

# Transgenderism and Minor Age in Italy

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### Abstract

In light of relevant rulings of the European Courts, this paper deals with the protection of the fundamental rights of individuals with gender dysphoria, with particular regard to the health and gender identity of the 'older minor', who only recently has drawn the attention of Italian case law.

The Author examines the major issues that affect adolescence and highlights the progress that the Italian legal system has made in recent years in relation to the needs of those teenagers who want to change their sex and name, at times without undergoing sex reassignment surgery. In line with the necessity of enhancing protection of rights of all transgender persons, the objective of this article is to promote anti-discrimination policies in Italy while respecting the fundamental guarantees of dignity and self-determination of these 'special minors'.

## I. The Condition of Transgender Persons

The term transgenderism, which includes transsexualism in its sphere, came to prominence in Italy in the 1980s.<sup>1</sup> This political and cultural movement claimed the right for each individual to identify themselves at any position along a spectrum between the two categories of femininity or masculinity, and thus be free from discrimination on the basis of a discrepancy between the biologically defined body and the body that they identified as the correct one for them.

At a European level, an individual's need to recognise his or her gender identity is protected in some European Directives,<sup>2</sup> in some European

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<sup>1</sup> The Italian Constitutional Court first dealt with the issue of transsexualism in 1979 (Corte Costituzionale 1 August 1979 no 98, *Rassegna diritto civile*, 507 (1980), with comment of P. D'Addino Serravalle, 'Le trasformazioni chirurgiche del sesso nella sentenza n. 98 della Corte Costituzionale'), when a transsexual person was not granted the right to obtain recognition of a sex other than that assigned at birth.

<sup>2</sup> Equal Treatment Directives: 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 [1976] OJ L039; European Parliament and Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of

Resolutions<sup>3</sup> and in some rulings of the European Court of Justice,<sup>4</sup> which has repeatedly stressed the close link between the right not to be discriminated against because of one's gender identity or sexual orientation and respect for the dignity of the human person. The Charter of Fundamental Rights of the European Union<sup>5</sup> does not contain explicit references to gender identity or sex characteristics, but it establishes that

‘any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any

employment and occupation (recast) [2006] OJ L204/23. See, more recently, European Parliament and Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337/9. In Recital 30, the directive, referring to the fear that the asylum seeker may be subjected to persecution in his own country in relation to membership in a given social group, states that it is necessary to introduce a common definition of the reason for persecution of ‘membership of a particular social group’. Subsequently, Art 10 clarifies that, in order to determine membership of a particular social group, ‘gender considerations, including gender identity’ must be taken into account.

<sup>3</sup> Reference is made to: European Parliament Resolution of 28 September 2011 on human rights, sexual orientation and gender identity at the United Nations; European Parliament Resolution of 12 March 2015 on the Annual Report on Human Rights and Democracy in the World 2013 and the European Union's policy on the matter; European Parliament Resolution of 12 December 2018 on the annual report on human rights and democracy in the world 2017 and the European Union's policy on the matter, which ‘acknowledges that sexual orientation and gender identity can increase the risks of discrimination, violence and persecution; European Parliament Resolution of 18 December 2019 on public discrimination and hate speech against LGBTI people, including LGBTI free zones.

<sup>4</sup> Case C-13/94 *P. v S. e Cornwall County Council*, Judgement of 30 April 1996, available at [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu). The case concerned an English transgender woman who was dismissed after informing her employers that she was undergoing gender reassignment. Here the Court ruled that the Council Directive 76/207/EEC of 9 February 1976, which was an expression of a fundamental principle of equality, precluded dismissal for a reason related to gender reassignment. This is the first piece of the Court of Luxembourg's case law that prevents discrimination in employment based on gender identity. More recently, see Case C-451/16 *MB v Secretary of State for Work and Pensions*, Judgement of 26 June 2018, available at [www.curia.europa.eu](http://www.curia.europa.eu). Here the Court, dealing with the issue of change of gender in relation to the right to pension treatment and to the right not to be discriminated against on grounds of sex, establishes that a person who has changed sex while remaining married to the previous partner, has the right to retirement at the age provided for people of the acquired sex. In fact, Council Directive 79/7/EEC of 19 December 1978, relating to equal treatment between men and women in social security [1979] OJ L 6/24, must be interpreted as not admitting national legislation which requires a transgender person not only to fulfil physical and psychological criteria, but also not to be married to a same sex person, to claim a State retirement pension. Among legal scholars, on this issue, see E. Longo, ‘La Corte di Giustizia, i diritti dei transessuali e la riduzione delle competenze statali’ *Quaderni costituzionali*, 581 (2006); M. De Salvia and V. Zagrebelsky, *Diritti dell'uomo e libertà fondamentali. La giurisprudenza della Corte europea dei diritti dell'uomo e della Corte di giustizia delle Comunità europee* (Milano: Giuffrè, 2007), III, 52.

<sup>5</sup> The Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 by the European Parliament and European Commission, had full legal effect with the entry into force of the Treaty of Lisbon on 1 December 2009.

other opinion, membership of a national minority, property, birth, disability, age or sexual orientation, shall be prohibited' (Art 21, para 1).

Similarly, the European General Data Protection Regulation of 2016<sup>6</sup> does not refer to 'gender identity' in any way, although it lists information on sex life and sexual orientation as a 'special category of personal data' (Art 9, para 1).

At an international level, the United Nations Convention on the Rights of the Child<sup>7</sup> states that States Party to the Convention shall respect and ensure the rights contained in the treaty, to each child within their jurisdiction without discrimination of any kind, in particular irrespective of the child's

'sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status' (Art 2, para 1).

Since 2002,<sup>8</sup> the European Court of Human Rights has begun to provide protection for transgender persons, using the application of Art 8 (*right to private and family life*) and Art 12 (*right to marriage*) of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>9</sup> Art 8 of the ECHR prohibits any restriction on the right to privacy and family life, unless that restriction is required by law and is necessary for national security, the economic well-being of the country, the prevention of crimes, the protection of

<sup>6</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

<sup>7</sup> The United Nations Convention on the Rights of the Child (signed in New York on 20 November 1989, entered into force on 2 September 1990 and ratified by Italy with legge 27 May 1991 no 176) is the first legally binding international instrument aimed at protecting children and recognizing their human rights. On the issue, see C. Focarelli, 'La Convenzione di New York sui diritti del fanciullo e il concetto di "best interest of the child"' *Rivista diritto internazionale*, 981 (2010); R. Virzo, 'La Convenzione delle Nazioni Unite sui diritti del fanciullo e l'orientamento sessuale del minore', in B.E. Hernández-Truyol and R. Virzo eds, *Orientamento sessuale, identità di genere e tutela dei minori* (Napoli: Edizioni Scientifiche Italiane, 2016), 108-130.

<sup>8</sup> Eur. Court H.R. (GC), *Goodwin v United Kingdom*, Judgment of 11 July 2002, available at [www.echr.coe.int](http://www.echr.coe.int), which condemned Britain for denying a transgender person the right to marry. Subsequently, in 2004, in the United Kingdom, the Gender Recognition Act was passed, allowing for gender reassignment. In literature, see L. Trucco, 'Il transessualismo nella giurisprudenza della Corte europea dei diritti dell'uomo alla luce del diritto comparato' *Diritto pubblico comparato europeo*, 371 (2003).

<sup>9</sup> The European Convention on Human Rights and Fundamental Freedoms (Convention of Rome), signed by the member States of the Council of Europe in Rome on 4 November 1950, was ratified by the Italian State with a law enacted in 1955. See, on the Convention of Rome, V. Zagrebelsky, 'Corte, convenzione europea dei diritti dell'uomo e sistema europeo di protezione dei diritti fondamentali' *Foro italiano*, IV, 353 (2006); J. Long, 'La Convenzione europea dei diritti dell'uomo e il diritto italiano della famiglia', in P. Zatti ed, *Trattato di diritto di famiglia* (Milano: Giuffrè, 2006), VII, 1; L. Lenti, 'L'interesse del minore nella giurisprudenza della Corte europea dei diritti dell'uomo: espansione e trasformismo' *Nuova giurisprudenza civile commentata*, I, 148 (2016).

health or morality, or the protection of rights and freedom of others. According to the European Court of Human Rights, the right to private and family life must be understood in a wide sense, including the fundamental need to be able to express one's identity as a human being. Therefore, a norm of Italian law that prevents a transgender person from exercising any rights because of the non-recognition of the acquired gender would be incompatible with European law. Indeed, according to Art 14 of the ECHR, the enjoyment of the rights and freedoms recognized in the ECHR must be ensured without discrimination, in particular that based on sex, race, colour, language, religion, political views or those of other national or social origin, belonging to a national minority, wealth, birth or any other condition.

## II. The Right of the Child to Be Educated and Heard

Gender dysphoria must not be confused with the condition of intersexuality,<sup>10</sup> which indicates the coexistence of male and female sexual characteristics in the same individual. While intersex minors present, usually from birth, ambiguous genital organs, not definable with certainty as male or female, minors with gender dysphoria are characterized by a psychological perception of their gender as not corresponding to their own corporeality. This incongruity may give rise to an identity crisis and can lead individuals with gender dysphoria to adopt their identified gender, which is different from that which they were assigned at birth.

The topic of transgenderism must be addressed from a different legal standpoint than in the past, as it is no longer considered clinically a psychosis, but a form of psychological distress.<sup>11</sup> It is even more important to adopt a new

<sup>10</sup> Intersexuality, defined in the past as hermaphroditism or androgyny, now defined as 'variation of sexual development', indicates the coexistence or lack, in the same individual, of male and female sex characteristics, due to a biological mutation of chromosomal, gonadic-hormonal and/or anatomical sex. In order to protect his/her legal position, an intersex person may ask a judge to order a public officer to rectify his/her sex in the civil status records under Art 95 of decreto del Presidente della Repubblica 3 November 2000 no 396. On this issue, however, there is a debate in jurisprudence that discusses the rules applicable to cases of intersexuality. According to some authors, the intersexual person could ask the civil officer directly to correct the sex indicated in the act of birth according to Art 98 of decreto del Presidente della Repubblica 3 November 2000 no 396, which allows the public officer to correct any writing errors that have been made. The thesis, however, is not convincing, as such a procedure is only possible where there has been an error of distraction in writing the act of birth, in presence of a certain and determined sex: consider the case where an act of birth formed abroad where a foreign name or a neutral name was indicated (eg Andrea), has been mistranslated or misinterpreted by the civil officer. In this sense, see G. Cardaci, 'Il processo di accertamento del genere del minore intersessuale' *Rivista diritto processuale*, 683 (2016).

<sup>11</sup> The name 'gender dysphoria' is included in the latest version of the Diagnostic Manual of Mental Disorders (DSM V, fifth edition of the Classification Manual of Mental Disorders, American Psychiatric Association, J. Morrison, *DSM - V Made Easy, Percorsi alla diagnosi*, in E. Sacchetti and C. Mencacci eds (Milano: Edizioni Edra, 2014), 370-375. On the legal notion of transexualism, see P. Perlingieri, 'Note introduttive ai problemi giuridici del mutamento di

approach when the individuals experiencing gender dysphoria are minors; indeed, it is necessary to guarantee their well-being and affirm their identity from an early age. For some, dysphoria in relation to one's gender identity may appear at a very early age (sometimes even between three and four), but the onset of the discomfort most commonly occurs in late adolescence or early adulthood.<sup>12</sup>

The problem must be tackled at the beginning of puberty through a hermeneutic method based on the central value of the human being, which allows adjudicators to focus not on the minor age as an abstract category of incompetence, but rather on the concrete situation of each minor. As inferred from various provisions of the Italian legal system,<sup>13</sup> every child has the right to be educated, based on their requirements and necessities. From an international perspective, the above-mentioned Convention on the Rights of the Child recognizes this fundamental right to education (Art 28). Further, the Preamble of the Convention declares that

‘children's rights require special protection and call for continuous improvement of the situation of children all over the world, as well as for their development and education in conditions of peace and security’.

Being educated means being guided in all aspects of development and growth: physical, psychological, cultural, spiritual, social. The duty of education must be fulfilled while respecting the abilities, inclinations and aspirations of the child. With reference to minors with gender dysphoria, this means accepting them for what they feel, observing their social behaviour, and understanding their reasons for rejecting their biological sex. Parental acceptance is a difficult but fundamental process: the goal is to understand the real needs of the child who does not

sesso' *Diritto e giurisprudenza*, XXVI, 830-843(1970); B. Pezzini, 'Transessualismo, salute e identità sessuale' *Rassegna di diritto civile*, II, 463 (1984); J. Baldaro Verde and A. Graziottin, *Lenigma dell'identità, Il transessualismo* (Torino: Gruppo Abele, 1991), 7; M. Iorio et al, *Sessualità e legge*, (Torino: Minerva Medica, 2000), 134; S. Patti, 'Il transessualismo', in S. Patti and M.G. Cubeddu eds, *Diritto della famiglia* (Milano: Giuffrè, 2011), 943-959.

<sup>12</sup> On the obstacles faced by transgender youth in the United States, with particular reference to the rights of those children living in a group foster home, see: C.L. Olson, 'Transgender Foster Youth: A Forced Identity' 19 *Texas Journal of Women and the Law*, 25-57 (2009). Regarding queer children harmed because of their gender non-conformity, see S.E. Valentine, 'Traditional Advocacy for Nontraditional Youth: Rethinking Best Interest for the Queer Child' 4 *Michigan State Law Review*, 1053-1113 (2008), who defines queer children as 'children who either self-identify or are perceived by others as being a sexual minority or who do not conform to normative gender roles' and focuses her article on the role of attorneys representing those children in their journey through the court system and beyond.

<sup>13</sup> Art 30, para 1, of the Constitution proclaims that 'it is the duty and right of parents to support, instruct and educate their children, even those born outside of matrimony'. Within the Civil Code, parental responsibility means obligation to educate a child (see Arts 315-*bis* and 316 of the Civil Code). The Italian Law on Immigration (decreto legislativo 7 July 1998 no 286) extends to foreign minors all the normative provisions regarding the children's right to be educated and to access school (see Art 38).

respond to the standard of binarism that divides the world into males and females. This is also the content of a broader concept of ‘parental responsibility’<sup>14</sup> that must always be exercised for the children’s benefit in accordance with their personalities.

To comprehend the real needs of the child, it is necessary to give him a voice, as many national and international legal instruments provide.<sup>15</sup> Under Italian law, all children have the right to be heard at the age of twelve and even when they are younger – including in early childhood – if they have the capacity of understanding and willing:<sup>16</sup> this right is applicable in all matters and judicial or administrative procedures concerning them (Art 315-*bis*, para 3, of the Civil Code). The goal of these laws is that children are the chief protagonists of their own interests and, even if they do not have full capacity until the age of eighteen, they enjoy a plethora of rights which demand respect and satisfaction. Consequently, also within the family home, children with sufficient awareness have to be heard before the family or parents take decisions which may affect them.

### III. Flexible and Adaptable Protection for Adolescents with Gender Dysphoria

This section discusses the protection needs of adolescents with gender

<sup>14</sup> The notion of parental responsibility is defined by Art 2, para 7, of the Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L1/338. After the Italian Reform 2012 on filiation (legge 10 December 2012 no 219, titled ‘Regulations Regarding the Recognition of Natural Children’), the concept of ‘parental authority’ has been completely left behind, opting for the broader concept of ‘parental responsibility’ that consists of a collection of duties and rights of parents, such as raising, taking care, education, maintenance, determination of residence, administration of properties and representation of the child in legal matters.

<sup>15</sup> Art 12 of the United Nations Convention on the Rights of the Child (n 6 above) recognizes respect for children’s views, statuting that ‘children have the right to give their opinions freely on issues that affect them. Adults should listen and take children seriously’. According to Art 3 of the European Convention of Strasbourg on the Exercise of Children’s Rights (signed on the 25 January 1996, ratified by Italy with legge 20 March 2003 no 77), every child has the right to receive all relevant information, to be consulted and express his or her views in proceedings and to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.

<sup>16</sup> On the child’s right to be heard, see Corte di Cassazione 10 June 2011 no 12739, *Famiglia e diritto*, 37 (2012), with comment of F. Tommaseo, ‘Per una giustizia “a misura del minore”: la Cassazione ancora sull’ascolto del minore’. In jurisprudence, see, among others, P. Stanzione, ‘Potestà dei genitori e diritti fondamentali del minore’ *Rassegna di diritto civile*, 460 (1980); E. Quadri, ‘L’interesse del minore nel sistema della legge civile’ *Famiglia e diritto*, 80 (1999); F. Bocchini, ‘L’interesse del minore nei rapporti patrimoniali’ *Rivista di diritto civile*, I, 277 (2000); A. Palazzo, *Contributo alla ricostruzione della tutela del principio di vita*, in A. Palazzo and I. Ferranti eds, *Etica del diritto privato* (Padova: CEDAM, 2002), II, 96; F. Parente, ‘L’ascolto del minore: i principi, le assiologie e le fonti’ *Rassegna di diritto civile*, 459 (2012); C.M. Bianca, ‘Il diritto del minore all’ascolto’ *Nuove leggi civili commentate*, 592 (2013); F. Scaglione, *Ascolto, capacità e legittimazione del minore*, in R. Cippitani and S. Stefanelli eds, *La parificazione degli status di filiazione* (Roma-Perugia-Mexico: Iseg Gioacchino Scaduto, 2013), 271.

dysphoria. Their position in the legal system is influenced by the evolution of case law, which in recent years has focused on transgender adults and has sought to simplify the legal transition necessary for the fulfilment of their human rights.

To understand how this evolution has had an impact on the situation of these particular minors, it is necessary, first of all, to consider that the minor, traditionally incapable of entering a contract, is also considered by law incapable of acting autonomously within the personal sphere in general. Since there is no Italian legislation covering children's personal rights in general, in the specific field of gender identity, we may refer to some norms from which we can deduce an adolescent's autonomy in decision making when there is a minimum level of intellectual maturity.

To understand which decisions the child should be considered capable of making, it is appropriate to review the law with regard to consenting to medical treatment (legge 22 December 2017 no 219). Medical diagnoses of gender dysphoria can be treated only with the consent of a minor's parent or guardian, based on the principle established by Art 3 of legge no 219 of 2017. This law does not establish a minimum age when minors can express an autonomous decision. However, the law calls on doctors to enable minors' 'ability to understand and decide' (Art 1 and Art 3, para 1) with regard to their life and health. As a consequence, the minor must receive all the relevant information concerning his or her health choices according to his or her capabilities, so as to express his or her conscious adherence.

An axiological and systematic reading of the aforementioned provisions requires abandoning the idea that a child is a subject totally incapable of exercising his or her personal rights. Accordingly, adolescents who are close to the age of majority and with a certain level of maturity, should be granted even more agency in the execution of their rights and fundamental freedoms, because they have a 'decision-making capacity'. Consequently, in such cases, parents should not enforce their will on the child, but should acknowledge and support his or her medical choices, according to a principle that can derive not only from the Civil Code (see, eg, Art 316)<sup>17</sup> and medical ethics (Art 37, para 1, medical deontology code), but also from numerous regulatory provisions existing both at a national (Art 3, paras 1 and 2, legge no 219 of 2017)<sup>18</sup> and international level (see Art 6, para 2, of the Oviedo Convention).<sup>19</sup> As a result, a modern meaning of the minor's

<sup>17</sup> Art 316 of the Civil Code establishes that both parents have dual responsibility of their children, taking into consideration their capacity, natural inclination, desires and ambitions.

<sup>18</sup> According to Art 3, paras 1 and 2, legge no 219 of 2017, the minor has the right to be informed about his medical choices in relation to his decision-making capacity (age and level of maturity) in order to express his will.

<sup>19</sup> Art 6, para 2, of the Convention on the Protection of Human Rights and Human Dignity on the Applications of Biology and Medicine (approved by the European Council in 1996 and signed in Oviedo on 4 April 1997) states: 'Where, according to law, a minor does not have the capacity to consent to an intervention, the intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body provided for by

competence is deduced from the legal system as a whole: it approaches the notion – typical of the common law tradition – of inability to consent to medical treatments.<sup>20</sup> It coincides with the capacity for rational choice, which allows enhancement of the autonomy of a person, as it is not absolute, unchangeable and necessarily tied to age, but relative, alterable and strictly related to individual maturity, skill and understanding.

On this basis, to resolve individual cases regarding physical and psychological treatment of a minor, a guide criterion could be useful to distinguish – not categorically, but concretely, with regard to specific situations – between the so called ‘small minor’, who is an infant, and the so called ‘older minor’, who is a mature adolescent.

#### IV. The Right of the Child to Gender Identity

The right to a different sex from the one originally indicated in the birth certificate was recognized by legge 14 April 1982 no 164 on Rectification of Sex Attribution, which overcame the conception that sexuality is only determined on the basis of physical traits. This is the fundamental right to sexual identity, which was defined by the Italian Constitutional Court<sup>21</sup> as the right to having access to a legal and medical procedure to adapt one’s body to the psyche.

In recent decades, there has been a further refinement of the concept, moving from the need for sex change to the need to realize one’s gender identity, read as an essential aspect of mental and physical health and personal identity,<sup>22</sup> interpreted also as a specific expression of the right to self-determination in achieving personal equilibrium.<sup>23</sup> This evolution implies, as recently underlined

law. The opinion of the minor shall be taken into consideration as an increasingly determining factor in proportion to his or her age and degree of maturity’.

<sup>20</sup> For the concept of incompetence in the *common law*, see E. Jackson, *Medical law, Text, Cases and materials* (Oxford: Oxford University Press, 2010), 216; A.E. Morris and M.A. Jones, *Medical Law* (Oxford: Oxford University Press, 2011), 203; F. Burton, *Family law* (Padstow, Cornwall: TJ International Ltd, 2012), 277; J. Fortin, ‘Accommodating Children’s Rights in a Post Human Rights Act Era’ 69 *The Modern Law Review*, 299 (2006).

<sup>21</sup> On this point, see Corte Costituzionale 23 May 1985 no 161, *Giurisprudenza italiana*, I, 235 (1987).

<sup>22</sup> P. Stanzione, ‘Transessualismo e sensibilità del giurista: una rilettura attuale della legge n. 164/82’ *Diritto di famiglia e delle persone*, 715 (2009); E. Pascolo-Fabrizi et al, *Identità di genere*, (Trieste: EUT, 2016), 27-29; M. Silvaggi, ‘Aspetti psicologici nell’adolescente omosessuale’, in B.E. Hernández-Truyol and R. Virzo eds, n 6 above, 15; M.C. De Cicco, ‘Il diritto alla diversità come espressione del diritto all’identità personale’, in E. Caterini et al eds, *Scritti in onore di Vito Rizzo. Persona, mercato, contratto e rapporti di consumo* (Napoli: Edizioni Scientifiche Italiane, 2017), II, 505.

<sup>23</sup> G. Palmeri and M.C. Venuti, ‘Il transessualismo tra autonomia privata ed indisponibilità del corpo’ *Diritto di famiglia e delle persone*, 1331 (1999); V. Lingiardi, ‘Orientamento sessuale e genere: declinazioni molteplici e ampie le intersezioni’ *Famiglia e minori Guida al diritto*, 7, 19-21 (2011); A. Lorenzetti, *Diritti in transito. La condizione giuridica delle persone transessuali*



by the Italian Constitutional Court,<sup>24</sup> the necessity to differentiate the terms ‘sex’ identity and ‘gender’ identity: while sex is an objective concept, which has a physical and biological definition, gender is a subjective, psychological and cultural notion, which indicates the perception of oneself as belonging to a male or female category. Facts, in reality, show that personal fulfilment is not necessarily achieved through the identification of an individual as belonging to a masculine or feminine category, but can also be found in an intermediate gender between man and woman. There is a wide range of gender identities and not all of them require a surgical solution which identifies them as socially accepted body archetypes.

Thus, the recent shifts in case law<sup>25</sup> have reflected an understanding that surgical intervention concerning primary sexual characteristics is not the only remedy for an ‘ambiguous’ person to become a ‘normal’ man or woman. Following the jurisprudence of the European Court of Human Rights,<sup>26</sup> the prevailing interpretative orientation in Italian case law is that transgender persons have the right to rectify their name and sex even without losing their reproductive capacity, simply by changing their secondary sexual characteristics;<sup>27</sup> it is their decision to determine if surgical intervention with regard to their reproductive organs is functional to their physical or psychic well-being.

The same rights to health, gender identity and human dignity that are accorded to adults in these contexts are essential needs that also cannot be denied to minors. Recognition of these rights, however, requires further reflection and

(Milano: Franco Angeli, 2013), 20; F. Bilotta, ‘Transessualismo’ *Digesto discipline privatistiche - Sezione Civile* (Torino: UTET, 2013), 715.

<sup>24</sup> In this regard, see Corte Costituzionale 13 July 2017 no 180, available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it). Here the Corte Costituzionale clarified that surgical intervention in primary sex characteristics cannot be justified by a public interest in establishing certain genders and, consequently, it is not necessary for having one’s gender legally recognized.

<sup>25</sup> Corte di Cassazione 20 July 2015 no 15138, *Studium iuris*, 4, 400 (2016), with comment of V. Greco, ‘Mutamento di sesso senza costringimento al bisturi’. See, also, Tribunale di Rovereto 3 May 2013, *Nuova giurisprudenza civile commentata*, I, 1116 (2013), with comment of F. Bilotta, ‘Identità di genere e diritti fondamentali della persona’; Tribunale di Roma 14 April 2011 no 5896, *Guida al diritto - Famiglia e minori*, 7, 15-16 (2011), with comment of F. Bilotta, ‘ Rettifica dell’atto di nascita anche senza l’intervento chirurgico del sesso. Decisione rispettosa delle garanzie fondamentali di dignità e autodeterminazione’.

<sup>26</sup> See the recent rulings by the Eur. Court H.R., *S.V. v Italy*, Judgment of 11 October 2018 and Eur. Court H.R., *Y.Y. v Turkey*, Judgment of 10 March 2015, both available at [www.echr.coe.int](http://www.echr.coe.int). The first judgment focuses on the human rights to gender identity and to a name, clarifying that the Italian authorities’ refusal to authorise a transgender person with a female appearance to change her male first name prior to surgery, constitutes a violation of Art 8 (right to respect for private and family life) of the ECHR. The second ruling of the Court refers to self-determination regarding reproductive health, discussing reproductive capacity as a condition of access to surgical intervention; more specifically, it states that Turkey cannot refuse to authorise a transgender person, who had not been previously sterilised, to have access to sex reassignment, without breaching the right to respect for private life (Art 8 of the ECHR). See, among the Italian scholars, S. Patti, ‘Il transessualismo tra legge e giurisprudenza della Corte europea dei diritti dell’uomo (e delle Corti costituzionali)’ *Nuova giurisprudenza civile commentata*, I, 143 (2016).

<sup>27</sup> Secondary sexual characteristics are defined: distribution of muscle mass, fat, hairs, tone of the voice. Primary sexual characteristics are considered genital and reproductive organs.

discussion about the possibility of physicians and healthcare professionals prescribing drugs to stop puberty and postpone physical development of young children with symptoms of gender dysphoria. This issue will be discussed in the next section.

## **V. The Controversial Issue of the Use of Triptorelin Hormone in Adolescence**

Italian medical science has raised the issue of the use of Triptorelin hormone in adolescents in the early phase of puberty (from ten to fourteen years old). This drug, taken for a prolonged period, slows down or suspends the development of naturally produced hormones; it is therefore evident that starting such treatment in early adolescence means starting a decisive path towards a new personal identity. This is a heated issue, which has been dealt with differently in European and non-European countries. The debate focuses on adolescents with severe dysphoria from childhood and their dramatic conditions that can lead to extreme gestures, such as suicide.

In the latest version of International Care Standards, the World Professional Association for Transgender Health emphasizes the importance of using Triptorelin therapy to give teenagers more time to explore their gender identity and, above all, to avoid development of sexual characteristics not corresponding to the perceived identity. This eases the subsequent transition, requiring a lower future dosage of hormones and reducing the need for medical and/or surgical intervention. As highlighted in the Commission Report to the European Parliament of 26 October 2017 regarding the current status of pediatric medicine in the European Union, the lack of specific pediatric clinical studies enabled the off-label use of Triptorelin in the past,<sup>28</sup> with dosages and indications not specifically tested for the pediatric age.

However, the treatment of gender dysphoria in pre-adolescence is highly controversial. The Italian Bioethics Committee recently expressed its position on the practice in the 'Opinion of 13 July 2018 on the request of the Italian Medicines Agency (AIFA) regarding the ethics of the use of the Triptorelin drug for the treatment of adolescents with gender dysphoria'.<sup>29</sup> This important document, while being substantially favorable, mandates an extremely conservative use of the

<sup>28</sup> The off-label use of Triptorelin means use outside of the recognized medical indications, with dosages not specifically tested for the paediatric age. The Commission's report to the European Parliament and the Council of 26 October 2017 on the current state of paediatric medicines in the EU underlines that the off-label use of adult medicines 'entails the risk of ineffectiveness and/or adverse reactions in children'. See also the National Reference Guidelines (Agency for Regional Health Services) on conducting clinical trials in basic paediatrics, available on the website of the Service of Epidemiology and Preventive Pharmacology: [www.sefap.it](http://www.sefap.it)

<sup>29</sup> The Opinion of the Italian Bioethics Committee of 13 July 2018 is available at [www.bioetica.governo.it](http://www.bioetica.governo.it).

drug, limited to carefully selected cases. The Opinion's main recommendations include: the need for the involvement of a multidisciplinary and specialized team; the use of the treatment only when other medical interventions have been ineffective; the requirement of informed, express and unrestrained consent by the parents/guardian; adequate training of paediatricians and of health and social services and educational institutions; safety and follow-up studies on the treated cases; and a policy of fair and homogeneous access to the drug. Further, according to the Committee, a medical protocol including psychotherapeutic interventions should be available, in order to avoid damaging effects on mental and physical health and to eliminate the causes of suffering induced by stigmatization and social discrimination.

Taking into consideration the above opinion, on 25 February 2019, the Italian Medicines Agency decided to include Triptorelin in the list of medicines paid for by the National Health Service, authorizing its use in the treatment of adolescents with gender dysphoria.

Nevertheless, according to some scholars,<sup>30</sup> there are no sufficient paediatric clinical tests to determine the side effects of such therapies on children in the short and long term; in particular, there is no evidence of the possible recovery of physical and cognitive development and full restoration of fertility of those children who decide to stop the treatment. Consequently, the use of this drug should be limited for a predetermined period of time and in very select cases, with a case-by-case evaluation.

Indeed, the need to proceed to a careful assessment is inferred from the above-mentioned 'Opinion' of the Italian Bioethics Committee, which advocates adherence to the principles of responsibility, non-maleficence and precaution,<sup>31</sup>

<sup>30</sup> F. Signani, N. Natalini and C. Vagnini, 'Minori Gender Variant: il ruolo che un'Azienda Sanitaria può (deve?) svolgere' 2 *GenIUS*, 4-13 (2019); K. Varani and F. Signani, 'Benefici e Rischi nel Trattamento Farmacologico con Triptorelina nella Disforia di Genere' 2 *GenIUS* 67-73 (2019). These Authors emphasize problems and limits of a drug treatment with Triptorelin and highlight the importance of preparing safety studies on the short and long term efficacy, in order to regulate its correct use in puberty. Among the legal scholars, see the opinions expressed by M. Ronco et al, *Determina AIFA sulla Triptorelina: nota congiunta di Scienza & Vita e del Centro Studi Livatino*, 5 March 2019, available at [tinyurl.com/y99ynfoc](http://tinyurl.com/y99ynfoc) (last visited 7 July 2020). With regards to the foreign literature, see D. Chew et al, 'Hormonal Treatment in Young People with Gender Dysphoria: A Systematic Review' 4 *Pediatrics*, 141 (2018).

<sup>31</sup> On the principles of responsibility and non-maleficence, see F. Bellino, *Trattato di Bioetica* (Bari: Levante, 1992), 325-326; E. Sgreccia, *Manuale di bioetica* (Milano: Vita e Pensiero, 1994), I, 175-184. With specific reference to the precautionary principle, see World Commission on the Ethics of Scientific Knowledge and Technology, *The precautionary principle* (Paris: UNESCO, 2005), 1-52, available at [unesdoc.unesco.org](http://unesdoc.unesco.org). At a European level, Art 174, para 3, of the Treaty on the European Union [2012] OJ C 326/01 provides that 'in preparing its policy on the environment, the Community shall take into account (...) the potential benefits and costs of action or lack of action'. On the issue, on 29 January 1999, the Council of Europe adopted the Recommendation no 1399 on xeno trans-plantation. In the Italian literature, regarding the precautionary principle in the field of health, see M.G. Stanzione, 'Principio di precauzione, tutela della salute e responsabilità della P.A. Profili di diritto comparato' *Comparazione e diritto*

which are general criteria to be respected in every medical intervention and, even more important in interventions involving minors. Particularly, the precautionary principle takes into account the potentially harmful consequences of the use of a medical therapy and aims to prevent personal injury or personal damage; thus, this principle should be emphasized in order to determine the most reasonable solution to problems in this field, as the virtue of 'prudence' offers an answer to a question before scientific proof of harm is given.

## VI. The Problem of Gender Identity at the Threshold of the Majority Age

In this section we will address the difficult question of whether it is legitimate to allow the rectification of sex and name at an earlier stage before the age of majority, without waiting for gender identity and personality of an individual to be completely defined. Pursuant to Art 1 of legge no 164 of 1982, the rectification is made by two sentences that give a person a different sex and name to those recorded on the birth certificate; consequently, this involves the change of sex and name in civil status records and on all identity documents.

Legge no 164 of 1982 does not refer to minors: it does not explicitly exclude them from accessing the transition procedure, but, at the same time, it does not allow them to pursue an autonomous exercise of a sex change. The debate on this issue is still open.

According to a ruling of Tribunale di Catania in 2004,<sup>32</sup> an adolescent before the age of eighteen cannot obtain public recognition of his identity, because he is not considered capable of acting in the sphere of personality rights. In that case, a parent's request for gender reassignment surgery on behalf of a minor was rejected. Under this approach, it was not possible to derogate from the general principles on the legal incapacity of minors.

Several years later, the Tribunale di Roma arrived at a different conclusion in two conforming rulings.<sup>33</sup> According to these decisions, age does not preclude access to surgery for a minor with gender dysphoria, because, despite the lack of a regulatory provision, the need for effective protection of the rights of the child

*civile*, September 2016, 2-34; R. Adorno, 'The Precautionary Principle: a New Legal Standard for a Technological Age' 1 *Journal of International Biotechnology Law*, 11-19 (2004).

<sup>32</sup> Tribunale di Catania 12 March 2004, *Giustizia civile*, I, 1107 (2005), with comment of L. Famularo, 'I minori e i diritti della personalità'. Here the judges declared inadmissible the procedure of gender reassignment, brought before the courts by the parents, because of their lack of ability to sue, on the assumption that it was a strictly personal question, not exercisable through a judicial representative.

<sup>33</sup> Tribunale di Roma 11 March 2011 and Tribunale di Roma 22 March 2011, *Nuova giurisprudenza civile commentata*, I, 243 (2012), with comment of A. Schuster, 'Identità di genere: tutela della persona o difesa dell'ordinamento?'. In this case, the tribunal authorizes surgery in favor of a minor, allowing the parents to submit an application for a sex change.

requires a parent's intervention to assert his or her rights in court. The Roman judges ruled that a change of gender by an adolescent close to the age of majority might be considered, in certain cases, beneficial to his/her interest.

In fact, an adolescent with gender dysphoria, like any adult, has not only the right to health, but also the right to be identified according to his or her desires, as an expression of the inviolable rights to personal identity and sexual freedom, protected by Art 2 of the Constitution. These rights can be exercised by a legal representative, which is one of the parents (or a guardian in their absence), after obtaining the judge's authorization. In order to grant the authorization, each case is assessed by the judge, who is called to ascertain the authentic will of the interested adolescent. This solution is consistent not only with the general principle that guarantees legal action to protect human rights and interests (Art 24 of the Constitution), but also with numerous sources of international law<sup>34</sup> that consider the 'best interest of the child' as the pre-eminent criterion for every decision taken.

The concept of 'best interest of the child' has become a binding principle in the Italian State with the ratification of the Convention on the Rights of the Child (Art 3), which emphasizes this concept as a core principle, in addition to the principles of non discrimination (Art 2) and respect for the views of the child (Art 6 and Art 12). As a basic criterion of interpretation of laws and dispute resolution rule, this principle implies that, in the decisions of public or private institutions involving a child, no 'higher' or 'superior' interest should be pursued, rather, the child's 'pre-eminent' interest must be carried out with priority, as children are weak and vulnerable persons in the family and in society and, therefore, they must be supported more widely than others.<sup>35</sup>

The 'best interest of the child' must be given a 'primary' consideration in

<sup>34</sup> First, reference has to be made to the United Nations Declaration of the Rights of the Children, proclaimed on the 20 November 1959 by the General Assembly of the United Nations (see Art 2). Later, the European Convention on the Exercise of Children's Rights (Strasbourg 1996, n 15 above) provided that 'In proceedings affecting a child, the judicial authority, before taking a decision, shall: a) consider whether it has sufficient information at its disposal in order to take a decision in the best interests of the child and, where necessary, it shall obtain further information, in particular from the holders of parental responsibilities; b) in a case where the child is considered by internal law as having sufficient understanding: – ensure that the child has received all relevant information; – consult the child in person in appropriate cases, if necessary privately, itself or through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be manifestly contrary to the best interests of the child; – allow the child to express his or her views; c) give due weight to the views expressed by the child' (Art 6, *Decision-making process*). The principle of the 'best interest of the child' was implemented by Art 23 of the European Council Regulation no 2201 of 27 November 2003 concerning Parental Responsibility (n 14 above) and inserted in the Charter of Fundamental Rights of the European Union (Art 24).

<sup>35</sup> In the Italian literature, see, among others, L. Lenti, '“Best interest of the child” o “best interest of children”?' *Nuova giurisprudenza civile commentata*, II, 157 (2010); L. Paladini, 'Best interest del minore e obblighi internazionali nella recente giurisprudenza italiana' *Giurisprudenza italiana*, 2274 (2014); F. Giardina, 'Interesse del minore: gli aspetti identitari' *Nuova giurisprudenza civile commentata*, I, 159 (2016); G. Ferrando, 'Ordine pubblico e interesse del minore nella circolazione degli status filiationis' *Corriere giuridico*, 2, 181 (2017).

relation to individual cases, since the needs of the individual may vary during the process of development. The approach that focuses on the pre-eminent interest of the child has led to a significant emphasis on the role of case law and an increase in the power of judges to make laws adequate to the specificities of reality, adapting them to the multiplicity of cases.

## **VII. Conclusion: The Right of the Child to Live in an Inclusive Context**

Currently, a double judicial procedure is not always necessary for the purposes of gender change. A prior authorization for surgery might not be requested in some cases: when the intervention has already been carried out or when the person asks to rectify their sex without undergoing an operation. Therefore, a single judicial procedure for the modification of sex and name is now permitted. In these situations the judge simply verifies that sufficient modifications have been made to confirm the successful transition, without the need of resorting to surgery.

Sometimes, gender dysphoria appears during childhood. This article has examined the concrete possibility that an adolescent under the age of eighteen could possess the necessary capacity of judgment to make decisions regarding his or her life and personal identity. Legge no 164 of 1982 does not prohibit minors from changing sex and name, nor does it exclude, in special cases, the authorization of a surgical gender reassignment procedure when a minor is close to the age of majority.

This article has highlighted the progressive increase in the protection of children with gender dysphoria, who deserve special legal protection. This result has been determined by a constitutional interpretation of the definition of minority, inspired by the objective of the Constitution to implement the principle of substantial equality (Art 3, para 2, and Art 2, of the Constitution). In particular, the importance given to the decision-making power of the minor regarding health and gender identity choices emerges when he or she reaches a maturity level suitable enough to express his or her opinion.

Considering that difficulties linked to gender identification often arise at the age of puberty, an appropriate intervention from childhood is essential to ensure tranquillity and stability during this phase. The need for identification in the opposite sex can also appear in the first years of life, even if the behaviour of small children related to sexuality tends to remain in the private sphere. Thus, in childhood, the role played by parents is more incisive with greater responsibility, as the child, although he has fundamental rights, cannot yet enact them.

Some critical elements persist with regard to the obstacles that children with gender dysphoria encounter in everyday life. It is of fundamental importance for society and culture to evolve, thus providing support to these minors and their families.

They should receive all necessary medical help to ensure a balanced

development of their identity. An inclusive context together with participation of social services and of all administrations is necessary to avoid social stigmatization.

In the field of education, the adoption of guidelines by schools and other educational institutions could be a good strategy to guarantee transgender adolescents the free development of their personality. Effective measures against prejudice and discrimination might be found in the organization of training courses that target not only students and teachers, but also social services, who should cooperate with judges and lawyers, in order to promote good practices in every sector of society.

Following this trend, some Italian universities<sup>36</sup> give their students the opportunity to obtain a temporary identity card (called 'Alias' Student Card), which is valid only within the university and indicates their chosen name. The so called 'Career Alias' represents an anticipation of the measures that could become necessary at the end of the gender transition process, when the person obtains new personal identity documents; indeed, it can be requested not only by those who have already undergone a gender change, but also by those who have started a psychotherapeutic and clinical program in a health center to undergo a possible gender change. The final objective of this interesting tool is to allow students to exercise, while in the delicate process of gender transition, the rights to personal identity and privacy at the same time.

<sup>36</sup> Reference is made to the Universities of Basilicata, Pisa, Verona, Torino, Bologna, Perugia, Bari, Urbino, Napoli, Catania, Padova, Milano (in this last regard, see F. Cavadini, *Milano, sì al doppio libretto per i transgender in Statale e Bicocca*, 28 January 2016, available at [tinyurl.com/y59a5jn9](https://tinyurl.com/y59a5jn9) (last visited 7 July 2020)). On the issue, see E. Stradella, *Le discriminazioni fondate sull'orientamento sessuale e sull'identità di genere* (Pisa: Pisa University Press, 2019).