

Sex reassignment with or without surgery. New ethical and juridical pathways



Ann. Ital. Chir., 2019 90, 2: 95-99
pii: S0003469X1902918X

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INTRODUCTION: *The access to sex-reassignment surgery is based on the existence of an unequivocal dyscrasia between the morphological sex and the objective evidence that emerges from in-depth analysis of the individual's personality. In Italy, such type of surgical intervention is subject to the authorization of a judge.*

MATERIAL OF STUDY: *Authors examine the recent Italian Constitutional judgement which has addressed the right to change legal sex status without the need for sex-reassignment surgery.*

DISCUSSION: *The Italian approach is in line with scientific evidence that the physical and mental well-being of an individual does not always require the surgical rectification of primary sexual features. Thus, sex reassignment surgery is not to be considered mandatory; rather, it should be aimed at ensuring the transsexual individual's stable psychological and physical good. From an ethical point of view, the Court's decision is very important, since it does not subordinate such fundamental rights as gender identity, healthcare and equality to prior, highly invasive surgery.*

CONCLUSIONS: *The authors point out that critical issues and obstacles to the full implementation of the right to gender identity remain, in that this right is still subject to the authorization of a judge. This approach does not seem to be in line with the recent World Health Organization (WHO) decision to remove the "gender incongruity" from the list of mental and behavioural disorders (as it is in the current International Classification of Diseases-10, so far), to decrease the stigma surrounding such a condition.*

KEY WORDS: Gender identity, Sex reassignment, Surgery, Stigma, Transsexualism, Transgender

Introduction

As is widely known, transsexualism is characterized by the dichotomy between psychic and anatomical identity, which sometimes arouses feelings of profound anguish and frustration¹. This dichotomy impacts on the indi-

vidual's daily life, often engendering a lack of compliance with traditional and predefined social categories and leading to marginalization and stigmatisation².

In Italy, the right to change one's legal sex status is regulated by Law no. 164/182, subsequently amended in 2011 (D.lgs. No. 150/2011), which provides comprehensive regulations concerning the procedure to be followed in order to rectify anagraphic data. From an ethical point of view, this option constitutes the recognition of the right to personal identity, including its intrinsic autonomy, and the recognition of a new concept of gender identity, which is no longer defined on the basis of genital organs alone, but also on the basis of psychic and social components³.

Pervenuto in Redazione Luglio 2018. Accettato per la pubblicazione Novembre 2018

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Recently, the World Health Organization (WHO) decided that “gender incongruence” has to be classified - in new edition of the International Classification of Diseases (ICD) - as a sexual health condition. Such a change will be presented during the next World Health Assembly, which will be held in 2019, taking effect on January 1st, 2022 ⁴.

The debate concerning the right to change legal sex status cannot ignore the profound social and cultural changes which have taken place in recent decades in several areas of individuals’ lives, such as sexual morals, gender relations, health and control of their own bodies ^{5,6}.

Clearly, the focus of this discussion is the individual’s constitutionally guaranteed right, to have his/her perceived identity and legal identity recognised in external relations; in other words, the right not to be imprisoned for life in a pre-designated gender that is assigned at birth and which engenders conflict and estrangement. The recognition that gender identity is a *continuum* clashes with the traditional binary view of a strict male-female dichotomy ⁷. While most western societies have institutionalized this male-female dichotomy over the years, other cultures have acknowledged at least three different sex statuses: males, females, and those who are either biologically male and act as females, or biologically female (“women with a male heart”) and enact social and parental behaviours associated with males ⁸.

The recent judgement of the Italian Constitutional Court addresses the right of an individual to change legal sex status without having to undergo destructive and/or reconstructive surgery, thereby protecting the right to health. Indeed, according to the judges, the right to sexual identity should not be made conditional on highly invasive and irreversible surgery, which may endanger the subject’s life. Conversely, obliging an individual to undergo such operations would conflict with fundamental human rights, such as the right to gender identity, equality, liberty and health.

Thus, the Court’s ruling stresses the priority to protect gender identity as one of the inviolable human rights that make up the personal and relational profile and contribute to the harmonious and balanced development of the personality ⁹.

The option of sex reassignment surgery: a question of justice

A precondition of this legislation is the adherence to a phenomenology of multidimensional gender in which male and female are viewed as fluid categories within a *continuum*, rather than as being clearly opposed ¹⁰. Under Italian law, access to sex-reassignment surgery is based on the existence of an unequivocal dyscrasia between the morphological sex, which is empirically

assessed at birth, and the objective evidence that emerges from in-depth analysis of the individual’s personality. In order to change their legal sex status, people are generically required by law to have modified their “sexual characteristics”; however, the law says nothing about what exactly these changes should be consist of ¹¹. This legal setting has given rise to different interpretations over the years, which has generated uncertainty and anxiety in people requesting to change their legal sex status.

Before the Constitutional Court’s ruling, the judicial procedure authorizing rectification of a subject’s anagraphical data required that surgery be performed and documented. As mentioned above, however, since the ruling, this requirement has been overturned.

Indeed, the Italian Constitutional Court, not least on the basis of the principles expressed in the European Court of Human Rights (ECHR) case-law, has explicitly refused to define sex reassignment surgery as a *condicio sine qua non* of authorization to change legal sex status, thereby definitively paving the way to gender determination in Italy ¹².

From a juridical point of view, the Court’s decision appears to be very important, and is consistent with the recommendations expressed by the Supreme Court in 2015, whereby sex reassignment surgery was considered to be only one of the potential means of settling the interior conflict between the external image and the true identity felt by the individual ¹³. The Court went on to state that the judicial practice requiring sterility surgery was inappropriate and incompatible with the respect of human dignity and its related rights.

Furthermore, it is important to underline that, before the introduction of the Italian law on civil unions among homosexuals (law no. 76/2016), “stepchild adoption” had generally been legally recognized since 2014.

In this perspective, therefore, access to the surgical change of sexual characteristics is not authorised a priori merely as a predetermined step in the judicial procedure of rectification; rather, it is aimed only at alleviating the suffering that arises from an internal conflict between the subject’s anatomical and psychic identity. This approach also appears to be in line with the scientific evidence, which indicates that the transsexual subject’s psychophysical balance does not always need the surgical adjustment of sexual characteristics in order to be guaranteed. As generally occurs in the health environment, transsexuals should be treated like any other patient; specifically, they should be regarded as end-users of health services. Thus, transsexuals should be entitled to refuse sex reassignment surgery, just as any other patient has the right not to accept a medical treatment ¹⁴.

The decision of the Italian Court is clearly based on the ethical principle of protecting the subject’s self-

determination and psychological profile as a central factor constituting the individual's gender identity. Forcing people to undergo highly invasive surgery is equivalent to invalidating or negatively affecting their life and health. By contrast, granting access to the rectification of anagraphical data without the need to undergo sex reassignment surgery would allow people to live in harmony with their gender identity, without being constrained a priori by predetermined ideological boundaries. Furthermore, this orientation meets the needs of people who, for any reason, such as old age or particular psychological and physical conditions, are unable to undergo sex reassignment surgery.

The most relevant aspect of this matter is undoubtedly the definitive and irreversible nature of the surgery, which is not always perceived by the subject as a real need. According to the Court, the surgical option should be justified only by medical utility. The indication for surgery is supported by medical utility when the intervention is aimed at consolidating the individual's psychological orientation. Consequently, when this utility does not exist (e.g. when the desired effect has been achieved through hormonal treatment) or is negligible, surgery can (indeed, must) be excluded. The novelty of this new approach is that the principle of self-determination must be respected even in the case of transsexuals, with the result that their refusal to undergo ablative or destructive surgery cannot preclude acceptance of their application for rectification of their legal sex status.

However, the mere will of the subject is not enough in order to authorize the change of legal sex. Indeed, the Constitutional Court has stressed the need to rigorously ascertain not only the seriousness and clarity of the individual's will, but also the objective transition of gender identity after appropriate counselling.

Unresolved critical issues

The Court's judgement has clearly aligned the application of the Italian regulation on gender reassignment with the provisions embodied in the Constitution and with the principles enunciated by international sources. This new interpretation is also in line with the practice of accumulating, in the same procedure, both applications for sex rectification and those for the authorization of ablative/destructive sexual surgery, an innovation that was introduced with the aim of speeding up the process and protecting the right to gender identity.

Recognition of the right to gender identity, which excludes any imposition to conform to ideological and conventional categories, should also enable us to correctly interpret the meaning of the legal requirement of "intervened changes of sexual characteristics". According to the Court, this requirement should be

interpreted on the basis of a set of factors that characterize gender identity, whereby primary and secondary sexual characteristics carry less weight, from a medical point of view, than psychic characteristics.

Although the Court's judgement deserves credit, critical issues and obstacles to the full implementation of the right to gender identity still remain. The fact that this right is still subject to the authorization of a judge, for example, determines a dangerous interaction between law and medicine, whereby juridical authorities take on the role of a guarantor of health rather than of a guarantor of the constitutional right to gender identity¹⁵. This legal framework implicitly continues to endorse the acceptance of a medical approach that seems to be based on the conviction that transsexualism is a pathology. In this regard, it is noteworthy that a ruling issued in 2017 by a local court (Appeal Court of Turin) even defined the refusal to undergo psychological counselling as an abnormal behaviour and, as such, indicative of incomplete transition to the female gender¹⁶.

As mentioned above, sex-reassignment surgery is no longer a prerequisite to the rectification of legal sex status. However, the fact that subjects who are willing to undergo such surgery still need to obtain judicial authorization in order to access these treatments clashes with the full recognition of the right to sexual identity¹⁷. Indeed, the fact that the Court is asked to rule on a question that should belong to the domain of medicine casts doubt on the will of the individual.

This approach, which undermines the professional autonomy of the physician with regard to evaluating the patient's eligibility for surgery, appears to be entirely unreasonable and discriminatory. Moreover, it also raises problems of constitutional legitimacy regarding the protection of the individual's rights. Indeed, prior ascertainment of the patient's decisional capability and of the authenticity of his/her choices is a precondition of every medical treatment and should not be confined to the modification of sexual characteristics. As in the case of other procedures that affect the individual's psychological and physical sphere, the prior consent of the person undergoing healthcare intervention takes on a pivotal role, as it constitutes a synthesis of the subject's fundamental rights to health and self-determination. On the basis of this approach, in order to ensure that the patient's choice is well-informed and deliberate, every person is entitled to receive appropriate information regarding the nature and potential developments of the therapeutic pathway¹⁸.

A further issue concerns the type of documentation that must be provided in order to continue the process of sex rectification. In this regard, a recent ruling by a local Court (Appeal Court, 2016) expressly stated that only medical records from public healthcare institutions were admissible in order to certify the contrast between a subject's psychosexuality and morphological sexuality

and the non-transitional character of this condition, a conviction that impairs the full implementation of the right to self-determination and gender identity whereby transsexualism is not regarded as a pathological condition¹⁹. Thus, the abrogation (by law no. 150/2011) of the provision requiring judges to order a psychosexual consultation, whenever they deemed this necessary, is to be appreciated.

The legally required ascertainment of “intervened changes of sexual characteristics” should be aimed at protecting the right to gender identity, which falls within the absolute values cited by article 2 of the Italian Constitution. This procedure should therefore be implemented solely in order to dignify the person and his/her life and history, by means of direct interview and without the mediation of medical investigations or reports.

Attitudes towards those who do not fit into the “normal” categories continue to cause confusion and bewilderment. In this context, the law reaffirms the reassuring dichotomy between the sexes and strives to integrate the “different” into the traditional regulatory categories. The emphasis on the need for a rigorous judicial verification procedure confirms the persistence of a frame of reference that is deeply rooted in a pathological perspective, in which the judge does not merely register the applicant’s declaration, but is urged to take all the necessary measures to dispel any doubt about the individual’s actual transition¹⁵.

Current cultural and social developments aimed at promoting social inclusion and respect of the individual’s dignity have engendered the need to introduce more liberal legislation that is freed from the medical approach²⁰. This new orientation can be seen in the legislation of some countries, such as Denmark, Norway, Argentina, Malta and Ireland, where no investigation of the complex dimension of psychical identity is required in order to grant legal sex rectification, the only requirement being that the individual involved must provide a personal declaration¹⁵.

Conclusions

In the last decades, the recognition of individual’s centrality has developed a growing attention towards the rights of “vulnerable” subjects; accordingly, the recent WHO decision of a new “gender dysphoria” categorization appears quite relevant. Also the Constitutional Court’s decision is to be welcomed, since it states that sex-reassignment surgery is not mandatory in the process of gender identity rectification. Although this decision has been favourably received by most healthcare professionals, some barriers to the full implementation of the right to self-determination with regard to gender identity remain. Indeed, the fact that this right is still subject to the authorization of a judge, and is granted only after long juridical and administrative procedures,

hinders the full implementation of the individual’s personal identity.

The rejection of predefined gender categories that identify the individual’s personality would promote a culture of greater tolerance, a culture based on respect for others and for different ways of perceiving the identity.

Critical barriers also remain within the medical sphere, however, given that transsexualism is still defined in the Diagnostic and Statistical Manual of Mental Disorders-5 as gender dysphoria.

Riassunto

INTRODUZIONE: L’accesso alla chirurgia di riassegnazione del sesso si basa sull’esistenza di una discrasia inequivocabile tra il sesso morfologico e l’evidenza oggettiva che emerge da un’analisi approfondita della personalità dell’individuo. L’effettuazione di questo intervento chirurgico richiede, in Italia, una preventiva autorizzazione del Giudice.

MATERIALI E METODI: Gli Autori esaminano la recente pronuncia della Corte Costituzionale italiana che esclude la necessità dell’intervento chirurgico quale gravosa *condicio sine qua non* della rettificazione del sesso.

DISCUSSIONE: La decisione è in sintonia con le risultanze della letteratura scientifica secondo cui il benessere psico-fisico della persona transessuale non sempre necessita di un adeguamento chirurgico dei caratteri sessuali primari. L’accesso all’intervento chirurgico non risulta affatto obbligatorio, ma esclusivamente funzionale alla eventuale necessità di assicurare al soggetto transessuale uno stabile equilibrio psicofisico. Sotto il profilo etico la decisione assume una forte significatività escludendo la possibilità di subordinare i fondamentali diritti all’identità di genere, alla tutela della salute e all’uguaglianza a preventivi trattamenti chirurgici altamente invasivi.

CONCLUSIONI: Gli Autori, nonostante la rilevanza di questo pronunciamento, rilevano persistenti criticità e pregiudizi nella piena attuazione del diritto all’identità di genere sottoposto a una procedura autorizzativa giudiziale che sembra collidere con la recente rimozione della transessualità dalla categoria dei disordini mentali dell’International Classification of Diseases (ICD) da parte dell’Organizzazione mondiale della Sanità e con la necessità di una normativa mite, capace di superare rigide e prestabilite categorie omologanti.

Authorship’s contribution

Rosagemma Ciliberti contributed to the conception of the article and to the analysis and discussion of ethical issues, and wrote the first draft. Matteo Gulino, Ilaria Baldelli and Alessandro Bonsignore carried out the search of the scientific literature and contributed to the analysis of the ethical and medico-legal issues; Ilaria Gorini

contributed to the organisation of the research and coordinated the whole project. All authors contributed to the content of the latest version of the manuscript and to the revision of the final version.

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