

JUDGMENT NO. 180 YEAR 2017

In this case the Court considered two referral orders challenging a law requiring the existence of a prior modification of a person's primary sexual characteristics in order for that person to amend the gender attribution on his or her birth certificate. The referring tribunal alleged that this made the exercise of a right (the right to one's own gender identity) contingent upon one's submitting to invasive and health-threatening procedures. After ruling that the question was admissible, the Court held that it was unfounded. While the referring tribunal interpreted prior modification to entail physical deconstruction and reconstruction of a person's genitalia, the Court cited a Court of Cassation decision, consistent with the case law of the ECtHR, which concluded that acquiring a new gender identity may come as the result of a personal process that did not entail invasive procedures. The Constitutional Court had also ruled, in a judgment handed down after the referral orders were submitted, that surgical intervention was not required in order for the amendment to be made. The Court reiterated that the constitutionally correct interpretation allowed for rejecting the requirement of a prior surgical procedure. It also reiterated that the judicial authority must carry out a rigorous assessment to conclude that a gender transition is both serious and unambiguous, and corroborated by objective indicia, in order for the amendment to be made to the public record.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 1(1) of Law no. 164 of 14 April 1982 (Provisions on amendment of gender attribution), initiated by the Ordinary Tribunal of Trento with two referral orders of 8 April 2015 and 28 April 2015, registered respectively as no. 174 and 211 of the 2015 Register of Referral Orders and published in the Official Journal of the Republic no. 37 and 42, first special series of 2015.

Considering the entries of appearance of E.R. and G.N. and the interventions of the President of the Council of Ministers;

having heard from Judge Rapporteur Giuliano Amato at the public hearing of 20 June 2017;

having heard from counsel Massimo Luciani on behalf of E.R. and G.N. and State Counsel [*avvocato dello Stato*] Gabriella Palmieri on behalf of the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.– With two referral orders similar in their contents, the Ordinary Tribunal of Trento has raised questions concerning the constitutionality of Article 1(1) of Law no. 164 of 14 April 1982 (Provisions on amendment of gender attribution) in reference to Articles 2, 3, 32, and 117, first paragraph, of the Constitution, this last Article in relation to Article 8 of the European Convention for Human Rights (ECHR), signed in Rome on 4 November 1950, ratified and executed with Law no. 848 of 4 August 1955.

The questioned provision provides that: “Amendment is made based on the final decision of a court attributing to a person a gender different from that written on their birth certificate, following prior modification of his or her sexual characteristics.”

In the opinion of the referring Tribunal, the challenged provision contradicts with Articles 2 and 117, first paragraph, of the Constitution, in relation to Article 8 of the ECHR, since requiring the modification of one’s sexual characteristics through highly invasive surgical treatments for purposes of amending the attribution of gender in one’s records allegedly seriously undermines the exercise of the fundamental right to one’s own gender identity.

The referring Tribunal also alleges the violation of Articles 3 and 32 of the Constitution for the inherent unreasonableness of making the exercise of a fundamental right, that of sexual identity, contingent upon the requirement that the person undergo medical treatments (surgical or hormonal) which are extremely invasive and dangerous to their health.

1.1.– In the operative part of the first referral order (no. 174 of 2015) the Tribunal raises the question of the constitutionality of Article 1(1) of Law no. 164 of 1982 “in the part in which it makes the amendment of gender attribution contingent upon prior modification of the primary sexual characteristics of the person in question, through destructive and reconstructive surgery.”

In its following referral order, no. 211 of 2015, the Ordinary Tribunal of Trento asks this Court to accept the question of constitutionality of the same provision “in the part in which it makes the amendment of gender attribution contingent upon the surgical modification of the sexual characteristics of the person in question.”

2.– In consideration of the substantial overlap of the questions raised by the referring Tribunal, the judgments may be joined in order to be jointly addressed and decided.

3.– As a preliminary matter, the Court notes that the objection that the question of constitutionality is inadmissible, made by the State Counsel’s Office, is unfounded.

3.1.– The State Counsel’s Office alleges that the question is inadmissible on the grounds that the referring judge did not sufficiently explore the possibility that there is a constitutionally acceptable interpretation of the challenged provision.

3.2.– The Ordinary Tribunal of Trento maintains, in particular, that the literal contents of Article 1(1) of Law no. 164 of 1982 do not allow a person to amend his or her gender attribution in the absence of surgical modification of his or her primary sexual characteristics, that is to say genitalia, on the basis of which a person’s sex is identified at the time of birth.

The referring judge is aware that Article 31(4) of Decree Law no. 150 of 1 September 2011 (Supplemental provisions for the Code of Civil Procedure on the reduction and simplification of civil fact-finding proceedings, under Article 54 of Law no. 69 of 18 June 2009) appears to qualify medical-surgical treatment as merely potential, for purposes of amending gender attribution. Nevertheless, in the judge’s view, this does not mean that the amendment may be made independently of an adjustment of the primary sexual characteristics, but merely that there may be concrete cases in which these characteristics have already been modified (for example by a surgery already undergone abroad, or for congenital reasons).

3.3.– In this regard, it bears reiterating the holding of constitutional case law that maintains that “[t]he possibility for a further alternative interpretation, which the lower court did not consider it appropriate to pursue, does not have any significance for the purposes of compliance with the rules governing proceedings before the Constitutional

Court, as the control as to the existence and legitimacy of such an additional interpretation is a question that relates to the merits of the dispute, and not to its admissibility” (Judgment no. 221 of 2015, in reference to the same objection raised in similar proceedings; finally, see also Judgments no. 42 of 2017, 240, 219, 95, and 45 of 2016, and no. 262 of 2015).

4.– On the merits, the question of the constitutionality of Article 1(1) of Law no. 164 of 1982 is unfounded.

4.1.– The possibility that there is an interpretation of the challenged provision that respects the constitutional values of the freedom and dignity of the human person has been identified and validated both by the case law on legitimacy and by constitutional case law.

This Court has long recognized that, “Law no. 164 of 1982 is situated [...] within the stream of an evolving legal civilization, which is increasingly attentive to the values, of freedom and dignity, of the human person, which it searches for and protects even in minor and anomalous situations” (Judgment no. 161 of 1985).

The Court of Cassation, First Civil Section, positioned itself within this context of ideas in its Judgment no. 15138 of 20 July 2015, in which it adopted interpretations of Article 1 of Law no. 164 of 1982 as well as of Article 3 of the same law (now merged into Article 31(4) of d.lgs. no. 150 of 2011) that were both constitutionally oriented and in conformity with the case law of the European Court of Human Rights (ECtHR). In that decision, the nomophilic Court held that, in order to obtain an amendment of gender attribution in civil state records, it is not obligatory to have undergone surgical procedures that destroy or modify the primary anatomical sexual characteristics.

The Court recognized that acquiring a new gender identity may come as the result of a personal process that does not entail the need for such procedures, provided that the serious and unambiguous nature of the chosen path and the settled nature of the final point are the object of verification (including technical verification) by the courts.

4.2.– Most recently, in Judgment no. 221 of 2015, handed down after both referral orders were made, this Court recognized that the challenged provision constitutes the end point “of an evolution in cultural attitudes and the legal system towards the recognition of the right to gender identity as a constitutive element of the right to personal identity, which falls squarely within the scope of the fundamental rights of the person (Article 2 of the Constitution and Article 8 ECHR).”

In light of this evolution, which is at once both cultural and legal, this Court, therefore, stated that, in “the absence of a textual reference to the manner in which the modification is achieved (surgery, hormones or as a result of a congenital situation), it may be concluded that surgery, as only one of the possible techniques for modifying sexual characteristics, is not necessary for the purposes of access to the judicial process leading to correction in the civil registry. [...] The recourse to the surgical modification of sexual characteristics may thus be authorised with reference to the guarantee of the right to health, that is where this procedure has the aim of enabling the person to achieve a stable psychological and physical equilibrium, in particular in cases in which the discrepancy between anatomical gender and psycho-sexuality is such as to give rise to a situation of conflict and a rejection of the person’s own anatomical morphology. The prevalence of the protection of the health of the individual over the correspondence between anatomical gender and a person’s gender for administrative purposes suggests that surgery is not a prerequisite for eligibility for the correction procedure – as is

asserted by the referring court – but is one possible means of engaging it, as its aim is to achieve full psychological and physical well-being.”

The possibility that there is an interpretation of the challenged provision that is compatible with constitutional values leads this Court to reject the question of constitutionality of Article 1(1), in the part in which it makes amendment of gender attribution contingent upon prior modification of sexual characteristics.

5.– In affirmation of the nomophylactic value of the interpretative choice carried out in this regard by the Court of Cassation, this Court must identify the solution to the interpretative ambiguities – which are, incidentally, entirely isolated – mentioned by the intervening private parties.

5.1.– The reaffirmed validity of this interpretation moreover excludes the foundation of the additional hypotheses formulated only implicitly in the referral order registered as no. 211 of the 2015 Register of Referral Orders and explicitly in the defenses of the constituent parties.

In particular, although the arguments put forward by the referring tribunal focus exclusively on the lack of a need for surgical procedures for purposes of amending records, the complaint formulated in the operative part of the order focuses on the annulment of the provision regarding the prior modifications of the sexual characteristics of the relevant party. With this the referring tribunal appears to call for a greater intervention than the one described in its reasoning section, in that it aims to exclude the provision requiring said modifications, by whatever method achieved (surgical, hormonal, or by congenital condition).

From this same viewpoint, defense counsel for the parties, in the memoranda submitted after Judgment no. 221 of 2015, which the parties recognized as having satisfied the previous requests for protection, asked that, in general, the parties not be submitted to medical or psychological examinations as a part of the requisite judicial assessment necessary to amend records, as these would be potentially invasive of privacy. The parties argue that such assessments must focus exclusively on social manifestations of personal identity and on the psychic, behavioral, and physical aspects that combine to make up one’s gender identity.

5.2.– In light of the principles affirmed in Judgment no. 221 of 2015, it bears reiterating that the constitutionally appropriate interpretation of Law no. 164 of 1982 allows for the rejection of the requirement of a prior gender realignment surgery. Nevertheless, this in no way implies that there is no need for a rigorous assessment – indeed, it confirms its necessity – not only of the serious and unambiguous nature of the person’s intent, but also that a prior, objective transition in gender identity, revealed in the path followed by the person in question; a path that corroborates and reinforces the intent thus manifested. Therefore, in continuity with the principles in the cited judgment, the Court must reject the idea that merely the will-based element can take priority or exclusive importance for purposes of making an assessment regarding the transition.

In line with the holding of the cited judgment, it must once more be observed that an individual’s wish that the gender attributed to him or her in official records at the moment of birth correspond to the gender that he or she subjectively perceives and lives out undoubtedly constitutes an expression of the right to recognition of one’s gender identity. In the system of Law no. 164 of 1982, this is achieved through a judicial procedure that guarantees, at the same time, both the rights of the individual and the need to have certainty in legal relationships, upon which the purpose of public records is founded.

The reasonable balancing point between the various necessities for guarantees was, indeed, identified in entrusting to the judge, in the judicial evaluation of the irreducible uniqueness of every individual, the task of ascertaining the nature and importance of the prior modifications to a person's sexual characteristics, which combine to determine one's personal and gender identity.

ON THESE GROUNDS
THE CONSTITUTIONAL COURT

having joined the judgments,

declares that the question of constitutionality of Article 1(1) of law no. 164 of 14 April 1982 (Provisions on amendment of gender attribution) raised by the Ordinary Tribunal of Trento with the referral orders indicated in the headnote in reference to Articles 2, 3, 32, and 117, first paragraph, of the Constitution (this last provision in relation to Article 8 of the ECHR) is, for the reasons described in the reasoning section above, not founded.

Decided in Rome, at the seat of the Constitutional Court, Palazzo della Consulta, on 20 June 2017.