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Lina Forero-Nino

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THE ABORTION DEBATE IN LATIN AMERICA

*Lina Forero-Niño**

I. INTRODUCTION

IN most Latin American countries abortion is only allowed in limited circumstances such as when the woman is raped, the woman's life is in danger or the fetus is severely deformed.¹ But "Cuba and Mexico City, though not the rest of Mexico, allow abortions without restriction in the first [twelve] weeks."² Argentina's Supreme Court recently clarified an existing law on abortion, Uruguay is debating a law legalizing abortion, and several Mexican states have amended their state constitutions to prevent the enactment of laws legalizing abortion. This report will explain in more detail the developments in Argentina, Uruguay, and Mexico relating to the abortion debate.

II. ARGENTINA

According to Argentine law, an abortion is only allowed if "the mother's life or health are at risk, or if the woman is deemed 'of feeble mind.'"³ But on March 13, 2012, the Argentina Supreme Court decided that a woman may also get an abortion after being raped.⁴ The court reiterated that the decision "was not part of a discussion about the legalization of abortion in Argentina, but just a clarification of existing laws."⁵ Before that ruling, women who were raped and became pregnant would have to get a court order to get an abortion.⁶ The court clarified that "no rape victim could be punished for terminating a pregnancy, and that those women no longer needed a court order."⁷ Today, in order to get an abor-

* "With God's power working in us, God can do much, much more than anything we can ask or imagine." *Ephesians* 3:20. Lina Forero-Niño received a B.A. in Communication from the University of Texas at San Antonio and a J.D. from Southern Methodist University Dedman School of Law.

1. *Uruguay Senate Votes to Decriminalize Abortion*, BBC NEWS (Dec. 28, 2011), <http://www.bbc.co.uk/news/world-latin-america-16343687>.

2. *Id.*

3. *Argentina Court Decriminalizes Abortion in Rape Cases*, BBC NEWS (Mar. 13, 2012), <http://www.bbc.co.uk/news/world-latin-america-17360739>.

4. *Id.*

5. *Id.*

6. *Argentina: Court Allows Abortion for Rape Victims*, N.Y. TIMES (Mar. 14, 2012), <http://www.nytimes.com/2012/03/14/world/americas/argentina-court-allows-abortion-for-rape-victims.html>.

7. *Id.*

tion, the victim only needs to give the doctor a sworn statement that she was raped.⁸ The court said that the debate of whether to legalize abortion “would have to be carried out in Congress.”⁹ Media reports indicate that a bill legalizing abortion was proposed in 2008 and that supporters of the bill hoped that it would be debated in Congress in 2010.¹⁰ But the status of the bill or results of Congressional debate on the issue is uncertain.

III. URUGUAY

The Uruguayan legislature is currently debating a proposed bill legalizing abortion.¹¹ On December 27, 2011, the Uruguayan Senate passed a bill legalizing abortion in the first twelve weeks of pregnancy.¹² Senator Monica Xavier, in favor of the bill, said “[w]e don’t have the right to pass moral judgment by saying that the woman who continues her pregnancy and has her baby is in the right whereas the one who doesn’t for whatever reason, is in the wrong.”¹³ On the other hand Senator Alfredo Solari, an opponent of the bill, said “[h]ow can the law leave the decisions to end a pregnancy only with the woman?”¹⁴ He also said, “[i]nstead of promoting responsible fatherhood, with this law we’re saying the man doesn’t matter.”¹⁵

The Senate attempted to pass a similar law in 2008.¹⁶ But it was vetoed by former Uruguayan President Tabare Vazquez and medical doctor, who explained his veto by saying, “[o]ur laws cannot ignore the reality of the existence of human life in the gestation period, as scientific evidence clearly shows.”¹⁷ The bill is currently being debated in the lower house of the legislature and the results are pending.¹⁸ While the results of the debate are uncertain, it is possible that the bill could become law because President Jose Mujica suggested that he will sign the bill into law.¹⁹ Also, recent surveys indicate that 63 percent of Uruguayans support the proposed bill.²⁰ But the Uruguayan Catholic Bishops’ Conference filed ob-

8. *Id.*

9. *Argentina Court Decriminalizes Abortion in Rape Cases*, *supra* note 3.

10. *Debate Over Legalizing Abortion Intensifies in Argentina*, BBC NEWS (July 22, 2010), <http://www.bbc.co.uk/news/world-latin-america-10478832>.

11. *Uruguay Senate Votes to Decriminalize Abortion*, *supra* note 1.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Uruguay Head Vetoes Abortion Bill*, BBC NEWS (Nov. 14, 2008), <http://news.bbc.co.uk/2/hi/americas/7728597.stm>.

17. *Id.*

18. *Inician Campaña para Pedir a Diputados Uruguayos que Despenalicen el Aborto* [Campaign Initiated to Request Uruguayan Deputies to Decriminalize Abortion], TERRA.COM (Mar. 29, 2012), <http://noticias.terra.com.co/internacional/inician-campana-para-pedir-a-diputados-uruguayos-que-despenalicen-el-aborto,d2777f7ccc16310VgnVCM4000009bcceb0aRCRD.html> [hereinafter TERRA.COM].

19. *Uruguay Senate Votes to Decriminalize Abortion*, *supra* note 1.

20. TERRA.COM, *supra* note 18.

jections to the bill with Congress.²¹

IV. MEXICO

A. HISTORY OF THE ABORTION DEBATE IN THE MEXICAN STATES

Because Mexico has a federal political system in which there are differences between federal level and state level laws, “there is diversity between states as to the legal status of the embryo, as well as in abortion and reproductive rights.”²² In 2007, Mexico City’s Legislative Assembly amended a local criminal code by legalizing abortions performed before the twelfth week of gestation.²³ The law made the federal district the first state in the country to legalize abortion.²⁴ The Legislative Assembly also added provisions to the local health law act “stipulating that the Mexico City Ministry of Health, through its health providers (i.e. public hospitals and clinics), should provide first-trimester abortion services at no cost to Mexico City residents and for a moderate fee to women from outside the city.”²⁵ The President of the National Human Rights Commission and the Attorney General of the Federal Government challenged the constitutionality of the amendments before Mexico’s Supreme Court.²⁶ In 2008, the Mexican Supreme Court upheld the amendments by a vote of eight to three.²⁷ Consequently, “Mexico City’s Criminal Code and Health Law are now considered to be the most progressive in Latin America in terms of promoting self-determination in relation to women’s health and reproductive rights.”²⁸

In response to the Supreme Court’s ruling to uphold the law legalizing abortion in Mexico City, eighteen of Mexico’s thirty-one states approved “right-to-life” amendments to their constitutions, establishing that “life shall be protected from the moment of conception until the natural end of life.”²⁹ The main purpose of the amendments was to prevent the enactment of similar laws legalizing abortion across the nation.³⁰ Among

21. Matthew Hoffman, *Latin America Teeters on Edge of Abortion Abyss*, NAT’L CATHOLIC REG. (Feb. 24, 2012), <http://www.ncregister.com/daily-news/latin-america-teeters-on-edge-of-abortion-abyss/>.

22. María de Jesús Medina Arellano, *The Need for Balancing the Reproductive Rights of Women and the Unborn in the Mexican Courtroom Unconstitutional Claim 146/2007 and the Appended 147/2007*, 18 MED. L. REV. 427, 432 (2010).

23. *Id.*

24. El Universal, *Debate Aborto la SCJN*, EL MEXICANO (Sept. 27, 2011), <http://www.el-mexicano.com.mx/informacion/noticias/1/2/nacional/2011/09/27/505037/debate-aborto-la-scn.aspx>; Ken Ellingwood, *Mexico High Court Upholds Baja California Antiabortion Measure*, L.A. TIMES (Sept. 28, 2011), <http://articles.latimes.com/2011/sep/28/world/la-fg-mexico-abortion-20110929>.

25. Medina Arellano, *supra* note 22.

26. *Id.*

27. El Universal, *supra* note 24.

28. Medina Arellano, *supra* note 22.

29. *Id.*; Ellingwood, *supra* note 24.

30. Mailee Smith, *Mexican Supreme Court Agrees with AUL Brief in Mexico’s “Roe v. Wade”*, AUL.ORG (Sept. 29, 2011), <http://www.aul.org/2011/09/mexico-supreme-court-agrees-with-aul-brief-in-mexico%E2%80%99s-%E2%80%9CRoe-v-wade%E2%80%9D/>.

the states that approved such amendments are Baja California, San Luis Potosí, Chihuahua, Sonora, Morelos, Colima, Puebla, Jalisco, Durango, Nayarit, Quintana Roo, Campeche, Guanajuato, Yucatán, Querétaro, Oaxaca, Chiapas y Tamaulipas.³¹ With the support of President Felipe Calderon's National Action Party and the Catholic Church, the state legislatures passed the amendments quickly and with minimal debate.³² Abortion is allowed in all states "when pregnancy results from rape" and most states allow it "when the woman's life is in danger."³³

B. BAJA CALIFORNIA AMENDED ITS STATE CONSTITUTION TO PROTECT LIFE OF THE UNBORN

In 2008, Baja California amended its state constitution to establish a person's right to legal protection "from the moment an individual is conceived."³⁴ In effect, the amendment considers the unborn a person entitled to all legal rights.³⁵ Baja California's Human Rights Commissioner filed the lawsuit challenging the amendment.³⁶ After years of intense debate throughout Mexico,³⁷ the Supreme Court heard the controversy.

C. MEXICO'S SUPREME COURT UPHELD BAJA CALIFORNIA'S AMENDMENT

One issue before the court was whether it is constitutional to define a fetus as a person and to grant a fetus, from the moment of conception, all the legal rights that a live person is entitled to.³⁸ Another issue the court decided was whether it is constitutional for a state to restrict abortion.³⁹ In his challenge to the amendment, the Commissioner claimed that the amendment invaded women's reproductive rights guaranteed by Mexico's Constitution and affirmed by the 2008 Supreme Court ruling.⁴⁰ He also argued that state legislatures cannot pass constitutional amendments protecting life because the Constitution does not offer such protection and doing so would violate international treaties on the subject.⁴¹

Americans United for Life (AUL), a non-profit public interest legal and educational organization, filed an amicus brief in the case, arguing in favor of the amendment.⁴² AUL "advocates, among other things, that

31. El Universal, *supra* note 24.

32. Ellingwood, *supra* note 24.

33. *Mexico Court Upholds Baja California Abortion Stance*, BBC NEWS (Sept. 29, 2011), <http://www.bbc.co.uk/news/world-latin-america-15104022>.

34. Ellingwood, *supra* note 24.

35. *Agencias, Protestan Mujeres Contra la Decision de la Suprema Corte [Women Protest Against Supreme Court's Decision]*, EL MEXICANO (Sept. 29, 2011), <http://www.el-mexicano.com.mx/informacion/noticias/1/3/estatal/2011/09/29/505866/protestan-mujeres-contra-la-decision-de-la-suprema-corte.aspx>.

36. Medina Arellano, *supra* note 22.

37. Smith, *supra* note 30.

38. El Universal, *supra* note 24.

39. Smith, *supra* note 30.

40. Medina Arellano, *supra* note 22.

41. El Universal, *supra* note 24.

42. Smith, *supra* note 30.

the practice of human abortion harms the physical and social welfare of women and contradicts the highest moral standards of human life.”⁴³ In its brief to the Court, AUL said that it has “researched and tracked the harm abortion brings to women in the United States, as well as to women in other parts of the world.”⁴⁴ The brief includes statistical information and medical study results that “demonstrates that abortion is harmful to women, and that protecting life from conception also protects the health and welfare of women.”⁴⁵

The Mexican Constitution requires eight votes to invalidate a law.⁴⁶ Because only seven justices would invalidate the amendment, the Court upheld the amendment.⁴⁷ The Court determined that the amendment did not conflict with the Mexican Constitution, “because the rights of the unborn have long been recognized in Mexican federal law.”⁴⁸

Justice Fernando Franco opposed the amendment.⁴⁹ He argued that a fetus cannot reasonably be considered a person according to the Mexican Constitution or international treaties.⁵⁰ He also argued that the amendment is unconstitutional because it goes against women’s dignity and fundamental rights, specifically women’s liberty and reproductive health.⁵¹ Other justices who opposed the amendment said such laws “exceed states’ authority and endanger women’s rights by closing off access to legal abortion, even in cases of rape or when the mother’s health is endangered.”⁵² Justice Arturo Zaldivar who voted to invalidate the amendment, said that “sending women, especially the poor, in search of back-alley abortions or even to jail was ‘profoundly unfair, profoundly immoral[,] and profoundly unconstitutional.’”⁵³

Several justices said that states had the right to write statements in their state constitutions regarding when life begins.⁵⁴ Justice Salvador Aguirre Anguiano pointed out that “Mexican law has recognized the right of protection [of the unborn] since the 19th century.”⁵⁵ Justice Margarita Luna Ramos, who voted in favor of the amendment, said “just as states have legal authority to allow abortion, they are free to declare that life begins at conception.”⁵⁶ Justice Ramos also concluded that a woman’s right to terminate her pregnancy is not provided for in the Consti-

43. Brief for Americans United for Life as Amici Curiae Supporting Petitioners, *Acción de Inconstitucionalidad: 01/2010*, available at <http://www.aul.org/interest-of-amicus-curiae-americans-united-for-life/>.

44. *Id.*

45. *Id.*

46. *Mexico Court Upholds Baja California Abortion Stance*, *supra* note 33.

47. *Id.*

48. Smith, *supra* note 30.

49. Ellingwood, *supra* note 24.

50. El Universal, *supra* note 24.

51. *Id.*

52. Ellingwood, *supra* note 24.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

tution or in any international treaty.⁵⁷ The Constitution only addresses the concept of planning a family in a responsible and informed manner.⁵⁸

The court's ruling upholding the amendment to Baja California's constitution "does not set any binding precedent regarding the [seventeen] other state laws."⁵⁹ The court is due to rule on a challenge to a similar amendment to San Luis Potosi's constitution.⁶⁰

D. PUBLIC OPINION ON THE RULING

In Baja California, Catholic Archbishop Rafael Romo of Tijuana praised the decision as "positive."⁶¹ Other supporters of the amendment who had camped outside of the Supreme Court building cheered when they heard the ruling.⁶² AUL said that "[w]hile the practical effect of the amendment remains to be seen, media outlets are already reporting that the amendment effectively bans abortion in Baja California—which means both women and the unborn [sic] will be protected under the law in that state."⁶³ One of the most likely effects of the amendment is that Baja California's penal code will have to be amended to criminalize abortion.⁶⁴ Jorge Serrano, leader of an anti-abortion organization called Pro-Life, said "[w]e have to continue working so that life may triumph."⁶⁵

Mexico's President Felipe Calderón and first lady Margarita Zavala publicly defended the amendment.⁶⁶ With regard to President Calderón's stance on abortion, he has requested the Senate to amend a commitment Mexico made when it signed the Pact of San Jose on Human Rights in 1981.⁶⁷ In the San Jose Pact, Mexico agreed "to not take on the obligation of enacting legislation to protect life from [the time of] conception."⁶⁸ President Calderón's office said that Mexico's withdrawal from the San Jose Pact "would allow Mexico to endorse a 'commitment to the right to life as a legal right protected under Mexican law.'"⁶⁹

57. El Universal, *Reinicia Suprema Corte Debate Sobre Aborto* [*Restart Supreme Court Debate on Abortion*], EL MEXICANO (Sept. 28, 2011), <http://www.el-mexicano.com.mx/informacion/noticias/1/25/politica/2011/09/28/505586/reinicia-suprema-corte-debate-sobre-aborto.aspx>.

58. *Id.*

59. EFE, *Mexico High Court Lets Anti-Abortion Law Stand*, FOX NEWS LATINO (Sept. 29, 2011), <http://latino.foxnews.com/latino/news/2011/09/29/mexico-high-court-lets-stand-state-law-protecting-unborn/print#ixzz1qGKFeQ5S>.

60. *Mexico Court Upholds Baja California Abortion Stance*, *supra* note 33.

61. Ellingwood, *supra* note 24.

62. *Id.*

63. Smith, *supra* note 30.

64. Agencias, *supra* note 35.

65. *Mexico Court Upholds Baja California Abortion Stance*, *supra* note 33.

66. EFE, *supra* note 59.

67. EFE, *supra* note 59 ("Mexico signed the treaty in 1981 with the provision that becoming a signatory 'does not constitute an obligation to legislate to protect life' from conception and made it clear that 'States reserve the right to have exceptions in their legislation, such as is the case with determining responsibility in abortion cases.'").

68. *Id.*

69. *Id.*

The Human Rights Commission, a Mexico City government entity, said the ruling “would worsen the serious public health problem of clandestine abortions.”⁷⁰ “Advocates for reproductive rights called the close ruling a temporary setback in the country’s abortion debate.”⁷¹ A representative of Amnesty International said the amendment is a huge setback for the rights of women and girls in Mexico.⁷² In a press release, Amnesty International said that the Court missed the opportunity to make the Constitution of Baja California conform to international jurisprudence on the protection of reproductive rights of women and girls in Mexico.⁷³ Some women’s rights activists are concerned that the ruling “may create a divide between those able to go to Mexico City for a legal abortion and those living in states where it is largely restricted.”⁷⁴

V. CONCLUSION

The impact that that the developments in Argentina, Uruguay, and Mexico may have on other Latin American countries remains unclear. But experts believe that Uruguay is a “testing ground for the implementation of anti-life and anti-family public policies.”⁷⁵ Because of the potential for Uruguayan abortion related laws to influence other Latin American countries, international organizations on both sides of the abortion debate are spending more resources in their advocacy efforts in Latin America.⁷⁶ Mario Rojas, director of Latin American coordination for Human Life International, said that if the Uruguayan bill is signed into law, this would set a precedent for other South American countries to follow such as Brazil, Argentina, and Paraguay.⁷⁷ Alberto Monteiro, a Brazilian pro-life activist, has said “[w]e are on the brink of the introduction of the culture of death in all of our continent.”⁷⁸ Dan Zeidler, director of the U.S. Office of the Latin American Alliance for the Family, said that two institutions, the Catholic Church and the U.S. government, are critical to winning the struggle to protect the right to life and the family in Latin America.⁷⁹ According to Zeidler both institutions are crucial because they have “enormous influence over the region.”⁸⁰ Rojas believes

70. *Mexico Court Upholds Baja California Abortion Stance*, *supra* note 33.

71. Ellingwood, *supra* note 24.

72. El Universal, *AI Lamenta Fallo de SCJN Sobre Aborto [AI Regrets Supreme Court's Failure Regarding Abortion]*, EL MEXICANO (Sept. 29, 2011), <http://www.el-mexicano.com.mx/informacion/noticias/1/2/nacional/2011/09/29/505934/ai-lamenta-fallo-de-scn-sobre-aborto.aspx>.

73. Press Release, Amnesty International, México: Derechos Sexuales y Reproductivos en Retroceso [Mexico: Sexual and Reproductive Rights Regress] (Sept. 29, 2011), <http://amnistia.org.mx/nuevo/2011/09/30/mexico-derechos-sexuales-y-reproductivos-en-retroceso-2/>.

74. *Mexico Court Upholds Baja California Abortion Stance*, *supra* note 33.

75. Hoffman, *supra* note 21.

76. *See id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

that the results of the U.S. presidential elections will directly impact the extent to which “life and family values” are threatened in Latin America.⁸¹

81. *Id.*