Legal aspects of transsexualism: the Italian scenario in comparison with other European countries

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Summary

Background: at the time of birth, a sex is assigned based on the examination of the external genitalia so that legal sex coincides with the biological sex. However, there are cases where the legal sex does not match with the real one or does not match at a later time. Sometimes the psychological component differs from the biological one; in this case the multiple components of human sexuality (the phenotypic, genetic, psychological, social and cultural components) clearly emerge. If the chromosomal or phenotypic elements are privileged, there may be realities such as those associated with transsexualism likely to be denied and ignored.

The issues relating to the rights of transsexuals have traditionally drawn the attention of scholars from various cultural backgrounds (physicians, psychologists, lawyers). The national and supranational measures aimed at protecting their rights have witnessed historical changes which have ended by depriving them of medical content to the detriment of a regulatory framework aimed at removing the discriminating factors.

Objectives: the authors illustrate the actual innovations brought at a national and supranational level in the field of gender rectification by taking a quick look at the situation in Europe and in particular at the Italian, English and Spanish situations.

Methods: the authors have analyzed Law no. 164 of April 14th 1982, and Legislative Decree No. 150 of September 1st, 2011, capturing their main points of innovation and focusing on the legal relevance of psychosocial conditions. They have also analyzed how transsexualism is configured in the European Parliament Resolution no. 1117, 12th September 1989, in the European Parliament Resolution of 28th September 2011 and in English and Spanish laws.

Results/Discussion and Conclusions: the analysis shows that there are important differences in the European legislations as concerns the change of name following sex rectification, the institution of marriage, the need for a review by a panel of experts and whether or not to undergo surgery in order to obtain sex rectification. The Spanish and English laws do not require surgery; Italian law affirms the need for the presence of “modifications of sexual characteristics”: a general indication that could be considered as limited to secondary sexual characteristics and therefore sufficient to suggest a hormonal treatment in the absence of surgery.

European legislations still have further important steps to take to meet the supranational demands and to protect the transsexual subjects in their entirety in view of empowering them to express their gender identity, which is an integral part of their personality, freedom and dignity, without the need to undergo medical or surgical treatments.

KEY WORDS: transsexualism, gender identity dysphoria, Italian and European legislation.

Background

At the time of birth each one of us is assigned a sex at the registry based on an examination of the external genitalia so that legal sex is made to coincide with the biological sex. However, there are cases where the legal sex does not match the real or ceases to do it later (1), in which case sex assignment is a pure fiction (2). When the psychological component differs from the biological one, the multiple components of human sexuality, i.e. the phenotypic, genetic, psychological, social and cultural components, become evident (3). Generally, law tends to focus on the biological one, so that legal sex is made to coincide with the biological sex. However, there are cases where the legal sex does not match the real or ceases to do it later (1), in which case sex assignment is a pure fiction (2).
sexual one. The judge then made his decision only on the base of the chromosomal factor (4).

Preference to the chromosomal or phenotypic element is likely to result into denial of and lack of consideration for realities such as intersexuality, transgenderism and transsexualism; a point at which we can no longer speak of sex but of gender.

Chromosomal sex is biologically determined, it manifests itself through internal organs and anatomical attributes aimed at one of the most important human functions i.e. procreation. The term gender is rather referred to as “a cultural construction, made of male and female prototypical and conventional images which determine the social and legal recognition of a subject in view of his/her framing inside an ontologically determined area representing a pre-established biological reality” (5). If there is a contrast between the gender assigned at birth and what one feels to belong to there is a gender identity disorder.

The term transgender was coined by Dr. David Cauldwell in 1949, but it became widespread only in 1966 after the publication of the book “The transsexual phenomenon” by the sexologist Harry Benjamin, who was the first to broach this topic with a therapeutic approach. In 1985 the word transsexual was used in Italy to refer to “the subject who, despite presenting the phenotypic and genotypic characters of a particular sex, has a deep feeling of belonging to the opposite sex (or gender) which appearance he/she took on and adopted the behavior and in which, therefore, he/she wants to be recognized to all effects and at any cost or sacrifice” (6).

Even the English case-law, in 1970, had included transsexuality among sex anomalies with a psychological nature for which “transsexuales come to think of themselves as females imprisoned in a male bodies, or vice versa, and dislike for their own sexual organs which constantly remind them of their biological sex” (7).

Later on, in 2003, it was included among psychiatric disorders “often known as gender dysphoria or gender identity disorder” for which “transsexual people are born with the anatomy of a person of one sex but with an unshakeable belief or feeling that they are persons of opposite sex” (8). And again in 2007 in Spain “transsexualidad is considerada como un cambio de la identidad de genero” (9).

Hereinafter we are going to analyze the general legislative framework of transsexualism in Europe and we will look at the latest laws on the subject, i.e. the Gender Recognition Act of 2004, the Spanish law of 2007 and the Italian law of 1982, innovated with Legislative Decree no. 150/2011.

The situation in Italy

The matter is regulated in Italy by Law 14 April 1982 no. 164, which the Constitutional Court declared constitutionally legitimate by order of 24 May 1985, no. 161, in which “the legislator finally showed he did no longer ignore the phenomenon of transsexuality by recognizing a great principle of justice: no one can be condemned to declare throughout life a gender identity in which they do no longer recognize themselves” (10).

This law actually focuses on issues pertaining to rectification of sex attribution and indeed it is not considered a law on transsexualism – a term which is not even contemplated therein – but to the prerequisites for the change of legal sex (11) in that it introduces an important innovation, namely the possibility to change the sex assigned at birth. This law seeks solutions limited to the core questions of transsexualism leaving up to the interpreter the task of rebuilding the subjective individuality of these subjects (12).

Various aspects of the matter can be given consideration, one being the need for judicial authorization in order to undergo the medical and surgical treatment aimed at adapting sexual characteristics (Article 3) since it appears not to be consistent with Strasbourg case law in matters relating to the right to health of the transsexual person (13). The rectification of sex is possible only as a result of “a modification of sex characteristics” (Article 1) and there is no question of obtaining rectification by maintaining the original sex characteristics (14) nor are intermediate solutions or a possible legal restructuring contemplated as it is instead the case in other systems (15).

The term is generic and does not allow to automatically deduce which characters we should be referring to, whether physical or mental, primary or secondary ones. In any case, surgery is not considered a violation of the principle of inalienability of the body since, on the one hand, it is authorized by a judge (16) and, on the other, it is considered a therapeutic intervention that helps the transsexual person to achieve a state of well-being in which resides his/her health (ex art. 32 of the Constitution) and hence it will not be deemed unlawful. The court must, however, make sure that the subject has provided a full and informed consent to surgery to avoid the risk of “a forced recourse to scalpel” (17). The modification of sexual characteristics is acknowledged even if it is done without judicial authorization, and even foreigners are recognized the opportunity to request sex correction even when their national law does not contemplate this possibility in order to protect “[their] sexual identity, which represents an integral and essential part of the personal identity of the subject” (18).

Sex rectification leads to the dissolution of a marriage previously contracted by the subject as the spouses have now become of the same sex, but it is duty of parents to comply with the obligations set forth by art.30 of the Constitution towards the children born within this marriage, and can be united in marriage with a person of the same sex of origin.

Today, Law no. 164/1982 has been completely revised in the light of Article. 31 of legislative decree September 1, 2011, no. 150 on the reduction and simplification of the civil contentious proceedings, which resulted in a reduction of civil proceedings from 33 to 3 (ordinary cognizance, job-related and summary cognizance proceedings).

The proceedings relating to sex rectification are included in the ordinary cognizance proceedings. Hence, it
will be necessary to comply with the deadlines and guarantees of ordinary proceedings (19). Moreover, the changes made by Leg. Decree no. 150 have lead to a significantly streamlined judicial process even with respect to areas of medico-legal interest. Article 1 of Law 164/82 had undergone marginal changes as a result of Presidential Decree November 3, 2000, no. 396 [Revision and simplification of marital status regulatory framework] which had repealed the reference to art. 454 cc with the new norm deeply influencing its content: “The disputes referred to in the first subparagraph shall be governed by Article 31 of Legislative Decree 1st September 2011, 150”.

Hence it is clear that, although Article 1 Law no. 164/1982 remains in force with the above mentioned amendments, the regulatory frame of reference for the proceedings pertaining to the rectification of gender assignment is today art. 31 Legislative Decree no. 150/2011.

It is worth pointing out that the new text specifies that the competent Court acts as a collegial body (Article 31, paragraph 2), whilst in the previous formulation competence fell on the investigating judge designated by the chief judge (Article 2 Law 164/82).

Another difference between the old and the new text is that the latter does not contemplate any specific time limit to apply for sexual rectification in the cases in which the person concerned has already undergone medical and surgical intervention. Article 6 L.164/82 provided for a maximum period (one year), which has now disappeared (20).

Another aspect is related to the consequences of the institution of marriage following the correction of sex. Since law 164/82 reiterates and confirms the duality of gender and the heterosexual form of marriage, the correction of gender of one of the spouses may lead to the dissolution of marriage (21). A further reason for debate is represented by the medico-surgical changes in children and the role of parental authority (22).

### Transsexualism in the European framework. English and Spanish law

European Parliament was the first to tackle the legal issues relating to persons with gender dysphoria dealt with by Resolution 12th September 1989: this document explained the reasons why transsexual individuals are subject to discrimination and it further pointed out that “human dignity and the right of personality must include the right to lead a life corresponding to their sexual identity”, the Member States were invited to take legal actions in order to guarantee each individual the freedom to lead a life in conformity to the chosen sexual identity, nonetheless the document failed to provide a definition of the term transsexualism.

The recommendation of the Council of Europe gives instead a definition of the term transsexualism and focuses only on the administrative aspects of the problem. Transsexualism is defined as “a syndrome characterized by a dual personality, the former being a physical one and the latter being a mental one. Transsexual people are deeply convinced they belong to the opposite sex which leads them to request their body to be “corrected “accordingly” (23), and changes of name and sex in the birth records are only possible if transsexualism is declared irreversible. This condition is not specified and its definition is therefore left to national laws.

The topic in question has so far been addressed only from a medical point of view: some specialists talk about irreversible transsexualism if the subject has undergone hormonal treatment susceptible of causing devitalization / defeminization and loss of fertility, which may be irreversible. Such an interpretation could, in theory, allow for a name and gender change without the need to undergo surgery, but this interpretation is not universally accepted (24).

Directive 2006/54 of 5th July on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation states explicitly that the principle of equality “also applies to discrimination resulting from a change of sex” (25), reaffirming the principle already expressed in 1996 in the judgment P. against S. and Cornwall County Council which expressed itself as follows: “dismissing a person because he/she intends to undergo, or has undergone, a gender reassignment treatment results into an inequitable treatment compared with persons of the sex to which he/she was deemed to belong to before the operation” (26).

In a report entitled “Human rights and gender identity” (27) the Commissioner for Human Rights highlights the discrimination suffered by the transsexual victims because of their sexual orientation or gender identity hence revealing the loopholes and lack of a consistent approach in the legislation of the member countries. It also invites each State to protect human rights and fight against discrimination. The issues addressed in the above-mentioned document include the problem of gender reassignment, surgical treatment, the change of name and sex, the recognition of filiation, the right to health care and the possibility to join in marriage after sex rectification or to maintain the same contract before rectification.

This change is subject to several conditions, including the need for surgery. However, the Commission on Human Rights considers this condition as a violation of the physical integrity of the person. The national case law of many Countries has embraced this approach, arguing that surgery should not be a mandatory condition for the sex change.

The procedure can be shorter or longer depending on the Country of residence of the subject. The conditions to be met include hormonal treatment and medical diagnosis of gender dysphoria; in some Countries surgical treatment is considered a necessary prerequisite. Marriage is another issue addressed: the report highlights that in many Countries divorce is still considered mandatory if a married person changes gender, since marriage is only possible between persons of different sex. However, in this regard there have been some national proposals aimed at overcoming the mandatory divorce requirement (28). The report also focuses on the possibility of a new classification of transsexualism
outside mental illnesses, the need for a generalized medical expense management in all Member States and the need to create a national anti-discrimination law including gender identity among the discriminating factors in the labor market.

Even though gender identity and sexual orientation are not properly regarded as human rights, the Commission of the United Nations stated that "gender identity is included among the prohibition grounds of discrimination; for example, transgender, transsexual or intersex people often suffer serious violations of human rights, such as bullying in schools or in the workplace" (29).

In turn, the European Court of Human Rights (ECHHR), in the light of the provisions of the European Convention on Human Rights, held that the States must make it possible for transsexual subjects to undergo surgical interventions aimed at gender reassignment and because these measures are considered "necessary from a medical point of view", they must be covered by health insurance (30). The Court also ruled that States need to recognize the sex change in identity documents (31).

There have been numerous European Directives concerning the principle of equitable treatment between men and women for access to and supply of goods and services (32) that does not explicitly state that this principle also applies to the change in a person's gender, as expressly stated by the Court of Justice of the European Union (ECJ) in the case of P v S and Cornwann County Council, concept repeatedly confirmed later by the ECJ (33).

More recently, the European Parliament (34) passed a resolution on human rights, sexual orientation and gender identity. These texts reaffirm the importance of respecting, promoting and safeguarding the universality of human rights to be applied in the same way regardless of sexual orientation or gender identity; the EU Parliament also declared to be in favour of a debate on discriminatory laws and practices and acts of violence against persons on grounds of their sexual orientation and gender identity; such dialogue took place on the occasion of the 19th session of the Council of Human Rights in spring 2012. It also firmly condemned some Countries, even within the European Union, which still consider transsexualism, homosexuality and bisexuality as mental illnesses; unfortunately gender identity disorders are still included in the list of mental and behavioral disorders and in this regard, the European Parliament calls on the Commission and the World Health Organization to eliminate them from the list and give a non-pathologizing reclassification in the 11th version of the International Classification of Diseases (ICD-11) scheduled for 2015.

The case law of the European Courts has always been strongly recommending European Countries to adopt a national regulatory framework on transsexualism. Nevertheless, the Agency for the Fundamental Rights of the European Union records thirteen EU Member States dealing with discrimination on grounds related to gender identity as a form of sex discrimination, two Member States considering it as a discrimination for reasons related to sexual orientation but in eleven Member States the question is not dealt with in any way (35). As for the twenty remaining EU Member States data are not systematically collected yet, but, as reported by the Client, it can be assumed that gender identity is not explicitly regarded as a ground of discrimination (36).

Among the States that have special rules Great Britain and Spain are included.

Britain has developed the Gender Recognition Act of 2004 (37) (into force since 4th April 2005). Before this date the birth certificate was considered a historical document and as such it could not be amended. Thanks to this law the transsexuals who have or have not undergone surgery can request the Gender Recognition Certificate, or a certificate of legal recognition of the gender, thus having the possibility to get a new birth certificate and then to join in marriage. The law provides that the person may request a certificate of Gender Recognition provided he/she is of age, a British citizen and provided that the disorder of gender dysphoria has been established by a special commission. Moreover, the person in question is required to have lived for at least two years according to the acquired gender and intends to do so until death or has legally changed gender under the law of a foreign country, his/her name being mentioned in a list drawn up by the competent Ministry.

The special board is composed of legal experts, doctors and psychologists who examine the application and, if appropriate, grant the certificate. If the individual is married a “full gender recognition certificate” shall be issued, or otherwise, a temporary certificate shall be issued, an “ad interim gender recognition certificate” that can be used to annul the marriage. Finally, after the annulment, the Court shall issue a “full gender recognition certificate” that is a final certificate. When the final Gender Recognition Certificate is issued, the individual acquires the opposite sex. The Registrar General receives a copy of the certificate and must register it in the Gender Recognition Register ensuring that there is a correspondence between the former and the recording made in the UK Birth Register which must also be “marked”. However, the recognition has no retroactive effect: the certificate does not affect past events. The new birth certificate must be the same as any other birth certificate, only in rare and very exceptional cases, the Court may authorize to access the gender recognition register.

Another European country that has passed a law on transsexualism is Spain. On 8th November 2006, the Spanish Parliament passed a law on the rectification of civil status of the transsexuals (38), which entered into force in 2007, allowing them to request a change of sex and name of the marital status without having undergone a sex reassignment surgery. The Spanish Parliament declared that transsexuality, defined as a change in the type of identity, has become a social reality and as such it requires an adequate legislative response to ensure the free development of the personality and dignity of people whose gender identity does not match with sex assigned at birth. Every person of Spanish nationality, who is of age and in full possession of his/her
mental faculties can benefit from this law. In order to ac-

cess sex rectification, gender dysphoria must be diag-
nosed by a panel of physicians or psychologists and the 
subject must have undergone, for at least two years, a 
medical treatment aimed at fulfilling the physical char-
acteristics corresponding to the sex required. 

However, the medical treatment aimed at reconciling 
the physical characteristics is not considered neces-

sary if there are medically proven age or health con-

traindications. The legal effects of the modification re-

quested enter into force upon filing in the civil register. 

This correction allows the person to exercise all the 

rights inherent to the new condition, however it does 

not exempt the individual from all the previous obliga-

tions and rights. 

Conclusions 

Issues relating to the rights of transgender people 
have traditionally attracted the attention of scholars 
from various cultural backgrounds (doctors, psycholo-

gists, lawyers). The national and international meas-

ures designed to protect their rights have undergone a 
historical evolution that tend more and more to empty 
them of medical content at the expense of regulatory 
frameworks aimed at giving priority to the removal of 
discriminatory factors. 

It is in this light that we have witnessed the creation of a 
political and cultural movement insisting on the ex-
clusion of transsexuality from the list of mental disor-
ders, where it is instead still present. 

The analysis of the legislation in the Countries of the 
European community that have enacted specific legis-
lation shows that the right to change name after the 
rectification of sex is recognized as necessary by the 
Italian and Spanish laws, while in English law there is 
not a specific statutory provision on the subject. 

As for the institution of marriage, following the correc-
tion of sex the subject may exercise all the rights relat-
ed to the new condition, including the possibility to join 
in marriage. In Italy, if the transsexual subject is al-
ready married, dissolution of marriage would take 
place as a result of the principle of heterosexual mar-
riage. In Britain this does not happen because both 
spouses are still considered as having a different bio-

logical sex and it is up to them whether to use the 
interim gender certified in order to annul the marriage. 

The Spanish law does not specify the effects on mar-
riage in case of sex rectification of one of the spouses, 
probably because it is considered superfluous, given 
that law June 1\textsuperscript{th}, 2005, no.13 also permits marriage 
between persons of the same sex (39). 

A further reason for differentiation is represented by the 
need to undergo or not undergo surgery in order to 
obtain the correction of sex. For the Spanish and the 
English law no such action is necessary and the Italian 

law provides for the need of “modification of sexual 
characteristics”, this is a generic indication that could 
be considered limited to secondary sexual characteris-
tics and therefore sufficient to suggest a hormonal 
treatment in the absence of surgery.

Both the Spanish and the English laws, however, firm-

ly maintain the need for a review by a committee of ex-

perts, formed by physicians and psychologists, who 
will assume the burden of declaring the existence of a 
real gender dysphoria. In this respect and as a result of 
the changes occurred in 2011, Italian legislation 
shows substantial differences, since the only control 
activities is entrusted to a board of judges that are not 
obliged to have recourse to experts, and they can infer 
requirements even only from the documents produced 
by those who apply for sex rectification. 

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