JUDGMENT NO. 221 YEAR 2015

[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 governing the correction of the assigned gender), initiated by the *Tribunale di Trento* in the proceedings pending between D.B. and the Public Prosecutor at the *Tribunale di Trento* by the referral order of 20 August 2014, registered as no. 228 in the Register of Orders 2014 and published in the Official Journal of the Republic no. 52, first special series 2014.

Considering the entry of appearance by D.B. and the interventions by the *Associazione Radicale Certi Diritti* [Radical Association Certain Rights] and the Association *ONIG – Osservatorio Nazionale sull'Identità di Genere* [National Gender Identity Observatory] and others and the President of the Council of Ministers;

having heard the judge rapporteur Giuliano Amato at the public hearing of 20 October 2015;

having heard Counsel Massimo Luciani for D.B., Counsel Potito Flagella for the Association *ONIG – Osservatorio Nazionale sull'Identità di Genere* and others and the State Counsel [*Avvocato dello Stato*] Gabriella Palmieri for the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.− By a referral order of 20 August 2014, the *Tribunale di Trento* raised – with reference to Articles 2, 3, 32, 117(1) of the Constitution, the last provision in relation to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR), signed in Rome on 4 November 1950 and ratified and implemented by Law no. 848 of 4 August 1955 − a question concerning the

constitutionality of Article 1(1) of Law no. 164 of 14 April 1982 (Provisions governing the correction of the assigned gender).

This provision stipulates that "Correction shall be implemented in accordance with an order of a court that has become final vesting a person with a different gender to that stated on his or her birth certificate following alterations to his or her sexual characteristics".

In the opinion of the referring court, the contested provision violates Articles 2 and 117(1) of the Constitution in relation to Article 8 ECHR as the imposition of the requirement that primary sexual characteristics must have been altered through highly invasive clinical treatment as a prerequisite for the rectification by the civil registry of the assigned gender causes serious detriment to the exercise of the fundamental right to gender identity.

The provision is also claimed to violate Articles 2 and 32 of the Constitution due to the unreasonableness inherent within the rule rendering the exercise of a fundamental right, such as the right to gender identity, conditional on the prerequisite of subjecting oneself to medical treatment (involving surgery or hormones) that is highly invasive and dangerous to health.

2.− As a preliminary matter, it is necessary to reiterate the finding made in the ruling read out at the public hearing, which is annexed to this judgment, concerning the inadmissibility of the interventions by the Association *Radicale Certi Diritti* and by the Association *ONIG – Osservatorio Nazionale sull'Identità di Genere*, the Foundation *Genere Identità Cultura* [Gender Identity, Culture], by the Association *ONLUS MIT − Movimento d'Identità Transessuale* [Transsexual Identity Movement] and by the *Associazione di Volontariato Libellula* [Dragonfly Voluntary Service Association].

According to the settled case law of this Court, alongside the President of the Council of Ministers and, in cases involving regional legislation, the President of the Regional Executive, only the parties to the main proceedings are entitled to intervene within interlocutory constitutional proceedings.

Third parties not involved in the main proceedings may only intervene where they have a qualified interest that is directly related to the substantive right averred in the proceedings, and not simply governed, in the same manner as any other, by the contested provision or provisions (see *inter alia* the order read out in the public hearing

of 7 October 2014, confirmed by Judgment no. 244 of 2014; the order read out in the public hearing of 8 April 2014, confirmed by Judgment no. 162 of 2014; the order read out in the public hearing of 23 April 2013, confirmed by Judgment no. 134 of 2013; and the order read out at the public hearing of 9 April 2013, confirmed by Judgment no. 85 of 2013).

In this case, the interveners are not parties to the main proceedings, which were initiated by D.B. with a view to obtaining the correction of his/her gender in the civil registry, and are not vested with a qualified interest directly related to the substantive right averred in the proceedings.

It follows from the above that the interventions referred to are inadmissible.

3.− The objection that the question of constitutionality is inadmissible is unfounded.

3.1.− The State Council has averred as a preliminary matter that the question is inadmissible on the grounds that the lower court did not adequately verify whether it was possible to interpret the contested provision in a manner consistent with the Constitution.

3.2.− As far as the need for surgery is concerned, the lower court concludes that it is not possible to interpret the provision under examination to the effect that gender correction is possible, even in the event that primary sexual characteristics have not been modified.

In particular, the lower court states that, in providing that “When a modification of sexual characteristics through surgery is necessary, the court shall authorise it by a final judgment”, Article 31(4) of Legislative Decree no. 150 of 1 September 2011 (Complementary provisions to the Code of Civil Procedure on the reduction and simplification of civil cognisance proceedings, enacted pursuant to Article 54 of Law no. 69 of 18 June 2009) appears to be consistent with the view that surgery is merely contingent (as is suggested by the adverb “when”).

However, the referring court considers that the provision for this contingent scenario does not by any means indicate that gender correction may be obtained irrespective of the alteration of primary sexual characteristics, but rather only that there may be cases in which the primary sexual characteristics have already been modified (for example by surgery performed abroad or due to congenital reasons).

In support of this interpretation, the lower court observes that the expression "following alterations to his or her sexual characteristics" contained in Article 1(1) of Law no. 164 of 1982 would not otherwise make sense. The court concludes that "Had the legislator intended to enable a person to rectify his or her assigned gender irrespective of the modification of his or her primary sexual characteristics, it would not have mentioned that modification in the final part of the provision under examination".

3.3.− Whilst a complete assessment of these arguments is not capable of precluding potential disparate solutions, it appears to be indicative of an actual attempt by the lower court to use the interpretative instruments available to it in order to assess whether the contested provision can be read differently in a manner that may be compatible with the Constitution. This possibility is consciously excluded by the referring court, which considers that the literal wording of the provision precludes an interpretation that is compatible with the Constitution.

The 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.

4.− On the merits, the question concerning the constitutionality of Article 1(1) of Law no. 164 of 1982 is unfounded as stated in the reasons for the judgment.

4.1.− The provision under examination provided the starting point for 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 fact, as was held by this Court in Judgment no. 161 of 1985, Law no. 164 of 1982 embraces "a new and different concept of sexual identity compared to the past in the sense that, for the purposes of such identification, importance is placed no longer exclusively in the external genital organs as ascertained at the time of birth or which have 'naturally' evolved, albeit with the assistance of appropriate medical and surgical therapy, but also in elements that are psychological and social in nature. Thus, a prerequisite for the contested provision is an awareness of gender as a complex element

of personality determined by a range of factors, the achievement of an equilibrium between which must be facilitated or pursued by privileging – since the difference between the two sexes is not qualitative but quantitative – the dominant factor or factors […]. Law no. 164 of 1982 thus operates within the ambit of a legal culture that is evolving and is becoming increasingly sensitive to the values of the human person of freedom and dignity, which it strives after and protects also in minority and anomalous situations".

This general and highly innovative scope of the legislation under examination is also clear from the literal wording of the contested Article 1, which lays down the prerequisites for the correction of gender in the civil registry as "alterations to […] sexual characteristics". Accordingly, the task of defining the perimeter of these modifications and, insofar is of relevance here, the manner in which they may be achieved, is left to the interpreting body.

When interpreted in the light of human rights – which the Italian legislator has sought to recognise and guarantee through the legislation under examination − due 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.

This path was previously referred to in Judgment no. 161 of 1985 in which it was asserted that the provision under examination "concerns all scenarios involving the judicial correction of the assigned gender where it is established to be different from that stated in the birth certificate following modifications to the sexual characteristics of the interested party, even though the provision under examination does not consider the way in which those modifications occurred, whether naturally or through surgery".

The exclusion of the mandatory requirement for a surgical operation for correction in the civil registry is the corollary of an arrangement which − in line with the highest constitutional values − leaves to the individual the choice, with the assistance of doctors and other specialists, over how to realise his or her own transition, which must in any case focus on the psychological, behavioural and physical aspects that contribute to gender identity. The breadth of the literal wording of Article 1(1) of Law no. 164 of

1982 and the lack of rigid legislative schemata regarding the types of treatment reflect the irreducible variety of individual circumstances.

This approach has also been endorsed in the recent case law of the Court of Cassation. In judgment no. 15138 of 20 July 2015, the first civil division of the Court of Cassation asserted that the choice of modifying sexual characteristics through surgery can only be the result of "a process of self-determination towards the objective of changing sex". Surgery is one of the possible ways of changing external appearance to fit one's own personal identity, as perceived by the individual. On the other hand, the Court of Cassation stresses that "The complexity of the process, which is accompanied by a variety of medical […] and psychological safeguards, sheds further light on the fact that the right in question belongs to the constitutive core of the development of individual and social personality, in such a way as to permit an appropriate balance to be struck with the public interest in certainty of legal relations".

It is thus inevitable that there must be a rigorous judicial assessment of the way in which the change has occurred and of its definitive nature. As far as this assessment is concerned, a surgical operation is one possible way of guaranteeing the full psychological and physical well-being of the person by largely matching up bodily features with those of the sex with which the person identifies.

The reference contained in Article 31 of Legislative Decree no. 150 of 2011 to the contingent status ("When ... is necessary") of surgery in order to alter sexual characteristics must also be read against this backdrop. In fact, in enacting this provision the legislator reiterates, almost thirty years after the introduction of Law no. 164 of 1982, its intention to allow the court to assess, as part of the procedure for authorising surgery, whether surgery is effectively necessary, having regard to the specific circumstances of the individual case.

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.

Accordingly, the interpretative process highlighted above recognises the provision under examination as performing the role of guaranteeing the right to gender identity as an expression of the right to personal identity (Article 2 of the Constitution and Article 8 ECHR), and at the same time as an instrument for the full realisation of the right to health, which is also protected under constitutional law.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

rules that the question concerning the constitutionality of Article 1(1) of Law no. 164 of 14 April 1982 (Provisions governing the correction of the assigned gender), raised with reference to Articles 2, 3, 32, 117(1) of the Constitution, the last provision in relation to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and ratified and implemented by Law no. 848 of 4 August 1955, by the *Tribunale di Trento* by the order mentioned in the headnote, is unfounded as stated in the reasons for the judgment.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 21 October 2015.