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Martin Hevia

Daniela Schnidrig

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AUTONOMY, CONSENT AND MEDICAL CONFIDENTIALITY: PATIENTS' RIGHTS IN ARGENTINA

*Martín Hevia & Daniela Schnidrig**

WHAT rights do patients have in light of the Argentine National Constitution? For many years, this question was strange to Argentine constitutional practice. Respect to autonomy and privacy was not a fundamental value in Argentine society. In addition, constitutional law used to grant primacy to "public interest" over personal opinions or values. Thus, for example, in an attempt to safeguard the value of human life, it was justified to compel a person to accept medical treatment against her will.

The paradigm shift in the conception of the Argentine constitutional law that took place after the return of democracy in 1983 and the incorporation of human rights treaties in the 1994 constitutional amendment had a positive impact on the way the relationship between doctors and patients is now conceived.¹

Firstly, the Argentine National Constitution acknowledges that people have a right to health.² Hence, in the Argentine legal system, it is a fundamental human right that is acknowledged and protected in several international treaties and covenants incorporated in the Argentine National Constitution in 1994.³ This explicit acknowledgement is impor-

* Executive Dean, School of Law, Universidad Torcuato Di Tella (Argentina); Lawyer, Universidad Torcuato Di Tella. This paper is a translated version of the article "Autonomía, consentimiento y confidencialidad médica: los derechos de los pacientes en el derecho constitucional argentino", published in *Tratado de los Derechos Constitucionales*, Tomo II. Abeledo Perrot. Translated by María Laura Serrano, revised by the authors. The best account of patients' rights after the 1994 Constitutional amendment is ALFREDO KRAUT, *LOS DERECHOS DE LOS PACIENTES* (1997).

1. Art. 31, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

2. Art. 41, CONST. NAC. (Arg.).

3. See art. 75.1 CONST. NAC. (Arg.); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 3 & art. 8, (Dec. 10, 1948); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI) A, U.N. Doc. A/RES/2200A(XXI), at 12.1, 12.2 (Dec. 16, 1966); Organization of American States, American Declaration of the Rights and Duties of Man, May 2, 1948, O.A.S. G.A. Res. XXX, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/II.82, doc. 6 rev. 1 (1992); American Convention on Human Rights, art. 26, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 (read with remission to art. 33 of the O.A.S. Chart); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (Dec. 18, 1979); Convention on the

tant because health is a good that substantially contributes to people's quality of life. It has an intuitive value for people, families, and communities. It is not difficult to understand why we value health. Much of what we expect to become, individually or as community members, is based on health. Medical care enables people to participate actively in political, social, or economic aspects of their society. It also protects people's possibilities to have access to many opportunities, services, and life plans.⁴ The constitutional acknowledgement of the right to health serves a good criterion to assess the state's health public policies.

Secondly, nowadays, it would be odd to hear someone say he or she is not willing to accept or refuse any treatment proposed by his or her medical practitioner, and it would be odd to hear of someone who believes that physicians shouldn't be bound to professional secrecy and keep to themselves the sensitive information that patients reveal to them.

However, notwithstanding the acknowledgement of the right to health, neither the Argentine National Constitution nor the international human rights treaties with constitutional status expressly acknowledge patients' rights. This acknowledgment has had its mention in case law and in some national and local laws. Particularly, Argentina's Supreme Court case law and other courts of justice have analyzed the scope of two rights: the right to offer informed consent and the right to medical confidentiality. They both reflect the importance of autonomy and patients' privacy. The patient's right to offer her informed consent is the expression of the exercise of their autonomy. At the same time, the right to confidentiality reflects the patient's concern for sensitive information and health that he or she reveals to his or her medical practitioner. The decision to divulge or not to divulge certain personal information should be left in the patient's hands. In some circumstances, it may be necessary to violate their privacy by sharing that information—for instance, to prevent the patient from causing damage to third parties. But the scope of this exception is not that clear.

This article analyzes the scope of informed consent and professional secrecy in light of the Argentine legal system, case law, and doctrine. It is organized into three sections. In the first section, we focus on the scope of autonomy in the Argentine legal system and its implications for the exercise of the right to accept or refuse medical treatment. This section also explains what informed consent is and how Argentina's National Supreme Court and other lower courts have interpreted it.

In the second section, we concentrate on patients' rights to medical secrecy, and we discuss four questions in light of the Argentine National Constitution, the current legislation, the national case law, and the Inter-

Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25, art. 24.2, (Nov. 20, 1989).

4. Lawrence O. Gostin, *Transforming Global Health Through Broadly Imagined Global Health Governance*, 11 REVISTA ARGENTINA DE TEORÍA JURÍDICA [R.A.T.J.] 1, 1 (2010), available at http://www.utdt.edu/ver_contenido.php?id_contenido=6288&id_item_menu=5858.

American Human Rights System. According to the Argentine National Constitution, do health professionals have a duty to keep patients' confidential information within their professional relationship? If they do, is it an absolute duty? If that were not the case, what boundaries would be compatible and required by the constitution? Can the professional invoke "public interest" to justify his or her decision to violate professional secrecy?

Lastly, in the third section, we offer some conclusions.

I. INFORMED CONSENT AND AUTONOMY

The starting point to discuss the concept of informed consent and how it is reflected in the Argentine legal system is the principle of personal autonomy. According to this principle, autonomous persons have the capacity to develop their own conception of good; that is to say, the capacity to have "an ordered family of final ends and aims which specifies a person's conception of what is of value in human life or, alternatively, of what is regarded as a fully worthwhile life."⁵ In light of this idea, people must be free to choose their own life plans or the pursuit of excellence, and third parties ought not to interfere in that choice. On this basis, in order to respect autonomy, the state should let persons pursue their own plans because self-government is an end in itself. It is unacceptable to invoke the person's wellbeing to interfere with his or her decisions. Who is better than himself or herself to judge the value of his or her preferences? This liberal conception of the person is incompatible with the vision that holds that certain preferences are unacceptable and that the community, through the state, ought to promote certain ideals of human virtues. The principle of autonomy is accompanied by another principle, inviolability of the person, which bans the imposition of sacrifices on a person only to benefit others or collective entities. This principle is reflected in the moral prohibition to use persons as mere means for purposes that are not theirs. Thus, for example, public policies could not violate human rights, even if doing so would promote valuable collective interests.⁶

What is the scope of the principle of autonomy in the Argentine legal system? Recently, in the *Arriola* decision, the Supreme Court discussed the scope of the recognition of autonomy in the constitution and the international treaties with constitutional status reflected in Article 19 of the Argentine Constitution and Article 11.2 of the American Convention on Human Rights, among other articles.⁷ In general, Supreme Court justices agreed on the idea that, according to Argentine National Constitution,

5. JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 19 (Erin Kelly ed., 2001).

6. For a discussion on the scope of autonomy and inviolability, see CARLOS NINO, *DERECHO, MORAL Y POLÍTICA: LOS ESCRITOS DE CARLOS S. NINO* [LAW, MORALITY & POLITICS: THE WRITINGS OF CARLOS S. NINO] 140–42 (2007).

7. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 25/8/2009, "Arriola, Sebastián y otros s / recurso de hechos," *Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación* [Fallos] (2009-891-1)

the state cannot interfere in any decisions or plans that an individual may have as long as those plans do not affect the rights of third parties.⁸ It is because of this statement that the detrimental consequences of a person's decisions regarding his or her own health *do not* justify the state's interference with that decision.⁹ Judge Lorenzetti explained this point in the following fashion:

. . . Article 19 of the National Constitution constitutes a boundary that protects personal freedom against any type of interference interventions, including that of the State. It is not only about respecting private actions, but also about the acknowledgement of a sphere in which every adult individual is sovereign to decide freely about the lifestyle they desire. . . . This powerful acknowledgement of personal freedom implies an inversion of burden of proof, so that any restrictions to that sphere of freedom must be justified in the constitutional legality.¹⁰

This way of understanding the value of autonomy is also reflected in the interpretation of Article 11 of the American Convention on Human Rights, developed both by the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR).¹¹ Recently, for instance, the Commission has interpreted Article 11 as follows:

The case law of the IACHR and the Inter-American Court holds that Article 11 of the Convention has a broad content that includes protection of the home, the private life, the family and correspondence

. . . .
One fundamental purpose of Article 11 is to protect individuals from arbitrary action by State authorities that intrude into the private sphere. The Inter-American Court has held that "the sphere of privacy is characterized by being exempt and immune from abuse and arbitrary invasion by third parties or public authorities"

The guarantee against arbitrariness is intended to ensure that any such regulation (or other action) comports with the norms and objectives of the Convention, and is reasonable under the circumstances. The IACHR has observed that protection of the individual against any arbitrary interference by public officials requires that the state adopt all necessary legislation in order to ensure this provision's effectiveness.

Taking account of the jurisprudence of the European Court of Human Rights, the IACHR has held that protection of private life encompasses a range of factors pertaining to the dignity of the individual, including, for example, the ability to pursue the development

(Arg.) (where the Court discussed whether forbidding the use of drugs for personal consumption was consistent with the Constitution).

8. *Id.* at 22.

9. *Id.* at 27-28.

10. *Id.*

11. See INTER-AM. COMM'N ON HUMAN RIGHTS, REPORT NO. 85/10 CASE 12.361MERITS GRETEL ARTAVIA MURILLO ET AL. V. COSTA RICA (2011), available at <http://www.cidh.oas.org/demandas/12.361Eng.pdf>.

of one's personality and aspirations, determine one's identity, and define one's personal relationships.

In its case law, the European Court of Human Rights has expanded the content of the right to have one's private life respected by providing that while the concept of "private life" covers the physical and psychological integrity of a person, it also encompasses aspects of a person's physical and social identity, including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world.¹²

In order to offer informed and full consent, it is necessary to consider all the information related to the patient's state of health for he/she to exercise her right of autonomy and free determination, which will be reflected in his or her own, rational and private decision, according to her personal moral commitments. Therefore, it is plausible to argue that the right to obtain information comes from Article 19 of the Argentine National Constitution, because in order for the patient to make decisions related to his or her health and exercise his or her autonomy, the patient needs to have proper information. Nonetheless, while it has been acknowledged in doctors' professional ethic codes that patients have rights to offer informed consent, in Argentina, there was no official legal rule expressing recognition of it. But in 2009, the Argentine National Congress passed the Patients' Right Law 26.529.¹³ Article 2(f) recognizes the patient's right to receive sanitary information relevant to his or her health.¹⁴ This right also includes the right to refuse receiving information, which is restricted in cases where the physical integrity or the life of other persons would be at risk, or for public health causes.¹⁵ Article 3 of the law defines sanitary information as "that which, in a clear way, is proper to the patient's comprehension ability, informs about her health, the studies and treatments that were to be practiced and their foreseeable evolution, risks, complications and fallouts," and "the therapeutic alternatives and their risks, and the prevention measures, their benefits and damages."¹⁶

Once the patient has all the relevant information about his or her state, the patient may take his or her own decision and exercise sovereignty over his or her own body. The individual's right to enjoy his or her autonomy through informed consent is stated in Articles 4, 5, 6, 7, 9, and 10 of Law 26.529 of Patients' Rights, which defines informed consent as:

[T]he adequate declaration of will, made by the patient, or by their legal representatives if any, issued after receiving by the intervening professional, clear, accurate and appropriate [information]. . . .

The statutory right in case of suffering from an irreversible or incurable illness, or when she is in end-stage, or have suffered injuries that

12. *Id.* ¶¶ 69–73.

13. Law No. 26.529, Nov. 19, 2009, [31.785] B.O. 1, art. 2(f) (Arg.).

14. *Id.*

15. *Id.*

16. *Id.* art. 3.

place them in the same situation, when it comes to the refusal of surgical, hydration, nutrition, of artificial resuscitation procedures, or to the withdrawal of vital supportive measures, when being extraordinary or disproportionate in relation to improvement perspectives, or that produced excessive suffering, also, the right to refuse hydration and nutrition procedures when these produce as only effect the prolonging in time of that irreversible and incurable end-stage.¹⁷

Nevertheless, there are requirements for valid informed consent. First of all, only *competent* individuals may grant their consent.¹⁸ The European Convention on Bioethics defines an "incompetent person" as one who does not have the capacity to express his or her consent.¹⁹ Thus, Article 5 of Decree 1089, which regulates Law 26.529, states that there ought to be consent by representation:

[W]hen, according to the treating professional, the patient is not able to make decisions, or when their physical or psychic state would not allow her to take charge of her situation . . . in the case of the legally disabled or minors who are not intellectually or emotionally able to understand the scopes of the practice to be authorized.²⁰

Although respect for the patient's autonomy is the rule, in some cases it is reasonable to accept interferences with autonomy, such as with minors, who may not be able to form judgments, or in the case of individuals who suffer from cognitive incapacities. Yet, it is important to point out that that the legal category "incompetent" may be both under- and over-inclusive, since minors quickly develop their own identity and preferences by their experiences, whereas some adults may be actually less sophisticated and mature than some minors.²¹ In any case, when it comes to individuals who are not able to offer proper consent, either because they are minors or because they do not have full capacity to grant it, their opinion ought to be heard. Thus, Article 5 of Decree 1089 establishes that the representative making the decision should only do so after having listened to the patient's opinion, respecting the patient's dignity, and fostering the patient's participation in the process, according to his or her competence and discernment.²² In the case of minors, Article 12 of the Convention on the Rights of the Child states that state parties shall assure the child, who is capable of forming his or her own views, that he or she has the right to express those views freely in all matters affecting him or her, and that the child's views are to be given due weight in accordance with his or her age and maturity.²³ In addition, Article 3 of the Integral

17. *Id.* arts. 4–7, 9, 10.

18. *Id.* art. 5.

19. PEDRO FEDERICO HOOFT, *BIOÉTICA, DERECHO Y CIUDADANÍA* [BIOETHICS, LAW, & CITIZENSHIP] 41 (2005).

20. Law No. 1089, July 5, 2012, [32.433] B.O. 1, arts. 5, 7, (Arg.).

21. MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT*, 150–51 (1993).

22. Law No. 1089, July 5, 2012, [32.433] B.O. 1, art. 5 (Arg.).

23. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25, art. 12 (Sept. 2, 1990).

Protection of Children and Adolescents Law 26.061 states that children have a right have to be heard; the age, degree of maturity, discernment capacity, and other personal conditions of the child must be respected.²⁴ That is to say, even in those cases in which the person does not have full capacity to grant informed consent, his or her participation and inclusion in the decision-making process must be promoted, and his or her opinion must be heard and taken into account.

A. CASE LAW ON AUTONOMY AND INFORMED CONSENT

We will now analyze the extent of autonomy when it comes to the possibility of refusing medical treatment. According to the Argentine Supreme Court, individuals are free to accept or refuse medical treatment, even if it would cause their death. A paradigmatic exercise case of patient autonomy is the 1993 Supreme Court ruling in *Bahamondez*.²⁵ Bahamondez was admitted to a hospital in Ushuaia, Province of Tierra del Fuego because of digestive bleeding.²⁶ The physicians suggested a blood transfusion.²⁷ Bahamondez refused it because he belonged to the religious group of Jehovah's Witnesses and a transfusion would go against his religious beliefs.²⁸

The first instance judge authorized the transfusion, even against Bahamondez's will.²⁹ The Federal Court of Appeals confirmed this decision on the grounds that Bahamondez's decision of refusing the transfusion constituted a "slow suicide, committed by a non-violent means and not by his own hands by means of an act, but through the proper omission of the suicidal [person]."³⁰ The Court argued that Bahamondez's attitude was "nihilistic" and that an expression of individual freedom that affected his life, that is, the "supreme good," would be unacceptable.³¹

Against this first instance decision, Bahamondez interposed a writ of certiorari ("Recurso Extraordinario Federal") based on the constitutional right to religious freedom and the principle of reserve.³² Bahamondez held that he wanted to live, not to commit suicide, but that the treatment was against his religious beliefs.³³ Although Bahamondez's medical condition had been resolved without the transfusion, the case eventually reached the Supreme Court.³⁴ Although the majority of the Court thought that the matter was abstract because the patient no longer needed the transfusion, six judges wrote their opinions about the mat-

24. Law No. 26061, Oct. 21, 2005, [30.767] B.O. 3, arts. 2, 3 (Arg.).

25. CSJN [National Supreme Court of Justice], 6/4/1993, "Bahamondez, Marcelo s/ medida cautelar," Fallos (1993-316-479) (Arg.).

26. *Id.* at 488.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 487.

ter.³⁵ Judges Fayt and Barra argued that even though a ruling in this case would be futile, Law 17.132 of Medicine Exercise, Dentistry and collaboration activities (1967) favored Bahamondez's position.³⁶ This law states that a patient's will has to be respected even when he or she refuses to be treated or hospitalized.³⁷ According to this view, Article 19 of the Argentine National Constitution grants persons the right to dispose of their actions, bodies, and lives.³⁸ The individual is attributed a realm of lordship, subject only to his will:

"Man is the axis and the center of all the legal system and as an end in himself—beyond his transcendent nature—his person is inviolable. Respect for the human person is a fundamental, legally protected value; for which the remaining character values are always instrumental character."³⁹

In turn, Judges Cavagna, Martínez, and Boggiano claimed that the rights of freedom of conscience and religious freedom have been previously acknowledged by the court as rights recognized by the constitution.⁴⁰ Freedom of conscience is the right to not be forced to carry out an act that is forbidden by one's own conscience, either by religious beliefs or moral convictions. In turn, religious freedom is a natural and inviolable right, so they wrote, which implies the legal autonomy that allows men to act freely according to their religion.⁴¹ Cavagna, Martínez, and Boggiano stated that the right to religious freedom entails:

[I]n its negative aspect, the existence of a sphere of immunity from coercion on the part of individuals and groups, but also by public authorities. This excludes every state intromission in an absolute way, from which a forced election of a certain religious belief could result in restricting free adherence from the principles that in conscience, are considered right or true.⁴²

They also understood that there is a big difference between a defender of euthanasia and an objector of conscience, since the practice of euthanasia or mutilating operations without a therapeutic purpose constitute "*manifestations of a culture of death*,"⁴³ whereas the objector of conscience in this case "does not seek suicide . . . but only intends to maintain the religious ideas he professes unscathed."⁴⁴ They assured, too, that Bahamondez's behavior was self-referential as long as third parties' rights were not affected.⁴⁵

35. See *id.* at 479.

36. *Id.* at 493.

37. Law No. 17132, Jan. 24, 1967, [21.119] B.O. 1, art. 132 (Arg.).

38. See art. 19, CONST. NAC. (Arg.).

39. "Bahamondez," *supra* note 25 at 494.

40. *Id.* at 497–98 (Martínez, J., and Boggiano, J, dissenting).

41. *Id.* at 497.

42. *Id.* at 498.

43. *Id.* at 499 (emphasis added).

44. *Id.* at 500.

45. *Id.*

Lastly, Judges Belluscio and Petracchi claimed that Bahamondez did not invoke a supposed right to death or suicide, but to his personal autonomy. They held that, "adults' possibility that they could be able to accept or refuse all interference in the sphere of their intimacy, is an essential requirement for the existence of the mentioned right to individual autonomy, which is the very foundation of constitutional democracy."⁴⁶

In this view, although the right to autonomy could be validly limited for relevant public interest, "the 'right to be left alone' . . . cannot be restricted just because the patient's decision may seem unreasonable or absurd for society."⁴⁷

They concluded that a judicial ruling that subdued an adult to a sanitary treatment against his will "*meant to turn Article 19 of the Magna Carta into a mere empty formula that would only protect the intimate realm of the conscience or those behaviors with such a scarce importance that would not have any repercussion in the external world.*"⁴⁸

After the enactment of the patients' rights law, in 2012 the Supreme Court mentioned the extent of informed consent again in the *Albarracini Nieves* case, where the Court ruled similarly as in Bahamondez.⁴⁹ Pablo Albarracini was admitted to Bazterrica Hospital in Buenos Aires.⁵⁰ He was unconscious and the physicians established that a blood transfusion was necessary.⁵¹ But, as Albarracini belonged to the religious group, Jehovah's Witnesses, he made a statement before a public notary in 2008 where he expressed he would not accept any blood transfusions even if his life was in danger.⁵² His father requested a cautionary measure that would order the transfusion to be practiced.⁵³ The first instance court upheld the solicited measure, considering that although Albarracini had expressed that he refused an eventual transfusion, he was not "in a condition to make decisions with full discernment."⁵⁴

The case reached the Supreme Court, which argued that there were no reasons to doubt the current validity of Albarracini's expression of will and that there was no evidence that he would not have considered the significance of his decision.⁵⁵

The court remembered Belluscio and Petracchi's opinion in *Bahamondez* and reaffirmed that "this Court has clearly established that Article 19 of the National Constitution grants the sphere of freedom, within which he can freely adopt fundamental decisions about himself without any state or third party interference, as long as those decisions do

46. *Id.* at 505 (Belluscio, J., and Petracchi, J., dissenting).

47. *Id.* at 506.

48. *Id.* at 506–07 (emphasis added).

49. CSJN [National Supreme Court of Justice], 1/6/2012, "*Albarracini Nieves c. Jorge Washington s/ medidas precautorias*," La Ley [L.L.] (2012-C-483) (Arg.).

50. *Id.* para. 1.

51. *Id.*

52. *Id.* para. 3.

53. *Id.* para. 1.

54. *Id.* para. 4.

55. *Id.* paras. 9, 10.

not violate third parties' rights."⁵⁶

In turn, the court cited the opinion of Judges Fayt and Barra in Bahamondez, regarding the lordship that every individual has over his persona and the right to act free from impediments.⁵⁷ The court stated that:

The possibility of accepting or refusing a specific treatment, or selecting an alternative form of treatment, is part of self-determination and personal autonomy; that patients have the right to choose options according to their own values or points of view, even when they may seem irrational or imprudent, and that free choice must be respected.⁵⁸

Lastly, in line with the *Bahamondez* ruling, the court held that the freedom of an adult's act could be limited if there was a relevant public interest at stake, which was not present in this case.⁵⁹

An important legal consequence of the court's ruling in *Albarracini* is that, as it has recently been sustained, "[N]ational Law 26.742 . . . finally clears up any doubts over the consideration of the therapeutic effort limitation as 'passive euthanasia,' that has been held by some doctrine, prompting confusion and promoting defensive medicine practices."⁶⁰ In other words, it is unnecessary to obtain judicial authorization to respect the patient's will.⁶¹ In its recent case law, the court has referred to the absence of necessity to obtain judicial authorizations in the cases in which the patient's health is involved: "A *contra legem* practice is being maintained, fostered by health practitioners and validated by operators of the national and local judiciary, which ignores those precepts, requiring (where laws require nothing), requirements like an application for authorization."⁶²

The discussion on informed consent and the right to refuse medical treatment has also taken place in the lower courts. One of them is the *Parodi* case.⁶³ In 1995, Ángel Parodi was admitted to a hospital in Mar del Plata, Province of Buenos Aires.⁶⁴ His right foot was amputated because of gangrene, which had resulted from his diabetes and alcoholism.⁶⁵

56. *Id.* para. 14.

57. *Id.* para. 15.

58. *Id.*

59. *Id.* para. 14.

60. Paula Siverino Bavio, *Derechos de los pacientes y muerte digna: comentario a la ley sobre el rechazo o la negativa al soporte vital* [Patients' Rights & Dignified Death: Commentary on the Law on the Rejection or Negative to Life Support], LA LEY 127, 130 (2012), available at <http://www.graciamedina.com/assets/Uploads/Suplem.-Identidad-de-gnero.1.pdf>.

61. *See id.*

62. CSJN [National Supreme Court of Justice], 13/5/2012, "F. c. A.L. s/ medida autosatisfactiva," Fallos (2012), at para. 19 (Arg.).

63. Juzgado de Primera Instancia [1a Inst.] [Provincial lower courts of ordinary jurisdiction], 18/9/1995, "Dirección del Hospital Interzonal General de Agudos (HIGA) de Mar del Plata s/ Presentación, Mar de Plata" (Arg.).

64. *Id.* para. 1.

65. *Id.* para. 3.

Months later, he was admitted again and the physicians determined it was necessary to amputate his left foot.⁶⁶ In view of his refusal to amputate his left foot, which was essential to save his life, the case reached the Criminal Court N°3 of Mar del Plata.⁶⁷ After the hospital's Bioethics Committee were advised to respect Parodi's will, Judge Hooft claimed, "if we do not object to the need of supplying information order to have a valid consent for the medical intervention, we must likewise accept the right of that patient to refuse a treatment that is considered convenient or necessary by the health team."⁶⁸

Thus, Judge Hooft concluded that:

Under the particular circumstances of the case, proceeding with the amputation of the second inferior limb of Patient Parodi, contravening his clear previously expressed will and being the patient considered "competent"—in the bioethics sense—would entail a serious violation of his personal sphere of freedom, of his intimacy and privacy; in sum, a serious offense to his dignity as a human being.⁶⁹

"That is why, in this case, the "life" value (as a legally protected good), through a medical intervention against the patient's will, cannot and must not prevail over the principle of dignity, inherent in every human being."⁷⁰

A more recent example of respect of personal autonomy is that of a 74-year-old doctor who died March 13, 2013, after being hit by a bus in the Province of Cordoba and refusing a blood transfusion because she belonged to the religious group, Jehovah's Witnesses.⁷¹ The woman was conscious when admitted to the hospital and signed a medical document in which she asked not to be transfused.⁷² Eventually, after not receiving the necessary blood transfusion, she passed away.⁷³ The Bioethics Committee of the Hospital issued a statement that made it clear that, by virtue of the Law 26.529 of Patients' Rights, they "had to admit her expression of will."⁷⁴

In a recent case in the Province of Neuquén, it was difficult to prove the patient's will because, unlike in the *Albarracini Nieves* case, the patient did not have a written statement indicating whether it was appropriate for him to receive certain medical treatment that would keep him

66. *Id.*

67. *Id.*

68. *Id.* para. 7.

69. *Id.* para. 8.

70. *Id.* para. 9.

71. Ariel Bogdanov, *Muere una testigo de Jehová por no querer recibir transfusión* [*He Died A Jehovah's Witness for Refusing to Receive Transfusion*], PERFIL (Apr. 2, 2013), <http://www.perfil.com/sociedad/Muere-una-testigo-de-Jehova-por-no-querer-recibir-transfusion-20130402-0004.html>.

72. *Id.*

73. *Id.*

74. *Id.*

alive.⁷⁵ In this case, the patient had been in a permanent, irreversible, vegetative state for eighteen years.⁷⁶ His sisters and curators requested the discontinuation of the vital supportive measures that maintained the patient alive in an artificial way.⁷⁷ The Superior Court of Justice of the Province of Neuquén decided the case, invoking article 21(d) of Law 24.193, which refers to article 6 of the previously mentioned Law 26.529.⁷⁸ According to this law, the sisters have standing to grant informed consent in the name of their brother.⁷⁹ The Superior Court insisted the new regulations on patients' rights do not require the court's legal intervention to implement the sisters' request.⁸⁰ Following the Supreme Court's ruling in the case *F.A.L.*, the Superior Court held that "imposing the legal authorization (in other words, of the state through one of its judicial body: the Judiciary), is a violation of the principle established in Article 19 of our National Constitution that excludes state intervention in the individual's reserved sphere [of privacy]."⁸¹ The court added that not requiring a legal authorization "also results in a more respectful solution of the legality principle, contained in that same principle, which states that nobody can be forced to do what the law does not stipulate, or be deprived of what it does not forbid, for the petitioners must not be obliged to ask for an authorization that, in the present times, the law does not require."⁸² On these grounds, the Superior Court concluded that it is not appropriate to rule about the sisters' request, as the Court is not authorized to do so.⁸³

In conclusion, the Supreme Court and Argentine lower courts have interpreted the National Constitution and concluded that it grants patients a wide range of choice as it regards their autonomy, reflected in their right to refuse medical treatment.

II. THE RIGHT TO MEDICAL CONFIDENTIALITY

"I swear by Apollo Physician and Asclepius and Hygeia and Panacea and all the gods, all the goddesses, making them my witnesses, that I will fulfill according to my ability and my judgment, this Oath and covenant . . . [W]hat I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on

75. Tribunal Superior de Justicia de Neuquén [Trib. Sup. Nqn.] 10/5/2012, "D.M.A. s/ declaración de incapacidad," pt. I (Arg.).

76. *Id.* pt. II.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* pt. III

82. *Id.* Courts in other jurisdictions have also followed this view. See, *In re Jobes*, 529 A.2d 434 (N.J. 1987). We borrow this quote from the amicus curiae filed by the Asociación por los Derechos Civiles (ADC) in "D. M. A. S/DECLARACIÓN DE INCAPACIDAD" (File N° 178, 2011)).

83. *Id.*

no account one must spread abroad, I will keep to myself, holding such things shameful to be spoken about."

—Hippocratic Oath

I will respect the secrets that are confided in me, even after the patient has died

Declaration of Geneva (according to
Amendments in 1968, 1983, 2006).⁸⁴

The ethical codes of different professions establish an obligation to respect professional secrecy.⁸⁵ For example, religious ministers, accountants, lawyers, and healthcare professionals have an obligation to respect professional secrecy. This obligation, however, is not always absolute. The codes acknowledge exceptions to this general principle. In the case of professional physicians, an absolute obligation of confidentiality could be unacceptable in some scenarios. For example, suppose that a married patient, who has a contagious disease, engages in sexual intercourse with his wife without the wife knowing of the medical condition of her husband. If the professional cannot waive its duty of respecting professional secrecy to let her know about the health condition of her husband, then she would face the risk of infection that she does not necessarily accept. Alternatively, what would happen if a father confessed his compulsion to beat his children? The professional could keep his confidentiality or protect the children. On the other hand, allowing exceptions to the general principle of confidentiality could entail too much freedom for the professionals, generating fear in patients over the possibility that certain information can be revealed to third parties or become public knowledge. That could dissuade people from seeking medical treatments or, alternatively, and directly, could make people hesitant to reveal necessary information to receive the correct medical treatment, that is to say, the patients could opt for lying to health professionals.⁸⁶ How does Argentine law deal with situations like those mentioned in this paragraph?

To begin with, professional secrecy in general (not only that of health professionals) is not expressly mentioned in the Argentine National Constitution.⁸⁷ Professional secrecy is also not expressly acknowledged by the international treaties incorporated in the Constitution by Article 75, subsection 22 of the Constitution.⁸⁸ Nevertheless, the Argentine case law

84. Peter Tyson, *The Hippocratic Oath Today*, NOVA (Mar. 27, 2001), <http://www.pbs.org/wgbh/nova/body/hippocratic-oath-today.html>.

85. *WMA Declaration of Geneva*, WORLD MEDICAL ASSOCIATION, <http://www.wma.net/en/30publications/10policies/g1>.

86. See MARGARET BRAZIER & EMMA CAVE, *MEDICINE, PATIENTS, AND THE LAW* 69 (4th ed. 2007).

87. Although it is connected to the right to privacy recognized in Article 19 of the Argentine National Constitution, Article 17 of the International Covenant on Civil and Political Rights, Article 11 of the American Convention on Human Rights, among other documents, professional secrecy as a professional duty and a patient's right is not expressly mentioned. See Art. 17, 19, CONST. NAC. (Arg.).

88. Art. 75, § 22, CONST. NAC. (Arg.).

has legal norms that expressly acknowledge the right to medical secrecy.

Article 11 of Law 17.132 of the Medicine Practice, Dentistry and collaborative activities (1967) establishes:

Anything that would reach to the persons' knowledge, whose activity is regulated by the present law, with a reason or about the exercise, could not be disclosed—except on those cases in which other laws determined it or when it is a question of preventing a greater wrong and without prejudice to the provisions in the [Argentine] Criminal Code—but to institutions, societies, magazines or scientific publications, prohibiting its facilitation or using it with propaganda purposes, publicity, profit or personal benefit.⁸⁹

Article 156 of the Argentine Criminal Code sanctions those who “having news, because of their state, profession or employment, of a secret whose divulgence could cause harm, revealed it without a just cause.”⁹⁰ The Argentine National Criminal Procedure Code also stipulates in article 244 the obligation of those who exercise “any branch in the art of healing” of denouncing those crimes against life and physical integrity “except when the known facts were under professional secrecy.”⁹¹

The more recent Law 26.529 of the Patients' Rights (2010) provides in Article 2, subsection d the right to confidentiality and reserve that the patient has regarding any person who participates or has access in some way to their documentation.⁹² In the same line, Law 25.326 of Personal Data Protection (2000) considers the information regarding a person's health, as “sensitive data”: Article 10 establishes the obligation to respect professional secrecy of any person who intervenes in any stage of the personal data treatment.⁹³

The American Convention on Human Rights, which by article 75.2 of the Argentine Constitution⁹⁴ has constitutional status, does not expressly establish a right to confidentiality.⁹⁵ Nevertheless, IACtHR, the ultimate Convention's interpreter, has discussed the scope in confidentiality in the Convention and in the Inter-American human rights system. The 2004 *De la Cruz Flores v. Peru* judgment is paradigmatic.⁹⁶ De la Cruz Flores and another group of physicians were arrested and accused of belonging to a terrorist organization and of having provided medical assistance

89. Law No. 17.132, Jan. 27, 1967, [21.119] B.O. 1 (Arg.), available at <http://www.infoleg.gov.ar/infolegInternet/anexos/15000-19999/19429/norma.htm>.

90. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 156 (Arg.) available at <http://www.infoleg.gov.ar/infolegInternet/anexos/15000-19999/16546/texact.htm#19>.

91. CÓD. PROC. PEN. [CRIMINAL PROCEDURE CODE] art. 244 (Arg.), available at <http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/383/texact.htm#9>.

92. Law No. 26.742, May 9, 2012, [32.404] B.O. 1 (Arg.), available at <http://www.infoleg.gov.ar/infolegInternet/anexos/160000-164999/160432/norma.htm>.

93. Law No. 25.326, Oct. 30, 2000, [31.965] B.O. 2 (Arg.), available at <http://www.infoleg.gov.ar/infolegInternet/anexos/60000-64999/64790/norma.htm>.

94. Art. 75.2, CONST. NAC. (Arg.).

95. American Convention on Human Rights, art. 26, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143.

96. *De La Cruz-Flores v. Peru*, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 115, (Nov. 18, 2004).

(medicine, healings, etc.) to terrorists of that group.⁹⁷ A faceless court condemned them and, even though the rulings were withdrawn several years later, De la Cruz Flores continued to be detained.⁹⁸ The case reached the Inter-American Court, which based its decision on the Peruvian Constitution, specifically Article 2.18,⁹⁹ which established the right of *every person to maintain professional confidentiality*.¹⁰⁰ The court stated that confidentiality is one of the essential assumptions in the physician-patient relationship.¹⁰¹

In the case, the IACtHR argues against the criminalization of the exercise of the medical profession.¹⁰² To support such arguments, it mentions several international instruments that grant special protection to the exercise of the medical profession.¹⁰³ The IACtHR also cites principles of humanitarian law¹⁰⁴ and the Geneva Conventions.¹⁰⁵ Although the court did not decide the case on the basis of humanitarian law, the reference has important rhetorical value. According to Article 16 of Protocol I (international conflicts) and Article 10 of Protocol II (non-international conflicts) of the Geneva Conventions of 1949 “[u]nder no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.”¹⁰⁶ Using this particular reference, the Court clearly demonstrates its intention to render special status to medical activities.¹⁰⁷

97. *Id.* para. 3.

98. *Id.*

99. *Id.* para. 98.

100. Every person has the right to “keep his political, philosophical, religious, or any other type of conviction private and to reserve the professional secrecy.” Constitución Política del Perú, art. 2 (1993).

101. De La Cruz-Flores v. Peru, *supra* note 96, para. 101.

102. *Id.* para 74.

103. *Id.* para 75.

104. *Id.*

105. The court also cites the (i) International Code of Medical Ethics of the World Medical Association; (ii) Regulations in time of armed conflict, World Medical Association; (iii) Principles of European Medical Ethics; (iv) Code of Ethics and Deontology of the Medical College of Peru (document concerning the merits and eventual reparations and costs, volume IV, folios 846 to 857); and (v) Law, Statute, and Regulation of the Medical College of Peru. For example, Article 12 of the Code of Ethics and Deontology of the Medical College of Peru states that, “medical activity is every action or disposition in which the doctor engages during the exercise of the medical profession. By this is understood: activities of diagnosis, therapy and prognosis in which the doctor engages while attending patients, and those [acts] that result directly from these [activities]. The medical activities mentioned are exclusively within the scope of the medical professional.” *See id.*

106. *Id.* para. 57(b).

107. According to Article 62.3 of the American Convention on Human Rights, the IACtHR’s jurisdiction comprises all cases concerning the interpretation and application of the provisions of this Convention. Thus, it seems that the IACtHR quotes humanitarian law and international and local codes of Medical Ethics only for informational purposes, because a decision by the IACtHR cannot be based on provisions other than those of the American Convention on Human Rights. However, another explanation for these quotes is available. It may be that the IACtHR thinks these rules have the status of *peremptory norms*, a fundamental principle of international law that cannot be derogated. Thus, it may be that when determining which standards are to be considered regarding medical confidentiality, the

In his separate opinion, Judge Sergio García Ramírez clearly holds that while a physician may commit crimes that may warrant criminal sanctions, the ultimate aim of the medical act is to preserve a fundamental legal right: the right to life.¹⁰⁸ According to García Ramírez,

One of the oldest and most noble activities is that designed to safeguard the life and health of the individual. In this case, what is involved is the protection of the highest-ranking rights, a condition for the enjoyment of all the others [rights]. Society as a whole has an interest in it and the State must protect it.¹⁰⁹

García Ramírez understands that the special legal protection of medical acts finds its basis in the social utility derived from this activity.¹¹⁰ He holds that

[T]he safeguard and development of the lives of the individual and the group have led to identifying, encouraging and regulating the performance of certain activities—scientific, technical, artistic, relating to public or social service, etc.—which are considered to be socially useful and even necessary, and which are generally surrounded by appropriate guarantees.¹¹¹

García Ramírez expresses the importance of the State's refrain from dissuading physicians to fulfill their duties:

If the State imposed on or authorized doctors to misuse their profession, as has occurred under totalitarian regimes, it would be just as censurable as if it prevented them from complying with their ethical and juridical duty, and even imposed penalties for such compliance. In both cases the State would be harming the right to life and health of the individual, both directly and by intimidation or restrictions imposed on those who, due to their profession, are regularly obliged to intervene in the protection of those rights.¹¹²

García Ramírez's main concern seems to be that the State should not dissuade doctors from fulfilling their professional obligations:

[T]he State cannot violate the protection of health and life for which doctors are responsible, by norms or interpretations of norms that dissuade a doctor from complying with his duty, [. . .] or because they [such norms] oblige him to deviate from his proper functions and

IACtHR has to look into the internationally accepted principles in the area at stake. Accordingly, if the court were to discuss, say, the professional ethics of lawyers, it would appeal to international standards such as those accepted by the International Bar Association. If this alternative account of what the IACtHR is doing is right, it follows that this reference by the court is related to the IACtHR's view that Peru had violated the principle of legality: given that these peremptory norms are binding in the Peruvian legal system.

108. *De La Cruz-Flores v. Peru*, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 115, para. 7 (Nov. 18, 2004) (separate opinion of Judge García Ramírez).

109. Separate opinion of Judge García Ramírez in *De la Cruz Flores* (2004) IACtHR Series C 115, par. 6.

110. *Id.* para. 6.

111. *Id.*

112. *Id.* para. 7.

assume others that enter into conflict with the former, pose unacceptable dilemmas, or change the basis of the relationship between doctor and patient, *as would happen if doctors were obliged to inform on the patients they treat*. A similar situation would arise if lawyers were forced to report the unlawful acts committed by their clients (which they learn about through their relationship of assistance and defense), or priests to reveal the secrets of the confessional (emphasis added).¹¹³

So, just as the priest who hears confessions or the lawyer whose client confesses having committed a crime, the physician has the duty and the obligation to keep professional secrecy. If the state forced the physician to reveal information, obtained in exercise of their profession, the special protection that it has to be granted to the medical act, would not be respected. It is the duty of the state to ensure the protection of this socially useful activity, to grant guarantees to the medical act.

The IACtHR and García Ramírez's analyses concentrate on the physician's duty and right of not revealing information before that of the right of the patients to confidentiality. The justification of the obligation of not revealing information is based in public health and in the futile consequences that would force physicians to reveal confidential information regarding the patient's health.

The Argentine Supreme Court of Justice, the ultimate interpreter of the Argentine Constitution, follows a similar position. In the *Baldivieso* judgment, the Supreme Court reaffirmed the right to confidentiality and analyzed its scope.¹¹⁴ César Baldivieso was admitted to a hospital emergency room in the Province of Salta, having ingested cocaine hydrochloride pills. Somehow, the information spread and reached a police agent, presumably because the treating physicians disclosed the information.¹¹⁵ Baldivieso was sentenced to four years imprisonment for the criminal offense of transporting drugs. The case finally reached the Supreme Court. The Attorney General's verdict and that of the court analyzed the scope of the duty of confidentiality and medical secrecy. The Attorney General held that

Through the assurance to each and every patient that their medical secrecy will be kept, the general good is obtained, which not only consists of the protection of the secrets of that particular patient, which was kept closely-guarded, but also of the general confidence that there will be confidentiality. In this way, by strengthening this feeling, the patients' recurrent frequency to the medical treatment is maximized; on the contrary, it would diminish if it were not expected that the intimate data would be privately kept. Thus, public health is promoted.¹¹⁶

113. *Id.* para. 8.

114. CSJN [National Supreme Court of Justice], 4/4/2010, "César Alejandro Baldivieso s/ Causa No 4733," B 436. XL. RHE. (Arg.).

115. *Id.*

116. *See id.* at 11.

The Supreme Court adhered to the Attorney's verdict and referred to the *Natividad Frías*' plenary. It held that

In abstract, it can be understood that it is the weighting between the right to confidentiality for every inhabitant of the Nation who requires attention from a professional health care even when it involves criminal behavior, as an integral part of their individual autonomous sphere . . . and the State's interest in the prosecution of crimes. *But, in concrete and in the case, it is nothing less than a person's right to life and the State's interest.*¹¹⁷

Moreover, the court highlighted the supremacy of dignity in the Argentine constitutional legal system, pointing out that

The republican principle of government prevents the State from pursuing crimes using immoral means, as taking advantage of the imminent risk of death imposed on the defendant who goes to medical assistance, through the imposition of an obligation of the physician to turn the defendant into an agent of the criminal State prosecution.¹¹⁸

Other Argentine lower courts have also examined the value and justifications for confidentiality. The National Criminal and Correctional Appeals Court, for example, bases the right to confidentiality on ethical reasons, that is to say, on the patients' rights. Thus, it held that confidentiality and medical secrecy has its foundation in the right to health and intimacy, safeguarded in the Articles 19 and 33 of the Argentine Constitution¹¹⁹, and not respecting the duty of professional secrecy entails a violation of the right against self-incrimination, as well as the right to intimacy.¹²⁰

B. LIMITS OF PROFESSIONAL SECRECY

The Argentine legal system includes norms that refer to the limits of respecting professional secrecy. The Argentine Penal Code sanctions in Article 156, those who "having news, because of their state, profession or employment, of a secret whose divulgation could cause harm, revealed it without a just cause."¹²¹ Therefore, it is important that we question ourselves about what is "just cause." Our legal system does not determine the scope of this concept.

117. *See id.* at 17 (Emphasis added).

118. *Id.*

119. "[P]ues es claro que la accesibilidad a un tratamiento médico adecuado depende en gran medida de la convicción que pueda tener quien concurre a la asistencia de que su confianza será retribuida y su intimidad respetada." "[I]t is clear that access to adequate medical treatment depends largely on the belief that those who attend to you will be trusted to respect privacy." *See* Poder Judicial de la Nación, 30/4/2009, "Muñoz Alcalá, Paulino s/ causa no 41.557," Juzg. Fed. n/ 6 - Secret. n/ 11 (Arg.).

120. *See* C. Nac. Civ. y Com. Fed., Sala VI, "S. A. E.," 23/10/2007. (Arg.).

121. COD. PEN. [CRIMINAL CODE] art. 156 (1984) (Arg.).

While confidentiality is a right and an obligation from the physicians' side, it cannot have an absolute character. According to the IACHR, no right acknowledged in the Convention is absolute: acknowledging absolute rights would be contrary to the aim of the American Convention—to protect human rights generally.¹²² According to the IACtHR, for a restriction of a right to be legitimate, it (i) must be taken in response to “an urgent social need” and directed towards “satisfying an imperative public interest”; (ii) must employ the least restrictive alternative, i.e., the available means which least jeopardizes the protected right; and (iii) must be “proportional to the interest [that it seeks to protect] and must adjust itself to the achievement of this legitimate objective.”¹²³

To understand the scope of “just cause,” it is useful to explore solutions in other systems. Two famous pioneer cases come from California and Canada. In *Tarasoff v. Regents of the University of California*, the Supreme Court of California held that the duty of medical confidentiality is implicitly subordinated to the physician's obligation to protect third parties when the doctor knows that his/her patient will seriously injure another person.¹²⁴ The notoriety of this case can be attributed to, among other things, the maxim that “the privilege of protection ends where a public threat begins.”¹²⁵ In turn, in a famous Canadian case, the Supreme Court of Canada adopted a similar standard, identifying three factors to decide whether a doctor may abrogate her duties of confidentiality: 1) there must be a clear risk to a person or identifiable group; 2) the risk must involve serious physical injury or death; 3) the risk must be imminent.¹²⁶ More recently, in Colombia, the Constitutional Court held that in extreme situations medical secrecy must be revealed to prevent the consummation of a serious crime.¹²⁷

122. See *Artavia Murillo et al. (“In vitro fertilization”) v. Costa Rica*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 259 (Nov. 28, 2012).

123. *La Colegiación Obligatoria de Periodistas* (arts. 13 and 29), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5, ¶ 46 (Nov. 13, 1985). Additionally, in the international human rights system, we find the Siracusa Principles on the Limitations and Derogation of Provisions of the International Covenant on Civil and Political Rights (“Siracusa Principles”). Although the Siracusa Principles are not binding, they have important persuasive force because they establish functional guidelines to rightfully limit fundamental human rights enshrined in the United Nations International Covenant on Civil and Political Rights. For instance, the Siracusa Principles have been used as standards by international organizations, such as the World Health Organization. United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985), available at <http://www.unhcr.org/refworld/docid/4672bc122.html>.

124. *Tarasoff v. Regents of the Univ. of California*, 551 P.2d 334 (Cal. 1976).

125. *Id.* at 347.

126. *Smith v. Jones*, [1999] S.C.R. 455 (Can.).

127. *Corte Suprema De Justicia [C.S.J.] [Supreme Court]*, Sala de Casación Penal junio 9, 2005, M.P. Jorge Aníbal Gómez Gallego, Proceso No. 20134, Aprobado Acta No. 49 (Colom.).

In Argentina, the majority of the courts follow the *Natividad Frías*¹²⁸ precedent, which impedes the instigation of criminal charges against a woman who attends a hospital after having an abortion.¹²⁹ *Natividad Frías* famously held that

A report filed by a health professional who learnt of the abortion while exercising his or her official or unofficial duties *is not valid to initiate a criminal procedure against the woman* who has caused her own abortion or allowed someone else to cause it. *The report, however, is valid to initiate a criminal procedure against the perpetrator of the abortion*, as well as the co-perpetrators, instigators and accessories.” In turn, this statement is based on the constitutional guarantee against self-incrimination, stated in article 18 of the Argentine National Constitution: “No inhabitant of the Nation . . . may be compelled to *testify against himself*, nor be arrested except by virtue of a written warrant issued by a competent authority. The defense by trial of persons and rights may not be violated”¹³⁰

The National Supreme Court discussed the scope of “just cause” on two occasions. In 1997, in *Zambrana Daza*, the court analyzed the case of a woman who had been admitted to hospital with a stomach ulcer caused by transporting illicit drugs in her stomach.¹³¹ The assisting physician reported her to the police. When discussing the scope of professional secrecy, the Supreme Court held

[R]eference was made from a previous court that asserts that the public function of a public hospital physician did not relieve her from the obligation of keeping professional secrecy and constitutes, according to this court, an unreasonable treatment of the controversy in accordance with applicable legal provisions as they are crimes of public action, a court file must be opened in all cases, not having previewed any exceptions to the obligation of denouncing of a public officer, as the exception to the obligation mentioned. . . is not ex-

128. Cámara Nacional de Apelaciones en lo Criminal y Correccional de Capital Federal, en Pleno (CNCrimCorr), 26/8/1966, “*Natividad Frías*,” *Jurisprudencia Argentina* [J.A.] (1966-V-69). It should be noted that *Natividad Frías* is problematic because, although it clearly states that women cannot be prosecuted on the basis of a report by a doctor, the ruling does not address the most fundamental issue at stake: whether the ban on certain type of abortions entails a violation of a woman’s right to health.

129. See Mercedes Cavallo, *Derecho y Deber de Confidencialidad: Desafíos para el Ejercicio de los Derechos Sexuales y Reproductivos en América Latina* [Right & Duty of Confidentiality: Challenges for the Exercise of Sexual & Reproductive Rights in Lat. Am.], 13 REVISTA ARGENTINA DE TEORÍA JURÍDICA [R.A.T.J.] (Jun. 13, 2009) (explaining that *Natividad Frías* is the ruling followed by the majority of the courts in Argentina, both because it is a plenary decision and because it seems to protect women and to punish the providers of illegal abortions). See also Emiliano Villa, *Secreto Profesional y Obligación de Denunciar: un análisis de la Jurisprudencia Argentina* [Professional Secrecy & Obligation to Report: An Analysis of the Argentina Jurisprudence], 13 REVISTA ARGENTINA DE TEORÍA JURÍDICA [R.A.T.J.] (Jun. 13, 2009).

130. See “*Natividad Frías*,” *supra* note 128.

131. CSJN [National Supreme Court of Justice], 12/8/1997, “*Zambrana Daza*, Norma Beatriz s/ infracción a la ley 23.737,” Fallos (Z-17-XXXI), para. 2 (Arg.).

tended to authorities or public officers.¹³²

The Supreme Court's *Zambrana Daza* decision caused uncertainty over the scope of the duty of confidentiality.¹³³ In 2010, with new information, the Court addressed the scope of confidentiality in the aforementioned *Baldivieso* case.¹³⁴ The Court concluded that, according to article 177 of the Criminal Code, medical secrecy must *only* give in to criminal cases against the right to life or physical integrity.¹³⁵ In case of a conflict between the patient's intimacy and the state's legitimate interest in crime, the prosecution is less critical than the protection of general confidence in the medical community's reputation as a promoter of the public health system.

In conclusion, according to Supreme Court case law, as a rule, the right to confidentiality and the duty to keep medical secrecy could be undermined only in exceptional circumstances such as threat to the life or physical integrity of third parties, but not for the mere invocation of a public interest in prosecuting crimes. In other words, "just cause" is to be understood restrictively.

III. CONCLUSION

We have analyzed the scope of patients' right to their personal autonomy in light of the Argentine legal system, case law and doctrine. In light of our analysis, we can conclude that, in Argentina, the state must consider and respect persons as ends in themselves. Ultimately, the main point of the first part of the paper is to show that the state ought to respect the fact that individuals may have views on how they prefer to die, which may, at the same time, be part of a more comprehensive account of the good life.¹³⁶ In turn, regarding the patients' right and the physicians' duty to preserve medical confidentiality in Argentina, health professionals have a duty to keep the information that the patients reveal to them secret when there is a professional relationship between the two, but this is not an absolute duty. The Argentine legal system establishes "just cause" as the exception to the duty to keep medical secrecy. We have defined the standard of "just cause" in light of the Argentine Supreme Court case law. This exception is limited to cases in which relevant public interests were at stake—understood as risk to the life or integrity of third parties.

Patients' rights in Argentina, its scope and application, continue to constantly develop and advance. As we've seen in this paper, the Argentine legal system has established rules that widely protect patients' autonomy

132. *Id.* para. 3.

133. COD. PEN. [CRIMINAL CODE] art. 177 (1984) (Arg.). That was not the case in *Baldivieso*.

134. See "*Baldivieso*," *supra* note 114, at 10.

135. *Id.*

136. EDUARDO RIVERA LOPEZ, PROBLEMAS DE VIDA O MUERTE. DIEZ ENSAYOS DE BIOÉTICA [PROBLEMS OF LIFE AND DEATH: TEN TRIALS OF BIOETHICS] 72 (2011).

and dignity. Nevertheless, facing the future, it would be desirable to translate into expressed legal provisions the scope of certain legal concepts like "just cause" in a way according to the development in the case law to prevent unnecessary controversies over the scope of patients' rights.