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Article abstract

Despite "progressive" legislative changes concerning the LGBT collective and assisted reproductive technologies (ARTs) in Argentina, women and their sexual and reproductive rights have been overlooked. This article presents a critical perspective of some of these legislative modifications in the country. It addresses why some legislators and society are prepared to challenge a conservative or traditional approach for certain groups while ignoring others. Several factors are at play. There is no all-inclusive explanation. I stress that a striking double standard prevails in Argentina with respect to women and their sexual and reproductive rights. I also contend that powerful discrimination exists, in particular against poor women, who continue to suffer and are "punished" by the criminalization of abortion.

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ARTICLE (ÉVALUÉ PAR LES PAIRS / PEER-REVIEWED)

From the Middle Ages to the 21st Century. Abortion, Assisted Reproduction Technologies and LGBT Rights in Argentina

Florencia Luna[1,2]

Résumé
Malgré des changements législatifs “progressifs” concernant le collectif de lesbiennes, gays, bisexuels et transgenres et les technologies de reproduction assistée en Argentine, les femmes et leurs droits sexuels et reproductifs ont été négligés. Cet article présente une perspective critique de certaines de ces modifications législatives dans le pays. Il explique pourquoi certains législateurs et membres de la société sont prêts à défier une approche conservatrice, voire traditionnelle, pour certains groupes tout en ignorant les autres. Plusieurs facteurs sont en jeu. Il n’y a pas une seule explication. Je souligne qu’un double standard frappant prévaut en Argentine en ce qui concerne les femmes et leurs droits sexuels et reproductifs. Je soutiens également qu’il existe une discrimination puissante, en particulier contre les femmes pauvres, qui continuent de souffrir et d’être “punies” à travers la criminalisation de l’avortement.

Mots clés
avortement, technologies de reproduction assistée, LGBT, genre, pauvreté, discrimination

Abstract
Despite “progressive” legislative changes concerning the lesbian, gay, bisexual, and transgender collective and assisted reproductive technologies in Argentina, women and their sexual and reproductive rights have been overlooked. This article presents a critical perspective of some of these legislative modifications in the country. It addresses why some legislators and members of the society are prepared to challenge a conservative or traditional approach for certain groups while ignoring others. Several factors are at play. There is no all-inclusive explanation. I stress that a striking double standard prevails in Argentina with respect to women and their sexual and reproductive rights. I also contend that powerful discrimination exists, in particular against poor women, who continue to suffer and are “punished” by the criminalization of abortion.

Keywords
abortion, assisted reproduction technologies, LGBT, gender, poverty, discrimination

Introduction

Latin America (hereafter LA), a region with great potential and abundant resources, still falls behind in matters of justice and gender sensitivity. Health is deemed a social good and a degree of idealism prevails. However, a dark side coexists with these benefits and ideals: deep-rooted problems, widespread corruption, authoritarianism, discrimination and strong inequalities. One issue that is often overlooked or downplayed are women’s conditions and the deficient respect for their sexual and reproductive rights. Even though LA shares a strong cultural and religious heritage, differences between countries exist. To avoid generalizing or trivializing my proposal, I will focus on the Argentine case.

In what follows, I will examine the direction that laws on the Lesbian, Gay, Bisexual and Transgender (hereafter LGBT) collective and assisted reproduction technologies have taken. These laws have a “progressive” position and go beyond the “status quo”. However, even if changes are taking place, they are not consistent. For example, the abortion situation has not varied and it is still strongly criminalized. Thus, some groups’ rights have been protected while others are left aside. Among other possible explanations, I argue that a striking double standard prevails in Argentina with respect to women and their sexual and reproductive rights. I also claim that a powerful discrimination exists that targets poor women in particular: they are ignored, silenced and forgotten.

The article begins with some clarifications. I first explain the links in these three supposedly unrelated areas and explain why I am examining the legal path. I then consider the legal situation of abortion, as well as its impact on women’s health and their lives. Second, I present the legislative changes addressing some marginalized populations, such as the LGBT collective. I then analyze the new Argentine law concerning assisted reproductive technologies (ARTs). Finally, I provide some possible explanations for the dissimilar legal situation present in the aforementioned areas.

Some clarifications

At first glance, the topics in this article may appear to be unrelated. However, they have a relevant common thread: persons who have had an abortion, belong to the LGBT community, or opt for the use of assisted reproductive technologies live their sexuality or reproductive choices in a way that Argentina’s status quo questions. They defy the traditional or conservative morality. Their actions assume a degree of tolerance and respect from others, but such respect is not easily found in the more conservative or traditional sectors of society that tend to interfere or implement restrictions.

In what sense do these persons and their actions defy traditional morality? Abortion is a controversial topic, not just because of the moral status of the embryo but most importantly because it implies that women can choose how many children they want and when to have them. Abortion offers women the opportunity to end undesired pregnancies. Pregnancy ceases to be

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a fate and becomes a decision, a choice. For patriarchal societies where maternity is “essential” this position is highly subversive. The LGBT collective has always been spurned and persecuted. As in many societies, this group has been strongly stigmatized in Argentina. It is very difficult for a traditional society to accept a sexual identity that does not conform to the external perception people have of sexuality. In this regard, LGBT people have been the subject of discrimination, with different legal rulings against them. The third set of practices concerns ARTs. They involve a non-natural way of reproducing and several features have been criticized. Children can be genetically related to their parents or not: they can be conceived with sperm, ova or embryos from another person. In many cases the social, biological and genetic “mother” may be a different person. Other criticisms point to the possibility of the manipulation and destruction of embryos, or surrogacy practices. Although ARTs are offered in private clinics and many women undergo these treatments, for decades they have been performed without the approval of the Catholic Church, without any regulation, and with a problematic judicial ruling.

The practices we are going to examine also involve laws, judicial sentences or rulings that banned their performance or that threatened these groups. For example, since 1921 the Argentine Penal Code (Article 86) has forbidden abortions, with three exceptions: when the woman’s life is endangered, when her health is at risk and when the woman is the victim of sexual violence. But these three exceptions are not necessarily observed. Manifold obstacles exist – from a distorted interpretation of the law to the reluctance of physicians and gynecological services in public hospitals to carry them out owing to conscientious objections. Paola Bergallo interprets such actions as part of an informal rule establishing a de facto prohibition of abortion services [1]. As Bergallo points out, informal rules can operate in the so-called “brown areas” of the State. They can reinforce, subvert or even overturn formal rules, procedures and organizations that try to guarantee that exceptions be respected [2]. The situation regarding the provision of abortion is so deficient that the enforcement of the three exceptions allowed by the Penal Code since 1921 has been and is still a struggle of the women’s movement and feminists in the country. For example, Bergallo [1] shows how conservative actors deployed an array of legal arguments and strategies that inhibited the provision of legal abortion authorized by Article 86. And this is so even if progressive actors developed new strategies to enforce the duty to provide legal abortions.

These struggles began with a first stage characterized by the adoption of simple procedural rules followed by minor implementation policies. This battle transitioned to a second phase when the guidelines became justified in terms of rights and were accompanied by an increasing degree of compliance. A third stage of this process finally occurred when the Supreme Court ruled on F.A.L (a pivotal case of abortion that was taken up to the Supreme Court) in early 2012. But as Bergallo acknowledges, all these changes coexisted within extensive areas of the country that were still subject to the informal rule [1 p.151]. In 2012 the Supreme Court ruling [3] reaffirmed that the exceptions to the Penal Code were constitutional and conventional, thereby establishing that they should be guaranteed. It also produced standards for their implementation. However, the executive and legislative branches of the State have done nothing to foster legal and safe abortion practices. Bergallo points out, “Moreover, President Fernández de Kirchner remained silent about the Supreme Court’s decision. Had the president mandated compliance with the Supreme Court’s order, all the government officials would have followed her order.” And she adds, “Similarly, the National Ministry of Health for Argentina has not advanced any significant initiative to promote the implementation of the Court orders in F.A.L […]”. Today, non-punishable abortion cases are not respected consistently in the country (many provinces ignore them). A survey [4] reported that only five provinces had guidelines that satisfied the standards delineated by the Court in F.A.L, the remaining ten provinces that have procedural requirements are more demanding than those that the Court defined, and the rest of the jurisdictions (9) do not have any rulings. Thus, despite all the efforts depicted by Bergallo, she acknowledges that “by the end of 2012 the actual provision of Article 86 abortion services is far from a reality across the country” [1]. And this has not changed! A formal and informal penalization of abortion and the implementation of exceptions make it difficult to apply. To solve this and end the problem of access to safe abortion, Bergallo argues that legislation introducing an early stage decriminalization model is preferable to exceptions or permissions [5]. However, progressive legislative positions are absent, and the possibility of changing the law regarding abortion remains unthinkable in Argentina.

As was mentioned, Argentina’s LGBT community was discriminated against and marginalized. Not only were their rights not respected, but members of this community were criminalized and persecuted. Even after the last dictatorship (1983), during democratic periods, *Edictos Policiales* (police rulings) criminalized offences and infractions related to homosexuality and transvestite practices. These rulings justified, among other attitudes, violence towards them and, in practice, denied LGBT persons basic public services. For example, sick transgender persons have poor access to health services. As Socias et al. [6] explain, “Transgender women […] often experience multiple forms of oppression for transgressing gender norms, such as stigma, discrimination, isolation and economic hardship”. In 2011 the prevalence of HIV infection reached 34% in these minority groups compared to 0.4% in the general population [7]. Moreover, in Argentina transgender women have a life expectancy of approximately 35 years compared to 79 years in other women [6,8]. Their access to education and formal work has also been quite difficult and most end up as sex workers.

Finally, the third set of practices I examine also shares similar problems. ARTs have long been available in Argentina but they were unregulated. For decades, several bills were proposed but not passed. This difficulty was mainly related to the moral status of embryos. Conservatives and Roman Catholics deemed the entire artificial process unacceptable and they found the possibility of cryopreserving and discarding embryos most questionable. According to their position – quite prevalent in Argentina and the region – embryos are persons (sometimes holding more rights than women). Laws regulating these practices were not sanctioned, but in 2005 a particular judicial figure was created thanks to a ruling of the City of Buenos Aires: the special guardian of embryos. This figure could register and protect embryos, much like the legal guardian of minors [9]. The

latter legal figure is used in the case of orphans but, in this case, the guardian of embryos oversees ex-uterus embryos. At the time, centres or clinics carrying out ARTs opposed this judicial ruling and the new legal figure. They argued that it contravened the privacy and confidentiality of their clients, but they could not modify the ruling.

This legal hurdle jeopardized the practice of ARTs, which were only performed in private clinics. In addition to this challenging ruling, there was also the perception that a new court ruling or law could ban the entire practice of ARTs at any moment in order to protect “innocent embryos” (the emotionally charged terminology used by conservative groups and members of the Catholic Church) [9]. This understanding was by no means an overreaction as something similar had happened in Costa Rica. In 2000, a Supreme Court ruling banned nearly all ARTs in Costa Rica; only homologous insemination for married couples was accepted [10]. The decision was aimed at protecting embryos and preventing their destruction [11]. The case eventually ended in 2012 (note that it took more than a decade to resolve) with the Inter-American Court of Human Rights’ sanction of Costa Rica. One of the judgments of this court in the Costa Rica decision was that the protection of life from conception is not applicable between fertilization and embryonic implantation in utero; that is, un-implanted embryos resulting from IVF do not possess a right to life [12,13]. But until this ruling, the possibility of banning all or some of these procedures prevailed in the region. In Argentina, as ARTs were not explicitly forbidden, these techniques could be provided. However, the situation was certainly unsettling.

So, these three groups of practices and the persons involved are all rejected by the status quo, lacked regulation and protection, and face direct prohibition. In this article I will consider legislations that have been enacted in recent years concerning the two latter groups (LGBT collective and ART users). I believe that some laws can have an impact on society. They can be a first step towards accepting different practices and demonstrate an interest in solving specific problems, as well as ignore others. This does not mean that all the changes that a society incorporates must be enacted through laws. However, when persons are stigmatized or when practices are forbidden and/or condemned, there is a need to change the law. For example, in order to gain access to a safe abortion in a public hospital, the Penal Code’s current prohibition must be amended. Another case focuses on the transgender population: a study conducted just one year after the enactment of the laws – to be considered later in this article – shows the impact they had enabling this group to access health care [14]. Obviously, this impact not only had to do with the law but also with the work of non-governmental organizations (NGOs) informing transgender people of their rights. But these laws served as a first step towards change in society.

Criminalization and stigmatization are closely related [15]. In this sense, some laws de-criminalizing or accepting certain practices can function as generators of change. However, they may not suffice. In other words, laws may not reverse entrenched prejudices and practices embedded in society. I am fully aware that it takes more than rulings to transform social structures, especially when we are speaking of deeply rooted discrimination. Nevertheless, a law protecting persons, behaviours or actions provides the legal groundwork to require or demand respect for such law. It allows those concerned, lawyers, and NGOs to be able to advocate and demand the fulfillment of that right, as well as restrain those that disrespect them. In this sense, it is quite relevant to analyze what the trend is and whose rights are involved. For this reason, I examine how some laws have developed and which groups they are effectively protecting. I then present some recent laws from 2010 onwards, a period in Argentina where human rights were specifically part of the political discourse and political changes.

The impact of abortion legislation

In global terms, according to the World Health Organization (WHO),

> unsafe abortion accounts for 13% of maternal deaths, and 20% of the total mortality and disability burden due to pregnancy and childbirth. *Almost all deaths and morbidity from unsafe abortion occur in countries where abortion is severely restricted in law and in practice*. Every year, about 47,000 women die from complications of unsafe abortion, an estimated 5 million women suffer temporary or permanent disability, including infertility. Where there are few restrictions on access to safe abortion, deaths and illness are dramatically reduced [16, my emphasis].

Along similar lines, the WHO [16] also explains that 99% of maternal mortality occurs in developing countries. This implies the death of otherwise healthy young women and constitutes an inequality index. For example, compared to 11 maternal deaths per 100,000 born live in Canada, LA registers 72 per 100,000 live births. As Rebecca Cook points out, people have to move beyond quantitative data and show the stigmatizing harms that aborting women suffer. So we should also acknowledge the weight that criminal law instills in society and how women are constructed and stigmatized by criminal law [15].

When the rights of women to make autonomous decisions regarding abortion are restricted, a wide range of human rights are threatened. The right to life is threatened, not only from the risk of undergoing unsafe abortions, but because, for example, the continuation of unwanted pregnancies increases the likelihood of postpartum depression. Evidence shows [17,18] that this is one of the most common causes of postpartum suicide. Restrictive abortion laws affect the right to health, not only because they prevent access to safe abortion practices, but also because women face delays in obtaining health care following complications due to abortions performed outside the health system. Women fear being penalized and thus arrive for care when it is too late, increasing abortion-related morbidity rates. Similarly, the rights to freedom, to privacy, to information

(especially on reproductive matters), to non-discrimination, and not to be subjected to torture or to cruel, inhumane or degrading treatment or punishment, etc. are violated [19,20].

"Almost every one of these deaths and disabilities could have been prevented through sexuality education, family planning, and the provision of safe, legal induced abortion and care for complications of abortion" [16]. Death because of risky or unsafe abortions is absolutely preventable. The WHO maintains that "the risk associated with childbirth cannot be totally eliminated; only deaths due to unsafe abortion are entirely preventable" [21]. "In nearly all developed countries, safe abortions are legally available upon request or under broad social and economic grounds, and services are generally easily accessible and available. In countries *where induced abortion is legally highly restricted* and/or unavailable, *safe abortion has frequently become the privilege of the rich*, while poor women have little choice but to resort to unsafe providers, causing deaths and morbidities […]" [15, my emphasis].

Finally, another relevant issue is that the prohibition of abortion or its criminalization does not necessarily prevent women from undergoing abortions. Indeed, restrictive laws are not effective as they do not achieve the supposed goal of actually preventing abortions. As the WHO and other studies [22] clearly point out, countries without restrictive laws have lower abortion rates than those with more restrictive laws. Abortions are performed anyway but are mostly carried out in unsafe conditions for women with scarce resources (middle- or upper-income groups can cover the cost of safe abortions). Therefore, considering this lack of efficiency, it follows that upholding the prohibition does not prevent abortions; it merely targets poor women and arguably punishes them.

Abortion in Argentina

Argentina replicates these developing-world problems. Argentina is a large country with wealthy provinces and cities (such as the city and province of Buenos Aires), and other quite poor ones (Chaco, Formosa, Jujuy, or La Rioja, among others) with a federal system that extends autonomy to provinces.

The penalization of abortion is a problem for all Argentine women. Not only does it violate women's sexual and reproductive rights, but it also denies them their autonomy and self-determination. They are assigned a lower status. That is, it considers them disabled individuals that are incapable of deciding about their own lives and well-being. In addition, society seems to have idealized maternity, combining motherhood with the view that it is a fate women cannot avoid. Such an image endorses the perpetuation of compulsory pregnancy. Yet, even if we recognize that penalizing abortion affects all women, poor women are worse off. Middle- and upper-income women have the economic and socio-cultural resources to obtain a safe abortion, consequently limiting or decreasing their risks. By contrast, poor women's sexual and reproductive rights are disregarded, deepening strong inequalities and punishing them with death or disabilities. Some empirical data clearly illustrate this situation.

Argentina's maternal mortality rate has reached a plateau, showing little variation over the last 20 years. This in itself is a source of concern. Note that this country enjoys a public and universal healthcare system where over 99% of childbirths occur in institutional contexts. Disquieting and significant are the existing internal differences: in 2012, the City of Buenos Aires recorded a maternal mortality rate of 13/100,000, while the province of Formosa registered extremely high maternal mortality rates – 123/100,000 and Jujuy 115/100,000. Consider that in these provinces, complications derived from unsafe abortions are the leading direct cause of maternal mortality and that abortion is the leading individual cause of death in 17 of the 24 jurisdictions in Argentina. To this situation we can add that this pending debt falls well short of both local and international standards. It is related to the fifth millennium development goal on maternal mortality rates, a goal that Argentina could not achieve. In contrast, neighboring Uruguay obtained quite good indicators with the legalization of abortion and suitable sexual and reproductive rights policies.

Other troubling data are related to adolescent pregnancy rates. According to the 2013 World Population Study of the United Nations, 15% of all childbirths in Argentina occurred among girls between the ages of 10 and 18, frequently from the poorest sectors. Once again, the same inequalities are evident: the City of Buenos Aires registered 7%, while for Formosa it was 24.6% and for Chaco 25%. Of these girls and adolescents, only 14.8% graduated from secondary school (43% did not complete primary school and 39.4% did not complete secondary school). These figures reinforce the inequality parameters and reveal that at least 82.4% of these pregnant teenagers do not receive a basic education.

So, this is Argentina's strong inequality panorama where issues for women are distinctly visible, above all, for those from the poorest sectors. Of course, the causes of these data are varied and it is unquestionable that for this situation to arise there are obstacles of all kinds (social, structural, economic, legal, and so on). Obviously, we should distinguish different levels – empirical and normative. One could argue that it is most difficult to modify these deep socioeconomic structures and that laws may not suffice. Yet, as was mentioned, legislation constitutes a first step that should be followed by a chain of other changes. Once a law has been enacted, people can fight for its effective enforcement. Legislation shows a certain tendency and political will to initiate these changes. But as we will see, no intention exists to authorize abortion. Moreover, the new Civil Code blocks this possibility and endorses the logic of punishing and penalizing abortions. In the following sections, I analyze whether this is the case because society as a whole is very homogenous and conservative, and this is part of a bigger picture, or whether there is an intentional disrespect for resource-less women that could even be deemed discriminatory. Before examining this, let us see what happened with the LGBT collective's rights and ART legislation.

New laws: LGBT rights

To end a trend of discrimination and violence against the LGBT collective, in 2010 Law 26.618 [23] was enacted legalizing matrimonial equality, that is, same-sex marriage. Argentina was the first country in the region to pass such legislation and the tenth in the world. This made a substantial modification in the social structure by enabling persons of the same sex not only to build a family but to adopt children. This law is clear evidence of a willingness to fight against the discrimination of homosexual persons. In addition to sanctioning this law, in May 2012 Law 26.743 [24] was enacted targeting gender identity. The gender identity law orders medical treatments to adapt to the gender expression a person seeks and to include them in the Mandatory Medical Plan (for example, surgery and integral hormone treatments). That is to say, these services must be provided for free by the public health system and included in the private system.

Law 26.743 also allows trans persons (transvestites, transsexuals, transgender) to register for ID documents according to their self-perceived identity. Thus, they can change their first names to adapt them to their new sexual identity. This law may serve babies born with sexual ambiguity: it allows families and the babies themselves to wait until later in life to choose their sexual identity, instead of forcing an early selection or surgery, with the harm this could imply when adapting children to sexual identities that they may later feel do not represent them.

Law 26.743 precludes judges', experts' or physicians' authority to choose a person's gender identity. At the time, this was one of the most progressive laws in the world. It did not treat gender identity or the trans condition as a pathology. It was the first law in the world to embrace a position with the greatest empathy and respect. As Diana Maffia [25] explains, this law is not merely a technical issue; it has to do with power, ethics and philosophy. It involves admitting that sexual identity is an important aspect of one's personal identity and that the right to an identity is a basic right. It also means recognizing each person's epistemic authority over their own body, sexuality and gender. At the same time, it means acknowledging the person as an agent, as a moral being [25]. Remember that for several decades homosexuality was treated as a pathological, mental illness. From 1954 to 1986 the Diagnostic and Statistical Manual of Mental Disorders (DSM) elaborated by the American Psychiatric Association, which rules the world's practice of psychiatry, established that homosexuality was a mental disorder and was included among sexual deviations. Only very recently has homosexuality has begun to be considered a normal variant of human sexuality; it was in 2013 that the DSM-5 modified "disorder of gender identity" and pathological transsexuality to become a "gender dysphoria", referring to the anguish a person could feel when belonging to a different sex to that socially or medically assigned to that person. This classification is still criticized by some authors as being unnecessary and discriminatory [25]. Nevertheless, the law we are analyzing does not rely on the pathological aspect but on the individual's self-perceived assertion.

Ariza and Saldivia also explain how radical this law is: "[…] the recognition of gender identity – perceived by many people as 'simply' the right to change a name and sex on the identity documents – has indeed implied the destabilization of social and legal arrangements, it challenges the binary construction of sexuality and requires rethinking questions such as: what is a woman/man?" [26]. These laws do not reflect a conservative society. On the contrary, it shows a "progressive" and respectful view of a long-overlooked minority.

Note the existing gap between the situation of poor women in Argentina and these laws: the LGBT collective's sexual rights and autonomy are respected. Also note that to be able to sanction these kinds of laws, we are not confronting a consistently conservative society. It implies recognizing the rights and protection of some minorities, usually ignored and discriminated against in conservative societies in addition to modifying a certain status quo. Thus, at first glance we could say that Argentine society is not homogeneous, that is, that traditional values do not prevail and changes are acceptable.

New laws for some women

In the light of these legislative responses, what is happening to Argentine women? In 2013 national Law 26.862 [27] was enacted regulating Assisted Reproductive Technology (ART). It would seem that women had not been forgotten. Law 26.862 put an end to the lack of regulation of ARTs. It established the coverage of ART for all persons (without setting an age or other limits like gender, marital status, sexual orientation, etc., Article 7). Its regulation also established that the public health care system had to provide four low-complexity treatments and three high-complexity treatments annually (Regulatory decree, Article 8). The listing of treatments included cryopreservation for embryos (Regulatory decree, Article 2). However, interestingly, the law did not contemplate the status of embryos and their possible disposal or use.

I will not judge the aptness of the number of treatments or whether it is up to the State to provide them (this is the subject of another article regarding the just allocation of resources in middle-income countries where basic attention and health care provision is not accessible to all). Instead, I will stress three issues. First, by not setting an age limit and embracing all persons, new non-traditional families once again can take shape (say, single women or homosexual partners). This implies open, non-discriminatory policies and it follows previous laws for the LGBT collective. Second, it regulates the provision of these treatments but mentions nothing of the status of the embryos or their possible uses in the implementation of some techniques (that is, whether they can be discarded, used in research, and so on). So, in the light of such progressiveness, the absence of a clear position is striking. And third, those who will benefit from this law are, basically, middle-income women and couples. It does not deal with, for example, the prevention of secondary infertility due to infections from sexually transmitted diseases

(STDs) or due to unsafe, illegal abortions affecting poor women. That is, it does not consider women without access to treatments because of their sexual and reproductive health. If the law were to consider such women and their infertility problems, it would necessitate, at the very least, carrying out serious preventive measures (treating STDs or preventing unsafe abortions). Instead, this law mainly targets middle- and upper-income women who want to become mothers. The law only contemplates information campaigns to promote fertility care, but it does not attack the root of the infertility problem in low resource settings.

Of even more concern was the draft bill of the Civil Code [28] (one of the fundamental legal instruments of Argentine law) proposed in 2012. Authors of this new code expressed particular concern to update the Argentine law and legislate the affiliation of children born via assisted reproduction. In it, when the legal status of the embryos had to be made explicit – Article 19 of the draft bill – it introduced the distinction between *ex utero* and *in utero* embryos. It stated: "The existence of the human person begins with conception in the woman or with the implantation of the embryo in her in cases of human assisted reproduction technologies" [28 (my translation)]. Only *in utero* embryos were considered human persons. This meant that the proposed Civil Code draft intended to accept ARTs and stem cell research, but it continued to penalize abortions as these involve the destruction of *in utero* embryos. More troubling still was the emphasis of this supposed progressive culture to rigorously promote reproduction by differentiating between *in utero* and *ex utero* embryos.

To include and maintain the traditional view that the *in utero* embryo is a person does not allow for a logical regulation of ARTs. ARTs include not only the manipulation of the embryos – which this bill would have allowed – but also the possibility of conducting selective abortions (for example, when a woman becomes pregnant from multiple embryos). This is a possibility given the absence of policies regulating the transfer of only one or two embryos, or for a cycle of artificial insemination, in which the woman is stimulated with hormones and, on generating several ovules, becomes pregnant with multiple embryos at the same time. In such cases, a procedure aborts some of these implanted embryos in gestation so that only one or two embryos remain, making it possible for the pregnancy to safely reach the end of its term. Specialists call this "embryonic or fetal reduction". Despite its creative terminology, in practice, it is an abortion that is carried out for therapeutic reasons (even though it was the therapy itself that caused these high-risk, multiple pregnancies).

Embryonic or fetal reduction deals with implanted embryos and not with *ex utero* embryos. Hence, if the goal had been to allow all of these practices, which, in fact, occurs in Argentina and throughout Latin America, the solution would not have been to dichotomize the notion of an embryo but to coherently define it in order to respond to the implementation of these techniques and what these techniques involve. If we follow the proposed Civil Code draft, selective abortions and, therefore, the practices that generate them (multiple embryo transfer or artificial insemination with hormone stimulation) would be unacceptable. In this regard, it not only poses inconsistencies, but also means that the content of Article 19 would not allow ARTs to be effective and safe (the expressed goal of the authors of the Project).

As it was drafted, Article 19 of the Civil Code bill was problematic. Yet, much more disturbing was the Upper House's rejection of the distinction between embryos in November 2013, upholding the formulation of the 1871 Civil Code. It was the resurgence of "embryolatry" by bluntly deleting the second part of Article 19 of the draft bill. Bowing to political pressure, this questionable article ultimately proved to be far more conservative and regressive. Thus, the recently sanctioned Civil Code states that: "The existence of the human person begins with conception" [29]. And though one could argue that this article can be interpreted more broadly by following the ruling of the Costa Rica case by the Inter-American Court of Human Rights, the wording aims to maintain the traditional formula of the Catholic Church. Even if it can be interpreted to allow the manipulation and destruction of *ex utero* embryos, the new Article 19 ignores the serious public health problems that the country faces owing to illegal abortion. But most disturbing was the fact that all these legal hurdles and last minute changes in Article 19 were deliberately intended to keep abortion illegal.

Possible reasons

How can we make any sense of these laws? How is it possible that some laws can take an innovative and ground-breaking position in the region, while others ignore the most vulnerable and destitute? It seems that totally progressive laws coexist with others that only appear to bear women in mind when it comes to promoting their reproductive role despite the consequences.

Before presenting specific strategic reasons that may clarify the previous questions, let me outline some of the underlying ethical issues. Autonomy is one of the central values in bioethics. As Erin Nelson points out, even if the concept of autonomy is far from established, it is clear that one must have the capacity, together with some accompanying social condition, to be the author of one's own life story [30]. As the reader realizes, the laws we are examining and the lack of others concern our sexual and reproductive autonomy. While sexual autonomy is very important because it relates to our desires, our self-esteem and our perception of ourselves, it does not have the impact that reproductive autonomy has on individuals. As Nelson argues, reproductive autonomy is fundamental in regulating reproduction. Reproductive decisions have a critical impact on one's life, including the ability to live autonomously [30]. And I would add, they also impact the long-term responsibilities and obligations they may create for others.

Nelson argues: "When law and policy fail to respect reproductive autonomy, although it is problematic for women and men alike, it is particularly troubling for women. Reproduction can have dramatically different effects on the lives of men and women.

Reproduction takes places in a context within which women's bodies, needs and interests have a central role. Reproductive activity is literally located within women's bodies" [30, p.56]. Thus, Nelson grounds reproductive autonomy on bodily integrity but she also grounds it on equality. She considers not only the impact reproduction has on the woman's body but also on her economy (she offers evidence of the impact that motherhood and "motherwork" can have on women's career prospects). Statistics illustrate this in graphic terms: "It has been estimated that a woman with children in Britain loses as much as 57% of lifetime earnings after 25% of her childless counterpart." [31] And Nelson adds: across sectors, women lose a staggering 37% of their earning power when they spend three or more years out of the workforce [32]. She argues that "a fragmentary and unreflective approach to reproductive regulation has uneven effects on women and men. Women's capacity for reproductive autonomy is also tied much more intimately to reproductive health than is the case for men" [30, p.56]. Hence, both autonomy and equality are at stake when reproductive autonomy is not respected. In addition, the lack of justice towards women is reinforced when we add the staggering effect abortion has on poor women (which is not the case for wealthier women that can access safe abortions, avoiding morbidity and mortality). So, justice and equality are values and principles that are seriously at risk. This is the ethical background we should consider when examining other reasons involved in the dissimilar approaches to legislation.

The first specific reason for Argentina's contextual situation can be explained by the prevailing political power of the Catholic Church to block any kind of change that would liberalize abortion. Traditional Catholicism does not accept abortion. And, even if the discourse of the Church preaches the defence of the poorest in the world, when it comes to abortion, the situation of the poorest women does not seem to matter. It is clear that the prohibition of abortion affects these women and this is evident from the above maternal mortality and morbidity rates in Argentina's poorest regions.

In addition, political representatives do not want to lose the Church's support. Historically, President Perón defied the Church, and this anti-Church stance was perceived to be a major political mistake. Since then, politicians have been highly reluctant to challenge Argentina's Catholic Church. Although the Church may criticize governments at times, politicians do not want to upset the religious status quo. Nonetheless, politicians did sanction the ART law and same sex marriage. The Church opposes ARTs because they are not natural. That is, they are not the product of "normal" sexual intercourse. Not even artificial insemination is acceptable, not to mention more sophisticated techniques that involve manipulating embryos (which the Church considers innocent persons). The same rejection can be said of homosexuality and gay marriage. At the time of the debate, Bishop Bergoglio – now Pope Francis – criticized it as the "devil's law" and published a letter against the law. Despite this opposition, the law was enacted. This was not the case for laws regarding abortion or changes to the Civil Code. Even though legislators accepted ARTs and wanted to regulate them appropriately, at the last minute (literally) the symbolic and controversial Article 19 which would have permitted new legislation on abortion – if re-written – was changed to satisfy conservative and religious politicians.

Another of the multiple reasons may be the lobbying force of some groups. The LGBT collective has achieved some vindication after years of struggle. Likewise, assisted reproduction physicians and clinics have long lobbied for access to and the regulation of ARTs. And, in the case of ARTs, it is not so much the case of women fighting for their rights and needs, but of families and couples wanting to have babies. These techniques were sometimes promoted using photos of "Gerber babies", healthy, beautiful babies and "nice doctors" bringing desired babies into world, unlike the selfish desire of a woman who is trying to "eliminate an innocent person". In this sense, note that of the six parties running in the 2015 presidential election, only the smallest, most radical leftist party (Frente de Izquierda y de los Trabajadores, FIT) with no representation in the Legislature openly defended abortion rights in its platform. The more important parties strategically skirted the issue. Not one voice defended and lobbied for these women. Of course, active feminists have been campaigning for abortion rights since the 1960s. As Bergallo points out [1] and as was sketched in the previous sections, several battles have been fought against conservative, informal rules. However, differences have arisen between some feminist groups [33]: whether it is preferable to take a stronger, more inflexible position and fight for the legalization of abortion or whether it would be better to compromise and demand the provision of non-punishable abortions (advancing step by step). The lack of clear and precise agreement may have undermined the feminist struggle as no unified agenda has been developed to date [34].

Another reason may be "pink washing", that is, the strategy of granting rights in exchange for political benefits. Ariza and Saldivia [26] raise this possibility and question to what point recognizing the rights of the LGBT collective but not recognizing abortion has to do with the inclusion of sexual minorities or, instead, with calculating electoral costs. Even though the authors explain that the country has implemented policies guaranteeing human rights in the wake of Argentina's last dictatorship, they find striking the contrast between the swift recognition of LGBT rights (and I add the rights of persons to use ARTs), while sexual and reproductive rights are still pending. In reference to ARTs and the pink washing strategy, the two main candidates in the 2015 elections publicly debated and praised the law regulating ARTs, which had been passed by one candidate in his province. He explicitly referred to the 900 babies born thanks to his law [35].

Another way to explain these inconsistencies is through the double moral standard. In an article published in 2010, Arleen Salles and I [9] analyzed the legal silence regarding stem cell research activities in Argentina. This research was practiced and promoted but was not regulated by any law. In that article, we challenged Shawn Harmon's [36] interpretation of legislative silence as a morally incoherent position. Instead, we offered a generous interpretation and argued it was a "survival strategy". Facing the possibility of prohibition, legislative silence was a source of "resistance": buying time to achieve a wider national and international debate and acceptance. We argued that there was a hidden battle with conservative Catholic views. However, marked changes have occurred since 2010. Progressive laws have been enacted without consideration for conservative

positions. Can we state today that not passing a law regulating abortion is another form of resistance? Clearly no. As was mentioned above, we are now witness to different lobbies and interests at play while the rights of poor women are ignored. In that article, Salles and I [9] dismissed what we called “native cunning” (*viveza criolla*), that is, taking advantage of a confusing situation without confronting or solving ethical issues. This position implies the promotion of self-interest – an easy way out where everybody pretends that nothing is really happening when, in fact, something is. The status quo is seemingly unaltered and the powerful lobbies of society go undisturbed. This kind of strategy is usually defended by interested parties on the grounds that the objective is ultimately met (the activity in question is still carried out). If we reconsider the acceptance of ARTs without acknowledging abortion practices or the current practice of genetic screening and testing without the possibility of abortion, the silence and secret around abortion practices appear to be clearly intentional. In light of these situations, no one says anything (neither ART physicians performing selective abortions nor geneticists referring to abortions) and they continue to perform or refer to hidden practices quietly and secretly as if these did not exist. Now that several laws have challenged the status quo, it does not only seem morally incoherent – as Harmon correctly pointed out – but it also promotes cynicism and hypocrisy.

Something similar occurs with LGBT rights. The rights of a vulnerable minority are finally respected. Undeniably, this is a very important fact. We appear to be a society that respects human rights; LGBT persons have recovered ownership of their minds and bodies while this epistemic capacity is denied to women. Sexual autonomy is finally recognized for the LGBT collective through Laws 26.618 and 26.743 as well as reproductive autonomy through Law 26.862. However, in the case of abortion, poor women’s sexual autonomy is restricted and they are denied their reproductive autonomy, together with the ethical costs this bears on their autonomy and equality, as was previously mentioned. So, while the rights of one group are respected, the rights of a silenced majority are still violated. Maternal mortality is ignored and the problem does not seem to exist. Once again, we face a double standard.

Another explanation might also complement this argument. The way “status quo” is understood may be more complex than how we actually consider it. A first approach explains that the status quo frequently prolongs inherited authoritarian patterns and the “traditional values” that oppress certain members of society [37]. However, a deeper analysis seems to show that what we call status quo could have strong hetero-patriarchal structures. The hetero nucleus only acknowledges heterosexual relations. And, the patriarchal side raises men to the top of a hierarchy where women are subordinate to them. This perpetuates traditional family values and roles. Within this traditional pattern there is also a tendency to “normalize” people. That is, people should fit into accepted categories or institutions. In this sense, marriage, building a family and reproduction are the main milestones for traditional thinking. Thus, another way of interpreting the legal difference in the above situations is to interpret these laws as a way of normalizing. For example, by accepting gender identity and allowing LGBT to align with their perceived gender (medically and socially), transgender persons can harmonize with themselves and better fit into some structures; they can work, produce, lead a “normal” life. We might even hold that the marriage institution is still playing a very relevant role: LGBT persons can marry, build a family and assimilate with the “hetero” rules. Family values are still precious things that should be upheld no matter how or by whom. Motherhood “must” apply to laws regulating ARTs. Thus, everything will be provided to have a baby, no matter how many cycles of ARTs are needed and no matter how old the mother may be. Anybody that desires a child should be able to access these techniques. Building a family seems to be the ideal! By contrast, a woman’s choice to end a pregnancy and not to have a baby may be inordinately disruptive and unacceptable. Thus, there is no possibility to escape from pregnancies, no way out. Compulsory pregnancies are the norm. So let us ask: are these women’s reproductive decisions respected as much as those who want to have a baby through ART? Do women have the same degree of autonomy as men or transgender persons? The answer is no. Only the autonomy and rights of some persons are respected. It seems that the progressive thinking in Argentina has a clear limit and it is bound by patriarchy. Thus, the above progressive laws only seem to modify the hetero structure “normalizing” the LGBT collective and leaving the patriarchal nucleus untouched.

Likewise, abortion is still a taboo issue. No group wants to be associated with abortion. Like a leprosy patient in the Middle Ages, abortion renders anything related to it “impure”. It taints whoever suggests that an abortion must be performed. The taboo argument can be complemented with the stigma that abortion produces. As Cook argues, the law affects the operation of stigma in society [15, p.349]. Abortion laws are used to create stigma. “In criminally prohibiting abortion, societies create a category called ‘abortion’ distinct from other medical services in categorically different ways. In exceptionalizing abortion, criminal law perpetuates stigma, and stigma has a social meaning.” [15 p. 352]. As depicted by Cook, “[Stigmatized individuals] may become social pariahs or outcasts. Stigmatized individuals are valued less than individuals without spoiled social identities, that is, so-called ‘normal’ persons” [15 p.353]. And what is also interesting is that the abortion stigma is applied to both: those who seek and those who supply abortions. Indeed, this explains why ART physicians do not concede that they may have to perform abortions on certain occasions. It also explains why geneticists do not acknowledge that they refer to abortions when due to genetic tests patients choose to end a pregnancy. Abortion practices are precluded and denied; they do not exist! Once again, here we see another kind of double standard.

Ariza and Saldivia [26] also signal racism and classism. Even if we leave aside “racism” as an inapplicable category today, their reasoning is valid as an argument that points to classism. It reinforces the double-standard argument with a discrimination angle. Ariza and Saldivia [26] argue that popular consciousness regards the woman that turns to the State to obtain an abortion as a *negrita* (a low-class woman of colour). As was mentioned before, middle- or upper-income women have no need for the State’s help; they can pay for safe abortions. So, even if all women are treated with disrespect and their sexual and reproductive rights are violated, they are not harmed to the same degree as are poor women. Middle-income women can “defend” themselves because they have the economic and socio-cultural means. Poor women do not; they are defenseless and suffer

endless layers of vulnerability [38]. Going back to Nelson's analysis of reproductive autonomy [34], note that she argues that reproductive autonomy should be understood in a deeply contextualized way and that it should be based on equality "given the clear and dramatic impact of reproduction on women's life" [34]. Justice issues are clearly involved. And this class argument reveals the lack of justice these poor women experience in another way. It clearly reinforces the discrimination hypothesis. These women are not worthy; they have no voice or do not deserve the help of the State. Moreover, they should be punished. These prohibition laws are too inefficient to prevent abortions – if the goal were to actually prevent abortions, other kinds of policies would have to be in place. The penalization of abortion not only stigmatizes women, but it also threatens and cripples them. Thus, rather than upholding the idea of preventing abortions, it punishes women.

Surprisingly, all the progressive attitudes towards minorities end when it comes to the situation of poor women and abortion. In this sense, respect for human rights has a categorical limit. We can formulate multiple hypotheses to explain legal differences; but no matter what the reasons are, it is clear that there is a double standard with a strong discriminatory side. Poor women are deliberately being ignored, abandoned and punished.

Final words

This article presents a critical perspective of some of the more recent legislative modifications in Argentina. It provides a strategic argument to defend women with few resources and their reproductive decisions by examining the striking difference between LGBT and ART laws that contrasts sharply to the penalization of abortion. This article shows how legislators and society are prepared to challenge a conservative or traditional approach for certain groups while ignoring others. On the one hand, it describes the willingness to accept gay marriage and changes in sexual identity. This leads to the protection and respect of a minority that has traditionally been ignored, rejected and punished. This is welcome and can be viewed as strongly aligned with human rights. It also implies the acceptance of new family structures through the combination of LGBT laws and ARTs; new families and babies born via ARTs are also considered and protected. But, on the other hand, all these "progressive views" towards these collectives co-exist with an authoritarian mindset whereby women should reproduce no matter what their desires and needs may be. And while the hetero nucleus of the status quo no longer governs, a patriarchal one still does. Reproductive autonomy for poor women is not respected and there is no justice for them; there is no protection and respect for the sexual and reproductive rights of poor women and their situation continues to be disregarded. Why is it that Argentine legislators, the government and society as a whole continue to ignore these realities and the deep inequalities they foster? No one clear explanation exists and, as was pointed out in the previous section, different reasons may coexist. However, among them, what stands out is the double standard and discrimination towards the most vulnerable members of society with no voice or lobbying power.

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