

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

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

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

Summary: 1. INTRODUCTION. 2. THE "COMMON STANDARDS" DEVELOPED BY THE ECtHR ON THE RIGHT TO RECTIFY ONE'S LEGAL SEX. 2.1. The first twenty-five years of case-law on the subject. 2.2. Subsequent case-law. 2.3. The most recent ruling to date (2021) and a first systematisation of the common rules developed by the ECtHR. 3. THE INCORPORATION OF THE COMMON RULES ELABORATED BY THE ECtHR IN THE LEGISLATION OF MEMBER STATES. 3.1. The spanish case: the current situation and the draft of the "trans law". 3.2. A look at the main critical aspects of the spanish "trans law". 4. FINAL CONSIDERATIONS. BIBLIOGRAPHY.

1. INTRODUCTION

The different forms of discrimination directed at LGBTIQ+ persons have been addressed by a substantial number of international and supranational measures, both legally binding and not. These include the Yogyakarta principles (Principles on the application of international human rights law in relation to sexual orientation and gender identity 2006¹) or the decision of the World Health Organization (WHO) from 2018 to eliminate gender dysphoria from the list of mental illnesses or disorders.² Although different in source and

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

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

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

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

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

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

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

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

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

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

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

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

2. THE "COMMON STANDARDS" DEVELOPED BY THE ECtHR ON THE RIGHT TO RECTIFY ONE'S LEGAL SEX

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

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

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

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

⁷ Romboli 2020.

⁸ For a more complete review of the ECtHR case-law on the matter, see Romboli, 2021. See also Trucco 2003.

⁹ Álvarez Rodríguez 2019: 55.

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

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

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

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

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

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

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

2.2. Subsequent case-law

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

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

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

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

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

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

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

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

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

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

¹⁰ Romboli 2021.

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

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

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

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

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

3. THE INCORPORATION OF THE COMMON RULES ELABORATED BY THE ECtHR IN THE LEGISLATION OF MEMBER STATES

Once the common standards elaborated by the ECtHR regarding the protection of the trans persons have been teased out, the next challenge is to ascertain to what extent they are effectively respected and implemented by Member States.¹¹ According to available data, eight European countries currently allow the so-called "free self-determination of gender" from the age of 18 (Belgium, Denmark, France, Greece, Ireland, Luxembourg, Malta and Portugal), while further two allow it from the age of 16 (the Netherlands and Norway).¹² On the other hand, countries such as Hungary (a Member State of the Council of Europe since 1990 and of the European Union since 2004¹³) or Slovakia (a Member State of the Council of Europe since 1993 and of the European Union since 2004), among others, maintain the requirement of mandatory sterilisation to obtain legal recognition of gender reassignment.¹⁴

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

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

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

¹¹ See Lorenzetti 2017; Rubio-Marín & Osella 2020.

¹² Álvarez, Ayuso, Abril 2021.

¹³ Take, for example, the news broadcast on 2020, v. Arancibia, 2020.

¹⁴ ILGA Europe, 2021 Annual Review: 15. Available at https://www.ilga-europe.org/sites/default/files/2021/full_annual_review.pdf [Accessed: 30 November 2021].

¹⁵ <https://op.europa.eu/es/publication-detail/-/publication/7341d588-ddd8-11ea-adf7-01aa75ed71a1> [Accessed: 30 November 2021].

¹⁶ Omedes 2021.

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

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

This Law brought about an improvement in the legal protection of trans people. As its Explanatory Statements make clear, it aims to “*guarantee the free development of the personality and dignity of the people whose gender identity does not correspond to the sex with which they were initially registered*”. Yet it sought to do so by finding a compromise between the rights of trans persons and the need to protect legal security and the general interests, as they were perceived to be at the time. In line with this, the Law only allows “duly accredited” trans persons to rectify their registered sex, bearing in mind that, at a time of its passing, the “trans condition” (gender dysphoria) was still classified as a disease by the WHO. According to article 4 of the Law, applicants for a rectification of their legal sex must meet two requirements: first, they must have been diagnosed with gender dysphoria, through a medical or clinical psychological report (which must contain very precise specifications¹⁹); second, they must have been medically treated for at least two years to accommodate their physical characteristics to those corresponding to the sex claimed, a circumstance that must also be proven through a medical report. Excluded from this requirement are those persons who have undergone medical treatment for sexual reassignment surgery, or who certify that they cannot follow the medical treatments described above for reasons of health or age.

It seems evident that these requirements do not comply with the current minimum standards of protection elaborated in the case-law of the ECtHR. Since 2007 this points to the depathologisation of trans persons and to States’ obligation to articulate a legal system that comprehensively protects their dignity and free development, as well as their right to physical integrity and respect for private life. Legal systems that allow for rectification of legal sex only after verifying the presence of a medical diagnosis and prolonged medical interventions affecting the applicant’s body violate these principles and rights. Aware of this, the Spanish Government has undertaken a long (and so tortuous²⁰) path towards adjusting Spanish legislation to current European standards. On 29 June 2021, the Council of Ministers approved the Draft Bill for the real and effective equality of trans people and for the guarantee of the rights of LGTBI people (*Anteproyecto de Ley para la igualdad real y efectiva de las personas trans y para la garantía de los derechos de las personas LGTBI*²¹), known as the preliminary project of “Trans Law”.

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

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

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

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

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

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

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

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

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

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

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

The text also allows people with disabilities to request the rectification of their registered sex with the support measures that may be required (article 37.3). It also mentions foreigners, notably foreigners without legal residence in Spain and stateless persons (article 44).²⁶ To be sure, article 68 establishes that "*Public Administrations, within the scope of their powers, will guarantee foreign LGTBI persons who are in Spain, regardless of their administrative situation, the ownership and exercise of the right to equal treatment and non-discrimination by reason of the causes established in this Law in the same conditions as nationals, in the terms set forth in this law*". Yet the Draft excludes all foreign legal residents in Spain, refugees and asylum seekers from the possibility of exercising the right to rectifying their legal sex-gender markers²⁷.

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

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

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

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

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

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

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

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

Second, article 41 of the Draft, which establishes the reversibility, within the first six months, of the rectification of the registration mention relative to the sex of the persons,³⁰ also lends itself to criticism. This is so because, although not mentioned in the text of the Draft Bill, the Government (through the Minister of Justice, Juan Carlos Campos) has declared that reversal will be possible only once³¹. It is not clear what this means. Does this mean that, within the framework of an administrative procedure for sex reassignment, it will be possible to request the reversal of said specific procedure only once? Or does it mean that, once a person has requested the rectification of their registered sex, they only have one chance within their lifetime to change their minds? If both scenarios are problematic, the second is even more so. It seems appropriate to ask whether a law that is based on the protection of the dignity of the person and their right to self-determination in matters of gender identity can then prohibit accessing the change of registered sex more than once. This circumstance appears as a true contradiction with the principles that allegedly inspired the legislative reform, principles based in turn on those developed by the ECtHR.

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

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

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

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

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

Last but not least, and in close connection with the above, the Draft Bill does not even mention the situation of non-binary people, of people whose sex-gender identity does not fall within any of the two binary poles, i.e. male and female. It does not allow a person to choose to leave blank the registration field related to their legal sex-gender (which other countries in Europe and other parts of the world do³²). This circumstance may be due to the fact that non-binary people have only recently started to be seen, that their claims have only recently started to be heard, or even that Spanish society is not yet prepared to face this debate.³³ Whatever the reasons might be behind the final decision not to include a “third gender” as a permanent option in the Draft, the result is the exclusion and discrimination of part of the people who identify as LGBTIQ+.

4. FINAL CONSIDERATIONS

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

This is not to deny that States must enjoy some margin of appreciation in certain matters. It is to stress that this cannot come to the detriment of the rights recognised in the ECHR and the development of *common standards* that ensure that the Convention remains a living instrument, the interpretation of which reflects the evolution of society and responds to current conditions and needs³⁵. Eliminating the barriers that prevent trans people from fully exercising their rights and that undermine their dignity, free

³² An example of this is the German case; see Müller & De Benito 2013.

³³ See, among others, Rodríguez Álvarez 2021; Soto 2021.

³⁴ *Cossey v. United Kingdom*, Decision of the ECtHR of 27 September 1990 (§ 2.7 in Martens’ Dissenting Opinion); Martens uses a quotation which he borrows from a critic of the Corbett doctrine.

³⁵ *Cossey v. United Kingdom*, Decision of the ECtHR of 27 September 1990 (§ 3.6.3 in Martens’ Dissenting Opinion).

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

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

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

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

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