

THE SEVERE ARGENTINE ABORTION LAW

Por María Paula Croatto Massi¹

April 2021

After the rejection of the abortion law in 2018, Argentine society was able to resume its daily activities without having the violent pressure of abortion at the doors of Congress. The activities of pro-life associations in the country were again devoted to seeking to assist mothers with vulnerable pregnancies or families with complex needs.

All that work began with a coordinated macro strategy that was the result of an agreement between various pro-life organizations. This agreement intended, on the one hand, to work with a toll-free hotline for the Accompaniment of Pregnant Women² and, on the other hand, to develop in as many regions as possible a model program already used in San Miguel³, Buenos Aires, Argentina.

In this context and with a new government, rumors of an abortion law began to resurface. These rumors were initially silenced by the global impact of the pandemic caused by COVID19. However, despite the strong fight to save lives that the worldwide virus was taking away, the momentum of the abortion law was reborn with force from the national government.

In the middle of a great financial-economic and social collapse and against the voice of the Argentine people expressed in dozens of public polls⁴, President Alberto Fernandez sent to the National Congress the bill to decriminalize abortion that he had promised in his presidential campaign⁵.

Since the pro-life movement was already fully engaged, it cost little to reactivate the lobbyists, the typical large social mobilizations⁶ and the entire network of resistance to the threat of the abortion laws.

With the experience of 2018 and the strong determination to save lives, pro-life organizations developed various advocacy strategies at both local and national levels. Many legislators maintained their defense of unborn children and many others that in the past declared themselves pro-life

¹ Lawyer from the University of Cuyo, Argentina. She specialized in Human Rights, Maternal Care and Infant Mortality. She is a pro-life activist for the Argentine NGO "Vae Victis".

² For more information of the free line: <https://0800vida.com.ar/>

³ The Child and Family Development Centers are dedicated to providing a space of emotional support, stimulation and socialization to children from 45 days to 3 years old from families in vulnerable situations. The "Care Spaces" work with children from 6 months up to 12 years old. These spaces are made up of multidisciplinary teams that accompany each family according to their situation, promoting articulation with the relevant entities in each case, based on four fundamental axes: stimulation, education, nutrition and affectivity. For more information visit: <https://www.msm.gov.ar/ninez-y-familia/>

⁴ More information available at: <https://www.unidadprovida.org/post/las-encuestas-muestran-que-el-pueblo-argentino-tiene-un-rotundo-rechazo-al-aborto>.

⁵ Journalistic note: <https://www.telam.com.ar/notas/202011/535488-camara-de-diputados-ingreso-proyectos-legalizacion-del-aborto-plan-de-los-1000-dias.html>.

⁶ Journalistic note: <https://www.lanacion.com.ar/sociedad/grupos-provida-marcharan-mas-250-ciudades-legalizacion-nid2523849/>.

changed to support abortion. Many officials denounced that from the executive branch "there was pressure" to vote in favor of the abortion bill⁷.

The result of the vote in favor of abortion did not represent the people's will, was not a decision free of pressure, and most of all was not the result of the normal legislative processes of a democratic country. The tricks of the current government were the only reason why the pro-life victory of 2018 was not repeated. The non-official journalistic media described it in their pages as "a combination of political pressure and concessions from the Executive Power for some provinces [which] would guarantee the Government the numbers to approve the bill to legalize abortion"⁸.

Legal Aspects

On January 14th, 2021, the President of the Argentine Republic promulgated the aforementioned law that authorizes abortions almost without restrictions⁹. This law has been enacted contrary to the Constitution of our country and the International Treaties with constitutional hierarchy incorporated into it.

The Magna Carta of Argentina contains in various articles express references intended to protect the life of the unborn. In logical coherence due to the principle of subordination, a large amount of national and provincial legislation has developed a protective system of laws for children throughout their age range, giving special protection to unborn children in view of their vulnerability.

On the one hand, in the last major reform of the Civil Code¹⁰ that sought to mainstream human rights in private law, the famous article 19 was written in accordance with the national constitution and establishes: "*The existence of the human person begins with conception.*" It should be noted that this reform was in the hands of internationally renowned jurists such as Dr. Lorenzetti, Dr. Highton de Nolasco and Dr. Kemelmajer de Carlucci. This principle was further established later in article 22, "*Every human person has the ability to be holder of rights and duties.*" These articles constitute the protective basis of life in Argentine domestic law.

As for the Penal Code, before the aforementioned abortion law, it incorporated life as a legal asset and consequently protected it from possible harm, thus determining the crime of abortion as a felony -although with some cases of unimputability¹¹.

We can also mention national laws such as the labor law, which especially protects pregnant women by determining pregnancy leave, breastfeeding periods, protection of the workplace, all of which are

⁷It was of public knowledge that there was pressure to vote in favor of the bill: <https://www.lanacion.com.ar/sociedad/grupos-provida-marcharan-mas-250-ciudades-legalizacion-nid2523849/>.

⁸Journalistic note: <https://www.lanacion.com.ar/politica/aborto-intensas-gestiones-del-gobierno-consolidar-mayoria-nid2553155/>.

⁹Complete text of the law available at the following link: <https://www.boletinoficial.gob.ar/detalleAviso/primera/239807/20210115>.

¹⁰Complete text of Article 19 available at: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/235000-239999/235975/norma.htm#6>

¹¹ Old text of the law available at: <https://www.conceptosjuridicos.com/ar/codigo-penal-articulo-86/#:~:text=El%20aborto%20practicado%20por%20un,ser%20evitado%20por%20otros%20medios>.

established in Articles 177-183 of the Labor Law, No. 20,744¹². There is also law 26.061 for the comprehensive protection of children's rights, which in article 2 says "The Convention on the Rights of the Child is mandatory under the conditions of its validity"¹³.

Prestigious national jurists emphasize that "as for the provincial constitutions, thirteen of twenty-three Argentine provinces protect human life explicitly from conception. Most of them have blocked this protection in the form of a constitutional mandate. Other provinces explicitly incorporate the convention on the rights of the child in the conditions of its validity."¹⁴

Finally, in the text of our Magna Carta, in article 75 section 22 incorporates with constitutional status the Convention on the Rights of the Child with respect to which Argentina has made a reservation. Law No. 23,849¹⁵, which ratifies the Convention, incorporates in Article 2 the following determining "clarification": "In relation to Article 1 of the *CONVENTION ON THE RIGHTS OF THE CHILD*, the *ARGENTINE REPUBLIC* declares that it must be interpreted in the sense that a child is understood to be every human being from the moment of conception to 18 years of age."¹⁶

The remaining treaties with constitutional hierarchy are: The Universal Declaration of Human Rights, American Declaration of the Rights and Duties of Man, American Convention on Human Rights, known as "Pact of San José de Costa Rica", International Covenants on Economic, Social and Cultural and Civil and Political Rights and its Optional Protocol, all of which express in literal terms the protection of the right to life.

At the same time, Article 75, Section 23, determines as powers of legislators: *"To dictate a special and comprehensive social security system to protect the child in a situation of helplessness, from pregnancy until the end of the elementary school period, and of the mother during pregnancy and breastfeeding time."*

All the aforementioned make clear the deep, real and legal protection of the right to life of the unborn, so that any law of lower hierarchy that contradicts the protection of the unborn would directly violate the National Constitution and International Human Rights Treaties.

¹² Full text of the law available at: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/25000-29999/25552/norma.htm>.

¹³ The constitutional convention in 1994 granted "constitutional hierarchy" to the International Convention on the Rights of the Child, in the full force of its provisions (i.e. as the Argentine Republic obliged itself internationally). To the extent that obligation expressly recognizes that a child exists since conception, any law of lower hierarchy becomes unconstitutional.

¹⁴ Basset, Ursula and Bach de Chazal, Ricardo "The right to life of the unborn child in the Argentine legal system. The right to life and unborn children in the Provincial Constitutions". Faculty of Law, Universidad Católica Argentina, Ed. EDUCATES. 2010 page 87.

¹⁵ Full text of the law available at: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/249/norma.htm>.

¹⁶ See in this respect: "El derecho al Aborto ante el Congreso". Vítolo, Alfredo M. *Pensar en Derecho*, a. 5, no. 12. Universidad de Buenos Aires. Facultad de Derecho. Departamento de Publicaciones. Año 2018. Available at: <http://www.derecho.uba.ar/publicaciones/pensar-en-derecho/revistas/12/el-derecho-al-aborto-ante-el-congreso.pdf>.

However, on December 30, 2020 the Argentine Congress approved law 27,610¹⁷. The law determines in its article 4¹⁸, that a baby in the womb can be aborted up to the fourteenth week inclusive, without determining any cause for it, which implies that it could be in any case. However, and beyond that time of pregnancy, the woman can abort for two reasons: when the pregnancy is the result of rape, or when the life or health of the mother is at risk. These two causes are so broad and unclear that abortion in Argentina is almost unlimited in time and causes.

On the one hand, the cause of rape requires nothing more than the allegation of the woman in a “sworn statement”. With the terrible aggravation of not prosecuting the rapist in cases where the pregnancy arose for that reason, thus allowing the continuity of the violations if they occurred in the family or residential environment.

On the other hand, the cause of “health” refers to the WHO concept that *“Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”*¹⁹. We clearly see that based on this cause, any circumstance could be valid to request to an abortion.

Another great offense to human rights created by this law is its limitations on the right to freedom of conscience, both personal and institutional. As Fernando Toller points out in his research²⁰, the approved norm curtails the freedom of action of health professionals by threatening them with sanctions and forcing them to provide information on abortion *“even if there is no explicit request (...) and forbidding personal or axiological considerations”*.

For all the aforementioned reasons, the unconstitutionality of the law is evident, and it clearly violates basic human rights. For this reason, there have been various legal actions brought seeking to nullify this law and enjoin its enforcement²¹.

¹⁷ Full text of the law available at: <https://www.boletinoficial.gob.ar/detalleAviso/primera/239807/20210115>.

¹⁸ Art. 4 - Voluntary interruption of pregnancy. Women and people with other gender identities capable of gestation have the right to decide and access the termination of their pregnancy until the fourteenth (14) week, inclusive, of the gestational process.

Outside the period provided in the previous paragraph, the pregnant person has the right to decide and access the interruption of her pregnancy only in the following situations:

a) If the pregnancy is the result of a rape, with the request and the pertinent sworn statement of the pregnant person, before the intervening health personnel.

In the cases of girls under thirteen (13) years of age, the affidavit will not be required;

b) If the life or integral health of the pregnant person is in danger.

¹⁹ See full WHO concept of health: <https://www.who.int/about/who-we-are/constitution>.

²⁰ See complete text of his research available at: <https://www.facebook.com/fernando.toller/posts/10225162154546886> or https://drive.google.com/file/d/1HO5jpBu_DLYdPyhE4a8_uEXYVke-60fK/view.

²¹ See journalistic notes on various initiatives to nullify the law: <http://www.chacohoy.com/inicio/basicamovil/240597>, <https://informatosalta.com.ar/contenido/259151/fallo-provida-que-dijo-la-camara-federal-contra-el-rechazo-del-juez-bavio>, <https://www.nortecorrientes.com/166470-aborto-severa-apelacion-al-fallo-descolgado-del-juez-tributarista>, <https://elchorrillero.com/nota/2021/02/06/251165-aborto-legal-en-san-luis-presentaron-un-recurso-de-amparo-contra-la-aplicacion-de-la-ley/amp/>, <https://www.perfil.com/noticias/cordoba/admiten-el-amparo-contra-la-ley-del-aborto-que-presento-garcia-elorrio.phtml>