

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.

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 Portugal¹⁰ and Germany,¹¹ albeit not always as effectively as would be desirable.¹² In most, however, it still constitutes normal practice (Ghattas 2020: 11).

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 "incurable 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.

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

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 LGBTI rights (*Borrador Anteproyecto de Ley para la igualdad de las personas LGBTI 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

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 personenbezogener Vorschriften (Personenstandsrechts-Änderungsgesetz)* (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

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.

REFERENCES

- AGHA, Petr (2019), “Subjectivity, gender and agency”, in P. Agha (ed.), *Law, Politica and Gender*, Routledge, Oxford, pp. 61-80. <https://doi.org/10.4324/9781351047005-6>
- AMMATURO, Francesca R. (2019), “Can human rights exist without gender? LGBTQI issues and the Council of Europe”, in Peter Agha (ed.), *Law, Politica and Gender*, Routledge, Oxford, pp. 33-44. <https://doi.org/10.4324/9781351047005-4>
- BUTLER, Judith (1990), *Gender Troubles. Feminism and the Subversion of Identity*, Routledge, London & New York.
- BUTLER, Judith (1993), *Bodies that Matter. On the discursive limits of sex*, Routledge, London & New York.
- COSSUTTA, Carlotta (2019), “Linguistic traps: identity and differences through institutions”, in Peter Agha (ed.), *Law, Politica and Gender*, Routledge, Oxford, pp. 45-60. <https://doi.org/10.4324/9781351047005-5>
- DEVOR, Holly (1989), *Gender Blending. Confronting the limits of duality*, Indiana University Press, Bloomington and Indianapolis.
- DOSE, Ralf (2014), *Magnus Hirschfeld: The Origins of the Gay Liberation Movement*, Monthly Review Press, New York.
- DREGER, Alice D. (1998), *Hermaphrodites and the Medical Invention of Sex*, Harvard University Press, Cambridge, MA.
- FAUSTO-STERLING, Anne (2000 [2020ed.]), *Sexing the Body. Gender Politics and the Construction of Sexuality*, Basic Books, New York
- FOUCAULT, Michel (1976 [1981ed]), *The Will to Knowledge. The History of Sexuality I*, Penguin Books, Middlesex.
- FOUCAULT, Michel (1980), *Herculine Barbin (Introduction)*, New York: Vintage Books.
- GHATTAS, Dan C. (2020), *Protecting Intersex People in Europe: A Toolkit for Law and Policymakers*, ILGA Europe, Brussels.
- HIRSCHFELD, Magnus (1918 [2015ed.]), *Sexuelle Zwischenstufen*, Fachbuchverlag Dresden, Dresden,
- KESSLER, Suzanne (1998), *Lessons from the Intersexed*, Rutgers, New Jersey.
- KESSLER, Suzanne & MCKENNA, Wendy (1978), *Gender. An Ethnomethodological Approach*, Chicago University Press, Chicago.
- KING, Helen (2016), *The One-Sex Body on Trial: The Classical and Early Modern Evidence*, Routledge, London. <https://doi.org/10.4324/9781315555027>
- LACQUEUR, Thomas (1990), *Making Sex. Body and Gender from the Greeks to Freud*, Cambridge University Press, Cambridge, MA.
- LEWONTIN, Richard C. (1993), *Biology as Ideology. The Doctrine of the DNA*, Harper Perennial, New York.

- PATEMAN, Carole (1988), *The sexual contract*, Stanford University Press, Stanford.
- PATEMAN, Carole (1989), *The Disorder of Women*, Stanford University Press, Stanford.
- PLATERO, Lucas (2016), “La transfobia también es una lucha feminista”, *Viento Sur*, nº 146, pp. 55-61.
- PRECIADO, Paul B. (2020), *Yo soy el monstruo que os habla. Informe para una académica de psicoanalistas*, Anagrama, Barcelona.
- RODRÍGUEZ RUIZ, Blanca (2019), *El discurso del cuidado. Propuestas (de)constructivas para un estado paritario*, Tirant lo Blanch, Valencia.
- RUBIN, Gayle (1975), “The Traffic in Women: Notes on the ‘Political Economy’ of Sex”, in Rayna R. Reiter (ed.), *Toward an Anthropology of Women*, Monthly Review Press, New York, pp. 157-210.
- RUBIO MARÍN, Ruth & OSELLA, Stefano (2020), “El Nuevo derecho constitucional a la identidad de género: entre la libertad de elección, el incremento de categorías y la subjetividad y fluidez de sus contenidos. Un análisis desde el derecho comparado”, *Revista Española de Derecho Constitucional*, nº 118, pp. 45-75. <https://doi.org/10.18042/cepc/redc.118.02>
- SALAZAR BENÍTEZ, Octavio (2015), “La identidad de género como derecho emergente”, *Revista de Estudios Políticos*, nº 169, pp. 75-107. <https://doi.org/10.18042/cepc/rep.169.03>
- SALVATORE, Ingrid (2019), “The politicisation of sexuality: feminism, difference, differences”, in Peter Agha (ed.), *Law, Política and Gender*, Routledge, Oxford, pp. 8-20. <https://doi.org/10.4324/9781351047005-2>
- THEILEN, Jens T. (2020), “Subversion subverted: Developments in German Civil Status Law on the Recognition of Intersex and Non-Binary Persons”, Eva Brems, Pieter Cannoot and Toon Moonen (eds.), *Protecting trans* rights in the age of gender self-determination*, Intersentia, Cambridge, UK, pp. 95-120. <https://doi.org/10.1017/9781839700897.005>
- YOUNG, Iris M. (1996), “Communication and the Other. Beyond Deliberative Democracy”, in Seyla Benhabib (ed.), *Democracy and Difference. Contesting the Boundaries of the Political*, Princeton University Press, Princeton, pp. 120-135. <https://doi.org/10.1515/9780691234168-007>
- WITTIG, Monique (1992), “On the Social Contract”, in *The Straight Mind and other Essays*, Beacon Press, Boston, pp. 33-45.

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