Same Sex Marriage in Argentina

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0. Introduction

In recent years, same sex marriage has become one of the hottest legal and political topics worldwide. Latin America is no exception to that rule. For instance, very recently, in December 2007, civil unions were made legal in Uruguay. The controversy in the region is long-existing, but the beginning of the more recent discussions in that region can be traced back to December 2002, when the Legislature of the City of Buenos Aires, the capital city of Argentina, passed the Civil Union law, as it is named.1 This law allows couples of any sexual orientation who have lived together for two or more years in Buenos Aires to enjoy rights and duties similar to those that husbands and wives have. Buenos Aires became the first city in Latin America to permit civil unions between persons of the same sex. In November 2007, Buenos Aires was followed by Villa Carlos Paz, a city in the Province of Córdoba. Although these facts were landmarks in the Argentine history of human rights, gays in Argentina do not yet enjoy the same rights that heterosexuals do. First, the rest of the country still does not even permit civil unions. Second, even though in Buenos Aires and Villa Carlos Paz same sex couples are recognized as civil unions, they cannot get married to one another and there are many important differences between a civil union and a married couple – for instance, although

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1 Disp.95-DGRC-03 Uniones Civiles.
the civil union provides both members of the couple with health and insurance benefits and hospital visitation rights, unlike spouses, members of a civil union may not adopt a child or inherit the estates of each other. Several projects to make same sex marriage legal have been put before the Argentine Senate – the last one being in October 2007 – but have not yet received serious consideration. Uruguay and the aforementioned cities in Argentina are exceptions in a region that is generally hostile towards same sex marriage. In this line, in September 2007, the Argentine National Civil Court of Appeals - “Cámara Nacional de Apelaciones en lo Civil” - rejected an injunction brought by a female couple who wanted to get married. In the injunction, they argued that Art. 172 of the Argentine Civil Code – which requires that marriage be celebrated between individuals of different sex – is unconstitutional. The main arguments of the Court were the following:

1. The Court states that Art. 172 of the Argentine Civil Code\(^2\) does not discriminate against gays and lesbians because they can get married; they just cannot get married to someone of the same sex.

2. The different sex requirement established by Art. 172 has an “objective and reasonable” justification”: the state’s interest in supporting couples who are prone to procreate and who are the basis of the institution of the family. According to the Court, this justification is similar to that used for the ban on polygamy and marriage between relatives.

3. Finally, the Court stated that the human rights conventions invoked by the plaintiffs do not support same sex marriage because their explicit reference to the right of men and

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\(^2\) Section 75 of the Argentine Constitution states, amongst other things, that Congress is in charge of designing the Civil Code, which is meant to apply to the entire country. That means that Congress regulates marriage. Although legislatures of cities in Argentina may not regulate marriage, they can regulate civil unions.
women to marriage should be understood as their right to heterosexual marriage – the requirement that spouses should not be of the same sex has to do with the very *essence* of marriage.\(^3\)

Even though these arguments are specific to this case, they represent the usual arguments put forwards in the media and in the Courts.– and, most probably, the view of most Argentine legal scholars and the general public. The aim of this paper is to examine in more detail these arguments and then consider their plausibility.

In support of the plaintiffs’ position, we were part of a group of law professors that presented an *amicus curiae* arguing against the decision of the inferior court that had denied the right to marriage of the same sex couple at stake. Both the injunction and the *amicus* were unsuccessful. We will take some of the arguments posed by that *amicus curiae* and add further reasons against the decision by the Court of Appeals. We hope that readers unfamiliar with discussions in Argentina in particular will learn about the prevailing discourse about marriage in Latin American legal practice.

I. Art. 172 of the Argentine Civil Code Does not Discriminate Against Gays and Lesbians

The Court argues that, even though under Argentine law same sex couples cannot get married, gays and lesbians are allowed to get married. The Court says that gays and lesbians are not discriminated against because they can get married – it’s just that they

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\(^3\) Section 75 of the Argentine Constitution states that the American Convention on Human Rights, the Universal Declaration of Human Rights, and the American Declaration of the Rights and Duties of Man, amongst other conventions, have constitutional status. That means that these conventions must be interpreted in harmony with the Constitution: both the Constitution and those conventions are the supreme laws in Argentina.
cannot get married to each other. That is to say, the sexual orientation of the members of a couple is not taken into account – what matters is that individuals that get married should not be of the same sex.

Now, there is no morally relevant distinction between the prohibition of same sex marriage and prohibiting gays and lesbians to get married. Let’s suppose that the Argentine State were to ban the Muslim religion. Let’s further imagine that the Argentine State claims that Muslims enjoy the same degree of religious freedom that Catholics do because both Muslims and Catholics can practice the catholic religion. Of course, this would not be a good argument: in the described scenario, Catholics would enjoy more religious freedom than Muslims because Catholics would be allowed to practice their religion. In the same sense, even though under Argentine law both heterosexuals and gays and lesbians can get married, gays and lesbians are less free because, in order to get married, they need to give up their sexual preferences – which they may perfectly consider to be as important or even more important than their religious views.

Against what the Court says, the legal distinction posed by Art. 172 of the Argentine Civil Code is indeed based on “sexual orientation.” It is true that the text of the norm does not explicitly refer to “sexual orientation” as a legal impediment to marriage. However, it is obvious that while same sex couples cannot get married, heterosexual couples can. As the law professors said in their amicus, the use of “sexual orientation” is a “suspicious classification,” which is presumptively unconstitutional. Given this presumption, the State has the burden of showing that there are “compelling state interests” that justify the distinction posed by Art. 172.

The use of the suspicious classifications standard by the Argentine Supreme Court
was inspired by the US Supreme Court’s use of it. According to this idea, it’s not sufficient for the State to show that a legal classification is “reasonable,” “convenient,” or “timely.” The standard applied to scrutinize the legality of those types of classifications is higher: the existence of a justifying “compelling state interest” is a necessary condition. In a different context, the Argentine Supreme Court has applied this standard and has held that legal distinctions such as “nationality” and “national origin” are “suspicious classifications” and, therefore, presumptively unconstitutional. In the next section, we discuss whether there is a “compelling state interest” that would justify the discrimination against same sex couples.

II. Is Heterosexual Marriage Prone to Continue Humankind?

The Court held that Art. 172 has an objective and reasonable justification: the state has an interest in favoring those unions which, in general, procreate. According to this view, reproduction is a very important goal and prohibiting same sex marriage is an effective mean to achieve it. The Court’s argument seems to be the following: if the state permits same sex marriage, reproduction will decrease and, some day, society will disappear. If, on the contrary, the state forbids same sex marriage, it makes a contribution to reproduction and, therefore, to the conservation of humankind.

The soundness of this argument depends on the premise that legalizing same sex marriage prevents the reproduction of society. In turn, this premise can be posed in the

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4 See, e.g., “Repetto”, Fallos 311:2272; “Calvo y Pesini”, Fallos 321:194. The Standard has also been applied by other Argentine courts. See, e.g., “Salgado,” Superior Court of the City of Buenos Aires – arguing that the reference to “age” is a “suspicious classification” – and “Barcena”, Supreme Court of the Province of Buenos Aires, 20.9.2000 – arguing that laws that discriminate against women with regards to social security rights are unconstitutional. See, also, “Fundación Mujeres en Igualdad v. Freddo”, Civil Courts of Appeals of the City of Buenos Aires, 16.12.2004 – arguing that the denial of a private enterprise to hire women was discriminatory.
following way: if the number of same sex marriages rises, the number of heterosexual marriages will decrease. This premise, nevertheless, is false and, therefore, the Court’s argument is fallacious.

As a matter of fact, the state promotes procreation because it permits heterosexual marriage: the state offers – hererosexual - couples a set of rules that are specially designed to guarantee their full development as a family. Now, it’s not true to say that were same sex marriage legalized, the number of heterosexual marriages would diminish: just as a communist would not vote for a liberal candidate at the presidential election merely because there are no communist candidates, heterosexuals would not get married to someone of their same sex because of the mere fact that same sex marriage is legalized. Furthermore, it’s also not true to say that were same sex marriage banned, the number of heterosexual marriages would increase: just as a liberal would not join a Nazi party merely because there is a Nazi party, the ban on same sex marriage would not make gays and lesbians marry heterosexuals merely because same sex marriage is not allowed.

In other words, against what the Court seems to be claiming, there isn’t a nil-all game between heterosexual marriage and same sex marriage. Just as allowing Jews to exercise their freedom of religion does not imply that Catholics have less freedom to exercise their’s, legalizing same sex marriage does not imply either that there would be fewer heterosexual marriages nor that there would be less procreation. To put it another way, the legalization of same sex marriage would not affect reproduction.

III. The Ban on Same Sex Marriage and Personal Autonomy

Perhaps we’re being unfair to the Court. Perhaps its argument it not that the State bans
same sex marriage for the sake of the reproduction of society, but that it does so just to show its preference for those couples who have a tendency to procreate, to wit, heterosexual couples. It’s not that same sex marriage implies less procreation, but that the State is willing to make public its preference for heterosexuals and wants to do so by giving them a special status – to the detriment of same sex couples.

For the sake of our discussion, we assume that it is legitimate for the State to give preference to some life plans over others. Of course, it may be argued that the liberal state should be neutral towards different life plans that do not harm third parties. Let’s put that discussion aside for a moment. The problem with this way of stating the State’s preference is that if the only point of the ban is to express a preference for heterosexual couples, then the means chosen is not the appropriate one because, autonomy-wise, the costs generated are too high. The state could express its preference in ways that do not necessarily restrict personal autonomy. For instance, it may support public campaigns for heterosexual marriage. In other words, given the presumption in favour of liberty, whenever the State has a “legitimate interest” in restricting some rights and there is more than one way to promote that interest, the duty of the State is to choose the least autonomy-restricting means. Otherwise, under Argentine law, that restriction would be unreasonable and, therefore, unconstitutional.

It may be argued that the mere fact that the state does not recognize the validity of same sex marriages is not a restriction of personal autonomy because that does not interfere with the life plans of same sex couples. This is because the state does not prohibit gays and lesbians from having homosexual sexual intercourse, nor from presenting themselves as same sex couples before others. That is to say, same sex couples
do not have a positive right to marriage. The only duty of the State is not to interfere with their plans, without providing them with the positive benefit of recognizing their status as married couples. In other words, for the Court, the Argentine Constitution does not prohibit same sex individuals from adopting the practice of engaging in homosexual intercourse as part of their life plan because, provided that what two individuals do with their sexual preferences does not harm third parties and is not an offence to public morality, whatever they do has to do with their privacy and any democratic polity should recognize and respect that sphere of privacy.

That argument, however, is not plausible enough. The ban on same sex marriage is indeed a restriction to the personal autonomy of gays and lesbians even if “autonomy” is understood as mere “non-interference.” If a man and woman willing to get married fulfil all the requirements established by Argentine law for marriages, the State official will marry them. In contrast, the State official will not marry a same sex couple. Thus, the same sex couple’s plan of getting married will not be fulfilled and their autonomy would be restricted. In other words, there is a life plan that is unavailable for same sex couples, but that heterosexual couples can fulfil: the union of two individuals regulated by certain rights and duties.⁵

IV. Marriage and Prevailing Values

The Court argued that prohibiting same sex marriage does not discriminate against same sex couples because this prohibition respects our prevailing values. In other words, these kinds of prohibitions are part of social and cultural values that, in general, the

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Argentinian people share at this point in time. The Court compares the ban on same sex marriage with the ban on incest or polygamy: these three prohibitions rest on secular traditions. To put it another way, the Court claimed that, in order to determine whether two persons may get married, it is necessary to appeal to the prevailing values in our societies. On that basis, the Court concluded that, according to these values, same sex couples do not qualify as a family: “family” is understood as a union between a man and a woman.

Now, prevailing values are majoritarian values. Just as any other constitution with liberal roots, the Argentine Constitution need not defend the values of the majority because if it did so, it would frustrate its own goal, to wit, the protection of minorities by means of the establishment of individual rights. The values of the majority do not need to be defended: they are safe precisely because they prevail over other values. The aim of a liberal constitution is to protect those individuals whose lifestyle is not popular and who have more chances of being discriminated against and oppressed by the majority. In John Hart Ely’s words,

. . . “[i]f the Constitution protects only interests which comport with traditional values, the persons more likely to be penalized for their way of life will be those least likely to receive judicial protection,” and that flips the point of the provisions exactly upside down. Reliance on tradition therefore seems consistent with neither the basic theory of popular control nor the spirit of the majority-checking

In other words, a law is an expression of prevailing values: a law is passed by the legislative body, which allegedly represents the voice of the majority, Judges must not reject an injunction \textit{because} the law that plaintiffs challenge reflects prevailing values. Precisely, an injunction is a claim that a law, which is part of prevailing values, should not be applied in a particular case because the law at stake violates individual rights. If judges were to reject injunctions by making reference to prevailing values, they would fail to fulfill their obligation to control the legislative body. Their rejection would merely be a restatement of something that is not news at all: legislation reflects certain prevailing values.

In order to reject an injunction, judges have to offer arguments that do not depend on whether the law that is being challenged reflects the values of the majority. Their arguments must explain why this law, which reflects the prevailing values, is compatible with the Argentine Constitution. The mere fact that a law is an expression of the values of the majority says nothing about its constitutionality: a further argument has to be made to show that those values are the values of the Argentine Constitution. In a liberal polity, the mere fact that marriage has traditionally been conceived as a union between individuals of different sexes does not satisfy the high standard of “compelling State interest” applicable to “suspicious classifications.” This was the position of the Supreme Court of Massachusetts in “Goodridge v. Department of Public Health,” where a local law that
banned same sex marriage was considered unconstitutional.⁷

V. International Conventions and Same Sex Marriage

The injunction presented by the plaintiffs invoked certain international human rights conventions. They appealed to Section 17 of American Convention on Human Rights, which establishes “[t]he right of men and women of marriageable age to marry and to raise a family.” Furthermore, they mentioned Section 16 of the Universal Declaration of Human Rights, which says that “[m]en and woman of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. . . .” Finally, they invoked Section VI of American Declaration of the Rights and Duties of Man, which claims that “[e]very person has the right to establish a family. . . .”

In response to these arguments, the Court of Appeals held that, if due attention is paid to the dates in which the invoked conventions were signed and ratified, it will become apparent that by that time people did not raise the issue of same sex marriage. For the Court, that means that, under those conventions, the right to get married is established only in favor of heterosexual couples. In addition, the Court held that the fact that these conventions literally say that men and women have a fundamental right to get married implies that only marriages celebrated between a man and a woman are recognized. Otherwise, these conventions would have made explicit reference to a right to get married of all persons, just as these conventions refer to a right to life, liberty, integrity, and so on of all persons. According to the Court, the upshot of the fact that these conventions do not consider same sex marriage is that ratifying states should not

⁷ Ruling of 18.11.2003, per the concurring opinion of Greaney.
permit same sex marriage. However, this argument is wrong.

The fact that a law does not consider an action, like getting married with a person of one’s same sex, does not imply that this law does not permit it. This inference is valid only if there is a rule stating that all the actions that the law does not explicitly permit are forbidden - fortunately, international human rights conventions do not include this kind of rule.

If a law does not consider an action, there is a legal loophole. In light of that, the Court of Appeals cannot conclude that, according to the human rights conventions at stake, same sex marriage is forbidden. In any case, the conclusion should be that, under those conventions, same sex marriage is neither permitted nor forbidden and, therefore, there is a loophole on the issue of same sex marriage. Hence, the Court’s argument is neither against nor in favor of the legality of same sex marriage. Given this loophole, in order to argue in its favor or against it, a further argument - perhaps based on higher legal principles or on other relevant legal materials - should be made. Now, if, as we suggested earlier, the ban on same sex marriage is based on a “suspicious classification,” then the burden of proof falls on any position that purports to support that classification. We suggested that the Argentine State has not yet made the case for the ban on same sex marriage.

VI. Final Thoughts

Individuals decide to get married for many reasons. Some of them are willing to spend their lives together and have kids, but choose to get married before having kids because

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8 Carlos E. Alchourrón y Eugenio Bulygin, *Introducción a la metodología de las ciencias jurídicas y sociales* (Buenos Aires: Ed. Astrea, 1974), pp. 221-224
they prefer to be married before having kids. There are also individuals who get married but do not want to have kids, or people who, even though they cannot have children for biological reasons, still want to be married. People may want to get married because of the intimacy enjoyed by married couples, for company, social recognition, economic benefits, and so on. It is obvious that, just as heterosexual couples do, same sex couples can have long and stable relationships. However, as was stated in *Halpern* by the Ontario Supreme Court, the ban on same sex marriage promotes the idea that same sex couples are unable to do so and that, therefore, they do not deserve the same sort of respect that heterosexual couples are entitled to receive. Contrary to what the Argentine National Civil Court of Appeals says, the very essence of marriage is not necessarily procreation.