

Constitutional Challenges and Argentine Abortion Law

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Beginning in the second half of the 1960s several Western countries reformed their abortion laws. In a short period of time, most central democracies relaxed their prohibitive criminal regulations through the implementation of a broad and redefined version of the classic “model of permissions” or through the repeal of criminal law at some point in early pregnancy, the “repeal model.” This wave of liberalization, however, was not echoed in Latin America where the region’s laws on abortion continue to be among the most restrictive of the World. Until today, some Latin American countries still impose a total ban on abortion while others only allow it in a limited set of cases.

Latin American debates on reproductive justice and abortion, in particular, have experienced a very slow progress in the last decades of democratization. As in the rest of the region, the Argentine polity persistently avoided considering abortion in the context of the transitional project to foster human rights. In the mid 1990s provincial laws began to mandate establishment of reproductive health programs to provide birth control information, free contraception and sexual education. At the federal level, only in 2002 in the context of a deep social, political and economic crisis, discussion of a reproductive rights law was possible in Congress. Abortion, however, remained outside the new reproductive rights legal framework. Both the right and the left had agreed upon the need to postpone addressing an issue perceived as too sensitive and complex. Some still believe that the subject is too polarizing; others argue that the people or the political situation are not ready or mature to face it; and many feel that the political costs of dealing with the issue will outgrow potential rewards for both camps.

In the context of the preclusion of a serious and open dialogue, constitutional discussions of abortion in Argentina are portrayed as trapped between two implausible extremes. On the one side, we find a group of players arguing that the Constitution demands a total or an almost total ban on abortion that, they claim, is actually in the text of our constitutional and criminal law. This view is grounded on an absolute right to life allegedly enshrined in the constitutional text and in the human rights treaties incorporated to it in 1994 which, in turn, support a restrictive reading of the criminalization of abortion. On the other side, the opposing viewpoint, generally ascribed to feminists and liberals, is often described as vindicating an absolute right to abortion that admits no restrictions.

I want to argue here that the stalemate that this extended characterization of the Argentine constitutional discussion suggests, first, misrepresents the arguments actually uttered in the public domain by players in the liberalizing camp, and secondly, is based on a flawed understanding by conservative groups of the current criminal rules and the legal alternatives compatible with our constitutional commitments. I also claim, a total ban on abortion as the one predicated by so-called guardians of the right to life is not only an inaccurate description of current abortion law but is plainly at odds with our normative

constitutional understandings. What is more, under the Argentine Constitution in its post 1994 definition, abortion regulation would only be compatible at minimum with a truly accessible model of permissions as the one currently set forth in the text of the criminal code. It may further be argued that such constitutional understandings demand the repeal of the criminalization of abortion in early pregnancy for which a reform of the criminal code will be needed. It is my final point that these last two claims are, in fact, the actual demands of players in the pro-liberalizing side of the debate. These last two claims, and not other radical and extremist views, are the straightforward demands of liberals, feminists' and women's organizations as they have been exposed by the national campaign organized to fight for safe, legal and unpaid abortion.

1. A brief account on Argentine abortion law in the books and in action. Like its Spanish predecessors, the first Argentine criminal code dating from 1887 criminalized abortion in all circumstances and punished it with incarceration from one to three years. The original code also authorized the judge to reduce the sanction when women sought to hide their dishonor. During the first two decades of the following century several modernizing proposals for an entire revision of the code were put forward. A newly fashioned code was finally approved in 1921 with the leadership of the then ruling Radical Party. The criminalization of abortion was not absolute in the modernized code that remains in force to our days. Section 86 embraced what was "in the books" one of the more liberal models of permissions for abortion at the time. The new code penalized abortion during the whole pregnancy but established a scheme of permits in case of risk for the life or the health of the woman and rape.

Yet for most of the code's history the permissible regulation adopted in the 1920s remained almost completely unavailable. Several barriers restricted women's actual accessibility to Section 86's permits (Ramos, et al. 2009). Obstacles for accessing the model of permissions included, among others, open challenges to the permits' constitutionality, uncertainty about their scope in the case of risk for the health of the woman or rape,¹ or lack of regulatory initiatives establishing the conditions to access permitted abortions.² The unavailability of truly accessible services from a geographic and economic point of view as well as the lack of services specially sensitive to the situation of women in vulnerable groups such as adolescents, women with disability or indigenous women, were other of the traditional impediments for accessing the permissions. Also, the medical profession's demands for judicial authorization to provide de-criminalized abortions and its misuse of conscientious objection in the supply of such services were among the restrictions faced by women seeking Section 86 abortions. As this brief recount of some of the barriers suggests, the day-to-day practice of the model of permissions in Argentina has been and continues to be extremely restrictive, pushing in fact towards *a model of absolute banning of abortion* far more limitative than what the law in the books demanded for more than eighty years.

¹ Judicial decisions and legal scholars' writings urging the restriction of the interpretation of the permission of abortion in case of risk for the health of the woman to her physical health or limiting access to the permission in case of rape for mentally retarded women were among the limiting constructions of the model of permissions.

² Public policies or regulations to promote access to the permissions were not designed or implemented until 2007, when a group of extremely simple initiatives in the form of medical protocols were approved in 4 of the 24 provincial jurisdictions.

In addition, this practically unavailable model of permission cohabited with a fairly loose standard of criminalization of a practice that was known to be well extended.³ Tolerance of the crime is demonstrated, for instance, with data for the City of Buenos Aires which in 2005 officially registered 6545 hospital discharges for post-abortion complications (National Health Department 2007), 148 cases of abortion reports to the judiciary (Ministerio Público Fiscal 2009); 16 actual trials; and zero convictions.

2. A problematic constitutional argument and the mischaracterization of the contending view. In the introduction I have presented what are often portrayed as or what are believed to be the two prevalent views in Argentine constitutional discussions on abortion. The first viewpoint, reflecting the teachings of the Catholic Church, though not necessarily uttered in a religious tone, asserts that the Argentine Constitution protects the right to life for all persons, that life and personhood begins at conception and that, therefore, unborn persons have a right to life since the moment of conception. This view further contends that the right to life is the only and the primary absolute right protected by the Constitution and that as a result of its absolute character such right prevails when in opposition to any other constitutional right or value.

Among followers of this view there are some who are ready to accept an exception to the criminalization of abortion in case of a severe danger for the life of the woman. Others, however, reject even the possibility of this exception. Those within the former group who accept that a woman could exceptionally have an abortion when her life is at risk due to the pregnancy and should not be punished, frequently believe that from this does not follow that access to the permitted abortion should be guaranteed or regulated by the state. They assert that non-punishable cases do not imply the permission to commit the crime and that therefore, government should not regulate how to access abortion services for such non-punishable abortions. Unlike this last group, those rejecting the possibility of any exemption to the blanket prohibition on abortion consider that all Section 86 permissions are unconstitutional and should remain inaccessible to women under all circumstances.

Supporters of these two extremely restrictive views ground them textually on the implicit protection of the right to life in Section 33 of the Constitution, and in Congress' mandate to pass laws for the special protection of children since the time of the pregnancy established in Section 75.23. They also appeal to the provisions of Section 4.1. of the Inter-American Convention on Human Rights that asserts that "every person has the right to have his life respected" and that it "shall be protected by law and, in general, from the moment of conception," and of the Convention of the Right of the Child. From a moral point of view, the

³ A recent study estimated that approximately 450,000 abortions are performed annually in the country (CEDES 2007) at a rate of almost one abortion per every two births (0.64). Also, maternal mortality records for the last twenty years consistently show unsafe abortions as the primary cause of maternal deaths (Ramos, et al. 2009), providing for a third of the total maternal deaths per year. In 2007 the maternal mortality rate was of 44/100.000 (National Health Department 2008), a rate higher than that of other countries of the region with comparable development indices. That year maternal deaths reached 306 women, out of which 74 died from complications related to abortion. Finally, this picture can be completed with official numbers for national patient discharge rates showing in 2005 alone, 68,869 women were discharged from the public health system following complications of abortion (National Health Department 2008).

argument assumes what Dworkin calls a *derivative* objection to abortion because it “presupposes and is derived from rights and interests that it assumes all human beings, including fetuses, have” (Dworkin 1994, 11). According to this interpretation, the current model of permissions of Section 86 should be repealed in order to reflect the total ban on abortion mandated by the Constitution.

This perspective is often normatively articulated by important and well respected actors including the hierarchies of the Catholic Church or the editorials of one of the two main national newspapers. But this view is also uttered as the best descriptor of valid and mandatory Argentine criminal law by a majority of the players in public debates including politicians, health professionals and their professional associations, legal actors and legal scholars, and many people in the general public. Surveys of doctors and public opinion reveal that people believe that a total ban on abortion stems from the text of the criminal code and they remain ignorant or unclear about the extent of the model of permissions actually in place at least in the text (Gogna, et al. 2002). Furthermore, this is the view expressed in the Supreme Court decision in *Portal de Belen*, the decision that in 2002 banned emergency contraception considered an abortifacient in violation of the absolute right to life of the pre-implanted embryo.

In contrast, the view opposing this perspective is often characterized as demanding the repeal of the criminalization of abortion throughout the complete pregnancy. This is not exactly a view voiced by any recognizable actor representing the liberalizing camp. Neither the majority of feminists nor other pro-liberalization players have clearly articulated such a demand in a public forum. Moreover, the larger national feminist initiative organized as the *Campaña Nacional por el Derecho al Aborto Legal, Seguro y Gratuito* (the *Campaña*) [National Campaign for Legal, Safe and Unpaid Abortion], the venture epitomizing the most liberal demands on the discussion, has filed with Congress a draft bill vindicating the repeal of criminal law in the first trimester and accepting a progressively restrictive model of permissions for the remaining of the pregnancy when abortion would still be criminalized. Several other recognizable actors with public voices within this liberalizing camp including members of national or provincial legislatures and public officers are exclusively demanding the implementation of the model of permissions and the removal of the barriers hindering access to it. Both claims for the implementation of rules and policies to guarantee access to Section 86 abortions and those urging for the repeal of criminalization in early pregnancy ground their views in the values of equality, liberty and dignity enshrined in the Argentine Constitution and reinforced by the commitments expressed in the 1994 amendments.

Let me now restate my merely descriptive first point here. Traditional characterizations of a polarized debate are mistaken because the picture of two dichotomous and extremist contending views between right to life defenders and radical views of women’s self-ownership as demanding the total abandonment of criminalization are simply not representative of two existing voices and claims expressed in the public domain. The description of the liberal side of the discussion as an extremist perspective is part of the success of conservative groups’ fight for avoiding upfront confrontation of abortion in a society that, as opinion polls suggests (M. Petracci 2007), seems ready to support some liberalizing initiatives.

Far from standing for the extreme vindications generally ascribed to them, the liberal side of the contention claims instead a two tier argument. First, pro-liberalization actors, feminists among them, demand that access to the 1922 permissions cease to be restricted and

that availability of such permissions be fostered through regulatory initiatives at the federal, provincial and municipal levels. This is also the claim that women's organizations have posed in several petitions to governmental authorities and congressional members, and it is also the vindication they have taken to international forums such as the CEDAW Committee or the Human Rights Committee in the recently admitted *LMR* case. Secondly, some though not all actors in this liberalizing camp also urge congressional reform of the criminal code on the grounds that the use of criminal law in early pregnancy is incompatible with post 1994 constitutional undertakings.

3. Opposing constitutional arguments: ruling out supported but implausible grounds in favor of restrictive abortion laws. My argument also claims that the characterization of the discussion confronting the two views described above is normatively mistaken as the absolute right to life-based arguments cannot survive constitutional scrutiny. This is so because the conservative extreme side, the one actually articulated in public debates, in favor of a total ban on abortion grounded in the constitutional protection of an absolute right to life not only objects or ignores the current permissible model of abortion regulation established in the criminal code since 1922, but it is also based on an implausible description of the constitutional protection of the right to life as I explain below.

Once we show how an over-polarized portrayal of contending views misrepresents the actual positions of the players, it is necessary to find out which are the best constitutional grounds for regulating abortion in Argentina. Does the Argentine Constitution demand a total ban or the values and rights protected by it are only compatible with a more permissible alternative? My point here is that the answer lays in the second assertion. Indeed, I argue that Argentine constitutional norms and values require, at minimum, taking the steps necessary to promote the actual enforceability of the current liberal model of permissions of the criminal code. I also understand that, especially since the 1994 constitutional reform, Argentine constitutional norms and values further demand the repeal of criminalization of abortion in early pregnancy until a point to be determined by Congress and that could be fixed within the first and the second trimester depending on the legally accepted point of viability.

That the Argentine Constitution does not defend an absolute right to life seems too elementary a claim to defend here. Yet this would be necessary *vis a vis* a local Argentine audience to whom one may simply show that descriptively Argentine law, as a majority of comparative constitutional systems, only protects life gradually. This follows, for instance, from the regulation of the legitimate defense, from the different punishment applied to abortion and infanticide or from the absence of criminal provisions to sanction intentional injuries to the fetus (Ferrante 2008).

Despite pro-lifers understandings, Argentine constitutional law does not protect any right in absolute terms. Neither does the Constitution enshrine the perspective of any particular religious credo on the sacred nature of life and the existence of an absolute right to life. On the contrary, the Constitution assumes that the rights and values protected have the potential to enter in infinite instances of conflict requiring complex balancing operations that are the core of daily constitutional interpretation. The model of permissions in the criminal code is actually the result of the recognition of a series of instances of the conflict between the interest in the protection of fetal life that is reflected by the criminalization of abortion and the right to life of

the woman, her right to health, and her right to dignity. As the 1922 legislators implicitly identified, the life, health and dignity of the woman are protected by permitting abortions in case of risk for the life or the health of the woman or in case of rape. Moreover, today the duty to protect these rights when conflicting in the interest in the protection of fetal life also finds textual support in the specific constitutional commitments of the Constitution in 1994 and in the human rights treaties incorporated to it. I am thinking in the congressional mandate to promote sex equality as enshrined in Sections 75.2 and 75.23 of the constitutional text; the duty to protect the right to health broadly construed in an integral as provided for in International Covenant on Social Economic and Cultural Rights (ICSEC); and the specification of the rights of woman to decide when to bear or not bear children stemming from the provisions of the Convention of the Elimination of All Forms of Discrimination against Women (CEDAW).

The pledge to these values and rights further validated in the precedents of our courts demands, I argue, the urgent removal of all the existing barriers impeding access to the model of permissions of the criminal code. It further requires assessing the constitutionality of the use of criminal law in early pregnancy and its compatibility with the constitutional protection of equality, liberty and dignity. My view is that the current extension of criminalization to early pregnancy would not hold if we take seriously our constitutional commitments to substantive equality of opportunity, autonomy and dignity not only as expressed in the Constitution text but also as they stand protected in the human rights treaties that also express the right-protective nature of our constitutional program as set forth in 1994.

Uncovering the problems of the mischaracterization of a polarized debate framed in descriptively or normatively implausible terms becomes central when appeals to such polarization are too often used to postpone an upfront discussion of the constitutional treatment of abortion. Showing the flaws of the arguments uttered by contenders on the discussion is also important when they are uncritically embraced by so many among us. This is, however, only a first step towards a discussion that a society that claims to have a truly egalitarian project could not continue to avoid or defer.

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