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The Right to Gender Recognition before the Colombian Constitutional Court: A Queer and *Travesti* Theory Analysis

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This article discusses the case-law on gender recognition of the Colombian Constitutional Court. It argues that the Court, paying attention to queer and trans theory and to the demands of trans activists, has interpreted mainstream constitutional rights in such a way that trans people can have their self-defined identities recognised. The article criticises the limitations of this case-law, which still does not explicitly include non-binary and gender fluid people. On the other hand, it highlights that the Court's doctrine has the potential to challenge both the gender binary and the very category of 'sex' or 'gender' in the law.

Keywords: Colombian constitutional court, gender binary, gender fluidity, gender self-determination, non-binary gender, trans rights.

The claims of trans people are becoming a pivotal point in constitutional law and jurisprudence. 'Trans' is usually understood as an umbrella term. It refers to a diverse group of people whose gender identity, i.e. the deeply felt and individual experience of gender (International Commission of Jurists (henceforth, ICJ), 2007), does not correspond to that assigned to them at birth (*see* Valentine, 2007; Berkins, 2003). Supreme Courts and Constitutional Courts around the world are increasingly discussing the claim for gender recognition, with scholarly interest in the topic on the rise as well (Scherpe, 2015). To put it simply: gender recognition usually indicates the correction of one's 'sex' legal status, in registries, birth certificates, and other documents, so that it corresponds to one's gender identity. The Colombian Constitutional Court represents a telling example of how this claim, so central in trans advocacy, can be welcomed, and of how, under favourable conditions, constitutional law may be an empowering tool in the hands of trans advocates.

This article offers a doctrinal discussion and theoretical appraisal of the right to gender recognition as developed by the Colombian Constitutional Court, that is, as a right purely based on self-determination (in this article, also the right to gender self-determination). Such a right protects the free election of one's 'sex' legal status, without external controls or assessments. Centrally, the article shows the potential of constitutional law, especially when interpreted in light of queer, trans and *travesti* theory for the protection of trans identity rights. In so doing, the article wants to stimulate interest in a Court which has, to date, remained under-researched, despite its great innovative capacity to go beyond the status quo, in the hope that it may inspire other courts in the region and beyond, and provide doctrinal ammunition to those who may consider strategic litigation as a way to advance trans rights. This article focuses on the decisions which, by discussing the reclassification of civil status, have shaped a right to gender recognition of adult people. It must be mentioned, however, that the Colombian Constitutional Court has recently ruled on the right to gender recognition of children, in which self-determination has been balanced with the best interest of the child in being accompanied in the process for recognition (Decisions T-447/19; T-675/17; T-498/17).

Over the years, the Colombian Constitutional Court has shaped a fundamental right to gender recognition which is capable of original, even subversive, applications. Yet so far, the literature has not fully explored the potential of the Court's doctrine but also its limits when it comes to issues which the Court has not yet had the opportunity to clarify. This includes the recognition of persons who are non-binary, whose identity falls outside, rejects, and re-signifies the heteronormative gender binary (Clucas and Whittle, 2017; Wayar, 2018: 25). Equally neglected have been the demands of recognition of gender fluid people, who do not permanently identify with one specific gender and may need to be legally re-categorised (within and beyond the binary) more than once. Trans identity, indeed, may be characterised by development, crisis, and redefinition (Wayar, 2018: 25). In this regard, the article suggests that Colombian constitutional case-law is capable of expansive interpretations.

The recognition of LGBTQI+ rights by the Colombian Constitutional Court has already attracted some scholarly attention (Lemaitre Ripoll, 2009). More specifically the rights of same-sex couples (Bonilla, 2013; Molina Ricaurte and Carrillo Cruz, 2018), as well as those of intersex people have been object of investigation (Céspedes-Báez and Sarmiento-Forero, 2011; Rubio-Marín and Osella, 2018). Despite the important case-law, however, the scholarly discussion of the right to gender self-determination remains more limited. Bridging a doctrinal inquiry with queer, trans, and *travesti* theory, this contribution adds to (earlier) doctrinal systematisations (Espinosa Pérez, 2008; Moreno-Pabon, 2014; Bernal Crespo, 2018; Palomares Garcia and Rozo Ladino, 2019) and the critiques of the subjectivities that the Constitutional Court has defined within its case-law (Ruiz Nieves, 2018).

Before proceeding, a few terminological clarifications could be useful. The article will not distinguish between sex – as the biological sexual characteristics – and gender – as the cultural inscription upon it. As we shall see, this distinction has lost much of its significance in recent years. Hence, the article will therefore group these notions together and refer to them as 'gender'. When referring to civil status, sex and gender will be used interchangeably. The former is indeed the legal terminology in Colombian law regarding civil status, and the latter is commonly used in academic literature. Moreover, when the article refers to legal categories, statuses, or legal identities, this will be specified. It must also be clarified at the outset that, when providing a doctrine to classify people

according to 'sex', the Constitutional Court of Colombia in fact categorises them according to their self-defined gender identity. Finally, the term 'gender recognition' or 'right to gender identity' (and, specifically, gender self-determination) will be used to refer to the change of one's legal sex status, as generally understood in legal scholarship.

The argument develops as follows. The next section offers some preliminary, and essential considerations to show what is at stake, both practically and theoretically, before engaging in constitutional analysis. In the subsequent section, the article then discusses the right to gender recognition as currently constitutionalised by the Colombian Court. The penultimate section explores what the Court has not yet explicitly addressed. It discusses the potential of the current case-law for the right to go beyond the binary and fully accommodate gender fluid people. The conclusions summarise the argument and press for further research.

What Is at Stake: The Demands of Trans Rights and the Theory Backing Them

Gender Recognition

The importance of gender recognition for trans people cannot be overestimated. Social and legal recognition is essential to live a dignified life (Berkins, 2003; Berkins, 2012). It is moreover said to have great psychological value, being related to one's sense of inclusion (Hines, 2013). Furthermore, it has social and economic implications. Trans people typically experience ostracism, exclusion from the job market, poverty, and violence (Campuzano, 2009). Lack of recognition characteristically represents a forced 'outing' in oftentimes transphobic settings, and has potentially adverse consequences for trans people (Spade, 2015).

Even when granted, gender recognition has traditionally remained subject to a series of preconditions. These requirements range from medical interventions – such as sterilisation, surgery on primary or secondary sexual characteristics, and/or a psychiatric diagnosis – to behavioural standards – such as showing feminine or masculine manners in line with the gender status claimed (Clarke, 2015; Dunne, 2017; Osella, 2021). Over time, the legitimacy of these preconditions has come to be questioned (Silver, 2013; Bernal Crespo, 2018). Those who defend their validity refer to the necessity to preserve a degree of control over the individual gender status for reasons of legal certainty, given that it shapes one's legal positions to some extent. Consider the limits sometimes imposed by family law (such as access to marriage and procreation), especially where same-sex marriage is not accepted (Osella, 2021). Likewise, the need to identify the person through features which include one's gender may be referenced, not only for security purposes but also in order to fulfil some of the central functions of the contemporary state, such as the administration of segregated facilities, or the administration of welfare and equality measures, such as affirmative actions (Currah and Moore, 2009; Spade, 2015; Osella, 2020).

As of the 1990s at least, the trans community has been demanding a right to gender recognition based on self-determination, questioning the procedures and preconditions required to achieve it (Frye, 2006). The trapped-in-the-wrong-body narrative, which postulates the desire of the individual to transform a rejected corporeality, has been problematised as too narrow a representation of trans identity (Wayar, 2018: 115). The Yogyakarta Principles, the authoritative and highly effective advocacy statement

on LGBTI+ rights (O'Flaherty, 2015), reflect this evolution. In their first 2006 edition, the drafters declared a right to gender recognition subject to no preconditions based on medical or family status (such as being single) (ICJ, 2006: Principle 3). The 2017 update of the Principles – the Yogyakarta Principles +10 – moreover explicitly rejected psychiatric and psychological assessments, making gender recognition exclusively based on self-determination (ICJ, 2017: Principle 31).

These demands are increasingly accepted by courts and legislators. At the supranational level, and significant for the regional context of this article, the 2017 Inter-American Court of Human Rights' Opinion on 'Identidad de Género, e Igualdad y No Discriminación a Parejas del Mismo Sexo' (Gender Identity, Equality and Non-Discrimination for Same-sex Couples) has – uniquely among supranational institutions, albeit limitedly to soft law – pronounced a right to gender recognition solely based on self-determination, and free and informed consent, without any medicalisation ((OC-24/17): para 160). At the national constitutional level, besides the Constitutional Court of Colombia, the constitutional right to gender self-determination has also been protected by the Belgian Constitutional Court (Decision 99/2019), with the Brazilian Supreme Court undertaking clear steps in this direction by rejecting medicalisation (ADI 4275/DF, 2018). At the legislative level, this right has also made inroads in several (though still a minority of) jurisdictions. In Latin America, these include Argentina (*Ley* 26.743), Chile (*Ley* 42.225), Ecuador (*Ley Organica* 4 February 2016, Art. 94), and Uruguay (*Ley* 19.684).

The demand of gender self-determination is not limited to the binary. The recognition of non-binary identities is explicitly mentioned in the Yogyakarta Principles +10 (ICJ, 2017: Principle 31), which call for having 'a multiplicity of gender marker options' available. In Latin America in particular, activists for the rights of *travesti* people are increasingly vocal and contesting the gender binary as a limitation to their personality. *Travesti*, a transregional identity with strong political connotations (Berkins, 2012), indeed 'subverts both normative expectations of femininity and trans politics structured around assimilation and respectability' (Rizki, 2019: 149). The *travesti* identity comprises the explicit rejection of standard binary labels, but also the – so to speak – more conventional trans identity, as well as the refusal to be intelligible (Berkins, 2003; Campuzano, 2009; García Becerra, 2009; Machuca Rose, 2019). The demand for non-binary recognition, which is so central in *travesti* advocacy, is increasingly welcomed at the constitutional level in a plurality of jurisdictions (Rubio-Marín and Osella, 2020).

On the other hand, the advocacy for gender fluid people – that is, people whose identity is not permanent and may change multiple times – seems to be less explicit. Yet, the fixed-over-time and *a priori* definition of the trans experience has been problematised. Instead, the idea of an evolving personhood, open in its concreteness to a plurality of options and reimaginations, has been advanced. Such an identity, seen as rich and fruitful, has been contraposed to the rigidity of definitions which are – so to say – set in stone (Wayar, 2018: 25 and 67). In theory, the right to have one's self-defined gender identity recognised by law should also entail the right to change one's legal sex categorisation at any time when this might be necessary. But laws typically limit the number of changes over time or make subsequent changes procedurally more difficult. At the time of writing, only in Belgium has the right to multiple changes without additional restrictions with respect to the first gender recognition through constitutional law (Decision 99/2019; Rubio-Marín and Osella, 2020).

Finally, the Yogyakarta Principles +10 have questioned – at least to a certain extent – the necessity of gender registration in civil registries or birth certificates, thus

advancing the freedom *from* gender, and not just the freedom within it (Gross, 2009). In particular, Principle 31 calls for official documents to include only the 'personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality' (ICJ, 2017).

While this is key to their struggle, one must emphasise that the effective achievement of identity rights does not entail the full completion of trans demands (Spade, 2015). Further claims, often depending on a plurality of characteristics, such as class and race, centre on the achievement of full citizenship of trans people, who, often deprived of many fundamental rights, live in a 'state of siege' (Berkins, 2003: 133). Trans and *travesti* people have demanded a reappropriation of the public space and the transformation of cis-heteronormativity, as well as the dominant sexual values, in society (Berkins, 2012: 226–227). Measures to face trans poverty, curb transphobic violence, guarantee equal access to services, as well as the protection of sex workers, are thus key objectives of trans activism too (García Becerra, 2009; Campuzano, 2009: 78–82). More than that, *travesti* advocacy has also sought an overall societal transformation. From this perspective, a care-oriented, balanced, integrated and sustainable life has been embraced, while a predatory capitalism which ultimately fuels (gender) violence has been rejected (Wayar, 2018: 100–105).

Colombia is a case in point. Activists certainly claimed self-determination-based gender recognition, and have insisted that the lack of recognition was the source of considerable discrimination, as demonstrated by the intervention of a group of associations through *amici curiae* in the trial before the Constitutional Court (T-063/15). After having been recognised, however, activists insist that the right must still be implemented properly. NGOs have reported that some notaries – in charge of the procedure for gender recognition – have refused their services, possibly with the support of the Unión Colegiada del Notariado Colombiano (Aquelarre Trans et al., 2016). In a similar vein, trans groups are asking for specific measures to fight the rampant violence they experience, women in particular (Colombia Diversa et al., 2019, para 7). They have accused authorities of failing to duly investigate the attacks, when not directly being involved in the perpetration (Colombia Diversa et al., 2019). Additionally, trans advocates, as members of the broader LGBTQI+ coalition, are demanding justice for LGBTQI+ victims of the conflict, as well as due representation in the peace process (Colombia Diversa et al., 2019). Health and poverty related concerns have also been at the centre of their claims (García Becerra, 2009). Furthermore, as the abundant case law of the Colombian Court shows, trans people continue their struggle against discrimination in a plurality of other settings, for example in healthcare (T-771/13; T-552/13), education (T-141/15), the army (C-356/19; C-584/15; T-476/14), or the workplace (T-143/18).

The Theoretical Foundations of the Debate

Beyond the political confines of the struggle, the debate around the recognition of gender identities and the mobility within and outside them has important theoretical underpinnings, and these are also occasionally brought to the table in legal disputes. The notion that power, rather than biology or nature, is centrally at stake has indeed been developed within post-modernist, feminist, and queer literature, and much of this theory resonates in the jurisprudence of the Colombian Court.

The starting point of much of this literature comprises the difficulties associated with the notion of a 'true sex'. In the first volume of his *History of Sexuality*, Foucault rejected

the notion of 'sex' as a biological *a priori* preceding power dynamics. Instead, he argued that 'sex' was an 'artificial unity' of diverse bodily elements and biological functions, feelings and pleasure, the effect of which is that the power dynamics behind it are obscured (Foucault, 1979: 152–155). Around the same time, Wittig also argued against the notion of 'woman' as a construct outside categories of power, while acknowledging the existence of 'women' (in the plural) as a class, defined by patriarchal oppression (Wittig, 1992). Butler pushed these ideas furthest by famously arguing that 'the body itself is a construction' as a 'myriad of bodies' are subsumed under a notion of 'gender', prior to which no body has a 'signifiable' existence. In this context, sex cannot be understood as existing before gender, but rather as a naturalised category rooted in gender itself (Butler, 1999: 9–12). The gender binary precedes the 'reading' of bodies (and genitals) and determines their understanding (Maffia and Cabral, 2003: 86–87). The direct corollary of this is the collapse of the distinction between genders as a cultural inscription over the biological 'hard-core' of sex.

The challenging of sex as a pre-political category has also entailed a contestation of the sexual binary, that is, the exclusive existence of physical maleness and femaleness, with non-normative bodies reduced to pathological exceptions to be erased (and mutilated). As also demonstrated in the biological literature (Fausto-Sterling, 2000), a multitude of different bodies is hence overshadowed by the cis-heteronormative male–female dyad. Diverse anatomies – such as that of intersex people – are simply illegible in such a system (Cabral, 2003: 121). The binary, in other words, represents a system of power relations, which preserves a normative – and non-representative – understanding of society (Butler, 1999; Campuzano, 2009; Campuzano, 2006). This philosophical insight has been further backed by different disciplines including history (Domurat-Dreger, 1998), anthropology (Karkazis, 2008), and law (Osella, 2021), all of which denounce the pathologisation of diverse bodies, and the 'enforcement' of the binary on non-conforming individuals, especially intersex people.

Accordingly, Butler has argued that gender is neither a noun, nor a set of 'free-floating attributes'. Instead, gender manifests itself as an *ensemble* of repeated rituals which are not an expression of a deeper pre-discursive identity, but rather of 'deeds', with no need for a 'doer'. In other words, there is no internal essence, but only a fictionalised effect of a social discourse (Butler, 1999: 185). In sum, the difficulties and contradictions in defining any ontological distinction between gender identities lead to the challenge of traditional 'intelligibility' (Berkins, 2003; Campuzano, 2009, Campuzano, 2006) and to the rejection of 'heteronormative extremes' and the belief in 'true sex(es)'. Once this normative structure is abandoned, genders can be reimagined. Citing prominent *travesti* activist and theorist Marlene Wayar, this redefinition can be carried out with the creativity of a child, opening a plurality of gendered options which escapes the strictures of the binary (Wayar, 2018: 25).

As we shall see, these notions are echoed, if not explicitly cited, in the jurisprudence of the Constitutional Court, which, in establishing a right to gender self-determination, has opened the possibility for this transformation to take place.

The Right to Gender Recognition: Making Trans People the Ultimate Judge of their Own Identity

Colombian law regulates gender recognition through a presidential decree (*Decreto* 1227 of 2015) (Bernal Crespo, 2018). The 2015 decree, which expressly implements a

constitutional decision of that same year (T-063/2015; see also T-099/15), refers to 'sex' as a social construct and establishes that gender recognition can be achieved through a notarial procedure, based on the sworn oath of the applicant (Art. 2.2.6.12.4.5, *Decreto* 1227/2015). Any other requirements are explicitly barred (Art. 2.2.6.12.4.4, *Decreto* 1227/2015). Gender recognition is explicitly limited to the male–female binary (Art. 2.2.6.12.4.3, *Decreto* 1227/2015). Finally, the decree allows only two transitions in total, that is one transition back or reversal, but only after a ten-year period has elapsed (Art. 2.2.6.12.4.6., *Decreto* 1227/2015).

Decision T-063/15, on which the decree is based, clarified a procedural matter of the law as it stood prior to *Decreto* 1227, namely how to obtain gender recognition. This question, which the Court answered by declaring a constitutional right to have one's gender identity recognised through a simple, self-declaratory, notarial procedure, presupposed a discussion on the understanding of the notion of gender and gender identity. In concrete terms, the Court had to decide whether legal sex reflects an objective fact which external authorities can certify (and, hence, to be discovered by courts, so to speak), or an aspect of individual identity, which is ultimately for the individual to determine, and, therefore, simply to declare before a notary.

To understand what was at stake exactly, one must recall that, before *Decreto* 1227 of 2015, no *ad hoc* procedure existed for gender recognition (Espinosa Pérez, 2008; Moreno-Pabon, 2014). Changes to one's legal sex were granted via interpretation of the general law on civil registries, which prescribed that changes to the civil status could be made through judicial or notarial procedure (*Decreto ley* 1270 of 1970, Arts. 89 and 95). In 1994, the Court had decided that a judicial decision was indeed necessary, allowing a judge to examine the applicant and their transformation (T-504/94, Para 4). Accordingly, the Court understood sex, as the legal status, mirroring an objective fact of a physical nature, independent of the individual self-assessment (T-504/94, Para 2). With Decision T-063/15, the Court reversed this doctrine. Triggered by a trans woman asking to have her gender identity recognised through the – quicker, cheaper, and less intrusive – notarial procedure, the Court established that the judicial procedure disproportionately restricted the right to gender identity of the person (T-063/15, Para II.7.2.7). Essentially, the Court rejected any narrative which replicated the biological foundation of gender identity, and defined it as an aspect of individual identity, which the person concerned is best suited to assess. The Court held that the right to gender recognition is grounded in the constitutional rights to dignity (Art. 1 *Constitución Politica* (Political Constitution) – henceforth, CP), free development (Art. 16 CP), and recognition of one's personality (Art. 14 CP). Although it concerned a procedural matter, the reading developed by the Court, which combines doctrinal law and critical theory, seems to ground the protection of the right to gender recognition purely in self-determination.

However, this result was not achieved overnight. Rather, it was rooted in an established jurisprudence on intersex rights and gender recognition which gave the Court the chance to expand and explore critical gender theory in connection with fundamental rights. The initial decision discussing gender identity dates back to 1995. It concerned the involuntary reassignment of a boy, who, following an injury, had his penis removed after a medical decision, and was then raised as a girl – a decision which he later contested before the Constitutional Court. Within the Judgment, the Court affirmed that 'sex represents a non-modifiable feature of each person [that is, non-modifiable by external actors] […] [the person being] the only one who – with full knowledge and after adequate information – may consent to [their own] sex or "gender" reassignment' (T-477/95, Para 13.1). For the Court, the – so to say – choice of one's gender identity

is grounded in human dignity, enshrined in Article 1 of the Constitution, which protects the autonomy of the person to be the only master over one's own decisions and life course.

Almost two decades later, in 2012, the Court produced a decision which proved significant for establishing a right to gender recognition. The Decision came as the answer to a claim of a trans woman to have gender confirmation medical treatments covered with public funding (T-918/12). In granting the claim, the Court re-emphasised that dignity prescribes the acceptance of all individuals as they are, and as they decide to appear in society. Despite falling short of enunciating a right to gender self-determination (T-918/12, Para IV.7.3), the Court also found that the right to free development of the personality, under Article 16 of the Constitution, gives each person the right to develop and fulfil an autonomous life project, without coercion, unjustified controls, and limitations other than those which follow from the rights of the others or public interests (T-918/12, Para IV.3.3). The Court found that dignity and the right to free development of one's personality support the self-determination of one's legal sex, without interference by, or supervision of the State. The latter has indeed no competence on the matter as there can be no harm to third persons from one's self-determination (T-918/12, Para IV.3.3). On this basis, the Court came to confirm this doctrine in Decision T-063/15, adding that autonomy as to one's legal sex is also grounded in the constitutional right to the legal personality (Art. 14 CP). Such a right, the Court specified, means that everyone can have their legal persona correspond to their identitarian definition (T-063/15, Para II.4.1–4.5).

In its 2015 Decision, the Court offers a reading of the right to gender recognition which arguably embraces diversity. Firstly, the Court does not define an 'ideal beneficiary' of the right. This lack of definition is of primary importance for shaping an inclusive right, as any identity definition represents an exclusionary act, bound to include some (and exclude others from) its scope. Thanks to the lack of definition, individual experience of gender can arguably flourish and obtain recognition without restrictions. In other national contexts, the definition of the beneficiary of the right has indeed had essentialising and exclusionary effects for non-normative individuals (Dutta, 2013). Despite not defining the beneficiary of the right, the Court nonetheless defines the notion of gender identity along the lines of the Yogyakarta Principles, following the associations intervening in the case (T-063/15, Para I.4.1.8), and clearly detaching it from any physical dimension. The Court interestingly refers to gender identities in the plural as deserving the protection of the law, thus avoiding the definitional process of one trans identity over the other. In so doing, the Court acknowledges the complexities of trans lives, and refrains from imposing 'one' model of trans identity through the erasure of contradictions and nuances, very much in line with the tenets of queer theory and trans demands, which clearly resonate in the decision.

Consistently, in its 2015 judgement, the Court clarifies further that 'sex' – as a legal status – is not to be seen as reflecting an objective, physical, element but rather as an 'identitarian construction', in harmony with the individual's gender identity (T-063/15, Para II.5.2). Moreover, the Court also stated that there is no such a thing as an objective, 'true', sex reality to be reflected in the civil status (T-063/15: Para II.7.2.4). The Court contests the very existence of a 'true sex', essentially recognising gender, including its physical parts, as a political-cultural category. Furthermore, the Court states that a trans identity is not pathological (T-918/12: Para II.7.2.2). Thereby, it meets another claim that has been central in trans advocacy, namely the depathologisation of diverse gender identities which fails to take place when trans identity – as 'gender dysphoria' – is

included in the list of mental illnesses, resulting in stigmatisation and discrimination (Theilen, 2014).

Given these premises, it is not surprising that the Court decided that the requirement of a judicial procedure to recognise one's gender identity in the law unjustifiably restricted the rights to dignity, free development, and legal personality (T-063/15, Para II.2). Admittedly, the Court recognised that judicial supervision of the civil status could serve a few constitutionally legitimate purposes, such as ensuring that the civil status of the person is protected from arbitrary changes, and granting certainty to the information required to assign public offices, rights and duties based on the civil status of persons. However, the Court found that judicial supervision unnecessarily interfered with the right to gender recognition because it could just as well be achieved through different and less invasive instruments, such as a declaration before a notary public (T-063/15: Para II.7.2.6). In so doing, the Court highlighted that the judicial procedure is unduly long, expensive, and uncertain in its outcome (T-063/15: Para II.7.2.3). Moreover, the Court noted that, in its own case-law, cisgender people – meaning people whose gender identity corresponds to that assigned to them at birth on the basis of anatomical consideration – when wrongly registered, are not required to go through a judicial procedure to correct their 'sex' classification in the civil status (T-231/13). Considering that the Court excluded the existence of a 'true sex', the correction of sex registration for a cisgender person had to be considered qualitatively identical to that of a trans person, and not treating it as such was unjustifiable discrimination against trans people. Beyond the comparison with cisgender people, the Court criticised the attempt to assess applications for gender recognition through an external – in this case, judicial – examination. Any external assessment, the Court noticed, would require a degree of physical or psychological intrusion, and must necessarily rely on stereotyped evaluations. In the Court's words:

> [T]hese inquiries often force transgender persons to position themselves in a heteronormative extreme, so they can obtain a positive result which may permit their recognition. In many instances, this means that they will have to lie about their life, tastes and preferences and many aspects of their personality. (T-063/15: Para II.7.2.3)

This is how the Colombian Court has met the demands for gender recognition based on self-determination, embracing a de-essentialised, and de-essentialising, understanding of legal sex. Despite the label 'sex', still the terminology of the law, what in fact is recorded is the self-defined gender identity of the person, who is the only, and ultimate, authority on their own legal identity. The Court, in other words, severs any connections between normative bodily or behavioural characteristics, and the legal registration of the individual. Reading it out of the constitution, the Court produces a reasoning which leads to the conclusion that there is no 'right' way to live maleness or femaleness which the law should endorse, except the one the individual decides for themselves. It radically contests what are traditionally understood as the bedrocks of gender in favour of the individual sense of self, which the constitution itself protects and supports.

This de-essentialised understanding of 'sex' in the civil status moreover bestows control over the legal status on the individual. Lacking definitions of the characteristics that a male or a female in law 'must' have, individuals are free to renarrate their identities, bodies, and behaviours. Genitocentrism and normative understanding of gender categories and expressions are thus repudiated by the Court. As eloquently put by De Mauro Rucovsky, with reference to the Argentinian *ley de identidad género* (26.743):

> a political potentiality dwells within the very legal letter of [gender self-determination]. In its very inner workings, it allows for different people to embody a particular gender and corresponding gendered name. As previously indicated, the political and legal potency of the text lies undoubtedly within its exposure of masculinity and femininity as modifiable categories. (De Mauro Rucovsky, 2019: 234)

Having indeed forfeited any argument on the naturalness – or even appropriateness – of gender, and explicitly rejected stereotyped roles as benchmarks for legal recognition, the Constitutional Court of Colombia has indeed opened the law to the possibility to reimagine legal sex with the creativity that Wayar advocates. Pre-defined and fixed-over-time identities are no longer intended to be the reference for legal purposes and individuals may arrange their lived experience with the gender they see fit for themselves.

Some Open Questions: Beyond the Binary and Gender Fluidity?

To date, the doctrine of the Court has not been applied to some other fundamental issues related to gender identity: the recognition of non-binary and gender fluid people. These issues, as we have seen, seem to be critical in the Latin American context, where *travesti* people reject both binary-normativity and the fixed understanding of gender identity. However, the Constitutional Court of Colombia has not ruled on those specific issues yet. Nevertheless, the current doctrine, with its emphasis on self-determination and the explicit rejection of naturalness, seems open to the recognition of non-binary and gender fluid people too. In fact, as it stands, such an expansive interpretation seems to be most consistent with the Court's jurisprudence.

The doctrine of the Court seems easy to reconcile with the potential identity claims of non-binary people. The right to dignity (Art. 1 CP), free development of personality (Art. 16 CP), and recognition of legal personality (Art. 14 CP) entail that each person has a right to be accepted as they are, without external interference by the state (T-063/15) and thus a right to have their identitarian perception enshrined in the law (T-063/15: Para II.4.1–4.4). At the same time, the Court has consistently rejected any rhetoric of naturalness associated with the binary. It has recognised gender as an instrument of a power play, and challenged the pre-political existence of a 'sex' binary. In Decision SU-337/99, the Court provided a strong framework to protect intersex children from invasive surgeries, explicitly questioning the binary construction of gender, as well as its physical components. Emphasising that the binary is a cultural construction (SU-337/99: Para 36) the Court called for sexual and gender diversity to be regarded as something to learn from, rather than something to erase (SU-337/99: *Aclaración final*).

In this light, outright denial of the right to gender recognition beyond the binary would seem inconsistent with precedent. Arguably, the most obvious consequence of the theory embraced by the Court would be the recognition of non-binary identities. The current doctrine can indeed provide the backbone for an expansive right to gender recognition, even in the absence of a specific ruling of the Court – which, at any rate, would clear the field from doubts. In 2013, the Court itself has underlined that people who cannot be registered as either male or female have a right to be registered nonetheless, though not in a third legal 'sex' (which was not the object of the claim lodged by the applicant), but simply omitting the relevant information (T-450A/13). The right to be registered without marking a gender was granted despite the public interests in (binary)

registration: protection of women, mothers, and marriage (T-450A/13: Para II.4.5.3). However, nothing seems to suggest that the option of recognising a non-binary gender identity cannot follow from the same principles, especially after Colombia has given up on the legal institution which was clearly built on the binary: heterosexual marriage. Same-sex couples now enjoy a constitutional right to marry (SU-214/16).

Similar considerations can be made with regard to the right to gender recognition of gender fluid people. At the time of writing, the legal system provides that a second change in the legal sex can be granted, but only after ten years after the first one. No more than two changes are allowed in total (*Decreto* 1227 of 2015, Art. 2.2.6.12.4.6). As such, the law would put a straitjacket on non-normative, more fluid, identities, limiting the possibility for re-elaborating genders. Yet, the current constitutional doctrine can arguably provide a more solid bedrock for expanding the right to gender recognition. The emphasis which the court has placed on self-determination, and on the right to legal personality in its identitarian dimension, seems to allow for gender recategorisation whenever necessary (T-063/15: Para II.4.1–4.4). In fact, it must be mentioned that the Constitutional Court has already granted protection to trans persons asking for a second name change – not a second change in the sex classification (T-077/16; T-086/14; T-977/12). Relying on the rights to dignity, equality, free development of personality, and legal personality, in such instances, the Court has consistently supported the right to 'change back' one's name through notarial procedure (T-077/16: Para II.3.4).

Of course, the need for legal certainty which the Court itself has – consistently – referred to in its jurisprudence, has not disappeared (T-077/16: Para II.3.4; T-063/15: Para II.7.2.6; T-450A/13: Para II.4.5.3). Yet, as suggested by the Belgian Constitutional Court, to date the only constitutional court which ruled out the limits on the subsequent changes to the civil status (Decision 99/2019: Paras B.8.3-B.8.8), gender recognition of fluid identities cannot be granted in a discriminatory way vis-à-vis that provided to people with a permanent gender identity. For the Belgian Court, when the law contemplates ordinary and less invasive mechanisms to avoid the abuse of the right to gender recognition, these can be validly applied to prevent deception in multiple changes as well. Should the law apply a stricter standard to gender fluid people, it would operate an unjustified distinction between trans people with a – so to speak – permanent gender identity and gender fluid people. This suggests that the standards that the Colombian Court envisioned, and that were only partially translated into the *decreto* 1227 of 2015, should apply equally to the first and the subsequent recognitions. The rich tradition of protecting gender identity rights of the Colombian Court, as well as its embracing of a constructed, cultural understanding of gender identity, would definitely place this judicial body before quite a radical decision, even a break with its previous doctrine, should it opt to preserve a differentiation between gender fluid and other trans people.

Conclusions

How has the Constitutional Court of Colombia responded to the claims of trans rights? More generally, how meaningful can the contribution of constitutional law be to protect trans people? The Court has actively engaged with trans demands for over twenty years. The result is the definition of a constitutional right to gender recognition based on self-determination. Even though the Court still relies on 'sex' categories, and has not yet ruled explicitly with respect to gender plurality and fluidity, its doctrine may have the capacity to provide protection to non-binary and fluid people too. Particularly relevant

seems the lack of definition of an ideal right-bearer, which allows for freedom to reimagine the concepts of legal maleness and femaleness, especially to the benefit of those who live gender in a diverse and creative way.

Importantly, the jurisprudence of the Colombian Constitutional Court provides a strong framework to protect trans people by combining mainstream constitutional provisions with critical gender theory. The investigation of *how* the Constitutional Court has come to embrace such theories is still to be carried out and cannot possibly be undertaken here. Nevertheless, it seems evident that this effort to reach beyond the narrow legal domain has given the Court its capacity for insight. Further investigation, including empirically based socio-legal research, is however needed to understand the concrete conditions and reasons for the development of this jurisprudence. Likewise, more research is required to show how street-level bureaucrats are applying the constitutional *nomos* in their daily practices. Further avenues for investigation should explore the dynamics between the vernacular and the global which may take place before the Constitutional Court of Colombia. Such research should problematise the globalisation of 'northern' queer identities vis-à-vis local realities and political demands. In this regard, the Latin American literature on the subject provides a rich theorisation, which could represent the starting point for future investigation (Falconí Travez, Castellanos, and Viteri, 2013; Viteri, 2017).

In any event, the Court has achieved its results through the interpretation of rights which are widely shared in modern constitutions and human rights treaties. In this sense, the Colombian experience offers a tale of hope for trans – and, in general, LGBTQI+ – advocates and activists, as well as a theoretically rich case-study for scholars working in this field. It indeed demonstrates how the protection of gender identities can find a basis in mainstream constitutional reasoning and argumentation. Such elements despite the differences between contexts, are capable of mobility and offer inspiration in other countries too. The Colombian case-law shows how constitutions can, under the right circumstances, represent a remedy to, if not an alternative for, the inactivity of the legislator and empower a minority, such as trans people, whose claims have far too often and for far too long been unduly neglected.

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