Presentation

CONFRONTING BINARY FOUNDATIONS: NON-BINARY IDENTITIES AND THE EDGES OF RIGHTS

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This Special Issue of The Age of Human Rights Journal, entitled *Confronting binary foundations: non-binary identities and the edges of rights*, covers some of the Conferences organised online in 2020 and 2021 within the Research Project (PID2019-107025RB-I00) "Sexed citizenship and non-binary identities: from non-discrimination to citizenship integration" (*Binasex*). The aim of *Binasex* is to carry out interdisciplinary comparative research on the challenges non-normative sex-gender identities face and pose in contemporary democracies, in both strictly legal and broader social terms. It is to show how these challenges are rooted in the foundations of modern states, constructed on the basis of a rigidly binary sexed citizenship. It is ultimately to examine the specific shape these challenges take in different contexts and explore ways to respond to them in terms that enhance the vocational inclusivity of democratic citizenship.

Binasex started functioning in 2020, at a time when the measures adopted to face the Covid pandemic made in-person meetings difficult, if not impossible to hold. Our first meetings, directed to drafting a provisional comparative diagnosis of the situation, had to take place online. As second best, online meetings deprived us of physical contact, face-to-face discussions and more relaxed exchanges at social venues, yet they also proved easier to organise and to be part of, particularly for an international research team. This happened at a time, moreover, when several draft bills addressing non-normative sex-gender identities were being discussed in Spain, and one Draft Bill was finally proposed by the Spanish central Government; all of which stirred up heated social, political and legal debates, particularly among feminists. Members of *Binasex* took an active part in these debates. Circumstances thus led us to hold several online conferences between December 2020 and May 2021, some of which paid particular attention to the situation in Spain. This Special Issue collects some of the papers presented in them.

The Issue opens with Rafael Vázquez' inspiring reflections on the deep connections between the democratic principle, feminism and the need to go beyond binary citizenship; the author elaborates on feminism as an essential motor for democracy, one that has historically pushed democracy to remain consistent with itself, beyond the pressures of liberal-capitalist logic; he finds queer theory to be an essential part of this motor looking forward; and he invites us to embark on a queer democratic utopia.

Assumpta Sabuco opens then a series of analyses centred on Spain; her paper takes us on an engaging review of how normative and non-normative sex-gender roles and identities have been portrayed in Spain's popular culture since the 1960s (the latter part of Franco's dictatorship) to date, on the part they have played and continue to play as elements of national definition and/or political transgression. Blanca Rodríguez then critically reflects on the legal and cultural obliteration of non-binary bodies; on how binary citizenship has been built at the cost of biological diversity; on Spain's reticence to open the official gender spectrum beyond binary strictures even on the brink of embracing gender self-determination; on the inherent contradictions and misfunctioning this entails from a democratic perspective. Ruth Mestre delves in turn into the fears that gender self-determination arouses in some feminist ranks in Spain, afraid that without medical control of their identity trans-women might hamper cis-women's physical safety and legal position; in these fears Mestre identifies the features of "moral-panic" dynamics. Laura Flores closes this set of papers with an analysis of Spain's approach to gender identity at a regional level, a journey through the specific laws enacted in 14 of Spain's 17 Autonomous Communities; she highlights the differences among regions, hence the diversity of legal orders in Spain, but also their common features, the main one being that, except for one, all regional laws rely explicitly or implicitly on self-determination, thus paving the way for it to be embraced by national legislation.

A second set of papers take a look at different legal approaches to gender identities and their expressions. Anna Lorenzetti tells us about the medical and legal treatment of intersex children in Italy: about the absence of any legal recognition in a strictly binary sex-gender system, about the prevalence of cosmetic surgeries on new-borns and their damaging consequences, and about possible legal strategies that could ensure the protection of intersex children's rights. Silvia Romboli then introduces us into the standards of protection of trans people's gender identity developed by the European Court of Human Rights, based on the right to private life as linked to the dignity and freedom of individuals; she leads us through the evolution of this Court's caselaw towards higher standards of protection and a narrower margin of appreciation for Member States to decide on the limitation of this right; she finally focuses on how far the Draft Bill proposed by the Spanish Government complies with European Standards. Caroline Hansen also concentrates on the European Court of Human Rights and its caselaw on gender identities and their expressions, albeit from a different angle: her aim is to highlight how heavily this Court relies on gender stereotypes, the extent to which these impregnate its caselaw even ~~in the context of~~ protecting trans people's rights. There follows Sebastián López' insights on how trans identities are being approached in Latin America; his paper offers us an analytical overview of the most relevant legal approaches to be found in this continent, in a comparative analysis that contrasts the positions taken by constitutions, legislators and courts.

A third and last set of papers contemplate non-normative identities and their expressions from different standpoints. Luisa Winter Pereira takes us through the world of intersex activism as represented by two associations (*Brújula Intersexual and Stop Intersex Genital Mutilation*), through their involvement with the United Nations in five of their committees, and the role they have played in shaping the international protection

of the rights of intersex people. Ana Galdámez analyses the protection non-normative sex-gender identities and their expressions require against hate speech; she explores the standards of protection established by the European Court of Human Rights on the matter and reflects on how the balancing act between freedom of expression and hate speech against sex-gender minorities can be expected to operate in the digital era. Finally, Ana Valero reflects on (non-binary) post-porn as a form of expression; after revising feminist debates on pornography, and without ignoring the prevalence of mainstream (hetero-patriarchal) pornography and how it can be harmful for women, she highlights the potential that non-conforming pornography, in particular post-porn, can have as a tool for expressing political dissent and instigating social change.

MAKING SENSE OF IT: WHY DEMOCRACY (AND FEMINISM) NEEDS TO GO BEYOND BINARY CITIZENSHIP*

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Abstract: This text assumes and departs from three basic premises: 1) identities are not born but constructed through repeated performative actions that are in turn informed by existing social constructions of gender; 2) analysing and understanding the ways in which gender is shared and historically constructed can lead to a construction of gender that goes beyond the binary system on which heteronormativity depends; 3) feminism is inherently democratic and entails the consolidation of the very conception of democracy. If feminism wants to remain so, it concludes, it cannot but embrace the theoretical framework and action of non-binary citizenship conceived by Queer Theory.

Keywords: Citizenship, democracy, feminism, identity, non binary, Queer Theory.

Summary: 1. Introduction. 2. Some Considerations on Gender and (Trans) Feminism. 2.1. Patriarchy, gender and identity. 2.2. Feminism and Transfeminism. 3. Why is Queer Theory Important to Democracy. 3.1. Widening the "demos". 3.2. Decolonised Cosmopolitan democracy. 3.3. Democracy as pleasure. 3.4. (Trans)feminism, democracy and capitalism. 4. Posthuman Knowledge and Utopia: Concluding Remarks

"We are a movement of masculine females and feminine males, cross-dressers, transsexual men and women, intersexuals born on the anatomical sweep between female and male, gender-blenders, many other sex and gender-variant people, and our significant others. Our lives are proof that sex and gender are much more complex than a delivery room doctor's glance at genitals can determine"
(Feinberg, 1998)

-First, we believe that each person has the right to define their own identity and demand that society respect them. This also includes the right to express our gender without fear of discrimination or violence.

Second, we hold that we have the exclusive right to make decisions regarding our own bodies and that no political, medical or religious authority should violate their integrity against our will or impede the decisions we make in this regard.
(Koyama, 2000)

Todos los orgasmos que he tenido esta semana me han permitido acceder a Dios y me han revelado premoniciones detalladas del futuro y de lugares que no existen en esta dimensión. Mi abuelo me observa mortificado desde la puerta de la cocina. La familia entera me escucha indignada, extremando las medidas de incredulidad
(Tilsa Otta, 2021)

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1. Introduction

During the last decades, the irruption of Queer Theory has meant an important challenge both for the agenda of gender studies and its epistemological principles and for the political and philosophical order of contemporary democracies. If feminism has been perceived as a main driving force in the democratisation of democracies, it in turn should perceive to what extent Queer Theory has relaunched and deepened that process of "democratic democratisation".

This paper argues that democratic theory, hence also gender studies, must incorporate Queer Theory's main assumption: i.e. the need to go beyond the modern gender binary. To this end, it is divided into two large parts. In the first one, it exposes how the concept of patriarchy, in its modern (neo)liberal version as "total ideology", has consciously couched the construction of gender in predetermined binary terms, and has provided the necessary mechanisms to prevent any deviation from this predetermined ideal. It also shows how, despite the often conflicting relationships between some strands of feminism and the queer agenda, so-called Queer Theory provides grounds and mechanisms like no others for questioning patriarchy in its binary roots and must hence be incorporated in mainstream feminist agenda and gender studies. The second part develops a critical approach to democratic theory which argues that queer stands for democracy at its purest and must be embraced by feminism in order to widen the demos and the democratic ethos. It also links this democratising attempt to the process of decolonising the main assumptions underlying Western democracies. It shows how non-binary axioms can help critical reflections on capitalism and open new horizons when debating on the notion of pleasure within it. The last section offers some concluding thoughts on Queer Theory as a democratic and hence feminist utopia.

2. Some Considerations on Gender and (Trans) Feminism

2.1. Patriarchy, gender and identity

The social construction of gender is arguably the most effective mechanism of socio-political control. The binary division between male and female enables subordinate relations over more than half the world's population. While other mechanisms of social control, such as race, social class or religion, are capable of partially subordinating important population groups, and while these mechanisms often work intersectionally with gender, gender in itself is of unmatched power.

Male patriarchal thought has focused its ethics on the value of law and justice, indeed a highly relevant value, yet one that is frequently cold and distant and, worse, non-operative and unfair. Some strands of feminism have, on the other hand, highlighted the value of caring, as complementary to justice and as based on feelings such as compassion, solidarity or responsibility (Gilligan 1982). Reason and feelings feed each other, talk to each other; furthermore, it is feelings, not reason, that ultimately motivate behaviour. Thus, only an approach to knowledge that harmonises reason and feelings, that gives both of them their place, can lead us to act as moral agents, to assume moral responsibilities.

By contrast, the dominant hegemonic approach to knowledge imposed by the modern socio-political project, especially since the last quarter of the 19th century, attempts to separate economic motivations and psychology from all the other interests that make up social reality. As such it is, in Karl Mannheim's terms, a "total ideology". It presents reality through a merely functional, aseptic, neutral description, as a reality "concretizing itself to an objective description of the structural differences of the mentalities that operate on a different social base" (Mannheim 1941: 51). However, as Gramsci has already pointed out, the construction of any hegemonic *apparatus* that intends –that is even required– to conduct human behaviour also needs to consciously and intentionally recreate a whole new ideological field (or fields), to introduce a whole reform of the consciousness and produce a precise form of knowledge and socialisation in that knowledge (Gramsci 1975). Regarded in this light, the construction and expansion of liberalism should not be seen as a historical accident, the accidental product of the evolution of humanity through alleged progress towards a goal determined in advance. It is rather a highly structured ideological project, one concentrated on the will to create truths. It is all about a meta-project of domination, a complete hegemony, a supposedly secular theology, at the same time as a teleology that prefixes, announces and builds the way forward. The project creates truth through sets of inclusions and exclusions. Nothing exists beyond these sets, beyond their classifications of good versus evil, correct versus deviant. Truth devices require a logic of meanings that appear to be so inescapable as to be indisputable. These standardised truths become so entrenched that they deactivate and even erase in advance any attempt to question them, any proposal of otherness, to the point of diluting the very "will to truth" (Foucault 1999). The power of the State is thus transformed and refined into biopolitics.

The above gives rise to a kind of neoliberal governmentality based on an alliance-fusion between the State and the market. Together they exert an all-encompassing power of control, coercion and punishment, a much more efficient mechanism for the production of truth than the 19th century liberal state and, of course, than monarchical absolutism, Roman imperialism or any other legal-political form of control to which we can go back. "For this will to truth, like the other systems of exclusion, is supported by an institutional support: it is both reinforced and accompanied by a dense series of practices such as pedagogy, such as the book system, publishing, libraries, like the societies of wise men of yesteryear, the current laboratories" (Foucault 1999: 10).

Even when "the other" is impossible to hide, it is (it must be) interpreted as a deviation from the normal, a failure with respect to the model to be followed, an inadmissible alterity against which there are mainly two strategies. On the one hand, there is the recovery of the deviant and their return to normality. The mentally sick, the homosexual, the non-Western savage, the shameless nationalist of a state minority ... all are offered the opportunity to redeem themselves and redirect their behaviour to fit within the limits of what is accepted, what is acceptable. On the other hand, there is the denial, expulsion, marginalisation of all those who are intrinsically different in biological and / or cultural terms, their placement without possible redemption forever at the outskirts of normality. Among them are women, trans and non-binary people, those who are racialized as non-white, as well as, of course, those belonging to non-human species, the other "animals".

From here on, the modern project of the Enlightenment can be seen as a control machinery, in Foucaultian terms, as a "normalizing" mechanism that naturalises as unquestionable truths whatever it conceptualises as "normal". This includes dichotomies such as male versus female, white versus non-white, Western versus others, wealthy versus poor, "capable" versus "incapable", productive versus non-productive, hetero versus homo, cisgender versus trans, humans versus animal beasts.

In this monitoring framework, identity is one of the most effective mechanisms for the creation and reproduction of binary dynamics and the relations of exclusion and domination deriving therefrom. It is so in as far as identity is interpreted as an impregnable and inescapable pattern of being for humans. The normalisation of certain identities against others has been the main instrument of subordination, exclusion and denial safely relied on by Western states at least since the 18th century, when the imposition of normalised identities starts to be more easily recognised. Western identity parameters will then be exported, transferred and imposed without negotiation to the rest of the territories, at the cost of denial of their original ones.

From both a philosophical and an epistemic point of view, however, identity is not inborn but rather constructed through repeated performative actions. These are in turn informed at their core by existing social constructions of gender. When analysing and understanding how gender is shared and historically constituted, it becomes clear that it can be produced in a variety of different ways, including ways that go beyond binary patterns. This idea of diversity underlies the very notion of the "sex-gender system", which Gayle Rubin enunciated as a social construction in 1975, in "Traffic in women: notes on the political economy of sex", notably as "a set of agreements by which society transforms biological sexuality into products of human activity, and in which these transformed sexual needs are satisfied" (Rubin 1996: 44). In this line, and in the words of Jeffrey Weeks, identities are "necessary fictions" for us to understand our relationship with our body, with other people and with the environment. Far from stemming from some 'natural' essence, they are but social constructions that link us to a community and are built through the affirmation of differences (Weeks 1995).

2.2. Feminism and Transfeminism

As the preceding reflections make clear, expanding the feminist subject beyond cisgender women is central to the feminist agenda of the 21st century. It is what Carolina Meloni has called the turn of feminist consciousness, a turn marked by its opening towards what she has termed eccentric subjects, broken and resituated, multiple and non-binary. With this turn, women as a political category redirect the debate on the subject of feminism to a new dimension, a non-biologic dimension (Meloni 2012). This breaks the unidirectional connections between sex and gender that weigh traditional sexuality, with a view to liberating and pluralizing it. This in turn questions the physiological limits of bodies and connects us with a new consciousness of what she terms "the technique", the mechanisms of subordination institutionalised (hence normalised) by modernity. This epistemic turn places us, in sum, in a type of *Trans Feminist Standpoint*, one that embraces Queer Theory.

Queer Theory is about questioning and subverting existing sex-gender categories (see Foucault, Sedgewick, Butler, Lauretis and others). Traditionally, feminist theory has only been concerned with issues affecting (cis)women and (cis)women's empowerment. The subjects of Queer Theory, on the other hand, are diverse. They include women, homosexuals, transsexuals, and those considered to be sex-gender deviants. At the beginning of the 1990s, in a series of highly notable works, such as *Transgender Liberation: A Movement whose Time has Come* (1992), Leslie Feinberg defined "transgender" people as people who challenge the gender binary construction, as established mainly by white heterosexual males with the capacity to generate power discourses. The term "transgender" would then be about setting in motion a counter-history of sex-gender identity for the present and the future, as well as re-claiming oppressions of the past.

Teresa de Lauretis is one of the first to have used the expression *queer* when speaking of both the post-feminist and trans-feminist condition of the feminist movement and practice for the century to come. At her basis is the epistemological turn begun by decolonial feminism and the theories of intersectionality, which have now become the object of academic philosophical reflection and social concern more broadly, as shown through cultural products in cinema or literature (1987).

Eve Sedgwick Kosofsky, with her *Epistemology of the closet* (1990), also questions the gender binary in sexuality and sexual relationships, noting that the meanings of sex and sexuality are difficult to understand from a hetero / homo sexual perspective. The conception of sex is as varied as individuals and, of course, goes beyond heteronormative patterns where the male must be explicitly active, while the female corresponds to the opposite attitude.

In *Gender Trouble: Feminism and the Subversion of Identity* (1990), Judith Butler sustains that gender is in any case a philosophically diverse space, one that does not require unity to make itself visible and understood. What is queer, what is strange, what is deviant, what is degenerate, what is twisted, what is not conformed, what is not regulated ... all of it is perceived as gender, thus posing a challenge to the patriarchal and androcentric apparatus as a whole. Even more noteworthy, they also pose a challenge to the historical foundations of a significant sector of feminism, mostly to that which has institutional weight and is therefore close to institutionalised power.

In order to understand gender and its diversity we must go beyond the psychological or cultural imprint of biological or chromosomal sex. We must understand gender as a permanent and structured discursive practice, one that has been constructed in its hegemonic form around the concept of heterosexuality, understood as the norm of human relationships. The body itself is, in this sense, a "signifying practice"; it is or expresses a social practice insofar as the perception of sex (biological-genital) creates and manifests a certain social value. Queer Theory radically de-essentialises, or deliteralises (as it is also said), the categories of sex and gender. As such, it has served as a theoretical foundation and as a political tool to legitimise a series of groups classified (in the past) as "sexual minorities", who (together with women) were, and continue to be, excluded, segregated and stigmatised by binary gender norms.

What is queer (cuir in an accepted Castilianized version) is revolted against the order of the (inherited) patronymic discourses, not only in the field of sex-gender-sexuality relations, but very especially within it (Alabao 2020: 129-131). Hegemonic narratives are imposed by means of institutional violence, through the creation of legal and social norms, often also through physical violence. Emphasising the plurality denied and repressed by the constraints of hegemony, queer brings out the multidimensional layers of oppression. This is why Queer Theory is essentially and primarily intersectional. Like intersectionality, it draws on the experience of black feminist thought and decolonial feminism, to expand into an intersectional critique that includes dimensions such as ageism, ableism, migrant-local confrontation, and the radically important Eurocentrism-native people's opposition. Like Queer Theory, in turn, intersectionality explores the universe of possible combinations to present us with multiple polysemic subjects, subjects changing in identity, but also traversed and questioned by plural forms of oppression. They both universalise and particularise received feminism at the same time (Hill Collins and Bilge 2016).

Intersectionality, like Queer Theory, thus becomes an indispensable element in the fight for women's rights, whatever their condition, thus overcoming the essentialising binary homogeneity originating from second wave feminisms (Crenshaw 1991). Through questioning the gender binary, they both also question the very concept of traditional liberal citizenship. As the citizenship of cisgenderism is being questioned, so is the possibility that gender occupies a different place within citizenship, as this can no longer be accounted for in the traditional dichotomous man / woman categories. The very notion of gender could even become dispensable in identity documents, an idea that is now being proposed in some countries, like Argentina.

3. Why is Queer Theory Important to Democracy

3.1. Widening the "demos"

Inclusiveness or inclusivity is (should be) the most characteristic feature of a literal conception of democracy. Democracies, however, have historically been constructed upon the exclusion of certain subjects from the idea of demos (Losurdo 2005). In the most positive analysis, the liberal narrative of the history of democracy has mostly focused on the gradual appearance of new individual rights as a distinctive and defining feature of the expansive character of democracies. Narratives of democracy, however, would be incomplete if they stayed within the realm of rights and their recognition, relevant though this is, without enquiring into their subject. The object of analysis should be expanded to focus not only on the content of the rights, but also on the construction of right-holders through dynamics of inclusion / exclusion of different people as legal subjects. The debate, both historical and contemporary, has prefixed a group of individuals capable of holding and exercising rights, while depriving others of such possibility. Historically, the wealthy, white, male historical subject has been the predominant one. Progressively, the notion of the democratic (political) subject has been broadened to include, albeit often only partially, women, other ethnic-racial groups and other "outsiders", generally regarded as colonised. There remain, however, many areas of exclusion, groups "disabled" by the State. These

notably comprise migrant population, "undocumented" and invisible people, all of them equally supportive of the economic and socio-political functioning of our societies. They also comprise queer or, more generally, LGTBIQ+ people.

The inclusion of LGTBIQ+ remains disputed in many places and areas; many remain non-existent for the administration. Yet democratic citizenship is not consistent with leaving sectors of the population beyond its bounds. Where the opportunities for partaking in participatory dynamics are hampered either legally or through political or social practice, it is not consistent to speak of a system as democratic. Discrimination of LBTBIQ+ people encompasses many areas. Following Surya Monro (2005), this starts with language as a tool for creating and communicating knowledge and identity. The very ability to name others and ourselves presents important obstacles when referring to trans people, as these challenge the traditional pronouns in most languages. The inclusion of "others" as a genre does not solve the situation, since it seems to pigeonhole in a general sack everything that is not normative, that does not belong in the "point of reference", thus confirming the very normativity it tries to confront. The very process of linguistic labelling thus comes into question. Do we name ourselves to recognise ourselves or to take control of ourselves? Closely related to this are the bureaucratic mechanisms of demographic census and the statistical tools of the state, part of every state's control of its territory and population.

Other forms of non-democratic exclusion of the non-binary are explicitly material. It is the case of economic exclusion. It is also the case of the spatial violence implied in the absence of standardised spaces for the non-binary in public or private spheres or institutions (schools, parliaments, toilets...). There is, furthermore, no total discrimination without legal support (Monro 2005: 51-52). Trans people are excluded from the direct protection of the law and are generally penalised by it in more or less explicit terms (Sharpe 2002). Other areas of exclusion, abandonment and expropriation have been, and continue to be, medicine, education or the media (Whittle 2002; Center for American Progress 2020). The representation that the latter make of trans persons, as a whole as well as of single individuals, tends to range from contempt, rejection, disgust, or distance, to other perhaps less violent but equally damaging attitudes, such as condescension, paternalism or compassion, if not the self-serving commodification of a certain progressive aesthetic attires.

3.2. Decolonised Cosmopolitan democracy

At the core is the project of decolonizing democracies, of stripping it of a long list of basic tenets that are both western and male, yet that have been constructed as global and neutral (Güven 2015). This entails a project to open democratic citizenship to those whose sex-gender-sexuality identity options have been subject to mechanisms of exclusions. Non-binary citizenship is in this sense decolonial, because it blows up the binary mechanisms that have helped to articulate (cis / hetero) male colonial Eurocentric thinking. As has been pointed out from the ranks of Critical Studies, more specifically in Decolonial Theory, Black Feminist Thought and more recently in Critical Race Theory and Intersectionality Studies, the logic of the gender binary does not differ in essence

from the biological essentialism successfully claimed by modernity, and which even today survives in many ways: the essentialism that differentiates between the humanity of white beings and the animality (non-humanity) of blacks and, by way of extension, of all non-whites. All differentiations revolve around this first one.

As Elsa Dorlin has highlighted in *La Matriz de la Raza*, heteronormative control devices have required, on an imperialist scale, the presentation of non-white and non-male bodies as pathologised beings. Western medicine has long contributed to presenting non-white, non-straight, and non-cisgender bodies as caustic deviations from the initial prototype (Dorlin 2020).

The process of historical inquiry, however, brings us closer to old "new" conceptions that break with the *digital* relationship of opposites and excluding categories, as proposed by Agueda Gómez (2010). There is an abundant literature of *analogical* "sex / gender" relationships, understood as those where none of the values or meeting points of the imaginary are by definition excluded. These are more transitive identities, which can take multiple forms, which are not defined in exclusion and which do not have to have total durability (Prigogine 1999).

Queer Theory has revealed the discursive, fluid and transitory possibilities of "sex-gender" systems which have existed for centuries in other scenarios, mostly pre-capitalist and pre-Columbian contexts. Think for example of the Rrámuri model, the Bijagó model, the Hindu model of India, the Zapotec model or the pre-Hispanic Mayan model (Gómez 2010: 81-86). The ancestral thus becomes a point of reference from which to question the totalizing universe of the liberal capitalist. In most of these models, together with the traditional categories of man and woman or masculine / feminine, there exist other sex-gender combinations that are also institutionalised as possible. This shows a diversity of gender roles and a scope of relationships, identities and sexual preferences that is more flexible and wider than our predetermined and socially accepted (binary) ones. Although these are mostly patriarchal societies, they rest on a much more elaborate, complex, multiple and plural development of sexual intersectionality. It is for example the case of the muxe in the Zapotec model, the hijras in India or the reneke / ropeke and nawki categories in the rarámuri people (Gómez 2010: 76-81). They rest on a kind of social functionalism based on diversity.

All this comes to show that the normalisation and biologisation that characterise Western essentialism is nothing but an artifice and a discursive construction. As such it offers no further evidence of its foundation, it is not in accordance with human nature, nor is it consistent with physiological and affective diversity sex of the species as such. The performative character of gender makes it possible and urgent to generate transnational alliances, as cosmopolitan forces, across the excluded for reasons related to sex, gender and/or sexuality, just as alliances have been promoted transnationally on the basis of class consciousness. Queer demands for recognition must be acknowledged and vindicated beyond the construction of the legal frameworks of the nation state, particularly as these are built upon structurally excluding pillars. In order to deconstruct and replace these pillars for inclusive ones, international solidarity is in order.

3.3. Democracy as pleasure

The dominant model aspires to control the different forms of pleasure, enhancing some over others, as long as they are controlled by the market. Normative sexual acts are attached to concrete situations and circumstances accepted and permitted, protected by respectability and morally shared. Both law and custom, as well as traditions, function as mechanisms to avoid deviation from the frameworks of normative (monogamous and heterosexual) relationships, most commonly within the bosom of the cisgender couple / family. While the erotic is commodified, while it is assumed as an acceptable object of consumption, there is an important rejection of the most personal and everyday forms of pleasure as a force for change, fulfilment, opposition and protest, also as it was conceived by Audre Lorde (1978).

The market also subjects sexual forms according to the time (the nights after long and strenuous work days) and the places (generally the private spaces of private homes) stipulated for them as proper. Following Gayle Rubin's words: "Modern Western societies appraise sex acts [and pleasure] according to a hierarchical system of value. Individuals whose behavior stands high in this hierarchy are rewarded with certified mental health, respectability, legality, social and physical mobility, institutional support, and material benefits" (Rubin 2006: 158).

Pleasure, however, can also become counter-hegemonic, if we manage to endow it with transforming force, as a dimension of the process of personal, social and political empowerment. Detached from the rules of the market, it can become an instrument of transformation. Sexuality is no longer bound to the demands of reproduction, nor is it surrounded by the narrow space of monogamy and the familiar. It has broken through the timelines of productivity and the "productivity racks" through relative and even dissipate time frames. Most importantly, pleasure and sexuality have been disconnected from the duality of heteronormative agents. Subjects become plural in their volitional feelings, which do not have to be bought or sold, but only have to be enjoyed. The actors involved are multiple and the options and manifestations of affections and sex as well. Queer involves us in the pre-constructed, taking up latent drives in some way from yesteryear, while launching a profoundly anti-hierarchical and intersectional challenge. Queer pleasure can be seen as a sort of resistance to the narrow logic of pleasure and eroticism. It is an homage to a politics of radical sexuality and a signal of ways in which a politics of pleasure is actively queer.

3.4. (Trans)feminism, democracy and capitalism

From the dawn of the bourgeois liberal revolutions to the present, both feminist theories and feminist mobilisation in all their plurality have made huge contributions to the construction of democracy. The evolution of the practices and theoretical frameworks of democracies could not be understood without the democratisation that feminism has promoted within them. From diverse positions and in different historical periods, pigeonholed in waves, democracy is what it is thanks in large part to the progressive introduction of more egalitarian demands and visions, a process that

could hardly have taken place outside the framework of feminist theory and practice. However, the possibility of incorporating and broadening the idea of the political subject is stirring within feminist ranks not a few disquieting disagreements and internal contradictions.

This is perplexing. The patterns of democratic citizenship have evolved and deepened very notably thanks to the progressive incorporation of feminist citizenship models, through public policies and regulatory changes that have allowed for a more egalitarian conception of the very idea of citizenship. Yet some sectors of feminism seem to be contributing to some of the difficulties we encounter when defining a more transversal, intersectional and inclusive concept of citizenship. Many of those difficulties stem from the intrinsic connection between (bio)politics and capitalism. The dissolution of the idea of the citizen in the "consumer-rightsholder" duo makes both the theoretical debate and the practical proposals for the expansion of the demos extremely difficult. Capitalist liberal democracies rely on the prototypically cis-hetero normative model of (re)production, which places at its centre the conception of the heterosexual family with cisgender members, who produce-consume and reproduce.

The androcentric-patriarchal hegemonic dominant discourse imposes a logic of subordination specially designed for the submission of every perceived alterity, of the "non-man", to the pattern of what is considered "masculine". This is especially evident in the historical moment of the conjunction of the liberal state and the capitalist economy. As Silvia Federici highlights in her *Caliban and the Witch*, the witch hunt and female sexual repression of early modernity were essential for the development of the new liberal capitalist hegemony, which accentuated the androcentric interests of domination inherited from yesteryear (Federici 2010). The establishment of the nuclear family through marriage in capitalist liberal societies further corroborates the implantation of this model. In this sense, Engels made an important contribution to our knowledge of women's position in society and in history as subjects (objects) under androcentric domination, by underlining the basic mechanisms deployed by capitalist liberalism to establish its model of domination. In this line, he demonstrated that there is a connection between private property, monogamous marriage, and prostitution, while showing the connection between men's economic and political dominance and their control over female sexuality (Engels 2010 -original 1884-).

As all this comes to show, capitalism is not an aseptic, depoliticised and merely economic system; rather it has a clear link with liberal morality. Capitalism is fundamentally the economic structure of liberalism in politics, its superstructure, and has assumed its moral postulates and its conservative idea of family and sexual conception. Libertarian capitalism does not rest on the scenario of moral neutrality it wants to be seen as supporting. Political, social, cultural relations and moral and religious value patterns are not alien to it, but a central part of its essence. The construction of an inclusive concept of citizenship is not part of the value baggage of capitalism. Democracy, however, aims precisely at this, at expanding citizenship to make it all inclusive. This implies moving towards the recognition of inclusive citizenship, in its different and interdependent dimensions (civil, political and social, as theorised by T.H. Marshall), and towards an inclusive construction of the status of rights-holders, of the holders of the rights (civil, political and social) that

enable the enjoyment of the different strands of citizenship, regarded as an indivisible set (Marshall 1949 [1963]).

Feminism has fought for women's full inclusion within democratic citizenship. In order to be coherent with itself, it has to continue fighting for the inclusion of every woman and everyone left out for reasons related to sex, gender and/or sexuality. The recognition of LGTBIQ+ people as full democratic citizens must be part of this fight. Their citizenship cannot be reduced to their role as voters, in line with classical liberalism, and as consumers, in line with capitalism. They must be recognised as legal and political subjects with full (civil, political, social) citizenship rights. Far from remaining neutral in this struggle, far also from being an emancipatory force, capitalism adheres to constructions of sex-gender-sexuality that support its inner structures, as is the case of the hegemonic binary, while also engulfing affective relationships of which it takes commercial advantage, by transforming them into commodities, into items for consumption (Illouz 2017). Not expanding its subjects to include LGTBIQ+ people makes feminism complicit with the interests of capitalism and its power dynamics, including the subordination of ciswomen.

4. Posthuman Knowledge and Utopia: Concluding Remarks

Critical Posthumanities deal with increasingly different subjects. As Jenny Kleeman has argued, science and technology applied to both philosophical knowledge and technical artefacts accelerate the historical relationship that human beings have been having with scientific-technical advances. It is about overcoming the physiological defects or deficiencies arising, not only from genetic arbitrariness or body wasting, but also from the biological barriers of ascription. The process of sexual (and of course gender) self-determination relies on medicine, biology, cybernetics and other sources of knowledge, to imagine individuals who think with autonomy beyond pre-established strictures of what was received in the lottery of birth (Kleeman 2020). It also invites us to investigate the possibilities of a plurality of masculinities and femininities, of a range of ways of living our lives. This tends towards an implosion of gender as a useful category of analysis, a result of the disentangling of sex, gender and desire (sexuality).

Queer Theory also encourages us to focus on the utopia of a gender-free world (Bornstein 1994). It is worth noting here the importance of the utopian component of queer literature, as well as the relationship between Queer Theory and the poststructuralist literature from which it draws heavily, and deconstructionist proposals such as Braidotti's *Posthuman Knowledge* (2019) or Donna Haraway's seminal works (*Cyborg Manifesto*). As has already been pointed out, since queer generates a generalised rejection not only in the normative field, but also and above all in the field of the visual, the transfeminist utopia is the ideal locus to posit, empower, highlight and strengthen the idea of the strange, the abject, the different and the monstrous (García 2016).

All queer utopian literature shows an explicit rejection of liberalism / libertarianism, as does the more classical utopian feminist literature (think of the work of Haraway, Piercy, LeGuin, Gilman, Russ ...). Far from being libertarian and capitalist (Jones 2013), this is rather a deeply communitarian vision, the view of a world where individuals are members of

a community and conform ways of living much more based on collective care and reciprocal commitments and much less reliant on isolated rational actions (Dolan 2008; Nicholas 2009).

In this sense, democracy could use the idea of a gender-free world to focus its attention on individuals, political subjects who embrace a community ideal regardless of their gender. What matters in this sense is who participates and the democratic ethos which they deploy when they do so, not so much their corporeality or their gender ascription, whatever it may be. This idea somewhat follows the parameters proposed by the notion of post-racial democracy as a way of going beyond the traditional western pattern of democracy. The central focus of democracies would thus be on political agents and any attempt to catalogue and label them would be avoided. A potentially inclusive democracy, in sex-gender terms and beyond, would ensue.

The incursion into the utopian genre of the queer is fundamental for sex-gender transformation proposals, not only for a future way of living, but for our present ones. The trans version of these utopia stands as a stepping stone towards the final aim: the confusion of boundaries / a border war; the fight against biological essentialism and patriarchal control of nature; a critique of heterosexism; the deconstruction of public / private polarities; the fight against historicism in favour of no origin stories. The final goal is the queer utopia. The queer utopia of non-binary citizenship appears, in sum, as a democratic utopia of the place every democracy must aim to reach, indeed one of which we can already find perceptible traces everywhere. It is a place that may never come to be in a fully blown shape, but one that can gradually materialise and gain terrain through the transformations experienced along the way towards it (Sargisson 1996; Muñoz 2020).

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TRANS-VISIBILITIES AND SEXUAL POLITICS: TEMPORARY PASSAGES IN SPANISH POPULAR CULTURES*

ASSUMPTA SABUCO I CANTÒ**

Abstract: This article aims to review the models that historically have shaped technologies of gender through popular representations in Spanish culture. First, an anthropological view will be cast on the naturalised Catholic-Francoist models that exalted heterosexual dichotomies and reproductive marriage. This includes an analysis of how, although the criminalization of transsexuals aggravated their situation, resistance movements generated a wide range of cultural references and possibilities for inclusion. Second, the article will review the models associated with Spain's transition to democracy and their evolution moving on to the beginning of the 21st century. Finally, it will draw an outline of the trans models produced during the past two decades and their popular expressions.

Keywords: Performance, transsexuality, Spain, politics, gender, sexuality.

Summary: 1. Introduction. 2. Different Normalities and Their Ruptures: Reproductive Heterosexuality, Transvestites and Cabarets (Pre-Gay Stage). 3. Transition to Sexual Modernity (Gay Stage). 4.Towards a New Sexual Citizenship (Post-Gay Stage). 5. Some Final Reflections.

1. Introduction

There is currently a growing interest in analysing the cultural representations that have sexualized Spanish society from its transition to democracy in the second half of the 1970s to our days (Colling and Sabuco 2021; Harsin and Platero 2021; Valcuende and Cáceres 2021; Rampova 2020; Nash, 2020; Platero and Roson 2019; Chamouleau 2018 ; Ballesteros 2001). Among all the pioneering studies that cover transsexuality in Spain during that period from an anthropological perspective (Guasch 1987; Nieto 1987, 1998; Cardín 1984), the work of Guasch and Grau is of particular interest. Their 2014 article described how the transvestite and the operated transvestite were hegemonic categories in what they call the "pre-gay period" (1970-1982), while the transsexual category has prevailed throughout the "gay period" (1982-2005). In the current "post-gay period", the transgender category stands as a conceptual and discursive novelty that includes and at the same time goes beyond the preceding ones (Guasch and Grau 2014).

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Concerning terminology, and upon reviewing the use of terms such as transvestite, transsexual or transgender in popular Spanish culture, Platero's remarks appear relevant for our purposes:

> "The word 'transgender' intends to avoid this distinction [between pre- and post-operative status] regarding transition and surgery, and contains different meanings and contexts (Hausman, 1995; Nieto, 1998; Valentine, 2007). However, this term has not had the same predicament in Spain. Taking these distinctions into account, throughout this article I will use the English term 'transgender' when referring to the term 'transexual' as used in Spanish" (Platero, 2011: 599).

Bearing Platero's observation in mind, the terms transvestite, queer, transsexual or fluid gender will be used in this paper in their loose Spanish popular meaning. It should also be born in mind that different generations will prioritise different sets of terms over others as identification references. Now, like many other countries in the so-called Western world, Spain has an ageing population (Herce 2016). Although immigration and the impact of Covid-19 may alter this circumstance, they do not affect it for the purposes of our reflection. The drop in birth rates explains the population prominence of people over the age of fifty. This in turn explains why to a great extent Spanish social mores and mentalities are still rooted in Franco's times. Franco's dictatorship imposed a Catholic morality based on the exaltation of the virtuous woman, wife and mother, the submissive, prudish and modest Perfect Wife. Sexuality was destined for reproduction and imprisoned in the institution of marriage. Military virility was incorporated into the figure of the breadwinner, the head of the family, acting as domestic and public authority. Homosexuality, bisexuality and non-binary identities were persecuted. *La ley* de v*agos y maleantes* (Layabout and Wrong-Doers Act), dating back to 1933, was amended in 1954 to allow for the arrest of homosexuals and transsexuals, as well as pimps, ruffians and "professional beggars" or exploiters of beggars, all with a view to preserving Spanish social honour (Subrat 2019; Ramírez 2018). Known as *La gandula*, the Act was implemented to send homosexuals, transsexuals and pimps to forced labour or to prison.

Democracy and membership in the European Union meant greater visibility of LGTBIQ groups in public spaces and social organisations in Spain. This was part of a new kind of modernity that flourished during the 1980s, one that opened the country to new sexual subjectivities and that became popular through the work of internationally acclaimed artists such as Pedro Almodovar. Within the field of academic studies, Oscar Guasch' book *The Pink Society* (1991) framed the parameters of these new ways of living sexuality in Spain.

The new millennium has brought along significant changes in the field of sexuality, including the regulation of same-sex marriage in 2005 (Sabuco and Colling 2020) and the greater visibility of trans groups and fluid gender subjectivities. These changes express, in Lila Abu-Lughod's terms, the evolving cultural "patterning" of society (Abu-Lughod 1987). They point to a wider acceptance of transsexuality. This is expressed through legislative changes, a greater normalization of transsexuality away from the repressive

policies of Franco's regime and a larger diversity of identities as sex-gender referents. Yet social demands and legal achievements in this field continue to arouse social and political confrontation. This has reached feminist ranks, as we shall see, with some sectors of feminism embarking on a fierce battle against trans demands and the "erasure of women" to which, they argue, these demands will lead.

In this context, our anthropological reflections on the new gender politics open with the question of how trans representations have been made visible in popular culture. How have the representations of transsexuality changed in Spain since the dictatorship? How have they been approached by social sciences? To address these questions, this article proposes a diachronic review that contextualises the changes and the current state of sexuality in Spain, a country marked by the strong influence exerted by religion, as well as by a culture of dual politics, defined by the polarised confrontation between conservative and progressive positions. The different representations of sex and bodies are condensed between these two poles. In one extreme we find disciplined bodies that reproduce the hegemonic conservative order. The other is inhabited by subversive bodies that yearn for recognition and seek social transformation. Between the two there are a wealth of possibilities, concealments and transitions, resulting in a rich array of different and mobile itineraries. In this article, they will be analysed from the standpoint of queer theory (Halberstam 2015). The focus will be, more specifically, on artistic expressions, as these offer particularly useful tools when tracing the different models of representation of transsexuality that today subsist as technologies of gender (De Lauretis 1987).

The technologies of sexiness (Evans and Ridler 2015) give greater social value to bodies that reflect social ideals. The greater erotic capacity of diverse bodies, less stereotyped by class and age, has been reconfigured in Spain. Transgressing existing codes brings along new body landscapes, new possibilities for excitement and pleasure. The punishments, the dangers that underlie non-compliance, provoke fear and excitement at the same time. As Carole Vance warns in *Pleasure and Danger*, the exploration of sexuality has never been foreign to these polarizations (Vance 1989). They manifest different visions of the world, of present reality and of possible futures.

In view of all this, the standpoint of the genealogical methodology proposed by Michel Foucault appears useful for analysing how sex-gender technologies, based on the premises provided by Gayle Rubin (2007) and Teresa de Lauretis (1987), generate sexual representations. Films, songs and shows are powerful ways of creating, reproducing or modifying sex-gendered mentalities. Following de Lauretis, who in turn takes her "conceptual premise from Foucault's theory of sexuality as a 'technology' of sex",

> "too, both as representation and as self-representation, is the product of various social technologies such as cinema, as well as institutional discourses, epistemologies, and critical practices; by that I mean not only academic criticism, but more broadly social and cultural practices" (De Lauretis 1987: ix).

Conservative and progressive positions have become more entrenched and polarised with the pandemic. Modesty and the obscene clash even more starkly since Covid-19 came to disrupt both the public sphere and the private, domestic one. This makes it all the more interesting to investigate the subsistence of docile bodies forged in the norms of modesty and decorum, in the face of the virtual exposure of multiple, abject sexualities (Foucault 2010). The result of all this is the set of normative criteria that a society imposes on bodies, on their uses, on the images and words that accompany them. Timothy O'Leary points this out about transgression:

> "Bataille, in his linking of spirituality, sexuality and excess, tries to develop a language for this experience – in effect his work constitutes, as Foucault says, a preface to transgression. The second point to make is that for Foucault (and Bataille), contrary to what one might expect, transgression is not essentially a matter of breaking limits. Of course, it involves a movement which is hostile to limits, but it cannot be defined simply in terms of a negative or violent assault on limits; it doesn't aim for its own completion in an annihilation of the limit. Rather, the limit and transgression rely on each other in a mutual relation which is positive in nature. In fact, transgression, according to Foucault, is a kind of affirmation; an afirmation which has no other content than the existence of difference itself" (O'Leary 2011: 44)

As Domenec Font points out, obscenity is found on the border between order and disorder (Font 2005). Subject to social and aesthetic codes, it is both familiar and enigmatic, allowed in certain contexts, forbidden in others. It serves to point to the proscribed, the unrepresentable, while at the same time imbued with desire through the allure of prohibition. Its variability bespeaks its capacity to adjust to historical times, to technological dispositions, to the codification of rectitude and etiquette. Disruptions of these norms are signs of opposition and rejection, while at the same time generating new models, based on shamelessness and informality (Bataille 1984).

What follows is a diachronic review of the main sexual representations in Spain, structured in the three stages (pre-gay, gay and post-gay) proposed by Guash and Grau (2014). First, we will explore the changes brought about by the opening of Spain to tourism in the 1960s. Second, we will investigate the framework opened by Franco's death and Spain's democratisation, and the changes and greater visibility of LGTBIQ groups that ensued. Finally, we will draft the characteristics of the new sexual expressions and their demands for more equitable laws, in a society where fluid genders embody a clear transition from binary and reproductive models.

2. Different Normalities and Their Ruptures: Reproductive Heterosexuality, Transvestites and Cabarets (Pre-Gay Stage)

Spain's opening to tourism during the 1960s was accompanied by the reaffirmation of traditional models of masculinity, with a view to curbing the impact that openness and modernisation could have on "the" Spanish identity (Nash 2018; Coll Planas 2010). Controlling men's sexuality was a matter of state relevance, related to national identity.

To this end two stereotypes were promoted and spread: the married, hard-working, urban figure popularly baptised with the also popular surname "*Rodríguez*", and its counterpart, the *Don Juan*. Both served to reinforce the position of the father of the family and heteropatriarchal values.

Pedro Lazaga's films, *El cálido verano del Sr. Rodríguez* ("Mr. Rodriguez's Hot Summer") in 1964, and *Tres suecas para tres rodriguez* ("Three Swedes for Three Rodriguez") in 1975, served to popularise a middle-class or working-class male head of a family who enjoys some sexual permissiveness while his family is on holiday. The object of seduction was always a foreign woman, generally Swedish, who personified freedom and the dangers of a free, highly sexualised femininity. The films were inspired by the North American film *The Seven Year Itch* by Billy Wilder, *La tentación vive arriba* ("Temptation Lives Upstairs") in its Spanish translation. In contrast to the sensuality exuded by the latter, *El cálido verano del Sr. Rodriguez* reinforced the values attached to the figure of the wife and made fun of the sexual fantasies that might be entertained by any honourable man of the time, particularly if they did not end up in extramarital sex. The failures of these Rodriguez met popular success. The expression continues to be a joke to this day, one that makes fun of the (stereotypical) secret sexual imaginations entertained by married men over fifty.

Working-class single men, for their part, enjoyed in the popular imagination the characteristics of *Don Juan*. Inexhaustible sexual desire, a physically attractive body and an oratory capable of conquering any woman at will, defined these young working-class men –Spanish men in general, although Francoist mores restricted this profile to (young) bachelors. Beaches, bars and hotels were the hunting grounds for these Latin lovers, who also stood as part of the Northern European imagination (Nash 2020). The sexuality they flaunted was dressed in animal-like savagery: it was the corporality of the nether regions, a natural and boundless primitive sex. To uphold Spanish national pride and reverse the play of geopolitical power, the summer conquistadors "took advantage" of foreign women. In these portrayals, foreign women were objects of consumption, "prey" for the Hispanic hunters who, at the same time, guarded the honour of Spanish women, to be "respected" until marriage, while letting off steam with the "*guiris*" (a rather dismissive slang term for foreigners). Swedish women symbolised the sadness of sunless, bloodless societies: cold, libidinous and alien to the Latin character, but very sexy. Spanish women, on the other hand, were to be respected and to counterbalance male fieriness. The latter was conceived as a biological attribute; in the case of married men the only demand was that their extra-marital affairs be discrete. Still, bachelorhood was the vital phase during which sexual experiences should be accumulated. To this end, a crucial differentiation had to be drawn between easy women and marriageable ones.

In this context, the notion of the obscene focused on women's bodies. The fact that mayors had to obtain a special permission from government in order for bikinis to be authorised on their beaches stands as an eloquent example of this. In this moral and legal context, where transgressions only came to reinforce the normative, the Act on Social Danger and Rehabilitation (*Ley sobre peligrosidad y rehabilitación social*), of

1970, punished non-normative sexuality with sentences of five years' imprisonment or internment in a psychiatric centre (Espinosa 2020).

Yet there were also signs of rebellion. In 1971, Jaime de Armiñán directs *Mi querida señorita* ("My dear lady"), starring José Luis López Vázquez as an intersexual person. For some critics (Hopewell 1989: 103), the story describes the harsh situation of poor women in Spain, whose destiny was limited to domestic service or prostitution. Indeed, the plot reflects the loneliness and marginality of a spinster from the provinces who falls in love with the lady she works for. Yet it is about more than that, as the spinster is an intersex woman. Once diagnosed by a doctor, she becomes a man, moves to Barcelona and as a man conquers his "dear" lady. In 1974, the film *Odio mi cuerpo* ("I hate my body") by León Klimovski, describes the misadventures of an engineer who after an accident, and in order to be kept alive, has his brain transplanted into a woman's body. Two years later, in 1976, José María Forqué addresses in *Una pareja distinta* ("A different couple") the role reversal between a cabaret drag queen, again José Luis López Vázquez, and a bearded woman played by Lina Morgan.

Tourist destinations were, for homosexuals, centres of freedom, or at least places where the Francoist state showed more permissiveness. Stories at the fringes of the norm in tourist towns like Torremolinos and Benidorm were mythical; interestingly, during recent times of pandemic, they are being the subject of celebration and historical recovery through publications (Cáceres, Valcuende del Río, Parrilla Molina & Martín-Pérez 2021). During the seventies, transvestite, transexual and non-binary figures occupied the place of the obscene, and homosexual transgressions were heavily persecuted. Ocaña (1947-1983), a trans artist in Barcelona, used to dress as a woman while showing his penis in his walks along the Ramblas. His work as an artist, transvestite performer and homosexual activist was recognised early on in films such as Ventura Pons' *Ocaña retrato intermitente* ("Ocaña, an Intermittent Portrait") in 1978. His figure has also been recovered in the new millennium (Aliaga 2011; Colling and Sabuco 2021). In Valencia, Anastasia Rampova (1956-2021) embodied an irreverent ideal of freedom where life was a constant cabaret. Her memoirs, *Kabaret Ploma 2. Socialicemos las lentejuelas* ("Kabaret Ploma 2. Let's Socialise Sequins"), were published in 2020, including essays by Juan Vicente Aliaga and Lourdes Santamaría. The Spanish Cinema Academy has so far ignored the contributions made by these and other transgressors (Pérez Sánchez 1999, 2007).

With a certain naivety, Spaniards longed to see what at the time they could only imagine. This desire pushed many to cross the French border to escape from national Catholic narrowness and see European productions that were banned or harshly censored in Spain. Seeing Bertolucci's *The Last Tango in Paris* (1972) in Perpignan was an act of obscenity for the thrill of avoiding the 1972 censorship and of sharing banned scenes with friends when back at home. Married couples often travelled abroad with friends to watch it; the long queues, the feeling of transgression, the visualization of the obscene -the anus and butter sexual scene- remain unforgettable memories. The film was released in Spain in the midst of its transition to democracy, in 1978, and made a great impact, particularly because it fed the desire to experiment with parts of the body strongly stigmatised as related to homosexuality.

3. Transition to Sexual Modernity (Gay Stage)

After Franco's death in 1975, films previously forbidden became accessible in Spain. Many were of little artistic value, but very popular. They would mark the so-called Spanish *destape* (uncovering), as the exhibition of nudity in cinema was nicknamed (Castro 2009). Exhibiting the naked bodies of beautiful women was the only aim of films such as *Pepito Piscina* ("Swimming Pool Pepito", 1978) or *El liguero mágico* ("The Magic Garter", 1980).

This new sexual freedom reached trans representations (Melero 2010, 2015). In 1977 Vicente Aranda's film *Cambio de sexo* ("Sex change"), Bibiana Fernández, a trans woman known as Bibi Andersen, debuted with her popular stage name, marking a significant shift in trans-visibility. The protagonist is a trans woman who must fight against her father's masculinisation attempts and flees to Barcelona to start a life more in line with her self-assignment. There, with the help of a cabaret star, played by a real trans artist, she opts for having her sex reassigned in Casablanca. The film is of documentary value, particularly because the centrality of the transformation process offers very realistic footage. In the 1977 film *El transexual* ("The trans"), featuring performers like Paco España, José Lara recounts the death of a trans star, Lorena Capelli, who died of complications in the sex reassignment operation. Though blurred by the success of Aranda's film, the mix between documentary and fiction makes it a valuable precedent for a forward-looking approach to transsexuality (Dentell 2011: 12).

In Almodovar's short film (1977) *Sexo va, sexo viene* ("Sex goes, sex comes"), a boy decides to mutilate himself to become a woman, in order to obtain the love of a girl he had met on the street. However, the bodily change provokes a new loving drive towards men, in a parody of the hybridizations that shape gender and sexuality (Grau 2015). In 1978 Pedro Olea filmed *Un hombre llamado Flor de Otoño* ("A man named autumn flower"), about the double life of a transformer in Barcelona, Lluis, interpreted by José Sacristán. Sex-change comedies became common in the late 70s and 80s: *Ellas las prefieren ...locas* ("Women prefer them...wild", by Mariano Ozores, 1977, playing with title of the film "Gentlemen Prefer Blondies", by Howard Hawks); *La tía de Carlos* ("Carlos's aunt", by Luis María Delgado, 1989), featuring Paco Martínez Soria; *Policía* ("Police", by Álvaro Saénz de Heredia, 1987); *Canción triste de …* ("... blues", by José Truchado y Antonio Ozores, 1989).

Trans people occupied a space between the morbid and the fascination (Berzosa 2014). In live performances, transsexual shows were always expected to finish with a display of genitals. According to Mira (2008: 401), this is an expression of the privileges of the heterosexual gaze and its obsessions with the anomalous, with the extraordinary as opposed to the norm. At the same time, moralising arguments underlined the dangers of sex reassignment operations. Yet many demonstrations for LGBTIQ rights used the transvestite to force social change in gender dichotomies.

> "In 1977 the Valencian countercultural magazine *Los Marginados* dedicates a monographic issue to «social dangers». On the cover, in the foreground,

> we can see the face of a man with makeup. To represent transvestites, Nazario draws a funny picture of "Miss Social Dangerousness", a bearded transvestite who exclaims provocatively and happily "They say that for us the whole year is carnival" (Picornell 2010: 287).

During the transition years, the curiosity and attraction towards transvestites turned in their favour (Kwan 1999). Yet the popular appropriation of the figure of the transvestite responds to a metaphor of the desire for social change, for stripping dictatorial power of its old masks, not so much for a greater consideration towards transvestites themselves or for the desire to rupture with the heteronormative system (Moreno 2021). Trans marginality could be vindicated in a humorous tone, but what trans people demanded was greater integration, expansion of their rights and betterment of their living conditions.

With democracy and the recognition of civil rights, new sexual stereotypes were sought through cinema. Bigas Luna shot *Tatuaje* ("Tattoo") in 1978 and reached the Cannes Film Festival in the same year with *Bilbao*, a film where a psychopath falls in love with a prostitute. The highly erotic content of his films provoked both rejection and excitement, as they dealt with taboo subjects. It is notably the case of his 1979 film *Caniche* ("Poodle"), which tells two siblings' incestuous story. Despite the scandalous relation between the two, Dani, a French poodle, is the real protagonist in this representation of zoophilia.

The popularity of filmmaker Pedro Almodovar marks an era of exaltation of sexual freedom and transgression: *Pepi, Luci, Bon y otras chicas del montón* (English title: "Pepi, Luci, Bom") of 1980, *Laberinto de pasiones* (English title: "Labyrinth of Passions") of 1982, *La ley del deseo* (English title: "Law of Desire") of 1987, all frame the imaginary world of the 1980 for wide sectors of the population, now in their fifties. La *movida madrileña* ("Madrid Movement") was a symbol of the democratic transition and sexual freedom -an association between the transition to democracy and greater sexual freedom that has been criticised by Villarós (1988) and Labrador (2017). Actresses like Antonia San Juan and Bibiana Fernández achieved great popular recognition, which they used to overcome the obstacles posed by a transphobia still very present in the performing arts. Almodovar will once again represent transsexuality in his 2004 film *La mala educación* ("Bad Education").

Even in this new context of openness, however, trans groups continued to be seen as the source of greatest scandal and moral panic, hence excluded and marginalised. Indiscriminately included under the category of transvestites, their visibility was reduced to the artistic environments of the cabaret, with figures such as Paco España or Angel Pavlovsky, and to prostitution.

The 1980s mark, in any case, a generational break with the Catholic and Francoist morality of the older generations. Musical groups such as *Kaka de Luxe*, *Alaska y los Pegamoides* and *Radio Futura* achieved great popularity with songs in which the body and pleasure are expressed beyond normative limits. The female punk quartet *Las Vulpes,* with their song *Me gusta ser una zorra* ("I like being a bitch", 1983), generated great controversy. Based on *I Wanna Be Your Dog*, by The Stooges, it used obscene language to defend

masturbation or social climbing through fellation. The political reactions were resounding, and the group members were sued for public scandal. The B-side of their single *Inkisición* criticised religious sentiments and Catholic double standards. The director of the television program where it was broadcast was fired. Conservative politicians of the time demanded five years' imprisonment and ten years' disqualification from public office for him.

Vestida de azul ("Dessed in blue", 1983), Antonio Giménez Rico's documentary on the lives of trans women, based on their own life stories, enjoyed wider acceptance, as well as great success at the San Sebastian Film Festival, where it was premiered with its protagonists in attendance. In 1987 the first association of Transsexuals in Spain was created: Transexualia, which sought to bring the struggle for visibility and the recognition of civil rights away from the previous stigmatising gaze (Mejía 2006). Zacarías Urbiola premiered in 1989 a film entitled *La pitoconejo* or *El regreso de Eva-man* ("The cockpussy" or "The return of Eve-man", 1982), which shows continuity in trans representations. The film tells the story of two transsexuals at the service of a scientist, Professor Pissinguer, who uses a Love Gun on them. The leading roles were played by trans actresses Ajita Wilson and Eva Coatti, who had worked with actors closely linked to Franco's times in the popular culture, such as Mariano Ozores and Andrés Pajares. The film comes to show the survival of traditional stereotypes surrounding women's exuberant bodies, now applied to trans women. Curiosity about the bodies of trans women is highlighted when, after Wilson's death, journalists insisted on corroborating whether she was transsexual, or not. To this Carles Aured, director of the 1982 film *Apocalipsis Sexual*, simply replied: "She was charming, beautiful and very professional. The rest is not important" (Mulholland 2020).

Despite boasting greater trans visibility (Melero 2010), however, this period is best characterised by the strong presence that homosexuality gained in cultural imagination, by homosexuals' vindications and by their eagerness to embark on the consumerist prototypes of the pink market: body cult, saunas, exclusive venues (Guasch and Más, 2014), as a way to grow their own cultural roots in Spanish brand-new democracy.

4. Towards a New Sexual Citizenship (Post-Gay Stage)

Despite resistance, the generational change multiplied sexual possibilities. These became closely associated with the left and erased part of the social stigma against divergent sexualities, criminalised until the end of the eighties. Visualising naked, non-binary bodies, experimenting with a sexuality not associated with reproduction and its associated dangers, characterise the so-called X generation. Improvements in women's sexual health were achieved and sexual liberation claims were strengthened. The impact of AIDS served to articulate protest movements through collectives such as *Radical Gay* or *Lesbianas Sin Duda* ("Lesbians No Doubt").

The 1990s and the beginning of the new millennium enriched queer proposals with what became "a bible": *El Manifiesto Contrasexual*, by Preciado (2002). Many feminist groups engaged in the manipulation of dildos, in making instruments that imitated the penis in order to urinate in the street and in the transgression of norms

around modern femininity as established by institutionalised feminism. Despite advances in laws seeking equality and recognition of sexual diversity, millennials felt that not enough progress was being made, especially as regards the breaking down of gender binary premises and a sexuality that, from the institutional point of view, was still predominantly heterosexual.

Being lesbian/gay/bisexual as a choice or phase rather than a fixed o predetermined identity stood as a critique of identity politics. The impact of the internet and dating technologies have changed the forms of courtship, the durability of the bond and the content of desire. As in other countries, the technification of sexuality has meant major changes in the further sexualisation of bodies, pornification, the pursuit of success and the increase in venues, possibilities and objects of pleasure (Langarita 2015).

The commodification of sex and the rise of toys encouraged so-called *tuppersex*, sexual meetings organised in the style of Tupperware parties in houses, where one is invited to try out different sexual gadgets. Its diffusion in Spain ran parallel the transformation of sex shops and perceptions of sex work and the increased consumption of pornography. The regulation of same-sex marriage in 2005 was the culmination of this wave of sexual modernity in Spain (Sabuco and Colling 2020). Getting there was not easy, as the project was caught between the poles of political confrontation: it was perceived as a provocative stance of the Socialist Party *PSOE* and gathered strong opposition from right-wing parties and the Catholic Church, which organised mass demonstrations against homosexuality and in favour of heterosexual reproductive marriage. In this context, the film *Veinte centímetros* ("Twenty centimeters", 2005), by Ramón Salazar, continued the line of visibility initiated by Almodovar, yet without the same public success. It shows how Marieta's desire not to be named after her father and not to have the same size penis as him is aggravated by narcolepsy and her dreams of musical shows. The film was awarded prizes for Best Screenplay and Best Soundtrack at the Malaga Festival.

The 2008 economic crisis led to an increased desire for security through affection and sex. Spanish cities were filled with padlocks placed by young people, symbolizing mutual support and attachment. The liquid bonds of a transforming sexuality met with this search for solidity and support. In 2011, well within the crisis, the so-called 15M (15 May) movement revitalized the protests against a state that had manipulated and distorted the meaning of democratic citizenship. Feminist, left-wing and LGTBIQ groups demanded real and effective sexual democracy (Fassin 2009). The politicisation and confrontation between left and right brought the emergence of new left-wing parties such as *Podemos* ("We Can"). A few years later, an extreme right-wing party, *Vox*, railed against sexual advances and revived the Francoist ideology with a strong following among a portion of the disenchanted young.

Against this backdrop, the so-called Z generation, born between 1994 and 2009, is characterised by a strong entrenchment in communication technologies, pleasure-based learning, practical hedonism, greater sexual diversity and a revision of hierarchies. Along with millennials, they have been most sexually affected by the pandemic. During lockdown, LGTBIQ groups stressed their social presence through the internet. In the midst of limitations

to access premises, bars or places of sexual exchange, they have thus maintained their public presence, just as heterosexual groups have. In this way, they are being increasingly normalised in Spain. Normalisation was already underway (Mira 2004; Coll Planas 2010). The film *Elisa y Marcela* ("Elisa and Marcela", by Isabel Coixet, 2019) tells the true story of two Galician teachers (Marcela Gracia Ibeas and Elisa Sánchez Loriga) who were married in Church on 8 June 8 1901. It was the first same-sex marriage in Spain, and the only one officiated by the Church. It was possible because Elisa passed herself off as a man, Mario Sánchez, and deceived the parish priest of Dumbría (A Coruña). Regarded as a film about lesbians, it also pays some attention to transsexuality or cross dressing, indeed a central theme in the story. It has received numerous distinctions for its contribution to education in values.

Transexual groups have gained high visibility and have carried out a huge struggle during the pandemic. Visibility has been enhanced by a national Draft Bill on LGTBIQ rights, which has given rise to strong political controversies. The struggle for sexual self-determination and the search for measures against the stigmatisation of non-binary children have been central. The most conservative positions have allied to prevent expressions of transsexuality in childhood, which has caused a great division of opinion even among intersexuals. At the other end, the Spanish Federation of Transexuals has multiplied the presence of transgender people in the media through photos, art exhibitions and demonstrations. There has also been an increase in virtual meetings and the fight to gain support through social networks. The use of Tinder and TikTok among the youth contrasts with the majority use of Facebook among the older generations.

As Hilary Radner (1999) suggests, the greater erotic capacity of diverse bodies, less stereotyped by class and age, has been reconfigured. Imaginary bodies have been replaced by a greater need for real bodies in the pandemic. One interesting example of this is Rodrigo Cuevas (Oviedo, 1985), a multidisciplinary artist with an academic musical background, who defines himself as a folk agitator. Cuevas has created what he calls the *elektrocuplé*, a style that re-signifies popular artistic traditions, notably the couplé, especially from Asturias and Galicia. His immersion in local traditions, and his transgression of the codes of cabaret and *cuplé* with an interactive "divism", it has all made an impression on audiences. In 2019 he began a tour, which he called *Trópicos de Covadonga* ("Tropic of Cavadonga"), toying with the literature of Henry Miller and the importance of sexuality. Through 2020 he filled theatres and venues all over Spain whenever it was possible to perform. Considered the inventor of the *tonada glam* and *cabaret underprao* (a pun on the pairing of underground venues and rural culture), he sports a *montera* (a traditional Asturian hat) and other traditionally Asturian inspired clothing, transformed by the designer Susana de Dios. His aesthetic has become a reference for creativity. His *Manual del cortejo* ("Textbook on courtship"), produced by Raúl Refree, also a singer and discoverer and promoter of figures such as Rosalía, was released at the end of 2019.

In his shows Rodrigo Cuevas criticises the expansion of foreign dances such as swing or the *capoira* and reclaims local body codes. Asturian dances such as the *xiringüelo* or Galician dances such as the *muñeira* are frameworks of affective significance, which differentiate his from works such as Rosalía's *El Mal Querer* ("Bad love"). From Cuevas' point of view,

their differences are down to a question of age. While Rosalía adjusts to the patterns of a millennial, the search for a universal sense of beauty and eternity is the basis of Cuevas' proposal for seduction. Contrasting with the liquid links of today's social networks and their abundant use of emoticons, it is the poetic word, he argues, that must not be forgotten. In this sense, his work connects with distant generations, that of the older grandparents marked by the rituals of seduction from agricultural times, the rituals of the seasons.

As he recalls in his shows, the difference between old forms of courtship and masturbation lies in beauty. The subtlety of romance and sex between older people contrasts with the liquid contacts of the young who prefer quantity to quality. He transgresses because he advocates multiple bodies (his use of traditional clothes and garters, his poses in underpants next to a donkey, the ostentation of an erotic body far removed from hegemonic codes). The syncretism of his staging is rooted in memory: a Galician *montera* hat, colorful lace T-shirts, the traditional waistband, a Japanese *yukata* and Asturian *madreñas* shoes (Hidalgo 2021a). His is the body of a homosexual man who lovingly loves other men but who sings of love itself as a personal and collective quality: it all shows awareness of one's own body and its musical configurations. In his interviews he alludes to the homophobic discourses of the extreme right; in his work, he upholds the authenticity of traditional sources in the face of mass individualism. Located at the fringes of the counterculture, he has altered well-known folk songs and made an impact with low budget videos in which friends and residents of his village take part (Hidalgo 2021b). Not being afraid to ask the audience to shout like their grandmothers is a way of questioning evolution and unstoppable modernity.

On authenticity, he declares "When something is too contrived, I stop liking it". Rodrigo Cuevas has claimed the countryside for the young and the city for the old. He lives in the small Asturian village of Vegarrionda, with fifteen inhabitants. From his home he broadcasts free streaming of different performances that have gathered many followers. He has maintained a strong public support for LGTBIQ struggles. Indeed, he has recovered and dedicated many of his songs to well-known homosexuals from the past, such as the *habanera* he dedicated to Rambal, who cross-dressed in a neighbourhood in Gijón and was murdered in the 70s.

Samantha Hudson, the alias of Ivan González Ranedo (León, 1999), goes one step further. A singing artist and non-binary LGTBIQ activist, she was fifteen when, in 2015, she recorded the song *Maricón* ("Faggot"), causing a huge scandal both at her school and beyond, when the song appeared on Youtube. Right-wing and religious sectors protested her obscenity, as she used constant references to the Catholic Church in her performances and interpretations. The far-right group *HazteOir* ("Make yourself heard") called for the school teacher who approved her work to be removed from public employment, for the broadcast to be banned from the internet and for her performances to be blocked. In the end, the video was removed from the platform.

Her camp provocations go beyond transgression to seek an interpellation of class. Songs such as *Burguesa arruinada* ("Bourgeois ruined") and *Dulce y bautizada* ("Sweet and baptized") enquire into the possibilities of being gay and Catholic. Her first show

in 2021, *Eutanasia Deluxe*, is a pun based on the title of one of the most popular gossip programs on Spanish television, *Sálvame* ("Rescue me") *Deluxe*. Many of her themes are inspired by television programmes. Her non-binary position, her trash aesthetic, her class-consciousness -she declares herself Marxist and anti-capitalist- and her use of obscene language serve to politicize art.

In her/his graduation speech (s)he said:

> "The moment I put on a crown, it is a political act. The moment I put on a princess backpack, I am fighting against a system that oppresses me. And when I wear pink and go out on the street *and draw attention to myself*, I am fighting against a society that rejects me and denies me the right to enjoy my own life. Because I really am in danger because of who I am («Samantha Hudson, una historia de fe, sexo i electro queer». *https://ib3.org.*)"

Samantha's frequent use of social media is characteristic of her XXY generation. (S)he has a large number of followers on Instagram. (S)he appears on platforms like *Netflix* or *Filmin* and enjoys cameo appearances as famous Spanish personalities. (S)he has even featured in a *Filmin* documentary about her own life entitled *Una historia de fe, sexo y electroqueer* ("A story of faith, sex and electroqueer"). With the record label *Subterfuge* and the production company *Putochinomaricon* (s)he will release her/his third single *Disco Jet Lag*. Her/his lyrics are obscene both for their content, their exhibitionism and for the bodily performance accompanying them. These activities have allowed her/him to abandon the sporadic jobs on which (s)he used to make a living in Barcelona and to dedicate her/himself exclusively to her/his shows. In the last year (s)he has become the *new Spanish* queer icon.

The visceral nature of her (as she now prefers to be known) performances generates both enthusiasm and rejection. Her *mamarrachadas* (extravagant, ugly and ridiculous acts), which she defends as part of a social class, scandalise; she even includes in her lyrics a call to Marxism or photographs herself with a pink hammer and sickle, which is widely applauded among her followers. Among art critics, her figure has been both dismissed as lacking aesthetic value and praised. Joan Porcel documented Hudson's transition from high school icon to instagram in 2018. In 2021 Marc Ferrer directed *Corten* (CUT) with the participation of Samantha Hudson and La Prohibida, another famous trans, in a queer horror film. Fran Granada is responsible for the recording of *Todo por España* ("Everything for Spain") where Samantha Hudson and Papa Topo resignify the values of transgression in the Franco era and even shoot the dictator. The soundrack of *Corten*, composed by Adrià Arbona, spread very quickly through whatsapp, internet, instagram and other social networks.

5. Some Final Reflections

The performances of Rodrigo Cuevas and Samantha Hudson express contemporary hybrid ways of conceiving sexuality. Some are rooted in the past, others focus on a

non-binary future and incorporate new technologies for inventing and building new corporeality. They are all representations of sexual choices, of a way of life that goes beyond pre-established constraints, that adopts sarcasm and confrontation as a means of expression. At the core of it lies the idea of fluidity (Langarita and Grau 2017). It should not come as a surprise that different political positions have referred to this idea. *Vox* has done so to criticise the social and sexual decadence of Spanish society; at the other end, we find parties such as lef-wing *Más Madrid*, which has joined together with icons of sexual diversity such as La Prohibida, Cuentos Rosales, and the filmmaker and cultural manager Alex de la Croix. The picture, however, is more complex. Alexia Herranz, a trans woman, aspires to become the first head of the Popular Party, the main conservative party in Spain. Gender fluidity is the great central theme of sexuality in today's Spain. For young people, it is a necessary demand and has led to battle for a national law on trans rights, which is finally being discussed in Spain, and that is generating great upheaval. Linking popular traditions to a new vindication of love experiences regardless of the sex of the individuals shows the porous limits of normativity and transgression. Vindicating intersex, Catholicism and the desire to be a mother, and doing so with obscene language, might still be reprehensible, but is very popular within the most progressive sectors.

Beyond gender fluidity, transphobia also divides and fragments Spain and Spanish feminists. The expression TERF *(Trans-exclusionary radical feminist)* speaks of trans exclusion and is also used as an insult against these sectors of feminism. TERFs have been identified as inciting hate crime. A lawsuit was filed in 2019 against the *Feminist Party of Spain* (*PFE*) and its leader since 1979, the Marxist feminist Lidia Falcón, for disseminating hate against trans women. Although it did not succeed, it led to the expulsion of the PFE from the *United Left*, a left-wing political coalition, and its gradual proximity with the ultra-conservative *Vox*. For their part, right-wing politicians, such as Isabel Díaz Ayuso, Head of Madrid Regional Government, have announced their opposition to any attempt to update the existing legislation on gender identity. Ayuso has accused left-wing parties of using homosexual and transsexual demands to gain political ground by claiming to be their only legitimate representatives.

While the Spanish population strives to adjust to a "new normality" after recent lockdowns, the youngest propose a different pace for sexuality and the meanings of citizenship, set by the globalized meanings of the obscene and the political potentials of body transgression. Mar Cambrolle, a politically prominent trans activist who boasts publications and activism at the national and European levels, has joined transsexual intellectuals such as Preciado (2021) and Lucas Platero (2012, 2016) as points of reference. As Platero and Ortega-Arjonilla (2016) stated in their study about Elsa Ruiz Cómica, a Spanish transgender influencer, the new constructions about sex and gender are mapping a different political trans visibility where digital media acquire centre stage, in line with the consumption habits of the youngest generations (see also Tortajada, Willen, Platero and Arauna 2021). The presence of fluid gender experiences is becoming more frequent every day. A new trans visibility is becoming evident on television, movies, talks, meetings, news.

The crisis associated with the pandemic, social fears in the face of an uncertain (fluid) future, Spain's growing political bipolarisation, all seem to place us at a kind of crossroads: either we go down the road of a ground-breaking, open, multiple and fluid approach to sexuality or we return to heteropatriarchal reproductive constraints. The choice should be clear.

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WHAT IS AT STAKE IN THE RECOGNITION OF NON-NORMATIVE IDENTITIES?*

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Abstract: The deconstruction of the binary sex-gender system that sustains modern western states demands the deconstruction of its dichotomies and their excluding effects on non-normative identities. This demands in turn that gender self-determination be recognised as a right. In Spain this right has been given constitutional status (*STC* 99/2019), yet it is currently not articulated in legislation. Proposals of a new legal framework have met with resistance and an ensuing need for compromise. Unless it grasps and upholds the full constitutional extent of the right to gender self-determination, however, legislation risks being born both unconstitutional and obsolete, out of pace with social demands.

Keywords: Sex-gender system, self-determination, trans, intersex, non-binary.

Summary: 1. Introduction. 2. Feminism and Binary Boundaries. 3. Binary Dissenters. 4. Gender Self-Determination in Spain. Constitutional Grounds and Legal Hurdles. 4.1. Current state of affairs. 4.2. On the brink of change?. 5. Final Reflections.

1. Introduction

In as far as they entail men's power over women, feminism is about the deconstruction of sex-gender systems, of the "set[s] of arrangements by which a society transforms biological sexuality into products of human activity, and in which these transformed sexual needs are satisfied" (Rubin 1975: 159). A sex-gender system lies at the core of every society's "cognitive schema", of the "conceptual structures [people use] to organize their experience into cognitive bits which make sense to them, and which may be effectively communicated to others" (Devor 1989: 45). In the modern West, cognitive schema, our sources of understanding and shared meanings, are constructed upon a binary sex-gender system, a male/female divide that is both rigidly dichotomous and strongly hierarchical, with the male side openly taking the upper hand and providing the "dominant gender schema" (Devor 1989: 47 ff.). Theorised as the result of the sexual contract that underlies the social contract, the foundational myth of states in the modern West (Pateman 1988), this male/female divide permeates the construction of citizenship within them through a whole series of further (dichotomous and hierarchical) pairs: public vs. private; active vs. passive; strong vs. weak; independent vs. dependent; rational vs. irrational, intuitive, emotional.

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In its attempts to deconstruct gender power dynamics, feminism has questioned these binary divides. It has questioned in particular their hierarchical component and has insisted on the need to deprive sex-gender dichotomies of the hierarchical elements that feed them. To this end, feminism has emphasised the need to include women on an equal footing with men within the side of these dichotomies where power lies (the public, active, strong, independent, rational side). Whether this aim is pursued through means of formal equality, or through policies that take into account women's specific needs and requirements, resulting from men's and women's different starting position, the aim is to make power accessible to women and to men alike, thus leading to the actual disintegration of power in sex-gender terms.

This paper aims to present this strategy as incomplete. It suggests that the route to end men's position of power is to focus, not only on the hierarchical elements that feed modern western sex-gender, but also on the dichotomies that sustain it. To this end, it argues that feminism needs to reach out beyond cis-women's claims and find allies in sex-gender binary dissenters. It argues, specifically, that it needs to reach out to gender identities and expressions placed beyond binary dichotomous boundaries (2). From here it moves on to focus on the intersex and on non-binary identities, on how they both challenge our sex-gender system, and on how this is reacting to them (3). An analysis ensues of the position of sex-gender identity dissenters in the Spanish legal framework as it now stands and as shaped in the Draft Bill on LGTBI rights currently under consideration (4). The paper ends with some final reflections on gender identity as a cognitive category and the importance of eradicating it as a source of power.

2. Feminism and Binary Boundaries

In its efforts to combat men's position of structural power over women, feminism has concentrated on its hierarchical pillars, the ones that grant men control over the spheres where power is exerted. Feminism endeavours to correct this situation and to imbue these spheres with gender parity. The problem is that men's control starts with the very definition of those spheres, with their monopoly of the capacity to call the shots, to pick the (power) games and to set the rules of those games to fit their own profile. This leaves women either out of those games or at a structural disadvantage when joining them.

By focusing on the hierarchical element of the sex-gender system, feminism often loses sight of this. When it does, it runs the risk of confirming the very sex-gender system it set out to question and combat. It runs the risk of remaining stuck in what Carole Pateman labelled as the "Wollstonecraft dilemma" (Pateman 1989: 196-197), by reference to the two routes that appear since the Enlightenment to be available to women in search of full citizenship. These are the routes of equality and of difference. Although frequently perceived and constructed as complementary, both routes are mutually exclusive: aspiring to equal rights with men is incompatible with vindicating specific rights for women that take their specific needs and concerns into account. More importantly, they are both problematic, as they remain entrenched in the very sex-gender system that they aspire to overthrow. Equality involves extending to women the rights that define male citizenship and which men have designed for themselves; difference involves claiming women's

specific needs and concerns as differentiated from those of men. One way or the other, both of them confirm men as points of reference in the construction of modern citizenship. Both these routes, Pateman concludes, "remain within the confines of the patriarchal … state, and make women's access to full citizenship impossible to achieve" (1989: 196–197).

In order to break the confines of patriarchal states, in order to question men's experiences as points of reference, feminism needs to go beyond questioning women's structural inferiority. It needs to question the (dichotomous) binary sex-gender system itself. Realising this leads to the further realisation that the sex-gender binary is built upon the subordination of women to men, but also upon the exclusion of everyone who does not fit within the straightjackets of its dichotomies. In order to deconstruct the sex-gender system of the modern West, feminism must thus reach out to all those with non-normative sexual orientations (Wittig 1992) and/or sex-gender identities, and embark with binary dissenters on a project to deconstruct the sex-gender (dichotomous) binary at its core.

In this project, trans identities are obvious allies. "By definition, a transsexual is a person whose physical sex is unambiguous, and whose gender identity is unambiguous, but whose sex and gender do not concur" (Devor 1989: 20). By disconnecting gender from sex, by exposing gender as an identity that is constructed and performed, and turning it (eventually along with sex) into a matter of choice, trans identities lay open the artifice and performativity (Butler 1990) that feeds our sex-gender system and its strictures. Their recognition counts with increasing support at the international and supranational levels through instruments of soft law, such as the Yogyakarta Principles (2006) and Yogyakarta Principles Plus 10 (2017),[1] or Resolution 2048 (2015) of the Parliamentary Assembly of the Council of Europe.[2] It is also gaining recognition by the European Court of Human Rights (ECtHR) and the Interamerican Court of Human Rights, as well as within states. The trend here is towards protecting people's gender identity as part of their right to privacy and as part of their right to autonomy or self-determination, in turn a defining feature of citizenship in any democratic society.

Although challenging to the foundations of our sex-gender system, however, in and of themselves trans identities do not necessarily challenge its dichotomies. These could even be reinforced by binary sex-gender reassignments, particularly where sex reassignment surgery, medical realignment and/or external assessment of the ability to live in the opposite sex role are required, as part of the "born in the wrong body" narrative (Agha 2019: 66-67). Our sex-gender system could thus be confirmed as a duality of mutually exclusive halves, each gaining existence, like gestalt figures, by the blurring of the other. Questioning modern sex-gender dichotomous construction requires us to take a further step right out of it and engage with identities and/or their expressions that place themselves beyond pre-defined binary poles, be it in terms of sex, gender, or a combination of both. It is to these identities that we shall now turn.

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1. Both available at: http://yogyakartaprinciples.org/principles-en/official-versions-pdf/. [Accessed: 10 November 2021].
2. Available at: https://pace.coe.int/en/files/21736/html. [Accessed: 10 November 2021].

3. Binary Dissenters

Let us begin with the intersex. Intersex are people whose biological sex markers do not fit neatly within either the male or the female category. Because gender dichotomies allegedly rely on biological sex dimorphism, the intersex pose serious theoretical and practical challenges to western modern sex-gender. Rather than faced, these challenges have been largely ignored. As a result, intersex people have been consigned to irrelevance, turned into the (modern) bodies that do not count, that do not matter (Butler 1993), that do not even *exist*. According to UN data from 2015, though, between 0,05% and 1,7 % of the world population is intersexual.[3] The percentual range aims to accommodate all different kinds of intersexuality. "Perfect" intersexuality is rare (around 0,05% of the population). Its less-than-perfect varieties, on the other hand, are rather common and expand over a wide spectrum, the result of various biological factors and combinations thereof. These factors relate to hormones, chromosomes, inner gonad and external genitals, all of which have a say in the shaping of biological sex. Not all of them, however, always respond to sex dimorphism, or necessarily point in the same dimorphic direction. Surprisingly often they do not. There are frequent cases of Disorders (of Differences) of Sex Development (DSD), as the sources of intersexuality have been termed: atypical chromosomal development; irregularities in the production of hormones (mostly androgens); atypical development of gonads; atypical external genitalia. Intersexuality can result from any of these developmental occurrences. Each can also be present in a variety of forms and can interact with one another in a multiplicity of ways, which may be more or less easy to perceive: some cases of intersexuality are visible at birth; others show during infancy or puberty; others do not till adulthood; some are never found out. This makes intersexuality a rich reality, one that is complex to map. Its typologies have been the object of various different classifications mostly dependent on the cultural context and the medical conventions stemming from it (Kessler & McKenna 1978, pp. 42 ff.).

Just as a social system's most revealing feature is the way it approaches its minorities, the way intersexuality is approached is most revealing of the dynamics inherent in a given construction of gender. In the words of Suzanne Kessler, "gender is a product [and a reflection] of the way intersexuality is managed" (Kessler 1998: 111). It is in this sense revealing that in the West intersexuality became an issue, indeed an obsession, during the XIX century, when the gender binary was cast in the building stones of our modern states. Pre-modernity perceived the intersex as part of a continuous line between its male and its female extremes. This is so at least in the context of what Thomas Laqueur (1990) has called the "one-sex model", a model where all sex-gender identities were seen as variations of the male one, regarded as superior and as point of reference for all others. In this one-sex model, which according to Laqueur prevailed in the West from classic antiquity until the XVIII century, the differentiating factor between male and female was not so much sex as gender, not so much biology as the social roles attributed to men and women. Although this account has been questioned in its historic faithfulness, concerning the long prevalence of the one-sex model; although it seems more likely that the

[3] United Nations Office of the High Commissioner for Human Rights (2015): Fact Sheet. Intersex. https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf. [Accessed 10 November 2021].

one-sex model coexisted with the current binary dichotomous construction; although the latter appears to have started to gain terrain over the former already in the Renaissance (King 2016); although this might all be so, the one-sex model appears to have had a space of its own in pre-modern western culture and to have accommodated intersexuality somewhere along the sex-gender continuum. To be sure, intersex people did not enjoy legal recognition, they were rather assigned to a binary (male or female) gender identity; yet they were granted some level of sex-gender expression, as they were allowed to have their identity reassigned at puberty (Foucault 1980: viii; Dose 2014: 70).

There were some modern attempts to revive the one-sex model and the idea of gender as a continuum. Most notable is the work of Magnus Hirschfeld (1868-1935), which elicited violent reactions by the Nazi regime (see for all Hirschfeld 1918 [2015ed.], Dose 2014). By and large, however, the consolidation of modern sex-gender dichotomies in the XIX century turned intersexuality into a conceptual impossibility. This brought an obsession with the intersex. Hermaphrodites, as they were then called, became strange bodies, the object of obsessive medical and legal attention, so difficult to accommodate that they were constructed as non-existent, a mere "appearance". Hermaphroditism was treated as *pseudo*-hermaphroditism, with every case being but an "apparent" case (Foucault 1980; Fausto-Sterling 2000 [2020]: 40). Even doctors frequently dealing with it sustained that all cases were, could only be, *pseudo*-cases (Dreger 1998: 107). "Real" biological sex could only be male or female. Once thus defined, our sex stood as the marker of our gender and, with it, of our "real" identity in the broadest possible sense. As Michel Foucault said, "[a]t the bottom of sex, there is truth", since "our sex harbours what is most true about ourselves" (1980: xi). Any deviation from our (binary, dichotomous) sexual truth could not be but a misconception, or a case of deception.

In order to turn sexual dimorphism into a medical truth over and above intersex diversities, that truth was pinned onto genitals. As markers of sexual identity, genitals also became the key to gender identity and the citizenship roles attached to it, hence to adequate sexual and gender aptitudes, attitudes and behaviours (Kessler 1998: 52 ff.), to a person's identity writ large. Sex, gender and sexuality were turned into an inseparable triad (Dreger 1998: 88-91; 110 ff.). Every departure from what were considered appropriate (social and sexual) aptitudes, attitudes and behaviour became a sign of *apparent* hermaphroditism; every case of apparent hermaphroditism became a pathological, clinical case (*ibidem*).

Obsession with genitalia as markers of citizenship gave rise to an obsession with their external appearance. Ideal models of genitals were defined, in dimorphic terms, to the detriment of real ones -of the real people who do not meet ideal standards. Every deviation from those models became a pathology in need of "normalisation", as did every genital ambiguity. The result has been sex assignment surgery on babies born with intersex features or merely ambiguous genitals. This particularly affects the penis as marker of the model citizen. In order to fulfil a (male) citizen role in a dichotomous world, an adequate penis is required. What is required, more precisely, is a penis that *looks* adequate. Standards for an adequate-looking penis are attached strong cultural significance and are consequently more stringent than those attached to female genitalia. Not surprisingly, sex-assignment surgery mostly produces females (Kessler 1998: 68, 95). This surgery, forerunner of transsexual reassignment surgery, is more appropriately known as Intersex Genital Mutilation (IGM)

and is still widely practiced today. It is overwhelmingly practiced, moreover, not for medical reasons (at any rate not for medical reasons so urgent that any delay, to obtain the person's consent, is to be considered inadvisable), but for reasons related to cultural (gender) normalisation, often related to aesthetic ambiguity. This needs to be "'corrected', not because it is threatening to the infant's life but because it is threatening to the infant's culture" (Kessler 1998: 32; see also Fausto-Sterling 2000 [2020]: 83 ff.); it is gender, not health, that demands surgery.

The new century has brought along with it a surge of objections to IGM: because it is practiced on new-borns and minors and is as such non-consensual; because it is invasive and irreversible; because it is all of that as well as medically unnecessary. There is also concern about its long-term consequences, both physical and psychological, mostly as it affects a person's capacity for sexual intercourse and pleasure. Beyond isolated individual testimonies, however, there is little information available about this, as social stigma makes follow-ups and systematic surveys difficult to conduct (Kessler 1998: 52 ff.). In light of all this, IGM has been condemned in Europe by the German Ethics Council (2012),[4] the Swiss National Ethics Commission for Human Medicine (2012)[5] and the Austrian Bioethics Commission (2017).[6] They all concluded IGM is a serious violation of physical integrity and recommend that, other than in cases of medical emergency, it not be practiced on non-consenting minors. The same line has been followed by the Parliamentary Assembly of the Council of Europe, in its Resolution 2191 (2017), *Promoting the human rights of and eliminating discrimination against intersex people*,[7] and by the European Parliament, in its Resolution of 14 February 2019 (2018/2878(RSP)), on the rights of intersex people.[8] Some European countries have banned IGM, notably Malta,[9] Portugal[10] and Germany,[11] albeit not always as effectively as would be desirable.[12] In most, however, it still constitutes normal practice (Ghattas 2020: 11).

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4. *Intersexuality. Opinion.* Available at: https://www.ethikrat.org/fileadmin/Publikationen/Stellungnahmen/deutsch/DER_StnIntersex_Deu_Online.pdf. [Accessed: 11 November 2021].

5. On the management of differences of sex development. Ethical issues relating to "intersexuality". Opinion No. 20/2012. Available at: http://www.nek-cne.ch/fileadmin/nek-cne-dateien/Themen/Stellungnahmen/en/NEK_Intersexualitaet_En.pdf. [Accessed: 11 November 2021].

6. *Intersexuality and Transidentity. Opinion of the Bioethics Commission*. Available at: https://www.bundeskanzleramt.gv.at/en/topics/bioethics-commission/publications-bioethics.html. [Accessed: 11 November 2021].

7. Available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232. [Accessed: 30 November 2021].

8. https://www.europarl.europa.eu/doceo/document/TA-8-2019-0128_EN.html. [Accessed: 30 November 2021].

9. *Gender Identity, Gender Expression and Sex Characteristics Act*, de 14 de abril de 2015 (artículo 14). Available at: https://legislation.mt/eli/cap/540/eng/pdf. [Accessed: 9 November 2021].

10. Lei n.º 38/2018, de 7 de agosto: *Direito à autodeterminação da identidade de género e expressão de género e à proteção das características sexuais de cada pessoa* (artículo 5). Available at: https://dre.pt/pesquisa/-/search/115933863/details/maximized. [Accessed: 9 November 2021].

11. *Gesetz zum Schutz von Kindern mit Varianten der Geschlechtsentwicklung*, 25 March 2021. Available at: https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//*%5b@attr_id=%27bgbl121s1082.pdf%27%5d#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl121s1082.pdf%27%5D__1631208130560. [Accessed: 9 November 2021].

12. https://stopigm.org/. [Accessed: 9 November 2021].

IGM confronts us like no other phenomenon with politics' controversial relationship with nature. "Because nature is governed by laws independent of us, all that falls under its domain is unamendable. A naturalistic view of the social order seems, *eo ipso*, to legitimate a given status quo" (Salvatore 2019: 8). Indeed, in the tension between nature and culture, nature (biology, sex) is conventionally regarded as the immutable marker of immutable truths, and is accordingly expected to have the upper hand over culture (gender). Yet as IGM makes clear, it is gender that rules over sex. It is biology (genitals) that must surrender to culture and its binary construction of gender and be operated upon in order to meet its requirements. "If culture demands gender, physicians will produce it and of course when physicians produce it the fact that gender is 'demanded' will be hidden from everyone" (Kessler 1998: 75). Western modern culture indeed demands gender. It demands it so that western modern citizenship can be constructed upon it. To this end, biology is first subjected to cultural assumptions about bodies and then used as a rhetorical shroud to disguise those very assumptions, a display of "body politics" at its highest (Foucault 1976 [1981ed]: 140-144).

Far from being the holder of ultimate truths, however, "biology is no closer to the truth, in any absolute sense, than a deity" (Kessler & McKenna 1978, p. 162).[13] What is immutable is not biology, but culture's dogmas, its "incorregible propositions" (Kessler & McKenna 1978: 4), claims to truth that become a matter of faith in their own unquestionable basic assumptions. Thus, "although it seems as if biological facts have an existence independent of gender labels […] the process is actually the reverse" (Kessler & McKenna 1978: 75; see also Devor 1989: 146 ff.). It is gender labels that condition biological attitudes to gender assignments. "Sexes are attributed on the basis of gender attributions" (Devor 1989: 146), in new-borns as in grown-ups. In the latter, "[g]ender roles, rather than being the results of biological imperatives, actually function as cues to sex and gender" (Devor 1989: 146); in the former, gender conditions our medical approach to intersexuality, even its very existence as a medical concept. This is why some scholars speak, not of sex-gender, but of the "gender-sex system" (Laqueur 1990; Fausto-Sterling 2000 [2020]). And this is why the binary construction of gender that sustains modern states has succeeded in obliterating biological realities that do not fit within it, condemning intersex bodies to inexistence.

Should there be a biological truth, this would point, not to dichotomies, but towards continuity. As has been noted, "scientists find fewer biological, psychological and social dichotomies and more biological, psychological and social continua". Yet most scientists remain faithful to sexual dimorphism (Kessler & McKenna 1978: 164, 163). Forsaking it would necessarily take us beyond the gender binary. Sure, (biological) intersex and (cultural) non-binary gender identities need not go hand in hand, and they often do not. Yet opening biology (sex) to the former does appear to go hand in hand with opening culture (gender) to the latter (Preciado 2020).

Turning now to non-binary identities, note that not all sex-gender (or gender-sex) systems are binary, and not all binary systems are as dichotomous as the one in place in the modern West (Kessler & McKenna 1978: 21 ff.). Nor is every sex-gender (or gender-

[13] On the subordination of science to culture, see Lewontin 1993.

sex) system based on "heteroassignment" (Rubio Marín & Osella 2020). Some western legal systems are currently moving away from the binary and towards gender self-determination. Whether by legislation or by judicial decision, an increasing number of them now acknowledge non-binary gender identities and their right to express themselves in official documents.[14] In Europe, the abovementioned reports on intersexuality, elaborated by the German Ethics Council, the Swiss National Commission of Ethics for Human Medicine and the Austrian Bioethics Commission, all recommended that a person whose sexual identity cannot be unambiguously determined in binary terms be offered a non-binary sex-gender option. So did the Parliamentary Assembly of the Council of Europe and the European Parliament in their abovementioned Resolutions on the matter (2017 and 2019, respectively), both of which pointed to self-determination in the context of gender identities. Germany followed the recommendation of its Ethics Council in 2013. Malta (2015), Austria (2018), The Netherlands (2018) and Portugal (2018) have adopted similar provisions.

The fact that this is happening in some countries within the European Union has legal relevance for all others. People who have had their non-binary identity recognised in one Member States have the right to have this identity respected in all others, whether or not they recognise non-binary identities domestically. This is so on account of EU citizens' right of free movement of citizens within the European Union (article 21 Treaty on the Functioning of the EU; article 45 Charter on Fundamental Rights of the EU; EU Directive 2004/38/EC). As the Court of Justice of the European Union ruled in 2018, the exercise of this right cannot come at the cost of one's personal status. Established in the context of same-sex marriage with regards to the recognition of one's marital status (Decision of 5 June 2018, *affair* C-673/16 -*Coman & others*) and, more recently, parenthood (Decision of 14 December 2021, Grand Chamber, *affair* C-490/20 -Stolichna obshtina, rayon «Pancharevo»), this doctrine must be considered all the more applicable to one's gender identity, on account of the even more central role it plays in the definition of one's status as a citizen. Spain is as bound by it as is every other Member States. As we will see, however, it has not yet joined other EU countries in the recognition of non-binary identities.

4. Gender Self-Determination in Spain. Constitutional Grounds and Legal Hurdles

4.1. Current state of affairs

The Spanish legal system is firmly rooted in the gender binary. This is so despite the constitutional ban on discrimination. The Spanish Constitution (*CE*) does not

[14] It is the case of Australia (2003), Pakistan (2009), India (2009), New Zealand (2012), Bangladesh (2013), Kenia (2014), Nepal (2015), Chile (2017), Canada (2017), Argentina (2018), Uruguay (2018), Iceland (2019), as well as some states within the U.S.A., as New York, California, Ohio, New Mexico, Nevada, Oregon, Utah, Washington, New Jersey, Colorado. See Human Rights Watch data, available at https://www.hrw.org/news/2020/09/08/transgender-third-gender-no-gender-part-i. [Accessed: 10 November 2021].

explicitly ban discrimination on the grounds of sex-gender identity. Article 14 refers to sex (to sex-gender) as a forbidden ground for discrimination, but according to the Constitutional Court the aim of this ban is to put an end to the "differences that historically have placed [women] in a position of legal and social inferiority" with respect to men (Decision of the Constitutional Court -*STC*[15]- 241/1988, 26 October, *FJ 6*;[16] see also *STC* 26/2011, 14 March). As a forbidden ground for discrimination, "sex" (sex-gender) has not been interpreted to include gender identities, whether binary or not. Article 14's list of forbidden grounds for discrimination is however open-ended and the Constitutional Court has included both sexual orientation (*STC* 41/2006, 13 February) and sex-gender identity (*STC* 176/2008, 3 August) within that list. Under the Spanish Constitution, discrimination on the grounds of sex-gender identity, whether binary or not, is therefore forbidden.

The protection of autonomy could come to support the claims of non-normative sex-gender identities. Despite its democratic importance, however, autonomy is not recognised as a fundamental right in the Spanish Constitution. It is not even mentioned as part of the "highest values" of the Spanish legal order, which are rather "liberty, justice, equality and political pluralism" (Article 1.1 *CE*). Nor is it mentioned amongst the foundational principles of Spanish political order and social peace, which include respect for human dignity and the free development of the personality (Article 10.1 *CE*). In the battle for the recognition of non-normative gender identities in Spain, claims to personal autonomy or self-normativity help to frame the question as a matter of democratic citizenship, yet they bear little, if any, constitutional weight.

Dignity and the free development of the personality can come to the rescue. After all, despite the philosophical differences between freedom (absence of bonds) and autonomy (self-rule in the midst of our complex network of diverse, overlapping, often contradictory bonds - Rodríguez Ruiz 2019: 125 ff.), both are often used as interchangeable terms in political theory (Rodríguez Ruiz 2019: 128-129). And, after all, democratic dignity can hardly refer to anything other than respect for one's capacity for self-rule (one's autonomy), a reading supported by the Spanish Constitutional Court (see for all *STC* 236/2007). Once again, the hurdle is that dignity and the free development of the personality are not constitutionally recognised as self-standing rights, but more loosely as principles (Article 10.1). As such they sustain the recognition of non-normative gender identities. Yet they do not stand as grounds for individual claims to have such recognition granted, unless they are read in conjunction with some fundamental right. The right not to suffer discrimination (Article 14 *CE*) and the right to privacy (Article 18.1 *CE*) stand here as likely candidates. One such claim has reached the Constitutional Court and won the case before it, as will be explained below. Nevertheless, probably because the constitutional basis for a judicial case appears all but straightforward, the struggle for the recognition of non-normative gender identities has mostly been waged in the political arena rather than at court, aimed at instigating legislative reform rather than constitutional acknowledgement.

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15. Acronym for *Sentencia del Tribunal Constitucional*.
16. Acronym for *Fundamento Jurídico* (Legal Ground).

In this struggle, the Act on Gender Identity (Act 3/2007, 15 March)[17] marked an important stepping stone. This Act, in force at the time of writing, came to allow legal gender reassignment without previous sex reassignment surgery, let alone sterilisation. Since then, having one's gender identity legally recognised need not come at the cost of physical integrity, a choice the Federal Constitutional Court of Germany declared unconstitutional a few years later (*BVerfGE* 1, 155, 11 January 2011). To be sure, this choice implied in Germany the construction as mutually exclusive of two fundamental rights, the rights to physical integrity and to the free development of the personality, thus posing a blatant constitutional oxymoron; in Spain, where the latter is not a constitutional right but a mere principle, the oxymoron is less apparent. Nevertheless, ruling out that confrontation stands also here as a matter of constitutional consistency.[18] In this sense, the Act on Gender Identity marked an important step forward in the legal recognition of non-normative gender identities.

The Act is, however, burdened with limitations. First and foremost, it remains rooted in a binary dichotomous logic that only allows for man-to-woman and woman-to-man transits. Non-binary sex and/or gender identities are left out of its bounds. This places the Act at odds with the right not to suffer discrimination on the grounds of sex-gender identity, as well as out of pace with international and European developments in the field.

A second set of limitations concern its beneficiaries, which the Act restricts to Spanish nationals above the legal age (article 1). Based on this, foreign residents cannot claim to have the documents issued them by Spanish authorities (residence cards, health-care cards) adjusted to their gender identity. This is so despite the fact that, with a few exceptions explicitly noted in the Constitution (*STC* 107/1984, 23 November), nationality plays no role in defining who is a fundamental right's holder. At the most, it can come to qualify the terms in which some fundamental rights are regulated, notably rights not directly related to human dignity, and only in as far as their essential content, their core defining features, are not compromised (*SSTC* 115/1987, 7 July; 236/2007, 7 November). This points to the Act on Gender Identity as discriminatory on the grounds of both sex-gender identity and nationality.

The same can be said regarding age. In its *STC* 99/2019, of 18 July, the Constitutional Court knew of the claim raised by an under-aged trans boy to have his gender identity legally acknowledged, based on his fundamental right to privacy.[19] When the Spanish Supreme Court had to decide on the case, it acknowledged that the source of the problem lay in the Act on Gender Identity itself and raised a question concerning its constitutionality (*cuestión de inconstitucionalidad*) before the Constitutional Court. To address it, the Constitutional Court relied on the notion of autonomy (on the "autonomous determination

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17. *Ley 3/2007, de 15 de marzo, reguladora de la rectificación registral de la mención relativa al sexo de las personas*.

18. The European Court of Human Rights followed the line of reasoning earlier developed by the German Federal Constitutional Court in the case of *AP, Garçon and Nicot v France* (Decision of 6 April 2017), in reference to sterilisation surgery or treatment.

19. Claims of violation of the fundamental right to physical and moral integrity (Article 15), including right to health (Article 43), were discarded by the Court (*FJ* 4c).

of one's own identity"), as connected to the principles of the free development of the personality and the respect due to human dignity (Article 10.1 *CE*), the latter being "the ultimate justification of the existence of a constitutional state like the one established by the 1978 Constitution" (*FJ* 4a). From here the Court went on to rely on the right to privacy: not having access to legal gender reassignment, it argued, exposes a person's "condition of being a transsexual to public scrutiny each time he/she has to identify himself" or herself, gender identity being "one of those particularly relevant circumstances that the person has the right to prevent others from knowing" (*FJ* 4b).

Thus connected with basic constitutional principles and with the right to privacy, one's gender identity was to all effects and purposes recognised as a fundamental right. Any restrictions to its exercise must consequently be justified as pursuing a legitimate constitutional aim. If coming from public power, they need to be further justified on the basis of a proportionality test, as being adequate, necessary and proportionate, in a narrow sense, to the aim in question. The Court concluded that here no such justification existed. While the Act aimed at protecting minors from premature decisions, a legitimate constitutional aim (Article 39.3 and 39.4 *CE*), in as far as their exclusion was unconditional, without due regard to individual circumstances, it was unnecessary and disproportionate. The Act, in particular, did not take account of minors' maturity and the steadiness of their state of transsexuality. It was in thus far declared unconstitutional (*FJ* 8-9).

At the time of writing, the Act on Gender Identity has not yet been amended, on this or on any other point. Until it is, it must be read and applied in accordance with this constitutional ruling. This means that every minor's application for recognition of their trans gender identity must be considered individually in its own merits, based on the applicant's maturity and the stability of their gender identity. It further means that foreign residents, regardless of their residence status, must be acknowledged as holders of the right to the gender identity, based on its connections with the right to privacy and human dignity (STC 107/1984, 23 November, *FJ* 3).[20] Over and above it all, this Act must be read and applied in accordance with autonomy as a constitutional principle.

This last reflection takes us to a third set of limitations contained in the Act on Gender Identity. The Act pathologizes trans identities. Far from connecting their legal recognition to autonomy, it makes it dependent on a diagnosis of gender dysphoria, as certified by a medical or clinical psychological report, which must attest to the "stability and persistence" of said "dysphoria" (article 4). The Act also relies on medicalization, as it requires that medical treatment be followed for at least two years prior to the recognition of a person's trans identity, with a view to accommodating their physical features to those of the gender they identify themselves with, unless this is unadvised by age and/

20. "The Constitutional Court has established the "complete equality among Spaniards and foreigners […] with respect to rights that belong to the person as such […], [rights] that are indispensable to guarantee human dignity, which according to Article 10.1 of our Constitution constitutes a foundational principle of Spanish political order. Rights such as the right to life, to physical and moral integrity, to *privacy*, to ideological freedom, etc, belong to foreigners by constitutional command and it is not possible to grant them a different treatment with respect to Spaniards" in their context (emphasis added).

or certified health reasons (article 4). Gender identity is thus made dependent on binary sex markers (Salazar 2015, p. 88). As reassignment medicalization replaces reassignment surgery, the conflict between free development of the personality and physical and also moral (psychological) integrity persists.

Bringing the pathologization and medicalization of non-normative gender identities to an end is an old trans demand, one that is being increasingly addressed by law and medical conventions alike. In 2018, the World Health Organisation decided to strike Gender Identity Disorders out of the list of mental illnesses. Some years earlier, the Resolution 2048 (2015) of the Parliamentary Assembly of the Council of Europe had recommended the abolition of mental health diagnoses and medical treatments as preconditions for the legal recognition of (non-normative) gender identities, in favour of self-determination. Such diagnoses are currently no longer requested in Belgium, Denmark, France, Greece, Iceland, Ireland, Luxembourg, Malta, Norway or Portugal.[21] The European Court of Human Rights (ECtHR), on the other hand, still places pathologization and medicalization of sex-gender reassignment within the margin of appreciation of member states, on the grounds that there is not yet enough consensus among them on this matter (*A.P., Garçon y Nicot v. Francia*, 6 April 2017). It has however acknowledged that an increasing number of member states are turning away from these requirements and has pointed towards self-determination (*X & Y v. Romania*, 19 January 2021).

These features (its binary roots, the exclusion of minors and foreign residents as beneficiaries, the pathologization of trans identities) set the Spanish Act on Gender Identity out of pace with both constitutional requirements and social demands on the matter and speak for the urgent need to provide the right to gender identity with a new legal framework.

4.2. On the brink of change?

Despite the convergence of social and constitutional demands on this matter, amending the Act on Gender Identity is proving controversial. Several bills drafted to this effect have stirred up heated debates. Controversy has reached the ranks of the *Spanish Workers' Socialist Party* (*Partido Socialista Obrero Español -PSOE*) and the central Government coalition of which it is part with left-wing party *Together We Can* (*Unidas Podemos -UP*).[22] Controversy is particularly strong among feminists: while broad sectors of feminism endorse gender self-determination as consistent with feminist claims, some cast suspicions on the effects it might have on cis-women. Affirming one's autonomy in the field of gender identity beyond medical or social control, some fear, might lead

[21] https://tgeu.org/trans-rights-map-2021/. [Accessed: 21 November 2021].

[22] Polemics have revolved around three draft bills, one proposed by the Socialist (*PSOE*) Parliamentary Group in Congress (*Proposición de Ley integral para la igualdad de trato y la no discriminación*, 21 January 2021) and two proposed by the Ministry of Equality (run by *Unidas Podemos*): one on trans rights (*Borrador de Ley para la igualdad real y efectiva de las personas trans,* 2 February 2021) and one on LGTBI rights (*Borrador Anteproyecto de Ley para la igualdad de las personas LGTBI y para la no discriminación por razón de orientación sexual, identidad de género, expresión de género o características sexuales*, 2 February 2021).

to frivolous or even fraudulent gender transitions that could blur the notion of 'woman' as a legal category. This could in turn put at risk the effectiveness of norms and policies introduced to eradicate women's structural discrimination with respect to men; it could also threaten women's safety, by allowing 'men' to occupy traditionally safe spaces and events, such as women-only toilets, gym sessions, sport teams, and the like; becoming a woman, it is alleged, could even allow men to escape conviction for gender violence (in Spain defined as violence wielded by a man onto a woman currently or formerly his partner).[23] Some feminists fear, in brief, that enough men might be attracted to the perks of being a woman to transit into one and pose a threat to 'real' women's physical safety and legal position.

There is much to object to this line of reasoning. To begin with, it implies imposing preventative restrictions to a fundamental right in order to avoid its potential abuses. This is an unconstitutional approach to rights: their restrictions cannot be justified in the abstract (see for all *STC* 57/1994, 28 February) and their abuses must be addressed only if and when they actually occur; it is also one that feminists rightly criticise when put forward in other contexts (notably in relation to the legal means available to combat gender violence). Similarly, alleging that gender reassignment could be used to circumvent previous legal responsibilities suggests that it could come to alter a person's legal personality, against articles 29, 30 and 32 of Spanish Civil Code, which link its creation and extinction to a person's birth and death, respectively.[24] In addition, this line of reasoning offers an alluring view of women's social and legal situation that is far removed from reality, and that is all the more surprising as it comes from feminists who decry women's structural disempowerment with respect to men in all relevant fields. It ignores, moreover, female to male transits, allegedly also open to strategic decisions, indeed ignoring that being legally a man is the more attractive option. Above all, the reasoning banalizes the high cost attached to exercising the right to gender identity in non-normative terms.

Meanwhile, fourteen of Spain's seventeen Autonomous Communities (Regions) have passed their own regional Acts, thirteen of which based, more or less explicitly, on self-determination (Salazar 2015; see Laura Flores in this issue). Recently, the parties in the central Government coalition have reached an agreement and jointly passed a Draft Bill on *Real and effective equality of trans people and guarantee of LGTBI rights*.[25] The Draft Bill aims to become the new Act on Gender Identity. To this end, it covers LGTBI rights in the fields of civil service, labour market, health care, education, media, culture, entertainment and sports, as well as foreign relations and international protection. It also regulates administrative registration and gender legal reassignment in terms that try

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23. *Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género* (article 1).

24. Article 29: "Birth determines legal personality..." ("*El nacimiento determina la personalidad*"). Article 32: "Legal personality is extinguished with the person's death" ("*La personalidad civil se extingue por la muerte de las personas*"). I am grateful to Marina Echevarría Sáez for this insight.

25. *Anteproyecto de ley para la igualdad real y efectiva de las personas trans y para la garantía de los derechos de las personas LGTBI*. Available at: https://www.igualdad.gob.es/servicios/participacion/audienciapublica/Documents/APL%20Igualdad%20Trans%20+LGTBI%20v4.pdf. [Accessed: 21 November 2021].

to minimise the controversy surrounding it. The Draft Bill thus states that gender or name reassignment will not alter previously existing rights and duties, with explicit reference to violence against women (article 40.4). It also precludes that gender reassignment can affect a person's legal position as related to their biological sex, or that it can have retroactive effect (whether favourable or unfavourable) upon the enjoyment of affirmative action measures (article 40.3).

More importantly, the Draft Bill attempts to adjust the process of legal gender reassignment to the *STC* 99/2019 ruling. To this end, the age requirement is amended. Access to legal gender reassignment is granted to people above the age of sixteen (article 37.1), while minors above the age of fourteen can apply for it with the assistance of their legal representatives; should there be any disagreement between these and/or with the applicant minor, a Judicial Defender (article 300 of the Spanish Civil Code) will be nominated to settle the matter (article 37.2); judicial assistance is required for minors between twelve and fourteen years of age (Final Clause 7); all of this with a view to protecting the minor's best interests (article 38.4). Whether or not procedures for legal gender reassignment have been initiated, moreover, minors can have their name legally changed to match their gender identity (article 42). The Draft Bill thus places self-determination and the protection of minors' best interests at the heart of the age requirement. Self-determination indeed stands as the touchstone of the Government's Draft Bill, though perhaps less emphatically than would be desirable. In accordance with it, legal reassignment processes are detached from diagnoses or reassignment medical treatments such as the ones currently in force (article 37.4).

It remains to be seen how the Draft Bill will fare, on this and other issues, in its passage through Parliament. It also remains to be hoped that controversy around self-determination will not hide from view some of its flaws. First, the scope of its normative force is limited. The Draft Bill resorts to programmatic language rather than binding provisions in areas as relevant as labour law. It also leaves relevant questions unaddressed, such as the situation of trans people in prison,[26] or their access to abortion and assisted reproduction. The latter is only mentioned in the context of the intersex (article 18.3). This means that trans people could have problems accessing assisted reproduction that is consistent with their biology. It also means that, if pregnant, trans men could be denied legal access to abortion, as legislation explicitly recognises this right to women only (Organic Act 2/2010).[27]

Second, the Draft Bill's approach to the nationality requirement is problematic. Although addressed to every person on Spanish soil, and although everyone can benefit from the policies it articulates (article 2), access to legal gender reassignment is only open to Spanish nationals, stateless people and non-legal residents who certify that they cannot

[26] This was contemplated in the Ministry of Equality's previous draft bills on LGTBI rights (*Borrador Anteproyecto de Ley para la igualdad de las personas LGTBI y para la no discriminación por razón de orientación sexual, identidad de género, expresión de género o características sexuales*, 2 February 2021, article 52). It was also contemplated, more incisively, in its Draft Bill on Trans people's rights (*Borrador de Ley para la igualdad real y efectiva de las personas trans,* 2 February 2021, articles 37-38).

[27] *Ley Orgánica 2/2010, 3 de marzo, de salud sexual y reproductiva y de la interrupción voluntaria del embarazo*.

access it in their country of origin (article 44). Legal residents in the same situation are, by contrast, not allowed to apply for their residency documents to be adjusted to their gender identity. This, as has been explained, amounts to a violation of the right to privacy as interpreted by the Constitutional Court. It also runs counter recent case-law of the ECtHR granting access to gender reassignment to a foreign resident lawfully settled in a Member State (Decision 16 July 2020, affair *Rana vs. Hungary*).

Third, the Act remains rooted in a binary logic. This is clear in the scant attention it pays to the intersex. Beyond their inclusion within some general rights and principles (autonomy, integral assistance, informed consent, co-decision, non-discrimination, honour, privacy, self-image, confidentiality), and beyond a general reference in the field of education (article 23), their specific situation is only contemplated in article 18 (health care, including assisted reproduction) and in article 71 (particularly vulnerable people). Article 18.2 bans IGM, yet only if practised upon new-born babies, unless otherwise advised for health reasons (article 18.2). Not only is this not a general ban on unconsented IGM; it also begs the question of how long the new-born status can be deemed to last. It is tempting to find the answer in article 71.2, which allows parents of intersex new-borns not to register their sex, yet only by mutual agreement and only during the year following birth, after which time registration becomes compulsory and a requirement for obtaining any ID documents (article 71.2). It is indeed tempting to take this one-year limit as also applicable to the ban on IGM surgery, particularly since legal registration remains available only in binary terms, as we shall now see. The one-year moratorium thus seems to stand as a reflection period for parents, who must then opt for a binary identity, possibly accompanied by IGM of the baby, by then arguably no longer a new-born.

As just said, the Draft Bill does not contemplate non-binary gender identities, either by original assignment, in connection with intersexuality, or by ensuing reassignment.[28] This leaves unaltered the Regulation of the Civil Registry,[29] dating back to 1958 and still in force, which rules that new-borns have to be registered as either male or female (article 170) and refers doubtful cases to medical assessment (article 313). Far from ensuring "that a wide range of [gender] options are available for all people, including [...] intersex people who do not identify as male or female", as recommended by the Parliamentary Assembly of the Council of Europe (Resolution 2191(2017), Recommendation 7.3.3), the current Draft Bill abandons every effort in this direction.

Meanwhile, increasingly more countries are offering non-binary sex-gender identity options. Of particular interest here is the German case (Theilen 2020). In 2013, following the recommendation of the national Ethics Committee, Germany passed an Act that allowed for the sex-gender entry at the Civil Registry to be left blank.[30] In 2017, the Federal Constitutional Court declared the Act to be in violation of the fundamental rights to the free development

[28] Interestingly, a previous Draft Bill on trans people's right, elaborated by the Ministry of Equality, allowed for gender identity (sex) not to be specified in official documents: *Borrador de Ley para la igualdad real y efectiva de las personas trans* (2 February 2021), article 13.2.

[29] *Decreto de 14 de noviembre de 1958 por el que se aprueba el Reglamento de la Ley del Registro Civil.*

[30] *Gesetz zur Änderung personenrechtlicher Vorschriften (Personenstandsrechts-Änderungsgeset)* (7 May 2013).

of the personality and not to suffer discrimination (Articles 2.1 and 3.3 of the Basic Law, respectively), as it did not allow non-binary identities to be recognised and expressed in positive terms, but just negatively, through the refusal to adhere to existing binary legal options.[31] In 2018 legislation was amended to accommodate this decision. Since then, the identity "diverse" is open in Germany to the intersex.[32] By contrast, unless it is amended in its binary constraints, the new Spanish legal framework on gender identity will be born obsolete.

We must wonder at this point whether, in and of itself, adding a third option within an essentially binary system will help to subvert it or will rather come to confirm it as the norm, while pointing to those who deviate from it. Suffice it to think that, all too often, non-binary identities do not even find linguistic accommodation in, mostly, binary gendered languages. This can particularly burden intersex people marked as non-binary as babies, hence not as a result of their own choice. Not surprisingly, the report of the Third Intersex Forum (held in Malta in 2013) recommended, along with the rejection of IGM, "that intersex children be registered as females or males with the awareness that, like all people, they may grow up to identify as the different sex or gender" (cited in Cossutta 2019: 55). The conclusion to be drawn from this is not that non-binary sex-gender options are redundant; it is rather that the subversion of the sex-gender binary requires, along with non-binary options, a flexibilization of gender classifications. Furthermore, the recommendation raises the question whether, and if so to what extent, sex-gender identities should be exposed in official documents.

This question reveals (last but not least) a fourth flaw of the current Draft Bill: the Bill expects us to continue to expose our gender identity in official documents. This is such a common occurrence that we appear to take it for granted. Yet it is undoubtedly an intrusion into the rights to privacy and data protection (Articles 18.1 and 18.4 *CE*). As such, though not necessarily unconstitutional, it requires justification. For every document where we are required to expose our gender identity, this must be justified as a proportionate means (i.e., one that is adequate, necessary and proportionate in the narrow sense) to the pursuit of a constitutional aim. No such justification is currently provided in Spain. The Decree 1553/2005, 23 December, that regulates the Spanish ID,[33] merely states (article 11) that, along with their name, surnames, date of birth, nationality, ID number, signature and photograph, every ID must state its holder's sex (gender), to be registered in binary terms. No justification is given as to why. It is as if displaying information on a person's gender identity had no bearing on any fundamental right. Yet it does. This is acknowledged in the recommendations included in the Yogyakarta Principles Plus 10 (2017).[34] According to Principle 31, States shall

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31. *BVerfGE* 10 October 2017.

32. *Gesetz zur Änderung der in das Geburtenregister einzutragenden Angaben* (13 December 2018). Not intersex non-binary persons, however, are not included in the Act (Theilen 2020).

33. *Real Decreto 1553/2005, de 23 de diciembre, por el que se regula la expedición del documento nacional de identidad y sus certificados de firma electrónica.*

34. Additional Principles and State obligations on the application of International Human Rights Law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles (10 November 2017). Available at: http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf. [Accessed: 30 November 2021].

> "A. Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality"
>
> "C. While sex or gender continues to be registered:
>
> i. Ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person's self-defined gender identity;
>
> ii. Make available a multiplicity of gender marker options […]"

Certainly, the Yogyakarta Principles are not part of an international treaty, but mere non-binding guidelines for states. The Spanish Organic Act 4/2015, on the protection of citizens' security, however, *is* binding and points in the same direction.[35] After reminding us that IDs must of course respect the right to privacy, it underlines that they cannot include information related to race, ethnicity, beliefs, opinion, ideology, disability, political affiliation, sexual orientation, or sexual (gender) identity (article 8.2). Despite this ban, however, gender identity continues to be shown in Spanish IDs, as per an older and lower norm, the Decree 1553/2005 referred to above.

The only way to account for this gross breach of the rule of law is to admit that, as used in the Organic Act 4/2015, the expression "sexual [gender] identity", is taken to refer to non-normative gender identities only. It is as if normative binary identities were so naturalised that they are not even regarded as "identities" and their exposure is regarded as harmless. In this reading, what the Organic Act 4/2015 would be banning would be the exposure of *non-normative* sex-gender identities, not of those that conform to the sex-gender binary. This reading seems to be confirmed by article 83 of the Act on the Civil Registry. After requiring a person's sex to be registered (article 44), the Act grants unrestricted access to this information, while granting special protection to information on sex change (article 83). The fact that we all have a sex-gender identity; that this information is covered by our right to privacy; that as such it needs protection from unjustified exposure; that it needs protection regardless of what a person's specific identity actually happens to be; all these considerations are lost from sight in this reading. So is the fact that non-normative sex-gender identities must not only be protected from unjustified exposure, but also from the erasure that comes from the obligation to pass as binary. The Spanish Draft Bill currently under consideration makes no attempt to rectify this.

35. *Ley Orgánica 4/2015, de 30 de marzo, de protección de la seguridad ciudadana.*

5. Final Reflections

"[T]he law, which constantly reproduces the binary system even when adding a third exception, is based on a *lie*, on the idea that there are only two sexes, naturally and clearly divided" (Cossutta 2019: 57 –emphasis in the original). An inclusive democratic citizenship requires us to rescue non-normative sex-gender identities from the silence this lie has imposed on them. Inclusion begins with listening. We need to listen to what Alice D. Dreger has called "wounded storytellers" (Dreger 1998: 169), to the stories told by people the sex-gender binary has wounded, physically and as part of the citizenry. We need to listen to them and we need to listen *with* them, in the knowledge that their stories, like all stories, are not isolated occurrences, but part of a broader cultural tale. We need to open the public space to post-modern sex-gender narratives in the spirit of communicative inclusion proposed by Iris M. Young (1996: esp. 131-132), to make sure that our democratic exchanges include as wide a spectrum of voices as possible.

With these narratives come post-modern (post-binary) vindications of autonomy, of relational autonomy (Rodríguez Ruiz 2019: esp. 125 ff.), of our capacity for self-rule within our complex relational networks. Thus defined, autonomy must be affirmed in the face of all binary sex-gender strictures (hierarchical, dichotomous) and their unquestionable propositions, the core components of the modern economies of truth and power (Foucault 1976 [1981ed]: 135 ff.). Doing so is a democratic demand. If we aim to construct a society of individuals with a parity capacity for self-rule (and this is after all what democracy is about), then gender identities cannot stand as a source of power. This means the end of normative and non-normative gender identities and the beginning of new cultural truths, where sex-gender differences are acknowledged to cover a wide spectrum and the very notion of normative gender identities, if still existent, is very much diluted as a marker of power.

We can now wonder whether gender identities can exist beyond power dynamics. Can there be gender without power? If not, can we (must we) dispense with gender identities altogether? Can we ultimately construct cognitive schema without gender identity categories? We may or may not be able to do this. We may, moreover, be advised to do it or not –under the current power dynamics the risk of gender neutrality taking a cis-hetero male profile looms above (Cossutta 2019: 58). What we can and must certainly dispense with, however, are gender identities as imposed strictures and social givens. We can and must move instead towards "gender blending" (Devor 1989) based on self-determination, towards a loose conception of gender "that includes notions of incoherence, non-linearity and incongruence in one's personal life and lived experiences" (Ammaturo 2019: 42). This entails the "recognition that sex identity, sex attribution, gender identity, gender attribution, and gender roles can all combine in any configuration" (Devor 1989: 153), as expressions of individual autonomy, beyond heteroassigned constraints. We can, in brief, embrace sex-gender diversity and flexibility as the key to end sex-gender as a source of power. In this sense, deconstructing the gender binary seems like the final aim of feminism (Platero 2016). Whether doing so will bring along the erasure, or the dwindling, of gender identities as a source of social understanding and meaning remains to be seen.

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TRANS JUSTICE FIGHTS TRANS MORAL PANIC[*]

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Abstract: Between the summer of 2019 and the summer of 2021, a violent discussion about trans rights took place in Spain. This paper argues that the discussion can be understood as an instance of 'social problems work', more specifically as part of a moral crusade or a moral panic episode. Implicit in this is the idea that there has been an over-reaction to trans recognition and trans equality laws, publicly presented as a major social problem. This paper also provides legal arguments against the fears voiced in the discussion, by summarizing relevant ECHR case-law that agrees with an alternative feminist account of trans rights that de-pathologizes gender-identity self-determination. The paper thus suggests that a 'cultural war' over gender identity has been ignited and has yet to be fully fought and won.

Keywords: Moral crusades, trans equality, gender-identity self-recognition, moral panics, cultural wars.

Summary: 1. Introduction. 2. Moral Crusades, Moral Panics and Cultural Wars. 3. Transexclusive Documents. 3.1. The Argumentative. 3.2. The Open letter to the President. 4. Brief Diagnosis. 4.1. The elements of a crusade. 4.2. Unveiling power. 5. A Cultural War?. 5.1. An alternative feminist account. 5.2. European Court of Human Rights case-law. 6. Conclusion.

1. Introduction

In June 2020, a 4-pages-long internal *Argumentative* of the Spanish socialist party (PSOE)[1] became public. "Arguments against the theories that deny women's reality" alerted about the dangers and evils of trans activists and trans equality laws. [2] It summarized the arguments exposed in a 2019 Summer School by some prominent feminist academics, where the very existence of transgender persons was put into question and aggressively and painfully ridiculed.[3]

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[1] PSOE: Spanish Socialist Party.

[2] PSOE. Comunicado nº 699 de 9 de junio de 2020. *Argumentos contra las teorías que niegan la realidad de las mujeres*. (PSOE, Internal Communication nº 699, from June, 9th 2020. *Arguments against theories denying women's reality*). I refer to this document as the *Argumentative*.Accessed on December 3rd 2021 at: http://www.abc.es/gestordocumental/uploads/sociedad/ARGUMENTARIO%20REALIDAD%20MUJERES%20(1).pdf. [Accessed: February 2022].

[3] The videos of the XVI Escuela Rosario Acuña, Gijón, held in July 2019 can be found at: https://www.youtube.com/watch?v=UNAa2e0bmwc. [Accessed: February 2022].

At that time, the coalition Government PSOE-Unidas Podemos (UP)[4] was drafting a law modifying the requirements and procedures for legal recognition of gender identity that embraced a de-pathologizing and self-determination approach. In February 2021, some days after a Draft of the law had become public, several newspapers published an *Open letter to the President*, [5] signed by 8 well-known women, publicly alerting about controversial aspects of the draft that allegedly implied a regression in the protection of women and women's rights.

In July 2022, PSOE members promoting such discourses were removed from government positions, which in part contributed to decrease hostility towards LGBTIQ+ people in general, and trans people in particular, smoothing the ambience for parliamentary discussion of the law. Yet the contestation process washed away some of the most advanced provisions of the law.[6]

Since its emergence, the concept of 'moral panic' (Cohen, 1972) has had great impact and has somehow become familiar in debates about social problems (Garland, 2008). According to Loseke (2003), for a society to notice and categorize certain situations as social problems, 'social problems work' needs to be done. Loseke convincingly argues that social problems are created around conditions that people believe are troublesome, and that can and should be changed. Because social problems do not exist until they are defined and widely accepted as such, meaning needs to be given to 'objective' facts and conditions.

Different actors conduct this 'social problems work' that provides an interpretation of reality: activists, politicians, researchers, academics, the mass media, influencers… Through actions and discourses they can transform situations into explicit problems. By calling attention to certain situations and defining certain conditions as a 'social problem', they make the public aware of the need for intervention, reaction, or change. Moral crusades occur when specific social groups or interest groups (moral entrepreneurs; crusaders) engage in a public awareness campaign that transforms a social condition into a "social problem" or a threat, by advancing claims about the seriousness of a particular 'moral' problem (Weitzer, 2007: 448). In the field of law, these dynamics have been analyzed both at national and international levels, as 'moral entrepreneurs' and rule makers have launched moral campaigns to ensure the enactment of laws protecting certain interests, achieving in some cases global prohibition regimes (see for instance Nadelman, 1990).

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[4] Unidas Podemos is an electoral coalition of the left parties Podemos and Izquierda Unida (United left, itself the sum of smaller political parties). Podemos originated in the 15 M 2011 protests. See Kerman, C. y Alvarez, I. (2015).PSOE and UP signed a Coalition Agreement of Government in December 2019.

[5] See for instance https://www.levante-emv.com/comunitat-valenciana/2021/02/09/carta-abierta-feministas-ley-trans-34321497.html. [Accessed: February 2022].The newspaper says that 6.743 people had signed the letter at the time of publication.

[6] For instance, registered sex modification does not require a medical certificate, nor does it require external validation (as proposed), but does require a ratification from the claimant in the following months. Although this was accepted by trans activists, they regret the implicit mistrust towards trans people in asking them to declare twice who they are.

The aim of this paper is twofold. On the one hand, by examining the arguments and reasons provided in the *Argumentative* and the *Open letter*, it explores whether the described facts could be understood as 'social problems work', and more explicitly, whether they could be understood as a moral crusade developing into a moral panic episode going from July 2019 to July 2022. Implicit in that approach is the idea that both documents overreact and wrongly present trans recognition and trans equality as a major social and moral problem to fight.

The second aim of this paper is to provide legal arguments against the fear expressed in both documents, by summarizing relevant case-law that is in accordance with an alternative feminist account of trans rights: a de-pathologizing legal approach to gender-identity self-determination. By doing so, it suggests that a cultural war between trans-activists and trans-exclusionary-activists ignited; a war still being fought in Spain -and probably elsewhere.

2. Moral Crusades, Moral Panics and Cultural Wars

Legal changes and the enactment of new laws have often resulted from previous social mobilizations demanding remedy for a certain injustice, or that a certain social problem be addressed. In fact, the vindication of rights is at the core of our legal and political tradition.[7] The emancipatory use of the law; the idea that law can be a tool for social engineering (Pound 1958); that it can aim at creating fair conditions for a fair society. These are all familiar ideas. Consequently, discussions about what are the possibilities for law to transform society, and under which conditions such intention may have a chance to succeed, have had a prominent place in the field of sociology of law for decades (see, for instance Moore, 1973). From a political perspective, N. Fraser proposed a procedure for vindicating rights and collectively evaluating and deciding upon such claims as a way of enhancing democratic justice (Fraser, 2006).

The analyses of moral crusades, moral panics and cultural wars are framed in this broader debate about the relations between law and society, social change, and social mobilizing through law, but they represent a specific type of action and reaction.[8] Although organising, mobilising, claiming, and launching public campaigns to gain recognition of rights represents a normal democratic dynamic of pluralistic societies, certain types of public discourse and narratives have been qualified as moral crusades. Of course, not all public debates are moral crusades, create moral panic episodes, or constitute cultural wars,

[7] The first work that comes to mind is Wollstonecraft's *Vindication of the rights of women* (1791). Amorós (2000: 57) argues that the *genre vindication* requires that a potentially universal platform of equality is established (this is, criteria by which to declare that the relation of equality between two elements is pertinent) but restrictively applied or enforced. This gap allows those de facto excluded to vindicate equality either by affirming that they do share the criteria and thus their exclusion is unfair, or by challenging the criteria themselves for being biased or unfair. See also Young (1989).

[8] The debate about the legal enforcement of morality, although connected to moral panics and moral crusades will not be dealt with in this paper.

but some do and have an important impact in the living conditions, wellbeing, recognition, and rights of those signaled as being responsible for the worrisome situation.

Moral crusades occur when specific social groups or interest groups engage in public awareness campaigns with the aim of transforming a given social condition into a *threat*. To do so, they advance claims about the seriousness of a particular problem, qualified as 'moral' (Weitzer, 2007: 448). Moral crusades pretend to redistribute social status amongst groups by declaring "one form of life superior to its rivals" (Garland, 2008: 17).

When the debate is amongst social groups with equal status, the expression "cultural wars" is preferred. The term shifts the focus away from the *fanaticism* (uncritical zeal) present in a crusade, precisely to show a power balance amongst rivals. Thus, although moral crusades and cultural wars are crossed with power dynamics and relations, crusades tend to affect groups lacking power, with low status, receiving little respect or affected by multiple and intersecting forms of discrimination. In that sense, moral crusades reinforce existing social hierarchies and are launched by social groups that want to retain their status.

Weitzer has analysed how the issue of sex trafficking and prostitution has become increasingly politicized in the U.S.A. due to a moral crusade led by an alliance of the religious right, neo-abolitionist feminists and governmental agencies. This moral crusade has been successfully institutionalized and globalized. It can hardly be said to have originated spontaneously by a shared fear about prostitution, or by a shared concern about sex workers' life and working conditions, or about migrant women's opportunities of a fair share. Drawing from this example, Weitzer (2007: 467) lists seven elements as hallmarks for moral crusades:

- The framing and presentation of a social condition, situation, or behaviour as an evident and absolute evil, danger, or risk;
- The enthusiastic assumption of moral crusaders/ moral entrepreneurs or leaders of their *mission* to rescue society from that evil;
- The expression of claims as universal truths;
- The presentation of selected horror stories to illustrate the problem as if they were representative of the problem itself. A part (worse stories) is said to be the whole, and the tale is expressed in a very emotional language;
- The disclosure of huge numbers of victims and problems without real evidence;
- The attempt to modify normative boundaries by increasing or reinforcing criminalization.

Of course, launching a moral campaign does not necessarily result in a moral panic situation, but under certain circumstances that may be the case (Garland, 2008; Goode and Ben-Yehuda, 1994). A moral panic is a form of 'inappropriate' reaction to a 'social problem', that is, a situation where the 'social problem work' results in disproportionate social fear targeting the condition or social group defined as a threat to societal values and interests. To distinguish moral panics from other related phenomena, E. Goode and

N. Ben-Yehuda (1994: 156-159) propose five elements or criteria that need to be met in order to consider that a moral panic has taken hold on society. These are concern, hostility, consensus, disproportionality, and volatility.

Episodes of moral panic involve *concern* over the behaviour or supposed behaviour of a group of people (*folk devils*)[9] and the consequences such behaviour causes to the rest of the society. This concern is expressed as in a moral crusade. According to Garland (2008) two salient aspects of moral panics are the *moral dimension* of the social reaction and the idea that the deviant behaviour is *symptomatic* of something. On the one hand, there's something normative about moral panics -the condition or folk devil *is perceived* as a threat or a challenge to a *shared morality*, to the morality of specific ways of life. As Devlin would put it, a threat to the shared public morality that glues society. The practice threatens injury to society itself because it is an attack on its moral structure (Devlin, 1959). On the other hand, consequently, the episodes connect a particular concern to a wider source of anxiety: the condition or behaviour is a symptom of a greater problem; something deeper and more dangerous than what is simply perceived. What seems irrelevant is in fact a deep attack on the moral structure of society.

During the episode, *hostility* toward the group of people seen as evil increases. *Folk devils* are presented and represented as dangerous enemies or deviant people that threaten shared values, social structures and/or a way of life. Folk devils are perceived and marked as responsible for the risk looming over law-abiding citizens (and respectful societies). Although the sentiment of fear does not need to be widespread, moral panic situations imply that there is some sort of *consensus* in certain segments of society about the seriousness of the threat.

As E. Goode and N. Ben-Yehuda point out (1994: 158), in the use of the term 'moral panic' there is "the implicit assumption … that the concern is *out of proportion* to the nature of the threat". Moreover, implicit in the labelling of an episode as 'moral panic' is the fact that the label it put by an outsider, this is, by someone who does not share the analysis about the social problem, nor the concern over the threat; or by someone who denies the existence of a threat. Thus, an outsider may see the reaction as disproportionate, whilst those participating, suffering, or contributing to the panic truly believe that the threat exists.

Finally, we refer to moral panics as episodes because they are *volatile*. The impact of an episode may be long or short, and the consequences be big or small, but the hostility, fear and concern experienced tends to be concentrated in a short period of time. Different as they may be in length, frequency, impact and intensity, moral panics do "make things happen. They create effects and leave a legacy" (Garland 2008). When compared to moral crusades, moral panic episodes are intense moral crusades, concentrated in a period in which hostility towards the target group or situation increases, and has social and legal consequences that go beyond the episode itself.

[9] This term was coined by S. Cohen in his 1972 book *Folk Devils and Moral panics: The creation of the Mods and Rockers* (Routledge).

3. Transexclusive Documents

The existing Spanish 2007 *Law regulating the modification of civil registers regarding sex* was promoted by the PSOE when in government.[10] Although very progressive at the time, the law is nowadays contested because it requires a dysphoria diagnosis and hormonal treatment for the full recognition and legal modification of registered sex. It also ignores the situation of trans children and youth and excludes migrants. Thus, its modification towards a de-pathologizing regulation based on self-determination of gender identity was included in the coalition agreement between PSOE and UP, in which the Equality portfolio was assigned to UP as of January 2020.

With a similar approach to a 2017 PSOE draft,[11] the Equality Ministry issued a draft in February 2020, proposing the elimination of a medical certificate or diagnosis (de-pathologizing) and the recognition of the sexual identity as expressed by the person without further external evidence (self-determination). It included provisions for children and youngsters as well as for non-citizens. Although it ignored the demands of non-binary people, it received the support of LGBTIQ+ associations.

Prior to the publishing of the draft, the disagreement about this issue between the two parties in government was frequently in the news. For months, the arguments expressed in the PSOE *Argumentative* were broadly exposed and widely spread by media. Similarly, when the draft was made public, the *Open letter* was published in the national press. The two documents complement each other, share content, language, and *tone*. Moreover, both documents have *amplified* and spread the contents of the website "Alianza contra el borrado de las mujeres" (*Alliance against the erasure of women*), which reunites a variety of trans-exclusionary organizations and individual activists that

[10] Ley 3/2007 de 15 de Marzo, reguladora de la rectificación registral de la mención relativa al sexo. (Law 3/2007 of March 15th, regulating modification of sex registration).

[11] On March 2017 the PSOE registered in Congress a proposal to modify the Law 3/2007. The proposal explicitly said in the introductory remarks that the aim of this new law was to eliminate the requirements of medical certificates or body interventions to legally change one's sex and name in the public civil register. Boletín oficial de la Cortes Generales. Congreso de los Diputados. Serie B. Proposiciones de Ley, 3 de Marzo de 2017, núm. 91-1, Proposición de ley 122/000072 Proposición de Ley para la reforma de la Ley 3/2007, de 15 de marzo, reguladora de la rectificación registral de la mención relativa al sexo de las personas, para permitir la rectificación registral de la mención relativa al sexo y nombre de los menores transexuales y/o trans, para modificar exigencias establecidas en el artículo 4 respecto al registro del cambio de sexo, y para posibilitar medidas para mejorar la integración de las personas extranjeras residentes en España. Presentada por el Grupo Parlamentario Socialista. (Oficial bulletin Parliament, Act Proposition March 3rd, 2017, num. 91-1 to amend Law 3/2007, of March 15th, regulating modification of public registered sex, to allow modifications regarding sex and name of trans minors, modifying article 4 requirements regarding registered sex modification and to adopt measures facilitating the integration of migrants residing in Spain. Presented by the Socialist Parliamentary Group).

identify themselves as 'feminists'.[12] The Alliance organized public demonstrations uniting neo-abolitionist claims[13] with trans-exclusionary demands, and published a Manifesto.[14]

Thus, the ambience surrounding the documents we are about to summarize and discuss was a transphobic one, in which messages alerting about the dangers of trans equality laws occupied a lot of public space, energy and time. This environment magnified the discourse and its social impact, especially because one of the most heard voices against trans equality laws was the vice-president of government, Carmen Calvo.

3.1. The Argumentative

In June 2020 an *Argumentative* claiming to summarize the position of the PSOE was internally distributed, promoted by party members holding high governmental and party positions.[15] By becoming public it created both concern and alarm. Not only does its content differ from what the PSOE had approved in its internal political Congresses; it also contradicts the modifications the party had been proposing until then. The document displays the arguments grouped around four main ideas:[16]

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[12] La 'Alianza contra el borrado de las mujeres' defends the 'rights of women on the grounds of sex' and fights 'against the discrimination resulting from substituting sex by gender'. The website is: https://contraelborradodelasmujeres.org/. [Accessed: February 2022].Although it has a complex website with glossary terms and FAQ, the content does not add arguments to those expressed in the *Argumentative* and the *Open Letter*. This paper addresses mainly the two mentioned documents because of their public relevance and impact but has used the Manifesto and the Website for clarificatory purposes.

[13] For a discussion on neo-abolitionism see Vanwesenbeeck, I (2017).

[14] There were several demonstrations in Madrid, for instance, on June 26th 2021: https://www.elmundo.es/espana/2021/06/26/60d70e95e4d4d8a8168b45cb.html. [Accessed: February 2022].The October 23rd, 2021 demonstration is different, because a Manifesto was made public and open to signature: https://www.catalunyapress.es/texto-diario/mostrar/3219234/manifestacion-23-octubre-exige-proteja-todas-mujeres. [Accessed: February 2022].The Manifesto says that: "We are at a crucial historical moment due to the new attacks with which our government and specifically, the Ministry of Equality, plan to override our rights. Even today, the impunity of sexist violence, the commodification, exploitation an objectification of women, the ID laws, the interference of religions in our lives, the feminization of poverty and the care system, and the erasure of women, remain the expression of our oppression. They oppress us for being born women. (…) WE DECIDE our country has the duty to listen to our critical feminist arguments and stop and eliminate all legislation that protects gender as an identity, erasing women as political subjects. WE DECIDE also that no one should legislate on subjective self-identification: doing so makes public policies for effective equality between women and men irrelevant.WE DEMAND individual wishes or feelings do not prevail over women's rights."The Manifesto can be read in English here: https://docs.google.com/forms/d/e/1FAIpQLSe8hNoA2-6zR0phWN3rqdgx2ayWvIP-MtQjGE_B53ezuJ2GiA/viewform. [Accessed: February 2022].

[15] PSOE, Internal Communication nº 699, from June 9th, 2020 (n 2). The document was signed by J.L. Ábalos (PSOE -party organization secretary), Carmen Calvo (PSOE-party equality secretary), Santos Cerdán (PSOE- party territorial coordination secretary) and Alfonso Rodríguez. At that time Calvo was First Vice-president and Minister of the Presidency; whilst Ábalos held the Ministry of Public works and transport.

[16] This paper offers a translated summary of the documents, rather than an 'interpretation'. In translating and summarizing them, an effort has been made to remain truthful to the language and terms used. Unfortunately, it has sometimes become a challenge to make sense, and sometimes the sentences are hard to understand.

"Sex is a biological fact whereas gender is a social construction. Sex is a biological fact that refers to the physical characteristics differentiating men from women. Gender is the social construction of the biological birth sex. It comprises roles, expectations, tasks, and stereotypes assigned to men and women. Gender establishes the sexual division of labour, the public/ private divide, and the prevalence of the masculine over the feminine in all aspects of life.

The analytical category *gender* is used by certain social movements as a substitute for sex. Yet, denying biological sex as a socially meaningful category eliminates the capacity to identifying and fighting the social inequality drawing from it. Women are killed because of their biological birth-sex (they are biologically born women); and are assigned care work because they are biologically born women. Because gender is what society adds to biologically sexed bodies, socialists want gender to disappear.

The terms 'sexual identity' and 'gender identity' are being manipulated. Sexual identity is a solid concept to refer to how one person feels about her own body, and whether it is in accordance or not with her biological birth-sex. The situation where there is discordance is called transsexuality. Gender identity, a recent term, occurs irrespective of biological sex and does not express disconformity. One can feel to be a woman in a man's body and vice versa.

Although the terms express different ideas, they are being used as interchangeable in many legal and international documents. They are also being used manipulatively by queer activism. The consequences of such manipulative use constitute a risk for the legal and political subject "women". Distinguishing both terms is necessary to guarantee equality and non-discrimination.

The question is not how a person feels about her body, but rather how can the legal system incorporate a feeling or expression that is not constant through time. Trans rights must be framed within the limits of legal certainty. Thus, contrary to the belief of those defending the idea that feelings, desires, self-expressions, or self-determination can achieve full legal recognition, the right to self-determination of sexual identity is non-existent and lacks legal rationality. Modifying one's sexual identity requires a continuous situation of transsexuality duly certified.

Theories that modify the definition of women and deny their reality are dangerous. Recognizing that anyone at will is/ can be a woman, thus making biological sex irrelevant, modifies the definition of women or what women are.

The possibility of sex being mutable at will would have a devastating impact in political representation, quotas, policies regarding gender-based violence

against women or any other public policy grounded in sexual difference (shelters, prisons), as well as in sports and competitions. For instance, data collection disaggregated by sex to promote affirmative action policies will become futile. Thus, other questions arise: How would this affect to the enforcement of measures against gender-based violence? Could a man that is accused of gender-based violence declare to be a woman and escape justice?

Women are not an identity, nor an essence. Women are not a group. Women are over half humankind. Feminism is a political project to achieve equality of rights and citizenship for women because birth-sex (being born a woman) determines an unequal place in society, inequality of rights and misrecognition. The political subjects of feminism are biological women.

Queer activism dilutes the political subject 'women' and jeopardizes women's rights, public policies that aim at increasing equality between men and women and the accomplishments of the feminist movement. Socialists will defend these ideas in the parliamentary discussions regarding trans equality laws."

3.2. The Open letter to the President

In February 2021, eight well-known women made public an *Open letter to the President after reading the trans rights draft*,[17] pointing to six troubling aspects of the norm.

"**By referring to trans children, the law endangers children** and encourages them to assume a trans identity. The alleged existence of a trans infancy pressures them to receive treatment with hormones, which have long lasting effects and can impact their lives forever. The consequences of these manipulative discourses are being challenged in courts, in countries like the United Kingdom, by youngsters that were subjected to such treatments (Keira Bell case). Because Catalonia has actively engaged in trans-encouraging policies, an increment of over 2.200% cases has occurred, being 70% of the cases girls wanting to transition to boys.

Medicalizing de-pathologization. Certifying something is different from pathologizing. The law affirms to be de-pathologizing, but it medicalises people throughout their lives. The law presents as a choice what is a painful

[17] The signatories are public known women with very long careers, high social standing, and recognition. Some are active members of the Socialist party (A. Alvarez, J. Serna), while others are part of *Clásicas y modernas*, an association for *Gender equality in culture* (M. Gilabert, L. Freixas, RM Rodriguez Magda), and the rest are well-known academic philosophers (A. Miyares, A. Valcarcel, V. Sendón).

process that requires psychological support, a support that must include the possibility of non-transitioning.

The Law dilutes gender-based violence. The law refers to intra-gender violence and contradicts the fight against gender-based violence against women. This minimizes the objectives of the law because it resonates with the term domestic violence or family violence that extreme-right parties defend.

Gender identity substitutes sex. Gender is the cultural construction of sexual stereotypes. By using the term 'gender identity', the law is reinforcing the sexist hierarchy implicit in the stereotypes. The term 'gender identity' erases the category of sex, making inequality on the grounds of sex irrelevant. The rest of the policies aiming to redress the power imbalance between the two sexes also become irrelevant.

Gender identity is defined in the law as 'the internally lived experience of the individual's gender that can be different from the one corresponding to the sex assigned at birth'. Yet, internally lived experiences don't have legal consequences or effects. Laws are not grounded on feelings, convictions, or desires because that would entail discrimination *per se*.

A new fictional legal subject is created, *trans people*, that encroaches on LGBTI people's voice. Lesbians, gay men, transexuals, crossdressers, bisexuals or intersexual people will hardly find a measure regarding their problems in this law.[18]

It is unconstitutional, the ambiguity of the language creates legal uncertainty and confusion because it uses gender (the cultural forms and behaviours that relate to sex) to refer to sex (the category that biologically divides people into women and men).

This law is a backward movement in the protection of women's rights, and questions in general very relevant aspects of our legal system."

Although similar in the thesis held, the documents are complementary, and both understand gender self-determination as a threat to women's rights. Yet, whilst for the *Argumentative* the main imperilled population is 'women', the *Open letter* adds children and LGBTI people as threatened groups due to the manipulative effects of replacing sex with gender.

[18] The Equality Portfolio wanted to present two separate laws: a LGBTIQ+ equality law and a de-pathologizing trans law for the modification of registered sex.

4. Brief Diagnosis

4.1. The elements of a crusade

A superficial analysis of the texts could illustrate the moral crusade elements discussed: framing the issue as a threat; presenting arguments as universal truths; relying on horror stories and exaggerated figures without clear evidence, or intending to have an impact on laws and other normative systems.

The social group targeted as a threat to society is composed by those affirming that gender identity is an individual choice that should be socially respected and legally sanctioned. Trans-persons, queer activists, trans-feminists, and other allies (Academics, politicians, LGBTI families…) are accused of making a manipulative use of sex and gender, in ways that render sex and sexual difference irrelevant. Both documents affirm that far from being "innocent", the shift from sex to gender threatens the fight against women's inequality, and against gender-based violence against women. According to them, the political subject 'women' disappears.

Presented as a truism, both documents hold that humans are born either men or women, and society ascribes meaning to such pre-existing differences. Thus, it is sex rather than gender what provides an identity and a place in society, and sexual difference is a useful category for analysing power relations. This approach to sexual difference is a form of determinism that represents one of the edges of what Nicholson (1994: 82) calls *biological foundationalism*, or the belief that at some basic level, distinctions of nature ground sex identity and explain social distinctions. Thus, this interpretation is at odds with feminist theory: affirming that it is sex that places women in a subaltern position contradicts decades of feminist challenges to the assumption that biology is destiny.

Regarding sexual identity and gender identity, the documents hold that transsexuality expresses a process of discomfort, and that such disconformity requires professional support. When medically certified and consistently manifested through time, the process may result in the modification of one's body and sexual identity. Thus, both documents assert that registered sex modification requires both a diagnosis and a body modification treatment to bridge the gap between felt sex and biological sex. In other words, Spanish trans-exclusionary activists are willing to accept the new identity of trans people having undergone a process of sex reassignment (*transsexuals*), but will not recognise trans people that have not undergone such a process (*trangenders*) the right to say who they are.[19]

[19] According to ILGA, *Trans* is an inclusive umbrella term referring to those people whose gender identity and/or a gender expression differs from the sex they were assigned at birth. The term trans includes but is not limited to men and women with transsexual pasts, and people who identify as transsexual, transgender, transvestite/cross-dressing, androgyne, polygender, genderqueer, agender, gender variant or with any other gender identity and/or expression which is not standard male or female and express their gender through their choice of clothes, presentation, or body modifications, including undergoing multiple surgical procedures. See https://www.ilga-europe.org/what-we-do/our-advocacy-work/trans-and-intersex/trans. [Accessed: February 2022].

Further, both documents alert to the danger of minimizing reassignment procedures. The documents deny that the term 'gender identity', as opposed to sexual identity, may express disconformity with one's body and assess that the term gender identity does not provide "objective" elements to distinguish men from women. The relevance of the subjective element of gender self-determination together with the lack of external or 'objective' criteria to distinguish men from women poses a threat to women's legal status. In other words, the fact that any man could affirm to be a woman without an external diagnosis, without modifying his body to meet female requirements, and without constancy through time (external 'objective' criteria), not only threatens women's identity (what women are), but also women's legal status (how women are conceived and treated by law). Thus, reassignment procedures are key for legal recognition. Otherwise, recognition would escape the limits of legal certainty and rationality -because it would not correspond with nature/biology, or with other people's expectations, nor is it required to be constant through time.

The horror stories and exaggerated figures concern children. Whether the figures about Catalonia are inflated or not is hard to tell because no evidence is given, nor reference of the source. Yet, the alleged risks posed to children by trans equality laws are displayed in the *Open Letter* and the Alliance website, the Keira Bell's case (UK) being *the paradigmatic case*. Keira Bell was prescribed puberty blockers at the age of 16 to initiate her transition from female to male after being diagnosed with gender dysphoria. At age 23 she claimed in a UK Court that the National Health Service (NHS) should have challenged her on her decision to transition and should have protected her from making such a choice at that age. The High Court ruled in December 2020 that children under 16 were unlikely to be able to give informed consent to receive puberty-blocking drugs, thus revisioning public procedures and requiring judicial authorization in such cases.[20]

Lastly, the aim of the *Argumentative* and the *Open letter* regarding legal reform is clear as both documents openly advocate against amending the 2007 existing law, and for maintaining the requisites of dysphoria diagnosis, a minimum of two-year hormonal treatment and majority of age for modifying one's registered sex, thus mutilating the move towards de-pathologizing and self-determination, and further procrastinating the discussion about non-binary gender recognition.

[20] Keira Bell was diagnosed with dysphoria, was supported and her changes were constant through time. The Argumentative and the Open Letter would consider her a transsexual person, not a transgender person (which is the threat). Thus, the problem in this case is being under 16. The UK Court said that medical professionals accompanying trans teenagers should gather not only the individual's consent, and maybe the family's consent but also a judicial authorization to prescribe a treatment with lasting effects, such as puberty blockers and cross-sex hormone treatment. Available at: https://www.theguardian.com/world/2020/dec/01/children-who-want-puberty-blockers-must-understand-effects-high-court-rules. [Accessed: February 2022].In Spain, the Constitutional Court ruled in 2019 that restricting the possibility of registry sex modification to adults (majority of age) was unconstitutional. Constitutional Court Decision 99/2019, Plenary, July 19th 2019.

4.2. Unveiling power

According to Garland (2008: 21), a full analysis/ diagnosis would also require operating at the level of symbolic meaning (Why this folk devil? Why this fear?), at the level of social relations (Why these crusaders?) and at the level of the historic temporality (Why at this moment?) Such an analysis can help understanding what is perceived to be at stake, the status at risk, and the power structures that crusaders want to maintain. Although a full analysis is unfortunately beyond the scope of this piece, there are some elements worth mentioning.

The temporary lapse. The moral crusade/discourse appeared with force as the intention to modify the legal requirements for registered sex was manifested, and it increased when the draft of the law became public. Part of the problem was that the parties in government (PSOE and UP) symbolically competed to represent and embody feminist interests, and to determine the Spanish feminist agenda. Challenging the government coalition agreement that gave UP the Equality portfolio, some PSOE feminists openly opposed the Ministry of Equality's agenda and found in trans equality laws a productive field of confrontation. However, paying attention to the broader context provides relevant information as well.

The documents and discussions appear in a moment in which trans-exclusive narratives have increased in European public opinion,[21] and elsewhere, whether expressed by TERF[22] or by anti-gender movements (either extreme-right or religious based). In fact, because transnational movements opposing gender equality are increasing and gaining ground, different international agencies have issued reports, declarations, and position papers to counter the attacks to gender equality policies in the broad sense. [23]

[21] FRA's surveys have showed high levels of discrimination and harassment towards LGBTI+ persons across the EU. The 2021 FRA Fundamental rights report points to the fact that social acceptance decreases as hate speech increases in public discourse, further inciting discrimination. FRA calls EU Member States to consider the available evidence on discrimination, and to take measures to combat hate speech and hate crime, and to address the harmful impacts of homophobic and transphobic statements made by public authorities and officials (FRA 2021).

[22] https://en.wikipedia.org/wiki/TERF: "TERF is an acronym for trans-exclusionary radical feminist. First recorded in 2008, the term originally applied to the minority of feminists espousing sentiments that other feminists considered transphobic, such as the rejection of the assertion that trans women are women, the exclusion of trans women from women's spaces, and opposition to transgender rights legislation. The meaning has since expanded to refer more broadly to people with trans-exclusionary views who may not be involved with radical feminism. Those referred to with the word *TERF* typically reject the term or consider it a slur; some identify themselves as gender critical. Critics of the word *TERF* say that it has been used in an overly broad fashion and in an insulting manner, alongside violent rhetoric. In academic discourse, there is no consensus on whether or not *TERF* constitutes a slur."

[23] See, for instance, United Nations Human Rights Office of the High Commissioner Position paper 2020 and the Committee on Equality and Non-Discrimination- Parliamentary Assembly, Council of Europe, *Combating rising hate against LGBTI people in Europe*, 2021 Report. The anti-gender movement that refers to feminism, Queer and other feminist theories as '*gender ideology'* and is similar in many aspects to TERF ideology, for instance when it refers to Queer theory as *genderism*. See Cornejo-Valle, M. & Pichardo 2017.

The status at risk. In Spain the most visible crusaders are female politicians, academics and 'intellectuals', that is, women holding power and other privileges in terms of gender, class, race, education, to name but a few. Crusaders are well placed in the complex social board of status as they represent a generation that has fought for women's equality, has initiated feminist theory and feminist politics during the transition from the dictatorship to actual democracy. Drawing on this position of power, they have publicly spread and voiced a trans-exclusionary discourse, mobilising fear, reluctance, and doubts. They represent not only a generation but a feminist *tradition*, mainstreamed and *institutionalized*, whose ideas, status and accomplishments are being challenged by a different generation -and a different feminist wave. This internal feminist debate is not limited to Spain. Rather, it is generalized in western societies where feminists "for the 1%" are being confronted by the other 99% (Arruzza, Bhattacharya and Fraser, 2019).

Mainstream liberal feminism holding institutional positions (institutional feminism) has framed gender politics with a twofold focus. On the one hand, emphasis has been put on equal opportunities and affirmative action policies, whether for accessing the masculine labor market or representative political spaces, improving the situation and opportunities of many white middle-class, educated women. Regrettably, such an emphasis has precluded the working conditions of poor, marginalized and racialized women; female jobs or migrant women status from entering the official feminist agenda, whilst accepting the capitalist mode of production and social reproduction as a given. Consequently, instead of fighting social hierarchies, liberal feminism has provided a better place *within* to a minority of women, whilst ignoring the rest.

Fighting violence against women has been a second major area of concern, but its conceptualization has been hetero-centered, grounded on binary distinctions and considering men as being violent and sexual predators *per se*. Thus, liberal feminism has promoted a detailed regularization of sex and sexual relations through criminal law, and has contributed to centering heteronormativism, whilst marginalizing non-normative bodies and sexualities. This approach has failed to unearth that capitalism requires binary sexual difference to be naturalized; that sexual violence and gender-based violence ensure the subordination of women and reproduction to men and production.

It would be naïve to think that the *status at risk* only refers to women's social status. Rather, this debate shows a deeper crisis within feminist lines, as it challenges the status of some women, some theories, and some forms of theorizing within the feminist community. In fact, for decades now, intersectional feminism, post-colonial feminist theory and Queer theory, amongst others, have challenged the theories and policies advanced by second wave feminism. Yet, until very recently, the debates and disputes thus generated were well incorporated into the feminist heritage, enhancing it.

Institutional feminism openly expresses a fear of disappearing from the official public agenda, and from being recognized as mainstream. Factors such as the increased visibility of the discrimination LGBTIQ+ people and other groups suffer; the action and involvement of wider society movements and actors (civil rights movements, political parties, international bodies); the competition for public resources, and the attacks of

the anti-gender movement to all gender-equality programs may have contributed to institutional feminists' perception of being relegated to the background or to a secondary position in the equality agenda.

Hence the *symbolic character* of sexual identity as representing society as we know it, and the *fear* of losing much more than female figures in statistics. Challenging the gender binary construction of citizenship and its naturalization not only threatens heteronormativity but capitalism itself. Affirming that sex is not a given biological category existing prior to society, or prior to human interpretation, but a political category grounding heteronormativity and capitalism dramatically challenges the order of things. Challenging the sex-binary fractures the agreement of perceiving women as privileged victims. Accordingly, the documents identify this as a manipulative anti-feminist practice, with consequences on the equal standing and citizenship of women, affirmative action policies and on the fight against gender-based violence.

5. A Cultural War?

When compared to moral crusades, moral panic episodes are intense moral crusades, concentrated within a short span of time, during which hostility towards the target group or situation increases, and has social and legal consequences that go beyond the episode itself. One could say, then, that what started in Spain as a crusade in July 2019, developed into a panic episode because the space given to anti-egalitarian discourses in mass media was extraordinary; the hostility towards LGBTIQ+ in general increased considerably, and has been a constant since then; and the negative impact in the final Draft of the law is evident. What if, instead of a moral panic episode, a cultural war was at play?[24]

The distinctive trait of 'cultural war' situations is that the marked group or groups respond to the finger-pointing by challenging their labelling as deviant/ dangerous and by voicing an alternative understanding of the problem itself. Although hostility is common in both situations, what differentiates one from another is the capacity of the target group to respond to the accusations, that is, the social status of the alleged *devil folk*, and whether it is heard, respected, and considered in society on a *par*.

A close reading of the Report of the Committee on Equality and Non-Discrimination (Parliamentary Assembly, Council of Europe 2021) seems to uphold this idea:

> "In Spain, work began in 2016 on new legislation to facilitate trans people's access to medical care and bodily autonomy, ensure that legal gender recognition is based on self-determination, and make the latter available to people of all ages. All are in line with Assembly Resolution 2048 (2015) and there was overwhelming public support for these changes (98% of responses to a public consultation carried out at the time were

[24] I want to thank for this insight Marina Echebarria Sáenz, President of the Participation board of LGBTI people at the Equality Ministry.

> in favor) and cross-party support in parliament. However, the legislative process has since been blocked. ***Extremely hostile anti-trans discourse has recently come from the highest political levels, including the Vice-President of the Spanish government***, who described legal gender recognition based on self-determination as putting the "identity criteria of 47 million Spaniards at risk". The bill was eventually debated in May 2021, following a hunger strike by 70 trans activists and parents of trans children, but failed to attain the necessary majority, notably because the majority party abstained. Much of the opposition has come from ***anti-trans feminist movements that portray trans people as a threat to society, and in particular to women, deny the identities of trans and non-binary people, suggest that they cannot be trusted to know who they are, and depict parents who are supportive of their trans children as criminals.*** Trans activists underline that the hostile discourse from the highest political levels has legitimized violence against trans people and the denial of care." (Emphasis added).

Although the emphasised parts point to the moral crusade/panic elements, the quote suggests a cultural war, because there has been both resistance and response to the narrative of threat and to the panic in Spain and elsewhere. For decades, feminist theories have given an alternative account of trans rights and gender identity;[25] international treaty, documents and bodies provide an alternative account of trans rights and gender identity;[26] and trans activists worldwide are fighting back the backlash to equality laws with strategies that range from hunger strikes to strategic litigation. A brief review of these alternative accounts is provided below.

5.1. An alternative feminist account

Nicholson (1994: 84) explains that the growth of a materialist metaphysics in XVII to XIX Century Europe did not create new social distinctions, but it did transform the meanings associated to them. The modern Western understanding of the distinction male/female incorporated the physical characteristics as an explanation of the distinction itself. Thus, it was *in the nature of women* to be excluded from citizenship. The body came to explain social standing precisely in a historic moment of greater social and political changes; a moment in which a growing separation between public and domestic life gave support to the biological explanation of the male/female distinction as a binary one. This distinction suited the roles and functions the new society required citizens to fulfill. In other words, modern Western capitalist societies required men and women. Biological

[25] There are many different approaches and theories could be explained here, and not just Queer theories (which are also varied). In fact, the ones I have chosen (L. Nicholson, N. Fraser…) are not Queer theorists.

[26] For an analysis of International human rights Law in relation to Sexual Orientation and gender identity see, UN General Assembly, *Protection against violence and discrimination based on sexual orientation and gender identity*, A/73/152, Report of the independent expert, 2018.

theories of sexuality, administrative, legal and other forms of state control gradually led to the idea that everybody had to be *either* man or women from birth. Thus, 'biological sex' or 'sexual difference' is, itself, a social construction fulfilling a political aim.

A modern sexed citizenship was organized and developed along the binary division: men and women occupy a different position on the public/private divide, that unevenly distributes functions, status, recognition, and rights. Key to sustaining the system is heteronormativity, this is, the extension of the heterosexual monogamous family as the norm, because it ensures the division of labor, the subordination of status and the production of human beings separated from economic benefit while ensuring the reproduction of heteronormativity itself.[27] Thus, a feminist transformative project should incorporate a critique to heteronormativity and the gender binary as being fundamental pieces to understand discrimination, violence and oppression; and could easily defend gender self-determination.

A similar feminist approach is reflected in the mentioned UN 2018 Report on Protection against violence and discrimination based on sexual orientation and gender identity. Interestingly, the point of departure is expressed as follows:

> "6. The notion that there is a gender norm, from which certain gender identities "vary" or "depart" is based on a series of preconceptions that must be challenged if all humankind is to enjoy human rights. Those misconceptions include: that human nature is to be classified with reference to a male/female binary system on the basis of the sex assigned at birth; that persons fall neatly and exclusively into that system on the same basis; and that it is a legitimate societal objective that, as a result, persons adopt the roles, feelings, forms of expression and behaviors that are considered inherently "masculine" or "feminine". A fundamental part of the system is a nefarious power asymmetry between the male and the female".

Especially since the WHO recognized in 2019 that transsexuality is not related to mental health, recent reports by international agencies foster the move towards de-pathologizing gender self-determination. De-pathologizing is a different process than that of recognizing gender-identity self-determination. De-pathologizing means not only that trans people cannot be treated as fools, but also that no diagnosis is needed for whatsoever reason to legally believe the person's felt and expressed gender identity. This means that, although transitioning may require medical support, diagnosis and treatment (as when a person desires to modify her body), this is dissociated from any other social, legal or economic aspect.[28] Examples of such international documents are the 2018

[27] Arruzza, Bhattacharya, and Fraser (2019) demonstrate how capitalist western societies have exploited (and benefited from) the effects of racism, colonialism, and other forms of extractivism, and oppression.

[28] Thus, a diagnosis is not required to modify one's registered sex, but it is necessary to receive hormonal treatment. This diagnosis and treatment some people may need cannot interfere in the legal recognition process.

Report to the UN General Assembly, that analyses the scope of state obligations in respecting and recognizing gender identity self-determination;[29] United Nations Human Rights Office of the High Commissioner Position paper (OHCHR 2020) or the Report of the Committee on Equality and Non-Discrimination-of the Parliamentary Assembly, Council of Europe (2021).[30]

5.2. European Court of Human Rights case-law

Long before 2019, the ECHR recognized that Article 8 of the European Convention on Human Rights (respect for private life) implied "the rights for individuals to define their sexual identity". It had also emphasized that the notion of personal autonomy includes the "principle of self-determination, of which the freedom to define one's sexual identity" is one of the most basic features.[31] Yet, as the quotes manifest, the decisions concerned legal recognition of persons who had undergone reassignment surgery, and systematically used the term "sexual identity".[32]

In *Garçon and Nicot v. France* (2017) the Court had to decide whether the state's refusal to remove the indication of sex on the birth certificates of the claimants, on the grounds that persons making such a request had to demonstrate that they suffered from gender identity disorder and that the change in their appearance was irreversible, amounted to a violation of article 8 in conjunction with article 3 (prohibition of torture and degrading treatment). The issue was framed as to determine whether the respect of the private life of the claimants obliged the State to recognize their gender identity without either requesting a gender disorder diagnose (de-pathologizing) or an irreversible change in appearance, thus recognizing body and personal autonomy.

The State argued that amending an individual's birth certificate could not be a matter of individual choice alone, "because the reliability and consistency of French civil-status records was at stake, and *in the interest of the necessary structural role of*

[29] The Report draws on the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender identity. It guides states' process to de-pathologizing certain gender identities and provides legal basis for State recognition of gender identity. It addresses the violence and discrimination that results from state's lack of recognition of gender identity, and the effects abusive legal requirements have in the standing of trans people. It addresses the issue of recognizing the gender identity of children. It provides tools to fight violence and discrimination based on gender identity. And, last, offers a list of good practices and effective measures taken in different places of the world to ensure respect of gender identity.

[30] See United Nations Human Rights Office of the High Commissioner Position paper (OHCHR 2020) and the Committee on Equality and Non-Discrimination- Parliamentary Assembly, Council of Europe, *Combating rising hate against LGBTI people in Europe*, 2021 Report. (np 18)

[31] See for instance *Ch. Goodwin v. The United Kingdom*, Ap. Nº 28957/95 (2002).

[32] See *A.P. Garçon and Nicot v. France*, Ap Nºs 79885/12, 52471/13 and 52596/13 for a summary and list of cases at para 93.

sexual identity within the country's social and legal arrangements" (para 105, emphasis added). Thus, the ECHR had to decide if the legislation struck a fair balance between the general interest and the applicants rights. The Court stated that whilst the principle that civil-status records must reflect "reality" is in the interest of trans people as well, by no means such principle precludes modifications of the civil records. On the contrary, claimants precisely argued that only if modifications are allowed such registers will reflect reality. Moreover, the Court affirmed that the aim of ensuring legal certainty does not justify presenting trans people with an impossible dilemma: *either* they undergo hormonal treatment or reassignment surgery against their wishes, thereby compromising their right to physical integrity with procedures resulting in probable sterilization; *or* they renounce to having their identity recognized and respected, which is a clear violation of their right to private life. Thus, whilst recognizing states a margin of appreciation to fulfill their positive obligations ex article 8, the Court proclaims that mandatory body modifications or treatments without fully free consent are abusive requirements, hence contrary to the Convention; and re-affirms the right to gender self-determination.

However, it expresses fears and doubts in regards with de-pathologizing as both the state (France) and the Court understand disorder diagnoses as being protective measures facilitating trans people access to much needed help and support and protects them from taking wrong decisions about their lives and bodies. This approach was reproduced in a 2021 decision, despite the fact that the WHO had already excluded transsexuality from the list of mental-health disorders. In *X&Y v Romania* (2021) the claimants argue that the requirement of obtaining a judicial authorization to modify registered sex is an abusive requirement, violating article 8, because judges do not issue authorizations unless a dysphoria diagnosis is substantiated, and permanent body modifications are performed. The claimants also point to the fact that article 8 imposes upon member states both positive obligations of respect to their private life and gender identity, and negative obligations to refrain from interfering in their family and private life; this includes the requirement of a third-party authorization.[33]

Unfortunately, the Court did not analyze all the claims.[34] Yet it did affirm that because public order and legal certainty are at stake, Rumania has the obligation to establish a clear, proportionate, fair, fast, and accessible procedure to modify public records, one that does not impose abusive requirements such as irreversible changes in appearance.

In sum, according to the ECHR, states must recognize gender identity self-determination as constitutive of the individual right to private life and as part of an individual's autonomy, and must put in place a clear, fast, fair and proportionate procedure

[33] According to article 8, the interferences are only justified when some conditions are met. This approach was developed in a very interesting Joint dissenting opinion of judges Sajó, Keller and Lemmens in the case *Hamalainen v. Finland*, Ap. Nº 37359/09), 2014.

[34] Unfortunately, the Court decided not to discuss the alleged violations of article 6 (due process), 13 (effective remedy), and 14 (prohibition of discrimination). Nor did it discuss about the negative obligations of the state regarding art. 8, which would develop the de-pathologizing approach.

that reflects the individual's gender identity. Whilst the ECHR does not preclude a disorder diagnosis, it does require states to create a procedure that does not impose abusive requirements regarding body modifications, treatment, or a third-party intervention.

6. Conclusion

Drawing on two of the most salient public debated documents, the PSOE *Argumentative* and the *Open letter*, this paper has approached Spanish current debates and narratives opposing to trans equality laws from a 'social problems work' perspective. Advancing a reading within a broader transphobic context, the paper explores whether a moral crusade, followed by a moral panic episode took hold on Spanish public debate from July 2019 to July 2022. The implicit claim is that both documents over-react to the vindication of equal rights for trans people, and wrongly present trans recognition and trans equality as a major social and moral problem to fight. The paper argues that a moral crusade against trans rights was clearly initiated but suggests that, rather than a panic episode, a latent cultural war manifested itself.

The distinctive trait of 'cultural war' situations is that the group or groups marked as dangerous respond to the finger-pointing by challenging their labelling as deviant and by voicing an alternative understanding of the problem itself. Although hostility is common in both situations, what differentiates the one from the other is the capacity of the target group to respond to the accusations, this is, the social status of the alleged *devil folk*, and whether it is heard, respected, and considered in society on a *par*.

To illustrate such resistance, an alternative feminist account of trans rights has been summarized, supported by international agencies and, to a certain extent, by the ECHR that defends gender identity self-determination as an individual right. Whilst recognizing that de-pathologizing has not been fully accomplished in the European context, and that not all battles have been won, the paper provides arguments to ensure trans justice, trans equality and trans human rights and to fights against different forms of anti-gender, trans-exclusive activism, narratives, ideologies and laws.

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THE RIGHT TO GENDER SELF-DETERMINATION IN SPAIN. LESSONS FROM AUTONOMOUS COMMUNITIES*

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Abstract: Law 3/2007, regulating the rectification of a person's official sex, is still in force in Spain. Although it does not demand reassignment surgery, it pathologizes the reassignment process, among other shortcomings. Since its enactment, 14 of Spain's 17 Autonomous Communities (Regions) have legislated on the subject, mostly on the basis of self-determination, in an attempt to compensate for the perceived deficiencies in national legislation. This paper analyses and compares the legislative approach to gender identity and the rights of Trans people at a national and regional level.

Keywords: Trans, pathologisation, self-determination, fundamental rights, Autonomous Communities.

Summary. 1. Introduction. 2. The Recognition of Self-Defined Gender Identity in the Spanish Legal System. 3. Distribution of Powers and Recognition of Rights in Spain's Autonomous Communities. 4. The Right to Gender Self-Determination in the Autonomous Regions. 5. Conclusions.

1. Introduction

Both socially and legally, categories are used to classify people and determine their relational position with respect to both other individuals and State institutions. In these categories, sex and its association with a particular role, i.e. gender,[1] is a key facet. Equality feminism has focused mostly on the need to differentiate between the category of "sex", as a biological reality inseparable from the individual, and "gender", as a cultural construct which, on the basis of biological sex, imposes differentiated roles and destinies on women

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1. According to gender stereotypes, both men and women must act in accordance with these behavioural patterns in order to comply with the social norm; this is the role they are expected to play and it is determined according to their sex. Thus, men are synonymous with reason, mentality, independence, activism, selfishness, toughness, calculation, rationality, science; women are identified with emotion, physical appearance, dependence, passivity, sacrifice, tenderness, unpredictability, irrationality (Marçal 2016: 258). In this way, as Laura Nuño points out, "patriarchal socialisation produces two radically different cultures and two completely different ways of feeling. Gendered socialisation implies that each gender must have internalised the necessary guidelines to know what to think or do in order to fulfil gender expectations" (Nuño Gómez 2010: 173).

and men. The essential premise of this strand of feminism, a legacy of women's demands since the Enlightenment,[2] is that there are no natural biological conditions associated with either of the sexes which can justify the differentiated normative social models imposed on men and women, that biological differences which have a real impact on the way women and men relate are minimal, hence that gender roles, maleness and femaleness, are nothing more than cultural constructions. Feminist theories developed in the 1970s reinforced this perspective, giving it a solid theoretical-scientific basis. By focusing on genders as imposed cultural categories, they encouraged the delegitimisation of the normative gendered social order.[3] More recently, this distinction between sex-biology and gender-culture has also been called into question by authors, such as Butler (1990), who dispute that two natural sexes exist separately from culture, thus highlighting how the category of sex is itself a cultural construction.

Having thus embarked on a path of relativizing biological essentialisms, having pointed to the resulting construction of maleness and femaleness as a cultural product, having even questioned sex as an immutable biological concept, the next logical step for democratic societies would seem to be the abolition of gender as a cultural imposition, and the relegation of sex to an irrelevant social category, apt to address some purely biological questions. Nevertheless, although equality stands as an essential democratic principle, and although discrimination on grounds of sex has formally been abolished almost entirely, the concept of exclusionary citizenship inherited from the Enlightenment continues to be in place in democratic states (Pateman 1995; Rodríguez Ruiz 2010), and the sex-gender system (Rubin 1975) continues to play a central role within it.

Despite the growing rejection of sex as destiny, sex-gender continues to have a decisive influence on an individual's way of participating in society. The sex assigned to an n individual at birth, mostly on the basis of their genitalia, and then consigned to the official documents which identify them as a legal person, continues to define their relations with the State and to condition their social interactions, while the symbolic ramifications of one's official sex remain decisive in the construction of personal identity. From the custom of piercing girls' ears at birth, to the adscription of a certain aesthetic appearance to each sex, the presumption of heterosexuality, the masculinisation or feminisation of certain professions, the differentiation of public spaces by sex-gender, etc., social identities and relations continue to be structured around a performative sex-gender binary based on the sex assigned at birth.

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2. The best-known feminist figure of the Enlightenment is perhaps Olympe de Goudes, author of the Declaration of the Rights of Woman and the Citizen (1791). But she was not alone. Alicia Puleo's *La Ilustración olvidada* [*The Forgotten Enlightenment*], (1993) compiles texts by both women and men who contested the dominant tendency of the Enlightenment to consider women as inferior beings excluded from citizenship and the rights attached to it.

3. American anthropologist Gayle Rubin (1975) was the first person to take the concept of gender and apply it to feminist theory, based on a revision of the idea of the "exchange of women" by anthropologist Lèvi-Strauss. Also relevant in this respect is Joan Scott's (1986) research on the role of gender in power relations throughout history.

The apparent simplicity of classifying individuals according to a watertight model of sexual identities, which only admits two alternatives, clashes with individual real life experiences, which are much more complex and difficult to classify. The persistence of social and legal binary categories means, however, that people who do not identify with the gender roles linked to the sex they were assigned at birth feel the need to be reassigned to the other one, "not only as a way of consolidating a sense of inclusion and belonging to the community, but also to avoid socio-economic damage and psychological harm in societies which continue to be, for the most part, transphobic" (Rubio Marín and Osella 2020: 49). This situation has shaped the struggles for increased legal flexibility of the sex-gender categories, so as to allow for the recognition of self-perceived gender identity over and above the one imposed upon binary biological criteria. Over the last few decades, these demands have become part of the political agenda in many countries, including Spain.[4]

This paper aims to analyse the legal solutions articulated in Spain to address the treatment of dissident gender identities. After examining national legislation and exploring its shortcomings (2), it will focus on the constitutional margin Autonomous Communities have to recognise rights and legislate on the matter (3), in order then to analyse existing regional laws (4). It will then reflect on the discrepancies between the two levels of legislation and the need to homogenise them through national legislation that responds to Trans and LGTBI people's demands (5).

2. The Recognition of Self-Defined Gender Identity in the Spanish Legal System

In Spain, scholars (Salazar Benítez 2015; Alventosa del Río 2016) and courts (Supreme Court's Decision of Admissibility –ATS[5]- 10 March 2016; Decisions of the Constitutional Court -*SSTC*[6]- 176/2008, 99/2019) agree that the need to protect gender identity is rooted in the respect that, according to the Spanish Constitution, is due to the dignity of the person and the free development of the personality, both regarded as foundations of political order and social peace (article 10.1 of the Spanish Constitution –*CE*-[7]). The implication is that sex-gender identity is part of one's personality. Gender identity is also protected by fundamental rights such as the right to physical and moral integrity (Article 15 *CE*), the rights to one's honour and privacy (Article 18.1 *CE*), and by the constitutional protection granted to health (not a fundamental right as such, but a guiding principle of social and economic policy, enshrined in Article 43 *CE* and connected to Article 15's right to physical integrity – *STC* 176/2008), which is broadly understood

4. According to a study about the evolution of discrimination in Spain published in 2018 by the Women's Institute (*Instituto de la Mujer*), when asked whether a person who was born male and feels female should be able to change their name and documentation to be treated as a woman, and vice versa, 65% of the people surveyed were in agreement and 14% agreed to some extent. Only 6% completely disapproved, whilst another 6% disapproved to some extent.

5. *Auto del Tribunal Supremo*.

6. *Sentencia del Tribunal Constitucional*.

7. *Constitución Española.*

as a complete state of physical, mental and social wellbeing. With regard to the right to equality and not to suffer discrimination (Article 14 *CE*), there is no doubt that, although not expressly mentioned as a suspicious ground for discrimination, sexual and/or gender identity has historically left certain groups at a structural disadvantage with respect to others, and is therefore covered by the ban on discrimination. Disadvantaged identities, mostly Trans and non-binary identities, are also covered by the duty of public authorities to work towards substantive equality (Article 9.2 *CE*), which includes the adoption of affirmative action measures. Moreover, all these rights must be interpreted in accordance with the international treaties and agreements on the matter ratified by Spain, as interpreted by international and European bodies (Article 10.2 *CE*). In this sense, the European Court of Human Rights (ECtHR) has consistently stated that the right to respect for private life as recognised in Article 8 of the European Convention on Human Rights (ECHR) also includes the protection of the right to gender self-determination (Decision of 10 March 2015, case of *Y.Y. v. Turkey*; Decision of 6 April 2017, case of *A.P., Garçon and Nicot v. France*).

Although the Constitution thus supports the recognition of gender self-determination in Spain, there is no national comprehensive legislation which addresses it. Some norms refer to the rights of Trans people in the civil, criminal, health and labour spheres, mainly through anti-discrimination law.[8] The arguments underpinning them often are, however, hesitant or confused, as are some of the arguments developed by the Constitutional Court. An example of this is *STC* 176/2008. Here the Constitutional Court included transsexuality among Article 14 *CE*'s forbidden grounds for discrimination. As the Court stated, the aim of Article 14 *CE* is to ban historically entrenched differentiations which, both through the actions of the public authorities and social practice, have placed certain sectors of the population in positions of structural disadvantage, as against the dignity of the person (Article 10.1 *CE*; see *SSTC* 128/1987, *FJ*[9] 5; 166/1988, *FJ* 2; 145/1991, *FJ* 2). Trans people have historically been placed in such positions of disadvantage, inequality and even marginalisation.

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8. With regard to health, Article 6.1 of Law 33/2011, of 4 October (General Law on Public Health), stipulates that "All persons have the right to public health under conditions of equality without discrimination on the grounds of birth, racial or ethnic origin, sex, religion, conviction or opinion, age, disability, sexual orientation or identity, illness or any other personal or social condition or circumstance".

In the labour sphere, several norms proscribe discrimination on grounds of sex or sexual orientation (such as Article 4 of Workers' Statute, as amended by Law 62/2003, of 30 December, on fiscal, administrative and financial measures; or Article 8 of Law 5/2000, on offences and penalties in the social order). Yet only the more recent Law 36/2011, on the social jurisdiction, makes explicit reference to sexual identity. Specifically, Article 96.1 establishes the attenuation of the burden of proof "in those proceedings in which the allegations of the plaintiff establish the existence of well-founded indications of discrimination on grounds of sex, sexual orientation or identity", among others.

In the criminal field, the reform of the Criminal Code by Law 5/2010, of 22 June, involved the incorporation of crimes committed for reasons of sexual identity as an aggravating cause of criminal liability, independently of sexual orientation, sex or gender (Article 22). Meanwhile, when hate crimes were introduced in the Criminal Code (Article 510) in 2015, they included a reference to sexual identity as one of the reasons that place a certain person in a position of special vulnerability, differentiating it from sex, gender and sexual orientation.

9. Acronym for *Fundamento Jurídico* (Legal Ground).

The Constitutional Court, however, misses the opportunity to develop a more thorough discourse on the legal construction of transsexuality as a cause of discrimination. It initially refers to transsexuality as the condition of "a person who, belonging to one sex due to their chromosomal and morphological configuration, feels and acts as a member of the other sex" (*FJ* 4), in accordance with the common meaning of the term. Yet it then becomes imprecise and equivocal on the subject, as it conflates discrimination on these grounds with discrimination based on sexual orientation. It refers to the case-law of the ECtHR on sexual orientation; to the UN Human Rights Committee's interpretation of the International Covenant on Civil and Political Rights, stressing that the prohibition of discrimination on grounds of sex (Article 26) includes discrimination on grounds of sexual orientation; to Article 13 of the Treaty Establishing the European Community, which includes sexual orientation as a forbidden ground for discrimination; and to Article 21.1 of the Charter of Fundamental Rights of the European Union, which also includes "sexual orientation" as a forbidden ground for discrimination of any kind. Transsexuality, however, concerns a person's identity,[10] not their sexual orientation. Using precise terminology and concepts is a crucial step towards providing adequate protection.

Trans demands have been more successful in the field of Civil Law. Law 3/2007, of 15 March, which regulates the rectification of registered sex, expressly addresses the legal situation of Trans persons, although only in relation to the rectification of their legal sex in the civil registry. It rules that any Spanish person of legal age, and with sufficient capacity to do so, may request the modification of the registration of sex, provided that certain requirements are met. These include:

1º) A report from a doctor or clinical psychologist, stating that the applicant has been diagnosed with gender dysphoria, accredited by means of a reference to:

– Disparity between the morphological sex or physiological gender initially registered and the applicant's self-perceived gender identity or psychosocial sex, as well as the stability and long-term persistence of this disparity.
– The absence of personality disorders that could have a decisive influence on the existence of this disparity.

2º) That the person requesting the change of registration has been medically treated for at least two years to bring their physical characteristics into line with those corresponding to the desired sex.

This Law significantly relaxed the criteria for rectifying one's registered sex. Prior to it, any such rectification required a favourable court ruling. Moreover, the dominant case-law on the subject, as upheld by the Supreme Court, focused on chromosomal or gonadal

[10] When deciding on this case, the ECtHR observes that, while transsexuality is indeed included in Article 14 of the ECHR as a forbidden ground for discrimination, it does not concern sexual orientation, but gender identity. However, the ECtHR did not adequately assess the consequences of the Constitutional Cout's failure to adequately conceptualise transsexuality.

criteria rather than psychosocial factors.[11] Gender reassignment surgery was required. Yet Law 3/2007 did not recognise a right to self-determination, but remained rooted in the logic of external assignment. This goes against the Spanish constitutional framework, as indicated above. It is also out of line with the international (albeit non-binding) standards set out in the Yogyakarta Principles, specifically No. 18, which provides that States "shall ensure that any medical or psychological treatment or counselling does not explicitly or implicitly consider sexual orientation and gender identity as a health condition to be treated, cured or suppressed". In addition to this, the Law's parameters are still defined on the basis of a binary system which does not contemplate any identities other than male and female.

Furthermore, Law 3/2007 leaves non nationals and minors out of its scope (Article 1.1). This latter point has been criticised by scholars (Burgos García, 2016; Alventosa Del Río 2016) and has been declared unconstitutional by the Constitutional Court (*STC* 99/2019). Requiring that applicants be of age when requesting a rectification of their registred sex, this Court ruled, without offering a procedure to accommodate minors "with sufficient maturity" and in a "stable situation of transsexuality", is a disproportionate restriction of constitutional principles (dignity, free development of the personality) and rights (privacy), as the harm caused to these young people exceeds their need for protection, which is the given reason for their exclusion (*FJ* 9).

Above all, the 2007 Law fails to provide a comprehensive and all-encompassing regulatory framework as required to address the situation of Trans people. As Alventosa del Río points out, "the identity of a person implies far more than mere registry rectification". There is notably a lack of legislative provisions concerning various other issues:

> "the existence of a right to one's own sexual and gender identity, comprehensive health care for transgender people, incentives for research in the area of transsexuality, campaigns and initiatives to combat transphobia, the creation of a legal advice service and psychological and social support for family members and relatives of transgender people, and the design of a policy of positive discrimination in employment and other legal and social areas" (Alventosa del Río 2015: 751).

Similarly, as Salazar points out, "it is obvious that a change of sex and name registration is an essential factor for a transgender person to be able to operate in legal terms without discrimination, but it is far from being the only issue which conditions their status as a citizen " (2015: 86).

All this points to the need for a national law which both depathologises transsexuality and includes a comprehensive approach to the reality of Trans people. The need to pass such a law has been under discussion for some time and has undoubtedly become an

[11] However, from 2007 onwards (*STS* 929/2007, of 17 September, confirmed in subsequent rulings such as SSTS 158/2008, of 28 February; 182/2008, of 6 March; 183/2008, of 6 March; 731/2008, of 18 July, or 465/2009, of 22 June), there was a shift in the Supreme Court's doctrine.

important item in the current Government's political agenda, particularly of the agenda of its the Ministry of Equality. However, ideological differences have created tensions and discrepancies and caused delays. It was not until June 2021 that Government finally passed a Draft Bill on the real and effective equality of Trans people and on the rights for LGTBI people[12]. The Draft Bill will be discussed in Parliament once mandatory reports on it are issued, by the General Council of the Judiciary and the Public Prosecutor's Council.[13] In the meantime, Autonomous Communities have tried to fill the existing legal gaps within the scope of their powers.

3. Distribution of Powers and Recognition of Rights in Spain's Autonomous Communities

Between 2004 and 2011[14] various Spanish Autonomous Communities reformed their Statutes of Autonomy, in an effort to increase their range of powers within the limits set by the Constitution. Reforms included the introduction of a list of statutory rights. This gave rise to heated academic and political debates concerning the legal nature and constitutional conformity of these statutory declarations of rights[15], which led to two Constitutional Court rulings (SSTC 247/2007 and 31/2010). Here the Court considered the development of a multilevel model for the protection of fundamental rights. It accepted the constitutionality of statutory rights within such a model, but only provided they were regarded as mere principles or guidelines, not as true rights. This means that statutory rights inspire the activity of public power within the region, but can only be claimed at court if they have been developed in regional legislation.

Despite this limitation, a significant number of statutory rights have been recognised which have a direct impact on the issue at hand. Some of them clearly mention gender identity, together with sexual orientation, among the potential grounds for discrimination.

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12. Draft Bill for the real and effective equality of transgender people and for the guarantee of the rights of LGTBI. Available at https://www.igualdad.gob.es/servicios/participacion/audienciapublica/Paginas/2021/apl-igualdad-efectiva-persona-trans-derechos-lgtbi.aspx [Accessed: 31 March 2022].

13. "LGTBI groups ahve urged the Judiciary to issue its report so that the Trans Law can continue to be processed" eldiario.es 22/03/2022 https://www.eldiario.es/sociedad/colectivos-lgtbi-urgen-judicial-emita-informe-ley-trans-siga-tramite_1_8851249.html. [Accessed: 31 March 2022].

14. During this period, organic laws were passed to reform the Statutes of Autonomy in Valencia, Catalonia, the Balearic Islands, Andalusia, Aragon, Castile and Leon, Navarre and Extremadura.

15. The division in the doctrine between those who consider that the Autonomous Statutes are adequate instruments for recognising true fundamental rights of citizens and those who argue that they are not is clearly illustrated in the exchanges between Díez Picazo and Francisco Caamaño Domínguez in a series of academic articles published in *Revista Española de Derecho Constitucional*, whose titles are expressive of the opposing positions. In 2006 (vol. 78), Díez Picazo published an article entitled "¿Pueden los estatutos de autonomía declarar derechos, deberes y principios?" ("Can autonomous statutes declare rights, duties and principles?). In the following issue (vol. 79), Caamaño replied with an article entitled "Sí pueden. (Declaraciones de derechos y Estatutos de Autonomía)", ("Yes they can. (Declarations of rights and Autonomous Statutes"). Díez Picazo replied in turn (vol. 81) with another article entitled "De nuevo sobre las declaraciones estatutarias de derechos: respuesta Francisco Caamaño"("Again on statutory declarations of rights: Francisco Caamaño's response"). See Caamaño Domínguez, 2007; Cámara Villar, 2011; Díez-Picazo, 2006, 2007.

Others include more specific references. The Andalusian Statute of Autonomy, for instance (Organic Law 2/2007, of 19 March), recognises everyone's right to have their sexual orientation and gender identity respected and calls on public authorities to promote policies which guarantee the exercise of this right (Article 34). Similarly, the Canary Islands Statute of Autonomy (Organic Law 1/2018, of 5 November), obliges public authorities to recognise people's right to their own gender identity and to guarantee non-discrimination based on gender identity or sexual orientation. Other statutes, although not specifically recognising a right to gender identity, do mention it. Examples of this include the Aragonese Statute of Autonomy (Organic Law 5/2007, of 20 April), which recognises the right not to suffer discrimination on the grounds of sexual orientation or gender identity (Article 24.d), and the Extremadura Statute of Autonomy (Organic Law 1/2011, of 28 January), which states that public authorities shall promote policies to guarantee respect for the sexual orientation and gender identity of all people (Article 7.13).

Since 2009, statutory references to non-discrimination based on gender identity and the right to gender self-determination have been formalised in regional laws. In order to justify their Region's power to legislate in this field, as established in its Statute of Autonomy, these laws appeals to heterogeneous grounds. After all, we are dealing with a very broad issue, which affects a multitude of aspects of social reality and has a wide range of legal consequences. This is particularly clear, for example, in the explanatory memorandum of the Valencian Law:[16]

> "With this law, the Generalitat intends to develop a series of fundamental areas of competence which are attributed to it by the Statute of Autonomy. These comprise those included in the different sections of Article 49, such as culture (section 1.4), social services (section 1.24), youth (section 1.25), protection of minors and the elderly (section 1.27), sports and leisure (section 1.28), and civil protection and public safety (section 3.14). [...] This law also aims to develop essential statutory powers covering education, (Article 53) and public health institutions, (Article 54) ".

Likewise, the Andalusian Law states in its explanatory memorandum:

> "In addition to developing the right established in Article 35 of the Statute of Autonomy […], the Autonomous Community has sufficient powers in different areas to regulate each and every one of the aspects covered by this Law. These include: Andalusian public administrations (Article 47), education (Article 52), universities (Article 53), research (Article 54), health, sanitation and pharmacies (Article 55), social services and minors (Article 61), employment, labour relations and social security (Article 63), media and audiovisual content services (Article 69), sport (Article 72), gender policies (Article 73), data protection (Article 82), organisation of basic services (Article 84) and exercise of the functions and services inherent to the powers of the Autonomous Community (Article 85)".

[16] For a concise description of all the autonomous laws mentioned throughout the text, see Table 1.

In turn, the preamble to the Law of Aragon refers to the transversality of the right to gender identity, which affects a broad range of subjects and areas of jurisdiction, while pointing out that regional legislation in this area need not come into conflict with national law:

> "The Aragonese Statute of Autonomy provides regional public authorities with instruments and powers which guarantee the adequate protection of the fundamental rights and duties of its citizens in the educational, social, and cultural spheres, as well as family care, protection of minors and the elderly, regional administrations and administrative procedures. This enables the Aragonese legislator to take a comprehensive approach to the various matters affecting the situation of transgender people without coming into conflict with the State or other administrations".

Autonomous Communities also rely on Article 9.2 *CE* to justify their legislative powers to protect people's gender identity, notably by promoting the effective equality among individuals and the groups to which they belong, whilst removing the obstacles that prevent or hinder their participation as citizens in political, economic, cultural and social life. The Statute of Autonomy of the Community of Madrid replicates Article 9.2 *CE* almost literally (Article 1.3). The regional law 3/2016, on comprehensive protection against LGTBIphobia and discrimination on the basis of sexual orientation and gender identity, refers to this:

> "Article 1.3 of the Region of Madrid's Statute of Autonomy, approved by Organic Law 3/1983, 25 February, proclaims that "the Region of Madrid, by facilitating the fullest participation in political, economic, cultural and social life, aspires to make the principles of freedom, justice and equality a reality for all its citizens".

Meanwhile, Article 7.4 establishes that:

> "It is incumbent upon the public authorities of the Region of Madrid, within the limits of their jurisdiction, to promote the conditions for the real and effective freedom and equality of the individual and of the groups to which they belong, whilst removing the obstacles which prevent or hinder the participation of all citizens in political, economic, cultural and social life".

The case is similar in the Galicia. The Galician Law states:

> "Like Article 9.2 of the Spanish Constitution, Article 4.2 of the Galician Statute of Autonomy lays the foundations for promoting effective equality between individuals, by stating that public authorities are obliged to 'promote the conditions whereby the freedom and equality of the individual and the groups to which they belong are real and effective, removing any obstacles which prevent or hinder the participation of all Galicians in political, economic, cultural and social life'".

The Basque Country Law is a combination of the two previous examples. On the one hand, it refers to the statutory mandate for public authorities to guarantee the real and effective equality of citizens in the autonomous sphere; on the other, it calls for the development of new legislation to cover a range of issues which the region is responsible for regulating in relation to gender identity:

> "The Basque Country Statute of Autonomy's Organic Law 3/1979, of 18 December, establishes in Article 9.2 that the Basque public authorities must monitor and guarantee the proper exercise of the fundamental rights and duties of citizens, as well as adopting the necessary measures and removing any obstacles to the freedom and equality of the individual and of any groups to which they belong, thereby facilitating the participation of all citizens in the political, economic, cultural and social life of the region.
>
> In Title I of its Statute of Autonomy, the Autonomous Community establishes jurisdiction over various matters affecting the situation of transsexual persons, including the organisation, administration and operation of institutions and establishments for the protection and guardianship of minors (Article 10.14); internal health (Article 18.1), and, especially, social assistance (Article 10.12). It is therefore necessary to make explicit reference to the application of the principle of non-discrimination in the free development of personality and, specifically, of gender identity, so that in the interpretation and application of the Basque Country's legal system no one can be discriminated against on the grounds of their transsexual status".

A look at the Statutes of Autonomy of the Autonomous Communities which have enacted legislation on the situation of Trans people, or of LGTBI people in general, thus allows us to conclude that said legislation is well within the powers of the Autonomous Communities in question. The constitutionality of recognising Trans and LGTBI people's rights at a regional level appears to be beyond dispute.

4. The Right to Gender Self-Determination in the Autonomous Communities

The Autonomous Communities which pioneered the process of passing specific laws on sexual and gender identity were Navarre and the Basque Country, in 2009 and 2012 respectively (Navarre updated its law in 2017). Since then, various other Autonomous Communities have gradually followed suit, the most recent ones being the laws of the Canary Islands (Law 2/2021, of 7 June, replacing a previous law of 2014) and La Rioja (Law 2/2022, of 23 February). Currently, 14 of Spain's 17 Autonomous Communities have passed laws on Trans people's rights. These include, in addition to those already mentioned, Andalusia, Catalonia and Galicia in 2014; Extremadura in 2015; the Community of Madrid, the Balearic Islands and Murcia in 2016; Aragon and the Community of Valencia in 2018; and Cantabria in November 2020 (see Table 1).

A first distinction can be drawn between two types of legislation: those that deal exclusively with gender identity and those concerned with the rights to equal treatment

and non-discrimination of LGTBI persons. While the latter also deal with gender identity and the protection of Trans persons, they may not do so to the same extent as the former (Alventosa del Río 2015: 759). The first group includes Andalusia, Aragon, the Canary Islands, La Rioja and the Basque Country (see Table 1); the second group includes the remaining nine Autonomous Communities which have legislated on the matter.[17] Another important distinction concerns the recognition or not of "gender self-determination": while some openly refer to it, others fail to legislate explicitly on this most controversial issue (both politically and dogmatically). We will return to this later.

Beyond these differences, regional laws have a number of common features. Interestingly, most laws include a clarification of concepts, in an attempt to avoid terminological and interpretative imprecision and to establish the purpose of the provisions they contain. Thus, the Andalusian law literally adopts the definition contained in the Yogyakarta Principles and describes gender identity as "the internal and individual experience of gender as each person feels it, which may or may not correspond to the sex assigned at birth, and includes personal physical perception" (Article 3). It adds that it "may involve modification of bodily appearance or function through pharmacological, surgical or other means, provided that this is freely chosen", which should be understood to mean that it may not involve the change in external appearance or bodily function traditionally associated with transsexuality.

Similarly, the Canary Islands Law defines gender identity as "the internal and individual experience of gender which is self-perceived and does not require any third party ratification. It may or may not correspond to the sex assigned at birth and may or may not involve the modification of appearance or bodily functions through pharmacological, surgical or any other means, providing that this is freely chosen". Gender expression, on the other hand, is defined as "the way in which each person communicates or expresses their gender identity through their aesthetics, language, behaviour, attitudes or other manifestations, which may or may not coincide with those considered to be related to the socially assigned gender according to the sex at birth". A Trans person is "any person whose gender identity does not match with that assigned at birth or whose gender expression does not correspond to the social norms and expectations associated with the sex assigned at birth". As such, "for the purposes of this law, and without prejudice to other social meanings, the term Trans covers multiple forms of gender identity expression such as transsexuals, transgender, transvestites, queer, and non-binary gender identities and expressions, as well as those who define their gender as "other" or describe their identity in their own words" (Article 2).

Other laws, such as those of Aragon and Cantabria, similarly describe the concept of Trans persons, but not that of gender identity. Thus, the Aragonese Law defines Trans

17. In the case of Navarre, the first Autonomous Community to approve a specific law to address the situation of Trans people, the Foral Law 12/2009, of 19 November (establishing non-discrimination on grounds of gender identity and recognition of the rights of transgender people), initially focused on gender identity, but was repealed by the Foral Law 8/2017, of 19 June (concerning the social equality of LGTBI+ people), which added provisions for LGTBI+ people as a whole.

persons as "any person who identifies with a freely self-determined gender or gender expression regardless of the gender they were assigned at birth" and adds that "the term "Trans" covers multiple forms of gender identity expression or subcategories such as transsexual, transgender, intersex, intergender, queer, agender, crossdressing, etc." (Article 1). Cantabria offers the following definition of a Trans person (Article 3.g):

> "Anyone who identifies with a different sex or who expresses their sexual or gender identity differently from their biological sex. The term Trans encompasses multiple forms of expression of sexual or gender identity as well as subcategories such as transgender, gender variant, or those who define their gender as other or describe their identity in their own words. The term Trans is used in this law to encompass all the different forms of sexual or gender identity, unless specific reference to one of the variants is required".

The Catalan Law, on the other hand, chooses to dedicate part of its preamble to establishing what the term "transgender" means within the scope of the law (Preamble):

> "This law uses the term 'transgender' to refer to persons who feel that they are of the opposite sex to the one they were assigned at birth according to their biological characteristics, as well as to persons who do not identify exactly with being either male or female according to the traditional concept of gender, regardless of whether or not they have undergone surgery. Transsexual persons are therefore included within the term transgender. Transsexuality is also included in the generic term "transidentity", which defines the condition of transgender".

The Law of the Community of Madrid defines sexual or gender identity as follows: "the self-perceived sex of each individual, which does not have to be accredited or determined by means of a psychological or medical report. It may or may not coincide with the sex assigned at birth, and may or may not involve modification of appearance or bodily function by pharmacological, surgical or other means, according to the will of the person" (Article 3.p).

The definition of "transsexual persons" in the Basque Country Law also contains an explicit rejection of the pathologisation of this condition (Article 3):

> "The notion of transsexuality refers to a situation whereby the sex that a person was assumed to be at birth, based on their genitalia, does not coincide with the sex that they perceive and know themselves to be. Transsexuality therefore, can only be understood by accepting what a person freely expresses and, like sexual identity, it cannot be diagnosed. It is not a disease, a disorder or an anomaly, but is part of human diversity".

In short, most regionals legislators introduce a number of conceptual clarifications in order to avoid confusion and interpretative misunderstandings around concepts which might not yet be sufficiently established in the legal field –the aforementioned *STC*

176/2008, with its confusion between "sexual orientation" and "gender identity", offers a telling example of this.

Another common element, this one invariably found in all the laws under examination, is the obligation for public authorities to act in accordance with the anti-discrimination clauses in the field of sex-gender identity. Thus, the Law of Aragon states (Article 5):

> "In accordance with this law, any form of discrimination on the grounds of gender identity and expression or sexual characteristics is prohibited. This includes direct or indirect discrimination, discrimination by association or by accident, multiple discrimination, harassment, inducement, instruction to discriminate, retaliation or failure to comply with positive action measures deriving from normative or conventional obligations, and secondary victimisation due to inaction by those who have a duty of care".

According to the Law of the Region of Murcia (Article 9.2):

> "No person may be subjected to discrimination, harassment, criminalisation or punishment on the grounds of their sexual orientation, gender identity and/or gender expression. Specifically, people must be treated in accordance with their expressed gender identity, which is how the person presents themselves to society, regardless of their legal sex. The Autonomous Community of the Region of Murcia will act in accordance with these principles in each and every case in which it is involved".

The Law of the Autonomous Community of Navarre provides (Article 6.1):

> "The Public Administrations of the Foral Communities and the Ombudsman of Navarre shall ensure the right to non-discrimination, regardless of the sexual orientation, gender expression or sexual identity of the person or the family group to which they belong. These administrations and public institutions may act *ex officio*, regardless of whether a legal or civil complaint has been filed ".

These clarifications are appropriate for interpretative or even symbolic purposes, but unnecessary in prescriptive terms, as they merely reiterate Article 14 *CE*. More interesting, because of their possible practical consequences, are anti-discrimination provisions which prescribe that public authorities must combat transphobia. This is the case of the Andalusian Law (Article 7). Similarly, the Basque Law (Article 5.1) obliges regional public administrations to design and implement proactive and wide-ranging policies to facilitate the support needed by Trans people, undertaking awareness-raising campaigns to combat the prejudices underlying gender identity related violence, as well as awareness-raising training programmes for all civil servants on issues surrounding non-discrimination on grounds of gender. There is also commitment to ensuring that the media are plural and non-discriminatory in terms of gender identity; to supporting the recognition of organisations and

groups which promote and protect the rights of transsexual people; to encouraging Basque universities to include and promote training, teaching and research on transsexuality; and to promoting greater social participation in the field of leisure and sports.

The labour market is a particularly fertile ground for discriminatory behaviour against Trans people. For this reason, most laws include explicit measures to combat discrimination in this area, as well as active policies to facilitate the employment of Trans people. Thus, the Cantabrian Law declares (Article 28) that the competent regional ministry must adopt a series of measures aimed at preventing and eliminating all forms of discrimination based on sexual orientation or sexual and gender identity in terms of access to employment, recruitment and working conditions. These include the development of anti-discriminatory codes of conduct and protocols for action in situations of harassment and discrimination and the adoption of active measures to promote access to employment, as well as grants or subsidies. Similarly, through the Labour Inspectorate, the Law of Catalonia requires real and effective guarantees concerning non-discrimination on grounds of sexual orientation, gender identity or gender expression, as well as active dissemination and awareness-raising to achieve equal opportunities and non-discrimination in the workplace (Article 20.1). Other laws, such as that of Galicia (Article 12.7), also contemplate the elaboration of equality and good practice protocols in the work environment in terms of non-discrimination on grounds of sexual orientation and gender identity.

Most regional laws also refer to healthcare, notably including the overall principle that health care must be guaranteed in accordance with gender self-identity. Some, such as the laws of Aragon or the Canary Islands, also specify that Trans peoples' rights must be taken into consideration on their admission to wards or centres when there are different facilities according to sex. In terms of the treatments offered by the regional public health systems, the various regional laws provide for the inclusion of the process of sexual reassignment and other related procedures in their range of services. Thus, for example, many Autonomous Communities include treatments aimed at modulating the tone and pitch of the voice "providing it is not for purely aesthetic or cosmetic reasons, but is clearly related to gender identity" (Article 10.7 Andalusian Law). Aragon (Article 13) offers similar services upon request, such as hormone treatment, genital surgery, breast augmentation and masculinisation of the chest as well as the necessary prosthetic material and treatments to modulate vocal tone and pitch. It also offers hormone blockers at the onset of puberty alongside complementary treatments, the implementation of which may not be conditional on prior reassignment surgery.

In addition, efforts have been made to remedy cases of discrimination, based on national legislation, in having access to assisted human reproduction techniques. Discrimination results from a Ministerial Order of 2014[18], which excluded single women and Trans people from access to public funding for this type of treatment. To address

[18] Order SSI/2065/2014, of 31 October, amending Annexes I, II and III of Royal Decree 1030/2006, of 15 September, which establishes the National Health System's range of common services and the procedure for updating them.

this issue, most Autonomous Communities guarantee access to assisted reproduction techniques to all persons with gestational capacity regardless of their sexual orientation and marital status (Article 12.2 Law of Aragon; Article 22.3 Law of the Balearic Islands; Article 21.3 Law of Cantabria, Article 16.k Law of Catalonia; Article 16.2 Law of the Valencian Community; Article 12.2 Law of Extremadura; Article 17.3 Law of Murcia). Fewer laws, such as the Law of the Canary Islands (Article 28.1.b), expressly mention both Trans and intersex persons with gestational capacity as being entitled to assisted reproduction treatments. In the case of people who decide to undergo hormone treatments there are also examples where the freezing of gonad tissue and reproductive cells for future recovery is offered before treatment begins (for example, Article 16 of the Law of Aragon).

Another issue ignored by national legislation, and addressed by most regional laws, is the situation of intersex people. These are defined as people who, at some level in their chromosomal, gonadal or sexual characteristics, present a sexual or reproductive anatomy which is different to those typically defined as male or female. Some Autonomous Communities openly ban conversion treatment unless it has been expressly requested. This is also the case in genital surgeries which are not based either on the decision of the person concerned or health reasons related to ensure biological functionality (Article 4.4 Law of Aragon, Article 4.3 Law of the Canary Islands; Article 23.c) Law of Cantabria; Article 11.2 Law of Extremadura). One of their aims is to eradicate genital modification surgery on newborn babies with ambiguous biological sex markers. Some laws go further and include specific provisions to address the reality of intersex people and non-binary identities. In this sense, the Law of Catalonia envisages the creation of specialized units for the study and care of people with intersex variations (Article 49). Others, such as the Laws of Murcia and Extremadura, cover the development of special protocols for the comprehensive care of Trans people. These are highly significant provisions in terms of the real and effective treatment which intersex people will receive, as well as being of symbolic importance (Articles 16 and 11, respectively). In this sense, they represent a step towards greater flexibility in order to accommodate people who traditionally neglected because they do not fit into the traditional binary categories.

Regional legislators have also tried to address the recognition of the rights of Trans minors. Whilst the national legislator has not yet incorporated *STC* 99/2019, regional laws contain specific provisions aimed at ensuring that minors can also gain access to the process of identity change and safeguarding all their rights. In this sense, for example, the Andalusian Law recognises in Article 19 "the right of transsexual minors to develop physically, mentally, morally, spiritually and socially in a healthy and comprehensive manner, in conditions of freedom and dignity", which would include "the determination and evolutionary development of their own gender identity and the right to freely use the name they have chosen". At the same time, it is envisaged that parents or legal guardians will collaborate with regional authorities, with the minor's explicit consent, always taking into account their suitability and cognitive capacity. The most complete example in this sense would be the Law of La Rioja, which dedicates a whole chapter to Trans minors (Part IV, Chapter I). It establishes, amongst other provisions, that "children and adolescents' right to gender self-identity and expression must be respected in all social

environments, whilst also receiving the necessary support and assistance when they are victims of discrimination or violence ". Here as in other areas, moreover, the various regional laws have tended to broaden and deepen the national provisions in the field of social protection. Thus, support and awareness-raising measures are envisaged in the areas of family, health, education, culture, sports, media, access to justice, etc. The objective is shared: the promotion of Trans people's rights and the eradication of discriminatory behaviour against them. There are, however, substantial regional differences in the degree of specificity and regulatory rigour, which leads to significant geographical differences in terms of the recognition of these rights.

Finally, most Autonomous Communities take a stance on one of the most divisive and controversial questions, both politically and theoretically, concerning the rights of Trans people, i.e., the role of self-determination. Apart from Galicia, the other 13 Autonomous Communities all recognise the right to gender self-determination and reject any medical requirement for the administrative recognition of gender self-identity beyond the declaration of intent by the person concerned.

The Andalusian Law specifically recognises the right to gender self-determination (Article 2), and expressly excludes that a person may be obliged to undergo treatment, medical procedure or psychological examination to exercise this right (Article 5). The Laws of Extremadura and Murcia are similar in intent, stipulating, in identical terms, that "no person may be obliged to undergo treatment, medical procedure or psychological examination that restricts their freedom of gender self-determination" (Articles 3.1.g in both laws). Similarly, the Law of the Community of Madrid provides that "in no case will a psychological or medical report be a requirement to prove gender identity" (Article 4.1). The Law of Cantabria also recognises the right to gender self-determination and, along similar lines, specifies that "no person may be required to undergo tests or examinations to determine their sexual orientation or sexual or gender identity, especially when this affects or may affect their access to employment, benefits, or the exercise, or enjoyment of any other right or opportunity, whether in the public or private sphere" (Article 4. 4). The Law of the Balearic Islands stipulates that "transsexual persons may avail themselves of the provisions of the law without the need for any diagnosis of gender dysphoria or medical treatment" (Article 22.4). Trans people are also exempt from any medical or psychological evaluation in order to access the rights contained in the Laws of Navarre and Valencia (Articles 41.4; 5.1.a), whilst the Aragonese Law expressly refers to the recognition of "self-determined gender identity" (Article 16). The Autonomous Community of La Rioja is the most recent region to legislate on equality, recognition of gender identity and expression and the rights of Trans persons and their families. Law 2/2022, of 23 February, sets out the right to self-determination of gender (Article 4) and explicitly rules out any requirement for medical diagnosis of any pathology or to undergo any kind of treatment: to "accredit gender identity it shall be sufficient for the person concerned or, where appropriate, their legal representative, to expressly state their identification as a woman, man or non-binary person, as well as registering the name which they wish to use if it does not coincide with that expressed in the official documentation on file" (Article 39.5.a).

Although the 2012 Basque Country Law failed to include the right to gender self-determination, this was amended in 2019, also specifying that Trans people could benefit

from the provisions of the law without the need for prior psychiatric or psychological diagnosis or report, or any medical treatment. The Law of Catalonia, whilst not specifying the concept of "gender self-determination", does expressly state that "a diagnosis of gender dysphoria or medical treatment" is not necessary (Article 23.4). Originally, the Canary Islands Law 8/2014, of 28 October, concerning non-discrimination on grounds of gender identity and recognition of the rights of Trans persons, did not consider gender self-determination as a right, and stated that to be considered transgender, a person required a report by a member of the college of professional psychologists confirming serious and persistent dissonance lasting at least 6 months between the morphological sex at birth and the self-perceived gender identity. However, this law has now been replaced by Law 2/2021, of 7 June, concerning social equality and non-discrimination on grounds of gender identity, gender expression and sexual characteristics, which does expressly recognise the full exercise of free self-determination of gender. Furthermore, this law prohibits any person from being encouraged, or in any way coerced, to undergo treatment, medical procedure or psychological examination that would restrict their freedom of self-determination and expression of gender identity or sexual characteristics, and expressly recognises that gender identity is an internal experience of the individual that cannot be defined by third parties and does not necessarily involve modification of appearance or bodily functions (Article 2.1).

The 2014 Law of Galicia is therefore the only existing regional law which still fails to recognise gender self-determination as a right. Unlike the previously discussed laws, neither does it specify that people are exempt from having to prove their transgender status with a medical report. It does contain anti-discrimination measures but these are aimed at the LGTBI collective as a whole, and it lacks explicit or well-developed provisions concerning the particular realities of Trans people. In contrast, the regional laws that do include the right to self-determination require that all public administrative bodies respect gender self-identity for all citizens. This includes the stipulation that, within the limits of their jurisdiction, regional public administration ensure that administrative documentation reflects self-perceived gender identity. The laws usually refer, generically, to administrative documentation being adequate to the sexual and emotional diversity of LGTBI persons, and to the heterogeneity of the family. Some, such as the Law of the Community of Madrid, state that access to public services and benefits must guarantee that transsexual, transgender and intersex persons can be named and treated in accordance with the gender with which they identify (Article 5.2). Others, such as the Law of the Balearic Islands (in Article 22.1.b), specifically refer to educational centres, establishing that, in the case of transgender persons their chosen name shall be used in administrative documentation for public display.

The most comprehensive provisions with regard to administrative documentation, however, are those contained in the laws that deal exclusively with the reality of Trans people. This is the case of the laws of Andalusia, the Canary Islands, Aragon and the Basque Country. Thus, the Law of the Canary Islands stipulates (Article 7.4):

> "In order to accredit gender identity, it will be sufficient for the interested party, or where appropriate, their legal representative, to expressly state their identification as a woman, man or non-binary person. The same applies to the name by which they identify themselves if it does not coincide with

> that expressed in the official documentation on file. The declaration of gender self-identity may be made either by means of a standardised written request, or online, making use of the legally established electronic signature systems, as well as by going in person to the corresponding registry office":

The Andalusian Law (Article 39.2) establishes that there will be a specific regulatory procedure for accreditation of identity, provided that certain criteria are met: that the documents provided for in the Law be issued free of charge, that they require no intermediary, and that they imply no obligation to provide or accredit any type of medical documentation.

The Basque Country Law (Article 7.2) legislates on the right to privacy of Trans persons, and the elimination from the files, databases and other documentation belonging to the Administration of any reference to the previous identification of the person or data which makes their transsexual reality known, with the exception of essential information in their confidential medical record. In a similar sense, the Law of Aragon (Article 7) states that the regional public administrations shall provide the necessary assistance to make the necessary changes in the files of private or state bodies.

To conclude, thirteen Autonomous Communities have made legal commitments to the institutional recognition of gender self-determination based on the will of the individuals concerned. Rubio Marín and Osella (2020) describe these models of identity recognition as elective gender regimes. They enable the reassignment of sex in administrative documentation based entirely on the recognition of the right to self-determination of sexual identity and the will of the individual. In contrast to this model of gender definition, Rubio and Osella also identify other approaches, which they define as heteroassignment. This corresponds to legislations which fail to consider the possibility of rectifying the sex assigned at birth, or where reassignment is legally covered, but is dependent on external evaluation or classification criteria (the confirmation of a diagnosis of gender dysphoria, undergoing hormone treatments and/or reassignment processes and surgeries, etc.). They use this classification to draw a comparative analysis of the legislation and case-law in force on the matter in different jurisdictions. They look specifically at Italy, India, Colombia and Belgium. Though each of these countries has a different approach to gender identity, however, it seems that issues of overlapping elective and heteroassignment gender regimes do not arise in them. In Spain however, this anomaly does exist. The heteroassignment approach provided for in National Law 3/2007 coexists with elective regimes in thirteen of the seventeen Autonomous Communities, i.e., in the majority of the country, thereby affecting the large bulk of the population.

This means that there may be discrepancies between the identity recognised in the administrative documentation issued by Autonomous Communities (think of regional health cards) and that issued by the State (think of the national identity card). In order to avoid complications resulting from these possible discrepancies, regional laws stipulate that individuals' legal rights and obligations will not be altered, and that the national identity card number will remain valid. Likewise, when an administrative procedure requires that data included in the national identity document be recorded, the name chosen for reasons of gender identity shall be recorded to prevent suffering or discrimination

(Articles 9.1 d) Law of Andalusia; 7.3 Law of the Canary Islands; 7.3.c) Law of Aragon). In this way, regional laws attempt to patch up a situation which is essentially unsatisfactory. The fact that a person can have their gender identity recognised by the autonomous public administration, but not by national institutions, represents a contradiction which can negatively impact the lives of Trans people.

Table 1: Autonomous Community laws concerning gender identity[19]

Autonomous Community	**Law**	**Year of Approval**	**Gender Self-Determination**	**Party ruling the Autonomous Community at the time of approval**
Andalusia	Regional Law 2/2014, 8 July: Comprehensive Law on non-discrimination on the basis of gender identity and on the recognition of the rights of transsexual people	2014	Yes	PSOE
Aragon	Regional Law 4/2018, 19 April, regulating gender identity and expression, social equality and non-discrimination	2018	Yes	PSOE
Canaries	Regional Law 2/2021, 7 June, on non-discrimination on the basis of gender identity, gender expressions and sexual features	2021	Yes	PSOE
Cantabria	Law of Cantabria 8/2020, 11 November, on the Guarantee of Rights of Lesbian, Gay, Trans, Transgender, Bisexual and Intersex Persons and Non-Discrimination on Grounds of Sexual Orientation and Gender Identity.	2020	Yes	PRC
Catalonia	Regional Law 11/2014, 10 October, to guarantee the rights of lesbian, gay, bisexual, transgender and intersex people and to eradicate homophobia, biphobia and transphobia.	2014	Yes	CiU
Community of Valencia	Law 23/2018, 29 November, on the equality of LGTBI persons.	2018	Yes	PSPV-PSOE
Extremadura	Regional Law 12/2015, 8 April, on social equality for lesbian, gay, bisexual, transsexual, transgender and intersex people, and on public policies of non-discrimination on the basis of sexual orientation and gender identity	2015	Yes	PP

[19] Source: Author's own elaboration.

Autonomous Community	Law	Year of Approval	Gender Self-Determination	Party ruling the Autonomous Community at the time of approval
Galicia	Regional Law 2/2014, 14 April, on the equal treatment and non-discrimination of lesbian, gay, transsexual, bisexual, and intersex people	2014	No	PP
Balearic Islands	Regional Law 8/2016, 30 May, to guarantee the rights of lesbian, gay, trans, bisexual and intersex people, and to eradicate LGTBI-phobia	2016	Yes	Podemos
La Rioja	Law 2/2022, 23 February, on equality, recognition of gender identity and expression and the rights of trans persons and their families in the Autonomous Community of La Rioja	2022	Yes	PSOE
Madrid	Regional law 2/2016, 29 March, on gender identity and expression, equal treatment and non-discrimination Regional Law 3/2016, 22 July, on comprehensive protection against LGTBIphobia and discrimination on the basis of sexual orientation and gender identity	2016	Yes	PP
Murcia	Regional Law 8/2016, 27 May, on social equality for lesbian, gay, bisexual, transsexual, transgender and intersex people, and on public policies of non-discrimination on the basis of sexual orientation and gender identity	2016	Yes	PP
Navarre	Regional law 8/2017, 19 June, on social equality for LGTBI+ people	2017	Yes	UPN
Basque Country	Law 14/2012, 28 June 2012 on non-discrimination on grounds of gender identity and recognition of the rights of transgender people.	2012	Yes	PSOE-EE

5. Conclusions

Despite the theoretical and institutional efforts made to deconstruct gender roles and question sexual determinism, the sex-gender system remains a key factor in the definition of peoples' role in society. The weight of these categories in the construction of individual identity leads to the marginalisation and suffering of those who do not fit within the narrow identity parameters of biological binary categories, presented as immutable. This is leading to increasing demands for the recognition of dissident sex-gender identities, based on self-determination. The possibility for people to self-identify as being of a gender other than the one assigned at birth seems to be gaining social acceptance in Spain. This has led to a relaxation of the legal criteria for sex-gender determination, as

established in national Law 3/2007. However, this Law suffers from several structural problems: (1) it pathologizes Trans identities and medicalises sex-gender reassignments; (2) it remains within the binary framework, leaving out identities beyond the traditional male and female; (3) minors and foreigners are excluded in absolute terms; (4) it does not address the reality of Trans people comprehensively.

Regional parliaments have tried to respond to these shortcomings within the scope of their jurisdictions. They have done so by means of laws that either focus specifically on Trans people or cover the LGTBI community in general, addressing the various situations in which their rights may be compromised for discriminatory reasons. In an effort to make up for the inadequacies of the national framework they pay special attention to areas such as education and health, but also underline the obligations of the public authorities to protect people with dissident sex-gender identities in all the different spheres of life. They also address the reality of intersex people and minors. Moreover, 13 of the 14 Autonomous Communities which have legislated on the matter (Galicia excepted) recognise the right to gender self-determination and exclude any medical requirement for the administrative recognition of gender identity, relying solely on the person's declaration of will.

These legislative advances towards a depathologising concept of sexual identity and gender expression are undoubtedly significant. Yet their limited scope and heterogeneity -some more precise and developed, others more general and presenting important omissions-, lead to an unequal situation regarding the recognition of Trans people's rights, depending on the territory. It is the downside of relying on a regional model for the recognition of rights. These disparities could be remedied with the introduction of more comprehensive national legislation based on self-determination. This could provide Trans people with both the administrative recognition and the necessary public resources required to overcome the situation of discrimination and social marginalisation from which they still sorely suffer.

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INTERSEX IN ITALY: AT THE SOURCE OF THE COMPLEXITY?*

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Abstract: Focusing on the Italian legal scenario, this paper examines medical practices that impose cosmetic surgeries on intersex children. Carried out with the aim of adjusting their genitalia to a perfect male or female body, these practices infringe upon the fundamental rights of the children subjected to them and demand new ways of protection. The paper explores the legal approaches that could be adopted to challenge them and to ensure the protection of children's rights.

Keywords: Intersex, Fundamental Rights, medical practices, parental consent, selective abortions.

Summary: 1. Introduction. 2. Intersex People in Italy. 2.1. Medical Practices and Protocols. 2.2. Sex assignment in the Italian legal scenario. 2.3. Parental decisions and the infringement of the best interests of the child: parental consent and selective abortions. 2.4. Language and recognition strategies. 3. Suggestions on How to Protect Intersex People. 4. Conclusion.

1. Introduction

This paper analyses the legal situation of intersex persons in Italy. It analyses in particular the practice of performing cosmetic surgeries on children, aimed at *normalising* their genitalia and bodies. The aim of these medical procedures is, as said, purely cosmetic: it is to alter the genitalia of intersex children so that their bodies can conform with a 'perfect' male or female body. This paper takes the perspective of the best interests of the child to analyse these procedures as they stand within the Italian legal framework.

The absence of a specific legal framework designed to protect intersex people renders them particularly vulnerable, leaving them in a state of social and legal frailty. In fact, intersexuality is not explicitly recognised as a ground of discrimination in the Italian legal system, nor does this offer specific tools of protection. This exclusion has deep theoretical roots. From a theoretical point of view, intersexuality challenges traditional notions of sex, gender and sexual orientation, something which Italian law has not welcomed so far.[1] The Italian legal system is rooted in a binary logic, which states that

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1. For instance, also in Italian legal feminist academia, the binary structure continues to be considered as strictly 'necessary'. Pitch (1998) significantly speaks of *Un diritto per due*, A right for two, which presumes the male/female gender dichotomy.

every person must be either a man or a woman, either female or male, and thus indirectly imposes early surgeries aimed at *normalising* the bodies which do not conform to these binary male/female standards. Intersex people are treated as *inferior*, as bodies to be corrected, at the most or as subjects of welfare, health, charity or public programmes.

Instead of this, the Constitutional principle of equality could and should guarantee intersex people their position as autonomous individuals with self-standing rights and freedoms. Doing so implies undermining the power structures which define a perfect body – i.e., a body that perfectly conforms to what is considered to be male or female–, which take it as a 'parameter' of what is 'normal' and define *other* bodies as 'not normal', assumed to be *inferior*. Overcoming the male-female dichotomy could subvert the oppression of intersex persons and, at the same time, recognise the intersex condition as a variance of human beings. This would lead to granting intersex persons rights and freedoms guaranteeing their autonomy, in particular the right to oppose medical practices which harm their genitalia.

In addressing the condition of intersex persons, this paper attempts to take a look into ways to overcome said harmful practises, in order to guarantee respect for human dignity.

2. Intersex People in Italy

In the Italian legal culture intersex children are considered *abnormal* and *different* because they do not fit within the binary male vs. female model. As a consequence, they are subject to *normalising* surgeries, aimed at making their bodies fit into the male/female dichotomy. Their bodies are considered to be in need of *repair*. As a result, intersex children are assumed to be *inferior* to children unambiguously born as male or female.

Despite the invasive medical procedures carried out in Italy to normalise intersex bodies, and despite the lack of a substantive legal framework protecting the rights of intersex people, academic debates on these issues are here very limited. The issues that intersex people face have only aroused academic interest in the last ten years,[2] during which scholars have organised and delivered seminars,[3]

[2] In 2006, an international medical conference on Intersex was held in Rome (Cola and Crocetti 2011).

[3] The Research Centre Politesse (Politics and Theories of Sexuality) of the Department of Philosophy, Education and Psychology, University of Verona organised many seminars between 2013 and 2015: "Intersex/dsd: biopolitics of gender, normalization and subjectivation" (literally, *Intersex/dsd: biopolitica del genere, patologizzazione, normalizzazione medica e processi di soggettivazione*), with Michela Balocchi and Beatrice Busi (9 October 2013) on the historical and sociological analysis of people with DSD/intersex conditions; "Male or female? Is sexual binarism a legal must?" (literally, *Maschio o Femmina? Il binarismo sessuale è davvero indispensabile al diritto?*), with Anna Lorenzetti, Alessandra Cordiano and Matteo Nicolini (6 December 2013) on the legal issues; "Intersex/DSD: medicalization and political subjectivation", (literally, *Intersex/dsd: medicalizzazione e soggettivazione politica*, with Elisa A.G. Arfini and Alessandro Comeni (14 February 2014) on critique of the abuse of intersexuality as a rhetorical device to explain the social construction of gender and on the intersex movement; "Intersex: International Developments" (5 May 2015) lecture of Morgan Carpenter (OIIL Australia).

conferences,[4] academic articles in a variety of disciplines,[5] as anthropology (Crocetti 2010, 2013), sociology (Balocchi 2012, 2015, 2019), philosophy (Bernini 2010, 2015; Busi 2005, 2009, 2012) and law (Osella 2016; Lorenzetti 2013b; 2015; 2019). However, legal and empirical studies concerned with the normalising surgeries performed on children and the effects they have on them are still underdeveloped in Italy. The lack of further and deeper academic and public debates contributes to feed the strong legal barriers faced by intersex children, who remain confined to cultural and social invisibility.

2.1. Medical practices and protocols

In order to fully grasp the complexity of intersex issues, it is important to analyse Italian procedures and medical protocols for *normalising* surgeries. Invasive cosmetic surgeries on intersex children are still performed in many Italian hospitals. For example, female infants born with a clitoris that is considered to be 'too large' often receive clitoral reduction surgery.[6] Similar interventions are performed on children born with a penis which appears atypical or smaller 'than the norm'. In general, surgeries on intersex children are performed following heteronormative rules:[7] the protocols used in Italy require that children to be raised as males should be able to engage in heterosexual activity as adults (by penetrating a female's vagina). Following the surgery, male (XY) children with functional testicles often see their ability to reproduce destroyed, a preferred option to having a penis that is considered smaller than the norm. For females, on the other hand, emphasis is placed on maintaining their reproductive capacity.

Early surgery is based on the assumption, not supported by evidence (Greenberg 2012: 21; Chase 1997; Diamond, Glenn Beh, 2006: 103; Diamond, Garland 2014: 2-7; Diamond, Sigmundson 1997; Dreger et al. 2005: 729-733), that irreparable emotional and psychological trauma will derive from the child's growing up with atypical genitalia. Another reason encouraging surgery is the idea that *abnormal* bodies need to be *repaired*

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4. The first conference on Intersexuality was held in Florence on 24 September 2010 with the title "Intersexuality in the Italian Society" (literally, *L'Intersessualità nella Società Italiana*; in 2013 (16 November); in Bologna there was a conference on the "Medicalisation of gender body: intersexuality and DSD" (literally, "*Medicalizzazione del corpo di genere: Intersessualità e DSD*"); recently, in 2015 (1011 April) in Perugia, there was the first legal conference on the Intersex Issues (the title was "Intersexualism and the Law: equality, rights, protections", literally, *Intersessualismo e diritto: uguaglianza, diritti, tutele*) organised by the Association Avvocatura per i Diritti LGBTI – Rete Lenford.

5. See Conference proceedings of the national seminar on "Intersexuality in the Italian Society" (literally, *L'Intersessualità nella Società Italiana*) (Balocchi 2015).

6. Doctors would remove the clitoris or reduce it to a size that they considered acceptable, even though the surgery might diminish or destroy the person's ability to engage in satisfactory sex.

7. Similarly, this happens in others countries (Greenberg 2012; Sytsma 2006). In fact, according to Greenberg (2012: 5), "Although most intersex conditions are not disabling, pose no physical risk and require no medical intervention, infants with an intersex condition are often subjected to invasive cosmetic surgeries to alter their genitalia so that their bodies conform to a binary sex norm".

and the only appropriate tool to achieve this is surgery.[8] A further motivation for *normalising* the child's body is to ease the psychological discomfort of parents and to enhance their ability to bond with their child. Because intersex children are considered *atypical* and in some way *abnormal*, their condition is hidden from society and their birth is shrouded in shame and secrecy. Parents are often not correctly informed and when some information is provided they are often advised not to tell their children of their intersex condition or medical history (Streuli et all 2013; Greenberg 2012; Sytsma 2006).

Although health is recognised as a fundamental right in Italy,[9] there are medical procedures which attempt to eliminate evidence of intersexuality by surgically altering infants, so that they conform or blend into a medically created definition of 'normal' genitalia. This creates a double paradox. First, the medical and surgical therapy does not resolve the *problem*, because the person remains intersex for the rest of their life. In fact, only the body and the external genitalia can be modified, but this does not (and will never) change the intersexual condition, which cannot be totally eliminated (think for instance of chromosomes). Secondly, according to some studies, the person's health gets worse after the therapy (Greenberg 2012: 18). In fact, surgical interventions cause more physical and psychological trauma to intersex persons than letting them grow up with atypical genitalia. Also, surgery may lead (and usually leads) to irreversible harm on the bodies which are physically violated.

The studies carried out on intersex people who have been subjected to early surgeries recognise not only the stigma and the psychological trauma, but also lifelong physical complications, without proof of any benefit to the child. Indeed, these medical procedures often lead to a significant number of problems: they may result in infections, scarring, genital pain or discomfort, incontinence, and other severe physical complications; they also may render women incapable of experiencing an orgasm.

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8. Recently, see an Information brochure on CAH, *Congenital Adrenal Hyperplasia*, (*I.S.C., Opuscolo informativo*) ellaborated by an Association of parents and supported by one of the most important Italian Private Hospitals (San Raffaele Hospital, Milan, Lombardy Region); many Italian famous medicine societies supported it: Italian Society of Pediatrics (SIP), Italian Society of Preventive and Sociale Pediatrics (SIPPS), Italian Society of Pediatrics, Endocrinology and Diabetology (SIEDP); Italian Society of Adolescence Medicine (SIMA). It stresses that medical therapy is not enough to correct external genitalia anomalies. Therefore, it is necessary to undergo surgery in order to reduce the clitoris and to correct the aspect of the vagina. It also stresses that, generally, surgery should be performed in the first year, to avoid that the child could be disturbed by confusing genitalia. It also refers to the eventual "revision" of surgery during puberty: thus, it implicitly admits that there are additional surgeries to be performed. The goal of the early surgery (or, rather, surgeries) is twofold, on the one hand to correct the anatomic alteration (cosmetic aspect) and on the other to allow for normal sexual intercourse (functional aspect); p. 16.

9. In the Italian Constitution, see article 32. In the EU context, access to health and social services is considered as a fundamental right and a key element of the so-called European social model and of the national Welfare State model, as it is explicitly stated in several Member State constitutions and incorporated into the European Union Charter of Fundamental Rights (article 35). We should also consider the United Nations Convention on the Rights of the Child.

Medical procedures performed on intersex children may also cause cosmetically unacceptable genitalia that create a sense of rejection in the person (Greenberg 2012; Sytsma 2006). Finally, additional surgeries are often required for several years after birth in order to allow the genitals to conform to the body's natural growth, and the person is forced to live a *pathologised life*. In fact, for the rest of their lives intersex persons receive medical checks (or operations) and take hormones that are no longer naturally produced after the operations, because of the ablation of glands and gonads. In addition, persons who take hormones suffer changes of behaviour and temper, and psychological stress (Greenberg 2012: 18).

Although there is a legislative proposal which suggests that surgeries should only be performed when strictly necessary to save the life of the child, or when there is an actual risk to the child's physical health,[10] Italian law does not yet offer a comprehensive framework to protect intersex persons. Recently, a soft law instrument was introduced. The National Committee for the Bioethical issues approved the G*uidelines for the treatment of child affected by the Disturb of Sex Difference*.[11] These include a moratorium for operations which are not urgent and the need to respect the integrity of the child's body.

Case law is limited too. The most famous case on this matter involved a child whose parents argued that medically unnecessary cosmetic genital surgeries should be delayed until the child would reach puberty. Considering the best interests of the child, the court named a guardian (in Italian, a *curatore speciale*) in order to decide which types of cosmetic genital surgeries could be performed. The idea of the court was that the best interests of the child pointed to genital surgery, while the parents' approach was considered unlawful.[12]

An important barrier for intersex people's access to justice is linked to the procedures surrounding these surgeries. Medical services often do not keep records of surgeries performed on intersex individuals and on their long-term effects. Records about early surgeries cannot be found because in the past they were simply not kept; when records started to be kept, they have not been made available. Therefore, intersex people who have had surgeries do not have access to their medical records, which makes it difficult and very expensive to start lawsuits. All these elements represent significant barriers for intersex persons pursuing justice, and place them in a subordinate position compared to male/female persons.

[10.] A.C. 246; A.S. 392; A.S. 405, proposal for amendment of law n. 164 of 1982 on sex reassignment, presented in the XVII legislature (*Norme in materia di modificazione dell'attribuzione di sesso*, "Provisions on change of sex assignment"). It requires the moratorium of surgeries, except in the cases where it is strictly necessary to save a child's life.

[11.] National Committee of Bioethics (Comitato nazionale per la Bioetica, *I disturbi della differenziazione sessuale*), *The Disturbs of Sex Differentiation*, opinion of 25.2.2010. Available at: *http://www.governo.it/bioetica/pareri.html.* [Accessed: 1 February 2022]. See Osella 2016.

[12.] Trib. min. Potenza, 29.7.1993, in *Riv. it. med. leg.*, 1996, 299, and in *Dir. fam. e pers.*, 1993, 1199.

2.2. Sex assignment in the Italian legal scenario

The way in which sex is assigned in Italy raises particular concern because the procedure contributes to placing intersex persons in a position of subordination compared to male/female persons. In Italy, a medical attendant establishes the new-born's sex at birth according to the external genitalia and records it on the birth certificate, which is then included in the civil registry. In general, when a child is born with a penis with the prescribed size then the child is registered as male. When children are born without a normative penis then they are registered as female and no other biological factor is generally verified and considered. The use of a sex marker other than binary male/female genital indicators is not allowed;[13] according to the Italian legal system, the child must be assigned to a male or female sex[14] also in the case of ambiguous genitalia; and the name must clearly correspond to the assigned sex.[15] In fact, in Italy there are male or female names, generally recognisable by the final letter.[16]

Linked to this issue is whether intersex people may amend their birth certificate in order to reflect their change of sex. There are no specific rules allowing people with an intersex condition to amend the sex designation on the official registers. The only way open to intersex people is to rely on the norms that rule transsexuality. Yet these regulate a long, confusing, complicated and uncertain process,[17] paved by a significant number of intermediate steps (Lorenzetti 2013a; Cardaci 2018), which entails important procedural and economic barriers.

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13. However, in some Hospitals, the form to be filled in considers two sexes (male or female), but includes three possibilities to describe sexual characteristics and genitals (male; female; ambiguous).

14. See the Regulation governing the registration of civil status events: Decree of the President of the Republic, no. 396 of 3 November 2000 "Regulation to revise and simplify the civil status registration system, in accordance with Article 2(12) of Law n. 127 of 15 May 1997". Available at: http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2000-11-03;396!=vig. [Accessed: 1 February 2022]. The registrar records (Article 28 of D.P.R n. 396/2000) any declaration of birth received by the registrar who draws up a formal document known as *atto di nascita* (birth certificate). In fact, D.P.R. no. 396 of 3 November 2000 (article 30) asks the declaration of the sex (article 29).

15. According to article 35, no. 396 of 3 November 2000, a child's forename must correspond to their sex.

16. For instance, for female names, the presumption is the finale 'a'; male names usually end in 'o'. Some exception can be stressed, for example, for foreign names or for some names that can be used both for males and for females (Èlia, which is a female name; or Elìa, which is a male name; Andrea, which can be only used as a male name, except in the case of foreign children, where it can be used for a female). Both male and female names can also end in 'e' or even with a consonant.

17. Transgender people may change sex according to the national law. Italy introduced regulation on sex reassignment surgery and recognition of gender reassignment in identity documents in 1982 (Law 164 of 1982 which states Provisions on sex assignment). This was amended in 2011 (with the legislative decree no. 150 of 2011) hence going against the declared goal of simplifying the procedure. Now the procedure to change sex is longer and more expensive, since it asks for a double judicial procedure. Law 164/82 does not expressly require a complete body change on primary sex characteristics and sterilisation as necessary conditions for gender reassignment. In fact, the law provides that surgery must be authorised when [so, if] necessary (article 3, former law 164/1982, now, article 31, Legislative decree 150/2011). However, cases-law shows the opposite. Court of Appeal Bologna, 22.2.2013; Tribunal of Rome, 8.7.2014, n. 34.525; Tribunal of Vercelli, 12.12.2014, n. 159; Tribunal Catanzaro, 30.4.2014. *Contra* see Tribunal of Rovereto, 3.5.2013 and the recent Court of Cassation no. 15138/2015. The decisions are available at: www.articolo29.it. [Accessed: 1 February 2022]. Before granting an official new name and sex change, judges often require that the person who asks for gender reassignment should be permanently sterilised even when the transgender person is not will to do so. There is a pending question before the Constitutional Court (Tribunal Trento, ordinance 19.8.2014).

2.3. Parental decisions and the infringement of the best interests of the child: parental consent and selective abortions

A significant barrier intersex people encounter in accessing justice regards parental decisions over the intersex child's body, in particular regarding parental consent and selected abortions.

The consent of both parents is required to perform surgeries on an intersex child. In order to avoid inappropriate decisions, parents should be provided with complete information about their child's condition and offered appropriate professional counselling and support. Although a minority of parents (try to) decline or postpone surgery on their children with atypical genitalia, the practice shows that most parents still consent to it. When they do, the intersex child is left in a position in which they are not allowed to refuse this harmful practice, and which closes the door to any future judicial actions against the hospital and the doctors who performed it. The intersex person who looks for redress needs to rely on the parents who gave the informed consent to the surgeries, which entails the risk of weakening familial ties and encountering further emotional and psychological barriers.

The question is whether parents, in consultation with doctors, should have the legal power to consent to genital modification surgery on behalf of their children. Another question is whether parental consent is adequate to protect the child's best interests. The law presumes that parents will correctly weigh the potential benefits and risks of medical procedures and make decisions that are in the best interests of their children. However, complete deference to parental decisions may infringe upon a child's best interests. In fact, parents may not be in the best position to determine what treatment would be in their child's best interests because it can be difficult for them to separate their child's interests from their own interest in having a *perfect* child, a child with a *perfect* body. In addition, parents might be influenced by social norms and stereotypes which state the *necessity* to normalise the appearance of the body, because a life with an intersex condition is not considered worth living. Surgeries are performed even if parents were not given a chance to consent to every surgical procedure; moreover, doctors could perform surgeries at the risk of permanent damage or without a real medical necessity, based on parental consent.

A related concern can be raised with regard to parental decisions about selective abortions, following the prenatal diagnosis that discovers the intersex conditions of the foetus. Although such prenatal tests are in some cases used to identify conditions that may be treated in utero, often they lead to the decision to abort foetuses[18] that carry mutations associated with intersexuality syndromes.[19] Activists stress that selective abortions could be considered a dangerous step toward eugenics, because their primary effect is to select the *perfect* foetus and to avoid intersex children. Selective abortions will reduce the

18. In Italy, abortion is allowed by the Law 194/1978 in cases of danger for the mother's physical and mental health.

19. This is the opinion of the National Committee of Bioethics. Available at: *http://www.governo.it/bioetica/pareri.html* [Accessed: 1 February 2022].

number of intersex people and their visibility and presence in the society.[20] This is also highly problematic because the visibility of intersexual persons is crucial for overcoming a legacy of prejudice and social marginalisation.[21]

The fact that prenatal diagnosis is followed by selective abortion is highly problematic and driven by misinformation. In fact, medical professionals suggest that abortion in cases of 'foetal deformity' is due to the view that life with an intersex condition is not worth living. The woman who must take prenatal treatment and who decides to undergo an abortion could be mentally and emotionally vulnerable and could be influenced by social norms and stereotypes which state the importance of having a *perfect* child, with a *perfect* body, and may believe that a life with an intersex condition is indeed not 'worth living'.

All the above medical practices confirm the unequal position of intersex children, their placement within a hypothetical hierarchy where the parameter is the male/female body and where intersex children are considered an exception, all of which infringes upon the full respect due to their rights and freedoms (Tamar-Mattis 2006: 59-110).

The need to challenge medical models that approach intersexuality as a pathology[22] should thus be stressed and intersexuality should be recognised as a normal variance of human beings. The most urgent goal is the elimination of harmful practices based on sex and gender stereotypes, eliminating or decreasing the number of medically unnecessary cosmetic genital surgeries being performed on intersex children. To this end, enhancing the right to self-determination is a primary aim.[23]

2.4. Language and recognition strategies

A focus on the language used to define intersex persons is important; otherwise, we risk using words and expressions which many of them find offensive or feel as distorting of their identity. Indeed, language mirrors and is evidence of the subordinate position of intersex persons; thus, changing the way that language is used could represent a first step towards a more respectful approach to intersex people's rights.

Some people in the Italian intersex community point to the need to abandon the expression "Disorder of Sex Development" (also referred to as DSD) and encourage the use of the term 'intersex'. This position reflects the rejection of the medicalisation implied in the expression DSD; in addition, the term 'disorder' is considered inappropriate and

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20. This is the position of Alessandro Comeni (Collettivo Intersexioni), as expressed in his speech during the Final Conference on "LGBTI persons and Access to Justice", held in Bergamo on 22-23 May 2015.
21. If fewer people with intersex conditions are born, and if it is easier to prevent them from being born, the social commitment to treatment and the protection against medical treatments may be weakened.
22. See the Organization Intersex International (OII Intersex Network. Available at: *http://oiiinternational.com*) and the Intersex Society of North America (ISNA), *www.isna.org.* [Accessed: 1 February 2022].
23. See the web site of the Collettivo Intersexioni, *www.intersexioni.it.* [Accessed: 1 February 2022].

pejorative, and 'intersex' persons do not want to be labelled under it (Balocchi 2015; Arfini and Crocetti 2015). Some of the people who support the move away from the expression of DSD also oppose the term intersex and suggest that we embrace instead the acronym "dsd", referring to "differences or divergences in sex development*"* (in Italian, *differenze e divergenze nello sviluppo sessuale*), and written in small case in order to differentiate it from DSD, which means Disorders or Disturbances of Sex Development (in Italian, *Disordini o Disturbi dello Sviluppo Sessuale*) and which is written in capital letters (Greenberg 2006, pp. 93; Balocchi 2015; Arfini and Crocetti 2015).

To define their condition, intersex activists prefer the word intersexuality (in Italian, *intersessualità*) because it describes the intersex as a form of identity and culture (Balocchi, 2015), or directly the English expression 'intersex' or *intersesso*. They refuse to use the expression 'intersexualism' (in Italian, *intersessualismo*), as this is considered borrowed from the transgender movement, which introduced and uses the term transsexualism (in Italian, *transessualismo*). Controversies around the way Italian language is used show the risk of using words and expressions which many intersex persons find offensive, and of the importance of referring to this condition correctly, in terms which do not add to the discomfort of intersex people.[24]

It is also important to consider the preferences of intersex people with regards to actions and strategies to be undertaken to advance their legal situation. In this respect, it has been suggested that the legal arguments used by organisations fighting for sex and gender equality be adopted. In fact, gender stereotypes, which are the basis of gender discrimination, can also be considered as the reason for performing early surgeries on intersex children (Greenberg 2012). Thus, the re-definition of gender hierarchies could help to overcome the subordination of intersex people as compared with persons who perfectly match male and female characters.

However, in the opinion of the author of this paper, relying upon gender equality discourses creates the risk of missing the focus on the trauma and stigma that early genital surgeries cause, and hinder the primary goal of ending medical practices that surgically alter infants and harm intersex bodies. The goal of ending early surgeries differs from the cultural and social reasons which contribute to gender inequalities and must be treated separately, primarily as a health issue.

Some other activists believe that altering current medical protocols for the treatment of infants with an intersex condition could be better advanced by focusing on issues emphasised by disability rights advocates. In fact, the focus on the right to self-determination, autonomy and bodily integrity could be a more effective tool to protect people with an intersex condition (Sytsma 2006). There is a stigma, however, in being considered as disabled, *abnormal* and in need of help and assistance.

[24.] The distorting effect of language is not unique to intersex people. It concerns all the so called 'minority rights' debates and gender issues.

Another way to re-think the hierarchy which places the intersex in an unequal position could be to follow the legal frameworks used by other social justice movements. From a practical perspective, however, this seems a dead-end in Italy, where social justice movements are not so rooted and strong. From a theoretical perspective, the true question is whether and how the intersex movement can form alliances with other social movements and use similar legal strategies. This seems to be difficult, given that intersex activists believe that the primary goal of the movement should be to end the medical practices that cause irreparable physical harm and psychological trauma.[25]

3. Suggestions on How to Protect Intersex People

Turning now to the analysis of the different legal ways to protect the intersex from harmful medical treatments and surgeries, many options seem to be open. There is the path of legal reform, including the empowerment of the role of the Regions, and the implementation of positive actions and good practices. Other ways include the protection of the intersex condition through the recognition of intersex children as disabled persons, or as a human rights problem (Domurat Dreger 2006: 73-86; Schneider 2015). Lastly, a further significant route could be attempting a consistent enforcement of the constitutional right to equality.

In order to eliminate medical practices of early surgeries, a first option is to introduce legal reforms providing a complete moratorium on surgeries, except in the case of life-saving treatments. A recent example of this approach is the law introduced in Malta which declares it unlawful for medical practitioners or other professionals to conduct any sex assignment treatment and/or surgical interventions on the sex characteristics of a minor, when such treatment and/or intervention can be deferred until the treated person can give their informed consent. The same law also provides that the sex assignment treatment and/or surgical intervention shall be conducted if the child gives informed consent through the person who exercises parental authority or the tutor of the minor. In exceptional circumstances, treatment may be performed once agreement is reached between an interdisciplinary team and the persons who exercise parental authority or their tutor who is still unable to provide consent. The law also provides that medical interventions driven by social factors without the consent of the minor must be considered in violation of the law.[26]

Another approach is to recognise intersex as a third sex category.[27] Recently, some countries such as Germany and Australia have introduced this solution. However, this possibility hides the stigma of being considered as different and as 'other' from the M (male) or F (female).[28] In fact, the difference makes the intersex persons be seen as *inferior* comparing to those who are assumed to be the *parameter*, the *norm*.

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25. A final and central question to be understood is whether the intersex movement could really be considered as an identity movement compared to other identity movements.
26. Malta approved the "Gender Identity, Gender Expression and Sex Characteristics Act" (Malta 2015).
27. This is the way followed in Germany and Australia.
28. If fact, you are neither male or female, you are *other*.

Generally speaking, the introduction of a legal moratorium of early surgeries guarantees a protection against the harmful practices and interrupts the oppression of the intersex person compared to male or female persons. Although this legal reform could be considered the highway to protect intersex persons, it depends upon Parliamentary approval. The actual political scenario in Italy shows that a legal reform protecting the rights of intersex persons is difficult to achieve.

In the effort to overcome the vulnerability of intersex people, the potential role to be played by regional administrations also needs to be considered. Generally speaking, the State is competent in the "determination of the basic standards of welfare related to those civil and social rights that must be guaranteed in the entire national territory" (article 117). However, Regions have residual legislative power in all matters that are not expressly covered by State legislation and they are also expressly empowered to contrast gender discrimination by article 117 (para. 7) of the Italian Constitution. In particular, Regions hold some legislative power regarding health.[29] Following the example of specific legal statutes aimed at ending discrimination based on sexual orientation and gender identity,[30] Regions have at their disposal a variety of instruments that can be adopted with the aim of enhancing the rights of intersex persons. These instruments include approving regional laws protecting the intersex from discrimination, developing Health Guide Lines (for instance, through Regulation acts) in order to impose the moratorium of surgeries, and introducing medical training and protocols (D'Ippoliti and Schuster 2011; Gusmano and Lorenzetti 2014).

However, we have to bear in mind that using this margin of manoeuvre could lead (and usually leads) to deep differences among Regions, depending among other factors on the political orientation of each regional government.[31] This could translate into different treatments for the intersex condition across the country. In addition, the Regions might not come to redress the hierarchy implicit in the comparison between the 'norm', i.e., the person who is male or female, and the intersex person. Thus, the intersex would continue to be considered as 'different' and 'other', thus as *subordinated*; all of which calls for stronger protection under equality and dignity principle.

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29. This is the so called 'concurring legislation' applied to health protection. Since 2001, a significant reform of Title V of the Constitution has introduced a new division of legislative powers among the State and the Regions. The State holds exclusive legislative powers in specified matters, while other matters are covered in so called 'concurrent legislation' – Regions hold legislative power except in the case of certain fundamental principles which are reserved for state law in many significant matters (for instance, health protection). Thus, the power balance between the State and the Regions in such matters remains somewhat unclear.

30. For instance, in 2004 the Region of Tuscany first enacted a regional law prohibiting discrimination on the grounds of sexual orientation and gender identity in regard to employment, education, public services and housing (Law issued by the Region of Tuscany, on 15.11.2004, NBo. 63, Rules against discrimination on the grounds of sexual orientation and gender identity). Other regions such as Marche, Liguria and Emilia-Romagna have taken similar steps by recently enacting specific laws concerning protection from discrimination based on sexual orientation and gender identity (Marche Regional Law, 11.2.2010, n. 8; Liguria Regional Law 10.11.2009, n. 52).

In addition, a considerable number of regional statutes have been modified during the last five years, so that they expressly refer to sexual orientation and gender identity.

31. In general, we may stress that antidiscrimination law seems to be an arena for regional political debates.

The national and regional legislative *vacuum* suggests the need to verify the possibility of introducing positive actions and promotional measures. Positive actions could lead, for example, to the establishment of information services, following the example of the first (and only) intersex info point opened in Florence. A further positive action measure could be the introduction of training for health and social professionals who have a fundamental role in filling the information gap. In fact, limited and inaccurate information is considered to be one of the first causes for surgery on intersex children and correct information could also lead to reduction of selected abortions following prenatal testing results. In a legislative *vacuum,* the role of positive actions and promotional measures could guarantee bodily integrity and reduce early surgeries provoked by misinformation.

Other strategies are needed in order to undermine the hierarchy which defines a 'perfect body', a body that 'perfectly conforms' to what is considered male or female, a *normal* body, the *parameter* from which to define the 'other', assumed to be *inferior*. One option –which has not yet been taken into account– consists in extending the Italian legal framework[32] on disability to intersex persons. If bodies that fail to conform to the sex binary system are perceived as nonconforming, disabled, and in need of repair, or if they are considered as abnormal, they should also have the right to access the protection granted by disability law. This recognition could effectively advance the rights of people with an intersex condition.

However, as was mentioned above, intersex activists generally refuse this approach, because it reinforces the stereotype of the intersex condition as an 'abnormality'. In fact, it does not guarantee the overcoming of the hierarchical relation between the 'norm' (male or female person) and the 'exception' (intersex persons), but in some way reinforces it with a paternalistic approach. It sends the message that the intersex needs to be protected, not in order to safeguard their rights and freedom, but because they are weak and not included in the norm.

Another way to ensure protection for intersex people could be through human rights standards. In general, international protocols and practices raise strong barriers to the violation of intersex children's human rights, which are first listed in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations in November 1989. For instance, if the best interest of the child is the primary consideration, surely medically unnecessary cosmetic genital surgeries should not be performed; at least they should be delayed until the child is old enough to make the decision, which is usually after puberty. Also the General Comment No. 13 of the UN Committee on children's right to freedom from all forms of violence stresses the importance of combating unnecessary and unjustified surgeries on intersex babies. In the same direction, the Resolution of the Parliamentary Assembly of the Council of Europe[33] and the position of the Fundamental rights agency (FRA 2015)[34] emphasise the importance of respecting bodily integrity for intersex children, hence of stopping early surgeries.

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32. In Italy, the disabled are protected at the workplace (law no. 67 of 2006; legislative decree no. 216 of 2003), at school and in many other fields (law 104 of 1992).

33. See Article II of the Resolution 1952 (2013) of the Parliamentary Assembly of the Council of Europe, which calls for respect of the physical integrity of children, including "early childhood medical interventions in the case of intersex children".

34. This document stresses the connection among articles 1 (Human dignity), 3 (Right to integrity of the person), 7 (Respect for private and family life), 9 (Right to marry and right to found a family), 21 (Non-discrimination), 24 (The rights of the child) of the EU Charter of Fundamental Rights.

Although International law tools could create strong boundaries to surgeries on children, in practice, however, these are mostly soft law instruments, with no direct effect on individuals. In addition, they do not focus on the personal condition and the lives of intersex people who face cosmetic surgeries, for whom the need to stop them stands as an immediate problem.

Moving to European sources, the EU anti-discrimination perspective does not include the intersex condition, which comes to show its deficiencies in granting protection to individuals. The main difficulty is that European Community law was (and EU law in part still is) characterised by the economic goal of avoiding social dumping (Bell 2002; Ellis 2005). Only in recent times, with the Charter of Nice (2000) and the Lisbon Treaty (which came into force in 2009), has the European legal framework started to consider the social dimension of equality as a general principle, and also to incorporate the concept of individual dignity.[35]

Theoretically, also the Italian Constitution calls for strong protection of intersex people through their fundamental rights. In fact, it grants the right to equal treatment to all citizens, who shall be able to enjoy the same rights irrespective of any personal condition.[36] Its article 2 specifically grants protection to all individuals. The duty to promote equality, based on social rights, and the protection against discrimination as a fundamental concern of the Italian Republic (article 3) should cover intersex people. Although the Constitution does not expressly mention the intersex condition, this must be considered as included in the 'personal condition' mentioned by article 3 among the forbidden grounds for discrimination, which is interpreted as an "open formula" (Cerri 1994). In addition, the notion of sex in article 3 can be interpreted in extensive terms, as including persons who are not biologically male or female.[37]

Furthermore, the second section of article 3 of the Italian Constitution states: "It is the duty of the Republic to remove those economic and social obstacles which, limiting in fact the freedom and equality among citizens, hinder the full development of any human person and the integration of all workers in the political, economic, and social organization of the country" (i.e., the so called "principle of substantive equality"). Based on it, it should be the duty of the Republic to stop unnecessary surgeries, as they prevent the full respect of the body and personality of intersex persons.

Another relevant provision is the recognition of health as a fundamental right in article 32 of the Italian Constitution. Considering that early surgeries have a strong impact on the person's physical and psychological well-being, the constitutional protection of

35. In fact, the jurisprudential attitude of the European Court of Justice had already severely affected the legislator's work, forging new notions of discrimination (such as the notion of indirect discrimination) and moreover steering the interpretation of the original rule in article 119 of the Treaty towards social meaning.
36. Article 3 states that all citizens "have equal social status and are equal before the law, without distinction of sex, race, language, religion, political opinion, and personal or social conditions" (the so called principle of formal equality).
37. The interpretation follows the direct link between sex as a biological feature, gender as its social construction and sexual orientation as the expression of an individual's sexual preferences (Pollicino 2005; Pezzini 2012).

health could play a key role. Lastly, the Constitution also imposes upon the Italian state the duty to implement international law that protects the intersex condition and that considers the best interest of the child (article 117, para. 1).

The Italian constitutional framework thus calls for the protection for intersexuality and for the full recognition of the intersex' rights and freedoms. However, as the actual situation and the medical practices of early surgeries show, thus far it has been an ineffective tool, which prompts the need for other ways of protection. Thus, the implementation of the theoretical framework for protecting intersexuality should consider the multifaceted character of constitutional equality in order to guarantee the protection of intersex people.

In view of all this, it may be interesting to contemplate the intersex condition, in connection with the analysis of the equality principle, not only from an anti-discrimination perspective but also on the grounds of diversity (Niccolai 2007; Ruggiu 2009, 2010, 2012). Such perspective could be referred to as the gendered "dilemma of difference" (Morondo Taramundi 2004), as social rights which widen the range of what is considered as 'the norm' and 'normal'. An interpretation of equality as inclusive of diversity could allow for protective measures, which could reduce or remove the negative impact of protecting minorities (through their protection as 'particularly vulnerable individuals') and at the same time limit patterns of social exclusion. It could also legitimise specific treatment designed according to individuals' specific situation and promotional measures that recognise their specificity (as is the case with measures which emphasise the recognition of identity), founded on a multidimensional view of society (measures which emphasise specificity) (Gianformaggio 1997, 2005). However, the protection of diversity proves to be a frail strategy, because it stigmatises whatever, or whoever, is considered as 'different' and 'other' from the *norm*. We therefore need a different interpretation of the theoretical framework of equality, one which could guarantee the full enjoyment of rights and freedoms for intersex children.

The interpretation of equality from the antisubordination perspective stands here as a promising alternative. This new perspective could overcome the limits that burden other ways of protecting intersex persons, by focusing, not on difference, but on hierarchies, thus altering the symbolic horizon which regards the person (male or female) defined as the norm (the standard, the parameter) as superior, and the exceptions (intersex persons) as inferior.

This change in perspective allows us to go beyond anti-discrimination policies, a sphere where gender hierarchies are expressed and performed.[38] It also allows us to go beyond the protection of diversity, which risks to stigmatise what (or who) is considered as the exception to the norm (Pezzini 2012). The antisubordination principle allows us to confront the gender binary system, which defines what it is to be a man or a woman and at

[38] In fact, the anti-discrimination perspective confirms and legitimates a comparative process which identifies the masculine as the universal benchmark and stigmatises the feminine as different, 'other' and implicitly *inferior* (Pezzini 2009; Barrère Unzueta 2004).

the same time requires and prescribes that every person be either the one or the other. The revision of the gender binary system could help in considering intersexuality as a normal human variance, not only an exception to the 'normal' male/female dichotomy.

4. Conclusion

In addressing the legal condition of intersex children, this paper has analysed the Italian scenario, in particular the medical practices and protocols on intersex children which allow the practice of surgeries on them; it then looked into the Italian academic debate, the situation of the Intersex movement and analysed the Italian legal framework, including suggestions on how to improve it.

Regarding the barriers that intersex people face, we must first mention the organisational barriers that lie at the roots of their institutional and social invisibility, and of the weakness of the Italian intersex movement, which has failed to promote judicial cases. One such barrier is that the procedure for sex reassignment according to sexual dichotomy and based on the legal tools available for trans people (Law no. 164 of 1982) is long, confusing and uncertain (Cardaci 2018). In addition, there is scarce legal and medical evidence of the surgeries. Medical services are rarely transparent about the statistics of operations performed on intersex individuals and on their long-term effects. Moreover, medical records are not available even to the intersex persons who were subjected to the treatments.

Procedural barriers bring economic barriers, as judicial proceedings in Italy are long and rather expensive. There are also emotional and psychological barriers, as the intersex person who hopes to access justice needs to address his/her parents in order to gain their (informed) consent for the surgeries. In these cases, the judicial way could involve the risk of weakening family ties and compromising the person's emotional and psychological well-being.

Given this scenario, this study has attempted to suggest ways to prevent harmful practices on intersex children. Many ways seem feasible: a legal reform, following the recent Maltese law; the action of Regions; the possibility of positive actions and good practices; the protection through disability law or through the recognition of human rights; the enhancement of the Italian constitutional framework and the recognition of an antidiscrimination principle and the protection of difference. Finally, a new reading of the equality principle based on anti-subordination discourse seems best suited to guarantee rights to intersex people in a way that undermines the power structures that conceptualise them as the *others* and *inferior*, because they do not conform to the binary male/female dichotomy (Pezzini 2012).

Wrapping up, we may draw some general conclusions.

A number of changes to current practices must be encouraged and a more cautious approach should be introduced in order to avoid or postpone surgical intervention. Only the concerned children should have the power to decide whether they want to undergo surgery, when they reach an age at which they are can appropriately assess the risks and

benefits. This includes an assessment of the risks of psychological harm, which should be recognised as more detrimental than the purely physical risks of surgery. In general, cosmetic genital surgeries should not be performed on children until they are able to meaningfully participate in the decision-making process.

Some of the suggested solutions – implementation of good practices, actions taken by the Regions – lay bare the limits of relying on the legislators' discretion, who in turn might remain silent and thus leave intersex people in a state of frailty (social as well as legal). To balance this out, this paper proposes that we approach the protection of intersex persons from within a theoretical standpoint that regards equality as anti-subordination. The implementation of equality through anti-subordination discourses could remove the many barriers and stigmas that intersex people face in their path to justice. It could help to overcome the limits of the solutions that have been suggested here and ensure full respect for their rights and freedoms. It could lead to an unquestioning consideration of intersexed bodies as a normal variance of human being.

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THE STANDARDS OF PROTECTION OF TRANS PEOPLE ELABORATED BY THE COURT OF STRASBOURG AND THEIR INCORPORATION IN THE RECENT SPANISH LEGISLATIVE PROPOSAL*

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Abstract: This article has two main purposes. On the one hand, it aims to systematise the progress made by the European Court of Human Rights (ECtHR) in the creation of common standards for the protection of trans people, in particular regarding rectification of one's registered sex. On the other, it intends to verify to what extent said standards have been incorporated into the Draft Bill on LGBTI rights currently under discussion in Spain. To this end, it will analyse the Draft Bill from the standpoint of the case-law developed by the ECtHR on the matter. It will also make some critical reflections on this case-law from the standpoint of the rights it is set to protect.

Keywords: European Court of Human Rights, privacy, self-determination, sex-gender identity, Spanish legislation.

Summary: 1. Introduction. 2. The "Common Standards" Developed by the ECtHR on the Right to Rectify One's Legal Sex. 2.1. The first twenty-five years of case-law on the subject. 2.2. Subsequent case-law. 2.3. The most recent ruling to date (2021) and a first systematisation of the common rules developed by the ECtHR. 3. The Incorporation of the Common Rules Elaborated by the ECtHR in the Legislation of Member States. 3.1. The spanish case: the current situation and the draft of the "trans law". 3.2. A look at the main critical aspects of the spanish "trans law". 4. Final Considerations. Bibliography.

1. Introduction

The different forms of discrimination directed at LGBTIQ+ persons have been addressed by a substantial number of international and supranational measures, both legally binding and not. These include the Yogyakarta principles (Principles on the application of international human rights law in relation to sexual orientation and gender identity 2006[1]) or the decision of the World Health Organization (WHO) from 2018 to eliminate gender dysphoria from the list of mental illnesses or disorders.[2] Although different in source and

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1. Available at: https://yogyakartaprinciples.org/principles-en/ [Accessed: 30 November 2021]. On the significance of this document, see Peribáñez Blasco 2018; among the authors against it, see Marsal 2011.

2. The list of the ICD-11 (International Classification of Diseases, 11th revision) is available at: https://icd.who.int/en [Accessed: 30 November 2021]. See Borraz 2018 and De Benito 2018 on this topic; on the preceding debate, see Belluck 2016.

scope, both these documents point to the same purpose: granting LGBTIQ+ persons equal dignity with all others, ending the inequalities and discriminations affecting them, hence ensuring that they can enjoy their rights to the same extent as people with normative sex-gender identities.

International instruments, however, have proven largely insufficient to bring us closer to this aim, particularly as they often consist of *soft-law* measures. Recent news reaching us from Member States of the Council of Europe, such as Russia, Poland, Hungary,[3] or Italy,[4] most of which are also EU members, testify to an impulse in the opposite direction, one marked by discrimination and stigmatisation. In view of this, it is becoming increasingly necessary to go beyond non-binding principles and provide basic international guidelines and standards for the protection of LGBTIQ+ persons, that is, to establish common mandatory standards for States. In this regard, the different actors in the international community have a fundamental role to play.

This article will focus specifically on the European Court of Human Rights (hereinafter ECtHR, or Strasbourg Court) and the standards of protection it has developed for the rights of trans persons based on the European Convention on Human Rights (hereinafter ECHR). Decisions of the ECtHR influence legislation in the Member States of the Council of Europe, in particular where the State in question has been found in violation of a right recognised in the ECHR.[5] The introduction of minimum common standards for the protection of the rights of trans persons by the ECtHR is thus often a crucial step on the road towards their effective protection at the national level.

The aim of this article is twofold. First, it purports to examine the case-law developed by the ECtHR on this issue, most notably in the face of the refusal by national public authorities to allow for the rectification of trans persons' legal sex marker.[6] As we will see, the response of the Strasbourg Court to these cases has gradually evolved in the direction of greater recognition of the right to sex-gender identity. The aim here is to analyse this evolution and the common minimum standards of protection for trans persons' rights in the ECtHR's case-law as they currently stand.

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3. The situation has become so obvious and extreme that the European Union has had to intervene; see Pellicer 2021.

4. Recently (27 October 2021) the Italian Senate overthrew the so-called "Disegno di legge Zan", which aimed to add sex, gender, sexual orientation and identity, as well as disability, to race, ethnicity, nationality and religion as suspicious grounds for discrimination. The contents of the reform are available at: https://www.repubblica.it/politica/2021/10/27/news/legge_zan_storia_del_disegno_legge_iter_parlamentare_polemiche-323935250/ [Accessed: 30 November 2021]; on the recent vote in the Italian Senate, see Casadio 2021.

5. Consider, among others, the decision of the ECtHR in the Rumasa case (*Ruiz Mateos v. Spain*, 23 June 1993) and the subsequent reform of the *Ley Orgánica del Tribunal Constitucional* of 2007; or the approval of the Italian law on civil unions for same-sex couples after the decision of the ECtHR on *Oliari et al. v. Italy* (21 July 2015). About them see, respectively, Chueca Sancho 1994; Viggiani 2016.

6. Other cases decided by the ECtHR refer, for example, to trans persons' access to marriage under certain conditions; see Lorenzetti 2016.

Complaints against the refusal of a Member State to rectify an applicant's legal sex, to adapt it to their (trans) sex-gender identity, involve the alleged violation of the right to respect for private life as recognised in Article 8 of the ECHR. As we will see, there has been an interesting evolution in the Strasbourg Court's approach to this right when dealing with trans persons' sex-gender identity. This regards both the content of the right and the progressive reduction of States' margin of appreciation, an issue closely intertwined with the estimated existence, or not, of a "European consensus" on a controversial and sensitive issue. Casting a critical look onto the ECtHR's common minimum standards of protection for trans persons' rights above Member States' margin of appreciation is one of the main purposes of this article.[7]

Second, the aim is also to verify the incorporation of said common minimum standards in Spain. This is part of a wider line of research that intends to explore the incorporation of the ECtHR's standards of protection of trans persons' rights in the Member States of the Council of Europe, notably through legislation. Indeed, the case-law of the ECtHR makes little sense if we do not verify the effective weight it is given at the national level as a motor for change. Spain and the Draft Bill on LGTBI rights currently under discussion here will be the focus of the second part of this article.

2. The "Common Standards" Developed by the ECtHR on the Right to Rectify One's Legal Sex

Most of the cases trans persons have brought before the ECtHR have to do with requests for rectification of their sex marker, at it appears in the civil registries of a Member State. They concern a kind of original moment, a fundamental issue without which a trans person cannot even begin to fully enjoy their rights.[8] The ECtHR case-law has fluctuated between granting Member States a (more or less wide) margin of appreciation on the issue, based on the lack of European consensus around it, and the establishment of certain basic protection criteria. Gradually, "case by case",[9] the ECtHR has modified the way it addresses the protection of trans persons in this field. The move has been towards widening and strengthening these criteria, as we shall now see.

2.1. The first two decades of case-law on the subject

This phase covers the period that expands between the first case that came to the Court regarding the protection of the rights of transsexual persons, *Van Oosterwijck v. Belgium* (6 November 1980), and the *Christin Goodwin* affair (2002), which as we shall see represented a turning point in the protection of trans persons by the ECtHR.

Between 1980 and 1992, the ECtHR did not protect trans people's rights. The two most important and notorious cases during this period are *Rees v. UK* (17 October 1986) and *Cossey v. UK* (27 September 1990). Both concerned the denial of authorization to

7. Romboli 2020.
8. For a more complete review of the ECtHR case-law on the matter, see Romboli, 2021. See also Trucco 2003.
9. Álvarez Rodríguez 2019: 55.

modify the indication of sex in thei applicants' birth certificates, which according to them amounted to the violation of Articles 3 (prohibition of torture), 8 (right to private and family life) and 12 (right to marry) of the ECHR. In both of them, the ECtHR referred to the fact that Member States shared no common and uniform criteria in such a sensitive matter; therefore, it ruled, States maintained a wide margin of appreciation to strike a balance between the public and the individual interests at stake.

The case of *B. v. France* (25 March 1992) brought about a first step forward, which however remained isolated for a time. The case also concerned a country's denial, this time France, to allow the applicant, Ms. B., a transsexual woman, to rectify her legal sexual identity in the civil registry. This time the ECtHR reduced the State's margin of appreciation and stated that France's refusal to grant the applicant the desired change of name was not based on a legitimate interest and entailed a violation of Article 8 of the ECHR. This decision is relevant not only because of the ECtHR's actual ruling, but also because it reveals a significant change in sensitivity in its approach to the matter at hand, specifically as it refers to the suffering and humiliation endured by trans people whose identity does not find legal recognition. However, in *Sheffield and Horsham v. UK* (30 July 1998), its next decision on this matter, the ECtHR went back to its previous doctrine and made statements that reveal the little consideration non-normative sex-gender identities were granted at that time.

The real change arrived in 2002 with *Christine Goodwin v. United Kingdom* (11 July 2002). Although similar to previous cases, here the ECtHR considered that the time had come to overrule its previous case-law on this matter. Its most important statements in this regard can be summarized as follows:

1. The lack of legal recognition of sex reassignment through surgery affects the private life of transsexual people and can entail a serious violation of the right to enjoy it, as recognised in Article 8 of the ECHR.
2. The protection of trans persons is linked to the need to protect the dignity and freedom of individuals, both of which stand at "the very essence of the Convention", all the more so since Article 8 of the ECHR covers the notion of personal autonomy and protects individuals' personal sphere, including the right to define their own identity as human beings.
3. There is no denying a continued trend, not only towards greater social acceptance of trans people, but also towards legal recognition of the identity of operated transsexuals.
4. In the 21st century, trans people's full enjoyment of their rights can no longer be considered a legally controversial issue, which legal systems can be given some time to accommodate; the ECtHR specifically mentions the rights to free personal development and to physical and moral integrity (§ 90).

The ECtHR concluded that sexual identity fell within the scope of the right to private life as recognised in Article 8 of the ECHR. As such, its protection had to be weighed against that of other interests, such as public order, public interest and legal certainty in areas such as access to records, family law, filiation, inheritance, social security

or insurance. However, the Strasbourg Court noted, the conflicts that may arise in these areas "*are far from insuperable*"; rather "*society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost*" (§ 91).

Thus, for the first time, the ECtHR modified the balance between the public and private interests involved in a transsexual's claim for legal sex reassignment, recognised the prevalence of Mrs. Goodwin's rights and stated that the United Kingdom had violated Article 8 ECHR. The national margin of appreciation to protect national interests gave way, therefore, to the need to protect the dignity, the free development of the personality and the right to sexual identity of the claimant, all of this in consideration of the evolution of social awareness and medical and psychological knowledge related to transsexuality. This doctrine was consolidated in *Van Kück v. Germany* (12 June 2003). It is important to underline, in any case, that both this and the 2002 ruling refer to transsexuals who have already undergone surgery. We will return to this later.

2.2. Subsequent case-law

The following stage in the ECtHR's case-law on the matter, expanding from the first decade of the 21st century to date, meant the intensification of the protection of the trans persons. With (nearly) every decision it made, the ECtHR took another small step forward. It is therefore interesting to single out the relevant decisions and the significant advances that they have brought along.

a) In *L. v. Lithuania* (11 September 2007) the ECtHR paid greater attention to the situation of "*distressing uncertainty*" in which trans people find themselves in terms of developing their private lives and having their true identity recognised. This includes people who, as the plaintiff in this case, have had no access to sex reassignment surgery, but want to have it.
b) *Hämäläinen v. Finland* (16 July 2014) marked another significant moment in the evolution of the case-law of the ECtHR on the matter, at least for two reasons. First, this decision allowed the ECtHR to clarify its criteria regarding the scope of States' margin of appreciation when trans identities are at stake. One of the factors it mentions as relevant stands out here: that margin is limited in cases where a particularly important aspect of an individual's existence or identity is at stake. Second, more attention is paid to the protection of physical integrity in sex reassignment procedures. Indeed, although the ECtHR did not rule against Finland, it did start paving the way towards new standards of protection for trans people that have subsequently been consolidated. Among them is the ban on imposing surgical sex reassignment as a requirement for rectifying one's registered sex, which was imposed in 2015, as we shall now see.
c) In *Y.Y. v. Turkey* (10 March 2015) the ECtHR ruled for the first time on the requirements that can be imposed for the rectification of legal sex markers. It examined the criteria established in the different Member States of the Council of Europe. These included sterilisation, prior hormonal treatment, a so-called

"real life experience" test, a diagnosis of gender dysphoria, a period of psychotherapy, evidence of social integration and/or a waiting or observation period. The novelty lies in that the ECtHR analysed whether these conditions respected Article 8 of the ECHR (§§ 61-62). In this respect, it noted that the number of Member States where trans people were no longer required to undergo reassignment surgery, sterilization or hormone reassignment therapy was gradually growing, although the States that do impose at least one of the conditions listed above remained the majority (§§ 42-43). It also mentioned recent resolutions and recommendations at the supranational level pointing in the same direction, such as the Resolution of the Parliamentary Assembly of the Council of Europe 1728 (2010), on discrimination on the basis of sexual orientation and gender identity adopted on 29 April 2010, §§ 29-34. All this led the ECtHR to rule that demanding prior sterilisation amounted to an interference with the plaintiff's rights to physical integrity and private life which was neither necessary in a democratic society nor sufficiently justified, hence that Turkey had violated Mr. Y.Y.'s right to respect for private life, as recognised in Article 8 ECHR.

d) The case of *A.P., Garçon and Nicot v. France* (6 April 2017) meant another step forward in the protection of the physical integrity of transsexual persons and the corresponding restriction of the States' margin of appreciation in the matter. The State (France) made the rectification of the registry indication of sex dependent upon the person's undergoing prior surgical or medical treatment leading to irreversible sterilisation. The ECtHR affirmed that *"[t]he right to respect for private life under Article 8 of the Convention applies fully to gender identity, as a component of personal identity*" (§ 95); this included trans people who have not undergone, and do not wish to undergo, sex reassignment treatment.

When analysing States' margin of appreciation to require sterility as a condition for rectifying a person's legal sex, the ECtHR affirmed that the international community had not reached consensus on that particular. However, that margin of appreciation had to be considered especially "limited" or "restricted" in these cases, for two main reasons. First, because they affect an essential aspect of people's identity, as well as their physical integrity, and the right to gender identity and personal development is a fundamental aspect of the right to respect for private life (§ 123). Second, because the legislation of many Member States and the statements of many European and international institutions were already moving towards the elimination of the sterilisation requirement (§ 124). Some States still demand sterilisation, however (§ 126). In this respect the ECHR did not hesitate to state emphatically that "*[m]edical treatments and operations of this kind affect an individual's physical integrity, which is protected by Article 3 of the Convention […] and by Article 8*" (§ 127), since they negatively impact the physical and mental well-being of those who undergo it, as well as their emotional, spiritual and family life (§ 128). Consent to it, moreover, cannot be considered freely granted when withholding it prevents the person from exercising their right to gender identity and free personal development.

e) In subsequent cases, the ECtHR seemed to put on hold the doctrine developed of the *A.P., Garçon and Nicot v. France.* case, although it continued to take steps toward building standards for the protection of the rights of the transsexual group. In *S.V. v. Italy* (11 October 2018), the ECtHR added procedural "speediness" as a necessary demand for the protection of trans persons. It considered it no longer enough for States to ensure individuals may request a rectification of registered sex; in order not to violate the ECHR, they must also ensure that procedures do not leave individuals in a prolonged state of suffering. Likewise, in *X. v. Former Yugoslav Republic of Macedonia* (17 January 2019), the Strasbourg Court ruled against the State because "*the current legal framework in the respondent State does not provide «quick, transparent and accessible procedures» for changing on birth certificates the registered sex of transgender people*" (§ 70).

Both cases offered the ECtHR the chance to reaffirm and expand the arguments developed in *A.P.*, *Garçon and Nicot v. France* against the imposition of medical treatments as requirements for the rectification of registered sex. Doing so would have helped to consolidate a minimum essential standard for the protection of the rights of transsexual people; it had almost become a duty, considering the WHO's 2018 decision to eliminate gender dysphoria from its list of diseases. The Strasbourg Court, however, preferred to ignore this controversial issue and considered the ECHR violated on other grounds. It thus was, as usual, very cautious when imposing protection standards to the detriment of the State's margin of appreciation in an area in which the international community had not (and still has not) reached a consensus.

This attitude led to undesirable results in the case *Y.T. v. Bulgaria* (9 July 2020). The case concerned a transsexual man, Mr. Y.T., born with female biological features, who had identified as a man since adolescence. After voluntarily undergoing some sex-reassignment operations (a complete mastectomy, among others), he received an unjustified refusal to have his legal sex rectified in the civil status registry. The ECtHR concluded that the applicant's right to physical integrity had not been violated, because Mr. Y.T. voluntarily and freely made the decision to undergo the surgical reassignment his country requires for legal gender reassignment (§ 68), a circumstance that differentiates this case from the 2017 *A.P., Garçon and Nicot* case. The ECtHR ignored, however, that Y.T.'s decision came after several years of seeing national authorities deny his request. It cannot be said to have been made freely.[10]

2.3. The most recent ruling to date (2021) and a first systematisation of the common rules developed by the ECtHR

The ECtHR has reaffirmed the doctrine established in *A.P., Garçon and Nicot v. France* in its most recent decision on the matter, *X. and Y. v. Romania* (19 January 2021). In this case, the plaintiffs refused to undergo surgery to have their gender legally reassigned. The ECtHR ruled that the Romanian requirement that they do so violated their physical

[10.] Romboli 2021.

integrity (§§ 160-161). The absence of a clear and predictable procedure in Romania that would allow the rectification of registered sex in a fast, transparent and accessible way; the refusal of national authorities to recognise the applicants' gender identity in the absence of reassignment surgery; the evolution of Member States' legislation on the matter; it all spoke, according to the ECtHR, of a violation of Article 8 ECHR, as well as of the rupture of the fair balance that the State must maintain between the general interest and the interests of the applicants (§§ 166-168).

This decision raises some questions. First, the Strasbourg Court differentiated the situation of the plaintiffs in this case from that of plaintiffs in the cases decided between 2018 and 2020, based on whether or not they had expressed their desire to undergo reassignment surgery. Yet, after the WHO struck gender dysphoria out of the list of diseases in 2018, the attention of the ECtHR should focus on verifying whether Member States continue to treat trans identities as pathologies and to impose medical treatments contrary to trans persons' physical and moral integrity, their dignity and the free development of their personality. The ECtHR, in particular, neglected to elaborate on how, where certain medical treatments are still required, consent to them could be vitiated. In accordance with its role in establishing minimum common protection criteria, the ECtHR should focus on the need to promote the elimination of any obstacle States place in the way of exercising the right to self-determination in the realm of sexual identity. After all, as the Strasbourg Court has made clear, States have a limited margin of appreciation in this field and must also promote positive actions that allow transgender people to feel safe during the legal sex change procedure, seeing to it that these procedures are as fast, transparent and accessible as possible in order to avoid unnecessary suffering.

Second, in relation to the above but more generally, since 2017 and in particular in this 2021 decision, the ECtHR appears to have refrained from spelling out and imposing the minimum standards Member States may require when authorising a rectification of registered sex. These must point towards eliminating any pathologising requirement and moving away from the stigmatization of this group, towards affirming respect for private life, dignity and self-determination.

In light of all of the above, the contributions of the ECtHR regarding the protection of the transgender group in the face of the request to change the registered sex can be summarised in the following essential points, the basis of common rules for the Member States:

1. The right to one's sexual identity, as expressed through a rectification of registered sex and/or access to surgical or hormonal sex reassignment, is included within the scope of protection of Article 8 of the ECHR.
2. States' margin of appreciation to restrict access to rectification of registered sex is limited, despite the fact that a consensus on the matter has not yet been achieved among Member States.
3. The imposition of certain requirements to authorise the rectification of registered sex may be in violation of the right to physical and moral integrity, in particular when they imply medical or psychological treatments which the person does not want to follow (Article 3 ECHR).

3. The Incorporation of the Common Rules Elaborated by the ECtHR in the Legislation of Member States

Once the common standards elaborated by the ECtHR regarding the protection of the trans persons have been teased out, the next challenge is to ascertain to what extent they are effectively respected and implemented by Member States.[11] According to available data, eight European countries currently allow the so-called "free self-determination of gender" from the age of 18 (Belgium, Denmark, France, Greece, Ireland, Luxembourg, Malta and Portugal), while further two allow it from the age of 16 (the Netherlands and Norway).[12] On the other hand, countries such as Hungary (a Member State of the Council of Europe since 1990 and of the European Union since 2004[13]) or Slovakia (a Member State of the Council of Europe since 1993 and of the European Union since 2004), among others, maintain the requirement of mandatory sterilisation to obtain legal recognition of gender reassignment.[14]

In August 2020 the European Commission released a study that classifies countries into five groups, according to the requirements they impose, and their degree of obstruction they introduce, for rectifying a person's official (registered) sex-gender marker.[15] In a first group are the States that allow for rectifications, but have no specific legislation ruling it; the decision, therefore, is subject to the discretion of the decision-making body, which imposes requirements in a discretionary manner. A second group is made up of States that impose "intrusive" medical requirements for the modification of registered sex-gender markers, among which are sterilisation, hormonal therapy or a diagnosis of 'gender dysphoria'. Countries in a third group impose a mental health diagnosis, opinions of medical experts and/or testimonies that support sex-gender reassignment. In the fourth group we find countries that impose no medical intervention or diagnosis on applicant, but oblige them to comply with some requirement prior to the reassignment procedure (a judicial authorization or ratification, for example, or divorce). The last group is made up of States that recognise the right to gender self-determination, thus allowing for a person's sex-gender marker to be rectified based on the autonomous declaration of their will to do so.[16] Let us now turn to Spain, in order to analyse to which of these groups it belongs.

3.1. The Spanish case: the current situation and the Draft of the "Trans Law"

In 2007, Law 3/2007, of 15 March, on Gender identity,[17] was passed in Spain. According to this Law, which modified some articles of the Civil Registry Law from 8 June 1957, and which is still in force today, Spanish nationals above the legal age may request the rectification of their sex as mentioned in the civil registry (article 1.1). The Spanish

11. See Lorenzetti 2017; Rubio-Marín & Osella 2020.
12. Álvarez, Ayuso, Abril 2021.
13. Take, for example, the news broadcast on 2020, v. Arancibia, 2020.
14. ILGA Europe, 2021 Annual Review: 15. Available at https://www.ilga-europe.org/sites/default/files/2021/full_annual_review.pdf [Accessed: 30 November 2021].
15. https://op.europa.eu/es/publication-detail/-/publication/7341d588-ddd8-11ea-adf7-01aa75ed71a1 [Accessed: 30 November 2021].
16. Omedes 2021.
17. *Ley 3/2007, de 15 de marzo, reguladora de la rectificación registral de la mención relativa al sexo de las personas*.

Constitutional Court declared article 1.1 unconstitutional in as far as it excluded minors in unqualified terms, without any regard to their maturity and to the stability of their situation of transsexuality (Judgment 99/2019, 18 July).[18] Said registry modification would also entail the change of the person's name, so that it is not discordant with the registered sex (article 1.2).

This Law brought about an improvement in the legal protection of trans people. As its Explanatory Statements make clear, it aims to "*guarantee the free development of the personality and dignity of the people whose gender identity does not correspond to the sex with which they were initially registered*". Yet it sought to do so by finding a compromise between the rights of trans persons and the need to protect legal security and the general interests, as they were perceived to be at the time. In line with this, the Law only allows "duly accredited" trans persons to rectify their registered sex, bearing in mind that, at a time of its passing, the "trans condition" (gender dysphoria) was still classified as a disease by the WHO. According to article 4 of the Law, applicants for a rectification of their legal sex must meet two requirements: first, they must have been diagnosed with gender dysphoria, through a medical or clinical psychological report (which must contains very precise specifications[19]); second, they must have been medically treated for at least two years to accommodate their physical characteristics to those corresponding to the sex claimed, a circumstance that must also be proven through a medical report. Excluded from this requirement are those persons who have undergone medical treatment for sexual reassignment surgery, or who certify that they cannot follow the medical treatments described above for reasons of health or age.

It seems evident that these requirements do not comply with the current minimum standards of protection elaborated in the case-law of the ECtHR. Since 2007 this points to the depathologisation of trans persons and to States' obligation to articulate a legal system that comprehensively protects their dignity and free development, as well as their right to physical integrity and respect for private life. Legal systems that allow for rectification of legal sex only after verifying the presence of a medical diagnosis and prolonged medical interventions affecting the applicant's body violate these principles and rights. Aware of this, the Spanish Government has undertaken a long (and so tortuous[20]) path towards adjusting Spanish legislation to current European standards. On 29 June 2021, the Council of Ministers approved the Draft Bill for the real and effective equality of trans people and for the guarantee of the rights of LGTBI people (*Anteproyecto de Ley para la igualdad real y efectiva de las personas trans y para la garantía de los derechos de las personas LGTBI*[21]), known as the preliminary project of "Trans Law".

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[18] Among the authors, in particular, see Bustos Moreno 2020; Salazar Benítez 2019.

[19] Paragraph 1 of article 1 specifies: "*The accreditation of compliance with this requirement will be carried out by means of a report from a doctor or clinical psychologist, registered in Spain or whose degree has been recognized or approved in Spain, which must refer to: 1. The existence of dissonance between the morphological sex or physiological gender initially registered and the gender identity felt by the applicant or psychosocial sex, as well as the stability and persistence of this dissonance. 2. The absence of personality disorders that could have a decisive influence on the existence of the dissonance outlined in the previous point*".

[20] This paper will not approach the social and political debates that accompanied this journey. On this topic, see Ruth Mestre's contributions to this issue.

[21] Available at: https://www.igualdad.gob.es/servicios/participacion/audienciapublica/Documents/APL%20Igualdad%20Trans%20+LGTBI%20v4.pdf [Accessed: 30 November 2021].

The Draft has two different, though related, parts:[22] a first and general part includes measures for promoting the effective equality of LGBTI people in areas such as labour, education, health or sports (Title I) and also for the effective protection and compensation against discrimination and violence based on LGTBI grounds (Title III)[23]; a second part focuses on promoting the real and effective equality of trans people in particular (Title II), including the regulation of a new procedure for the rectification of legal sex (articles 37-44). This second part takes significant steps forward in the direction of adapting the Spanish legal system to the most recent case-law of the ECtHR in the matter.

Among the new elements introduced by the Draft Bill is the right of any Spanish person to request the rectification of their legal sex as it stands in the Civil Registry (article 37), without the need to present a medical or psychological report, thus adapting Spanish legislation to international standards that protect the right to self-determination in this field. Likewise, the Draft Bill prohibits that the rectification of registered sex be made dependent on the previous modification of the appearance or bodily function of the person through medical, surgical or other procedures, thus effectively protecting the right to physical integrity of the persons.[24]

The Draft also responds to the recent indications of the Spanish Constitutional Court in its Judgment 99/2019 cited above. To this end, it opens the right to rectify one's legal sex to minors over sixteen years of age (article 37.1). Minors between fourteen and sixteen years of age may also submit an application by themselves, albeit with the assistance of their legal representatives. In case of "*disagreement between the parents or legal representative, between themselves or with the minor, a judicial defender will be appointed in accordance with the provisions of article 300 of the Civil Code*" (article 37.2). In this way, the Draft Bill seeks to protect trans minors whose family situation is not supportive of their gender self-determination. Minors between the ages of twelve and fourteen must obtain judicial approval for the modification of their registered sex (seventh Final Provision, which modifies Law 15/2015, of 2 July, on Voluntary Jurisdiction). In all these cases, the *best interests of the child* must be the leading consideration at all times (article 38.4).[25]

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22. This "merger" resulted from the need to find an agreement between the parties in the current Spanish Government and was open to numerous criticisms from LGBTIQ+ activists. See for example, Álvarez 2021; see also https://www.publico.es/sociedad/ley-trans-igualdad-acepta-fusionar-leyes-trans-lgtbi-llegar-acuerdo-psoe.html [Accessed: 30 November 2021].

23. The Draft Bill also includes a brief Title IV dedicated to "Infractions and sanctions", as well as additional, transitory provisions, and an abrogation provision.

24. Art. 37.4: "*The exercise of the right to rectify the registry indication of sex in no case may be conditioned to the prior presentation of a medical or psychological report regarding the disagreement with the sex mentioned in the birth certificate, or to the prior modification of the appearance or bodily function of the person through medical, surgical or other procedures*".

25. The best interest of the child has for years been recognised, both nationally and internationally, as a guiding principle of unavoidable compliance in all procedures that have to do with minors; see Pizarro Moreno & Rivero Hernández 2020; Romboli 2019.

The text also allows people with disabilities to request the rectification of their registered sex with the support measures that may be required (article 37.3). It also mentions foreigners, notably foreigners without legal residence in Spain and stateless persons (article 44).[26] To be sure, article 68 establishes that "*Public Administrations, within the scope of their powers, will guarantee foreign LGTBI persons who are in Spain, regardless of their administrative situation, the ownership and exercise of the right to equal treatment and non-discrimination by reason of the causes established in this Law in the same conditions as nationals, in the terms set forth in this law*". Yet the Draft excludes all foreign legal residents in Spain, refugees and asylum seekers from the possibility of exercising the right to rectifying their legal sex-gender markers[27].

With regards to procedure, if on the one hand the Draft Bill eliminates all medical and psychological requirements, on the other it introduces a different structured procedure to articulate the necessary balance between the right to self-determination and the protection of national interests and legal certainty mentioned in all ECtHR decisions. According to article 38, the applicant must appear before the person in charge of the Civil Registry Office of their choice. They must fill in a form stating their disagreement with the sex mentioned in their birth certificate and request a rectification (article 38.2). The person in charge of the Civil Registry must provide relevant information, including the legal consequences of the intended rectification, the reversion regime, the measures of protection against discrimination, the existing associations and other organizations for the protection of rights in this area, etc. (article 38.3). Upon receiving this information, the applicant may sign a first request for rectification of their registered sex as mentioned in their birth certificate (article 38.5). Within a maximum period of three months, the competent administration will summon the applicant to appear again and ratify their request, thus asserting the persistence of their decision (article 38.6). Once all relevant documents have been verified, and within a maximum period of one month from the date of the second appearance, the person in charge of the Civil Registry will issue the requested rectification (section 7).[28]

3.2. A look at the main critical aspects of the Spanish "Trans Law"

The "Trans Law" Draft has been heavily criticised from different corners. The harshest and most insistent criticisms have come from some feminist sectors and the world of sports, both on the basis that gender self-determination opens the door to abuses and to nullification and frustration of many of the achievements long fought-for in the field of

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[26] Article 44: "*Public Administration must, within the scope of their its powers, enable procedures through which foreign persons without legal residence in Spain who prove the legal or de facto impossibility of rectifying their registered sex, and their name where appropriate, in their country of origin, as well as stateless persons, may rectify their registered sex and name in the documents issued to them*, *provided they meet the legitimacy requirements provided for in this law, except that of being in possession of Spanish nationality".*

[27] In this regard, see Sánchez & Borraz 2021; see also https://kifkif.info/kifkif-reclama-la-inclusion-de-las-personas-trans-migrantes-refugiadas-y-solicitantes-de-asilo-en-la-ley-trans-y-lamenta-su-exclusion-en-la-propuesta-que-ha-aprobado-este-martes-el-consejo-de-ministr/ [Accessed: 30 November 2021].

[28] According to article 38.7, "*The resolution will be open to appeal under the terms provided in the regulations governing the Civil Registry*".

women's rights.[29] Despite the social echo these criticisms have gained, however, I will not dwell on them here. Rather, I will focus on those that can be made from the perspective of the case-law of the ECtHR.

First of all, and from this perspective, some activists for the rights of trans people have criticised the need to reiterate the desire to rectify one's registered sex within a period of three months. They argue that this requirement expresses a paternalistic approach to trans people which tends not to take their self-determined identity seriously; hence the decision to give them more time "to think it over" or to "think better". However, the requirement that the will to rectify one's registered sex be expressed twice responds to the need to reconcile the right to bender self-determination with national interests such as legal security, the protection of which is also mandatory under the common standards developed in the case-law of the ECtHR.

Second, article 41 of the Draft, which establishes the reversibility, within the first six months, of the rectification of the registration mention relative to the sex of the persons,[30] also lends itself to criticism. This is so because, although not mentioned in the text of the Draft Bill, the Government (through the Minister of Justice, Juan Carlos Campos) has declared that reversal will be possible only once[31]. It is not clear what this means. Does this mean that, within the framework of an administrative procedure for sex reassignment, it will be possible to request the reversal of said specific procedure only once? Or does it mean that, once a person has requested the rectification of their registered sex, they only have one chance within their lifetime to change their minds? If both scenarios are problematic, the second is even more so. It seems appropriate to ask whether a law that is based on the protection of the dignity of the person and their right to self-determination in matters of gender identity can then prohibit accessing the change of registered sex more than once. This circumstance appears as a true contradiction with the principles that allegedly inspired the legislative reform, principles based in turn on those developed by the ECtHR.

Third, the Draft has also been criticised for how it addresses the situation of intersex people. Article 71.2, in particular, states that, when registering the birth of an intersex person, parents may request by mutual agreement that the field of the new-born's sex be left blank

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29. For a summary of the most recurring views, see Léon 2021; see also, among many others, Alías 2021; Aránguez Sánchez 2021; Sen Barcelona 2021; Popelka Sosa & Brandariz Portela 2021; or the links https://cadenaser.com/ser/2021/02/08/sociedad/1612797657_874419.html [Accessed: 30 November 2021] and https://www.eldiario.es/sociedad/feministas-manifiestan-ley-trans-irene-montero-dimision_1_8078362.html [Accessed: 30 November 2021].

30. Article 41: "*1. Six months after the registration in the Civil Registry of the rectification of the legal indication of sex, the persons who have promoted said rectification may recover the indication of sex that appeared prior to said rectification in the Civil Registry. 2. To this end, they may once again request the rectification of said indication, obtaining judicial approval through voluntary jurisdiction as regulated in articles 26 sexies to 26 nonies of Law 15/2015, of July 2, on Voluntary Jurisdiction*".

31. https://www.lamoncloa.gob.es/consejodeministros/Paginas/EnlacesTranscripciones_RPCMin_2021/290621-campo.aspx" [Accessed: 30 November 2021] and https://www.cope.es/actualidad/espana/noticias/reversible-cambio-genero-ley-trans-asi-explica-ministro-justicia-20210629_1372482 [Accessed: 30 November 2021].

in the civil registry, yet only for a maximum period of one year. After this period, reference to sex will be mandatory. In the event that the parents do not provide this information, no identification documents will be issued for the person in question. This is evidently too short a period for intersex people to exercise their right to sex-gender self-determination. It is even too short for parents to make an informed decision on the matter. This can only be taken as evidence of how the classic binary sex-gender ideology prevails in the Spanish Draft.

Last but not least, and in close connection with the above, the Draft Bill does not even mention the situation of non-binary people, of people whose sex-gender identity does not fall within any of the two binary poles, i.e. male and female. It does not allow a person to choose to leave blank the registration field related to their legal sex-gender (which other countries in Europe and other parts of the world do[32]). This circumstance may be due to the fact that non-binary people have only recently started to be seen, that their claims have only recently started to be heard, or even that Spanish society is not yet prepared to face this debate.[33] Whatever the reasons might be behind the final decision not to include a "third gender" as a permanent option in the Draft, the result is the exclusion and discrimination of part of the people who identify as LGBTIQ+.

4. Final Considerations

I would like to conclude with two reflections. The first one concerns the case-law of the ECtHR. It concerns, in particular, the relationship between the existence of a certain "European consensus" within the Council of Europe, on the one hand, and Member States' margin of appreciation on a certain matter, on the other, as applied to the right to gender self-determination. We should wonder whether it is really appropriate that minimum standards of protection of trans persons' gender identity is made dependent on a certain "European consensus", that this may determine the margin of discretion enjoyed here the Member States. When rights so closely linked to human dignity are at stake, it should be more appropriate to follow the indications of former ECtHR judge Martens, as expressed in 1990 in a case relating precisely to the protection of transsexuals: *"[r]efusal to reclassify the sex of a post-operative transsexual seems inconsistent with the principles of a society which expresses concern for the privacy and dignity of its citizens*".[34]

This is not to deny that States must enjoy some margin of appreciation in certain matters. It is to stress that this cannot come to the detriment of the rights recognised in the ECHR and the development of *common standards* that ensure that the Convention remains a living instrument, the interpretation of which reflects the evolution of society and responds to current conditions and needs[35]. Eliminating the barriers that prevent trans people from fully exercising their rights and that undermine their dignity, free

[32] An example of this is the German case; see Müller & De Benito 2013.
[33] See, among others, Rodríguez Álvarez 2021; Soto 2021.
[34] *Cossey v. United Kingdom*, Decision of the ECtHR of 27 September 1990 (§ 2.7 in Martens' Dissenting Opinion); Martens uses a quotation which he borrows from a critic of the Corbett doctrine.
[35] *Cossey v. United Kingdom*, Decision of the ECtHR of 27 September 1990 (§ 3.6.3 in Martens' Dissenting Opinion).

development and physical integrity constitutes a current and urgent need. Addressing it inevitably involves recognising these people's right to sex-gender self-determination. Institutions such as the Council of Europe, in particular the ECtHR, have a duty to give a significant push in the direction of the recognition of this right, along with their right to respect for private and family life and physical and moral integrity, through the elimination of medical, hormonal or surgical requirements for rectifying one's registered sex.

My second reflection concerns the Draft Bill on LGTBI rights currently under discussion in Spain. Parliamentary debates around it are still pending. While it is true that these might result in the introduction of better forms of protection for LGBTIQ+ people, particularly those excluded in the original Draft (foreign residents, intersex, non-binary), the reverse is unfortunately also possible: we could also witness a reduction in the rights recognised in the original Draft, mostly as a response to the criticisms addressed against it. Yet some of these criticisms point to "minor" problems, which should not come to trump the rights to people subject to constant discrimination and stigmatisation.

To be sure, as the ECtHR stated in 2002, on the occasion of the Christine Goodwin case, the right to sexual identity, protected by the right to private life of Article 8 ECHR, has to be weighed against other interests, which must not be underestimated or forgotten, including public order and public interest and legal certainty in areas such as access to records, family law, social security, etc. Yet, as the ECtHR also stated, the risks posed to these interests "*are far from insuperable*", and "*society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost*".

Legal systems have the duty to recognise the rights of transsexual people, so that they enjoy the same level of protection and dignity as others. While these rights will have to be weighed against other interests, including public order and legal certainty in areas such as access to records, family law, social security, etc, and while mechanisms must be articulated to avoid abuses by some subjects in the access to those rights, constitutional democracies, like Spain, cannot continue to deny fundamental rights to a minority such as trans people (or LGBTIQ+ more generally) on the pretext of wanting to protect certain public interests from abuse.

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DISMANTLING OR PERPETUATING GENDER STEREOTYPES. THE CASE OF TRANS RIGHTS IN THE EUROPEAN COURT OF HUMAN RIGHTS' JURISPRUDENCE*

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Abstract: The European Court of Human Rights (the Court) considers gender identity a fundamental aspect of the right to respect for private life and has taken important steps towards ensuring that it is implemented in Council of Europe states. The Court has thus held that trans persons cannot be required to undergo sterilisation surgery or treatment to have their gender legally recognised. Yet certain requirements remain. Where the legal recognition of trans persons' gender identity depends on 'verification' by a third-party, there is a risk of having stereotypical visions of gender enforced, against the general aim of dismantling gender stereotypes for all. This paper analyses gender stereotypes in the Court's cases relating to trans persons, and explores alternatives to current systems of legal gender recognition that may aid in dismantling them.

Keywords: Gender stereotypes, transgender, European Court of Human Rights, case-law, deregistration.

Summary: 1. Introduction. 2. The European Court of Human Rights' Approach to Gender Identity. 3. Gender Stereotypes in the European Court of Human Rights' Case-Law. *a) Gender stereotypes in the requirements imposed on applicants. b) Gender stereotypes in the language of the judgments. c) Gender stereotypes in gender equality cases. d) Distinctions in the Court's approach to gender identity and gender equality cases*. 4. Possibilities for Elimination of Gender Stereotypes from Case-Law. *a) The Court's anti-stereotyping power. b) A role for applicants in the framing of cases?. c) Possibilities for change on a systemic level*. i. Depathologisation. ii. Self-determination. iii. Categorical expansion. iv. Deregistration. 5. Conclusion.

1. Introduction

The European Court of Human Rights ("the Court" or the "Strasbourg Court") has held that "States may not impose traditional gender roles and gender stereotypes", in the case of *Konstantin Markin v Russia* (2012, para 142). The Court thereby took a firm stance in favour of the elimination of gender stereotypes, which was arguably highly necessary, when following Timmer's argument that "[i]f the Court wants to go to the roots of structural gender discrimination it should dismantle gender stereotypes" (2011, p. 713). It is then interesting to study whether the Court has applied these principles in its own case-law, for persons of all gender identities. Indeed, the Court set out this principle in a case relating to gender equality between women and men. However, when the Court decides on

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cases relating to the gender identity of trans[2] persons, it does not tend to demonstrate the same consciousness of gender stereotypes. Where the Court creates distinctions between transgender and cisgender applicants, it enables the application of different standards and expectations.

Stereotypes have been defined by Cook and Cusack as "a generalized view or preconception of attributes or characteristics possessed by, or roles that are or should be performed by, members of a particular group" (2010, p. 9). Though the focus of efforts to dismantle stereotypes tends to be on "harmful gender stereotypes" (*SVP v Bulgaria* 2012, CEDAW Committee, para 9.6) or on "wrongful gender stereotypes" (*RKB v Turkey* 2012, CEDAW Committee, para 8.8), it is argued that gender stereotypes may be harmful in all their forms, even when they do not seem negative (UN OHCHR 2013, pp. 18-19). Indeed, even seemingly positive or innocuous stereotypes have the potential of imposing undue expectations and burdens upon their recipients, who may not conform to these stereotypes. It has also been found that where stereotypes are "statistically sound" generalisations, relying on them may still enhance profiling, and may lead to further marginalisation of certain groups of people (Schauer 2003, pp. 16-17, 187-188). Therefore, if the Court relies or enables reliance on gender stereotypes in its case-law, it may not directly harm the applicants themselves, but it may have negative effects on the applicants' community as a whole. Where that community is the trans community, it becomes especially important to avoid any further marginalisation, considering the heightened discrimination and violence trans persons are already subjected to as a result of their gender expression (FRA 2014, p. 3).

This paper will therefore analyse whether the European Court of Human Rights has applied its stance against gender stereotypes in cases of gender identity, relating to trans applicants, equally as in cases of gender equality, and how the Court may play a role in the elimination of gender stereotypes from its judgments. This paper will first review the case-law of the Court related to gender identity, and legal gender recognition for trans persons (II). It will then seek to analyse gender stereotypes in the Court's case law, related both to gender identity and gender equality, to determine whether the Court approaches its applicants differently (III). Lastly, this paper will review various ways in which the Court and its actors may play a role in dismantling gender stereotypes in a manner that is inclusive of trans persons (IV).

2. The European Court of Human Rights' Approach to Gender Identity

In the Court's case-law, 'gender identity issues' have been understood to be those relating to trans people (European Court of Human Rights 2021, *Factsheet – Gender Identity Issues*). The Court's approach to these gender identity issues has greatly evolved over time, reflecting evolutions in society and clearer understandings of the socially

[2] Trans will be understood as an umbrella term in the context of this paper, encompassing persons of all gender identities who do not correspond to their sex assigned at birth (IACtHR 2017, para 32(h)). This may include transgender women, transgender men, non-binary persons, genderqueer persons, gender fluid persons, agender persons, bigender persons, or any other person identifying with gender diversity.

constructed nature of gender. This brief overview of the Court's case-law as it relates to gender identity will focus on cases relating to legal gender recognition.

The first case dealing with the legal recognition of a trans person's gender was *Rees v UK* in 1986. In this case, a trans man sought to have his gender identity legally recognised, which was refused by UK authorities. The Court held that this refusal did not constitute a violation of the European Convention on Human Rights, highlighting the administrative consequences to the general population (*Rees v UK* (1986) paras 43-44). Referring to the annotation of the birth register to reflect the applicant's gender identity, the Court held that "the change so recorded could not mean the acquisition of all the biological characteristics of the other sex" (para 42(b)). The Court reiterated this approach in its case *Cossey v UK* in 1990.

The Court eventually recognised in the case of *B v France* that trans persons presented a "discrepancy between their legal sex and their apparent sex" (1992, para 59(a)), and consequently put into question the immutability of sex, ordering that the birth certificates of trans persons in France should be amended, as they regularly are for various purposes (1992, para 52). This however distinguished the case from the previous English ones, as it concerned a French specificity, and did therefore not yet set out any general rights relating to legal gender recognition.

Broad recognition of what has since been considered a general 'right to gender identity' occurred in the case of *Goodwin v UK*. In that case, the Court considered the failure to recognise the applicant's gender identity a violation of her right to private life (*Goodwin v UK* 2002, para 93), based on "clear and uncontested evidence of a continuing international trend" towards the legal recognition of the gender identity of "post-operative transsexuals" (2002, para 85).

This right to gender identity has nonetheless remained a conditional right, though requirements have evolved over the years since *Goodwin v UK*. The Court has for instance accepted reliance on the 'divorce requirement', which prevents married trans persons from legally changing their gender unless they have divorced or converted their marriage into a civil partnership, in order to avoid turning what had been considered a heterosexual marriage into a same-sex one, in the states not recognising same-sex marriage yet (*Hämäläinen v Finland* (2014)).

While *Goodwin v UK* had allowed access to legal gender recognition only to trans persons having undergone "gender-reassignment surgery", by referring to the recognition of "post-operative transsexuals" (2002, paras 76, 93), the Court has since reviewed its case-law on the matter. In the 2017 case of *AP, Garçon and Nicot v France*, the Court held that "sterilisation surgery or treatment" could not be relied on as requirements for legal gender recognition of trans persons (2017, paras 131-132). The Court insisted on the "impossible dilemma" that this placed the applicants in. Indeed, under this requirement, applicants were forced to choose between undergoing surgeries or hormonal sterilisation, whether or not those were desired, thus giving up their right to physical integrity, or refusing to undergo sterilising treatment or surgeries, and thus giving up their right to

gender identity (2017, para 132). The Court reiterated this stance in 2021 in the case of *X and Y v Romania* (2021, para 165).

Nonetheless, while *AP, Garçon and Nicot v France* brought much-anticipated changes to the jurisprudence of the Strasbourg Court, in bringing forward the right to gender identity, it has not declared an absolute right to gender identity. The Court has indeed held that a Member State requiring a psychiatric diagnosis of a gender identity disorder does not violate article 8 of the European Convention on Human Rights, ensuring applicants' right to private life (*AP, Garçon and Nicot v France* (2017) para 141). The right to gender identity therefore remains conditional, and subjected to external scrutiny.

3. Gender Stereotypes in the European Court of Human Rights' Case-Law

The Court has made advances in its jurisprudence, ensuring broader applicability of the right to gender identity. But while these improvements have made a difference in the accessibility of legal gender recognition in Member States of the Council of Europe, through lowered requirements, the Court should remain under attentive scrutiny in its approach to trans persons and gender identity rights.

While the Court has highlighted the need to dismantle gender stereotypes, it must be ensured that the Court applies this itself, in the approach it takes to trans applicants. While the approach of the Court to trans persons, in its application of gender stereotypes, could be especially highlighted in comparison with the cases of cisgender persons, such an approach is difficult, due to the lack of specification in cases of whether applicants are cisgender. Therefore, while gender identity cases will explicitly mention the trans identity of the applicants, no cases mention the cisgender identity of applicants. While this information may simply seem irrelevant in judgments, that is not the case where it comes to scrutinising the attitude of the Court, and any potential differences in treatment between cisgender and transgender applicants. Comparisons will therefore be drawn between the approach to applicants in gender identity cases, and applicants in gender equality cases, in order to get as close as possible to an analysis of the differences in approach between transgender and cisgender applicants, where the Court does not provide this information.

a) Gender stereotypes in the requirements imposed on applicants

Where gender recognition is conditional upon certain requirements, as it is in the Court's case-law, those requirements should be subjected to careful scrutiny.

As established in *AP, Garçon and Nicot v France*, the Court enables gender recognition to be dependent on a psychiatric diagnosis. This approach is referred to as the pathologisation of trans persons, where legal gender recognition is made conditional upon "a diagnosis of gender dysphoria, gender identity disorder or transsexualism" (van den Brink and Dunne 2018, p. 63).

This approach enshrines in the case-law the belief that trans persons require external validation of their identity for it to be genuine. The Court takes this view

in noting that a psychiatric diagnosis "is aimed at safeguarding the interests of the persons concerned in that it is designed in any event to ensure that they do not embark unadvisedly on the process of legally changing their identity" (*AP, Garçon and Nicot v France* (2017) para 141). The Court therefore takes a paternalistic approach to trans persons' rights, implying a lack of autonomy and responsibility in making major decisions for oneself.

Furthermore, psychiatric diagnoses of gender identity disorders have been recognised to be unreliable for lack of legitimate external tests, with criteria relying on gender stereotypes (Transgender Europe et al. 2017, para 21). A past version of the Diagnostic and Statistical Manual, the DSM-IV-TR of 2000, relied on highly stereotyped factors to diagnose a gender identity disorder. Some diagnostic characteristics are described by Spade as "stereotypically gender inappropriate behavior" (Spade 2003, p. 24). Indeed, they included, for young boys, preferring "traditionally feminine activities" and playing with girls, liking dolls, and avoiding brutal or aggressive activities. The opposite characteristics were relied on for the diagnosis of young girls. The DSM-IV-TR itself specifies that there exists no specific diagnostic test for gender identity disorders. Consequently, by accepting States' reliance on the diagnosis of gender identity disorder, the Court effectively endorsed the use of unreliable, illegitimate, and highly stereotyped diagnostic tests. The Court accepted the criteria of a diagnosis of a gender identity disorder without adequate scrutiny into the implications of such a test.

The Court can therefore be said to have perpetuated gender stereotypes and reliance on them in medical and judiciary fields. This application of stereotypes in the medical field has serious consequences for trans persons who need a gender identity disorder diagnosis to fully exercise their rights, receive legal recognition, or qualify for desired medical care. Indeed, such a system forces trans persons to simplify complex identities into stereotyped conceptions of gender identity. Spade criticises that "[t]he medical approach to our gender identities forces us to rigidly conform ourselves to medical providers' opinions about what "real masculinity" and "real femininity" mean, and to produce narratives of struggle around those identities that mirror the diagnostic criteria of GID [gender identity disorder]" (Spade 2003, pp. 28-29). While acknowledging that some trans persons do fit those narratives and stereotypes, Spade condemns the "medical gatekeeping" which follows from forced hyper-masculinity and hyper-femininity (Spade 2003, p. 28). Such requirements take away from the agency of trans persons in determining their own gender identity, and further stereotype their identities. Furthermore, by allowing the reliance on gender stereotypes to effectively determine gender identity, the Court is implicitly accepting such stereotypes when it comes to trans people, though it had purported to eliminate such stereotypes (*Konstantin Markin v Russia* (2012), para 142).

While 'gender identity disorder' has been removed from following DSMs sections on mental disorders, the use of the words by the Court still carries the pathologising and stigmatising weight associated with them originally. Reliance by the Court on this requirement therefore remains deeply problematic, and forces trans persons into narrow and stereotyped conceptions of gender.

b) Gender stereotypes in the language of the judgments

While the criteria accepted by the Court set a precedent of judicial acceptance of stereotypes, the language used by the Court also carries a significant weight. The Court, through its language, has the power to convey and entrench outdated and stereotyped conceptions of gender, but it also holds great power to instigate change and inclusion.

Judgments relating to the gender identity of applicants reference multiple types of gender stereotypes. For instance, these judgments regularly convey gender stereotypes related to the social behaviour of applicants. These mentions take the form of a judgment highlighting that the applicant "behave[d] like a boy", in *YY v Turkey* (2015, para 9), or "always behaved like a girl", in *AP, Garçon and Nicot v France* (2017, para 8), or "began from adolescence to behave like a boy in his way of dressing and his social relations", in *X and Y v Romania* (2021, paras 4, 34). By failing to address the link created between social behaviour and gender identity, the Court allows the perpetuation of gender stereotypes according to which girls and women, and boys and men, must act in certain ways depending on their gender identity, in order to fit in.

While gendered norms of behaviour can be seen in the Court's judgments, it is also frequent to see stereotypes related to the gender expression of applicants appear. For instance, applicants are often presented in relation to their physical appearance. In *AP, Garçon and Nicot v France*, it is mentioned that the first applicant's "physical appearance has always been very feminine" (2017, para 8), while the second "dressed as a woman and was perceived by others as a woman" (2017, para 35), while in *X and Y v Romania* it is noted that the applicant started to "behave like a boy in his way of dressing" (2021, paras 4, 34). Such references to physical appearance and attire perpetuate a strong link between gender identity and gender expression, and maintain expectations of stereotypical masculinity and femininity to fit into the boxes of gender. While many applicants might match social expectations of gender conformity, and gender expression may reinforce social recognition, such assimilations of gender identity and gender expression can cause great harm.

First, this places expectations of gender conformity upon trans persons, leaving out those persons who do not or cannot fit into gendered standards of physical appearance, or who do not wish to conform to stereotypically gendered ways of dressing. Secondly, by including such mentions of gender conformity as validating gender identity, the Court perpetuates stereotypes that physical appearance and attire are determinants of gender identity, where such stereotypes have been fought against in the context of the fight for women's rights. By relying on outdated ideas of what it means to dress like a woman or a man, such statements undermine decades and centuries of fighting for gender equality, for the rights of women and men to dress and act in ways that go beyond stereotyped expectations. Furthermore, placing value on gender expression comforts the view that gender must be validated by the perception by others, implicitly giving social perception a validating role in legal recognition of gender.

Gender stereotypes may also appear in other insidious ways, notably by reliance on heteronormative standards in judgments. Indeed, in *YY v Turkey*, multiple mentions

are made of the applicant's relationships with women. Such mentions, used in the context of demonstrating a person's gender identity, are harmful. By using the applicant's relationships with women to validate his male gender identity, the belief that heterosexual relationships are the norm is upheld. This perpetuates heteronormative understandings of gender, and invisibilises trans persons who do not identify as heterosexual.

Lastly, in the case of *X v Macedonia*, the Court referred to the applicant as a "pre-operative transsexual" (2019, para 69), implying that trans persons not having undergone surgeries are in a temporary situation, awaiting a final state. This mention made by the Court itself is especially surprising, as this case was preceded by two years by the case of *AP, Garçon and Nicot v France*, in which the Court held that surgical requirements could not be imposed on trans persons for their legal gender recognition, thus confirming that not all trans persons can or wish to undergo surgeries. This reflects the Court's stereotypes regarding the sex characteristics associated with gender, expecting trans persons to conform to cisgender norms.

While the applicants in the cases cited above may have fit into a number of gender stereotypes, and raised a number of these stereotypes themselves in their testimonies, these stereotypes become problematic when they are not questioned. Indeed, if gender stereotypes are to be efficiently dismantled, they must be named and challenged, and they should not be relied on. Though reliance on stereotypes may not have affected the applicants' cases, or positively affected their cases, such mentions of and reliance on gender stereotypes begs the question of how the Court will react when a person who does not fit gender stereotypes seeks legal gender recognition. Moreover, where such stereotypes are unquestioningly set out and relied on in the cases of trans persons, though they have been actively fought against in the context of cisgender persons for many decades, one can wonder whether the Court creates a distinction between cisgender and transgender applicants, in their right to be free from gender stereotypes.

c) Gender stereotypes in gender equality cases

The Court held in the case of *Konstantin Markin v Russia* that "States may not impose traditional gender roles and gender stereotypes" (2012, para 142). In its cases relating to gender equality, the Court has made consistent efforts to name and address gender stereotypes, though not all these efforts have been equally successful.

The Court indeed tends to highlight where the Government relies on gender stereotypes in its arguments in gender equality cases. In *Ünal Tekeli v Turkey* (2004), the Government argued that the obligation on married women to take their husband's surname could be justified by the aim of "reflecting family unity through a joint family name" (para 68). The Court pointed out the stereotypes based on gender roles reflected in this view, noting that the tradition of married women taking their husband's surname "derives from the man's primordial role and the woman's secondary role in the family" (para 63), while stating that a joint family name has no bearing on family unity (para 66), and that a joint family name may in any case as well be the wife's surname or a jointly chosen one (para 64).

In *Carvalho Pinto de Sousa Morais v Portugal* (2017), the Portuguese Court had considered that an applicant being 50 years old and having had two children diminished the importance of sex for her (para 16). The Strasbourg Court condemned this approach, and held that by handing down such a judgment, the Portuguese Court had portrayed "female sexuality as being essentially linked to child-bearing purposes" (para 52), which perpetuated stereotypes related to gender roles of women as destined to motherhood, and stereotypes relating to social behaviour around sexuality.

Similarly, in *Jurčić v Croatia* (2021), the Court identified and condemned the stereotypes invoked by the Government, which had contended that the applicant should not have taken up new employment while undergoing IVF treatment. Indeed, the Court held that this "implied that women should not work or seek employment during pregnancy or mere possibility thereof" (para 83), highlighting the stereotype related to gender roles and social behaviour that women's role as child-bearers should take priority over other roles, and that women could not work while pregnant.

In *Konstantin Markin v Russia* (2012), a policy denied military men the same length of parental leave as military women, which the Court held was "disadvantageous both to women's careers and to men's family life" (para 141), highlighting the stereotypes based on gender roles implied in this policy, of women as caretakers and men as breadwinners. The Court further held that "States may not impose traditional gender roles and gender stereotypes" (para 142), highlighting the harm of such a policy.

Nonetheless, the Court did not always identify and condemn the gender stereotypes which appeared in gender equality cases. Indeed, in *Carvalho Pinto de Sousa Morais v Portugal*, despite highlighting some stereotypes, the Court did not explicitly identify or name the stereotypes appearing in the Portuguese Court's reliance on gender roles in the context of domestic work carried out by the applicant (para 16).

Furthermore, in *Khamtokhu and Aksenchik v Russia* (2017), the Government argued that life imprisonment being exclusive to men was not discriminatory, by reason of women's "special role in society", which "above all" is "their reproductive function" (para 47), thus perpetuating gender roles by placing women's value in their potential motherhood. In this case, the Court held that women may be exempted from life imprisonment, as a measure of "public interest" (para 82), thus implicitly condoning the perpetuation of gender stereotypes. The Court simply condemned the stereotype of "male toughness" perpetuated by this rule leaving only men to be sentenced to life imprisonment. This case was nonetheless exceptional, as the Russian Government had stated that a finding of a violation in this case would lead to all groups of offenders risking being sentenced to life imprisonment, rather than improving conditions for all by eliminating life imprisonment. The Court choosing to allow these stereotypes to be perpetuated was therefore ultimately beneficial to the persons most affected by them.

Despite its effort to identify gender stereotypes in cases, the Court is not immune to including stereotypes in its own reasoning. In *Jurčić v Croatia*, the Court stated that "such a decision could only be adopted in respect of women, *since only women could*

become pregnant" [emphasis added] (2021, para 70). By portraying women as the only persons capable of becoming pregnant, the Court is invisibilising the many trans men, and non-binary and other gender-diverse persons born with a uterus who may have the ability to become pregnant. This argument of the Court is especially striking in light of its anterior jurisprudence in the case of *AP, Garçon and Nicot v France*, where it held that sterilisation surgery or treatment may not be required for legal gender recognition, thus implying that trans men may have their gender legally recognised, while retaining functioning reproductive systems and the possibility of carrying pregnancies, if they are able and willing to. The Court, by conflating the ability to get pregnant with womanhood, linked womanhood to a biological foundation, in contrast with its previous jurisprudence. It must however be noted that this stereotype, though appearing in the case of a cisgender woman, affects only trans persons. It seems that the Court did not take into consideration trans persons in this case, merely because they were not directly involved.

d) Distinctions in the Court's approach to gender identity and gender equality cases

From these observations, it can be concluded that while the Court does not succeed in highlighting all gender stereotypes mentioned before it either in gender identity or gender equality cases, it consistently fails to address stereotypes where they appear in gender identity cases. While the Court must undoubtedly improve its ability to name and point out gender stereotypes in all cases, it has already made important efforts to do so in gender equality cases, and must now work on achieving the same in gender identity cases, rather than ignoring the harms brought on by reliance on stereotypes in the context of trans persons.

It must also be noted that the stereotypes referred to in gender equality cases and gender identity cases are often different. Gender equality cases tend to contain stereotypes relating to gender roles, whereas gender identity cases tend to focus on gender expression, with both types of cases containing references to stereotypes linked to the social behaviour of applicants. This difference in the types of stereotypes may entail a need for the judges of the Court to become better informed about different types of gender stereotypes, and where those may arise. While gender stereotypes may be referred to in terms of gender roles in some international instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW 1981, article 5a), gender stereotypes are an incredibly broad notion, and they show up in a variety of ways.

Lastly, it can be noted that while gender stereotypes appear in judgments relating to both gender identity and gender equality, their sources vary. Indeed, in gender equality cases, stereotypes are most often brought up by the Government or the policies it is defending. However, in gender identity cases, stereotypes often appear in the facts of the judgment, in the testimonies of the applicants' families for instance, and are thus brought up by the applicants and their lawyers themselves. This distinction may explain why the Court is more inclined to counter stereotypes where they are brought up by the party opposing the applicant, rather than by the applicants

themselves. Nonetheless, naming stereotypes does not have to be done to the detriment of the applicants, but may merely serve as a way for the Court to highlight that reliance on stereotypes is not necessary to the success of an application, where that truly is the case, as it should be.

4. Possibilities for Elimination of Gender Stereotypes from Case-Law

To eliminate gender stereotypes from the courts, and from legal gender recognition at large, several alternatives and possibilities exist. Dismantling gender stereotypes will take time and widespread systemic change, but a combination of efforts from various actors may bring about meaningful improvements.

a) The Court's anti-stereotyping power

While the Court may not hold enough power to entirely dismantle systems of legal gender recognition riddled with gender stereotypes, the Court does have a responsibility to identify and address gender stereotypes when they appear in cases brought before it. As highlighted by Cook and Cusack, naming stereotypes carries a vast power, and ensures that stereotypes are recognised and questioned (2010, pp. 39, 54).

A realistic and immediately available step for the Court to take is therefore the "anti-stereotyping approach". This approach is defined by Timmer as entailing for the Court not to rely on "harmful (gender) stereotypes in its own reasoning" and to "name gender stereotyping whenever it occurs on a national level and proceed against it as a particularly damaging form of discrimination" (Timmer 2011, p. 717). Through this approach, Timmer proposes to analyse gender stereotypes and the harm they could potentially cause in a comprehensive manner, with the aim of "exposing and contesting the patterns that lead to structural discrimination" (Timmer 2011, p. 725).

For the Court, taking such an anti-stereotyping approach would entail being "continuously critical" and being "interrogative of the underlying social patterns and beliefs" which have led to the situations at hand (Timmer 2011, p. 737). Thereby, the Court may take steps towards uncovering the reasoning behind the presence of gender stereotypes in their cases, whether they appear through the applicants' own arguments, other actors in the case, or the Court's judgment itself. In looking at these underlying factors which contribute to the perpetuation of stereotypes, the Court may question its biases and assumptions, and seek to set out jurisprudence which does not perpetuate stereotypes, and even attempts to combat and dismantle them. Such an approach will require the Court to be attentive, by carefully choosing the language of judgments, and analysing the implications of the requirements and principles it sets out. This approach will also require the judges to question their own underlying biases, to adequately "problematise the 'naturalness' of stereotypes" (Timmer 2011, p. 737).

Where gender stereotypes are so deeply entrenched in society, it can seem unrealistic to expect judges of the Court to notice them, adequately respond, and eventually dismantle them. Indeed, information on the harmfulness of gender stereotypes, their prevalence, and their insidiousness must be made available to the judges of the Court, to demonstrate the importance

of the issue and its ramifications, and to unlearn biases accumulated over many years. Cook and Cusack have suggested that "[t]raining programs could invite judges to analyze how wrongful gender stereotypes have become embedded in court decisions, and how such stereotypes have been or can be dismantled and remedied" (2010, p. 83). Such training programmes would enable judges, and possibly other jurists contributing to these judgments, to better notice stereotypes, and see the harm that they do, to encourage their effective dismantling.

b) A role for applicants in the framing of cases?

As established in section III.d., applicants often tend to raise gender stereotypes themselves. This poses the question of the potential role to be played by the applicants and their lawyers in ridding the Court's judgments of gender stereotypes.

Spade argues that while one person winning their case may entail increased rights for the group they belong to, it must nonetheless be ensured that the opposite does not occur, where one person's fight diminishes the rights of the group as a whole (Spade 2003, p. 36). This argument is illustrated by the example of a trans applicant having undergone a medicalised transition, in which case this fact could be instrumentalised in their case, and result in such a medicalised transition becoming a requirement for the obtention of certain rights. This would then be similar to the case of a trans applicant perfectly matching social expectations of gender expression, social behaviour, heteronormativity and conformity to gender roles, which may result in the Court expecting similar features from other trans applicants coming before it.

One part of the solution to such harmful generalisations is therefore the inclusion of trans persons in discussions on the direction taken by the lawyers in their handling of these cases (Spade 2003). Spade believes that including trans persons in these discussions on their cases will increase awareness among lawyers of the great impact of such cases, and a better understanding of the communities affected by these verdicts, whose members may or may not resemble the applicants. Thereby, Spade places a moral obligation upon the applicants and their lawyers to fight not only for themselves, but also for the entire community.

Nonetheless, this approach can also prove problematic. Indeed, while it has not been established whether reliance on stereotypes directly affects the outcome of trans applicants' cases, these stereotypes may still form part of a "normalisation strategy" (Camminga 2020, p. 255), whereby applicants purposefully portray themselves as easily relatable for the judges, who can identify themselves with these individuals and empathise with them. Furthermore, Catto has concluded that while the lack of adherence to gender stereotypes does not harm a person's case, reliance upon stereotypes can still aid the cases of persons who do conform to them (Catto 2019, para 47). Consequently, expecting applicants who may have the possibility to rely on the judges' biases to further their cases not to take up this opportunity seems not only unrealistic in many regards, but also deeply unfair. Indeed, trans persons are exposed to numerous legal and social barriers, and suffer from the marginalisation of their community in society. It therefore seems that expecting trans applicants to fight for the entire community, and hold themselves to the high moral

standard of refusing to rely on a potential privilege, entails placing an additional burden upon persons who have already been greatly burdened by a system that excludes and marginalises them.

It is undoubtedly a powerful choice for applicants not to rely on gender stereotypes that they conform to, where those could have appealed to the judges' understandings of gender and played in their favour. However, taking such a stance should be a personal choice, as it may deprive the applicants of an advantage that could have helped their case. The burden of fixing a broken and exclusionary system should ultimately not lie with those who suffer from it, but those who have benefited from it for years and are now in a position to repair the errors of the past.

While the Court may not be well-informed enough to take such stances on its own without input from trans communities, there are ways to encourage the Court to act without potentially jeopardising the cases of individual applicants. For instance, third party interventions in the cases studied in section III did not contain gender stereotypes. Third party interventions represent a way for organisations working for the promotion of rights to advocate for the advancement of rights for all, and the implementation of more just standards. These organisations, contrary to most individual applicants, have a general purpose and greater resources to advocate for larger groups. Their participation may therefore enable the applicants to rely on all arguments available to them, while enabling the Court to be reminded by the interveners that stereotypes should ultimately not play a role in the decision, but rather the right to self-determination of the applicant.

c) Possibilities for change on a systemic level

While the Court holds power in its language, and while the burden of dismantling stereotypes should not be borne by the applicants, the Court also has control over the requirements and criteria that it sets out. Though the Court tends to rely on a European consensus or on a clear and continuing international trend (*Goodwin v UK* (2002), para 85) to make major changes to its jurisprudence, it is undoubtedly possible for the Court to gradually implement changes in its case-law and reference current trends in the lead-up to a change in jurisprudence. The following notions may be applied in the shorter or longer term, but all hold the potential of eliminating at least some stereotypes from the Court.

i. Depathologisation

As of the current state of the case-law, the Court follows a pathologising approach to legal gender recognition. Pathologisation, as set out in section III.a, is the approach by which a trans identity is considered an illness (Theilen 2014, p. 328), making legal gender recognition conditional upon "a diagnosis of gender dysphoria, gender identity disorder or transsexualism" (van den Brink and Dunne 2018, p. 63), or even surgical or sterilisation requirements (Cannoot 2019, p. 15). The 2017 case of *A.P., Garçon and Nicot v France*, by allowing the French state to require a psychiatric diagnosis of a gender identity disorder to recognise a trans person's gender identity, upheld such a

pathologising approach. This approach has been largely contested, leading to a movement for depathologisation, understood as the elimination of psycho-medical requirements from legal gender recognition (Cannoot 2019, p. 15).

As set out in section III.a., reliance on a diagnosis of a gender identity disorder reinforces gender stereotypes, through medically unfounded tests relying on gender stereotypes. Depathologisation therefore offers an approach to legal gender recognition which may aid in the elimination of gender stereotypes from case-law, by removing stereotyped and unwarranted diagnoses.

Nonetheless, while depathologisation may enable the elimination of certain gender stereotypes from the assessment leading to legal gender recognition, it does not guarantee that gender stereotypes will be absent from the courts' decisions. In France, where the legislation on legal gender recognition was depathologised in 2016 – a few months before the judgment in *A.P., Garçon and Nicot* was handed down – the Civil Code, in its article 61-5, requires applicants to demonstrate that they present publicly as the claimed sex, are known socially as the claimed sex, or have had their first name legally changed to match the claimed sex. While these requirements are no longer of a psycho-medical nature, they do still require the courts to interpret gender or sex, and how it is defined socially, or what "match[ing] the claimed sex" entails. Gender stereotypes have therefore not been eliminated from the courts, according to Catto, and still appear through these different requirements. French judges, in applying these requirements, have therefore focused on the gender expression of applicants, underscoring their conformity to gender stereotypes in their attire or makeup. Courts have also at times looked to the social behaviour of applicants, highlighting stereotypically masculine jobs, or participation in sports, for instance (Catto 2021, pp. 169, 179).

Therefore, while the elimination of psycho-medical requirements is absolutely essential for the respect of trans persons' autonomy and self-determination, it cannot in itself ensure that gender stereotypes will be kept out of the courts. If gender stereotypes are to be dismantled, depathologisation will not be sufficient individually, and will need to be combined with other approaches for better effectiveness.

ii. Self-determination

Interestingly, the Court has relied on the "right to self-determination" of applicants (*AP, Garçon and Nicot v France*, para 93), without giving the term the meaning commonly associated with it, but rather interpreting it as a conditional right for trans people to have their gender legally recognised.

The self-determination model, in its academical sense, proposes to enable legal gender recognition through the submission by the applicant of "a statutory declaration affirming that they have a stable connection with the gender in which they wish to be recognised" (van den Brink and Dunne 2018, p. 59). This model thereby entails the depathologisation of legal gender recognition, while also removing other forms of external validation or verification.

The implementation of a self-determination model has received widespread support, notably from the Council of Europe (PACE 2015, Resolution 2048, para 6.2.1.), the human rights experts who set out the Yogyakarta Principles Plus 10 (International Commission of Jurists 2017, principle 31.B.) and the Inter-American Court of Human Rights (IACtHR 2017, paras 127, 129-131). These are all soft law instruments that the Strasbourg Court could draw upon in its future jurisprudence, as there are currently no other international human rights law instruments dealing with the human rights of trans persons (Cannoot 2019, p. 28).

By removing requirements necessitating scrutiny from judges, the self-determination model ensures that gender stereotypes can no longer be applied in the course of legal gender recognition. Nonetheless, while self-determination provides autonomy to applicants in the process of their legal gender recognition, it may not be entirely sufficient in itself, so long as it exists within a binary framework, which remains limiting for many persons.

iii. Categorical expansion

To overcome the limiting nature of the gender binary, it has been proposed to make more gender markers available, beyond 'female' and 'male'. This model is known as categorical expansion. While certain versions of this model make a third gender marker available only for persons presenting a medically certified intersex variation, as is the case in Germany (Cannoot and Decoster 2020, p. 39), other forms intend to broaden the scope of this model. The most relevant type of categorical expansion for the purposes of this research is categorical expansion within a self-determination framework, whereby all persons may choose to self-register as any available gender marker, which exists in California (Holzer 2018, p. 24). Thereby, non-binary persons without intersex variations may choose to self-register as such, and intersex persons may self-register as such without medical requirements. This will however depend on the number and types of gender categories made available under various applications of this model.

However, adding a third gender or a larger number of categories comes with its own set of risks. Though it expands choices beyond the binary, it runs the risk of promoting the notion that categorisation of sex or gender is required, as well as perpetuating the binary as a standard that only few do not fit into (Quinan et al, 2020, p. 2). Fausto-Sterling asserts that "[t]he problem with gender, as we now have it, is the violence - both real and metaphorical - we do by generalizing," and argues that "[n]o woman or man fits the universal gender stereotype" (Fausto-Sterling 2020, p. 111). Following this argument that binary categories are not right for anyone inexorably leads to the question of whether continued reliance on a binary gender system truly makes sense and is beneficial. Nonetheless, Fausto-Sterling also argues that "recognizing a third category does not assure a flexible gender system" (2020, p. 112), which Mak seconds, considering that the creation of an additional category of gender will merely depict those who identify with this new category as outsiders (2012, p. 14). Where additional genders risk being portrayed as abnormal or uncommon, this reinforces a strict 'female / male' binary as the norm, with everyone else being mere exceptions to this norm, rather than reflections of an inflexible system in need of profound reshaping.

iv. Deregistration

As established in the previous sections, any type of scrutiny or attempt at categorising or controlling gender seems to bear risks. The abolitionist model proposes to do away with those problems, by deregistering gender, through removal of sex or gender markers from identity documents. Indeed, Cannoot and Decoster argue that "the law will never be able to reliably document [gender]" (2020, p. 47), with gender being fluid and socially constructed. The abolitionist model thus prevents gender from being recorded inaccurately where it cannot be encompassed under current registration models. This may for instance prove useful for non-binary persons where states do not offer options for demedicalised recognition of non-binary gender, or genderfluid persons, where rigid registration systems only allow for the recognition of one gender, with insufficient flexibility. The abolitionist model also seeks to remove state control over gender, and to prevent it from continuing to "police its boundaries" (Neuman Wipfler 2016, p. 543).

While the ultimate aim of deregistration is to remove sex and gender markers from official documents altogether, gradual steps will be required to achieve it. Neuman Wipfler proposes to start by eliminating gender markers form birth certificates, contending that children have no need for gender markers, whereas gender markers may impede on the lives of trans and intersex persons (2016, pp., 529, 534-539). Nonetheless, Neuman Wipfler opposes the immediate removal of gender markers on other identification documents, considering such a move unachievable and potentially dangerous at this point in time, as many trans persons rely on their identity documents for social recognition, safety, and access to gender-congruent spaces (2016, pp. 540-542).

The registration of gender represents a prevailing attitude towards gender today, a view of gender that has its roots in habits rather than necessity (Cannoot and Decoster 2020, p. 41). The Council of Europe's Commissioner for Human Rights has enjoined states to "consider the proportionality of requiring gender markers in official documents" (2015, p. 9), which would require states to put thought into the reasoning behind registering gender and its usefulness.

Though this approach may seem like one for the future, unachievable for the time being, the truth may be very different. The Belgian Constitutional Court, in 2019, declared parts of the Belgian Gender Recognition Act unconstitutional, and proposed several alternatives. One of these suggested alternatives was the suppression of sex or gender registration, on the ground that both the lack of recognition of non-binary persons, as well as the definitive nature of legal gender recognition making fluid gender impossible to legally recognise, were unconstitutional (Belgian Constitutional Court 2019). Such a strong stance taken by the Belgian court provides hope that other courts may follow suit, including the Strasbourg Court, though a European consensus or international trend may be required before the Court follows this route.

5. Conclusion

The European Court of Human Rights has over recent years improved its approach to the rights of trans persons, by enabling legal gender recognition with lowered requirements, thus ceasing the imposition of stereotypically cisgender bodily characteristics on trans people, thereby arguably broadening its understanding of gender.

Nonetheless, while the Court has recognised more rights for trans persons, it has not reached equality of treatment between trans and cisgender applicants. This paper sought to examine the distinctions that the Court implicitly, and likely unconsciously, makes between trans and cisgender persons. It must be noted that the Court has shown great efforts at naming and attempting to dismantle gender stereotypes in cases relating to gender equality, though these attempts were not always entirely successful. Nonetheless, when it comes to trans applicants, in gender identity cases, the Court has not shown such efforts at dismantling gender stereotypes, and has failed to address any gender stereotypes which were invoked before it. What is more, the Court has on occasion raised gender stereotypes itself, and accepted reliance on stereotyped requirements for the recognition of trans persons' gender.

In doing so, the Court has created an implicit distinction between its trans and cisgender applicants, seeing only cisgender applicants as needing to be freed from the constraints of gender stereotypes, with limiting the fight against stereotypes to a cisgender issue. Additionally, the Court's lack of attention to gender stereotypes arising in gender identity cases may undermine its commitment to the elimination of gender stereotypes. By condemning certain gender stereotypes while accepting others, the Court creates an inconsistency, and conveys the idea that reliance on gender stereotypes can at times be acceptable. For the Court to truly succeed in dismantling gender stereotypes, it must ensure that gender stereotypes are consistently addressed, at all levels, and for all persons.

Where legal gender recognition procedures allow gender stereotypes to play a role, through the criteria set out or the manner in which judges apply the legislation and approach the applicants' identities, it raises the question of whether judges or the state can truly play a decisive role in legal gender recognition, without this role being tainted by gender stereotypes. This paper argues that the only way to remove gender stereotypes from the courtroom is to deregister gender, removing external scrutiny and validation of gender identity. Though the way to deregistration may be long, and the Court may not be prepared or able to take such a radical approach yet, there are many steps to be taken in the meantime. By applying an anti-stereotyping approach and depathologising legal gender recognition, the Court would already take meaningful strides towards equality, and show its willingness to work towards the elimination of gender stereotypes for all in the judiciary.

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TRANS RIGHTS: THE ONGOING DEBATE IN LATIN AMERICAN LEGAL AGENDAS*

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Abstract: This article offers an overview of the Trans people's rights agenda in Latin America. It focuses on various Latin American countries to reveal how the route towards rights has been marked by a binary and medicalizing approach to non-normative identities, directly influenced by the traditional and conservative moral projects prevalent in the region. It also accounts for some recent normative and case-law developments, which however coexist with restrictive norms that criminalize the rights of gender-diverse people. It concludes that the recognition of Trans people's rights is often insufficient, that it contributes to rendering Trans diverse realities invisible, thus reinforcing discrimination.

Keywords: Latin America, human rights, gender identity, trans people, legislative agenda.

Summary: 1. Introduction. 2. The Latin American Context and the Rights of Transgender People. 3. The Recognition of the Rights of Transgender People and the Legislative Agenda in Argentina, Uruguay and Chile. 4. The Situation in Colombia and Ecuador. 5. The Experience of Bolivia and Peru. 6. Overall Conclusions.

1. Introduction

Despite renewed constitutional agreements, many of which fall within the framework of the so-called new Latin American constitutionalism (Uprimny 2011; Viciano and Martínez 2010), the rights of transgender[1] people are subject to ongoing debates in South American legislative agendas, where their recognition faces considerable opposition. As the pro-rights sector has warned, the assault against them goes hand in hand with demands by more conservative social sectors to introduce statutory and legal reforms, with the aim of reinforcing traditional family and moral values which exclude diversity. This coincides with the erosion of constitutional rights, resulting from strategic litigation seeking to consolidate dominant, majority values. At a legislative level, this reactionary offensive has been accompanied by arguments and deliberative strategies by pro-life groups as well as staunch resistance to the advancement and protection of transgender people's rights.

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1. In this article, Trans persons are defined as those whose gender identity is not consistent with the normative expectations and codes associated with the one legally assigned to them at birth.

The recognition of rights linked to the reality of transgender people has not followed a uniform pattern across Latin America. Countries such as Argentina, Uruguay and Chile have definitely made a certain amount of progress in adopting overall legislation on gender identity, whereas countries such as Ecuador have attempted to regulate a number of specific aspects, without having endorsed more far-reaching reforms. In countries such as Colombia, on the other hand, the protection of transgender rights has resulted from constitutional case-law, as well as certain administrative measures, although there is no specific ordinary legislation on the matter. In other countries, reluctance to recognise these rights still prevails.

Developments in the Inter-American system of human rights have led to the establishing of a minimum level of protection. A number of specific cases submitted to the Inter-American Court of Human Rights (IACtHR), as well as Advisory Opinions and special reports on the protection of the rights of transgender people, have paved the way to the development of a judicial framework in the different countries subject to the interpretative guidelines of the Inter-American system. Despite this, at a domestic level, developments have not been uniform. In some countries, significant levels of regulation and legislative recognition have been achieved, but these advances have not always been accompanied by judicial support. An example of this is the case of Bolivia, where the Constitutional Court has taken a step backwards with respect to legislation, the latter being more in accordance with the protection of rights.

In general, there have undoubtedly been clear attempts to move from a model involving the stigmatisation and pathologisation of Trans people, which is essentially conservative, to one of self-determination and recognition which incorporates broader social debates and reflection. However, these attempts tend to be half-hearted, and are often shown to be deficient and fragmentary, or at best only lead to a formal recognition of rights with few real advances. The result is a great disparity beween regional experiences. Based on different national realities, this study of the rights of transgender people in Latin America aims to provide an overview of the legislative and judicial commitment to such rights in a range of the subcontinent's legal systems. At the same time, the experiences described will provide an analytical framework to assess either the evolution or the erosion of rights in different national legislations.

To this end, this paper is structured into four parts. The first section provides a brief description of the pathologising approach to the rights of Trans people and its conservative roots, whilst also offering a brief overview of a number of Latin American constitutional frameworks in which this approach shapes discussions on the issue. The second part examines the Argentinean, Uruguayan and Chilean models, the most progressive examples in the region, all three of which have enacted specific legislation to protect transgender people, despite the fact that their rights are not explicitly recognised in their national constitutions.

The third part focuses on the situation in Ecuador and Colombia, where legislative inertia has led to a situation whereby transgender people have had to rely on constitutional case-law to protect and guarantee their rights. Finally, we shall look at Bolivia and Peru

as examples of systems which are reluctant to recognise these rights altogether. While Bolivia provides an example of judicial regression in this area, the case of Peru highlights the strong influence of the international human rights system, which has had a clear effect on the future agenda of discussions about Trans people's rights in the region's different states. The paper concludes with a number of reflections on the progress and limitations of Latin American regulatory strategies in this area in the light of current case-law and legal texts, and with some questions on the role of legislators and courts in this field.

2. The Latin American Context and the Rights of Transgender People

The historic prevalence of a binary conception of gender identity, which conceives it as something objective and indisputable, has consolidated the existence of a system which excludes those who do not adapt to these binary premises and their rigid categories of classification, based on equally rigid (male/female) power relations. In fact, as Ruth Rubio Marín (2020: 47) has pointed out, "the definition of categories is an instrument frequently employed by legislators to determine the legal position of subjects in terms of the different general aims pursued by legislation and public policies", leading to apparently neutral and unquestionable classification and ordered criteria, through which subjects are either included or excluded (Butler 2009).

In terms of gender identity, discourses which pathologise Trans people are allied with a deterministic binary vision, imposed on the basis of what could be called a "medical model", or medical paradigm of classification or registration of people, which marginalises any diverse identity that does not adhere to the strict canons of binary assignment. This apparently neutral (binary) classification is in conflict with the realities of many people's experiences. In contrast, the exponents of a more positive approach see Trans identities from a less restrictive and exclusionary medical viewpoint. They demand instead a shift of understanding and comprehension, leading to the proper recognition of Trans people as democratic subjects with all corresponding rights.

In the Latin American context, this transition from a deterministic, essentialist, medicalised and exclusionary vision to one which strengthens the recognition of rights and subjective diversity has been uneven. Many South American constitutional states have not only failed to question, but have actually confirmed the mandatory enforcement of gender regulatory norms as a series of dichotomies and hierarchies which effectively exclude and marginalise many people. In fact, although the more recent Latin American "green constitutions" are associated with the protection of the rights of nature and the environment and are committed to pluralism and diversity, whilst giving an active voice to indigenous communities, peoples and nationalities, gender demands as such are largely absent. This is despite the insistence that this new constitutional approach is essentially aimed at including channels of political participation for social sectors historically excluded from the social contract.

This is not to say that the region is completely devoid of reforms aimed at offering a minimum of protection for gender-related rights. Thanks to the impetus of progressive movements and social awareness programmes, countries such as Colombia, Argentina,

Costa Rica, Brazil, Mexico, Uruguay and Ecuador have, for example, formally recognised same-sex marriage. Nevertheless, in other countries there is continued resistance and the issue is still under discussion. With regard to gender identity and the rights of transgender people, the debate has essentially focused on the sphere of international human rights, in particular on certain pronouncements by the IACtHR in 2018 on gender identity and the protection of same-sex couples (Advisory Opinion 24/17). At a constitutional and legal level however, a strategy of resistance or backlash is clearly evident,[2] with the traditional family order being emphasized in constitutional and legal texts, thereby undermining a more plural recognition of diversity.

There are therefore various different approaches to the issue in Latin American legislative agendas. In some cases, there is evidence of progress towards a greater commitment to the recognition of certain rights, whereas in others failure to make such a commitment threatens even the most straightforward constitutional guarantees. There are also countries which seem to suffer from legislative "idleness", often accompanied by conservative and regressive judicial practices, which complicate the whole issue of rights altogether. In all of these cases, a combination of factors tend (to a lesser or greater extent) to have a negative impact on the effective recognition of the rights of transgender people in the Americas. Behind the pathologising of identities that dissent from the modern gender binary, there is an ongoing conservative discourse which generates stigmatisation, subordination and exclusion from official norms. Significantly, there is also an underlying common religious element, which is part of Latin American countries' colonial inheritance and which informs the traditional principles and moral values continuing to influence their legislative agendas.

It is striking that despite their diverse realities Latin American states were founded on ideals of homogeneity (Tapia 2019), articulated through laws and public policies that aspired to impose themselves over those realities through the creation of an all-encompassing normativity. Notwithstanding its long colonial past, Latin America has resisted the imposition of a European-style hegemonic social model, yet at a normative level it has paradoxically reproduced Europeanised ideals of family and femininity typical of the "coloniality of power" (Quijano 2000; Mignolo 2011); ideals which, as decolonialist feminist theory points out, reinforce a "coloniality of gender" (Lugones 2010). It is only

2. In Ecuador, for example, following the Constitutional Court's rulings recognising equal marriage in the country (Ruling 11-18-CN and Ruling 10-18-CN), pro-life groups have insisted on the need to carry out a popular consultation, capable of reversing these historic rulings, seeking to disregard the Court's pronouncements and activating a mechanism for a regression in rights. Several members of the legislature have also insisted on bills aimed at openly disregarding another decision of the Court (a case concerning the decriminalisation of abortion for rape, Ruling 34-19-IN/21 and subsequent additions), in a form of contempt and open defiance of the decisions of the highest body of constitutional control in the country. To date, after an intense debate on the controversial presidential objection, the National Assembly has painstakingly approved a bill on the voluntary interruption of pregnancy in cases of rape, the official publication of which is still pending. Similarly, in Uruguay a group of conservative parliamentarians attempted to reject the approval of the Transgender Identities Law via a consultative referendum.

through the struggles of the feminist movement, and the parallel theoretical reflection of LGBTI people, that an essential contribution has been made to eroding this traditional model of gender and family. This has enabled the possibility of formally proposing new options in terms of ordinary legislation, whilst also giving rise to a wide range of theoretical positions which have a substantive impact on areas of discussion and the vindication of rights.

Currently, there are certain Latin American legal systems which explicitly recognise gender claims and others which do so implicitly, whilst some others fail to acknowledge the issue entirely. Among the more recent constitutions is that of Ecuador (2008). In its 444 articles it mentions gender equality and the prohibition of discrimination on at least 13 occasions in different passages concerning education, health, the family and the integration of various institutions. This shows constitutional concern about the subject at least at a formal level. Meanwhile, the Bolivian Constitution (2009), with 441 articles, refers to gender issues on at least 9 occasions. When outlining the values which inspire its state model and listing its catalogue of rights as well as the integration of certain bodies and institutions, this Andean country has at least identified the issue of diversity as an area for discussion. The Colombian Constitution (1991), on the other hand, does not mention the issue of gender at all in its 380 articles, or at least not directly, and although certain social policies have nonetheless been adopted at local or national levels in relation to questions of gender, it is not possible to percieve any real impact in terms of sexual diversity in the country. When it comes to Venezuela, its Constitution (1999) mentions gender equality on two occasions in its preamble. Thus, as can be seen, gender has found recognition in Latin America's most recent constitutionalism, which should set the tone for ordinary discussion, not only with regard to the eradication of discriminatory dynamics within a classic binary system, but also and principally in terms of the recognition and protection of (dissenting) gender identities.

However, due to a common history inherited from the conservative religious tradition referred to above, even the most "progressive" regional constitutions seem to have failed to include the issue of "gender" as a wide-reaching and inclusive vindication of sexual diversity; they rather generally include it as a formal response aimed essentially at reaffirming women's rights. At most, Latin American systems recognise the rights of homosexual people, in particular the right to same-sex marriage, yet they fail to articulate a comprehensive constitutionally protective framework for rights related to gender diversity. In fact, several aspects of Latin American constituent pacts, which in principle are presented as facilitators of inclusive dialogues, may be veiled by a reality which hides persistent exclusions and prejudices, even, or especially, in constitutent moments, i.e., in extraordinary political (democratic) moments (Ackerman 1991), when a new normative order is being drafted. It is then that the dominant, conservative social, political and economic forces make every effort to guarantee their interests, thereby diluting the original intention of acknowledging diversity and articulating inclusion.

Be that as it may, the gender agenda in today's Latin American democracies cannot rely on a merely normative approach, one in which law is understood as the instrument which ultimately gives meaning and significance to different social relations. Legal

visions have economic, political and cultural roots, which shape power relations. This is why, in order to understand Latin American reality, the social dynamics of subordination and exclusion which define the rights agenda need to be explored. The aim of this paper is however far more modest. Its purpose is to explore how these dynamics have been introduced in the legislative agendas enacted by various different parliaments, and to highlight their deficiencies. Its ultimate aim is to illustrate the degree of legislative commitment in this area, or the denounce the lack of it.

3. The Recognition of Transgender Rights and the Legislative Agenda in Argentina, Uruguay and Chile

Although sometimes perceived as part of so-called new Latin American constitutionalism, the Argentinean Constitution of 1994 is essentially conservative. Nevertheless, after five bills were drafted with the aim of recognising the right to gender identity, the Gender Identity Law 26.743 was sanctioned on 9 May 2012 and enacted two weeks later on 23 May. The product of Trans activism and other sympathetic alliances, the aim of this Law was to legally recognise the rights of people whose gender identity had hindered their access to legal rights: people that had been historically discarded as legal subjects on the basis of a binary construction of the person as a subject of rights, an abstract and universal construction which excludes all diversity.

With the political and legal recognition of Trans identities, this law dismantled the psychological determinism and gender naturalism which had prevailed in Argentina, thus ushering in a new approach which favoured the acknowledgment of diversity. In substance, the law accepts the right to rectify identity data and allows for the recognition of social rights, guaranteeing access to health treatment for anyone who needs to modify their body in accordance with their self-perceived gender (Article 3). Importantly, this does not require a medical diagnosis or surgical intervention (Article 4, final paragraph). The consent and will of the person alone is sufficient, overriding any kind of regulatory or procedural requirement aimed at limiting, restricting, excluding or suppressing the exercise of the right to gender identity. Based on this logic of self-determination, the system must be interpreted in such terms that any normative requirement be always oriented in favour of allowing access to the chosen gender identity (Article 13). In line with this logic, the law also guarantees recognition of gender identity for minors (Article 12). In the current legal context, therefore, the consent of the person prevails and the right to bodily autonomy is valued over the naturalised notion of physical identity which has long been used as a mechanism to subjugate and suppress diversities.

Furthermore, in the province of Buenos Aires, legislation has been introduced in parallel with Law 26.743 to strengthen the rights of transgender people. An example of this is the Law on Employment Quotas, yet to be enacted.

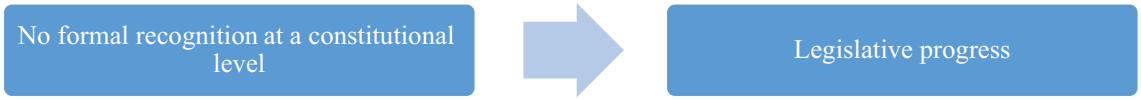
In addition to the above, the Presidencial Decree No 4676/21 (July 2021), concerning National Registration, marks a clear step forward in the recognition of non-binary identities. Article 2 of the Decree states:

> "The terms to be used in National Identity Cards and Ordinary Passports for Argentinians in the field referring to 'sex' may be 'F' (Female), 'M' (Male) or 'X'. The latter shall be specified, as outlined in the provisions of Article 4 of this Decree, in the cases of nationals whose birth certificates have been rectified in accordance with Law No. 26.743, whenever the registred option for 'sex' differs from 'F' (Female) or 'M' (Male), or when no 'sex' option has been specified".

As specified in article 4, "For the purposes of this decree, the term 'X' as used in the field of 'sex' shall include the following meanings: non-binary, indeterminate, unspecified, undefined, unreported, self-perceived, or any other category with which the person who does not feel they fall within the male/female binomial may identify themselves".

Despite all of the above, we must not forget that Trans people in Argentina continue to be exposed to acts of violence and aggression as a result of discriminatory practices regarding gender identities, while obstacles to basic social rights such as health, education, work or decent housing still exist. In practice, if not in legal theory, the rule of conduct continues to be criminalisation, stigmatisation and pathologisation, based on the traditional heteronormative religious discourses which have permeated and prevailed in Latin American ideology.

Argentina



Own elaboration

Following intense debate, in October 2018 the Uruguayan Parliament adopted the Comprehensive Law for Trans Persons (Law 19.684). This had first been presented in Parliament in 2017, and was endorsed by the Senate. It recognises the right to a change of name and registered gender; urges the public sector to guarantee one percent of jobs to members of the Trans community (Articles 12 and 13); establishes a public policy of educational inclusion (Articles 15 and 17); and guarantees the right of Trans people not to be discriminated against or stigmatised, establishing measures for prevention, care, protection and reparation.

These legislative advances are the result of a democratising public agenda, a particular focus of which is the violation of the rights of people from social groups who have historically been discriminated against in terms of sexuality and gender (Sempol 2019). As such, this Law highlights the introduction of a reparation regime for transgender people born before 31 December 1975 who can prove that they were victims of institutional violence for reasons related to their gender identity, through deprivation of liberty or other types of moral or physical harm. This could have been carried out by agents of the state or by people acting

with the state's authorisation, support or acquiescence (Article 10). As indicated above, this is included within a regulatory framework for education, health and labour policies. The Law also proposes the need to create a legal watchdog based on a National Diversity Plan.

In 2019 there was an attempt by a group of conservative MPs to repeal the Trans Identity Law through a referendum. Members of the conservative opposition National Party submitted a number of signatures to the Electoral Court in order to be allowed to organise a referendum to repeal the Law. The referendum went ahead, but did not receive the expected support. Nevertheless, the fact that it could be set in motion not only shows that certain legislative advances need to be reinforced with more far-reaching public policies, but also highlights the constant risk of backlash faced by transgender people's rights, as well as the ongoing threat which conservative state institutions pose to progressive organisations and their claims.

Uruguay

Own elaboration

In the case of Chile, the post-dictatorship experience involved a period of intense democratic debates. During this transition period, however, opportunities for discussing the rights of the LGBTI population were almost non-existent and in the context of the HIV-AIDS crisis of the 1980s specific agendas included the social and institutional criminalisation of homosexuality. Partly due to the strong influence of conservative groups, the Chilean democratic transition reinforced the ideology of heteronormativity. As has been the case in Bolivia, Ecuador, Colombia and other countries in the region, in a form of Latin American "common practice", the recognition of the rights of transgender people has been severely hindered by the design of criminal laws which have served to reinforce the dominant legal discourse, thereby criminalising diversity and difference. In Chile, the Criminal Code, which punishes crimes against "morality and decency", has undoubtedly served to restrict the rights of Trans women.[3]

This is not to say that the country has witnessed no legislative progrees. Thanks to the mobilisation and social pressure of transgender groups, certain administrative and judicial advances have been attained. Indeed, thanks to social activism, various judicial decisions were handed down in 2007 which opened the way to vindicating the rights to change one's name and sex (gender) in registration documents without prior sex reassignment surgery.[4] In the administrative sphere, ministerial reports have also been issued which deal with the recognition of the rights of transgender people, especially in

[3] Art. 373 of the Chilean Criminal Code

[4] "Transsexuals make history by winning name and sex change lawsuit in court". 5 May 2007. Available at: http://www.movilh.cl/transexuales-hacen-historia-al-ganar-en-tribunales-demanda-por-cambio-de-nombre-y-sexo/. [Accessed: 4 February 2022].

the field of health. Meanwhile, in terms of education, the Ministry of Education's Report No. 0768 of 2017, concerning the rights of transgender children and students, stands out as significant. These developments have all acted as instigators of the subsequent legislative agenda.

These advances and other emblematic precedents, such as the *Atala Riffo vs. Chile* case, decided by the IACtHR in 2012, and Law 20-609 of 2012 known as the "Zamudio" or anti-discrimination Law, all played their part in the eventual passing of Law 21120 in 2018. This recognises and protects the right to gender identity, regulating the procedures for permitting the rectification of a person's birth certificate in relation to their name and sex when the existing certificate is not congruent with their identity. The Law is based on guiding principles such as non-pathologisation; non-arbitrary discrimination; confidentiality; dignity of treatment; the best interest of minors; and the principle of progressive autonomy.

Law 21120 should be viewed in tandem with others, such as Law 20830, which came into force in 2015, thereby creating the Civil Union Agreement, and Law 21400, enacted on 9 December 2021, coming into force on 10 March 2022, and allowing same-sex marriage along with adoption and lesbian and gay parenting. It is hoped that all these pieces of legislation, when combined with the case-law referred to above, will serve as a basis for the development of public policies and norms, as well as playing a part in informing the agenda for the Constitutional Convention which is currently discussing a new Constitution in Chile, and will hopefully herald a significant constitutional shift.

It is worth bearing in mind, however, that despite the steps taken by Chilean society and its democratic order to recognise and protect the rights of transgender people, the rejection of these rights by more conservative social and political sectors has also intensified. Hence the importance of reinforcing Trans gender empowerment and continuing efforts to claim their place in civic spaces.

Chile

Own elaboration

Despite having conservative constitutional models, Argentina, Uruguay and Chile have been pioneers in recognising and regulating the rights of transgender people in Latin America. Legislative and/or judicial avances have been fundamental in enhancing the rights of people belonging to historically victimised groups, creating conditions of equality and recognition of rights. We cannot forget, however, that this is just the tip of a large iceberg floating in a sea of exclusion and discrimination, the visible head which has emerged after a long history of demands and resistance led by Trans people in the region.

4. The Situation in Colombia and Ecuador

In Colombia, gender demands and demands for the recognition of transgender people's rights have not had the hoped for effect at a legal level. Unlike Argentina and Uruguay, there is no specific legislation in Colombia regulating and protecting these rights; at most there is a specific decree on their exercise.[5] Any development in this area has been achieved at the judicial level, based on a number of rulings of the Colombian Constitutional Court. In a system where the preponderance of fundamental rights plays a central role, Colombia's Constitutional Court has acted with special concern on issues of LGBTI rights, even recognising the right of same-sex couples to equal marriage in 2006. In other cases, local decrees or local public policies have also contributed to the protection of transgender people's rights.

In terms of legal gender reassignment, it was the Constitutional Court's ruling T-504/94 which marked the beginning of the legal debate. Subsequently, rulings such as T-771/12; T-918/12; T-552/13; and T-063/15 have similarly allowed the Court to rule on specific issues in relation to Trans people's rights, such as the right to health; gender reasignment; compulsory military service; all based mainly on the concept of human dignity and the right to the free development of personality. The rejection of a pathologising approach to gender transitions is thus made explicit and a step has been taken towards an elective construction of gender, making less invasive instruments available to applicants in order to preserve individual autonomy (Ruling T-063/15 of the Constitutional Court). Likewise, in September 2019, on the basis of Ruling T-447/19, the Court decided on the rights of a Trans child, who, through his mother, sued a notary's office which had not allowed him to change his name to reflect his gender identity. The Court concluded that the absence of an efficient administrative mechanism to change a child's gender identity constitutes a violation of his or her fundamental rights.

In a number of cases, this case-law momentum has been accompanied by appeals to the Congress of the Republic to enact a Comprehensive Gender Identity Law but the prevailing legislative inertia concerning the issue has unfortunately prevented them from being successful. Nevertheless, the work of certain non-governmental organisations (NGOs) has been crucial in promoting strategic litigation on the issue, making freedom and individual autonomy possible in the face of allegations of police abuse and constant harassment of various Trans activists and sex workers in Bogotá.[6]

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5. Decree 1227/2015 Sole Regulatory Decree of the Justice and Law Sector, related to the procedure to correct information on sex in the Civil Status Registry.

6. According to the third ILGA World Trans Legal Mapping Report, abuse of Trans activists and sex workers continues to occur at the hands of the police, who often invoke "exhibitionism" laws to fine them, or physically attack them for going beyond the "defined space" for sex work. One transgender sex workers' organisation reports recurrent police harassment, with insults, physical violence and fines for drug use in private spaces. They also report completely unjustified violence during identity checks. (Chiam et al 2020: 208).

Colombia

Own elaboration

Ecuador, meanwhile, has as of 2008 a new Constitution of the Republic, which includes principles and values aimed at recognising diversity, non-discrimination and different types of families. Despite this constitutional framework, however, at a legislative level the response to the rights agenda demanded by trans people has been partial, fragmentary and essentially deficient. Nor does the Constitution properly settle the issue in favour of Trans people's rights. Rather, these appear to benefit from a merely formal or nominal recognition and often find themselves surrounded by ambiguities, or at the crossroads of the contradictions which often arise between different constitutional provisions (López 2018).

Indeed, although the Organic Law on Identity and Civil Data Management was passed in February 2016, thereby at least apparently articulating the protection of rights related to gender identity, there is no comprehensive legislation covering the issue. In fact, this Organic Law emphasizes a binary, patriarchal and heteronormative perspective, which tends to operate from suspicion. A prime example is the requirement for any person who transitions to another gender to provide two witnesses to prove the legitimacy of their choice.[7] Legislation thus casts a shadow of doubt over Trans people claiming to exercise their rights, thereby restricting the free development of their personality, discarding any proper recognition of diversity and accentuating discrimination.

Case-law, on the other hand, has been more positive. In a 2017 ruling, concerning case 0288-12-EP, the Ecuadorian Constitutional Court accepted the possibility of a change of legal gender based simply on the right to free development of personality. Similarly, in Constitutional Rulings 10-18-CN and 11-18-CN of 2019, the same court paved the way for another contentious issue: the recognition via case-law of so-called egalitarian marriage. From that point onwards, constitutional jurisdiction has become an agent for LGTBI rights, thus making up for legislative inertia. Specifically, in a 2017 ruling, in case 0288-12-EP, the Court urged the National Assembly to regulate the change of the 'sex' marker on identity cards of Trans persons, granting the legislator a period of one year to generate the necessary regulation in this regard. To date, however, the National Assembly

7. Article 94, final paragraph, of the Organic Law on Identity and Civil Data (2016) states:
"...Voluntarily, upon reaching the age of majority and once only, a person may replace the field of sex for a field of gender, which may be: male or female. The act shall be carried out in the presence of two witnesses who confirm there has been self-determination contrary to the sex of the applicant for a period of at least two years, in accordance with the requirements determined for this purpose in this Law and its regulations. This change shall not affect the data in the person's single personal register relating to sex. Should this situation arise, the petitioner may request a change of names based on the substitution of sex for gender...".

has not complied with the Constitutional Court's resolution and its mandate to adapt the infra-constitutional legislative system, which is indicative of negligence in this area.

Within these various contexts the fight for the rights of transgender people has intensified, generating a whole network of activism and preventative legal advice in order to provide intervention in cases of police violence and discrimination.[8]

Ecuador

Own elaboration

5. The Experience of Bolivia and Peru

In the case of Bolivia, as well as formal constitutional recognition of gender identity, the country's Legislative Assembly passed a Gender Identity Law (Law 807) for transgender and transsexual people in 2016, thereby establishing a procedure for changing a person's name and gender marker on identity documents. Its enactment was clearly perceived as a step forward for the rights of transgender people. However, despite the expectation that, combined with the 2010 Law against racism and all forms of discrimination, this would lead to regulation of the situation of Trans people, things have not turned out as was hoped.

While the Bolivian legislature consolidated certain minimum thresholds of protection, a conservative case-law reversal took place when the Plurinational Constitutional Court of Bolivia declared, in November 2017, that the aforementioned law was partly unconstitutional. The decision responded to a suit filed against the Law five months after its approval, based on legal and moral arguments. As Pascale Absi (2020, p. 38) points out, the lawsuit was filed

> "by the self-styled Platform for Life and Family (a Catholic and evangelist anti-abortion and anti-"gender ideology" coalition), with the support of six opposition assembly members (deputies and senators from the Christian Democratic Party, among others). In the meantime, the first marriages of transgender people -some of them highly mediatised– resulted in reactivating the campaign against the law".

[8] Since 2002, the Transgender Project in Ecuador has been working on legal activism in the streets using what they have called itinerant legal patrols to prevent arbitrary arrests and violent and abusive interventions by police officers against sex workers. Likewise, the PAKTA Foundation is an organisation created by activists for the promotion and defence of the human rights of the LGBTI population.

Conservative groups have portrayed this as a "victory for the traditional family". Meanwhile, Trans groups in Bolivia have continued to appeal to the National Assembly, arguing that the void produced by the declaration of unconstitutionality completely undermines the original intent of the Trans Identity Law as successfully approved by Parliament.

In this context, a municipal law was approved in La Paz in 2018, which regulates spaces where self-managed sex work takes place and which benefits a significant proportion of transgender women. According to the local government, it came about as a result of a civil society initiative supported by several different organisations and based on consultations with various state institutions. The Law states that the municipality must grant authorisation for sex work in order to prevent trafficking, sexual exploitation and procuring. However, the Trans Legal Mapping Report 2019 (2020: 200) has pointed out that:

> "civil organisations working for the rights of transgender people in Bolivia have reported that drug possession is used as an excuse (sometimes involving false accusations or fabrications) to harass sex workers and their clients, and in some cases, imprison both".

In Bolivia, therefore, everyday experience and struggle for the recognition of transgender people's rights still have to contend with harassment, discrimination, lack of recognition and reactionary forces.

Bolivia

Own elaboration

In Peru, meanwhile, the Women and Family Congress Commission approved a legal opinion in March 2021, proposing a Gender Identity Law for the country which appeared to create a window of opportunity for the LGTBI community. Unfortunately, Parliament has failed as yet to pass any legislation on the matter. Nevertheless, since the case of *Azul Rojas Marín vs. Peru*, decided by the IACtHR in 2020, the vulnerable situation of the LGBTI population has become more apparent, thereby increasing the opportunities for discussing the discrimination and violence suffered by transgender people and the urgent need to address it.

Perú

Own elaboration

6. Overall conclusions

The above discussion shows that the recognition of the rights of Trans people throughout Latin America is still fragmentary, inconsistent and often deficient. In some cases, Trans people are criminalised based on criminal norms which represent the conservative stance prevalent in the region. In this situation, the constitutional and legislative orders, as well as case-law, all have a role to play, often as a result of strategic litigation, but there is a distinct lack of uniformity and consistency at any of these levels. Even where recognition of rights has been possible, it has only been partial: social rights such as health, education, social security and inclusion remain unfulfilled for significant minorities. Moreover, the implementation of certain policies using conformist legal approaches of control and surveillance, criminal law and repressive administrative procedures has often enabled the continuation of hegemonic conservative legal epistemologies in the region.

Where achieved, the partial recognition of rights has been made possible thanks to the impetus, mobilisation and strength of purpose of activist groups and associations which embody this historical struggle, fighting their way as they have through the complex relationship between judges, legislators, public bodies and pressure groups which strive to maintain the conservative approach which largely embodies Latin American "legal orders". To their credit, the voices championing more progressive rights have refused to be silenced in the face of democratic attrition, reversals and restrictiveness.

In those Latin American countries where a degree of regulation has been achieved, it has not always been accompanied by jurisdictional support. In the Bolivian case, for example, constitutional case-law even led to a dismantling of existing legislative advances. In contrast, in countries such as Ecuador and Colombia, their respective Constitutional Courts have been far more pro-active and forward-looking in the face of lack of specific and comprehensive regulation, playing a vital role in the protection of rights as mediators in the complex relationship between the legislators, public authorities and jurisdictional bodies. What definitely does seem to have played a significant role in recent times is the influence of the International Human Rights system, which has permeated national states and successfully broadened protective frameworks thanks to persistent social mobilisation, thus increasing the visibility of hitherto stigmatised groups.

There could be several factors that account for the generalised absence of legislation granting adequate protection to the rights of Trans people: the marked conservatism of the members of national legislative bodies, who reflect heteronormativity as a remnant of traditional, immovable, hierarchical gender roles; the conservative backlash which threatens to disregard the more progressive constitutional covenants through regressive reforms of the content of rights; a legislative rhetoric aimed at "civilising" and "ordering" bodies and behaviours on the basis of supposed moral superiority; and the understanding of law as a tool of power, social control and surveillance which encourages orthodox and "civilising" behaviour (Tapia 2019). These are just some of the many causes which merit further discussion and analysis with a view to understanding the limited legal protection available to transgender people.

In view of this, even the most progressive constitutions in the region, such as those of Ecuador (2008) and Bolivia (2009), with their updated agendas concerning human rights,

have not proved sufficient to instigate a coherent legislative approach to the rights of Trans people. Meanwhile, at a constitutional level, the understanding of "gender" seems to ignore any comprehensive protection of gender-diversity as such. By way of contrast, as the Argentinean case indicates, more conservative constitutions in terms of fundamental rights, which fail to give explicit recognition to demands concerning gender, have not necessarily prevented legislators from taking a more progressive approach to the protection of rights for gender-diverse people.

What seems clear is that a paradigm shift in the recognition and protection of rights seems to be taking place in the region, brought about by new constitutional pacts, by the mobilisation of organised pressure groups and/or by the acceptance of international human rights instruments. It is equally clear, however, that formal recognition, whether based on the constitution, legislation or case-law, is still inadequate and fragile (Chiam et al 2020). It also has to contend with the actions of "agencies" linked to more conservative sectors, which have proved to be a key obstacle to the effective realisation of the rights of Trans people at a general level. Even where the rights of transgender people are recognised by law, there is still a long way to go to eradicate discriminatory and violent behaviour, be it physical or institutional.

As such, beyond some specific cases where there has been a legislative shift from a model of stigmatisation to one of recognition and self-determination, the limited attention paid to issues related to the rights agenda has tended to prevail, with no real concern, meaning or significance given to the proposals of Trans movements which are attempting to create a space for discussion within the dominant hegemonic discourse.

Also pending is the task of increasing awareness about the limitations of legal strategies which are often resorted to in order to ensure a threshold of state protection, but which in fact often simply make the daily experience of oppressed bodies invisible. Discourses which properly contemplate non-binary realities are scarce, and in many cases cover up strategies of criminalisation and state persecution by implementing laws which are apparently protective, but ultimately ineffective.[9] This has necessarily led to the development of new concepts and strategies for the consolidation and defence of rights in the Latin American context, a good example being the network for LGBT litigation.

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[9] Anti-narcotics laws are often used to criminalise transgender people in Bolivia, the Dominican Republic, Colombia and Ecuador. As the *Informe de Mapeo Legal Trans 2019: Reconocimiento ante la ley Trans* (Trans Legal Mapping Report 2019: Recognition before the Law) (2020: 190) reveals: "In Bolivia, drug possession is frequently used as a reason, often with allegedly false accusations, to harass and even imprison Trans sex workers and their clients. In Colombia, 40% of LGBTI people and 30% of transgender people who are imprisoned are convicted for drug offences. Ecuador also reports high rates of Trans persons being imprisoned for drug-related offences...". The same report, in relation to the Ecuadorian situation, states: "...According to civil society, the 2014 Ordinance regulating the urban regeneration zone in downtown Guayaquil is used to profile transgender sex workers. When Trans people are in public spaces or engage in sex work discreetly, paragraph (c) of the Ordinance applies, while when they engage in sex work openly, paragraph (f) applies. Municipal, metropolitan and national police use ordinances such as these to justify recurrent violence against Trans sex workers. In addition, they report that many transgender people are in prison for drug-related offences..." (Chiam et al 2020: 1; 215). Similarly, in Chile and Peru, identity control laws are frequently used against transgender people.

This journey through various Latin American legislative agendas and advances in case-law invites a deeper reflection about the role of legislatory bodies, the judiciary and public authorities in general in plural contexts of exclusion and discrimination against social groups which have not been able to achieve proper state protection. Questioning the role of the law and how exactly its narrative is constructed around the protection of rights is a necessary process for underpinning greater and enhanced recognition in an area where the region's more conservative forces are fighting to uphold a fragmented and limited protection of such rights, leaving anyone who is considered "different" out of the social contract. As Blanca Rodríguez has stated, "greater legislative activity is not necessarily synonymous with a better regulatory framework" (Rodríguez Ruiz 2010).

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INTERSEX LEGAL ACTIVISM. UNITED NATIONS ON THE HUMAN RIGHTS OF INTERSEX PEOPLE*

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Abstract: For some years now, two intersex associations, *Brújula Intersex* and *Stop Intersex Genital Mutilation*, have been coordinating the participation in evaluation processes of the rights of intersex people convened by the United Nations. This article will try to analyse the legal strategies of these two associations to obtain the condemnation of several states by the United Nations. The ultimate goal is to draw a common thread of life stories, functioning of medical devices, silencing by governmental authorities, and possibilities for intersex people's agency.

Keywords: Genital mutilation, intersex, sexual binarism, United Nations.

Summary: 1. Introduction. 2. Systemic Violence against Intersex People. 3. United Nations on Intersex People. 3.1. Committee on the Rights of the Child. 3.2. Committee on the Elimination of Discrimination against Women. 3.3. Committee against Torture. 3.4. Committee on the Rights of Persons with Disabilities. 3.5. Human Rights Committee. 4. Conclusions.

1. Introduction

On 3 August 2021, United States athlete Athing Mu won Olympic gold in the 800m at the Tokyo Olympic Games with a time of 1:55.21. At the previous Games, in Rio de Janeiro, the gold had been won by South African athlete Caster Semenya, with an almost equal time: 1:55.28. Caster Semenya achieved her best time in Paris in 2018, with a time of 1:54.25. However, she was unable to compete in Tokyo. Or, rather, she was forbidden to participate. The reason: she had higher levels of testosterone than the International Association of Athletics Federations' standards allowed.

The Court of Arbitration for Sport (CAS), in the case 2018/O/5794 *Mokgadi Caster Semenya v. International Association of Athletics Federations*,[1] took up the IAAF's thesis that, "for sporting purposes, individuals with 5-ARD are biologically indistinguishable from males without a DSD and have been shown to dominate in sport over 'biological

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1. It can be consulted at https://www.tas-cas.org/fileadmin/user_upload/CAS_Award_-_redacted_-_Semenya_ASA_IAAF.pdf [Accessed: 23 November 2021].

females' who, the IAAF asserts, have no chance to win when competing against such 'biologically male' athletes" (paragraph 503 CAS 2018/O/5794). To justify Semenya's *sporting advantage* over *biological women*, the CAS relied on a study published in the *British Journal of Sport Medicine*, which concludes that the upper limit of 5 nanomoles of testosterone per litre of blood is reasonable and proportionate as the distinguishing mark of *the biological woman*. Semenya was left out of this definition.[2]

However, in August 2021, the same scientific team that had signed the study that served as the basis for the CAS decision published an article in the same journal rectifying this preliminary study (Bermon and Garnier 2021). They argued that this was an exploratory study and that a causal inference between testosterone levels and athletic performance was not proven. Over and above this rectification, moreover, and as I attempted to point out above, the difference in performance between Semenya and Athing Mu (a non-intersex woman) was minimal and actually favoured the latter, who beat the former's time in an Olympic competition.

What the now retracted study justifying the CAS's sentence did was to produce *the woman*: it universalised a normative ideal of woman as related to testosterone levels. Other studies, on alimentary matters, are clear on this: environmental and alimentary factors condition testosterone levels (see for example Lo et al. 2018, for alimentary factors; Magid et al. 2018, for environmental factors). This decision of the CAS and the difference it draws between *the biological woman* and the rest, which includes intersex women like Semenya, is about the reproduction of the myth of testosterone. As Katrina Karkazis and Rebeca Jordan-Young (2019) put it, it is about the production and imposition of an essence of femininity. It is even a strategy of racist colonisation (Karkazis and Jordan-Young 2018).

In this article I would like to argue, following the thread of this introduction, that violence against intersex people has been constructed on the basis of the production of an essence of what it is *to be a man and to be a woman*, and that this production has been imposed colonially on our bodies, as a kind of *local-globalised ontology*. To this end, in the following section I will briefly outline what this kind of violence against the intersex population consists of. In the third and most extensive section of this study, I will focus on the legal strategies that intersex activism has developed to denounce such systemic violence within the United Nations (UN). I will finish with some concluding reflections.

2. Systemic Violence against Intersex People

In 2020, the European Union Agency for Fundamental Rights (FRA) published the report *A long way to go for LGTBI equality,*[3] focusing on the European Union. An entire section was devoted to intersex people (Section 4). The data are chilling:

[2] For more information on the case, see Carpenter 2020.

[3] It can be consulted at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf [Accessed: 21 November 2021].

> "[A]lmost two thirds (62%) of intersex respondents felt discriminated against in at least one area of life because of being intersex in the 12 months before the survey; 62% of intersex respondents did not provide -and were not asked for- their or their parents' consent before undergoing surgical intervention to modify their sex characteristics; Intersex respondents say that discrimination because of their sex characteristics, bullying and/or violence are the major problems they face in the country they live in; One in five intersex respondents (19%) faced hurdles when registering their civil status or gender in a public document. These include denials of service or ridicule by staff (41%)" (European Union Agency for Fundamental Rights 2020: 51).

Here, the FRA locates several foci of violence against intersex people: discrimination; unconsented medical interventions (especially surgery); harassment; registration obstacles; ridicule by state authorities. What do these data show us? We could distinguish between two types of violence: explicit and systemic. Explicit violence embraces instances of forceful interruptions our daily lives. If we see a person robbing another person in the street, we will immediately detect that something has happened, that our everyday life has been fractured. Harassment, mockery and discrimination of intersex people by individuals or institutions are instances of explicit violence. Systemic violence, on the other hand, is more subtle. It is not the kind of violence that fractures our daily lives, but the kind of violence that constitutes them. Systemic violence, according to Žižek (2008), is that which constitutes our legal system, our medical system, our educational system, our social system, and which, as such, we understand to be *normal*.[4] Based on it, it is *normal* that two out of three intersex people in Europe have undergone medical procedures to construct a body sexually adapted to the binary norm. It is similarly *normal* for intersex people to face serious obstacles in having their intersexuality registered and acknowledged by administrations, as the FRA study indicates.

Let us return to sports to make this systemic violence visible. The Brazilian athlete Edinanci Fernandes da Silva, an intersex woman and judoka, had to undergo a clitiridectomy in order to continue competing (Lins França 2009). Why should a person's *larger than normal clitoris* have to be reduced in order for them to compete in sports? This is the kind of systemic violence that governs intersex people's bodies. It is based on a dividing line between the normal body and the pathological body. It follows that a body with XY chromosomes is a man's body; as such, it must have a penis and testicles that appear to be masculine in shape and size, and generate testosterone at masculine levels, as well as maintain affective sexual relations with a body with XX chromosomes, that is with a woman's body. In order to be thus, a woman's body must in turn have ovaries and a vagina, and generate a certain maximum amount of testosterone considered to be in line with femininity, as well as maintain affective sexual relations with men. Together these features constitute what could be called a *narrative coherence of bodies* (García López

[4] In a similar vein, see Barrère Unzueta's concept of subordiscrimination in Barrère Unzueta and Morondo Taramundi (2011).

and Winter Pereira 2021). This narrative coherence of bodies imposes a coherent narrative between chromosomes, hormones, phenotype, genitalia, and gonads in the physiological sphere as if they were a uniform and universal whole. And this uniform and universal whole must, in turn, be coherent with a single narrative about gender identity and sexual orientation. Interruptions of that narrative coherence are placed on the side of pathology.

While historically intersex people were subjected to inquisitorial judicial processes that could result in a death sentence (García López 2015), it is during the nineteenth century that medical science picks up the baton from criminal law and the time of correction begins: homosexual and lesbian people are corrected because their sexual orientation is not consistent with the normative narrative; trans people are corrected because their identity is not consistent with the normative narrative; and intersex people are corrected because their bodily characteristics are not consistent with the normative narrative. I emphasise the locution *normative narrative* here because it refers to a construction about bodies that is presented as universal, neutral, objective, impartial, and yet is nothing more than a local-globalised ontology, a point of view that does not admit that it is a point of view. Those who do not conform to the universal subject it creates must be disciplined and fixed.

This is not a story exclusive to intersex people. The Cartesian subject of modernity has been imposed as *the subject*, so those who do not conform to that subject have been left on the other side of the abyssal line (Grosfoguel 2013). Think of the Declaration of the Rights of the Man and of the Citizen of France in 1789, or the Virginia Declaration of Rights of 1776 in what is now the United States. These two legal texts mark the time of rights and also the time of exclusions. Women and the non-white population in particular have been the subjects placed outside the normative subject and, therefore, lacking the legal guarantees to make their lives sustainable and worth living. Whereas women and the non-white population have gradually gained status as subjects and subjects of law, though not without brakes and limitations, law continues to reproduce its inclusion-exclusion logic: for some to be included, others must be excluded (Esposito 2011; García López and Winter Pereira, 2020). In this logic, intersex people are today what women were in 1789. They remain subjectivities outside the subject and the subject of law.

This is why the rights of intersex people become suspended at the doors of the operating room. When an intersex person, especially a child, has their body surgically *corrected/fixed* and *adjusted* to the norm, their rights to the free development of the personality, to privacy, or to physical and mental integrity remain outside the space of exception that is the operating room. Within that room, that body is regarded as a case of *Disorder of Sex Development* to which the medical protocol *Optimal Gender of Rearing* is applied. When a baby is born with genital or sex ambiguity, the aim is to produce a normatively sexed body (in shape and size) within its first 18 months of life (to avoid generating memories), in a process that is considered a psychosocial emergency (García Dauder et al. 2015). To this end, their 'true' sex is diagnosed based on what the intersex movement has ironically called the phallometer: on the measurements of the normative penis -minimum 2.5 cm (the normative clitoris being a maximum of 1 cm; see Fausto-Sterling 2000; Gregori Flor 2006), and it is fixed by means of irreversible surgical and hormonal treatments. Nor is it only about surgery: in addition to physical interventions

there are daily explorations of the genitals, hormonal experimentation, photographs, etc., often implying, as highlighted in an interview conducted by Amnesty International Spain in 2020[5], isolating children from their family and tying them to their bed in the post-operative period.

In addition to such medical violence,[6] there is also registry violence. With some exceptions (e.g., Germany), laws on civil registration normally establish that a person must be registered within a certain period of time (in Spain, it is 72 hours under the 2011 Civil Registration Act[7]) under one of the only two sexes available at the registry: male or female. The registration of a new-born's sex relies on a medical report that is in turn based on genitalia and its correspondence in shape and size with what has been normatively constructed as male and female genitalia (Greenberg 2012). A person's civil registration is thus based on *ius genitalis*.

The UN has acknowledged the existence of cases of intersex genital mutilation and torture (Carpenter 2022; Carpenter 2018). In the *Report of the special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (Méndez 2013), the UN recognised that this type of medical treatment, often non-consensual and sometimes based on flawed informed consent (Feder 2014), represents a case of child torture consented to and legalised by the states (Sandberg 2018), as shown in the FRA report cited above. Has this consideration of torture and genital mutilation by the UN been taken further? In the following section I would like to focus on how intersex activism is managing to make systemic violence visible through its intervention in consultation processes before international bodies.

3. United Nations on Intersex People

The legal strategies that intersex activism is pursuing globally involve engaging in national contexts through reporting, in order to expose systemic human rights violations, particularly in the form of genital mutilation. In this regard, I will focus on the work carried out in recent years by two associations: *Brújula Intersexual* and *Stop Intersex Genital Mutilation*. The first is a Mexican association with a Latin American outreach. It was created in 2013 and involves intersex people, families, and allies. As highlighted on its website, "the initial objective remains the same to this day: to make intersex experiences visible. As a result, one of our core activities is to distribute information in Spanish on the right to bodily autonomy and integrity of intersex people".[8] The second is an association based in Switzerland and founded in 2007 with the aim of "to represent the interests

5. A few years earlier, Amnesty International published a relevant report entitled *First, do not harm: ensuring the rights of children born intersex* (2017). It is available at https://www.amnesty.org/en/latest/campaigns/2017/05/intersex-rights/ [Accessed: 22 November 2021].
6. On the clinic and intersex people in the Spanish context, see Gregori Flor 2015; Fernández Garrido 2021.
7. In 2022, a draft law is being negotiated in Spain that recognises the right to free self-determination of the mention of sex in the civil registry. The United Nations resolutions that I will focus on in this paper reinforce the need for a legislative framework such as the one being proposed.
8. https://brujulaintersexual.org/acerca-de/ [in Spanish in the original] [Accessed: 19 November 2021].

of intersex people and their relatives, raise awareness, and fight IGM [Intersex Genital Mutilation] practices and other human rights violations perpetrated on intersex people".[9] Both associations have been involved in five committees, which have produced a total of 49 reports: Committee against Torture (8 reports), Committee on the Right of the Child (17 reports), Committee on the Rights of Persons with Disabilities (8 reports), Committee on the Elimination of Discrimination against Women (12 reports), and Human Rights Committee (5 reports). These 49 reports have led to the United Nations' reprimanding the genital mutilation of intersex persons in the 49 cases in which they have intervened.

Year	Countries reprimanded
2011	Germany
2015	Switzerland (2)[10], Austria, Denmark, Hong Kong, Chile, Germany
2016	France (3), Ireland, United Kingdom, Nepal, New Zealand, South Africa, Chile, Italy, Uruguay, Switzerland, Netherlands
2017	Denmark, United Kingdom, Morocco, Germany, Ireland, Switzerland, Australia
2018	Netherlands, Spain, Argentina, Chile, Luxembourg, Mexico, Australia, New Zealand, Liechtestein, Nepal
2019	United Kingdom, Belgium (2), Italy, Malta, Portugal, Australia (2), India, Mexico
2020	Austria, Portugal

Prepared by the author

According to the data, the following countries have been reprimanded by the UN for intersex genital mutilation a number of times that is indicated in brackets: Switzerland (4), France (3), Germany (3), United Kingdom (3), Ireland (2), Denmark (2), Netherlands (2), Italy (2), Belgium (2), Austria (2), Portugal (2), Spain (1), Luxembourg (1), Liechtenstein (1) and Malta (1) in Europe; Chile (3), Mexico (2), Uruguay (1) and Argentina (1) in Latin America; Nepal (2), Hong Kong (1) and India (1) in Asia; South Africa (1) and Morocco (1) in Africa; and Australia (4) and New Zealand (2) in Oceania. This makes a total of 26 states, mostly European, and 50 reprimands. As per committee, the number of reprimands issued by the UN stand as follows: Committee on the Rights of the Child 17; Committee on the Elimination of Discrimination against Women 12; Committee against Torture 8; Committee on the Rights of Persons with Disabilities 8; Human Rights Committee 5. I will henceforth focus on some of the cases handled by these Committees.

3.1. Committee on the Rights of the Child

Of all Committees under consideration, the Committee on the Rights of the Child (CRC) has undoubtedly been most active on intersex people. This might be related to the fact that intersex activism focuses mostly on the protection of the physical and mental integrity of children, as most vulnerable subjects and most often subjected to practices that violate human rights -most atrociously.

9. https://stopigm.org/about-us/about-the-ngo/ [Accessed: 19 November 2021].
10. This number indicates the number of UN interventions in that country in that year.

The CRC monitors the implementation of the 1989 Convention on the Rights of the Child. The States Parties must submit periodic reports on the implementation and development of the Convention: they must issue an initial report two years after joining the Convention and a follow-up report every five years. The CRC studies the reports, calling on the states' own governmental bodies, and makes concluding observations.

In the case at hand, i.e. violations of the rights of intersex children, the CRC bases its observations on Article 24.3 of the Convention on the Rights of the Child, according to which "States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children" in relation to General Comment 18 on non-discrimination. The countries analysed by the CRC since 2015 in relation to intersex children have been Switzerland, Chile, France, Ireland, United Kingdom, Nepal, New Zealand, South Africa, Denmark, Spain, Argentina, Belgium, Italy, Malta, Portugal, Australia, and Austria.

The first two interventions took place in 2015. The CRC studied the situation of intersex children in Switzerland and Chile. In the concluding observations on the Swiss case, published on 26 February 2015, the CRC dedicates paragraphs 42 and 43 to intersex persons:

> "[W]hile welcoming the adoption of a new provision of criminal law prohibiting genital mutilation, the Committee is deeply concerned at: a) The significant number of girls living in the State party who are affected or threatened by genital mutilation; (b) Cases of medically unnecessary surgical and other procedures on intersex children, without their informed consent, which often entail irreversible consequences and can cause severe physical and psychological suffering, and the lack of redress and compensation in such cases" (CRC/C/CHE/CO/2-4 2015: 9).

For case b, concerning intersex children, CRC urged Switzerland,

> "in line with the recommendations of the National Advisory Commission on Biomedical Ethics on ethical issues relating to intersexuality, [to] ensure that no one is subjected to unnecessary medical or surgical treatment during infancy or childhood, guarantee bodily integrity, autonomy and self-determination to the children concerned, and provide families with intersex children with adequate counselling and support" (CRC/C/CHE/CO/2-4 2015: 9).

In this report, the CRC placed at the same level, for the first time, the genital mutilation suffered by girls and intersex genital mutilation, and declared them both to be cosmetic, non-consensual, medically unnecessary, and irreversible. To lead to this pronouncement, *Stop Intersex Genital Mutilation* submitted a report describing the non-consensual and medically unnecessary treatments (clitoroplasty, clithridectomy, vaginoplasty, gonadectomy, etc.), as well as their connection with the problems encountered at the Civil Registry, and the violations of international law that these

practices entailed: "[T]he surgeries and other harmful treatments intersex people endure in Switzerland cause severe physical and mental pain. Doctors perform the surgery for the discriminatory purpose of making a child fit into societal and cultural norms and beliefs, although there is plenty of evidence on the suffering this causes".[11] The Swiss State was held responsible for these serious human rights violations.

Switzerland is not an isolated case. Far from it, we can find strong similarities on this issue with other countries, both in the reports submitted by intersex activists and the concluding observations by the CRC. Spain, for example, was reprimanded in 2018. The report follows the same structure: what are cases of intersexuality; what practices are carried out in these cases, based on those that are documented; what rights are violated by these practices; what obstacles do intersex people encounter in denouncing these violations; conclusions; and recommendations. The conclusions state:

> "[T]hus Spain is in breach of its obligation to 'take effective legislative, administrative, judicial or other measures' to prevent harmful practices (Art. 24 para. 3 in conjunction with CRC/CEDAW Joint General Comment No. 18/31 on harmful practices), as well as of its obligations under Articles 2, 3, 6, 8, 12, 16, 19, 23, 24.1, 34, 36, and 37 of the Convention on the Rights of the Child. Also in Spain, victims of IGM practices encounter severe obstacles in the pursuit of their right to access to redress and justice, including fair and adequate compensation, and the means for as full rehabilitation as possible. Further the state party's efforts on education and information regarding the human rights aspects of IGM practices in the training and education of medical personnel are grossly insufficient with respect to the treatment of intersex people"[12].

These human rights violations are given flesh and blood in the report. The first case reported concerns a girl born in 2001, who at 17 months of age underwent surgery for clitoral reduction, vaginoplasty, and labiaplasty. Seven months later, labiaplasty was performed again. From the age of two until the age of 12 the girl underwent periodic vaginal dilations with dildos/dilators of different sizes so that her vagina could be large enough to be penetrated in the future. The medications she was given, especially hydrocortisone, affected her health, causing Cushing syndrome, which led to overweight. Today, that surgically constructed girl identifies herself as a boy and stopped following the prescribed treatment at the age of 12. Their childhood was spent amidst hospitals, cures, relapses, and infections.

The recommendations presented in the intersex activists' report focus on the need to address the following points: prohibition of harmful practices against intersex people, i.e. unnecessary and non-consensual medical treatment, to guarantee the bodily integrity, autonomy and self-determination of children and their families; introduction

[11] The report presented by the activists in https://intersex.shadowreport.org/public/2014-CRC-Swiss-NGO-Zwischengeschlecht-Intersex-IGM_v2.pdf [Accessed: 18 November 2021]. The quote on page 26.
[12] The report presented by the activists in https://intersex.shadowreport.org/public/2017-CRC-Spain-NGO-Brujula-Zwischengeschlecht-Intersex-IGM.pdf [Accessed: 18 November 2021]. The quote on page 15.

of legal measures to realise the principle of truth, justice, and reparation; and education and training on intersexuality for medical, psychological, and educational professionals. The CRC concluded that hospitals in Madrid, Barcelona and Malaga continue to perform genital mutilations on intersex children. Hence

> "the Committee recommends that the State party prohibit unnecessary medical or surgical treatment from being performed on intersex children, when those procedures entail a risk of harm and can be safely deferred until the child can actively participate in decision-making. It also recommends that the State party ensure that intersex children and their families receive adequate counselling and support" (CRC/C/ESP/CO/5-6 2018: 7).

3.2. Committee on the Elimination of Discrimination against Women

The Committee on the Elimination of Discrimination against Women (CEDAW) is responsible for monitoring the implementation of the 1979 Convention on the Elimination of All Forms of Discrimination against Women. As with the CRC, States Parties are required to submit periodic reports to which the CEDAW will respond with concluding observations.

CEDAW has pronounced itself about intersex women on the basis of Article 5 of its Convention[13] in relation to General Recommendation 31, which is also closely related to General Recommendation 18. The countries analysed by CEDAW with regard to the rights of intersex women were: France, Switzerland, Netherlands, Germany, Ireland, Chile, Luxembourg, Mexico, Australia, New Zealand, Nepal, and Liechtenstein.

The CEDAW first commented on the situation of intersex women in July 2016 in relation to France. In paragraph 17, the CEDAW states how stereotypes reoccur in harmful practices. Specifically, it states:

> "[T]he Committee welcomes the State party's efforts to combat discriminatory gender stereotypes, including by promoting the sharing of household duties and parenting responsibilities, and to address the stereotyped portrayal of women in the media, including by regulating broadcasting licences and strengthening the role of the Audiovisual Superior Council. The Committee further welcomes legislative and other measures taken to combat harmful practices, including child and forced marriage, female genital mutilation and crimes in the name of so-called honour. However, the Committee is concerned that: […] f) Medically unnecessary and irreversible surgery and other treatment is routinely performed on intersex children, as noted by the Committee on the Rights of the Child and by the Committee against Torture" (CEDAW/C/FRA/CO/7-8 2016: 5-6).

[13] Article 5: "States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".

It is undoubtedly an important step for CEDAW to recognise that intersex women, especially girls, have their rights systematically violated due to their specific bodily features. Therefore, it recommends:

> "[D]evelop and implement a rights-based health-care protocol for intersex children, ensuring that children and their parents are appropriately informed of all options; children are involved, to the greatest extent possible, in decision-making about medical interventions and their choices are respected; and no child is subjected to unnecessary surgery or treatment, as recommended recently by the Committee against Torture and the Committee on the Rights of the Child" (CEDAW/C/FRA/CO/7-8 2016: 6-7).

The Mexican case, decided in July 2018, is similar. In response to the activists' report[14], the CEDAW includes intersexuality in the section on the legislative framework and discrimination against women, as an intersectional factor that is at the root of systemic violence:

> "[T]he lack of effective mechanisms and the insufficient state-level budgetary allocations to implement and monitor the laws relating to gender equality and women's right to a life free of violence have failed to eliminate discrimination, notably intersecting forms of discrimination, in particular against indigenous women, Mexican women of African descent, migrant women, women with disabilities, lesbian, bisexual and transgender women and intersex persons" (CEDAW/C/MEX/CO/9 2018: 4).

This requires the adoption of a roadmap at all levels of government (federal, state, and local) to implement laws for the prevention and elimination of all de facto discrimination against women, with special emphasis on intersex women. Likewise, CEDAW is concerned about unnecessary medical treatment of intersex girls. Therefore, it recommends that

> "[I]n the light of joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee of the Rights of the Child (2014) on harmful practices, the Committee recommends that the State party adopt provisions explicitly prohibiting the performance of unnecessary surgical or other medical procedures on intersex children until they reach an age when they can give their free, prior and informed consent and provide families of intersex children with adequate counselling and support" (CEDAW/C/MEX/CO/9 2018: 7).

3.3. Committee against Torture

The Committee against Torture (CAT) is concerned with the analysis of how states implement the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. States Parties are required to submit periodic reports every four years, plus the initial report one year after accession.

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[14] It can be consulted at https://intersex.shadowreport.org/public/2018-CEDAW-Mexico-NGO-Intersex-Brujula-StopIGM.pdf [Accessed: 18 November 2021].

The CAT has analysed cases of torture of intersex persons on the basis of articles 2, 12, 14, and 16 of the Convention.[15] It has so far studied the cases of Germany, Switzerland, Austria, Denmark, Hong Kong, France, Netherlands and United Kingdom. In 2011 it issued its first pronouncement on the matter, indeed the first pronouncement ever issued by the UN on intersex people, in a resolution on Germany. Based on a report submitted by intersex activists,[16] the CAT concluded, in a section devoted exclusively to intersex people, that there were cases of genital mutilation leading to forced sterilisation. Such surgeries, it noted, are not justified on health grounds, but for purely cosmetic reasons and without the informed consent of the persons involved or their legal guardians. Furthermore, the CAT expressed concern about the absence of a legislative framework guaranteeing the integrity of people regardless of their sexual orientation and providing redress in the form of compensation. Therefore, it urged Germany to

> "ensure the effective application of legal and medical standards following the best practices of granting informed consent to medical and surgical treatment of intersex people, including full information, orally and in writing, on the suggested treatment, its justification and alternatives; (b) Undertake investigation of incidents of surgical and other medical treatment of intersex people without effective consent and adopt legal provisions in order to provide redress to the victims of such treatment, including adequate compensation; (c) Educate and train medical and psychological professionals on the range of sexual, and related biological and physical, diversity; and (d) Properly inform patients and their parents of the consequences of unnecessary surgical and other medical interventions for intersex people" (CAT/C/DEU/CO/5 2011: 7).

Eight years later, in the United Kingdom (UK) case CAT/C/GBR/CO/6, CAT insists on the lack of a legislative framework to guarantee the lives of intersex people, as well as redress for those who have suffered genital mutilation and other unnecessary medical treatment. Therefore, it recommends the UK to ensure that

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15. Article 2: "1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." Article 12: "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."

Article 14: "1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."

Article 16: "1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment."

16. It can be consulted at https://intersex.shadowreport.org/public/Association_of_Intersexed_People-Shadow_Report_CAT_2011.pdf [Accessed: 20 November 2021].

> "[T]he parents or guardians of intersex children receive impartial counselling services and psychological and social support, including information on the possibility of deferring any decision on unnecessary treatment until they can be carried out with the full, free and informed consent of the person concerned; (b) Persons who have been subjected to such procedures without their consent and resulting in severe pain and suffering obtain redress, including the means for rehabilitation" (CAT/C/GBR/CO/6 2019: 14).

3.4. Committee on the Rights of Persons with Disabilities

The Committee on the Rights of Persons with Disabilities (CRPD) focuses on the 2006 Convention on the Rights of Persons with Disabilities. States Parties to this Convention are required to submit a comprehensive report on the measures taken to comply with it within two years after accession.

With regard to intersex persons, the CRPD applies articles 16 and 17 of the Convention[17] relating to exploitation, abuse, and violence, as well as integrity of the person. The states reprimanded have been Chile, Germany, Italy, Uruguay, United Kingdom, Morocco, India, and Australia. The resolutions issued by this Committee raise the need to protect the integrity of intersex persons, as "children are subjected to irreversible surgery for intersex variation and other medical treatments without their free and informed consent" (CRPD/C/ITA/CO/1 2016: 5). The CRPD recommends that States Parties ensure that no one is subjected to non-consensual medical or surgical treatment during infancy or childhood, thus guaranteeing the bodily integrity, autonomy and self-determination of children, by providing their families with appropriate counselling and support (CRPD/C/ITA/CO/1 2016: 6). In other cases, concerning for example Chile, the

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17. Article 16: "1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects. 2. States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive. 3. In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities. 4. States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs. 5. States Parties shall put in place effective legislation and policies, including women and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted."

Article 17: "Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others."

CRPD also proposes preventing forced sterilisations (CRPD/C/CHL/CO/1 2016: 6), or, in the case of Morocco, the prohibition and criminalisation of non-consensual medical treatment of intersex persons (CRPD/C/MAR/CO/1 2017: 7).

Moreover, in its October 2019 report, concerning India, the CRPD denounces the 'mercy killings' of intersex children with disabilities: "[T]he Committee is concerned about the deaths of children with disabilities in institutions, and information about 'mercy killings' of intersex children with disabilities" (CRPD/C/IND/CO/1 2019: 6). It also raises concerns about the non-registration of underaged intersex persons, thus increasing the risk of neglect (CRPD/C/IND/CO/1 2019: 10).

3.5. Human Rights Committee

The Human Rights Committee (HRC) monitors the implementation of the 1966 International Covenant on Civil and Political Rights. States Parties are required to submit an initial report within one year of their joining the Covenant and then further reports whenever the HRC requests them, which normally happens every four years.

The HRC's observations on the situation of the rights of intersex people were based on articles 2, 3, 7, 24 and 26 of the Covenant[18] concerning cruel, inhuman and degrading treatment, harmful practices and non-consensual medical or scientific experimentation. The countries studied were Switzerland, Australia, Belgium, Mexico, and Portugal.

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[18] Article 2: "1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant. 3. Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted."

Article 3: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

Article 24: "1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality."

Article 26: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

This is the Committee that has developed the fewest resolutions on intersex people since 2017, when it published the first one. The 2020 report on Portugal stands out here. Despite the fact that Portugal legally guarantees the rights of LGTBI people since 2018 (Law 38/2018 of 7 August), the HRC notes that "children born with intersex traits are sometimes subjected to invasive and irreversible medical procedures aimed at assigning them with a sex, that such actions are often based on a stereotyped vision of gender roles and that they are carried out before the persons in question are of an age to give their free and informed consent" (CCPR/C/PRT/CO/5 2020: 4).

4. Conclusions

The 49 Committee resolutions under analysis, of which only a small sample has been highlighted here, all point to the need for legal frameworks that guarantee the lives and integrity of intersex people, especially children. The vast majority of Committee reports are strongly critical of serious violations of the lives of intersex people, denouncing medical practices and administrative limitations that directly violate human rights. These reports, however, fail to address the need to eradicate a binary system, as the source for the perceived need to pigeonholes intersex people into bodily normativity, into a narrative of body coherence. Silence on this issue seems surprising. It might be that the reports did not appear to be the right space to include such a critique. Notwithstanding this silence, the pronouncements of the Committees, although merely aesthetic and without practical consequence for the States Parties, do represent an interesting legal strategy.

In this regard, in October 2021 Austria, on behalf of 53 states, requested the UN Human Rights Council to urgently protect intersex people in their autonomy and right to health. They called for a ban on non-consensual medical practices, as well as on violence and discrimination based on sex characteristics. The list of signatory states includes many of those that have been reprimanded by the United Nations.[19] Among them we find, for example, the Spanish state, currently immersed in the attempt to approve a legislative framework for LGTBI+ people, which ironically pays scant attention to the rights of intersex people.

To conclude this paper, I would just like to consider to what extent the resolutions of the United Nations Committees analysed here and the work carried out by intersex activists can be framed as *soft law*. By this I understand law that is not constructed vertically or hierarchically, but rather through horizontal, participatory, consensual and deliberative creation (Mercado Pacheco 2012). In this soft law framework, intersex activists become constituent agents that question the strict formulas of regulation (Rubio Castro 2014). These resolutions of the UN Committees on intersex people could even be understood as guides to the interpretation and application of hard law. They could be understood, in short, as a legislative technique that is apt to address such complex realities as those conveyed by the systemic violence of sexual binarism.

[19] The news is available on the Austrian government's website: https://www.bmeia.gv.at/oev-genf/speeches/alle/2021/10/united-nations-human-rights-council-48th-session-joint-statement-on-the-human-rights-of-intersex-persons/ [Accessed: 23 November 2021].

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HATE SPEECH AND BINARY EXCLUSIONS IN EUROPE: A DIGITAL AND COMMUNICATIVE APPROACH*

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Abstract: Hate speech targeting homosexuals, transgender people and other sexual orientations, as well as gender identities that deviate from the prevailing traditional binary system pervades social networks and digital communication channels. As a result, it is causing the exclusion of these groups, which often opt for invisibility in order to survive. Freedom of expression is an essential and preferential right in Western democratic systems. Based on this premise, this paper delves into the European legal and jurisprudential framework on hate speech –especially, acts of transphobia, homophobia and violence based on sexual orientation and gender identity– as a limit to freedom of expression, when other fundamental values, such as dignity, are at stake. Based on an analysis of the main normative instruments that have attempted to define the concept, as well as recent case law on hate speech, the aim of this article is to outline a consensus and to establish stable parameters to configure a legal response –valid in the European context– to cases of homophobic or transphobic speech.

Keywords: Hate speech, freedom of speech, dignity, binarism, transphobia, homophobia, social networks, digital communication.

Summary: 1. Preliminary Considerations: Tolerance, Speech and Discrimination in a Rights Framework. 2. Hate on the Basis of Sexual Orientation and Gender Identity: Exploring the Discourse on Social Networks. 2.1. Homophobia, transphobia and LGBTI-phobia: a brief semantic approach. 2.2. Sexual orientation and identities: myths, ignorance and prejudice in the *era of digital communication*. 3. Hate Speech as a Limit to Free Speech: The European Paradigm. 3.1. What is hate speech? Concept and weighting criteria. 3.2. Hate speech on the basis of sexual orientation or gender identity: vulnerable groups. 4. Hate Speech Against Sexual Minorities and the Jurisprudence of The European Court of Human Rights. 4.1. ECtHR judgment of the 9th of February 2012, the case of *Vejdeland and others v. Sweden*. 4.2. ECtHR judgment of the 14th of January 2020, the case of *Beizaras and Levickas v. Lithuania*. 5. Closing Thoughts: Challenges and Opportunities in the *Digital Era*.

1. Preliminary Considerations: Tolerance, Speech and Discrimination in a Rights Framework

"Dawn of the 28th of June 1969. The usual clients of the Stonewall Inn –a darkened bar of the New York mafia, located in the west of Manhattan– rise up against the police raids, with a brickbat. Each projectile, a piece of a memory. The Stonewall Inn was one of the few venues where queers were allowed in. Lesbians, drag queens, trans youth and sex workers turned the premises into a night-time haven. The peace never lasted too long" (Mauri, 2020). It was not an isolated event; raids and assaults for corrective purposes were frequent.

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Nowadays, as seen from a distance, it might seem that the episode –recounted with these words in a recent publication– is far behind us[1]; that the violence is anecdotal and that the actual reality is different. But the blows have only changed shape. Today the battle of identities is discursive and fought on social networks. Every tweet –every tag– reinforces a myth, reproduces a prejudice or consolidates a representation. Hatred towards difference –that which does not fit into our normative society and the structures that order it[2]– is often trivialised in this new infinite communicative space that is the digital stage, paving the way to words that synthesise the discourse of hate, exclusion and fear; that which erects the walls of language and turns the world into a more "divided and dangerous" place. According to Amnesty International, 2016 was a year marked by the "cynical use of rhetoric"[3] aimed at specific groups of people. Five years have since passed and the situation has not improved. New virtual communication channels are the perfect vehicle for transmitting messages that then expand on a global scale and perpetuate the endemic discrimination that is present in a society that is already steeped in –and divided by– classic structures that favour the consolidation of a predominant binary system of gender, a system that excludes those that intend to distance themselves from the established canons. Frequently, and more often than we might think, this exclusion turns into aggression, through a discourse that goes viral, promoting rejection and violence on the basis, simply, of sexual orientation or gender identity.

We all know –and I am aware of how obvious this is– that humans are social beings; we need to develop within a society and, in that regard, we do so through interactions between subjects; in short, communication is key. A society cannot sustain itself if it does not rest on the pillar of tolerance. John Locke himself stated it in his Letter[4] to those who professed a different religion –as faith cannot be imposed– and we can now translate this to the realm of discursive aggressions that are made on the basis of sexual and gender identity. However, if we approach discrimination from the starting point of tolerance, as a cardinal element of all democratic societies, we still cannot overlook the fact that it is an absolute value (Spigno, 2017: 182); "unlimited tolerance leads to the disappearance of tolerance itself and, as a result, the destruction of society" (Popper, 2011), which is why its limits can be found in the extent to which it can be confronted; colliding with another pillar of a democratic system: the right to free speech.

This is a freedom which encompasses many components –which, as such, must be guaranteed– and that is placed, in western systems, as a backbone of democracy[5]. It is of course necessary for the creation of the free public opinion, which in turn sustains

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1. However, it is brought back to the present in the testimonies of those who lived it, such as Donoso (2010) and Feinberg (2003), amongst others.
2. It is not in vain that "the patriarchal masculine thought has placed ethics at the core of the value of the law and of justice" (Vázquez García and Sánchez Fernández, 2017: 27).
3. "The situation of human rights in the world. Annual report 2016/17", Amnesty International [online]: https://www.amnesty.org/es/latest/news/2017/02/amnesty-international-annual-report-201617/ [Accessed: 09/02/2021].
4. "It is not the diversity of opinions, which cannot be avoided; but the refusal of toleration to those that are of different opinions, which might have been granted, that has produced all the bustles and wars, that have been in the world" (Locke, 1689).
5. In the renowned *Handyside* judgement, the ECtHR contends that freedom of speech not only safeguards those messages or discourses that are inoffensive or well-received, but "also those that shock, worry or offend". See judgement of the ECtHR in the case of *Handyside v. United Kingdom,* December 7 1976, § 49.

the bedrocks of all processes of legitimation[6]. However, it is through the communication and transmission of messages –opinions, ideologies and value judgments– that together we build our imaginary; consolidating structures and social patterns, prejudices and stereotypes that often segregate, exclude and perpetuate the existing discrimination, which means that the dignity of a person, as a legal asset that should be protected, is shattered.

In the face of these expressions of hatred, respect for diversity –as is stated in the UNESCO Declaration on Tolerance[7]– is also a guarantee of freedom on which to base the establishment of limits, which are necessary in order to harmonise the exercise of freedom of speech with other constitutionally protected legal assets, such as dignity. These legal goods are the ones used by Professor Jeremy Waldron to justify that the regulation of hate speech is possible within the legitimate margins of freedom of speech (Waldrom, 2012: 11 ff.). He represents, in the American context, the minority voice that counters the predominant classical liberal position. He denies the absolute and unlimited character of these freedoms, considering that such an affirmation would imply the impossibility of guaranteeing these other rights with which they could collide[8].

In the opposite corner are those who defend freedom of speech from the point of view of its practice in complete autonomy by those who express themselves, within a protected marketplace of ideas[9] in which any kind of discourse is allowed, regardless of its content. This implies a duty of abstention from the State and, at the same time, of acceptance of the principle of self-regulation of the public space in which, they claim, the weight of the argumentation and the debate itself are the determining factors that will foster the inevitable withdrawal of these messages from the public space. In line with this school of thought we can highlight the Rawlsian idea that the freedom of speech of those who are intolerant should only be restricted when it poses a threat to the security of institutions, or when it impedes institutions from operating effectively (Rawls, 1996, 2002). For the American philosopher, these *basic liberties* can only be restricted by other basic liberties. Thus, freedom of speech cannot be encroached upon by aggregative considerations, nor can it be restricted by other rights that are not basic liberties (Rawls, 1979: 82-83). Meanwhile, Dworkin –another exponent of the discussion in the United States– considers that restrictions in speech are only admissible in extreme cases where they directly incite violence (Dworkin, 1996: 218-225).

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6. On the concept of public opinion, amongst others: judgement of the Spanish Constitutional Court of STC 6/1981, of 16 Marche; STC 159/1986, of 16 December.

7. Declaration of Principles on Tolerance, proclaimed and signed in the 28th meeting of the UNESCO General Conference, on November 16, 1995.

8. The foundations of the restrictions are based, in the eyes of the author, on two pillars: on the one hand, the recognition of a kind of public good of inclusion or trust that is a part of social diversity and that would be undermined by hate speech; and, on the other hand, the dignity of minorities that are targeted by this speech: "Hate Speech is speech, no doubt; but not all forms of speech or expression are licit, even in America, and we need to understand why there might be a particular problem with restricting speech of this kind" (Waldrom, 2012: 14).

9. The *marketplace of ideas*, a concept first used by judge Holmes, in his dissident vote in the judgement in the case of *Abrams v. United States (1919)*.

As we know, in the framework of the debate regarding the limits to freedom of speech against hate speech, "the standards are not clear, and even less so, peaceful" (Valero Heredia, 2017: 285). Two theoretical models have traditionally been distinguished and which, in parallel, have shaped doctrinal constructions with differing legal consequences. Indeed, the cultural and political tradition of liberalism[10] presents the paradigm of tolerating intolerance; a narrative that exists alongside other models in democracy, built on the ideal on which contractual theories are based[11]. These theories are focused on the common good based on shared judgments: values and principles that are not attached to doctrine, which are the basis of the ethical premises that should delimit the structure of the political debate. From this second perspective –rooted in the European continent– some discourses should not even enter the marketplace of ideas; those that impinge on the pillars on which democracy is founded: human dignity and the development of personality.

First coined by the Supreme Court of the United States, the term *hate speech* has been defined by the Council of Europe as "any form of expression that spreads, incites, promotes or justifies racial hatred, xenophobia, antisemitism and other forms of hatred based on intolerance"[12]. It is the type of language that uses discriminatory vocabulary to degrade, intimidate or incite violence against a distinct group, whether it be on the basis of race, sex, religion, or any other personal or social circumstance (Weber, 2009: 3-5). This inevitably leads us to a debate about the convenience, or lack thereof, of imposing limits on its exercise. The same classical debate regains its meaning when, at the height of the *Society of Information*, digital channels and tools of mass broadcasting can multiply the visibility of certain extreme messages which –it was assumed– would have stay cornered as an outcome of the debate itself (Boix Palop, 2016: 61). This has not been the case. Hate speech against homosexual and transexual individuals and groups, or those of different sexual and gender identities, has arisen and now travels through social networks, leading to the marginalisation of these groups who –all too often– choose to remain invisible in order to survive. In this regard, it becomes necessary to study and analyse –from the perspective of Constitutional Law, although necessarily complemented with some elements derived from the criminal approach– the different discourses which, in some cases, are found to be closely linked to acts of transphobia, homophobia and violence on the basis of sexual orientation and gender identity. Furthermore, this should be done without neglecting the essential nature and central role played by freedom of speech in western democracies, despite the fact that it cannot serve as an excuse or a shield for those who promote hate and intolerance.

The article deals with a complex subject matter: it focuses on discrimination based on specific grounds, but it does so on the basis of a necessarily broad conceptual apparatus –anti-discrimination law and communication rights–, in an equally complex communicative

[10] A theoretical standpoint rooted in the postulates of John Stuart Mill. According to him, silencing the expression of an opinion is an evil that affects all of humanity, for two reasons: if it is a truthful opinion, it misses the opportunity to change error for truth; and, if it is not, it impedes the clearer perception of truth that would have been produced by its collision with said error (Mill, 1984).

[11] Locke's political theory is a good example of the liberal-rooted contractual tradition which defends the thesis that the limits in exercising power emanate from subjective rights that individuals possess by nature. In this regard, see Locke (1991).

[12] Recommendation no. 97 of the Committee of Ministers of the Council of Europe, 30 October 1997.

context –the digital one– which develops in a multilevel legal framework that is also extensive and complicated. It is certainly a challenge. It is, without a doubt, a complex debate that deserves an in-depth inquiry, starting from the convergence of the different elements at stake: the actors that take part in the communication; the minorities that are neglected or discriminated against; the content of the messages –an objective element– and the criteria that allow us to difference between hate speech and hate crime; as well as the channel or vehicle of transmission –along with its ramifications– of said speech.

What is hate speech? What discursive realities does the concept encompass? Should we tolerate hate speech targeted at identities that stray from the predominant binary system of gender? These questions are addressed in this work, from a Spanish and European normative and jurisprudential framework that frames the idea of hate speech as a possible limit to free speech. Particular attention will be paid to homophobic and transphobic speech, as well as the difficulties of reaching a consensus and establishing stable parameters of response (Valero Heredia, 2017: 287-88).

2. Hate on the Basis of Sexual Orientation and Gender Identity: Exploring the Discourse on Social Networks

This is a problematic concept; hatred "refers to subjective and emotional considerations that are difficult to legally categorise" (Salazar Benítez and Giacomelli, 2016: 131), and this then complicates the task of systematising its presence on the communication scene. In order to define the object of this work –which is focussed on hate speech on the basis of sexual orientation or gender identity– we will, firstly, turn our attention to the different shapes that this speech can take.

Social networks represent the perfect channel for the construction and subsequent transmission of discursive narratives which, often, are centred around particular prejudices related to different sexual orientations or gender identities, and which are directly linked to a rejection of homosexuality and transsexuality (Rodríguez Lorenzo, 2020). In this regard, it becomes useful to begin by identifying the main phobias –the definition of which should also be clarified– that are configured on the basis of pre-existing myths and judgments, insomuch as they are found at the origin of the most typical acts of extreme speech.

2.1. Homophobia, transphobia and LGBTI-phobia: a brief semantic approach

As in other similar debates, we can start from a "determinate construct of gender", from a "determinate view of people as being a part of a socio-legal community" (Rodríguez Ruiz, 2012: 50). The psychologist George Weinberg was the first to use the term *homophobia*[13] at the start of the seventies (Weinberg, 1972) to refer to "heterosexuals whose behaviour denotes a profound aversion to homosexuality; irrational fear, hatred and intolerance of those whose sexual orientation is other than heterosexual"[14]. Insomuch as it

[13] Later coined by K.T. Smith.

[14] Guide on LGBTI hate crimes, Ed. Department of Equality, Social Policies and Reconciliation. Government of Andalucía. (*Guía de delitos de odio LGTBI, Ed. Consejería de Igualdad, Políticas Sociales y Conciliación.* Junta de Andalucía.)

involves a discriminatory attitude targeted towards another person for being a homosexual, it also affects lesbian women. However, in these cases the term *lesbophobia* (Viñuales, 2002) is preferred, as it is more specific and sensitive to multiple discriminations: for being a woman and for being lesbian.

Over time, the tendency has been to expand the definition of the concept. In the *Resolution on homophobia in Europe*[15], this term is defined as an "irrational fear of and aversion to homosexuality and to lesbian, gay, bisexual and transgender (LGBT) people based on prejudice and similar to racism, xenophobia, anti-semitism and sexism"; a definition that is comparable to *LGBTI-phobia* which includes, generally speaking, a rejection of all diverse identities: lesbian, gay, bisexual, transexual, intersex, etc.

As for transphobia, considered to be an extension of homophobia[16], it is defined as the rejection suffered by transexual people based on their transgression of the socially established system of sex/gender. Some authors place its origin in oppositional sexism (Serano, 2020), that is, the belief that the categories of masculine and feminine are rigid and mutually exclusive, with different attributes that prevent them from overlapping. This contrasts with traditional sexism, which is based on the belief of the superiority of what is masculine.

These are some of the most common *phobias* that sexual minorities suffer from, and that can take on different forms[17] of rejection and discrimination: persecution, physical or psychological violence, torture, unjustified restriction of their rights or verbal violence– of interest to us here–that is, discursive aggressions that reproduce myths and prejudices that are inherent to our collective imaginary and difficult to eradicate.

2.2. Sexual orientation and identities: myths, ignorance and prejudice in the *era of digital communication*

"Homosexuality is not natural"; "it is an illness and, with adequate treatment, can be cured"; "to be transexual is comparable to cross-dressing". The examples are many: false myths and preconceived notions that are accepted, whether it be because of ignorance –in some cases– or because they are based on a particular ideological postulate, in the framework of the conventional heteronormative paradigm. In any case, it is a hatred that has been around for a long time and that, historically, has been reinforced and justified by the Law (Spigno, 2017: 188 ff.)

Homosexuality was forbidden –and criminalised– until the mid-twentieth century, at which point the trend began to reverse[18], leading to a diametrically opposed phase, characterised by its recognition, the alignment of rights and the legal protection of said

15. Resolution of the European Parliament on homophobia in Europe, 18 January 2006.
16. The origin of the rejection can be found in the defiance of binary gender roles (Norton, 1997).
17. Resolution of the European Parliament on homophobia in Europe, 18 January 2006. Consideration B.
18. In the Western world.

sexual minorities[19]. Before this point of inflection, the determining factors used to justify this repression were morality and the dogmas of religion and science. In the second half of the nineteenth century, medicine and scientific debate contributed to providing *data* and results –the outcome of research– to endorse the stigma (Tardieu, 1857). Thus, homosexuals were considered mentally ill, and were offered therapies such as sterilisation or castration (Foucault, 2008). They displayed a *deviant behaviour* and a sign of *weakness* which endangered the preservation of the purity of the Aryan race. These were the arguments used to justify the Nazi strategy of persecuting and exterminating homosexuals in Germany (Pretzel, 2003).

In Europe, the gradual –and indeed slow– process of decriminalisation began timidly after the Second World War, in parallel with the depathologisation of these behaviours. Until its update in 1993, the WHO's International Statistical Classification of Diseases and Related Health Problems (ICD) still considered homosexuality as an illness, categorised as a behavioural disorder. This was despite the fact that, in 1973, it had been removed from the list of disorders in the "Sexual deviations" section of the second edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-II). As for transsexuality, this milestone is surprisingly recent: the World Health Organisation removed transsexuality from its list of mental disorders in the ICD in July 2018, when it joined the section titled "Conditions related to sexual health".

The journey to this development[20], that some authors describe as "revolutionary", has been –and continues to be– "slow, but steady" (Spigno, 2017: 192). It is true that criminal repression has been widely overturned, with some exceptions. However, a sentiment of social rejection is still latent –due to centuries of stigmatisation– which leads to, in far too many occasions, episodes of violence and hate. When this hate is manifested through the use of words and rhetoric, taking the shape of speech targeted at specific discriminated or vulnerable groups, it becomes fitting to ask: to what extent does this discourse fit under the umbrella of freedom of speech, and should it therefore be protected? In which cases, and according to which criteria, should hate speech limit the exercise of this fundamental right? (Teruel Lozano, 2017).

The first transgender Miss Spain, Ángela Ponce –also the first to compete for the title of Miss Universe– has recently been the target of ridicule and several offensive messages on social networks, despite being considered a reference point and despite the importance of her feat in promoting the visibility of the *trans* community (Amo, 2018). Images of her appearance in the competition have been used to create a meme referring to the size of her genitals. What is troubling and what should be the focus of our attention is the content of these messages; we could debate –based on the specific case at hand– whether we consider them instances of hate speech or mere jokes; but it is also important

[19] However, despite notable progress, 70 countries in the world still criminalise homosexual acts.

[20] Rodríguez Ruiz's reflection on the subject is interesting. He considers the evolution of the family as a model of social organisation and which we can, by extension, translate to a new open-minded view with regards to the different sexual orientations and gender identities (Rodríguez Ruiz, 2011: 70-72).

that we pay attention to, albeit briefly, another element of the communication which, in recent times, has become a determining factor: the channel of communication; the medium through which the discriminatory, and at times hateful, content is disseminated.

Without seeking to be exhaustive –and aware of the number of doctrinal contributions that already exist on the effects of digital communication– allow me to simply note the defining characteristics of the new technological framework which, when addressing freedom of expression, oblige us to redefine the normative framework and the limits we apply to the exercise of this right (Rodríguez-Izquierdo Serrano, 2015: 151). Because, while hate speech is mainly a matter of content, with at its core the subjective element and the intent to discriminate against a particular community or social group, the legal treatment of this right cannot be the same when the medium changes; even more so when we use a channel that is tremendously invasive, and which places the recipient in an especially vulnerable position.

In any communication there is discourse–content and attributions of meaning–but also other elements: actors –subjects that take part in the communication– and channels of transmission, from which certain consequences arise. Internet, or communication in the digital era, entails a new model and paradigm of communication in which content acquires the capacity for mass diffusion (Boix Palop, 2016: 55-112). Messages that are broadcast on social networks can potentially go viral from the moment they are published, thanks to the emergence of platforms that enable the virtual contact between people and the flow of information. Content reaches even further and with a higher survival rate. Messages that are spread remain permanently stored in databases and digital archives of servers, except when we act to counter this; and this becomes especially dangerous when dealing with hate speech or discriminatory content which, in certain cases, can incite violence. This content is openly available and universally accessible for all those who have access to technology; from anywhere in the world, anyone can send or receive information, which blurs the dividing line between the creators and addressees of these messages.

The spectrum of possible subjects is now broader: until recently, the main characters were mainstream media –journalists and information professionals– on the one hand, and the recipients of said information –readers, listeners and viewers– on the other. This classic framework is complicated by the new digital platforms and broadcasting channels[21] (Balkin, 2018) –acting as disseminators of content– as well as ordinary citizens who can emit content through their profiles on social networks.

With such a broad casuistry, and considering the need to analyse –and resolve– each specific case based on its particular circumstances, it becomes practically impossible to establish a general solution for the constitutional deliberation of cases of hate speech. However, what we could do is extract certain common notes and unfluctuating criteria, which would be susceptible to standardisation. These could then be used with the aim of

[21] Platforms such as for-profit tech companies with stakes in the matter, but which are nonetheless granted increasing responsibility as "intervening guarantors in the management of content" (Serrano, 2019). In this regard, see also Cotino Hueso (2017).

configuring a legal response –which would be valid in the European context– to cases of homophobic or transphobic speech. In this regard, the following sections address the main normative instruments that have attempted to define the concept, as well as the recent jurisprudence in the field of hate speech on the basis of sexual orientation or gender identity.

3. Hate Speech as a Limit to Free Speech: The European Paradigm

3.1. What is hate speech? Concept and weighting criteria

We often use the phrase hate speech[22] to refer to actions or messages which are reprehensible due to their discriminatory or offensive meaning, and whose nature can widely vary. These events can have little to do with one another, other than being clear displays of the projection of hate towards a particular group or community. Indeed, the term has been used to label behaviours ranging from the burning of crosses in majority Black neighbourhoods[23], the distribution of pamphlets with homophobic content in a secondary school[24], the denial of the Jewish Holocaust[25] or of the extermination of the Tutsis in Rwanda (Lair, 2003). Therefore, delimiting a definition, although widely sought after, is by no means an easy task.

The phrase was coined by the Supreme Court of the United States of America, from where it has been exported to the rest of the world. In the realm of the Council of Europe –the relevant context of this work– Recommendation no. 97 of the Committee of Ministers of the Council of Europe, adopted on the 30th of October 1997, delineates the category of hate speech as:

> "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin".

It would appear that the key element is the manifestation of a feeling of intolerance and hatred, regardless of the form the message adopts, of its origin or of the motive of the discrimination (Teruel Lozano, 2017: 86) –racism, xenophobia, antisemitism, nationalism…–. This is the definition that the ECtHR has endorsed and now applies

22. The academic debate around the delimitation of the concept is very intense. Alcácer Guirao (2020) provides a complete overview.

23. Acts of intimidation carried out by members of the Ku Klux Klan, a right-wing extremist group created in the United States in around 1866, which professes segregationist ideas (Klanwatch Project, 2011: 46).

24. ECtHR, *Vejdeland and others v. Sweden,* 9 February 2012. We will examine the arguments of the Court in this case in more detail hereafter.

25. Holocaust negationism is that which, under a scientific guise, openly negates the existence of the Nazi Holocaust, or relativises it, reducing the number of victims of the extermination and minimising its effect. Henry Rousso –see *Le syndrome de Vichy (1987)*– was the first to use this term to distinguish it from historical revisionism a way to re-interpret history on the basis of the analysis of new sources (Teruel Lozano, 2015; Vidal-Naquet, 1994).

as the valid limit to the exercise of freedom of speech –bearing in mind that this right also safeguards those displays that "shock, worry or offend the State or any fraction of its population"[26]– through two clearly defined avenues of prosecution (Valero Heredia, 2017: 289).

In some cases, the Court resorts to the abuse of rights clause –Article 17 of the ECHR[27]–, which deprives this type of speech of protection –without analysing its content and circumstances– when it contravenes the fundamental principles and values of the Convention itself[28]. The aim is to protect democracy and the constitutional order that arose after the Second World War (García Roca, 2009). In other cases, the Strasbourg Court has opted for the method of weighting in light of Article 10 of the ECHR[29] –freedom of speech– the second section of which contains the reasons for limiting the exercise of this right, through the laws of a State; reasons among which homophobic/transphobic speech is not expressly found. This balancing broadly responds to the conjunction of three criteria: a) the proportionality of the interference with the right to free speech in relation to the legitimate aim pursued by its restriction; b) the legal provision of said interference; and c) the need to withstand it within a democratic society.

Despite the existence of this double criterion, the current tendency is to apply the second way: the balancing test. The main consequence, linked to the necessarily casuistic nature of weighting, is that the task of reaching stable parameters for the establishment of limits becoming more difficult (Valero Heredia, 2017: 288). Constitutional weighing offers a solution applicable to the specific case, not a general answer to all conflicts.

On the other hand, it is important to differentiate this category of hate speech from those messages that could be classified as hateful speech. These are speeches which, although they may be annoying or offensive, are not sufficiently serious to constitute a limit to the exercise of freedom of expression; they are, therefore, protected by this right. It is true that it cannot be limited or censored such content by means of repression, but it is possible –and even advisable– to explore other types of preventive measures aimed at reducing the general volume of hatred in the communicative context. This idea will be examined in further detail later.

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[26] ECtHR, *Handyside v. the United Kingdom,* 7 December 1976, *op cit.,* § 49.

[27] ECHR, Article 17. Prohibition of abuse of rights. "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention".

[28] ECtHR, *Dieudonné M'Bala M'Bala v. Francia,* 20 October 2015.

[29] ECHR, Article 10. "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

3.2. Hate speech on the basis of sexual orientation or gender identity: vulnerable groups

Over the past years, the arguments of the ECtHR have contributed to the task of demarcating a concept whose meaning has progressively expanded. Hence, the *Annex of the Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity* provides that:

> "Member states should take appropriate measures to combat all forms of expression, including in the media and on the Internet, which may be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination against lesbian, gay, bisexual and transgender persons. Such "hate speech" should be prohibited and publicly disavowed whenever it occurs. All measures should respect the fundamental right to freedom of expression in accordance with Article 10 of the Convention and the case law of the Court." (Let. B, para. 6).

It is thus imposed upon States "to adopt measures to sanction any form of hate speech against sexual minorities" (Spigno, 2017: 196). This approach was recently transposed to the definition found in the *General Policy Recommendation no. 15 on combating hate speech, by the European Commission against Racism and Intolerance*, adopted on the 8th of December 2015, and which defines hate speech as:

> "the use of one or more particular forms of expression –namely, the advocacy, promotion or incitement of the denigration, hatred or vilification of a person or group of persons, as well any harassment, insult, *negative stereotyping, stigmatization or threat of such person or persons* and any justification of all these forms of expression– that is based on a non-exhaustive list of personal characteristics or status that includes "race", colour, language, religion or belief, nationality or national or ethnic origin, as well as descent, age, disability, *sex, gender, gender identity and sexual orientation"*.

This iteration does contain an explicit reference to "sex, gender, gender identity and sexual orientation" as possible causes for hate speech. The ECtHR propounds another definition that is closely linked to another particularly relevant concept, which is built upon historical, institutional and social factors (Presno Linera, 2019: 285): vulnerability. To the ECtHR, a vulnerable group is defined as:

> [Any] "minority or group suffering from historical oppression or inequality, or which faces deeply rooted prejudice, hostility or discrimination, or that is vulnerable for any other reason, and which therefore, *can require a greater protection against attacks perpetrated through insults, ridicule or slander"*[30].

[30] ECtHR, *Savva Terentyev v. Russia,* 28 August 2018, § 76. See also ECtHR, *Soulas and others v. France,* 10 July 2008.

This need for greater protection is the main argument used to justify that, when the message –the hate speech– targets one of these groups or communities which the ECtHR has identified as *vulnerable*, the tendency should be towards restricting the right to free speech, even though said message –an offence that could incite hate and discrimination– does not present a clear incitement to commit acts of violence. Thus:

> "The incitement of hate does not necessarily require a call to such or such an act of violence, nor to another criminal act. The attacks that are committed against people that insult, ridicule or slander certain parts of the population and its specific groups, or the incitement to discrimination [...] are sufficient for the authorities to favour the fight against racist speech in the face of irresponsible freedom of speech and that impinges on dignity, including security, of these parts or groups of the population"[31].

The Court of Strasbourg differs, at least in this regard, from the way the Supreme Court of the United States usually approaches this kind of case[32]. The ECtHR opts for the restriction of hate speech, in line with a systematic interpretation of the Universal Declaration of Human Rights. Indeed, although this text recognises in its Article 19 that everyone has the right to the freedom of speech and opinion, we know that this is not exempt from limitations; amongst others: the recognition of human dignity[33]; the guarantee of equal enjoyment of rights and liberties, with no distinction of race, colour or sex[34]; the protection against discrimination and against the incitement to discrimination[35]; as well as the existence of duties –the respect of the rights of others– that are inherent to the rights[36].

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31. Amongst others, ECtHR, *Féret v. Belgium,* 16 July 2009, and ECtHR, *Vejdeland and others v. Sweden,* 9 February 2012. In this latter case –which will be further analysed in the following section– the discriminatory messages were targeted at the homosexual community.

32. In the judgment 562 U.S. 443 (2011), in which the case of *Snyder v. Phelps* is resolved, the umbrella of the First Amendment protects the messages and the harangues against homosexuality that were issued during the funeral of a marine who had died in the Iraq war.

33. Article 1 of the UDHR: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

34. Article 2 of the UDHR: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty".

35. Article 7 of the UDHR: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination".

36. Article 29 of the UDHR: "1. Everyone has duties to the community in which alone the free and full development of his personality is possible. 2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. 3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations."

Before we move on, it is first useful to briefly clarify the difference between hate speech and hate crimes. Although it is true that a part of the doctrine places hate speech within a concrete typology of these crimes, such as the incitement to hate (Quesada Alcalá, 2015: 2), other authors emphasise the importance of the distinction between them (Rey Martínez, 2015). They consider the legal good to be protected in both cases: the legal restriction, that is the *ultima ratio*, is only possible if we oppose a criminal legal good that could be damaged by the abusive exercise of free speech.

The approach chosen in this paper –for the sake of brevity– focuses on the first concept, although necessarily complemented by some elements derived from the criminal law. Hate crimes based on sexual orientation or gender identity will be tangentially mentioned, but not developed in depth. With this objective in mind, we will now turn to examining the cases–one of which is very recent–in which the ECtHR has been able to specifically analyse hate speech against *sexual minorities*.

4. Hate Speech Against Sexual Minorities and the Jurisprudence of The European Court of Human Rights

The allegory of the *free market of ideas* was formulated in the renowned dissident vote of Judge Oliver Wendell Holmes in the case of *Abrams v. United States*[37], resolved by the Supreme Court of the United States in 1919. As we have seen, it is still recognised today as one of the arguments used to justify key importance of the right to free speech. This is the context in which hate speech arose, as a concept-reaction against a current that was conducive to the maelstrom of vicious messages that had neither limit nor control; the term was later imported across the ocean and took on a different –and much broader– meaning, including any incitement to discrimination, regardless of its basis in race, religion or sexual orientation[38].

There are certain messages that have no place within the European paradigm of freedom of speech. As has already been mentioned: when in conflict with dignity, the impossible balance tends to lean towards the latter, protecting the people or groups –especially those considered as vulnerable– as well as the pillars and principles which underpin democracy. This has been the case in two occasions in which the ECtHR was

37. "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. […] But when men have realized that time has upset many fighting faiths, they may come to believe […] that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. […] While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe […] Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants [250 U.S. 616, 631] making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech'."

38. In this regard, Jeremy Waldrom considers hate speech to be an attack on the dignity of the members of the communities being targeted, and who are deprived of their right to be individuals who are fit for life in society (Waldrom, 2012: 16).

confronted with cases dealing with homophobic/transphobic speech. It did so in 2012, in the case of *Vejdeland and others v. Sweden* –which has already been commented upon and analysed by the doctrine– and in 2020, in the case of *Beizaras and Levickas v. Lithuania.* In any case, it is worth reviewing the details of both judgments, with the aim of extracting the common arguments and criteria that allow us to attempt to identify a European response to hate speech on the basis of sexual orientation or gender identity.

4.1. ECtHR judgment of the 9th of February 2012, the case of *Vejdeland and others v. Sweden*

This is the first pronouncement of the ECtHR on a case of hate speech on this basis. The applicants had been convicted –of inciting hate and violence against homosexuals, a criminal offence stated in Article 8 of the Swedish criminal code– for distributing homophobic pamphlets in a secondary school.

These pamphlets[39], of which there were about one hundred, were distributed in the lockers and pigeonholes of students, and they claimed –amongst other things– that "homosexuality is a deviant sexual inclination": "one of the main causes of HIV transmission and other sexually transmitted diseases", with a "destructive moral consequence on the essence of Swedish society". Moreover, they accused a group of teachers and professors in Sweden of being exceedingly tolerant of this type of behaviour, instead of abiding by their duty: warning students of its risks and consequences. To this, they added that "homosexual organisations are attempting to minimise the importance of paedophilia, and they are campaigning for their sexual deviance be legalised".

The ECtHR considered that, although these statements do not imply a direct incitement to violence against homosexuals, they do constitute an offense that could incite hatred, which "does not necessarily involve the call to an act of violence, or other offences"[40]. In this regard, "the attacks that are committed against people by insulting, ridiculing or slandering specific groups of the population are sufficient for the authorities to favour the struggle against racist speech rather than a form of free speech that is exercised irresponsibly"[41]. This is an argument that was previously used in conflicts regarding xenophobia and racial hate[42], and which was now translated to the present case to equate the legal treatment of sexual orientation to the other causes of extreme speech: "discrimination based on sexual orientation is equally as severe as that based on race, origin or colour".

The choice was made in this case to apply the balancing test, in light of Article 10 of the ECHR, considering that the encroachment on the right to free speech of the applicants –as established by law– was proportional to the legitimate aim pursued (the protection of homosexuals), as well as necessary in a democratic society. Several matters

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[39] Developed by an organisation known as National Youth.
[40] ECtHR, *Vejdeland and others v. Sweden,* 9 February 2012, *op cit.* § 54.
[41] *Ibid*., § 55.
[42] Amongst others, *Féret v. Belgium,* 16 July 2009.

previously analysed by the Swedish Supreme Court were taken into account, such as: a) the fact that the distribution of pamphlets took place in a school which they did not have the authorisation to access; b) the distribution in students' lockers implies that they received the information without having the chance to oppose or refuse it; and c) the potential recipients were minors, and therefore "more prone to be influenced" (Presno Linera, 2019: 291).

Therefore, in this case, the Court moves away from the criterion of the direct incitement to violence, in dealing with discriminatory speech targeted at a vulnerable group or minority. However, despite this move, the judgment was the object of numerous critiques and was deemed a "lost opportunity" (Salazar Benítez and Giacomelli, 2016; Spigno, 2017). It was thus stated by judges Yudkivska and Villiger in their concurrent vote, as they lamented that the Court of Strasbourg had not taken advantage of this case to "strengthen a response to hate speech against homosexuals" (Presno Linera, 2019: 291).

4.2. ECtHR judgment of the 14th of January 2020, the case of *Beizaras and Levickas v. Lithuania*

This judgment is especially relevant not only for how recent it is, but also because it marks the first time the ECtHR has faced a case of homophobic hate speech on the Internet. It occurred in 2014 after a photograph capturing a kiss shared by a gay couple unleashed a barrage of comments. The couple had posted the image on Facebook –which is accessible to the general public– with the aim of announcing their relationship. In response, they received over 800 messages, many of them containing markedly discriminatory content: "I'm going to throw up –they should be castrated or burnt; cure yourselves, jackasses– just saying"; "If you were born perverted and have this disorder, go and hide in basements and do whatever you like there, faggots. But you will not ruin our beautiful society, which was brought up by my mother and my father, where men kiss women and don't prick their skewers together. I genuinely hope that while you are walking down the street, one of you will get your head smashed in and your brain shaken up"; "these faggots have fucked up my lunch; if I was allowed to, I would shoot every single one of them"; "Scum!!!!!! Into the gas chamber with the pair of them"; "Fucking faggots burn in hell, garbage"; "Into the bonfire with those faggots…"; "Fags! Into the bonfire with those bitches!"[43].

These are some of the comments that were not duly investigated by the Lithuanian public authorities –prosecutors and national courts– who refused to open a preliminary investigation. The applicants asserted that the reason for this refusal was, precisely, their sexual orientation. Indeed, as the regional court of Kaipèda noted, their public exhibition "was an attempt to deliberately irritate or scandalise those with differing opinions, or to encourage the publication of negative comments"[44]. The actions of the courts were justified, in writing, by the Lithuanian government, despite Article 170 of the Criminal

[43] ECtHR, *Beizaras and Levickas v. Lithuania,* 14 January 2020, § 10.
[44] *Ibid.,* § 23.

Code, which classifies as an offence any "declaration targeting a broad and unlimited group of people, which has the aim of inciting them against another group of people belonging to a community characterised by their sexual orientation"[45]. The government warranted that with their "eccentric behaviour", "the intention of the couple had not been to announce the start of their relationship [...], but to unleash a public debate on the rights of the LGBT community in Lithuania"[46].

When presented with these facts, the ECtHR convicted the State of Lithuania for failing to fulfil their obligation to investigate cases of possible discrimination –which extends to matters relating to sexual orientation and gender identity[47]– under Article 13 of the Convention. It considers that "one of the motives for refusing to initiate the previous proceedings was the courts' disapproval of the applicants' public display of sexual orientation"[48], despite "the obligations of the State, inherent to the effective respect of privacy, as derived from Article 8 of the ECHR"[49].

Regarding the potential virality of the content, the Court asserts that, "in light of its accessibility and its capacity to store and communicate enormous quantities of information, the Internet plays an important role in improving the public's access" to content that has important repercussions[50]. As a result, "the publication of a single hate comment, not to mention the statements that people should be "murdered", on the Facebook page of the first applicant was enough to be treated with the seriousness it deserved"[51]. Thus, the Court concludes:

> "that the hateful comments including undisguised calls for violence by private individuals directed against the applicants and the homosexual community in general were instigated by a bigoted attitude towards that community,"
>
> And, secondly:
>
> "that the very same discriminatory state of mind was at the core of the failure on the part of the relevant public authorities to discharge their positive obligation to investigate in an effective manner whether those comments regarding the applicants' sexual orientation constituted incitement to hatred and violence, which confirmed that by downgrading the danger of such comments the authorities at least tolerated such comments"[52].

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45. *Ibid.,* § 98.
46. *Ibid*., § 92.
47. See also ECtHR, *Salguiero da Silva Mouta v. Portugal,* 21 December 1999, § 28; and ECtHR, *P.V. v. Spain,* 30 November 2010, § 30.
48. ECtHR, *Beizaras and Levickas v. Lithuania,* 14 January 2020, *op. cit.* § 121.
49. *Ibid.*, § 110.
50. ECtHR, *Magyar v. Hungary,* 2 February 2016, § 56.
51. ECtHR, *Beizaras and Levickas v. Lithuania,* 14 January 2020, *op. cit.* § 127.
52. *Ibid.,* § 129.

Therefore, the Court considers it proven that the applicants suffered from discrimination –in the form of hate comments and the refusal of an effective national avenue for legal recourse– based on their sexual orientation.

5. Closing Thoughts: Challenges and Opportunities in the *Digital Era*

With a first semantic observation we realise that the term "hate speech" encloses a dichotomy; it brings together two antagonistic concepts. On the one hand is the idea of speech –the process of building discourse necessarily implies a rational and logical process of attributing meaning– whose nature lies essentially in reason. This is juxtaposed to the irrationality that underpins all feelings of hate; something we cannot logically explain and which, in principle, is at odds with the idea of speech. Hate has its roots in the depths of the subject, with no need for any kind of reason or veneer to justify it.

It appears that, through a structure of opposites, the term attempts to convey that hate can be reasonable; that hate could possibly be made attractive by the use of verbal strategies by the person who is being intolerant. However, in the words of the philosopher Adela Cortina, "those who use hate speech are convinced that, from the start, there is a relationship of structural inequality with regards to the group that supports the discourse, and we cannot state that we live in an authentic democracy if the relationship between individuals is one of structural inequality" (Cortina Orts, 2017: 10).

We can begin by acknowledging that "opinions are not harmless" (Alcácer Guirao, 2012: 28); they soak through the suit worn by society, no matter how waterproof its coat. Debate is a formidable tool to develop democratic societies: it is only through dissent and dialectical confrontation that we can achieve its essential function of shaping public opinion. As the ECtHR has often reiterated, "freedom of expression [is] applicable not only to "information" or "ideas" that [are] favourably received [...], but also to those that offended, shocked or disturbed"[53]. Therefore, "it is precisely when ideas are confronted with one another, when they clash or reject the established order, that free speech is most valuable"[54]. In this regard, the more speech resembles political –or ideological– deliberation, strictly speaking, the broader the space should be in order to allow its effective transmission. It is undeniable, if we assume this premise, that in the context of digital communication there is a higher risk that certain messages could provoke an inevitable social destabilisation, especially when their content affects those we consider to be vulnerable (Rodríguez-Izquierdo Serrano, 2015: 156).

As electronic platforms have become more widespread, they have also become the driving force of interpersonal communication and of the inclusion of all citizens –at least those who have access to new technologies– in the public debate. This entails an obvious extension of communicative spaces, which grow increasingly broader while the domains

[53] ECtHR, *Beizaras and Levickas v. Lithuania,* 14 January 2020, *op cit.,* § 91.
[54] ECtHR, *Otegi Mondragón v. Spain,* 15 March 2011.

of privacy dwindle[55]. Thus, for the past few years, the use of mobile phones has brought unsuspected possibilities into reach: we can send and receive information from almost anywhere in the world; ideas and opinions can fly at great speed to reach any person at the mere click of a button. But this capacity is not risk-free; indeed, certain comments that used to remain within a more limited space now have a much further reach.

This situation reveals the disjunction between the free exchange of ideas, regardless of their content –in which the critical conscience of citizens is the tool used to neutralise xenophobic and discriminatory messages– and the alternative of restriction, which considers the social impregnation provoked by certain racist, xenophobic or discriminatory messages, and how they can silence the voices defending those minorities, whose boundaries tend to blur. This is the position defended by Owen Fiss, who justifies limiting free speech with the aim of protecting free speech itself, because "sometimes we need to lower the voices of some in order to hear the voices of others"[56].

When we post a comment on social networks, we are aware of the magnitude of its reach –in a dimension that is three-fold: physical, temporal and subjective– as well as its effect. Messages reach a higher number of people, further distances, for longer periods of time and with a greater impact[57]. In the caselaw analysed, the Court asserts that, "in light of its accessibility and its capacity to store and communicate enormous quantities of information, the Internet plays an important role in improving the public's access" to content that has important repercussions[58]. In this regard, the viral potential of every tweet justifies that –when facing a case of hate speech against sexual minorities, or against any vulnerable group in general– we resort to applying the analogy of the same legal treatment that the Spanish Constitutional Court applies in the context of print media, because of its greater dissemination and capacity for impact, as "its readers are far more numerous and impressionable than those of the news itself". This is also the case in the universe of Twitter: the home of short and high-impact messages, that spread at high speed and that, often, are accompanied by images and audio-visual content.

However, this is something that can also be used in a positive way, as an opportunity to define the blurred silhouette of those who need visibility. It is not in vain that "the Internet is not only an effective medium to preserve and promote democratic principles. It is, moreover, a powerful tool that is capable of undermining them". In Cass Sunstein's deliberations on the matter we can see the two sides of the coin: the Web as a vehicle for transmitting content that perpetuates stereotypes and that discriminates and, simultaneously, as an instrument capable of the exact opposite: promoting tolerance and those superior values that deserve to be protected, such as dignity.

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55. Among the consequences of this transformation: the enrichment of pluralism, the increase in possibilities of receiving information and being an active member of a political community (Boix Palop, 2016: 55-57).
56. On the silencing effect of hate speech, see Fiss (1996: 28-30).
57. These ideas have been developed in a recently published work (Galdámez Morales, 2021: 82-85).
58. ECtHR, *Magyar v. Hungary,* 2 February 2016, § 56.

The notion of dignity is traditionally linked to values or rights such as equal treatment, non-discrimination or social recognition. It acts in the face of conflict that arises when freedom of speech is opposed –in the context of hate speech– as an argument in favour of its legitimate restriction. As we have seen, it was asserted as such by the ECtHR in its jurisprudence and, in the same vein, by the Spanish Constitutional Court:

> [...] "neither the exercise of ideological freedom nor of freedom of speech can safeguard displays or expressions intended to disparage or generate feelings of hostility against particular ethnic, foreign or immigrant, religious or social groups, for in a State such as the Spanish Sate, which is social, democratic and governed by the rule of law, the members of such communities have the right to coexist peacefully and be fully respected by other members of the social community"[59].

It is a complicated balance to strike. The umbrella of freedom of speech cannot be a haven for messages of hate that promote intolerance and the rejection of people who are homosexual, transexual or have a different sex orientation or gender identity. The protection of *sexual minorities*, vulnerable groups and sectors that are excluded or made invisible by society, justifies the enforcement of limits to the exercise of this right when it translates into violence simply on the basis of sexual orientation or gender identity. Because, even if the statements do not imply a direct incitement to violence against homosexuals, they "may constitute an offense that may incite hatred". This argument serves the ECtHR to equate the treatment it has already applied to conflicts related to xenophobia and racial hatred to the legal treatment of sexual orientation as a cause of extreme speech[60]. Yet, hate speech only acts as a limit in cases where there is an offense is committed or there is a legal good to protect, "without the pure defence of an idea being considered as such" (Teruel Lozano, 2018: 13). Also, the necessarily casuistic nature of constitutional balancing difficults to reach general parameters for the establishment of limits. Another avenue of response needs to be explored: preventive measures such as education, the promotion of an inclusive discourse –from public and private institutions–, proactive and pedagogical policies to combat hate speech at its source. The concrete assaults must be –according to the adequate weighting– expelled from the debate, while avoiding the restrictive inertia that could arise as a response to these types of speech –which would be equally as concerning (Teruel Lozano, 2018: 15)– and that would make us forget the importance of the right to free speech in a democratic society.

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FEMINISM AND PORNOGRAPHY: FROM MAINSTREAM PORNOGRAPHY (HETERO-PATRIARCHAL) TO POST-PORN (NON BINARY)*

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Abstract: Along with prostitution, and more recently surrogate motherhood, pornography has been a contentious issue within the feminist movement ever since the 1970s. Perceived by abolitionists as the prelude to rape, for pro-Sex feminists it represents an ideal vehicle for expressing desire for women and minority sexual identities, and has a considerable transformative capacity. The latter school of thought proposes a paradigm shift and has aligned itself with Queer Theory, which advocates a non-binary approach to sexual identities through Post-porn. This study critically analyses the main arguments put forward by feminism in the field of pornography: women's rights and the principle of no-harm.

Keywords: Abolitionist feminism, pro-sex feminism, mainstream pornography, queer theory, post-porn.

Summary: 1. Introduction: The Debate about Pornography within the Feminist Movement. 2. The Abolitionist Feminist Argument: Pornography "Harms" All Women. 2.1. The arguments by Dworkin and MacKinnon. 3. Pro-Sex Feminism: If Mainstream Porn is Sexist, Let's Make Better Porn. 3.1. Brief notes about Queer Theory. 4. Feminist Porn and Post-Porn. 5. Conclusions.

1. Introduction: The Debate about Pornography within the Feminist Movement

Arguably, from a legal point of view, feminism has never been very interested in studying the scope and limits of freedom of expression, compared with the attention it has paid to other issues of legal-constitutional relevance such as rights to equality, privacy or reproductive freedoms. A significant exception to this can be found in the fields of sexual "speech" and pornography.

Although sexual expression has always been present in art, it was not until the late 1970s that the production and distribution of pornographic films developed on a large scale. These were the times of "sexual liberation" and the so-called "Golden Age of Porn" (1969-1984), and there is no doubt that films such as Gerard Damiano's *Deep Throat* or the Mitchell brothers' *Behind the Green Door* (1972) played a remarkable counter-cultural and therefore political role in their particular representation of explicit sex and female pleasure.

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From the mid-1980s onwards, the emergence of video consolidated porn as a mass phenomenon and gave rise to a heated debate within the feminist movement which is still going on today (Prada 2010: 7-26). It created a schism which has not yet been resolved and, if anything, has worsened in recent decades, since the mainstream pornographic dialogue has evolved to encompass increasingly degrading and violent narratives about women.

This divide pits the irreconcilable positions of so-called abolitionist feminists against those who espouse a pro-sex or sex-positive approach. While for the former pornography is nothing more than the visual embodiment of patriarchy and violence against women, the latter see it as a potential vehicle for channeling the erotic expression of women and sexual minorities, and thus as a mechanism for their sexual liberation.

This study offers a critical analysis of the arguments used by the two main feminist philosophies in relation to pornography: the rights of women and sexual minorities, and the no-harm principle.

2. The Abolitionist Feminist Argument: Pornography "Harms" All Women

The feminist anti-pornography movement emerged during the second half of the 1970s with feminists such as Catharine MacKinnon, Andrea Dworkin, Robin Morgan, Susan Brownmiller, Gloria Steinem and Kathleen Barry, amongst others. Mainly identifying with so-called "radical feminism", they operated under an umbrella organisation known as *Women Against Pornography* (WAP), founded in the United States in 1979.

Radical feminism is a perspective within the broader feminist movement which argues that the root cause of social inequality is patriarchy, defined as the system of male oppression of women. It calls for a radical reordering of society in which male supremacy is eliminated in all social and economic contexts, whilst recognising that women's experiences are also affected by other social divisions such as race, class and sexual orientation (Álvarez, Sánchez, Beltrán, Maquieira 2001: 22).

In contrast to more conservative political points of view, which have always based their rejection of pornography on its intrinsic immorality, anti-pornography feminists frame the issue in terms of "harm to women". From their perspective, there is nothing objectionable about the fact that sexual expression pursues and/or produces sexual arousal, or that it is offensive to communal morality: it is harmful because it is a potent mechanism for perpetuating sexism and violence against women through the stereotyping of bodies, the sexual objectification of women, and the androcentric construction of sex. Furthermore, it plays a clear role in maintaining a socio-political system in which women are second-class citizens.

The position of anti-porn feminism postulates a direct correlation between pornography consumption and the increase in violence against women, based on the

monkey see-monkey do thesis, according to which pornography inevitably engenders a violent and degrading attitude towards women. The essential premise of these authors is that "pornography is not representative but performative" (Fernández Gonzalo 2014: 25). This points directly to the socio-cultural functionality of porn, which acts as a guarantor of gender differences and a "hetero-patriarchal" and "hetero-normative" system. Its role is therefore not to show a reality, but to construct and monetize it (Calles Hidalgo 2018).

In her famous 1988 work *The Sexual Contract*, the British political theorist Carole Pateman offered a gendered interpretation of the Rousseauian "Social Contract" theory, arguing that there is a sexual contract prior to the social contract, as a result of which the sexual rights of men supercede those of women. Pateman analyses the principle of universal freedom, which supposedly forms the basis of the social contract, and questions precisely its universal character. She argues that it is only men who enjoy this freedom while women are deprived of it and are thus subject to male will. According to her, pornography is one of the instruments of perpetuation of this contract because it is a political practice of domination. Pornography is the theory, she says, and men learn from it, putting it into practice in rape and other forms of aggression against women.

In the same vein, in her book *Female Sexual Slavery*, the American author Kathleen Barry, another renowned anti-pornography sociologist, developed the theory of "sexual slavery", according to which pornography is the graphic description of what men demand from women, a political act of domination and subordination (1988: 174). Between masters and slaves there can be no common ground for sexual play and pleasure. Domination equals violence; violence equals sex. Therefore, the most extreme consequence of pornography is rape. Barry speaks of an "ideology of cultural sadism", with pornography playing an important role in reinforcing practices which encourage and support sexual violence, thereby normalising it as an activity (1988: 215).

The connection between pornography and rape was also examined by the American journalist Susan Brownmiller in her book *Against our Will: Men, Women and Rape*. In it, she characterises rape not as an irrational or passionate act, but as an expression of power, which is essentially political in nature and is used to control women through fear and as a "weapon of war". Pornography could incite men to move from latent intimidation to actual aggression, and represents the pure essence of propaganda against women: "Pornography, like rape, is a male invention, designed to dehumanize women, to reduce the female to an object of sexual access, not to free sensuality from moralistic or parental inhibition" (Brownmiller 1975: 394).

More recently, Prada has argued that pornography shapes sexual behaviour and preferences to the extent that it can construct sexual reality and actual sexual desire by portraying male power over women, and thereby perpetuating this relationship. He suggests that "pornography offers female humiliation as a key element of arousal, exalting this model as desirable and turning the inequality between men and women into something sexually exciting" (2010: 11).

In Spain, traditional feminist theorists such as Valcárcel and De Quirós, have also positioned themselves against pornography, characterising it as a representation which degrades women (1991). More recently the sociologist and abolitionist feminist theorist Rosa Cobo has argued that the core of the pornographic ethos lies in the fact that men understand sexual relations in terms violence, whereas women end up being the recipients of this aggression and accept it as if it were part of men's sexual nature. She also emphasises the socialising role of pornography, equating it with advertising (2020).

In short, feminist anti-pornographic theorists perceive pornography as inherently oppressive and degrading to women, and any form of use or representation of their bodies as objectification at the hands of male desire.

2.1. The arguments by Dworkin and MacKinnon

Undoubtedly, the two most prominent authors of anti-pornography feminism are the activist Andrea Dworkin and the lawyer Catharine MacKinnon. They are both indispensable references in the feminist debate on the prohibition of pornography. These authors go a step further than their fellow writers: if for example Langton's thesis is that pornography is a form of expression which represents or depicts the subordination of women, MacKinnon and Dworkin argue that pornography actually causes the subordination of women.

Dworkin, a radical feminist American writer and activist, believes that men are essentially violent beings, so their sexuality is bound to be violent too. In the existing patriarchal social order we live in they learn from childhood to dehumanise and objectify women through violence. In contrast, female sexuality is non-aggressive, sensitive and based on bonds of solidarity and mutual support.

In *Pornography: Men Possessing Women* (1981), her key work on the subject, Dworkin outlines the principles of power attributed to the male gender which perpetuate present-day sexual dynamics, chronically violating the dignity of women and thereby dehumanising them. Men's aggressive sexual tendencies form the basis for the imposition of power, perceived as an innate masculine characteristic, which justifies and indeed demands their dominance and leads to women's submission. The phenomenon which demonstrates the male position of natural dominance par excellence is "coitus", a form of possession in which the man inhabits or rather "conquers" the woman's body through penetration. In the same vein, other radical feminists have argued that what men call sex is in fact a mixture, to varying degrees, of antagonism and violence, so there is no difference between mutually consensual intercourse and rape. From this perspective the two terms are synonymous (Carter 1981).

Moreover, abolitionist feminists consider all sexual relations within a patriarchal society to be inevitably degrading to women and tantamount to sexual violence. As Strossen points out (2005),

> "the equivalence of all heterosexual relations and rape, which characterises feminist analyses against pornography, is exposed in particularly dramatic terms by Dworkin in her book *Intercourse* (1987, 13), where she affirms that the meaning expressed by sexual relations is that women are made psichologically inferior. Dworkin wants to show that physical invasions of a woman's body, a physiological essential aspect of heterosexual genital coitus, inevitably implies the same type of submission and loss of freedom that happens when a country's Armed Forces invade and occupy another. The political meaning attached to sexual relations for women is the fundamental question for feminism and freedom: can an occupied people, a physically occupied and internally invaded people, be free?"

It is evident that Dworkin takes the idea of violence being a key aspect of male sexuality to its logical conclusion. In her rendition, it is not only the lack of consent which characterises rape, but every heterosexual relationship is a form of rape, even if the woman believes she is participating in it voluntarily, because her will is conditioned by the systemic oppression to which she has been subjected. As such, consent is only apparently voluntary. In this respect, the American activist also argues that for men there is an inseparable link between violence and sexuality, which finds its cultural expression in pornography, where a woman's "no" is merely an excuse for them to force and abuse her (1981: 89).

In this context, pornography is revealed as a portrayal of sexual politics, which by always reproducing the hierarchical roles of dominance and subordination is intrinsically a manifestation of gender inequality. Consequently, pornography is not merely a metaphor, nor simply an expression; it is a form of sexual reality in itself. It not only represents women in the role of objects for male sexual use, it actually turns them into such objects.

In the same vein, Catherine MacKinnon, an American legal scholar and radical feminist activist, argues that pornography is not an expression, but rather, an act of male supremacy (1993: 56). It is not simply something which represents the subordination of women but is the practice of subordination itself.

> "Pornography is the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following: (i) women are presented dehumanized as sexual objects, things or commodities; or (ii) women are presented as sexual objects who enjoy pain or humiliation; or (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (v) women are presented in postures of sexual submission, servility or display; or (vi) women's body parts - including but not limited to vaginas, breasts, and buttocks- -are exhibited, such that women are reduced to those parts; or (vii) women are presented as whores by nature; or (viii) women

> are presented being penetrated by objects or animals; or (ix) women are presented in scenarios of degrada-tion, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual" (MacKinnon and Posner 1996: 71-72).

Her attack on pornography is "part of a larger project that attempts to account for gender inequality in the socially constructed relationship between power -the political- on the one hand and knowledge of truth and reality - the epistemological- on the other" (1984: 325). Unlike traditional conservatives, who base their rejection on questions of morality, she attempts to justify the regulation of pornography on the basis of her own unique interpretation of the no-harm principle. For her, as the title of one of her articles clearly states, pornography "is not a moral issue" (1984). As such, she tries to move the debate on pornography from a question of morality into the realm of sexual politics.

MacKinnon is right to point out that obscenity laws understand pornography as a sin rather than a crime. She adds that it is morality which motivates state intrusion into the issue of pornography. This concept of morality however, based on the distinction between "good" and "evil", does not respond to the gender inequality which pornography produces, but merely prohibits what the male worldview considers immoral. According to the author, obscenity laws deal with morality from the point of view of male dominance, while the feminist critique of pornography is based on the harm it causes to women.

Thus, she asserts that pornography causes two forms of harm. The first is that which happens to women who directly participate in the making of pornography; the second is the result of the fact that the subjects of violence are in fact all women in society, who are harmed as a direct consequence of the distribution of pornographic material. But MacKinnon also adds another reason to justify the legal prohibition of pornography, which is perhaps the most debatable of the three: pornography, she claims, actually "constructs" reality.

In terms of her first point, MacKinnon states that: "Women are known to be brutally coerced into pornographic performances" (1984: 339). The experiences documented during the filming of *Deep Throat* is the most cited example. As is well known, the actress in the film, Linda Lovelace, whom McKinnon represented legally, published an autobiography, *Ordeal*, in 1980, in which she spoke of beatings and coercion, and revealed that she had not received a single dollar from the profits of the film, going so far as to say that "when you see Deep Throat, you are watching me being raped" (1980: 47). Actresses in porn films however are not the main focus of MacKinnon's analysis.

The author is more deeply concerned with the second type of victim: literally each and every woman in society. MacKinnon argues that all women suffer direct sexual subjugation as a result of the distribution of sexually explicit books and films. She supports this thesis by referencing different studies which indicate changes in men's attitudes as a consequence of pornography consumption, leading to an increase in the intention

to assault and even rape women. Thus, she criticises the fact that, unlike blackmail, bribery, conspiracy or sexual harassment, which in themselves constitute a crime, when it comes to pornography, the law limits itself to understanding such images as a mere "representation", from which no causal relationship to harm inflicted on women can be established. From her perspective, the harm that pornography causes is a group harm, a harm to the collective of women, which it disempowers and dehumanizes. It defines them as subjects to be dominated, and as such, harms women, not one by one, but as members of the "group of women" as a whole (1995: 377).

In relation to her third argument, for MacKinnon, pornography becomes the truth about sex: "women bound, women battered, women tortured, women humiliated, women degraded and defiled, women killed" (1995: 138). Pornography transforms the inequality between men and women into something sexually exciting and portrays female humiliation as a key aspect of arousal. It does not distinguish between eroticism and subordination of women, but makes them appear as one and the same thing. Since everything which sexually excites men is considered to be sex, in pornography violence is sex, inequality is sex, humiliation is sex (1995: 384). As such, sexuality, and thus pornography as a representation of sexuality, is not only an area permeated by the gender structure, but is also the instrument through which gender is socially constructed.

Finally, the author maintains that the liberal argument for the protection of pornography in the private sphere, based on the grounds of free speech as established in the First Amendment of the American Constitution, actually protects men's right to impose pornography on women in the private sphere (1995: 372). The implication is that men's freedom of speech silences and censors women's voices.

To sum up, feminist abolitionist theory understands pornography as representing a form of sexual subordination and violence which is implicit in patriarchal ideology. Both Dworkin and MacKinnon consider that apart from promoting a sexist interpretation of sexuality for women based on unthinking patriarchal ideology, pornographic material also justifies this through the myth of consent, according to which women would ask to be raped (MacKinnon 1995: 249-250). As a result, in their efforts to stop the proliferation of misogynistic and violent images in the mass media, both authors unwittingly aligned themselves with the most conservative sectors of society, by calling for the prohibition of porn through legal means (Malem Seña 1992). As opposed to traditional conservatives, however, abolitionist feminists argue that their criticism of pornography is not moral but political in nature, since pornography is the source of violent and discriminatory attitudes and behaviour which define the treatment and social position of half the population.

3. Pro-Sex Feminism: If Mainstream Porn is Sexist, Let's Make Better Porn

As is well known, the rise of pornography as a mass cultural phenomenon at the end of the 1970s coincided with a period of political struggle and protest against pre-existing

sexual and gender models. In contrast to the abolitionist positions of more traditional feminism, the pro-sex feminist movement, also known as sex-positive, sex-radical or sexually liberal feminism, emerged in the United States in the early 1980s as a movement which fought for free sexuality as an essential component of women's liberation and led to the formation of the *Feminist Anti-Censorship Taskforce* (FACT). If the abolitionist *Women Against Pornography* (WAP) had associated itself with conservative forces to try to push through its initiatives, FACT approached the issue differently, allying itself with groups of publishers, the media, artists and civil rights advocates, with a view to ensuring that abolitionist arguments did not become part of legislation.

From their perspective, anti-pornography feminism is "hetero-normative" and "hetero-sexist", because it treats heterosexuality as the normative standard by which all sexuality is judged. In contrast, pro-sex feminist activists understand pornography as an instrument which potentially has a significant transformative and empowering capacity for both women and minority sexual identities.

In their view, the position of the anti-pornography movement has sought to reduce the question of female pleasure to the exclusive analysis of women as victims. As Vance points out:

> "Sexuality is simultaneously a domain of restriction, repression, and danger as well as a domain of exploration, pleasure, and agency. To focus only on pleasure and gratification ignores the patriarchal structure in which women act, yet to speak only of sexual violence and oppression ignores women's experience with sexual agency and choice and unwittingly increases the sexual terror and despair in which women live" (Vance 1982: 38).

And, as Lucía Egaña explains in *Trincheras de carne. Una visión localizada de las prácticas post-pornográficas en Barcelona* (2015, 86):

> "These tendencies find echoes in the Reagan administration of the 1980s, and in fact complicate the status of pornography by considering it to be a rape in itself, rather than a consequence of a male-dominated system in which pornography is just one of thousands of representations with which it seeks to perpetuate itself. Therefore, along with the outright renunciation of pornography, the abolitionist feminist perspective refutes the idea that female desire can be represented. At no point is there any question of appropriating the means of representation, but simply of censoring it".

Just as they still do today, the pro-sex feminists of the 1980s argued for the right to experiment with porn to discover forbidden avenues for female sexuality, emphasising the need for a fundamental change of approach. Gayle Rubin, Carol Vance, Alice Echols and Patrick Califia were some of its main proponents (Burstyn 1985), and they were joined by queer theorists such as June Fernández, Paul B. Preciado and Judith Butler. In Spain, as from 1983, anti-censorship feminism was embodied by authors such as

Raquel Osborne (1981), who denounced the New Right's appropriation of some of the approaches and initiatives of the anti-pornography movement, which had resulted in women as a whole losing some of the ground they had fought so hard for during many years of struggle.

It is important to bear in mind that the so-called *PornYes* movement does not deny that mainstream pornography depicts sexual activities and gender roles in a sexist way, and that it ignores and devalues women's experiences and desires. It believes, however, that this reality does not justify the rejection of pornography *per se*. In the words of Rubin: "The sex industry is hardly a feminist utopia. It reflects the sexism that exists in the society as a whole. We need to analyse and oppose the manifestations of gender inequality specific to the sex industry. But this is not the same as attempting to wipe out commercial sex" (1989: 14).

As porn actress and activist Annie Sprinkle famously commented, "the answer to bad porn is not to ban porn altogether, but to make better porn" so as to break down typical stereotypes and prejudices associated with both porn and the traditional view of sexuality itself. Therefore, "the best way to fight the dominant, hetero-patriarchal, phallocentric model of pornography which subscribes to a binary concept of the body, is to create our own porn - Do It Yourself: DIY Porn -" (Salanova 2015: 215). As such, these authors propose constructing a theory of sexuality not simply focusing on danger and guilt, but also on pleasure. Thus, for them, sexual liberation continues to be the key goal of the feminist movement, and they dispute the idea that pornography is the overriding cause of violence against women.

3.1. Brief notes about Queer Theory

The term "queer theory" was coined by Teresa de Lauretis in an article published in the summer of 1991 in the journal *Differences*. It was entitled "Queer Theory: Lesbian and Gay Sexualities", and in it the author put forward the argument that gay and lesbian studies were in need of critical reflection in order to address the existing differences within the gay and feminist communities (Ortega Ruíz 2009: 42).

In the interview by Gallagher and Wilson entitled "Sex, Power and the Politics of Identity" (1982), Michel Foucault says:

> "Well, if identity is only a game, if it is only a procedure to have relations, social and sexual-pleasure relationships that create new friendships, it is useful. But if identity becomes the problem of sexual existence, and if people think that they have to "uncover" their "own identity," and that their own identity has to become the law, the principle, the code of their existence; if the perennial question they ask is "Does this thing conform to my identity?" then, I think, they will turn back to a kind of ethics very close to the old heterosexual virility. If we are asked to relate to the question of identity, it must be an identity to our unique selves. But the relationships we have to have

> with ourselves are not ones of identity, rather, they must be relationships of differentiation, of creation, of innovation. To be the same is really boring. We must not exclude identity if people find their pleasure through this identity, but we must not think of this identity as an ethical universal rule".

One of the most influential feminists in the field of Queer Theory is Judith Butler, who together with other authors such as Donna Haraway and Teresa de Lauretis caused a serious epistemological upheaval on the notion of gender, sexuality and sexual diversity.

Butler questions the essence of identity categories and suggests that they are a culturally produced concept, both politically and theoretically. Her main thesis is based on considering gender and identity in terms of performativity: she proposes the definition of gender as performance. In *Gender Trouble*, the author builds on Foucault's idea that there is no such thing as biological sex and recognizable gender, because bodies are a cultural construct; there is no such thing as "natural" sex, because approaches to sex are always mediated by culture and language. By arguing this she questions the whole system of sex/gender (Butler 1990). As such, gender is produced as a ritualised repetition of conventions which are socially imposed thanks to prescriptive and hegemonic heterosexuality (Nazareno Saxe 2015).

It is in an attempt to break with the binary idea of gender that the new identities, known as "queer", emerge, and they question the hetero-normative law of sexuality. These ideas have led to the *Countersexual Manifesto*, a groundbreaking ideological position which locates biological sex itself as the main instrument of domination, and therefore constrains the possibilities offered by gender subjectivities:

> "The sexual organ is not a precise biological site, nor is the practice of sex a natural drive. Sex is a mechanism of hetero-social domination which reduces the body to erogenous zones according to an asymmetrical distribution of power between the genders (feminine/masculine), in which certain emotions coincide with certain organs and certain sensations with certain physical reactions". (Preciado 2011: 17).

For her part De Lauretis (1987: 1-165), defines the concept of gender as the social construct of women and men and the semiotic production of subjectivity. Gender is shaped by history, practices and the interweaving of meaning and experience, that is, by the mutually constitutive semiotic interaction of the external world of social reality with the internal world of subjectivity.

In general terms, queer theory proposes the need to de-naturalise gender, identity and even sex, as all social identities are equally anomalous, whilst at the same time rejecting the classification of individuals into universal categories such as "man", "woman", "homosexual", or "heterosexual", since these hide a huge number of cultural variations, none of which would be more fundamental or natural than another (Herrera 2011). It considers, therefore, that diverse identities can be strategically adopted and should be

conceived as being changeable, under continuous construction, and without limitations. In short, the queer movement rejects standardisation and any notion of identity which is articulated in essentialist terms. Proponents suggest that binary differences of gender or sex do not exist because there are a multitude of differences.

4. Feminist Porn and Post-Porn

On this basis, the debate around pornography has gradually changed in recent decades. Although the pornographic industry which advocates the patriarchal model of sexuality continues to be hegemonic –mainstream pornography–, other approaches to porn which go against the norm and offer alternative models such as "feminist porn" or "post-porn" are increasingly evident. The precedent for both can be found as long ago as 1984, when Candida Royalle founded *Femme Productions*, the first film production company which tried to create pornography from a "feminine" point of view, focusing on women's pleasure, and paying more attention to the quality of scripts and production values (Taormino et al 2016). This was the birth of so-called "porn for women", the aim of which was twofold: first, to make female sexual desire visible and, second, to recognise a space for women as consumers of pornography.

Spanish filmmaker Erika Lust works in this genre. As head of the production company *Lust Films*, she is an advocate for, and producer of, pornography which aims to offer a dialogue based on non-violence and equality, where women also have a role as active consumers. According to Lust: "Pornography, like all artistic and cultural expression, has a discourse. In the case of pornography, this discourse can be approached from a feminist perspective. If women do not participate in the discourse of pornography as creators, porn will only express what men think about sex. We must participate to explain what we are like, what our sexuality is like and how we experience sex. If we only let men do it, we will always continue to be represented in porn as their male fantasy sees us: whores, Lolitas, nymphomaniacs, etc."It is necessary to be part of porn in order to create a space where all sexualities and gender identities are represented. (2008: 49).

However, this model soon came to be criticised for perpetuating gender clichés. In the words of María Llopis, "the category 'porn for women' has tended to be associated with softcore, tenderness and romanticism, reproducing sexist stereotypes which typify and restrict women's sexuality" (2010: 72). Or, as Romina Smiraglia says: "Upholding the category of 'porn for women' is problematic, because it inevitably reinforces – consciously or unconsciously – a stereotype of what should give women pleasure as opposed to men". (2012:16).

Consequently, during the 1990s, new approaches began to appear which were more clearly detached from the conventional canons of the pornographic industry. It was with the turn of the century that these new voices made evident their identification with feminism and began to categorise their productions by using the term "feminist porn". According to the theoretical conceptualisation of authors such as Taormino, Penley, Shimizu and

Miller-Young, in their book *Porno feminista. Las políticas de producir placer*, a feminist pornographic artefact is one that "uses sexually-explicit images to question dominant representations of gender, sexuality, ethnicity, class, ability, age, body type and other markers of identity. It is a form of pornography which offers a true plurality of sexualities, and which translates into portraying a variety of bodies, desires, practices and sexual identities beyond those defined by hetero-normativity, homo-normativity, aesthetic norms and gendered sexual roles" (2016: 10).

This genre creates alternative images and develops its own aesthetics and iconographies, incorporating elements of the genres that preceded it – porn for women, for couples or lesbian porn – and opening itself up to the possibility of rethinking and reformulating pornographic content through artistic and experimental creation. As such, feminist porn focuses on: challenging stereotypes about the way pornography is made and consumed, and the creators/consumers themselves; taking control of the production of pornography; making and promoting women's pleasure-centred pornography; demystifying and de-stigmatising pornography for female consumers; and promoting sex positivity by emphasising the educational uses of pornography. Moreover, as opposed to the ideal of beauty depicted in hegemonic pornography, feminist pornography depicts non-stereotypical female bodies of all ages, which are not only represented but also eroticised. Its productions are also concerned with guaranteeing decent employment conditions for all workers by aiming to create a fair, safe, ethical and fully consensual working environment.

In addition to "feminist porn", alternative 21st century pornography also includes the "post-porn" genre, closely linked to the queer movement and the philosophical theory that underpins it. This approach has its roots in the French post-structuralist philosophy of Foucault and Derrida, and its subsequent adaptation to the North American context by authors such as Butler and her revision of the concept of "performativity".

It could be said that post-pornography has emerged as a political and artistic movement which seeks to reappropriate the pornographic image so as to make visible other identities, bodies, practices and sexual pleasures, going beyond the male heterosexual spectrum which has historically dominated mass-consumption pornography.

The term post-pornography is considered to have been coined by the photographer Wink van Kempen in the 1980s, who used the expression to refer to sexually explicit creations the aim of which is not masturbatory but parodic or critical (Llopis 2010: 22). The term was adopted and popularised in 1989 by the former mainstream pornographic industry actress Annie Sprinkle, with her *Public Cérvix Announcement*, a performance in which she invited spectators to look inside her vagina using a speculum and a torch, with the aim of parodying the myths and mystery which have surrounded women's genitalia (Romero Baamonde 2019: 423). Between 1989 and 1996 Annie Sprinkle developed her well-known work, *Post Porn Modernist*, which presented her autobiographical evolution through multimedia performances, where she played with pornographic imagery

by mocking clichés and the traditional pornographic aesthetic itself, whilst trying to show how pornography could play a fundamental role in the reconfiguration of sex and sexuality.

Meanwhile, the writings of Paul. B. Preciado, Itziar Ziga, Virginie Despentes and María Llopis evoke the insurrection of bodies, the construction of alternative forms of pleasure and the reappropriation of the technologies of production of sexuality and bodily experimentation, whilst proposing an alternative way of constructing desire and pleasure.

King Kong Theory, by French writer and filmmaker Virginie Despentes, published by Ramdom House in 2007, is a significant point of reference for the post-porn movement. In it she states that: "in Judeo-Christian morality we have been told more than enough that it is better to be taken by force than to be taken for a slut. There is a feminine predisposition to masochism that does not come from our hormones, or the times of the cave-dwellers, but from a precise cultural system, and that has disturbing implications for the control we can take over our independence. Being voluptuous and exciting is also detrimental: being attracted to what destroys us always keeps us away from power" (2007: 44).

The art critic and independent curator Marisol Salanova, offers the following definition: "post-porn is an artistic movement which aims to generate a different pornography by using sexual imagery in which peripheral and dissident sexualities which are marginalised by hetero-normativity and classic porn have a place". Post-pornography involves a radical inversion of the subject of pleasure: it is now women and minorities who reappropriate the pornographic dialogue and demand other representations and other pleasures (2015: 51).

For his part, Paul B. Preciado defines post-porn as "the effect of becoming a subject for those bodies and subjectivities that until now have only been contemptible objects of pornographic representation: women, sexual minorities, non-white or disabled bodies, transexuals, intersexuals and transgender people. In post-porn, those ignored by hegemonic porn or used to represent other people's fantasies, often in a denigrating way, take the reins, filming or performing themselves to express their sexuality, and becoming protagonists with a script of their own choosing".

In Spain, post-porn gained momentum at the beginning of the 21st century, a key moment being the 2008 Congress entitled *Feminismo Porno Punk*. It was organised by the aforementioned queer theorist Paul B. Preciado (formerly known as Beatriz Preciado), whose 2000 *Countersexual Manifesto* has been a key text for studies on post-pornography, transgender and queerness, and for whom post-pornography is a political platform for sexual dissidence. A number of prominent international figures took part in the Congress. These included the trans photographer Del Lagrace Volcano, the filmmaker Tristan Taormino and Sprinkle herself, all of whom attended alongside Spanish artists and activists such as *las Post-Op*, and *Diana Pornoterrorista*, as well as María Llopis and Águeda Bañón, with their project *Girls who like porno*.

The "performativity" which Judith Butler advocates is embodied in aspects of contemporary art in general, and post-pornographic art in particular. She explores the relationship between body and discourse and the idea of performance and repetition, which she defines as performativity, i.e, as the "reiterated action of materialization of sexed bodies". She stresses that the presentation of gender through established behaviour, citation and reiteration, shows that bodies do not constitute the boundary of nature and culture as assumed by normative discourse, but that sexual difference is produced through the performativity of gender (1990: 57-58).

In terms of perceiving the body as the central axis of performance theory and practice, artists such as Marina Abramovic, Regina Fiz, Diana J. Torres, Valerie Solanas, Angélica Lidell and Catherine Opie question sexual and gender categories by using their own bodies. The person carrying out the performance sees themselves as different from an actress/actor in that they speak, act and move in their own name, rather than embodying a character. They perform their own being as opposed to being an actress/actor who plays the role of another person.

Thus, post-pornographic expression makes use of methods such as performance –or action art–, video, photography, writing and drawing, in a stark exhibition of sexuality. In this way it punctures hegemonic sexual imagery and binary constructions of gender and sex, giving visibility to the exchange of roles, the eroticisation of different parts of the body, and identities and practices which are excluded from conventional and industrial flows of desire. In doing so, post-pornography disrupts what is traditionally considered beautiful, desirable and/or acceptable in a sexual context, just as postmodernism did in its day in the artistic context. Moreover, it transgresses bodily, aesthetic and gender normativities. In Preciado's words:

> "Post porn is not an aesthetic, but a collection of experimental productions which arise from movements supporting the political-visual empowerment of sexual minorities: the outcasts of the pharmaco-pornographic system (bodies working in the sex industry, whores and porn actors and actresses, nonconformist women from the heterosexual system, transgender bodies, lesbians, bodies with functional or psychic diversity...) thus demand the use of audiovisual devices for the portrayal of sexuality (2011: 37).

The search for pleasure, control and possession of one's own body, together with the obligation to reaffirm one's own individual identity, become a weapon against a system which uses sex as an instrument of domination and alienation - a weapon which is channelled and expressed through art and percieves bodies as political, as having a purpose: to demystify "moral issues which are strongly rooted in the mentalities of society (such as female sexual submission, the myth of virginity or masturbation)" (Ferré Baldrich 2018: 258). Post-porn distorts traditional power relations and uses pornography both as an essential battlefield to make certain identities and sexualities visible, and as a political platform to fight against existing hegemonies. Post-pornography therefore involves "the application of pro-sex feminism to the visual representation of non-normative sexualities" (Moreno Hernández and Maribel Domènech Ibáñez 2010).

Unlike mainstream porn, post-porn is both artistic and subversive, two essential values traditionally linked to sexually explicit discourse. This is especially relevant from a legal and constitutional perspective because, as well as featuring unquestionably artistic resources in its creations, post-porn has a clear political and countercultural objective: to question the hegemonic perspective of sexuality and sexual expression, and to vindicate the role of minorities. All the above returns explicit sexual discourse –"post pornographic"– to an area of creativity it should never have left, i.e. to the realm of freedom of artistic expression.

5. Conclusions

The confrontation between abolitionist feminists and so-called pro-sex feminists over the issue of pornography seems to be intensifying. Yet a closer look at it reveals, in my opinion, that it lacks substantive arguments to support it. Among the denunciations and demands of the former, it is common to find phrases such as: "This 8M, feminism has to focus on the barbarism of prostitution and pornography" (Rosa Cobo's Twitter account of 6 February 2022). Such messages offer but simple reflections, which stem from the assumption that "porn is bad" *per se*, and fail to acknowledge complex issues such as the sexual trafficking of women, the non-consensual dissemination of sexually explicit material, prostitution and pornography in general, due to their lack of distinctions or nuances.

As we have seen, we can divide pornography into two types: mainstream pornography, which represents sexuality from clearly sexist and misogynist narratives, in which violence against women is normalised and eroticised; and pornography which promotes gender equality, intimacy, diversity, express consent, safety, pleasure and free sexual exploration through representations made with ethical values. The opposition to mainstream pornography is not a position exclusive to abolitionists; quite the contrary. What happens is that pro-sex feminists reject abstentionism and prohibition, advocating instead for the active participation of women and new sexual and gender identities in the creation, representation and consumption of pornographic discourses which challenge stereotypes and question the use of sex as an instrument of domination and alienation.

It is in this sense that, in my opinion, feminist confrontations around the issue of pornography are, in and of themselves, groundless. We need to move away from "pro-porn" or "anti-porn" arguments, as we need to move away from confrontations that are essentialising in nature. Instead, we to enable a seroius public debate on gender identities that enables the process of gender equalisation. The whole question of pornography must be part of that debate.

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