The main proposal for the laws in this subject is to pay three big debts: the paternity rights, the social redistribution of care and the rights of the same sex couples.

In children and adolescence laws, as we mentioned, the bigger challenge is the implementation gap of these laws. In this sense, it's necessary to make reality their rights, to make reality the privileged budget, and work in capacity building and inter-sectorial coordination.

Related to labor laws for workers with families' responsibilities is necessary:

- To extend maternity leave because only three countries (Chile, Cuba and Venezuela) keep one in accordance with ILO recommendation (18 weeks)¹⁰.
- To establish paternity leave

¹⁰ Rico, María Nieves (2014) "El engranaje de las políticas de cuidado con las políticas de protección social. Una estrategia para la superación de la pobreza y alcanzar la igualdad en América Latina", Seminario Bi-regional América Latina-Europa "Inclusión Social Activa: Mejoramiento de las Estrategias para Superar las condiciones de pobreza", Nápoles, Italia, 25 de Noviembre de 2014. CEPAL-EUROsocial

- To establish other licenses for care reasons, for daily and exceptional care necessities. Could be a maximum of days per year.

In regards with the right to live free of violence, blanket laws with integral models of intervention appear as the most appropriate answer in legal terms. Nevertheless, the law is not enough. Technical, financial and human resources to fulfill the laws and social services like shelters, are essential, but these must exist in the reality, not only in the law's text. Also, building capacities among judicial system; coordinating the work of the police and prosecutor teams and health systems by means of inter sectorial protocols, are relevant measures, among others.

In this sense: "There is evidence that the main problem is not linked to the design of legislation but to the lack of public policies and institutions that can ensure effective implementation. Moreover, these laws usually focus on punishment of offenders without tackling the factors that enable the continuum of violence or addressing the lack of comprehensive measures to change the culture of violence" (Gender Equality Observatory, 2014:77).