



## WHAT WAS SOLID, IS NOW DISMANTLED: THE DECONSTRUCTION OF A GENDER AS A FIXED IDENTIFICATION

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### ABSTRACT

The purpose of this research is to study the right of people to non-identification by anatomical sex. Identification of biological sex is an extremely common practice in society. The first legal act, after the birth with life, is the public registry and the birth certificate in which the identification of the biological sex. Gender as a historical and cultural construction should not be understood as determinant and permanent. The visual inspection as soon as a given child is born is not enough to guarantee their gender identity, and the proof of this is the perception of the Supreme Federal Court (STF) by allowing transsexual people to extrajudicially alter the civil registry by modifying the civil and biological sex without the need for surgical intervention. However, such a faculty will have no effect for people of the fluid gender and no gender, the registration model needs to reflect the multiple representations of the sex/gender system beyond a binarism.

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### INTRODUCTION

Considering the current stage of society evolution, which is acknowledged to be made up of people of diverse genders, it is questioned whether it is still possible to impose the binary sexual model on the person's birth registration, when it is known that people can self-determine homosexual, transsexual and bisexual; can present themselves as a man one day and a woman the next day; or even not have a defined gender. The present research sought to understand reflexively the right of people to not being identified by anatomical sex. Identification of biological sex is an extremely common practice in society, and institutions require people to be identified by biological sex.

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The first legal act, after the birth with life, is the public registry and the birth certificate in which the identification of the biological sex, established in article 54, 2.º of Law n.º 6.015/73, must be included. Thus, this essay focuses on the construction and deconstruction of gender identity, knowledge about the contrassexuality and the influence of queer theory, permeating the rights of the personality and the fundamental right to gender identity, recent positions of the Brazilian Courts and development of the right to non-identification of anatomical sex in the public birth registry. For this purpose, the bibliographic review method was used based on the qualitative analysis of scientific articles, Brazilian legal diplomas, international covenants of which Brazil is a signatory, in addition to other documents, to answer the problem and achieve the objective proposed here.

**Gender Identities Running Down From the Fingers:**  
Contemporary society has undergone a number of changes

regarding aspects and issues of gender, in a sense it is necessary to understand that the gender here is being questioned beyond a closed system of power and an idea which concerns on passive matter, but the name of the set of sex-political devices (from medicine to pornographic representation, through family institutions) that will be the object of a reappropriation by sexual minorities, LGBT people take the lead in revealing their perspective on historical and social processes. From this perspective, in the last decade, this scenario begins to revert. As of the first LGBT National Conference in 2008, the Union, the States, the Federal District and the Municipalities begin to recognize the rights of LGBT citizens. Brazilians are still attached to Judeo-Christian principles that lead them to look at people from their genitals, disregarding the socio-historical construction of the feminine and the masculine, and believes in these dogmas as if it were part of the laws of the country. In this process, in addition to not admitting homosexuality, does not conceive the existence of people with gender identity other than biological sex, as is the case of transvestites and transsexuals. It is common to observe cases in which transvestites and transsexuals suffer discrimination from teachers/professors, for example. In contemporary society, it has been increasingly observed that people who are incongruent to the gender with which they identify with their biological body have sought both hormonal and surgical treatments to fit their bodies to their gender expression. This condition is called, by the Diagnostic and Statistical Manual of Mental Disorders (DSM IV), as Gender Identity Disorder. It is important to point out that gender is the behavior of each individual in relation to society, according to their cultural interpretation of sex, whereas sex refers to the female or male binary biological pattern. In this sense, gender can therefore be defined as a social product that is assimilated, represented, institutionalized and passed on from one generation to another, setting parameters of what it is to be a man and to be a woman. Therefore, the gender structures unequal power relations, making the woman or the one who considers itself as feminine, remains, almost always, in a subaltern position in the organization of social life (FERREIRA et al, 2017). Butler (2003) pointed out the problematic of the sex-gender binomial, where formally sex, of biological order, is distinct from the culturally constructed gender. But if gender is the cultural construction assumed by the body that is sexed, it can not be said to be derived from sex. When gender is perceived as independent of sex, it becomes floating, and can bring problems in its elucidation.

We can bring the transvestite persona as a highlight, according to Butler (2003), they reinvent the reality of the gender through multiple social performances, that is, the gender perspective can, from the social approach, take different arrangements, opening different possibilities of fluidity. As the body is constituted as an initial and immediate reality, the genus becomes present (FERREIRA et al, 2017).

### **The Contrasexuality, The Gender And Reinvented Body:**

The contrasexuality is a theoretical / reflexive / analytical construct produced by the Spanish philosopher Paul Beatriz Preciado, born Beatriz Preciado. In this document it is problematized that the contrasexuality constitutes a critical analysis of the difference of gender and sex, the reading about gender and sex as relations are products of the heterocentric social contract whose normative performativities were inscribed in the bodies as biological truths (BUTLER, 2001).

Contrary sexuality presents itself as a theory of the body that contains several technological devices aimed at sexuality, and

sexuality is a technology that lies outside the man/woman, female/male oppositions. And that the whole sex/gender system would be products made for the manipulative purposes of a society still closed in a binaristic and oppressive perspective, which limits subjects in their search for pleasure-knowledge, reducing subjects to their reproductive and sexual organs, to the detriment of the totality of the self. In the contra-sex contract, bodies recognize themselves not as men or women, but as bodies of speech, and recognize the other bodies as speakers. Preciado (2014) problematizes that the contemporaneity brings a capitalist dimension pharmacopornographic, that is, the drugs has been constituted in a scenario of extreme consumption for modeling and exaltation of these new bodies, starting to control them in a perspective of biopower. Thus, identity diversities and subjectivities will culturally represent these multiple bodies that are products of aesthetic experiences and experiences that respond to and surpass the gender/sex system (ROCHA, 2012). The discussion about the representations of the senses of the body can be seen from a set of perspectives that are going from medicine to the economy, passing through the biological sciences, anthropology, sociology, law, history, pedagogy and physical education. The body is legitimized as an object of investigation of multiple sciences, since from them the subjects, the groups and the collectivity can be understood in a historical construct, heterogeneous, unstable and sexual.

The notion of intelligible genders also expands the relations of coherence and continuity of people, establishing norms of socially constructed intelligibility between sex, gender, sexual practice and desire, in which is proposed the subversive multiplicity capable of breaking with the heterosexual, reproductive and medical-legal hegemonies. Through criticism of the sex-gender dichotomy, Butler (2003) brings the proposal to denature gender, to beyond the metaphysics of substance (a substantive being, identical to itself), and dismantles the idea of a subject one from performativity. Gender unity can bring coercive and regulatory effects of immobilizing identity through compulsory heterosexuality. Following in this sense, each society and culture act on the body to construct a variety of models assimilable for the individuals. Models of beauty, sensibilities, health, and gestures create the patterns within which men and women will be matched with their time and place. However, all these solids are being dismantled, since the subjects have been transposed among the several existing genders. So these cultural molds form, over time, a bodily history which, in turn, reveals the boundary between the natural body and the culturally codified. Moreover, this boundary separating the nature of our body from its cultural codification is not determined and circumscribes a dynamic relation whose history must be related by the set of processes that are dynamic and dialectical, in a cultural dimension of the body that used to delate and today the same reinvented body reports it from a perspective of citizenship. The body reinvents the gender, the gender constructs the subject, the subject enables its freedom through the fluid search of the possible genders. Still dialoguing with Preciado (2011), the bodies of the queer crowd are also the reappropriations and deviations of the discourses of anatomical medicine and pornography. The queer crowd has no relation to a "third sex" or a "beyond genders". It is done in the appropriation of the disciplines of knowledge/power over the sexes, in the rearticulation and diversion of the specific sexopolitical technologies of production of bodies "normal" and "deviant", the queer idea/paradigm erases all identity frontiers.

The queer affluence, itself, is the very dialectical negation of consent to exist. Is it the creation and rejection of an epistemological theory that produces true knowledge / power discourse, there are truths and which one am I? The queer dimension gives us the possibility of: I exist and demand that you recognize me here and now and not later, it is the demand for a fluidity that wants to be announced, perceived, "legitimized" and no longer acceptable to be invisible or ignored. As well placed by Fauzi Arap, immortalized in the voice of Maria Bethânia: *"Between you and me there is the news that separates us. I want you to see me naked, I strip the news. And my nakedness denounces you and mirrors you. I delate you, you relate me. I accuse and confess for ourselves. So I get rid of the words that you wear me."* However, the adequacy of the body image to the gender of identification is not sufficient for the individual to be recognized as such. The incongruity between the body image represented by the gender of identification and the name that the individual presents in its documents also causes serious constraints and embarrassments to the transgender subjects. First, there is a need to change their social name and, later, the civil name, so that they feel legitimate and appropriate to the heteronormative society in their daily lives. And throughout this process, the civil name is the one with which the individual was identified at the time of its registration and that appears in the Certificate of Birth. And the social name is the one by which the individual wants to be called, that is, the one that identifies the gender that it expresses, regardless of its civil registry name, thus freeing it from embarrassing and vexatious situations. The places that currently have adhered to the use of the social name are schools and health centers, seeking to bring these people closer to the services, guaranteeing their access and permanence.

It may be considered that Law n.º 6.015, dated December 31, 1973, art. 58, which provides for public records and other measures, opens the possibility for people with gender-based transvestite and/or transsexual orientation, male or female, to use, beside their first and last names, a social name that does not place them in a situation of public embarrassment. Regarding the change of the civil name, there are actions that open jurisprudence for individuals who, regardless of whether or not they have undergone surgery for transgendering, can file a petition for a change of name in their documents. Finally, it is evident that the use of the social name is vital so that individuals belonging to the transgender universe have recognized their human legitimacy in the context in which they live. Another aspect points out that there are several difficulties encountered by these individuals, according to the literature investigated, with the social name being one of the crucial factors for their acceptance of society, an issue that has not been legitimized until now, with only legal adopted in some states of the national territory.

**The Right to Non-Identification of the Gender:** If art imitates life, what about the first stanzas of the song "Totalmente Demais", in English "Totally awesome" released in 1986 by the Brazilian pop rock band Hanói-Hanói: "Beautiful as a baby/ what sex does it have, what sex does it have/ is always dating gay/ what nexus does so sexy gay/ [...]". Times have changed since then, and sexuality remains an unknown, the state insists on giving a simplistic solution with the imposition of male or female binarism. It says in the Federal Constitution that it respects the dignity of the human person, but in practice it does not respect. However, the formalities of the state can no longer silence the human nature

of being who you are, and the examples of this are arriving in the news and in the judiciary around the world: in 2017, the media released the news that the ID document of a Canadian baby was issued without identification of its biological sex, so that it can decide the gender when it is aware of it. According to BBC Brasil (2017) the document was issued by the government of the Province of British Columbia with the letter "U" in the space reserved for "sex". In English the vowel "U" can be interpreted as undetermined or unassigned. The document in question is actually the child's health card. The parent could not issue the birth certificate of the baby without the identification of the biological sex, because in the same way that occurs in Brazil, also in Canada, it is only allowed to issue birth certificate with the limitation in male or female. However, the baby's parent intends to judicialize the demand and demonstrate that the simple visual inspection performed by the doctor as soon as the baby is born is not sufficient to determine its gender. The fact is that sexual identification no longer has the importance it once had. In Brazil, the sexual identity is no longer an impediment to the celebration of weddings or the constitution of a stable union. In the judgment of the Direct Action of Unconstitutionality (ADI) 4277 and the Arrangement of Default of Basic Precept (ADPF) 132 by the Federal Supreme Court (STF) in 2011, it remains pacified that regardless of whether or not there is sexual diversity, couples or pairs can form families protected by the State.

Another important decision in favor of gender identity was issued by the Superior Electoral Court (2018), which came to understand that the quotas of political party candidates are gender, not biological sex. That is, the minimum quota of 30% provided for in article 10, § 3.º of Law n.º 9.504/97, considered the implementation of a public policy for the insertion of women in political life, has a broader interpretation, disregarding the biological sex and valuing the gender identity, so that, in this way, the insertion, also, of transgender in the political parties and candidacies. Recently, the STF (2018) surprised everyone by unanimously deciding to authorize transsexuals and transgenders to change their name and gender in the civil registry without the need for sex-change surgery. The Court considered the following judicial measures: ADI 4275 regarding to the unconstitutionality of Article 58 of the Public Registry Law to require justification and judicial decision to change the civil name; and the Extraordinary Appeal against the judicial decision maintained by the Court of Justice of Rio Grande do Sul to only allow the name change in the civil registry for transsexuals after performing surgery for the change of sex. The social name was already a reality regulated by the Brazilian legal system since the validity of Decree n.º 8.727/2016, and accepted by the Brazilian Bar Association, by the federal and state public administration, and other public and private entities, however, although in expansion, the said right for trans persons was limited to unofficial identifications. The decision of the STF corresponding to the possibility of name and sex change through an extrajudicial procedure without the need for surgical intervention and extensive to transsexuals and transgenders should be considered a great advance in the fight against absolute binarism. According to the STF's decision on the case, transsexual and transgender people may go to a Civil Registry Office and request a change of civil name and sex, without the imposition of surgical intervention for readjustment of sex. What it means to affirm that the psychosocial identity must prevail in relation to the biological identity.

It has even been in force since June 29, 2018, when it was published in the Official Gazette of the Union, CNJ Proceeding n° 73/2018, which regulates the registration of the change of the name and sex of transgender persons directly in the Civil Registry of Natural Persons. For this, the law imposes certain requirements, such as: firstly, the request may be made in any Civil Registry of Natural Persons (art. 3.º, sole paragraph); the applicant must be of age and have civil capacity (art. 2.º) as far as the name is concerned, the amendment is restricted to the first name, as well as the inclusion or exclusion of names indicative of gender or descent, making it impossible to modify family names (art. 2.º, §§ 1.º e 2.º); and finally, to submit the documents provided for in § 6.º of article 4.º.

The requesting person does not need to attach a medical report or psychological opinion attesting to transsexuality/transvestibility, much less medical report attesting to the performance of sex reassignment surgery. As well, the person is exempt from any previous judicial procedure, if it has opted for the administrative route. In fact, Provision n.º 73/2018 that regulates the change of the name and the gender for trans people is a great advance, nevertheless, it is still not enough, since, as it appears in the application model attached to said Provision, the person requesting the change of sex must choose between male and female, which will certainly limit the citizenship of those where the gender can not be self-determined as male or female (LANDO et al, 2018). However, there is already little or no relevance to the birth certificates record of the identification of biological sex, so it can be changed in administrative procedure. In Canada, where movements are already being observed in order to completely remove the identification of the biological sex of the birth certificate, arguments such as the need for such identification for the analysis of statistical data on the population are still raised. Argument that is insignificant when compared to the exercise of fundamental rights. Certainly, such data will have to be obtained by other means without having to impose as degradingly as the identification of the person incompatible with their gender self-determination.

### Final Considerations

The Federal Constitution of 1988, at the time of its promulgation, established a new foundation for the Brazilian legal system, by inserting human dignity as a fundamental principle of the Democratic Rule of Law. The principle of the dignity of the human person represented the repersonalization of the right, that is, it came to consider the person concretely as subject of rights, guaranteeing them the rights of the personality. Human dignity is the constitutional foundation of the rights of the personality, which means that all people have equal rights, freedom to exercise them, privacy, free of any kind of discrimination, regardless of race, color, sex, language, religion, political or other opinions, national or social origin, economic position, birth or any other social condition. In that thought, applying the principle of dignity for the development of the personality of the people, the article 58 of Law n.º 6.015/73 came to be interpreted by the STF to enable transsexual and transgender people to change name and gender by extrajudicial route, independent of the performance of transgenitalization surgery. The new interpretation represents the recognition of the existence of the fundamental right to gender identity and also ensures its effectiveness by guaranteeing any person the freedom to choose what is best for

them. However, the contemporaneity of the new interpretation still needs some adjustments to reach out to those self-determined people of the fluid gender and the genderless. Recognition of the fundamental right to gender identity is a victory for the queer crowd, but the essentialist view of gender that reduced gender to a fundamentally biological and binary understanding of closed identities is outdated. People of fluid gender and genderless have no interest in rectifying the public registry of birth to alter the anatomical sex, consigned by any other gender, since there is no "one" defined gender. In order to ensure the effectiveness of the fundamental right to gender identity for people of the fluid gender and the genderless, rectification of the public birth registry should be allowed to remove information regarding biological sex, as well as the insertion of letter that represents the indetermination of the gender. After all, biological identification is no longer of legal and social importance, in other words, what is the relevance of knowing whether a person is male or female? If for the family entities, marriage and stable union, sexual diversity is no longer an element for its existence, there is no reason to demand of any persons sexual identification whilst filling the cadastral form or institution in society.

The right to non-identification of biological sex should be understood as a consequence of the fundamental right to gender identity, so that any person can use the freedom of self-determination of the gender and justify the change of name and gender in the public registry, extrajudicially, if so desired, also allowing that the modification of the registry may have the purpose of removing the information about the biological sex of the holder of the right, as a means of avoiding hateful discrimination. Furthermore, considering that simple visual inspection is not enough to identify the gender; that this is due to a cultural construction that occurs throughout the life of the human being; and that it is incumbent on the State only to recognize the gender, never to constitute it, children born in national territory should not be identified by biological sex in the drafting of the public registry of birth as a measure of dignity, would be at the mercy of prejudiced behavior during childhood and adolescence. However, it would have the freedom to change the public registry from its self-determination, and it is incumbent upon the State alone to declare it.

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