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Gender and the Biopolitics of Public Order: Notes from Spain

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Abstract

This paper critically addresses the logics of exceptionality inherent to emerging regulations of the gender field, with a focus on Spain's recent self-determination-based regulation of gender. To achieve this, it offers a biopolitical analysis of the concept of "public order" and its influence on gender governance, drawing parallels to Agamben's concept of the state of exception and exploring the connections between contemporary regulations and the gendered public order of nineteenth-century France. Finally, it analyzes the exclusions and restrictions that the Spanish trans law reserves for migrants, non-binary people, and minors, contributing to the ongoing discourse on the limitations to gender autonomy in contemporary Western societies.

> It is thus not lack of cleanliness or health that causes abjection but what disturbs identity, system, order.
>
> Julia Kristeva

In March 2023, after decades of trans, LGBT, and queer activism, the so-called "trans law"[1] was approved in Spain. It replaced the "gender identity law" of 2007,[2], which had established as preconditions for legal gender change that an individual be of legal age,[3] present a diagnosis of gender dysphoria,[4] and undergo mandatory hormone therapy.[5] As a result, an administrative process in which one declares their self-perceived gender identity[6] will now suffice for correcting proper names and legal gender markers in personal documents. According to the new regulation, however, legal gender change is restricted to a rather limited, pre-given set of options. It is not up to the applicant to decide how many genders there are or what the corresponding legal categories might be called. Trans and gender-non-conforming people will also not be able to decide whether gender is a discrete category or, instead, a spectrum; how fluid or stable one's own gender might be or if, in a final reckoning, one actually identifies with any of the available options. Moreover, access to legal gender change is conditioned by factors such as age and migratory status. Trans migrants will only benefit from the new regulation if

they can prove that they do not have access to *any* procedure for legal gender change in their country of origin, regardless of whether the option available entails a pathologizing approach, forced sterilization, or any other abusive intervention as a requirement.[7] Minors, for their part, must be older than 16 to be allowed to determine their legal genders themselves. Otherwise, they might be subjected to different kinds of family,[8] judicial,[9] and even medical tutoring.[10]

We can thus agree that while the new regulation allows for increased gender autonomy, it falls short of fully embracing a "self-determination" model for legal gender recognition. This nuanced reality was underscored during an expert interview with Saida García,[11] renowned for advocating the rights of transgender minors in Spain. In response to my use of the term "gender self-determination", she paused, looked at me, and posed a pointed question: "Self-determination? For whom? And in what terms?"[12]

This line of questioning serves to represent a critical interruption of the celebratory tone with which the law was received, for the most part, within the ranks of Spanish LGBT activism. While acknowledging the significance of the new legislation, it urges a nuanced examination of the underlying assumptions and complexities inherent in the concept of self-determination within the legal framework of gender recognition. With this goal in mind, the present inquiry aims to encourage critical reflection on the limits of "self-determination-based" emerging regulations of the gender field.

It is worth noting, nonetheless, that this essay is not comparative in the methodological sense. Instead, it intends to explore a set of questions that, in my view, haunt the gendered public order of Western modern law. In a state-centered regime where legal gender markers are imposed, recorded, and displayed in personal documents—with significant symbolic, institutional, and penal consequences, and subject to change based on pre-established restrictions and bureaucratic processes—can we genuinely speak of "self-determination" in the legal sphere? Within such a legal system, and even when non-pathologizing procedures are made available, can the determination of gender identity be considered as a prerogative of the individual? Furthermore, when biomedical power retreats from legal gender change procedures, does this suggest that the state's disciplinary powers over the gender field have been reduced? Or might this retreat signal, instead, an expansion of the state's regulatory powers over it? Finally, are the seemingly conflicting options raised by these questions genuinely opposing, or do they form a Möbius strip that is fundamental to the governance of gender in Western liberal democracies?

To address these concerns, this essay will proceed by way of the following steps. It begins with a biopolitical reading of the notion of public order, highlighting its genealogical relationship with state governance of embodied life projects. Then, it draws some fundamental continuities between the "European public order" (ECtHR 2020) and the gendered public order as it was enforced in the times of the Napoleonic Code. For that purpose, it calls attention to the similarities in the registry of "sex" and "gender" in two specific birth certificates: that of Herculine Barbin, from nineteenth-century France, and that belonging to Y., a trans man whose case against the Belgian authorities was resolved by the European Court of Human Rights in 2022. This intertwined reading provides the basis for rethinking the relationship between "sex" and "gender" from the point of view of the biopolitics of public order; in contrast with those readings that establish a stronger, historical distinction between the "biopolitics of gender" (Repo 2017) and those of sex. Finally, the impact of trans-exclusionary *liberal* feminists[13] on the process of approval of the Spanish trans law will be

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addressed, and the restrictions faced by migrants, non-binary individuals in the resulting regime of gender exceptionality.

1. The order of the exception

In the first chapter of *State of exception,* Giorgio Agamben (2005) addresses an intriguing ambiguity that would come to be somewhat obscured in the legal architecture of modern Western states. According to his meta-juridical approach, the "state of exception" would be the name for the legal surface where the liberal rule of law becomes indistinguishable—for exceptional motives and at exceptional times—from authoritarian forms of sovereign power. For that reason, Agamben reminds us that law scholars tend to disagree on whether the state of exception represents an internal limit of the rule of law or, rather, the first step taken outside it. From his point of view, this "doubt" would be inherent to the ambivalent topology of the separation of powers which is signaled by the figure of the state of exception, understood as a suspension of the law that has, nonetheless, a legal form. Moreover, this fold of the law would be laden with biopolitical significance, in the Foucauldian sense, since the order of life would enter that of the law, precisely, via the threshold of exceptionality:

> If the law employs the exception—that is the suspension of law itself—as its original means of referring to and encompassing life, then a theory of the state of exception is the preliminary condition for any definition of the relation that binds and, at the same time, abandons the living being to law. (Agamben 2005, 1)

In this way, Agamben provides us with a paradigm for thinking the relationships in play between the juridical order, the logics of exceptionality, and life. This was a direct inspiration for the way Jasbir Puar addressed the discourses of Western sexual exceptionalism that render certain homosexual bodies as worthy of protection at the expense of depicting Arab masculinities as a threat, hence justifying Islamophobic, homonationalist politics (2017, 3–9). This is also the sense in which Paul Preciado, in *Can the monster speak?*, compares the relationship between the trans body and heteronormativity to the one Lesbos maintains to Europe, "as a border whose form and extent can be perpetuated only through violence" (2021, 35). In a similar way, in this paper I interpret emerging procedures on legal gender change as a bureaucratized exception that perpetuates the state's authority to categorize, oversee, and limit the range of possibilities within the gender field.

As a starting point, we should recall that, for Agamben, the detainee camps maintained by the United States during the "War on Terror," where individuals were held in a state of "indefinite detention," constitute a paradigm of contemporary biopolitics in the West (1998, 181). According to Agamben, in such camps the captives' bodies would be handed over to the law fully, so to speak, while at the same time being kept utterly out of its reach. To that extent, Agamben distances himself from Judith Butler's discussion of these irruptions of sovereign power as an "anachronism in the political field" (Butler 2004b, 53). For Agamben, it is biopower at its "worst" that manifests itself in those instances, rather than a complex interplay among sovereign and biopolitical forms of governance. On the other hand, critics of Agamben's view, such as Butler themself, have referred to the negation of agency on the part of the detainees which Agamben's reading entails (Butler 2015, 79–80). This is, in my view, a necessary

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criticism if we are to acknowledge the forms of political action which might arise in even the most adverse of situations.

For the purposes of this inquiry, however, I uphold the biopolitical importance attributed by Agamben—but also by queer scholars like Jasbir Puar, Paul Preciado, and others—to the exception as a disciplinary field of embodied subjection. Specifically, I am interested in the logics of exceptionality at play in emerging regulations of the gender field, where once exceptional norms become part of the ordinary public order. This is especially important if we consider that even the so-called "self-determination"-based regulations of the gender field, such as the Spanish trans law, nonetheless enact an essentialist understanding of biological *sex* by considering it as a default identity and as a boundary that either cannot be crossed—as in the case of migrants and non-binary individuals—or one that cannot be crossed *yet*—as in the case of trans and gender-non-conforming minors.

Curiously enough, "public order" is not a term that Agamben critically addresses when discussing the process by which the exception becomes part of ordinary governmental practices. However, this legal figure maintains crucial links to the state of exception, as it is made evident in the first place by the fact that the state of exception is often declared for its maintenance. Furthermore, law scholars face very similar challenges and paradoxes in their debates of the state of exception when dealing with the polysemic and highly contested notion of public order.

2. The biopolitics of public order

Let us examine, very briefly, some of the parallelisms that exist between the two notions: the state of exception and public order. In the first place, and mimicking the state of exception's suspension of the law, public order is said to begin its rule precisely where written laws end. This is made evident by the fact that, for some law scholars, the public order represents a necessary extension of the law, a surplus acting as "a clause of *closure* of the legislative system" (Acedo Penco 1997, 371), by allowing judges to perform a "*quasi-legislative* function" (Navarro 1953, 61). For instance, in the absence of an explicit law regarding any specific conduct, jurors often offer a *public order-based* sentence instead. In this sense, the notion of public order haunts liberal governmentality with the ghost of sovereign power in a very similar way to the state of exception in Agamben's view. In contrast, though, public order allows for life governance in any conceivable instance thanks to the *normalization* of sovereign power[14] in everyday administrative and legal practices.

From this point of view, public order is "the other side" of the Möbius loop that Agamben had in mind when pointing out the ambivalence between liberal and totalitarian regimes[15] that the logics of exceptionality allow for. In complementary fashion, the performative effects of the uses of this notion destabilize the Foucauldian contrast between highly condensed forms of sovereign power and a micro-physically disseminated biopower. Its use in the hands of jurors and policymakers, in particular, tends to multiply the sources of sovereign power in rapidly evolving social and legal fields, as is often the case with emerging biotechnologies, medically assisted reproductive practices, or non-binary genders, to name a few. It should be noted, however, that this micro-physical distribution of sovereignty does not take place solely in the legal arena *as such*. The law exceeds itself by acting as a social *norm*, as Foucault himself reminds us, when introducing the notion of biopower:

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> I do not mean to say that the law fades into the background or that the institutions of justice tend to disappear, but rather *that the law operates more and more as a norm,* and that the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory. (1978, 144; emphasis added)

Similarly, even if the strictly legal dimensions of public order have a disciplinary impact, they are also involved in a broader biopolitical field. Furthermore, the order that the notion of "public order" points to is enforced by myriad social institutions. This is what legal scholar Majia Holmer Nadesan emphasized in a study on liberal governmentality, when noticing that "parents, families, health experts, and other members of everyday society enact decisions about life and death, in part by rendering decisions about what constitutes normality, security, *and the conditions of public order*" (2008, 26). Indeed, as the latter heterogeneity of social actors aptly suggests, sharp distinctions between "public order" and the moral order of society are doomed to a failure that is not simply the result of the proverbial lack of preciseness of the term. On the contrary, the overlapping of the order of the law and the moral order has been *precisely* the function of this notion since its irruption in the sixth article of the Napoleonic Code, where it was established that "public agreements must not contravene the laws which concern public order *and good morals*" (Barrister of the Inner Temple 1824; emphasis added).

To illuminate the scope of this telling juxtaposition, it is worth noticing that the sole reference to the public order that was made in the discourse of presentation of the *Code* referred to it as a regulatory frame for the newly born institution of civil marriage, and that it was accompanied by a detailed explanation of the benefits of monogamy, fidelity, and of the gendered division of labor. In the process, *order* itself was advanced as a fundamental biopolitical principle, intimately linked to the moral order of the bourgeois family:

> When a nation is formed, there are enough people, the purpose of propagation [of the species] becomes less urgent, the gentleness and dignity of marriage are of greater concern than its purpose, *a constant order* is sought within families, to give love so structured a dominion that it *may never disrupt that order.* (Portalis 2016, 19; emphasis added)

Ever since, and under the influence of the jurists of the Enlightenment, the overlapping of the legal and the moral spheres when it comes to the maintenance of public order has become a distinguishing hallmark of Western law.[16] Hence, it should not be surprising that the concept of public order, along with the rhetorical contexts in which it operates as a regulatory mechanism, holds a prominent position in legal debates surrounding sexual and reproductive issues. This is also evident in efforts to identify, regulate, and punish perceived threats to the *gendered* public order. Consequently, instances such as those explored in the following pages often see this concept invoked as a shield against calls for increased gender autonomy, depathologization, and recognition of non-binary genders.

3. In the name of gender

It is important to recall, nonetheless, that "gender" was not a term that the jurists had exactly in mind when this notion was introduced into Western modern law. As a matter

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of fact, as Paul Preciado (2013, 27; 2009, 3), Jemima Repo (2017, 30–31), and others have shown, the term itself was popularized under the influence of John Money's research on intersex children and the (forced) malleability of gender roles and, later, appropriated with shifting meanings by feminist, trans, and queer thinking and social movements. I tend to disagree, though, with those readings that attribute a strong biopolitical significance to the generalization of the use of the term "gender" in the middle of the twentieth century, for reasons that might be relevant when it comes to exposing the disciplinary character of public order in relation to the gender field.

In this regard, it is important to consider that the notion of "gender" has been transitioning—so to speak—from the grammatical to the social field "through the ages . . . to evoke traits of character or sexuality" (Scott 1986, 1053). To make this point, Joan Scott noted that the *Dictionnaire de la langue française* of 1876 included a reference to masculinity and femininity as two distinct *subjective* categories, referring to them by the term "gender [*genre*]."[17] She also recalled various usages of gender in this social sense, such as Gladstone's statement that "Athene has nothing of sex *except the gender*, nothing of the woman *except the form*" (Williams 1983, 286; emphasis added).

There are, of course, as many specificities in present-day usages of "gender" as there are gender theorists. Considering its history, however, it would not seem accurate to attribute to Money the "coining" of the term to signal a cultural category separated from "sex," as Paul Preciado expresses it in *Testo junkie*:

> American pedo-psychiatrist John Money coined the term "gender," differentiating it from the traditional term "sex," to define an individual's inclusion in a culturally recognized group of "masculine" or "feminine" behavior and physical expression. (Preciado 2013, 27)

Similarly, Repo correctly asserts in her monograph *The biopolitics of gender* that Simone de Beauvoir did not "coin" the term, but she would seem equally misguided in stating this coining would have to wait another six years (2020, 79), referring also to Money's work. Her claim that Beauvoir did not "develop" the concept is not very accurate either considering the lasting influence of Beauvoir's analysis of the process of becoming a woman, as an aspect separate from having been born as a member of the female sex, as Judith Butler convincingly argues in one of their very first essays on Beauvoir's work (1986). Furthermore, it is appropriate to recall that, when Beauvoir discusses and ironically rejects Hegel's dialectics of the human "kind [*genre*, in the original],"[18] what is at stake is, precisely, the way in which the division of the species into two *genres* turns into an essential attribute of the subject (1956, 35). On this point, the translation of *genre* by "kind" in English should not elicit the protagonism this term enjoys in the very first pages of the opening chapter of *The second sex*, nor its intimate closeness to the characterization of the cultural and subjective life of sexual difference.

It would not seem fair, hence, to trace back feminist uses of "gender" *solely*, and not even *mainly*, to the work of Money and of other psychiatrists of the 1950s. I agree with João Manuel de Oliveira in this regard when they affirm that gender "is not about a single concept; it's about a multiplicity subsumed under the same name or, in some cases, not even subsumed under the same name"[19] (Oliveira 2012, 51; my translation). This is one of the reasons I also do not subscribe to the analysis according to which, during the 1950s, "a new apparatus for the regulation of life processes" (Repo 2015, 47) would have been put into place. Certainly, the evolution of biotechnologies and of the epistemological frames they are embedded in have a direct impact in gendered bodily

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life. At the same time, it seems crucial to recall that, from the state's point of view, in the end, how the distinction among sex and gender is conceptualized is not quite as relevant, nor is the availability of gender-affirming technologies and related treatments, as the very fact that bodies must be classified into two or, eventually, three categories—whether we call them kinds, or sexes, or genders—and that this information is thoroughly captured by a bureaucratic apparatus given that it "pertains" to (Köler and Ehrt 2016, 50) or it is "inalienable" (ECtHR 2017, 38) from the public order.

In the resulting regime, the gendered subject cannot control the effects of this seizing of one's own body and lived experiences of gender by the law in relation to civil and penal provisions, state protections, affirmative policies, cross-border mobility, and gender-specific forms of "administrative violence," to use the words of Dean Spade (2015). Furthermore, the state's organization of the gender field directly impacts other sources of gender normativity,[20] including the aforementioned availability of gender-affirming technologies and related treatments. Consequently, none of the heterogeneous biopolitical spheres involved in the social organization of gender, nor the correlating struggles they point to, should occlude the ways in which gender norms solidify to conform a gendered public order which is *in itself* a major source of disciplinary violence[21]—regardless of whether it is exerted in the name of "sex" or "gender."

4. Gender as a side-note

To illustrate the latter point, I would like to consider a telling parallelism between the administration of "sex" by the state, in relation to what was referred to as "hermaphroditism" in the nineteenth century, and that of "gender" in contemporary "European public order"—a common phrasing by the European Court of Human Rights (ECtHR 2020).[22]

Those familiar with the case might recall that Herculine Barbin's birth certificate was not reissued when a medical analysis concluded that the original information that it contained was a "mistake" (Foucault 1981, 147). Rather, to rectify Barbin's civil status, a note was "inscribed in the margin" of the birth certificate (151). In this manner, the performative force of the state was once again directed towards the same document, dramatically impacting Barbin's life. They were expelled from the female-only religious institution where they lived and studied, struggled to survive in the masculinized labor market, and reportedly attempted suicide in a street appropriately named "rue de L'Ecole-de-Médicine" according to the nineteenth-century Paris police report.[23]

Historical and biographical differences aside, this case resounds in significant ways with the recent case of Y. v. Poland, which originated when Polish authorities corrected the birth certificate of a trans man in the very same way, that is to say, "as annotation to his original birth certificate" (Holzer 2022, 176). Understanding that making his trans history public would be a violation of his right to privacy and, thus, of Article 8 of the European Convention of Human Rights, Y. initiated legal proceedings which ended up in the hands of the ECtHR. In 2022, his claims were rejected in the name of the state's right to preserve "the historical nature of the birth record system" (ECtHR 2022).

By doing so, the ECtHR did not negate the existence of a conflict between the "corrected" birth certificate and the right to privacy, but it defended the need to find a "fair balance between the different interests at stake" (2022, 17): Y.'s right to privacy on the one hand and the "public interest" (2022, 16) on the other. But more specifically, what does this "public interest" refer to? The Court is rather vague in this regard, yet we may infer that it has to do with Article 8 of the Convention, according to which there

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shall be no interference in the exercise of the right to privacy except in one all-encompassing case:

> such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. (ECtHR 1950, Article 8)

In other terms, "such as is in accordance" with the countries' public order is precisely the technical name of this heterogeneous mix of concerns. In this sense, by defending the right of the Polish authorities to keep the information in the birth certificate about what it terms, alternatively, "sex assigned at birth" (ECtHR 2022, 1, 9, 10, 12, 13, 16) and "gender assigned at birth" (ECtHR 2022, 13, 14, 15, 16),[24] the Court is invoking the exception of public order to the exercise of fundamental rights. This is the sense in which in this and other similar cases, as Lena Holzer puts it, "trans persons are rendered *the exception* by making their trans history legally visible" (2022, 178). To conclude then, despite the different positions they occupy in the gender field, and in time, both Barbin and Y. were subjected to a quite similar, historicized superposition of gender performatives that exposes a fundamental continuity between the way trans and gender-non-conforming bodies are subjected to the mandates of the gendered public order.

I do not point to this parallelism between "corrected" certificates to underscore the specificity of intersex and trans forms of medico-legal oppression. Certainly, in some important respects, Barbin was subjected to a *sex* reassignment while Y. was instead dispossessed of a legal *gender* marker. In other senses, however, the category of "sex" cannot be so neatly distinguished from "gender" since both are intertwined in the disciplinary powers of the state's registry and administrative procedures. I would disagree with Repo's view that Barbin would have been subjected to a *merely* "anatomical and legal disputation" of their body's *sex*, understood in opposition to traits such as "behavior, mannerisms, speech, unconscious desires, and personal preferences" (32) that she associates with gender. Indeed, Barbin's body only resulted in a correction of the "mistake about the sex" (Foucault 1981, 137) in conjunction with the succession of "alarming" facts leading to the medical analysis, such as the appreciation that "in daily contact with girls from 15 to 16 years old, she experienced emotions that she had difficulty in denying herself" and that "her dreams were sometimes accompanied by indefinable sensations" (137). It was precisely because of these subjective elements that Barbin sought out advice, charging Chesnet with the task of giving his "opinion concerning her true sex" (125). The subsequent medical examination added considerations on the masculine tones appearing in Barbin's "speech" (136) and on the "undescriptive sensations" that they felt (136). At the end, only by taking the anatomical examination in conjunction with these desires and unconscious elements could the question "is Alexina a woman?" (Foucault 1981, 127) be answered, and the heterosexual economy of bodies and desires, restored.

In Y.'s case, we find a very similar combination of anatomo-biological and socio-psychological traits in a single document, since his birth certificate states at the same time his "sex", which was assigned via a medical examination of his newborn body, and his gender identity. In both cases, then, the tensions arising between anatomical and cultural traits were tamed by way of an exceptional categorization of the conflictive body in the terms provided by a binary public order entailing a historicized confusion between

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sex and gender—with the result that, as Judith Butler famously expressed in *Gender trouble*, "the distinction between sex and gender turns out to be no distinction at all" (1999, 11).

5. A trans-friendly public order?

At this point, it is important to notice that, despite the historical inertia of public order as a "limiting archetype of fundamental rights"[25] (Martínez 2014, 769; my translation), it has become increasingly common to emphasize its role as grounds for rights-related claims. For instance, this is what a recent judicial order of the Spanish Supreme Court highlighted precisely in relation to gender recognition:

> In a social and democratic state under the rule of law, the recognition of fundamental rights of its citizens constitutes the fundamental core of public order, and *other questions that had traditionally considered to be included in that public order, such as the unavailability of civil status* [referring to proper names and legal gender markers] *now present* a secondary importance in relation to the exercise of fundamental rights.[26] (Tribunal Supremo 2016, 12; my translation, emphasis added)

By responding in this way to the petition for gender change issued by a transgender boy when he was 12, the Court's ruling acknowledged the restrictive role public order has played in relation to gender autonomy. At the same time, it also recognized that the "unavailability" of gender markers for the sake of maintaining public order would now hold a position of secondary relevance because of the influence of various international and national statements and laws, such as a resolution by the Parliamentary Assembly of the Council of Europe recommending the implementation of accessible procedures for name and gender markers change regardless of age, the Yogyakarta Principles, and the growing amount of emerging self-determination-based legislation in various countries.[27]

Undoubtedly, this was an essential point of a crucial ruling that prompted the Constitutional Court of Spain to declare the unconstitutionality of the age restrictions to legal gender change, emphasizing the importance of minor's "maturity" and the "stability" of their trans or gender-non-conformity regardless of age. Both rulings paved the way for the new trans law in Spain, which is inspired by the principle of gender self-determination and allows minors to change their legal gender markers within the restrictive frame discussed in the following sections. By doing so, Spain adds its name to a growing list of countries allowing minors legal gender change,[28] according to the Steering Committee on Anti-Discrimination Diversity and Inclusion (CDADI 2022) comprising 19 Member States of the European Union in June 2022.

As the above-mentioned ruling shows, progressive gender recognition for minors is closely linked to the "international trend toward the full depathologisation of transgender persons" (CDADI 2022, 15), which, following the lead of Argentina in 2012,[29] included 19 OECD countries in 2022. These emerging regulations regarding gender entail an emancipation from medical supervision that primarily affects trans and gender-non-conforming people, who are no longer obliged to comply with pathologizing requirements to have their legal gender changed. Secondarily, this transition will affect the state itself, which has increased its own autonomy from

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biomedical power when it comes to classifying citizen's bodies in relation to gender categories.

In practical terms, all these changes imply greater gender autonomy for trans and gender-non-conforming individuals. Considering the pervasive forms of state violence that are often exerted in the name of public order, however, one might cautiously inquire about the implications when these emerging regulations are sedimented into the public order of their respective states. Does this integration signify a genuine shift towards "self-determination," or does it represent a subtler means of perpetuating control over the gender field, seemingly liberated from biomedical intervention? Can we interpret this transition as a shift from a "sex-based" to a "gender-based" public order? If so, does it signify a turning point in biopolitical paradigms? Or does the emerging public order still recognize medically assigned sex as a material norm, whose effects shape the experiences of gendered citizens throughout their lives, even if this norm can be suspended in some cases according to certain bureaucratic processes? In such a scenario, could the emerging biopolitics of gender serve to perpetuate the sex-based regime, making it more acceptable or even desirable by incorporating certain forms of (trans) gender exceptionalism?

6. Trans-exclusionary *liberal* feminism: Guardians of morality

There are many ways to answer such questions, and one should keep in mind that the answers cannot be detached from the analysis of specific contexts. As an approximation, then, I would like to return to the case of the new trans law approved in Spain in early 2023, resulting from the complex process that fused a law proposal specifically intended for trans rights and a state law proposal against the discrimination of LGBT people. Importantly, the new regulation removed the need for a diagnosis of gender dysphoria and hormone treatments as a precondition for legal gender recognition. Simultaneously, the negotiation process significantly constrained the original proposal. In the words of trans activist Mar Cambrollé, president of Asociación de Transexuales de Andalucía (ATA)-Sylvia Rivera, one of the collectives that prepared the initial law project:

> What has been left out? Well, many things have been left out. The recognition of non-binary trans people has been left out, and specific policies to address labor exclusion have been left out. It's not enough to just have a statement saying active policies for trans people need to be made; it's necessary to specify what those policies are. Much more concrete and tangible things.[30]

The cuts Cambrollé refers to mainly resulted from the pressure of an unusual coalition of conservative and trans-exclusionary feminist forces, ultimately leading to the approval of a law that, in my view, starkly exposes the inherent limitations of state-centered regimes of gender.

For the purposes of contextualization, it should be noted that I use "trans-exclusionary feminism" as an umbrella term encompassing "the *radfem* case" (Willem et al. 2022), but also other strands of Spanish feminism that have directed their intellectual endeavors to delegitimize trans-related demands and legislative projects. This is the paradigmatic case of the Spanish trans-exclusionary *liberal* feminists, a strand of Spanish feminist philosophers committed to meeting the unfinished goals of liberal modernity and self-defining as feminists of *equality*.[31] For instance, Celia Amorós

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attempts to define the emancipatory goals of feminism by recourse to a "self-legislating subject, as it appeared in the constituents of the French Revolution"[32] (1994, 54). In a similar vein, Amelia Valcárcel states: "This is the ideological foundation of democracy and feminism: the concept of the abstract individual in liberal political philosophy"[33] (2004, 3).Such an abstract, self-legislating subject would, in their view, be equally opposed to poststructuralism, queer studies, and the depathologization of gender variance. In relation to the trans law, in particular, their position was fueled by a proactive re-elaboration of far-right moral panic rhetoric concerning the threat of "gender ideology" (Butler 2024, 3), especially regarding legal gender recognition for children. Consider, for instance, the moral panic-oriented undertones of the following words by Valcárcel who was, at the time, a member of the Council of State:[34]

> what we cannot tolerate is that, in order for four people of *questionable moral integrity* to keep their little positions, *we put at risk* the people we love the most, who are *our daughters and sons,* or subject them to experimentation. Nor can we allow *delusions* to take hold of the common rationality that is the law.[35] (Alsedo 2022; my translation, emphasis added).

Valcárcel's words clearly illustrate how trans-exclusionary liberal rhetorics, by depicting the law's *status quo* in relation to the gender field as a shield for the innocent child (see especially Edelman 1998) or even for "the State's form" (Alsedo 2022), aligned effectively with some of the primary concerns of the Global Right's "anti-gender crusade" (Prado and Correa 2018). This alignment contributed to a split within the Left coalition in the government, dividing it into a trans-exclusionary liberal position and a trans-inclusive one led by Unidas Podemos (UP). In the end, after multiple cuts and restrictions added to the initial proposal, the law was approved despite the firm opposition from the vice-president of the Spanish Socialist Workers' Party (PSOE), Carmen Calvo, who broke with the party line to vote against it on the basis that "the idea that gender might be chosen by mere will or desire *puts at risk,* obviously, the identity criteria of the 47 million remaining Spanish people" (Ugarte 2021; emphasis added).

To conclude this necessarily schematic contextualization, it is important to recall that trans-exclusionary positions were amplified in all imaginable ways in social media and had an unprecedented visibility in street protests, to the point that the March 8 feminist march was divided into a trans-inclusive and a trans-exclusionary call[36] for various years. On this basis, it is understandable that Cambrollé was *also* taken aback by my reference to the process of "negotiation" of the law when I interviewed her, responding, "Negotiation? What negotiation? This has just been a devious attack on trans people."[37]

7. The rule of sex in the Spanish trans law

This *attack* complicated the foreseen procedures for gender change, and it even resulted in the exclusion of various groups from the law itself. For instance, while the law already lacked concrete measures for non-binary individuals, it initially included the proposal to study their needs one year after its approval. In the subsequent versions of the law project, however, even this timid proposal was swiftly disregarded, in sharp contrast with the growing number of countries that in recent years have made room for the recognition of non-binary identities—even though very few have done so in accordance with the principle of self-determination (Holzer 2018; Peña Díaz 2022). This

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suppression of non-binary demands was so thorough that any discussion following this exclusion as to its justification or reasoning was actively avoided.[38] There was no public mention of options such as introducing a third gender "box" for non-binary individuals or, for that matter, of the possibility of removing gender markers from personal documents altogether. As a result, the new trans law has come to consolidate the strictly binary character of the gendered public order in Spain.

In the case of trans migrants, the comprehensive package of dedicated measures almost disappeared from the text of the law. Specifically, the correction of names and gender markers in documents issued for residents without Spanish citizenship, regardless of their administrative status, has been limited to those cases where proof of the absence of available options for gender change in their country of origin can be shown. By doing so, the Spanish trans law has the contradiction of being a self-determination-based law that presents pathologizing or sterilizing protocols in the country of origin as acceptable alternatives. Furthermore, this law condones the fundamental dispossession of proper names and gender markers by the state where one happens to be born and registered.

Let me pause, for a moment, to take up the provisions for transgender and gender-non-conforming children. Predictably, this aspect of the law focused on trans minors a significant amount of unsolicited attention, particularly due to the moral panic-induced narratives of trans-exclusionary feminism and right-wing media over the alleged menace of gender-affirming treatments at younger ages. These narratives failed to grasp the fact that the law was limited to facilitate *legal* gender recognition and to promote inclusive policies such as the respect for chosen names in educational settings. By focusing on the alleged dangers of hormone blockers and of non-existing, trans-affirming surgeries in minors,[39] however, trans-exclusionary pressures succeeded in restricting the law project in important ways. For instance, the law's call regarding the use of chosen names was substituted by a redundant—at best—right to be called by the chosen name *after* it has been formally changed in the national registry.[40] Furthermore, the trans law ended up by establishing an intricate age stratification according to which a legal gender change in the same terms as adults is only possible for minors older than 16; the consent of legal tutors is needed for those between age 14 and 16; a favorable court sentence, between 12 and 14; and no mention for those under 12.[41]

Paradoxically, while the trans law overcomes the age restrictions of the legislation that preceded it, it also represents a step back with respect to a growing set of registry practices and jurisprudence allowing minors to attain legal gender recognition at earlier ages in Spain. For instance, Lucia, a girl from Gipuzkoa, attained legal gender recognition by recourse to a judicial process when she was 4 (Eldiario 2016); while Lois, a girl from Fuerteventura, changed her name at 4 and her gender markers at 9, thanks to a simple administrative procedure—and, more importantly, without recourse to any medical diagnosis (García 2022). By choosing to ignore the lived experiences of these and multiple other trans and gender-non-conforming minors,[42] then, the trans law has simply reduced the reference to "maturity" included in the above-mentioned ruling of the Constitutional Court to a seemingly arbitrary scale of chronological age.

As a result, the trans law has certainly succeeded at enforcing a bureaucratized, state-centered regime of gender identity. Roughly put, this regime starts with the registry of the results of the visual inspection performed by the doctors at birth, which are supposed to be displayed in personal documents for at least 12 years. At 12, judicial power takes the lead, assisted by pathologizing supervision if the corresponding judges deem it necessary. Two years later, legal tutors occupy the state's role within the family. It is only

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after still another two years that finally the interested individual can solicit a gender change by themselves, having proven that they are Spanish citizens intending to substitute one gender marker for another within the binary frame, and that they confirm this decision after a "reflection" period,[43] and, no less importantly, that they know how to proceed. Paradoxically, then, the law binds a minor's gender identity to the convoluted temporality of an indefinite detention by recourse to a precise temporal segmentation of their gender autonomy—for the "indefinite" term of this figure implies the citational practice of a repetitive deferral.

In conclusion, while this regulation exemplifies a "self-determination-based" approach to gender recognition, it also conditions it by a tight supervision by several institutions, including various instances of the state's administrative apparatus, the judiciary system, the family, and migratory services. Therefore, in the emerging, "self-determination"-based biopolitical frame, deviant gender positions are still being constrained by the weight of the social norm hereby represented by the availability, or lack thereof, of the corresponding categories and procedures for legal gender recognition.

8. Liminal remarks

Despite its specificities, Spain is no "exception" in this regard. A common feature of the emerging biopolitics of gender is that the assigned category at birth serves as a baseline for the population, and that it may be *eventually* corrected in compliance with a specific set of administrative procedures. These may vary, and so will the restrictions and constitutive exclusions they rest upon. Some may include a third box, while some may not. Minors and migrants might also be treated in different ways, just as intersex individuals might be. In general terms, though, they all serve to consolidate the state's power to enforce a gendered public order that fosters the needs of certain bodies at the expense of others.

Consequently, dissident gender embodiments are subjected to the precarious forms of recognition that result from their having been considered as a threat to the very terms of recognition facilitated by the state. They are, in this sense, liminal[44] figures in transitional states, in the sense reserved to this term by cultural anthropologist Mary Douglas:

> Danger lies in transitional states, simply because transition is neither one state nor the next, it is undefinable. The person who must pass from one to another is himself in danger and emanates danger to others. The danger is controlled by ritual which precisely separates him from his old status, segregates him for a time and then publicly declares his entry to his new status. (1966, 128)

From this point of view, state restrictions to gender autonomy can be seen as bureaucratic rituals and administrative forms of segregation where gender deviance can be symbolically confined, the moral panics it spawns mitigated, and its threat to the binary public order tamed. In the process, gender categories are written in our gendered biographies with the force of Kafka's (1948) penitentiary machine, which wrote court sentences on the very bodies of the prisoners. Of course, legal gender markers are not really a sentence, much less a life sentence. They are just the state's attempt to ensure that gender remains as nothing but the exception that *proves* the rule of sex.

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Notes

1 Law for Real and Effective Equality of Transgender People and for Guaranteeing the Rights of LGBTI People, Spanish Law 4/2023, February 28.
2 Spanish Law 3/2007, March 15.
3 Ibid., Art. 1.1.
4 Ibid., Art. 4.1 (a).
5 Ibid., Art. 4.2 (b).
6 In this paper, "gender identity" refers primarily to trans and gender-non-conforming embodiments and lived gender experiences, on the understanding that "gender now also means gender identity, a particularly salient issue in the politics and theory of transgenderism and transsexuality" (Butler 2004a, 6). It is important to note that, while these experiences may be influenced by the performative power of legal gender markers, they are not solely determined by them and cannot be entirely reduced to them.
7 Spanish Law 4/2023, Art. 50.
8 Ibid., Art. 43.2.
9 Ibid., Art. 43.4.
10 Ibid., Chap. I bis, Art. 26 quater, 3.
11 Nowadays, she is vice-president of Euforia—Familias Trans-Aliadas, an activist group which offers legal advice and other forms of support for trans and gender-non-conforming people and their families. See https://euforia.org.es/.
12 "¿Autodeterminación? ¿Para quién? ¿Y en qué términos?" (my translation).
13 I introduce this term as a complement to "trans-exclusionary radical feminists" to describe a faction of Spanish feminism whose commitment to the legacy of liberal modernity is closely linked to their support for a pathologizing view of gender variance and their rejection of non-binary genders. This issue is discussed in greater detail in the corresponding section of this paper.
14 For this reason, the notion of public order has been considered a privileged point of view from which to observe the transition between the Ancien Régime and liberal forms of governmentality (see especially Godicheau 2022, 2–3).
15 On this point, I agree with historian Godicheau who, in an incisive study on the notion of public order, argued that "public order offers an ideal vantage point for observing the passage between what we commonly call the Old Regime and what we commonly call the liberal order; a passage, not a transition, because a transition always requires the identification of a point of arrival." (*el orden público ofrece un punto de observación ideal para observar el tránsito entre lo que solemos llamar el Antiguo Régimen y lo que solemos llamar el orden liberal; un tránsito, que no una transición, porque una transición siempre necesita la identificación de un punto de llegada, lo que, para los historiadores, es la madre de todas las teleologías*) (2022, 4–5; my translation).
16 Consider, for instance, the definition of public order provided by the Supreme Spanish Court according to which it would be "integrated by those judicial principles, public and private, political, economic, *moral and even religious*, that are absolutely mandatory for the conservation of the social order in a given country and time" (*está integrado por aquellos principios jurídicos, públicos y privados, políticos, económicos, morales e incluso religiosos, que son absolutamente obligatorios para la conservación del orden social en un pueblo y en una época determinada*) (Spanish Supreme Court—RJ 1966\1684; my translation, emphasis added).
17 "On ne sait de quel *genre* il est, s'il est male ou femelle, se dit d'un homme trés-caché, dont on ne connait pas *les sentiments*." (E. Littré *in* Scott 1986, 1053; emphasis added).

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18 For progenitors could well have looked "similar" (Beauvoir 1956, 36), reproduction could have been "asexual" (36), and humans could well pertain to "parthogenetic or hermaphroditic society" (37).
19 "Não se trata de um conceito único, trata-se de uma multiplicidade subsumida pelo mesmo nome ou em alguns nem sequer subsumida pelo mesmo nome."
20 Consider, for instance, the case of the Spanish trans law, which now prohibits genital surgeries in intersex children until they are deemed able to participate in such decisions. Unfortunately, as in case of trans minors discussed in the following sections, the law confuses chronological age with the capacity to take informed decisions over one's own body or gender experience.
21 It is worth recalling Foucault's warning that "in our day . . . the techniques of discipline and discourses born of discipline are invading right, and the normalizing procedures are increasingly colonizing the procedures of law" (1997, 38).
22 For a discussion of the genealogy of the European public order as an immunitarian shield against alien relational practices in fortress Europe, see Pérez Navarro (2022).
23 I question the taking for granted of the account of the death of an intersexual person in a hostile social setting, one that was backed up by a suicide note that no longer exists (if it ever did), and by an autopsy that found blood in both the mouth and genital area (see Pérez Navarro 2023).
24 This ambivalence is far from uncommon in current legislation, registry practices and court rulings in Western legal systems. For instance, referring to its usage in UK law, Katharine Jenkins and Ruth Pearce observe that "The absence of a clear distinction between sex and gender is accurately reflected in the current legal situation: sex and gender are not distinct concepts in UK law" (Jenkins and Pearce 2019).
25 "Arquetipo limitador de los derechos fundamentales."
26 "En un Estado social y democrático de derecho, el reconocimiento y la protección de los derechos fundamentales de los ciudadanos constituye justamente el núcleo fundamental del orden público, y *otras cuestiones que tradicionalmente se consideraban incluidas en ese orden público*, *como la indisponibilidad del estado civil*, presentan ahora una importancia secundaria con relación al ejercicio de los derechos fundamentales."
27 In Spain, the autonomous community of Andalusia recognized the right to gender self-determination in 2014 (Law 2/2014, July 18), becoming the first of several self-determination-based regional laws in the country. However, their practical consequences were often limited by prevailing national legislation, which still determined crucial aspects such as the issuing of passports and other personal documents (see Platero 2020).
28 According to the CDADI (2022) 19 Member States of the European Union allowed legal gender recognition for children in June 2022.
29 For a situated criticism of this law, see Mauro Rucovsky (2019).
30 "¿Qué se ha quedado fuera? Pues se ha quedado fuera muchísimas cosas. Se ha quedado fuera el reconocimiento de las personas trans no binarias, se ha quedado fuera el concretar políticas concretas para hacer frente a la exclusión laboral. No solamente vale un enunciado donde se diga hay que hacer políticas activas para las personas trans, sino que hay que concretar las cuáles son. Cosas mucho más concretas y tangibles." (Expert interview, my translation).
31 A phrasing which many of their proponents use to distinguish themselves from radical feminism in the US and from French and Italian feminists "of difference" (*de la diferencia*) (Amorós 1994, 10; my translation). In general terms, equality feminists perceive themselves as pursuing the universal subject position monopolized by masculinity, while they see difference and radical feminists as being restrained by, respectively, an essentialist (Amorós 1994, 69) and an excessively abstract, psychologized, and ahistorical conception of the subject of feminist politics (105).
32 "El sujeto autolegislador, tal como apareció en las constituyentes de la Revolución Francesa" (my translation).
33 "Este es el fundamento ideológico de la democracia y el feminismo: el concepto de individuo abstracto de la filosofía política liberal" (my translation).
34 The Council of State is the supreme consultative council of the Spanish Government. Valcárcel held this position by appointment of PSOE.
35 "Lo que no podemos tolerar es que, para que cuatro personas de dudosa integridad moral conserven su puestecitos, pongamos en riesgo a las personas que más amamos, que son nuestras hijas e hijos, ni ponernos a experimentar con ellos. Ni menos consentir que los delirios se posesionen de la racionalidad común que es la ley."

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36 The trans-exclusionary march is also engaged in a broader agenda, including the abolition of sex work and of gestational surrogacy. See Llach 2023.

37 "¿Negociación? ¿Qué negociación? Esto ha sido simplemente un ataque brutal contra las personas trans" (Expert interview, my translation).

38 Darko Decimavilla, co-founder of No Binaries España (see https://nobinaries.es/), associated this exclusion with the "filter" of PSOE: "How does it come to disappear? It disappears because . . . the PSOE took it away from us. So, the draft that came out of the government was from UP, but filtered through the PSOE. Okay, that filter, let's say, is already a closed door, there is no dialogue, no arguments, there is no version of why things do or do not enter or exit" *(¿Cómo llega a desaparecer? desaparece porque (. . .) el PSOE nos quitó. Entonces el borrador que salió de gobierno era el de UP, pero con el filtro del PSOE. Vale, ese filtro digamos que es ya puerta cerrada, ya no hay diálogo, no hay argumentaciones, no hay alguna versión de por qué sí o por qué no entran ni salen las cosas.)* (Expert interview, my translation).

39 Medical attention of trans and gender-non-conforming minors is oriented by regional, trans-specific health protocols and by the Patient Autonomy Law 41/2002, which establishes patient autonomy from legal tutors at age 16.

40 Law 4/2023, Art. 60.

41 Law 4/2023, Art. 43.

42 We could also recall the cases of Paula, a Galician trans girl who attained legal gender recognition at 9, in Galicia (Álvarez 2019) and Alejandro, a trans boy from Ourense who corrected his legal name change at 5 and his gender marker at 9 (*La Vanguardia* 2022), among other trans and gender-non-conforming minors who have managed to navigate legal, administrative, and judicial restrictions to legal gender recognition in Spain.

43 Belgium offers another telling example in this regard. Its recent reform of legal gender recognition procedures includes a three-month period during which it could be denied "due to a contravention of the public order" (Cannoot 2021, 18). This measure has been justified as a way to avoid cases of identity fraud, strikingly including misuse by "potential terrorists." It is hard to ignore, notwithstanding, that it constitutes a quote of the Article 6 of the Napoleonic Code, where "public order" was introduced as an intensely moralized limit to so-called negative freedoms.

44 Cultural anthropologists' analysis of liminality can be traced back to A. van Gennep's *The rites of passage* (1960 [1908]), where he recovered that term form the Latin *limen* (the threshold of a physiological or psychological response) which is also likely related to *limus* (transversal, oblique).

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