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(Trans)gender recognition in Portugal: From a ‘void’ to the right to gender self-determination

Sandra Palma Saleiro

<https://orcid.org/0000-0002-1491-8651>

Instituto Universitário de Lisboa (ISCTE-IUL)

Abstract:

This article reviews Portugal’s path in addressing non-normative gender identities, focusing particularly on legal gender recognition. While recognition is not limited to enshrining rights in the law – especially the right to the acknowledgement of (self)identity by the state – the legal step is one that is clearly fundamental to making overall recognition a reality. Portugal is an interesting case study, having shifted in less than a decade – the second of the twenty-first century – from a complete absence of trans issues in legislation to the passage of a law on gender identity based on self-determination. Using analysis of legislation and interviews of trans people and representatives of the LGBTQI+ movement conducted during two research projects spanning the last fifteen years, we analyse the macro-level transformations and how they are reflected, at the micro-level, in the trans people’s inclusion in or exclusion from legal recognition, and in the extension of this basic condition of citizenship.

Keywords:

transgender; legal gender recognition; gender identity rights; self-determination; Portugal trans and non-binary people; trans rights

Introduction: Why Trans People?

In Portugal, continuous attention has been paid to lesbian, gay, bisexual, transgender and intersex (LGBTI) issues since the beginning of this century, reversing the previous situation in which, ‘up until 2002, the only time the word “homosexual” appeared in Portuguese law was in the Criminal Code, whose Article 175 established the crime of homosexuality with minors’ (Vale de Almeida 2010: 84). The combination of Portugal’s geopolitical context (Vale de Almeida 2010) and the striking impact of LGBTI activism in legal and social policy (Hines 2013; Hines and Santos 2018) led to a series of legislative advances, beginning at the dawn of the century for the LGB and then the ‘T’ population, and more recently still for the ‘I’ in the acronym.

Specifically with regard to transgender issues, during the second decade of the twenty-first century Portugal went from being one of the European countries in which gender diversity was completely absent from legislation and public policies to being one of the few countries in this geographic area with a law on gender identity based on self-determination.

In this article we delineate Portugal's path towards the recognition of transgender identities in a European and international context, with an analytical demarcation of three periods that are classified according to the conditions required for legal gender recognition (LGR): (1) the absence of any legal mechanisms and protection; (2) recognition by means of a 'medicolegal alliance' (Davy 2011), giving rise to the gatekeeping of rights and their grant through inclusion in the medical model of transsexuality; (3) the recognition of gender identity based on self-determination, albeit still with greater or lesser restrictions on the universality of the right to gender identity. The Portuguese case can be used to draw lessons for situations currently being lived by trans people outside and within Europe (see European Commission 2020), given there are countries in which the conditions described in each of these three periods are being experienced at present.

The empirical material underlying this article comes from two research projects. The first, 'Transsexuality and transgender: Gender identities and gender expressions' (Saleiro 2013) was funded by the Portuguese Foundation for Science and Technology (FCT) and took place between 2007 and 2010. This pioneering project on trans issues in Portugal in the social science area primarily aimed at mapping the diversity of the existing (trans)gender identities and expression in Portuguese society. It involved 37 in-depth interviews with trans people at a time when there was no legislation on gender identity in this country. The second, 'Gender diversity, citizenship and health: Trans identities in view of the new medical and legal frameworks', began in 2016 and is still under way. Also funded by the FCT, it seeks to explore the impact the new medicolegal approaches to 'gender identity' have on the identity, aesthetic and bodily experiences of trans people and on their social, family and intimate acceptance. This has entailed 28 in-depth interviews of trans and non-binary people, eleven of whom were 'retrieved' from the first study. This second wave of interviews took place while the first gender identity law (Law 7/2011 of 15 March 2011) was in force and also extended into the period following the introduction of the law on gender identity based on self-determination (Law 38/2018 of 7 August 2018). Semi-structured interviews of representatives of the LGBTQI+ movement were also included. These projects involved analysis of documents of a political, legislative and medical nature and those produced by the LGBTQI+ movement, in addition to initiatives in which the latter's representatives took part, such as parliamentary hearings. This was all complemented by ethnographic work, especially on the design and passage of the two gender identity laws, including meetings with parliamentary groups, public hearings and parliamentary hearings, in which the author of this article was asked to participate as a researcher on the subject.

Recognizing Transgender: From Pathology to Human Rights

In the early 1990s, the emergence of the trans movement and trans scholars (Stone 1991; Feinberg 1992; Namaste 1996; MacKenzie 1994; Bornstein 1994; Stryker 1995, 1999; Whittle 1995) laid the foundations for the incipient process of shifting from seeing transgender identities as a pathology, with its diverse forms classified as mental diseases (namely in the World Health Organization's [WHO] International Classification of Diseases [ICD] and the American Psychiatric Association's [APA] Diagnostic and Statistical Manual of Mental Disorders [DSMMD]), to situating it in a human rights framework, as later embodied in the Yogyakarta Principles (2007).

These '[p]rinciples on the application of human rights law in relation to sexual orientation and gender identity' were launched by a group of human rights experts and became

an international reference for the application by states of human rights standards in the field of gender identity and sexual orientation. This change of paradigm implies the recognition of trans people as citizens who deserve to have their gender identity and other rights protected. Principle 3 refers to ‘the right to recognition before the law’, calling on states to ‘take all necessary legislative, administrative and other measures to fully respect and legally recognise each person’s self-defined gender identity’ (Yogyakarta Principles 2007: 3B).

In the European context, the Parliamentary Assembly of the Council of Europe (PACE) has played a leading role in the defence of the human rights of trans persons, in a strategy that Ammaturo (2015) called the Pink Agenda, that aimed at making Europe the worldwide benchmark for LGBT rights. In its case law, the European Court of Human Rights has set human rights standards for trans people. Specifically in 2002 with regard to LGR the case of *Christine Goodwin v. The United Kingdom* (2002), which obliged the United Kingdom to recognize the applicant’s new sex. The commissioner for human rights has been helping to drive studies, resolutions and recommendations to the member states since the end of the first decade of this century. This path was inaugurated with the issue paper ‘Human rights and gender identity’ (European Commissioner for Human Rights 2009a), in which the commissioner lists twelve such recommendations, including the development of expeditious and transparent procedures for the change of name and sex of trans people on their birth certificate and all other identification documents; the abolition of sterilization and other compulsory medical treatments as necessary legal requirements for the recognition of gender identity in the regulatory procedure of change of name and sex. These measures were then included in Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states (CoE 2010).

Despite being a logical consequence of the definition of gender (self)identity as ‘each person’s deeply-felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth’ (Yogyakarta Principles 2007: 6), the right to LGR based on self-determination was only to become explicit at an international level in one of the ten principles added to the original text in 2017: ‘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’ (Yogyakarta Principles 2017: 9).

It was also in the middle of the second decade of the twenty-first century, in PACE Resolution 2048 (2015), that EU member states were urged to endorse self-determination as a condition for the civil recognition of gender, without age limits:

[D]evelop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards, passports, educational certificates and other similar documents; make these procedures available for all people who seek to use them, irrespective of age, medical status, financial situation or police record. (PACE Resolution 2048 2015: 6.2.1)

This guideline was issued after self-determination had been included in the legislation of some European states. Indeed, it is worth noting Europe and its strategic Pink Agenda was surpassed by Argentina in the legal enshrinement of the right to LGR. While Europe was celebrating the entry into force of a law that did not require physical changes to the body as ‘the first European law on name change and legal gender recognition that meets the Yogyakarta Principles and the Recommendations of the Commissioner for Human Rights of the Council of Europe’ (European Commission 2012: 72) – specifically Portuguese Law 7/2011 of 15 March

2011 – Argentina moved further in 2012 by passing the first law based on self-determination (Law 26,743 Gender Identity) (Secretaría de Derechos Humanos 2014).

In its ground-breaking '[a]dvisory opinion on gender identity, equality, and non-discrimination of same-sex couples' (Inter-American Court of Human Rights 2017), the court also went further than the ECHR, which 'is not yet prepared to acknowledge a right to self-determined legal gender, as advocated in the Yogyakarta Principles' (Van den Brink and Dunne 2018: 42), considering that:

States must ensure that persons interested in rectifying the annotation of gender or, if applicable the mention of sex, in changing their name and changing their photograph in the records and/or on their identity documents to conform to their self-perceived gender identity may have recourse to a procedure that must: (a) be centred on the complete rectification of the self-perceived gender identity; (b) be based solely on the free and informed consent of the applicant. (Inter-American Court of Human Rights 2017: 229, 3)

In geographic terms, where rights related to LGR based on self-determination in general and the recognition of non-binary gender identities are concerned, we should also mention South Asia. Based on the long cultural traditions of recognizing non-binary gender categories in these countries, the Indian and Nepalese apex courts are world leaders in this respect. In *Sunil Pant v. Nepal* (2007), the Supreme Court of Nepal held that individuals have a right to be recognized as a third gender based on 'self-feeling' (Lau 2020).

The impact and importance of LGR

The way LGR is enabled or precluded in each society and the conditions laid down for its enablement are perhaps the most direct indicators of a state's official position regarding transgender issues. This is clearly visible in cases like Hungary, which passed a law in May 2020 that reverses previous progress, considering a person's sex to be immutable and the 'sex attributed at birth' to apply to all records.

However, LGR has a real impact on the life of trans people that goes well beyond the symbolic sphere. The experiences of the participants in the two research projects and other studies in both the Portuguese (Moleiro and Pinto 2020) and European (e.g. Ryan 2020; European Commission 2020) contexts reveal positive effects in the psychological and social spheres. In terms of psychological well-being, they include 'overcoming the psychological burden of not living according to their gender identity, and obtaining recognition of their self' (European Commission 2020: 10), including their embodied self (Ryan 2020: 276). Likewise, at a social level, coherence between gender expression and legal identification has potential impacts on reducing discomfort, discrimination and violence.

The safety issues should not be underestimated, given the high levels of discrimination experienced by trans people (FRA 2020). Having a document that confirms a registered name and sex that coincides with the way the person wants to be viewed and treated contributes to the safety of trans people. It avoids involuntary coming out when documents are required and prevents discrimination when the person is perceived as not belonging to the gender with which they identify.

The European Commission sums it up as follows:

Most commonly and across almost all EU Member States and the UK, participants experienced marked improvements to their well-being after gaining legal recognition, describing the sense of at last 'being seen' and validated in their identity. Many also underlined their improved health, the greater sense of personal safety, and more willingness to engage in education. (European Commission 2020: 14)

The results of the study carried out in Portugal reveal a greater satisfaction with life among trans people whose gender is recognized, as well as positive impacts on 'psychological well-being, family life, intimate relationships, employment, education/academic life, access to public places and services, perceived safety in public environments and overall social well-being' (Moleiro and Pinto 2020: 234).

In the Portuguese case, the change of given name and sex marker on the birth certificate and thereafter on all identity documents has a stronger impact on the life of trans people than in other countries. This is because Portugal possesses the peculiarity of a state control mechanism that ensures the matching of the recorded sex to the given name via an onomastic index, which lists all the names that can legally be registered and which is divided into female and male. Under this nomination policy as a (cis)regulatory tool (Santos and Santos 2017; Hines and Santos 2018), it is simply not possible to change a given name to one associated with the gender with which the person identifies in the absence of legal recognition. What is more, the main national identification instrument is the citizen's card, which is frequently used for obtaining public and private services, and in contrast to its predecessor (the identity card), visibly displays the holder's designated sex.

Emphasizing how important it is for trans people to have their gender identity recognized by the state does not mean this is a sufficient condition for automatically eliminating discrimination or that it should be the only necessary focus of attention when it comes to protecting human rights (Cannoot 2020: 12–13). As noted by Browne et al., 'legal recognition alone is not sufficient for liveability' (2021: 41). But, in societies that are structurally based on gender (Bourdieu 1999), while it is not enough, it is a condition that is necessary for a viable or liveable life (Butler 2004).

When we discuss the impact and importance of LGR on the recognition of and non-discrimination against trans people, we should bear in mind the diversity of gender identities and expressions embodied in (trans)gender (Ekins and King 2006; Monro 2007; Hines 2007, 2010), which has also been mapped for Portuguese society (Saleiro 2013). This diversity of (trans)gender identities is intersected by other variables, such as age, social class or citizenship status, among others, that also need to be taken into account. We must therefore consider the comparison between the conditions for access to LGR imposed by laws (or, in their absence, the criteria used in court) and those possessed by the diversity of trans people, as well as between the adequacy of the available legal gender categories for LGR and the needs and aspirations of those people (Hines 2010, 2013; Monro and Van der Ros 2018; Voli 2018; Clucas and Whittle 2017; Cannoot 2020; Meier and Motmans 2020; Platero 2020; Ryan 2020). This means that, in a given society, recognition can occur for some trans people and not for others (Hines 2013; Monro and Van der Ros 2018). We will thus see, in the Portuguese case, the extent to which each of the different LGR mechanisms that have successively been in place consider that plurality (Monro 2007) or diversity of genders and embodiments (Hines and Santos 2018), and how close they come to 'an account of recognition that can accommodate the full complexity of social identities' (Fraser 2000: 110).

From a 'Void' to Gender Self-Determination in Portugal

The path taken by Portugal in transgender recognition over the past decades is analysed below, demarcating three distinct LGR periods with different access conditions and different impacts on the life of trans people.

The legislative void: Recognition by the courts

Notwithstanding the international and European recommendations, Portugal entered the second decade of the twenty-first century without any legislation or public policies related to gender identity and consequently without established procedures for LGR. This legal void led the Council of Europe's Commissioner for Human Rights to express his concerns to the Portuguese State (European Commissioner for Human Rights 2009b).

In conformity with the hegemony of the medical paradigm on transgender in Portugal, the only reference to and regulations on trans issues were found in the Code of Ethics of the National Board of Physicians, in the form of 'transsexualism'. The code banned 'sex reassignment surgery in morphologically normal people' until 1995, when that prohibition was removed 'in clinical cases appropriately diagnosed as transsexualism or gender dysphoria' (Article 55). In other words, up until 1995, in this country there was not even recognition of the trans(sexual) person as a patient and there were no gender identity-related healthcare services whatsoever. Based on our interviewees' testimonies, some people would end up seeking those services in other countries where they had already been made official, especially elsewhere in Europe (e.g. Belgium and France). Others found them where they were available outside the formal system, especially in the case of gender-affirming surgery, for example in Casablanca, Morocco. But many more (trans women) resorted, both within and outside Portugal, to non-medical physical transition procedures carried out by bombadeiras (literally, 'pumpers') – other trans women specialized in injecting silicone into various parts of the body.

Trans people in Portugal were thus reduced to the level of 'non-citizen', deprived of 'liv(e)able' lives (Butler 2004; Browne et al. 2021).

Notwithstanding this legislative and healthcare void, a few dozen trans(sexual) people managed to change the given name and sex on their birth certificate through the courts,¹ as currently still happens in five European countries (see European Commission 2020). The first attempts entailed claiming an 'error in the birth certificate', but after objections in one court ruling, the focus turned to getting the state to recognize 'the person is no longer the one derived from the registral classification, in terms of assignment of sex, but rather their opposite' (Ferreira 2005: 342). Court proceedings sought to unequivocally demonstrate that the applicant belonged to the requested gender, calling upon their own narrative and that of others close to them, together with confirmation by health professionals and an expert examination of the body conducted by the National Institute of Legal Medicine. More than an affirmation of the existence, experience and corporality of trans people, these specific court cases acted as mechanisms of reproduction and reaffirmation of the (cis)gender binary system, leaving no space for 'gender outlaws' (Bornstein 1994).

¹ There is no official data on how many trans people have been able to get their gender marker changed through the courts. We only have information from some trans people who have gone through this process and the information provided by the reference lawyer for these cases, who participated in around 12–14 cases between 1981 and 2009.

Analysis of the wording of the court decisions and the first-hand accounts of the interviewees who experienced them reveals these legal rulings as true moral judgements of the person's conformity to gender stereotypes, as illustrated in the following extract from a ruling, where the applicant was a trans woman:

This appearance [physical features] of the applicant is associated with a congenital tendency in the field of psychism that makes the applicant attracted to persons of the male sex and enjoy activities more commonly linked to the female sex, such as those linked to homemaking. (Judgement of Lisbon Court of Appeal Tribunal of 2004: 2518/2004-1)

The courts consistently found in the applicants' favour, provided that a series of assumptions that are still common in some EU countries (European Commission 2020) were met, such as the person not being married, not having children, having undergone gender-affirming surgery and being sterile (Ferreira 2005; ILGA Portugal n.d.). LGR was thus reserved to those who both perfectly matched the 'classic narrative of transsexuality', presenting a body which the National Institute of Legal Medicine certified as being in conformity with that associated with the desired gender, and possessed the information, skills and substantial financial resources required for the judicial proceedings. This situation was especially problematic until the mid-1990s, with Portugal in the absurd situation that 'legal transition' could theoretically precede 'bodily transition', but the former was not authorized unless the latter had already occurred.

Among the group of several dozen trans people contacted in the first project, only four had managed to achieve LGR – one, who was the first person in Portugal to do so, back in the 1980s, and the others in the present century. Another two were undergoing this (lengthy) process. Of these six, only one is a trans woman, thus demonstrating the greater discrimination to which the latter were subject, as reflected in the fact they found it harder to both raise the financial resources needed for the judicial proceedings and access official trans-specific healthcare. Available on the national health service since the mid-1990s, healthcare for trans people was characterized by its high level of gatekeeping, which was even greater for trans women, who had to prove that they belonged to the 'true transsexual' medical category, demarcating themselves from 'effeminised homosexuals' or *travestis* (Saleiro 2013).

But it is also noteworthy that despite it being national policy to scrutinize the congruence between body, registered sex and name at birth, the slowness of the judicial system exposed trans people – even the more privileged among them, who had accessed healthcare and attained physical transition – to long periods of incongruence and subjection to constant comings out whenever they used their official documents. In this regard, they were in a situation similar to that experienced by many trans women, whose physical transition commonly took place outside official healthcare systems, without any possibility of success in court.

It was at the beginning of the twenty-first century that the process of making transgender questions more visible in Portugal started, above all with the emergence of the pioneering exclusively 'T' association, *At* (Association for the Study and Defence of the Right to Gender Identity) which was led by trans women and provided direct support to trans people. This association made it possible for several trans women to appear in the media and enabled them to tell their own (trans)gender story on their own terms for the first time.

However, the actual turning point occurred with the murder in 2006 of Gisberta Salce, a trans woman, Brazilian immigrant and homeless person, who was killed by a group of young people in the legal custody of the state at a Catholic institution (Saleiro 2013; Hines and Santos

2018; Ramalho 2020). This shocking incident alerted the public authorities, and above all the LGBTQI+ associations, which had thus far been mainly concerned with rights related to sexual orientation, as their representatives admitted when interviewed in the first project (Saleiro 2013). Among a range of demands, such as access to and the quality of healthcare, the main one emerged around the issue of LGR, as demonstrated both by the discourse of the representatives of LGBTQI+, and specifically 'T', associations at the time, and by analysis of the manifestos of the Lisbon LGBTQI+ Pride March during that period (Saleiro 2013).

The first 'gender identity law': Recognition by diagnosis

The pressure of the LGBTQI+ movement and its alliance with political parties, especially those on the left that formed part of a parliamentary majority, the Council of Europe's letter to the Portuguese State in 2009 and the approval in the same year of a gender identity law in neighbouring Spain – also considered a conservative and Catholic country – were all factors that came together to open the way for the first Portuguese law on LGR.

In March 2011 the so-called 'Gender Identity Law' (Law 7/2011 of 15 March) came into force, regulating those changes for Portuguese nationals aged 18 and over. It was inspired by the Spanish law, but unlike the latter, did not require any bodily change for gender recognition to occur. In the European context of the day, it was the law that came closest to the Yogyakarta Principles of 2007 (Author 2013; Hines and Santos 2018; Moleiro and Pinto 2020).

Even so, like all the laws that preceded it, it was still pathologizing, based on the recognition of trans people as mentally ill, and accessible only 'to those diagnosed with a gender identity disorder' (Law 7/2011: Article 2). Psycho-medical gatekeeping was explicitly included in the requirements: 'b) A report confirming the diagnosis of gender identity disorder, also called transsexuality, drawn up by a multidisciplinary clinical sexology team [...]. 2 The report [...] must be signed by at least one physician and one psychologist' (Law 7/2011: Article 3).

Although the medicolegal alliance (Davy 2011) prevented access to LGR by a trans population that was becoming more and more diverse, via the requirement for this diagnosis and the conditions under which it was issued in the Portuguese medical world, where medical practices frequently entailed (and still entail) 'interference with personal values, particularly with respect to gender and sexuality' (Pinto and Moleiro 2012: 148), the gains in both time and financial resources achieved by switching from judicial procedures to an administrative one have been very significant. At the very least, there has been a reduction of several years in the time needed to change one's registered name and sex, given that this is no longer subject to the slowness of the Portuguese justice system and the performance of gender affirmation surgery, access to which has been marked by long waiting lists ever since it became available on the national health service.

One of the most resounding consequences of this law has been the possibility for trans people to begin their adult life with their gender identity legally recognized. According to Ministry of Justice data, by May 2018, 47 18-year-olds had made this change (Reis 2018).

The official recognition of gender identity, above all in the case of young people, is an important instrument for affirmation in the eyes of the family, as shown in this account by Maria, who went through the transition process without the support of her relatives and was one of the first people to have her identity recognized, at the age of 21, by means of this law.

The difference was total, starting with the family impact it had, because until I had a citizen's card saying I really am a woman and of the female sex, my family kept on saying – and it was even an argument they used against me – 'but that's not what your document says', and that [the recognition] made it possible to turn the game upside down [...]. And I think that exemplifies the whole change it caused. But the change was total, it stopped being a problem and a constraint each time I had to identify myself.

As expected, the law democratized the number and social profile of the people who managed to access LGR. Numerically, this rose from the few dozen in the three decades of the previous period to 562 individuals in the seven-and-a-half years in which Law 7/2011 was in force (Reis 2018). In terms of their profile, this includes people who displayed some 'deviation' from the 'classic narrative of transsexuality' and would not have successfully passed the scrutiny of the courts. Examples among our interviewees include having been married, having children or possessing a sexual orientation outside the norm. This is the case of Hermenegilda, a trans woman divorcee with a daughter and a lesbian sexual identity, who even so was only able to collect the necessary signatures after going to several professionals.

I tried straight away, but I had difficulties getting the diagnosis. Dr X had doubts whether I was transsexual or not. And she told me so. Dr Y was stalling. And so I resorted to another path to get the diagnosis.

Although obtaining the diagnosis was still subject to scrutiny, the novelty of the absence of any implemented bodily change as a requirement for LGR also came to permit a novel corporeal citizenship (Davy 2011; Davy et al. 2018). A physical lack of conformity of the person's bodily aesthetic to the new registered sex arose either because that was what the person wanted (albeit it had to be appropriately managed in a clinical context) or more often because of the slowness of the health services, especially where surgery was concerned. The possibility of gender recognition, regardless of the body, was to open up a whole new realm of possibilities to be, and to think of oneself as, trans in Portugal.

Despite all its limitations on trans(gender) recognition (or also because of them), what the law ushered in when it recognized at least some part of trans people as citizens was a boost to their organization, empowerment and agency. There was a consolidation of the position and attention to 'T' in LGBTQI+ associations, and an attempt to create other specifically 'T' associations. Alongside the celebration of the legislative milestone, the demands for the depathologization of trans identities in the medical and legal contexts made by a segment of the LGBTQI+ movement were reinforced. In addition, the passage of the 2012 Argentinian law on gender self-determination proved it is possible in practice to reconcile self-determination for LGR purposes with maintaining and even promoting trans people's access to public healthcare. Later, in 2015, the adoption of a similar law in the European context – Malta's Gender Identity, Gender Expression and Sex Characteristics Act 2015 – was to become the reference for the Portuguese movement, as their representatives said in the interviews for the second project.

During the time that Law 7/2011 was in force, it became consensual within the LGBTQI+ movement, in which the specifically 'T' associations gained in both voice and standing, that self-determination was the primordial principle for trans citizenship. Analysis of the Portuguese parliamentary hearing (Assembly of the Republic 2018) conducted during the drawing up of a

new gender identity law, in which nine LGBTQI+ associations took part, reveals a mobilization around this basic principle.

This was the period in which transgender recognition was inaugurated and consolidated in Portugal. Driven by the existence of a law on gender recognition, 'gender identity' was positioned as a category of non-discrimination in the 2012 student's statute. In 2013, an amendment to the criminal code increased the seriousness of crimes motivated by the victim's gender identity. In 2015, the labour code prohibited discrimination based on gender identity. At the end of this period, the Secretary of State for Citizenship and Gender Equality launched the '#DireitoASer' (#RightToBe) campaign, which focused specifically on trans and intersex people.

The self-determination of gender identity: Recognition for all?

The strengthening of the 'T' movement, which represents rising numbers of more diverse trans people, and their mobilization around self-determination, the international and European guidelines in this regard, the examples of laws within and outside Europe and the left-wing majority in parliament, all converged towards the passage of Law 38/2018 of 7 August 2018. This Law, which confers the 'right to self-determination of gender identity and expression of gender, and to the protection of the sexual features of each person' and which is above all a victory for the LGBTQI+ movement involved in the various proposals and hearings that led to its drafting.

In contrast to its predecessor, which merely laid down the conditions governing 'the procedure for changing sex and given name on the civil register', the current law is framed by the human rights of trans people, as reflected in its name and visible in the tone employed throughout the text: 'All people are free and equal in dignity and rights, with all and any direct or indirect discrimination based on the exercise of the right to gender identity and expression of gender being prohibited' (Law 38/2018: Article 2[1]).

The law explicitly breaks with the medicolegal alliance, noting that:

No person may be forced to provide evidence of having been submitted to medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, or psychological or psychiatric treatments, as a requirement upon which the decision is to be based. (Law 38/2018: Article 9[2])

However, the way the Portuguese law is designed does not ensure universal access to LGR. In order to implement access to LGR for all, in addition to the self-determination that has now been achieved, it would have to remove age limits, meaning children and minors would be covered, permit registration beyond the two binary categories and extend to residents who do not possess Portuguese nationality.

The requirement for Portuguese nationality is reminiscent of the lingeringly persistent exclusion of the many *Gisbertas* who reside in Portugal, namely trans women and especially Brazilian immigrants. A significant part of the trans population in Portugal thus continues to (also) be excluded from (trans)gender citizenship – the part that, due to the intersection of these disadvantaged categories, is one of the most vulnerable and protection-deprived (Belizário 2018; Ramalho 2020).

As Mika, who is not a Portuguese national, but is resident in Portugal, says:

This is a law that excludes foreigners, which is a problem, given that we know that the most vulnerable among adult trans are migrant people, and they will go on not having access to this law. It's a good trans law, but it's not at all an intersectional law [...] and they basically made a law for the more privileged trans people. It's good, but it's not good enough.

Where age is concerned, the new law is accessible to people aged 16 and 17, subject to presentation of a medical report certifying 'their decision-making ability and informed willingness' (Law 38/2018: Article 7[2]). The law does not encompass children and young people under the age of 16. They are, however, covered by the ability to use their 'social name' (Law 38/2018: Article 3), including at school, with schools required to promote the exercise of the right to self-determination of gender identity and expression of gender (Law 38/2018: Article 12[1]).

The number and diversity of gender identities and expressions of people outside cisgender has expanded significantly in the last decade in Portuguese society. Self-identifications that were ultra-minority just ten years ago, such as 'gender fluid', 'agender' or 'non-binary', are now commonplace. These people do not find an identity category in the law, which continues to operate with registration categories limited to the 'male' or 'female' binary model. This mismatch, which has been pointed to in studies in various contexts (Monro and Van der Ros 2018 for the Norwegian case; Cannoot 2020; Meier and Motmans 2020 for the Belgian case) has also been found in the Portuguese reality.

If X existed, I would undoubtedly resort to it [the law] immediately. As things are, with binarism still in place, I won't make use of it. (Chico, agender, age 33)

Self-determination is super great, but there are still only two choices. If there were another option, I would make use of the law, without a shadow of a doubt. It would be important to me to be able, at least on paper, to be free of more labels that are not necessary for me. (Alice, non-binary, age 26)

The failure to contemplate other possibilities reveals that even when supposedly based on self-determination, transgender recognition is only allowed in Portuguese society (and others) to the extent that it maintains gender binary structures. So (cis)gender recognition can be extended to trans people, provided this does not affect or destructure the gender system. It does not jeopardize the binary gender system, but actually reinforces it by implicitly assuming that, when the right to gender identity based on self-determination is granted, these identifications continue to be limited to two options – those with which cis people identify.

Besides this exclusion from LGR as a result of the access conditions, we also found some interviewees who, despite meeting the formal requirements, did not enjoy the living conditions (primarily acceptance within the family or at work) that would have enabled them to opt for legal recognition. This was the case of Isabel, who was in the formal medical physical transition process, but did not feel she possessed the objective conditions needed to change her legal identity.

[What's stopping me is] the coming out to my family and at work. At work, I know I'm going to have trouble there. I.e. I need a job in order to pay for my needs, and my company will find a way of getting me fired. In the current [job] market, I'm going to encounter a lot of difficulties finding work, so I'm going to have to put up with some things. (Isabel, trans woman, age 45)

Or the case of Marta, where her wife's fears in relation to the consequences of legally assuming her identity, namely in her extended family, have prevented her from resorting to LGR.

There is the question of my wife, who, even if she accepts, doesn't want [me to assume it legally], and that conditions me. And my wife's family is always the problem. It's something my wife is scared to death of. (Marta, gender questioning, age 49)

Others consider that this recognition is not worthwhile, since it has not come in time to significantly change their lives. We particularly found this in older women, like Filomena and Romy, thereby demonstrating some of the consequences of the non-recognition of the past and the absence of redistribution policies for transgender people (Fraser 2000).

I've already really given up [...]. I already wasn't going to touch that [the question of documents] because I'm so fed up [...]. I made so many plans for my life, I suffered so much there at my work because of that, and so I don't want any more headaches. I've already been through so much – everything I've already suffered, all the things I've already done, what I've already spent, [I can't do it] anymore – it's messed up, but I'm going to stop here. (Filomena, age 63)

To me, [LGR] stopped being a priority, precisely because I managed to develop myself regardless of the legal shortcomings [...] personally, it doesn't substantially change my situation, be it financial, be it professional, be it social, because I was always seen as 'Romy, the trans', they always pointed fingers at me, so I created a mantle around me to protect myself from any aggression that might come from outside. (Romy, age 53)

In summary, notwithstanding its limitations, the numbers show this law has continued and intensified the process of democratizing access to LGR. Between 2018 and February 2021, 702 people had their gender identity recognized using the law (Cordeiro 2021). This is more than in the entire time the previous law was in force, which clearly reveals the effect psycho-medical gatekeeping previously had. Of them, 44 were young people aged 16 or 17 (Cordeiro 2021) – an age group that had been unable to do this under the previous legislation.

Recognizing Transgender: Lessons from Portugal

In this article we have journeyed along the remarkable Portuguese path to the recognition of transgender people – a path that is grounded in legislative advances, particularly those linked to LGR, and has led Portugal to become the fifth European country with a law based on self-determination. This progress, which reflects the Portuguese state's commitment to the rights of trans people, should be acknowledged and celebrated at a moment when the geopolitical context in which the country is situated has led to a number of retrograde steps, fuelled by populist and conservative ideologies.

The case of Portugal shows how advances in the rights of trans people are possible in a relatively short space of time, and how, in that process, the participation of LGBTQI+ and specifically 'T' social movements in the design and discussion of legislative proposals are crucial.

Analysis of the variation in the number of people encompassed in the different time periods reveals a democratization – albeit an unfinished one – of access to the recognition of gender identity. In procedural terms, the combination of the transfer of the various procedures to the administrative sphere with no need to go to court, and the simplification of the process,

has resulted in a saving of both time and financial resources, not just for trans people themselves but also for the state. Enshrining the right in law is empowering, and the transparency of and reduction in the conditions required for access are making it increasingly possible to restore equality between cis and trans people with regard to the right to gender equality.

However, the case of Portugal also shows that if policies on transgender recognition, namely regarding legal identity, are to have a more effective impact on the life of trans people, they must be designed in such a way as to consider the diversity of gender identities and expressions from an intersectional perspective.

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