



## Transsexuality: law and health-related aspects in the Spanish legal system

La transexualidad: aspectos jurídico-sanitarios en el ordenamiento español

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**ABSTRACT** The social weight of transsexual groups has been and continues to be crucial in many aspects regarding transsexuality, from the progressive elimination of discrimination to influence in the legislative branch. This paper especially discusses a classic demand of these groups, comprehensive medical treatment of transsexual people within the National Health System. Thus, progress in the development of an adequate health-care system for these groups, their treatment in the legal systems of Spain in general and of some of its autonomous communities with more noteworthy laws (especially in Andalusia, an autonomous community that has been pioneering in this regard, as well as the Basque Country and Navarre) and remaining challenges will be observed in this work. The article will also take particular note of the substantial developments that the publication of the Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders has established in this area.

**KEY WORDS** Transsexualism; Gender Identity; Health System; Human Rights; Discrimination; Spain.

**RESUMEN** El fenómeno de la transexualidad es un asunto en el que el peso social, en concreto de los colectivos transexuales, ha sido y sigue siendo crucial en muchos aspectos, desde la progresiva eliminación de la discriminación hasta la influencia para que el poder legislativo se pronuncie. En este artículo de investigación se tratará especialmente una de las reivindicaciones clásicas del colectivo, esto es, el tratamiento sanitario integral de la persona transexual dentro del Sistema Nacional de Salud. En este sentido, se observarán los avances en el desarrollo de un sistema sanitario adecuado para este colectivo, su tratamiento por parte de los distintos ordenamientos jurídicos en España, en general, y en alguna de sus comunidades autónomas con legislaciones más destacables (en especial Andalucía como comunidad autónoma pionera, el País Vasco y la Comunidad Foral de Navarra) y los retos pendientes, haciendo una especial investigación en torno a las sustanciales novedades que ha implantado en este ámbito la publicación de la quinta edición del Manual diagnóstico y estadístico de los trastornos mentales.

**PALABRAS CLAVES** Transexualidad; Identidad de Género; Sistema de Salud; Derechos Humanos; Discriminación; España.

## STATUS OF THE ISSUE

A rigorous study of the transsexuality phenomenon unavoidably requires an interdisciplinary approach<sup>(1)</sup> that involves not only the legal aspects *stricto sensu* – such as the human rights dimension<sup>(2-4)</sup> – and, specifically, the legal-medical aspect, which is the case under study here,<sup>(a)</sup> but it also needs the contribution of other disciplines, such as Medicine, Psychology, Sociology, Ethics, Philosophy.<sup>(5)</sup> However, it should be recalled that this issue has been a topic of political debate, with the resulting legal ups and downs that this matter has been undergoing.<sup>(6)</sup>

Hence, the passing of *Act 3/2007, of March 15, which regulates the rectification of entries relating to a person's sex*<sup>(7)</sup> (hereinafter referred to as *Act 3/2007*), has become a milestone, especially considering the inclusion of this issue in Section 10.1 of the Spanish Constitution, which proclaims the dignity and the free development of personality – and, therefore, it implies recognizing a controversial “right to sexual identity.”<sup>(8)</sup> Concerning this analysis, the elimination of the sex reassignment surgery as an unavoidable requirement for the rectification of entries, which was demanded through case-law, is very significant.

Among the advantages of this Act, we can find that the rectification of entries has ceased to be a legal procedure in order to become an administrative procedure, which does not require surgery for the name to be changed. It presents, however, some disadvantages, according to the critics, given that the applicant is forced to undergo hormone therapy for two years (with the subsequent risk of sterilization), and a psychiatric diagnosis is required (gender dysphoria) for the Act to be applied. In addition, it is an essentially civil act, specifically circumscribed to the registration sphere, that does not answer to the requests of the affected groups, which are currently aimed at an integral or multidisciplinary gender identity act that regulates (as already done by Autonomous Communities such as Navarre and, more recently, the Basque Country) transsexuality in all its aspects, among them, the one concerning health care.

## CONCEPTUAL DELIMITATION Origins and terminological clarification

Transsexuality is not a recent reality; what is fairly recent is its surgical treatment thanks to medical advances.<sup>(b)</sup> Transsexuality has existed since ancient times and in different cultures; however, it has acquired a considerable social and scientific importance in our times. Its first definition dates back to 1953 and was coined by Harry Benjamin<sup>(c)</sup>:

The irreversible desire to belong to the opposite sex to the one genetically established and to assume the relevant role and resort, if necessary, to a hormone and surgical treatment aimed at correcting this discordance between mind and body.<sup>(9)</sup> [Free translation]

The terminology used to refer to this phenomenon is by no means univocal, as can be seen in the text of *Act 3/2007*: the “Statement of Objects and Reasons” talks about transsexuality and gender identity change; “Section 4” talks about the diagnosis of gender dysphoria and medical treatments to adjust physical characteristics to the ones belonging to the required sex, or of gender reassignment surgery; and “Final Provision 2” talks about cases of gender dysphoria. In this study, the term “transsexuality” was chosen, not only because it is the most frequently used term, but it is precisely the term that psychologists and the transsexual community itself have adopted. Moreover, this term is the one currently used in the 10th Revision of the International Classification of Diseases, published by the World Health Organization.<sup>(7 p. 136)</sup>

The underlying idea behind this issue defines the transsexual as a person whose sexual or gender identity is opposite to his or her biological sex; that is to say, his or her sexual identity is in conflict with his or her anatomy. It could be characterized as the psychosexual *syndrome* suffered by those who show a discordance between the sex they psychologically feel that they belong to, and the sex that corresponds to them in accordance with their anatomy and the vital records. In order to correct this conflict, these people rely on a medical-surgical procedure, and will later try to make their new identity be reflected in the records held in the Civil Registry.<sup>(10 p. 200)</sup>

## Contrast between similar concepts

### ***Transsexuality vs. homosexuality, transvestism, intersexuality***

As it happens in other fields, in the legal sphere, there has often been a confusion between sex, gender, and sexual orientation. Thus, transsexuality was not legally recognized, and was compared to homosexuality: unlike transsexuals, homosexuals are comfortable with their gender and have no doubts regarding their sexual identity. Precisely, due to its decriminalization in 1979, it is possible to start talking about the regulation of issues concerning transsexuality independently. On the contrary, transvestites do not loathe their own anatomic sex; however, they find a means to satisfy their libido through a cross-dressing fetish, without there being the slightest doubt regarding their sexual identity. Likewise, the differential diagnosis must be done through physical intersexuality, which is characterized by sex ambiguity, that is to say, having not well defined anatomical and hormonal features. This suggests an imperfectly integrated personality, but not a change, as it happens in the case of transsexuals.<sup>(11)</sup>

### ***Transsexuality and sex reassignment surgery***

Habitually, the concepts of transsexuality and sex reassignment surgery (SRS) are also identified. SRS is a medical-surgical treatment on which transsexuals rely to adjust the anatomical or biological sex assigned to them by nature to the one they really experience or feel, that is to say, their psychosocial sex. Therefore, from a medical point of view, the sex reassignment surgery consists in the surgical procedures undergone by men and women to harmonize their anatomical sex with their sexual identity. This surgery may be focused on genitals – known as genital reconstruction or reassignment surgery – and includes procedures such as vaginoplasty, metoidioplasty, or phalloplasty, among others. In addition, there also are non-genital feminization or masculinization procedures, such as mastectomy or facial surgery.<sup>(7,10)</sup>

The first publicly known surgery of this type – in 1930 similar interventions had been performed in the USA – was the one performed on George (later Christine) Jorgensen, in Copenhagen on December 3, 1952.<sup>(11 p. 610)</sup> This event added fuel to the intense and controversial legal debate regarding the admissibility or criminalization of this medical practice. In Spain, the year 1983 is considered a key year, given

the fact that in that year the legislature expressly decriminalized this surgical procedure, which had been, until then, subsumed within criminal injuries (these procedures that modified the anatomical sex were included within the so-called castration). Thus, the Reform of the old Criminal Code – through the *Organic Law 8/1983, of June 25* – included in Section 428, paragraph 2, the so-called transsexual surgery as one of the cases in which the free consent of the adult and competent patient exempted the physician from any criminal liabilities for criminal injuries (Sections 418, 419, 420 and 428). The new Criminal Code – amended by the *Organic Law.10/1995, of November 23* – keeps the same decriminalizing tone (Section 156) and, in this way, the applicant's consent acquires special virtuality.<sup>(d)</sup>

## Addressing the issue from a medical perspective

### ***Transsexuality as a mental illness and considerations about its possible depathologization***

It should be noted that transsexuality has been considered a mental disorder since 1980, and that this term currently appears in the international manuals of mental disorders of greater reach, such as *The ICD-10 Classification of Mental and Behavioral Disorders: Diagnostic Criteria for Research* by the World Health Organization (WHO), and that in the fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-R), published by the American Psychiatric Association (APA), transsexuality is described as a “gender identity disorder.” Nonetheless, this term has been eliminated, as it will be explained in detail below, upon the publication by such prestigious association of the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-V), which is the currently valid edition.

As a consequence of such categorization, there is a medical diagnosis related to the dissociation between the biological sex and the socially attributed gender called “gender dysphoria” that, broadly speaking, refers to the anxiety associated with the conflict between the sexual identity and the assigned sex. Act 3/2007 deals with this issue, which precisely demands a gender dysphoria diagnosis as one of its premises.

Despite the fact that the main international diagnostic classifications of diseases include transsexuality as a mental disorder or disease, there are progressively more prestigious experts and researchers who seriously think of removing this type of pathological label, that is to say, they stand up for the decategorization of transsexuality as a mental disease. Among the reasons behind the promotion of its depathologization<sup>(14)</sup> – which is not the same as demedicalization because, as it will be discussed below, comprehensive health care is one of the historical demands of this group, not in terms of illness, but of a so-called “significant clinical discomfort”<sup>(15)</sup> – there is the suggestion that this fact may help abolish the stigmatization suffered by the transsexual population when they are treated as “ill,” an assumption that fosters social rejection and generalized transphobia.<sup>(16)</sup> On the other hand, this declassification would replace the current authorization scheme, which implies complying with some treatment protocols (such as the above mentioned diagnostic report and medical treatment), with an informed consent scheme respecting the patient’s autonomy.

***Novelties implemented by the DSM-V: conceptualization of transsexuality as “gender dysphoria”***

On May 18, 2013, the American Psychiatric Organization (APA) – within the framework of its annual congress, which was held in San Francisco, USA, between May 18 and May 22 – published the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders*, DSM-5.<sup>(17)</sup> This new edition replaced the previous version of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-R), published in 1994.<sup>(e)</sup>

It is important to mention that the DSM is based on empirical information using a descriptive methodology, aimed at improving communication between practitioners having different specialties and general practitioners with different researchers. In this sense, the manual’s aim is far from explaining the various diseases and/or suggesting pharmacological or psychotherapeutic treatments, as well as holding on to a specific theory or line of thought within psychology or psychiatry. A very frequent misconception is to think that the classification of mental disorders classifies people, when,

in fact, it classifies the disorders that people suffer from. It is important to clarify that this manual must always be used by people having clinical experience, since it is used as a guide that should be accompanied by clinical judgment, in addition to professional knowledge and unavoidable ethical criteria.

In relation to the previous version (DSM-IV-R), the DSM-5<sup>(18)</sup> includes changes concerning the organization of disorders in the manual, and bases their description on their occurrence during the life cycle, that is to say, developmental disorders in the first place, and neurocognitive disorders at the end. Throughout the whole manual, disorders are classified in accordance with the patient’s age, sex, and developmental characteristics. The multi-axial assessment system was eliminated, since it generated “artificial distinctions.”

In effect, among the amendments to this prestigious manual, which the APA has currently revised after twenty years, with the purpose of including the most recent scientific findings, what precisely stands out is the exclusion of transsexuality (or “gender identity disorder,” as it was called on the previous edition, DSM-IV-R) from the list of mental disorders.<sup>(19)</sup>

Therefore, the great novelty in the last edition of the manual is that the term “gender identity disorder” has been replaced by “gender dysphoria.” This change in the nomenclature has been quite controversial and has generated diverse points of view. On the one hand, some sectors support the replacement of this term, especially the ones who stand for a total depathologization, such as the activists of the *Stop Trans Pathologization* campaign, as they think of the former classification as “denigrating” and “detrimental,” considering that it “increased the stigma surrounding transsexuality.” Some opinions on this topic argue that this change represents significant conceptual and therapeutic differences that depathologize transsexual identity. Dysphoria, an antonym of euphoria and a synonym for discomfort, makes reference to the main symptom of the diagnosis, dissociating itself from the intrinsic nature of the term “identity,” which was present in the former classification. This means that experiencing or not some type of discomfort related to the assigned gender is a possible but not a determining factor of the transsexual experience. Other perspectives contend that this new classification represents a

“change of scenario but not of situation,” because psychiatrists and psychologists were already considering the discomfort generated by sex-gender discordance as the main diagnostic element. In conclusion, this term does not satisfy the groups in question, as they understand that although the negative bias toward transsexuality has been reduced (the word “disorder” is no longer in use), there is still a pathologizing bias.<sup>(f)</sup> This edition does not meet the expectations of different associations and groups of transsexual individuals who were hopeful that transsexuality would be eliminated from diagnostic classifications, as it happened with homosexuality in the 1970s.

## LEGAL TRASCENDENCE

The starting point is placed in the European Parliament Resolution of September 12, 1989, on transsexual discrimination and, specifically, in the Recommendation addressing the transsexual condition, which was passed on the same year by the Parliamentary Assembly of the Council of Europe. Through that Recommendation, the Assembly urged the Committee of Ministers to create a document inviting the member states to legislatively regulate the cases of irreversible transsexualism. In connection with this matter, the legal solutions provided by the member states of the European Union have been dissimilar: some states have offered a legal answer to transsexuality,<sup>(g)</sup> whereas others have remained within the merely administrative or case law frameworks. In Spain, with the passing of Act 3/2007, the existing legal vacuum related to transsexuality is filled – which was somewhat saved through case law in a rather contradictory and oscillating way – eliminating uncertainties and providing a higher level of legal protection.

### Case-law position: European Court of Human Rights and Supreme Court

The European Court of Human Rights has pronounced in significant sentences on this issue, the quid of the question lying in Sections 8, 12, and 14 of the European Convention of Human Rights, which set forth provisions regarding the right to

private and family life, the right to marry, and the prohibition of discrimination,<sup>(20)</sup> respectively. Despite the fact that at first its trend somewhat overlooked the legal consequences of transsexuality, the panorama changed after the emblematic sentence of March 25, 1992 (*Sentence Lyne Botella v. France*), by which the French State was found guilty for not recognizing the plaintiff’s psychosocial sex, a denial that was considered a violation of Section 8 of the European Convention of Human Rights. Nevertheless, the emblematic sentences *I. v. United Kingdom* and *Christine Goodwin v. United Kingdom*, both made on July 11, 2002, were significant enough to be deemed a true shift in judgment criteria. In both sentences, the United Kingdom was found guilty for violation of transsexuals’ right to a private life, to form a family, and to marry in accordance with their sexual identity (Sections 8 and 12 of the European Convention of Human Rights), given that a surgery had been performed on them.

Based on case law decisions coming from the European Court of Human Rights, the Supreme Court kept a firm position regarding the demand of sex reassignment surgery – *conditio sine qua non* for the change – to agree to let this person change his or her sex and, consequently, his or her name.<sup>(h)</sup> This position, after the passing of Act 3/2007, is amended through a key sentence, the sentence passed by the Supreme Court (SCS) on September 17<sup>th</sup>, 2007 that, pursuant to such Act, exempts transsexuals from the requirement of undergoing such surgery.

### Answer given by the Spanish Legislature *Regulation of transsexuality at a State level*

#### a) *Main purpose and object*

The Spanish legal response to transsexuality is grounded in the fundamental rights set forth in Section 10 of the Spanish Constitution, where the “Statement of Objects and Reasons” itself establishes that:

it is a social reality that demands an answer from the legislator, so that the first registration entry related to an individual’s sex and first names could be modified, with the purpose



of guaranteeing the free development of his/her personality and the dignity of the persons whose gender identity differs from the sex with which they had been initially registered.<sup>(23)</sup>

This point is crucial. For a long time there have been groups demanding their right to sexual identity, and this Act seems to recognize, although implicitly, a right to sexual identity or a right to gender identity.<sup>(24)</sup> Prior to these regulations, and precisely considering the absence of legal grounds, the direct application of the Constitution had been suggested, in particular after the constitutional recognition of free personality development.<sup>(25)</sup> This was certainly the path followed by the Supreme Court in sentences passed before this Act (SCS of July 15, 1988; March 3, 1989; April 19, 1991; and September 6, 2002; as discussed before), as legal grounds for a shift in the approach. However, the first sentence passed after the enactment of this Act – the previously mentioned SCS of November 17, 2007 – explicitly states that such a right:

implies, given the prevalence of psycho-social factors in determining an individual's sex, that a *right to hold sexual identity* as an expression of personal identity, which is a personality asset, should be given priority in the event of gender dysphoria.<sup>(26 p. 10)</sup> [Italics added]

The aim of Act 3/2007 is to regulate the requirements needed by individuals to be allowed to have their recorded sex rectified in the Civil Registry, when such registration is discordant with their real gender identity; and it also considers the change of the person's first name so as not to be discordant with the sex claimed. The rectification of entries regarding sex and the change of name are aimed at validating as a true fact the change that had already been made in gender identity, thus guaranteeing legal protection and public interest demands. To that effect, such change of identity must be duly recorded, and the rectification of entries will be carried out in accordance with the regulations related to administrative procedures of the Civil Registry.<sup>(i) (27)</sup>

#### **b) Requirements to rectify sex-related entries**

1. *Gender dysphoria diagnosis:* Compliance with this requirement can be confirmed by means of a report written by a general practitioner or clinical

psychologist, by which the professional certifies the existence of a discordance between the morphological sex or physiological gender initially recorded, and the gender identity perceived by the applicant, which the law defines as psychosocial sex,<sup>(i)</sup> and also certifies the stability and persistency of this discordance and the absence of any personality disorder that could decisively influence the existence of such discordance. The law does not require that gender dysphoria be diagnosed by two specialists simultaneously or consecutively, but it emphasizes the alternative of either “a general practitioner or a clinical psychologist.”

2. *Medical treatment for at least two years:* Such treatment is aimed at adjusting the physical features of the subject in question to those of the requested sex. Compliance with this requirement shall be confirmed by means of a report that, in accordance with the law, should be preferably written by the doctor that has supervised the treatment or, failing that, by a specialized forensic doctor. The legal expression “that (the person) has received medical treatment” refers to hormone therapy, if we pay attention to the medical – such treatment offers a temporal continuity that surgery lacks – and normative contexts of the precept. Pursuant to Act 3/2007, such treatment has to be provided for at least two years in order to adjust the physical features to those of the requested sex.<sup>(k)</sup>

Section 4.2 of Act 3/2007 is fundamental since it explicitly states that “it will not be necessary for a person to have undergone a sex reassignment surgery as part of the medical treatment to have the entry related to his/her sex rectified.”<sup>(30)</sup> The fact that a sex reassignment surgery is not required represents one of the most significant aspects of this Spanish Act – and a change of approach in the criterion followed by the Supreme Court as regards case-law<sup>(31)</sup> – that responds to one of the historical claims of transsexual people. However, although not required by law, some transsexuals decide to undergo this type of surgery, and for that purpose the applicant should be of legal age, have a positive diagnostic report, have undergone (previous) hormone therapy during certain time, and give his/her expressed and signed request. In this context – hormone therapy and surgery – the right to receive information and to give informed written consent adequately for both treatments, in an express and individual way, gains greater

prominence, pursuant to Section 8 of Act 41/2002, of November 14, which basically regulates the patient's autonomy, rights and obligations when it comes to clinical information and documentation.

In addition, there are exceptions to the medical reassignment treatment itself from a general content "when health or age reasons prevent the patient from continuing the treatment" and when "medical certificates confirming the impossibility of continuing the treatment are unavoidably provided."<sup>(23)</sup> It can be emphasized that the law not only eliminated the case-law requirement of sex reassignment surgery, but also enabled the exclusion of the physical adjustment treatment requirement.<sup>(l)</sup>

### c) Procedure

Rectification proceedings must be instituted following the administrative procedure (Section 2.1) set forth in the Act of June 8, 1957, of the Civil Registry, sections 93 to 97 in particular, a set of regulations that will be abrogated as from June 22, 2014, by the entry into force of Act 20/2011 of June 21, of the Civil Registry. The final provision two of Act 3/2007, in its fourth part, precisely amends Section 93 in order to expressly include gender dysphoria, which shows a clear difference regarding the wrong designation of sex:

The wrong designation of sex when there is no doubt as to the identity of the newborn by any other circumstance, as well as the registered designation regarding the sex of persons in cases of gender dysphoria.<sup>(23 p.4)</sup> [Italics added]

A significant change has certainly been produced regarding the previous situation in which an ordinary declaratory proceeding by legal means was necessary for the rectification of entries. In this respect, both the Directorate General of Registries and Notarial Affairs and the Supreme Court had considered court decisions as the suitable procedural means to rectify an entry in the Civil Registry related to a transsexual's sex designation. In view of the foregoing, Act 3/2007 refers to the administrative procedure that enables the rectification of entries without the need of a final court decision.<sup>(30)</sup>

The acknowledgement of the legal effects of such rectification gains special interest in civil order. The second paragraph of Section 5 of the Act provides that "the rectification of an entry in the Civil Registry shall enable the person to exercise all the rights inherent to his/her new condition."<sup>(23)</sup> In this way, the Act, despite keeping the issue of transsexuality within the sphere of the Civil Registry, grants full civil effects to the rectification, thus placing the person on equal footing with the new sex.<sup>(m)</sup>

To summarize, the work of the legislative branch is praiseworthy, as it addresses the principal demand of the groups directly affected, namely the legal recognition of the rectification of entries in the Civil Registry related to sex designation and name of the transsexual person in question, and the fact that gender reassignment surgery is no longer a requirement, which is as important as the fact that a transsexual person is now able to institute administrative proceedings, enabling an out-of-court solution.

### Comprehensive law on transsexuality: proposals *de lege ferenda*

As a premise, it is important to establish that, from the beginning, the Spanish legislative branch rejected the legislative option of creating a comprehensive law on gender identity, since it is an essentially civil law. Thus, transsexual associations<sup>(n)</sup> have claimed the passing of a comprehensive law on the right to a sexual or gender identity that not only provides for the rectification of entries in the Civil Registry, but also includes measures aimed at the healthcare sphere, the penalization of transphobia, the right to asylum, the penitentiary and labor spheres, among other aspects.<sup>(o)</sup>

Regarding healthcare issues, Section 43.1 of the Spanish Constitution, which recognizes the right to health protection, is taken as a starting point. It is understood that health is not only defined as the absence of a disease, but, in more general terms, it is defined as the enjoyment of a general, psychic, mental, and social well-being that helps achieve full personal development. Within this context, we have to include the need for medical treatment for transsexuals. Otherwise, we would fall into a paradox, since, on the one hand, the

affected groups demand comprehensive health care (especially, the inclusion of sex reassignment surgeries within the National Health System) and, on the other hand, they advocate for the depathologization of transsexuality (it is a common characteristic among transsexuals as patients to refuse to be treated as ill people). Therefore, the most reasonable argument would be the framing of transsexuality within the context of health in a broad sense, understood as the ambition of achieving a comprehensive well-being.

In fact, the National Health System does not currently include the sex reassignment comprehensive treatment in its health coverage,<sup>(p)</sup> although some Autonomous Communities have decided to cover costs on their own. In this respect, Andalusia was the Autonomous Community that paved the way: on February 1999, its parliament authorized the provision of healthcare services for transsexuals within the Andalusian Public Health System.<sup>(36)</sup> It is important to highlight the fact that, in the same year, the Health Ministry of the Regional Government of Andalusia created a *Unit of Gender Identity Disorders* at the Carlos Haya University Hospital in Malaga, which is a reference center at the national level, since it provides care to transsexual patients from other Autonomous Communities. Also, in that year, Madrid and Catalonia started to provide specialized care in the areas of mental health and endocrinology, although surgeries and official recognition did not take place until 2007 and 2008 respectively. It is worth noting that, in turn, the Community of Madrid implemented a *Multidisciplinary Care Unit for Gender Identity Disorders* in 2007. As for the Basque Country, it incorporated genitoplasty surgery in 2008. Other autonomous communities (such as Aragon, Asturias, Valencian Community, Canary Islands, Navarre) have a healthcare protocol for gender identity disorders but do not incorporate sex reassignment surgery in a comprehensive way.<sup>(37)</sup>

In conclusion, this is a complex and highly controversial issue. One of the main pitfalls is the high cost that clinical sex reassignment treatments represent. For that reason, comprehensive health care in the public sphere is one of the historical claims of the transsexual community. At first, they claimed for its inclusion through a comprehensive law on gender identity that could deal

not only with civil matters, but also with social and healthcare policies in the parliamentary proceedings regarding Act 3/2007. Once the idea of a comprehensive law on gender identity addressing these health issues, among other issues, was dismissed, the current efforts started to focus on the inclusion of health services in the National Health System's portfolio of common services.

### **Regulation of transsexuality in the autonomic sphere: the case of the Autonomous Communities of Navarre and the Basque Country**

Regional Act 12/2009 of November 19 on non-discrimination based on gender identity and recognition of transsexuals' rights has been a pioneering act as regards the way it comprehensively addressed gender identity and transsexuality from a human rights perspective. Its Preamble is based on provisions from Section 14 of the Spanish Constitution, the European Parliament Resolution of September 12, 1989 on transsexual discrimination, the case law of the European Court of Human Rights, and the Yogyakarta Principles. Thus, a multidisciplinary act is chosen, an act that meets health care, psychological and social needs of the transsexual people and, for such purpose, provides broad health coverage within the public health system of Navarre, which includes the training of healthcare professionals, the publication of a clinical guide, and the promotion of investigation on transsexuality. As regards the sex reassignment surgery, it specifically establishes that certain treatments and surgeries may be referred to public or private hospitals that offer a service specialized in sex reassignment surgery and meet the appropriate health standards. It also states that the Navarre Health Service (Osasunbidea) shall cover health-related trips and accommodation costs, and medical-surgical treatment itself of the transsexual person in question.

This initiative<sup>(q)</sup> was followed by the Autonomous Community of the Basque Country, which has recently passed Act 14/2012, of June 28, on non-discrimination based on gender identity and recognition of transsexuals' rights. Following its predecessor's path, it plans – like Navarre – to create a reference unit in transsexuality matters within the Basque Health Service (Osakidetza),



which will include professional staff specialized in medical, nursing, psychological, psychotherapeutic, and sexological care. At the same time, a clinical guide for the treatment of transsexuals is also planned, a guide aimed at gathering sufficient

professional consensus in the fields concerned. It is worth emphasizing that the Basque Health Service<sup>(38)</sup> is expected to provide – within the framework of free public health services – diagnoses, hormone treatments, and also plastic surgery interventions.

## ENDNOTES

a. This research is part of the “Program for the Training of Research Staff for the years 2012-2015,” of the Agency for Research Promotion and Management-DEIKER at the University of Deusto. This article comes from a broader research work included in the *Treaty of Health Care Law*, published in Spain by the legal publishing house Aranzadi in 2013, which was entitled “The legal treatment of human reproductive system surgeries: sterilization, chemical castration, and sex reassignment surgery.” As it can be inferred from the title, the authors focused their attention on sterilization and chemical castration, while the issue of sex reassignment surgery (SRS) remained in the background. Therefore, this is an independent work since, on the one hand, the authors made an extra effort to focus exclusively on the issue of transsexuality, adapting it to the typical demands of a research article; whereas, on the other hand, their studies have been broadened, developed, and updated including the relevant and substantial innovations that were introduced in this period of time, which were implemented on the occasion of the publication of the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders*, of May 18, 2013.

b. The first surgery was recorded in 1952, as we will describe in detail in the relevant section.

c. In 1966, he starts medical research in this area with his work *The Transsexual Phenomenon*. As a result, the syndrome related to transsexuality known as “Harry Benjamin Syndrome” arises. Later, the Harry Benjamin International Gender Dysphoria Association (HBIIGDA) is created.

d. It is a valid, free, conscious, and express consent given by the holder of a legally protected interest. The holder must be of legal age and capable, and such consent shall be deemed flawed if given at a price or reward.<sup>(13)</sup>

e. It is necessary to explain that it was subsequently revised, and that the edition that was in effect up to 2013 was the DSM-IV-TR, which dates back to the year 2000.

f. Stop Trans Pathologization believes that “with respect to the category of ‘Gender Dysphoria,’ we notice a certain influence of the critical debates that arose in the last few years. In this sense, it can be highlighted that there was an attempt to reduce the stigmatizing burden of this category by changing the title (from ‘Gender Identity Disorder’ to ‘Gender Dysphoria’), as well as an attempt to recognize gender diversity beyond a binary model through the introduction of the phrase ‘or some alternative gender different from one’s assigned gender’ in diagnostic criteria.”<sup>(21 p.6)</sup>

g. Sweden paved the way by means of the Act of April 21, 1972, on sex determination in established cases. It was followed by Germany with the Act of September 10, 1980, on change of name and determination of sex belonging in specific cases; and later followed by the Italian Act 164, of April 14, 1982, *Norme in materia di rettificazione di attribuzione di sesso*, and the Dutch Act of April 24, 1985. Afterwards, successive acts were published in countries such as Turkey (Act of May 12, 1988), Denmark (Act of October 1, 1989), and Norway (Act of August 1, 1993).

h. Among the most significant Supreme Court sentences we highlight: sentences from July 2, 1987; July 15, 1988; March 3, 1989; and April 19, 1991.<sup>(22)</sup>

i. For such purpose, Section 54 of the Civil Registration Act, of June 8, 1957, was amended through this act.

j. A review about it was done by Ángela Aparisi Miralles,<sup>(28)</sup> who observes that the Spanish act is based on an exclusively socio-psychological perspective that reduces gender identity to personal and social self-awareness (the current situation in the United Kingdom after the *Gender Recognition Act* was passed, which came into effect on April 4, 2005) and that therefore disregards the biological factor that, along with the socio-psychological

factor, represent the two essential factors in the origin and development of human gender identity.

k. The international scientific and medical community seems to agree with this term. In this way, specialists in this field affirm that the first effects related to hormone treatment can be noticed between the sixth and eighth week, being all changes completed approximately within six and twenty-four months.<sup>(7 p.151-152)</sup>

l. Rubio Torrano<sup>(29)</sup> contends that this “wide and permissive position that facilitates rectification of sex-related entries in the Civil Registry may lead to an extreme situation in which, if there is no sex reassignment surgery or hormone treatment, it could be possible that the morphological changes on which the rectification of entries is based may not be evident.”

m. For that reason, there would be no limitations related to the right to get married, as held by the Supreme Court (sentence of April 19, 1991) and discussed by legal scholars, a debate that is trivial at present because of *Act 13/2005, of June 1, whereby the Civil Code was modified in terms of the right to get married*, which at present permits same sex marriage.<sup>(32)</sup>

n. The labor of, among others, the Spanish Association of Transsexual People SATP-Transsexualia, LGBT collectives (lesbians, gays, bisexuals, and transsexuals) or, at the supranational level, The World Professional Association for Transgender Health (WPATH), has been especially active.<sup>(34)</sup> For further information, consult the book *Undoing Gender* by Judith Butler.<sup>(35)</sup>

o. It is true that Spain has made decisions that affect some of these fields. Thus, the issue of admission to detention centers has been solved, enabling the admission to prisons of men or women based on the gender identity transsexuals express, which has to agree with the mandatory medical and psychological assessment reports and the recognition of the psychosocial gender identity (Directive 17/2006, established by the General Directorate of Penitentiaries, on penitentiary integration of transsexuals). Likewise, Organic Law 3/2007, of March 22, for the effective equality of men and women, has added a new additional provision to Act 5/1984, of March

26. which regulates the right of asylum and the condition of refugee, thus enabling the grant of the right of asylum to those foreign women fleeing their countries of origin because of the well-founded fear of being persecuted because of their gender.

p. It implies that, at present, transsexuals have to resort to private medicine in order to receive the relevant medical or surgical treatment. Pursuant to the abovementioned Resolution of September 12, 1989, passed by the European Parliament, in which member countries were urged to allow transsexuals to gain access to comprehensive health care, some countries provide this coverage, such as the Netherlands, Sweden, Norway, and the United Kingdom, while other countries, such as Switzerland, France, or Germany, provide partial coverage for the treatment.

q. In line with this, Andalusia plans to pass a similar act soon, while the comprehensive bill on transsexuality – *Bill on no-discrimination based on gender identity and recognition of transsexuals' rights* – was published on February 13, 2013, in the Official Gazette of the Parliament of Andalusia, and then sent to the Government Council. By the time this work was finished, on April 11, 2014, the Plenary Session of the Parliament of Andalusia gave its unanimous approval to the consideration of the *comprehensive bill on no-discrimination based on gender identity and recognition of Andalusian transsexuals' rights*. Measures to guarantee educational, social, familiar, and health care to transsexuals will be included in this future text. In fact, in the healthcare field, the Andalusian Health Service is expected to apply a comprehensive procedure of sex reassignment and safe and high-quality multidisciplinary health care. Its portfolio of services will provide treatments and surgical procedures, thus reducing the number of unnecessary health-related trips. In addition, the Comprehensive Training Plan of the public health system will develop specific training actions as regards this subject. Moreover, minors will also be fully entitled to receive the necessary health care to ensure a balanced and healthy development of their gender identity, particularly focusing on puberty. Health care provided within this sphere shall comply with the provisions of autonomous laws concerning minors, and the rights related to clinical information and documentation.

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