Review

Clin Ter 2022; 173 (5):430-433 doi: 10.7417/CT.2022.2458

Identity and reproductive rights of transgenders: are current legal and ethical frameworks soon to be outdated? Medicolegal implications of potentially life-changing decisions

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Abstract

The level of recognition that transgender individuals (i.e. those whose gender does not match the sex assigned at birth) enjoy in our societies has certainly made giant strides. Still, there is no denying that the far-reaching ramifications arising from choices about one's gender expression do affect vital aspects of identity in school, workplaces, and the community, and should be clearly defined and addressed by laws and policies. One of the arguments most commonly used by supporters of transgender rights relies on the concept of inalienable human rights, including the rights to live safely, freely, and without fearing discrimination. The authors have set out to succinctly outline and elaborate on the dynamics that have been shaping the legal recognition of transgender individuals in light of the unique legal, social and ethical complexities that such an evolution entails.

Moreover, as assisted reproduction technologies make considerable progress and innovations open up new horizons for fertility preservation and restoration, it is worth exploring how such advance can play a role in upholding the reproductive rights of transgender patients who wish to achieve parenthood, and how counseling ought to be implemented taking into account the psychological traits of transgender patients and the implications of every choice they make. ***Clin Ter 2022; 173 (5):430-433 doi: 10.7417/CT.2022.2458***

Key words: *transgender rights, gender recognition, assisted reproductive technologies (ART), fertility preservation, counseling*

Introduction

The issue of recognition and rights for transgender individuals (an umbrella term which includes non-binary persons or those whose gender does not fit into the male/female categories) has been gaining attention and increasing relevance in western societies. It is nonetheless extremely challenging to outline a set of policies, legislative measures and regulations for upholding the right of such people. It has not yet been determined whether if gender identity establishes itself from genetic, hormonal, environmental factors or, as it appears more probable, a complex interaction of all such components, among others. In light of such scientific uncertainty, drawing up well-balanced approaches is even harder, due to the extremely controversial nature of the possible implications (1). Certainly, it appears quite far-fetched that those who experience gender identity disorders and identify with a different gender category than the one assigned at birth may simply choose their gender identity, any more than cisgender (i.e. identifying with the gender which they were assigned at birth) people do. Still, there is no denying that the far-reaching ramifications arising from choices about one's gender expression do affect vital aspects of identity in school, workplaces, and the community, and should be clearly defined and addressed by laws and policies. One of the arguments most commonly used by supporters of transgender rights relies on the concept of inalienable human rights, including the rights to live safely, freely, and without fearing discrimination. It is incumbent upon the medical scientific community to acknowledge their key role in designating, and at times changing, gender designations on legal records that themselves are not only used clinically. Overall, research point to a redefinition of the baseline criteria and parameters that make up the legal sex designation system on which we currently rely, and of the standards for amending such designations (2). Nonetheless, as this evolution unfolds, the flaws and shortcomings of the current legal sex designation system, especially for transgender people, have been denounced with increasing regularity. As a result, the suitability and effectiveness of the health care professional's role in recording legal sex designations has been put in doubt. The medicolegal challenges involving legal sex designations have the potential to affect the rights of both transgender individuals and society at large.

Transgender rights: a complex scenario

While transgender people still have to deal with impactful issues such as identity recognition in many countries, many European nations have enacted legislation granting such a right without any requirement for psychiatric reports or sexual reassignment procedures, which a large number of

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ISSN 1972-6007

transgender people do not choose to undergo. Some forms of assessment however are still in place in several European countries such as the United Kingdom, whose 2004 Gender Recognition Act law requires a significant medical explanation as to why a transgender person who seeks recognition has not undergone sex reassignment surgery and proof that they have experienced gender dysphoria, have lived as "the new gender" for at least two years, and wish to keep doing so. In Italy, one of the country with the most restrictive and convoluted set of norms relative to gender recognition, the legal requirement for the correction of ID is governed by law 164/1982, which requires a final court ruling establishing that the applicant should be attributed a gender other than that assigned at birth, and "whenever necessary", the court can demand that an assessment of the applicant be carried out aimed at evaluating his/her psycho-sexual conditions. Critics have long denounced the vagueness and ill-defined nature of such provisions (the exact kind of the evaluation to be implemented is also unclear). As a result, several years can go by before the applicant can have his/her "new" gender legally recognized. The law also required sexual reassignment surgery, although after 29 years, the rules of the procedure were amended by art. 31 of Legislative Decree 150/2011 which repealed arts. 2 and 3 and art. 6, paragraph 2, ending the surgery requirement. Such an update was confirmed in 2015, via Constitutional Court ruling n. 221/2015, which stated that "The law rules out the need for surgical treatment, in order to complete the legal process of rectification of personal data, since that is only one of the possible techniques for achieving the adaptation of sexual characteristics" (3). In Germany, the key provisions of the legislation named Transsexuellengesetz – TSG mandate that in order for the applicant to change either name or gender, two independent medical court experts must be appointed by the judge. The assessment will be centered around whether

the person "does not identify with the birth-assigned sex/gender, but with the other one", "has felt a compulsion to live according to his/her ideas for at least three years". Thus, it is to be assumed with high probability, that the feeling of belonging to the other sex/gender is not going to change". Originally, the statutes asserted that neither change of name nor legal gender were to be granted for those under the age of 25 years of age, but the judiciary has voided such a requirement, hence there is currently no minimum age requirement (4). France has a similar set of norms in place: on 24th May 2016, a bill was enacted by the French General Assembly that enabled transgender persons to legally change their gender without the need for sex reassignment surgery and forced sterilization (also known as mandatory infertility provisions) which is still mandated by law in 20 Council of Europe members, among which Finland and Poland (5).

Beyond identity recognition: the highly sensitive issue of transgender reproductive rights

If on the one hand the mandatory infertility provisions for the recognition of legal gender tend to be abandoned as new rights are asserted, the highly sensitive issue of reproductive rights for transgender individuals is still far from being solved, due to the moral, ethical and legal implications which it entails. Supporters of transgender reproductive rights argue that if recognition of transgender identity is to be full and equitable, then assisted reproductive techniques (ART) have to be made available to transgender individuals.

Regardless, the ethical viability of helping transgender persons to reproduce has long been a source of concern and controversy. Opponents have contended that transgender people are not mentally fit for parenthood, hence they ought to be denied access to reproductive services. Many of the sterilization provisions which have been mentioned earlier on have been enacted for the purpose of protecting the children. Twenty countries in Europe currently impose compulsory sterilization requirements for transgender individuals who apply for gender recognition. As a result, they either have to give up their reproductive potential or forfeit the right to be legally recognized by the gender which they feel as their own. Most research data denounce the argument that transgender people are unfit for parenthood as unfounded, obsolete and biased, pointing to no proven effect on the gender identity or sexual orientation of the children of transgender parents. Moreover, no evidence points to the danger that the well-being of the children could be somehow harmed or jeopardized.

Undoubtedly, providing fertility counseling to transgender patients presents unique complexities for which most healthcare professionals are not yet fully prepared. The feasibility of experimental fertility preservation approaches such as *in vitro* maturation of ovarian and testicular tissue is still undetermined and underresearched, as are other promising techniques such as ovarian tissue cryopreservation and testicular tissue cryopreservation, which could be well-suited for prepubertal patients. It is worth noting that for prepubertal transgender children the choice may be between whether to experience permanent puberty-related changes to their body or have their puberty suppressed with gonadotropin-releasing hormone agonist analogs (GnRHa), in order to go on with sexual reassignment, thus risking irreversible infertility (6). Such a choice is potentially life-changing and the patients need interdisciplinary counseling and support throughout the process. Recommendations by the American Society for Reproductive Medicine state that any decisions regarding gonadectomy ought to be delayed until the patient is an adult (7). Fertility preservation has in fact been shown to potentially create gender incongruence and dysphoria. However, such distress can be allayed by healthcare professionals, for instance by using gender-neutral language and the preferred pronoun. Patients in such situations seem to have coping strategies, but suitable and individually tailored specialist support is still needed for patients who experience gender dysphoria at this stage.

As for the possibility that transgender women may undergo uterus transplantation, the first successful medical treatment of absolute uterus factor infertility (AUFI), has been advised against by some of the world's foremost experts of this still experimental and highly complicated technique. Although transgender women may of course benefit psychologically from the opportunity to achieve pregnancy, since that experience would align with their gender identity through gestation and childbirth, quintessentially womanly experiences. Nonetheless, animal and human trials of uterine transplants have so far only been carried in cisgender fema-

les. Major concerns exist about creating suitable vascular structures in a transgender female, the placement of the organ in a non-gynecoid pelvis, and the hormonal cycles necessary to achieve pregnancy (8, 9). In light of such a degree of uncertainty, the Montreal Criteria for the Ethical Feasibility of Uterine Transplantation were issued in 2012, conceived to provide guidance for doctors towards the ethically sound implementation of uterus transplants, state that the recipient should be a cisgender female (10-12). Among the alternatives, embryo or sperm freezing require future access to ART procedures which are not accessible in several countries to transgender patients, or would involve hiring a surrogate mother (13-14). Surrogacy however is a controversial procedure with substantially high costs, to access which many couples travel to countries where it is legal and then take the children thus born back to the countries of origin (13). Such practices, often referred to as "fertility tourism" with a pejorative tone, do not guarantee that the children will be legally recognized in countries where commercial surrogacy is banned, since no consensus as yet exists, not even within the European Union (15-18).

Conclusions: thorough fertility counseling needs to address the transgender patients' distinctive psychological traits

Modern societies have made giant strides towards ensuring recognition to transgender persons, despite the opposition and the often legitimate concerns and objections raised by those who view such changes as too fast and hard to manage. From the standpoint of the clinical and surgical hurdles linked to the reproductive autonomy of such individuals, the specific needs of transgender persons need to be prioritized and thoroughly assessed by virtue of their unique and still not fully understood peculiarities; such an effort is essential in order to gain a better understanding of their fertility wishes and aspirations and outline the most adequate protocol for fertility counseling. Firstly, the risks arising from long-term exposure to hormones for transgender individuals undergoing hormone therapies is not fully understood, hence any potential risks to the patient or future offspring cannot be foreseen or assessed. Even more risky is the treatment of prepubescent transgender patients: pubertal suppression with GnRHa is in fact administered to such patients as early as Tanner stage 2 in order to stunt the development of permanent secondary sex characteristics incompatible with their gender identity. Such interventions can allay the psychological suffering which such changes can entail, while giving more time for these children to experience and understand their gender identity. Yet, even though pubertal suppression is reversible, it also pauses maturation of germ cells, potentially impacting future fertility capabilities.

Also, offering any services that are currently experimental could cause harm to the patient, given that they are only available under a research protocol and the risks are still unclear. Hence, it is of utmost importance from a medicolegal standpoint, that a thorough medical and ethics assessment is made when outlining gender-affirming care strategies for transgender and gender-nonconforming patients. The duty of each healthcare professional should be to prioritize benefits to patients, inkeeping with the principle of beneficence, avoiding harm (principle of nonmaleficence), and uphlding the rights and best interests of patients (particularly children/adolescents) at a delicate time of rapid development, while also ensuring equality in terms of access to care. It should always be borne in mind that albeit current research data on gender-affirming treatment are rather promising, and that withdrawing treatment from transgender and gender-nonconforming patients is risky, the long-term effects of hormonal and surgical interventions in this population are not yet fully known or understood (19). In light of those aspects, and in order for any such procedure to be rooted in solid counseling and informed consent, which is essential in shielding professionals from medicolegal repercussions and malpractice charges, it has to be taken into account that transgender people are exposed to abnormal levels of adverse mental health outcomes compared both to gender-normative, heterosexual individuals and lesbian, gay, and bisexual persons (20). The theoretical basis of current transgender mental health research is to a degree at least influenced by the minority stress model, a framework which emphasizes the role played by stressors that primarily or solely affect members of a minority group, (which may entail violence, stigma, and discrimination against such a minority), as substantial contributing factors to poor physical and mental health outcomes (21). Furthermore, transgender adolescents and young adults take into account several factors when considering whether to opt for fertility preservation and the complexity of the decision-making process stresses the need to prioritize fertility counseling, by calling attention to a set of strategies enhancing patient education and awareness, in addition to evaluating the impact of such support mechanisms in order to spot and address any weaknesses and shortcomings. Future studies also should examine whether transgender adults of childbearing age who were offered FP but declined, experience regret related to their FP decisions. In light of such dynamics, it is of utmost importance to produce a risk-benefit analysis that can prioritize the physical and mental health of each individual in a state of fragility, particularly adolescents and pediatric patients who may be affected for life by any given choice which they make with the support of their doctors. To that end, it is certainly worth mentioning the recent position statement by the Italian Society of Gender, Identity and Health (SIGIS), the Italian Society of Andrology and Sexual Medicine (SIAMS) and the Italian Society of Endocrinology (SIE), which has elaborated on current Italian legislation governing gender affirming surgery and registry rectification (the already mentioned law 164/1982) in addition to an in-depth analysis as to the psychological functioning of transgender individuals, and the way to best pursue gender-affirming and reassignment treatments in light of such an extremely complex and multifaceted balance (22).

Conflicts of Interest

The authors declare no conflict of interest.

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