Expert Opinion on the Third Gender Marker in North and South America

This document is intended for presentation at Verbal Trial No. 106/2025, before the 35th Court of First Instance of Madrid, which is considering the right to recognition of the option of a third gender registration marker in the Spanish Civil Registry.

While we understand that the jurisprudence of the Inter-American human rights system is not binding on the Spanish jurisdiction, nor are the resolutions of third states, we consider that, when faced with a procedure in which positive obligations derived from human rights are analyzed, the trial court can benefit from the legal doctrine emanating from this human rights system as well as from the reasoning employed by courts of other jurisdictions. This is especially true given that, as established by the Inter-American Court of Human Rights in its Advisory Opinion OC-24/17 of November 24, "the right to identity […] is a fundamental human right enforceable *erga omnes* as an expression of a collective interest of the international community as a whole" and "the fundamental principle of equality and non-discrimination has entered the realm of jus cogens."[1]

Therefore, since this right is a peremptory legal obligation and recognized as part of the body of customary international human rights law, the doctrine of international tribunals and the practice of third countries can inform the interpretation and application of these human rights by the Spanish courts. This is especially true given that the sources of Spanish law expressly include both custom and general principles of law—as provided for in Article 1.1, .3, and .4 of the Spanish Civil Code.

To this end, we will strive to provide technical and legal information that will deepen understanding of the human right to gender identity and expression, as well as legal critique of binary gender models from a human rights perspective.

We will then analyze the specific situation of non-binary people and the impact that binary state models of gender marking have on the recognition, enjoyment, and protection of their human rights.

Finally, we will address various specific precedents of recognition of the third gender registry marker in the domestic sphere of some American states, which may be illustrative for reflecting on possible solutions to the case.

This work is supported by four members of the International Network of Civil Liberties Organizations (INCLO), a network of seventeen national human rights and civil liberties organizations from all continents, with the aim of strengthening the human rights movement globally, maximizing its impact locally, and legitimizing the international legal framework for the promotion and protection of human rights.

INCLO has developed extensive work, particularly in its "Equality and Equity" pillar, seeking to understand and respond to the diverse and complex ways in which discrimination, marginalization, and inequality impede or hinder the enjoyment of human rights. This has been evident, for example, in its ongoing intervention with the organization "Transgender Europe" (TGEU) before the European Court of Human Rights, which contributed to the judgment in the case of "Savinovskikh and Others v. Russia," in which the State was found responsible for violating the human rights to privacy and family life on the basis of the complainant's gender identity[2].

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[1] Cfr. Corte IDH. Opinión Consultiva OC-24/17, del 24 de noviembre de 2017. Serie A No. 24, párr. 61, 87.

[2] Cfr. Resolución de la Corte Europea de Derechos Humanos, 3ra Sección. Caso de “Savinovskikh y otros v. Rusia”. Denuncia N° 16.206/19. Dictada el 9 de octubre de 2024.

As the Inter-American Commission on Human Rights (IACHR) has pointed out when addressing some of the interesting precedents, it is true that in various socio-cultural contexts "there may be different positions and consensus regarding the origin, relevance or convenience of enabling a third gender marker, which is why consultation processes with civil society organizations and other actors involved in the issue should be encouraged"[3].

That is why we consider it essential that the voice and expertise of our organizations be weighed and taken into consideration in the process of seeking a solution to the case that is consistent with the ideal of justice and international human rights commitments.

The human right to gender identity in the inter-American sphere

Following the ruling in the "Atala Riffo" case, the Inter-American Court of Human Rights (IACHR) gave rise to a profound jurisprudential development,[4] In this case, it recognized sexual orientation and gender identity as protected categories and, therefore, prohibited grounds of discrimination under Article 1.1 of the Pact of San José de Costa Rica. The Court recalled its doctrine on the duty of States to "refrain from taking actions that in any way are aimed, directly or indirectly, at creating situations of de jure or de facto discrimination" and to "adopt positive measures to reverse or change existing discriminatory situations in their societies, to the detriment of a particular group of persons," in order to comply with the principle of equality and non-discrimination, which has become a rule of jus cogens[5].

Now, it was in 2017, with the issuance of Advisory Opinion No. 24/17, that the Inter-American Court had the opportunity to "carry out a generic approach to the specific protection of the human rights of LGBTIQ persons, without attribution of state responsibility or case-by-case limitations, achieving the progressive development of the applicable standards."[6]

After highlighting the historical and structural discrimination, stigmatization and violence suffered by LGBTI people, the Court took into account the distinction between sex and gender within the framework of binary systems[7], to recognize the autonomous

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[3] Cfr. CIDH. Informe sobre personas trans y de género diverso y sus derechos económicos, sociales, culturales y ambientales. Aprobado el 7 de agosto de 2020. OEA/Ser.L/V/II. Párr. 90.

[4] Integrado -más allá de las resoluciones citadas en el cuerpo de este trabajo- por las sentencias dictadas en los casos Duque Vs. Colombia, del 26 de febrero de 2016, Serie C No. 310; Flor Freire Vs. Ecuador, del 31 de agosto de 2016, Serie C No. 315; Ramírez Escobar y otros vs. Guatemala, del 9 de marzo de 2018, Serie C No. 351; Rojas Marín vs. Perú, del 12 de marzo de 2020, Serie C No. 402; Pavez Pavez vs. Chile, del 4 de febrero de 2022, Serie C No. 449; y Olivera Fuentes vs. Perú, del 4 de febrero de 2023, Serie C No. 484, a lo que se adicionan las Opiniones Consultivas Nº 27/2021, Serie A No. 27, y Nº 29/2022, Serie A No. 29.

[5] Cfr. CorteIDH. Atala Riffo y Niñas vs. Chile. Sentencia del 24 de febrero de 2012. Serie C No. 239. Párr. 79-80 y 91-93.

[6] Cfr. Pelayo, A. y Bertín, B. (2024) "La protección de las personas LGBTIQ en la jurisprudencia interamericana", pp. 162. En: Revista IIDH/Instituto Interamericano de Derechos Humanos. Nº 78 (enero - junio 2024), pp. 143-184.

[7] Si bien resultan ser conceptos de difícil delimitación, tomamos aquí las definiciones provisorias vertidas en el glosario de la referida Opinión Consultiva. El concepto de sexo *"se refiere a las diferencias biológicas entre el hombre y la mujer, a sus características fisiológicas, a la suma de las características biológicas que define el espectro de las personas como mujeres y hombres o a la construcción biológica que se refiere a las características genéticas, hormonales, anatómicas y fisiológicas sobre cuya base una persona es clasificada como macho o hembra al nacer"* agregando que *"la asignación del sexo no es un hecho biológico innato; más bien, el sexo se asigna al nacer con base en la percepción que otros tienen sobre los genitales".* A ello se adiciona el género, definido como *"las identidades, las funciones*

human right to gender identity and expression, which derives from the human rights to recognition of legal personality, personal freedom, freedom of expression, privacy, and a name (Articles 3, 7.1, 11.2, 13.1, and 18 of the American Convention on Human Rights).

In its advisory role, the IACHR then defined gender identity as "the internal and individual experience of gender as each person feels it, which may or may not correspond to the sex assigned at birth, including the personal experience of the body (which may or may not involve the modification of appearance or bodily function through medical, surgical, or other means, as long as it is freely chosen) and other expressions of gender, including clothing, speech, and mannerisms. Gender identity is a broad concept that creates space for self-identification and refers to a person's experience of their own gender. Thus, gender identity and its expression also take many forms; some people **do not identify as either male or female, or they identify as both**" (emphasis added)[8]. Consequently, gender expression is conceived as "the external manifestation of a person's gender, through their physical appearance, which may include the way they dress, their hairstyle, or the use of cosmetic items, or through mannerisms, ways of speaking, patterns of personal behavior, behavior or social interaction, **names or personal references**, among others" (emphasis added)[9].

In operational terms, the Advisory Opinion establishes the principles of depsychopathologization and the declarative nature of gender identity, and establishes a set of minimum standards applicable to registry rectification procedures.

In this regard, it urges States to establish simple, expeditious, confidential, preferably free of charge, administrative procedures based exclusively on the free and informed consent of the person concerned, in order to guarantee the concordance of the self-definition of identity with the personality attributes recorded in identity documents, which includes the rectification of the name, image and sex and gender markers[10]. This implies an option for non-judicialization: guaranteeing the enjoyment of the right through administrative means is the appropriate way to make the right effective.

Additionally, it emphasizes the equal access of boys, girls and adolescents to requests for recognition of their self-perceived gender identity in records and documents, understanding it as part of the special protection measures to which States have committed (Article 19 of the American Convention on Human Rights), in accordance with the guiding principles relating to this age group: the best interests of the child, progressive autonomy, the right to be heard and for their opinion to be taken into account in all proceedings affecting them, and for their life, survival and development to be guaranteed[11].

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y los atributos construidos socialmente de la mujer y el hombre y al significado social y cultural que se atribuye a esas diferencias biológicas". Teniendo ello en consideración, se denomina "sistema binario sexo-genérico" al *"modelo social y cultural dominante en la cultura occidental que considera que el género y el sexo abarcan dos, y sólo dos, categorías rígidas, a saber masculino/hombre y femenino/mujer. Tal sistema o modelo excluye a aquellos que no se enmarcan dentro de las dos categorías (como las personas trans o intersex)".* Ese sistema se funda en el régimen de "cisnormatividad", que implica la idea o expectativa de que todas las personas son cisgénero, es decir, que *"aquellas personas a las que se les asignó el sexo masculino al nacer siempre crecen para ser hombres y aquellas a las que se les asignó el sexo femenino al nacer siempre crecen para ser mujeres".* Cfr. Corte IDH. Opinión Consultiva OC-24/17, cit. *supra,* párr. 32.

[8] Cfr. Corte IDH. Opinión Consultiva OC-24/17, cit. *supra*, párr. 32.

[9] Cfr. Corte IDH. Opinión Consultiva OC-24/17, cit. *supra*, párr. 32.

[10] Cfr. Corte IDH. Opinión Consultiva OC-24/17, cit. *supra*, párr. 116 y 160.

[11] Cfr. Corte IDH. Opinión Consultiva OC-24/17, cit. *supra*, párr. 154.

The basis of the state obligation to guarantee registry rectification is that the lack of recognition “could result in indirect censorship of gender expressions that deviate from cisnormative standards” sending “a widespread message that those who deviate from these “traditional” standards will not have legal protection and recognition of their rights on equal terms”[12]. This same approach was taken into account in the ruling on the case "Vicky Hernández vs. Honduras," which alleged the commission of a hate crime motivated by the murder of a trans woman based on her gender identity and expression. The Honduran State was held responsible for violating the victim's right to gender identity by failing to provide identity documents consistent with her self-perceived gender and chosen name, and by conducting the criminal investigation without acknowledging said identity[13].

Finally, it is important to highlight that the American states have followed the jurisprudential developments described above, signing new treaties that normatively expanded the principle of equality and non-discrimination, expressly including gender identity as a protected category.

Thus, the Inter-American Convention against All Forms of Discrimination and Intolerance, agreed upon in June 2013 and in force since February 2020, establishes in Article 1.1 that discrimination may be based on grounds such as sexual orientation and gender identity and expression, among others. Similarly, in the Inter-American Convention on the Protection of the Human Rights of Older Persons, adopted in June 2015 and entered into force in 2017, States committed to establishing public policies on aging and old age that develop specific approaches to address multiple or intersectional discrimination, including “persons of diverse sexual orientations and gender identities” (Article 5).

Non-binary people in the inter-American sphere

At this point, it is necessary to refer to non-binary or gender non-binary people, who are part of the "vast universe of diverse gender identities and expressions."[14] The aforementioned 2020 IACHR Thematic Report established the current applicable legal standard, stating that these are people who identify with a fixed gender position other than male or female, or do not identify with any particular gender, or consider themselves genderless, or disagree with the idea of gender itself, regardless of their physical configuration at birth or the sex assigned at birth. There are even people who experience gender in a fluctuating and impermanent manner, and who are often called "gender fluid." Ultimately, the distinguishing element of this identity category is an identification outside of the dual categories that reflect the binary system of man/woman or masculine/feminine[15].

However, the recognition of the human right to gender identity and expression for all people without discrimination, as previously discussed, necessarily implies extending its scope to those who exercise this right through a non-binary or fluid gender identification.

In hermeneutical terms, it is the pro persona interpretation of the international legal norm, in terms of progressive development, which "has allowed the clarification of the content and scope of the rights already recognized, some of them in permanent

[12] Cfr. Corte IDH. Opinión Consultiva OC-24/17, cit. *supra*, párr. 97.

[13] Cfr. Corte IDH. Vicky Hernández y otras vs. Honduras, sentencia de 26 de marzo de 2021. Serie C No. 422, párr. 121-122.

[14] Cfr. CIDH. Informe sobre personas trans y de género diverso…, cit. *supra,* párr. 71.

[15] Cfr. CIDH. Informe sobre personas trans y de género diverso…, cit. *supra,* párr. 86 y 87.

expansion (such as the core rule of non-discrimination)"[16]. This is how the IACHR has understood it, in line with the European Court of Human Rights, by considering applicable an evolutionary interpretation "that accompanies the evolution of current times and living conditions."[17]

Thus, it is the State's responsibility to fulfill its obligations to respect the right to gender identity of non-binary people (by refraining from actions that arbitrarily interfere with their personal sphere, such as registering a gender that is contrary to their self-perception) and to guarantee it (by implementing mechanisms that remedy violations of the law and restore full recognition, enjoyment, or use of the right).

In this regard, the IACHR cited the 2018 Thematic Report of the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (IE SOGI), Víctor Madrigal-Borloz, in which he urged States to "accept and recognize non-binary identities, such as gender identities that are neither "male" nor "female," and offer diverse options for gender markers"[18], which is consistent with the provisions of the Yogyakarta+10 Principles[19].

Advances in the recognition of the third registration marker

As we have explained, to the extent that the recording of gender markers in documents or archives is stipulated by law, we consider it necessary to enable the possibility of recording alternatives that go beyond the binary of male-female or masculine-feminine for those who do not wish to fit into that closed and dichotomous scheme.

Well, a review of the status of national legal systems in the Americas reveals a progressive trend toward recognition of the third gender registry marker.

In Argentina, the enactment of Law No. 26,743 on Gender Identity in May 2012 recognized and regulated the right to rectify the sex on identity documents in accordance with one's self-perceived gender identity. The text of this legislation is not governed by a binary gender logic, limited to the transitions of trans women and men who seek to identify with the gender opposite to that attributed to their sex assigned at birth. Therefore, the Civil Registry of the Province of Mendoza took this progressive and pro persona interpretation into account when, on November 2, 2018, through a mere administrative procedure and based on the aforementioned law, it rectified two birth certificates and issued two national identity documents (DNI) to two non-binary people without specifying any gender.[20]

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[16] Cfr. Salvioli, F. (2019). Introducción a los Derechos Humanos. IIRESODH. Pp. 403.

[17] Cfr. CorteIDH. Atala Riffo y Niñas vs. Chile, cit. *supra*, párr. 83.

[18] Cfr. IE SOGI (2018), informe transmitido a la Asamblea General el 12 de julio de 2018. A/73/152. En igual sentido, el Comité de Derechos Humanos celebró, en sus observaciones finales al segundo informe periódico de Nepal, "la introducción de un "tercer género" en diversos documentos oficiales, incluidos certificados de nacionalidad". Cfr. documento del 15 de abril de 2014, CCPR/C/NPL/CO/2.

[19] El principio 31 de Yogyakarta+10, sobre el derecho humano al reconocimiento legal, establece que los Estados deben "garantizar que los documentos de identidad oficiales incluyan únicamente información personal que sea pertinente, razonable y necesaria de conformidad con la ley para cumplir un propósito legítimo; y, por lo tanto, deben poner fin al registro del sexo y género de las personas en documentos de identidad tales como certificados de nacimiento, cédulas de identidad, pasaportes y licencias de conducir; y como parte de su personalidad jurídica", y que "mientras el sexo y el género continúen siendo registrados" deben "garantizar un mecanismo rápido, transparente y accesible que reconozca legalmente y afirme la identidad de género con la que cada persona se identifica" y "tener disponibles múltiples opciones de marcadores de género".

[20] Agencia Presentes (5 de noviembre de 2018). *Inédito en América Latina: personas no binarias lograron documentos sin sexo.* https://surl.li/abthrf

A different case arose when the Civil Registry of the Province of Tierra del Fuego refused to grant a similar request. Once the case was brought to court, on December 16, 2019, the First Instance Family and Minors Court No. 1 of Ushuaia granted the amparo action filed alleging discrimination and ordered—based on the aforementioned Law No. 26,743—the issuance of a DNI (National Identity Document) that records the plaintiff's "non-binary/equal" gender identity[21].

The need to standardize the application criteria of the aforementioned regulations led to the issuance of Presidential Decree 476/2021, on July 20, 2021, which ordered the adaptation of the registry nomenclatures for the issuance of DNI and Passports, incorporating into the field referring to "sex" the markers "F" (female), "M" (male) and "X" for "the following meanings: non-binary, indeterminate, unspecified, indefinite, uninformed, self-perceived, not recorded; or another meaning with which a person who does not feel included in the male/female binomial could identify themselves", in accordance with art. 4 of said regulation.

However, the choice of the symbol X as a registry marker for people who do not identify with binary genders, ruling out the implementation of other types of references, did not turn out to be an arbitrary or random decision. As the decree's grounds suggest, Argentina is a member of the International Civil Aviation Organization (ICAO), an international entity empowered to regulate standards, policies, and recommended methods aimed at achieving safety and efficiency in international civil aviation. In this regard, ICAO Document No. 9303, to which Argentina has adhered, is particularly important. This regulatory instrument details the technical specifications of machine-readable travel documents (commonly known as passports), stipulating that the symbol "X" must be used in cases where the gender-restricted area of the document must be completed in "undefined cases" or when the sex is not specified.

However, Article 9 of the law establishes the obligation of civil registry authorities to inform any person requesting documentary rectification with the gender marker “X” “about the possibilities of seeing their entry, stay and/or transit status restricted in those States in which no sex categories other than binary ones are recognized”, which allows the decision to be adopted with the free and informed consent of the interested party, that is, knowing the possibility that their request for non-binary personal documents may affect their mobility across various international borders.

This procedural requirement makes sense since the very grounds of the decree provide an example of a limited list of States (Bangladesh, Canada, India, Nepal, and Pakistan) that, at the time of the approval of the regulation, had normatively recognized the nomenclature "X" for people under their jurisdiction. However, since there is no international consensus that results in the existence of clear and indisputable international commitments or obligations on the matter, and since the treatment given to non-binary people by different States is different, it is possible - hypothetically - that a person with non-binary documentation may not receive the same treatment in terms of immigration in some countries as people with binary gender registration. This circumstance must be known and understood in advance by the applicant.

Special mention should be made of the decision adopted by the Supreme Court of Justice of the Nation on November 5, 2024, in a case in which the plaintiff requested the rectification and issuance of a new DNI (National Identity Document) stating that her self-perceived gender is "transvestite femininity" (FT). Although the case was

[21] Cfr. Sentencia dictada en Expte. Nº 19760/2019 - “S.B., G. A. S.L. C/ REGISTRO DE ESTADO CIVIL Y CAPACIDAD DE LAS PERSONAS S/ AMPARO”; y Yuba, G. (2019). Reconocimiento de identidad de género "no binaria/igualitaria". Comentario a partir de un fallo. En: Revista de derecho de familia y de las personas. Nº 4 - Junio 2020. Pp. 209-218.

dismissed by the majority without reasoning, and its subject matter does not specifically refer to a non-binary person, it is useful to consider the dissenting opinion of Judge Horacio Rosatti, insofar as it provides valuable considerations for critically rethinking the State's registry function in the context of the binary sex/gender system.

The judge conceptually differentiated between “identification,” which allows “registering a person based on relatively immutable objective data: their affiliation, their date of birth, their place of birth, their fingerprint, among others,” from the “identity” of a person, which changes over time depending on the exercise of their subjectivity[22].

Thus, he stated that "the State's sphere is that of registry identification, whose constitutional validity—he insists—will be conditioned on the lawfulness of the purpose of the registration and the usefulness and reasonableness of the data collected in such registries." For its part, identity (which is in itself self-perception) is "foreign to the regulatory power of the State, unless it operates as a prerequisite for positive protective actions" for the benefit of vulnerable sectors[23].

Colombia is another country where the recognition of the human right to gender identity led, through praetorian means, to an extension of its application to non-binary people, as the Constitutional Court of that state had the opportunity to rule on two occasions on the recognition of a third gender marker.

It should be noted that the procedure for correcting personal documents in line with a person's gender identity has been regulated there since 2015, by Decree No. 1227, which was issued in compliance with ruling T-063 issued by the Constitutional Court. In that decision, the court held that the correction of the "sex" component, due to a lack of correspondence between the sex assigned by third parties and the identity of the person in question, should be carried out through a procedure that does not require judicial intervention. However, the procedure established in the aforementioned decree enabled document rectification only in binary terms, that is, from "M" to "F" and vice versa.

The first case decided by the aforementioned Constitutional Court regarding non-binary individuals was initiated following a tutela action filed by Dani García Pulgarín, who had been assigned male at birth.

Since her youth, García Pulgarín underwent a gender transition process, deviating from social expectations regarding the male gender and identifying as a "transvestite." Thus, between 2010 and 2015, she corrected her name and sex on her birth certificate and ID, indicating the category "female." However, the fact that she did not self-identify or have an appearance that fully matched the social perception of female characteristics led her to suffer violations of her rights to health, work, safety, and personal integrity.

For this reason, she requested a new rectification of her identity document from the National Civil Registry, by eliminating the “sex” component, or, failing that, by replacing the letters “F” or “M” with the letter “X” or with the word “undetermined.” The rejection of the request, based on the fact that the legislation only recognizes two possibilities for registering sex, “when none of them agree with her experience and with the identity construction that she has made of herself,”[24] this meant an infringement of his constitutional rights to legal personality, human dignity, free development of personality and freedom of conscience, as alleged when he went to court.

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[22] Cfr. CSJN. Resolución dictada en Expte. CAF 28756/2018/1/RH1, caratulada “B., L. M. c/ EN - M Interior OP y V s/ información sumaria”. Voto Particular de Horacio Rosatti, considerando 6.

[23] Cfr. CSJN. Resolución cit. *supra*, considerandos 7 y 8.

[24] Cfr. Corte Constitucional Colombiana, Sala Sexta de Revisión. (2022, 4 de febrero). Sentencia T-033 de 2022. Magistrada Ponente: Dra. Gloria Stella Ortiz Delgado. Párr. I.A.1.

In its ruling, the Court considered "the historical burden of undervaluation to which people with diverse gender identities are subjected" and the duty to refrain from creating scenarios that result in a serious disregard for their rights, considering this to be the lack of correspondence between identity documents and self-perceived gender identity, "to the extent that it impedes recognition of the same in society and institutions. It hinders the projection of one's gender in society and fosters scenarios of discrimination and exclusion in the public and private spheres in which the person interacts." Thus, after reviewing its jurisprudence and the abandonment of the biological conception of the "sex" item, it concluded that "the information recorded in that field should be understood as a personal decision, which coincides with the definition of gender. Thus, currently the identity card announces that it refers to sex, but records the gender of the person. Hence, in this decision, sex is usually treated on the identity card as a representation of gender"[25].

After considering the recognition of a third gender marker in fourteen countries (at the time of ruling), it declared the exception of unconstitutionality to render inapplicable the rule that limits sex markers to binary ones, since "it denies the plaintiff's experience of gender, which is constituted outside of them." It thus states that "the act of denial of rights is explained by the historical preconception according to which gender is reduced to binary classifications, male and female, and is exhausted in them," since "the plaintiff has consolidated its own being in a counter-majoritarian manner, without corresponding to that idea, without seeking to be identified within the framework of its limited possibilities, and this has exposed it to scenarios of discrimination"[26].

Finally, after considering seven alternatives, he opted to recognize the third marker, "non-binary," which "does have the vocation to protect the rights of the plaintiff, as a person with a gender identity that is neither female nor male," highlighting the way in which it contrasts with the binary logic of sexual categories[27].

In order to implement the decision, the court ordered the National Government and the National Civil Registry to amend Decree No. 1227 of 2015 (and similar regulations) within six months, including the "non-binary" category among the gender markers of the citizen identification scheme and guaranteeing non-binary people access to this category on equal terms with people who self-identify as binary. However, it ordered that if, after this period, the new regulation has not been implemented, non-binary people may still change their identity documents before the competent authority under the terms established in the ruling. Furthermore, the Constitutional Court demonstrated its broad-mindedness by also urging Congress to regulate, within two years, all services, rights and obligations that have criteria for assigning sex or gender, to specify the way in which non-binary people will access them[28].

Two years later, the Constitutional Court had the opportunity to rule on a second tutela action filed against the National Civil Registry by a non-binary person who was unable to access the "non-binary" sex marker on their digital identity card, even though they had been able to correct their physical identification documents. The refusal was based on an alleged lack of funding to modernize the computer system. The Court held that the Registry violated previously established judicial precedent, dismissed the budgetary argument as insufficient to justify differential treatment in situations where

[25] Cfr. Corte Constitucional Colombiana, Sentencia T-033 de 2022. Párr. II.26, 33 y 44.
[26] Cfr. Corte Constitucional Colombiana, Sentencia T-033 de 2022. Párr. II.61, 62 y 64.
[27] Cfr. Corte Constitucional Colombiana, Sentencia T-033 de 2022. Párr. II.86.
[28] Cfr. Corte Constitucional Colombiana, Sentencia T-033 de 2022. Párr. II.89.

fundamental rights are at stake, and ordered the government agency to adopt the technical tools to implement the "non-binary" gender marker in digital documents[29].

Finally, it's worth mentioning that other American states are moving along similar lines. In Canada, passports with a non-binary marker option have been issued since 2017, and several provinces (such as Ontario, Alberta, Saskatchewan, and British Columbia) have adopted it or eliminated gender information on birth certificates, public health credentials, and driver's licenses[30]. In November 2021, the First Civil Court of Santiago de Chile rectified the birth certificate of a non-binary adult, using the marker "X" for the category "Registered sex" even though this was not contemplated in the regulations, doing the same with respect to an adolescent the Third Family Court of Santiago, six months later[31]. For its part, in May 2023, Mexico began issuing passports with the “X” marker[32].

Conclusiones

There is no doubt about the importance of personal identification regimes for the State, including in the planning and implementation of public policies necessary to guarantee the enjoyment of human rights in general[33]. Now, we believe it is necessary to unravel the false dilemma between registration and respect for people's gender identity and expression. In this regard, we have presented arguments that tend to explain that it is possible to seek harmonious solutions, in which the State can select and register personal information without undermining individuals' gender identity or restricting its expression as a way of existing in the world and connecting interpersonally.

It is important that the State's registry activity recognizes, values, and enhances the diversity of ways of being, feeling, self-defining, and projecting oneself into the environment, without becoming entrenched in sociocultural mandates that restrict this richness; all the more so when failure to do so—and thus serving as agents for the preservation of the social rules of gender binarism—leads to the violation of human rights, entails violations of the programs established by the Political Constitution of States, and may entail international liability for the latter for failing to comply with their conventionally assumed commitments.

Judicial work must always be to reestablish the law with a view to the ideal of justice and guarantee the supremacy of conventional and constitutional norms. A tiny change, such as the recognition of a third gender registry marker, can result in a major transformation for the concrete experiences of non-binary people, while helping to consolidate the legal and institutional architecture deserved by every pluralistic and

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[29] Cfr. Corte Constitucional Colombiana, Sala Quinta de Revisión. (2024, 16 de diciembre). Sentencia T-527 de 2024. Magistrado Ponente: Dr. Jorge Enrique Ibáñez Najar. Párr. II.77, 78 y 86.

[30] Cfr. CIDH. Informe sobre personas trans y de género diverso…, cit. *supra,* párr. 89.

[31] Cfr. Poder Judicial (6 de mayo de 2022). *Tercer Juzgado de Familia de Santiago acogió solicitud de inscribir a adolescente con registro no binario.* https://2y2.co/MSDITM ; y Universidad de Chile (8 de julio de 2022). *Clínica Jurídica U. de Chile logra primer fallo que reconoce género no binario a persona mayor de edad. https://2y2.co/FcHVFA*

[32] Cfr. Gobierno de México (17 de mayo de 2023). *El canciller Marcelo Ebrard expide los primeros pasaportes con género no binario en México y en el exterior. https://2y2.co/XFEVye*

[33] La CorteIDH considera “de vital importancia” el derecho a la identidad de género para “la protección contra la violencia, tortura, malos tratos, derecho a la salud, a la educación, empleo, vivienda, acceso a la seguridad social, así como el derecho a la libertad de expresión, y de asociación”. Cfr. OC-24/17, cit. *supra*, párr. 98.

multicultural society that aspires to a truly democratic shared life with respect for each individual's self-determined life plan.

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