

The rights of transsexual and transgender persons: the Italian legal framework and new national and European challenges

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This intervention will focus on the legal situation of transsexual and transgendered person in the Italian legal system, also with reference to the European context.

A progressive act has been approved by the Italian Parliament on this purpose in 1982: the act no. 164 of April 14, 1982 on gender reassignment. In other words, transsexualism has legal relevance in our system, since the Parliament, regulating the matter with Law No. 164/82 on gender reassignment, admitted the divergence between one's legal sex and sexual attributes, on the one hand, and the psycho-sexual and gender identity, on the other, which characterizes the transsexual individual, and provided a procedure enabling transsexual persons to fully express their personality. The act was strongly supported by the transsexual movement, which was moving "its first steps", and proposed by the Radical party; it was approved thanks to a compromise with the more progressive part of the Christian Democrat party. The result was extremely important: the act establishes that the gender reassignment (change of legal sex and name on civil status records and papers) is disposed by a decision of the Tribunal. The judges must appoint one or more experts in order to verify the psychophysical conditions of the individual, as resulting from the advisory opinion drafted by the experts themselves; the judge may also authorize the surgical intervention, *if necessary*. Once the transition has been completed, the judge orders the correction of identity papers and records. The existing marriage is dissolved by the decision of the judge. Even if extremely important, the Italian act has some "dark areas" which especially have negative effects on the situation of transsexual workers or jobseekers. In fact, if we want to summarize, the Italian act, we must affirm that: 1) it rules the gender reassignment; 2) it is not clear with respect to the correction of identity papers and records, since it does not establish definite criteria that must be followed by the judges; 3) it does not mention the change of legal name (in particular with reference to the period of transition or the transgendered people).

Even though in principle, by a literal interpretation of the act, the gender reassignment would be possible even without the surgical intervention (indeed, the judge must authorize surgery if necessary, while the change of legal name and sex would be independent), the courts unanimously chose a different interpretation, first authorizing the intervention, then ordering the modification of legal sex and name, and, consequently, the correction of identity records and papers. Only in a few isolated cases the change of legal sex and name has been authorised even without the surgical intervention: it must be pointed out that in those cases, actually, the intervention had been previously established by the judge but it could not be carried out due to the health conditions of the person concerned; in other circumstances the change of name was authorised when the name chosen was not unequivocally a male or female name.

After the entry into force of the Act 164 of 1982, the Italian Supreme Court invoked the intervention of the Constitutional Court, arguing that the act was unconstitutional under the article 5 of the Civil code,

forbidding the acts of disposal over own body, with reference to the article 32 of the Italian, which guarantees the right to health.

The Constitutional Court, in its decision no. 161 of 1985, not only declared the constitutional legitimacy of the act 164/1982, but recognized the existence of a fundamental right to the gender identity. The Court acknowledged the "contrast between psychological and biological sex" in transsexual persons, but, above all, it admitted the fact that the law had accepted a new concept of sexual identity based not only on a person's sexual attributes, but also on psychological and social factors, from which there descends the concept of "sex as a complex feature of an individual's personality, determined by a set of factors; those factors must be balanced in order to find and give priority to the dominant factor(s)". It must be stressed, with respect to this judgement, that the Constitutional Court has recognized a broad view of the 'right to health' under Article 32 of the Constitution, including not only physical health, but also mental welfare and health, in relation to which any changes to one's body, if made with a view to ensuring the latter, are perfectly legal; furthermore, the affirmation of one's sexual identity is an inviolable right of the individual, in pursuance of Article 2 of the Constitution, because it allows transsexual persons to fully display their personality, both intimately and psychologically, and in their relationship with others.

As I said before, even if the legal regulation is particularly important (considered that such an act is in force just in a few countries in the world) neither the written law nor the case law take into account the problems related to the diversity between one's psycho-physical identity and exterior appearance, on the one hand, and one's name, on the other. As we know, this difformity may either permanently or temporarily affect the life of a transsexual or transgender person. Permanently, in the case of transgenderism, when the person concerned achieves a psycho-physical balance by changing his/her exterior appearance and secondary somatic features, without the need for the surgical adaptation of the genitals, or when the health conditions of a transsexual person are an obstacle to the surgical operation; temporarily, in the transition period, which begins with the hormonal treatment and the alteration of the secondary sexual attributes and ends with the actual surgical operation, and which has a minimum duration of two years, (which is not true in Italy, due to the shortcomings of the national health service). This situation often causes social stigmatization and discrimination and uses to be a very serious obstacle to finding a job for the transsexual person.

I think that, on this purpose, the decision of the Constitutional Court is a milestone for the recognition of the proper meaning of gender identity in our legal system, and, in this sense, the concepts of the right to health and the right to psycho-physical identity aiming at developing the personality of the individual, are the starting points for allowing pre-operative transsexuals or those who do not intend to undergo the surgical intervention to change their names. Indeed, I believe it is at the essence to focus on the extensive interpretation of the concepts previously mentioned in order to recognize a fundamental right of the transsexual or transgender individual to her/his identity and name. On the other hand, it is almost impossible to conceive a full and wealthy development of own personality if the person has to face with discrimination and stigmatization every time she/he has to disclose the legal identity or the legal name; it is impossible to conceive a full development of the person's psychic health if she/he has to disclose the transitional phase or the personal condition of transsexual or transgender every time she/he has to purchase a good by credit card or to apply for a job. In general, every situation in which the individual has to disclose her/his identity against her/his own wish represents an obstacle to the development of the personality.

I can say that in Italy the issue of the change of name is currently the central point of the legal and political agenda with reference to transsexual persons. I am aware that the situation in Europe is not as favourable as in Italy or in a few other countries.

The first European country to introduce a legal reform aiming at legally recognizing the change of sex was Sweden. The Swedish Act nr. 119 of 21 April 1972 on gender assignment in some cases establishes that the Swedish citizen who is unmarried, not able to procreate and who does not feel to belong to the original biological sex can obtain a certification of the sex corresponding to her/his identity. If a surgical intervention is needed, the competent administrative authority may issue a special authorization. Against the decision of the administrative authority competent for the procedures established by the present act, the appeal before the Administrative Court is admitted. The act provides that the provisions also apply to persons with genital malformations.

The following and innovative reform was introduced in Germany with the Act on change of name and on gender assignment in particular cases (Act on transsexuals - TSG) of 10 September 1980. As I said, the German solution is particularly innovative and important since it provides two options, which may be applied either successively or independently of each other. Title I of the act on transsexuals regulates the so-called *kleine Lösung* or "minor solution", that is to say the change of name: the judge may authorize the change of name of the applicant who, for three years, does not feel anymore to belong to her/his biological sex. The change of name does not imply the surgical intervention; the decision can be reversed on applicant's request. The decision of the judge is annulled if the applicant becomes parent after the decision itself. Title II of the act regulates the so-called "major solution", establishing that, after the surgical intervention the judge may authorize the gender reassignment and the change of legal sex. The act requires that the applicant is not married and is not able to procreate. The relationship between the parent and her/his children are immutable even after the decision by the judge.

According to article 29 of the Dutch Civil Code, the gender reassignment is possible provided this person is not married and is not able to procreate. On the contrary, the change of name is possible separately and earlier, since the gender reassignment is not a requirement for the change of name.

Anyway, even though in many other European countries the change of legal sex is possible after the gender reassignment by decision of the court, in other countries, such as in the UK, the change of legal sex (and name) of the post-operative transsexual is always forbidden. On this purpose the European Court of Human Rights expressed its opinion very recently, condemning the UK for the lack of any form of legal recognition of the post-operative sex and of the legal status of transsexuals, and opening the way for a broad legal change in Europe. The decision of the European Court is particularly important, since it is binding to all the forty European countries. It is particularly important to our analysis since the applicant made also explicit reference to sexual harassment at work during and following her gender re-assignment. In the case *Christine Goodwin v. UK*, the applicant, a post-operative MtoF transsexual, claimed that she had problems at work, as I said before. After her surgical intervention, she experienced difficulties concerning her national insurance (NI) contributions. As legally she is still a man, she has to continue to pay NI contributions until the age of 65. If she had been recognised as a woman, she would have ceased to be liable at the age of 60 in April 1997. She has had to make special arrangements to continue paying her NI contributions directly herself to avoid questions being raised by her employers about the anomaly. She also alleged that the fact that she keeps the same NI number has meant that her employer has been able to discover that she previously worked for them under another name and gender, with resulting embarrassment and humiliation. She also alleged that, according to the current legislation, she is not allowed to marry with a man (but paradoxically, she

could legally marry with another woman!); she complained to the ECHR arguing, inter alia, violations of the Convention Articles 8 and 12, which guarantee the right to respect for private and family life and right to marry. The Court was "struck" by the fact that the U.K. authorities did not provide for full legal recognition of Ms. Goodwin's new civil status, although the U.K.'s national health service covered the costs of Ms. Goodwin's re-assignment surgery, after recognizing her condition as "gender dysphoria." The ECHR concluded that it was "illogical" to refuse to recognize the legal implications of the result to which the treatment have led. The judges recognized that the lack of recognition had effects on Ms. Goodwin's life where sex was of legal relevance, such as in the area of pensions, retirement age etc. The Court admitted that a serious interference with private life also arose from the conflict between social reality and law which placed the transsexuals in an anomalous position in which they could experience feelings of vulnerability, humiliation and anxiety. It was pointed out that, though fewer countries permitted the marriage of transsexuals in their assigned gender than recognised the change of gender itself, the Court did not find that this supported an argument for leaving the matter entirely within the Contracting States' margin of appreciation. The ECHR held that the situation in which post-operative transsexuals live in an "intermediary zone" as not quite one gender or the other is "unsatisfactory" and "no longer sustainable" in the twenty first century. On the other hand, according to the judges, no concrete or substantial hardship or detriment to the public interest had indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considered that society might reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost. Consequently, the ECHR ruled that the United Kingdom's failure to accord full legal recognition of Ms. Goodwin's gender re-assignment amounted to a failure to respect her right to private life guaranteed under Article 8. The ECHR also recognized, with reference to the right to marry, that Article 12 of the European Convention referred in express terms to the right of a man and woman to marry, without making reference to a purely biological criteria. The ECHR also noted that there have been "major social changes in the institution of marriage since the adoption of the Convention, as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality." The judge focused on the fact that, actually, it was artificial to assert that post-operative transsexuals had not been deprived of the right to marry as, according to law, they remained able to marry a person of their former opposite sex. Therefore, the limitations imposed by the state infringe the very hearth of the transsexual's right to marry. The Court found no justification for barring the transsexual from enjoying the right to marry under any circumstances, concluding that there had been a breach of Article 12. Finally the judges found that the lack of legal recognition violated the principle of non discrimination under article 14 of the European Convention.

You can easily imagine how this decision is important for the protection of transsexuals' rights, even though it explicitly and clearly mentions the case of post-operative transsexuals.

I said before that the Italian legal regulation of transsexualism has some "dark areas", which particularly affect the situation of the transsexual or transgender worker. In particular I would like to focus on the fact that there is not any specific provision in the Italian legal system for the protection of the transsexual and transgendered person. Of course the protection is offered by the general legislation. I should have to repeat on this point what I said in my previous intervention on the situation of gay and lesbian workers, making reference to the same legal provisions and the same consequences (also with reference to the obstacles to guarantee effective protection and to provide positive actions). I prefer to "skip" this part and consider the peculiar aspects regarding the transsexual worker. On this purpose, I have to make reference again to the intervention of a different European institution, the Court of Justice of the European Community, in *P v S and Cornwall County Council*. The

applicant, a transsexual worker, informed her employer of her intention to undergo gender reassignment before starting the "real life test"; after undergoing minor surgical intervention, she was dismissed. The applicant brought an action against her employer before the Industrial Tribunal on the ground that she had been the victim of sex discrimination. S. and the County Council, the employer, maintained that the reason for her dismissal was redundancy. It appears from the order for reference that the true reason for the dismissal was the applicant's proposal to undergo gender reassignment, although there actually was redundancy within the establishment. The Industrial Tribunal found that such a situation was not covered by the Sex Discrimination Act 1975, inasmuch as it applies only to cases in which a man or woman is treated differently because he or she belongs to one or the other of the sexes. Under English law, P. is still deemed to be male. If P. had been female before her gender reassignment, the employer would still have dismissed her on account of that operation. However, the Industrial Tribunal was uncertain whether that situation fell within the scope of the directive. The Court of Justice held that in its decision, in view of the objective pursued by Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Article 5(1) of the directive precludes the dismissal of a transsexual for a reason arising from the gender reassignment of the person concerned. Since the right not to be discriminated against on grounds of sex constitutes a fundamental human right, the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. It must extend to discrimination arising from gender reassignment, which is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment. Dismissal of a transsexual for a reason related to a gender reassignment is therefore in breach of the Directive.

The European Court judgement is clearly important: the Equal treatment Directive has been implemented in all European countries; in particular, in Italy acts no. 903 of 1977 and 125 of 1991 introduced provisions implementing the principle of equal treatment between men and women, covering direct and indirect discrimination and the principle of equal pay. Unfortunately the Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation makes no express reference to discrimination on the grounds of gender identity. In the light of the sexual discrimination rules and the Directive, that focuses on discrimination on the grounds of sexual orientation, and from a cross-reading of the normative corpus, I believe that under no circumstances the legal system may allow a lower level of protection against forms of discrimination on the grounds of gender identity.

Even though we can say that from a formal and legal point of view transsexual workers are protected under the provisions banning discrimination on ground of sex, de facto transsexual and transgendered people are still discriminated. The issue of the change of name is, in my opinion, with reference to our system, the central point. For this reason I am persuaded that a reform aiming at introducing something similar to the German *kleine Lösung* represents the most adequate solution. For this reason the New Rights Office of the Italian trade union CGIL took a strong initiative in this sense. On this purpose we worked on three bills on the change of name for transsexual and transgendered people have been introduced in the Italian Parliament in July. The bills are the result of an initiative of the responsible of the New Rights Office of the national CGIL trade union, Maria Gigliola Toniollo, as I said, together with MPs Titti De Simone and Elettra Deiana, and a work group of three legal experts formed by Nicola Coco, professor at University La Sapienza of Rome, Stefano Oriano, lawyer of the CGIL, and coordinated by Stefano Fabeni, director of Cersgosig.

The bills aim at introducing in the Italian legal system the possibility for the transgendered or transsexual individual to change the name before the surgical intervention, or even when the transgendered person cannot or does not intend to undergo the intervention, by proposing different legal solutions, according to our legal system.

The bills are:

1) Bill no. 2939 on provisions regarding the adaptation of the name to the psychical-physical identity of the individual, introduced in the Chamber of Deputies on 2 July 2002 by MPs Elettra Deiana and Titti De Simone (drafted by Stefano Fabeni), aiming at introducing a procedure for the change of name similar to the German Kleine Lösung;

2) Bill no. 2990 on the interpretation of art. 89 of the Presidential Decree no. 396 of 3 November 2000 regarding the modification of names and family names introduced in the Chamber of Deputies on 9 July 2002 by MPs Elettra Deiana and Titti De Simone (drafted by Stefano Oriano), aiming at establishing a new interpretation of the existing provisions on change of name in order to include the possibility for transsexual and transgendered individuals to change their names, notwithstanding the divergence between legal sex and name;

3) Bill no. 3031 on change of name and on adaptation of the name to the gender identity, introduced in the Chamber of Deputies on 16 July 2002 by MPs Elettra Deiana and Titti De Simone (drafted by Nicola Coco), aiming at stating an individual and fundamental right to the name and establishing the procedures for the change of name of all the citizens, with some peculiar provisions for transsexual and transgendered persons.

We are persuaded that this solution will improve the conditions of the transsexual and transgender people at the workplace. We are also persuaded that this is not enough: collective agreements, good practices, code of conduct, an effective protection by effectively enforcing the instruments offered by the legislation on equal treatment between men and women, but also training at the workplace are at the essence to guarantee equal treatment for transsexual and transgender workers.

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A governative bill has been presented: if approved, as it is presumed to happen, it will be the most progressive legislation on transsexualism in the world. Indeed, the new bill establishes that it is possible the change of legal name and legal sex even without the surgical intervention. In other words, transgendered people will be able to change name and sex (and consequently even marry a person of the opposite sex) even if they do not want to undergo surgery. The change of name and sex is authorized by the court, in compliance with the opinion of a medical expert.