

**LGTB LEGAL PROTECTIONS:  
A COMPARATIVE STUDY OF SPAIN AND SCOTLAND**

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**Work made by:** Jesús Calviño Ruiz

**Directed by:** Jose Ramón Bengoetxea Caballero

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## 1. INTRODUCTION.

*“This love cannot be turned back. And this love is something carried by many people who have been militating for many years to live in a more decent country”*, said Pedro Zerolo. His words have never been more actual than now, 28th February 2023, when the Parliament of Spain has enacted the *Law for the real and effective equality of trans people and for the guarantee of the rights of LGTBI people*. There is no doubt about the changes that this Act will introduce in the legal system, which is the aim of this piece of work.

Nevertheless, not only the Spanish Act but also the *Gender Recognition Reform Bill* of Scotland will be analysed. In this second case the process of enactment is being longer than expected because of the appeals that have been filed before the legislative bodies due to discrepancies regarding the content of the legal text. This is caused, in a vast majority, by the waves of ultra-conservative ideas that are sweeping across Europe.

Scottish Bill is, in reality, a reform of the *Gender Recognition Act* of 2004 enacted for the entire United Kingdom. Thus, Scottish Parliament is searching for changes and specific regulations for its territories. Therefore, we are going to see that the structure of the bill is a bare reformulation of the Gender Recognition Act taking into account the legislative particularities of Scotland.

The need for these laws is clear, especially in a society that, as in the case of Spain, includes (in studies carried out in 2021) 12% of the non-heterosexual population<sup>1</sup>. By the other side, in Scotland around 2% of the population affirmed to have other sexual orientation than heterosexual<sup>2</sup>. Thus, legislating for this sector of population has become, over the last few years, a latent claim in the social demands of both places.

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<sup>1</sup> IPSOS. España, líder mundial en defensa de los derechos LGTBI+. (2021). *Ipsos*. Recovered 19th February 2023, from <https://www.ipsos.com/es-es/espana-lider-mundial-en-defensa-de-los-derechos-lgtbi>

<sup>2</sup> SCOTTISH GOVERNMENT. (2017). Demographics [Portable Document Format (PDF)] in *Sexual orientation in Scotland 2017: summary of evidence base* (p. 10). <https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2017/01/sexual-orientation-scotland-2017-summary-evidence-base/documents/00513240-pdf/00513240-pdf/govscot%3Adocument/00513240.pdf>

There is no doubt that both legal texts (the Spanish Act and Scottish Bill) will revolutionize the legal system. This is because they focus on the development of constitutional rights that directly affect the basic and elemental core of Law: the person. What they seek, ultimately, is to allow people to be who they are and express their identity in the way they feel. The recognition of identity will be analysed in the following chapters, in concordance with legal and social equality.

As it was said before, the main aim of this investigation work is comparing the similarities and differences between both legal texts. Also, under the pretext that these types of issues are being dealt with, also analyse similarities and differences between the different procedures of a civil or administrative nature that must be followed in the various cases, as well as a focus on the sanctioning regime of the Public Administration from both territories.

Some diverse methods will be used to complete the information about both legal texts and to compare them, which is the main aim of this work. Online sources, books, articles and diverse legal texts will be the main materials to make this work having sense. In addition, other types of experiences and sources not necessarily linked to the above could be used to complete the different problems and information that is going to appear as a result of the investigation. As these are also relatively new topics, we will also use a variety of news and publications from various national media in each territory, as well as international media.

We will now go on to briefly define the content of the various sections into which the work is structured. Section 2 details the historical-legislative evolution of transsexuality both globally and in each of the territories analysed, as well as the evolution of the legal texts under study and explains how each of the laws deals with the process of gender recognition. Section 3, on the other hand, will discuss the treatment of identity and the perception of transsexual people, including conversion therapies, maternity and filiation, treatment in prison and treatment in sporting practices.

Section 4 will deal with the issue of the fraudulent use of the law, the concern of some social sectors about it and the solutions proposed by each of the legal texts. Finally, section 5 will analyse two personal cases in Spain: one before Law 4/2023 came into force and the other after the law came into force; it will also deal with the issue of transsexuality in Scotland from the point of view of the writer Jo Clifford, who has a great reputation in the area. The paper will then conclude with a section of conclusions drawn from the analysis of the two legal texts.

## 2. HISTORY AND DEVELOPMENT OF TRANSEXUALITY AND BOTH LEGAL TEXTS IN THEIR RESPECTIVE TERRITORIES.

### 2.1. Concept and brief history of transsexuality.

Before going into detail about the study of legislation on the subject in both Spain and Scotland, it is important to clarify the concept of transsexuality or transgender people. As the framework of this work is legal analysis, it is appropriate to define transsexuality from a legal perspective. Thus, according to the Pan-Hispanic Dictionary of Legal Spanish, transsexuality is the "*quality of the person who belongs to the male or female sex under the phenotypical aspect, and who has the physiological functions that respond to that phenotype, but, nevertheless, experiences and conceives himself or herself as belonging to the opposite sex*"<sup>3</sup>. In short, transgender people feel a mismatch between the biological sex they were assigned at birth and their felt or perceived sex.

Transsexuality has been documented in societies for thousands of years<sup>4</sup>. Already in civilisations such as Sumerian or Akkadian there is evidence of the existence of people who defied the socially established as far as being a man or a woman is concerned, but always linked to reasons of worship of certain gods or celebration of religious ceremonies, as in the case of the *hijras* in Asia. Even in Roman imperial times, an emperor, Heliogabalus, acted in accordance with what was socially considered to be a woman, and even wanted to undergo surgery to reassign his sex, something unthinkable at the time from a medical point of view.

Several centuries later, we also find cases of people who defied the established gender canons, such as Catalina de Erauso<sup>5</sup>, also known as "La Monja Alférez" (The Nun Ensign) in Spanish. This person, dedicated to crime and military tasks, was a character widely represented in the period known as the "Golden Age", which took place in the Baroque

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<sup>3</sup> REAL ACADEMIA ESPAÑOLA. *Diccionario panhispánico del español jurídico (DPEJ)* [online]. <https://dpej.rae.es/> [Accessed on 16th April 2023].

<sup>4</sup> BLAKEMORE, E. (2022). Breve historia de la vida de las personas transgénero y su reflejo en la sociedad. *National Geographic*. <https://www.nationalgeographic.es/historia/breve-historia-de-la-vida-de-las-personas-transgenero-y-su-reflejo-en-la-sociedad>

<sup>5</sup> GONZÁLEZ OCHOA, J. M. (2020). La increíble historia de Catalina de Erauso, la Monja Alférez. *Historia National Geographic*. [https://historia.nationalgeographic.com.es/a/increible-historia-catalina-erauso-monja-alferez\\_13152](https://historia.nationalgeographic.com.es/a/increible-historia-catalina-erauso-monja-alferez_13152)

period. In the last years of her life she even obtained papal and royal authorisation to use her male identity, until her death in 1650.

The use of the term "transsexual" did not become widespread until the second half of the 20th century, when the use of hormone therapies and gender reassignment surgeries became widespread<sup>6</sup>. One of the first documented cases is that of the German artist Lili Elbe who, after his wife decided to use him as a substitute for one of her artistic models, decided to live as a woman. It was also in this century that awareness of the struggle for transsexual and LGBT rights in general began to grow, with the Stonewall events of 28 June 1969 as its greatest exponent, with great transsexual figures such as Marsha P. Johnson and Sylvia Rivera.

## **2.2. A legislative overview of transsexuality in Spain and Scotland.**

Although in this research work we will deal with the new legal texts on the subject of LGBT rights, focusing above all on the rights of transsexual people, these were not the first to regulate the subject. For this reason, in this section we will analyse the varied legislative process in both territories, briefly detailing the points that each law dealt with at the time and what novelties they introduced in the social and legal sphere. In addition, we will also try to detail the different objections that have existed to the legal advances, and which still exist today with the legal texts presented and which are being analysed.

In order not to unnecessarily lengthen the explanations about the legislative history against LGBT people, we will focus above all on those legal aspects that directly affect transsexual people or that, in the case of general laws, affect transsexual people.

### **2.2.1. Spain.**

#### **2.2.1.1. The historical and legal context of transsexuality<sup>7</sup>.**

In the case of Spain, we find that both social and legal persecution of LGBT people has been going on since the 6th century, with the conversion of the Visigothic kingdom of Hispania from Arianism to Catholicism. In the year 1460 we find the first documented hanging of a transsexual woman, Margarida Borràs. Already in the 19th century we find ourselves with

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<sup>6</sup> See footnote number 4.

<sup>7</sup> MARTÍNEZ, R. (2017). *Lo nuestro sí que es mundial. Una introducción a la historia del movimiento LGBT en España* (3rd ed.). Egales.

various moments in which homosexuality is decriminalized and penalized, with the Napoleonic invasion and with the return of absolutism with Fernando VII, respectively. References to "sodomy" are first removed from a legal text in Spain in the Penal Code of 1848.

However, in the Criminal Code of 1928, homosexuality was included again as an aggravating factor in crimes, a circumstance that was eliminated with its reform in the Second Republic in 1932, a reform led by Luis Jiménez de Asúa and Victoria Kent. However, with the entry of the Franco regime, any progress made by the Republican government disappeared, since with the approval of the Law of Vagrants and Crooks (known as "Ley de Vagos y Maleantes" in Spanish) the persecution of homosexuals was allowed. This law, although already existing in the Republican era, was modified to include homosexuals.

Specifically, the second and sixth articles of the aforementioned Law were modified. In the second article the following was added: "*They may be declared in a dangerous state and subject to the security measures of this Law: Second number. Homosexuals, ruffians and pimps*"<sup>8</sup>. On the other hand, in the sixth article the present modification was made: "*The security measures will be applied to the categories of dangerous subjects, as follows: Number second. To homosexuals [...]*"<sup>9</sup> so that security measures such as internment in agricultural colonies, residence bans or control by special Government Delegates would be applied to homosexuals.

This law was replaced by *Law 16/1970, of August 4, on dangerousness and social rehabilitation*, from which references to homosexuality were eliminated in 1978 and all the content of the law disappeared in 1995. Currently, it can only be accessed to the police records of those processed by these two laws for statistical and historical purposes, as established by *Organic Law 15/1999, of December 13, on the Protection of Personal Data* in its third additional provision: "*The files specifically instructed under the repealed Laws of Vagrants and Crooks, and of Dangerousness and Social Rehabilitation, [...] may not be*

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<sup>8</sup> *Law of July 15, 1954, by which articles 2 and 6 of the Law of Vagrants and Crooks, of August 4, 1933, are modified.* "Boletín Oficial del Estado" number 198, 17th July 1954.

<sup>9</sup> See footnote number 8.

*consulted without the express consent of those affected, or fifty years have elapsed from the date of those*<sup>10</sup>.

One of the most interesting precedents for this work is the first sex and name change registered in Spain, which took place in 1987<sup>11</sup>. The woman who obtained it, Antonia Soria, did so in the Provincial Court of Cadiz, a decision that was appealed by the Chief Prosecutor but ratified by the Supreme Court. She had lived all her life as a woman and even underwent sex reassignment surgery in Casablanca (Morocco). This decision served as a precedent for favourable consideration of other transition cases, but using denigrating terms such as "female fiction".

Finally, we can say that the 21st century also brought major legislative changes for the LGBT community in Spain. The first of these that we can highlight is the approval in 2005 of marriage between people of the same sex, but undoubtedly the one that most interests us in terms of what we are analysing here is the approval in 2007 of the *Law 3/2007, of March 15, regulating the registry rectification of the mention related to the sex of people*, which allows for the first time and in an administrative manner the change of name and sex in the Civil Registry. This was a very important step, as it was the first time in the legislative history of Spain that a change of sex and name was allowed in the registry. This marked the beginning of a stage of progress in the field of transsexual rights and in general for the whole group. What happened on 16 March 2023 is already being analysed in this work: the approval of *Law 4/2023, of 28 February, for the real and effective equality of trans people and for the guarantee of the rights of LGTBI people*.

#### **2.2.1.2. Process of approval of Law 4/2023.**

However, the adoption of this recent law has not been a short process at all: from the time the proposal was initiated back in 2012 by the European Union to legislate on the matter until this year. The EU thus urged member states to allow gender self-determination without sexual reassignment surgery or hormone therapy in their legislation, of which Denmark was

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<sup>10</sup> *Organic Law 15/1999, of December 13, on the Protection of Personal Data*. "Boletín Oficial del Estado" number 298, 14th December 1999.

<sup>11</sup> BERZAL DE MIGUEL, V. (2022, 20th August). Historia del activismo LGTBI español a través del Orgullo de Madrid (I). *Cultura Diversa*. Recovered 19th April 2023, from <https://culturadiversa.es/2020/07/historia-orgullo-de-madrid.html>



the pioneer<sup>12</sup>. Several Autonomous Communities passed laws on transgender issues, but the first state proposal came in 2018 from the Podemos-En Comú Podem-En Marea parliamentary group, in which they detailed some of the points that would later be included in the final text, such as not needing hormones or allowing minors to change their gender and name<sup>13</sup>.

In 2020, at the beginning of the XIV Legislature of the Spanish Government, the Minister for Equality, Irene Montero, reaffirmed the government's commitment to pass a law to defend trans rights and those of the LGBT community in general, after previous years and even subsequent strikes and demonstrations by the affected sectors. Certain sectors of the PSOE even issued a communiqué stating that *"The so-called 'right to self-determination of sexual identity' or 'right to sexual self-determination' lacks legal rationality"*<sup>14</sup>. After months of negotiations and pressure on the government, which removed some of the members who had written the communiqué, such as Carmen Calvo and José Luis Ábalos, a bill was finally presented in June 2021.

In 2022, after having been revised once again by the Council of Ministers, it was definitively designated as a draft law. However, that same year, the political parties Vox and PP presented amendments to the totality, citing the *"ideologising and dubious*

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<sup>12</sup> EFE. (2014, 11th June). Dinamarca permite a los transexuales el cambio legal de sexo sin operarse. *www.20minutos.es*. Recovered 19th April 2023, from <https://www.20minutos.es/noticia/2164845/0/dinamarca-permite/transexuales/cambio-legal-sexo-sin-operarse/>

<sup>13</sup> RTVE.es (AGENCIAS). (2018, 23th February). Registrada la primera proposición ley sobre transexualidad. *RTVE.es*. Recovered 19th April 2023, from <https://www.rtve.es/noticias/20180223/podemos-registra-congreso-primera-proposicion-ley-transexualidad/1683451.shtml>

<sup>14</sup> PRIETO, A. D. (2020, 11th June). El PSOE «en contra» de que la nueva ley de infancia reconozca el derecho a la autodeterminación sexual. *El Español*. Recovered 19th April 2023, from [https://www.elespanol.com/espana/politica/20200611/psoe-nueva-infancia-reconozca-derecho-autodeterminacion-sexual/496701540\\_0.html](https://www.elespanol.com/espana/politica/20200611/psoe-nueva-infancia-reconozca-derecho-autodeterminacion-sexual/496701540_0.html)

*constitutionality*<sup>15</sup> of the legal text. In a deadline for the submission of amendments that was initially not to be extended beyond 19 October of the same year, the day before the PSOE voted to extend the deadline for amendments further, which led to a major trans activist in the party, Carla Antonelli, withdrawing her membership. The PSOE's blocking of the law was strongly criticised as they were preventing its approval, however, it was finally proposed for a vote on 21 December 2022<sup>16</sup>.

In the aforementioned vote, the bill was approved by 188 votes in favour, 150 against and 8 abstentions, including some from the PSOE. Already in 2023 it was passed to the Senate for discussion and finally in the second vote it was approved on 16 February of the same year, by 191 votes in favour, 60 against and 91 abstentions<sup>17</sup>. The following day it was published in the BOE (“Boletín Oficial del Estado”), coming into force on 3 March.

Even after being approved, there have been various criticisms of the legal text. Among them is the promise of the PP leader, Alberto Núñez Feijóo, to repeal it if his political force reaches the Government<sup>18</sup>. Most of the criticism has been received from sectors of TERF (Trans Exclusionary Radical Feminism) feminism, saying that the concept of woman is blurred and

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<sup>15</sup> EFE. (2022, 21th September). PP y Vox enmiendan a la totalidad la reforma del aborto y la ley trans. *RTVE.es*. Recovered 19th April 2023, from <https://www.rtve.es/noticias/20220921/pp-vox-enmiendas-ley-trans-aborto/2403167.shtml>

<sup>16</sup> VALDÉS, I. (2022, 22th December). El Congreso aprueba la ‘ley trans’ con apoyo del PSOE pero con la abstención de Carmen Calvo. *El País*. Recovered 19th April 2023, from <https://elpais.com/sociedad/2022-12-22/el-congreso-aprueba-la-ley-trans.html>

<sup>17</sup> ELDIARIO.es. (2023, 1st March). Autodeterminación de género y otras claves de la ley trans, que entrará en vigor este jueves tras ser publicada en el BOE. *elDiario.es*. Recovered 19th April 2023, from [https://www.eldiario.es/sociedad/claves-ley-trans-entrara-vigor-jueves-publicada-boe\\_1\\_9993500.html](https://www.eldiario.es/sociedad/claves-ley-trans-entrara-vigor-jueves-publicada-boe_1_9993500.html)

<sup>18</sup> ELDIARIO.ES. (2022, 21st August). Feijóo dice que si gobierna derogará la ley de Memoria Democrática, la de Educación y la «ley trans». *elDiario.es*. Recovered 19th April 2023, from [https://www.eldiario.es/politica/feijoo-dice-si-gobierna-derogara-ley-memoria-democratica-educacion-ley-trans\\_1\\_9257468.html](https://www.eldiario.es/politica/feijoo-dice-si-gobierna-derogara-ley-memoria-democratica-educacion-ley-trans_1_9257468.html)

that only those who are biologically women can be called women<sup>19</sup>. However, there have also been positive criticisms, such as those made by LGTB associations, which state that *"the legislation places Spain once again among the countries at the forefront of LGTBI+ rights"*<sup>20</sup>.

### **2.2.2. Scotland.**

#### **2.2.2.1. The historical and legal context of transsexuality.**

In the Scottish case, we will review LGBT history along the lines of what we have done for Spain, highlighting transgender people in particular and general provisions that may affect them. As Scotland is a unique entity in the UK, we will also look at developments and provisions at a general level across the whole territory, not just in particular. To begin with, and by way of an introductory summary, we can state that the consideration of sexual diversity in Scotland has varied over the centuries, being fully accepted in some eras, while in others it has been brutally persecuted.

The first sources of socially accepted homosexual relationships date back to the Iron Age, when male homosexuality was widely accepted and, one might even say, widespread<sup>21</sup>. The situation continued during the Roman conquest, as male homosexuality was seen as a reinforcement of masculinity. It is from this period that we have one of the first testimonies of the existence of transsexuality in the United Kingdom, as in present-day Catterick, the

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<sup>19</sup> EFE. (2022, 5th October). Colectivos feministas se manifiestan contra la ley trans. *RTVE.es*. Recovered 19th April 2023, from <https://www.rtve.es/noticias/20221005/colectivos-feministas-manifiestan-contra-ley-trans-congreso/2405078.shtml>

<sup>20</sup> KOHAN, M. (2022, 22nd December). Organizaciones LGTBI, sobre la ley trans: «Esta legislación vuelve a colocar a España a la cabeza de los derechos LGTBI+». *Público*. Recovered 19th April 2023, from <https://www.publico.es/sociedad/organizaciones-lgtbi-ley-trans-legislacion-vuelve-colocar-espana-cabeza-derechos-lgtbi.html>

<sup>21</sup> SHELDON, N. (2019). Brutal and Intriguing Facts About Celtic Life. *History Collection*. <https://historycollection.com/brutal-and-intriguing-facts-about-celtic-life/>

remains of a *gallus* (eunuch priests who worshipped the goddess Cybele)<sup>22</sup> have been found, which could fit in with what we might socially know today as a transsexual person.

The arrival of Christianity in ancient Roman Britannia at the end of the 6th century only confirmed the punishment of homosexuality with the death penalty. Until the 17th century, as we have already mentioned, there were successive periods of greater repression and greater permissiveness. In the 19th century we find another precedent of a transsexual person, Eliza Edwards<sup>23</sup>, whose autopsy was interpreted as having male physical characteristics despite considering herself a woman, according to the information of the time. Another precedent can be found in the 20th century<sup>24</sup>, when the athlete Mark Weston transmogrified from female to male, a case that became known worldwide. The century also saw the first gender reassignment surgery performed on Michael Dillion, from female to male<sup>25</sup>.

It was not until 1980 that "private" homosexual relations were no longer illegal in Scotland, thanks to the Criminal Justice (Scotland) Act in section 80, paragraph 1, which stated: "*Subject to the provisions of this section, a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of twenty-one year*"<sup>26</sup> (the age of consent for heterosexual sexual relations was lower, 16 years). Years later, in 2004, the first legislation to allow transgender people to change their registered sex and name was passed, the Gender Recognition Act, and in 2010 an amendment to the Equality Act was passed to prohibit discrimination against transgender people. Finally, in 2022 we come to

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<sup>22</sup> BBC. (2002, 21st May). Dig reveals Roman transvestite. *BBC News*. Recovered 21st April 2023, from [http://news.bbc.co.uk/2/hi/uk\\_news/england/1999734.stm](http://news.bbc.co.uk/2/hi/uk_news/england/1999734.stm)

<sup>23</sup> DRYDEN, S. (2020). *Transgender identities in the past*. The British Library. Recovered 21st April 2023, from <https://www.bl.uk/lgbtq-histories/articles/transgender-identities-in-the-past>

<sup>24</sup> HEGGIE, V. (2010). Testing sex and gender in sports; reinventing, reimagining and reconstructing histories. *Endeavour*, Vol. 34(4), pages 157-163. <https://doi.org/10.1016/j.endeavour.2010.09.005>

<sup>25</sup> ROACH, M. (2010, 11th June). The First Man-Made Man. *The New York Times*. Recovered 21st April 2023, from <https://www.nytimes.com/2007/03/18/books/review/Roach.t.html>

<sup>26</sup> *Criminal Justice (Scotland) Act 1980*.

the point that is of interest to us in this paper, the Gender Recognition Reform (Scotland) Bill, the process of which we will explain below.

### **2.2.2.2. Process of Gender Recognition Reform.**

The background to this law reform project begins in 2020, when in a report<sup>27</sup> the European Commission ranked member countries' gender reassignment legislative procedures according to their difficulty of access, with the UK process ranked second from the bottom for requiring "intrusive medical requirements". The Scottish National Party (SNP) pledged to make a proposal in 2020, which because of COVID-19 could not be put to a vote until 2022, where it was approved in the first stage with 88 votes in favour over 81 against, 4 abstentions and 4 absences<sup>28</sup>. Further amendments were proposed at a second stage, but were not adopted.

The draft was proposed for a third stage vote at the end of 2022, the result being in favour by 86 votes to 39<sup>29</sup>, after the draft was described as "a significant step forward" by the United Nations Independent Expert on Protection against violence and discrimination based on sexual orientation and gender identity<sup>30</sup>.

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<sup>27</sup> EUROPEAN COMMISSION. (2020). *Legal gender recognition in the EU: the journeys of trans people towards full equality* (DS-03-20-267-EN-N). Directorate-General for Justice and Consumers. Page 13. Recovered 22nd April 2023, from [https://commission.europa.eu/document/bdffcbef-4c28-4c99-9c5a-b8207110d486\\_es](https://commission.europa.eu/document/bdffcbef-4c28-4c99-9c5a-b8207110d486_es)

<sup>28</sup> SCOTTISH PARLIAMENT. (2022, 25th October). *S6M-06459*. Scottish Parliament. Recovered 22nd April 2023, from <https://www.parliament.scot/chamber-and-committees/votes-and-motions/S6M-06459>

<sup>29</sup> SCOTTISH PARLIAMENT. (2022, 22nd December). *Meeting of the Parliament (Meeting date: Thursday, December 22, 2022)*. Scottish Parliament. Recovered 22nd April 2023, from <https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/meeting-of-parliament-22-12-2022?meeting=14071&iob=127436>

<sup>30</sup> MEDIA CENTER OF UNITED NATIONS. (2022, 16th December). *UN expert on gender identity calls on Scottish Parliament to adopt Gender Recognition Reform Bill* [Press release]. <https://www.ohchr.org/en/press-releases/2022/12/un-expert-gender-identity-calls-scottish-parliament-adopt-gender-recognition>

However, the use of section 35 of the Scotland Act 1998 was invoked, which states: "*Power to intervene in certain cases: If a Bill contains provisions [...] which make modifications of the law as it applies to reserved matters and which the Secretary of State has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters, he may make an order prohibiting the Presiding Officer from submitting the Bill for Royal Assent*"<sup>31</sup>. This invocation was made by the Scotland Secretary, as the section itself mandates, because he considered that this project violated the powers conferred on Scotland in legislative matters by the same legal text<sup>32</sup>. As of 12 April 2023, Cabinet Secretary for Social Justice announced the intention to launch a request for a judicial review of the UK government's use of Section 35 of the Scotland Act 1998<sup>33</sup>.

Social opinions on the bill are, in general, very positive, although there is no lack of criticism from conservative groups, feminist associations of the TERF type (such as those we have already seen in the Spanish case) and religious groups. However, it should be noted that the most talked-about event in relation to the non-approval of this project due to the invocation of the aforementioned article 35 has been the resignation of Nicola Sturgeon, Scotland's First Minister. She has gone so far as to claim that this action is a total attack on Scotland's ability to make its own decisions in the powers that have been devolved to it. In the article that discusses this<sup>34</sup>, Professor Tierney argues that it is difficult to predict how the courts will rule on the invocation of Article 35 and whether the next government will be willing to reform it or pass the Gender Recognition Reform (Scotland) Bill.

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<sup>31</sup> *Scotland Act 1998*.

<sup>32</sup> UK GOVERNMENT. (2023, 16th January). *Gender Recognition Reform (Scotland) Bill: statement from Alister Jack* [Press release]. <https://www.gov.uk/government/news/gender-recognition-reform-scotland-bill-statement-from-alister-jack>

<sup>33</sup> BBC NEWS. (2023, 12th April). Block on Scottish gender reforms to be challenged in court. *BBC News*. Recovered 22nd April 2023, from <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-65249431>

<sup>34</sup> TIERNEY, S. (2023). The Gender Recognition Reform Bill: another dispute over devolved competence. *UK in a changing Europe*. [https://ukandeu.ac.uk/the-gender-recognition-reform-bill-another-dispute-over-devolved-competence/?mc\\_cid=71c929e541&mc\\_eid=675c5e4929](https://ukandeu.ac.uk/the-gender-recognition-reform-bill-another-dispute-over-devolved-competence/?mc_cid=71c929e541&mc_eid=675c5e4929)

### **2.3. Juridical-legal recognition of gender identity.**

In order to find the foundation of the gender recognition in Spain, we must rewind to 2007, when the Law 3/2007 was enacted. For the first time in the history of Spain, the gender assigned at birth was allowed to be rectified in the Civil Registry. In accordance with article 1 of the aforementioned legal text, access to this possibility was allowed to anyone over 18 years of age with the necessary capacity to do so.

The recently approved new law on the matter introduces a series of changes to the age at which this type of legal procedure can be accessed. From now on, a 12 years old child can change his or her gender. Nonetheless, this point deserves a deeper explanation. Article 38 redefines ages and steps to follow in these cases, differentiating three categories and a special condition applicable to all categories.

The first category is focused on people over the age of sixteen, who can request by themselves the rectification. The second one is focused on people over the age of fourteen and under the age of sixteen, who will need the assistance of their legal representatives to submit the application by themselves. The last one is focused on persons under the age of fourteen and over the age of twelve, who may request judicial authorization to modify the registry mention of sex. All of them could be affected by a special condition: persons with disabilities may request the rectification with the support measures that may be required.

The Gender Recognition Reform Bill of Scotland introduces changes in the *Gender Recognition Act* of the United Kingdom enacted in 2004. There are significant differences between this bill and the Spanish act. In Scotland, only people over the age of 16 can apply for a change in the recognition of their gender at the Registry. Applicants between the age of 16 and 18 must be assisted by their representatives. We can see this limitation in the second section of the Bill, which is a modification of the 8A section of the Gender Recognition Act.

We must also take into account that, unlike what happens in the Spanish case, this proposition only applies to Scottish citizens or those with habitual residence in Scotland. For all other cases, the GRA for the entire United Kingdom will apply. In Spain, the law applies for Spanish citizens and those with habitual residence in Spain, without prejudice of the legislative development of the Autonomous Communities, as long as they respect the minimums contents included in the general act.

To which concern the procedure, we can find that it is very close in both legal systems. Beginning by the Spanish one, it can be appreciated that the first step that must be followed is the fulfilment of the application at any office of the Civil Registry. The interested person will be informed about the rights and duties that they will have and about the procedure of reversion. Before three months have passed, the person will be appealed again to rectify the decision that was made and the Registrar must solve the request in a maximum of one month.

In the case of Scotland, the applicant must also fulfil the request, but the applicant will have a reflection period of three months to decide and to rectify the decision that was defended. If in the term of two years there is no answer by the Registrar General of Scotland or the applicant does not confirm the decision that was made, the case will be considered as withdrawn. Thus, we can see that both systems are quite similar because there are only slight modifications on the reflection period (Scottish one is longer than Spanish one).

### **3. TREATMENT OF THE AFFECTIVE-SEXUAL ASPECT AND THE IDENTITY OF TRANSGENDER PEOPLE.**

#### **3.1. Sexual Orientation Change Efforts (SOCE for its acronym).**

According to the Independent Expert on Protection Against Violence and Discrimination based on Sexual Orientation and Gender Identity, Sexual Orientation Change Efforts (SOCE for its acronym) or ‘conversion therapies’ consist of “[...] *interventions of a wide-ranging nature, all of which are premised on the belief that a person’s sexual orientation and gender identity, including gender expression, can and should be changed or suppressed when they do not fall under what other actors in a given setting and time perceive as the desirable norm, in particular when the person is lesbian, gay, bisexual, trans or gender diverse. Such practices are therefore consistently aimed at effecting a change from non-heterosexual to heterosexual and from trans or gender diverse to cisgender. [...]*”<sup>35</sup>. If we take into consideration a report published by the European Parliament in June 2022, at least 5% of

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<sup>35</sup> INDEPENDENT EXPERT ON PROTECTION AGAINST VIOLENCE AND DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY (2020). *Practices of so-called “conversion therapy”* (A/HRC/44/53). Human Rights Council of the United Nations. Recovered 21st February 2023, from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/108/68/PDF/G2010868.pdf?OpenElement>



LGBT people were offered conversion therapies and over a 2% accepted to be ‘treated’ with these methods, but it is considered that percentages could be higher than expected due to the fear of the victims, the lack of legal regulation or the low percentage of complaints about these practices<sup>36</sup>.

Until the approval of the law at the state level, in Spain only eight Autonomous Communities (Madrid, Andalusia, Valencia, Aragon, La Rioja, Cantabria, Castilla-La Mancha and Canary Islands) prohibited conversion therapies and also established a sanctioning regime for them. Another four Autonomous Communities (Navarre, Murcia, Catalonia and Balearic Islands) prohibited them, but did not establish any kind of sanction<sup>37</sup>. Thus, the most relevant change in this matter in the new legal text is the pursuing of prohibition of these practices in the entire national territory.

This prohibition is not only visible in article 17, which specifically prohibits these practices, but also is included in infractions section, concretely in article 75.4.d), which qualifies "*The promotion or practice of methods, programs or aversion, conversion or counterconditioning therapies, whether psychological, physical or through drugs, whose purpose is to modify the sexual orientation, sexual identity, or gender expression of people, regardless of the consent that they or their legal representatives may have given*"<sup>38</sup> as a very serious administrative offense.

If we take into account the case of Scotland, we can see that ‘conversion therapies’ are not banned yet. There are some propositions that were exposed in Scottish Parliament but none of them was approved. The fact that takes place in Scotland is that, as it was said in the

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<sup>36</sup> DE GROOT, D. (2022). *Bans on conversion «therapies». The situation in selected EU Member States* (PE 733.521). European Parliament. Recovered 21st February 2023, from [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733521/EPRS\\_BRI\(2022\)733\\_521\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733521/EPRS_BRI(2022)733_521_EN.pdf)

<sup>37</sup> LÓPEZ TRUJILLO, N. (2022, 21 julio). Así afectan las terapias de conversión a la salud de las víctimas: “Te llegan a medicar para que te baje la libido y así decir que estás curado”. *Newtral*. Recovered 21st February 2023, from <https://www.newtral.es/terapias-conversion-espana-salud-victimas/20220721/>

<sup>38</sup> *Law 4/2023, of February 28, for the real and effective equality of trans people and for the guarantee of the rights of LGTBI people*. “Boletín Oficial del Estado” number 51, 1st March 2023.

introduction, there are a huge number of conservative groups that have enough power to have the necessary influence in the decisions made by the Government. There is an extended feeling of criminalisation of parents and religious groups, situations that some wings of the Parliament do not agree with<sup>39</sup>.

If we take in consideration the Bill that we are analysing as the central piece of this work, it can be seen simply searching on the index that there is no mention of ‘conversion therapies’ at all. As it was said, it is being a very complex process, speaking in legislative terms.

### **3.2. Maternity and filiation.**

Another of the aspects in which Spanish law introduces substantial changes is that relating to maternity, paternity and filiation. Homoparental adoption has had a legal course since 2005, since it was considered a right inherent to the right to marry<sup>40</sup>. The legal text that for the first time gave legal coverage to this possibility was Law 13/2005, of July 1, which modifies the Civil Code regarding the right to marry. This includes a modification of article 175.4 of the Civil Code, which implies that the possibility of adoption by homosexual couples exists.

The new legal text pursues similar aims but introducing new possibilities. The first of these is the proposal to modify the third additional provision of Law 21/1987, of November 11, which modifies certain articles of the Civil Code and the Civil Procedure Law in matters of adoption. In this the change is minimal, but a greater legal inclusion of couples and homosexual marriages is pursued. Until now, the provision stated the following: *“The references in this Law to the capacity of the spouses to simultaneously adopt a minor will also be applicable to the man and woman who are members of a couple permanently united*

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<sup>39</sup> HARRISON, J. (2023). «Conversion therapy Scotland: Warning plan “would criminalise parents” ». *HeraldScotland*. Recovered 24<sup>th</sup> February 2023, from <https://www.heraldscotland.com/politics/23232165.conversion-therapy-scotland-warning-plan-would-criminalise-parents/>

<sup>40</sup> GUTIÉRREZ LEÓN, M. (2018). *Regulación de la adopción homoparental en España* [End of degree project]. Universidad de La Laguna. Page 1. <https://riull.ull.es/xmlui/bitstream/handle/915/9508/Regulacion%20de%20la%20adopcion%20homoparental%20en%20Espana.pdf?sequence=1#:~:text=En%20Espa%C3%B1a%20la%20adopci%C3%B3n%20homoparental,es%20el%20hecho%20de%20la>

by a relationship of affectivity analogous to the conjugal one”<sup>41</sup>. The legal text of 2023 changes the mention to men and women by “members”.

The second change which has relevance is the possibility of unmarried couples and non-pregnant parents to recognize the children of the pregnant parent if they thus express their agreement. This is especially relevant in the case of couples formed by women, in which filiation to the non-pregnant parent was only recognized if there was a marriage bond. Thus, with this legislative change, the recognition of filiation is allowed with the mere recognition of the will to carry out said filial recognition.

Until the approval of this new legal text that we are now dealing with, the only option left for the non-pregnant mother to have her maternity recognised in relation to her partner's biological child (without a marital relationship) was adoption<sup>42</sup>. The new terms in which the new law expresses it are as follows: *"The affiliation of the non-pregnant father or mother at the time of the registration of the child, shall be recorded: b) When the non-pregnant father or mother states their accordance with the determination of such affiliation, provided that it is not contrary to the presumptions established in civil legislation and there is no controversy. In addition, the conditions provided in civil legislation for its validity and effectiveness must be met"*<sup>43</sup>.

If we take into account the legislation approved by the Scottish Parliament on maternity and filiation, we can see, after an analysis of the legislation on the matter, that adoption by homosexual couples has been allowed since 2009. The first step in the area (in 2007) was allowing the adoption to homosexuals individually, without acknowledging paternity to the other member of the couple. This was possible thanks to *Adoption and Children (Scotland) Act of 2007*.

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<sup>41</sup> Law 21/1987, of November 11, which modifies certain articles of the Civil Code and the Civil Procedure Law in matters of adoption. “Boletín Oficial del Estado” number 275, 17th November 1987, pages 34158 to 34162.

<sup>42</sup> DE LA FUENTE NÚÑEZ DE CASTRO, M. S. (2015). Acción de reclamación de la filiación y doble maternidad legal: A propósito de las SSTs de 5.12.2013 y 15.1.2014. *InDret. Revista para el análisis del Derecho*, 1, 17.

<https://www.raco.cat/index.php/InDret/article/download/293062/381570>

<sup>43</sup> See footnote number 38.

Then, in 2009, with the changes introduced by *The Looked After Children (Scotland) Regulations*, same-sex couples were allowed to be considered adoptive parents on the same terms as anyone else.

### **3.3. Prison treatment of transgender people.**

Totally changing focus, one of the points that neither of the two legal texts dares to modify (or even introduce or regulate) is the treatment of transsexual people in prisons. Gender continues to be a crucial point as far as the treatment of prisoners is concerned, since they are separated based on their registered gender. However, various modifications have been emerging in both legal systems to accommodate those people whose felt and perceived gender does not correspond to that which is officially reflected at the administrative level and in all their documents.

As we have been doing so far, we will take the approach of each of the legal texts separately and then we will compare their similarities, differences and divergences. We will begin by explaining the situation of this type of treatment of prisoners in Spain and then we will explain, with different cases, the current situation of transsexual prisoners in Scotland. Both places present very different situations and in which a large number of different factors are taken into account.

In the Spanish case, we find the reason for the refusal to include additional regulation of the treatment of transsexual prisoners already in the explanatory statement of the law itself. Specifically, what is said is the following: *"In the same way, it should be noted that in the spheres of the [...] Penitentiary Institutions there have been regulatory advances aimed at acting with full respect and non-discrimination to the LGTBI collective, especially in the case of trans people in a situation of deprivation of liberty, by virtue of Instruction 7/2006 of the General Directorate of Penitentiary Institutions, on penitentiary integration of transsexual people"*<sup>44</sup>. Precisely, the aforementioned instruction is the one that will give us the opportunity to comment on the situation of prison treatment of transsexual people.

Instruction 7/2006 starts by providing justifications for its reasons. It begins by recalling that in 2001 the right of transsexual people to be treated according to their felt gender was recognized, but only if it matched their appearance and external characteristics. For this reason, this text seeks that not only the mere appearance marks the treatment, but also that

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<sup>44</sup> See footnote number 38.

the psychosocial circumstances of the person play a central role in the decision and determination of their classification in terms of prison terms. Thus, in the case of Spanish prison laws, the psychosocial gender identity criterion is followed, thus abandoning the previously used criterion of "apparent sexual identity"<sup>45</sup>.

The procedure must be initiated at the request of the interested party. This must urge his desire before the Penitentiary Administration, which will decide on the matter and whose resolution will not imply, if the gender change is not registered, the acquisition of a new legal identity. At the end of the Instruction there is a standard form that the interested person can use to make this request.

As long as their petitions are not resolved, these people have the right to have provisional measures applied to them in accordance with their felt gender. Likewise, they will have the right to monitor the endocrinological treatments that they were following, as well as the hormonal therapies to which they were undergoing. However, these provisional measures may be eliminated if it is finally ruled that, from a medical and psychosocial point of view, they do not correspond to them. Even so, there is the possibility of appealing that decision within a period of 30 days from the opinion before the Penitentiary Administration.

There are other rights available to the transsexual prisoners. The first of these is that if their request is denied, they have the right to repeat the psychosocial report that has determined the content of the resolution. Another of them is that, even if they have not requested the application of the measures of this Instruction, if a discrepancy is observed between the physiology of the person and their official gender identity, they will be informed of their rights in accordance with the provisions of the aforementioned Instruction. If, finally, their wish is not to be treated according to their felt gender, they will be imprisoned according to their biological sex, previously noting this circumstance and attaching the pertinent medical assessment.

However, before the endorsement of the aforementioned Instruction, there were so many cases where the rights of trans people were not taken into account in order to give an

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<sup>45</sup> ARMENTA GONZÁLEZ-PALENZUELA, F. J. (2011). Régimen penitenciario y prestaciones. Separación interior: internos transexuales; in *Procedimientos penitenciarios (incluye diccionario penitenciario)* ([2nd ed., page 48], Ser. Estudios de derecho procesal penal, 23). Comares.

adequate prison treatment. In Spain, one of the most mediatic cases was the one of Cristina Ortiz Rodríguez, also known as “La Veneno”. Cristina was accused of fraud against her home insurance company. Despite the efforts made by the members of the Technical Team, she was assigned to a prison module in accordance with her biological gender (in addition to the fact that she was still registered as a man). The events, which occurred in 2003, took place at a time when gender was not taken into account as a circumstance with the power to change prison treatment<sup>46</sup>.

On the other hand, it is useful to focus on the caseload in Scotland. In this territory there is a great disparity in the way in which this circumstance is most conveniently regulated. We will take the case of Isla Bryson as a reference. Isla Bryson is a transsexual woman who was convicted in January 2023 for the rapes of two women that she committed before her gender transition (i.e., when she was registered as a man).

Before we go into detail about the current legal situation of transgender prisoners in Scotland, which is very complex, we need to look at the legislation that has been developed by the central authority (UK Government) over the years. In 2011 it was established that prisoners would be imprisoned according to their assigned gender under British law. However, in Scotland, as early as 2014, the social perception of the prisoner's own gender was considered sufficient as a cause for differentiation in treatment, and this gender would be fully respected<sup>47</sup>.

However, the first controversies about the appropriateness of these measures were not long in appearing. In January 2021, an appeal was lodged with the UK High Court of Justice to protest about trans women who had committed rape offences against other women when they were still registered as men being sent to women's prisons. The appeal therefore argued that they should be placed in male prisons, as they were a danger to cisgender women. The Court finally ruled as follows: according to the Equality Act, placing transgender women in

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<sup>46</sup> ROJO SANZ, T. (2021). La lucha de las personas transexuales en las cárceles españolas. *Clínica Jurídica de Acción Social. USAL*. Recovered 7th March 2023, from <https://diarium.usal.es/clinicajuridica/2021/04/06/la-lucha-de-las-personas-transexuales-en-las-carceles-espanolas/>

<sup>47</sup> BEARD, J. (2018). Transgender prisoners. *House of Commons Library* (Number 07420). UK Parliament. Page 12. Recovered 7th March 2023, from <https://researchbriefings.files.parliament.uk/documents/CBP-7420/CBP-7420.pdf>.

male modules violated their rights to full recognition of their gender identity. Far from calming the atmosphere, this did nothing but fuel the TERF (Trans Exclusionary Radical Feminist) movements, creating social alarm that any man could go to the Registry to change gender in order to "benefit" from the favourable treatment of women. This is one of the points criticised in the Isla Bryson case<sup>48</sup>.

In August 2022 there is a complete change of procedure compared to what has been established so far. Justice Secretary Dominic Raab determined that the general rule for the treatment of transgender prisoners and their detention would be according to their genitalia, not according to their perceived or felt gender from a psychosocial perspective. This was a complete break with what we have seen previously: the ruling of the UK High Court of Justice. Thus, the internment of transgender people according to their perceived or felt gender would be entirely testimonial and anecdotal, requiring ministerial authorisation<sup>49</sup>.

This measure taken in 2022 was reconfirmed in 2023 by the same Minister, Dominic Raab. Specifically, its entry into force occurred on 27 February this year, a measure which, as is clear, is totally against the opinion of the High Court of Justice of the United Kingdom. Thus, it is established that transsexual women (or transsexual women with "male genitalia") who have committed acts of rape or sexual assault against women will be definitively interned in male modules.

In public statements, Scotland's First Minister, Nicola Sturgeon, said that "I don't see how it's possible to have a rapist within a female prison, even the understandable public and parliamentary concern. I hope that provides assurance to the public presiding officer, not least to the victims, in this particular case". The government is basing its decision on the

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<sup>48</sup> MAURICE, E. P. (2021, 7<sup>th</sup> July). High Court emphatically rejects legal bid to force trans women into men's prisons in landmark ruling. *PinkNews: Latest Lesbian, Gay, Bi and Trans News*. Recovered 8th March 2023, from [https://www.thepinknews.com/2021/07/02/high-court-trans-women-prison-policy/?\\_gl=1\\*\\_Inniufi\\*\\_ga\\*MjQ3NzY3ODQ3LjE2NzgyMTU2NjA.\\*\\_ga\\_BX9CRJ4BBP\\*MTY3ODIxNTY3Ny4xLjAuMTY3ODIxNTY3Ny42MC4wLjA](https://www.thepinknews.com/2021/07/02/high-court-trans-women-prison-policy/?_gl=1*_Inniufi*_ga*MjQ3NzY3ODQ3LjE2NzgyMTU2NjA.*_ga_BX9CRJ4BBP*MTY3ODIxNTY3Ny4xLjAuMTY3ODIxNTY3Ny42MC4wLjA)

<sup>49</sup> WAKEFIELD, L. (2022, 7<sup>th</sup> August). Justice secretary Dominic Raab to 'house trans prisoners based on genitals'. *PinkNews: Latest Lesbian, Gay, Bi and Trans News*. Recovered 8th March 2023, from <https://www.thepinknews.com/2022/08/07/trans-prisoners-womens-prison-dominic-raab/>

need for greater security for other women prisoners who are in the same female modules as transgender women would be in the absence of this measure<sup>50</sup>.

Now that we have reviewed the legal treatment of transgender people in prison, we will proceed to analyse the vicissitudes of the case we have outlined above, the case of Isla Bryson. As we said at the beginning of the section on the analysis of Scottish law, this person was accused of committing various acts of rape against women when she had not yet transitioned. The media coverage of this case is that she was placed in a women's prison, which clashes with what we have corroborated so far on a legal level, since she should not have been placed in a women's prison because she had not yet transitioned, but should have been placed in a men's prison.

This case has only added fuel to the debate about transgender people in prison. Although in principle Bryson should have been placed in a male unit because the offences were committed when she had not yet transitioned or undergone sex reassignment surgery, she has been placed in a female unit. The reason given by the institutions is that she does not represent a danger to the other inmates (cisgender women), despite the fact that she committed her crimes against cisgender women when she was legally still a man. Some sectors believe that her placement in a women's unit is a government image-whitening mechanism<sup>51</sup>.

### **3.4. Transsexual people on sports.**

The participation of transgender people in sport is another of the topics of debate on the LGTB collective that has been emerging in recent years. There are basically two groups: the

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<sup>50</sup> HANSFORD, A. (2023, 26<sup>th</sup> February). Trans women convicted of violence banned from women's prisons by Tory minister Dominic Raab. *PinkNews: Latest Lesbian, Gay, Bi and Trans News*. Recovered 12th March 2023, from <https://www.thepinknews.com/2023/02/26/womens-prison-trans-women-dominic-raab-ministry-of-justice/>

<sup>51</sup> MATCHETT, C. (2023, 9<sup>th</sup> February). Scotland gender row: Scottish Prison Service concludes Isla Bryson posed «no risk to women» in women's jail. *The Scotsman*. Recovered 13th March 2023, from [https://www.scotsman.com/news/politics/scotland-gender-row-scottish-prison-service-concludes-isla-bryson-posed-no-risk-to-women-in-womens-jail-4021723?utm\\_campaign=scot-news-api](https://www.scotsman.com/news/politics/scotland-gender-row-scottish-prison-service-concludes-isla-bryson-posed-no-risk-to-women-in-womens-jail-4021723?utm_campaign=scot-news-api)



first group is of the opinion that the participation of transgender people in sport should be guaranteed from a gender equality perspective. On the other hand, the second group looks at biological criteria, especially when it comes to allowing trans women to participate in sport. This is because they consider that they have higher concentrations of the hormone testosterone, which gives them greater qualities than biological/cisgender women; or seen from the opposite side, transgender men are at a disadvantage compared to cisgender men, as they have lower levels of testosterone, which reduces their qualities.

As is the usual line of this comparative research work, we will first analyse the circumstances of this section in depth and then place them in the legal context of both Spain and Scotland. Firstly, and due to the regulatory singularity of sporting practices, we will analyse the rulings that have been issued by different sporting organisations. Among the sports associations and federations, we will analyse the case of the World Athletics and the International Olympic Committee (IOC).

World Athletics' most recent criterion is a total ban on the participation of transgender women in women's track and field events. This was established by its President as of 31 March: transgender males and females will be banned from participating in women's events if they have gone through "male puberty". In addition, athletes with differences in sexual development (DSD) must have a testosterone concentration of less than 2.5 nanomoles per litre and, if they wish to participate in women's events, they must remain so for at least two years before the event<sup>52</sup>.

On the other hand, there is the International Olympic Committee (ICO) criterion, which is similar in nature, although perhaps more lax. This criterion, together with that of the World Anti-Doping Agency (WADA), involves measuring testosterone blood concentrations and sexual self-identification, with the former having more weight. The blood concentration limit for testosterone nanomoles in both organisations is set at 10, as opposed to 2.5 in World Athletics. However, in some quarters, these testosterone measurement levels are not

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<sup>52</sup> L., P. (2023, 25th March). Las personas transgénero no podrán participar en competiciones femeninas de atletismo. *ABC*. Recovered 29th March 2023, from <https://www.abc.es/deportes/personas-transgenero-podran-participar-competiciones-femeninas-20230323185220-nt.html?vca=compartirrrss>

considered conclusive, as the length of hormone treatment, body build or sex reassignment surgery may have an impact on testosterone levels<sup>53</sup>.

In Law 4/2023 we find several references to the participation of LGTB persons in sport, especially also in the case of trans persons. The first of these is detailed in Article 14, which states the following: *"Public administrations, within the scope of their competences, will continue to provide initial and ongoing training to their personnel on diversity in terms of sexual orientation, sexual identity, gender expression and sexual characteristics, on family diversity and on equality and non-discrimination of LGTBI persons, which guarantees their adequate awareness and correct action, paying special attention to personnel who provide their services in the areas [...] of sport [...]"*<sup>54</sup>. In other words, emphasis will be placed on ensuring that staff working for public administrations are properly trained to be able to deal adequately with queries made by LGTB people, which includes trans people.

The second reference can be found in Article 26, which is entitled "Sport, physical activity and sports education". Basically, this article does no more than develop what is expressed in the aforementioned article 14. Administrations are urged to raise awareness about the participation of LGTB people in sport and to prevent discrimination in any form. It is also worth highlighting what is included in paragraph 3 of this article, which states the following: *"In sporting practices, events and competitions in the field of federated sport, the provisions of the specific applicable national, regional and international regulations, including anti-doping rules, which, in a justified and proportionate manner, aim to avoid competitive advantages that may be contrary to the principle of equality, shall be complied with"*<sup>55</sup>. In other words, everything we have seen above regarding World Athletics and the ICO would be applicable in Spain regardless of the legislation that this country develops; however, not only international regulations will be taken into account, but also regional and national regulations.

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<sup>53</sup> SÁNCHEZ DE CASTRO, D. (2021, 28th June). Deportistas transgénero, entre la inclusión, la justicia deportiva y las dudas médicas: ¿tienen ventaja las mujeres trans en las pruebas femeninas? [www.20minutos.es](http://www.20minutos.es). Recovered 29th March 2023, from <https://www.20minutos.es/deportes/noticia/4745492/0/deportistas-transsexuales-transgenero-ventajas-inconvenientes/>

<sup>54</sup> See footnote number 38.

<sup>55</sup> See footnote number 38.

The changes introduced by Law 4/2003 even go beyond the scope of the law itself, amending, deleting or adding provisions to other laws. One of them is Law 19/2007 of 11 July 2007 against violence, racism, xenophobia and intolerance in sport, in which a specific section is added to Article 1.1 to include the elimination of LGTBPhobia specifically. The definitions in article 2.2 are also rewritten to adapt them to the reality of discrimination based on sexual orientation, sex/gender and transphobia. Other measures included in Law 19/2007 as a result of the approval of Law 4/2003 are, among others, the elaboration of a monitoring of discrimination in sport for the reasons mentioned above and the criminalisation of *"The organisation, active participation or encouragement and promotion of the carrying out of violent acts, racist, xenophobic, discriminatory on grounds of sexual orientation and identity, gender expression or sexual characteristics or intolerant acts of special significance due to their effects on the sporting activity, the competition or the people attending or participating in it"*<sup>56</sup> as a very serious offence.

We will now proceed to explain the guidelines for the consideration of sexual and gender diversity in sport in Scotland and in the UK in general. A report published by the Sports Council Equality Group in September 2021<sup>57</sup> details the 10 principles to be followed for the participation of transgender people in sport. These measures can basically be summarised under three headings: appropriateness of sporting practices if full inclusion occurs, possible solutions to the lack of inclusion, and requirements and exclusions when opening up sport to inclusion of different realities. However, as an opening we can cite the first point, which advocates the inclusion of trans people by the sports committees of Scotland, Northern Ireland, Wales and England.

As far as the first section is concerned (appropriateness of sporting practices if full inclusion takes place), we find more detail in the information provided by the report in several points, mainly highlighting points 4 and 6. Firstly, point 4 details that the appropriateness of sporting practices is incompatible with gender self-determination, as it is said that in non-mixed

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<sup>56</sup> Law 19/2007 of 11 July 2007 against violence, racism, xenophobia and intolerance in sport. "Boletín Oficial del Estado", number 166, of 12th July 2007. Article 21.1.g).

<sup>57</sup> SPORTS COUNCIL EQUALITY GROUP. (2021). *The UK's Sports Councils Guidance for Transgender Inclusion in Domestic Sport*. Pages 7-8. Recovered 5th April 2023, from <https://equalityinsport.org/docs/300921/Guidance%20for%20Transgender%20Inclusion%20in%20Domestic%20Sport%202021.pdf>

sports certain circumstances such as strength or endurance inherent to a given biological condition would not be fair in a competition that is supposed to be between equals. Point 6, in relation to this, states that a case-by-case analysis is impossible and should aim at the generalisation of measures to promote fairer participation of all persons in sporting practices.

If we look at the second section (possible solutions to the lack of inclusion), we can see that it is most reflected in points 2, 3, 7 and 8. Point 2 argues that the best solution is the separation of sports in a binary way, i.e. by the traditional gender classification (male and female). Furthermore, point 3 considers that it is best for transgender female athletes, in certain sports where a greater use of traditionally "masculine" characteristics is required or may be an advantage, to participate in the male categories. Point 7 defends the legality of requiring information on biological or assigned sex at birth in order to promote equal participation in sporting events. Finally, point 8 opens up the possibility of establishing special requirements for those who do not identify with any gender (agender), non-binary gender or gender fluid.

The third and final paragraph (requirements and exclusions when opening up sport to inclusion of different realities) is developed by point 5 and the last two points of the report. Point 5 determines that the absence of testosterone levels in the blood is not sufficient in the case of transgender sportswomen to determine that they participate on equal terms with other athletes, as they may retain physical advantages over their cisgender female opponents. Lastly, point 9 details that it will depend on the regulations of each sport to establish to what extent a mixed and diverse activity can be considered fair; this is related to point 10, which determines and concludes that the inclusion of all the realities set out in the Equality Act of 2004 is too complex to be realisable in the short term.

#### **4. THE SIMPLIFICATION OF THE REGISTRATION OF GENDER CHANGE AND THE POSSIBILITY OF FRAUD.**

There is no doubt that the legal texts of both countries have contributed to facilitate the administrative and legal procedures for transgender people who want to make their gender change effective. However, some political and social sectors criticise that this supposed "simplification" of procedures could have negative legal consequences or even distort other laws that were not easy to achieve at the time. Basically, what these groups are referring to is fraud by law, which we will explain below, following the method we have followed up to

now: the exposition of the problems and facts in both Spain and Scotland, the similarities and differences.

Let us start with the case of Spain. According to Spanish law, a fraud by law is an *"apparently lawful action that in reality seeks to avoid the application of the rule established for the occasion"*<sup>58</sup>. This type of deceitful action is additionally included in the Civil Code, specifically in Article 6.4 of the same, which expresses it in the following terms: *"acts carried out under the protection of the text of a rule that pursue a result prohibited by the legal system, or contrary to it, shall be considered to have been carried out in fraud of law and shall not prevent the due application of the rule that has been sought to be circumvented"*<sup>59</sup>. In other words, the concern of the above-mentioned sectors is that certain men will go to the registry to change their sex to female, in order to benefit from supposed "advantages" that are granted to women because they are women, such as social assistance or specialised attention in the face of certain types of violence.

Before going into detail about the acts that could constitute fraud of law in this case, we must analyse the requirements that the doctrine establishes to determine which acts are fraud of law and which are not. In the words of Xavier O'Callaghan, Magistrate of the Supreme Court and Professor of Civil Law<sup>60</sup>, there are two main requirements to consider the concurrence of this type of fraud: firstly, they are *"acts carried out under the protection of the text of a rule, which is the so-called covering law"* and, secondly, acts that *"pursue a result prohibited by the legal system or contrary to it"* are considered as such.

The first of the requirements is as follows: the protection provided by this supposed "covering law" is merely apparent, i.e. the purpose of the law is in reality to cover other acts and not acts such as fraudulent acts. On the other hand, the second of the requirements (acts that *"pursue a result prohibited by or contrary to the legal system"*) means that the fraudulent intent to commit fraud is already present in the nature of the commission of the act. However,

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<sup>58</sup> REAL ACADEMIA ESPAÑOLA. *Diccionario panhispánico del español jurídico (DPEJ)* [online]. <https://dpej.rae.es/> [Accessed on 16th March 2023].

<sup>59</sup> *Royal Decree of 24 July 1889 publishing the Civil Code*. "Gaceta de Madrid" number 208, 25th July 1889.

<sup>60</sup> O'CALLAGHAN MUÑOZ, X. (2004). Lección 4<sup>a</sup>. Fraude de ley [VLex]. In *Compendio de Derecho Civil. Tomo 1 (parte general): Vol. 1* (4th edition). Edersa. <https://app.vlex.com/##vid/fraude-ley-214603> (Original work published 2002).

and to conclude this explanation, it should be said that it is not necessary for that intentionality to be fully pursued by the perpetrator, but it is sufficient that there is only that intention to circumvent the law deduced from the commission of acts that could be classified as such.

One of the greatest concerns of the social sectors alarmed by the possibility of fraud is that men may use the law by changing their gender, so that in cases such as gender violence, they are not judged with this aggravating circumstance and are tried for crimes without this gender-based reason. If we turn to Article 46.3 of Law 4/2023, we see that it establishes the following: *"The rectification of the registry mention relating to sex and, where appropriate, the change of name, shall not alter the legal regime which, prior to the registration of the change of registry, was applicable to the person for the purposes of Organic Law 1/2004, of 28 December, on Comprehensive Protection Measures against Gender Violence"*<sup>61</sup>.

In short, even if a person defined as a man convicted of gender-based violence were to change his or her registered gender to female, he or she would be tried as a man. The same would be true from the opposite perspective: if a person registered as a woman is a victim of gender-based violence and decides to change her gender to male, the provisions favourable to her status as a victim of gender-based violence will continue to apply to her as they did when she was registered as a woman. One of the arguments most widely used by those opposed to the law is the absence of a specific measure to prevent fraud, although in cases such as gender-based violence there are measures in certain cases to prevent the harmful effects that a fraudulent act could have.

In the case of Scots law, we do not encounter something similar to fraud of law in terms of terminological designation. However, we may find that the expression "abuse of rights" can mean something similar. If we look more closely at this concept in Scots law, we can see the existence of the principle *aemulatio vicini*. This principle consists of the following: *"doctrine which provides that a malicious or spiteful intent towards a neighbour may forbid an otherwise lawful act in particular circumstances"*<sup>62</sup>. In other words, if an act is committed with malicious intent towards a neighbour (it is understood to be against society by

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<sup>61</sup> See footnote number 38.

<sup>62</sup> RELX. *Aemulatio vicini*. In *LexisNexis*. Recovered 13th April 2023, from <https://www.lexisnexis.co.uk/legal/glossary/aemulatio-vicini>

extension) it will cause that other actions under cover of that act, in principle lawful, may not be considered as such.

In contrast to the Spanish case, we see that in Scottish law there are specific mechanisms for the prevention and prosecution of fraud against the law. If we turn to the provisions of section 14, we see that section 22 of the Gender Recognition Act 2004 adds three new sections detailing the different offences and the way to proceed in their prosecution. Three offences are detailed (which will be explained below): offence of making false declaration or application, aggravation of offence by connection with gender recognition certificate obtained by fraud and revocation of certificate in criminal proceedings.

The first of the sections (section 22A), entitled *Offence of making false declaration or application*, details the penalties applicable to cases in which there is falsehood in the declaration of gender reassignment or in the requirements for access to it. This offence is committed, in the words of the reform bill itself, when "*the person knowingly makes a statutory declaration in accordance with this Act or regulations made under it which is false in a particular material*"<sup>63</sup>, both at the time of application and if there is falsehood in the request or in the data confirming the change (as long as there is the intentionality we were talking about). Penalties range from simple fines to prison sentences of 12 months to 2 years, depending on the seriousness of the case. However, for anything missing from this draft, the Criminal Law (Consolidation) (Scotland) Act 1995 will apply.

The second of the sections (section 22B), entitled *Aggravation of offence by connection with gender recognition certificate obtained by fraud*, is devoted to the prosecution of fraudulently obtaining a false gender recognition certificate as part of the aggravation of another offence. This case applies, according to the law itself, when "*libelled in an indictment, or specified in a complaint, that an offence is aggravated by a connection with a gender recognition certificate obtained by fraud, and proved that the offence is so aggravated*"<sup>64</sup>. It is important that, in order to be recognised as an aggravating factor, the gender recognised on the fraudulent certificate is key to the commission of the offence being prosecuted.

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<sup>63</sup> *Gender Recognition Reform (Scotland) Bill*.

<sup>64</sup> See footnote number 63.

Only confirmatory evidence of fraud will be sufficient for it to be considered aggravating. Once considered an aggravating factor, the Court must effectively establish the connection of the aggravating factor to the case and effectively demonstrate its relevance to the commission of the offence; furthermore, if there is a difference in sentencing in the absence of the aggravating factor, the Court must set out the reasoning for both positions and why it chooses the aggravated option.

The third of the sections (section 22C) is not focused on the prosecution of an offence per se, but details powers available to the various Courts involved in the prosecution of offences such as those discussed in the previous sections. In particular, this section discusses the power to revoke certificates if the Courts deem it appropriate to do so. As we have said, this power is subject to the commission of offences under section 22A or if the change of gender registration has been found to have been used as an aggravating factor in the commission of other offences (section 22B). In the words of the section itself, the section applies when exist *"an offence under section 22A(1) or (2) in connection with a gender recognition certificate or confirmatory gender recognition certificate issued to the person, or an offence which is aggravated under section 22B(1) in connection with a gender recognition certificate issued to the person"*<sup>65</sup>. The decision must always be notified to the Registrar General for Scotland, as must all stages of the proceedings.

## **5. BEFORE AND NOW: GENDER TRANSITION IN SPAIN AND SCOTLAND OVER THE YEARS.**

As we have seen, there have been important legislative changes in both of the legal systems we are analysing. However, rather than viewing them only from a purely legal perspective, it is convenient to look at them additionally from a social perspective. For this purpose, we will rely on various testimonies, both from Spain and Scotland, to bring us closer to the complexity of this issue. In the case of Spain, we will have the testimony of two transsexual men: one who began his process before Law 4/2023 came into force and another one after this law came into force.

The method that was used was the following: a form was sent to two transgender boys to fill in. It contained a number of questions about their legal gender and meaning, the stages of

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<sup>65</sup> See footnote number 63.



their transition process, the discrimination they experienced from the medical and administrative staff, the points of the new law that they felt were the strongest and weakest and what they would improve about the law.

We will start with the Spanish case where the process was started before the approval of Law 4/2023. When Matteo began his gender transition, Law 3/2007, of 15 March, regulating the registry rectification of the mention of a person's sex, was still in force; he began his transition in 2019, at the age of 19, on both a personal and legal level. He was assigned the gender of woman at birth, a legal gender that he continues to hold but which does not correspond to what he truly is and identifies as: he is a non-binary transmasculine person. His legal gender remains female to this day in the absence of more specific recognition, but he would be considered to fit into what is socially accepted as "male".

Matteo, by virtue of Article 4 of Law 3/2007, was asked to provide a medical report diagnosing him with gender dysphoria and to provide evidence of a two-year period of hormone treatment to adjust his secondary sexual characteristics to his felt gender. From the age of six, he felt that he was not a girl, and even suffered from depression at the age of 13 when he began to menstruate. When he told home, he had to wait seven months before he could start hormone treatment and an additional two months to have his first psychological consultation.

He says that he felt violated by the psychologist who asked him questions that Matteo judged to be stereotypical, although later in his life he met professionals who supported him in the process. He also claims that he was discriminated against by a surgeon he consulted to remove his breast, to which the doctor replied that "it would not look good aesthetically because he was too fat". Because of this, he has not yet been placed on the Osakidetza (Basque Health Service) waiting lists, which have an average waiting time of approximately two years.

Finally, we asked Matteo about his opinion on the changes introduced by Law 4/2023. From his point of view, the fact that medical reports are no longer required for the change of gender registration or that the requirement of two years of hormone treatment for the change of sexual characteristics to bring them into line with the sex sense is a great step forward. Likewise, he believes that the law has not worsened anything in itself, although he believes that it lacks the inclusion of more categories of sexual diversity and that there are problems that it does not tackle at its base, without specifying exactly which ones.

We will continue with the second case, which is that of the boy who started his transition process after the passing of Law 4/2023. Ashton is a 20-year-old transgender man living in Ciudad Real. He started to perceive himself as a man in 2019, at the age of 16, which is also when he started his transition process. Thanks to the new regulation, he has changed the name on his ID card and is awaiting confirmation of the gender change within 3 months, as the regulation dictates. This means that her registered gender remains "female".

He has never undergone hormone treatment, because due to his mental situation of dysphoria with his body, the medical team repeatedly refused to allow him to undergo hormone treatment because he was "mentally unstable", even though they knew that this instability was caused by this non-conformity. She has never undergone hormone treatment, because due to her mental situation of dysphoria with her body, the medical team repeatedly refused to allow her to undergo hormone treatment because she was "mentally unstable", even though they knew that this instability was caused by this non-conformity. The only body treatment he is undergoing is Minoxidil, which is normally used for alopecia, but is used by transgender men to stimulate facial or body hair growth in areas where hormones do not sufficiently stimulate hair growth.

Finally, he has been asked for his opinion on Law 4/2023, which he considers to be generally very positive compared to previous laws. He sees as a strong point the possibility of changing the name on the DNI without the need to change gender and the shortening of the deadlines for this second change to take place; as positive measures to favour the elimination of discrimination against trans people. As an improvement, he would have introduced the possibility of legal recognition of people of non-binary genders, an issue that was discussed in the very early stages of the law's passage and which in the end was not included<sup>66</sup>.

In the case of Scotland, after several and repeated attempts to contact LGTB associations and groups such as Stonewall Scotland, no response was received, so the attempt to obtain testimonies through this channel was unsuccessful. As a result, the method followed has been to search for online resources to try to obtain these testimonies. In this case we have

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<sup>66</sup> GUEDE, A. (2021, 28th June). Doble comparecencia, menores, género no binario. . . La Ley Trans llega al Consejo de Ministros tras algunos cambios. *www.20minutos.es*. Recovered 14th March 2023, from <https://www.20minutos.es/noticia/4742704/0/doble-comparecencia-menores-genero-no-binario-ley-trans-consejo-ministros-cambios/>

the testimony of Jo Clifford<sup>67</sup>, a well-known Scottish writer and dramaturge and transgender woman. It should be clarified that, unlike what we have done in the Spanish case, in the Scottish case we do not have a more recent testimony because, at the time of writing, the new legal text is only a draft and has not yet been approved.

Jo Clifford began to feel that her felt gender did not match her biological sex at a very early age: one of her earliest memories of this is that when she was 4 years old, she looked in the mirror one day and was shocked to see the image of a boy and not a girl. When she began to have affective-sexual experiences at the age of 15/16 she confirmed what she was. However, because of the time in which she lived (she was born in 1950), she had to live as a man well into her adulthood.

Despite the fact that she considers Scottish society to be conservative, she highlights in the interview that there have been various legislative changes that demonstrate an evolution of political thought. For example, she highlights that once her transition began, she was afraid of being fired for it, but her right was guaranteed thanks to the reforms made to labor laws that guarantee non-discrimination against trans people. She also praises the fact that direct discrimination such as insults, threats or harassment is classified as a crime.

Lastly, she recognizes the legislation on LGBT rights as crucial and a great advance, although she believes that improvements could be made in other matters and other areas (not only legislative). For her, education is the key to achieving awareness of sexual diversity and the elimination of bullying in schools. Even so, she evaluates the line of legislative evolution as positive and believes that one day society will see diversity as the norm, without questioning it.

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<sup>67</sup> SCOTTISH GOVERNMENT. (2014, 20th November). *Scotland Believes in Equality - Jo's Story* [Video]. YouTube. Recovered 9th April 2023, from <https://www.youtube.com/watch?v=YJ5J-VmuWfI>

## 6. CONCLUSIONS.

This work has allowed us to understand more broadly the similarities and differences between these two legal texts. It has also allowed us to understand more deeply the context and situation of transgender rights in both territories which, despite being very similar, have advanced in different ways over time.

In both cases, at a legislative level, we can easily observe how in barely 40-50 years great progress has been made in allowing the free determination of perceived and felt gender. Thanks to this research work, we have also been able to see that the elimination of the medical requirements for the change of gender registration, after so many and so many demands from the affected groups, has finally arrived. This may contribute to the definitive depathologisation of transgender people, which has already begun with the removal of transsexuality from the WHO's list of mental illnesses<sup>68</sup>.

The prohibition of conversion therapies for LGBT people is a step in the right direction towards creating a more inclusive and accepting society. The fact that this practice is currently only prohibited in Spain is a positive development, but it is important that Scotland follow suit in order to protect vulnerable individuals and promote equality. The benefits of prohibiting conversion therapies for LGBT people are clear. This practice has been shown to cause significant harm to individuals, including psychological distress, trauma, and a negative impact on their mental health. By banning these therapies, we can ensure that everyone is able to live their lives free from harm and discrimination.

Thanks to the chapter on the treatment of identity and the affective-sexual sphere of transgender people, we have seen that trans people often face significant barriers when it comes to accessing sport, which can have a negative impact on their physical and mental health. It is important that we work to break down these barriers and create a more inclusive environment in sports for all individuals, regardless of their gender identity. Although we have already seen that progress has been made in reproductive matters with this law (in terms of the recognition of non-marital children of lesbian couples), it is worth highlighting that other aspects could continue to be improved, such as making it easier to access adoption and

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<sup>68</sup> REYES GARCÍA, R.; AYUSO-MATEOS, J. L. (2019). CIE-11 y la despatologización de la condición transgénero. *Revista de Psiquiatría y Salud Mental*, Vol. 12(2), pages 65-67. <https://doi.org/10.1016/j.rpsm.2019.01.002>

family reconciliation. Likewise, it is crucial to train the administrative staff in charge of the processes so that those who access adoption do not encounter obstacles.

Legal fraud is a serious issue that can have devastating consequences for individuals and society as a whole. The fact that Spanish law provides less protection against this type of fraud than Scottish law is a cause for concern and highlights the need for stronger legal measures to prevent and punish fraudulent behaviour. However, it should be noted that one of the considerations that were taken into account at the time for the lack of a more specific development of the mechanisms against fraud in Spanish law was that in Spain fraud of law has sufficient jurisprudential guarantees of protection.

Finally, the section on testimonies (section 5), far from having only a social or merely informative value, is also valuable from a legal point of view, although initially it may not seem so. This is because, with the testimonies from Spain above all, we see whether the law is in line with the legal problem it is intended to solve. We see this especially in the case of Ashton more than in the case of Matteo, as we see that Ashton with the mere responsible declaration at the Civil Registry has managed to initiate the process of a change of sex registration, while Matteo has had to go through more complicated processes. In the case of Jo Clifford's testimony, we see that with a legal modification such as the one currently pending approval, she would have had a smoother transition process and perhaps would not have had to face so many forms of discrimination.

While there are still many challenges to overcome, the progress that has been made in Spain and Scotland towards protecting LGBT individuals and promoting equality is encouraging. By continuing to work towards a more inclusive and accepting society, we can create a better future for all people, regardless of their sexual orientation or gender identity.

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