



Master's Final Dissertation

**GENDER SELF-DETERMINATION IN THE
EUROPEAN UNION: PRECEDENTS, CURRENT
TENDENCIES AND THE CASE OF SPAIN**

Máster en Unión Europea.
Multilevel European Integration and Fundamental Rights

Master's Thesis

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1. Introduction

Gender recognition is a rather recent concept, and its evolution is moving towards a greater acceptance. The increasing visibility of transgender individuals within the latest 70 years has resulted in higher levels of social inclusion and certain legal advances for the community¹. However, the situation of transgender individuals is still linked to discrimination at different levels. The needs of such community have been ignored on many occasions by society in general and, specifically, by policymakers². The lack of acceptance of the community worsens the situation, altogether with the absence of legislation protecting transgender individuals and recognising their self-perceived gender.

On a global basis, transgender people are usually required to undergo certain medical procedures, in multiple occasions involving sterilisation and psychological, exams in order to change their legal gender. These requirements have been categorised as contrary to human rights³. The United Nations, which is expressly against such criteria, considers them as “onerous and abusive requirements” and defines legal recognition of gender identity as a right for transgender people⁴. Besides, the development of personal aspects such as self-esteem is highly influenced by the recognition of the gender identity of the person by the State he or she resides in⁵. Although it is extended within the European Union to include the possibility for transgender people to modify their gender marker legally, most of EU Member States impose medical, surgical, or psychological requirements⁶. The time lapses to obtain documents according to their identity also leads to higher levels of discrimination, mental health issues

¹J. Green “Legal issues for transgender people: a review of persistent threats” in *Sexual Health*, No 14 Volume 5 (2017), pp. 431-435.

²J.M. Grant et Al. *Injustice at Every Turn. A Report of the National Transgender Discrimination Survey*. The National Gay and Lesbian Task Force and the National Center for Transgender Equality, Washington 2011, p. 16.

³Transgender Europe. *Overdiagnosed but underserved*, 2017, p. 27.

⁴Office of the High Commissioner of the United Nations. *United Nations Free and Equal. Transgender*. 2017. Source: <https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Transgender.pdf>

⁵P.A. Calderon-Cifuentes. *Trans Discrimination in Europe. A TGEU Analysis of the FRA LGBTI Survey 2019*. TGEU, 2021, p. 37.

⁶M. Szydłowski “Gender recognition and the rights to health and health care: Applying the principle of self-determination to transgender people” in *International Journal of Transgenderism*, Nos. 3-4 Volume 17 (2016), pp. 199-211.

and overall discomfort in all ambits of life⁷, since the person needs to constantly give personal information to strangers when being identified with legal documents.

The concept of self-determination or self-identification of gender has its origins in social movements led by transgender activists. The *Stop Trans Pathologization 2012* campaign was one of the most remarkable movements in the process of emancipation from the medical discourse imposing transgender individuals physical modifications and psychiatric criteria⁸. Transgender identities have been historically medicalized, since it was considered that individuals who did not fit into the gender binary norms needed to adjust their bodies to the preconceived idea of what a man and a woman should be⁹. Thus, being categorized based on psychological and medical exams of different kinds. The first legal advances towards the recognition of transgender identities imposed certain requirements related to surgical modifications of the individuals' bodies, castration and/or psychiatric certificates¹⁰. As the transgender movement gained public relevance, legislations not based on the pathologization of those identities emerged. Notwithstanding that fact, most of the countries do not recognise transgender identities and, many of those who do, only allow gender recognition of transgender people who undergo procedures modifying their sexual characteristics¹¹. Within that context, the concept of self-determination of gender was developed, where it was the transgender person the one entitled to determine his or her gender identity¹². Such determination had to occur without the intervention of medical authorities of any sort, without pathologization of

⁷Transgender Europe. *Historic Danish Gender Recognition Law Comes into Force*. TGEU, 2014. Obtained from: <https://tgeu.org/tgeu-statement-historic-danish-gender-recognition-law-comes-into-force/>

⁸A. Araneta "Diversidades cuestionadoras: la campaña internacional "Stop Trans Patologización 2012"" in *Feminismo/s*, Volume 19 (2012), pp. 143-163.

⁹E. Ortega "Reframing Care Practices on Transgender Health: The International Campaign Stop Trans Pathologization" in A. Bamme, G. Getzinger & T. Berger, *Yearbook 2014 of the Institute for Advanced Studies on Science, Technology and Society*, Profil, Graz, 2014, pp. 33-34.

¹⁰E. Ortega, *op.cit*, p. 34.

¹¹J.M. Ryan "Gender Identity Laws: The Legal Status of Global Sex/Gender Identity Recognition" in *LGBTQ Policy Journal*, Volume 8, No. 1 (2018), pp. 3-16.

¹²L.K. Langley "Self-determination in a gender fundamentalist state: toward legal liberation of transgender identities" in *Texas Journal on Civil Liberties & Civil Rights*, Volume 12, No. 1 (2006), pp. 101-132.

transgender identities and based merely in the declaration stating being an individual of a different gender than the one assigned at the moment of birth.

The first legal act that officially recognised self-determination of gender in a state was the Argentinian Gender Identity Law, which entered into force in 2012. It was the first law to allow the modification of the gender marker without medical, psychological, or surgical requirements, thus being considered as pioneer¹³. Other countries have followed such adoption, although up to date the prevalence of such legislations, as aforementioned, is a minority. Within Europe, only nine states have gender recognition laws based on self-determination of gender, and only six of the Union's states have incorporated such principle to their gender identity laws¹⁴.

Despite that fact, some European Union bodies such as the Commission are insisting that Member States incorporate self-determination of gender in their legislation. Within the LGBTIQ Strategy 2020-2025 of the European Commission¹⁵, such institution states that it will promote the adoption by Member States of LGR legal acts and procedures which are accessible to the overall population and “based on the principle of self-determination and without age restrictions”¹⁶. The position of the Commission is thus clear regarding self-determination.

The Steering Committee on Anti-Discrimination, Diversity, and Inclusion (CDADI) of The Council of Europe elaborated in 2022 the *Thematic Report on Legal Gender Recognition in Europe*¹⁷. The report shares good practices regarding LGR of certain Member States, analyses the situation within the Union overall and offers recommendations in the matter. Other non-EU organisations

¹³E. Schmall. *Transgender advocates hail laweasing rules in Argentina*, The New York Times, 2012. Source: <https://www.nytimes.com/2012/05/25/world/americas/transgender-advocates-hail-argentina-law.html>

¹⁴Council of Europe, *Thematic Report on Legal Gender Recognition in Europe. First thematic implementation review report on Recommendation CM/Rec (2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity*, Strasbourg, 2012. Obtained from: <https://rm.coe.int/thematic-report-on-legal-gender-recognition-in-europe-2022/1680a729b3>

¹⁵European Commission, *LGBTIQ Equality Strategy 2020-2025*, Brussels, 2020. Source: https://commission.europa.eu/system/files/2020-11/lgbtiq_strategy_2020-2025_en.pdf

¹⁶Article 3.3 of the LGBTIQ Equality Strategy 2020-2025 (2020). Adopted in Brussels.

¹⁷Council of Europe, *Thematic Report on Legal Gender Recognition in Europe*.

such as The Council of Europe¹⁸ show a tendency within Europe to acknowledge the importance of LGR in the continent. Within the Section II, of Good Practices, the Council establishes that self-determination based legal acts “are the most accessible ones where recognition of a person’s gender identity is self-defined, and not determined by anyone other than the individual”¹⁹.

The present project is an analysis of the Gender Recognition Bills in the European Union which are based on self-determination of gender. The main objective of the research is to study the legal situation of gender self-determination within the European Union. The secondary objectives are to compare the Union situation in the matter with the international perspective and to analyse in more detail the situation within the Spanish territory.

Despite the legal acts based on self-determination of gender having a common origin, the characteristics of each law may vary well as how the concept is applied in each case. Self-determination may be present in the law in force within a certain territory and only be applied to adult individuals or only to citizens who have the nationality of such territory. Therefore, this research will study how the concept of self-determination of gender is applied to each case.

The different reports of the Council of Europe, the European Commission, and other works from the perspective of fundamental rights support this legal review partly. This legal analysis will note international laws which are relevant, study a case which is not in force currently and autonomous laws. Besides, the current self-determination laws will be studied in depth.

Initially, the research is focused on the social and legal development of the concept of gender self-determination, including the case law which has led to the current situation. Later on, the work studies the current tendencies on the matter, analysing how self-determination of gender is established in the European Union: studying the view of the Union as an organization, the different actions of Union institutions in the matter and analysing individually the legislation of the Member

¹⁸Although the Council of Europe is not a European Union institution, the mentioned report studies legislation involving, amongst others, EU Member States.

¹⁹Council of Europe, Thematic Report on Legal Gender Recognition in Europe, p. 23.

States. Then, the analysis delves into the case of Spain. In such part, the current provision of law is studied and how Spanish autonomies have regulated self-determination of gender in the absence of a national law.

Finally, the conclusions of the analysis are displayed. The conclusions compare the different legal acts studied, pointing out the principal benefits and negative outcomes of each one and how each one commits with the concept of self-determination of gender. Within this part, the possible advances close in time are also established, as well as the juridical conundrums on the matter.

1.1. Basic concepts

Due to the nature of the present work, directly related to the transgender community, as gender self-determination or self-identification is part of their agenda and revindications as a group, it is necessary to define the concepts that will be mentioned herein.

Transgender: transgender individuals are those whose gender identity differs from the one assigned at birth. Although in other languages such as Spanish, concepts as transgender and transsexual tend to coexist, in the English language ‘transgender’ is more broadly used. In addition, ‘trans’ is becoming a more popular term, as it is being considered as an umbrella concept, which could include the terms ‘transgender’ and ‘transsexual’²⁰.

Cisgender: a cisgender person is one whose gender assigned at birth and self-perceived gender are aligned²¹.

Non-binary: this gender category is a third category including individuals who “identify outside of the gender binary”²². Such identities, thus, do not coincide, whether entirely or partially, with the binomial categories male/female.

Gender identity: the concept of gender identity alludes to the internal understanding of an individual regarding their own gender²³. Thereby including

²⁰A. Iantaffi & M.J. Barker. *How to Understand Your Gender: A Practical Guide for Exploring Who You Are*, Jessica Kingsley Publishers, London, 2017, p. 21.

²¹H. Frohard-Dourlent et Al. “I would have preferred more options”: Accounting for non-binary youth in health research” in *Nursing Inquiry*, Volume 24, No. 1 (2017), pp. 1-9.

²²C. Richards et Al. “Non-binary or genderqueer genders” in *Internationally Review of Psychiatry*, Volume 28, No. 1 (2016), p. 95.

²³A. Iantaffi. & M.J. Barker, *op.cit*, p. 32.

the gender they identify with, regardless the gender the person was assigned at birth.

Legal Gender Recognition (LGR): according to Transgender Europe, it is the “official recognition of a person’s gender identity, including gender marker and name(s) in public registries and key documents”²⁴. Being therefore, the acknowledgment by the pertinent authorities of the gender the person identifies with. By that means, modifying legal documents such as Passports, Driving Licenses, or other pertinent documents. LGR does not necessarily comply with gender self-determination, although gender self-determination is a form of LGR.

Legal sex: it is the labelling of people as male or female “for the purposes of the administrative state and in criminal and civil law”, usually the only options for such category are the aforementioned, thereby being binary²⁵. The concept can be interchangeable with gender marker.

Gender self-determination: this term, habitually used as a synonym of self-identification and both terms being interchangeable, is defined by FELGTBI+ as “the right of a person to determine and express his/her own gender, as part of the free development of one’s personality”²⁶. The concept of self-identification is opposed to the pathological understanding of transgender identities.

Preferred name: the concept alludes the name chosen by the transgender person and under which he or she requests to be referred to as. It is usually different than the one assigned at birth and in accordance with the gender he or she identifies with. Multiple professional guides suggest asking, when the name is not legally changed, for a preferred name²⁷. Notwithstanding that fact, some individuals decide to keep the name assigned at birth or gender-neutral names.

²⁴R. Köhler, J. Ehrh & A. Recher. *Legal Gender Recognition in Europe: Toolkit*, Transgender Europe, Open Society Foundations, 2013, p. 9.

²⁵C. Hutton “Legal sex, self-classification and gender self-determination” in *Law and Humanities*, Volume 11, No. 1 (2017), p. 65.

²⁶FELGTBI, *Right to self-determination of gender: Comparative law study on five questions related to gender identity*, Madrid, 2021, p. 5.

²⁷M. Garret “Working With Transgender Individuals in Case Management Practice” in *Professional Case Management*, Volume 23, No. 1 (2018), pp. 19-24.

Transgender man/men/male: a transgender individual who defines himself as a male is a person who was assigned the female gender at the moment of birth, but who identifies as a male²⁸.

Transgender woman/women/female: a transgender individual who defines herself as a female is a person who was assigned the male gender at the moment of birth, but who identifies as a female²⁹.

2. Theoretical foundation

Human rights have had a similar development in the European Union level as internationally, considering the fact that such perspective is rather recent and has gained importance in the latest years. The internationalization of human rights is key during the current times since international entities have proclaimed such rights at that level and also within a local scope³⁰. The Human Rights perspective is key to the current legislative advances in the Union, being them based in it. The EU legal order has been developed considering human rights as essential therein, being part firstly of the general principles of EU law and later with the adoption of the Charter of Fundamental Rights of the European Union³¹.

Although within this section, the term used is “human rights”, delving into the matter of the research, the concept developed is “fundamental rights”. Such decision is taken due to the fact that it is the term most commonly used by EU bodies.

2.1. International legislation involving human rights

The current tendency regarding human rights, in which the protection is guaranteed and assumed as a longstanding tradition, is rather recent. The origin of human rights protection at a legislative level remounts to the end of the

²⁸R. Stephenson, E. Riley, et Al. "The Sexual Health of Transgender Men: A Scoping Review" in *The Journal of Sex Research*, Volume 54, Nos. 4-5 (2017), p. 424.

²⁹S. Peitzmeier, A. Wirtz, et Al. "The transgender-specific intimate partner violence scale for research and practice: Validation in a sample of transgender women" in *Social Science & Medicine*, Volume 291 (2021), pp. 1-11.

³⁰F. Gómez "La protección internacional de los derechos humanos" in F. Gómez & J. Pureza, *La protección internacional de los derechos humanos en los albores del siglo XXI*, Universidad de Deusto, Bilbao, 2004, p. 23.

³¹T. Ahmed & I. de Jesús "The European Union and Human Rights: an International Law Perspective" in *The European Journal of International Law*, Volume 17, No. 4 (2006), pp. 771-801.

Second World War, as a collective effort to avoid the anterior breaches in the human rights field and protect the population over the globe³².

The law of human rights internationally establishes a series of obligations of the signing states, which they are bound to respect³³. Thereby, the countries which are adhered to the international treaties regarding human rights adopt a firm compromise to respect the rights therein stated. International human rights law includes a series of declarations, treaties, principles, and other sources: “the UDHR, a variety of international and regional treaties, principles of customary international law, and general principles of international law”³⁴.

International human rights law, however, is a complex issue. There are many intents to analyse and understand how international law is enforced and debates on whether such law is enforced. According to Koh, international human rights law is enforced by states, government officials and overall population, through the process of internalization, amongst others³⁵. However, the question on the practical applicability of international human rights law is still open. Cassel affirms that “the direct impact of international human rights law on practice in most of the world remains weak and inconsistent”³⁶. Notwithstanding that fact, Cassel considers the lack of direct impact does not necessarily mean there is no indirect impact. The indirect impact of international law is growing and consistent, and its effectiveness needs to be seen in the bigger picture in order to analyse the repercussion and capability of progress, the concept of such sort of law “must be understood as part of a broader set of interrelated, mutually reinforcing processes and institutions-interwoven strands in a rope-that together

³²J. Morsink “World War Two and the Universal Declaration” in *Human Rights Quarterly*, Volume 15, No. 2 (1993), pp. 357-405.

³³United Nations, *International Human Rights Law*, Human Rights Office of the High Commissioner, 2022. Source: <https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law>

³⁴P. Macklem “What is international human rights law three applications of distributive account” in *McGill Law Journal*, Volume 52, No. 3 (2007), p. 578.

³⁵H. Koh “How is international human rights law enforced” in *Indiana Law Journal*, Volume 74, No. 4 (1999), pp. 1397-1418.

³⁶D. Cassel “Does international human rights law make difference” in *Chicago Journal of International Law*, Volume 2, No. 1 (2001), p. 135.

pull human rights forward, and to which international law makes distinctive contributions”³⁷.

The existence of international human rights law does not imply an overall protection that is unbreakable. Today, it is still a utopic concept in many territories and for many individuals. The international action on human rights is necessary and uncomplete, being challenged frequently everywhere in the world³⁸. Considering that fact, it is understandable that international human rights law is questioned in terms of efficiency. The regional legislative advances that have been developed within the latest decades are based on human rights and, to a great extent, international human rights law.

Within *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric*, the author Holning Lau dedicates a chapter to gender recognition, titled *Gender Recognition as a Human Right*. Lau links the rights of personal autonomy, informational privacy, health, and body integrity to LGR. The concept of personal autonomy, related to Article 22 of the UDHR, lies closely to self-determination because “an important aspect of protecting personal autonomy is protecting individuals’ freedom to determine one’s own identity”³⁹. Gender self-determination can be, therefore, essential, for an individual to develop his or her personality and evolve at a personal level. Lau also links the right of informational privacy with self-determination, arguing that the prohibition of the recognition of the self-defined gender identity in official documents e.g., IDs, passports and driving licenses provokes the revealing of the status of transgender to some individuals, without respecting their desires and augmenting the possibility of suffering different forms of discrimination and prosecution.

³⁷D. Cassel, *op.cit.*, p. 135.

³⁸A.R. Chowdhury & J.H. Bhuiyan. *An introduction to international human rights law*, BRILL, 2010.

³⁹H. Lau “Gender Recognition as a Human Right” in v. Arnauld, v. d. Decken, & Susi, *The Cambridge Handbook on New Human Rights: Recognition, Novelty, Rethoric*. Cambridge University Press, 2018, p. 3.

2.2. Union legislation and case law regarding fundamental rights

Human rights have become the cornerstone of European Union policies and the tendency is for the EU to be more human rights centered in order to achieve, amongst others, greater levels of integration⁴⁰. Fundamental rights gained relevance when the Court manifestly included fundamental rights as general principles of EU law, later with the Treaties and the Charter of Fundamental Rights of the European Union⁴¹. There are different initiatives that indicate an active role in protection of fundamental rights within the EU.

The former jurisdiction regarding fundamental rights within the Union did not come with the Treaties and was established in the general principles of EU law. The *Stauder* case⁴², where the question submitted to the Court was related to the principle of dignity, was one of the first precedents on the matter. The Court stated then that fundamental rights were “part of the general principles of EU law”⁴³. Therefore, the precedent of fundamental rights becoming part of Union law.

Within the Treaties, the respect for human rights is established as foundational principles of the European Union and gives the Charter a binding status, amongst others. Therefore, Member States are obliged to stick to those values to the extent the Charter recognises, and, in theory, facing consequences when there is a violation of human rights by any Member State or the Union itself.

⁴⁰A. Von Gogdandy “The European Union as a Human Rights organization? Human Rights and the European Union” in *Common Market Law Review*, Volume 37 (2000), pp. 1307-1338.

⁴¹N.V. Dura “General Principles of European Union Legislation Regarding the Juridical Protection of the Human Rights” in *Journal of Danubian Studies and Research*, Volume 3, No. 2 (2013), pp. 7-14.

⁴²Court of Justice of the European Union, *Erich Stauder v City of Ulm*, Case 29/69, 1969. Reference to the Court under Article 177 of the EEC Treaty by the Verwaltungsgericht Stuttgart for a Preliminary Ruling in the action pending before that court between Erich Stauder, 15 Marienweg, 79 Ulm, and City Of Ulm, Sozialamt (Social Welfare Office).

⁴³E. Spaventa. *Fundamental Rights in the European Union*. European Union Law 2014.

Due to the initial perspective of an economic union, an institutional acknowledgement of human rights was incorporated later than it could have occurred, in the 1970s. Since then, multiple legislative and social advances within the Union have allowed a significant development in the matter. Resulting in the current situation, where human rights are a key part of the European Project⁴⁴.

The Charter of Fundamental Rights of the European Union⁴⁵ provides a formal basis regarding such rights within the Union. As aforementioned, although formerly an economic alliance, the Union has developed a profound protection in terms of fundamental rights, originally based on the case law from the Court of Justice of the European Union. The Charter was proclaimed in 2000, originally without any binding force. Notwithstanding that fact, the Treaty of Lisbon changed its status, becoming the Charter a legal act with the same value as the Treaties. There might be certain conflicts due to its similarity with the European Convention of Human Rights, however, the coverage of rights is equal unless, as it actually occurs, the Charter presents a more extensive protection⁴⁶.

Title III of the Charter offers common grounds for equality and, consequently, overall protection for the LGBTIQ community within the Union. Article 21 states that: “any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be

⁴⁴P. Craig & G. de Búrca “Human Rights in the EU” in P. Craig & G. de Búrca, *EU law: text, cases and materials*, Oxford University Press, New York 2020, pp. 414-462.

⁴⁵European Union, *Charter of Fundamental Rights of the European Union*, Official Journal of the European Union, Nice 2000.

⁴⁶Hartley, C. “Human rights and general principles of law” in Hartley, C. *The foundations of European Union Law*, Oxford University Press, New York 2014, pp. 144-173.

prohibited”⁴⁷. Thus, the LGBTIQ community is protected from discrimination, under the scope of the Charter. Notwithstanding that fact, the relationship between national legislation and Union legal acts is rather complex. It is therefore relevant to remember that the Charter, in terms of primacy of EU law, has the same legal status as the Treaties⁴⁸. Notwithstanding that fact, it is important to remark the scope of the Charter and its applicability. The Charter, under Article 51, covers “institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law”. In addition, the competences of the Union are not extended in any way by the Charter. Thus, although the Charter is going to be further analysed within this work, as a basis to consider self-determination of gender a fundamental right, it is not directly applicable except when the scope of the issue in question is within the aforementioned coverage.

Although there is a legal basis for such protection within the Member States, in this part only the Union policy is analysed, and such states are studied in other parts of this document. That will only be studied in Member States which have adopted gender self-determination-based legal acts.

2.3. Gender self-determination as a fundamental right

Gender self-determination is a concept defined by the possibility for individuals to define their gender regardless of the identity they were assigned at the moment of birth. It allows individuals to determine the legal and social gender they are referred to without any conditions but their own manifestation and request⁴⁹.

⁴⁷Article 21 of the Charter of Fundamental Rights of the European Union.

⁴⁸J. Ziller “Hierarchy of Norms. Hierarchy of Sources and General Principles in European Union Law“ in U. Becker, A. Hatje, M. Potacs & N. Wunderlich, *Verfassung und Verwaltung in Europa Festschrift für Jürgen Schwarze zum 70. Geburtstag* (eds.), Nomos Verlagsgesellschaft, Baden-Baden 2014, pp. 334-352.

⁴⁹FELGTBI, *op.cit*, p. 5.

One of the principal pillars in which the European Union is based, despite the economic origins of the alliance, is equality amongst individuals from the Member States and their institutions. The definition of ‘fundamental rights’, according to the FRA, refers to the notion of human rights, but within the sphere of the Union⁵⁰. Moreover, fundamental rights are a group of requirements from both the Union and the Member States towards the people in the European Union.

The progress on gender issues and the inclusion of them as a human rights issue has been developed in the latest years. Later on, the LGBTIQ community (Lesbian, Gay, Bisexual, Transgender, Intersex and Queer) has been added to the human rights bodies⁵¹, being their coverage part of the agenda. Within that context is where transgender rights and self-determination are recognised as a human right.

The requirements of physical modification, hormone treatments, surgeries and/or sterilization are a breach of certain fundamental rights such as the right to personal autonomy and the right to physical integrity. Also excluding transgender individuals who do not wish to modify their sexual characteristics, who are also part of the transgender community⁵², would cause a breach in the aforementioned rights.

Within this chapter, how self-determination is considered a fundamental right and the legal pillars under which it can be considered as such are explained, offering a perspective on the aforementioned concept based on Union legislation and, in other parts of the work, case law regarding the transgender community.

⁵⁰Fundamental Rights Agency, *What are fundamental rights*, European Union 2022. Obtained from: <https://fra.europa.eu/en/content/what-are-fundamental-rights>

⁵¹S. Farrior “Human Rights Advocacy on Gender Issues: Challenges and Opportunities” in *Journal of Human Rights Practice*, Volume 1 (2009), pp. 83-100.

⁵²P. Cannoet “The Pathologisation of trans* persons in the ECtHR’s case law on legal gender recognition” in *Netherlands Quarterly of Human Rights*, Volume 37, No. 1 (2019), pp. 14-35.

The Charter, as aforementioned, offers extensive protection to fundamental rights. Furthermore, some of the provisions of the Charter are related to the right to gender self-determination.

The first Article of the Charter involves the right to dignity, affirming it as inviolable and ensuring the obligation for it to be protected and respected. The lack of recognition of the gender of transgender individuals interferes in their personal development, damaging their mental health, influencing their relationships with others, and affecting other aspects of their lives such as education and employment. Transgender organisations and activists also claim that the absence of gender recognition is a breach of their dignity⁵³.

Article 3 of the Charter, of the right to the integrity of the person states that “everyone has the right to respect for his or her physical and mental integrity”. The impositions of physical modifications that some of the current transgender laws, which involve compulsive sterilisation, surgeries, or hormonal treatments in order to access to LGR imply a threaten to the right to personal integrity.

Pursuant Article 7 of the Charter, all individuals have the right to “respect for his or her private and family life”⁵⁴. If ever transgender people are not legally recognised, they are subject to personal questions whenever they request being treated with their preferred name and pronouns. The absence of recognition of the preferred name and gender identity of transgender people provokes higher risk of human rights violations⁵⁵.

In addition, regarding the access to work, Article 15(1) states that “everyone has the right to engage in work and pursue a freely chosen or accepted occupation”⁵⁶. The transgender community has been proven to have higher levels of

⁵³National Center for Transgender Equality, *Identity Documents & Privacy*, Transequality 2022. Obtained from: <https://transequality.org/issues/identity-documents-privacy>

⁵⁴Article 7 of the Charter of Fundamental Rights of the European Union.

⁵⁵United Nations, *The struggle of trans and gender-diverse persons. Independent Expert on sexual orientation and gender identity*, Office of the High Commissioner 2022. Obtained from: <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity/struggle-trans-and-gender-diverse-persons>

⁵⁶Article 15(1) of the Charter of Fundamental Rights of the European Union.

unemployment compared to the overall population⁵⁷. The absence of recognition of their gender causes an implicit obligation of exposing themselves as transgender. Coming out as transgender is a process that, in the workplace, usually leads into an increasing probability of suffering discrimination and lack of protection from being dismissed from work. Moreover, the implicit obligation of coming out if the person is not legally recognised and wishes to be addressed his or her identity worsens the situation⁵⁸. Therefore, creating potentially unfavourable conditions in the workplace.

One of the specific rights that are related to transgender rights and, subsequently, to gender recognition, is Article 20, which states that all individuals are equal before the law.

Equality before the law can be interpreted as related to gender recognition due to the fact that the absence of LGR-related legal acts, transgender individuals' gender identity is not officially recognised by the state. Leading to situations where, e.g., a transgender man would be legally considered a woman, and vice versa.

At the same time, protection against discrimination is considered to include discrimination directed to transgender individuals, being it transphobia, the same way other marginalized groups are recognised against discrimination motivated by the belonging to the minority in question⁵⁹. Especially considering some rulings as *P. v S. and Cornwall County Council*, further analysed, officially recognising discrimination against transgender individuals.

Furthermore, regarding the right to access to health care, Article 35 declares that “a high level of health protection shall be ensured in the definition and

⁵⁷K. Leppel “Transgender Men and Women in 2015: Employed, Unemployed, or Not in the Labor Force” in *Journal of Homosexuality*, Volume 68, No. 2 (2021), pp. 203-229.

⁵⁸S.M. Brumbaugh-Johnson & K.E. Hull “Coming Out as Transgender: Navigating the Social Implications of Transgender Identity” in *Journal of Homosexuality*, Volume 66, No. 8 (2019), pp. 1148-1177.

⁵⁹S. Reisner, J.M. White Hughto et Al. “Legal Protection in Public Accommodations Settings: A Critical Public Health Issue for Transgender and Gender Non-Conforming People” in *The Milbank Quarterly*, Volume 93, No. 3 (2015), pp. 447-649.

implementation of all Union policies and activities”⁶⁰. Transgender children who are supported regarding their identity tend to have standards of mental health similar to the overall population⁶¹ and adults experience an improved mental health after transitioning and when their identity is recognised⁶². Thereby, the welfare of transgender individuals is closely linked to the right to self-determination and rights recognised in the Charter would be threatened to transgender people without self-determination of gender.

2.4. Legal precedents of gender recognition

During the final years of the 20th century and beginning of the 21st century, there has been a significant change in terms of LGBTIQ acceptance and, consequently, of transgender identities⁶³. The apparition of studies in the biological field, altogether with a sociological background and pressure from activists⁶⁴, led to legal statements that, in a slow progress that continues to this date, has entailed a radical turn in terms of transgender recognition.

In respect of the recognition of sex or gender equality as a fundamental right and, therefore, the apparition of a solid protection of such, the Court started in the 70’s rulings in favour of the protection against sex-based discrimination. In *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*⁶⁵, the Court ruled regarding “the scope of the principle prohibiting discrimination between men and women workers laid down by Article 119 of the Treaty”⁶⁶. Therein, the ECJ stated that the erasure of sex-based discrimination is part of

⁶⁰Article 35 of the Charter of Fundamental Rights of the European Union.

⁶¹K.R. Olson, L. Durwood et Al. “Mental Health of Transgender Children Who Are Supported in Their Identities” in *Pediatrics*, Volume 137, No. 3 (2016), pp. 1-10.

⁶²A.J. Smith, R. Hallum-Montes et Al. “Determinants of transgender individuals’ well-being, mental health, and suicidality in a rural state” in *Journal of Rural Mental Health*, Volume 42, No. 2 (2018), pp. 116–132.

⁶³B. Witeck “Cultural Change in Acceptance of LGBT People: Lessons from Social Marketing” in *American Journal of Orthopsychiatry*, Volume 84, No 1 (2014), pp. 19–22.

⁶⁴K. Schilt & D. Lagos “The Development of Transgender Studies in Sociology” in *Annual Review of Sociology*, Volume 43 (2017), pp. 425-443.

⁶⁵*Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, Case 149/77, Court of Justice of the European Union 1978. Reference for a preliminary ruling: Cour du travail de Bruxelles - Belgium. The principle that men and women should receive equal pay for equal work.

⁶⁶*Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, Case 149/77, Court of Justice of the European Union 1978

fundamental rights. Moreover, in *Razzouk and Beydoun v Commission*⁶⁷, the subject of the matter was the right to receive different pays in widows' pensions in relation to the sex of the deceased person. The Court ruled that such procedures were contrary to the principle of equal treatment of both sexes. Indeed, the Community was ordered to review the policies regarding the matter to adopt the actions required in order to secure "equality between the sexes as regards the Community pension scheme"⁶⁸.

The first legal approaches regarding the transgender community were not related to the concept of self-determination, since such notion was established in the mid-10's, with the first adoption of legal acts such as the Argentinian Gender Identity Law⁶⁹. Thus, the precedents that lead to its elaboration are the legal advances which, although not explicitly recognising of self-identification, were slightly relevant in the matter.

The *Resolution on discrimination against transsexuals* of the European Parliament⁷⁰ states that the respect to an individual's gender identity and adoption of it in all ambits of his or her live is aligned with human dignity and personal rights. Furthermore, the resolution urged Member States to take action against transphobia and to improve the conditions of such community, calling on them to "enact provisions on transsexuals' right to change sex by endocrinological, plastic surgery, and cosmetic treatment, on the procedure, and banning discrimination against them"⁷¹. The declaration of the Parliament could be considered as the basis for the subsequent advances in the coming years for the transgender community in the European Union. The text recognised for the

⁶⁷C. Razzouk and A. Beydoun v Commission of the European Communities, Joined cases 75/82 and 117/82, Court of Justice of the European Union 1984. Equality between male and female officials - Widower's pension.

⁶⁸C. Razzouk and A. Beydoun v Commission of the European Communities, Joined cases 75/82 and 117/82, Court of Justice of the European Union 1984

⁶⁹S. Zucarelli, *Nueve años de la primera Ley de Identidad de Género del mundo*, IP Noticias 2021. Obtained from: <https://ipnoticias.ar/nota/8311-nueve-anos-de-la-primera-ley-de-identidad-de-genero-en-el-mundo>

⁷⁰European Parliament, *Resolution on discrimination against transsexuals*, Eur-Lex 1989. Obtained from: [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:51989IP0016\(02\)](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:51989IP0016(02))

⁷¹Article 2 of *Resolution on discrimination against transsexuals*.

first time rights for the transgender community and formally rejected the discrimination suffered by such collective, although its nature was not binding⁷². The European Court of Justice ruled in 1994 the case of *P. v S. and Cornwall County Council*⁷³. The concept of sex equality evolved therein, considering protection against transgender discrimination part of the aforementioned. Furthermore, the statement of the ECJ is considered as a landmark in terms of transgender rights. The case involved a transgender woman who was dismissed after she transitioned medically, with the intention of going through gender reassignment surgery. The tribunal in the matter asked the Court whether the Council Directive 76/207/EEC⁷⁴, regarding sex equality under the scope of Article 177(2) of the EC Treaty, was applicable to the case. Article 177(2) states the following: “community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms”⁷⁵. Not the Directive, nor the EC Treaty explicitly mentioned transgender individuals, thus, the ruling of the Court would determine whether such community was included under the scope of the aforementioned legal acts. The ruling of the Court indicated that Article 5 of the Council Directive nullified the possibility to reject a transsexual individual due to gender reassignment-related rationale, stating that the article “precludes dismissal of a transsexual for a reason related to a gender reassignment”⁷⁶. Therefore, protecting transgender individuals under such circumstances.

⁷²L. Platero “Haciendo memoria: recuperando la(s) historia(s) de los derechos trans en el estado español” in O. Moreno & L. Puche, *Transexualidad, adolescencias y educación: miradas multidisciplinares*, Egales Editorial, Madrid 2013, pp. 33-43.

⁷³*P v S and Cornwall County Council*, Case 3-13/94, Court of Justice of the European Union 1996. Reference to the Court under Article 177 of the EC Treaty by the Industrial Tribunal, Truro (United Kingdom), for a preliminary ruling in the proceedings pending before that court between P. and S. and Cornwall County Council, on the interpretation of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

⁷⁴Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

⁷⁵European Communities, Consolidated Version of the Treat Establishing the European Community, Official Journal of the European Communities, Rome 1997.

⁷⁶*P v S and Cornwall County Council*, Case 3-13/94, Court of Justice of the European Union 1996.

Without prejudice to the distinction between Union institutions and other organisations such as the European Court of Human Rights, the rulings of the ECtHR constituted precedents in relation to gender recognition within Europe. Despite the fact that the European Court of Human Rights is not an EU institution, nor its rulings are binding, the Declaration on Article 6(2) of the Treaty on European Union of the TFEU⁷⁷ acknowledges the relationship between the ECJ and ECtHR, mentioning a habitual conversation between the two institutions⁷⁸. Therefore, the rulings of the ECtHR are significant to the present analysis.

The *Van Oosterwijck case*⁷⁹ involved a transgender man, D. Van Oosterwijck, who requested being legally recognised with the Belgian authorities as a male individual after going through Hormone Replacement Therapy, also known as HRT, and gender reassignment surgery. The applicant invoked Articles 3, 8 and 12 of the European Convention of Human Rights, hereinafter the Convention, on the grounds of degradation towards him, his identity not being respected within his legal documents and discrimination due to the incongruence between his social identity and the legal one, consequently. Although the claim was dismissed due to a formal error: the applicant did not exhaust domestic remedies; considering the fact that the ruling took place in 1980 and, at that time, there was no Belgian legislation in the matter, the case could be seen as a beginning of debates regarding gender recognition for transgender individuals.

However, the first cases regarding gender recognition in the ECtHR resulted in negative or neutral outcomes for the community, since there was no progress for those transgender individuals wishing to change their legal sex. In the *Rees*

⁷⁷Treaty on the Functioning of the European Union.

⁷⁸European Union, Consolidated Version of the Treaty on the Functioning of the European Union, Official Journal of the European Union, 2012.

⁷⁹*Van Oostereijck v Belgium*, Application no. 7654/76, European Court of Human Rights 1980. Application against the Kingdom of Belgium lodged with the Commission on 1 September 1976 under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Danielle van Oosterwijck.

*case*⁸⁰, which took place in 1985, the applicant was also a transgender man who requested the rectification of his birth certificate after going through HRT and gender reassignment surgery. All his legal documents, except the aforementioned certificate, were aligned with his male identity. Therefore, excluding the possibility of a further marriage with a woman, since the legislation did not allow at the time a marriage between two individuals of the same sex. The ECtHR denied that the absence of recognition of the applicant of his male identity conformed a breach of Article 8 of the ECHR. Thus, refusing the situation affected his right to privacy. Moreover, the breach of Article 12 ECHR was also declined.

In 1990, the *Cossey case*⁸¹ had similar background and result. The claimant was a transgender woman seeking a change in her birth certificate. However, in this case, the applicant wished to marry a man, to whom she was engaged. They were informed their marriage, in case it took place, would be considered as void. The ECtHR stated there was no violation of Articles 8 and 12 of the ECHR, as in the *Rees case*.

In both the *Rees* and the *Cossey case*, it was the United Kingdom's legislation, altogether with the ECHR, to the extent it could be invoked, the norm applied to the case.

One of the milestones regarding gender recognition and consequently, self-determination, is the adoption of *The Yogyakarta Principles plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*. The principles added to the initial Yogyakarta Principles cover multiple aspects of protection regarding gender identity, such as protection, freedom, and health. Notwithstanding that fact, the more relevant coverage lies in Principle 31: The

⁸⁰Rees v. United Kingdom, Application no. 9532/81. European Court of Human Rights 1987. Application against the United Kingdom of Great Britain and Northern Ireland, lodged with the Commission in 1979 by a British citizen, Mr. Mark Rees, under Article 25 (art. 25) of the Convention.

⁸¹Cossey v. United Kingdom, Application no. 10843/84. European Court of Human Rights 1990. Application against the United Kingdom lodged with the Commission under Article 25 (art. 25) by Miss Caroline Cossey, on 24 February 1984.

Right to Legal Recognition. Principle 31 states the basis in which further LGR laws are founded: the right to access to the necessary certificates addressing the personal identity, disregarding aspects such as identity, orientation, expressions, or bodily characteristics. In addition, it informed of the right to modify the information present in the aforementioned documents that address the gender of the person”⁸². Moreover, the basis for legal self-determination of an individual’s gender is implied, invoking states, and requesting them to: “ensure access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the self-determination of the person”⁸³.

Principle 31 also states a series of requirements so that self-determination of gender occurs fairly and without discrimination, involving accessible mechanisms to obtain the legal change of sex/gender, the elimination of requirements related to medical interventions, mental health diagnosis, age requirements, third opinions or other statuses. Criminal records and immigration status shall not as well prevent from self-determination.

The European Court of Human Rights, in *S.V. v. Italy*⁸⁴, ruled favourably to transgender rights. The case involved a transgender woman who was not allowed to obtain the legal change of name until she went through gender reassignment surgery. The Italian Court did not allow the change of name arguing it did not comply with the legal gender of the interested party. The woman stated that the denial of change of forename until undergoing gender reassignment surgery violated “the right to respect for her private life”⁸⁵. The ECHR emphasizes “the particular importance of matters relating to a most intimate part of an

⁸²United Nations, *Principle 31 of The Yogyakarta Principles plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*, Geneva 2017.

⁸³Obligation B towards states of the *Yogyakarta Principles plus 10*.

⁸⁴Case of *S. V. v. Italy*, Application no. 55216/08, Judgement of Strasbourg. European Court of Human Rights 2018. Application against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by S.V.

⁸⁵P Case of *S. V. v. Italy*, Application no. 55216/08, Judgement of Strasbourg. European Court of Human Rights 2018.

individual's life, namely the right to gender identity"⁸⁶. Therefore, emphasizing the importance of such right. Finally, the Court determined that the impossibility of the applicant to obtain the change of forename until going through gender reassignment surgery, a process she was going to undergo when it was possible for her, resulted in negligence by the State when guaranteeing the right to respect for the interested party's private life. The case was admitted as a violation of Article 8 of the Convention, regarding the aforementioned right.

Rulings of these characteristics, alongside with principles and other international documents are especially relevant to locate the precedents of transgender rights being recognised and pointing out to the states, indicating an obligation to respect several rights linked to the transgender experience, e.g., the right to privacy or to development of one's personality.

2.5. Gender self-determination internationally

International organizations such as the UN have assured the importance of self-determination of gender in the field of human rights. The Report of the Office of the United Nations High Commissioner for Human Rights: *Discrimination and violence against individuals based on their sexual orientation and gender identity*, addressed issues regarding gender recognition, and the findings of abusive practices when it comes to the requirements of multiple countries. Despite the recognition of the advances that are taking place at an international level, the overall situation of transgender individuals is unfavourable when intending to accede to a legal change of their names and, consequently, for that to occur through self-determination⁸⁷.

The document states that the impossibility for many transgender people to obtain legal documents in accordance with their gender identity provokes difficulties in terms of employment, housing, benefits of the State or even travelling. In addition, the Commissioner informs the requirements in the states that recognise

⁸⁶Case of *S. V. v. Italy*, Application no. 55216/08, Judgement of Strasbourg. European Court of Human Rights 2018.

⁸⁷United Nations Human Rights Council, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, A/HRC/29/23, Office of the United Nations High Commissioner for Human Rights 2015.

transgender identities, in order to obtain legal recognition, such as the imposition of medical procedures, sterilization and others, are often abusive and “in violation of human rights standards”⁸⁸.

Although this document does not explicitly mention self-determination, it includes a discourse which intends to insist on the importance of protection of transgender rights. When it comes to gender recognition, that protection is to occur through processes that do not violate human rights. And, indeed, the elimination of such requirements is closely linked to the concept of self-determination itself: once the medical and psychological requirements of the legal change of gender and name are eliminated, the option that remains is offering an individual the possibility to determine his or her gender without third party approval.

Moreover, the *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, Victor Madrigal-Borloz, titled *The Law of Inclusion*, submitted to the Human Rights Council, does acknowledge self-determination as an obligation of states in order to comply with human rights. The report argues that mandate holders identify “the legal recognition of gender identity based on self-identification as State responsibilities under international human rights law”⁸⁹. Finally, the recommendation with which the Independent Expert concludes is that the access to legal recognition of gender identity, amongst other requirements, should be “based on self-determination by the applicant”⁹⁰.

The World Report 2016 of the Human Rights Watch, *Rights in Transition: Making Legal Recognition for Transgender People a Global Priority*, detailed the situation of LGR at an international level. The report prefaces by adding that states and governments should not unfairly limit or veto the right to gender

⁸⁸United Nations Human Rights Council, *Discrimination and violence against individuals based on their sexual orientation and gender identity*.

⁸⁹V. Madrigal-Borloz. *The law of inclusion: Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, A/HRC/47/27, United Nations Human Rights Council 2021.

⁹⁰*The law of inclusion: Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*.

identity, reasserting its consideration as fundamental right⁹¹. Therefore, the current tendency is not only for self-determination bills to appear, but also for international organizations working the field of human rights to inform states of the breach of human rights that provokes the denial of self-determination of gender for transgender individuals.

The international progress regarding self-determination varies depending on the region, in a situation where most countries do not allow LGR⁹². In the case of the European Union Member States, the situation is analysed further in the following heading. The first LGR law approved according to self-determination of gender in a State was Argentina's Gender Recognition bill, Gender Identity Law, *Ley N° 26.743 de Identidad de Género*, which passed in 2012. Therein, the right to gender identity is established in Article 1, which determines that every person has the right to (a): "the recognition of his/her gender identity"⁹³⁹⁴.

In addition, the definition of transgender person itself within the law is based on the self-determination concept, eliminating any allusion to medical characteristics, and acknowledging only the social conception of gender. Gender identity is defined in Article 2, as the "personal and individual experience of gender as each person feels it, which can coincide or not with the one assigned at birth, including the personal experience of the body"⁹⁵⁹⁶.

The Argentinian law states in Article 4(2), of requirements for the legal change of gender, that the procedure consists of submitting a request to the National Registry of the People exposing being covered by the law⁹⁷. The only requirement, therefore, is to submit a request and to manifest the name chosen according to the manifested identity. In the case of minors, the submission shall

⁹¹ Human Rights Watch, *Rights in Transition: Making Legal Recognition for Transgender People a Global Priority*, World Report 2016.

⁹²Open Society Foundations, *License to Be Yourself: Laws and Advocacy for Legal Gender Recognition of Trans People*, 2014, p. 8.

⁹³Original text: "al reconocimiento de su identidad de género".

⁹⁴Article 1 of *Ley N°26.743 de Identidad de Género* (2012). Gobierno de Argentina.

⁹⁵Original text: "la vivencia interna e individual del género tal como cada persona la siente, la cual puede corresponder o no con el sexo asignado al momento del nacimiento, incluyendo la vivencia personal del cuerpo"

⁹⁶Article 2.

⁹⁷Article 4.

be effectuated by his or her legal representatives and with the minor's conformity. Within the Argentinians law, no medical, psychological, or surgical requirements are established. The mere request of the interested party is sufficient to obtain a rectification of his or her birth certificate.

This Gender Recognition Bill became a precedent for the countries that would later adopt legal acts based on gender self-determination. Although over the globe self-determination laws are rather minoritarian⁹⁸, there is an increasing tendency to implement such legal acts. The recognition is significantly different depending on the territory, and in Oceania, Asia, and Africa the self-determination legislative advances are barely existent. Notwithstanding that fact, some LGR advances have taken place within the latest years, in countries such as Australia, New Zealand, and some judgements in India, Pakistan and Nepal appoint to recognition of gender⁹⁹.

Within the Americas, in North America only Greenland has legislation based on self-determination of gender, with the United States and Canada lacking self-determination national laws. In Centre-South America, besides Argentina, there are self-determination legal acts in Colombia, Bolivia, Ecuador, Peru, and Chile.

2.6. Gender self-determination in the European Union

The situation regarding LGR and, consequently, gender self-determination in the Union is disparate. According to the Commission, self-determination, compared to other LGR procedures with different requirements, “is the most respectful of transgender people and reflects the highest human rights standards, as well as being the most accessible”¹⁰⁰. Such approach has only been adopted by six EU states to this date, as of January 31st.

Although some states such as Spain or Finland are working on LGR models involving self-determination of gender, around one fifth of Union Member States recognise such right currently. The recognition of one's gender within the

⁹⁸Open Society Foundations, *op.cit.*, p. 41.

⁹⁹P.R. Dunne. *The Conditions for Obtaining Legal Gender Recognition: A Human Rights Evaluation*, Trinity College Dublin, School of Law, 2018, p. 30.

¹⁰⁰European Commission, *Legal Gender Recognition In The Eu: The Journeys Of Trans People Towards Full Equality: Report*, Publications Office of the European Union 2020.

European Union not only varies depending on the state the individual resides in, but also his or her personal characteristics. Some citizens encounter more barriers, as those disabled, the ones who lack citizenship status in the country they are residing in, or the economic situation. Most EU Member States, require medical treatments, psychological documents, or gender reassignment surgery to access to LGR. In that scenario, the obtention of documents according to the interested person's gender identity does require, apart from a long waiting period and the social and personal suffering it can provoke, a high monetary expense in those countries which lack a public health system or a public system which does not cover such expenses¹⁰¹.

The differences between how LGR is enforced in each Member State are present. Some include the right to gender self-determination, and some impose more restrictive requirements, creating a conflict for transgender individuals. Even the lack of recognition of the gender declared official in a Member State could infringe the right to residency in another Member State and freedom of movement, as the transgender person would not be recognised as his or her perceived gender and would suffer levels of discrimination that would not allow him or her to live freely in the aforementioned Member State. Marriages and civil unions can be damaged, as a transgender man who was married to another man would have to divorce in certain states to have his gender recognised. The necessity to uniform LGR legal acts, towards more self-determination-oriented laws, is manifested and some even argue that it would be idealistic for the EU to regulate that aspect, although it is a really complex task, unreachable in the short run¹⁰².

¹⁰¹L. Holzer "Legal gender recognition in times of change at the European Court of Human Rights", in *ERA Forum*, Volume 23 (2022), pp. 165-182.

¹⁰²M. Mirisch-Krueger "Filling the Legal Void in Interstate Legal Gender Recognition in the European Union: A U.S. Style Full Faith and Credit Clause and Coman-Based Approach Notes and Comments", in *Southwestern Journal of International Law*, Volume 28, No. 1 (2022), pp. 210-230

The first legal act adopted within the European Union based on self-determination of gender was the law of Denmark, adopted in 2014. Such legal act was followed by the Maltese transgender law.

The Danish law has been criticized due to its restrictive conditions, such as the exclusion of minors in the right to gender self-determination and the obligation of waiting for six months since the request for LGR until the individual can access to the modification. Par contrary, the Maltese law is considered as having a more agile procedure and more inclusive of different particularities within the transgender community¹⁰³.

The rest of the legal acts adopted, in chronological order, are the following: Ireland, Belgium, Luxembourg and Portugal. The tendency, despite the fact that is of adopting more legal acts based on self-determination of gender, grows slowly and without many advances in the latest years. Each of them has different benefits and limitations, which will be discussed further.

2.7. Recognition of self-determination in European Union institutions

European Union institutions, although all of them are related amongst them, do not have the same competences, and have not adopted an official position regarding self-determination of gender, but there are some exceptions. The institution which has adopted a more active role regarding such is the European Commission, with strategies and studies on the situation of self-determination of gender and Legal Gender Recognition within the European Union.

The European Commission set grounds for the Union's perspective on self-determination of gender in the *LGTBIQ Strategy 2020-2025*. Article 3 of the aforementioned strategy invokes Member States to adopt self-determination legislations, with the encouragement of the Commission. In order to comply with the recommendation of the Commission, such procedures shall not be age-

¹⁰³J.T. Theilen "The Long Road to Recognition: Transgender Rights and Transgender Reality in Europe", in G. Schreiber, *Transsexualität in Theologie und Neurowissenschaften. Ergebnisse, Kontroversen, Perspektiven*, DeGruyter 2016.

restrictive and should be accessible¹⁰⁴. Thus, demonstrating not only accepting the self-determination of gender perspective within the European Union, but also encouraging and insisting Member States to adopt legislation in the matter.

In addition, the document elaborated by the Commission, *Legal Gender Recognition in the EU: The journeys of trans people towards full equality*, includes a series of recommendations in terms of actions towards the transgender community. Within the actions considered as key to adopt by Member States, the adoption of legal acts regarding recognition of gender based on self-determination is considered as essential, and, in addition, the option of a different gender marker for non-binary identities, whether the option of an “X” in the documents or several options related to such identities¹⁰⁵.

3. Methodology

The present work consists of a legal analysis of the legal framework regarding gender self-determination within the European Union and the study of the development of the right to self-determination of gender in Spain, considering the particularities of its legislation.

3.1. Objectives

The main objective of the research is to study how self-determination is implemented in each Member State which has adopted legislation in the matter and to delve into the case of Spain, considering the particularities of the autonomic division of the country and the scope of autonomous laws. The secondary objectives are to compare the limitations and benefits of each law, to analyse the scope of each legal act and to study the case of Spain comparing the recently adopted, but not in force as of early February 2023, national law and the in force autonomic legislations.

3.2. Analysis

The legal analysis is fulfilled focusing on the documents approved in the six Member States which are already implementing self-determination laws at a

¹⁰⁴Article 3 of LGTBIQ Strategy 2020-2025.

¹⁰⁵Legal Gender Recognition In The Eu: The Journeys Of Trans People Towards Full Equality: Report.

national level, and, separately, on the law to be adopted in Spain and the regional ones. The principal items which are considered in the analysis are the following:

Table I: Analysis criteria.

Analysis criteria	
Principal items evaluated	Complies (yes/no/limited)
Minors above 16 included	
Minors under 16 included	
Adults in guardianship included	
Immigrants included	
Recognition in other country contemplated	
Non-binary identities included	
Opinion of a professional requested	
Possibility of a second change of legal gender	
Waiting period between request and resolution	
Other particularities	

Source: own elaboration

The objectives of the research are achieved with the in-depth analysis of all the documents in depth and concluding briefly in each case with the information displayed in the table of analysis criteria. In the Spanish autonomous laws analysed, the table of criteria is not accurate, considering the fact that the scope of the legal acts is different than a national law. For this reason, each autonomous law is studied considering its own particularities. Some aspects of the autonomous laws to contemplate are the inclusion of non-binary identities, the possibility to access to sex-segregated facilities according to the perceived gender, the inclusion of minors and how is the procedure in order to be recognised, considering its scope.

The legal acts which are studied within this thesis are the following:

Table II: Legal acts analysed and basic data.

Legal act	Scope	Year	Country
Anteproyecto de Ley para la igualdad real y efectiva de las personas trans y para la garantía de los derechos de las personas LGTBI	National	In process	Spain

Lov om ændring af lov om Det Centrale Personregister. Tildeling af nyt personnummer til personer, der oplever sig som tilhørende det andet køn	National	2014	Denmark
Ley 2/2014, de 8 de julio, integral para la no discriminación por motivos de identidad de género y reconocimiento de los derechos de las personas transexuales de Andalucía	Regional	2014	Andalusia
Ley 11/2014, de 10 de octubre, para garantizar los derechos de lesbianas, gays, bisexuales, transgéneros e intersexuales y para erradicar la homofobia, la bifobia y la transfobia	Regional	2014	Catalonia
Gender Recognition Act	National	2015	Ireland
Gender Identity, Gender Expression and Sex Characteristics Act	National	2015	Malta
Ley 12/2015, de 8 de abril, de igualdad social de lesbianas, gais, bisexuales, transexuales, transgénero e intersexuales y de políticas públicas contra la discriminación por orientación sexual e identidad de género en la Comunidad Autónoma de Extremadura	Regional	2015	Extremadura
Ley 8/2016, de 27 de mayo, de igualdad social de lesbianas, gais, bisexuales, transexuales, transgénero e intersexuales, y de políticas públicas contra la discriminación por orientación sexual e identidad de género en la Comunidad Autónoma de la Región de Murcia	Regional	2016	Murcia
Ley 2/2016, de 29 de marzo, de Identidad y Expresión de Género e Igualdad Social y no Discriminación de la Comunidad de Madrid	Regional	2016	Madrid
Ley 8/2016, de 30 de mayo, para garantizar los derechos de lesbianas, gays, trans, bisexuales e intersexuales y para erradicar la LGTBI fobia	Regional	2016	Balear Islands
Loi réformant des régimes relatifs aux personnes transgenres en ce qui concerne la mention d'une modification de l'enregistrement du sexe dans les actes de l'état civil et ses effets	National	2017	Belgium
Ley 8/2017, de 7 de abril, integral del reconocimiento	Regional	2017	Valencian

del derecho a la identidad y a la expresión de género en la Comunitat Valenciana			Community
Ley Foral 8/2017, de 19 de junio, para la Igualdad Social De Las Personas LGTBI+	Regional	2017	Navarra
Loi du 10 août 2018 relative à la modification de la mention du sexe et du ou des prénoms à l'état civil et portant modification du Code civil	National	2018	Luxembourg
Direito à autodeterminação da identidade de género e expressão de género e à proteção das características sexuais de cada pessoa	National	2018	Portugal
Ley 18/2018, de 20 de diciembre, de igualdad y protección integral contra la discriminación por razón de orientación sexual, expresión e identidad de género en la Comunidad Autónoma de Aragón	Regional	2018	Aragon
Ley 9/2019, de 27 de junio, de modificación de la Ley 14/2012, de 28 de junio, de no discriminación por motivos de identidad de género y de reconocimiento de los derechos de las personas transexuales	Regional	2019	Basque Country
Ley 8/2020, de 11 de noviembre, de Garantía de Derechos de las Personas Lesbianas, Gais, Trans, Transgénero, Bisexuales e Intersexuales y No Discriminación por Razón de Orientación Sexual e Identidad de Género	Regional	2020	Cantabria
Ley 2/2021, de 7 de junio, de igualdad social y no discriminación por razón de identidad de género, expresión de género y características sexuales	Regional	2021	Canarian Islands
Ley 2/2022, de 23 de febrero, de igualdad, reconocimiento a la identidad y expresión de género y derechos de las personas trans y sus familiares en la Comunidad Autónoma de La Rioja	Regional	2022	La Rioja
Ley 5/2022, de 6 de mayo, de Diversidad Sexual y Derechos LGTBI en Castilla-La Mancha	Regional	2022	Castilla la Mancha

3.3. Limitations

The principal limitation of the research work itself is the variety of languages present in the European Union, adding difficulties to the investigation, as the

legal acts are published in the official language or languages of the country. Despite the use of a singular external translation for the unknown language by the researcher and the prior knowledge of English, Spanish and French have allowed the course of the investigation to continue, there is the possibility of errors in translation. To avoid such problems to the extent where it is possible, the original texts of the quoted articles of the legal acts have been added to the footnotes. Other limitation of the investigation is the fast evolution of the legislation in the object of study.

Thus, it is important to remark that, meanwhile this investigation was accomplished, Finland adopted on the first of February a transgender law based on self-determination¹⁰⁶, which, due to the absence of time to analyse it, has not been included. In addition, the Spanish project of national law based on self-determination was officially adopted the 16th of February 2023¹⁰⁷. As the legal act was not in force at the moment of doing the analysis, the Spanish legal act was studied separately, in the revision of the case of Spain.

4. Results

The results this investigation shows are divided into two principal categories: recognition of self-determination of gender in Member States and gender self-determination in Spain. The former includes the legal acts of the Member States with laws in force regarding self-determination of gender, and, the latter, national and autonomous legal acts of Spain, including the evolution of LGR and self-determination and certain particularities of the Spanish case.

4.1. Recognition of self-determination in Member States

Gender self-determination within Member States is significantly disparate, especially considering the fact that some Member States do not have gender recognition laws.

¹⁰⁶D. Keane. *Finland reforms gender recognition law and introduces self-ID for trans people*, Evening Standard 2023. Obtained from: <https://www.standard.co.uk/news/world/finland-reforms-gender-recognition-law-trans-people-b1057619.html>

¹⁰⁷I. Valdés. *El Congreso aprueba la 'ley trans' y la reforma del aborto*. El País, 2023. Obtained from: <https://elpais.com/sociedad/2023-02-16/el-congreso-aprueba-la-ley-trans-y-la-reforma-del-aborto.html>

Gender self-determination is only established by the law in six Member States: Belgium, Denmark, Ireland, Luxembourg, Malta, and Portugal. There are four Union Member States which require sterilisation for transgender individuals to change their legal gender: Czech Republic, Finland, Latvia, and Romania. In addition, the majority of Member States demand a psychological certificate or mental health diagnosis in order for their gender to be recognised. Such countries are sixteen out of the twenty-seven Member States: Austria, Croatia, Czech Republic, Estonia, Finland, Germany, Italy, Latvia, Lithuania, Netherlands, Poland, Romania, Slovakia, Slovenia, Spain¹⁰⁸ and Sweden¹⁰⁹.

For this reason, gender self-determination is still a minoritarian phenomenon and most of the Union Member States do not commit with the requirements not only at a fundamental rights basis, but also, they do not commit with the different objectives the Commission has set in terms of gender recognition in the *LGBTIQ Strategy 2020-2025*.

Herein, the different Gender Recognition Bills that are based on self-determination will be analysed and, also, the legal initiatives which have not passed at the moment, but which are in the process of being implemented into the state's legal system.

4.1.1. Denmark

The Danish Gender Recognition Bill is one of the most relevant ones at a Union level, since it was the first transgender law based on self-determination. The law was submitted the 30th of April of 2014 and came into effect on September 1st of the same year¹¹⁰. Being the first one within the EU to revolve around self-determination, the Danish law also established criteria which would be later followed by some other countries: the implementation of a six-month waiting period. After the former request, the applicant shall wait six months and confirm

¹⁰⁸ The case of Spain will be discussed further, since in December 2022 the Parliament adopted a LGR law based on self-determination, which was definitely adopted the 16th of February of 2023. The legal act will be in force when officially published by the State.

¹⁰⁹Transgender Europe, *Trans Rights Map 2022 of Europe, and Central Asia*, TGEU 2022. <https://tgeu.org/trans-rights-map-2022/>

¹¹⁰The analysis of the Danish law has been effectuated consulting the translation of the law from Equal Rights Trust, by H. Irminger. Obtained from: <https://www.equalrightstrust.org/news/landmark-transgender-law-enforced-denmark>

the request. Some organisations, such as Transgender Europe, have criticised the measure, arguing that the waiting time “prevents trans people from changing their documents quick when necessary”. Par contrary, the lawmakers affirmed to implement such period to give time to the applicants to be sure of their decision and avoid situations where applicants request the modification of the sex¹¹¹.

The Danish law¹¹², *Lov om ændring af lov om Det Centrale Personregister. Tildeling af nyt personnummer til personer, der oplever sig som tilhørende det andet køn*¹¹³, has two main parts: the legal act itself and a series of comments on the law. The legal act consists of the amendment of the *Act on the Central Personal Register, of Executive Order No. 5 and 9 January 2013*. Therein, the requirements in order to obtain the modification of the legal gender are established. The comments on the law offer background both on the purposes of the law and administrative features, such as the fact that the change in the social security number allows an issue of documents such as passports, ID cards and other personal documents where the gender of the person can be displayed.

The law consists only in three articles, therefore, the specifications incorporated are vague and there are certain aspects not contemplated therein. The first Article determines the procedure the transgender individual needs to go through in order to obtain the legal change of the Social Security Number. In Denmark, the Social Security Number responds to the initials CPR and displays personal information of residents in Denmark, such as name, address, marital status, place of birth and gender, amongst others. The ending digits vary depending on the gender of the individual, being necessarily changed if the person wants their legal gender to be changed officially¹¹⁴. Article 1(1) establishes that the “person who perceives

¹¹¹Transgender Europe, *Historic Danish Gender Recognition Law enters into force*, TGEU 2014. Obtained from: <https://tgeu.org/tgeu-statement-historic-danish-gender-recognition-law-comes-into-force/>

¹¹²Lov om ændring af lov om Det Centrale Personregister. 30th April 2014. Lovforslag nr. L 182. Obtained from: https://www.ft.dk/RIpdf/samling/20131/lovforslag/L182/20131_L182_som_fremsat.pdf

¹¹³Translation to English: “Act amending the Act on the Central Personal Register. Assignment of a new social security number to people who perceive themselves as belonging to the other gender”.

¹¹⁴Copenhagen Citizen Service. CPR, Registration, and documents. Obtained from: <https://international.kk.dk/cpr-number#:~:text=The%20CPR%20number%20consists%20of,and%20odd%20numbers%20for%20men.>

themselves as belonging to the opposite gender¹¹⁵”¹¹⁶ will be assigned a new social security number. Also, it establishes that the requirements for the person in question is to request a new social security number because of the aforementioned condition. Six months from the former request, the applicant shall confirm the petition in order for it to be completed¹¹⁷.

The possibility to submit the request includes only individuals above the age of eighteen at the time of elaborating the petition¹¹⁸.

The second Article establishes the entry into force of the law and also that when individuals that had previously requested the modification of a different forename to one belonging to the opposite gender, obtained the gender neutral option, X, displayed in the passport or asked for a sterilisation linked to gender reassignment¹¹⁹, the reflection period stated in Article 1(1) of the LGR Danish law is counted from the aforementioned petition and, if more than one petition was elaborated, considering the first one in time. In addition, such article allows non-binary identities to be reflected in the law, therefore being recognised officially in passports. However, the statement is ambiguous. Although it mentions a third option, “X”, it does not indicate who is entitled to request it, nor any other specifications.

The last article, Article 3, refers to the applicability of the law in the territorial facet. Both the territories of Faroe Islands and Greenland are excluded from the law; however, it could be effective in Greenland with a royal decree¹²⁰.

The exclusion of minors from the law is under debate and some proposals have been effectuated in order to modify the law, although they have not been successful. Other controversial aspect of the legal act is the lack of recognition of

¹¹⁵Original text: “en person, som oplever sig som tilhørende det andet køn”.

¹¹⁶Paragraph 3 of Article 1(1) of “Lov om ændring af lov om Det Centrale Personregister. Tildeling af nyt personnummer til personer, der oplever sig som tilhørende det andet køn”.

¹¹⁷Paragraph 3 of Article 1(1).

¹¹⁸Paragraph 4 of Article 1(1).

¹¹⁹Paragraph 6 of Article 2.

¹²⁰Paragraph 7 of Article 3.

transgender parents as their preferred gender, as a transgender man, assigned female sex at birth, would not be legally recognised as father of a child¹²¹.

Considering all this, the more relevant aspects of the Danish law in terms of recognition of transgender individuals would be the following:

1. The law is based on self-determination, with the only requirement that the applicant shall, in a period of six months after the application, ratify his or her request to modify his or her social security number.
2. Only adults are allowed to submit the petition and, consequently, to have their legal sex modified. Therefore, minors, with or without parental consent, are not included in the law.
3. Immigrants are not explicitly mentioned in the law. However, considering that there is no explicit exclusion and that the requirements to obtain a CPR are a working and residential permit, those who meet such requirements would, in theory, be included. There are not legal specifications that include irregular immigrants.
4. There is no limitation, in theory, to the times the sex can be modified under the aforementioned terms.
5. The law includes non-binary identities, offering the possibility of a third gender category in passports. Nevertheless, the status is rather ambiguous.
6. Some aspects such as the filiation of children or similar situations that can occur are not mentioned in the law. That could lead to a legal void in the matter.

The concept of self-determination of gender, thus, is limited to individual adults and binary identities. Minors are not included, and the inclusion of immigrants is not clearly specified. When it comes to adults, further modifications are not explicitly rejected, being the concept of self-determination broad in that sense.

¹²¹D. Tamm & I. Lund-Andersen “The Civil Status of Trans Persons in Denmark“ in I.C. Jaramillo & L. Carlson, *Trans Rights and Wrongs. A Comparative Study of the Legal Reform Concerning Trans Persons*, Springer, Cham 2021, pp. 451-462.

Table III: Analysis of the transgender law of Denmark.

Transgender law of Denmark			
Analysis criteria			
Principal items evaluated	Yes	No	Limited
Minors above 16		X	
Minors under 16		X	
Adults in guardianship		X	
Immigrants	X		
Recognition in other country		X	
Non-binary identities	X*		
Opinion of a professional		X	
Possibility of a second change of gender	X		
Waiting period between request and resolution	X		
Filiation of children		X	
Other particularities			

Source: own elaboration

*The characteristics of the recognition are ambiguous.

4.1.2. Malta

The transgender law of Malta has a different scope compared to the rest of the laws which will be studied in this chapter. Instead of being a legal act only focused on transgender individuals, it also includes intersex people. The law is titled *Gender Identity, Gender Expression and Sex Characteristics Act. To provide for the recognition and registration of the gender of a person and to regulate the effects of such a change, as well as the recognition and the protection of the sex characteristics of a person*¹²² and shortened as “Gender Identity, Gender Expression and Sex Characteristics Act”. It is based on the concept of self-determination and personal autonomy of the individuals.

The law begins with a list of definitions, including the terms “gender expression”, “gender identity”, “gender marker”, “lived gender” and “sex

¹²²Gender Identity, Gender Expression and Sex Characteristics Act. To provide for the recognition and registration of the gender of a person and to regulate the effects of such a change, as well as the recognition and the protection of the sex characteristics of a person. 14th April 2015. Obtained from: <https://legislation.mt/eli/cap/540/eng/pdf>

characteristics”, amongst others. It is also relevant that, before this law, a minor is considered to be a person below sixteen years of age.

The Maltese transgender law establishes in Article 3(1) that the totality of Maltese citizens have the right to: gender recognition, personality development in that respect, being referred to as belonging to the manifested gender, and the identification according to the aforementioned gender identity. The, whether explicit or implicit, recognition of gender identity appears in all transgender laws based on self-determination herein analysed, as it occurs with the emission of documents according to such identity and consequent treatment. Notwithstanding that fact, the integrity and autonomy are not usually mentioned. In Article 3(3) it is set that such identity shall always be respected.

Regarding the filiation of children or marriage situation, the Maltese law states that the rights, relationship, and obligations originated from the aforementioned situation remain equal, not being modified in any way¹²³.

The prohibition for medical or psychological criteria to be required, being a basis of self-determination as aforementioned, is established in Article 3(4), which states that the interested party “shall not be required to provide proof” of any procedure, medical, psychiatric, or surgical, related to gender reassignment in order to access to the rights the law establishes.

The process to obtain the modification of the gender marker, as determined in Article 4(1) consists of a request to the Director for Public Registry where the interested person declares he or she wants to modify the gender marker and/or forename. There is no waiting period established, therefore, there is no need for a ratification form the transgender individual applying for a rectification of his or her legal sex. The lack of requirements besides the declaration of the applicant is stated in Article 4(3), where it follows “the Director shall not require any other evidence other than the declaratory public deed”. The rest of the documentation necessary are the usual formal requirements related to a procedure of such characteristics.

¹²³Article 3(2).

Although immigrants are not mentioned in the law, those who are protected under the *Maltese International Protection Act*, being labelled as refugees, are allowed to request the modification of gender marker and/or forename. There is no other requirement than the declaration from the interested party¹²⁴.

The requirements of the declaratory public deed, in terms of gender identity, are “a clear, unequivocal and informed declaration by the applicant that one’s gender identity does not correspond to the assigned sex in the act of birth”¹²⁵, besides clarifying the gender and the forename chosen. It is remarked in Article 5(2) that no medical/psychological certificates will be requested, in this case by the Notary.

The case of minors, set in Article 7, does not revolve around a medical/psychological opinion, as it occurs in other cases where the situation significantly varies from adults and minors. The parents in custody of the minor or legal representatives are the ones entitled to submit the petition, which shall be issued to the Civil Court in charge. The Court shall, under Article 7(2)(a) and (b) “ensure the best interests of the minor (...) and give due weight to the views of the minor having regard to the minor’s age and maturity”. There is no age limit in order to submit the request, therefore, no minors are excluded from the law, nor their requirements are different from adults. Besides the fact that, in the case of minors, the parental authorities are in charge of the petition.

There is another particularity of this law, since it includes intersex individuals, in Article 7(4). Although on some occasions intersex realities might not be related to the concept of self-determination of gender, this case is closely linked. Therein, it is established that some minors do not necessarily have their gender declared at birth, probably intersex children, and before they turn eighteen, the parental authorities have to declare his or her gender and the forename, the last if he or she wishes it to be modified. The process shall respect express consent of the minor and consider “the evolving capacities and the best interests of the minor”.

¹²⁴Article 4(8).

¹²⁵Article 5(1)(b).

In the case of more than a modification of the gender marker, it is stated that it can only be modified again obtaining an order from a court¹²⁶.

The case of foreigners that have had their gender recognised in other country is also clarified, in Article 9. It is indicated that Malta shall recognise the recognition of gender identity made by a competent foreign court acting on behalf of the country's law. Also, it is remarkable that Article 9(2) sets the grounds for recognition of non-binary identities who were originally recognised by the country of origin. Consequently, the premise allows different registral options than male or female, or the possibility of omitting the gender marker, to be officially recognised in Malta when “recognised by a competent foreign court or responsible authority acting in accordance with the law of that country”.

No extra criteria are established in order for gender to be recognised in such case. Lastly, the law also includes clauses regarding the protection of self-determination of gender. The exposure, insulting or reviling of a person recognised by the LGR act can be liable to a fine, same occurring if there is a violation of the legal act knowingly. Offences “motivated by gender expression and sex characteristics” are in addition included in the Criminal Code¹²⁷. And there is a data protection clause indicating that the matters of process from such act shall not be disclosed, under Article 12. Besides, Article 13(1) establishes that “every norm, regulation or procedure shall respect the right to gender identity”, prohibiting any limitation, restriction, or annulment of the aforementioned right. Moreover, including a clause that explicitly informs of the obligation to interpret the law favourably to the right to gender identity.

The rest of the articles of the law, although related to gender identity, are not directly linked to self-determination. Thus, they are not relevant to this analysis and will not be further discussed.

The Maltese law, within self-determination-based legal acts, is considered as progressive. The recognition of such right not only to adults, but also minors without any exclusions based on age or different requirements to minors,

¹²⁶Article 8(2).

¹²⁷Article 11.

provokes the consideration of the Maltese legal act as one of the most complete ones¹²⁸.

Although the law only recognises non-binary identities in foreigners whose identity was recognised abroad as non-binary, a third gender option was further developed. This way, the LGBTI action plan 2015-2017¹²⁹, included in Article 4.5.d, the introduction of a different gender marker than male or female. Consequently, the country included the “X” as a third option in 2017¹³⁰.

Considering all the aforementioned, the main aspects of the Maltese law in terms of gender identity are:

1. The law revolves around self-determination, without establishing a waiting time from the first application.
2. The process consists of a request indicating the interested party wants his or her gender marker modified and/or the forename.
3. There are no other requirements rather than the application itself.
4. Minors are included in the law without different requirements or age limit.
5. Foreigners are not included, but in the case of refugees, where there is the possibility to modify the gender marker and/or forename.
6. Changes of legal gender under other legislations are included, even if the gender recognised abroad is non-binary or there is no gender reflected.
7. Non-binary identities were not originally included in the law, except in the cases recognised in a different country. However, to choose a “X” option became a possibility in 2017.
8. The legal registry of sex, if the person wants to modify it a second time, needs a court acceptance. There is no mention of succeeding occasions.
9. There is no mention if the petition can be denied, nor the conditions under which it can occur.

¹²⁸S. Winter et Al “Transgender people: health at the margins of society” in *The Lancet*, Volume 388 (2016), pp. 390-400.

¹²⁹Ministry for Social Dialogue, Consumer Affairs and Civil Liberties. *LGBTIQ Action Plan 2015-2017*, Malta, 2015. Obtained from: <https://humanrights.gov.mt/en/Documents/Publications/LGBTIQ%20Action%20Plan%202015-2017.pdf>

¹³⁰Human Rights, Government of Malta. *Legal Gender Recognition and Bodily Integrity*, 2020. Obtained from: <https://humanrights.gov.mt/en/Pages/LGBTIQ%20Equality/Legal%20Provisions/Legal-Gender-Recognition-and-Bodily-Integrity.aspx>

10. The filiation of children remains equal as before the modification, without any change in the relationship, obligations, or rights. It is not specified what would happen with children born after the modification.

Table IV: Analysis of the transgender law of Malta.

Transgender law of Malta			
Analysis criteria			
Principal items evaluated	Yes	No	Limited
Minors above 16	X		
Minors under 16	X		
Adults in guardianship		X	
Immigrants			X*
Recognition in other country	X		
Non-binary identities	X**		
Opinion of a professional		X	
Possibility of a second change of gender	X***		
Waiting period between request and resolution		X	
Filiation of children			X*****
Other particularities		X	

Source: own elaboration

*Only to refugees.

**Included in 2017.

***Needs court approval.

****It is not modified.

4.1.3. Ireland

The Irish transgender law¹³¹ is the *Gender Recognition Act 2015*. It entered into force in September of 2015 and the law passed on the 15th of July of 2015. The purposes of the law are to “recognise change of gender; to provide for gender recognition certificates”¹³² and to amend certain legislative acts related to the matter.

The law is formed by five parts: the first includes preliminary and general provisions, where some technical aspects are detailed; the second, of applications and appeals relating to gender recognition. This part of the law establishes the requirements to obtain the change of the gender marker, how the petition shall be

¹³¹Gender Recognition Act 2015. 22nd July 2015. Obtained from: <https://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/print.html>

¹³²Preface of Gender Recognition Act 2015.

effectuated, the grounds on which a request can be revoked and other circumstances. The third part specifies the details regarding the Gender Recognition Certificate, its effects, how the filiation of children is influenced by it, gender specific offences and similar issues. The fourth is focused on the modifications of Civil Acts in order for the law to be complied with. Lastly, the fifth part revolves around miscellaneous provisions, of offences regarding the law, Circuit Family Court, and amendments of passports.

The Irish transgender law, as aforementioned, as based on the self-determination model, requires the express petition of the interested party. The conditions established are divided between Article 9(1), of the ones related to the residency and state of origin, and Article 9(2) of particular specifications regarding the characteristics of the individual. Within Article 9(1), people whether they are residents in Ireland or not, but have been born in Irish territory, or have been adopted nationally or internationally are included; the second category is ordinary residents in Ireland. Therefore, including immigrants. The conditions laid down in Article 9(2) are being eighteen years old or above, not being married or having a civil partner and the specific criteria depending on whether the change will be effectuated in basis of the Irish law or the country of origin of the individual¹³³. Article 9(2)(b), where the obligation to not be married or have a civil partner was settled, was eliminated when the *Marriage Act 2015* was adopted¹³⁴.

Despite these requirements, an individual between the ages of sixteen and eighteen years might obtain the gender recognition certificate. However, the procedure would not be based on self-determination, since medical and/or psychiatric opinion would be required and the consent of parental or guardian figures. Such procedure will be explained in detail further on.

¹³³Article 9(2).

¹³⁴Irish Statute Book. *Amendments and other effects of Gender Recognition Act 2015*. Obtained from: https://www.irishstatutebook.ie/eli/isbc/2015_25.html

The general process consists of a petition issued to the Minister of Social Protection¹³⁵, who can accept or dismiss the request. Article 8(4) establishes that, considering the documents provided by the person, the Minister can contemplate to “request further information from the applicant regarding any information or evidence”¹³⁶, and the Article 8(5) includes the obligation for the Minister to argue his or her decision. The reasons for the Minister to reject the petition are not clarified therein.

The formal requirements of the request include basic data of the individual, and, regarding the declaration, stating that the individual “has a settled and solemn intention of living in the preferred gender for the rest of his or her life; understands the consequences of the application” and affirming doing the request freely¹³⁷. There is another specific situation recognised: whenever an individual has obtained gender recognition within another state. In that case, if the person applies for a gender recognition certificate in Ireland, the requirements are the following: giving proof of obtaining the legal change of gender in the subsequent territory. Besides, naturally, the basic data aforementioned. It is also necessary for the applicant to show to the Minister that the conditions in the state where the gender was recognised were “at least equivalent to the requirements to be fulfilled” referring to the intention of living as the preferred gender and doing the application freely¹³⁸.

The case of minors is displayed in Article 12. As aforementioned, the only minors allowed to submit the petition are the ones between the ages of sixteen and eighteen. The consent of the parents or legal guardian is required under Article 12(4)(a) and the certificate necessary is the following. The document has to be issued by the primary treating medical practitioner of the minor¹³⁹ and need to address the statement that, according to his or her medical opinion the minor “has attained a sufficient degree of maturity” to make such request, being aware

¹³⁵Article 8(1) and Article 8(2).

¹³⁶Article 8(4).

¹³⁷Article 10(1)(f).

¹³⁸Subparagraph i of Article 11(2)(b).

¹³⁹Subparagraph I(i) of Article 12(4).

and understanding of the aftermath of the decision, being free in the decision-making process without external influence and that “the child has transitioned or is transitioning into his or her preferred gender”¹⁴⁰. It is also necessary a second opinion of a professional not connected to the minor, who is an endocrinologist or psychiatrist, issuing a certificate where stating being in accordance with the aforementioned medical opinion¹⁴¹. If there was a request to revoke the gender recognition certificate, the process would follow the same steps.

Therefore, although minors are recognised within the law, the process is not based in self-determination, and it is needed a medical opinion in order for their identity to be recognised.

Where the guardian of the minor or parent does not support the decision, cannot be identified or the request would be contrary to the benefit of the child, there can be an exemption of such requirement because “the nature of the relationship between the child concerned and the person shows that it would not be in the interest of the safety or welfare of the child to contact the person”¹⁴². In order to dispense such requirement, the court in question shall satisfy the decision is “in the best interest of the child”¹⁴³.

It is relevant to address the characteristics of the gender recognition certificate, since such document does not exist in other states of the Union, where the recognition consists usually in the change of the gender marker in the birth certificate. Despite the certificate being a different document than in other states, the only information displayed therein is the forename chosen by the interested party, his or her surname, the date of birth and his or her gender.

Within Article 14, the reasoning under which the Minister can revoke the petition is set. Despite the matter being clarified therein, the application is ambiguous, since Article 14(1) states the Minister could revoke such certificate if being aware of circumstances that would have led to a negative resolution originally¹⁴⁴.

¹⁴⁰Subparagraph A, B, C and D(II)(i).

¹⁴¹Subparagraph ii of Article 12(4).

¹⁴²Article 12(5).

¹⁴³Article 12(6).

¹⁴⁴Article 14(1).

The interested party which originally asked for the gender recognition certificate may also request for the Minister to revoke such certificate, according to Article 15(1).

The effect of the gender recognition certificate starts within the day where such document is issued and the applicant's gender "becomes for all purposes the preferred gender"¹⁴⁵. Article 18(3) also establishes the possibility for transgender people to only marry or be part of a civil relationship with individuals of the opposite gender. However, it is important to remark that same sex marriage in Ireland was legally accepted months after the adoption of the Gender Recognition Act¹⁴⁶.

The other two principal effects of the Gender Recognition Act 2015 are that whoever has a gender recognition certificate shall not be called for purposes related to corroborate his or her gender or identity "for any purpose save as required by law"¹⁴⁷ and that the issue of the certificate does not modify the "the rights or liabilities of a person or consequences of an action by the person in their original gender"¹⁴⁸ before the issue of the certificate.

In addition, the filiation of the children born before the effect of the gender recognition certificate is not modified, according to Article 19. There is also a particular article regarding Gender specific offences. Infractions of that nature are defined upon Article 23(3)(a) and (b), being offences which can only be effectuated by a person of a certain gender or against/in relation to a person of a certain gender. Regarding how gender specific offences function when it comes to transgender individuals, Article 23(1) states that "a relevant gender-specific sexual offence could be committed or attempted only if the gender of the person to whom a gender recognition certificate is issued were not the preferred gender, the fact that the person's gender has become the preferred gender does not

¹⁴⁵Article 18(1).

¹⁴⁶Citizens information. *Rights of same-sex couples*. Obtained from: https://www.citizensinformation.ie/en/birth_family_relationships/cohabiting_couples/rights_of_same_sex_couples.html#:~:text=same%2Dsex%20couples,-.Same%2Dsex%20marriage,civil%20partnership%20can%20also%20marry.

¹⁴⁷Article 18(4).

¹⁴⁸Article 18(6).

prevent the sexual offence being committed or attempted”. Consequently, the emission of the gender recognition certificate does not prevent the possibility of a transgender individual to be charged of gender specific offences related to the gender he or she was assigned at birth. In addition, Article 23(4) clarifies that parts of the body modified upon gender reassignment surgery are equal to the non-constructed equivalent in cisgender individuals.

The rest of the legal act consists of formal modifications of the Civil Register and amendments to other legislations in order to comply with the adopted text. Within the fifth part, of Miscellaneous Provisions, it is established as offence to give false or misleading information to the Minister or to not surrender a gender recognition certificate when requested by the aforementioned authority¹⁴⁹. In addition, the Article 38 of *Amendments of Passports Act 2008* offers the possibility to people to whom Article 9 of requirements in order to issue a gender recognition certificate does not apply the possibility of being issued a passport with their preferred gender and chosen name¹⁵⁰. In the case of minors above sixteen years of age, the requirements in terms of medical documents and parental approval are the same as mentioned previously.

The Irish transgender law entailed a significant advance to the Irish population who identified themselves as transgender, due to the fact that the country lacked any Gender Recognition Law, not even based on medical requirements. Notwithstanding that fact, the Irish law is considered to be improvable, due to the exclusion of minors under sixteen, non-binary identities and different conditions to minors above sixteen than to adults¹⁵¹.

Concluding with this legal act, the most relevant aspects of the Irish transgender law are the following:

1. The law is based on self-determination and does not require for the applicant to wait a certain amount of time to ratify the application.

¹⁴⁹Article 36(1)(a) and (b).

¹⁵⁰Addition of Article 2A and 2B to the Passports Act 2008, Ireland.

¹⁵¹M. Szydłowski, *op.cit.*, p. 207.

2. The process consists of the issue of a gender recognition certificate, from which the rest of legal documents can be modified.
3. Minors above sixteen years of age are allowed to change their legal gender and name, but in a process not based on self-determination. They need, besides parental consent, a second and third opinion from professionals of health, both related and not related to the child.
4. Immigrants who reside in Ireland are included in the law.
5. Non-binary identities are not mentioned therein and there is no mention of the option of a third gender category. Therefore, being excluded.
6. The Minister can decide, upon circumstances not being clarified, to deny a petition for a gender recognition certificate. Although it is comprehensive that there is the possibility to reject a petition, the grounds are not clear and might lead to discrimination.
7. The filiation regarding children already born before the modification does not change. Therefore, a transgender man who gave birth would be considered a mother in the effects of the law.

Table V: Analysis of the transgender law of Ireland.

Transgender law of Ireland			
Analysis criteria			
Principal items evaluated	Yes	No	Limited
Minors above 16	X		
Minors under 16		X	
Adults in guardianship		X	
Immigrants	X		
Recognition in other country			X
Non-binary identities		X	
Opinion of a professional		X*	
Possibility of a second change of gender	X**		
Waiting period between request and resolution		X	
Filiation of children			X
Other particularities		X	

Source: own elaboration

*Yes, in the case of minors

**Not mentioned

4.1.4. Belgium

The Legal Gender Recognition Law in Belgium¹⁵² was approved the 25th of June of 2017 and took effect the 1st of January 2018¹⁵³. The legal change of gender and forename became, with the bill, a simple procedure in which the interested party requests the modification before the civil registry. Afterwards, the applicant has to go through a waiting period of three months, and then confirm the original request. The minimum age to request the change of the gender marker and name is 16 years old, and below that age, there is the additional requirement of remitting an inform of a medical expert¹⁵⁴.

The law, *Loi réformant des régimes relatifs aux personnes transgenres en ce qui concerne la mention d'une modification de l'enregistrement du sexe dans les actes de l'état civil et ses effets*¹⁵⁵, reforms the Civil and Judicial Code of Belgium. Article 3 states the modification of Article 62bis of the Civil Code, replaces the former content to adjust to the recognition of the gender identity of transgender individuals. The article refers to the individuals who are covered by the law, including any Belgian adult, emancipated minor, or registered foreigner who is “convinced that the sex mentioned in his birth certificate does not correspond to his intimately lived gender identity¹⁵⁶”, offering the possibility to submit a declaration to a civil status officer¹⁵⁷. This article modifying the Civil Code recognises the existence of transgender people at a legal level and briefly introduces the concept of self-determination, since it is the transgender person who has to notify an officer such condition. Then, the modification of Article

¹⁵²Loi réformant des régimes relatifs aux personnes transgenres en ce qui concerne la mention d'une modification de l'enregistrement du sexe dans les actes de l'état civil et ses effets. 25th June 2017. Obtained from:

https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2017062503&table_name=loi

¹⁵³The translation from French of the law used for the analysis is an own translation from the original text. The translated content is an own translation.

¹⁵⁴Transgender Europe, *Belgium: Legal Gender Recognition Law*. TGEU 2017. Obtained from: <https://tgeu.org/belgium-legal-gender-recognition-law-2017/>

¹⁵⁵Translation from French: “Law reforming regimes related to transgender people regarding the mention of a modification in the registration of sex in civil status records and its effects.”.

¹⁵⁶Original text: «qui a la conviction que le sexe mentionné dans son acte de naissance ne correspond pas à son identité de genre vécue intimement,»

¹⁵⁷Belgian Government, Article 3 of *Loi réformant des régimes relatifs aux personnes transgenres en ce qui concerne la mention d'une modification de l'enregistrement du sexe dans les actes de l'état civil et ses effets* (2017).

62bis proceeds and establishes the grounds under which such determination has to take form. People residing in Belgium which are not registered in population registers are mentioned, indicating that the person shall inform of the address where they can be notified and includes the possibility of denial of the request, as it states “a refusal to draw up the act of modification of the registration of the sex can be communicated¹⁵⁸”¹⁵⁹. Consequently, arguing that the officer in question is likely to deny the change of the gender marker.

The characteristics of the legal procedure under which a transgender person shall go through to modify the gender marker and the legal name is the declaration towards the consequent registrar and assuring the conviction, persistent in time, of belonging to a different gender than the one established in the birth certificate and wishing “the administrative and legal consequences of a change in the registration of sex in his birth certificate¹⁶⁰”. The applicant is informed of the administrative and legal consequences of the change of gender marker and name and that such modification is irrevocable. The request is submitted to the Crown Prosecutor, who may, in the time lapse of three months after receiving the receipt sent by the civil registrar “issue a negative opinion on the grounds of a breach of public order¹⁶¹”¹⁶². Unless there is a negative opinion from the Crown Prosecutor, the process can continue. Despite the former request of the applicant, he or she needs to go to the civil registrar for a second time, between three and six months after the original petition was effectuated. Then, he or she shall sign a declaration confirming the request of modification of gender marker and forename, being aware of the consequences at an administrative and legal level of the modification, and that the nature of the modification of sex is in principle irrevocable¹⁶³.

¹⁵⁸Original text: «l'officier de l'état civil de l'adresse à laquelle un refus d'établir l'acte de modification de l'enregistrement du sexe peut lui être communiqué »

¹⁵⁹Modification of Article 62bis (2) of Belgium's Civil Code.

¹⁶⁰Original text: «depuis un certain temps déjà, il a la conviction que le sexe mentionné dans son acte de naissance ne correspond pas à son identité de genre vécue intimement et qu'il souhaite les conséquences administratives et juridiques d'une modification de l'enregistrement du sexe dans son acte de naissance»

¹⁶¹Original text: «rendre un avis négatif en raison d'une contrariété à l'ordre public».

¹⁶²Modification of Article 62bis (4) of Belgium's Civil Code.

¹⁶³Modification of Article 62bis (5) of Belgium's Civil Code.

In the case that the Crown Prosecutor had given a negative opinion, the modification of the registration of the sex would have to be declined by the civil registrar. However, if there is an absence of such negative opinion, the civil registrar can proceed to draft a modification of the gender marker in the birth certificate of the applicant.

It is relevant when reviewing Belgium's Gender Recognition Bill that, despite the nature of the law as based on self-determination of gender, the change of the sex marker can be denied with a negative opinion of the Crown Prosecutor, and that the civil registrar is also entitled to deny the modification: "the civil registrar who refuses to draw up an act modifying the registration of sex notifies the person concerned of his reasoned decision and, where applicable, the negative opinion of the public prosecutor¹⁶⁴,¹⁶⁵. Such resolution can be appealed. The law does not establish a reasoning under which the civil registrar or the Crown Prosecutor can deny the modification request.

Although it is important to recognise that certain situations might indicate unfavourable consequences if the change is authorised, the lack of specification of why it could be denied can provoke discriminatory situations towards certain transgender individuals. The self-determination concept could be threatened under that premise and fundamental rights such as personal development, dignity and protection against discrimination could also be in breach. It would be relevant to check whether the negative resolutions are minoritarian and the reasonings under which the entities reject the applications.

The law also endorses that despite the in principle irrevocable nature of the change of registration of sex. Despite that fact, under exceptional circumstances, it can be modified a second time¹⁶⁶.

¹⁶⁴Original text: « L'officier de l'état civil qui refuse d'établir un acte de modification de l'enregistrement du sexe notifie sa décision motivée et, le cas échéant, l'avis négatif du procureur du Roi à l'intéressé sans délai ».

¹⁶⁵Modification of Article 62bis (7) of Belgium's Civil Code.

¹⁶⁶Modification of Article 62bis (10) of Belgium's Civil Code.

The case of minors is also determined by the law. Emancipated minors are included in the requirements aforementioned, however, non-emancipated minors have to go through a different procedure.

First of all, minors are required to be above sixteen years of age to request the change of the gender marker. That requirement met; the law establishes that the procedure consists of the submission of a psychiatrist certificate conforming that the minor has the faculty to distinguish having the conviction that “the sex mentioned in his birth certificate does not correspond to his intimately lived gender identity¹⁶⁷”¹⁶⁸. The minor’s parents or legal representatives are part of the legal procedure and assist the minor in question.

The possibility of such parts not to be cooperative with the procedure is contemplated. If that were the case, the minor may request a family court to give him or her authorization to be assisted by an ad hoc tutor and go through the procedure that way. Thereby, both minors above the age of sixteen and minors of that age who are not supported by their legal representatives are included in the law.

Regarding those transgender individuals who change their gender marker and had descendants registered, the change of the registry of sex does not modify ties of filiation of already born descendants¹⁶⁹. The Article 4 of the Gender Recognition Bill of Belgium determines how the filiation of such children is made. When the child is born after the modification of the gender marker, there are various situations regarding the filiation of the child. In the case of transgender males¹⁷⁰, the filiation of their children is applied in accordance with Book I, Title VII, Chapter I, “of the establishment of maternal filiation¹⁷¹”. Par contrary, in the case of transgender females¹⁷² who have descendants, the

¹⁶⁷Original text: « le sexe mentionné dans son acte de naissance ne correspond pas à son identité de genre vécue intimement ».

¹⁶⁸Modification of Article 62bis (11) of Belgium’s Civil Code.

¹⁶⁹Article 4, inserting Article 62bis 1(1) in Belgium’s Civil Code.

¹⁷⁰People assigned the female gender at birth but whose gender identity is male.

¹⁷¹Original text: « Livre I : des personnes, Titre VII : de la filiation, Chapitre I : de l’établissement de la filiation maternelle ».

¹⁷²People assigned the male gender at birth but whose gender identity is female.

filiation of the children is applied in accordance with Book I, Title VII, Chapter II, “of the establishment of paternal filiation¹⁷³”.

The law also states that the transgender parent of children born conceived from a transgender female with assistance to procreation is “mentioned as co-parent on the birth certificate¹⁷⁴” and that, in the rest of the cases “the application of Book I, Title VII, of the Civil Code is based on the new sex¹⁷⁵”¹⁷⁶.

Therefore, the status of male or female of transgender individuals who have descendants is not totally respected within the law, since a transgender male would be legally considered a maternal figure and a transgender female as a paternal figure. Notwithstanding that fact, the nature of such change would be profoundly complex. It is important to acknowledge that the maternal filiation is closer to the experience of transgender males and the paternal filiation to the experience of transgender females. It may be a subject to further analyse, considering that the identity of the applicants should remain respected, without prejudice to the legal benefits implicit from the aforementioned category.

Despite the fact that minors under sixteen years old are not allowed to modify the registration of sex, Chapter 4 of the legal act, of amendments to the law of 15 May 1987 regarding surnames and first names¹⁷⁷, establishes on Article 11 the possibility for minors under twelve years old to modify, as occurred with non-emancipated minors above the age of sixteen, assisted by their parents or legal representatives, their first name¹⁷⁸. In addition, if the legal representatives do not support the minor, he or she has the possibility to invoke family court to decide on the matter.

The Belgian legal act allows a wider range of transgender individuals to be recognised, considering that the previous law in force, from 2007, was more restrictive and was not based on the concept of self-determination. Regardless

¹⁷³Original text: « Livre I : des personnes, Titre VII : de la filiation, Chapitre II : de l'établissement de la filiation paternelle ».

¹⁷⁴Original text: « mentionnée comme coparente sur l'acte de naissance ».

¹⁷⁵Original text: « l'application du livre I, titre VII, du Code civil est fondée sur le nouveau sexe ».

¹⁷⁶Article 4, inserting Article 62bis 1(1) in Belgium's Civil Code.

¹⁷⁷Original text: « Modifications de la loi du 15 mai 1987 relative aux noms et prénoms ».

¹⁷⁸Article 11.

that fact, the absence of non-binary recognition of the Belgian transgender law has been criticized and some studies indicate that there is a significant amount of non-binary citizens not included by the law. In addition, the non-alteration of the filiation of children also affects transgender individuals¹⁷⁹.

Furthermore, the Belgian Constitutional Court, ruled on 2019 regarding the unconstitutionality of two aspects of the transgender law¹⁸⁰: the irrevocability of the modification of the legal gender and the lack of recognition of non-binary identities. The Court determined that, considering self-determination of gender, non-binary identities should not have to decide upon a gender identity based on gender binarism. Regarding that matter, the Court addressed that the legislature had to find a solution. The clause that only allowed one modification of the registry of sex was annulled by the Court¹⁸¹.

By this means, the concept of self-determination of gender in the Belgian law is limited only to adults, to binary identities and is limited in the case of immigrants. Regarding adults who do have access to the change of gender marker based on self-determination, under certain circumstances the self-determination is limited: if the Crown Prosecutor denies the request, when involving the filiation of children and if a second modification of the gender marker is requested.

These would be the most relevant aspects of the Belgian law regarding self-determination. The key aspects of this legal act would be the following:

1. Self-determination is the cornerstone of the law. However, it can be denied to the applicant if the Crown Prosecutor and/or the civil registrar give/s a negative opinion. The grounds under which such opinion can take place are not stipulated.

¹⁷⁹P. Meier & J. Montmans “Trans Laws and Constitutional Rulings in Belgium: The Ambiguous Relations between Sex and Gender” in *Politics and Governance*, Volume 8, No. 3(2020), pp. 242-252.

¹⁸⁰Arrêt n° 99/2019 du 19 juin 2019. Le recours en annulation partielle de la loi du 25 juin 2017 réformant des régimes relatifs aux personnes transgenres en ce qui concerne la mention d'une modification de l'enregistrement du sexe dans les actes de l'état civil et ses effets, introduit par l'ASBL « Çavaria » et autres.

¹⁸¹English summary of the ruling 99/2019. Obtained from: <http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/EUR/BEL/BEL-2019-2-003>

2. Immigrants are allowed to request the modification of the gender marker if the place where they were born is likely to deny their modification.
3. The law does not include non-binary identities, at least does not include a third gender category nor it explicitly mentions such identities.
4. Minors above 16 years old are included. However, their requirements are not based on self-determination, since they need an external opinion of an expert. Minors above 12 years old are allowed to change their first name.
5. The procedure consists of two apparitions before the civil registrar, separated between three and six months from the date where the first request was made.
6. The modification is irrevocable, unless very specific circumstances, where it could be modified a second time.
7. The filiation of children born before the modification remains as it was. In most cases, the filiation of children born after the modification is categorized as maternal for transgender men and paternal for transgender woman.

Table VI: Analysis of the transgender law of Belgium.

Transgender law of Belgium			
Analysis criteria			
Principal items evaluated	Yes	No	Limited
Minors above 16	X		
Minors under 16			X*
Adults in guardianship		X	
Immigrants			X
Recognition in other country		X	
Non-binary identities		X	
Opinion of a professional		X**	
Possibility of a second change of gender	X***		
Waiting period between request and resolution	X		
Filiation of children	X		
Other particularities		X	

Source: own elaboration.

*Only above 12 years of age

**Required in the case of minors

***Although the law establishes the irrevocability of the modification, the Belgian Constitutional Court declared it null in 2019.

4.1.5. Luxembourg

The transgender law of Luxembourg¹⁸² was adopted in 2018 and introduced for the first time within the country the right to Legal Gender Recognition, with a legal act being based in self-determination of gender. The law, titled *Loi du 10 août 2018 relative à la modification de la mention du sexe et du ou des prénoms à l'état civil et portant modification du Code civil*¹⁸³ is formed by five chapters: the principal considerations, competent authorities, formalities regarding the procedure, how the civil status is influenced and other dispositions. The principal parts to be considered within this analysis are chapter I, III and IV.

The main requirements to apply for the modification of the gender marker are established within Article 1(1), which states that citizens of Luxembourg who are adults and capable are eligible for requesting the modification of the sex registry and forename/s. If so, he or she is entitled to submit a petition to the Minister in charge of Justice¹⁸⁴.

In addition, Article 1(2) determines the following formal requirement, which can be one of the three offered options, but not necessarily the three of them: “to present themselves publicly as belonging to the claimed sex¹⁸⁵”, be known in any close environment as the manifested gender or having obtained the modification of the forename in accordance with that identity. These criteria could be controversial, due to the fact that the first option, “to present themselves”, can be associated to a certain physical appearance more than the identification as the gender affirmed. Additionally, some individuals might decide to socially transition once their official documents match their gender identity.

Article 2 explicitly informs of the right to gender recognition without the obligation to undergo gender reaffirming surgeries, affirming that the condition

¹⁸²The translation from French of the law used for the analysis is an own translation from the original text. The translated content is an own translation.

¹⁸³Translation into English: “Law of 10th August 2018 regarding the modification of the mention of sex and of the name(s) in civil status and amending the Civil Code.

¹⁸⁴Loi du 10 août 2018 relative à la modification de la mention du sexe et du ou des prénoms à l'état civil et portant modification du Code civil. 27th July 2018. Obtained from: https://tgeu.org/wp-content/uploads/2019/03/2018_LGR_FINAL.pdf

¹⁸⁵Original text: « de se présenter publiquement comme appartenant au sexe revendiqué ».

of not undergoing medical, surgical or sterilization procedures “cannot justify the refusal to grant the request¹⁸⁶”.

The principal difference of the Luxembourgish law compared to other gender recognition legal acts resides in the case of minors according to the law. While in most of the aforementioned cases of other states the only minors allowed to access the modification of the gender marker were those above sixteen years of age, this case differs. The minimum age for the legal sex to be modified is five years old, where, complying with the original criteria in Article 1, except the age, the parents or legal representatives of the minor can initiate the procedure. Such request is made by the aforementioned representatives, with the particularity in the case of minors above twelve years old, that the minor has to give formal consent at the time where the request is fulfilled at the Ministry of Justice. If the parental figures are in disagreement, the case would be taken to court, considering the interest of the child¹⁸⁷.

When minors are above five years of age, the procedure involves a district court to determine whether the modification of the legal sex is accepted¹⁸⁸. In both cases, it is clarified that the Article 2 continues to be applied. Thus, no medical, surgical or of sterilization criteria shall be contemplated.

Non-Luxembourgish citizens are also included in the law, complying with the criteria of Article 1 and whenever the applicant has resided habitually and legally during a minimum of twelve months prior to the application. Such period shall be consecutive and immediately before the request¹⁸⁹. If the interested party is a foreigner minor, the minor shall comply with the aforementioned requirements, alongside with one parental figure or legal representative committing with the stay requirement and the agreement of both parents or legal representatives¹⁹⁰.

¹⁸⁶Original text: « Le fait de ne pas avoir subi des traitements médicaux, une opération chirurgicale ou une stérilisation ne peut motiver le refus de faire droit à la demande ».

¹⁸⁷Article 3.

¹⁸⁸Article 4.

¹⁸⁹Article 5.

¹⁹⁰Article 6.

In addition, refugees are included in the law. Adults who are refugees can request the modification of the legal sex with the same requirements as Article 5 and minors who are refugees under Article 6.

The case of adults who are under guardianship is also mentioned in the law. Under such circumstances, the petition is to be effectuated to the district court competent in the case¹⁹¹.

Within the second chapter of the law, certain formal aspects of the procedure are established. In the case that there were doubts regarding the criteria established in Article 1, whenever the competent Minister in Justice was not sure whether the information provided is truthful, Article 11(3) establishes that the State General Attorney shall be informed, and the latter is to give an opinion on the issue. There are two possible outcomes of the petition: being whether accepted or rejected, according to Article 11(4). In Article 15, the grounds for cancelation of the modification already effectuated are established. The Minister competent in Justice is entitled to annule the modification of the sex registry and forename/s “when the person or persons concerned have made false assertions, concealed important facts or acted by fraud within the framework demand¹⁹²”, before any outcome is final, the interested person is called in to provide a written explanation on the matter. Therefore, it is clear why a proposal can be rendered void and a process before the decision where the person concerned has the opportunity to give his or her opinion.

The formal procedure consists of the interested party presenting himself or herself before the competent authority, or the legal representatives and minor if the interested party is a minor¹⁹³, to verify his or her identity and the submission of certain documents.

Regarding the filiation of children already born before the modification of the legal sex of the individual, Article 13 determines how such status remains after the acceptance of the petition. The filiation is not modified by the petition, nor

¹⁹¹Article 8.

¹⁹²Original text: « ou les personnes concernées ont fait de fausses affirmations, dissimulé des faits importants ou agi par fraude dans le cadre de la demande ».

¹⁹³Article 12.

there is a mention in the birth certificate of the descendants of the modification of the sex registry of the parental figure. This occurs if the children were born before the modification of the gender marker. The case where the children were born after the rectification is established in Article 13(3), stating that “the filiation of this child shall be established, pursuant to the provisions of the Civil Code, on the basis of the biological sex of the person concerned¹⁹⁴”. Consequently, a transgender man who gave birth to a child would be registered as a mother and, a transgender woman who has a biological child would be registered as a father. Without prejudice to the legal benefits the interested person could obtain thanks to the correspondent status, considering a transgender man a mother and a transgender woman a father can interfere with how their gender is recognised, since they are not considered as their preferred gender in the legal terms referring to filiation.

The legal sex can be modified more than a first time, same as occurring with the forename or forenames of the interested party, pursuant Article 16. It is not established a limit of times where this can occur.

Chapter III determines the formalities to be effectuated to obtain the Legal Gender Recognition. Unlike other transgender laws analysed herein, the Luxembourgish transgender law does not impose a waiting period between the first application and a second verification by the interested party.

Besides the usual documents requested by most of the transgender laws in order to modify the gender marker, as birth certificates, passports or similar, a formal request is necessary, “stating his/her free and informed consent, accompanied by any supporting evidence¹⁹⁵”, according to Article 17. The other relevant documentation necessary, different from other similar legal acts, is a copy of the criminal record from the competent authorities¹⁹⁶. In the case of minors, the parental authority is entitled to give his/her personal criminal record as well,

¹⁹⁴Original text: “la filiation de cet enfant sera établie, en application des dispositions du Code civil, sur base du sexe biologique de la personne intéressée”.

¹⁹⁵Original text: “faisant état de son consentement libre et éclairé, accompagnée de tout élément de preuve au soutien de celle-ci”.

¹⁹⁶From Luxembourg and other countries, where applicable, if the applicant has resided abroad from the age of 18 or is not a Luxembourgish citizen.

under Article 18. If the interested party is married or has a civil union, it is necessary to bring proof that the spouse or civil partner is aware of the request of change of the legal sex¹⁹⁷.

The legal act of Luxembourg is considered as overall protective of the right to gender self-determination, as inclusive of minors, foreigners and lacks different procedures for minors, rejecting completely processes that would require a third-party opinion¹⁹⁸.

The following articles indicate other formal parts of the procedure which are not relevant to the analysis and the modifications of the Civil Code, that in the Luxembourgish law are the same or similar writing to the ones analysed herein in previous parts of this chapter. Thus, the most relevant particularities of the Luxembourgish transgender law are the following:

1. The law is based on self-determination and does not require a waiting period between the first application and the acceptance of the modification.
2. The process consists of an application from the interested party, where the person shall appear, and in the case of minors above twelve years of age, to ratify the petition.
3. The applicant has to give proof that he or she lives as the preferred gender, is known by such gender by close people or has modified the forename to adjust to the preferred gender. Also, it is requested to submit the criminal record.
4. Minors above five years of age are included in the law and minors above twelve years old have to confirm that they wish to modify their gender marker.
5. Immigrants who reside in Luxembourg or refugees are included in the law, whether they are adults or minors.

¹⁹⁷Article 17.

¹⁹⁸A. Vicente. *Situación jurídica de los menores trans en el espacio europeo*. Universidad Rey Juan Carlos, Madrid 2020, pp. 214-215.

6. Non-binary identities are not mentioned in the law, nor a third gender/sex category is implemented.
7. The competent authority in the Minister of Justice has to notify the State General Attorney if he or she doubts the veracity of the information submitted.
8. The request can be denied and the conditions under which it can occur are clear in the law.
9. The legal registry of sex can be modified more than a first time. There is no explicit limit of such modification.
10. The filiation of children remains, whether they have been born prior or not to the modification, as the one of the gender assigned at birth. Leading to possible discrimination as the preferred gender is not recognised in that sense.

Table VII: Analysis of the transgender law of Luxembourg.

Transgender law of Luxembourg			
Analysis criteria			
Principal items evaluated	Yes	No	Limited
Minors above 16	X		
Minors under 16			X*
Adults in guardianship	X		
Immigrants	X		
Recognition in other country	X		
Non-binary identities		X	
Opinion of a professional		X	
Possibility of a second change of gender	X		
Waiting period between request and resolution		X	
Filiation of children			X*
Other particularities	X		

Source: own elaboration.

*Above five years of age

**Contemplated but not modified.

***Submission of a personal criminal record is required.

4.1.6. Portugal

The gender recognition bill of Portugal¹⁹⁹ passed on July 2018 and is titled *Lei n.º 38/2018, de 7 de agosto: Direito à Autodeterminação da Identidade de Género e Expressão de Género e à Proteção das Características Sexuais de cada Pessoa*²⁰⁰. The law is formed by five chapters: general provisions, legal recognition of gender identity, protection measures, remedies, and transitory and final dispositions. Within this analysis, the only chapters relevant are the first, second and fifth chapters. The rest, although related to gender identity, are not relevant to the study regarding self-determination²⁰¹.

The Chapter I defines the right to self-determination of gender identity, gender expression and the right to protection of the sex characteristics of the person within Article 1. The role of public and private entities is established as well, in Article 2(1), where it states such bodies shall ensure the commitment with the law, providing, within their scope “the necessary conditions for the proper exercise of the right to self-determination of gender²⁰²”.

In addition, the following Article provides further information on such right, determining that shall be exercised and assured by means of “the free development of the own personality in accordance with his or her gender identity and expression²⁰³”. Besides, Article 3(2) offers an alternative possibility to those individuals who have not obtained legal gender recognition. When going through a procedure where the legal information shall be indicated, they are allowed to request to only use the initials of the legal name, preceding the preferred name and manifested gender identity. Indicating, as well, the number of document in case.

¹⁹⁹Lei n.º 38/2018, de 7 de agosto: Direito à Autodeterminação da Identidade de Género e Expressão de Género e à Proteção das Características Sexuais de cada Pessoa. 7th August 2018. Obtained from: <https://dre.pt/dre/detalhe/lei/38-2018-115933863>

²⁰⁰Translation into English: “Law no. 30/2018, of 7th August: Right to Self-determination of Gender Identity and Gender Expression and to Protection of the Sex Characteristics of each Person”.

²⁰¹The translation from Portuguese of the law used for the analysis is an own translation from the original text. The translated content is an own translation.

²⁰²Original text: “as condições necessárias para o exercício efetivo do direito à autodeterminação da identidade de género”.

²⁰³Original text: “e o livre desenvolvimento da respetiva personalidade de acordo com a sua identidade e expressão de género”.

Various following articles refer to the right to protection of sex characteristics, regarding intersex individuals and the prohibition for surgeries in intersex minors where it is not necessary in terms of health. However, these aspects are not relevant to the analysis.

The Chapter II, of the juridical recognition of gender identity, establishes the procedure in order to obtain legal gender recognition, requirements, and other relevant aspects on the process. Article 6(1), of procedure, specifies that legal gender recognition implies the modification of the gender marker and forename, by request of the interested party. It is also established, in Article 6(3) that the legal sex registered can only be modified further through judicial authorisation.

The modification of the gender marker in other countries, following the law of the state of origin, is recognised by Portugal. In such case, there are no extra requirements established therein.

The requirements for gender identity to be recognised with the perspective of self-determination of gender are to be a Portuguese citizen, be an adult person (eighteen years of age) and not being incapacitated due to a psychological disability. Moreover, the law defines the individuals included by the legal act as the ones “whose gender identity does not correspond with the sex assigned at the moment of birth²⁰⁴”²⁰⁵. The case of minors is set in Article 7(2), only including those between the ages of sixteen and eighteen. In such case, the ones effectuating the petition are the legal representatives of the minor. The registrar shall have a hearing of the applicant, to validate the free and informed consent of such party. The registrar is also to request to a medical authority or psychologist ensuring the informed decision-making ability and willingness on the matter. The document shall lack references to psychological diagnosis on gender identity and occur “always taking into consideration the principles of progressive autonomy and higher interest of the child²⁰⁶”. This part is rather complex, since there is no medical diagnosis established, but the mere identification of the individual is not

²⁰⁴Original text: “cuja identidade de género não corresponda ao sexo atribuído à nascença”.

²⁰⁵Article 7(1).

²⁰⁶Original text: “tendo sempre em consideração os princípios da autonomia progressiva e do superior interesse da criança constantes na Convenção sobre os Direitos da Criança”.

the cornerstone and a third party inform is necessary. Minors under sixteen years of age are not included in the law.

The procedure consists of the presentation of an application in the offices of the Civil Registry, with no other requirements than indicating the gender the person identifies with, the preferred name and other formal requirements as the Identification Number. There is the possibility of obtaining a modified birth certificate, without mentions to the fact that the registry was modified.

The Article 9(1) determines that the veracity of the requirements of age, nationality and not being legally incapacitated for psychical reasons, and the modification is executed in a maximum period of eight working days. The birth certificate is modified where applicable. There is no waiting period between the request and a second apparition of the interested party, nor a further verification. Moreover, Article 9(2) refers to the prohibition to submit proof of having been subject to any sort of medical treatments, including psychological ones, and any intervention related to gender reassignment as a requirement in order to obtain LGR, thus specifying the prohibition for medical requirements of any sort to access to the rights the law establishes.

The possibility of denial of the modification of the legal sex is implicitly mentioned, informing of the right to appeal in Article 9(3). However, considering Article 9(1), the denial would be related to the veracity of the aforementioned requirements.

It is also established that the constitutional rights and legal obligations assumed before the modification of the gender marker are not altered²⁰⁷. The filiation of children born before the rectification is not mentioned. Despite that fact, it could be considered from Article 10 that it is not modified.

Although not directly affecting the legal effects on the issue of self-determination, there are other clauses relevant to the right of self-determination and how such is executed. Article 12, of education and teaching, mentions the obligation of the State to guarantee measures within education that, amongst

²⁰⁷Article 10.

others “promote the exercise of the right to self-determination of gender identity²⁰⁸”, assure the “privacy and self-determination of children and youth who transition socially in terms of gender identity and gender expression²⁰⁹”. Also establishing the respect of the gender identity of minors and being treated in accordance with such identity.

Article 15, of protection against acts of retaliation, also reflects the right to self-determination. In this case, acts against the right to self-determination, harming or disfavours the person in question are considered.

The legal act has been considered as positive to transgender individuals, as the previous Gender Recognition Act, of 2011, did not recognise the right to gender self-determination and promoted the non-pathologization of transgender identities. Interviews to transgender individuals reinforce such view of the law, although they are minoritarian and might need further study²¹⁰. The fact that the Portuguese law is one of the most recent ones adopted might have influenced the lack of analysis of the law by authors.

Considering all the aforementioned, the principal ambits of scope of the Portuguese legal act regarding gender recognition are the following:

1. The law is based on self-determination of gender and there is no need for ratification of the application.
2. The process consists of a request indicating the gender the person identifies with and the consequent forename.
3. The requirements are to be a Portuguese citizen, be eighteen years old and not being incapacitated for psychic reasons. The case of minors is discussed separately.
4. Only minors between sixteen years of age and eighteen are included, with the particular requirement of a document from a medical authority where the ability and willingness of changing the gender marker.

²⁰⁸Original text: “promovam o exercício do direito à autodeterminação da identidade de género”.

²⁰⁹Original text: “privacidade e autodeterminação das crianças e jovens que realizem transições sociais de identidade e expressão de género”.

²¹⁰A.P. Hilário “Rethinking trans identities within the medical and psychological community: a path towards the depathologization and self-definition of gender identification in Portugal?” in *Journal of Gender Studies*, Volume 29, No 3(2020), pp. 245-256.

5. Immigrants, including refugees, are not mentioned in the law, thus, are not included.
6. Decisions made in other countries, complying with the corresponding law of the country, regarding the modification of the gender marker are recognised by the law.
7. Non-binary identities are not mentioned in the law in any form, not being included the possibility of a third gender option or the absence of a specific gender.
8. In order to obtain a second modification of the sex registry, it is necessary a court order. No further modifications are mentioned therein.
9. The petition can be denied if the requirements necessary to obtain the modification are not fulfilled or they are not truthful.
10. The filiation of children is not explicitly mentioned. Notwithstanding that fact, the legal rights, and obligations previous to the modification of the gender marker are not modified in any way.

Table VIII: Analysis of the transgender law of Portugal.

Transgender law of Portugal			
Analysis criteria			
Principal items evaluated	Yes	No	Limited
Minors above 16	X		
Minors under 16		X	
Adults in guardianship		X	
Immigrants		X	
Recognition in other country	X		
Non-binary identities		X	
Opinion of a professional		X*	
Possibility of a second change of gender			X
Waiting period between request and resolution		X	
Filiation of children			X**
Other particularities	X***		

Source: own elaboration.

*But in the case of minors

**Not modified

***Physic incapacitated individuals are not allowed to request the modification of the gender marker.

4.1.7. Comparison

Acknowledging all the particularities of each legal act herein discussed, the principal results of the analysis are displayed within this part of the work, in order to compare the legal acts. Although there are significant differences between certain aspects of the law, some particularities are common to most of the studied laws.

As aforementioned, all the legal acts are based on the concept of self-determination of gender, including adult and capable individuals. Minors above sixteen years of age are allowed to modify the gender marker in most of the legal acts, with the exception of Denmark. However, in most of the cases, the requirements for such minors are not based in self-determination of gender, since a third party, medical or psychological opinion is required in order to obtain LGR. Therefore, the right to gender self-determination is exclusive to adults on many occasions.

The filiation of children, in most cases, is not modified. Although it is understandable in terms of the rights generated by the filiation, transgender men remain considered as “mothers” and transgender women as “fathers” of the children conceived. This compromises the right to gender self-determination, since the gender identity is not truly respected at that extent. The non-alteration of the filiation of children, although could be beneficial in legal terms, can lead to the exposure of the transgender status of transgender parents with children born before the modification of the gender marker.

Non-binary identities have a third gender category in the case of Denmark, in terms of the law. The grounds for that are ambiguous, as the only thing it establishes is the existence of a third category, “X”. On the other side of the spectrum, Malta recognised non-binary identities in 2017 and offered an “X” option in IDs and passports and Belgium’s Constitutional Court determined that the impossibility to request a third gender marker was unconstitutional.

Adults guarded by the state are barely mentioned and are only explicitly recognised by the legal act of Luxembourg. In addition, a second change of legal

gender is allowed in most of the cases, some of them requiring in this case a court order.

It is relevant to address that some of the countries analysed require a waiting period between the first request and a second appearance to confirm it, being such Belgium and Denmark. The waiting period some countries establish is of six months, being controversial due to the duration of such period.

The right to gender self-determination is limited by certain controversial requirements in Luxembourg. It is necessary to submit a criminal record to obtain LGR, which can lead to unfavourable situations to some individuals and discrimination. The country also requires giving proof of living or being known as the manifested gender or having changed the forename.

Ireland limited the right to LGR to those individuals who were not married or in a civil union, but the article was eliminated after the modification of the legal act regarding marriage in the country.

Despite the fact that the legal acts recognise the right to gender self-determination and some limitations to such right are necessary in order to guarantee the proper implementation of the right, there are certain limitations restricting the right and provoking that some individuals cannot exercise the right for arbitrary reasons. That also occurs in cases as Ireland, where a request can be denied, without any clarification of the circumstances that can lead to the denial.

4.2. Gender self-determination in Spain

Gender self-determination within the Spanish territory was introduced legally in 2014, in the Andalusian transgender law²¹¹ which came into force in such year. The idiosyncrasy of Spain allowed autonomous laws to recognise transgender identities based on self-determination. However, the competences of autonomies are limited and do not rule on matter related to the civil registry, legal name on Passports, driving licenses and others. Therefore, to study the current situation in

²¹¹Ley 2/2014 de 8 de julio, integral para la no discriminación por motivos de identidad de género y reconocimiento de los derechos de las personas transexuales de Andalucía, 2014.

the Spanish territory, it is necessary to differentiate between autonomic legal acts based on self-determination and state law²¹².

Out of the seventeen Autonomous Communities and two Autonomous Cities in Spain, fourteen already have, to this date, autonomous legislation involving transgender people from a self-determination perspective. These legal acts, despite not determining aspects as the legal name and gender, have competencies regarding healthcare, education, and other autonomous competencies. For instance, many of them do allow transgender individuals to request a change of name and gender in the educational registries that depend on the Autonomous Community, the name displayed in the healthcare card²¹³ or other regional registries. The fact that self-determination is not homogeneous within the Spanish territory, due to the fact that the Autonomous legal acts are disparate and that some do not have a law on the matter, leads to “a situation of inequality and juridic insecurity”²¹⁴.

The current “Gender Identity Law” in Spain is the *Ley 3/2007, de 15 de marzo, reguladora de la rectificación registral de la mención relativa al sexo de las personas*²¹⁵, that came to force in 2007. The law is not based on self-determination and includes a series of requirements based on corporal modifications and surgeries. Such legal act was the first one to be in force specifically addressing in Spain a procedure to modify the legal sex without going through sterilisation and gender reassignment surgery²¹⁶.

The law offered the possibility to obtain LGR to transgender individuals above eighteen years of age and Spanish citizens who meet with the necessary

²¹²All the legal acts and rulings analysed within this chapter have been studied with an own translation from Spanish. The translated content is an own translation.

²¹³In Spain, the Social Security System, in terms of healthcare, has a card that depends on the Autonomous Community. Being possible, thus, for a transgender individual to request the change of name and gender in Autonomous Communities allowing so in the law.

²¹⁴A. García. *Análisis de la legislación trans en España*, Universidad de Huelva, Derecho Huelva 2021.

²¹⁵Translation to English: “Law 3/2007, of 15th March, regulating the registral rectification of the mention related to the sex of the people”.

²¹⁶L. Arroyo. *Problemática del reconocimiento legal de la identidad de género. Análisis de evolución de la legislación española*, Universidad Autónoma de Barcelona, Barcelona 2020.

conditions. According to Article 4(1)²¹⁷, the requirements are to “be diagnosed with gender dysphoria²¹⁸” and “to have been treated medically during at least two years to accommodate his/her physical characteristics to the manifested gender²¹⁹”. Article 4(2) also offers the possibility of modifying the legal sex to those who have gone through gender reassignment surgery or those who cannot accede to Hormone Replacement Therapy due to health or age reasons, being this proven via certificate by the competent authority.

The so-called *Gender Identity Law* left aside immigrants who had not obtained the Spanish nationality, minors and those who decided for personal reasons not to undergo the aforementioned treatment. The requirement of a mental health diagnosis has been evidenced as pathologizing for transgender individuals and, despite the advances the law offered to the community, it did not recognise rights as personal autonomy, freedom of choice and identity²²⁰.

In 2019, the Spanish Constitutional Court dealt with the law, in the *ruling 99/2019*, regarding the unconstitutionality of the prohibition for mature transgender minors to have their gender marker modified. The Spanish Constitutional Court ruled on Article 1(1), which only includes adult individuals, declaring the article as “unconstitutional, only in the referred to the subjective ambit of the prohibition for minors with “enough maturity” and who are in a “stable situation of transsexuality”²²¹”.²²²

²¹⁷Ley 3/2007, de 15 de marzo, reguladora de la rectificación registral de la mención relativa al sexo de las personas, 2007.

²¹⁸Original text: “que le ha sido diagnosticada disforia de género”.

²¹⁹Original text: “que ha sido tratada médicamente durante al menos dos años para acomodar sus características físicas a las correspondientes al sexo reclamado”.

²²⁰J. Cano & M. Yacovino "Identidad de género. Comparación crítica entre la ley española y la ley argentina." Jornada de Género y Diversidad Sexual (2014).

²²¹Original text: “inconstitucional, pero únicamente en la medida que incluye en el ámbito subjetivo de la prohibición a los menores de edad con «suficiente madurez» y que se encuentren en una «situación estable de transexualidad»”.

²²²Spanish Constitutional Court, *Sentencia 99/2019, de 18 de julio de 2019. Cuestión de inconstitucionalidad 1595-2016. Planteada por la Sala de lo Civil del Tribunal Supremo respecto al artículo 1 de la Ley 3/2007, de 15 de marzo, reguladora de la rectificación registral de la mención relativa al sexo de las personas. Derechos a la integridad física y moral, a la intimidad y a la protección de la salud, en relación con la dignidad de la persona y el libre desarrollo de su personalidad: inconstitucionalidad del precepto legal en la medida en que prohíbe cambiar la mención registral del sexo y nombre a los menores de edad con suficiente madurez y que se encuentren en una situación estable de transexualidad. Voto particular*, Boletín Oficial del Estado, Madrid 2019.

This ruling reinforced the notion that Spain needed a national transgender law based on self-determination of gender, alongside with the consideration that was already on the table that the legal act in force had become obsolete and did not respond to the current needs of society²²³.

There is also an official instruction submitted to judges in 2018 that regulates the possibility of allowing minors and adults whose case is not recognised by the law to obtain the modification of the forename. The document, *Instrucción de 23 de octubre de 2018, de la Dirección General de los Registros y del Notariado, sobre cambio de nombre en el Registro Civil de personas transexuales*²²⁴, offers a guideline to the Civil Registry's workers, when there is a request to modify the forename of a transgender person who has not been legally recognised as an individual of the preferred gender, so that the legal name is modified in accordance with the self-perceived identity.

The instruction consists of two articles. The first one revolves around adult individuals or emancipated minors who request the modification of the forename to one of his or her preferred gender. The individual shall argue “belonging to the gender which coincides with the forename manifested and not being able to modify the legal inscription of his or her sex²²⁵”. The second article allows minors to obtain a forename according to their gender identity. Minors without age requirements are included and, above the age of twelve years they have to sign the petition and below such age, be heard by the person in charge of the Civil Registry. The petition would be submitted by the legal guardians of the minor.

4.2.1. Spanish project of transgender law

Although not in force as of early February 2023, there is a legal act at national level that has been accepted by the Spanish Parliament. The law was approved by

²²³I. Ravetllat, I. Vivas & V. Cabedo “La realidad de la infancia y la adolescencia trans en España a propósito de la Sentencia del Tribunal Constitucional español 99/2019, de 18 de julio: avances y retrocesos” in *Ius et Praxis*, Volume 26, No. 1 (2020), pp. 310-325.

²²⁴Translation into English: “Instruction of the 23rd October 2018, of the General Direction of the Registries and the Notary Collectives, about the change of the name in the Civil Registry of transsexual people”.

²²⁵Original text: “se siente del sexo correspondiente al nombre solicitado, y que no le es posible obtener el cambio de la inscripción de su sexo”.

the Senate in early February 2023²²⁶ and was adopted by the Spanish Parliament the 16th February 2023. The legal act, thus, will be in force soon. However, the analysis is effectuated considering it “project of law”, due to the fact that, when the analysis was elaborated, the law had not been adopted by the Parliament.

The project of law, *Proyecto de Ley para la igualdad real y efectiva de las personas trans y para la garantía de los derechos de las personas LGTBI*²²⁷ passed on the Parliament the 20th December 2022. Although the majority of the law revolves around the LGBTIQ community in general, the Title II, of measures for the real and effective equality of transgender people, is focused entirely on transgender individuals. The proposal of legal act, when referring to the transgender population, does not explicitly mention the concept of self-determination of gender. The closest direct approach to the aforementioned concept is the definition, within Article 3, of sexual identity. Therein, it is defined as “the internal and personal experience of the sex just as each person feels and self-defines it, possibly being in accordance or not with the one assigned at birth²²⁸”.

The Title II is formed by two chapters: the first one, of the registral rectification regarding the sex of the people and documental adequation, and the second, of public policies to promote the real and effective equality of transgender people. In Article 38, of legitimacy, the possible applicants for Legal Gender Recognition are established. Spanish adults and minors above sixteen years of age are allowed to request the modification of the gender marker without any previous authorisation. In the case of minors above the aforementioned age, it is not necessary to obtain parental consent. Minors between fourteen and sixteen years of age can also request the modification of legal sex, but with consent of their legal representatives. In the case of discrepancy between the parental figures

²²⁶N. López. La ley trans y la reforma de la ley del aborto, aprobadas en el Senado con cambios mínimos, regresan al Congreso para su aprobación definitiva. Newtral (2023). Obtained from: <https://www.newtral.es/ley-trans-ley-aborto-senado/20230209/>

²²⁷Translation into English: “Project of Law for the real and effective equality of trans people and the guarantee of the rights of LGBTI people”.

²²⁸Original text: “vivencia interna e individual del sexo tal y como cada persona la siente y autodefine, pudiendo o no corresponder con el sexo asignado al nacer”.

and/or the minor, a judicial advocate would be assigned. In addition, minors under fourteen and above twelve years of age can also submit the petition, requesting judicial authorisation to initiate the process. The case of disabled people is also mentioned, indicating that they can request the modification of the gender marker, only addressing that they shall receive the support measures necessary in each case.

It is also clarified that no medical, psychological, or psychiatric document shall be requested, nor any modification of appearance or physical characteristics through any treatment, surgery, or others²²⁹. Being such criteria basic in order to argue that the law is based on the concept of self-determination of gender.

The process is defined in Article 39, where the interested party shall submit the petition to the Civil Registry. After the petition, the person has to person himself or herself ahead of the person in charge of the Civil Registry and declare a nonconformity with the sex stated in the birth certificate and requesting the modification of such marker. It is also necessary to address the chosen name in case the person wants it to be modified as well.

The person in charge of the Civil Registry shall inform the applicant of the juridical consequences of the modification, in terms of reversibility and of the resources in terms of assistance, information and protection towards discrimination, under Article 39(5). In the case of minors, such information will also be provided to all the parties and, to the minors, in a form adapted to his or her understanding and abilities. When referring to minors, it is stated that the higher interest of the minors shall be always considered. In the case of disabled individuals, the information shall be adapted to his or her abilities and needs of accessibility. Article 39(8) establishes a second appointment, where the person in charge of the Civil Registry shall cite the applicant, in a maximum period of three months after the first request. There, the person has to ratify the original petition. Checking the documentation provided, the worker aforementioned has to dictate the resolution. There is no specific clause on the grounds where the

²²⁹Article 39(3) of *Proyecto de Ley para la igualdad real y efectiva de las personas trans y para la garantía de los derechos de las personas LGTBI*, 2022.

request can be denied, although it can be understood that it is if the documentation provided is not correct or truthful.

In Article 41, of effect, it is stated that the rights associated with the “new” gender can be exercised by the person who has obtained LGR. Despite that fact, the conviction or protection of a person under the Spanish *Gender Violence Act* before the modification of the legal sex is not modified under any circumstances. Transgender women can be benefited from gender specific protection towards women in situations which arose after the modification and transgender men will maintain the benefits from gender specific protection generated before the rectification of the gender marker. Also, Article 41(5) states that “regarding legal situations that bring about the registered birth at the time of birth, the person will retain, where appropriate, the rights inherent to it in the terms established in the sectoral legislation²³⁰”. The filiation of children is not mentioned, thus, not being clear if it is modified or not.

The possibility of a second modification of the sex registry is mentioned in Article 42. After six months of the modification, a second rectification can occur without further inconvenience. A third modification is subject to judicial authorisation.

Although some minors are not allowed to obtain the modification of the gender marker, it is established in Article 43 the possibility for all minors, without age requirements, to obtain the modification of the forename.

Once obtained the rectification, in the cases included, new documents reflecting the new identity shall be issued, in order to be adequate to the modification that has taken place.

Regarding foreigners, there are only two cases in which the rectification of the sex registry can occur. The first revolves around immigrants who cannot accede to LGR in their country of origin, proving such fact. Complying with such requirement, the rest of the formalities would be the ones established for adult

²³⁰Original text: “Respecto de las situaciones jurídicas que traigan causa del sexo registral en el momento del nacimiento, la persona conservará, en su caso, los derechos inherentes al mismo en los términos establecidos en la legislación sectorial”.

Spanish citizens, eliminating the nationality requirement. The second case includes foreigners who have obtained the modification of the gender marker in their country of origin. If their situation is regular in Spain, documents reflecting the modified sex registry and forename, if it has been modified, shall be issued.

There is also a clause, in Article 46, regarding the modification of the forename of minors. There, it is clarified that those minors not being able to obtain the modification of the gender marker, when their forename is modified to adequate their gender identity, shall be respected, and be addressed as their preferred gender. Documents with their preferred name shall also be issued. Not affecting, despite that fact, the rights related to the gender they were assigned at birth.

Although directly addressing transgender individuals, the Chapter II of the Title II, regarding public policies to promote real and effective equality of transgender people, is not relevant to the current analysis. This is due to the fact that it is not related to the concept of self-determination, nor the modification of the legal registry of sex. The only article relevant is Article 55, where it is stated that minor students have the right to “obtain a treatment in accordance with their identity in all the activities developed in the education ambit²³¹”.

Considering all the points studied, the principal characteristics of the law regarding the concept of self-determination are the following:

1. Despite the fact that, in theory, it should be argued that the law is based on self-determination of gender, it is not explicitly mentioned. The process, requirements and foundations shall be considered as based on self-determination, but the law does not mention it.
2. The process consists of an application by the interested person, an apparition in person in the Civil Registry to confirm the identity and the knowledge of the consequences of the decision, and a second apparition in a period no longer than third months, in order to ratify the decision.
3. Minors are included in the law, without special requirements of third parties' authorisation. Minors above sixteen years of age do not require parental consent,

²³¹Original text: “obtener un trato conforme a su identidad en todas las actividades que se desarrollen en el ámbito educativo”.

minors above fourteen require consent of the legal representatives and minors above twelve need judicial authorisation in order to obtain the modification of the gender marker.

4. Foreigners are only included in the law if proven impossibility to obtain the modification of the sex assigned at birth in their country of birth, and then meeting the criteria established for Spanish adults or minors above the necessary age.

5. Changes under other legislations are included, without any further requirements apart from the ones from the country of origin.

6. Non-binary identities are not included, nor mentioned in any way within the law.

7. A second modification of the gender marker is contemplated without further requirements six months after the first modification. A third one needs judicial authorisation in order to be accepted.

8. It is not clarified why a petition can be denied, although, considering that the law mentions that the person in charge of the Civil Registry has to consider the information provided, the denial can probably be because of falseness of the documents or absence of them.

9. The filiation of children is not explicitly mentioned. It can be understood that, considering the law maintains the rights associated with the sex assigned at birth of actions occurred before the modification, the rights remain as equal. But it is not clarified whether the filiation is modified or remains equal.

Table IX: Analysis of the project of transgender law of Spain

Transgender law of Spain			
Analysis criteria			
Principal items evaluated	Yes	No	Limited
Minors above 16	X		
Minors under 16			X*
Adults in guardianship	X		
Immigrants			X**
Recognition in other country	X		
Non-binary identities		X	

Opinion of a professional		X	
Possibility of a second change of gender	X		
Waiting period between request and resolution	X		
Filiation of children		X	
Other particularities		X	

Source: own elaboration

*Only above 12 years of age.

**Only allowed to the ones in whose country of origin it is impossible to modify the registry of sex or that obtained LGR in their country of origin.

After studying the Spanish legislation regarding self-determination of gender at a national level, the autonomous legal acts will be discussed.

4.2.2. Community of Andalusia

The autonomous law in Andalusia was the first law adopted in Spain that recognised the right to gender self-determination. The legal act, titled *Ley 2/2014, de 8 de julio, integral para la no discriminación por motivos de de identidad de género y reconocimiento de los derechos de las personas transexuales de Andalucía*²³², offered the possibility to LGR within the competencies of the aforementioned autonomous community. The law is formed by five chapters, the first one, on general provisions; the second, of health assistance; the third one, of non-discrimination in the labour ambit; the fourth, of educational assistance; and the fifth one, of social assistance.

Within the first chapter, the right to gender self-determination is defined. The purpose of the law, as set in Article 1, is to offer a legal framework where the right to self-determination of gender is assured, and to regulate duties, rights, and actions of the autonomous community, regarding such right.

The Article 2, of right to gender self-determination, states that every person has the right to: “the recognition of his or her gender identity, freely determined²³³”, “the free development of his or her personality in accordance with his or her gender identity, freely determined²³⁵” and, amongst others, be

²³²Translation into English: “Law 2/2014, of 8th July, comprehensive for non-discrimination for reasons of gender identity and recognition of the rights of Andalusian transgender people”.

²³³Original text: “Al reconocimiento de su identidad de género, libremente determinada”.

²³⁴Article 2(2).

²³⁵Original text: “Al libre desarrollo de su personalidad conforme a su identidad de género, libremente determinada”.

treated and identified in accordance with the gender identity of the person within the ambit of the Autonomous Community of Andalusia, in the legal instruments of the community.

The scope of the law includes all individuals officially residing in Andalusia, without any specific requirements. Therefore, minors without any age limit are included as well as foreigners as long as they are residing in Andalusia formally. Considering the fact that this is not a national law, the entities where the law is applicable are clarified. Them being the Administration of the Government of Andalusia, agencies of such administration, committees, the entities part of the Local Andalusian Administration, autonomic Public Law institutions, the Andalusian university system, and others. Then, Article 5(1) indicates the obligation of the aforementioned institutions to respect gender self-determination and the prohibition to restrict, exclude or suppress such right. Also, this article indicates the law shall be interpreted in favour of gender self-determination.

The prohibition to impose bodily modifications and psychological exams is declared in Article 5(2). The norms of the Andalusian Community are declared to include the right to gender self-determination and the institutions of the community shall guarantee that the self-perceived gender identity is the one appearing when mentioning transgender people.

Other articles reflect non-discrimination and protection measures which are not relevant to the case. Specifically, regarding self-determination, it establishes the promotion for Andalusian public universities to educate and research in gender self-determination²³⁷.

The procedure in order to obtain documents reflecting the interested party's gender identity is established in Article 9. The person has to formulate the request and there are no other requirements. The adaptation of the Andalusian documentation would take effect after the petition. It is clarified that there are no legal costs of the action, no medical or psychological documentation shall be requested and there would be no third-party intervention. When the legal

²³⁶Article 2(2).

²³⁷Article 5(2).

information is necessary, the preferred name appears followed by the initials of the legal name and the complete surnames. In the case of minors, if the parental figures are in discrepancy with the minor, it is possible to request intervention of the Public prosecutor's office, looking for the higher interest of the child.

The labour ambit, in Article 13, indicates that companies or institutions in the scope of the law have the duty to respect the self-determined identity of their workers. Article 15(2) recognises that the manifested identity shall be respected in the educative field, in the case of students, workers and teachers. In addition, according to Article 23, transgender women victims of gender violence have the right to receive the resources the community offers in such cases.

The Andalusian transgender law was considered a legal advance that positioned the Autonomous Community as pioneer regarding transgender rights and acknowledging the right to gender self-determination²³⁸. Not only the legal act is the first autonomous one to address self-determination of gender, but also it was adopted before any national transgender law within the European Union based on such concept.

4.2.3. Community of Catalonia

The Catalan law includes the LGBTIQ community entirely. With the title of *Ley 11/2014, de 10 de octubre, para garantizar los derechos de lesbianas, gays, bisexuales, transgéneros e intersexuales y para erradicar la homofobia, la bifobia y la transfobia*²³⁹ and adopted in 2014, the legal act was the second of these characteristics to be adopted in Spain, after the Andalusian law. The law is formed by five titles: preliminary title, administrative organisation, public policies to guarantee the effective equality of LGBTI people, trans-identity and intersexuality and mechanism to guarantee the right to equality.

It is relevant to begin addressing the fact that self-determination of gender is not mentioned within the law. Although it does mention concepts such as gender

²³⁸P. Ramos. *Andalucía, pionera en la despatologización de la transexualidad*. Diagonal Periódico 2014. Obtained from: <https://www.diagonalperiodico.net/libertades/23611-andalucia-pionera-la-despatologizacion-la-transexualidad.html>

²³⁹Translation into English: "Law 11/2014, of October 10, to guarantee the rights of lesbians, gays, bisexuals, transgenders and intersex and to eradicate homophobia, biphobia and transphobia".

identity and transgender individuals are explicitly included, self-determination of gender can only be understood as part of the law considering the processes and basis of the legal act.

The law, as specified in Article 3, has an autonomous scope, being applied to all the individuals who are present in Catalonia, whether the person is residing therein or not and whatever is his or her status. Also, the government of Catalonia and local entities are to guarantee the commitment with the law.

Most of the content of the law is not related to the aspects where, even if it has not been explicit, self-determination of gender could be inserted. The principal aspects of the law are linked to the LGBTQ community as a whole and certain measures antidiscrimination, more than actions and procedures to obtain LGR in the autonomous level.

The first article where the proper treatment of transgender individuals according to their gender identity is established is Article 18, of public order and freedom privacy. Therein, it is established that, when transgender individuals are subject to reconnaissance and frisking, that shall be executed according to their gender identity and that inmates shall be treated accordingly as well.

Title III, of trans identity and intersexuality, formed by Article 23, of transgender and intersex individuals, is the only exclusive part of the law destined to transgender individuals, altogether with intersex people as well. Therein, it is stated that to the extent of Catalonia's public administration, highlighting the ambits of education and university, "regulations shall establish the conditions for transgender and intersex individuals, so they are treated and named according to the name of the gender they identify with, even if they are minors^{240,241}. Also, in Article 23(4), it is established that no gender dysphoria diagnosis or medical treatment shall be requested in order to obtain rights mentioned in the law.

²⁴⁰Original text: "deben establecerse por reglamento las condiciones para que las personas transgénero y las personas intersexuales sean tratadas y nombradas de acuerdo con el nombre del género con el que se identifican, aunque sean menores de edad".

²⁴¹Article 23(1) of *Ley 11/2014, de 10 de octubre, para garantizar los derechos de lesbianas, gays, bisexuales, transgéneros e intersexuales y para erradicar la homofobia, la bifobia y la transfobia*, 2014.

However, despite the fact that the right to be recognised with the preferred name manifested by the individual is affirmed, it is not mentioned in the law that the gender identity of the transgender person is recognised as belonging to such gender.

No other explicit mentions of the transgender community are relevant to this case. Considering this is, it is important to remark that no procedures are described in the law in order to obtain the modification of the forename in the autonomous documents, nor it is described how such right can be exercised.

4.2.4. Community of Extremadura

The law of the Community of Extremadura is not a specific transgender law, but a general legal act including the LGBTIQ community as a whole. The law, *Ley 12/2015, de 8 de abril, de igualdad social de lesbianas, gais, bisexuales, transexuales, transgénero e intersexuales y de políticas públicas contra la discriminación por orientación sexual e identidad de género en la Comunidad Autónoma de Extremadura*²⁴², mentions and includes the right to gender self-determination. However, the transgender community is barely considered within the law. The legal act is formed by three titles. The first one involves general provisions; the second, public policies to guarantee social equality and non-discrimination for sexual orientation or gender identity reasons to LGBT people; and the third one, of measures to guarantee the effective and real equality of gay, lesbian, bisexual, transsexual, transgender and intersex people.

Article 3(1)(b), where the principles in which the law is based on are stated, informs of the right to development of the personality, stating that “every person has the right to build for themselves a self-definition with respect to their body, sex, gender and their sexual orientation²⁴³”. Moreover, the article indicates that the self-defined orientation, sexuality, and gender identity is one of the pillars

²⁴²Translation into English: “Law 12/2015, of April 8, on social equality for lesbians, gays, bisexual, transsexual, transgender and intersex and policies against discrimination based on sexual orientation and gender identity in the Autonomous Community of Extremadura”.

²⁴³Original text: “toda persona tiene derecho a construir para sí una autodefinición con respecto a su cuerpo, sexo, género y su orientación sexual”.

under which self-determination, dignity and freedom are founded. Self-determination of gender itself is not defined separated to the rest of the concepts mentioned, but considering it mentions self-determination related to gender identity, it is clearly included.

Although the law, when defining the effectiveness of it, states that the administrations of the Community of Extremadura will promote public policies regarding non-discrimination of the LGBTQ community, visibility, and equality, it is not specified that the gender identity is to be protected from the perspective of self-determination of gender.

Article 7(5) does indicate that sex-segregated institutions have to respect the preferred gender of the individual and they shall be allowed to go to the correspondent facility. In the ambit of health, the self-determination concept is mentioned, referring to the creation of a protocol of integral assistance towards transgender individuals, that shall “respect the principles of free gender self-determination, non-discrimination and non-segregation^{244,245}”.

In addition, as it occurs in the Andalusian transgender law, the protection of transgender women when suffering from gender violence is contemplated, considered as women in the scope of the law in the matter, according to Article 19(3).

Although not explicitly mentioning self-determination, it is indicated that the education system shall respect the gender identity of its students, without indicating any specific requirements²⁴⁶. Within the sports field, Article 30(1) recognises the right of transgender people to be identified according to their sexual identity, without setting requirements in order to achieve such recognition.

²⁴⁴Original text: “respete los principios de libre autodeterminación de género, de no discriminación y no segregación”.

²⁴⁵Article 10 of *Ley 12/2015, de 8 de abril, de igualdad social de lesbianas, gais, bisexuales, transexuales, transgénero e intersexuales y de políticas públicas contra la discriminación por orientación sexual e identidad de género en la Comunidad Autónoma de Extremadura*, 2015.

²⁴⁶Article 20(3).

The protection of gender identity within legal documents of the Autonomous Community is established in Article 35(1), where it is stated the obligation to name individuals according to their identity, explicitly adding up that such shall occur in the case of transsexual, transgender, and intersex individuals. Despite the fact that the law establishes certain sanctions, the denial to treat an individual according to the self-determined gender is not specified. It can be considered as discrimination due to gender identity, but there is not a specific clause, which can lead to confusion.

The law does offer the possibility to be treated in front of the Community of Extremadura with the preferred name and identified gender identity. However, the self-determination concept is barely mentioned and the procedure in order to be recognised is not addressed.

4.2.5. Community of Madrid

The law of the Community of Madrid is focused specifically on the transgender community. Titled *Ley 2/2016, de 29 de marzo, de Identidad y Expresión de Género e Igualdad Social y no Discriminación de la Comunidad de Madrid*²⁴⁷, the legal act was adopted in 2016. The law is formed by the following titles: the Preliminary Title; administrative treatment of gender identity; health assistance of trans people; measures in the educative field; measures in the labour ambit and of corporate social responsibility; measures in the social field; measures in the familiar ambit; measures in youth and the elderly; measures in the sports, culture and leisure field; measures in international cooperation; communication; measures in the police field; administrative measures to guarantee the real and effective equality of people regarding their gender identity or gender expression; infractions and sanctions; and, procedure.

The legal act defines, within Article 1(1), sexual and gender identity as “the personal experience of gender as each person feels and self-defines it²⁴⁸”.

²⁴⁷Translation into English: “Law 2/2016, of March 29, on Gender Identity and Expression and Social Equality and Non-Discrimination of the Community of Madrid”.

²⁴⁸Original text: “la vivencia interna e individual del género tal y como cada persona la siente y auto determina”.

Therefore, being based on the concept of self-determination of gender. Also, it indicates that such determination is not subject to any third party approval.

The scope of the law, as declared in Article 2, includes all the individuals without the necessity of residing in Madrid, as long as they are present in the community or acting within its scope. Also, local entities, law entities and municipalities are included. There are no age restrictions, as it is established that the law acts in individuals of all ages.

The right to being treated according to the individuals' gender identity is addressed in Article 3, indicating the right to "the recognition of their freely manifested gender identity"²⁴⁹,²⁵⁰ and "being treated in accordance with their gender identity in all public and private ambits, and in particular to be identified and accede to documentation according to that identity"²⁵¹,²⁵². Therefore, considering the initial definition, although self-determination is not mentioned in Article 3, it is a part of the basis of the article and concept.

The right to gender recognition is described in more detail in Article 4, where the right of individuals to their self-defined gender identity is affirmed. It is also established that no physical modifications, psychological or psychiatric evaluations or any other similar requirements are to be established to recognise an individual's gender identity. The same article also prohibits conversion or aversion therapies when a person self-defines his or her identity.

There is a specific article referred to minors, indicating, amongst others, that actions of the Autonomous Community shall be based on the higher interest of the minor, the respect of the self-determined gender identity and the guarantee of a proper development on basis of such identity²⁵³.

²⁴⁹Original text: "al reconocimiento de su identidad de género libremente manifestada".

²⁵⁰Article 3(1) of *Ley 2/2016, de 29 de marzo, de Identidad y Expresión de Género e Igualdad Social y no Discriminación de la Comunidad de Madrid*, 2016.

²⁵¹Original text: "a ser tratado de conformidad a su identidad de género en los ámbitos públicos y privados y en particular a ser identificado y acceder a documentación acorde con dicha identidad".

²⁵²Article 3(2).

²⁵³Article 6(4).

The present legal act does establish the procedure in order to manifest the gender identity and have it recognised in the scope of Madrid, in Article 7(3). The process is basically equal to the one in the Andalusian Community, including only the petition by the interested individual, a free issue of documentation without any other requirements and a treatment in accordance with the self-determined gender identity through the whole process. The preferred name is included in the new documents, and, where necessary, the initials of the legal name are added, followed by the surnames of the individual.

The concept of self-determination of gender is mentioned in the scope of health assistance, in Article 13(1), informing of the right to self-determination of gender of transgender individuals as part of the principles of assistance to the community. The rest of articles regarding health are related to non-discrimination and assistance of transgender individuals, not relevant to this case.

Within the educative field, it is established the creation of a protocol in terms of educative assistance towards gender identity, where the preferred name and self-defined identity appears in the relevant documentation, except in the official and private registries, the personal of the school would be informed of the preferred name and identity of the student and in activities with sex segregation, the gender identity would prevail²⁵⁴.

Regarding victims of gender violence, the law establishes in Article 29 that victims of gender-based violence and human trafficking have the right to receive attention in the same terms as cisgender women under autonomous law. Thus, being such transgender women. The respect of the identity of minors which are guarded by the public administration is also contemplated, under Article 30(2) and disabled individuals under Article 30(3), and of elderly in residencies, under Article 36. In sports competitions in the Autonomous Community of Madrid, the gender considered at such effects is the perceived gender identity of the person, according to Article 38.

²⁵⁴Article 23.

The concept of self-determination, although implicit throughout all the legal act, has only been explicit in various occasions. In this case, as it occurred with the Andalusian law, the procedure is clear and explicit, and individuals are treated in the community scope as their self-determined gender.

4.2.6. Community of Murcia

As it occurs with several legal acts analysed as part of this heading, the law of the Community of Murcia includes the LGBTIQ community and not only transgender individuals. Adopted in 2016, the law, *Ley 8/2016, de 27 de mayo, de igualdad social de lesbianas, gais, bisexuales, transexuales, transgénero e intersexuales, y de políticas públicas contra la discriminación por orientación sexual e identidad de género en la Comunidad Autónoma de la Región de Murcia*²⁵⁵, does recognise explicitly the right to self-determination of gender and mentions it in several occasions. The law has four titles: the first one, of general provisions; the second one, of public policies to guarantee the social equality and non-discrimination because of the social orientation and gender identity of LGTBI people; the third one, of measures to guarantee the real and effective equality of gay, lesbian, bisexual, transsexual, transgender and intersex people; and, the fourth, of sanctions regime.

The scope of the law, explained in Article 2, is applicable to those present or executing any action within the territorial range of the Community of Murcia. The law lacks any explicit restrictions of age, residency, or nationality, but the ones that can be established in the national legislation. The Community of Murcia itself, local government, right entities dependent to them and municipalities are bound to guarantee the commitment with the legal act.

Within Article 3, of principles, the right to gender self-determination is included. Article 3(1)(b), states that “every person has the right to build for himself or herself a self-definition regarding his or her body, sex, gender and sexual

²⁵⁵Translation into English: “Law 8/2016, of May 27, on social equality for lesbians, gays, bisexuals, transsexuals, transgender and intersex, and on public policies against discrimination based on sexual orientation and gender identity in the Autonomous Community of the Region of Murcia”.

orientation²⁵⁶”, followed by defining the possibility to determine one’s gender identity as a “fundamental aspect regarding self-determination²⁵⁷”, together with others.

Amongst the definitions that the law includes, the description of “trans”, includes a multiplicity of concepts, including non-binary identities. However, that does not result necessarily in the recognition of a third gender category. In addition, when gender identity is defined, it revolves around self-determination, being the definition claimed by the individual without third party intervention²⁵⁸.

Within Article 7(5), regarding support and protection towards vulnerable individuals, the right for minors guarded by the State when acceding to sex fragmented facilities, to access to the ones of their manifested identity, is established.

Furthermore, there is an article entirely destined to the right to the freely manifested gender identity, Article 8. Therein, it is explicit that “every person has the right to build for himself or herself a self-definition regarding sex, gender and sexual orientation”. Conversion therapy is prohibited, and no medical, surgical, or psychological treatments can be required in order to recognise the aforementioned identity. It is mentioned, additionally, that transgender individuals can obtain documents according to their gender identity in the scope of public administrations and private entities within the Community of Murcia.

Non-discrimination includes manifestly the respect to the gender identity of individuals, affirming that they shall be treated according to the manifested identity and regardless of the inscription of the legal sex²⁵⁹. In the case of minors, Article 10(4) recognises their right to be treated according to their gender identity, based on self-determination and the higher interest of the minor. The

²⁵⁶Original text: “toda persona tiene derecho a construir para sí una autodefinición con respecto a su cuerpo, sexo, género y su orientación sexual”.

²⁵⁷Original text: “aspectos fundamentales de autodeterminación”.

²⁵⁸Article 4(1) of *Ley 8/2016, de 27 de mayo, de igualdad social de lesbianas, gais, bisexuales, transexuales, transgénero e intersexuales, y de políticas públicas contra la discriminación por orientación sexual e identidad de género en la Comunidad Autónoma de la Región de Murcia*, 2016.

²⁵⁹Article 9.

legal guardians of the minor are the ones entitled to request the necessary measures and, in conflictive situations, through social services.

Transgender women who are victims of gender-based violence are recognised, pursuant Article 12, on the same conditions and considerations as cisgender women within the Autonomous Community of Murcia.

Health assistance shall also be in accordance with the gender identity of the person, under Article 13(3). Within the same ambit, there is a specific protocol of assistance of transgender individuals, based on self-determination and, amongst others, with the following characteristics: treatment according to the self-perceived identity and placement in facilities of the gender identity in sex segregated environments, besides medical aspects not relevant to this analysis²⁶⁰.

In the educational field, in the scope of Article 25, it is established that the identity of transgender students shall be respected using their preferred name within all the internal activities of the school centre, except when unavoidable. Thus, respecting the gender identity of students, without any specific requirements, but the particularities in non-emancipated minors of parental consent.

In terms of the public administration, Article 39 revolves around documentation. It is established therein that the documents of the public administration of Murcia shall reflect the gender identity of transgender individuals, being named, and treated accordingly.

The present law, despite not being a specific transgender law, mentions self-determination in various occasions and details where the right is to be exercised. Despite that fact, the aspect that is not mentioned in the law is the procedure in order to obtain LGR at an autonomous level.

²⁶⁰Article 14.

4.2.7. Balear Islands

The law in force in the Balear Islands is not exclusive of the transgender community and involves all LGBTIQ realities. The legal act, titled *Ley 8/2016, de 30 de mayo, para garantizar los derechos de lesbianas, gays, trans, bisexuales e intersexuales y para erradicar la LGTBI fobia*²⁶¹, was adopted in 2016. It is formed by the Preliminary Title, of general provisions; Title I, of administrative organisation; Title II, of public policies to promote effective equality of LGBTI people; Title III, of measures to guarantee effective and real equality of people attending to the gender identity and expression; Title IV, of intersex people; and Title V, of mechanisms to guarantee the right to equality. The Preliminary Title, Titles II and III are the only ones relevant to the analysis.

The general provisions do not mention the right to gender self-determination, referring only to equality and non-discrimination. Although the respect to the identity manifested can be considered to a non-discrimination aspect or equality, the fact that it is not explicitly mentioned does not guarantee such right. The scope of the law, as defined in Article 3, involves any individual in “the territorial ambit of the autonomous community of Balear Islands²⁶²”, regardless of his or her situation.

The first approaches in the law based on the principle of self-determination are in Article 6, of orientated principles of action of public powers. Therein, it is informed that “every person has the right to build to himself or herself a self-definition regarding his or her body, sex, gender and sexual orientation²⁶³”²⁶⁴. Also, Article 6(g) prohibits treatments or procedures of any kind restricting the right to gender self-determination.

²⁶¹Translation into English: “Law 8/2016, of May 30, to guarantee the rights of lesbians, gays, trans, bisexuals and intersex and to eradicate LGTBI phobia”.

²⁶²Original text: “el ámbito territorial de la comunidad autónoma de las Illes Balears”.

²⁶³Original text: “toda persona tiene derecho a construirse una autodefinición con respecto a su cuerpo, sexo, género y orientación sexual”.

²⁶⁴ Article 6(c) of *Ley 8/2016, de 30 de mayo, para garantizar los derechos de lesbianas, gays, trans, bisexuales e intersexuales y para erradicar la LGTBI fobia*, 2016.

Title I, of administrative organisation, does not have any article relevant to the analysis. In the aspect of public policies, reflected in Title II, reflects within Article 11 that the gender identity of minors guarded by the public administration shall be respected, and same occurring with individuals with disabilities, or the elderly. Sex segregated facilities, in all the aforementioned cases, shall be used, if requested, in accordance with the manifested identity.

In terms of the educational ambit, despite the fact that it is explicit that all the members of the educational community should have the possibility to live freely their sexual orientation, gender identity or gender expression, there is no clause adding the right to LGR in the terms the autonomous communities are allowed to within their competencies. In sports, according to Article 14, the respect of transgender individuals' identity is mentioned, so they are allowed to participate according to their gender identity.

When referring to health assistance, Article 16(3)(j) states that the documents from the health and administration ambit shall “attend to diversity in terms of family and circumstances of LGBTI people²⁶⁵”. Despite the fact that it doesn't explicitly mention transgender individuals, preferred names, or identity, it could derive from such article.

Article 17, of social action, reaffirms that minors under guardianship shall have their gender identity respected, regardless of where they are residing in and that, in facilities which are sex segregated, they have the possibility to access to the ones according to the gender they manifest.

The third title, of measures in terms of gender identity and expression, does inform of the treatment of transgender individuals in the scope of the autonomous community. Article 22(1) informs that transgender individuals have the right to be “treated and named according to the name of the gender they identify with, even if they are minors, especially in the educative, university and

²⁶⁵Original text: “en la documentación administrativa y en la sanitaria se atiende a la diversidad del hecho familiar y a las circunstancias de las personas LGTBI”.

health ambit²⁶⁶". Students are allowed to use their preferred name in the school facilities and public information will display such name, and in sex segregated ambits, they will be allowed to use the one according to their identity. In the case of minors, the process will be initiated by the legal representatives. In addition, Article 22(2) indicates that, in any public ambit, transgender individuals shall be treated with their preferred name and manifested identity, if requested, and a health card will be issued according to such. Finally, Article 22(4) declares that no diagnosis or treatment can be requested in order for the law to be applied.

The right of gender self-determination, although implicit, has only been mentioned in two occasions within the text. The documents that can be modified are explicit, as well as the individuals who can accede to such modifications, but the process is not explained. The nature of the law, being a general legal act regarding the LGTBI community, could have caused that the transgender issue in question is not detailed throughout the document.

4.2.8. Valencian Community

The law of the Valencian Community is exclusive to the transgender community. Titled *Ley 8/2017, de 7 de abril, integral del reconocimiento del derecho a la identidad y a la expresión de género en la Comunitat Valenciana*²⁶⁷, the legal act was adopted in 2017. The law is formed by six titles: general provisions, rights, administrative treatment of gender identity, attention policies regarding transgender people and measures against gender identity or gender expression motivated discrimination, administrative guardianship measures, and infractions and sanctions. The most relevant titled to this analysis are the first three titles.

The legal act establishes clearly the right to gender self-determination within the first articles of the text, in the Title I of general provisions. The object of the law, as set in Article 1, is to achieve the proper implementation of the right to gender self-determination throughout the legislative dispositions of the community. That

²⁶⁶Original text: "tratadas y nombradas de acuerdo con el nombre del género con el que se identifican, aunque sean menores de edad, especialmente en los ámbitos educativo, universitario y sanitario".

²⁶⁷Translation into English: "Law 8/2017, of April 7, comprehensive recognition of the right to gender identity and expression in the Valencian Community".

shall occur, according to Article 2, within the scope of the Valencian Community, being applied to any individual present in the community or acting therein. There are no age restrictions, nor restrictions regarding the legal residency of the individuals.

The general principles of the legal act determine that Valencian public administrations shall “respect in all their actions the human right to gender self-determination and guarantee the right of the individuals object of the law to be treated according to the gender identity to which they feel they belong²⁶⁸”, indicating that such right shall be included in the legal act of the autonomous community²⁶⁹. The definition of gender identity refers to self-determination as well, indicating that individuals self-determine their own gender identity.

In Title II, referred to rights, Article 5, of rights established within the law, indicates that no medical or psychological treatments shall be required in order to obtain LGR. Thus, being considered as right and declaring that the treatment of individuals shall be effectuated according to their gender identity, whether the ambit in question belongs to the private or public field.

Minors are explicitly included in the law, under Article 8. The higher interest of the minor shall be the leading criteria and the rights established in this law are applied to minors, via their legal representatives. In case of discrepancies between the parties, social services might intervene.

The specific measures to be taken by the Valencian Community and how the process is effectuated is explained in the law, in Title III of administrative treatment of gender identity. Article 9, of administrative documentation, establishes that individuals covered by the law shall be treated in accordance with their gender identity and shall receive documents reflecting such identity, within the scope of the community.

²⁶⁸Original text: “respetar en todas sus actuaciones el derecho humano a la autodeterminación de la identidad de género y garantizarán el derecho de las personas objeto de esta ley a ser tratadas de acuerdo con la identidad de género a la que sienten pertenecer”.

²⁶⁹Article 3 of *Ley 8/2017, de 7 de abril, integral del reconocimiento del derecho a la identidad y a la expresión de género en la Comunitat Valenciana*, 2017.

The process, established in Article 9(3), is initiated by the interested party, without involving any cost, nor third party intervention or medical documents. The rights and obligations of the individuals cannot be modified and, where the data is necessary, the initials of the legal name will be displayed, followed by the surnames, and preferred name. Article 9(3)(f) refers to foreigners residing in the Valencian Community, indicating that the legal name will be maintained in the necessary databases until they obtain LGR in their country of origin or obtain Spanish nationality. However, their identity would be recognised internally in the autonomous community. Subparagraphs 4 and 5 of Article 9 indicate that documents of autonomous competency and of municipal competency shall be modified according to the gender identity of the applicant, and without any costs.

In Title IV, of attention policies and measures against discrimination, the relevant aspects in terms of self-determination, and the aspects considered in this analysis, are the following. In terms of health assistance, in Chapter I, it is established in Article 15(2)(d) that a health card with the preferred name of the individual would be issued. Within the education ambit, in Chapter II, Article 21 establishes that all the documents in the schools will respect the gender identity and, Article 22 setting a protocol to assist transgender students, indicates that public information will respect the preferred name and self-determined gender identity. According to Article 25, the same protocol, adapted to the idiosyncrasy of university, will be adopted to the aforementioned institution.

In the labour ambit, Article 28 of Chapter III, indicates that public registries of workers will not display the forename of the candidates or workers, so that transgender individuals not legally recognised in the state can maintain their privacy.

As it occurs with several legal acts analysed before, Article 29(3) indicates that victims of gender-based violence or human trafficking who are transgender women can access to the relevant resources in the same terms as cisgender ones. In addition, sex segregated facilities shall be used, in the case of transgender

individuals, according to their gender identity freely determined²⁷⁰. In the case of the elderly in nursing homes, they shall be treated accordingly as well, having the right to attend to the home of their gender identity²⁷¹.

In Chapter VII, regarding leisure, sports, and other ambits, according to Article 38(1) in competitions the manifested identity shall also be respected, where the national laws allow such measure.

This legal act does refer to self-determination explicitly and on several occasions. In addition, it clearly establishes the procedure, the individuals that can access to it and several other relevant ambits. It is, therefore, a complete legal act involving multiple circumstances.

4.2.9. Foral Community of Navarra

The legal act of the Foral Community of Navarra is the *Ley Foral 8/2017, de 19 de junio, para la igualdad social de las personas LGTBI+*²⁷², adopted in 2017. It is one of the longest consolidated laws analysed in this work, with an extension of forty pages. It consists of five titles: general provisions; administrative organisation; public policies to promote effective equality of LGBTI+ people; transsexual, transgender, and intersex people; and measures to guarantee effective and real equality of gay, lesbian, bisexual, transsexual, transgender, and intersex people.

In the general provisions, there are several articles and subparagraphs with relevant aspects in the matter. The scope of the law, explained in Article 3, includes any person in the ambit of the Foral Community and the autonomous government, local and municipal entities, besides the Parliament, are the ones entitled to guarantee the commitment with the law.

Within Article 4, of principles and rights recognised by the law, relevant aspects regarding self-determination of gender are addressed. The right to personality, the right to a personal definition in terms of body, sex, gender, and sexual

²⁷⁰Article 30.

²⁷¹Article 36(2).

²⁷²Translation into English: “Foral Law 8/2017, of June 19, for the social equality of LGBTI+ people”.

orientation without any medical or psychological procedure is established. In addition, there is the explicit prohibition of procedures as the aforementioned limiting the right to self-determination of gender²⁷³. The inclusion of transgender minors within the law is also addressed.

Non-binary identities are included within this legal act, in an explicit way, in Article 5(d), where gender identity is defined as possibly binary, non-binary or agender and in Article 5(g), in the definition of transgender.

There is a clause that had not appeared in the previously analysed legal acts, and it is the recognition of non-treatment of transgender individuals according to their gender identity as discrimination towards them. Indicating that gender segregated environments will offer a third option of mixed spaces and, where not possible, they can be used in accordance with their gender identity²⁷⁴.

The First Title, of administrative organisation, does not mention any information related to LGR or self-determination. Within the Second Title, regarding public policies, reflects in Article 13 the protection of the gender identity of guarded minors and respect of such right. Segregated facilities of guarded minors, disabled individuals, the elderly or similar, shall be possibly used, if the person requires so, according to the gender identity of the interested person.

Article 15 provides a protocol of assistance of transgender people in terms of health, based on self-determination of gender, segregated facilities, if it is the case, respecting their gender identity. Furthermore, a health card is issued with the preferred name and manifested identity, amongst others. The rest of the particularities of the protocol are health related.

The recognition that transgender women are considered as women at the effects of the Foral laws regarding violence based on the gender is also declared in the law.

²⁷³ Article 4(1)(b) and (g) of *Ley Foral 8/2017, de 19 de junio, para la igualdad social de las personas LGTBI+*, 2017.

²⁷⁴Article 6(2).

Within the field of education, it is established that the preferred name and manifested identity of transgender students will be reflected in the necessary databases and documents, especially in the ones that are public to other parts of the educative community. Segregated facilities shall be used by students and any workers or teachers who are transgender, according to their identity. In the case of minors, parental consent is necessary and, if there are conflicts regarding such procedures, social services can intervene. The higher interest of the minor should prevail in that case²⁷⁵. The rights established in Article 26 are applicable to universities in Navarra, according to Article 30(6).

In the ambit of measures in leisure, culture, and sport, it is established that library cards or documents shall be issued in accordance with the preferred name and gender identity of the users of such services, under Article 34. In sport competitions and events, Article 35(1) establishes that their identity will be respected, and they will compete in the consequent category. Moreover, if there is any sort of identification, as documents or cards, it will respect the identity of the person. In the police environment, transgender individuals shall be identified and frisked in accordance with their identity.

The Third Title, of transsexual, transgender and intersex individuals, reaffirms the aforementioned treatment recognising their preferred name, including minors, without any medical treatments or psychological documents of any kind, in Article 41.

The measures to guarantee equality, in Title IV, describe within Article 44 the process in order to obtain LGR based on self-determination in the scope of the Foral Community of Navarra. Besides the aforementioned treatment, the law states that those individuals who have not obtained LGR at a national level, can access to documents valid for identification, where the ID number or equivalent is displayed and with their gender identity and preferred name.

²⁷⁵Article 26.

The legal act of Navarra involves different ambits and the proper issue of documents according to the person's identity, is based on self-determination and is significantly complete. The text lacks, notwithstanding, the procedure in order to obtain the documents being specified.

4.2.10. Community of Aragon

The law of the Community of Aragon reflects the transgender community and was adopted in 2018. It is titled *Ley 4/2018, de 19 de abril, de Identidad y Expresión de Género e Igualdad Social y no Discriminación de la Comunidad Autónoma de Aragón*²⁷⁶. The legal act is divided in fourteen parts: general provisions; administrative treatment of gender identity; health assistance towards transgender people; measures in the educational ambit; measures in the labour ambit and of corporate social responsibility; measures in the social ambit; measures in the familiar ambit measures in the ambit of youth and the elderly; measures in leisure, culture and sport; measures in the ambit of international cooperation towards development; communication; measures in the Security Forces and Bodies; administrative measures to guarantee the real and effective equality of people in the assistance to gender identity or expression; and sanctions regime.

In general provisions, within the Article 1(g), self-determination is included as part of the definition of gender identity and sexual identity, considering that individuals self-determine their own identity.

The scope of the law, as in most of the legal acts analysed, everyone present, or acting within the Autonomous Community and its institutions and relevant entities shall guarantee the commitment with the law. In addition, it is applicable regardless the ambit in question and the age of the person²⁷⁷.

Within Article 3, the basis of the law is established. The most relevant aspects are the self-defined gender identity being recognised as a right and the right to a

²⁷⁶Translation into English: "Law 4/2018, of April 19, on Identity and Gender Expression and Social Equality and Non-Discrimination of the Autonomous Community of Aragon".

²⁷⁷Article 2 of *Ley 4/2018, de 19 de abril, de Identidad y Expresión de Género e Igualdad Social y no Discriminación de la Comunidad Autónoma de Aragón*, 2018.

treatment in accordance with the self-perceived gender identity in public and private environments, and “to be identified and accede to documentation in accordance with such identity^{278,279}. In addition, subparagraph 2 indicates the right for transgender women with the status of gender-based violence victims to the same resources as cisgender women with the same status.

The following article establishes the right to gender identity being manifested in conditions of equality, being based on self-determination of gender and the prohibition of requesting medical treatments or psychological examinations of any sort in order to achieve LGR at an autonomous level. Article 5, of non-discrimination, affirms the obligation to address individuals in accordance with their perceived gender identity and that public administrations and institutions shall respect that.

Minors are included in the law, under Article 5, via their legal representatives and if there is evidence of neglect towards the minor, social services of protection of minors might intervene.

The Title I, regarding the administrative procedures, regulates the process and conditions in order to obtain LGR. The public administration is obliged to guarantee, within its competencies, the respect of gender identity of individuals requesting so. In addition, it will issue the documents necessary to access to any administrative procedures or services, displaying the person’s gender identity²⁸⁰. The procedure established in Article 7 determines the lack of costs of the procedure, absence of third-party intervention and prohibition for medical requirements of any kind. As seen in other legal acts, the previous legal rights or obligations are not modified and, where necessary, the initials of the legal name will be incorporated, followed by the preferred name, surnames, and number of ID document. Always respecting the self-determined identity.

²⁷⁸Original text: “a ser identificado y acceder a documentación acorde con dicha identidad”.

²⁷⁹Article 3(c).

²⁸⁰Article 7.

Non-binary identities are mentioned in Article 8(1)(a), as receivers of information and assistance. However, as in other texts analysed, there is no statement that affirms such identities are legally recognised.

Within Title II, of health assistance, the attention received by transgender individuals is declared to be based on self-determination, according to Article 13, where the attention is declared to be based on the manifested identity. In sex segregated facilities, the right to access to the one in accordance with such identity is established.

The Third Title, regarding the educational ambit, defines in Article 23 a protocol of attention towards gender identity. Therein, the right to gender identity is determined and students shall be treated according to such identity, issuing documents with the preferred name in public information. Also, in sex segregated environments, the due respect to the manifested identity is recognised. In the case of minors, the rights will be exercised via the legal representatives.

In university, pursuant Article 26(4), students, and workers have the right to be treated with their preferred name and identity, without any psychological examination. Subparagraph 5 also indicates the use of gendered facilities according to the manifested identity.

The measures in social issues, pursuant Title V, include within Article 30(6) the use of facilities according to the person's gender identity in the use of equipment of the elderly, guarded minors, disabled individuals or other spaces. This right is reinforced in Article 35, highlighting especially the elderly and disabled population who are transgender.

The Title VIII, regarding leisure, culture, and sport, includes the possibility to participate in sport competitions and events according to the manifested identity regarding the legal sex registered²⁸¹.

²⁸¹Article 37(1).

The rest of the legal act is not relevant to this case. This text addresses properly the right to self-determination, including the procedure and the people who can access to the rights established in the law.

4.2.11. Basque Country

The case of the Basque Country has a significant difference in comparison with the rest of legal acts studied herein. Although the law was adopted in 2012, it was not based on self-determination of gender originally, and the modification came in 2019, where it included such perspective. The legal act, *Ley 14/2012, de 28 de junio, de no discriminación por motivos de identidad de género y de reconocimiento de los derechos de las personas transexuales*²⁸², is exclusive of the transgender community. It is formed by five chapters: general provisions, basis for a public policy in terms of transsexuality, health assistance of transsexual people, non-discrimination in the labour ambit and treatment of transsexuality in the educational system.

The scope of the law, par contrary to most of the legal acts analysed, is reduced, and only includes, under Article 2, individuals with effective residency within the Autonomous Community of the Basque Country and who are transsexuals. Article 3, defining what a transsexual individual is, states that “the consideration of transsexual person is regulated by the right to self-determination of sexual identity²⁸³”. It is also established that no medical or psychological requirements are needed in order for the law to be applicable.

Regarding public policies, in Chapter II, it is established that the Basque public administration shall treat individuals according to their gender identity²⁸⁴. In addition, those whose gender identity is female are entitled to the resources offered to women in situations of gender violence, in the same terms as non-transgender women, pursuant Article 6(3). Article 7 offers the possibility for

²⁸²Translation into English: “Law 14/2012, of June 28, on non-discrimination based on gender identity and recognition of the rights of transsexual people”.

²⁸³Original text: “la consideración de persona transsexual se regirá por el derecho a la libre autodeterminación de la identidad sexual”.

²⁸⁴ Article 4 of *Ley 14/2012, de 28 de junio, de no discriminación por motivos de identidad de género y de reconocimiento de los derechos de las personas transexuales*, 2012.

transsexual individuals to obtain documents according to their gender identity “as the sex reassignment process lasts²⁸⁵”. This statement, as indicated in Article 7(2), refers to the modification previous to the LGR at a state level. Notwithstanding that fact, the selection of the words “sex reassignment” could be unfortunate, considering that such concept is usually used referring to medical procedures. Article 7 also offers the possibility for immigrants residing in the Basque Country to obtain the same documentation as the rest of Basque citizens.

The rights of transsexual individuals, in terms of LGR, include being treated as their manifested gender, and, if hospitalized, being in the correspondent place to their identity if segregated²⁸⁶.

The legal act barely specifies ambits such as the educative system, where it is not declared whether students can access to documentation according to their gender identity, nor the case of minors is clarified in terms of LGR. The procedure is not specified in order to obtain documents, and other ambits such as sports are not mentioned either. The fact that originally it was not based on self-determination and was later modified could have influenced such fact, not being as complete as other cases studied.

4.2.12. Community of Cantabria

The legal act of the Community of Cantabria comprehends the LGBTIQ community, was adopted in 2020 and is titled *Ley 8/2020, de 11 de noviembre, de Garantía de Derechos de las Personas Lesbianas, Gais, Trans, Transgénero, Bisexuales e Intersexuales y No Discriminación por Razón de Orientación Sexual e Identidad de Género*²⁸⁷. The law is divided in the following titles: general provisions; right to equality of treatment and non-discrimination; public policies to guarantee social equality and non-discrimination due to sexual

²⁸⁵Original text: “mientras dure el proceso de reasignación de sexo”.

²⁸⁶Article 10(a).

²⁸⁷Translation into English: “Law 8/2020, of November 11, Guaranteeing the Rights of Lesbian, Gay, Trans, Transgender, Bisexual and Intersex Persons and Non-Discrimination for Reasons of Sexual Orientation and Gender Identity”.

orientation and gender identity of LGTBI individuals; mechanisms to guarantee the right to equality of LGTBI people; and sanctions regime.

As set in Article 1, establishing the objective of the law, self-determination of gender is one of the rights in which is based on, amongst others. The applicability of the law is autonomous, acting within the community's administration, entities from the community, whether private or public and to individuals present or acting within Cantabria²⁸⁸.

The definition of “trans”, as declared in Article 3(g), includes non-binary identities, as it states that it includes “other identities of those who define their gender as other or describe their identity in their own words²⁸⁹”.

Within the ambit of equality and non-discrimination, of the First Title, Article 4(2) involves the right to gender and sexual self-determination throughout “attention that is integral and adequate to their needs²⁹⁰”, recognition of self-determined gender identity and the necessary measures to “guarantee the free development of their personality²⁹¹”. Also, Article 5(1)(a) defines the right to individually elaborate a self-definition regarding gender, sex, body, and sexual orientation.

The Title II refers to public policies. Article 13(3), of education, indicates that the users of hygienic services are entitled to use the ones according to their gender identity. Within Article 17, it is established that transgender individuals, remarking the case of minors, have the right to be recognised with their preferred name. In addition, the manifested gender identity is to be respected within health centres²⁹² and treated accordingly and with their preferred name, issuing the

²⁸⁸Article 2 of *Ley 8/2020, de 11 de noviembre, de Garantía de Derechos de las Personas Lesbianas, Gais, Trans, Transgénero, Bisexuales e Intersexuales y No Discriminación por Razón de Orientación Sexual e Identidad de Género*, 2020.

²⁸⁹Original text: “otras identidades de quienes definen su género como otro o describen su identidad en sus propias palabras”.

²⁹⁰Original text: “atención integral y adecuada a sus necesidades”.

²⁹¹Original text: “asegurar el libre desarrollo de su personalidad”.

²⁹²Article 19(2).

consequent documentation. Also, a protocol based on self-determination of gender is declared to be further elaborated²⁹³.

Under Article 25, of protection of minors, it is remarked the right to use the preferred name. In the case of the elderly and disabled individuals, when attending to facilities segregated based on gender, they have the right to use the one according to their identity.

In Sport events and competitions which are not competitive the gender identity of the people will be respected, under Article 32(2). However, those which are competitive are not clarified, being possibly non-respective with the manifested identity if the legal sex has not been modified.

The rest of the articles of the text are not relevant within this analysis. The legal act is brief and, although the right to gender self-determination is clear and explicit, many formalities are not specified. The procedure is not clarified, nor competitive competitions or the recognition of transgender women as gender-based violence victims if it is the case.

4.2.13. Canary Islands

The legal act of the Autonomous Community of Canarias is the longest legal act of all the ones studied herein, being formed by fifty pages. It includes the realities of transgender and intersex individuals and, adopted in 2021, is titled *Ley 2/2021, de 7 de junio, de igualdad social y no discriminación por razón de identidad de género, expresión de género y características sexuales*²⁹⁴. The legal act is formed by thirteen titles: general provisions; administrative treatment and general measures regarding gender identity and expression, and sexual characteristics; health assistance towards trans and intersex people; measures in the educational ambit; measures in the social ambit; measures in the labour ambit; measures in the familiar ambit; measures in leisure, culture and sport;

²⁹³Article 21.

²⁹⁴Translation into English: “Law 2/2021, of June 7, on social equality and non-discrimination based on gender identity, gender expression and sexual characteristics”.

measures in the ambit of communication media; measures in the Canary system of Security and Emergencies; and sanctions regime.

Within general provisions, Article 1 defining the aims of the law, includes the right to self-determination of gender and to “be treated in conformity with the gender identity in public and private ambits, and, in particular, being identified and accessing to a documentation in accordance with such identity²⁹⁵”²⁹⁶. Self-determination is also mentioned in terms of measures to guarantee such right in the ambits of work, public participation, education, culture, sport, health, social aids and others. The scope, established in Article 1 and also in Article 3, affects any individual present in the community or acting therein, regarding of his or her status in terms of residence. The public administration shall apply the law and also entities dependent on it, regardless the public or private nature of them.

The definition of gender identity, in Article 2(1), is also based in self-determination and non-binary identities are included explicitly in the trans definition as well.

The rights recognised by the law include the recognition of personality based on the definition established by each person regarding his or her gender, and the prohibition to impose medical or psychological criteria to access to LGR. In addition, the non-discrimination definition includes that the gender identity expressed shall be respected and the Canary Islands shall act accordingly, and the denial to do so is considered as discrimination. The gender differentiated environments shall be used by transgender individuals in accordance with their perceived identity and, where possible, a third option is to be offered²⁹⁷.

Minors are included in the law, as established in Article 6, and based on the self-perceived gender identity. The process will be carried out by the legal

²⁹⁵Original text: “A ser tratada de conformidad a su identidad y expresión de género en los ámbitos públicos y privados, y, en particular, a ser identificada y acceder a una documentación acorde con dicha identidad”.

²⁹⁶ Article 1(1)(c) of *Ley 2/2021, de 7 de junio, de igualdad social y no discriminación por razón de identidad de género, expresión de género y características sexuales*, 2021.

²⁹⁷Article 4.

representatives and, if there is evidence of neglect by them recognising the minor's gender identity, the social services are allowed to intervene.

The Title I, regarding administrative procedures, establishes the procedure in order to obtain LGR and other aspects. According to Article 7, the manifested gender identity shall be recognised within the public administration and other entities within the scope of the community without medical requirements, being treated in accordance with that identity. The previous rights and duties are not altered and, where the circumstances require it, the initials of the legal name would be displayed, including the preferred name and surnames. The process consists of the request by the interested person or legal representatives, indicating the gender they identify with and the forename. In this case, it is included the non-binary option as a possibility in legal terms. There are two options to fill the application, in person or electronically. The modification of the data can be requested in one instance or all the documents in the scope of the Autonomous Community.

Transgender women or trans-feminine people, in the conditions of victims of human trafficking or gender-based violence, are entitled to receive the same resources as the rest of women in the same condition²⁹⁸.

Title II refers to the health assistance. Article 20 defines such attention based on gender self-determination and prohibits the limitation of such right via any sort of medical requirements. Moreover, it establishes the right to identity in such basis, with a medical assistance according to the manifested identity of individuals. In addition, facilities differentiated by gender shall respect the right to identity of transgender individuals, being them able to attend to the one corresponding such identity and being treated accordingly. The identification in the health system shall display the preferred name and gender identity²⁹⁹. Article 32, of guarantees to the health workers, allows them to use the facilities according to their gender identity.

²⁹⁸Article 8(4).

²⁹⁹Article 25.

Within the school ambit, Title III, guarantees the same aforementioned right in terms of facilities for all the members of the scholar community, according to Article 33(3)(a). A specific protocol is established in Article 34, including the right to the mentioned parties to have their preferred name and gender identity in public documents, student cards, electoral lists, and others. Where necessary, the condition of adding the initials of the legal name is addressed. These rights, according to Article 37(6), are applicable to universities.

The social ambit, in Title IV, includes the possibility of facilities for guarded minors, disabled people or the elderly, amongst others, are used by transgender individuals respecting their gender identity when they are sex differentiated³⁰⁰.

The work ambit includes that collective bargaining agreements include a clause to protect the right to gender self-determination, under Article 42(6)(b), in order to avoid discrimination. The protection of the elderly includes the possibility to accede to facilities according to their gender identity, in Article 49(2).

The cards issued by libraries or cultural centres shall respect the transgender person's preferred name and identity, and in the usage of facilities segregated by sex, according to Article 50(5) and (6). Within the ambit of sports, in events and competitions, the transgender individuals will "be considered as participating attending to their gender identity and expression to all effects"³⁰¹³⁰², and sports cards shall be adapted too.

Considering the fact that the rest of the articles of the law are not relevant, it is possible to argue that the legal act is complete and attends to multiple circumstances, including a detailed procedure and non-binary identities at a legal level.

³⁰⁰Article 40.

³⁰¹Original text: "se considerará a las personas trans que participen atendiendo a su identidad y expresión de género sentida a todos los efectos".

³⁰²Article 51(1).

4.2.14. Community of La Rioja

The transgender law of the Community of La Rioja was adopted in 2022 and is exclusive of the trans community. It is titled *Ley 2/2022, de 23 de febrero, de igualdad, reconocimiento a la identidad y expresión de género y derechos de las personas trans y sus familiares en la Comunidad Autónoma de La Rioja*³⁰³. The legal act consists of eleven titles: general provisions; measures and actions in the educational ambit; measures in the health ambit; measures and actions in the labour ambit; measures and actions in the ambit of the minors, youth, and elderly; measures and actions in the cultural, of leisure and sport; administrative formalities of gender identity; media; measures in the police, judicial and other fields; and infringements and sanctions.

The main aim of the legal act, as defined in Article 1, is to “guarantee the right to gender self-determination of all the residents in the Autonomous Community³⁰⁴”. In theory, the law would not include those who are not officially residing therein or under other circumstances.

The right to gender self-determination is established in Article 4, indicating the right to being recognised as the perceived gender, treated accordingly, and identified within La Rioja, where possible.

Despite the original affirmation of residents in the Autonomous Community, within Article 5 that defines the scope of the law, including all individuals present, acting or residing in La Rioja are included, besides public institutions and other entities. The definitions include gender identity as based on self-determination of gender and also define non-binary identities³⁰⁵.

Within the actions in the educational ambit, in Title I, Article 9 establishes the right to be treated in accordance with the self-defined identity within education. In addition, the defence of self-determination of gender is to be implemented

³⁰³Translation into English: “Law 2/2022, of February 23, on equality, recognition of gender identity and expression, and rights of trans people and their families in the Autonomous Community of La Rioja”.

³⁰⁴Original text: “garantizar el derecho a la autodeterminación de género de todas las personas residentes en la Comunidad Autónoma”.

³⁰⁵Article 6 of *Ley 2/2022, de 23 de febrero, de igualdad, reconocimiento a la identidad y expresión de género y derechos de las personas trans y sus familiares en la Comunidad Autónoma de La Rioja*, 2022.

within the educational system³⁰⁶. All the members of the educative community are entitled to use their preferred name and being recognised accordingly in public documents, as class lists, elections lists and others³⁰⁷. The elaboration of a protocol is contemplated as well, in Article 11, including the use of the preferred name by students and the allowance to use sex segregated facilities according to their identity.

In the public university of La Rioja, according to Article 15(4), the preferred name can be used by students in administrative features that allow so. The case of private universities is not mentioned.

Title II reflects the measures in the health field. Under Article 16, health assistance shall respect the gender identity of its users, and under Article 17, they shall be treated accordingly and in the correspondent facilities when such are gender segregated.

Regarding minors, the youth and elderly, in Title IV, Article 27 establishes that minors are included within the scope of the law, based on self-determination of gender. That shall occur via their legal representatives, or social services might intervene where it is necessary to. In the case of the elderly, they shall be treated according to their gender identity, respecting it, and using the correspondent facilities, under Article 30.

Regarding social measures, minors guarded by the state will be allowed to use the facilities according to their gender identity, where such differentiation exists, and the same protection is applicable to disabled individuals and any resources of the autonomous community towards vulnerable groups³⁰⁸. The resources directed to women in terms of gender-based violence are also applicable to transgender women victims of the same kind of violence, under Article 36.

³⁰⁶Article 10(1)(b).

³⁰⁷Article 10(2)(b).

³⁰⁸Article 33.

The actions in the cultural, leisure and sports field include the possibility for transgender individuals to compete and participate according to their gender identity, as stated in Article 38.

The Title VII, regarding administrative process, establishes the conditions, scope, and different actions to be taken by the Autonomous Community of La Rioja. Pursuant Article 39, the public administration shall respect the person's gender identity and will provide the necessary documents in the scope of the community according his or her gender identity. The process consists of the application itself by the interested party, declaring the gender they identify with, including the possibility to identify as non-binary, and the preferred name. A written request is to be effectuated, in person or online, within a free process that does not require any sort of medical documentation. The rights and duties previously generated are not modified in any way. As it occurs in other legal acts, where necessary, the initials of the legal name would appear³⁰⁹.

The rest of the legal act is not relevant in terms of the concept of self-determination of gender. Considering that fact, it is to argue the legal act is complex, offering the relevant procedures and detailing the procedure. There are not any important restrictions to the right of self-determination.

4.2.15. Community of Castilla-La Mancha

The legal act of the Autonomous Community of Castilla la Mancha is the last one adopted chronologically. Adopted in May 2022, the law is titled *Ley 5/2022, de 6 de mayo, de Diversidad Sexual y Derechos LGTBI en Castilla-La Mancha*. The legal act does not explicitly mention self-determination of gender and includes the LGBTI community entirely. The parts defining the law are six titles: right to equality of treatment, opportunities, and non-discrimination due to general provisions; belonging to the LGBTI community; public policies to promote equality in the diversity of LGBTI people; measures to guarantee the equality of LGBTI people; and sanctions regime.

³⁰⁹Article 39.

The applicability of the law, as defined in Article 3, includes the Autonomous Community of Castilla-La Mancha, and any person, physical or not, therein. In addition, there is a distinction between actions directed towards prevention, education and sensibilization, applicable to all the population of the Autonomous Community; and, services derived from the legal act, which are directed towards those residing in municipalities of the community and who meet the conditions established in each resource.

Gender identity is not defined within the definitions the law establishes, complicating to determine whether such definition, in theory, is based on self-determination of gender.

The right to equality of treatment, opportunities, and non-discrimination, set in Title I, indicates in Article 6(2)(b) the “respect of the freely developed sexual orientation, identity, development or gender expression³¹⁰”. In addition, Article 6(3) includes the prohibition to require any tests to determine the sexual identity of a person, amongst others. Article 7 refers especially to the case of transgender and intersex individuals, prohibiting the pathologization of their identities, and defining the right to be treated and named based on their sexual identity when they are making use of administrative services.

The administrative measures, within Title II, include the case of transgender individuals. Although the writing of Article 11 refers to the LGBTI community, indicating that the administrative documentation shall be appropriate to the circumstances of the aforementioned community, the final clause establishes that “the juridical identity shall not be affected meanwhile the rectification³¹¹”³¹² of the sex is not modified at a national level. Therefore, it is not clear that the identity displayed in documents of the autonomous community will be according to the gender identity of the transgender person in question.

³¹⁰Original text: “el respeto de su orientación sexual, identidad sexual, desarrollo sexual o expresión de género, libremente desarrollada”.

³¹¹Original text: “no afecte a la identidad jurídica de la persona interesada en tanto no se produzca la rectificación registral”.

³¹² Article 11(1) of *Ley 5/2022, de 6 de mayo, de Diversidad Sexual y Derechos LGTBI en Castilla-La Mancha*, 2022.

Regarding the social ambit, in the third Title, Article 23(6), indicates that in sex segregated facilities the sexual identity of the people will be respected, in places where minors, disabled individuals, the elderly or other vulnerable people are attended.

In the health system, under Article 30, transgender individuals shall be treated with respect of their sexual identity and, where the facilities are segregated by gender, be hospitalised accordingly. In addition, Article 37 establishes the issue of a health card with the preferred name of the transgender individual in question.

The educational ambit also recognises the right to be treated respecting the sexual identity of the students, offering the possibility to be recognised by the preferred name and manifested identity within the school ambit, in public information. The process shall be effectuated by the legal representatives when the student is a minor. The segregated facilities shall be used as well according to the gender identity of the student³¹³. The same rights, according to Article 39(7), are applicable to the university ambit.

Within sports, transgender participants are allowed to participate according to their gender identity, under Article 41(2).

The rest of the articles of the legal act are not relevant. It is important to remark that the legal act, although it does not mention explicitly self-determination, could be considered as based in such, as it does not require medical requirements or psychological exams in order to obtain LGR. However, the processes are not established, nor all the entities where the preferred name can be modified. It is a rather short legal act, in terms of gender identity, and is more focused on the LGBTI community generally.

4.2.16. Comparison

The autonomous gender recognition laws emerged to offer a wider protection of the right to gender identity for transgender individuals, as the current national

³¹³Article 38.

law in force did not allow LGR without medical and psychological requirements. They offered, thus, a right which was not even mentioned at national level, self-determination of gender. It is relevant to address that, comparing the national project of transgender law based on self-determination of gender to the autonomous legal acts, the latter include a wider range of possibilities. While minors have age restrictions in the project of national law, the Autonomous Communities do recognise such right to minors without restrictions. The same phenomenon occurs with foreigners, who can only accede to LGR according to the project of law if they cannot modify their gender in their country of origin. As aforementioned, this requirement provokes that, when the countries are those where the procedure is not based on self-determination, the right to LGR would be threatened. This requirement is not present in the autonomous legal acts.

Most of the autonomous legal acts of Spanish Autonomous Communities explicitly recognise the right to gender self-determination, although two cases: Catalonia and Castilla-La Mancha, do not directly refer to that right. There are differences amongst the laws, in which the ones who are exclusive of the transgender community, or including intersex individuals as well, tend to be more comprehensive of the ambits where self-determination can be exercised than the legal acts involving the LGBTIQ community in general.

Despite the fact that at a national level, the legal act in force does not allow to obtain LGR unless the applicant has obtained a psychological certificate of gender dysphoria and has been under HRT for two years, the autonomous legal acts offer the possibility to obtain LGR at an autonomous level, being able to modify the documents that depend on the autonomous community, and the case of Navarra, the authorities of the community will display a valid document for identification respecting the identity of the person. This is especially relevant considering the fact that, usually, the valid documents for identification are the Identification Document, Passport or Driving License, documents that depend on national authorities.

The autonomous laws allow the use of gendered facilities according to the self-perceived gender identity in all of the cases, accessing to resources to victims of gender-based violence for transgender women in most of the autonomous communities with a transgender law in force, and being recognised within the educational and health field with the pertinent documentation. The recognition of gender-based victims who are transgender is not established in the legal act of Cantabria, offering a more reduced protection within that community. The same Autonomous Community does not establish whether sport competitions can include transgender individuals in the category which corresponds to their gender identity. Although non-binary identities are not usually recognised, some communities as La Rioja and the Canary Islands offer the possibility for individuals to be identified as non-binary within the scope of the territory.

The protection of the right to gender identity of transgender individuals within the autonomous communities which have legal acts in force is based under the same principles. However, some acts are more comprehensive than others. The law of Castilla-La Mancha, e.g., does not specify which documents can be modified or a procedure in order to obtain documentation according to the self-perceived gender identity. The lack of specification in terms of procedure is maintained in other legal acts as Cantabria, Basque Country, the Balear Islands, Murcia, Extremadura, and Catalonia.

The most complete legal acts, acknowledging the procedure in order to obtain LGR, addressing the documents that can be modified and with a wider range of protection are the legal act of La Rioja, the Canary Islands, Aragon, Valencian Community, Madrid and Andalusia.

5. Conclusions

There is an evident growing tendency on adopting legal acts based on the self-determination of gender. The ground for such proceeding is reduced habitually to adult individuals and rarely to minors, where the request shall be supervised by a health professional. Since 2014, where the first self-determination transgender law was adopted in the EU, some Member States have followed the path and

others are going through the process to do so. It is important to acknowledge the limitations of each legal act and trace the trajectory of the different legal acts that have been entering into force.

The principal objective of the research was to study how the right to self-determination of gender is implemented in each Member State of the European Union which has adopted legislation in the matter and deepening in the case of Spain. The secondary objectives were to analyse the limitations and opportunities of each legal act, comparing them and, in the particular case of Spain, comparing the project of legal act to be in force when the Parliament approves it for a second time, and the in force autonomic laws.

Regarding the first objective, the principal scope of the legislation of the six Member States which have implemented legislation on the matter that has been analysed are the inclusion of minors, foreigners, non-binary identities, waiting period between a first request and the acceptance, possibility of denial of the application, inclusion of adults under guardianship, recognition of resolutions from other countries, necessity of a professional's opinion, possibility of a second change of legal gender and other particularities of the law.

The current tendency in terms of LGR is to include a procedure that is based on self-determination of gender, and where the application consists of a statement from the interested individual in which the person affirms belonging to the opposite gender than the one assigned at birth. Besides, they include addressing the conditions established in the law of each Member State.

The limitations of the right to gender self-determination, generally, involve certain characteristics: age, nationality, filiation of children, belonging to a third gender category and others. Minors, but in the case of Denmark, are recognised in the law. However, they lack the right to gender self-determination in all Member States studied but Malta and Luxembourg. The rest of the countries require the opinion of a professional, usually requiring medical or psychiatric documents. Although in Portugal the opinion shall not involve in a pathological process, the third opinion is still required. In addition, there is an age limitation, of between twelve years of age and sixteen, depending on the country. The less

restricting legal acts in that sense are Malta, without age limitation, and Luxembourg, where minors above five years of age are allowed to have their legal sex modified.

The limitation in terms of nationality provokes that, in certain circumstances, immigrants are not allowed to modify their gender marker if they do not possess the nationality of the country in question nor have the condition of refugees. That occurs in Belgium and Malta, where they need to be refugees or prove that their request is likely to be denied in their country of origin. Thus, if such country has a legal act not based on self-determination, the right to self-determination of gender would be threatened. In the case of Portugal, not even in such cases they would be allowed of such modification. The recognition of a change of the registry of sex made under other legislation is not present in the cases of Belgium and Denmark.

The limitations regarding the gender options are present in all cases but Denmark and Malta, where a third gender category is available in passports. The former has the particularity of only indicating the existence of a different category other than male or female, but without any clarifications. The latest has the particularity that included the option two years after the adoption of the legal act. In the rest, there is no possibility of being recognised with a different option than male or female. It is important to address that, although it does not offer a third option yet, is likely to do so after the ruling 99/2019 of the Belgian Constitutional Court in 2019 declaring the lack of non-binary options as unconstitutional.

Although it might seem that, after the adoption of the first self-determination of gender law in the EU, in Denmark, that included a waiting period of six months, the tendency of that legal act would have been followed, there is a lack of tendency to include such waiting period. Thereby, the time limitation is only present in Denmark and Belgium.

There are some limitations in terms of the times where the legal gender can be modified. Portugal, Malta, and Ireland only allow a second modification of the gender marker with a court approval. In addition, Belgium originally prohibited further modifications, which the Belgian Constitutional Court declared void.

Further modifications are not mentioned. The limitations to the times the modification can be effectuated can also threaten the right to gender self-determination.

The specific limitations exclusive of certain legal acts are the following. In Portugal, it is not having been incapacitated due to psychic reasons and, in Luxembourg, the criminal record is asked. Although it is not specified how it can influence the decision, it is a remarkable aspect of the law.

The benefits of the legal acts analysed, regarding self-determination of gender, involve the absence of a third party opinion required in order to obtain Legal Gender Recognition, which is the principal advance of laws based on such concept. One of the principal benefits applicable to, not all the legal acts analysed but some of them, is the inclusion of minors as individuals with the right to self-determine their gender, in the cases of Malta and Luxembourg.

Regarding the recognition of non-binary identities, the principal benefits are found in the Denmark case, where they are recognised, and in Malta, where, although not recognised at a state level, if the modification was made in other country that recognises such identities, then the aforementioned identity would be recognised in Malta.

Considering the limitations and benefits of each law, the countries with the most advanced legal acts are Malta and Luxembourg. They offer a wider recognition of minors, without age exclusions in the case of Malta, and only until five years of age in Luxembourg, and different requirements.

Furthermore, Luxembourg includes adults under guardianship, immigrants and includes the possibility for a second change of gender, alongside with the recognition of LGR in other countries. However, the case of Luxembourg is also an example of arbitrary criteria, as the submission of the criminal record, that is not related with the modification of the gender marker. These sorts of requirements can threaten the right to privacy or to personal development if the request was denied on those terms.

The Danish law is the most restrictive, excluding all minors and without any explicit mention of the case of LGR in a different state, adults under

guardianship and with the longest waiting period. Despite that fact, it is the only one which offers a third category in terms of legal gender.

It is relevant to address that the national legal acts analysed have clauses determining the prohibition of medical requirements for adults to obtain LGR. Although that occasionally occurs in minors, the tendency to respect the right to bodily autonomy in those terms is remarkable.

The Spanish case is rather particular, and the analysis shows that, meanwhile it lacks a national legislation based on self-determination of gender, the majority of autonomous communities have adopted autonomous legal acts based on that concept and regulated the right within the scope of the community. The evolution of self-determination legal acts has evolved since the appearance of the first autonomous legal act based on such concept, in 2014, until the approval by the Spanish Parliament of a national legal act based on self-determination of gender, which is not in force yet, but was adopted in Spain in February 2023.

However, it is relevant to address how in the case of Spain, not only autonomous legislation have offered a wider protection of the right to gender self-determination than the national actions, but also are more comprehensive in terms of requirements than the project of national law. As the latter includes a waiting period between a first petition and a second appearance to obtain LGR, the autonomous laws studied lack such requirement. In addition, there are no restrictions for minors in order to have their self-defined gender identity displayed in the documents from the autonomous community, while the project of national law does not allow minors below twelve years of age to have their sex registry modified. Immigrants are also included within the autonomous legal acts, meanwhile the project of national law is restrictive with that condition. At the same time, non-binary identities are not recognised in the project of law, and some Autonomous Communities do recognize the possibility to be officially identified as non-binary.

The overall scope of autonomous Spanish legislation in terms of gender self-determination involves the recognition of the preferred name and self-defined gender identity in documents that depend on the autonomous community and

have validity therein, such as health cards, educative documents and similar. It allows, furthermore, to access to sex-segregated facilities according to the identity of the person, regardless of his or her status at a national level. Although most of the legal acts recognise the same rights, the precision of them, details on procedures are not defined in each case, provoking significant differences amongst laws.

The law that recognises a minor number of circumstances and procedures is the legal act of the Basque country. Therein, the LGR in the educational ambit is barely specified and the recognition in fields as sports is not mentioned. Par contrary, other legal acts as the one from Community of La Rioja and Canary Islands, detail the procedures in order to obtain official documents respecting the interested person's identity, and recognise non-binary identities at an autonomous level, as aforementioned. Other communities as the Community of Cantabria mention non-binary identities within the definition of transgender, but do not specify whether such identity can be displayed in official documents.

Besides, although, in theory, all autonomous legal acts are based on the concept of self-determination of gender, some of them do not mention it on any occasion. That is the case of the transgender law of Catalonia and Castilla-La Mancha.

There are differences between the legal acts which only involve the transgender community, or both transgender and intersex individuals, and those laws which include the LGTBQ community in general. Although, in principle, it could seem as though they can offer the same possibilities, in this case, exclusively transgender laws tend to have a wider range of details in the law.

The comparison in the autonomous legal acts reflect that, although some rights established therein are rather common in most laws, there are significant differences amongst some of them, creating disparities within the Spanish territory.

It is relevant to address that, a procedure widely used in the autonomous legal acts is, when the legal name displayed nationally has to be used, the individual can use the initials of the legal name, followed by the surnames and preferred name. This method, used in the Portuguese law as well, which may have been

influenced by autonomous legal acts of Spain, allows transgender individuals who have not obtained LGR nationally, to not expose themselves publicly.

The self-determination of gender laws which have been studied in this research tend to align in general with the standards of protection of transgender human rights regarding Legal Gender Recognition. The aforementioned proposals of institutions such as the European Commission, insisting on adopting legal dispositions that allow self-determination of gender, are being adopted by some EU Member States. Notwithstanding that fact, some of the recommendations, as the inclusion of minors without age restrictions, recognition of immigrant's gender identity or recognition of non-binary identities, vary deeply depending on the state. In the case of non-binary identities, the recognition is rather anecdotal.

It is relevant to address how Spain adopted self-determination-based legal acts at an autonomous level long before there was a proposal of national law based on the same model. Even with a current proposal of law to be adopted, the right to self-determination of gender encounters less restrictions at an autonomous level. That occurs in the autonomous communities which have a legal act in force on the matter. Under those circumstances, autonomous laws have helped to develop the right to self-determination of gender within the Spanish territory. Those legal acts barely imply restrictions of age, nationality or similar, committing with the recommendations in terms of LGR based on self-determination of gender.

Possible extensions of this work, or other fields of study could be to include new legal acts regarding self-determination of gender, as they are adopted in the future. In addition, the experiences of transgender individuals when accessing to LGR through these legal acts could be studied, in order to check how the limitation of the law influences the experiences of the aforementioned community.

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