

The Ayuso Administration menace: The challenges posed by the derogation of the Madrid antidiscrimination policies for LGBTI citizens

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Abstract

Madrid is the first region in Spain whose government has managed to dismantle an already existing LGBTI legal framework, going against the recently voted Legal Gender Identity and LGBTI Law that applies at a State level (4/2023). The conservative government of Madrid has modified two regional laws to re-establish gate-keeping and gender surveillance, thus putting the depathologization and self-determination of gender identity at stake. LGBTI minors are particularly exposed to this measure, as the partial derogation of aspects of the Madrid law directly affects their autonomy and self-determination. Our policy analysis examines the contradictions and severe effects of this law reform. We employ a cross-reading of the State and regional statutory terms that are being jeopardized, to reveal the different levels of policy making in which the Spanish trans community is obliged to obey. We further call for further analysis and follow up of the consequences of these law reforms and the impact on LGBTI people of all ages.

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KEYWORDS

LGBTI, Madrid, policy-making, populism, self-determination, transgender rights

1 | INTRODUCTION

In November 2023, news on the derogation of parts of the Gender Identity Act and the Act against Lesbian, Gay, Bi, Trans and Intersex (LGBTI) Discrimination of the Community of Madrid shook the Spanish LGBTI community. These two regional laws had been passed by opposition parties during a conservative legislature in 2016 and are formally known as Law 2/2016 (March 29), on Gender Identity and Expression and Social Equality and Non-Discrimination of the Community of Madrid (Government of Madrid, 2016), and Law 3/2016 (July 22), on the Comprehensive Protection against LGBTI-phobia and Discrimination based on Sexual Orientation and Identity of the Community of Madrid (Government of Madrid, 2016), respectively.

Isabel Díaz Ayuso, Madrid's current governor, announced the derogation of 15 laws including those in regard to not only LGBTI rights but also Government and Administration, Madrid Radio-Television, Madrid Health Service, Transparency and Participation, and Madrid Chamber of Commerce, among others (Europa Press, 2023). The derogation of the 2016 LGBTI laws, promoted by the Popular Party in governing majority, was employed through an express procedure that required shorter time frames and took effect in December 2023. Those changes were justified as part of a project of normative simplification that the Ayuso mandate wished to promulgate during its second term in power (Puentes, 2023). This law reform has been interpreted as an ideological shift in tune with the conservatives' alliance with the far-right party VOX, notorious for its cultural war against "gender ideology," migrant, and LGBTI rights (López-Sáez et al., 2023; Mateo, 2021).

The impact of such regressive decisions, not only in terms of public policy, but mostly of the everyday life of LGBTI people, is severe. Throughout the long debate of the national law 4/2023, the conservative rhetoric posed the idea that manifesting rejection towards LGBTI rights can be a valid opinion, something that conservatives, ultraconservatives, and antitrans feminists have defended vehemently (López-Sáez et al., 2023). It can be argued that this antitrans opposition has undermined previous consensus, in which regional LGBTI legislation had been promoted in Spain by parties of all colors. This makes such different political actors seem like "strange bedfellows" and discontinues a tradition of inclusive action tuned with European institutions and regulations (Cantó & Arregui, 2022; Davy et al., 2018).

On a more practical level, depathologization and self-determination are the two values that face the greatest oppression by the reactionary turn, by being depicted as anticonstitutional. Interestingly, there are also the two key values to understand the trans rights movement in Spain (Missé, 2018). The social movement STP2012 started out in Spain in 2007, becoming an international movement soon afterwards and remaining active until 2017 (STP, 2017; Sues Schwend, 2020). STP2012 has promoted an important shift in trans rights mobilization, moving from a mere inclusion of trans people to a thorough frame change of the medical, legal, and social approach of transgenderism as a disorder, questioning the pathologization and its consequences in the life of trans people and with a clear focus on protecting and promoting trans autonomy and self-determination during childhood (Araneta & Fernández Garrido, 2016; Missé, 2018;

Suess Schwend et al., 2014). As Esther (Mayoko) Ortega Arjonilla puts it, “the influence of the International Campaign STP can be seen in (...) the brand new version of Standards of Care-7, the public debate of DSM-5, and in debates around the new version of ICD-11” (Ortega Arjonilla, 2016, p. 36). On the other hand, self-determination is a key value for trans policy-making that was first introduced in the extremely influential transnationally 2012 Argentinian 26.743 law but has also radically changed activist thinking, demands and action in Spain.

Precisely in relation to depathologization and self-determination, LGBTI children and youth are particularly exposed to risks of annihilation from the new statutory pronouncements. Having been the center of the social and political debate, they contend with persistent arguments against their sexual and gender rights under the logic of an alleged “protection” of their immaturity and innocence (D'Angelo, 2023; Langarita et al., 2023).

Moreover, it is noteworthy that this law reform takes place after two legislatures in which many relative clauses have not even been fully implemented due to lack of political will and budget precisely of the Popular Party in office. The existence of these two laws in Madrid was spreading an important social message, by prosecuting discrimination against LGBTI individuals as wrongful but seemed to fail in practice.

The purpose of this report is to review this derogation that takes place in a global context in which some policies that protect LGBTI citizens are being dismantled due to conservative resistances and also to focus specifically in a Spanish context, in which most regions already count with this kind of policies, precisely in the aftermath of the recent passing of the national law 4/2023 on the recognition and protection of rights for LGBTI people.

2 | THE DEROGATION OF THE LGBTI LAWS

As of January 2024, there are 15 regional laws granting LGBTI rights in Spain, while at the national level, a new LGBTI rights law has hardly passed in 2023, Law 4/2023 (Ley 4/2023, 2023). On a symbolic level, this is the first time a law concerning LGBTI rights has ever been (partly) derogated in Spain by means of an antigender ideology. This action sends a message that this is something that can be replicated in other regions (such as Andalusia, Aragon, and Valencia), in which conservatives are also governing with the support of the far-right party VOX. Spain is a quasi-federal State, with multiple levels of policy-making (national, regional, and local), which respond to a decentralized or autonomous model legally and administratively (Valiente & Ramiro, 2005). These different levels of policy-making are not always well-known to the general public but are relevant to understanding LGBTI rights in Spain and the diversity in the guarantee of rights according to the territory. For example, changing one's name and sex mention can only be performed under a national law, even though it is a regional administration body, namely, the Civil Registry, that has to apply the law. Some differences may appear from one Registry to another (Solís, 2022). On the other hand, most regions have some sort of LGBTI law, as well as antidiscrimination policies for trans and LGBTI students in educational settings.

In 2018, the Education and Research Department of Madrid published instructions, including definitions and intervention protocols that had been raised by the 2016 law (Government of Madrid, 2018). Those instructions aimed at fostering training in educational and healthcare settings, as misinterpretations were becoming apparent. Despite this incorporation, the Ayuso government decided to perform an ideological shift in 2023 towards biomedicalization, gatekeeping, and strict categorical anchorages. More specifically, regarding the 2/2016 law, the

focus is on restoring the notion of “transsexuality” over “gender identity,” and on refusing to accept changes of trans minors’ name and sex mentions in the Civil Registry.

It is noteworthy that, to this very day, families can change their children’s names thanks to the 2018 Instructions of the Registrar General Directorate, in regard to name changes in the Civil Registry (Ministry of Justice, 2018), something corroborated by the 99/2019 Supreme Court Sentence (aligning with the 3/2007 law that granted adult citizens the right to change their name and sex mention once they provide proof of a gender dysphoria diagnosis, ownership of Spanish nationality and absence of “comorbid disorders”). In that respect, it may be relevant to analyze the similarities and differences between the Madrid 2/2016 law and the national law 4/2023 in regard to trans rights, the main area of conflict and backlash in Isabel’s Ayuso law reform and in the debate around the national law. Table 1 summarizes the main axes of comparison between the previous Madrid 2/2016 law, its newly derogated version, and the National law 4/2023.

In regard to the name and sex rectification, only the national law permits the name and sex mention change (in addition to the previous legislation and judicial sentences that had already authorized rectifications) but only twice in a lifetime. In comparison, prior to the derogation, regional legislation in Madrid only performed changes in administrative documentation to regional services.

Ownership of a Spanish ID makes it easier for transgender and nonbinary people to access healthcare, since some regions do not grant universal access to non-European citizens. The same applies to changes in name and sex mentions in health or education documentation. Be it as it may, the Spanish law continues to reproduce a binary perspective to this very day, by not attending to the rights of nonbinary citizens. The related discrepancies remain to be witnessed.

On the involvement of professional authorities, the national law establishes in the general regime that there is no need for diagnostic assessments. As for the regional legislation, law 2/2016 frames a service-user or consent model orientation to prioritize personal needs and demands. In contrast, the effects of the derogation would include reinforcing the psychopathological model and re-instituting expert authorization and gatekeeping. In that sense, both the regional and the national laws were openly nonpathologizing. The recent derogation in Madrid of the law 2/2016 not only re-establishes pathologizing principles but also decriminalizes conversion therapies, which are explicitly prohibited by the State law.

Regarding family status and acceptance, both the national and regional laws are aligned in the protection of family heterogeneity, addressing the problem of violence and offering support strategies. The update made by Madrid’s government threatens the family status by withdrawing the protection of trans and intersex minors in health and educational settings.

Concerning migrants, who were not covered by any of the laws in question anyway, there are no significant updates implied in the derogation. Last but not the least, regarding minors, the most important modification has been to ban the access to any transition procedures before 13 years of age, contrasting the updates made in the national law which finally grants children from 12 to 14 access to transitioning procedures after identity stability and maturity are proven.

Moving on to a deeper analysis, the specific sanctioning framework for infractions referring to the violation of the rights of trans and intersex people is being eliminated as a whole as a result of the derogation. Similarly, any references to the prohibition of reparative therapies for trans people, one of the most impactful advances on the lives of LGBTI young people in Spain, or even their subjection to biomedical and psychological assessments, are suppressed (Mateo, 2023). Even though denouncing psychotherapeutic treatments preventing transition has been an important struggle of LGBTI activism at an international level (de Groot, 2022;

TABLE 1 Comparison between the regional law 2/2016 in Madrid and the national law 4/2023.

Laws	Madrid law 2/2016	Party derogated Madrid law 2/2016	Spanish national LGBTI law 4/2023
Name and sex mention	Cannot include changes of name and sex in the civil registry. Instead, the regional government can only perform changes in administrative documentation related to regional services	Rectification in administration documentation requires gender dysphoria diagnosis	Requires binary identification and can be performed only twice in a lifetime No requirement of a gender dysphoria diagnosis
Gatekeeping	Service-user oriented, to adjust to the variety of needs and demands of the community	Re-establishes the authority of gender identity (disorder) units and psycho-psychiatric implication	No diagnostic evaluations, reports, and gatekeeping
Pathologization of trans and nonbinary experiences	Nonpathologizing	Pathologizing Allows reparative practitioners to work without scorn	Nonpathologizing
Family status	Acknowledges family heterogeneity (article 27) and offers a specific section (VI) that addresses issues regarding family acceptance, violence, and support Offers consultations to trans people's families during transition	Refuses to protect trans and intersex minors in health and school settings	Possible legal gaps for the misgendering of intersex individuals but generally in favor of family diversity
Migrants	Brief mention in article 1.6	No specific mention on changes	Additional barriers for migrants
Minors	Acknowledges and protects trans and intersex minors (article 6), putting their benefit and authority first Offers individualized healthcare	Removes sex education from educational contents Disavows for transition procedures before 13 years of age	Minors of 16 years of age or older can access the procedure in the same conditions as adults. From 14 to 16 years of age, they need their legal representatives' assistance. From 12 to 14 years of age, a new judicial procedure is regulated, where maturity and stability must be proven. Children under 12 years of age cannot access legal gender recognition

Motmans et al., 2023), Madrid is facing a setback that will seriously affect the lives of young people with the permissiveness of the implementation of therapies that aim to change their identity or sexuality (Castro, 2022).

Insinuated in the process is the return of the institutional relevance of Madrid's Gender Identity Units, which in the last few years had faced a gradual loss of authority, even prestige. It is implied that mental health professionals regain their expert gatekeeping authority. In recent years, the progressive decentralization towards community-based, psychosocial, or alternative healthcare models had been viewed as a threat to the members of the multidisciplinary teams that for years carried out psychometric assessments and collaborated in the emission of DSM/ICD diagnostic labels (Gómez Gil et al., 2020).

Inconsistencies and biased views against trans and nonbinary people are still largely predominant in professional and adults mindsets (Castro, 2022; Langarita et al., 2023), which have clear effects in the well-being and self-acceptance of trans children and youth (Austin et al., 2020). With the excuse of better understanding the unique characteristics of transitioning youth, publications keep focusing on the wrong parameters, such as the “deeply felt” identification as transgender, the persistence rates across time, the narrative coherence, the experience of doubt or the discontinuation of hormonal treatment (De Castro et al., 2022; Gómez Gil et al., 2020).

What is more, even though initiatives seem to have been taken in order to include nonbinary or alternative gender identities and expressions, gender assessment procedures as such have remained intact, in the sense that comorbidity evaluations and reductionist gender role questionnaires resist change (Abiétar, 2019; Argyriou, 2022). Studies have revealed the connections between such parameters and the reification of the—by now largely questioned—wrongbody narrative (Esteve Alguacil & Farnós Amorós, 2021). However, it seems like the expert knowledge of the Gender Units' interdisciplinary teams is merely put aside, instead of indefinitely cast as illegitimate to trans service users' autonomy and self-determination (Freeman & Stewart, 2020).

The importance of family bonds in supporting and accompanying trans children and youth lies in the adult-centric power that the family occupies in making decisions affecting the life of minors under 18 years of age. Recent research explains the risks that children and adolescents outside gender and sexual normativity face when finding themselves in unsupportive familiar environments (Andrzejewski et al., 2021; Baiocco et al., 2016). Beyond the forms of violence and discrimination that may be inflicted in other social settings, when trans identities are not accepted in the family context, severe threats affecting the enjoyment of both this vital stage and fundamental rights emerge.

The recognition and protection from bullying of trans minors in schools and public administration as a whole are also diluted. In addition, the reform repeals article 7, referring to the emission of official documentation allowing trans people to align the documentation related to regional operations and domains (health card, transportation cards, and more) with their gender identity. With the elimination of this article, trans children shall have to wait until they are 13 years old to modify their ID card, in accordance with the new LGBTI law 4/2023, to adapt the regional documentation (López Trujillo, 2023).

In relation with other institutional parameters of the 3/2016 law, the conservative government stipulates forcing to cease the activity of the LGBTI Council of the Community of Madrid or the LGBTI Documentation and Historical Memory Center, which were created in order to protect and promote the public presence of LGBTI people and their demands in public institutions (Mateo, 2023). Although these two institutions have had limited activity so far, their

closing has a symbolic and material impact for the LGBTI social movement of the region. Concerning the sanctioning of hate crimes and violence on the grounds of sexuality and gender identity, Ayuso's reform further modifies the article relating to the reversal of the burden of proof, enhancing the proof of innocence of the aggressor, rather than relying on the testimonial authority of the victim (López Trujillo, 2023).

3 | DISCUSSION AND RECOMMENDATIONS

To sum up, in these Madrid law reforms, we evidence a strong backlash in trans and nonbinary people's rights (law 2/2016) that captures the current momentum of antitrans sentiments from the conservative front of the Popular Party, VOX, and transexclusionary feminists. This backlash comes along with a more generalized restriction of LGBTI rights (law 3/2016) that focuses mainly on eliminating institutions and legal protection against hate crimes, as if they were prerogatives or signs of LGBTI privilege. On the other hand, the national law (4/2023), combined with the sentences and other policies in place, intends to restore some of the rights at stake in Madrid but creates an uncertain environment for LGBTI citizens in the region.

It is still soon to stipulate the full impact of the reform of these two laws, but what is clear is that it creates a discrepancy in regional and national legislation on LGBTI rights. As we mentioned, some of the rights that were missing in the initial version of the two regional laws can now be found in the introduced national law, which is of higher rank and mandatory application in all regions. However, the derogation certainly complicates the application of the national law in this region, alongside others that might follow its lead, and creates a social climate in which the existing LGTBI legislation and acceptance is being questioned.

More importantly, populist Ayuso has crossed several red flags by accepting far-right anti-LGBTI rhetoric as part of her agenda, not only in respect to LGBTI rights but other topics, as well. In doing so, she gains the support of ultraconservative voters, becoming an ultraconservative-leader herself, willing to presumably "break the rules" following a populist "fight for freedom" (Martín Rojo, 2023). This might be promising for her reputation in Madrid but is not convincing for other regions, in which she is being seen as "too much," even potentially damaging the image of the Popular Party.

Paradoxically, the 2/2016 and 3/2016 laws had been voted for by the opposition during the Popular Party's term of Cristina Cifuentes, as mentioned earlier. Forty eight members of the party had abstained from the voting in the Madrid Assembly, rather than manifesting against it. The circumstances were quite different back then, as a more moderate rightwing party, Ciudadanos, that no longer exists in the political scene of the country, was less reluctant to a social rights agenda than both the current version of the Popular Party and the more far-right approach of VOX. Although VOX is downright adversarial to the promotion of laws regarding social justice and minority restoration, it is also channeling a commonly held majoritarian attitude that LGBTI people are part of a powerful lobby that wishes to degenerate the institutions. It might be the Popular Party that suggests the revisions, but the mystification, stigmatization, epistemic othering, and general turmoil regarding sexual and gender minorities brought to the Spanish political scene by VOX should not be underestimated.

Both regional laws stood closer to the epistemological framework of the latest national law 4/2023 that was passed in February 2023 but had managed to emerge in a quite different political setting. As we discussed earlier, the regional laws were passed by all kinds of political parties and ideologies. This relative political consensus seems opposed to the harsh and polarized

debates prior to the approval of the national law, led by a coalition government of Socialist Party and Podemos. The circumstances are different, and it could be argued that the antitrans campaigns led by conservatives, far-right VOX, and antitrans feminists have paved the way for this new scenario, where what might seem impossible before is now taking place “by law.” On the other hand, the emphasis of the LGBTI movements in passing new legislation often clashes with the reality of how the laws are being implemented, often revealing resistances, delays, and lack of resources. Both the 2/2016 and the 3/2016 Madrid laws bear proof of the resistance in employing what had been legally adopted even before the recent derogation of parts of them. LGBTI laws require solid political will to implement them, with several legislatures before the results are apparent, in a context of relevant social support and mobilization.

A major but also quite common effect of the derogation is the perpetuation of a State of “multiple velocities,” so to speak. The distance between State (as baseline), autonomous/regional (sublevel or microlevel) and European (supralevel framework) complicates the already polyphonic reality of the Spanish context and impedes a project of redistributive justice towards the LGBTI community. We urge for a wider academic debate and social mobilization, both by official and organizational political actors, in order to better understand the implications of these law reforms and safeguard LGBTI rights from similar menaces. We aim for a more stable rights-based framework to operate in the region, in accordance with the 4/2023 law.

Our analysis derives to a series of research recommendations and actions for stakeholders and academics, including the following:

- A detailed median- and long-term analysis of the impact of the reform of these two laws. Also, an analysis of the influence of these reforms in other conservative-governed regions, which might also face multilevel political backlash soon.
- A study of the profiles of populist leaders that perform antitrans and anti-LGBTI policies and the links among them and how this can be a sign of political turmoil in Spain.
- An exploratory research on the impact of these reforms in LGBTI children and their families, with a focus on whether they come up with strategies to access healthcare (such as moving to another region or using private healthcare services, for instance).
- An analysis of the populist outcome of breaking with the social and political consensus of legislating to protect LGBTI people, women, migrants, children, and other social groups that can be targeted by intolerant and reactionary political actors.

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