

The Right to Gender Identity in Argentina: Context, Originality, and the Need for World-Wide Promotion

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- I. Introduction.

Argentina has become a global leader with regards the right to gender identity (RGI).¹ Law #26,743 – which puts into place regulations relating to this right (heretofore referred to as the “Law”) was unanimously passed by the National Congress in May 2012. The combined efforts of the movement for the rights of sexual minorities (heretofore, the “movement”), efforts that had already obtained an important success when Law #26,618 on marriage equality was passed,

¹ “The fact that there are no medical requirements at all—no surgery, no hormone treatment and no diagnosis—is a real game changer and completely unique in the world. It is light years ahead of the vast majority of countries, including the U.S., and significantly ahead of even the most advanced countries,” said Justus Einfeld, co-director of Global Action for Trans Equality in New York, Argentina gender rights law: A new world standard, Published May 10, 2012, Associated Press. Disponible en <http://www.foxnews.com/world/2012/05/10/argentina-gender-rights-law-new-world-standard110394/>. “This law is saying that we’re not going to require you to live as a man or a woman, or to change your anatomy in some way. They’re saying that what you say you are is what you are. And that’s extraordinary”, Katrina Karkazis, disponible en http://www.glbtq.com/blogs/new_argentina_law_advances_transgender_rights.html

allowing for the marriage of people of the same sex and removing barriers preventing same-sex couples from adopting children.²

Since Argentina's return to democracy, the lesbian, gay, bisexual and intersexual movement (LGBTI) has been an intense advocate, and its efforts are reflected in the demands for acceptance and social inclusion that slowly but surely were granted, demands expressed in terms of human rights. The importance of human rights discourse during the transition to democracy was fundamental in imbuing the right to gender identity with substance. The right to identity granted to people who were taken from their parents and given up for adoption during the dictatorship provided a cornerstone for building and requiring RGI.

In this paper I will show why the regulation of RGI implemented in Argentina represents such an extraordinary advance for the human rights of transgender persons.³ When the idea that

² Among others, the Argentina Homosexual Community (CHA), the Argentina Federation of Lesbians, Gays, Bisexuals and Trans (FALGBT), Futuro Transgénero, Movimiento Antidiscriminatorio de Liberación (MAL), Asociación Lucha por la Identidad Travesti-Transexual (ALITT), Asociación Travestis, Transexuales y Trans Argentina (ATTTA), are some of the organizations that comprise the movement.

³ Since the 90s the term transgender or trans has been used to describe those whose identities, practices, or beliefs concerning sex or gender cannot be fit into categories socially expected of assigned or determined birth sex. *"Terminology is important; the words people use to describe their identity convey a sense of belonging, through connections to a shared history or community. No single term can capture the diversity of gender identity and expression around the world."* Discussion Paper Transgender Health and Human Rights, United Nations Development Programme, December 2013, p. 1, available at <http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/discussion-paper-on-transgender-health---human-rights/> See also Paisley CURRAH, "Gender Pluralisms under the Transgender Umbrella", en Paisley CURRAH, Richard M. JUANG y Shannon PRICE MINTER (eds.), *Transgendered Rights*, University of Minnesota Press, 2006, ps. 3-7. Es en este sentido amplio y político que en este trabajo utilizo intercambiablemente el término transgénero o trans. Otra aclaración: La sexualidad humana atraviesa todos los temas que aquí discuto. No es mi idea brindar una definición abarcativa sobre esta cuestión, solo mencionaré que mi entendimiento se aparta, en primer lugar, de una mirada binaria-focal de la sexualidad en dos sentidos: aquél que postula que hay algo definible y esencial como un hombre y una mujer; y aquél que considera que el cuerpo y el género se refieren a aspectos distintos, es decir, el cuerpo a una materialidad biológica indiscutible y esencial/natural/fija y el género a aquello construido socialmente. Por el contrario, esa materialidad biológica/sexo se produce y al mismo tiempo es producido por significados sociales. La sexualidad además no debe ser restringida a una parte del cuerpo o a un deseo o impulso biológico, sino que debe ser entendida como parte integral de una matriz donde interactúan de formas muy complejas elementos, dinámicas, prácticas, fuerzas sociales, culturales, económicas y políticas. Y aquí es donde la conducta, la orientación/deseo y la identidad sexual se intersectan de formas muy diversas. Sigo en esta definición a Petchesky, Rosalind, "Políticas de Derechos Sexuales a través de Países y Culturas: Marcos Conceptuales y Campos Minados", en Parker, Robert, Petchesky, Rosalind y Sember, Robert. (eds), *Políticas sobre Sexualidad: Reportes desde las líneas del frente*, New York, Sexuality Policy Watch, 2007.

people have the right to develop their identity according to their own perception and experience of gender was accepted, the “medical authorities” lost their authority to decide whether a given expression and experience of gender was an affliction requiring diagnosis and treatment. It has also removed from judges the power to validate, or not, the pathology (and cure) advanced by health officials. Neither the capability to change one’s name in official registries and on identification cards nor the access to sex modification surgery and treatment depend any longer upon a judge’s consent, granted based on medical reports, but rather upon the decision of the person in need of the modification.

First I will trace the events that pushed forwards the developments that resulted in the passing of the “Law.” Then I contrast the model of pathologized RGI with the model developed from self-perceived gender. This is followed by an analysis of a concrete case in which the “Law” was applied as a means to observe the Law in action, and the paper ends with some brief reflection.

II. Reconstructing RGI

Obtaining recognition for the rights of the LGBTI community was a long and slow process. The State made concessions reticently at first, and only recently began acting with more responsiveness and fluidity. It is not my intention to furnish an exhaustive historical account of the struggle for LGBTI rights, or of all the legal arguments employed, yet I would like to mention moments that enable us to outline a sort of genealogy in which the Law can be situated. My intention is to merely provide a few signals and reference points in order to tell a more superimposed, fluid, and changing tale, one that embraces much more than what I will lay out.

To begin with, the genealogy of RGI is related to and feeds from the elaboration and consolidation of a rhetoric of human rights in response to the torture, forced disappearance, and

appropriation of children exercised by the civil-military dictatorship. Family members and victims in exile, faced with emergency, learned to wield flimsy international mechanisms for protection that had grown rusty during the Cold War. Their “discovery” of international human rights law opened a breach through which claims could be made for the victims of repression.⁴ This discovery was accompanied by a theoretical and practical construction of a formal and discursive system of human rights for the purpose of investigating human rights violations committed by the dictatorship and holding accountable those responsible for the violations, behind which one factor was the search for a relative degree of institutionality and respect for the rule of law. This discourse of human rights conceptualized and put into practice primarily behind the force of the human rights movements composed of victims and their family members of dictatorship, took hold in Argentina, and led to their widespread development and practical application in the country, a characteristic which may still constitute the greatest emblem of our national identity.⁵

One of the most pressing issues for which human rights organizations advocated concerned the recuperation of children appropriated under the dictatorship. Removing children from those detained or disappeared and giving them up for adoption was one of the repressive policies of that government. Babies were robbed, yanked from their parents and illegally appropriated; their biological origins were hidden from them; in some cases even birthdates were changed and birth certificates falsified. They grew up not knowing who their parents were or in what circumstances

⁴ See Saldivia, Laura, “Derechos Humanos y Derecho de Interés Público en Argentina: ¿Quiebre o Continuidad?”, en Documentos de Trabajo sobre Derecho de Interés Público, Centro de Estudios de Postgrado, Facultad de Derecho de la Universidad de Palermo, Documento Nro 2, Noviembre 2003 y Rodolfo Mattarollo, “Aportes de la lucha contra el terrorismo de Estado al Derecho” escrito para el Seminario Internacional: CELS. 20 años de historia. Available at http://www.cels.org.ar/common/documentos/memoria_1999.pdf

⁵ La actuación de la CONADEP, la comisión de la verdad Argentina y los juicios a la Junta Militar son ejemplos de ello. La reforma constitucional del año 1994 que constitucionaliza a los principales instrumentos internacionales de derechos humanos, fue central para afianzar y darle aún más cuerpo a la retórica de los derechos humanos.

they were born.⁶ The formulation of the right of these children to know their identity furnished a platform on which the right to gender identity could later be based.

The movement for the rights of transgender people made the decision to utilize the discourse involving the right to identity that was provoked by the revelation of theft of babies during the dictatorship and defined itself on the basis of human rights protections in order to distance itself from the definitions found in the psychiatric literature on gender identity. The formulation of the right to identity by the Inter-American Court of Human Rights (heretofore IACtHR) “as the set of attributes and characteristics that enables a person’s individualization in society” provides a sufficient idea of its significance and scope.⁷ The IACtHR added that the importance of this recognition of identity lies in the fact that it is, according to the “is one of the means through which observance of the rights to juridical personality, a name, nationality, civil registration, and family relationships is facilitated, among other rights recognized in international instruments.”⁸ Specifically, the IACtHR affirmed that failing to recognize the right “can mean that a person has no legal proof of his or her existence, which makes it difficult to fully exercise his or her civil, political, economic, social, and cultural rights.”⁹

Protection of the right to gender identity grew from this conceptual framework once its lexicon was adopted for recognition of the rights claims of transgender persons, as the right to identity was the one from which the possibility of guaranteeing other rights (housing, health, education, access to justice, etc) had derived.

⁶ Se estima que 500 niños desaparecieron en estas circunstancias. Al día de la fecha 109 personas han recuperado su identidad.

⁷ Párr. 122, CORTE INTERAMERICANA DE DERECHOS HUMANOS, Sentencia en el caso GELMAN VS. URUGUAY, 24 DE FEBRERO DE 2011.

⁸ Ibidem, parr. 123

⁹ Id.

By adopting the human rights discourse and adapting it to the claims of the transgender community, the “movement” facilitated the reception of those demands by the general public, as that discourse was broadly known and internalized among legislators, judges, civil servants, academics, and human rights activists. Furthermore, the unconditional backing of the demands of the “movement” by the Mothers of the Plaza de Mayo sealed a strategic alliance of collaboration and mutual recognition between the two.¹⁰

In addition to the decision to employ the human rights discourse, it is also worth identifying the emphasis that was placed on the extreme vulnerability to which transgender persons are subjected, the circumstance that made enabling them to enjoy and develop their most basic human rights so urgent. To a certain degree, emphasis was placed more on the right to equality – in the most robust terms of equality commonly accepted – than on the right to personal autonomy, which had been favored previously.¹¹

The transition to democracy did not only represent an opportunity to address issues related to the rights violations related to the dictatorship, but also a chance to move forward on subjects such as absolute divorce and the bill requiring parties to meet quotas for women candidates on their congressional lists.

The shift to democracy was also accompanied by liberalization in attitudes and practices involving sexuality. Something that contributed to this change was the gradual legitimization of

¹⁰ En 1998 un grupo de travestis se sumó a la ronda de los jueves de las Madres de Plaza de Mayo para pedir que no se le confiera a la policía de nuevo la facultad de detenerlas. Entre la líder travesti, Lohana Berkins y la líder de las madres, Hebe de Bonafini, se dio el siguiente diálogo: (Berkins) “Nosotras venimos porque también nos cazaban como a animales en la dictadura. Y a explicar que peleamos para poder dejar de prostituirnos, que como todo el mundo nos discrimina no podemos vivir de otra cosa”. (Bonafini) “No te preocupes, nosotras tenemos claro cómo es la lucha de ustedes, y todos sabemos que siempre serán ellos los más prostituidos”. En “Un Jueves Diferente en la Plaza”, Página12, 1998, disponible en <http://www.pagina12.com.ar/1998/98-06/98-06-12/pag15.htm>

¹¹ Véanse la argumentación utilizada en el caso “CHA” o las discusiones en torno a la unión civil en la Legislatura de la Ciudad de Buenos Aires.

the human rights discourse, which made possible the spread of positive images of sexual diversity. As one author put it, “the possibilities were broadened for raising questions in the political arena concerning intimacy, the body, gender, and sexuality. In other words, some of the conditions that affect the social processes of visibility and invisibility of sexual diversity and those who comprise it were modified.”¹²

The situation presented an opportunity for the “movement” to increase and diversify its demands and modes of expression/communication. It is worth remembering that the AIDs epidemic forced an issue directly connected to personal sexuality into the public eye. The expansion and diversification of the movement for sexual diversity was largely a product of the mobilization on many levels (economic, emotional, legal, medical, etc.) that comprised the “communitarian response” to the AIDs epidemic.¹³

Yet beyond the liberalization regarding sexual discourse and practice, people in the LGBTI community continued to experience stigmatization and discrimination. They still encountered limitations with regards access to resources fundamental for their well-being (matrimony, adoption, official name changing, sex change operations, etc.) as well as criminalization by agents of public security and the justice system, who often subjected LGBTI persons to detention for the purposes of verifying identity or on the basis of presumed offenses or infractions.

¹² Moreno, Aluminé, “La invisibilidad como injusticia. Estrategias del movimiento de la diversidad sexual”, en Pecheny, Mario, Figari, Carlos y Jones, Daniel (comp.), *Todo Sexo es Político. Estudios sobre sexualidades en Argentina*, Libros del Zorzal, 2008, p. 227.

¹³ Sívori, Horacio Federico, “GLTTB y otros HSH. Ciencia y Política de la Identidad Sexual en la Prevención del SIDA”, en Pecheny, Mario, Figari, Carlos y Jones, Daniel (comp.), *Todo Sexo es Político. Estudios sobre sexualidades en Argentina*, Libros del Zorzal, 2008, p. 245. Dice este autor, “El combate al sida fue un gran movilizador, operando como fundamento moral del compromiso político y como puerta de entrada y punto de inflexión para el desarrollo de recursos simbólicos y materiales que potenciarían la expansión del movimiento de las minorías sexuales como un todo y le darían una orientación específicas”, p. 247.

In this regard, it is important to note that at the outset of the 1990s, the movement of sexual minorities engaged in actions targeting the legislation that were used to legitimate state violence directed towards homosexual and transgender people, norms including codes of infraction, police edicts, and codes misdemeanors in the city of Buenos Aires and certain provinces that criminalized prostitution, homosexuality, and dressing so as to pass for someone of a different sex from that indicated on one's official identification.¹⁴ The struggle against these local norms was the rallying point for the organization and mobilization of transvestite and transsexual people.¹⁵ At the time, the issues and spaces over and in which political leadership within the LGBTI organizations were disputed revolved around the position which each organization took with regards prostitution and the inclusion of transvestite and transsexual people in gay pride marches.¹⁶

Organizations for sexual diversity also undertook action meant to alter stereotypes and promote positive images of sexual diversity. These actions were part of or can be best understood as what was known as “the politics of visibility” – that is, “a set of strategies for the criticism and creation of new social patterns of ‘representation, interpretation, and communication.’”¹⁷ “Gay pride” parades were part of this strategy.

¹⁴ Véase el Informe sobre códigos contravencionales y de faltas de las provincias de la República Argentina y la Ciudad Autónoma de Buenos Aires en relación con la discriminación y represión a gays, lesbianas y bisexuales y trans elaborado por la Federación Argentina LGBT, disponible en http://www.lgbt.org.ar/archivos/codigos_contravencionalesyfaltas.pdf

¹⁵ Véase Sabsay, Leticia, *Fronteras Sexuales. Espacio urbano, cuerpos y ciudadanía*, Editorial Paidós, 2011 (donde se retrata el proceso de criminalización y discriminación en relación con la despenalización del trabajo sexual y la visibilización de colectivos de travestis y mujeres transexuales en el espacio público de la ciudad de Buenos Aires), Fernández, Josefina, *Cuerpos Desobedientes. Travestismo e identidad de género*, Edhasa, 2004, cap. 4 y Berkins, Lohana, “Un itinerario político del travestismo”, en Maffia, Diana (compiladora), *Sexualidades migrantes. Género y transgénero*, Feminaria Editora, 2003. 14/03/2006.

¹⁶ *Ibidem*.

¹⁷ Moreno, Aluminé, “La invisibilidad como injusticia. Estrategias del movimiento de la diversidad sexual”, en Pecheny, Mario, Figari, Carlos y Jones, Daniel (comp.), *Todo Sexo es Político. Estudios sobre sexualidades en Argentina*, Libros del Zorzal, 2008, p. 232

Another was obtaining state recognition of the legal standing of nongovernmental organizations that defended the rights of LGBTI minorities, a process that represents, on one side, the point of the group's most radical exclusion and, on the other side, the turn towards a position more protective of its rights. In the beginning of the 1990s, the Argentine Supreme Court of Justice denied legal standing to an association that defended the rights of homosexual persons in the "CHA case" (CHA standing for Argentina Homosexual Community in Spanish), in a decision which established a precedent following arguments that were very detrimental for the rights of sexual minorities.¹⁸ One demonstration of this is the affirmation by a majority of the Justices on the Supreme Court of the idea that the "public protection of homosexuality" was not an objective that served the "common good."

Fifteen years later, explicitly reversing this precedent, the Supreme Court – with a different composition and unanimously – decided to grant legal standing to an organization that defended the rights of transvestite and transsexual persons in a case that underlined the importance that this recognition has for an effective respect of the rights of sexual minorities.¹⁹ Here the High Court confirmed, on one side, the discriminatory character of earlier decisions that denied legal standing to the association in question and, on the other side, it marked the importance of interpreting the idea of common good in pluralist fashion to include minority interests. Of particular importance, for the first time the Argentine Supreme Court recognized the reality of exclusion, marginalization, and oppression that people who make up the various sexual minorities experience day in and day out.²⁰

¹⁸ Caso "Comunidad Homosexual Argentina" (CHA), CSJN Fallos 314:1531 (1991). Este caso fue decidido por 7 votos en contra y 2 a favor. Cada Juez escribió su propio voto.

¹⁹ Caso "Asociación Lucha por la Identidad Travesti-Transexual" (ALITT), CSJN Fallos 329:5266 (2006)

²⁰ Indicó la Corte: "[...] no es posible ignorar los prejuicios existentes respecto de las minorías sexuales, que reconocen antecedentes históricos universales con terribles consecuencias genocidas, basadas en ideologías racistas

Over the course of those fifteen years, many things happened. As already noted, the eruption of the AIDs epidemic was central for the visibility of the “movement.” Likewise, at the outset of the 1990s other topics related to sexuality, such as abortion, sexual and reproductive rights, violence against women, and questions of gender equality and sexual harassment, became themes under public discussion. At the international level, instruments covering the rights of specific minority groups (the Convention on the Rights of the Child and CEDAW) were passed. Moreover, and very importantly, towards the middle of the decade, Argentina gave constitutional force to the principal international human rights instruments. A few years later during the ALITT case before the Supreme Court, when the court’s decision regarding the transfer of a pension of a deceased homosexual to their partner was still pending,²¹ the Executive intervened and ordered the National Social Security Administration (ANSES) to recognize the rights of homosexuals to receive the pensions of their partners in case of demise.²² In doing so, the government capitalized

y falsas afirmaciones a las que no fue ajeno nuestro país, como tampoco actuales persecuciones de similar carácter en buena parte del mundo, y que han dado lugar a un creciente movimiento mundial de reclamo de derechos que hacen a la dignidad de la persona y al respeto elemental a la autonomía de la conciencia. Caso “ALITT”, cit. ut. *supra*, párr. 16. También sostuvo que no debe ignorarse que las personas pertenecientes a las minorías sexuales representadas por la ALITT “no sólo sufren discriminación social sino que también han sido victimizadas de modo gravísimo, a través de malos tratos, apremios, violaciones y agresiones, e inclusive con homicidios. Como resultado de los prejuicios y la discriminación que les priva de fuentes de trabajo, tales personas se encuentran prácticamente condenadas a condiciones de marginación, que se agravan en los numerosos casos de pertenencia a los sectores más desfavorecidos de la población, con consecuencias nefastas para su calidad de vida y su salud, registrando altas tasas de mortalidad, todo lo cual se encuentra verificado en investigaciones de campo”, parr. 17. De parte de las autoridades públicas argentinas también hubo algunos reconocimientos aislados de la situación de marginalidad que sufren las personas transgéneros, travestis, transexuales e intersexuales. El primero de ellos ha sido un documento del Poder Ejecutivo que da cuenta de la situación de vulneración cuando relata los numerosos y diversos tratamientos discriminatorios y de violencia que sufren las personas con orientación sexual e identidad de géneros diversos en Argentina en el ámbito de la educación, la salud y el trabajo. Véase el documento “Hacia un Plan Nacional contra la Discriminación”, aprobado por el Decreto N° 1086/05, pp. 166-171, 2005. Este documento realiza un diagnóstico de las distintas cuestiones y grupos que son objeto de discriminación en Argentina y entre ellas menciona la identidad y orientación sexual. En el mes de enero de este año (2012) el Instituto Nacional contra la Discriminación, la Xenofobia y el Racismo (INADI) reconoció que el Estado argentino ha discriminado y perseguido al colectivo trans y que existe un deber de pedir perdón por las violencias y discriminaciones sistemáticas que por acción u omisión han sufrido. Véase el *Diario Pagina 12*, “Es un deber el pedir perdón”, 23/1/2012.

²¹ Caso Yapur, Pascale?

²² La Resolución 671/2008 de dicho organismo declara a los convivientes del mismo sexo con derecho a la pensión por fallecimiento del jubilado, del beneficiario de retiro por invalidez o del afiliado en actividad del Régimen Previsional Público o del Régimen de Capitalización.

on the favorable public opinion provoked by the move, stealing a step in anticipation of the resolution that the Supreme Court would likely issue. This action showed that, excepting conservative religious sectors, the majority of people were not opposed to the policy and that, in fact, many supported it, thus opening a path for the discussion of reforming regulations for civil matrimony and adoption so that homosexual couples could participate in these public institutions.

In the years leading up to its passing in 2010, the campaign strategy of the “movement” to advocate the Equal Marriage Act primarily concentrated on lobbying legislators and filing lawsuits in response of the refusal of civil registries to perform marriages of homosexual couples.²³ This strategy eventually bore fruit, resulting in the approval of the law that in turn facilitated the recognition of the right to gender identity. Just as in the case of marriage equality, the places where the fight for the right to gender identity played out consisted both of the courts of justice through cases in which authorization for name changes and sex change operations was sought, or in which the constitutionality of police edicts was questioned, and Congress where lobbying efforts were concentrated. With a clear strategic objective, the movement formulated its struggle for the passing of both laws using discourse that centered on and exalted the right to equality and non-discrimination as rights to love and family. Previously, the fight for the rights of sexual minorities had focused on the violation to personal autonomy that restrictions to marriage and sex change represented. This change in tack helped show that homosexual and transgender parental families did in fact exist. It also helped reveal the extreme degree of marginalization of the trans community. By virtue of this strategy, the LGBTI movement disputed and expanded the boundaries of citizenship and the limits of what is considered normal. The result was that a large

²³ Para una reconstrucción del proceso que concluyó en la sanción de la ley de matrimonio igualitario, véase Hiller, Renata, “Matrimonio igualitario y espacio público en Argentina”, en Aldao, Martín y Clérico, Laura (coord.), *Matrimonio Igualitario. Perspectivas sociales, políticas y jurídicas*, Eudeba, Buenos Aires, 2010.

majority of legislators ceased speaking only in terms of pathology and criminalization and began also focusing on the protection of rights denied to sexual minorities.

In concluding this overview, it is important to emphasize that during the deliberation process that led to both laws, the different activist currents that make up the Argentine LGBTI movement managed to put aside internal political differences to support the passing of the law for marriage equality and the law recognizing GID. The successful passing of both laws can be in large part attributed to this accomplishment and represents another trait making the “Law” an achievement worthy of the entire world’s admiration.

III. Overthrowing the authority of medicine and law to decide and validate assignment of gender: from the pathological to the self-perception model.

Before continuing, it should be remembered that behind the demands of the “movement” centering on the recognition of the right to gender identity lies the pathologization of bodies and behaviors that differ from the man/woman and male/female binarities that was formulated by medical authorities and incorporated into legal structures. The main consequence of denying legal recognition of the right to gender identity consists of discrimination, exclusion, and rendering invisible, legally and in practice, intersexual, transsexual, transvestite, and transgender people. An indisputable indicator of the genuine inequality and deep-rooted prejudice that prevent these people from fully developing their own lives on all levels of social life is the profoundly disadvantaged social and economic position in which they find themselves.

Biomedical “science” is the primary determinant of what genders are consistent with what bodies and which are “healthy.” According to its postulates, intersexuality, transsexuality, transvestism and transgenderism are the result of essentially abnormal processes. For this reason

abnormality/illness is remediated through recourse to one of the two accepted and authorized categories of normal/natural gender/sex in dominant social paradigms for normal sex and genders.²⁴ Disruptive bodies and expressions that depart from social and cultural expectations for sex and gender are submitted to various forms of medical/scientific discipline, all because of their divergence from the binary opposition upon which the hierarchical order of the social world is built. While science is not alone responsible for the ways sex and gender are socially constructed, it possesses immense discursive and practical power to define and decide what is normatively human – what is natural and normal and what is ambiguous – all based on biological “facts” that are not open to question.²⁵

Law, in turn, incorporates the medical presumptions that label people on the edge of or outside the bounds of what is considered normal as sick or unwell, which both legitimizes those presumptions and reinforces them over time. On the basis of “objective, indubitable scientific knowledge,” law therefore approves/legitimizes gender binarity as a value in and of itself and as a valid moral justification for an entire ethico-political system. The rights of people who cannot be pigeonholed in the dominant gender paradigm thus go unrecognized or ignored, which places them in a position of extreme vulnerability.

According to the postulates of medical sciences, intersexuality, transsexuality, transvestism, and transgenderism are the result of essentially abnormal processes, and by implication their treatment must involve some sort of medico-scientific discipline to conform the

²⁴ Véase a Fausto-Sterling, Anne, *Sexing the Body*, Basic Book, 2000.

²⁵ Boaventura de Sousa Santos discurre sobre la subordinación del derecho a la ciencia como una característica central de la modernidad. Afirma que entre ellos se ha dado una relación de cooperación y de circulación de significados. “la mutua autonomía del Derecho y de la ciencia ha sido lograda mediante la transformación del primero en el áter ego de la segunda” De Sousa Santos, Boaventura, “La tensión entre regulación y emancipación en la modernidad occidental y su desaparición”, en García Villegas, M. *et al.* (comps.), *Crítica Jurídica*, Bogotá, Uniandes, 2006, ps. 427-28.

patient into one of the two categories of gender/sex accepted and authorized as normal/natural under dominant social parameters.²⁶ The Diagnostic and Statistical Manual of Mental Disorders (DSM) elaborated by the American Psychiatric Association and the International Statistical Classification of Diseases and Related Health Problems (ICD)²⁷ elaborated by the World Health Organization, which in turn is very much influenced by the first, are two texts that provide the basis for such disciplining. The first was modified in 2013 to eliminate the term “gender identity disorder” in favor of “gender dysphoria” to denominate the anguish suffered by people who do not identify with their masculine or feminine sex. Unlike the DSM-5, the ICD-10 retains the concept of sexual identity disorder, although it is under revision and hopes are that it will be modified as early as 2015.²⁸

Over time the field of psychiatry has become the authority for determining which minds are healthy and which are unwell, and the knowledge it produces has branched out into other fields, such as medicine, law, and bioethics. There exists a subaltern relationship between psychiatric diagnosis and access to surgical or hormonal treatments in which access is conditioned upon the diagnosis – without diagnosis, the health care providers do not furnish the necessary gender technology. This is why there is a reasonable fear that the legal depathologization will block access to technologies for corporal modification by depriving people of the corresponding medical coverage. On one side, it would seem that requiring diagnosis would ensure such medical access, in that the diagnosis would be a condition for inclusion in covered treatments validated by

²⁶ Al respecto véase el libro de Fausto-Sterling, Anne, *Sexing the Body*, Basic Book, 2000.

²⁷ Esta clasificación es un conjunto de definiciones estándar de enfermedades y de condiciones de salud de todo tipo, no solo psiquiátricas, que son utilizadas en gran parte del mundo.

²⁸ Para un paneo de las discusiones y consensos de quienes están a cargo de la modificación del CIE véase, Drescher, Jack, Cohen-Kettenis, Peggy y Winter, Sam, “Minding the body: Situating gender identity diagnoses in the ICD-11, *International Review of Psychiatry*, December 2012; 24 (6): 568-577.

mechanisms that interact hierarchically (with psychiatry occupying the vertex of the pyramid) and jointly among each other between fields such as psychiatry, medicine, legal norms, and bioethics. On the other side, however, the manner in which such diagnoses have been constructed has prevented many people from accessing the gender technology they require, as not everyone who seeks medical treatment meets the stipulated prerequisites. In other words, from the lack or impossibility of being diagnosed arises exclusions validated through the manner described and, while psychiatric diagnosis can open access for many people to the respective treatments, its construction as a mental disorder does not only exclude those who cannot obtain medical validation, but in addition also stigmatizes all those who are positively diagnosed.²⁹

Globally acknowledged references for the rights of sexual minorities hold that the depathologization of transsexuality goes beyond removing certain language from the DSM-5 and ICD-10, and that it must penetrate all areas where transsexuality is habitually understood in pathological terms.³⁰ In particular, they point out with preoccupation the recurrence with which pathologization occurs in juridico-normative contexts in which diagnosis is indispensable for access to rights. The necessity to seek such diagnosis, as well as the competences used to determine

²⁹ Para una discusión sobre los pros y los contras del diagnóstico psiquiátrico y médico y de las distintas estrategias sugeridas para alcanzar la despatologización, véase el documento de la World Professional Association for Transgender Health (WPATH), “WPATH Consensus Process Regarding Transgender and Transsexual-Related Diagnoses in ICD-11”, 31 mayo de 2013, disponible en http://www.wpath.org/uploaded_files/140/files/ICD%20Meeting%20Packet-Report-Final-sm.pdf y Butler, Judith, “Desdiagnosticar el género”, en *Deshacer el Género*, PaidósStudio 167, España, 2006, cap. 4 (*la autora discute las distintas formas en las que funciona el diagnóstico, liberador/capacitador, restrictivo/opresor/patologizador y la relación entre la cuestión económica y la autonomía decisional*).

³⁰ Al respecto véase la Campaña Internacional Stop Trans Pathologization (STP), que exige la retirada de la categoría de "disforia de género"/"trastornos de la identidad de género" del CIE-11 y en cambio propone la inclusión de una mención no patologizante. Sus exigencias centrales son: La abolición de los tratamientos de normalización binaria a personas intersex, el libre acceso a los tratamientos hormonales y a las cirugías (sin tutela psiquiátrica) y la cobertura pública de la atención sanitaria trans-específica (acompañamiento terapéutico voluntario, seguimiento ginecológico - urológico, tratamientos hormonales, cirugías), Disponible en <http://www.stp2012.info/old/es>

it, diminish and weaken the status of transsexual persons as rights holders. It is also necessary, these sources maintain, to abolish the application of sex assignment treatments following binary normalization to intersex persons. The psychiatric colonization of what is supposedly mentally healthy and what constitutes a disorder must therefore, with regards gender, be dismantled, as well as all of its ramifications.³¹ This is the only way the human rights of gender diverse persons can be protected, and it is down this path that Argentina has boldly embarked.

The Regulation of Gender Identity Prior to the “Law.”

The normative regime that consolidated the pathologization of gender diverse individuals comprised several norms that required judicial authorization to execute gender changes in registries, documents, or on the bodies of the people who solicited them.

To better understand this situation, an explication of the Argentine national identification system seems appropriate. The system involves two separate but interdependent systems – the national registry and the national identification system. The former is responsible for recording acts and occurrences that give rise to, alter, or modify civil status and personal capacity (birth, marriage, disability, and death, among others) and for issuing the respective certificates. Its organization corresponds to each province (and the Autonomous City of Buenos Aires, in accordance with Law 26,413). Gender and sex are for this system an essential piece of information, as name, surname, and sex are required to record births. Moreover, proof of live birth – the

³¹ “Despatologizar, significa mucho más que retirar la transexualidad del DSM-V y el CIE-10. Significa disputar el férreo control que la psiquiatría ha ejercido y ejerce sobre las identidades trans, y contrarrestar sus efectos. Significa recobrar la historia antes de los tiempos de la medicalización, y construir su posibilidad en el presente. Significa afirmar radicalmente el derecho de las personas a decidir sobre sus cuerpos –incluso a decidir modificarlos– y denunciar las violaciones a los derechos humanos que tienen lugar, hoy mismo, en el marco de la regulación estatal de ese derecho. Significa enfrentar ese orden diagnóstico del mundo que cada día impone su perspectiva de género, sus normas, su nomenclatura, sus procedimientos de inclusión, sus fronteras y sus exclusiones”, Cabral, Mauro, “Saquen sus manuales de nuestros genitales”, *Página12*, 22/10/2010, disponible en <http://www.pagina12.com.ar/diario/suplementos/soy/1-1675-2010-10-28.html>

“Medical Certification of Birth” – includes sex among the essential information. At this phase biological criteria predominate in differentiating between the sexes of newborns. The second system consists of a national repository for identifying individuals responsible for issuing national identity cards (DNI) which carry a unique number and involves the use of fingerprinting technology (in accordance with Law 17,671). In this system, the gender or sex of individuals does not normatively comprise an obligatory field for documented identification.

In addition to these systems, it is important to consider the law regulating the use of names by individuals (Law 18,248), which contains very specific dispositions, two of which have had a direct effect on the binary construction of gender identity. In the first place, Article 15 of the law establishes the possibility of changing one’s name, but only by judicial resolution and for just motives – but without specifying which motives were worthy of consideration. This gave rise to what is known in Spanish as *inmutabilidad del nombre* – the practical impossibility of changing one’s name – a policy whose purpose is to protect the function names serve in identifying individuals, whether for monitoring legal relations between people or for facilitating the operation of various collective institutions necessary for community life. Names thus become a method of civil policing that seeks control over the identification of individuals. Justification for the practice is found in the guarantee it represents for third parties, that is, as a means to ensure certainty in identifying others. In practice, this regulation meant that the alleged interest in changing one’s name had to be deemed more important than the public interests that provided the basis for the general rule prohibiting name changes, and in these circumstances invoking an interest in changing one’s gender was not deemed sufficient. In the second place, in accordance with Article 3, Paragraph 1 of the law regulating name changes, new names were required to reflect the sex one was assigned at birth; that is, one could not choose a name that led to ambiguity with regards the

sex of the person who adopted it. Although the “Law” modified the first of these two dispositions, the second remains in force, a circumstance that has generated interesting discussions within the trans movement (to which I will refer further on).

Another relevant aspect of this scheme is Article 19 Paragraph 4 of Law 17,132 on the exercise of medicine. This clause regulates sex changes by prohibiting medical professions from carrying out surgical interventions that modify “the patient’s sex.” The exception it established was for performing such interventions subsequent to court approval. Furthermore, Article 20 of the same statute prohibited interventions that would result in the sterilization of the patient. As we will see in the following paragraphs, when judges authorized surgery and other medical treatments, these were destined for people whose bodies reflected without any doubt the characteristics of the gender to which they claimed they belonged, or to people who were in the process of attaining similar concordance. In addition, in the chapter on injury, the Penal Code establishes punishments for those responsible for damage to the health, awareness, organs, members of others (Articles 90 and 91), another regulation which dissuaded many doctors from performing such surgeries and relevant medical treatments.

Court approval, both for changing one’s gender on the registry and documents and to access surgery and medical treatment for gender changes, was granted after an exhaustive verification of life history of the person soliciting the change. It violated the principle of self-determination with regards the free choice of life that the person desired to lead, and also the respect, in terms of human dignity, that such a decision deserves from the rest of society. Submitting the decision to a judge for approval represented an invasion of the State into the sphere of privacy, an invasion

intensified when, for the purpose of deciding whether or not to approve the change, the person was subjected to intense, meticulous scrutiny covering the most intimate aspects of their life.³²

For lack of space I cannot go into the details of these cases, yet will only mention in passing that the rule applied by judges consisted of the “normalization” of people and bodies considered pathological because they presented a certain “ambiguity.” Even in the cases in which the court’s decision appears to be a triumph because the desired name or sex change was granted, the process leading up to the decision remained extremely troublesome for the stigmatization inherent in the “scientific” verification of the pathology and suffering of the claimant. Furthermore, in all decisions of this type, there is a terrible connection between gender identity and the stereotypical ways gender is lived out (masculine men and feminine women), sexuality (grounded in heterosexual orientation), and corporal morphology. In this way, the justice system, through its experts, has served as the dispositive through which a relationship between biology and a heterosexual, homophobic conception of social gender was reinforced.

The inability of trans individuals to use a name that reflects their self-perceived gender identity represents the greatest obstacle to the exercise of their basic rights. Definitively, it is the first hurdle to being considered full citizens that they face when entering the labor market, when enrolling in schools, or when seeking healthcare. The scant data on indicators such as mortality rates, violence, health, education, and housing – among others – that exists for this group provides evidence of the situation of extreme structural vulnerability in which they find themselves,

³² Para un detallado análisis de los fallos emitidos en los años previos a la sanción de la ley, véanse Litardo, Emiliano, “Panorámicas sobre derecho, identidad de género y sexualidad”, en Jorge Raíces Montero (comp.), *Un cuerpo: mil sexos. Intersexualidades*, Buenos Aires, Editorial Topia, 2010, Scheibler, Guillermo, “Justicia Porteña e Identidad de Género”, y Von Opiela, Carolina, “Transformaciones: la (IN) Estabilidad del Nombre”, ambos artículos en Von Opiela, Carolina (Coord), *Derecho a la Identidad de Género Ley 26.743*, La Ley, 2012

vulnerability which reveals the large degree to which the human rights of these people are violated on a daily basis.³³

The Argentine law on the right to gender identity provides a model centered on the individual's own perception of gender, without requiring that gender to be certified by any psychiatrist, doctor, or judge.

The New Regulations for the Right to Gender Identity.

The restrictive regulatory regime for personal identity already described was modified by the Law of Gender Identity No. 26,743, which was passed in May 2012 by unanimous vote of the Argentine Congress. The Right to Gender Identity (heretofore RGI) recognizes, in the first place, the right

³³ Entre la escasa información disponible, cabe resaltar el “Informe Nacional sobre la Situación de las Travestis, Transexuales y Transgénero”, elaborado por activistas en la materia que refleja con datos empíricos la realidad de urgencia económica y social de estas personas que se observa en los datos que muestran que sufren de muerte temprana producto de enfermedades y violencia prevenibles. Al respecto, en este informe se consigna que 592 personas travestis, transexuales y transgéneros han fallecido entre el año 2001 y el año 2006. La principal causa de muerte es el VIH/Sida (54,7 %). La segunda es el asesinato (16,6 %). Respecto de la edad, el 43% murió entre los 22 y 31 años y el 33% entre los 32 y 41 años. El 9% no había cumplido los 21 años, en Berkins, Lohana (coord.), *Cumbia, Copeteo y Lágrimas. Informe Nacional sobre la Situación de las Travestis, Transexuales y Transgénero*, A.L.I.T.T., 2007, Introducción. Véase también Berkins, Lohana y Fernandez, Josefina, coords. (2005) *La gesta del nombre propio. Situación de la comunidad travesti en la Argentina*. Editorial Madres de Plaza de Mayo, Buenos Aires, y Berkins, Lohana, Un itinerario político del travestismo, en Maffía, Diana (comp.) Sexualidades migrantes. Género y transgénero, Feminaria Editora, Buenos Aires, 2003. Además pueden consultarse los artículos de Sacayán, Diana, “El crimen de Rubi”, Berkins, Lohana, “Un té en honor a Andrea” y Veira, Bruno, “La Plata. Avalancha de motores en la madrugada” con relatos sobre los crímenes de odio que aquejan a este grupo, *Revista El Teje. 1er Periódico Travesti Latinoamericano*, Nro. 6, 2010. También en esa revista Sacayán, Diana “¿Nadie oyó gritar a Naty?”, Nro. 2, 2008 y “¿Quién vió caer la sangre caliente sobre la espalda de Zoe?”, Nro. 4, 2009. Véase también el Informe Sombra elaborado por O en Conducta y la IGLHRC -Human Rights for Everyone. Everywhere-, Junio 2010, para el Comité de la CEDAW sobre “Violación de los derechos Humanos de las Personas Lesbianas, Bisexuales, Travestis, Transgénero, Transexuales e Intersex (LBTTTTI) en la Región Noroeste de Argentina (NOA). La única iniciativa estatal que se ha realizado en Argentina hasta la fecha es “La primera encuesta sobre Población Trans” cuyo objetivo fue describir las características sociodemográficas y las condiciones de vida de las Personas Trans e Indagar acerca de las experiencias de discriminación, el conocimiento de herramientas legales y normativas que protejan de la discriminación y el acceso a la justicia de la Población Trans. La encuesta se realizó en el Municipio de La Matanza y es una iniciativa conjunta del Instituto Nacional de Estadística y Censos (INDEC), el Instituto Nacional contra la Discriminación, la Xenofobia y el Racismo (INADI) y las organizaciones sociales en las que participan las personas Trans de La Matanza, disponible en <http://www.indec.gov.ar/webencuestatrans/preguntas.html> Los resultados en esta encuesta están reproducidos en por Rodríguez, Carlos, “Día Trans Día”, en Página12 20/8/2012 disponible en <http://www.pagina12.com.ar/diario/sociedad/3-201440-2012-08-20.html>

itself; in the second place, it recognizes the right of people to lead their lives in accordance with their gender identity; and, in the third place, it recognizes the right to treatment according to that identity. In addition, people must be registered and identified in accordance with their own gender identity. The primary objective of the law is ensuring full access to the right to gender identity. This means that anyone can request name changes on registries and identification documents without the mediation of judicial authorities. Integrated health is also guaranteed through access to total and partial surgical interventions and/or integrated hormone treatments to adjust the body to the self-perceived identity, for which obtaining judicial or administrative authorization is no longer required, only the informed consent of the person. In the following section I describe these two facets of RGI.

a) Name Changes on Registries and Documents.

The “Law” starts with a definition of gender identity as “the internal, individual experience of gender just as each person feels it, which may or may not correspond to the sex assigned at birth, and including the personal experience of one’s body. It may involve modifying corporal appearance or function through pharmacological, surgical, or other means, as long as the modification is made by free choice. Other expressions of gender, such as dress, speech, and manners, are also included” (Article 2).

Before addressing the specific content of this clause, it is worth noting that, in adopting this definition, the Argentine law carries out a concrete normative application of the definition provided by the Yogyakarta Principles on the Application of Human Rights Law in relation to Sexual Orientation and Gender Identity published in 2006. These Principles were the result of efforts by a group of experts to promote international standards with regards sexual orientation

and gender identity and relate to the application of international human rights legislation to the areas of sexual orientation and gender identity. Although they have not been officially adopted, they are cited in documents of the UN and national courts in many countries. Several governments have used them as a guide in defining their policies on the issue.³⁴

With regards the terms of the definition of gender identity advanced by the “Law,” it is worth underscoring that its most revolutionary aspect (I cannot think of any other adjective to categorize it) may be the exclusion of any requirement for medical diagnosis to determine gender identity. The determination rests solely in the hands of the person who lives and experiences that identity.

The formulation adopted by the “Law” separates the sex assigned at birth, which is marked in the registry and subsequently on identification documents under the person’s name, from gender identity, and establishes a subordinate relationship between them, superimposing self-perceived gender identity over sex and the identificatory practices that follow birth. In so doing, the definition formulated by the “Law” effectuates a conceptual excision, splitting gender from a person’s physical attributes. This has substantial effects, as it starkly departs from medical classifications of gender that are centered on biological appearance and sexual equipment – for example, the presence, absence, or size of the penis.

Gender is a constitutive element of human personality and its relationship with anatomy is complex. The “Law” recognizes that complexity to the degree that it disassociates the concepts. Sex as definitive element is nowhere considered in the “Law” and is only brought in for registry

³⁴ Por ejemplo, la Observación General N° 20 del Comité de Derechos Económicos, Sociales y Culturales, “La no discriminación y los derechos económicos, sociales y culturales (artículo 2, párrafo 2 del Pacto Internacional de Derechos Económicos, Sociales y Culturales)”, del año 2009, menciona a la identidad de género como un factor de discriminación jerarquizando los Principios de Yogyakarta al remitirse a su definición sobre la identidad de género.

purposes as an element subordinate to self-perceived gender identity, which is the only factor that must be considered in defining a person's gender. In the regulation, science, and specifically medical science, abandons its central role as the determinant constructor of sex, a role which is taken up by the personal perception of gender. A sort of medical deregulation of the body is hence produced.

The definition of the right to gender identity contained in the "Law" does not employ binary language. Yet this kind of language is still applied to the person involved, since when changing one's gender identity, by law people are still required to adopt a masculine or feminine name, as Article 3 Paragraph 1 of the law regulating name changes remains in force and it requires that people take names that reflect the sex assigned them at birth. In this regard, it is worth keeping in mind that the "Law" has been inserted into a legal system characterized by its rigid and traditionally dichotomous configuration; that is, into a long-standing juridical constellation with its own rhetoric, bureaucracy, and violence.³⁵ Although the introduction of the "Law" generates new and different expressions, it should not be surprising that the immediate consequences of its implementation are replications and reproductions following the folds and contours of the traditional discourse in which binary discourse still very much survives, though in different clothing.³⁶

³⁵ Boaventura De Sousa, Santos, *Sociología Jurídica Crítica*. Bogotá: ILSA, 2009, p. 55.

³⁶ Un ejemplo de ello puede verse en el actuar de los funcionarios públicos en la experiencia de "Lulú" la primera niña trans en el mundo en obtener a los 6 años de edad el cambio de nombre en su documento de identidad, véase Laura Saldivia Menajovsky "El reconocimiento del derecho a la identidad de "Lulú", será publicado en Valeria Paván (ed.), "Mi nombre es Lulú". Experiencia de reconocimiento propia, familiar, estatal y social de una niña trans de 5 años. Edición de la Universidad Nacional de General Sarmiento, 2014. Esta historia es un ejemplo, por un lado, de las resistencias que ofrece en el ámbito de la administración pública una "Ley" que viene a proponer nuevas formas de mirar la identidad de género y, por el otro, de cómo la "Ley" a contribuido a remover tal resistencia. Véase también el documental "Soy nena, soy princesa"..., el artículo periodístico "Lo que devuelve el espejo", Diario Página 12, 28/7/2013, disponible en <http://www.pagina12.com.ar/diario/sociedad/3-225462-2013-07->

The system, hence, despite the new law, has not escaped the binary logic related to gender and the suppression of uncertainty provoked by realities foreign to the binary masculine/feminine equation. The “Law” was inserted into a system that still needs to categorize, normalize, and dispel ambivalence,³⁷ regardless the change of the determinate quality used for classification – previously biological sex, now self-perceived gender. Although the law under examination erects, masterfully, the axis of self-perceived gender identity, enabling the excision of the sex assigned at birth from gender, it remains, paradoxically, only possible to perceive oneself as masculine or feminine, at least for the purposes of official registration and identification.

There is room for debate, therefore, over whether the “Law” manages to escape the “labyrinth of dualisms through which we have explained our bodies and our tools to ourselves.”³⁸ Marlene Wayer, transgender activist, argues that “This is a law for those who want to maintain man-woman normalization and those of us who have higher expectations are left where we started, or to put it better, the law blackmails us into conformation of these categories alone.”³⁹ Without disrespect for this criticism, which warrants attention, what is indisputable is that all human beings, whether cisgender,⁴⁰ trans, or intersexual, regardless the many gender options that we can conceive in theory to exist, inhabit in practice two genders – feminine and masculine. The “Law” reflects this phenomenon and for that reason can be challenged for reproducing gender binarity. Yet the law also contains a disposition that enables people who do not fit in either of the two boxes for sex/gender, or people who would like to move from one to another, or even occupy both, to

28.html, y “Luana, la nena trans de 6 años, ya tiene su nuevo DNI”, *Diario La Nación*, 9/10/2013, disponible en <http://www.lanacion.com.ar/1627459-luana-la-nena-trans-de-seis-anos-ya-tiene-su-nuevo-dni>.

³⁷ “Clasificar supone poner aparte, separar... el acto de clasificar postula que el mundo consiste en entidades consistentes y distintivas” (BAUMAN, 2001, p. 74).

³⁸ HARAWAY, 1991, p. 311.

³⁹ Véase Marlene Wayer, “¿Qué pasó con la T?”, *Revista Soy de Página 12*, 11 de mayo de 2012

⁴⁰ Cis-gender’. It refers to someone whose biological sex matches their gender identity.

command respect from society for the gender identity they adopt whenever this means using a first name different from the one registered on their national identification. The “Law” stipulates that “upon any person’s sole request, an adopted first name must be used when citing, registering, filing, calling the person, or performing any other task or service, both in public offices and in the private sphere.” This disposition requires obedience immediately following the expression and manifestation of such a desire by any person, be they adult or minor, without any requirement for supporting documentation. In this way, people in disagreement with the binary labeling incorporated into the law have recourse the greatest flexibility offered by this provision.

In addition to depathologizing the determination of one’s gender identity, the “Law” does not set gender identity once and for all. This is because the law does not assume that the credentials for authenticating gender identity are available from the very moment when it must be registered. Accordingly, the “Law” takes into account the dynamic rather than static nature of gender identity as it may be modified once without any other procedural prerequisite than the individual’s expressed volition. Still, the dynamism of the content has a limit: if a person wishes to modify their gender identity more than once, judicial authorization is required (Article 8). This is out of respect for persisting legal concerns of third parties who may have the right to verify the gender of the person with whom they are involved.

b) Gender Identity and Corporal Modification.

The “Law” also stipulates that gender identity “may involve modifying corporal appearance or function through pharmacological, surgical, or other means, as long as the modification is made by free choice” and that “other expressions of gender, such as dress, speech, and manners, are also included” in the right (Article 2). It is important to emphasize, however, that gender identity and

the consequent registries and documentation of it do not depend on genital reassignment nor any of the customary medical practices or interventions associated with it, as “in no case shall accredited surgical intervention for total or partial genital reassignment be required, nor shall it be necessary to accredit hormone therapy or other psychological or medical treatment” (Article 4).

Access to total or partial sex/gender reassignment or to hormone treatments for corporal adjustments of people over eighteen years of age does not require judicial or administrative authorization.⁴¹ For both access to integrated hormonal treatment and total or partial surgical genital reassignment surgery, all that is necessary is the informed consent of the person alone (Article 11).⁴²

Dejudicializing access to the gender identity sought by someone is another pioneering facet of the “Law.” Judges no longer hold the power to laboriously examine the body and life history of a person who requests gender modification in order to determine whether the alleged gender is genuine or not, a process that requires the invasion of the persons privacy/intimacy. Judges can no longer substitute their voice for that of the person who demands a change of gender identity. Another advantage of dejudicialization is the elimination of unnecessary delays in bureaucratic

⁴¹ Respecto de las personas menores de edad, la “Ley” sostiene que en todo caso donde se requiera la intervención quirúrgica —con o sin consentimiento de sus representantes—, ha de intervenir un/a juez/a. Es difícil juzgar la conveniencia de esta norma dada la probada ignorancia en la materia de algunos jueces que han demostrado en los últimos años una tendencia a aceptar la intervención de tecnologías médicas a fin de subsumir el cuerpo del niño al binarismo hombre/mujer

⁴² El último “Informe del Relator Especial sobre la tortura y otros tratos o penas crueles, inhumanos o degradantes, se centra en ciertas formas de abusos presentes en entornos de atención de la salud que pueden trascender el mero maltrato y equivaler a tortura o a tratos o penas crueles, inhumanos o degradantes. Respecto de las identidades estigmatizadas y del consentimiento informado, el informe sostiene: “Con miras a dar prioridad al consentimiento informado, como elemento esencial de un proceso continuo de prueba, consulta y tratamiento voluntarios, el Relator Especial sobre el derecho a la salud ha señalado también que debía prestarse especial atención a los grupos vulnerables. Los principios 17 y 18 de los Principios de Yogyakarta, por ejemplo, ponen de relieve la importancia de salvaguardar el consentimiento informado de las minorías sexuales. Los proveedores de servicios de salud deben estar al corriente de las necesidades específicas de las personas lesbianas, gays, bisexuales, transexuales e intersexuales y adaptarse a ellas (A/64/272, párr. 46)”, A/HRC/22/53, 1 de febrero de 2013, para. 38.

procedures and the stress produced by the legal uncertainty of someone who requests recognition of a new gender knowing that each judge interprets the matter differently and that many take much time to reach a decision. Removing delays also reduces the costs occasioned by recourse to justice.

Along with these aspects of the “Law,” the important place of informed consent must also be stressed, as it is the sole requirement for access to corporal modification technologies. Likewise, it is no longer necessary to obtain expert opinion, or psychiatric evaluations, or even witnesses to access some form of medical treatment. Medical intervention or treatment is understood as a right, not as some sort of gage for a supposedly authentic gender identity, a shift that represents a new relationship between medical science and individuals.

This relationship, however, does not emerge at birth, when gender binarity is still imposed on newborns – often literally, by means of surgical mutilation. This is the case for many babies who possess varying conditions of intersexuality. In this respect, although the “Law” contemplates a new relationship between people and medicalization and surgical intervention, and in fact posits a revolutionary relationship with regards the level of depathologization it advances, for the moment it does not penetrate the registry system for newborns, not even with regards the mutilating surgical interventions that the scheme entails. The topic of legal regulation and prohibition of sex/gender assignment surgery on newborns remains pending,⁴³ as does the matter of how babies are assigned masculine or feminine genders.⁴⁴

⁴³ Sobre este tema véase Jorge Raíces Montero (comp.), *Un cuerpo: mil sexos. Intersexualidades*, Buenos Aires, Editorial Topia, 2010, ps. 98-119 y el libro de y Cabral, Mauro (ed.), *Interdicciones. Escrituras de la intersexualidad en castellano*, Anarrés editorial, 2009.

⁴⁴ Este año fue noticia mundial que Alemania reconoce un tercer género distinto al de hombre o mujer para aquellos bebés con genitalia indeterminada. Esto fue calificado en varios medios de comunicación como una revolución social y jurídica. Véase <http://www.lanacion.com.ar/1612462-ni-hombres-ni-mujeres-alemania-reconoce-el-tercer-sexo> Sin embargo, considero que algo que parece muy novedoso y progresista como el rótulo de tercer género, en realidad está obturando directamente por qué etiquetar el sexo/género de un recién nacido. ¿Cuál es el sentido de

Another key aspect of the law that represents a paradigmatic change resides in the provision of medical surgery and treatments necessary to complete the desired gender change. Public healthcare providers, be they state-run, private, or part of the subsystem of social assistance, must respect in permanent fashion the rights that this law recognizes. For this purpose, the “Law” stipulates that those health services be included in the Obligatory Medical Program (PMO).⁴⁵

Here it should be remembered that the law does not remove the necessity of obtaining a medical diagnosis in order to access the necessary treatments and surgeries. On the contrary, medical authorities retain enormous power in terms of the diagnosis that permit people to realize the modifications that they need to adjust their gender to their self-perception. That is why a current battleground for LGBT movements around the world concerns the classifications in psychiatric and medical manuals used for categorizing pathologies (the DSM and ICD already mentioned). In these manuals those gender identities that diverge from the gender imposed at birth and do not reflect sexual/gender binarity are considered disorders or diseases. People are questioning why these pathologizing diagnoses should be a necessary condition for access to the right to gender identity and the rights that derive from it, questions addressed at the beginning of this section.

Regardless of how praiseworthy are many aspects of the regulation implemented by the novel, progressive legislation, it remains to be seen how it will be implemented by judicial and administrative agents and the medical corps in their respective spheres of operation and in each concrete case that arises.

esto? Más aún en un modelo donde se privilegia para la definición de la identidad personal la autopercepción del género.

⁴⁵ El Programa Médico Obligatorio (PMO) es una canasta básica de prestaciones a través de la cual los beneficiarios tienen derecho a recibir prestaciones médico asistenciales. La obra social debe brindar las prestaciones del Programa Médico Obligatorio (PMO) y otras coberturas obligatorias, sin carencias, preexistencias o exámenes de admisión.

IV. In Guise of Conclusion.

One of the first stages of sexual liberalization in Argentina coincided in part with the country's transition back to democracy and involved the politicization of sexuality, bringing sexuality into the arena of politics, making it visible, and revealing its mutual constructions and how they were shaped by power relationships. Currently, the situation is one of post-visibility, in which forms of production and regulation of such sexuality are becoming the focus.⁴⁶ While the discussions in the rest of the world continue to focus on the need to draw attention to the situation of vulnerability of LGBTI individuals,⁴⁷ Argentina has moved past this stage to one in which the discussions are centered on the questions of how to best guarantee in practice the recognition and political and legal visibility that has been achieved.⁴⁸

Although this recognition and visibility stem from a law, it has having what I would call a transformational impact at the level of society too. It is difficult to illustrate here what I mean by such a hopeful statement, but I sincerely believe that transgender people are now successfully occupying public spaces from which they were previously barred,⁴⁹ a circumstance which alters

⁴⁶ “Obtenidas las reformas, liberadas y liberados de estas demandas, se clausura una forma de pensar la política sexual y nos empuja a una nueva etapa en la academia que requiere no sólo visibilizar otras situaciones de exclusión y marginación sino también un pensamiento crítico sobre las mismas conquistas”, Juan Marco Vaggione en el prólogo de Jones, Daniel, Figari, Carlos y Barrón López, Sara (coords.), *La Producción de la Sexualidad. Políticas y Regulaciones Sexuales en Argentina*, Editorial Biblios, 2012, p. 13

⁴⁷ Muestra de ello son iniciativas como la reciente creación de la Unidad para los Derechos de Lesbianas, Gays, Bisexuales, Trans e Intersex en la Comisión Interamericana de Derechos Humanos

⁴⁸ Por supuesto que en la mayor parte de país el nuevo escenario todavía convive con la incipiente problematización y visibilización política de los derechos de la minorías sexuales. De todos modos las dos leyes marcan un piso de discusión y un marco legitimante para la misma

⁴⁹ Varias personas trans están ocupando lugares destacados en la administración pública, algo impensado pocos años atrás. Tal el caso de Lohana Berkins, activista trans renombrada, quien asumió a cargo de la Oficina de Identidad de Género y Orientación Sexual del Consejo de la Magistratura de la Ciudad de Buenos Aires, <http://www.telam.com.ar/notas/201311/40529-lohana-berkins-es-la-titular-de-la-oficina-de-identidad-de-genero-y-orientacion-sexual.html> . Un tema que ha recibido especial atención es el relativo al acceso al trabajo y las personas trans. Al respecto véase <http://www.trabajo.gov.ar/diversidadsexual/> y http://inadi.gob.ar/wp-content/uploads/2013/04/cuadernillo_de_inclusion_laboral_trans.pdf . Se ha firmado un convenio entre el INADI y el Ministerio de Trabajo para la inclusión en el mercado laboral de las personas trans, <https://www.facebook.com/notes/ministerio-de-trabajo-empleo-y-seguridad-social-de-la-nación/se-firmó-un->

the social perception of them. They are no longer forced to remain in private areas void of legal protection; on the contrary their presence in the public sphere brings with it social recognition.

The violence and social exclusion afflicting the group continues, of course. Yet today, with laws like the ones for marriage equality and gender identity, more favorable conditions for social acceptance and tools for countering and transforming violence and discrimination are created. The “Law” not only recognizes what may be one of the last formal inequalities lacking state recognition, but also advances the recognition of rights of socioeconomic nature which, if adequately implemented, will have important repercussions for the disadvantaged material conditions that people of diverse genders have long suffered.

Passing the “Law” represents an auspicious beginning to accomplish the depathologization, non-discrimination, and decriminalization of diverse gender identities in Argentina. Specifically, it dismantles the rigid binary legal regulation that presupposes the existence of only two kinds of bodies – man and woman – which it defines in a clear manner definitively for the term of one’s entire life.⁵⁰ The “Law” legitimizes in fact the transgender experience – not only the needs and histories of the people but the people themselves. This results in the disarmament/retraction/discredit of laws and state actions that stemmed from stigmatizing people of different gender identities and sexual orientations as sick or unwell.

It is not, however, only an auspicious start for Argentina, but for the rest of the world as well. A concrete model for depathologizing gender identity has been established to make room for self-perceived identity. Something that appeared impossible not long ago now exists in reality and

convenio-con-el-inadi-sobre-trabajo-y-diversidad-sexual/10150297106026313?comment_id=18864800&offset=0&total_comments=1

⁵⁰ Sobre la construcción binaria de la sexualidad véase Saldivia, Laura, “La Construcción Binaria de la Sexualidad”, en *Derecho y Sexualidades*. SELA 2009, Librería, Buenos Aires, 2010, ps. 98-119.

is being applied. In the first year of the “Law” alone, three thousand people were able to change their names on official registries and documents without having to obtain verification from a judge, on the basis of assessment by medical “experts,” that the gender sought was correct/true.⁵¹

This is why the RGI established by the “Law” should be extrapolated all over the world because it breaks apart the existing models that pathologize diverse gender identities. This is the reason for raising awareness of and publicizing the Argentine law. Some early signs of initiatives to adopt similar laws do exist. In the European Parliament’s report on “The Situation of Basic Rights in Europe (2010-2011),” express mention of the Argentine law is made as one that should be emulated in Europe.⁵² The Spanish province of Andalusia has become the first to follow the depathologizing trend started by the Argentine legislation.⁵³

As we have seen, the “Law” is revolutionary in many aspects. It removes decision-making power for access to name and corporal gender change from judges and administrative authorities. It makes informed consent the central consideration for whether medical treatment or surgery is

⁵¹ “A un año de la ley de identidad de género, 3000 personas se cambiaron el nombre”, Diario La Nación, 08 de mayo de 2013, disponible en <http://www.lanacion.com.ar/1580129-a-un-ano-de-la-ley-de-identidad-de-genero-3000-personas-se-cambiaron-el-nombre>

⁵² En el informe del Parlamento Europeo sobre “La situación de los derechos fundamentales en la Unión Europea (2010-2011)”, se hace mención expresa al modelo Argentino como aquél que debe ser emulado. El Parlamento, “Lamenta que en varios Estados miembros todavía se considere que los transexuales son enfermos mentales; insta a los Estados miembros a que introduzcan o revisen los procedimientos de reconocimiento jurídico de género, de acuerdo con el modelo de Argentina, y revisen las condiciones establecidas para el reconocimiento jurídico de género (incluida la esterilización forzosa); pide a la Comisión y a la Organización Mundial de la Salud que supriman los trastornos de identidad de género de la lista de trastornos mentales y de comportamiento, y que garanticen una reclasificación de dichos trastornos como trastornos no patológicos en las negociaciones de la undécima versión de la Clasificación Internacional de Enfermedades (CIE-11)”, 22/11/2012, parr. 94. Disponible en <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2012-0383+0+DOC+PDF+V0//ES> .

⁵³ La comunidad autónoma andaluza será la primera región de un Estado europeo en despatologizar la transexualidad y acatar esta recomendación del Parlamento Europeo del 12 de diciembre de 2012 que sugiere tomar como referencia la ley Argentina “la única a nivel mundial que ha reconocido la autonomía y la despatologización de las personas trans”, en “Andalucía será la primera región europea en despatologizar la transexualidad” 08/01/2014, disponible en http://www.eldiario.es/andalucia/Claves-andaluza-transexualidad-vanguardia-europea_0_196680636.html

necessary. It also accounts for their progressive development of autonomy inasmuch as the necessary medical treatments for effecting the desired gender change are concerned. It does not require genital surgery or psychological or hormonal treatment to change the gender on public documents and registries. It recognizes the right to gender of children. It obligates healthcare providers, be they state-run, private, or part of the subsystem of public assistance, to guarantee the rights established by the “Law,” meaning that they must perform the respective treatments and surgical interventions free of charge.

Another innovative aspect of the Argentine regulation of RGI lies in the use of new terms to conceptualize the relationship between the legal and medical fields. On one side, the “Law” is premised on the impossibility of disassociating legal issues and health concerns, as health itself is recognized as transitional for gender identity. This recognition of the attachment/inseparability of health and identity is yet another novel aspect of the Argentine regulation of RGI. On another side, the “Law” establishes a basis for overturning the traditional acquiescence of legal authorities to medical science. Now it is the medical authorities who must submit without question or examination to the self-perceived gender recognized by the legal norm.

In particular, the law implies state recognition of the denial of humanity to which transgender persons were exposed, people who suffered systematic violations of their human rights at the hands of the State and its agents. For this reason, the law represents significant historical reparation for the immeasurable violence to which the group was subjected, be it through pathologization, discrimination, or criminalization.

Last, but by no means least, attention should be drawn to the mantle of legitimacy that the “Law” bears as the product of advocacy on the part of LGBTI organizations. The law’s wording

was a result both of those groups input and advocacy. It was an historic occasion in which those most concerned by the law were also responsible for its promulgation.

It remains to be seen whether the legal and political changes that are promoted by the passing of such a law are able to take root and multiply in terms of changing personal attitudes and social understanding of human sexuality. There are, however, good reasons to believe that this is exactly what is occurring in Argentina.