

# 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,<sup>1</sup> 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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<sup>1</sup> 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,<sup>2</sup> 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.<sup>3</sup> 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 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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<sup>2</sup> The best-known feminist figure of the Enlightenment is perhaps Olympe de Gouges, 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.

<sup>3</sup> 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 Lévi-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.<sup>4</sup>

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<sup>5</sup>- 10 March 2016; Decisions of the Constitutional Court -SSTC<sup>6</sup>- 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<sup>7</sup>). 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

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<sup>4</sup> 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.

<sup>5</sup> *Auto del Tribunal Supremo*.

<sup>6</sup> *Sentencia del Tribunal Constitucional*.

<sup>7</sup> *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.<sup>8</sup> 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<sup>o</sup> 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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<sup>8</sup> 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.

<sup>9</sup> 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,<sup>10</sup> 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

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<sup>10</sup> 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 Court's failure to adequately conceptualise transsexuality.

criteria rather than psychosocial factors.<sup>11</sup> 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 registered 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

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<sup>11</sup> 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<sup>12</sup>. 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.<sup>13</sup> 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<sup>14</sup> 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<sup>15</sup>, 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.

<sup>12</sup> 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-igtbi.aspx> [Accessed: 31 March 2022].

<sup>13</sup> "LGTBI groups have 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-igtbi-urgen-judicial-emita-informe-ley-trans-siga-tramite\\_1\\_8851249.html](https://www.eldiario.es/sociedad/colectivos-igtbi-urgen-judicial-emita-informe-ley-trans-siga-tramite_1_8851249.html). [Accessed: 31 March 2022].

<sup>14</sup> 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.

<sup>15</sup> 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 appeal 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:<sup>16</sup>

"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)".

<sup>16</sup> 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 LGTBPhobia 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.<sup>17</sup> 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

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<sup>17</sup> 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 regional 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<sup>18</sup>, which excluded single women and Trans people from access to public funding for this type of treatment. To address

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<sup>18</sup> 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 LGBTBI 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 LGBTBI 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<sup>19</sup>

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

<sup>19</sup> 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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